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EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES –MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT

Report of the Panel

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US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131

BCI deleted, as indicated **[***]**

Short Title	Full Case Title and Citation
US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, 8243
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5
US – Countervailing Measures on Certain EC Products	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R, DSR 2003:I, 73
US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005, DSR 2005:XVIII, 8950
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, 119
US – FSC (Article 21.5 – EC II)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, 4721
US – FSC (Article 21.5 – EC II)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW2, adopted 14 March 2006, as upheld by Appellate Body Report WT/DS108/AB/RW2, DSR 2006:XI, 4761
US – FSC (Article 22.6 – US)	Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the* SCM Agreement, WT/DS108/ARB, 30 August 2002, DSR 2002:VI, 2517

BCI deleted, as indicated **[***]**

Short Title	Full Case Title and Citation
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769
US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, 4107
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
US – Lead and Bismuth II	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, as upheld by Appellate Body Report WT/DS138/AB/R, DSR 2000:VI, 2623
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, 641

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Short Title	Full Case Title and Citation
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865
US – Softwood Lumber VI (Article 21.5 – Canada)	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW, adopted 9 May 2006, as modified by Appellate Body Report WT/DS277/AB/RW, DSR 2006:XI, 4935
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
US – Upland Cotton (Article 21.5 – Brazil)	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 – Upland Cotton (Article 21.5 – Brazil)	Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521

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GATT REPORTS

GATT Panel Report, *German Exchange Rate Scheme for Deutsche Airbus* ("*EEC – Airbus*"), 4 March 1992, unadopted, SCM/142.

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GATT Panel Report, *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada* ("*US – Canadian Pork*"), adopted 11 July 1991, BISD 38S/30.

DISPUTES, IN WHICH MUTUALLY AGREED SOLUTIONS WERE NOTIFIED UNDER ARTICLE 3.6 OF THE DSU

DS83 Denmark — *Measures Affecting the Enforcement of Intellectual Property Rights*

DS86 Sweden — *Measures Affecting the Enforcement of Intellectual Property Rights*

DS124 European Communities — *Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*

DS125 Greece — *Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*

DS210 Belgium — *Administration of Measures Establishing Customs Duties for Rice*

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I. INTRODUCTION

A. COMPLAINT OF THE UNITED STATES

1.1 On 6 October 2004, the United States requested consultations with the European Communities[1] and certain EC member States (Germany, France, the United Kingdom, and Spain) pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Articles 4, 7 and 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement")(to the extent that Article 30 incorporates Article XXIII of the GATT 1994), with regard to measures affecting trade in large civil aircraft.[2] Consultations were held on 4 November 2004, but the parties failed to resolve the dispute.

1.2 On 31 May 2005, the United States requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII:2 of the GATT 1994, and Articles 4, 7 and 30 of the SCM Agreement (to the extent that Article 30 incorporates Article XXIII of the GATT 1994).[3] In its request for establishment of a panel, the United States requested that the Dispute Settlement Body (the "DSB") initiate the procedures provided in Annex V of the SCM Agreement pursuant to paragraph 2 of that Annex.[4]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 At its meeting on 20 July 2005, the DSB established a Panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by the United States in document WT/DS316/2. At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS316/2, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 On 7 October 2005, the United States requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU, which provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a Panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or

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[1] On 1 December 2009, the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

[2] WT/DS316/1, attached at Annex A.

[3] WT/DS316/2, attached at Annex B.

[4] The United States reiterated its request in this regard at the DSB meetings held on 20 July, on 3 and 31 August and on 23 September 2005. *See*, documents WT/DSB/M/194, 195, 196 and 197, respectively.

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> covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request".

1.5 On 17 October 2005, Deputy Director-General Alejandro Jara, acting in place of the Director-General, composed the Panel as follows:

Chairman:	Mr. Carlos Pérez del Castillo
Members:	Mr. John Adank
	Mr. Thinus Jacobsz.[5]

1.6 Australia, Brazil, Canada, China, Japan and Korea reserved their rights to participate in the Panel proceedings as third parties.

C. INFORMATION GATHERING PROCEDURE UNDER ANNEX V OF THE SCM AGREEMENT

1.7 At its meeting of 23 September 2005, the DSB agreed to initiate the procedures provided for in Annex V of the SCM Agreement ("Annex V Procedures") and designated Mr. Mateo Diego-Fernández as a representative for this purpose ("Designated Representative" or "Facilitator"). On 30 September 2005, the Designated Representative adopted Working Procedures for the Annex V Procedures, after consultation with the United States and the European Communities. On 10 October 2005, pursuant to paragraph 17 of those Working Procedures, the European Communities requested that the Facilitator adopt additional procedures for the protection of business confidential information ("BCI") and highly sensitive business information ("HSBI"). Following consultations with the parties, on 4 November 2005 the Facilitator adopted procedures for the protection of BCI and HSBI for the Annex V Procedures.

1.8 On 24 February 2006, the Designated Representative submitted his report to the Panel. The report of the Designated Representative, and the Working Procedures and additional procedures for the protection of BCI and HSBI adopted by the Designated Representative for the Annex V Procedures are attached at Annex C.

D. PANEL PROCEEDINGS

1.9 Following consultation with the parties, the Panel adopted Working Procedures on 9 November 2005.[6] On 1 March 2006, before the established dates for submissions by the parties, at the request of both parties, the Panel set aside its timetable.[7] At the request of the United States, made on 4 September 2006, the Panel recommenced its work.

1.10 At the request of the parties, and following consultations with them, the Panel adopted additional procedures for the protection of BCI and HSBI for the panel proceedings on 19 October 2006 ("the BCI/HSBI procedures").[8] The Panel issued several rulings over the course of the proceedings with respect to the interpretation and application of the BCI/HSBI procedures,

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[5] WT/DS/316/4.

[6] These procedures were modified on various occasions, and are attached, in their final form, at Annex D.

[7] On 28 February 2006, the Panel had received an unsolicited communication from an individual. The communication addressed a question that is not an aspect of the matter within the Panel's terms of reference. The Panel therefore found it inappropriate to consider that communication and has rejected it.

[8] These procedures were modified on various occasions, and are attached, in their final form, at Annex E.

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including regarding the designation of specific information as BCI or HSBI pursuant to those procedures in the parties' submissions and exhibits.[9]

1.11 On 26 October 2005, the European Communities submitted a request for preliminary rulings, which it subsequently updated on 7 November 2006, in which it requested, *inter alia*, that the Panel find that certain of the measures challenged by the United States are not within the temporal scope of this proceeding or are outside its terms of reference. Having carefully considered the views of the parties and third parties, the Panel issued a preliminary ruling concerning certain aspects of the EC request to the parties and third parties on 11 July 2007. The ruling is set forth in the Panel's findings at Section VII.C. The Panel addresses the remaining issues raised by the EC request for preliminary rulings in its findings below.

1.12 On 9 November 2005, Brazil submitted a request for enhanced third party rights in this panel proceeding; similar requests were received from Canada on 23 November 2005 and from Korea on 13 October 2006. After careful consideration of this issue in light of all comments received from parties and third parties, the Panel on 23 October 2006 informed the parties and third parties of its decision declining to grant enhanced third party rights to any third party. The Panel's reasons are set out in its findings at Section VII.D.1.

1.13 The Panel met with the parties on 20 and 21 March 2007 and on 25 and 26 July 2007. At the request of the parties, and following consultations, the Panel adopted procedures for public sessions of its meetings with the parties. Pursuant to those procedures, the Panel held a portion of its meetings with the parties in public session, by means of a subsequent showing of video-recordings of the public sessions. The parties were given an opportunity to review the recordings to ensure no BCI or HSBI had been disclosed, and the recordings were shown in public on 22 March and 27 July 2007, respectively. The Panel met with the third parties on 24 July 2007.

1.14 The Panel submitted its interim report to the parties on 4 September 2009. The Panel submitted its final report to the parties on 23 March 2010.

II. FACTUAL ASPECTS

A. PRODUCT AT ISSUE

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

2.2 The design, testing, certification, production, marketing and after-delivery support of LCA is an enormously complex and expensive undertaking. LCA are presently produced only by Boeing and Airbus, which both sell a range of LCA models world-wide, to serve the range of needs of their customers, principally airlines and airplane leasing companies. Both companies engage in continued development of LCA, which requires significant up-front investments over a period of 3-5 years before any revenues are obtained from customers. Sales of LCA are relatively infrequent, but generally very large in terms of the number of aircraft and dollar amounts involved (LCA sales are made in USD), although deliveries are generally made over a period of years subsequent to the sale.

[9] Selected rulings in this regard are attached, at Annex F.

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Customers choose among the various LCA models available those they conclude are most suitable for their needs, generally considering a broad variety of factors, including the physical and operating characteristics of the available models, operating costs, existing fleet, routes to be served by the aircraft, the structure of the existing fleet, and costs, with a view to minimizing costs and maximizing revenues.

2.3 The parties disagree as to the scope of the subsidized product or products, and the scope of the like product or products, at issue in this dispute. The United States contends that the subsidies at issue in this dispute benefit the production and marketing of the full range of LCA manufactured by Airbus, and that therefore the "subsidized product" is the Airbus LCA family as a whole, and that the corresponding "like product" is the entire family of Boeing LCA. The European Communities, on the other hand, contends there are four "families" of Airbus LCA, each constituting a separate allegedly subsidized product, and that there are three Boeing "like products" corresponding to three of the Airbus families of LCA, and no Boeing "like product" corresponding to the Airbus A380 family.

2.4 These issues are addressed by the Panel in its findings at Section VII.F.4.

B. MEASURES AT ISSUE

2.5 The United States, in its request for establishment, identified the measures at issue in this dispute as including the following:

(a) The provision by certain member States of the European Communities (Germany, France, the United Kingdom, and Spain ("the member States")) of financing for large civil aircraft design and development to the Airbus companies[10] (referred to by the United States as "Launch Aid").[11] This financing is alleged to provide benefits to the recipient companies including financing for projects that would otherwise not be commercially feasible. The non-commercial terms of the financing may include no interest or interest at below-market rates and a repayment obligation that is tied to sales. If the aircraft is not successful, some or all of the financing need not be repaid. Specific examples of the financing at issue include:

(i) French financing for the Airbus A300, A310, A320, A330/340, A330-200, A340-500/600, A380, and A350;

[10] The United States defined the "Airbus companies" to include Airbus SAS, its predecessor Airbus GIE and current and predecessor affiliated companies, including each person or entity that directly, or indirectly through one or more intermediaries or relationships, controls or controlled, is or was controlled by, or is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France S.A.S., Airbus UK Limited, European Aeronautic Defence and Space Company (hereinafter "EADS"), and BAE Systems. The European Communities disputes that the "Airbus companies", as defined by the United States, are recipients of the alleged subsidies. For purposes of this description of the measures at issue, the Panel has used the terminology of the United States' request for establishment. This should not be taken to have any significance for the Panel's consideration of the substance of the dispute. This question is addressed further in the Panel's findings at Section VII.E.1.

[11] The European Communities and the member States concerned use different terms to describe the type of financing at issue, such as member State financing, launch aid, launch investment, avances remboursables, Rückzahlbare Zuwendungen, Entwicklungsbeihilfen, Zuschüsse zur Entwicklung von zivilen Flugzeugen, anticipo reembolsable, and prestamo reembolsable. The European Communities disputes that the term "Launch Aid", as used by the United States, is an appropriate designation of these alleged subsidies. For purposes of this description of the measures at issue, the Panel has used the terminology of the United States' request for establishment. This should not be taken to have any significance for the Panel's consideration of the substance of the dispute. This question is addressed further in the Panel's findings at paragraph 7.291

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(ii) German financing for the Airbus A300, A310, A320, A330/340, A380, and A350;

(iii) United Kingdom financing for the Airbus A300, A310, A320, A330/340, A340-500/600, A380, and A350; and

(iv) Spanish financing for the Airbus A300, A310, A320, A330/340, A340-500/600, A380, and A350.

(b) In addition to Launch Aid, the provision by the EC and the member States, through the European Investment Bank ("EIB"), to the Airbus companies, of financing for large civil aircraft design, development, and other purposes. Specific examples of the financing at issue include:[12]

(i) financing to British Aerospace for the A320 and the A330/A340;

(ii) financing to Aérospatiale for the A330/340;

(iii) financing to Construcciones Aeronauticas SA ("CASA") for the A320 and the A330/340;

(iv) financing to Airbus Industrie for the A321;

(v) financing to Aérospatiale Super Transporteurs; and

(vi) financing to EADS for the A380.

(c) The provision by the EC and the member States of financial contributions to develop, expand, and upgrade facilities and other infrastructure for the Airbus companies. Specific instances include public investments by German authorities in Hamburg, Nordenham, Bremen, and Varel, by French authorities in the Toulouse region, by UK authorities at Broughton, Wales and by Spanish authorities at numerous locations in Spain (such as Puerto Real, Illescas, Puerto de Santa Maria, and La Rinconada).

(d) The assumption and forgiveness by the EC and the member States of debt resulting from Launch Aid and other financing for large civil aircraft development and production, including debt accumulated by Deutsche Airbus that was forgiven by the German government in 1997 and 1998 and debt assumed by the government of Spain on behalf of CASA and not repaid.

(e) The provision by the EC and the member States of equity infusions and grants, including through government-owned and government-controlled banks. Examples include equity investment by the German government through Kreditanstalt für Wiederaufbau ("KfW") in Deutsche Airbus in 1989 and the return of the shares acquired through this transaction to Deutsche Airbus' parent, the Daimler group, without compensation, in 1992; equity infusions by the French Government into Aérospatiale in 1987 and 1988; an equity infusion by French state-owned Crédit Lyonnais into Aérospatiale in 1992; an equity infusion by the French Government

[12] EIB financing to airline customers for the purchase of new aircraft is not within the scope of the US panel request.

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into Aérospatiale in 1994; and the grant by the French Government of its 45.76 per cent share of Dassault Aviation's capital to Aérospatiale in 1998.

(f) The provision by the EC and the member States of financial contributions for aeronautics-related research, development, and demonstration ("R&D"), undertaken by Airbus, whether alone or with others, or in any other way to the benefit of Airbus, including:

(i) EC funding for civil aeronautics-related R&D projects under the Second (1987-1991), Third (1990-1994), Fourth (1994-1998), Fifth (1998-2002) and Sixth (2002-2006) EC Framework Programs in which Airbus participated.

(ii) Funding from the German federal government and sub-federal entities for civil aeronautics-related R&D projects in which Airbus participated, including:

- federal government funding as set forth in the most updated version of the government's Förderkatalog database, including funding under the federal aeronautics research programs Luftfahrtforschungsprogramm 1 (1995-1998), Luftfahrtforschungsprogramm 2 (1998-2002), and Luftfahrtforschungsprogramm 3 (2003-2007);

- the regional Bremen Airbus Materials & System Technology Centre Bremen (AMST) (2000-2002) and the Airbus Materials & System Technology Centre Bremen II (AMST) (2002-2006);

- the regional Bavaria "Hightechoffensive Bayern" program (1999-2003); and

- the regional Hamburg Luftfahrtforschungsprogramm (2001-2005).

(iii) Funding from the government of the United Kingdom since 1992 for civil aeronautics-related R&D projects in which Airbus participated, including funding under the Civil Aircraft Research and Development Program (CARAD) and the Technology & Strategy Program.

(iv) Funding from the Spanish government, including regional and local authorities, since 1993 for civil aeronautics-related R&D projects in which Airbus participated, including loans and other financial support provided under the Plan Tecnológico Aeronáutico I and the Plan Tecnológico Aeronáutico II.

(v) Funding from the French government, including regional and local authorities, since 1986 for civil aeronautics-related R&D projects in which Airbus participated.

(vi) The provision by government-controlled and financed research institutions of civil aeronautics R&D-related goods or services to Airbus and/or funding for civil aeronautics-related R&D projects in which Airbus participated, including by the German Deutsches Zentrum für Luft- und Raumfahrt ("DLR"), by the UK Defence Evaluation and Research Agency ("DERA") and its successor Qinetiq, and by the French Office National des Études et

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des Recherches Aérospatiales ("ONERA"), the Centre National de la Recherche Scientifique ("CNRS"), and the Centre National de la Recherche Technologique ("CNRT").

(g) Any amendments, revisions, implementing or related measures to the measures described above.

(h) Any other measures that involve a financial contribution by the EC or any of the member States that benefit the Airbus companies.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. UNITED STATES

3.1 The United States requests that the Panel find that:

(a) Launch Aid provided to Airbus for the A380, the A340-500/600, and the A330-200 aircraft are export subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement;

(b) The Launch Aid Program, individual provisions of Launch Aid, and the other measures at issue in this dispute are specific subsidies that cause or threaten to cause adverse effects to the United States and, thus, are inconsistent with Articles 5(a), 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement;

(c) The Launch Aid Program, individual provisions of Launch Aid, and the other measures at issue in this dispute are subsidies that are inconsistent with Article XVI:1 of the GATT 1994; and

(d) the breaches of the SCM Agreement and the GATT 1994 set forth above nullify or impair benefits accruing to the United States.

3.2 The United States further requests that the Panel recommend, pursuant to Article 4.7 of the SCM Agreement, that the European Communities, France, Germany, Spain, and the United Kingdom withdraw their export subsidies without delay. The United States respectfully requests that the Panel specify, pursuant to Article 4.7, that the time period for withdrawal be 90 days after the DSB adopts its recommendations and rulings in this dispute.

3.3 The United States further requests that the Panel recommend, pursuant to Article 7.8 of the SCM Agreement, that the European Communities, France, Germany, Spain, and the United Kingdom take appropriate steps to remove the serious prejudice and the threat of serious prejudice or withdraw their subsidies.

3.4 Finally, the United States asks the Panel to reject all of the European Communities' requests for preliminary rulings.

B. EUROPEAN COMMUNITIES

3.5 The European Communities requests that the Panel reject all claims advanced by the United States in this dispute. As noted above, the European Communities separately requested the Panel to find, as a preliminary matter, that certain of the measures challenged by the United States are not within the temporal scope of this proceeding or are outside its terms of reference.

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IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written and oral submissions to the Panel, in their answers to questions and in additional comments submitted pursuant to the Panel's request. The parties' arguments, as summarised by them are presented in this section.[13] The full non-confidential text of certain EC submissions can be downloaded from the EC web site.[14] The full non-confidential text of certain US submissions can be downloaded from the Government's web site.[15]

A. PRELIMINARY ISSUES RAISED BY THE EUROPEAN COMMUNITIES

1. Arguments of the European Communities

4.2 In its first written submission, the EC underlines: (i) the importance in this dispute of other international aircraft related agreements, (ii) the fact that the EC is the proper respondent, (iii) the need to properly identify the alleged recipients of the alleged subsidies and (iv) the fact that the US has failed to make a *prima facie* case in a number of issues relating to subsidization and adverse effects. The EC argues that the Panel should not make the case of the US, but dismiss its claims on these grounds alone. The EC notes that third parties that address this issue, agree.[16] The EC also responds to the US position on the Article 6.2 DSU issue that the EC raised in its Request for Preliminary Rulings.[17]

(a) Relevance of Other International Aircraft Related Agreements

4.3 The EC asserts that despite the fact that it relies on historic events, the US chooses to ignore entirely the agreements that it has entered into with the EC concerning Large Civil Aircraft ("LCA") during this period – notably the 1979 *Agreement on Trade in Civil Aircraft (*"the 1979 Agreement"*)* and the 1992 *Agreement concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft (*"the 1992 Agreement"*)*.[18] The EC seeks to correct the main errors in the US story and in particular explains the importance of the above agreements to this dispute. The EC particularly objects to the fact that the US seeks to impugn measures that it expressly agreed and to apply new agreements retroactively to historical facts.[19]

4.4 The EC argues that the 1979 Agreement and the 1992 Agreement are relevant for this dispute for the following reasons.[20] First, these agreements provide essential factual background and

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[13] Pursuant to paragraph 13 of the panel's working procedures, the parties and third parties submitted non-confidential executive summaries of their written and oral submissions. The Panel issued its draft descriptive part to the parties on 4 March 2008, informing them that it intended to attach the executive summaries of parties' and third parties' submissions to its report, as has been the practice of a number of panels. Following comments received on 11 March 2008, the Panel drafted a revised descriptive part based on those executive summaries, which it provided to the parties and third parties for comment on 20 October 2008 The Panel received comments from the third parties on 27 October 2008 and from the parties, having granted the EC's request for extension of time, on 4 November 2008.

[14] *See*, http://trade.ec.europa.eu/wtodispute

[15] *See*, http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Section_Index.html

[16] Executive Summary of the First Written Submission of the European Communities, (hereinafter "EC, FWS, Executive Summary"), para. 14 and Executive Summary of the Second Written Submission of the European Communities (hereinafter "EC, SWS, Executive Summary"), para. 3.

[17] EC, FWS, Executive Summary, para. 14.

[18] EC, FWS, Executive Summary, para. 2.

[19] EC, FWS, Executive Summary, para. 2.

[20] EC, SWS, Executive Summary, para. 5.

BCI deleted, as indicated **[***]**

demonstrate that aircraft production has been treated as a special case in the GATT and the WTO ever since detailed rules on subsidies were first promulgated in 1979 during the Tokyo Round of trade negotiations.[21]

4.5 Second, according to the EC, these Agreements contain applicable law.[22] The EC explains that the 1979 Agreement was confirmed and readopted as a plurilateral agreement as part of Annex IV to the WTO Agreement.[23] Although it is not a *covered* agreement, it is an agreement specifically relating to aircraft and it incorporates the subsidy disciplines of the 1979 Agreement and the *Tokyo Round Subsidies Agreement*, which are relevant for assessing the legality of pre-1995 measures, rather than the SCM Agreement.[24] Both the US and the EC are parties. The 1992 Agreement is a bilateral agreement between the EC and the US, which expressly refers to and implements the 1979 Agreement.[25] Moreover, according to the EC, the 1992 Agreement forms part of the applicable law in this dispute under Article 7.2 of the *DSU* as it is not invoked by the EC to justify a countermeasure against the US in the context of a broader dispute, as was the case in *Mexico – Soft Drinks*.[26] The EC points out that the MSF contracts for the A320 and A330/A340 programmes were concluded at the time of the *Tokyo Round Subsidies Code*, and if at all, should be judged according to the standards fixed in that agreement, *i.e.*, the "cost to the government" benchmark.[27] The EC further explains that the Tokyo Round Subsidies Code is still applicable law as referenced in the 1979 Agreement which is still in force. Moreover, under general international law, a juridical fact must be assessed against the law contemporaneous to it. Hence, in the EC view, these contracts can only be assessed against the standards of the Tokyo Round Subsidies Code, but not against the disciplines of the SCM Agreement.[28]

4.6 Third, the EC submits that these Agreements provide essential context for the interpretation of other applicable law, and in particular provisions of the SCM Agreement invoked by the US.[29] The 1992 Agreement can serve as an interpretative tool for the SCM Agreement according to Article 31(3)(c) of the *Vienna Convention* since the Appellate Body has, in the past, also applied other non-covered Agreements to interpret notions contained in covered agreements.[30]

4.7 Last, the EC notes that the 1992 Agreement was not only adopted to implement the 1979 Agreement between the US and the EC, but also constituted a mutually agreed solution to a dispute between these parties. A mutually agreed solution must at least give rise to estoppel preventing a party to such an agreement from reneging on its terms. Having negotiated, concluded, and implemented the 1992 Agreement, the US cannot now challenge as prohibited or actionable subsidies the very same elements of financing to which it acquiesced and, indeed, actively contributed to.[31]

[21] EC, SWS, Executive Summary, para. 15.
[22] EC, FWS, Executive Summary, para. 15.
[23] EC, FWS, Executive Summary, para. 15.
[24] Executive Summary of the Second Non-Confidential Oral Statement of the European Communities (hereinafter "EC, SNCOS, Executive Summary"), para. 2.
[25] EC, FWS, Executive Summary, para. 15.
[26] EC, SWS, Executive Summary, para. 5.
[27] EC, FWS, Executive Summary, para. 35.
[28] EC, SWS, Executive Summary, para. 15.
[29] EC, FWS, Executive Summary, para. 15.
[30] EC, SWS, Executive Summary, para. 5.
[31] Executive Summary of the First Non-Confidential Oral Statement of the European Communities (hereinafter "EC, FNCOS, Executive Summary"), para. 2.

BCI deleted, as indicated **[***]**

(b) Extinction and Extraction of Subsidies

Relevance of the identity of the recipient or the continuity of benefit under the SCM Agreement

4.8 The EC argues that by failing to demonstrate how the alleged subsidies to other companies provide benefits to Airbus SAS, the US has failed to make a *prima facie* case of violation of the SCM Agreement.[32] The EC recalls the Appellate Body's observation that "a 'benefit' can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something."[33] Put simply, subsidies paid to entities that no longer exist, much less manufacture and sell LCA, cannot be assumed to benefit Airbus SAS, which has not, in the Appellate Body's words, "in fact received something". Whether it has "in fact received something" is for the United States to prove.[34] The EC explains that identity of recipient, extinction, extraction even 'pass through' are all different ways of expressing the same principle. The US calls it the "continuity of benefit". In reality, the EC explains, it is the requirement that the operator benefiting from the subsidy must be identified.[35] The EC adds that in accordance with the jurisprudence, the US bears the burden of proving the "continuity of benefit" from alleged subsidies to entities other than Airbus SAS, the current manufacturer of European LCA, through to Airbus SAS.[36] The EC submits that the US – as the complaining party – bears the burden of proving its claims. The fact that the EC advanced certain facts about certain transactions, described below, that the US should have advanced, does not shift the burden of proof.[37]

4.9 The EC notes that the main US argument seems to be that "{f}or a serious prejudice analysis, it is necessary to establish that the product at issue is subsidized but not that the recipient of the subsidy is one enterprise rather than another." In the EC view, the US logic omits a certain number of essential steps. The EC explains that a product may be considered directly subsidised where an amount is paid on each item produced or sold. But where a subsidy is paid to a person before products are produced or sold, or independently of production or sale, it is necessary to first establish a benefit to the producer or seller of the product in order to establish that goods produced or sold by that person are subsidised. As the Appellate Body made clear in *Canada– Aircraft*, "{a} 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient."[38]

4.10 Taking into account this standard, the EC argues that it is necessary in analyzing the alleged subsidies in this case to identify the precise recipients.[39] And according to the EC, the US does not address this issue at all in its first written submission and attempts to disguise the issue by sometimes using the term "Airbus" to cover many different entities.[40]

4.11 The EC considers that the Appellate Body requirements discussed above are all the more important in this dispute, given the US approach to proving adverse effects. The US argues that the principal harm of the challenged measures is that they provide cash flow relief to Airbus SAS, allowing it to price down aircraft today. Under many of the measures challenged by the US, however, entities other than Airbus SAS – entities that no longer exist, much less make or sell LCA – "in fact received" the cash. Thus, while entities other than Airbus SAS received the cash, the US

[32] EC, FWS, Executive Summary, para. 16, 18.
[33] EC, SNCOS, para. 52, *quoting* Appellate Body Report, *Canada – Aircraft*, para. 154.
[34] EC, SNCOS, para. 52.
[35] Executive Summary of the Closing statement, of the European Communities at the Second Meeting of the Panel, (hereinafter "EC, SCCS, Executive Summary"), para. 4.
[36] EC, SNCOS, Executive Summary, para. 3.
[37] EC, FNCOS, Executive Summary, para. 5.
[38] EC, SWS, Executive Summary, para. 11.
[39] EC, FWS, Executive Summary, para. 16
[40] EC, FNCOS, Executive Summary, para. 3.

BCI deleted, as indicated **[***]**

characterises the harm as consequent cash flow relief enabling subsidy-fuelled pricing behaviour by Airbus SAS. Not only was much of the cash received by entities other than Airbus SAS, but it was received by those entities decades ago.[41]

Relevance of arm's length, fair market value transactions under the SCM Agreement

4.12 The EC provides evidence regarding a series of intervening transactions – identified at paragraph 311 of its response to Question 111 – that it argues were conducted at arm's length and for fair market value. The EC argues that these transactions interrupted the flow to Airbus SAS of any monies received by entities other than Airbus SAS.[42] The EC adds that this position, supported by Japan in its third party submission, is consistent with panel and Appellate Body jurisprudence holding that the existence of a subsidy must be determined by assessing the benefit that it confers on the relevant recipient and that a subsidy conferred on a former owner of assets cannot be assumed to confer a benefit on a subsequent owner.[43] In light of the transactions identified by the EC, the EC maintains that the US has not demonstrated a link between cash "in fact received" decades ago by entities other Airbus SAS, and current pricing behaviour by Airbus SAS.[44]

4.13 The EC argues that the failure of the US to do so has implications for US adverse effects claims: the US considers that the Panel may simply presume that cash provided decades ago to entities other than Airbus SAS automatically translates into cash flow relief for Airbus SAS today. This presumption is not permitted by the SCM Agreement. A series of intervening transactions conducted at arm's length and for fair market value interrupted the flow to Airbus SAS of any monies received decades ago by entities other than Airbus SAS.[45]

4.14 The EC considers that the US is wrong to suggest that the prior case law is only relevant to countervailing duty cases. The EC explains that the rationale for these cases lies in the definition of what is a subsidy and the definition of subsidy in the SCM Agreement is common to the whole agreement. The principles recognised in this case law are as relevant to adverse effects cases as they are to countervailing duty cases.[46]

4.15 In regard to the US argument that the various transactions that have occurred in the European LCA industry over the last decade do not qualify as "full privatisations" or sufficient "changes of ownership" and its further assertion that they were not in any event at arm's length or fair market value[47], the EC argues that there is nothing in the SCM Agreement that provides for special rules for privatisations and changes of control.[48] The EC further points out that the Appellate Body has held that there was a *rebuttable* presumption that an arm's-length, fair market value privatisation precludes the pass-through of benefit from seller to buyer of a state-owned firm. However, the EC notes, the Appellate Body also reasoned that this presumption would appear to be *irrebuttable* in private-to-private sales.[49]

4.16 The EC adds that WTO case law further recognizes that subsidy benefits are extinguished in cases of the sale of a portion of an enterprise. The Article 21.5 panel in *US – Countervailing*

[41] EC, SNCOS, para. 53.
[42] EC, SNCOS, para. 55.
[43] EC, SWS, Executive Summary, para. 7.
[44] EC, FNCOS, para. 55.
[45] EC, SNCOS, Executive Summary, para. 3.
[46] EC, SWS, Executive Summary, para. 8.
[47] Executive Summary of the Closing statement, of the European Communities at the First Meeting of the Panel, (hereinafter "EC, FCCS, Executive Summary"), para. 2, citing US Oral Statement, paras. 115-125.
[48] EC, FCCS, Executive Summary, para. 2.
[49] EC, FWS, Executive Summary, para. 19.

BCI deleted, as indicated **[***]**

Measures on Certain EC Products examined the US imposition of countervailing duties on a company that had been sold in tranches, with all but a fraction of the sale admittedly having been at arm's length. In that case, the US investigating authority had found that the sale of 5.16 percent of the company's shares to company employees at less than fair market value "did not extinguish certain allocable, nonrecurring, pre-privatisation subsidies" with regards to that portion of the company. As a result, the US investigating authority found that "the 5.16 percent of the allocated pre-privatisation benefit was not extinguished" while "{t}he remaining 94.84 percent of the allocated benefit was found to be extinguished.[50] The panel reasoned that a portion or "segment" of subsidies did pass through to the buyers of 5.16 per cent of the company. It also found, consistent with economic reality and common sense, that this approach precluded charging the buyer of that segment with the entire amount of the subsidy. Consequently, the panel concluded that failure to consider the partial nature of a privatisation was untenable, as "benefit" would necessarily be limited to that portion of the original subsidy left unextinguished by the sale. The EC argues that there is no textual or economic basis for limiting this "segmented" approach to cases of partial privatisation, rather than extending it to private-to-private sales. Whether a sale is private-to-private or public-to-private, the arm's-length fair market value sale of a portion of a company precludes the pass through from seller to buyer of a corresponding portion of any benefit the seller may have enjoyed.[51] (The EC notes, however, that while the Appellate Body held that there was a *rebuttable* presumption that an arm's-length, fair market value privatisation precludes the pass-through of benefit from seller to buyer of a state-owned firm, the presumption would appear *irrebuttable* in private-to-private sales.[52])

4.17 The EC argues that the series of transactions it has identified extinguish or extract any benefits that could be said to have accrued to Airbus SAS. Under US and international accounting standards, the purchaser of a company is required to adjust the balance of any loan carrying a below market rate to reflect a market interest rate, thereby recognizing that the seller extracted the value of the below market rate loan in the price of the business. In other words, US and international accounting standards recognize that the benefit of a below market rate loan rests with the **seller**, and does not get passed on to the **buyer**.[53]

4.18 The EC states that the result of the transactions identified in paragraph 311 of the EC response to Question 111 is that any prior subsidies have already been "withdrawn", within the meaning of Articles 4.7 and 7.8 of the SCM Agreement.[54] According to the EC, even if the US were able to establish violations of Parts II or III of the SCM Agreement with respect to alleged subsidies, the EC would already, through these transactions, have secured the "withdrawal" of such subsidies and thus provided any remedy due the US under Articles 4.7 and 7.8.[55]

Specifics of transactions identified by the EC

4.19 The EC focuses on several significant transactions, listed in paragraph 311 of its response to Question 111. The EC argues that as a result of these transactions, over the past eight years, the EC LCA industry has been consolidated through a series of privatisations, private sales, public offerings, and cash extractions. Today 79.26 percent of EADS and therefore Airbus SAS is in private hands. The process of consolidating EC LCA production has occurred in a series of arm's-length fair market

[50] EC, FWS, Executive Summary, para. 20.
[51] EC, FWS, paras. 217-219.
[52] EC, FWS, paras. 213-215.
[53] EC, SNCOS, para. 56.
[54] EC, SNCOS, Executive Summary, para. 3.
[55] EC, FWS, Executive Summary, para. 26.

BCI deleted, as indicated **[***]**

value transactions that have ensured that no benefits could have been passed through from sellers to new owners.[56]

4.20 The EC explains that the creation of EADS necessarily served to extinguish, extract, or repay any "benefits" held by ASM, CASA, and DASA, as a result of alleged subsidies challenged by the US in this dispute. In France, 50 percent of any subsidies that existed in Aérospatiale were extinguished with the 1999 creation of ASM and the accompanying sale of assets to Lagardère and the general public. In Spain, CASA repaid the government EUR 342.4 million in cash, reducing the company's value by 26 percent. In Germany, at the time it spun-off the Airbus activities, DaimlerChrysler extracted EUR 3,133 million in cash from DASA in 2000 for use in non-LCA activities, an amount equal to 34.5 percent of the company's value. The US has not specifically alleged, nor could it support a claim, that the net present value of the benefit of any subsidies received by CASA or DASA before 2000 would have exceeded those amounts. As such, the upper limit on any subsidies enjoyed by EADS at the time of its creation would have been 50 percent of any subsidy benefits in ASM in 2000.[57]

4.21 The EC adds that since that time, additional alleged subsidy benefits have been extracted through the sale of EADS shares in conjunction with the (i) July 2000 IPO (6.47 percent plus 9.95 percent); (ii) January 2001 sale of additional shares by the French State (0.93 percent) and Lagardère (2.07 percent); and (iii) July 2004 sale of 2.75 percent by DaimlerChrysler. As Airbus SAS was created only in July 2001, and as EADS held 80 percent of Airbus SAS as of the July 2004 sale, this equates to the extraction of a further 21.62 percent of any alleged subsidy benefits still enjoyed by Airbus SAS by June 2004.[58]

4.22 During 2006, founding shareholders Lagardère and DaimlerChrysler each sold 7.5 percent of EADS, and BAe Systems sold its 20 percent stake in Airbus SAS. As EADS held 80 percent of Airbus SAS at the time of the Lagardère and DaimlerChrysler sales, their transactions served to extinguish 12 percent of any alleged subsidy benefits enjoyed by Airbus SAS. Taken together, these three sales served to extract an additional 32 percent of any alleged subsidy benefits still enjoyed by Airbus SAS in 2006.[59]

4.23 With respect to the transactions identified by the EC, the EC considers that the US misrepresents its argument as being that "transactions related to the establishment of Airbus SAS" extinguish or extract any past subsidies. The EC explains that the establishment of Airbus SAS is important background but is not one of the transactions, identified at paragraph 311 of its response to Question 111, as extinguishing alleged subsidies.[60]

4.24 The EC also considers that the US incorrectly asserts that two of the transactions analysed by the EC were not at arm's length and/or for fair market value.[61] First, with respect to the exercise of a put option by BAe Systems, the US argues that it "amounted to the exact opposite of a privatization carried out at arm's-length and for fair market value." The EC offers evidence from the transaction that it argues demonstrates that BAe Systems' exercise of its put option, and the negotiation of the price at which that option was exercised, was entirely at arm's length and for fair market value.[62] Second, the US argues that the privatisation of Aérospatiale was not at arm's length and for fair

[56] EC, FWS, Executive Summary, para. 22.
[57] EC, FWS, Executive Summary, para. 23.
[58] EC, FWS, Executive Summary, para. 24.
[59] EC, FWS, Executive Summary, para. 25.
[60] EC, SWS, Executive Summary, para. 9.
[61] EC, SWS, Executive Summary, para. 10.
[62] Second Written Submission of the European Communities (hereinafter "EC, SWS"), para. 98. *See, also*, EC, Answer to Panel Question 113, paras. 321-324.

BCI deleted, as indicated **[***]**

market value, based on a press Article appearing seven years after the transaction was concluded, and comments by two French legislators that the EC argues are taken out of context. The EC considers that the US has ignored the contemporaneous assessments of Aérospatiale's value that were conducted by a variety of investment banks, and the fact that the transaction involved a public offering of Aérospatiale (or, rather, ASM) shares on the Paris Bourse under the watchful eye of the world's most respected financial and accounting advisers.[63]

4.25 The EC also responds to the US assertion that several of the transactions listed at paragraph 311 of the EC response to Question 111 are not "actual sales of shares". The US arguments concern the July 2004 sale by DaimlerChrysler of a 2.75 percent holding in EADS, as well as the April 2006 sale by DaimlerChrysler and Lagardère of 7.5 percent each of their shareholdings in EADS. With respect to the Lagardère transaction, the EC notes that Lagardère entered into a binding agreement in April 2006 to sell its shares.[64] With respect to the Daimler transactions, the EC notes that US SEC filings characterize them as reducing the company's "legal ownership percentage" in EADS.[65]

4.26 The EC also rejects the US argument that because some of the transactions listed in paragraph 311 of the EC response to Question 111 occurred after establishment of the Panel, they must be disregarded. The EC notes that in *EC – Selected Customs Matters*, the Appellate Body rejected a similar US argument, explaining that "{e}vidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel." The EC considers that the failure to consider the impact of post-establishment facts regarding the transactions highlighted by the European Communities would be inconsistent with the requirement to conduct an objective assessment of the facts, under Article 11 of the DSU.[66]

4.27 In regard to the US argument that under the EC approach, subsidies to publicly-traded companies "would constantly be in the process of being extinguished" by virtue of daily trading activity, the EC points out that it has not contended in these proceedings that daily trading activity involving EADS' shares extinguishes prior subsidies. The EC explains that it has, instead, faulted the US for its failure to address the significance of the disposition by large institutional shareholders of specifically identified stakes identified in paragraph 311 of the EC responses. According to the EC, those transactions demonstrate that companies other than Airbus SAS enjoy the benefits of any subsidies, and in some cases, that any subsidy amount has been repaid to the government.[67]

4.28 Two of the transactions listed in paragraph 311 of the EC's response to Question 111 are extractions of cash made by the Spanish State and Daimler in advance of the contribution of the LCA assets of CASA and DASA, respectively, to EADS. The EC argues that the WTO treatment of change of ownership is founded on economic common sense – that a company's value reflects the residual value of any subsidies it may have received. Where the residual value of a subsidy is removed from a company, the value of that company is reduced commensurately. Thus, the EC asserts, the cash extractions by the Spanish State and Daimler extracted the residual value of any remaining subsidies, ensuring that CASA's and DASA's balance sheets were no longer enhanced by the alleged subsidisation.[68]

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[63] EC, SWS, paras. 99, 559-563. *See, also*, EC, SNCOS, paras. 65-75.
[64] EC, Answer to Panel Question 197, para. 231.
[65] EC, Answer to Panel Question 197, para. 232.
[66] EC, SNCOS, paras. 61-63.
[67] EC, SCCS, Executive Summary, para. 5.
[68] EC, Answer to Panel Question 112, paras. 317-318.

BCI deleted, as indicated **[***]**

4.29 The EC notes that the US argues that there is no reason to believe that the amount of any subsidy extinguished by the extractions by the Spanish State and Daimler is equal to the full amount of the extractions and that according to the US, this "inexplicably assumes that every dollar moved from the books of a subsidized entity … is a dollar of subsidy."[69] According to the EC, that argument misses the point. For instance, in the formation of EADS, Daimler transferred assets with sufficient value to acquire a 30 percent interest in the company. As DASA had a value that was DM 3.1 billion more than was necessary to acquire the agreed interest, Daimler extracted DM 3.1 billion in cash from the company. If DASA benefited from any past subsidies, the benefit of those subsidies will exist in the form of an enhancement of DASA's balance sheet. By extracting cash from DASA's balance sheet, Daimler necessarily extracted a proportionate part of the value that may have been present as the result of any past subsidies. The US assertion that the EC cannot identify the source of the extraction is specious.[70]

4.30 Simply put, "but for" the alleged subsidy, CASA and DASA would have had a lesser value. But for the extractions, the value of those alleged subsidies would have remained with CASA and DASA, and been available for use and exploitation by the buyers to fuel the adverse effects alleged by the United States. When cash was withdrawn from those entities by their sellers in advance of sale, those payments served necessarily to extract from the company any value it otherwise may have enjoyed, ensuring that any financial contribution at issue assuredly no longer conferred a benefit within the meaning of Article 1.1 of the SCM Agreement, and/or that any subsidies up to the amount of those payments was no longer available to produce the adverse effects alleged by the United States.[71]

4.31 The EC argues that it is not required to prove a tie between, *e.g.*, each euro of the Spanish State's cash extraction and each euro of value contributed to CASA by alleged prior subsidies, but that if it is so required, this requirement must also impact the burden placed on the US. In that case, the US must similarly be required to prove (rather than merely to assume) that every euro of alleged subsidy, no matter to whom and for what purpose it was provided, or how long ago it was received, presently enables Airbus SAS to price down every one of the aircraft it offers for sale. In that case, the US would indeed be under an obligation to prove a "continuity of benefit" from decades-old alleged subsidies provided to entities other than Airbus SAS, the current manufacturer of European LCA, through to Airbus SAS, as well as to prove the continuity of those benefits through to Airbus SAS' current pricing behaviour.[72]

4.32 The EC also argues that it not necessary to characterise the cash extractions as repayments of subsidy in order for them to extinguish any prior subsidies. While repayment of a subsidy to the granting government is one means of withdrawing the subsidy, it is not the only way of doing so. The Appellate Body has interpreted the term "withdraw", within the meaning of Articles 4.7 and 7.8 of the SCM Agreement, to mean "remove" or "take away". Drawing subsidized value away from CASA and DASA amounts to "removing" or "taking away" the incremental contribution of alleged prior subsidies to the value of the company.[73]

(c) Temporal Scope of the SCM Agreement

4.33 The EC argues that the MSF loans provided in support of the A300, A310, and A320, as well as most MSF loans for the A330/A340 programme, are not within the temporal scope of the

[69] EC, FCCS, Executive Summary, para. 4, citing US Oral Statement, para. 124.
[70] EC, FCCS, Executive Summary, para. 5.
[71] EC, Answer to Panel Question 112, para. 315.
[72] EC, Answer to Panel Question 201, para. 254.
[73] EC, Answer to Panel Question 198, 200 and 201, paras. 235, 245-248, 251.

BCI deleted, as indicated **[***]**

SCM Agreement.[74] The EC considers that in any event, these contracts do not cause any present adverse effects.[75]

4.34 Finally, the EC notes that the US also neglects to point out that the SCM Agreement only entered into force on 1 January 1995 and does not explain how EC governments were expected to anticipate the existence of its provisions when providing finance during the 1980's.[76]

4.35 According to the EC, pre-1995 measures fall outside the temporal scope of the SCM Agreement due to the prohibition of retroactive application under Article 28 of the *Vienna Convention*. The EC adds that third Parties have confirmed that there is no different intention arising from the SCM Agreement for individual subsidies. Moreover, the measures that are challenged by the US are completed acts. And even if they were not, the US has failed to demonstrate any post-1994 benefits of pre-1995 measures.[77]

2. Arguments of the United States

(a) Relevance of Other International Aircraft Related Agreements

4.36 The US argues that the EC mistakenly attempts to have the Panel analyze the US claims regarding Launch Aid according to rules set out in non-covered agreements.[78] The US notes that the EC refers to the SCM Agreement almost as an after-thought and asks instead the Panel to focus on agreements, such as the Tokyo Round Subsidy Code and the 1992 Agreement, that are not covered agreements and that are outside the Panel's terms of reference.[79] The US states that the EC theory that the Panel should review Launch Aid for the A320, A330, and A340 under the Tokyo Round Subsidy Code is baseless because the Tokyo Round Subsidy Code is not a covered agreement. The EC concedes the Airbus governments did not seek a commercial return on the Launch Aid for these aircraft, the relevant standard under the Uruguay Round SCM Agreement.[80]

4.37 The US further points out that by arguing that the Panel should review Launch Aid for the A330-200, the A340-500/600, and the A380 under the 1992 Agreement, the EC is seeking the interpretation and enforcement of the 1992 Agreement, notwithstanding the Appellate Body's clear statement in *Mexico-Soft Drink Taxes* that panels may not adjudicate non-WTO disputes.[81] According to the US, the EC ignores that the covered agreements listed in Appendix 1 to the DSU provide not only the basis for entering the dispute settlement system, but also the basis for resolving disputes under that system.[82]

4.38 As to the argument of the EC that the 1992 Agreement forms part of the applicable law in this dispute under Article 7.2 of the DSU, the US points out that Article 7.2 of the DSU provides no basis for this approach. The US explains that Article 7.2 requires only that a panel address covered

[74] EC, FWS, Executive Summary, para. 34.
[75] EC, SWS, Executive Summary, para. 14.
[76] EC, FWS, Executive Summary, para. 2.
[77] EC, SWS, Executive Summary, para. 4.
[78] Executive Summary of the Second Non-Confidential Oral Statement of the United States (hereinafter US, SNCOS, Executive Summary), para. 7.
[79] Executive Summary of the Closing statement, of the United States at the First Meeting of the Panel (hereinafter US, FCCS, Executive Summary), para. 2.
[80] Executive Summary of the First Non-Confidential Oral Statement of the United States (hereinafter US, FNCOS, Executive Summary), para. 3.
[81] US, FNCOS, Executive Summary, para. 4.
[82] Executive Summary of the Second Written Submission of the United States (hereinafter US, SWS, Executive Summary, para. 4.

agreements.[83] The US also referred to its arguments on these issues made in the context of the EC's request for preliminary rulings.[84]

4.39 In regard to the EC argument about estoppel, the US argues that WTO Members have not consented to provide for the application of what the EC refers to as "estoppel" in WTO dispute settlement. Not only do the panel and Appellate Body reports on which the EC relies not support its position, they actually undermine that position, inasmuch as they decline to recognize the applicability of "estoppel" to WTO dispute settlement. And, even by its own terms, the EC "estoppel" argument with respect to the 1992 Agreement must fail. Among other facts demonstrating the absence of any basis for arguing "estoppel" is the fifth recital in the 1992 Agreement, which expresses the parties' "intention to act without prejudice to their rights and obligations under the GATT and under other multilateral agreements negotiated under the auspices of the GATT".[85]

4.40 The US explains that it has not engaged the EC argument regarding the merits of the 1992 Agreement because that agreement is not relevant to this dispute.[86]

(b) Extinction and Extraction of Subsidies

4.41 The US notes that as a defense, the EC argues that certain transactions extinguished subsidies to Airbus.[87] The US observes that the EC has called attention to several transactions which, in its view, had the effect of eliminating subsidies to Airbus. However, the US argues, none of these transactions involved a transfer of "all or substantially all" of the subsidized entity to private interests, and none involved relinquishment of a "controlling interest in the privatized producer." Therefore, the Panel need not and should not reach the question whether privatization could have extinguished the subsidies at issue here. The US considers that the EC arguments about "extinction" and "extraction" are baseless.[88]

4.42 With regard to extinction, the US notes that the EC sought to rely on panel and Appellate Body reports from disputes in the countervailing duty ("CVD") context concerning the effects of a full privatization on pre-privatization subsidies. Those reports stand for the proposition that, in the CVD context, a full privatization may result in the extinction of pre-privatization subsidies where the privatization involves the sale of all or substantially all of the subsidized entity, at arm's length and for fair market value, and where the seller relinquishes control of the entity. Since the transactions cited by the EC do not meet these criteria, the reports do not help the EC argument.[89]

4.43 The US pointed out "while there may be a need for a 'pass-through' analysis in other contexts - such as the CVD context (where there is a need to quantify the subsidy attributable to particular entries of a good from a particular producer), or the context of a claim involving a subsidy provided directly to a company that does not produce, and is not related to a producer of, the product at issue (where there is a need to establish that it is subsidies benefiting the merchandise at issue that are causing adverse effects) - there is no such need in the context of determining whether subsidies

[83] US, SNCOS, Executive Summary, para. 7.
[84] US, SWS, para 25 & n.31 (referencing US Response to Updated EC Preliminary Ruling Request (29 November 2006), paras. 29-51).
[85] US, SWS, Executive Summary, para. 5.
[86] Executive Summary of the Comments by the United States on the Second Non-Confidential Oral Statement of the European Communities (hereinafter US, Comments on EC, SNCOS, Executive Summary), para. 1.
[87] US, SNCOS, Executive Summary, para. 15.
[88] US, FNCOS, Executive Summary, para. 17.
[89] US, SWS, Executive Summary, para. 73.

BCI deleted, as indicated **[***]**

provided directly to the producers of the merchandise at issue are causing adverse effects to the interest of other Members."[90]

4.44 Moreover, according to the US, the EC ignores the fact that when transactions have been found to extinguish subsidies in past disputes, those transactions were not only at arm's length and for fair market value, but also involved the transfer of all or substantially all of the assets of the subsidized entity and relinquishment of control by the seller. Relatedly, the EC fails to address the logical implications of its argument for subsidies to publicly traded companies. Absent from the EC's second submission is any support for its "extraction" defense.[91]

4.45 The US considers that the "extraction" argument is an EC invention. The US points out that the EC has not proven the validity of its concepts of extinguishment or so-called extraction of subsidies, nor has it demonstrated facts that might support its theories.[92]

4.46 The US first notes that while the EC makes vague references to "{t}he WTO treatment of change of ownership," "the test for cash extraction," and "the established WTO rules," it never states where in the SCM Agreement this "treatment," "test," or "rules" can be found. In the US view, it does not do so because it cannot do so. Second, the US notes that the EC asserts that "the test for cash extraction is a 'but for' test," even though the SCM Agreement contains no such test, and elsewhere the EC has insisted on interpreting and applying the language actually used in the SCM Agreement. Third, the US points out that as there is no treaty text to support its argument, the EC refers instead to what it calls "economic common sense," but provides no citation to a textbook or any other support for this "economic common sense." In effect, the US explains, the EC invents a special accounting rule whereby, when a subsidized entity transfers cash to the account of its owner, the transferred money is first attributed to any subsidies provided to the entity and is attributed to non-subsidized investment only after the amount transferred equals the amount of pre-transfer subsidies.[93]

4.47 More fundamentally, the US argues, the EC "extraction" theory relies on a supposed separation between a company and its shareholders – the very separation that the EC successfully opposed in *US –Countervailing Measures on Certain EC Products*. If it is the case that money taken out of an owner's pocket amounts to money taken out of the company, potentially eliminating subsidies that reside in the company, then the converse must also be true: money that is simply moved from the company to the owner's pocket has not really left the company-shareholder unit. Indeed, following the EC logic, it would seem that a company "extracts" subsidies every time it buys back stock or pays dividends to its shareholders – both types of transactions that involve a transfer of cash from the company to its owners. Yet, if this were so, then opportunities to circumvent the SCM Agreement would abound.[94]

4.48 With regard to the EC "extinction" argument, the US notes that it is based on four sets of transactions: (i) the 1999 corporate tie-up between Aérospatiale and Matra Hautes Technologies ("Matra"); (ii) the 2000 creation of EADS; (iii) the exercise by BAe of its put option in 2006; and (iv) the offerings of small portions of EADS shares between 2000 and 2007. By the EC Commission's own admission, the transactions resulting in the creation of EADS and Airbus SAS did not "affect the quality or nature of control of Airbus." They represented nothing more than "a restructuring and rationalisation of the existing legal partnership between the parties {that previously had coordinated their Airbus activities through Airbus GIE}." Moreover, it is telling that when asked how it responds

[90] US, Answer to Panel Question 122, para. 384.
[91] US, SNCOS, Executive Summary, para. 15.
[92] US, FNCOS, Executive Summary, para. 18.
[93] US, SWS, Executive Summary, para. 76.
[94] US, SWS, Executive Summary, para. 77.

to the US statement that "{n}one of {the pertinent} transactions involved a transfer of 'all or substantially all' of the subsidized entity to private interests," the EC simply ignored the phrase "all or substantially all."[95]

4.49 The US asserts that in addition to the conceptual flaws in the EC argument, certain of the transactions alleged to result in the extinction of subsidies occurred after Panel establishment[96] and therefore, have no bearing on the resolution of this dispute.[97] The US points out that the Appellate Body report in *EC – Selected Customs Matters* does not support the EC reliance on those transactions. In *EC – Selected Customs Matters*, the Appellate Body said that it is permissible to refer to facts post-dating panel establishment as evidence to confirm the existence of facts alleged to exist at the time of panel establishment. Here, the EC cites the transactions at issue not for their evidentiary value, but for the mistaken proposition that they extinguished pre-existing subsidies.[98]

4.50 Moreover, several of the transactions are not even actual sales of shares. The US also points out that all of the post-panel-establishment transactions and all but one of the remaining transactions that the EC argues "extinguished" parts of the subsidies to Airbus concern between 1 percent and at most 9.95 percent of the shares in the entities concerned. In other words, they involved significantly less than "all or substantially all" of the shares of those entities. Furthermore, the US notes that none of the transactions cited by the EC resulted in the seller "no longer {having} any controlling interest" in the company at issue. The US considers that the EC has in no way demonstrated that the transactions it cites occurred at arm's length and for fair market value.[99]

4.51 The US argues that, in the CVD context, the Appellate Body has recognized the possibility of subsidy extinction through an arms-length, fair-market-value transaction involving a transfer of all or substantially all of the assets of the subsidized entity and a relinquishment of control. In the US view, the EC is asking the Panel to alter these principles – not, as the EC asserts, extend them – so that it would be irrelevant whether the transaction at issue involves all or substantially all of the assets of the subsidized entity or a relinquishment of control.[100]

4.52 The US also notes that the EC criticized the report of Ms Lauren D. Fox regarding the transaction involving the Aérospatiale-Matra tie-up and subsequent minority flotation. The US explains that the Fox report shows that reports by various investment banks do not demonstrate that the transaction occurred at arms-length and for fair market value. In criticizing Fox, the EC (at paragraph 71 of its SNCOS) quotes misleadingly from her report. The full quote reads: "In situations where insider knowledge of detailed historical financials and access to management for discussions of likely trends are available, the most reliable indicator of long-term underlying economic value to shareholders" is the discounted cash value method. The EC left out the entire first part of the sentence. This intentional omission reflects the EC knowledge that the very reports it relies on were not based on "detailed historical financials and access to management for discussions of likely trends." Thus, as Ms Fox concluded, the reports the EC relies on do not confirm that the transaction was in accordance with the usual investment practice of private investors.[101]

4.53 The US notes that the EC repeatedly accuses it of failing to show that subsidies given to Airbus predecessor companies passed through to Airbus SAS. In the US view, this argument is just a

[95] US, SWS, Executive Summary, para. 74.
[96] United States, Comments on EC, SNCOS, Executive Summary, (hereinafter US, Comments on EC, SNCOS, Executive Summary), para. 4.
[97] US, SWS, Executive Summary, para. 75.
[98] US, Comments on EC, SNCOS, Executive Summary, para. 4.
[99] US, SWS, Executive Summary, para. 75.
[100] US, Comments on EC, SNCOS, Executive Summary, para. 3.
[101] US, Comments on EC, SNCOS, Executive Summary, para. 5.

BCI deleted, as indicated **[***]**

re-packaging of the EC's faulty "extinguishment" argument. According to the US, the EC pretends that by changing names and re-grouping subsidized entities, the resulting entity – Airbus SAS – emerges subsidy-free.[102]

4.54 In any event, the US argues, the answer to the EC's false argument on pass-through was summed up by the European Commission itself in 2000, in reviewing the creation of EADS. It said:

> "Most of the parties' activities in commercial aircraft are already integrated through Airbus. . . . There is no indication that the operation will affect the quality or nature of control of Airbus. . . . Accordingly, there is no indication that the operation will affect the competition position of Airbus."[103]

In short, as the European Commission itself admitted, no economically significant transaction occurred in the regrouping that led to the creation of EADS and, hence, the current-day Airbus SAS. It simply was a matter of bringing together four subsidized producers under "a single unified management." This bringing together under a single unified management did not cause the embedded subsidies to magically disappear, as the EC would have the Panel believe.[104]

4.55 The US further notes that the EC seems to argue that the transfers of cash from CASA to the government of Spain and from DASA to DaimlerChrysler were analogous to repayments of subsidies and thus constituted withdrawals of subsidies within the meaning of Articles 4.7 and 7.8 of the SCM Agreement. However, according to the US, the EC ignores an important distinction between these transactions and actual repayments of subsidy. The US explains that when withdrawal of a subsidy is effectuated by repayment, the government that provided the subsidy in the first place receives cash from the subsidized entity and gives up nothing in return. That is not what happened in the CASA and DASA transactions. Both the government of Spain and DaimlerChrysler gave something up in the sense that they received smaller stakes in EADS than they would have received if the cash transfers had not occurred.[105]

(c) Temporal Scope of the SCM Agreement

4.56 Finally, in response to the EC arguments on the temporal scope of the SCM Agreement, the US points out that while the EC argues that Launch Aid for the A300, the A310, and the A320 is outside the temporal scope of this dispute, it continues to withhold relevant evidence, such as the A300 and A310 Launch Aid contracts and the disbursement and repayment information for those models. Since the A300/A310 program was expected to end in July 2007, it is likely that the outstanding balances were about to become grants, which may explain the EC tactics.[106]

4.57 The US considers that the EC pursues a deeply flawed position that a subsidy is not covered by the SCM Agreement if the subsidy first came into existence prior to January 1, 1995. According to the US, the EC ignores entirely that the relevant question under the SCM Agreement is not when a subsidy first came into existence, but whether the Member providing the subsidy is causing, through the use of the subsidy, adverse effects to the interests of other Members.[107]

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[102] US, FCCS, Executive Summary, para. 9.

[103] US, FCCS, Executive Summary, para. 10, citing European Commission, Decision of 11 May 2000, COMP/M.1745 - EADS at paras. 15-16; s*ee also,* European Commission, Press Release, Commission Clears the Creation of the Airbus Integrated Company (18 October 2000).

[104] US, FCCS, Executive Summary, para. 11.

[105] US, SWS, Executive Summary, para. 78.

[106] US, FNCOS, Executive Summary, para. 2.

[107] US, SWS, Executive Summary, para. 2.

BCI deleted, as indicated **[***]**

B. WHETHER LAUNCH AID IS A SUBSIDY WITHIN THE MEANING OF ARTICLE 1 OF THE SCM AGREEMENT

1. Arguments of the United States

(a) Launch Aid as a Program

4.58 The US challenges not only each individual grant of Launch Aid, but also the Launch Aid program as a whole. The US argues that evidence of the Launch Aid program includes, *inter alia*, intergovernmental agreements, the Launch Aid contracts, the intergovernmental institutions, and the dedicated bureaucracies. Further evidence is the "legally binding" commitments of Launch Aid for the A350 XWB, as well as the value that market actors place on Launch Aid. The perception of Launch Aid by rating agencies should leave no doubt that Launch Aid is a program. It "creates expectations among the public and among private actors," demonstrating that it has "normative value" and should be considered as a measure in its own right.[108]

4.59 The US submits that the Airbus governments have provided between 33 and 100 percent of the financing that Airbus has needed to develop its LCA family. Every time that Airbus asks for further grants of Launch Aid under the Launch Aid regime, the Airbus governments provide it. As former French Prime Minister Lionel Jospin stated in a March 2000 speech before the French Parliament, their purpose in providing the aid is to "give Airbus the means to win the battle against Boeing."[109]

4.60 The US explains that the roots of the Airbus governments' Launch Aid program can be traced to 1969, when the governments of France and Germany entered into an agreement to "reinforce European cooperation in the field of aeronautics." The 1969 agreement was only the first of a number of agreements in which the Airbus governments have memorialized their program to support Airbus with Launch Aid. In addition to the 1969 agreement, there were at least four additional agreements relating to the A300 and A310 and their derivatives, an agreement relating to the A320, an agreement relating to the A330/340, and a joint decision by the Airbus governments to provide Launch Aid for the A380. Most recently, the Airbus governments made legally binding commitments to provide Launch Aid for the A350.[110]

4.61 The US asserts that the Airbus governments have created and maintain a set of formal intergovernmental institutions that they use to oversee Airbus and to work with it to determine whether and when to launch new Airbus aircraft. The US considers that the core intergovernmental institutions are the Airbus Intergovernmental Committee, the Airbus Executive Committee, and the Airbus Executive Agency, which the governments established in 1969 and which have been in continuous operation ever since. Other institutions include the Airbus Ministers Conference and the Permanent Working Group for Sales Financing.[111]

4.62 The US notes that in addition to the intergovernmental institutions, the Airbus governments also maintain dedicated bureaucracies at the national level. These bureaucracies perform the administrative tasks involved in maintaining the Launch Aid system and coordinating the provision of Launch Aid to Airbus.[112] In France, a special unit in the *Direction des Programmes Aéronautiques*

[108] US, FNCOS, Executive Summary, para. 1.
[109] Executive Summary of the First Written Submission of the United States (hereinafter US, FWS, Executive Summary), para. 7.
[110] US, FWS, Executive Summary, para. 8.
[111] US, FWS, Executive Summary, para. 9.
[112] US, FWS, Executive Summary, para. 10.

BCI deleted, as indicated **[***]**

Civils oversees Airbus and the Launch Aid system. The so-called "transport aircraft of more than 100 seats" unit participates in the Airbus intergovernmental institutions and administers the provision of Launch Aid to Airbus for the company's new projects. The UK Launch Aid system is administered by the "aerospace team" located within DTI's Aerospace and Defence Unit, which is "responsible for relations with civil aerospace companies, and launch investment." In Germany, the entity that is responsible for administering the Launch Aid system is the office of the Coordinator for the Aerospace Industry and for Aeronautics Research, an office within the Federal Ministry of Economics and Technology. In Spain, the Ministry of Science and Technology is responsible for administering the "system of reimbursable advances." It also "participates in the Council of Ministers of the four countries, the {Airbus} Executive Committee and the other bodies that manage and coordinate the system."[113]

4.63 The national Airbus bureaucracies work with the intergovernmental institutions to "manage and coordinate" the Launch Aid system. The Airbus governments also conclude agreements with Airbus to facilitate their coordination of the system. The US discusses an agreement pertaining to the A380, which is quite revealing of the pattern.[114]

4.64 The US points out that the European Commission and the Airbus governments have each confirmed the integrated nature of the Launch Aid program that they use to ensure the success of the Airbus enterprise. For example, on the same day that President Chirac described the A380 as a "success of European industrial policy," British Prime Minister Blair described the aircraft as "the result of unprecedented co-operation between the four countries... ." And on the day after the ceremony, the European Commission stated that "for the EU, the A380 represents the fruit of European state-level co-operation." Indeed, the former UK Secretary of Trade and Industry has stated that the provision of Launch Aid:

> "reflects our approach to industrial policy. We are not standing to one side and leaving everything to the market... ."[115]

4.65 The US argues that it is also clear that the Airbus governments will continue to work together to provide Launch Aid to Airbus. For example, a European Commission report on the future of the European aerospace industry stated in October 2003 that member States will retain the "crucial responsibility" of "providing support in terms of R&D programmes, repayable launch aid and contributions to ESA programmes... ." In May 2005, the European Commission defended the prospect of Launch Aid for the new Airbus A350 because Launch Aid is "part of the commercial landscape of aircraft development" in Europe. That same month, the French Transport Minister stated that "{t}he French state has given its financial support to the A380 programme and we expect to continue in this vein ... ."[116]

4.66 Similarly, in June 2006, an EADS spokesman stated that "{l}aunch aid is the only available system right now." In July 2006, the Airbus ministers "reaffirmed their agreement to support Airbus to continue to innovate and to develop programmes in the context of international competition." And on November 14, 2006, the French Prime Minister Dominique de Villepin said the role of the State in EADS (and thus Airbus) is "to defend a strategic long term vision, which is guarantor of jobs and economic dynamism of the company. I can ensure you that the State will fully play its part." The financial market standing of Airbus' parent company EADS hinges on these plans. The Moody's

[113] US, FWS, Executive Summary, para. 11.
[114] US, FWS, Executive Summary, para. 12.
[115] US, FWS, Executive Summary, para. 13.
[116] US, FWS, Executive Summary, para. 14.

BCI deleted, as indicated **[***]**

commercial rating service, for example, has explained that it takes the continued availability of Launch Aid into account in determining EADS' debt rating.[117]

4.67 The US argues that in light of the Airbus governments' consistent and systematic approach to their support of Airbus for over three decades, the institutional structures and bureaucracies they have created to maintain and provide this support, and their statements and actions concerning this support, the specific content of their Launch Aid program and the future conduct it will entail is clear. According to the US, the Airbus governments will continue to use Launch Aid to facilitate Airbus' commercial strategy, without regard to their WTO obligations or the effects of the subsidies on the US.[118]

4.68 The US asserts that Launch Aid is a subsidy within the meaning of Article 1 of the SCM Agreement because it involves a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement that confers a benefit that is specific to Airbus within the meaning of the SCM Agreement.[119]

(b) Launch Aid Constitutes a Financial Contribution to Airbus

4.69 The US notes that Article 1.1(a)(1)(i) of the SCM Agreement states that "there is a financial contribution" by a government where "a government practice involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion)" or "potential direct transfers of funds or liabilities (*e.g.*, loan guarantees)." According to the US, the Airbus governments' Launch Aid program is a government practice that involves the direct transfer of funds or potential direct transfer of funds in the sense of Article 1.1(a)(1)(i) – namely, success-dependent loans. Therefore, in the US view, "there is a financial contribution" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[120]

(c) Launch Aid Confers a Benefit on Airbus

4.70 The US argues that the Airbus governments have designed the Launch Aid system to benefit Airbus by providing the funds it needs to develop new models of LCA, carefully tailored to address the extremely high costs and risks of LCA development, at interest rates that are substantially below what the market would demand for financing with similar characteristics. The US describes the ways in which the Airbus governments have designed Launch Aid to insulate Airbus from those risks and the reasons why the financing confers a benefit within the meaning of the SCM Agreement.[121]

4.71 First, the US points out that developing new models of LCA is both extremely risky and extraordinarily expensive. The development programs require huge up-front investments to fund the development work that must be completed before deliveries can begin. Once this investment has been made, very little can be recovered in the event the program fails. There are many uncertainties at the time of commitment to launch an LCA program, and it is difficult to predict the prices that various customers will pay for the aircraft over the life of the program. Since the initial development investment is essentially a sunk cost and is incurred well before revenues are received, the size of these non-recurring costs is a key element affecting an aircraft program's risk and expected profitability. If a program is successful, the up-front investment is eventually recovered with margins earned on each aircraft delivery. Given the typical magnitude of program non-recurring costs, however, hundreds of sales are usually required before a program reaches its break-even point. If a

[117] US, FWS, Executive Summary, para. 15.
[118] US, FWS, Executive Summary, para. 16.
[119] US, FWS, Executive Summary, para. 17.
[120] US, FWS, Executive Summary, para. 18.
[121] US, FWS, Executive Summary, para. 19. *See, also,* US, FWS, Executive Summary, para. 5.

BCI deleted, as indicated **[***]**

program fails to reach break-even sales, the remainder of the non-recurring costs must instead be written off as a loss.[122]

4.72 Second, the US notes that repayment of Launch Aid is success-dependent. The US explains that one of the principal ways in which the Airbus governments assume Airbus' risks in developing new models of LCA is by allowing Airbus to repay the aid through "levies" on each delivery of the financed product. The Launch Aid is unsecured, and the government has no recourse to obtain repayment if the expected sales fail to materialize. Repayment is therefore "success dependent." A company that receives financing on a "success-dependent" basis enjoys the obvious benefit of no down-side risk. As one UK scholar has observed, "the distinctive risk-sharing feature of Launch Aid confers Airbus with an advantage over a rival who is constrained to debt and equity instruments alone."[123]

4.73 Third, the US points out that repayment of Launch Aid is back-loaded. The US explains that the Airbus governments further assume Airbus' risks by back-loading the repayment obligations. First, levy-based repayment terms are inherently back-loaded. One inevitable consequence of tying repayment to deliveries is that repayments only begin once deliveries begin. For the ordinary LCA program, this normally means there will be at least a five-year lag between disbursement of the aid to Airbus and the first repayments (in the case of the A380, the lag will be closer to ten years). Second, the Airbus governments further back-load the repayment schedules by allowing Airbus to make relatively small levy payments on early deliveries and progressively larger payments only on later deliveries. Third, in some cases, the Airbus governments allow Airbus to forego levies entirely on an initial tranche of deliveries.[124]

4.74 In addition, the US asserts that Launch Aid carries below-market interest rates. The US explains that the Airbus governments do not require Airbus to pay a commercial rate of interest that reflects the substantial risks that the governments assume on its behalf. In some cases, the Airbus governments have provided Launch Aid to Airbus interest-free. The US further notes that even the Launch Aid contracts that purport to include an interest component do not actually require Airbus to pay interest. Since the financing is success-dependent, the Airbus governments actually provide the aid without requiring any return, even of principal. The "Ellis Report," included as an exhibit to the US submission, compares the "potential returns" on Launch Aid with the actual returns that the commercial market would demand for financing with similarly advantageous characteristics. It concludes that Launch Aid borrowing rates are substantially below the rates that commercial investors would demand for comparable project-specific and success-dependent loans.[125]

4.75 The US also points out that the WTO has already found that Launch Aid-type financing confers a benefit. In the *Canada – Aircraft* subsidy dispute, the panel examined financing that was virtually identical to Launch Aid and concluded that the financing conferred a benefit on the recipient, and thus constituted a subsidy within the meaning of the SCM Agreement. In the US view, for the same reasons that the *Canada – Aircraft* panel found that the financing at issue conferred a benefit on the recipient, the Launch Aid that the Airbus governments provide to Airbus confers a benefit on Airbus.[126]

[122] US, FWS, Executive Summary, para. 20.
[123] US, FWS, Executive Summary, para. 21. *See, also,* US, FWS, Executive Summary, para. 6.
[124] US, FWS, Executive Summary, para. 22.
[125] US, FWS, Executive Summary, para. 23.
[126] US, FWS, Executive Summary, para. 24.

BCI deleted, as indicated **[***]**

(d) Launch Aid is Specific

4.76 Lastly, the US submits that the Launch Aid program is specific to Airbus. According to the US, the Airbus governments conceived and maintain their Launch Aid program for the specific benefit of Airbus. The US argues that they have used the program in a systematic and methodical way since its very inception to provide Airbus the means to develop a full family of LCA to compete against US producers in the LCA market. Accordingly, in the US view, the Launch Aid subsidies that Airbus has received have always been, and remain, specific to Airbus within the meaning of Article 2 of the SCM Agreement.[127]

(e) Other issues

4.77 The US notes that the EC asserted in its submission that the US had not challenged Launch Aid "as a subsidy programme," and therefore declined to engage on that US claim at all. However, the US argues that as it demonstrated in its statement at the first Panel meeting and in its responses to the Panel's questions, that assertion is incorrect.[128]

4.78 The US notes that the EC argues against the use of the term "launch aid," which it called a "loaded term"[129] and accuses it of using "terminological devices" to advance its argument.[130] However, the US contends that it is the EC that is using "terminological devices" by inventing a new label – "MSF" – to distract from the unmistakably systemic nature of Launch Aid.[131]

4.79 The US also notes that in responding to the US showing that the Launch Aid Program is a distinct measure breaching the EC obligations under Article 5 of the SCM Agreement, the EC conflates two distinct concepts: the concept of "measure" and the concept of an "'as such' claim." The US points out that rather than discuss the question of whether the Launch Aid Program is a measure, the EC argues that the US has not substantiated an "as such" claim. The US has shown that the Launch Aid Program is a measure, even according to the factors the EC says must be shown. The precise content of the Launch Aid Program is the consistent provision of Launch Aid based on the same core terms since 1969. The US argues that the EC attempt to dismiss this fact based on different interest rates and different repayment amounts in different Launch Aid contracts simply goes to the amount of benefit conferred. The EC assertion that "market-based instruments" display the same attributes as the Launch Aid Program is belied by key distinctions between the examples the EC gives and the Launch Aid Program. In addition, the US notes that the EC also ignores the substantial institutional apparatus that supports the Launch Aid Program, and it misconstrues evidence showing rating agencies' understanding that the Program exists.[132]

4.80 Finally, the US argues that the EC fails to rebut the US showing that the Launch Aid Program has general and prospective applicability. That Airbus has not sought or has not accepted offers of Launch Aid in particular instances does not affect that showing. Indeed, the Airbus governments confirmed the general and prospective nature of the Launch Aid Program when they fulfilled market expectations and made "legally binding" commitments to provide Launch Aid for the A350. The US considers that the EC provides no evidence to show that these commitments are not legally binding.[133]

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[127] US, FWS, Executive Summary, para. 25.
[128] US, SWS, Executive Summary, para. 9.
[129] citing, EC First Oral Statement, para. 40.
[130] citing, EC First Oral Statement, para. 114.
[131] US, FCCS, Executive Summary, para. 8.
[132] US, SNCOS, Executive Summary, para. 4.
[133] US, SNCOS, Executive Summary, para. 5.

BCI deleted, as indicated **[***]**

4.81 In any event, "the standard for determining whether the Launch Aid Program is a measure is not the EC's asserted test, but a standard based on the ordinary meaning of the term 'measure' in context and in light of the object and purpose of the WTO Agreement, which standard must be applied based on the facts. Following this standard, even if the Panel disagreed with the US that the Launch Aid Program has general and prospective application, it still should find that the Program constitutes a challengeable measure, based on the totality of the evidence.[134]

2. Arguments of the European Communities

4.82 The EC submits that the US has brought before the Panel a misconceived and grossly exaggerated case that ignores relevant international agreements and that is backed-up by limited and often incorrect facts.[135] The EC begins its defense by recalling the history of the EC LCA industry and distinguishing its participants over time.[136] By the mid-to-late 1960s, it became apparent that individual EC LCA manufacturers, in large part because of successful US industrial policy to undermine their separate product offerings, could not succeed on their own. These companies had difficulty recovering the high development costs associated with their separate LCA programmes, in part also because, even if they could successfully build one aircraft product, as many did, none of them could expand their business to build the required separate complementary product offerings that would become the key to success in the LCA business. Unless these companies pooled their resources, they recognized that they stood no chance of competing in the global LCA market. The creation of Airbus GIE allowed the EC LCA industry to transcend these limitations. Airbus GIE was established in 1970 as a consortium of two aerospace companies — Aérospatiale and Deutsche Airbus. Two other aerospace companies, CASA and BAe, joined Airbus GIE in 1971 and 1979, respectively. Each of these "Associated Manufacturers" held an ownership interest in Airbus GIE, which was formed as a *groupement d'intéret économique*, or "GIE," under French law. The loose collaboration permitted by the GIE structure had several advantages. The development and production of aircraft was allocated between the Associated Manufacturers, enabling Airbus GIE to harness each company's unique engineering talents and resources. This arrangement prevailed from Airbus GIE's inception in 1970 until 2001. During this period, Airbus GIE launched most of its aircraft families, including the A300, A310, A320, A330 and A340 families of LCA.[137]

4.83 Two events led to the creation of Airbus SAS, which heralded a fundamental change in Airbus GIE's corporate structure. *First*, the French State privatized Aérospatiale in 1999. The French defence contractor Matra Haute Technologies ("MHT") merged with Aérospatiale to form Aérospatiale Matra ("ASM"). An initial public offering ("IPO") of shares in the merged entity was conducted simultaneously with the merger transaction. *Second*, the European Aeronautic Defence and Space Company ("EADS") was created shortly thereafter. Through a complex series of transactions, ASM, DaimlerChrysler Aerospace AG ("DASA"), and Construcciones Aeronauticas SA ("CASA") merged to form EADS with effect from July 2000, when shares in the company were sold in an IPO. The merger yielded a company with a broad portfolio of civil aeronautic, military, and space activities. In several steps between 2001 and 2004, the LCA activities of each of the four partners were placed into subsidiaries under the control of a single, integrated company, Airbus SAS. The existing Associated Manufacturers (ASM, DASA, CASA, and BAe) were succeeded by wholly-owned subsidiaries of Airbus SAS (Airbus France, Airbus Germany, Airbus Spain, and Airbus UK) which are sometimes referred to collectively as the Airbus National Companies ("NatCos"). At the

[134] US, Answer to Panel Question 136, para 8.
[135] EC, FWS, Executive Summary, para. 92.
[136] EC, FWS, Executive Summary, para. 10.
[137] EC, FWS, Executive Summary, para. 11.

time of its creation, 80 percent of Airbus SAS shares were owned by EADS, and 20 percent by BAe Systems.[138]

4.84 Airbus SAS is an entirely different company from the Airbus GIE consortium. In particular Airbus SAS wields broader powers than its predecessor, the GIE, which had no power to bind its members and was a loose association of fully independently cost-centred companies. Airbus SAS is now responsible for managing the Airbus LCA business; conducting sales, marketing, and certain customer support functions; buying aircraft engines and nacelles; coordinating the transportation of aircraft parts and components among its subsidiaries, the NatCos; conducting flight tests; and developing a production plan for Airbus programmes. Airbus SAS also takes or approves most of the company's procurement decisions.[139]

(a) Member State Financing as a Programme

4.85 The EC does not accept the US descriptions of "launch aid programme" as a generic system denoting "long-term unsecured loans at zero or below-market rates of interest, with back-loaded repayment schedules". The EC points out that "rather than using the suggestive and oversimplifying term "launch aid", the EC will refer to each of the member States' measures separately. In the EC view, if a generic term is suitable to cover measures from all the four member States together the EC will denote them as "member State Financing" ("MSF").[140]

4.86 The EC refutes the US portrayal of MSF loans as a cross-country "programme" or "system" and explains that the US has not asserted "as such" claims against these loans."[141] In this respect, the EC notes that the US has clarified in its oral statement that it does not, after all, assert an "as such" challenge to the so-called "Launch Aid programme." The EC welcomes this clarification.[142]

4.87 In addition, the EC does not agree that the term "launch aid" is in "general usage". The EC notes that this term is used neither in the UK, nor in any of the other three member States (which use terms such as avances remboursables, anticipos reembolsables and Rückzahlbare Zuwendungen). The Article on UK "launch aid" by Mr. Kim Kaivanto and included as Exhibit US-2 to the US first written submission records that the UK House of Commons Trade Committee considered that the term may have been appropriate before the 1992 Agreement but was misleading thereafter and that a preferable term would be "reimbursable launch investment". Since both parties to this dispute accept that footnote 16 of the SCM Agreement describes and applies to what the US terms "launch aid", an appropriately neutral term could be that used in footnote 16, *i.e.*, "royalty based financing". The EC also points out that both parties also accept that Article 4 of the 1992 Agreement describes and applies to what the US calls "launch aid" and the term used in that provision is "development support".[143]

4.88 The EC asserts that each instance of financing is memorialized in an MSF contract. The terms on which MSF is provided are negotiated on a deal-by-deal basis; as a consequence, they vary considerably depending on the Airbus LCA programme at issue, both within and as between member States. In its condensed factual description of MSF, the EC describes some common attributes of MSF. Those common attributes speak solely to the similarity of the type or form of financing provided by the four member States. Each MSF contract is, however, a separate and independent

[138] EC, FWS, Executive Summary, para. 12.
[139] EC, FWS, Executive Summary, para. 13.
[140] EC, FWS, Executive Summary, para. 28.
[141] EC, FWS, Executive Summary, para. 32.
[142] EC closing statement, second meeting, Executive Summary, para. 6.
[143] EC, FCCS, Executive Summary, para. 1.

BCI deleted, as indicated **[***]**

measure.[144] In its submissions, the EC describes the basic elements of MSF loans as financial instruments, and their role in the development of the A320, the A330/A340 (including the A330/340 basic, the A330-200, and the A340-500/600), and the A380 aircraft programmes.[145]

4.89 According to the EC, the US challenge of a "launch aid programme" is without merit. In the EC view, the US has failed to point to the precise content of the alleged measure. It has also not shown that there is a norm of "general and prospective" or "systematic" application. The EC underlines that MSF is not always sought to finance development of Airbus LCA; that when MSF is sought, it is not always provided; that when development financing is sought, it is not always sought in the form of MSF; and that when MSF is provided, it is provided on terms that vary widely, both as between member States, and as between Airbus aircraft programmes.[146]

4.90 The EC asserts that it corrects certain factual errors that the US makes with respect to the relevance of the existence of "intergovernmental institutions" and "dedicated bureaucracies". [147] Concerning the "intergovernmental institutions," the EC notes that these do not set the terms of MSF, nor play any role in administering individual MSF loans.[148] Concerning the "dedicated bureaucracies" specifically, the EC clarifies that these entities do not provide MSF loans, nor are they dealing exclusively with "Airbus". Rather, it is the relevant ministry that provides MSF loans to the respective national company. Those ministries adopt procedures that vary from member State to member State and over time. Moreover, MSF loans are available to companies other than the recipients at issue in this dispute.[149] The EC submits that, whatever the relevance of these institutions, they cannot overcome the failure of the US to demonstrate the "precise content" and the "general and prospective application" of the alleged MSF programme.[150]

(b) US Failure to Prove that A member State Financing "Programme" Constitutes a Financial Contribution to Airbus

4.91 The EC argues that the US failure to establish the existence of a MSF programme also means that this alleged programme cannot constitute a financial contribution. In any event, the US failed to establish any financial contributions independent of individual applications of MSF loans.[151]

(c) US Failure to Prove that A member State Financing "Programme" Confers a Benefit on Airbus

4.92 The EC argues that the US failure to establish the existence of a MSF programme also means that this alleged programme cannot confer a benefit.[152]

4.93 Nonetheless, the EC also addresses the assertions on which the US bases its benefit arguments in relation to the alleged MSF programme. In particular, the EC submits that the US erroneously relies on a number of characteristics shared by certain of the MSF loans at issue – *i.e.*, the long-term, unsecured nature of MSF loans and their success-dependent and back-loaded repayment terms – to assert that the alleged measure confers a benefit. According to the EC, none of these characteristics, either individually or collectively, are indicative of benefit.

[144] EC, FWS, Executive Summary, para. 29.
[145] EC, FWS, Executive Summary, para. 31.
[146] EC, SWS, Executive Summary, para. 12.
[147] EC, Answer to Panel Question 172, paras. 19-43.
[148] EC, Answer to Panel Question 172, paras. 21-26.
[149] EC, Answer to Panel Question 172, paras. 27-33.
[150] EC, Answer to Panel Question 172, para. 18.
[151] EC, Comments on US Answer to Panel Question 139, paras. 35-43
[152] EC, Comments on US Answer to Panel Question 139, paras. 35-36, 44-53.

BCI deleted, as indicated **[***]**

4.94 First, the tenor of MSF loans is consistent with the tenors of other long-term financing instruments available at market.[153] Second, unsecured financing instruments are common in the market and do not, for that reason alone confer a benefit.[154] Third, financing with success-dependent repayment terms is available to both Airbus and Boeing from commercial actors, including private banks and risk-sharing suppliers.[155] While the success-dependent nature of the repayment does, indeed, transfer risk from the borrower to the creditor, this is a feature shared by most financing instruments. The degree of risk-sharing will be reflected in the price – *i.e.*, the interest rate – charged by the creditor for the financing instrument. Success-dependent repayment terms are, therefore, not indicative of benefit either.[156] Fourth, back-loaded repayments are common for many financing instruments. Commercial bonds for example are repaid in total at the end of their tenor, *i.e.*, their repayment is entirely back-loaded.[157]

4.95 Thus, according to the EC, the only measure against which it can be determined whether individual instances of MSF loans confer a benefit is the interest rate charged for that loan, compared to what a market creditor would have charged.[158] The EC addresses this issue in the context of its "benefit" arguments with respect to individual instances of MSF loans.

C. WHETHER EACH GRANT OF LAUNCH AID TO AIRBUS IS A SPECIFIC SUBSIDY TO AIRBUS WITHIN THE MEANING OF ARTICLES 1 AND 2 OF THE SCM AGREEMENT

1. Arguments of the United States

4.96 The US argues that the Airbus governments have provided or committed to provide Launch Aid for every major model of the Airbus LCA family – the A300, A310, A320, A330, A340, A380, and A350 – and for the three major derivative models of its family, the A330-200, A340-500, and A340-600. In its submissions, the US argues that each grant of Launch Aid constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement because it involves a financial contribution that confers a benefit on the recipient and is specific.[159]

(a) Benefit

4.97 The US notes that the EC concedes that Launch Aid is a subsidy.[160] The US points out that the EC does not dispute that Launch Aid grants confer a benefit; it disputes only the amount.[161]

4.98 The US notes that the EC openly admits that for the A320 and A330/A340, Launch Aid was provided either interest-free (Germany and Spain), at the rate of inflation (France), or at the government's cost of borrowing (UK). The US points out that the panel in the *Canada – Aircraft* dispute treated a similar admission by Canada with respect to the Technology Partnerships Canada (TPC) program as dispositive with respect to the existence of a benefit and thus a subsidy. The US also notes that the EC does not dispute that Launch Aid for the A300 and A310 was provided interest-free and thus confers a benefit.[162]

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[153] EC, FCOS, para. 15.
[154] EC, Answer to Panel Question 65, paras. 72-76.
[155] EC, Answer to Panel Question 64, paras. 58-66.
[156] EC, FCOS, para. 18.
[157] EC, FCOS, para. 16.
[158] EC, FCOS, para. 19.
[159] US, FWS, Executive Summary, para. 26.
[160] US, FNCOS, Executive Summary, para. 7.
[161] US, SNCOS, Executive Summary, para. 6.
[162] US, SWS, Executive Summary, para. 11.

BCI deleted, as indicated **[***]**

4.99 This then leaves the A330-200, the A340-500/600, and the A380. For all of these models as well – whether one uses the benchmark rates calculated by the US or those calculated by the EC – Launch Aid confers a benefit on Airbus. In fact, the US notes that in responding the Panel's questions, the EC acknowledged that Airbus sought Launch Aid for the A380 to "maximize{} the programme's profitability."[163]

4.100 The US explains that the question in a benefit analysis under Article 1.1(b) of the SCM Agreement is "whether the recipient has received a 'financial contribution' on terms more favorable than those available to the recipient in the market."[164] The US argues that the EC attempted to show that in demonstrating that Launch Aid confers a benefit on Airbus the US had overstated the relevant market benchmark and understated the expected return associated with Launch Aid. The US argues that the EC is wrong on both counts.[165]

4.101 The US argues that the EC mischaracterizes its benchmark methodology by pretending that it conceives Launch Aid as a pure debt instrument. In fact, the US asserts that its methodology recognizes that Launch Aid is a hybrid instrument that has characteristics of both debt and equity.[166] In regard to the EC assertion that it underestimates the potential returns on Launch Aid contracts, the US argues that it took the figures directly from the Launch Aid contracts themselves, which clearly state the relevant interest rates. In the US view, the EC's own submission confirms that the rates in the US submission are correct.[167]

4.102 The US points out that the EC wrongly contends that Launch Aid should be treated as pure debt, ignoring its equity-like qualities, including the governments' lack of entitlement to repayment with interest over a specified period of time and lack of recourse in the event of non-repayment.[168] The US argues that investment bank reports the EC cites are irrelevant, as they do not purport to evaluate the risk associated with Launch Aid. In the US view, the EC also misleadingly tries to downplay the riskiness of an LCA launch. It makes the irrelevant observation that Airbus has "never failed to certify a launched aircraft," and it ignores substantial delays in the repayment of Launch Aid.[169]

4.103 The US argues that the EC also mischaracterizes its benchmark, which relies not on returns to individual venture capital projects, but on the much lower returns to well-diversified portfolios that contain venture capital investments. In addition, the US argues that the EC fails to substantiate its assertion that Launch Aid may entail costs not associated with market-based financing.[170]

4.104 The US notes that the EC consultant attempts to suggest that the US experts, Dr. Dorman and Dr. Ellis, were performing comparable analyses, but using different benchmarks. In the US view, that is simply false. The US explains that the Dorman model examined the changes in profitability of a generic LCA program resulting from variations in prices, costs and airplanes sold, and examined the effect on profitability of Launch Aid. The discount rate was ancillary to this analysis, independent of the identity of the manufacturer and how the project was financed, and did not vary between the base case and the various Launch Aid scenarios. In contrast, the Ellis analysis was specifically intended to

[163] US, SWS, Executive Summary, para. 12.
[164] US, SWS, Executive Summary, para. 11.
[165] US, SWS, Executive Summary, para. 10.
[166] US, FNCOS, Executive Summary, para. 6.
[167] US, FNCOS, Executive Summary, para. 6.
[168] US, SWS, Executive Summary, para. 13.
[169] US, SNCOS, Executive Summary, para. 6. *See, also*, US comments on EC, SNCOS, Executive Summary, para. 12.
[170] US, SNCOS, Executive Summary, para. 6.

BCI deleted, as indicated **[***]**

determine the interest rate that appropriately reflected the risks borne by a supplier of capital with Launch Aid terms.[171]

4.105 The US also notes that the EC consultant asserts that Dorman and Ellis were looking at the same data. That too is false. In fact, the basis for the weighted average cost of capital used by Dr. Dorman was data for six US aerospace companies (not Airbus), while Dr. Ellis specifically examined the loans granted to Airbus. Moreover, the EC consultant asserts that Dr. Dorman upwardly adjusts his discount rate, which he claims will be higher than the company's average cost of capital, to reflect individual project risk. In the US view, that statement is factually accurate, but inapposite. It in no way undermines the validity of Dr. Ellis' benchmark. It was Dr. Ellis – not Dr. Dorman – who examined the return that a supplier of capital with Launch Aid terms would expect in return for providing such capital.[172]

4.106 The US notes that the EC asserts that it is inappropriate to add what it calls "a project-specific risk premium derived from equity returns" to Airbus' cost of debt. The US notes that the EC suggests that an equity risk premium should be added only to the corporate cost of equity. However, the US explains that adding the risk premium that Ellis identified to Airbus' corporate cost of debt was done precisely to reflect the hybrid nature of Launch Aid.[173] In addition, the US notes that the EC alleges that "use of an equity measure {for the risk premium} is at odds with the risk profile and terms of MSF loans." In the US view, that statement ignores Launch Aid's equity-like qualities and assumes incorrectly that the risk premium identified by Ellis is "an equity measure" rather than a hybrid measure.[174]

4.107 The US points out that in addition to erring in its criticism of the market benchmark in the Ellis report, the EC errs in criticizing the report's reference to the returns on Launch Aid actually identified in the Launch Aid contracts as the basis for comparison to the benchmarks. The US first notes that the EC calculation of an "internal rate of return" for the governments is based on the governments eventually receiving royalties – a possibility Ellis considered so remote that it "would play a marginal role, at most, in a commercial lender's financing decision." Second, the US notes that although the EC criticizes Ellis for not taking account of tax effects, it fails to provide any evidence to substantiate its assertion of tax effects, and, in any event, tax effects have no bearing on whether a financial contribution confers a benefit under the SCM Agreement. Market-based lenders set interest rates without regard to taxes that the recipients may subsequently pay and, indeed, neither the US nor the EC allows a party to adjust for tax effects when calculating the amount of the benefit under its domestic countervailing duty regime.[175] In the US view, the EC criticism of the market benchmark established in the Ellis Report (Exhibit US-80) is not well founded.[176]

4.108 The US asserts that the benchmark established in the Ellis report is confirmed by several alternative cross-checks. Although the EC criticizes each of them, it fails to discredit any of them. In the US view, its criticisms are flawed for reasons including their disregard of Launch Aid's equity-like qualities and their reliance on studies about risk that were unknown at the time that Launch Aid financing was provided and do not represent a consensus view.[177] Nor do the EC's own cross-checks undermine the Ellis benchmark. The first cross-check – a comparison to a contract between an Airbus company and a group of banks for financing development of an aircraft model – ignores important

[171] US comments on EC, SNCOS, Executive Summary, para. 12.
[172] US comments on EC, SNCOS, Executive Summary, para. 13.
[173] US, SWS, Executive Summary, para. 13.
[174] US, SWS, Executive Summary, para. 13.
[175] US, SWS, Executive Summary, para. 17.
[176] US, SWS, Executive Summary, para. 13.
[177] US, SWS, Executive Summary, para. 14.

BCI deleted, as indicated **[***]**

differences between that contract and government-provided Launch Aid, including, *inter alia*, the relatively small amount pledged by the banks and the fact that the bank contract provided for full repayment over a relatively small number of sales. The second EC cross-check – a comparison between the Launch Aid risk premium established in the Ellis report and a supposed "equity ceiling" – wrongly assumes that the risk of a single project cannot exceed the risk of a company's equity; wrongly relies on a sample of companies whose sensitivity to economy-wide risk factors is likely to be lower than that of LCA projects; and is based largely on very recent research that does not represent a consensus approach to measuring equity risk.[178]

4.109 The US considers that the EC's proposed "alternative benchmark rates" for Launch Aid are seriously flawed. And even under the EC's "alternative" approach, there is a substantial spread between the borrowing rates in the Launch Aid contracts and the EC's proposed "commercial" rates. Similarly, the Unites States notes that the EC criticizes it for allegedly not accounting for the effects of taxation. But even if the EC's alternative interest rate calculations were valid, they are still below the commercial benchmarks proposed by the US and the EC.[179] The US maintains that even under the EC's own flawed analysis, Launch Aid confers a benefit, and the EC does not dispute this.[180]

4.110 The US considers that the EC alternative to the US benchmark – based on project-specific returns for certain Airbus "risk-sharing suppliers" is inapposite, because the situation of risk-sharing suppliers is far different from that of an ordinary, market-based provider of Launch Aid-type financing to Airbus. The US explains that investment capital provided by banks and other financial entities is highly mobile, whereas a supplier's capital is relatively immobile in the short and intermediate terms. Further, the return that a risk-sharing supplier demands is likely to be influenced by a variety of factors that would have no relevance to an investor, including anticipated revenue from future business, sales of replacement parts, and servicing of goods supplied. And, a supplier may provide more than one component to Airbus and may adjust the rate it demands under one supply contract according to the rate it demands under a different supply contract. Finally, some suppliers may be shielded from risk by Airbus' commitment to purchase a minimum quantity of supplies regardless of actual aircraft deliveries.[181]

4.111 The US notes that mistakenly relying on footnote 16 of the SCM Agreement, the EC asserts that "the relevant test for determining whether a {Launch Aid} contract in the large civil aircraft sector constitutes a subsidy is the reasonableness of the forecasts {of aircraft sales}." In that regard, the US argues that whether forecasts are reasonable or not is irrelevant if the return the government demands is lower than what a market creditor would demand.[182] But, even if sales forecasts are reasonable, the US explains, if the interest rates demanded are below the rates that a market player would demand for the same shifting of risk, the Launch Aid would still be a subsidy.[183]

4.112 The US points out that while the EC acknowledges that "{f}ootnote 16 does not . . . discuss under which conditions royalty-based financing constitutes a subsidy," it nevertheless insists that footnote 16 is relevant to that inquiry. In effect, the EC seeks to take footnote 16 out of context and elevate its status to that of a general rule applicable to all inquiries under the SCM Agreement, contrary to customary rules of interpretation of international law.[184] Footnote 16 does not even say what the EC says it says. It does not say that "forecast sales" are "the decisive factor of royalty-based

[178] US, SWS, Executive Summary, para. 15.
[179] US, FNCOS, Executive Summary, para. 7.
[180] US, SWS, Executive Summary, para. 18.
[181] US, SWS, Executive Summary, para. 16.
[182] US, SWS, Executive Summary, para. 6.
[183] US, FCCS, Executive Summary, para. 13.
[184] US, SWS, Executive Summary, para. 7.

BCI deleted, as indicated **[***]**

financing."[185] It says just the opposite. That is, it says that actual sales falling below forecast sales "does not in itself constitute serious prejudice for the purposes of this paragraph."[186]

4.113 The US argues that if anything, the existence of footnote 16 is persuasive evidence that Launch Aid does constitute a subsidy. The very fact that the drafters of the SCM Agreement saw a need to clarify that a particular circumstance involving the implementation of Launch Aid contracts "does not in itself" constitute deemed serious prejudice suggests that the drafters presumed that the provision of Launch Aid confers a benefit and thus constitutes a subsidy. Additionally, footnote 16 is evidence that the SCM Agreement applies to the Launch Aid that Airbus received prior to January 1, 1995. At the time the agreement was being negotiated, Airbus was "not fully repaying" the Launch Aid it had received for the A300 and the A310 programs.[187]

4.114 In the US view, footnote 16 does not set the test for what constitutes a subsidy. It is attached to Article 6 of the SCM Agreement, not Article 1, which is where the definition of "subsidy" is set forth. If anything, the US contends, footnote 16 corroborates the understanding that Launch Aid is indeed a type of subsidy covered by the SCM Agreement.[188] The EC theory that footnote 16 of the SCM Agreement establishes a special rule for evaluating whether Launch Aid confers a benefit is baseless. The US explains that repaying Launch Aid does not "exclude" a finding of serious prejudice. Sales forecasts are not relevant to determining the existence of a "benefit." The US maintains that if the drafters of the SCM Agreement had wanted to make sales forecasts a relevant factor under Article 1.1(b), they would have said so explicitly.[189]

4.115 The US considers that the question of which benchmark rate is used for determining whether Launch Aid is a subsidy is not central to the question of the existence of a subsidy, because both the Ellis benchmark and the Whitelaw benchmark show a substantial subsidy to Airbus.[190]

4.116 The US argues that contrary to Professor Whitelaw's claim, Launch Aid differs from typical corporate debt in at least two crucial respects. First, the Airbus governments have no recourse if the repayments Airbus promises to make are never received because the corresponding sales are never made. By contrast, corporate debt-holders do have a claim on the debtor's assets in such a case. Second, Launch Aid is dependent on the success of a single project. By contrast, typical corporate debt is dependent on the success of the company in the aggregate.[191]

4.117 In the US view, Professor Whitelaw's assessment assumes incorrectly that Launch Aid is clearly less risky than equity in Airbus. The US asserts that one can readily identify scenarios in which the Airbus governments will receive little or no repayment, while the equity shareholders get returns from profits on other aircraft sales or other lines of business.[192]

4.118 Another problem with Professor Whitelaw's assessment alleged by the US is that supplier financing is not comparable to Launch Aid for reasons it described in its statement. Curiously, if financing with Launch Aid features is as typical in the market as Professor Whitelaw asserts, one wonders why he chose to base his analysis on financing provided to Airbus by certain suppliers, whose relationship with Airbus necessarily is influenced by factors other than the straightforward

[185] EC First Oral Statement, para. 58.
[186] US, FCCS, Executive Summary, para. 13.
[187] US, SWS, Executive Summary, para. 8.
[188] US, FCCS, Executive Summary, para. 12.
[189] US, FNCOS, Executive Summary, para. 5.
[190] US, FCCS, Executive Summary, para. 14.
[191] US, FCCS, Executive Summary, para. 15.
[192] US, FCCS, Executive Summary, para. 16.

BCI deleted, as indicated **[***]**

lending aspect of the transactions at issue.[193] In any event, repayment to the suppliers examined by Professor Whitelaw is generally contingent on fewer deliveries than repayment to the government providers of Launch Aid. The amounts of financing provided by these suppliers are significantly less than the amounts provided by the Airbus governments. A number of these suppliers receive their own support from the Airbus governments. And, the suppliers must take account of business considerations other than the straightforward concern about return on financing they provide to Airbus. And, according to the US, very little of the Whitelaw analysis of supplier financing is backed up by any evidence the EC has supplied.[194]

4.119 In its comments on the EC statement at the second Panel meeting, the US notes that one new concept introduced in the EC statement is its so-called "adequate return" theory for assessing the benefit conferred by Launch Aid. Under this theory, it is a government's "own view" regarding risk that determines whether the Launch Aid rate of return is "adequate" and, therefore, whether Launch Aid confers a benefit. This "adequate return" theory finds no support in the SCM Agreement.[195]

4.120 Alternatively, the US notes that the EC continues its attempt to defend a benchmark based on Airbus' contracts with risk-sharing suppliers. It states that this "benchmark is based on returns from the same project undertaken by the same company (Airbus) in the same market (LCA)." The US argues that in addition to numerous other flaws, the latter statement ignores that precisely because Airbus receives Launch Aid, the financing that risk-sharing suppliers provide to Airbus is unreliable as a benchmark. The US explains that Launch Aid makes Airbus less risky, which means that risk-sharing suppliers will demand a lower return on financing to Airbus than they would in the absence of Launch Aid.[196]

(b) A350

4.121 In its first written submission, the US argues that in 2006, the Airbus Governments reaffirmed their agreement to support Airbus in the development of new models of LCA. The US asserts that in spite of Airbus' leading global position, the Airbus governments refuse to end their practice of supporting Airbus with grants of Launch Aid. To the contrary, they have already agreed to provide at least $1,700,000,000 in Launch Aid for Airbus' newest aircraft, the A350. The US notes that recent events suggest that the final amount of the aid will be double or even triple that amount. Publicly available information indicates that the aid is in fact Launch Aid, *i.e.*, back-loaded, success-dependent, preferential financing, just as has been provided since Airbus' inception.[197]

4.122 The US notes that Airbus has been quite explicit in stating that it has launched the A350 to take orders that would otherwise go to the 787. The US also notes that Airbus has also made clear that the A350 is intended to target the Boeing 777 as well as the 787. On May 23, 2005, for example, the project manager for the A350 boasted that "{w}e are positioning our program to be a 777-200ER killer." As one industry analyst has observed, the A350 "will threaten the entire Boeing 777 product line, placing Boeing in the awkward predicament of having to figure out what to do at a time when the 787 program is entering production and plans are being made to design a successor to the 737."[198]

[193] US, FCCS, Executive Summary, para. 17.
[194] US, FCCS, Executive Summary, para. 18.
[195] US comments on EC, SNCOS, Executive Summary, para. 10.
[196] US comments on EC, SNCOS, Executive Summary, para. 11.
[197] US, FWS, Executive Summary, para. 27.
[198] US, FWS, Executive Summary, para. 28.

BCI deleted, as indicated **[***]**

2. Arguments of the European Communities

4.123 The EC argues that no subsidies have been provided by member States under MSF contracts, and even if such financing were considered to constitute a subsidy (*quod non*), any benefits are very small.[199]

(a) 1992 Agreement

4.124 According to the EC, there is no benefit for Airbus within the meaning of Article 1 of the SCM Agreement as the four member States complied with the obligations of the EC under Article 4 of the 1992 Agreement.[200] The EC points out that the US has not made any serious attempt to show non-compliance of the EC with Article 4.[201] The EC contends that it has explicitly demonstrated such compliance in its first written submission.[202]

4.125 The EC contends that the US has adopted an inappropriate benchmark for determining whether individual MSF financing agreements confer a "benefit" within the meaning of Article 1.1 of the SCM Agreement.[203] In the EC view, the market benchmark asserted by the US lacks merit.[204] The EC considers that the benchmark proposed by the US ignores the terms of the 1992 Agreement between the EC and the US. This bilateral accord fixes the agreed benchmark between the parties for determining whether government support for LCA programmes confers a benefit. The EC maintains that all MSF granted since 1992 complied with the terms of the agreement – terms which the US explicitly agreed to.[205] The EC notes that the A330-200, A340-500/600 and A380 contracts were concluded under terms and conditions which complied with its international obligations at the time of granting *i.e.*, the 1992 Agreement. The EC indicates that is well accepted that the existence of a subsidy has to be established on the information reasonably available to the granting government at the time it took the measure. The EC considers that the US now attempts to revisit this matter many years later and to construct an ex-post benchmark; it is effectively seeking a retrospective remedy.[206]

(b) Reasonableness of forecasts

4.126 The EC submits that even if the 1992 Agreement and its practical impact on the action of the two parties to this dispute were to be ignored, the benefit analysis of MSF must take account of the reasonableness of forecasts under the SCM Agreement, and that in view of this there is no benefit under the SCM Agreement.[207]

4.127 The EC explains that any decision to finance a new aircraft model inevitably involves a calculation of the project risk and the relevant economic environment for the LCA industry. Drawing from footnote 16 to the SCM Agreement, the relevant test for determining whether a MSF contract in the large civil aircraft sector constitutes a subsidy is the reasonableness of the forecasts. The EC contends that it has complied with this SCM standard. The EC argues that European Governments lent money in the public interest, subject to close scrutiny and sought to secure an adequate return. Accordingly, they used conservative assumptions for their forecasts, sometimes being even more cautious than the relevant business case from the company itself (which, in turn, has a responsibility

[199] EC, FWS, Executive Summary, para. 40.
[200] EC, FNCOS, Executive Summary, para. 8.
[201] EC, SWS, Executive Summary, para. 16.
[202] EC, FWS, para. 405.
[203] EC, FWS, Executive Summary, para. 36.
[204] EC closing statement, second meeting, Executive Summary, para. 7.
[205] EC, FWS, Executive Summary, para. 36.
[206] EC, FWS, paras. 401-404.
[207] EC, FWS, Executive Summary, para. 37. *See, also*, EC, SWS, Executive Summary, para. 17.

BCI deleted, as indicated **[***]**

vis-à-vis its shareholders).[208] The EC contends that it has demonstrated this in its first written submission.[209]

4.128 The EC considers that member State governments have adopted conservative repayment provisions based on reasonable forecasts. These result in a high probability of principal repayment and a minimum return for the government at a point in the delivery stream that is *lower* than the consensus number of deliveries forecast by various sources to occur over the life of the particular Airbus LCA programme, including in the Airbus business case. That has allowed the governments to agree to a structure of levies and repayment schedules that removes a great deal of risk and ensures adequate recoupment of its contributions over a reasonable period of time plus a real return at rates that would not be rejected by the market.[210]

4.129 In the EC view, the US misinterprets the SCM Agreement. First, although footnote 16 has nothing to say about whether an individual MSF loan as an instrument is a subsidy, it does demonstrate the key importance of the sales forecast for repayment purposes, a point confirmed by the US' own DDA rules submission. If the repayment target is set for a sufficiently low number of sales, thus removing most of the risk of non-repayment, the government, as a responsible investor, is entitled to take its own view of the remaining risk and to set the interest rate accordingly in order to ensure an adequate return.[211] In this regard, EC governments are not, as the US claims, required by the SCM Agreement to behave like "mobile investors", putting their money where it will fetch the highest return. Governments are not required to "play the markets" ; they are not required to act as market speculators.[212]

4.130 Second, member States have a proven track record in conservative forecasting. Actual sales of Airbus aircraft are well ahead of those forecast in MSF contracts and member States have consistently secured the returns they have sought over a lower number of deliveries than that forecast for the life of the LCA programme at issue.

(c) EC risk-sharing supplier benchmark and critique of US benchmark

4.131 The EC points out that the US proposed benchmark for MSF contracts is fundamentally flawed.[213]

4.132 First, the EC argues that the US overlooks the fact that government financing may impose costs on the recipient that market instruments do not. This distinction, in the view of the EC, should be taken into account when comparing MSF loans with a market benchmark.[214]

4.133 Second, the EC argues that the US mischaracterizes both the nature of MSF loans and the US "Ellis" model. The EC explains that through the US' consultant, Ellis, the US constructs a market benchmark based on a study of high-risk venture capital returns. Venture capital returns relate to high risk start-ups, but have no nexus to LCA markets, much less Airbus LCA programmes.[215] Moreover, as the EC's expert, Professor Whitelaw, points out, the Ellis benchmark suffers from severe methodological errors that render it useless.[216] Among others, the EC submits that Professor

[208] EC, FNCOS, Executive Summary, para. 9.
[209] EC, FWS, paras. 470-477.
[210] EC, SWS, Executive Summary, para. 18.
[211] EC, SNCOS, Executive Summary, para. 4.
[212] EC, SNCOS, para. 86.
[213] EC, SWS, Executive Summary, para. 19.
[214] EC, SWS, Executive Summary, para. 19.
[215] EC, SNCOS, paras. 94-98.
[216] EC, SNCOS, paras. 102-105.

BCI deleted, as indicated **[***]**

Whitelaw's analysis shows that the US overstates the project-specific risk premium and generates correspondingly inflated benchmark rates,[217] which are contradicted by another US expert, Dr. Dorman.[218] In addition, none of the alternative methodologies relied on by the US supports the flawed Ellis model.[219]

4.134 The EC submits that it shows that attempts by the US to infer an exaggerated benchmark from, e.g., an EC state aid decision, are wide of the mark.[220] First, the state aid decision cited by the US applies a legal standard from the standard in the SCM Agreement.[221] Second, the state aid decision relates to a different time period than is at issue in the present dispute, and involves a different product market – regional aircraft – that displays different conditions of competition than are at play in the LCA market.[222] Specifically, the decision notes that the regional aircraft manufacturer market in the EC was characterised as particularly "high risk" because of "overcapacity", "low market demand", and the "obvious presence of excess production capacity".[223] These characteristics are not found in the LCA market, where Airbus SAS stands as one of only two established global competitors, with little suggestion of overcapacity burdening the markets in which the firm operates.[224] The EC's expert, Professor Whitelaw, observes that the combination of low market demand and severe overcapacity significantly increases both general corporate and product risk, such that market lenders will demand a heightened risk premium.[225]

4.135 The EC submits that the benchmark proposed by the US fails to reflect financing terms available at market.[226] By contrast, when one looks to the returns obtained by market participants in the LCA industry – Airbus risk-sharing suppliers investing in the same project – the benchmark returns are far lower. These returns provide an ideal market benchmark, as both risk-sharing suppliers and MSF lenders bear risk associated with the same market (LCA), same company (Airbus), and the same project.[227]

4.136 Third, the EC submits that the US criticisms of the EC benchmark also fail. The EC considers that the US belated attempt to construe these instruments as a kind of hybrid between debt and equity is groundless. Nor does the Ellis model, which is predicated on venture capital returns, offer a benchmark for a hybrid instrument.[228] Regardless of whether one characterizes MSF loans as debt, equity, or hybrid securities, the risk profile of these instruments closely mirrors that of Airbus risk-sharing supplier contracts. The US criticisms of the EC benchmark reflect a misunderstanding of both the nature of Airbus risk-sharing supplier agreements and the procurement process.[229]

4.137 For example, the EC notes that the US asserts that the amount of money involved in the risk-sharing supplier (RSS) contracts somehow renders the returns obtained by these suppliers inapposite. But a rate of return is calculated on a per-dollar basis; the rate of return is decidedly not a function of

[217] EC, FNCOS, Executive Summary, para. 10.
[218] EC, SNCOS, paras. 106-110.
[219] EC, SWS, Executive Summary, para. 20.
[220] EC, FWS, Executive Summary, para. 38.
[221] EC, SWS, paras. 191-193.
[222] EC, SWS, paras. 194-195.
[223] EC, SWS, paras. 195-196.
[224] EC, SWS, para. 199.
[225] EC, SWS, para. 198.
[226] EC, FWS, Executive Summary, para. 38.
[227] EC closing statement, second meeting, Executive Summary, para. 7.
[228] EC, SWS, Executive Summary, para. 20.
[229] EC, SWS, Executive Summary, para. 21.

BCI deleted, as indicated **[***]**

the size of the contract at issue. Moreover, the amounts at stake were substantial, as the confidential record shows.[230]

4.138 The EC also notes that the US asserts – without support, it argues – that certain RSS received government funding. But even if these suppliers received government financing, and even if that financing conferred a benefit, there is no reason to believe that this benefit would affect the terms that these RSS agreed to with Airbus. Why would these suppliers pass on the alleged benefit to Airbus? The US offers nothing but speculation.[231] The EC offers evidence which it asserts shows that even if these suppliers were to pass on 100per cent of any benefit from MSF to Airbus, the change to the EC's benchmark rates would be negligible, and the premium would still be well below that asserted by the US' Ellis.[232] The EC considers that the US also speculates, without a shred of evidence, that the terms of these supply agreements were affected by the prospect of obtaining additional future contracts with Airbus. Yet, the bargaining power could well lie with the suppliers – not Airbus. Many of these suppliers possess unique technology that makes them the only viable source for certain contracts.[233]

4.139 The EC also addresses a new argument asserted (without reasoning or evidentiary support) by the US and Brazil at the second Panel meeting. The EC notes that the US appears to argue that MSF granted to Airbus reduces the risk associated with Airbus itself, and thus distorts the RSS benchmark. In that regard, the EC points out that RSS are exposed to two types of risk – development risk and market risk. There is no reason why MSF provided to Airbus would in any way affect the amount or nature of those risks. More fundamentally, RSS do not know whether or on what terms Airbus will receive MSF loans. On what basis are we asked to conclude that RSS would take lower returns based on the *possibility* that Airbus would receive MSF, and on terms and even amounts of which they are not aware? The EC considers that there is no evidence to support such a speculative hypothesis, and it should be rejected.[234]

4.140 Contrary to the US assertions, the EC presented documents associated with a commercial loan to one of the Airbus Associated Manufacturers as evidence that financing similar to MSF is available on the commercial market. Thus, the member States are not the only providers of project financing like MSF. The EC considers that the US is also not correct in arguing that there were sufficient orders on the date of signing of the financing agreement to fully repay the bank. The EC contends that it shows that the commercial lender did incur delivery risk. In addition, the EC does not claim that the risk incurred by the bank offering this commercial loan is comparable to the risk incurred by the member States for the A380. Moreover, the project specific risk premium measured by the EU is 2.5 times higher than the risk premium in the commercial loan agreement. The US would have the Panel believe that it is approximately 6 times the amount.[235]

4.141 The EC welcomes the US' belated admission that the government-related issuer ("GRI") enhancement applied by Moody's does not reflect the impact of MSF loans. The 2007 Moody's reports, which the EC considers have been cited by the US in a misleading manner, discuss this enhancement, but, in the US' words, are "not directly relevant to this dispute."[236]

4.142 However, the EC notes that the US continues to attempt to distract the Panel's attention from this concession by rehashing its failed argument that EADS receives an enhanced baseline credit

[230] EC, FCCS, Executive Summary, para. 6.
[231] EC, FCCS, Executive Summary, para. 7.
[232] EC, SCOS, para. 91.
[233] EC, FCCS, Executive Summary, para. 8.
[234] EC closing statement, second meeting, Executive Summary, para. 8. *See, also*, EC, SCCS, para. 14.
[235] EC, FCCS, Executive Summary, para. 9.
[236] EC, Answer to Panel Question 228, para. 3, *quoting* US, Answer to Panel Question 228, para. 22.

rating as an additional benefit or "indirect effect" of MSF loans. First, the EC notes Professor Whitelaw's statement that an improved credit rating would not be an "additional benefit" from MSF loans; rather, the benchmark fully captures any benefit from these alleged subsidies. The US does not dispute that benchmark return represents the market price of risk transfer associated with these loans, and all associated benefits, direct and indirect, are "bought and paid for."[237]

4.143 Second, the EC rejects the US attempt to re-characterize this rating enhancement as an "indirect effect" of MSF loans.[238] Moody's confirms that EADS' improved baseline credit rating flows from the risk-sharing aspect of MSF loans, which is equally present under market alternatives such as risk-sharing supplier financing.[239]

4.144 Third, even assuming that (a) EADS experienced a credit rating enhancement because of any under-compensated risk-sharing element of MSF loans, and (b) this higher rating reduced EADS' cost of capital, the EC notes that the US has failed to provide any evidence establishing the *amount* of this reduction.[240]

4.145 Finally, the EC notes that the US credit rating argument does not enhance its ability to show adverse effects from MSF. A statement provided by the US argues that tied "launch subsidies" are more likely to generate adverse effects than untied subsidies that simply generate additional cash flow. But any cash allegedly generated by a reduction in EADS' cost of capital would *not* be tied to any particular LCA programme, and would thus be unlikely to cause adverse effects.[241]

(d) Rates of return

4.146 The EC argues that the US understates the internal rates of return demanded by European Governments,[242] and thus underestimates the expected returns associated with individual MSF loans.[243] First, US expert Ellis ignores the market analysis and forecasts contained in the Airbus GIE or Airbus SAS business case, which inform the terms of individual MSF loan agreements. Consequently, Ellis omits a large number of deliveries that would trigger payments to the Governments and enhance their returns.[244]

4.147 Second, the US fails to take into account the effect of taxation on expected returns.[245] Specifically, the EC notes that MSF receipts are subject to taxation, like any other form of corporate income; when repaid, principal and interest are deducted in computing taxable income.[246] The result is that EC member States loaned funds with one hand and took back a portion with the other.[247] Since the member States continued to assess interest on the *gross amount* of MSF provided, the effective interest cost of the MSF that was actually left for use by Airbus was significantly higher than the contract interest rate.[248]

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[237] EC, Comments on US Answer to Panel Question 228, para. 5.
[238] EC, Comments on US Answer to Panel Question 228, para. 6.
[239] EC, Comments on US Answer to Panel Question 228, para. 6.
[240] EC, Comments on US Answer to Panel Question 228, para. 12.
[241] EC, Comments on US Answer to Panel Question 228, para. 13.
[242] EC, FNCOS, Executive Summary, para. 10.
[243] EC, FWS, Executive Summary, para. 39.
[244] EC, FWS, paras. 536-541.
[245] EC, FWS, paras. 542-547.
[246] EC, FWS, para. 543.
[247] EC, FWS, para. 545.
[248] EC, FWS, para. 545.

BCI deleted, as indicated **[***]**

(e) A350

4.148 Finally, the EC rebuts the US allegation that there is an existing measure for the A350. In a nutshell, there was nothing more than a commitment to negotiate: never has an agreement to finance, nor an MSF contract, nor any disbursement of money, ever existed or occurred for the A350. Indeed, there is no A350 project; Airbus SAS has abandoned it in favour of the A350 XWB.[249] The EC explains that member States have not provided any MSF loans in connection with the A350 programme. US claims with respect to such loans thus pertain to non-existent measures, and fall outside the Panel's terms of reference.[250]

D. WHETHER THE LAUNCH AID THAT AIRBUS HAS RECEIVED FOR THE A380, THE A340-500/600, AND THE A330-200 ARE PROHIBITED EXPORT SUBSIDIES

1. Arguments of the United States

4.149 The US argues that the Launch Aid that Airbus has received for the A380, the A340-500/600, and the A330-200 are prohibited export subsidies.[251] The US observes that a finding of export contingency involves three elements: (1) the "granting" of a subsidy; (2) that is "tied to" (3) "actual or anticipated exportation or export earnings."[252]

(a) A380

4.150 The US turns first to its claim that the A380 subsidies are prohibited export subsidies. The US explains that the UK, French, German, and Spanish governments have each granted Launch Aid to their respective Airbus companies to support the development of the Airbus A380. In each case, the Launch Aid is a subsidy within the meaning of Article 1.1 of the SCM Agreement. Therefore, for each provision of A380 Launch Aid, the first element for demonstrating export contingency is met.[253]

4.151 According to the US, the second element for demonstrating export contingency is the existence of actual or anticipated exportation or export earnings. The US argues that the evidence surrounding the Airbus governments' decision to provide Launch Aid for the A380 demonstrates not only that the governments anticipated or expected that exportation or export earnings would result from the project, but also that the governments knew Airbus was developing the A380 *primarily* for the export market, and that export sales would be critical to the project's success.[254]

4.152 First, in 1999-2000, at the time that the Airbus governments were discussing Launch Aid for the A380 with Airbus, Airbus was stating that it was developing the A380 primarily for the export market. Second, the four Launch Aid agreements between the Airbus governments and Airbus each anticipate a level of A380 sales that substantially exceeds the 247 aircraft with more than 400 seats that Airbus was predicting it would sell in Europe, thus demonstrating that the governments anticipated exports. Third, the four governments have specifically referenced the global nature of the A380 project and Airbus' export sales. Fourth, when Airbus was seeking the Launch Aid, it pointed to potential export earnings, and it stressed the importance of export sales to the project's success.

[249] EC, SWS, Executive Summary, para. 13.
[250] EC, FWS, Executive Summary, para. 33.
[251] US, FWS, Executive Summary, para. 29.
[252] US, FWS, Executive Summary, para. 30.
[253] US, FWS, Executive Summary, para. 31.
[254] US, FWS, Executive Summary, para. 32.

BCI deleted, as indicated **[***]**

Fifth, in addition to the fact that the A380 is an export-oriented project, Airbus itself is a highly export-oriented company.[255]

4.153 The third and final element for demonstrating that a subsidy is contingent on export performance is that the subsidy must have been "tied to" anticipated or expected exportation or export earnings. The terms of the Launch Aid contracts themselves, as well as the evidence surrounding the grant of the Launch Aid, demonstrates such a tie. First, a key feature of Launch Aid is that the Airbus governments tie repayment of the aid to sales of the particular aircraft model that the Launch Aid is funding. If sales of the aircraft fail to meet expectations, repayment of the aid is forgiven or indefinitely postponed. However, Airbus has stated that total European demand for aircraft with more than 400 seats is only 247 aircraft. This necessarily implies that the Airbus governments tied the grant of the Launch Aid to Airbus making substantial numbers of export sales.[256]

4.154 The US notes that the facts surrounding the grant of the A380 Launch Aid are quite similar to the facts surrounding the grant contract that the *Australia – Leather* panel found contingent "in fact" upon export performance. On the other hand, the facts that led the *Australia – Leather* panel to conclude that the loan contract at issue in that dispute was not contingent "in fact" upon export performance are entirely absent from the A380 contracts.[257]

(b) A340-500/600 and A330-200

4.155 The US next turns to its claims that the A340-500/600 and A330-200 subsidies are prohibited export subsidies. In its submission, the US asserts that the same types of facts that demonstrate export contingency for the A380 Launch Aid also demonstrate that the Launch Aid that the French and Spanish governments provided for the A340-500/600 and the Launch Aid the French government provided for the A330-200 is contingent upon export, and thus is prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement.[258]

(c) Export contingency

4.156 In its opening statement at the first Panel meeting the US argues that the EC has failed to rebut its *prima facie* case that the Launch Aid for the A380, A340-500/600, and A330-200 is contingent upon export performance.[259] The US contends that the EC misstates the legal standard for "contingency" and fails to apply the evidence to that standard.[260] The US notes that the EC says the UK took Airbus' sales forecasts into account in deciding to provide the Launch Aid, and that the government's decision to tie repayment of the Launch Aid to sales served to allocate risk between the company and the UK. But according to the US, this only proves its point: the Airbus governments provided unsecured, subsidized loans on the condition that Airbus repay the funds through levies on sales. In the US view, the facts demonstrate that, due to the nature of the product and the nature of the market for that product, the governments knew Airbus could only meet that condition by exporting. Therefore, the US argues, the subsidies are tied to export performance.[261]

4.157 The US notes that the EC concedes that the Launch Aid is a subsidy even under its flawed, alternative benchmarks,[262] and that the Airbus governments expected Airbus to repay Launch Aid and

[255] US, FWS, Executive Summary, para. 33.
[256] US, FWS, Executive Summary, para. 34.
[257] US, FWS, Executive Summary, para. 35.
[258] US, FWS, Executive Summary, para. 36.
[259] US, FNCOS, Executive Summary, para. 8.
[260] US, FNCOS, Executive Summary, para. 8.
[261] US, FNCOS, Executive Summary, para. 9.
[262] US, FNCOS, Executive Summary, para. 8.

BCI deleted, as indicated **[***]**

therefore anticipated the fulfilment of the conditional payment.[263] In addition, the US notes that the EC apparently concedes that the Airbus governments anticipated exportation or export earnings.[264]

4.158 The US asserts that the EC portrays it as arguing that the grant of Launch Aid is tied to anticipated exportation or export earnings merely because the Airbus governments expected that there would be exports of the LCA models developed as a result of Launch Aid. But the US explains that it does not argue that the governments' expectations of exportation or export earnings alone make the provision of Launch Aid contingent upon export performance. The US submits that those expectations unquestionably are an important part of the picture. But an equally important part of the picture is the fact that the governments' decision to provide Launch Aid was made in reliance on and in return for a commitment by Airbus to undertake a course of action that necessarily involves exports. The governments' expectations – informed by Airbus' Business Cases, Global Market Forecasts, and Launch Aid applications and by the governments' own critical project appraisals – were an essential precondition to the governments' decisions to provide Launch Aid.[265]

4.159 The US clarifies that contrary to the EC suggestion, it has never argued that any one of the provisions in the Launch Aid contracts on its own makes the granting of Launch Aid export contingent. The US explains that it has looked at all of the facts collectively and has shown that together they demonstrate that the provision of Launch Aid is contingent upon export performance. Relatedly, the EC notably omits any discussion of representations and warranties in certain of those contracts making the tie to anticipated exportation unmistakable.[266]

4.160 The US argues that in responding to its showing that certain provisions of Launch Aid are prohibited export subsidies, the EC makes several critical errors. According to the US, the EC adopts the mistaken view that the relationship between export performance and provision of a subsidy must be a condition-consequence or "if-then" relationship in order for the subsidy to be prohibited within the meaning of Article 3 of the SCM Agreement. However, the US argues that, not only is the term "consequence" not used in Article 3.1(a) or footnote 4 of the SCM Agreement, but the express reference to "anticipated exportation or export earnings" in footnote 4 means that a subsidy is contingent upon export performance even if it is granted prior to – rather than as a "consequence" of – "the future factual fulfilment" of exportation. The US adds that this understanding is supported by the findings of the panels in *Canada – Aircraft* and *Australia – Leather*.[267] In this regard, the US argues that the EC misstates the findings in *Canada – Aircraft*, *Australia – Leather* and *Canada – Autos*.[268]

4.161 In the US view, the EC compounds its error by making a series of arguments seeking to show the lack of a tie between the provision of Launch Aid and export performance. Its efforts ultimately fail, as they rely on a combination of mischaracterization of the US argument (for example, falsely accusing the US of confusing anticipation of export performance with a tie to export performance) and insistence on various irrelevant points (such as the possibility of Airbus electing to prepay Launch Aid amounts and the consistency of the governments' forecasts of LCA sales with prudent business practices).[269]

4.162 The US asserts that its contention that it does not confuse anticipation of export performance with a tie to export performance is demonstrated by the wealth of evidence the US has brought to bear

[263] US, SNCOS, Executive Summary, para. 1.
[264] US, FNCOS, Executive Summary, para. 8.
[265] US, SWS, Executive Summary, para. 19.
[266] US comments on EC, SNCOS, Executive Summary, para. 9.
[267] US, SWS, Executive Summary, para. 20.
[268] US, SNCOS Executive Summary, para. 3.
[269] US, SWS, Executive Summary, para. 21.

establishing the existence of such a tie in each of the Launch Aid contracts at issue. According to the US, the contracts consist of a commitment by the government to disburse Launch Aid according to a set schedule, which is undertaken in exchange for a commitment of performance by the company to repay the Launch Aid amounts on the basis of a specified levy per sale over an agreed-to number of sales. The number of sales over which Launch Aid is to be repaid is so large relative to demand in the EC for the LCA model at issue as to necessarily involve exportation in order to be achieved. The repayment provisions of the Launch Aid contracts establish that an essential condition for the provision of Launch Aid is a commitment to export. Other provisions of the Launch Aid contracts reinforce this point.[270]

4.163 The US notes that the EC concedes that the Airbus governments expected Airbus to repay Launch Aid. Because of the levy-based nature of Launch Aid repayments and the repayment schedules agreed to under the Launch Aid contracts, this would be possible for the A380, A340-500/600, and A330-200 only with substantial exports. Other evidence, including other Launch Aid contract provisions, also support a finding of export contingency. In response, the EC first argues that exportation is anticipated only if it "will occur," thus collapsing the concepts of "actual" exportation and "anticipated" exportation. However, the US argues that as the Appellate Body explained in *Canada – Aircraft*, "anticipated" means "expected."[271]

4.164 According to the US, the EC compounds its error by reading new text into the SCM Agreement, contending, for example, that a subsidy is contingent upon export performance only if "the terms of the measure vary, in law or in fact, depending on whether sales performance is in the domestic or export markets." And, it responds to arguments the US does not make, such as the argument that the mere expectation that a recipient of a subsidy will export renders the provision of that subsidy export contingent.[272]

4.165 The US contends that the EC attempt to dismiss evidence demonstrating *de facto* export contingency turns on its flawed premise that the terms of an export contingent subsidy must vary expressly according to the destination of a particular sale.[273] The US argues that in an effort to show that it has somehow confused "export performance" with mere "performance," the EC misconstrues the evidence. The US notes that the EC repeatedly asserts that the repayment terms of the Launch Aid contracts are "origin neutral" and that the evidence does not show that these terms "vary at all by reference to the EC and the rest of the world." But these observations are beside the point. Indeed, they suggest a test that has absolutely no basis in the SCM Agreement. The SCM Agreement does not provide that a subsidy is contingent upon export performance, and thus prohibited, only if the instrument tying the subsidy to actual or anticipated exportation or export earnings makes an express demarcation between domestic sales and export sales. Further, the Launch Aid contract repayment terms are "origin-neutral" only if considered in a vacuum, without any reference to the realities of the market in which the LCA models at issue are sold.[274]

4.166 The US argues that, related to the EC mischaracterization of the US export contingency argument is the EC assertion of an inconsistency between the US demonstration that Launch Aid confers a benefit on Airbus and the US demonstration that the provision of Launch Aid is contingent upon export performance. However, the fact that the Airbus governments anticipate a return on Launch Aid does not contradict the demonstration that Launch Aid confers a benefit. And the fact

[270] US, SWS, Executive Summary, para. 22.
[271] US, SNCOS, Executive Summary, para. 1.
[272] US, SNCOS, Executive Summary, para. 2.
[273] US, SNCOS, Executive Summary, para. 3.
[274] US, SWS, Executive Summary, para. 27.

BCI deleted, as indicated **[***]**

that the governments are not guaranteed a return does not contradict the demonstration that the provision of Launch Aid is tied to anticipated exports.[275]

4.167 The US also argues that, also related to the EC mischaracterization of the US export contingency argument is the assertion that following that argument "financial contributions that foresee a return (such as loans) are more susceptible to be found to contain a prohibited export contingent subsidy than financial contributions in the form of outright grants." However, it is not the foreseeing of a return that makes Launch Aid export contingent but the conditioning of the provision of Launch Aid on a commitment by Airbus to repay Launch Aid over levels of sales that necessarily involve exportation. An actual refutation of the EC argument is the panel report in *Australia – Leather*, finding a grant contract to be export contingent, but not a loan contract to the same recipient.[276]

4.168 The US considers that an additional aspect of the EC's futile attempt to show the absence of a tie between the provision of Launch Aid and anticipated exportation is its reference to Airbus' option to prepay Launch Aid amounts. This point is irrelevant because, *inter alia*, unlike repayment over the number of deliveries specified in the Launch Aid contract, prepayment is not an obligation. With respect to the EC contention that Launch Aid is not contingent upon export performance, because Airbus in theory could voluntarily accelerate its repayments of Launch Aid, the US explains that the mere fact that Airbus is allowed to repay Launch Aid at any time does not mean that repayment upon delivery is not an obligation.[277] Likewise, the EC reference to the "guarantee" provided by entities related to the company in certain Launch Aid contracts does not help the EC argument, because these guarantees are not guarantees of repayment of Launch Aid. They merely provide that in the event the company fails to make timely payment to the government following delivery of an aircraft, the government may turn to the company's parent for payment.[278]

4.169 In addition, the US notes that the EC offers certain "countervailing explanations" for the Airbus governments' decision to condition the provision of Launch Aid on Airbus' commitment to repay Launch Aid over levels of sales that necessarily involve exports. However, the US argues that these explanations do not address the existence of a contractual tie between Launch Aid and export performance but, rather, governments' motivations for establishing a tie.[279]

4.170 The US considers that the EC misrepresents its arguments. For example, on the issue of the relevance of a government's motivation to the determination of export contingency, the EC discussion at paragraph 129 takes excerpts from the US second written submission completely out of context. In the passage at issue, the US was responding to the EC's so-called "countervailing explanations" argument. The US considers that, even if the governments had non-export-related motivations for providing Launch Aid, that would not sever the tie between the provision of Launch Aid and anticipated exportation. That does not mean that the existence of a government motivation to support exports would be irrelevant to a finding that the provision of Launch Aid is export contingent.[280]

4.171 The US notes that at paragraph 144 of its second oral statement, the EC professes confusion over its use of the words "precondition" and "predicate" in its second written submission; it does likewise, at paragraph 151 of its statement, with respect to the word "commitment." The US notes that the EC states that these words do not appear in Article 3.1(a) or footnote 4 of the

[275] US, SWS, Executive Summary, para. 23.
[276] US, SWS, Executive Summary, para. 24.
[277] US, SNCOS, Executive Summary, para. 3.
[278] US, SWS, Executive Summary, para. 25.
[279] US, SWS, Executive Summary, para. 26.
[280] US comments on EC, SNCOS, Executive Summary, para. 6.

BCI deleted, as indicated **[***]**

SCM Agreement. According to the US, the EC is rebutting an argument the US has not made. The US points out that the key word that does appear in footnote 4 is the word "tied." The provision of a subsidy must be "tied to" actual or anticipated exportation or export earnings. There may be any number of ways in which that "tied to" relationship can be established. One would be, for example, where anticipated exportation is a precondition or predicate to the provision of a subsidy.[281] The US considers that in discussing the issue of export contingency, the EC would have the Panel ignore the text of footnote 4 of the SCM Agreement and, in particular, the key terms "tied to" and "anticipated exports."[282]

4.172 A further demonstration of the EC attempt to confuse the relevant issues and arguments is its accusation at paragraph 148 of its second oral statement that the US has asserted "new claims" regarding export contingency. What the EC calls "new claims" are nothing more than elaborations on how certain evidence introduced in connection with the US first written submission establishes the tie between the provision of Launch Aid and anticipated exportation.[283]

4.173 The US considers that the EC arguments are also tainted by its misreading of the panel report in *Australia – Leather*. Contrary to the EC characterization, the fact that the recipient of the subsidy at issue there was the sole exporter of automotive leather was relevant but not dispositive (as was the recipient's status as a participant in a prior program). And in any event, Airbus is the only EC exporter of LCA. The EC also ignores key facts, including that one of the grant disbursements at issue in *Australia – Leather* was made before any of the anticipated exportation had occurred. The EC ignores the sale-based repayment obligations in the Launch Aid contracts, which make them distinguishable from the loan contract in *Australia – Leather*. And it ignores that the guarantee of repayment referred to by the *Australia – Leather* panel is entirely unlike the "guarantees" provided in certain Launch Aid contracts.[284]

4.174 Finally, the US argues that the EC recourse to portions of the preparatory work for the SCM Agreement is misplaced. The US considers that the EC assertion that the US approach to Article 3.1(a) would lead to manifestly absurd or unreasonable results is based on arguments the US has not made.[285] The US argues that contrary to the EC statement, it is not the case that, following the US view, every loan in a globalized sector would be an export-contingent subsidy. Typical loans are paid out of the debtor's general cash flow, not out of a particular revenue stream that necessarily is tied to exports. The US argues that it is the fact that Launch Aid, under the terms of the Launch Aid contract, is tied to levels of sales which can be met only through export that makes Launch Aid export contingent.[286]

2. Arguments of the European Communities

4.175 The EC notes that the US claims that seven measures at issue contain subsidies contingent, in law or in fact, upon export performance, within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement. The EC disagrees both with the US presentation of the legal framework and with the inferences that the US attempts to draw from the facts it asserts and the evidence it adduces.[287]

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[281] US comments on EC, SNCOS, Executive Summary, para. 7.
[282] US closing statement, first meeting, Executive Summary, para. 20.
[283] US comments on EC, SNCOS, Executive Summary, para. 8.
[284] US, SWS, Executive Summary, para. 28.
[285] US, SWS, Executive Summary, para. 29.
[286] US, FCCS, Executive Summary, para. 19.
[287] EC, FWS, Executive Summary, para. 42.

BCI deleted, as indicated **[***]**

4.176 The EC rejects the US assertions that each of the seven measures constitutes an export contingent subsidy. The EC maintains that it sets out the correct legal standard and demonstrates that the US has not produced a single piece of evidence which could lead to the conclusion that any of the seven measures contains an export contingent subsidy.[288]

(a) Preliminary Observations

4.177 According to the EC, in its prohibited subsidies claims, the US has neither asserted nor demonstrated the existence and precise content of a single or general measure in the nature of a subsidy programme, "as such" or otherwise, whether labelled "Launch Aid" or otherwise,[289] and even if the relevant measures at issue would be found to contain subsidies to current EC producers of LCA (quod non), they would not be export contingent subsidies.[290] Rather, according to the EC, the US frames its claims by reference to each of the seven distinct and different measures identified by the US,[291] which the EC refers to by reference to the title of the particular measure.[292] The EC contends that this is a consequence of the US decision to frame its claims by reference to alleged facts and evidence particular to each of the seven measures.[293] According to the EC, the Panel must assess each of the US claims individually,[294] by reference to the specific evidence adduced by the US with respect to that claim and measure, and weighing the evidence by reference to the specific US assertion the evidence was adduced to support.[295]

4.178 The EC submits that the US repeatedly confirms and emphasises that it makes its claims on the basis of alleged subsidies allegedly contingent upon "anticipated" exports and makes no claims on the basis of alleged subsidies contingent upon "actual" exports. The EC argues that the Panel must address only the claims made by the US and is not entitled to address any supposed subsidy contingent upon "actual" exports.[296]

4.179 According to the EC, the US claims against the seven measures are both "in law" and "in fact".[297] The EC invites the Panel to approach the US claims (which the EC finds ambiguous and unclear)[298] and the legal interpretation of Article 3.1(a) and footnote 4 in a systematic and coherent manner and having regard to the interpretative rules in the Vienna Convention,[299] which takes into account the overall design and architecture of the provision, giving meaning to all its terms, both in the case of *ad hoc* subsidies and subsidy programmes.[300] The EC argues that, because there is a single

[288] EC, FWS, paras. 556 to 558.
[289] EC, SWS, para. 218.
[290] EC, FWS, paras. 557 to 558.
[291] EC, FWS, para. 555.
[292] EC, FWS, footnotes 478, 485, 487, 489, 490, 492 and 493.
[293] EC, SWS, para. 219.
[294] EC, FWS, para. 561.
[295] EC, FWS, paras. 613, 614, 674 and 678. . NC EC, Answer to Panel Question 79 from the Panel following the first hearing, paras. 132 and 142; EC, SNCOS, para. 133.
[296] EC, FWS, para. 564.
[297] EC, FWS, para. 562.
[298] EC, FWS, para. 560; EC, FNCOS, paras. 69 and 79; EC, SNCOS, para. 115.
[299] EC, FWS, para. 561; EC, FNCOS, paras. 70 and 73; EC, SNCOS, para. 114 and 116
[300] EC, SWS, para. 244. EC, SNCOS, paras. 117 to 126; EC, Answer to Panel Question 216, paras. 520 to 527.

standard,[301] it is imperative to understand what the "in law" standard is before proceeding to consider any "in fact" claim.[302]

4.180 The EC argues that, with respect to both the "in law" claims and the "in fact" claims, the US has not demonstrated for any one of the seven measures any one of the three elements cumulatively required for there to be a subsidy contingent upon export: subsidy; contingency; export performance. Thus, if the Panel finds in favour of the EC with respect to any one of these three requirements, it may exercise judicial economy with respect to the other two.[303]

4.181 With respect to subsidy, the EC does not accept that the US has demonstrated that any of the seven measures are subsidies.[304] Further, the EC argues that the contingency referred to in Article 3.1 relates to the subsidy, not to the financial contribution alone. The EC argues that given that the US confirms that it attempts to demonstrate contingency with respect to the financial contribution alone, its claims must therefore be dismissed.[305]

4.182 With respect to contingency, the EC recalls that the terms "contingent upon" and "tied-to" are synonyms,[306] and that these terms refer to an "if-then" concept, not a concept based on anticipation or consideration or motivation.[307] The EC cites *Black's Law Dictionary* in support of its arguments regarding the proper interpretation of the term "contingent" or "condition".[308]

4.183 The EC contends that the US is interpreting the term "actual" as if it means "real" – that is, "actually" has taken place in the past or "actually" takes place in the future; and the term "anticipated" (in juxtaposition to the term "actual") as if it means "potential", so that, according to the US, and specifically in the case of an *ad hoc* subsidy, whether or not the "anticipated" export ever "actually" takes place is irrelevant to the question of whether or not there is a subsidy contingent upon export performance. Thus, for the US, the required condition is not export, but "the anticipating of" export; this necessarily involves an enquiry into the hypothetical "state of mind" or "intent" of a natural person whose thoughts are imputable to the defending Member, with mere anticipation or consideration or motivation being sufficient to demonstrate contingency – an approach that the EC considers inherently flawed and legally erroneous.[309] The EC contends that the US bases its arguments on terms such as "precondition" and "predicate" that are not found in the text of the SCM Agreement.[310]

4.184 According to the EC, in order to properly appreciate the correct interpretation of the term "actual or anticipated" it is appropriate to make a systematic analysis, distinguishing between the case of an *ad hoc* subsidy and the case of a subsidy programme. For the EC, the term "actual or anticipated" makes it clear that the prohibition in Article 3.1(a) and footnote 4 captures all exports occurring before or after the measure establishing the contingency is enacted, if the fact of export completes or would complete the right to a subsidy. The timing of any export or payment makes no substantive difference.[311] Thus, specifically in the case of an *ad hoc* subsidy, the EC argues that the

[301] EC, FWS, para. 606.
[302] EC, FNCOS, para. 71. and 74; EC, SNCOS, para. 117; EC, Answer to Panel Question 216, paras. 520 to 527.
[303] EC, FWS, paras. 557 to 558; EC, FNCOS, para. 74.
[304] EC, FWS, para. 554.
[305] EC, SWS, Executive SummaryNCFWS, para. 23.
[306] EC, FWS, para. 581.
[307] EC, FNCOS, para. 76.
[308] EC, SNCOS, para. 119 and footnote 89.
[309] EC, SWS, para 233; EC, Answer to Panel Question 217, paras. 528 to 530 and 533 to 535.
[310] EC, SNCOS, para. 145.
[311] EC, SNCOS, paras. 117 to 126 and 142.

BCI deleted, as indicated **[***]**

correct interpretation is that the term "actual" means an export that exists (that is, has already taken place) at the moment when the subsidy is deemed to exist within the meaning of Article 1 of the SCM Agreement, whilst the term "anticipated" (also juxtaposed to the meaning of the term "actual") means an export that has not yet taken place at the moment when the subsidy is deemed to exist, but will take place in the future.[312] The EC argues that its position is supported by the context and object and purpose, and confirmed by the preparatory work.[313]

4.185 The EC submits that if the US interpretation was accepted, then findings of export contingent subsidies would be more likely in the case of small or export dependent economies, or in the case of global markets[314] because export would appear to loom larger in the set of potential considerations.[315] It is precisely the concept of contingency that guards against such an outcome. The EC considers that the US pays lip service to this principle; but in practice ignores it for the purpose of its submissions to the Panel.[316]

4.186 The EC emphasises with particular reference to this issue that the US ignores the overall design and architecture of Article 3.1(a) and footnote 4. The term "actual or anticipated" in footnote 4 confirms that the provision captures the whole range of possibilities, *i.e.*, exports that currently exist at the time of the initial grant (actual exports) as well as those that occur in the future (anticipated exports); and the whole range of evidence. Footnote 4 does change the basic legal standard of contingency from "if-then" to "because". "Becauseness" might (or might not) be evidence of contingency, but it is not itself to be confused with contingency, just as "the anticipating of" export is not to be confused with contingency.[317] In the EC view, the US makes no effort to demonstrate why and how the evidence it adduces about alleged "becauseness" demonstrates the existence and precise content of a subsidy contingent upon export, notably as regards any supposed subsidy programme. By its own terms, therefore, the US makes no *prima facie* case, because it is based on this false premise. The systemic implications of the US interpretation, if accepted, would effectively empty the requirement of contingency of meaning, converting a prohibition based on contingency into one based on some sort of "motivation" or "effects" based test.[318] This is not what the Members agreed. The EC adds that its interpretation of Article 3.1(a) of the SCM Agreement and footnote 4 is confirmed by the preparatory work.[319]

4.187 The EC considers that the US, confounding different factual and legal issues, refers to certain documents that may speak to the issue of *anticipation* or consideration or motivation and asserts that it has thereby demonstrated the existence of export contingent subsidies. However, the EC submits, it is impossible to discern in the US first written submission how the asserted facts and adduced evidence actually support the alleged legal conclusion, particularly with respect to the required *contingency*. Indeed, what the US case boils down to is the assertion that anticipation of sales plus export orientation in a global market demonstrates an export contingent subsidy, an assertion that has been rejected by panels and the Appellate Body repeatedly in previous cases.[320]

4.188 The EC argues that mere anticipation, or even consideration or motivation, does not constitute contingency. The EC contends that the provisions identified by the US in each of the seven measures

[312] EC, SWS, paras. 232 to 250; EC, SNCOS, paras. 117 to 131 and para. 142; EC, Answer to Panel Question 175, paras. 70 to 73.
[313] EC, SWS, paras. 248-249.
[314] EC, SWS, para. 229.
[315] EC, SNCOS, para. 129.
[316] EC, SWS, para. 230.
[317] EC, FWS, paras. 630 to 633; EC, Answer to Panel Question 175, paras. 70 to 73.
[318] EC, SWS, para. 245.
[319] EC, FWS, paras. 559 .
[320] EC, FWS, Executive Summary, para. 46.

do not provide for a subsidy upon export, but a *repayment* upon sale, which is the reverse of a subsidy. The EC explains that the repayment provision contains a contingency in the sense of a legally described condition (sale) the future factual fulfilment of which will entail a legal consequence (agreement by the company to make a repayment to the government). However, the EC maintains that this is not the contingency required by Article 3.1(a) and footnote 4 of the SCM Agreement. It is not by combining export orientation (or anticipation in a global market) with an irrelevant contingency that the US is going to generate export contingency.[321] The EC considers that the US position is inconsistent with *Australia – Automotive Leather II* and *Canada – Aircraft*.[322]

4.189 In any event, however Article 3.1(a) and footnote 4 of the SCM Agreement are construed, the EC contends that the facts asserted and evidence adduced by the US do not demonstrate that any one of the seven measure is a subsidy contingent upon export.

4.190 With respect to export performance, according to the EC, the US is effectively arguing that a subsidy contingent upon mere performance would be prohibited; whereas it is only subsidies contingent upon *export* performance that are prohibited. The EC explains that the text of Article 3.1(a) and footnote 4 refers repeatedly to export performance, whereas the US argues that there is a condition of performance. The EC finds support for its argument in the context of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement, which refers repeatedly to exports and/or the "favouring" thereof; in Articles XVI:1 and XVI:II of the GATT 1994 (which refer respectively to the effects of neutral subsidies and subsidies on exports); and in Article 3.1(b) of the SCM Agreement, which refers to subsidies contingent upon the use of domestic over imported goods. The EC finds further support for its argument in the object and purpose expressed in the preamble of the GATT 1994 and in the overall design and architecture of the SCM Agreement. According to the EC, export contingent subsidies are prohibited because such measures are a particularly effective method for partitioning markets, allowing Members to create an incentive for companies to export, whilst avoiding that domestic prices are driven down, thus frustrating the basic objective of the WTO Agreements to promote fair international trade. However, as the preparatory work also confirms, it was not the intention of WTO Members that all subsidies to firms with both domestic and export sales should be prohibited, as the final sentence of footnote 4 confirms. Any effects of neutral subsidies to exporting companies remain subject to Parts III and V of the SCM Agreement.[323]

4.191 More generally, the EC also argues that the existence and operation of the 1992 Agreement are facts surrounding the adoption of the measures. In the present case, as the US would have it, the US maintained with the EC for almost a decade an agreement permitting measures that the US knew to be prohibited subsidies. Further, the US view would appear to be that, whilst the support agreed for Boeing has not caused adverse effects to the interests of the EC, the support agreed for Airbus (that is, the essential *quid pro quo* in the 1992 Agreement) is prohibited. The EC submits that these are *facts* that the Panel *must* take into consideration when assessing the *credibility* and *plausibility* of the interpretation of Article 3.1(a) and footnote 4, and the assessment of the facts now advanced by the US.[324]

4.192 For these reasons, the EC concludes that the US has failed to demonstrate any of the three requirements of Article 3.1(a) and footnote 4 of the SCM Agreement. The EC emphasises that the Panel should first consider the claims "in law", and then the claims "in fact". The EC also emphasises that the Panel should exercise particular rigour with respect to the existence and precise content of the

[321] EC, FWS, Executive Summary, para. 47.
[322] EC, FNCOS, Executive Summary, para. 12.
[323] EC, FWS, paras. 570 to 577; EC, FNCOS, paras. 82 to 83; EC NC RPQ 79, paras. 138 to 140; EC, SNCOS, paras. 121 and 155.
[324] EC, SWS, paras. 251 to 257; EC, SNCOS, paras. 136 and 151.

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measures, especially with respect to the "in fact" claims, and should assess each of the seven measures individually.[325]

(b) No subsidies contingent in law upon export performance

4.193 The EC comments on five issues of legal interpretation: the existence of a subsidy within the meaning of Article 1.1 of the SCM Agreement, the condition (export performance), consequence (grant of a subsidy) and contingent relationship (or contingency) required by Article 3.1(a) and footnote 4, and the fact that the burden of proof is on the US to demonstrate its claims.[326] The EC considers that the US has not demonstrated that any of the seven measures at issue contain a subsidy contingent in law upon export performance. In this respect, the EC contends that the provisions cited by the US do not even have the content asserted by the US, but merely contain an agreed schedule.[327] In any event, according to the EC, the US has failed to demonstrate the required condition (export performance), the required consequence (grant of a subsidy), particularly since the consequence of achieving certain LCA sales is to *pay* the member State, and not to receive a grant, or the required contingency. Because these requirements are cumulative, for any one of these reasons considered in isolation the US claims must be rejected. [328]

4.194 In the EC view, the US has also failed to demonstrate that an export contingent subsidy can be "necessarily implied from the measure". In *Canada – Autos* the grant of a subsidy in the form of an import duty exemption was contingent upon a Canadian vehicle manufacturer respecting a "ratio" between the value of its production and the value of its domestic sales. For example, the ratio could be fixed at 100:100, which could be respected by selling all production in Canada, without import or export; or by exporting and importing equal value (for example, 100 produced, of which 80 sold in Canada and 20 exported; 20 imported and sold). Thus, a ratio of 95:100 permitted import value to exceed export value without loss of subsidy, but only up to the 5 percent limit fixed by the ratio. The panel and the Appellate Body correctly reasoned that, at the limit of the ratio, the only way for a manufacturer to import (and thus obtain the subsidy) would be to export, thus maintaining the ratio. The measure therefore provided for the grant of a subsidy contingent in law upon export performance. This could be deduced through elementary reasoning from the provisions of the measure itself.[329] The EC points out that in the present case, the US relies upon documents such as the contract, the GMF and the project appraisal. According to the EC, these do not demonstrate a subsidy contingent in law in the manner of the *Canada – Autos* case or otherwise.[330] According to the EC, the US has acknowledged that the seven measures are "origin neutral", and that the US arguments depend upon the supposed "market context", thus confirming that the US "in law" claims are without merit.[331]

(c) No subsidies contingent in fact upon export performance

4.195 The EC argues that, however Article 3.1(a) and footnote 4 of the SCM Agreement are construed, the US has failed to demonstrate a subsidy contingent in fact upon export performance. The EC first explains that the legal standard is the same (only the relevant evidence is different), that anticipation of (or consideration of or motivation by) (sales, including exports) does not, in itself, demonstrate contingency, and that export-orientation is insufficient (all points with which the US agrees).[332] The EC then shows that a simple review of the facts and evidence reveals that the US has

[325] EC, FWS, para. 584.
[326] EC, FWS, Executive Summary, para. 43.
[327] EC, FWS, paras. 584.
[328] EC, FWS, paras. 557.
[329] EC, SWS, Executive Summary, para. 28.
[330] EC, SWS, paras. 258 to 295.
[331] EC, SNCOS, para. 137.
[332] EC, FWS, paras. 605 to 612.

BCI deleted, as indicated **[***]**

failed to demonstrate the required condition (export performance), since the documents cited by the US in support of its claim merely demonstrate a concern with profit, wherever it may be earned in a global market, the required consequence (grant of a subsidy), or the required contingency. Indeed, not only are the US claims not supported by the documents, they flatly contradict them, because under the terms of the contracts the funds are advanced and remain with the recipient even if no export or for that matter sale or delivery ever occurs.[333] The EC argues that once again, because these requirements are cumulative, for any one of these reasons considered in isolation the US claims must be rejected.[334]

4.196 The EC contends that a review of the documents adduced and cited to by the US, measure-by-measure, and addressing the document by reference to the asserted fact in support of which it is adduced, reveals that the US has failed to make a *prima facie* case. The EC begins with the UK measure relating to the A380 and the thirteen documents adduced by the US to demonstrate "anticipation", explaining that: the repayment provision of the contract is origin neutral; as are the 1999 and 2000 Global Market Forecasts, a 1999 Airbus briefing that re-iterates the 1999 forecast, the project appraisal and the business case. The EC provides similar explanations with respect to a UK government press release, and press reports from AFX News Limited press report, AviationNow and the Economist, and with respect to a "position paper" entitled Aeronautics for Europe submitted to the European Commission by the External Advisory Group for Aeronautics.[335] The EC provides a similar analysis with respect to the three documents adduced by the US in support of its assertion that there is contingency.[336] The EC provides a comparable analysis, with the same result, for each of the seven measures.[337]

4.197 The EC argues that reduced to its essence, the US case is that any royalty based financing (allegedly on terms below a market benchmark) in a global market will always be a subsidy contingent upon export performance, for two reasons. First, because, in the long term, a company doing business in a truly global market is likely to have to sell into that global market (and not just its home market) in order to survive. Second, because achieving a market-based return on royalty based project finance is likely to include global sales, or in other words sales in both domestic and export markets. Thus, the smaller or more export-dependent an economy, or the more global a subsidised product market, the more likely that there will be, according to the US, a subsidy contingent upon exports. The EC submits that this approach is incorrect, and not supported by the facts.[338]

4.198 The EC explains that the repayment provisions cannot create contingency in the sense of Article 3.1(a) and footnote 4. The prohibition in Article 3.1(a) is *neutral* as to the *type* of the subsidy, meaning that it applies equally to all types of financial contributions. The EC notes that the US interpretation would create an incentive for Members to make outright subsidy grants, rather than financial contributions that foresee a return.[339] The repayment provision in the contract does not somehow magically convert the loan into an export contingent subsidy, by "necessary implication" or by means of any other obscure assertion, not least in the light of the obvious countervailing explanations as to the commercial rationale for the existence of such a repayment provision. In the EC view, the US attempt to dismiss these explanations with the puff that "the EC is only proving our point" is at once wholly inadequate and incomprehensible. In demonstrating that the reason for the existence of the repayment provision *has nothing to do with export markets* – the neutrality point that

[333] EC, FWS, para. 609.
[334] EC, FWS, para. 557. .
[335] EC, FWS, paras. 615 to 629.
[336] EC, FWS, paras. 637 to 656.
[337] EC, FWS, paras. 614 and 674 to 681.
[338] EC, SWS, Executive Summary, para. 30.
[339] EC, SNCOS, Executive Summary, para. 5.

BCI deleted, as indicated **[***]**

the US actually admits – the EC considers that it demonstrates that export contingency is not the "necessary implication" of the repayment provision, as the US asserts.[340]

4.199 For example, with regard to the United Kingdom measure relating to the A380, the US asserts that it has demonstrated the existence of a subsidy contingent in fact upon export performance because "the evidence demonstrates that, from the outset, the A380 was conceived primarily as a product for export markets in Asia". According to the EC, this assertion is entirely without merit. The United Kingdom did not influence Airbus' product design. Rather, demand, as reported in the *Airbus Global Market Forecasts* is what influences Airbus' product design.[341]

4.200 The EC argues that there are perfectly rational countervailing explanations that justify the existence of the repayment provision in each of the contracts, which have nothing to do with exports.[342] The EC contends that, in attempting to refute these countervailing explanations with the repeated affirmation that motivations are irrelevant to contingency, the US expressly confirms that its case is entirely without merit.[343]

4.201 According to the EC, the US arguments are inconsistent with, and the EC's arguments are consistent with, the panel report in *Australia - Automotive Leather II*. Contrary to what the US asserts, the facts of the present case are diametrically opposed to those surrounding the grant contract in *Australia - Automotive Leather II*; and the panel's reasoning regarding the loan contract in that case supports the EC position and disproves the US position.[344] The same is true with respect to the panel and Appellate Body reports in the *Canada – Aircraft* case, in which almost all of the panel's considerations related to a subsidy programme (the US makes no claim regarding a prohibited subsidy programme in the present case[345]), which exhibited both the required condition (export performance) and the required contingency, and which thus tainted the subsidy measures at issue, which were instances of the application of the programme, irrespective of their form.[346]

4.202 The EC argues that, faced with the EC rebuttal, the US attempts to impermissibly alter and enlarge the scope of its case with the late introduction of new arguments and new citations to evidence regarding supposed "reciprocal commitments", and that these new arguments should be dismissed for substantially the same reasons. None of the provisions to which the US refers contains any "commitment" to export, nor conditions the right to retain funds on export.[347]

4.203 In concluding, the EC invites the Panel to approach the US claims in a systematic manner, based on the ordinary meaning, context and object and purpose of the relevant provisions, measure-by-measure. The EC argues that by simply reviewing the facts asserted and evidence adduced by the US, it becomes immediately apparent that the US has failed to even make a *prima facie* case, and that all its claims must be rejected.[348]

4.204 The EC concludes that one-by-one the various elements of the US case have been challenged, and the US has been forced to concede. [349] It is not the global market.[350] It is not the fact that Airbus

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[340] EC, SWS, Executive Summary, para. 31.
[341] EC, SWS, Executive Summary, para. 32.
[342] EC, FWS, paras. 657 to 666; EC, FNCOS, para. 80; EC, SNCOS, para. 158; EC, Answer to Panel Question 217, paras. 531 to 533.
[343] EC, SNCOS, paras. 130 to 131.
[344] EC, FWS, paras. 667 to 673.
[345] EC, SNCOS, para. 124.
[346] EC, FNCOS, para. 79.
[347] EC, SNCOS, paras. 149 to 154, 159 and 163 to 169.
[348] EC, FWS, para. 561.
[349] EC, SNCOS, para. 170.

BCI deleted, as indicated **[***]**

exports (or is an "export-oriented" company).[351] It is not the alleged "anticipating (or consideration) of" exports.[352] It is not the alleged "motivation".[353] It is not performance that includes export performance.[354] It is not the fact that the measure foresees a return.[355] And it is not the repayment provision.[356] In the EC's view, it is just because the alleged recipient is Airbus. That, the EC contends, is the only reason why the US insists that somehow "altogether" its assertions demonstrate the existence and precise content of a subsidy contingent upon export performance, when manifestly they do not.

E. WHETHER CERTAIN LOANS FROM THE EUROPEAN INVESTMENT BANK SUBSIDIZED THE DEVELOPMENT OF AIRBUS LARGE CIVIL AIRCRAFT

1. Arguments of the United States

4.205 The US argues that the European Investment Bank ("EIB") has repeatedly subsidized the development of Airbus large civil aircraft. The US notes that the EIB has provided significant financial support to Airbus for the development of its new models of large civil aircraft. The US explains that the financial support has taken the form of loans – at least 11 to date – with a total principal value of approximately EUR 1,600,000,000. The EIB provides the loans for the development of specific models of Airbus LCA, usually as a supplement to the Launch Aid that the various Airbus governments provide for the same models. The US submits that each of the EIB loans is a subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.[357]

4.206 The US sets out the factual background of the European Investment Bank. It explains that the EIB, "the financing institution of the European Union, was created by the Treaty of Rome. The members of the EIB are the member States of the European Union, who have all subscribed to the Bank's capital." According to the US, the EIB describes itself as "the EU's policy-driven Bank." It has "close working relations with the other EU institutions, in particular the European Parliament, the European Council and the European Commission." It provides financing in support of EU policy priorities. The projects it funds must "help achieve EU objectives such as making European industries and small businesses more competitive." For all of these reasons, the EIB is, according to the US, a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement.[358]

4.207 The US contends that the loan that the EIB provided to EADS in 2002 is a specific subsidy under Articles 1 and 2 SCM Agreement. The US states that in 2002, the EIB agreed to provide a EUR 700,000,000 "individual loan" to EADS for R&D related to the Airbus A380. The loan is a subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.[359]

4.208 First, according to the US, the EIB is a public body, and the EUR 700,000,000 that it agreed to provide to EADS for the A380 – like all of the other EIB measures that the US is challenging in

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[350] US, SWS, para. 253.
[351] US, SWS, para. 253.
[352] US, SWS, para. 135 and 220.
[353] US, SWS, paras. 231 and 234.
[354] US, SWS, para. 244.
[355] US, SWS, para. 220.
[356] US, SWS, para. 134.
[357] US, FWS, Executive Summary, para. 37.
[358] US, FWS, Executive Summary, para. 38.
[359] US, FWS, Executive Summary para. 39.

BCI deleted, as indicated **[***]**

this dispute – is in the form of a loan. Accordingly, it is a financial contribution within the meaning of Article 1.1(a)(i) of the SCM Agreement.[360]

4.209 Second, according to the US, the loan confers a benefit because it is on terms that are more favourable than those available in the market. The US argues that the EIB readily admits that its entire purpose is to support the EU's public policy objectives by providing loans on better terms than the recipients could otherwise obtain, if they could obtain the loans at all. According to the US, the EIB effectuates this benefit by passing on the interest rate it pays on its own (AAA-rated) capital market borrowings to its non-AAA rated borrowers, and by lending the funds at cost. Thus, like the *Technology Partnerships Canada* ("TPC") program at issue in the *Canada – Aircraft* dispute, the EIB "neither seeks nor earns a commercial rate of return" on the loans it provides. The *Canada – Aircraft* panel treated this factor as dispositive in determining the existence of a subsidy in that dispute. It is equally dispositive with respect to the EIB.[361]

4.210 Furthermore, the information that the EC provided during the Annex V process confirms, in the US view, that the EIB loan for the A380 confers a benefit because the interest rate on the loan is below the risk-adjusted commercial borrowing rate that the market would have charged EADS in 2002 on an equivalent long-term loan. The loan is also specific within the meaning of Article 2 of the SCM Agreement. It is disproportionately large both in percentage and in absolute terms. Also, every "individual loan" that the EIB provides is entirely discretionary.[362]

4.211 Finally, the US submits that the loans that the EIB provided to Airbus between 1988 and 1993 are specific subsidies. The EUR 700,000,000 that the EIB agreed to provide for the A380 was not its first loan to an Airbus project. Since 1988, the bank has provided at least eleven additional loans for the development of specific Airbus models. The US contends that, like the EUR 700 million loan for the A380, each of these additional loans is a specific subsidy to Airbus within the meaning of Articles 1 and 2 of the SCM Agreement.[363]

4.212 In its second written submission, the US points out that the EC responded principally by contesting that the EIB loans are specific and that they confer a benefit. First, with regard to specificity, the US considers that among other flaws, the EC argument relies heavily on an approach to disproportionality for purposes of determining whether a subsidy is *de facto* specific that would measure each loan provided by the EIB against the totality of EIB lending over its entire five-decade-long history.[364] The US argues that the EC argument that the Panel should judge the specificity of EIB loans by examining all loans it has provided to all sectors since its founding would, if accepted, enable massive circumvention of the SCM Agreement.[365]

4.213 The US considers that the EC is mistaken in its view that the EIB loans at issue are not specific within the meaning of Article 2 of the SCM Agreement.[366] With almost no discussion, the EC asserts that "{t}he challenged EIB loans... cannot be specific under Article 2.1(a) SCM Agreement," apparently based on the absence of explicit limitations on eligibility for EIB loans. However, the US asserts, if the unique terms and conditions of a given subsidy contract are sufficiently different from the terms and conditions of other contracts granted under the same subsidy program, this can cause the subsidy at issue to fall outside the parameters of the broader program of

[360] US, FWS, Executive Summary, para. 40.
[361] US, FWS, Executive Summary, para. 41.
[362] US, FWS, Executive Summary, para. 42.
[363] US, FWS, Executive Summary, para. 43.
[364] US, SWS, Executive Summary para. 30.
[365] US, FNCOS, Executive Summary, para. 14. *See, also,* US, SWS, Executive Summary para. 30
[366] US, FNCOS, Executive Summary, para. 14.

which it is a part. In that case, the US explains, the subsidy ought to be considered separately from the larger program for purposes of a *de jure* specificity analysis under Article 2.1(a) of the SCM Agreement.[367]

4.214 The US argues that despite repeated assertions that eligibility for EIB lending is "objective" and "automatic" (and therefore, in the EC view, non-specific as a matter of law), the EC position is belied by its own explanation. In particular, the US notes that the EC describes multiple layers of review that must be completed in order for the EIB to approve a loan application, showing that obtaining an EIB loan is anything but "automatic." Also, the factors considered during that process show that the criteria or conditions governing eligibility – such as "improvement of the efficiency and/or quality of the infrastructure" and "alleviation of social problems or exclusion" – are subjective rather than objective. The US argues that while the EC calls the EIB Eligibility Guidelines "a very good example of criteria which are economic in nature and horizontal in application, and which are not favouring enterprises of any sector (or even any size)," it provides absolutely no demonstration of why this characterization is accurate. And, indeed, it is not.[368]

4.215 The US considers that in each case, the loans are discretionary, "individual" loans that are disproportionately large.[369] The US points out that **t**he EC has refused to provide the information that the Panel would need to evaluate the unique terms and conditions of most of the EIB loans at issue. Moreover, the EC refused to provide information about other EIB lending that might allow for an analysis of the manner in which the EIB exercised its discretion in providing loans to Airbus as compared with other borrowers.[370] The US explains that the EC provides no evidence to show that the EIB loans to Airbus are sufficiently similar to other loans granted by the EIB that they cannot be considered subsidies that are specific within the meaning of Article 2.1(a).[371]

4.216 The US submits that the EC has failed to demonstrate that the EIB loans are non-specific within the meaning of Article 2.1(b) of the SCM Agreement. According to the US, the EC's own description of the EIB's loan approval process makes clear that its loans are discretionary, and the facts further demonstrate that the challenged loans were specific to Airbus.[372] The US considers that the EC argues without basis that the EIB loans to Airbus must be analyzed in comparison to <u>all</u> the lending activity of the EIB over its <u>entire</u> 50-year history. In contrast, the US looks at *de facto* specificity based on how the EIB itself describes its lending activity, comparing the 2002 loan to EADS, for example, to the EIB's i2i program, which involved a "dedicated" amount of money loaned over a period of time with starting and ending points prescribed by the EIB.[373]

4.217 With regard to whether the EIB loans confer a benefit, the US considers that the EC is wrong to suggest that EIB loans do not confer a benefit on Airbus because of supposed (but completely unsubstantiated) "obligations imposed by the EIB" that, according to the EC, a commercial lender does not impose on its borrowers.[374] The US has presented evidence showing that the EIB's very purpose is to provide financing on terms more favourable than those available in the market. The EC misleadingly attempts to downplay the unmistakable import of statements about the EIB's mission. For example, the EC asserts that the requirements that EIB interest rates "be set at a level enabling EIB '*to meet its obligations, to cover its expenses and to build up a reserve fund*'" and that the EIB

[367] US, SWS, Executive Summary para. 36.
[368] US, SWS, Executive Summary para. 35.
[369] US, FNCOS, Executive Summary, para. 14.
[370] US, SWS, Executive Summary para. 36.
[371] US, FNCOS, Executive Summary, para. 14.
[372] US, FNCOS, Executive Summary, para. 14.
[373] US, SNCOS, Executive Summary, para. 14.
[374] US, SWS, Executive Summary para. 30.

BCI deleted, as indicated **[***]**

"not grant any reduction in interest rates" mean that "the bank's Statute expressly prohibits the bank from subsidising any borrower." But that is not what these provisions mean. All banks – regardless of whether they are for-profit or (as the EIB) not-for-profit – are required "to meet ... obligations, to cover ... expenses and to build up a reserve fund." What distinguishes a market lender from the EIB is that a market lender, in addition to meeting obligations, covering expenses, and building up a reserve fund, seeks a profit.[375]

4.218 Further, the US notes that the EC openly admits that the interest on EIB loans provided to Airbus from 1988 to 1993 did not include a risk premium, making them preferential to those available in the market by definition. Even with respect to the 2002 EIB loan to EADS for A380 development, the EC is less than clear as to whether the interest rate actually included a risk premium. The US argues its contention that EIB loans confer a benefit on the recipient is further confirmed by a comparison between the EIB loans to Airbus and market benchmarks established on the basis of the only two EIB loans for which the EC identified the precise terms and conditions.[376]

4.219 In addition to lower-than-market interest rates, the US argues that the EIB loans confer a benefit by excluding a commitment fee. The EC assertion that uncertainty about date of disbursement and the final interest rate on an EIB loan explain the absence of a commitment fee ignores the purpose of a commitment fee as compensating for providing a borrower the valuable option of drawing on funding at a later date.[377] The US considers that the EC's proposed market benchmark for measuring the benefit conferred by EIB loans is flawed for several reasons, including, *inter alia*, its reliance on bonds issued in the US, notwithstanding known yield differences between such bonds and dollar-denominated bonds issued by persons outside the US.[378]

4.220 At the second Panel meeting the US also asserted that in trying to show that EIB loans do not confer a benefit, the EC mistakenly focuses on the activities of international lending institutions in general (rather than the EIB in particular), inappropriately discounts the fact that the EIB does not seek to maximize profits, and alludes vaguely to hypothetical "other lending conditions" that "can ... outweigh{}" "{a}n advantageous interest rate" while providing no evidence of such conditions.[379]

4.221 In the US view, the EC's own words speak for themselves. According to the US, the EC acknowledged that the EIB's decisions are "policy driven," that they are "not determined by purely commercial considerations," and that the EIB has no need to "maximize profits."[380] For the US, this acknowledgment confirms that the financing provided by the EIB provides a benefit to Airbus as compared to financing provided by commercial lenders – that is, lenders who do have a need to "maximize profits." Accordingly, this financing constitutes a subsidy.[381]

4.222 Finally, the US asserts that the EC belief that loans for which the face amount has been repaid cease to confer benefits and cause adverse effects ignores that those loans were below market, and so the subsidy element has not been repaid.[382]

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[375] US, SWS, Executive Summary para. 31.
[376] US, SWS, Executive Summary para. 32.
[377] US, SWS, Executive Summary para. 33.
[378] US, SWS, Executive Summary para. 34.
[379] US, SNCOS, Executive Summary, para 13.
[380] citing, EC First Oral Statement, paras. 12 and 98.
[381] US, FCCS, Executive Summary para. 24.
[382] US, SNCOS, Executive Summary para. 13.

BCI deleted, as indicated **[***]**

2. Arguments of the European Communities

4.223 The EC rebuts the US assertions that the EIB repeatedly subsidised the development of Airbus LCA through loans provided to EADS and other companies.[383]

4.224 First, the EC asserts that it corrects a number of factual misinterpretations put forward by the US, and provides a corrected description of the EIB's status and functioning.[384] The EIB is a *sui generis* multilateral financial institution established in 1957, by the Treaty establishing the European Community (Treaty of Rome of 1957, hereinafter "EC Treaty") and created by sovereign governments, sharing many similarities with the World Bank and other financial institutions that operate at a regional or international level. The task of the bank is set forth in Article 267 of the EC Treaty.[385] To achieve the objectives set out in Article 267 of the EC Treaty, the EIB formulates a number of more specific priorities and objectives.[386] The US attempts to imply that EIB is controlled by member State governments through the Board of Governors and the Board of Directors are simplistic and misleading. The EIB enjoys legal personality and financial autonomy and is endowed with its own decision-making bodies. The EIB funds its operations by borrowing on the capital markets rather than by drawing on the budget of either the European Communities or the member States, in accordance with its Statute. Interest rates on loans provided by the bank are adjusted to conditions prevailing on capital markets. The EIB is not allowed by its Statute to grant subsidies.[387] The EIB enjoys full independence in the conduct of financial operations pursued to further its objectives, as confirmed by the European Court of Justice.[388] The EC also explains that the EIB does not promote only "European industries" as the nationality of the borrower is not a relevant criterion when granting a loan.[389] Examples of large loans to "non-EC" companies can be found at Exhibit EC-157 (Non-BCI) of the EC's first written submission in which the EC provides a complete list of all EIB loans for the period 1957-2006.[390]

4.225 The EC explains that the EIB is, together with the World Bank, the European Bank for Reconstruction and Development and others, in a category of international financial institutions which all have the same common feature that they do not seek to maximise profit but rather pursue, through their lending, wider developmental and socio-economic policy objectives. The EC submits that the US argument that the EIB provides subsidies just because it does not focus on profit maximization would mean, if followed by the Panel, that any of these international lending institutions provides subsidies. This would not only be legally incorrect, it would also constitute a major obstacle to developmental policies around the globe.[391]

4.226 The EC argues that the US failed to make a *prima facie* case with respect to those EIB loans that already were repaid[392] (ten out of thirteen loans challenged by the US have been fully repaid).[393] The US has not explained how loans that have long been repaid constitute existing measures that the

[383] EC, FWS, Executive Summary para. 52.
[384] EC, FWS, Executive Summary para. 53.
[385] EC, FWS, para. 1005.
[386] EC, FWS, para. 1006.
[387] EC, FWS, para. 1008.
[388] EC, FWS, para. 1007.
[389] EC, FWS, para. 1009.
[390] EC, FWS, footnote 817.
[391] EC, SWS, Executive Summary para. 38.
[392] EC, FWS, Executive Summary para. 53.
[393] EC, FNCOS, Executive Summary, para. 16.

BCI deleted, as indicated **[***]**

Panel should examine and determine how they cause present adverse effects to US interests.[394] Further, at least one of the challenged loans is not properly before the Panel.[395]

4.227 Next, the EC asserts that EIB financing is not specific and that the Panel can therefore reject the US claims on that ground alone.[396] In the EC view, the US entirely ignores that there are international financial institutions which, although operating on a basis that is actually very similar to that of commercial banks, pursue broader public policy objectives and – by their very founding charters – promote projects of all sizes in all sectors and without any discrimination. Financing by such institutions is, by definition, non-specific and – also under the terms of the US domestic law – does not constitute a subsidy.[397]

4.228 Furthermore, the EC argues that the US commits a legal error when it argues that EIB financing is specific. As regards specificity *de jure*,[398] the EC explains that under its founding statute and the EC Treaty, the EIB provides financing across all economic sectors and promotes projects in all areas of human activity. The facts also do not support the US allegation that EIB financing can be misused to promote the interests of Airbus.[399] In accordance with Article 267 of the EC Treaty, the EIB is legally required to extend financing to projects for companies of all sizes and across all sectors of the economy. All the terms of EIB contracts which have any relevance for the finding of subsidy (interest rate, maturity, repayment profile, etc) are set on the grounds of the same underlying criteria and methodology that apply across the board to all projects (and borrowers).[400] These criteria are neutral and economic in nature.[401] The eligibility determination made on the basis of these criteria is automatic within the sense of Article 2.1(b) SCM Agreement.[402] The EC has provided copies of all the contracts at issue as well as the template of a standard EIB contract.[403]

4.229 The EC indicates that the US attempts to overcome these EC arguments by arguing that the challenged loans are specific *de facto*. The EC argues that in doing so, the US commits both legal and factual errors. On law, the US ignores the text of Article 2.1(c) SCM Agreement and tries to artificially narrow the period of time of consideration or the area of EIB lending as much as possible, in order to succeed with its misconceived "disproportionality" analysis. However, neither the existence of the EIB's Innovation 2010 Initiative (i2i) as an individual policy objective, nor the EIB reporting of its activities on a sectoral or on an annual basis can be validly taken as evidence of a separate programme allowing a separate and distinct "disproportionality" analysis. Since the eligibility criteria apply across sectors, and since a single loan may, and routinely does, satisfy a number of policy objectives, any "disproportionality" analysis will always be artificial, unless one would consider the entire portfolio of EIB lending, across all EIB objectives and criteria, as a "programme" in the sense of Article 2.1(c) of the SCM Agreement.[404] The EC provides ample evidence showing that the US factual assertions in this respect – apart from being based on an erroneous legal theory – are also contrary to the facts.[405]

[394] EC, FWS, para. 1001.
[395] EC, FWS, para. 1003.
[396] EC, FWS, Executive Summary para. 53.
[397] EC, FCCS, Executive Summary para. 10
[398] EC, SWS, Executive Summary para. 40.
[399] EC, FNCOS, Executive Summary, para. 16.
[400] EC, SWS, Executive Summary para. 40.
[401] EC, FWS, para. 1024.
[402] EC, FWS, para 1031.
[403] EC, SWS, paras. 418-419 and, in particular para. 420.
[404] EC, FWS, para. 1039.
[405] EC, SWS, Executive Summary para. 40.

BCI deleted, as indicated **[***]**

4.230 The EC is of the view that the specificity of the challenged EIB loans is to be examined at the level of the EIB financing as a whole. The individual loans "reflect the normal operation" of the EIB and, further, the substantive terms of these loans, such as interest rate or security and risk pricing, are set on the basis of horizontally applied criteria and methodologies which are not tailored to any individual loans. The EC explains that it would be against the object and purpose of the SCM Agreement, which is to encourage Members providing financing to employ market disciplines, including risk pricing or requiring external security, to renounce on such elements. An interpretation of Article 2 that requires a Member to confer a subsidy to ensure that that subsidy is not specific must be rejected. To determine whether a loan provided under a programme is *de facto* specific, funding offered through the programme has to be considered, not an arbitrarily selected part of it.[406]

4.231 The EC argues that in any event, the challenged EIB loans do not and did not confer "benefits", and are therefore not "subsidies", within the meaning of Article 1 of the SCM Agreement.[407] The EC considers that the "market" benchmarks proposed by the US are grossly inaccurate and based on simplified assumptions.[408] The EC provides a detailed calculation of properly-identified benchmarks with regard to all of the remaining loans. The benchmarks show that the rates for the challenged loans are either at or above market terms[409] and demonstrate that none of these loans actually conferred any benefit. In any event, the EC also highlights that when making a comparison with the market, the US only takes into account one element of the loan – the interest rate – and ignores other tangible as well as less tangible aspects of the EIB lending which are of additional cost to the borrower.[410] Borrowers would not incur such additional costs in the market,[411] in particular with respect to market benchmarks based on bonds, as bonds have distinct characteristics from loans.[412] Thus, the additional obligations placed on the EIB borrower have to be taken into account.[413]

4.232 The EC also explains that the US assertion that EIB provides subsidies merely because the EIB does not seek to maximize profits is not relevant for the determination whether a subsidy exists under Article 1 of the SCM Agreement.[414] The EC maintains that the US approach contradicts the well established WTO jurisprudence that a subsidy exists only if it confers a benefit on the recipient (irrespective of whether the granting authority seeks profit or not). Hence, to determine the existence of benefit, one has to compare each of the loans challenged by the US with a market benchmark.[415]

4.233 The EC also explains that every one of the challenged EIB loans has been collateralised or, in case of the EADS loan for the A380 project, subject to a risk premium.[416]

4.234 The EC further argues that the fact that the EIB does not charge a commitment fee is a reflection of the fact that the EIB does not undertake a commitment comparable to the one available usually on the market.[417]

4.235 In addition, the EC asserts that the US arguments that EIB loans "supplement" MSF or other alleged subsides are fundamentally mistaken and explains at length that the EIB is an independent

[406] EC, SNCOS, Executive Summary, para. 6.
[407] EC, FWS, para. 1108.
[408] EC, FNCOS, Executive Summary, para. 16.
[409] EC, SNCOS, Executive Summary, para. 6.
[410] EC, SWS, Executive Summary para. 39.
[411] EC, FWS, paras. 1056 and 1084.
[412] EC, SWS, paras. 494-499.
[413] EC, SNCOS, Executive Summary, para. 6.
[414] EC, SWS, para. 490.
[415] EC, SWS, Executive Summary para. 39.
[416] EC, SNCOS, para.368
[417] EC, SNCOS, para. 192.

BCI deleted, as indicated **[***]**

institution and the decision of the Board of Directors approving a loan is based solely on business consideration and the EIB Statute.[418]

4.236 The EIB financing cannot be said to "shift commercial risk of launch", as the United States asserts, without any justification. Thus, the EC is of the view that the effects of the challenged EIB loans can not be aggregated with other financing mechanisms concerned and that even if the EIB loans were found to be a specific subsidy, they are, as such, not likely to create any adverse effects within the meaning of the SCM Agreement.[419]

4.237 Finally, the EC submits that the US failed to make a *prima facie* case as it ignored the fact that the challenged loans had been provided, to a large extent, to companies which no longer manufacture LCA that is alleged to cause adverse effects to US interests and that, in any event, the challenged EIB loans do not provide a benefit in the sense of Article 1.1(b) SCM Agreement.[420]

F. WHETHER THE GERMAN, FRENCH, UK, AND SPANISH GOVERNMENTS HAVE SUBSIDIZED AIRBUS THROUGH THE PROVISION OF INFRASTRUCTURE AND INFRASTRUCTURE-RELATED GRANTS.

1. Arguments of the United States

4.238 The US argues that the German, French, UK, and Spanish Governments have subsidized Airbus through the provision of infrastructure and infrastructure-related grants

4.239 The US submits that in addition to Launch Aid and EIB loans, the Airbus governments have provided massive subsidies to Airbus to develop, expand, and upgrade infrastructure and other facilities. These subsidies increased markedly in recent years in connection with the development of the Airbus A380. The subsidies at issue were granted by German authorities in Hamburg, Nordenham, and Bremen; by French authorities in Toulouse; by UK authorities in Broughton; and by Spanish authorities in numerous locations in Spain. The US contends that each of the measures is a specific subsidy to Airbus within the meaning of the SCM Agreement.[421]

(a) Alleged infrastructure subsidies

(i) Hamburg

4.240 The US contends that when Airbus launched the A380, it decided to establish one of its A380 assembly facilities at its Hamburg-Finkenwerder site. At the time that Airbus made this decision, however, its existing facilities in Hamburg were located on a peninsula, with the river Elbe and wetlands on three sides, leaving no space on which to build the A380 facility. The US explains that Hamburg authorities solved this issue by transforming one of the wetlands – the internationally-protected "Mühlenberger Loch" – into an industrial site, at a cost of approximately EUR 751,000,000. The development of the Hamburg-Finkenwerder site and its provision to Airbus is a specific subsidy to Airbus because the Hamburg authorities created a site that the market would not have created, and because they have provided the site to Airbus for less than adequate remuneration. Hamburg also subsidized Airbus by sharing the costs to construct the A380 assembly facilities.[422]

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[418] EC, SNCOS, para.370
[419] *Ibid.*
[420] EC, FWS, Executive Summary para. 53.
[421] US, FWS, Executive Summary, para. 44.
[422] US, FWS, Executive Summary, para. 45. The United States later withdrew this latter claim, US, Answer to Panel Question 24, para 167.

BCI deleted, as indicated **[***]**

4.241 The US notes that the EC concedes that Hamburg spent at least EUR 695 million to create an industrial site for Airbus at Mühlenberger Loch.[423] The US also notes that there is no dispute between the EC and the US that the City of Hamburg created the artificial land at the Mühlenberger Loch free of charge and free of risk for Airbus – and thereby allowed Airbus to expand its existing facilities to accommodate A380 production. The US points out that the EC approach to addressing the undisputed facts is to treat the creation of the site, the building of flood protection measures, and the building of special-purpose facilities on the site as three separate transactions, each distinct from one another, as well as being distinct from and unconnected to the lease of the newly created land and special purpose facilities to Airbus.

4.242 The US notes that the EC argues that the creation of the site, in and of itself, did not constitute a financial contribution to Airbus but, rather, the provision of general infrastructure. The EC then treats the lease to Airbus no differently from an ordinary commercial lease in which it was not necessary to first create the artificial land. The US considers that this approach ignores the reality that the City of Hamburg invested EUR 750 million into creating a site to the specifications of Airbus, an amount that Airbus otherwise would have had to spend itself on the expansion of its existing site.[424]

4.243 The US considers that the EC argument that the creation of the land was "general infrastructure" is based on a misinterpretation of the SCM Agreement and the false premise that Hamburg's "law on the development of the port" required the City to reclaim the land from Mühlenberger Loch. Hamburg spent EUR 751 million to transform a protected wetland area into an industrial site for Airbus, knowing that the project would result in a several hundred million Euro loss. A private investor would not have made such an investment.[425]

4.244 The US explains that the EC assertion that creation of the Airbus site at the Mühlenberger Loch amounted to the provision of general infrastructure is wrong for the following reasons. First, the EC theory that land for industrial and residential use in Hamburg is limited because Hamburg is "surrounded by water" is factually incorrect. Hamburg is located on the river Elbe, but it is certainly not surrounded by water, and Hamburg's own Minister for the Economy has touted the "abundant supply of office space and commercial real estate" in Hamburg.[426]

4.245 Second, the EC assertion that the creation of the new, artificial land in the Mühlenberger Loch was motivated by the need for additional land for the harbor and thus undertaken to fulfil a public task – the development of the harbor – is both legally irrelevant and factually wrong. It is legally irrelevant because the test for whether infrastructure is general is not whether it serves some "public policy objective." As for the facts, a closer examination shows that the creation of the site for Airbus does not serve the development of the Port of Hamburg, but was undertaken exclusively for Airbus. As the EC grudgingly admitted in responding to the Panel's questions, the entire site created from wetland and river areas in the Mühlenberger Loch and Rüschkanal is located outside the Harbor Area as defined by Hamburg's Port Development Act. The EC also errs in describing plans for expansion of the Harbor Area.[427]

[423] US, FNCOS, Executive Summary, para. 10.
[424] US, SWS, Executive Summary, para. 39.
[425] US, FNCOS, Executive Summary, para. 10.
[426] US, SWS, Executive Summary, para. 40.
[427] US, SWS, Executive Summary, para. 41.

BCI deleted, as indicated **[***]**

4.246 Third, the EC ignores that the Mühlenberger Loch and the Rüschkanal were transformed into artificial land exclusively for Airbus. This fact is confirmed by contemporaneous statements by the European Commission, the Hamburg government, and the Hamburg Court of Appeals.[428]

4.247 The US considers that equally erroneous is the EC theory that the Airbus site amounts to general infrastructure due to the remote possibility that one day the site might be used by another user, as long as the City of Hamburg retains formal ownership of the site. It would be very easy to circumvent the SCM Agreement if the provision of infrastructure by a WTO Member to specific companies or industries – even on a decades-long basis – were excluded from the agreement by virtue of being "general infrastructure" simply due to the Member's retaining title to the infrastructure. Moreover, the EC portrayal of the relevant facts is incorrect. German planning law prohibits any use of the site other than for aircraft manufacturing and aviation purposes. And with respect to the dyke lane that surrounds the site, the EC ultimately must admit that during the period of Airbus' lease, it is open to use only by "Airbus employees and officials of Hamburg with a responsibility for dyke maintenance and security." Even assuming hypothetically that the restrictions under German planning law did not exist and that Airbus terminated its use of the newly created land, the site still would not be suitable for users other than Airbus given the land's physical and geographical situation.[429]

4.248 The US considers that the dykes around the Airbus site – built at a cost of EUR 29.3 million (about four percent of the total cost of creating the artificial land) – are not general infrastructure, because it would not have been necessary to build them absent the creation of that land for Airbus in the first place.[430]

4.249 Given that the site created for Airbus at the Mühlenberger Loch is not general infrastructure, its lease to Airbus on terms that do not include the investment in creating the site confers a benefit on Airbus. And, in addition to ignoring the cost of creating the site, Hamburg assumed the entire risk that the artificial land may subside, conferring an additional benefit on Airbus in the form of a reduced lease price until 2019.[431]

4.250 The US notes that the EC argues that the cost of turning the wetland and water areas in the Mühlenberger Loch and the Rüschkanal into a site for Airbus are irrelevant as a benchmark. In the EC view, these costs do not reflect the benefit to Airbus, but the cost to Hamburg. However, in the US view, the EC ignores that Hamburg's actions represent a substantial cost savings to Airbus. The US explains that had it not been for the government's creation of the land, Airbus would have had to make that investment itself.[432]

4.251 The US points out that even assuming, for the sake of argument, that the value of pre-existing land is the right basis for determining a market price for Airbus' lease, the actual lease price still falls below a market benchmark, as demonstrated by an analysis provided by local real estate experts Dr. Ing. Keunecke and Dipl.-Ing. Stoehr.[433] The opinion to the contrary by the Hamburg Committee of Experts for Property Values is flawed in part because it accepts the proposition that the risk that the land will settle should be accounted for through a rent reduction, and in part because it uses the wrong basis under German law for calculating a market interest rate. Finally, even assuming that the land leased by the City of Hamburg had already existed (and that a market-based lease price would not,

[428] US, SWS, Executive Summary, para. 42.
[429] US, SWS, Executive Summary, para. 43.
[430] US, SWS, Executive Summary, para. 44.
[431] US, SWS, Executive Summary, para. 45.
[432] US, SWS, Executive Summary, para. 46.
[433] E.g., US, FWS, paras. 432-433, Exhibit US-189.

therefore, have reflected the cost of creating the land in the first place), a private landowner certainly would have demanded a premium from Airbus over the lease price it would have charged any other lessee, given that this site is adjacent to Airbus' existing facilities and is the only site that Airbus could use to locate its A380 production in Germany.[434]

(ii) Bremen

4.252 The US argues that Germany provided DM 50 million in infrastructure subsidies to Airbus in Bremen by agreeing to extend the main runway at Bremen airport to accommodate transport flights for Airbus wings manufactured in Bremen. The governing SPD in the Bremen Parliament has explicitly described the runway as a "Werksbahn" (or "company runway") for Airbus. Airbus paid nothing for this benefit.[435]

4.253 The US notes that the EC argues that Airbus does not receive a benefit "because it is landing heavier aircraft, and is in turn paying a higher user fee." The US considers that the EC misunderstands the fee regulation adopted by the City of Bremen. The US explains that under that regulation, fees are based on maximum take-off weight, not actual take-off weight. And in any event, regardless of the maximum take-off weight, users other than Airbus are not allowed to use the extended runway. Absent an arrangement that ensures that the City of Bremen is compensated for the runway infrastructure created specifically for Airbus and open for use only by Airbus, Airbus receives a benefit from having been provided with this infrastructure.[436]

(iii) Toulouse

4.254 The US notes that Airbus decided to establish its second A380 assembly facility at its Toulouse site. The US contends that French authorities expended EUR 200,000,000 to transform agricultural land next to Airbus' Toulouse headquarters and the Blagnac airport into the "AéroConstellation" site – an aeronautics industrial park that French authorities described as a "tailor-made solution for the A380." The development of the AéroConstellation site and its provision to Airbus is a subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement. First, the French authorities sold a portion of the site to Airbus for less than adequate remuneration. Second, the authorities are leasing the general facilities on the site (the EIG facilities) to Airbus for less than adequate remuneration.[437]

4.255 The US asserts that the French authorities spent at least EUR 78 million to develop the AéroConstellation site, plus another EUR 80 million to develop facilities on the site. Airbus purchased at least 51 hectares of the site, and the price Airbus supposedly paid is well below the amount the French authorities spent to develop the site. In this way, the French authorities conferred a subsidy on Airbus.[438]

4.256 The US notes that the EC's principal response is to argue that the goods the French authorities provided to Airbus constitute general infrastructure and therefore are excluded from the definition of "subsidy." This is another example of the EC's flawed understanding of what constitutes "general infrastructure." Moreover, as with the Hamburg site, the EC contention that the US has taken a cost-to-the-government approach to showing the existence of a subsidy ignores the fact that by

[434] US, SWS, Executive Summary, para. 47.
[435] US, FWS, Executive Summary, para. 46.
[436] US, SWS, Executive Summary, para. 54.
[437] US, FWS, Executive Summary, para. 47.
[438] US, FNCOS, Executive Summary, para. 11.

BCI deleted, as indicated **[***]**

transforming agricultural land into an industrial site and then providing it to Airbus at a below-market price, the French authorities have conferred a benefit on Airbus in the form of a cost savings.[439]

4.257 Also, Airbus does not pay a lease price reflecting market conditions for the so-called EIG facilities (taxiways, parking, etc.) at the Toulouse site. The average annual lease price of EUR 3.1 million demanded by Grand Toulouse for Airbus' use of the EIG facilities is substantially below a market price of between EUR 9.9 million and EUR 12.1 million for the facilities and the land. Other non-commercial aspects of the lease include the fact that Grand Toulouse allows for a deferral of the lease payments.[440]

(b) Regional Aid

(i) Nordenham

4.258 The US argues that in June 2002, the parliament of the German land of Lower Saxony approved a EUR 6,000,000 grant to Airbus to help underwrite a EUR 49,000,000 expansion of Airbus' production facility in Nordenham. The purpose of the expansion was to accommodate the production of components for the A380. As a grant, the EUR 6,000,000 necessarily constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement. The US considers that the grant is also specific since it is an *ad hoc* grant exclusively to Airbus for the specific purpose of expanding its A380 component production facility.[441]

(ii) Broughton

4.259 The US asserts that on September 24, 2000, the Welsh Assembly announced that it had agreed to provide a GBP 19,500,000 grant package to BAe Systems in support of its A380 wing production work in Broughton. The package included GBP 15,000,000 from the Welsh Development Agency for the "general infrastructure of a big site" and GBP 4,900,000 for the "development of people." As a grant, the GBP 19,500,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. The grant is also specific because, *inter alia*, it was an *ad hoc* grant to Airbus.[442]

4.260 The US notes that with respect to its claim concerning a GBP 19.5 million grant the Welsh Assembly provided to BAe Systems in September 2000, the EC argues that the grant is not specific within the meaning of Article 2 of the SCM Agreement. However, in the US view, the EC fails to address the circumstances under which the grants were provided. In particular, it ignores entirely BAe Systems' application for a grant under the Welsh government's RSA scheme and the reaction provoked by the rejection of that application, leading to the grant actually provided. Examining the circumstances surrounding the Welsh grant in their totality reveals that the grant indeed is specific within the meaning of Article 2 of the SCM Agreement.[443]

(iii) La Rinconada

4.261 The US argues that in April 2001, the Spanish Ministry of Economics issued an order approving regional grants of EUR 2,200,000 to EADS-CASA at Sevilla and EUR 814,000 to EADS-CASA at La Rinconada, Sevilla. As grants, the EUR 2,200,000 and EUR 814,000 are subsidies within the meaning of Article 1.1 of the SCM Agreement. The grants are also specific under

[439] US, SWS, Executive Summary, para. 52.
[440] US, SWS, Executive Summary, para. 53.
[441] US, FWS, Executive Summary, para. 48.
[442] US, FWS, Executive Summary, para. 49.
[443] US, SWS, Executive Summary, para. 56.

BCI deleted, as indicated **[***]**

Article 2.2 of the SCM Agreement because eligibility for the subsidies is explicitly limited to certain designated geographical regions within the jurisdiction of the authority granting the subsidies (Spain).[444]

(iv) Illescas

4.262 The US asserts that in March 2003, the Spanish Ministry of Economics approved a EUR 37,900,000 grant to Airbus España. The grant covered 15 percent of the total investment costs of an expansion of Airbus' parts and components production site in Illescas, in Toledo, Spain. The US asserts that as a grant, the EUR 37,900,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. The US contends that the grant is specific for the same reasons that the La Rinconada grants are specific.[445]

(v) La Rinconada

4.263 The US submits that in July 2003, the Spanish Ministry of Economics issued an order approving another regional grant, this time in the amount of EUR 43,100,000, to EADS-CASA at La Rinconada, in Sevilla. As a grant, the EUR 43,100,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. The grant is specific for the same reasons that the earlier La Rinconada grants were specific.[446]

(vi) Puerto de Santa Maria

4.264 The US asserts that in July 2003, the Spanish Ministry of Economics issued an order approving a EUR 5,900,000 grant to EADS-CASA at Puerto de Santa Maria, in Cadiz. As a grant, the EUR 5,900,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. The grant is specific for the same reasons that the La Rinconada grants were specific.[447]

(vii) Puerto Real

4.265 The US asserts that in July 2003, the Spanish Ministry of Economics issued an order approving a EUR 13,100,000 grant to EADS/Airbus España's facility at Puerto Real, in Cadiz. As a grant, the EUR 13,100,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. The grant is specific for the same reasons that the earlier grants are specific.[448]

(viii) Puerto de Santa Maria

4.266 The US submits that in July 2001, the government of the Spanish region of Andalusia provided a EUR 8,600,000 grant to CASA for a new production and maintenance facility in El Puerto de Santa Maria, in Cadiz. As a grant, the EUR 8,600,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. In addition, the grant is specific because it was provided as part of an Andalusian government development plan for the Bahía de Cadiz, and thus was limited to a designated geographical region of the authority granting the subsidies.[449]

[444] US, FWS, Executive Summary, para. 50.
[445] US, FWS, Executive Summary, para. 51.
[446] US, FWS, Executive Summary, para. 52.
[447] US, FWS, Executive Summary, para. 53.
[448] US, FWS, Executive Summary, para. 54.
[449] US, FWS, Executive Summary, para. 55.

BCI deleted, as indicated **[***]**

(ix) Sevilla

4.267 The US asserts that in July 2002, the government of Andalusia authorized a grant of EUR 35,700,000 for an investment by EADS-CASA in Sevilla. The US explains that the grant was 75 percent financed by the European Regional Development Fund and 25 percent financed by the Andalusian government. As a grant, the EUR 35,700,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. The grant is also specific within the meaning of Article 2 of the SCM Agreement. Subsidies under the European Regional Development fund are necessarily limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority," and thus are specific within the meaning of Article 2.2 of the SCM Agreement.[450]

(x) Puerto Real

4.268 The US submits that in July 2003, the government of Andalusia authorized a further grant of EUR 17,500,000 for the expansion and modernization of Airbus' facilities in Puerto Real, in Cadiz. The European Regional Development Fund co-financed the grant. As a grant, the EUR 17,500,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. Additionally, the grant is specific within the meaning of Article 2 of the SCM Agreement because it was provided under a program that is limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority."[451]

(xi) Illescas

4.269 The US argues that in March 2004, the government of Castilla-La Mancha approved a EUR 7,600,000 grant to Airbus España for the expansion and modernization of Airbus' parts and components production site in Illescas, in Toledo. The European Regional Development Fund co-financed the grant. As a grant, the EUR 7,600,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. The US considers that the grant is also specific within the meaning of Article 2 of the SCM Agreement because it was provided under a program that is limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority."[452]

(xii) La Rinconada

4.270 Finally, the US submits that in October 2004, the government of Andalusia authorized a grant of EUR 61,900,000 for an investment project by EADS-CASA in the municipalities of Sevilla and La Rinconada, Sevilla. As a grant, the EUR 61,900,000 is a subsidy within the meaning of Article 1.1 of the SCM Agreement. The grant is also specific within the meaning of Article 2 of the SCM Agreement because it was provided under a program that was explicitly limited to "certain enterprises" within the meaning of Article 2.1 of the SCM Agreement. The US notes that the EC asserts that the grant is not being used for large civil aircraft activities. However, the US argues, the evidence it provides fails to substantiate this assertion.[453]

(c) General infrastructure

4.271 In its second written submission the US notes that the EC argument concerning US claims relating to provisions of infrastructure rests largely on the position that much of what the US has challenged constitutes "general infrastructure" within the meaning of Article 1.1(a)(1)(iii) of the

[450] US, FWS, Executive Summary, para. 56.
[451] US, FWS, Executive Summary, para. 57.
[452] US, FWS, Executive Summary, para. 58.
[453] US, SWS, Executive Summary, para. 55.

BCI deleted, as indicated **[***]**

SCM Agreement and, therefore, is excluded from the definition of "subsidy." The US considers that to make that argument, the EC asserts a broad definition of "general infrastructure" that finds no support in the SCM Agreement or, indeed, in the EC's own practice under its state aids regime.[454]

4.272 The US asserts that based on its ordinary meaning, the term "general infrastructure" must include, involve, or affect all or nearly all the parts of a whole territory or community; must be completely or nearly universal, as opposed to partial, particular, or local. The US considers that the EC has proffered a very different definition that focuses on the fulfilment of broad public policy goals, such as "*enabl{ing}* members of the public at large, thereby fulfilling a public policy objective." Governments routinely act with the intention of "fulfilling a public policy objective." If any grant of infrastructure that met that test were deemed to be general infrastructure then virtually every grant of infrastructure would be excluded from the SCM Agreement's definition of "subsidy." But that result would deprive the word "general" in the phrase "general infrastructure" of any meaning. Nor do the *travaux préparatoires* for the SCM Agreement help the EC position. And, indeed, that position is contradicted by the EC's own practice under its state aids regime.[455]

4.273 The US points out that the EC relies on the erroneous view that any infrastructure is "general" as long as it is created for reasons of "public policy," and that all infrastructure is presumed to be general and becomes non-general only when limitations on its use are "clearly specified" and "restricted by regulation." Even under this flawed theory, however, the infrastructure provided to Airbus in Hamburg, Toulouse, and Bremen would not be "general infrastructure." Further, the government's investment in creating the infrastructure reflects the savings to the recipient – that is, the benefit – from receiving the infrastructure at a price that ignores that investment. Focusing on this fact does not represent, as the EC asserts, a cost-to-government approach to analyzing a subsidy.[456]

4.274 The US notes that the EC accuses it of inventing a legal test for determining whether infrastructure is general. However, what the EC refers to as the US "test" is nothing more than an application of the ordinary meaning of the term "general." The EC also repeats its argument that "knowledge about the first user does not render an infrastructure project non-general." But, once again, the EC observation is entirely beside the point. In the case of Hamburg and Toulouse, the government authorities did not simply undertake infrastructure projects with knowledge that Airbus would be the first user of that infrastructure. Rather, they undertook those projects expressly for Airbus.[457]

4.275 The US notes that at paragraph 212 of its second oral statement, the EC once again criticizes the US demonstration that infrastructure provided to Airbus by French and German authorities confers a benefit on Airbus. However, in each case, the governments involved undertook substantial efforts to alter the condition of certain land to make it suitable for Airbus production. The value that Airbus ultimately received was not simply the value of the bare land. The US asserts that a private landowner would have charged for these additional improvements, but the French and German authorities did not. According to the US, their provision of infrastructure to Airbus thus confers a benefit and constitutes a subsidy.[458]

4.276 The US notes that the EC asserts that in seeking a return on the provision of infrastructure a government need not obtain a market price if it expects to receive other "remuneration" in the form of

[454] US, SWS, Executive Summary, para. 37.
[455] US, SWS, Executive Summary, para. 38.
[456] US, SNCOS, Executive Summary, para. 14-16
[457] US comments on EC, SNCOS, Executive Summary, para. 14.
[458] US comments on EC, SNCOS, Executive Summary, para. 15.

BCI deleted, as indicated **[***]**

"higher tax revenues and increased employment." However, if this were the relevant rule there would be virtually no SCM Agreement disciplines on the provision of infrastructure.[459]

(d) Specificity of regional aid

4.277 The US further notes that with respect to grants for the construction of Airbus and EADS manufacturing and assembly facilities provided by a regional government in Germany and by national, regional, and local governments in Spain, supported in some cases by the European Regional Development Fund, the EC's principal defense is to argue that the grants are not specific within the meaning of Article 2 of the SCM Agreement. The US considers that this argument rests on two mistaken propositions: (1) that for a subsidy to meet the regional specificity test under Article 2.2, it must be limited to a subset of enterprises within a designated geographical region, and (2) that even if a subsidy meets this mistaken standard, it nevertheless may be found non-specific by virtue of Article 2.1(b).[460]

4.278 In the US view, the EC reading of Article 2.2 would reduce Articles 2.1(a) and 8.2(b) of the SCM Agreement to redundancy or inutility. Article 2.1(a) provides that a subsidy "shall be specific" if access is "explicitly limit{ed}" to "certain enterprises." Yet, the EC would read Article 2.2 to provide the same thing. Article 8.2(b) made subsidies in the form of assistance to disadvantaged regions non-actionable during the period when the Article was in force, as long as the subsidies met certain criteria. One of those criteria was that the subsidies be "non-specific (within the meaning of Article 2) within eligible regions." Yet, under the EC reading of Article 2.2, if a subsidy provided to a particular region is non-specific within that region, then it is not specific under Article 2.2 in the first place. Following that logic, it would have been unnecessary to provide that a regional subsidy is non-actionable if, *inter alia*, it is non-specific within the region. Similarly, under the EC reading of Article 2.2, Article 8.1(b) would make no sense.[461]

4.279 The US notes that the EC professes to find support for its reading of Article 2.2 in the SCM Agreement negotiating history. According to the US, the EC discussion of the history is inaccurate and ultimately does not support the EC conclusion. In particular, the EC ignores that the focus of the debate on regional specificity was on whether the fact that a subsidy was limited to a "designated geographical region" would automatically make it specific or whether, instead, regional specificity would depend on the scope of the granting authority's jurisdiction. According to the US, the EC's proposed construction of the regional specificity provision in Article 2.2 is contrary to its own practice in countervailing duty proceedings.[462]

4.280 Finally, the US points out that the SCM Agreement does not support the EC theory of a hierarchical relationship between Articles 2.1(b) and 2.2, whereby a finding of non-specificity under the former will prevail over a finding of specificity under the latter. The US highlights that when the drafters of the SCM Agreement wanted to make one provision subject to another then knew how to do so, but did not do so with respect to these two articles.[463]

[459] US comments on EC, SNCOS, Executive Summary, para. 16.
[460] US, SWS, Executive Summary, para. 48. *See, also*, US, FNCOS, Executive Summary, para. 12 and US, SNCOS, Executive Summary, para. 14-16.
[461] US, SWS, Executive Summary, para. 49.
[462] US, SWS, Executive Summary, para. 50.
[463] US, SWS, Executive Summary, para. 51.

BCI deleted, as indicated **[***]**

2. Arguments of the European Communities

4.281 The EC rebuts the US allegations that certain infrastructure projects and regional aid constituted a subsidy under the SCM Agreement.[464]

(a) General Infrastructure

4.282 The EC points to the fact that the Article 1.1 (a) (iii) of the SCM Agreement excludes general infrastructure projects from its scope. Tracing back the origins of that provision, the EC argues that the provision of general infrastructure in Hamburg, Bremen and Toulouse are covered by that exception. The EC argues that having established this, to the extent that Airbus entities used, leased or purchased parts of an industrial site, no benefit was conferred on them as these transactions were done at commercial rates and backed up by independent expert assessments.

4.283 In its second written submission, the EC recalls that measures of general infrastructure are excluded from the scope of the SCM Agreement. Referring to the submissions from Canada and Korea on this issue, it explains that the phrase "general" illustrates a broader concept than the one advocated by the US. For something that is "general" to become "non-general", the limitation must be clearly specified. In other words, infrastructure does not become "non-general" because the public does not use it *de facto* or because there is uneven use. Rather, the government must have specified limitations on the general public's use.[465]

4.284 Moreover, concurring with Canada, the EC maintains that improvements of general infrastructure are covered by this carve-out as well. Every improvement of general infrastructure may initially have a particularly positive effect on certain immediate users. But that does not remove its character of general infrastructure, as it benefits the public at large in the long run.[466]

4.285 The EC notes that both Canada and Korea are of the view that limitations on the use of general infrastructure do not deprive that infrastructure of its general nature. That leads to the two-step approach that the EC has advocated in its first written submission: *First*, the governments builds general infrastructure. *Second*, it may decide to put it at the disposal of certain users. The second step does not invalidate the first – rather, the second step has to be assessed on its own merits, since it is at this stage that a benefit may or may not be conferred.[467]

4.286 The EC asserts that it shows that the reclamation of land in Hamburg constitutes general infrastructure.[468] The EC argues that contrary to what the US alleges, *Scott Paper* is not relevant to the Hamburg measure. Hamburg's measure involved the pure creation of land, in this case the conversion of wetland into usable land, which is a typical task of governments as providers of general infrastructure. Governments, unlike private actors, are bound by public law and public policy considerations in such general infrastructure measures, and there is no market for such measures where private investors act. Furthermore, Hamburg has not sold the land in the reclaimed area to Airbus Germany. On the contrary, Hamburg retains ownership of the property and the possibility to use the newly created land for other purposes after a possible termination of the lease agreement with

[464] EC, FWS, Executive Summary, para. 49.
[465] EC, SWS, Executive Summary, para. 33.
[466] EC, SWS, Executive Summary, para. 34.
[467] EC, SWS, Executive Summary, para. 35.
[468] EC, SWS, Executive Summary, para. 36. *See, also,* EC, SWS, Executive Summary, para. 37 and EC, SNCOS, Executive Summary, para. 7.

BCI deleted, as indicated **[***]**

Airbus. The EC submits that, therefore, Hamburg's measures of land reclamation are not "financial contributions" within the meaning of Article 1.1(a) of the SCM Agreement.[469]

4.287 The EC considers that the US relies on a mistaken legal test and misrepresents key facts. The EC points out that Hamburg did not create a "tailor-made industrial site" for Airbus Germany. It turned wetland into usable land. The internal development of the land was and is still being carried out by Airbus Germany, and when the land is returned to Hamburg after termination of the lease contract it must be undone.[470] Even under the US test on general infrastructure, the Hamburg project would not be excluded from the notion of general infrastructure. With regard to the US argument that the Airbus site was created "exclusively" for Airbus, the EC argues that a government's knowledge of the first user does not render an infrastructure project non-general.[471]

4.288 With regard to the US allegation that the Airbus site – apart from the quay facilities – is not part of the harbour area, the EC notes that it never claimed that the area was covered by the Hamburg Port Law. The EC's argument was that the harbour could easily be expanded to cover the newly created land, should Airbus Germany decide not to continue the lease agreement after its expiration.[472] In addition, the US argument that German planning law restricts the use of the land to aircraft manufacturing and aviation is misplaced. Under German Construction Law, a local "Bebauungsplan" can easily be amended at any time, if the regional "Flächennutzungsplan" so permits. The latter contains no restriction with regard to the aircraft industry and so the "Bebauungsplan" can be amended when the need arises in the future.[473]

4.289 The EC submits that the creation of the *Zone d'Aménagement Concertée* (ZAC) in Toulouse constitutes a measure of general infrastructure.[474] According to the EC, the *Scott Paper* case under EC State aid law is not relevant to this measure, as the facts were assessed in the light of the State aid regime of the EC, and not the SCM Agreement. The EC argues that for that reason alone, this case is not relevant for the present dispute. Second, contrary to the US allegations, the facts in the *Scott Paper* case bear no resemblance to the undisputed facts in Aéroconstellation. In the *Scott Paper*, the authorities turned existing agricultural land into a tailor-made industrial site, by selling land and building a factory warehouse for the benefit of a single company.[475] In the case of Aéroconstellation, the French authorities developed a *Zone d'Aménagement Concerté*, like many other ZACs elsewhere in France, which was then put for sale at what an appraisal confirms was a fair market price. Any company that was interested in purchasing land in the ZAC could do so without restriction, and, indeed, Airbus is only one of many companies that so purchased.[476]

4.290 The EC argues that in Bremen, the extension of the runway falls under the notion of general infrastructure and the specific use by Airbus of the extension is adequately remunerated.[477] The city of Bremen is entitled to provide its citizens with modern transportation facilities and services, including the development and operation of an airport, and to take measures to reduce noise.[478] There

[469] EC, FWS, paras. 779-792.
[470] EC, SNCOS, para. 202.
[471] EC, SNCOS, para. 204.
[472] EC, SNCOS, para. 205.
[473] EC, SNCOS, para. 206.
[474] EC, SWS, Executive Summary, para. 36. *See, also,* EC, SWS, Executive Summary, para. 37 and EC, SNCOS, Executive Summary, para. 7
[475] EC, SWS, para.394.
[476] EC FCCS para. 24.
[477] EC, SWS, Executive Summary, para. 36.
[478] EC, FWS, paras. 869-870.

is no basis to the US claim that the lengthening of the runway was made for the "exclusive use" of Airbus.[479]

(b) The challenged measures do not confer a benefit

4.291 The EC argues that with respect particularly to the Mühlenberger Loch and the ZAC Aéroconstellation, the US clings to the cost incurred by government authorities in connection with these projects as the basis for asserting a "benefit". The cost-to-government standard has been rejected, and Article 14(d) tells us how to apply the benefit to recipient standard to the measures at issue. Specifically, Article 14(d) directs the Panel to assess whether "adequate remuneration" is paid for a good with reference to "prevailing market conditions", or in other words the market value of the good. Moreover, the EC notes that the US fails to cite a single provision of the SCM Agreement that would support its "cost savings" theory. Instead, it latches on to an EC state aid decision that reflects the *sui generis* characteristics of EC state aid law and has no bearing on this dispute.[480]

(i) Hamburg

4.292 The EC argues that, even if the panel were to conclude that the land creation and flood protection measures were not general infrastructure, the financial contribution reflected in the terms of the land lease, and also the leases for the special purpose facilities, does not confer a "benefit". This is because the lease rates were set at fair market value using accepted valuation principles, as affirmed by the City of Hamburg Real Estate Experts Committee.[481]

4.293 According to the EC, the US argument that the land rent should be based, as a surrogate for a market benchmark, on the cost to the City of Hamburg of reclaiming the land and of constructing the flood protection is without merit. It wrongly applies a "cost to government" standard. Article 14(d) of the SCM Agreement unambiguously sets the proper standard for measuring the "benefit" from a financial contribution as the benefit to the recipient.[482]

4.294 The EC notes, moreover, that the market value of the land, the fundamental value needed to measure any benefit to Airbus, is not in dispute. The US real estate expert, Dr. Keunecke, and the City of Hamburg Real Estate Experts Committee agree on the market value of the land.[483] The EC explains that the City of Hamburg Real Estate Experts Committee and Dr. Keunecke disagree only on the required market-based return on that investment. The EC offers calculations which it asserts demonstrate that when both proposed benchmarks are properly reconciled, the Experts Committee and Dr. Keunecke agree on the base measure of return, before Dr. Keunecke's recommended additional return premium of 3 percent.[484] The EC argues that, contrary to the US assertion, Dr. Keunecke's report does not support the suggested additional return premium by any market evidence and that he justifies it by citing to market conditions that are not relevant for the leases at issue.[485] The EC notes that Dr. Keunecke does not dispute the appropriate method to measure lease rates on the land and the special purpose facilities found to be at market by the City of Hamburg Real Estate Experts Committee.[486]

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[479] EC, FWS, paras. 871-874.
[480] EC, SNCOS, Executive Summary, para. 7.
[481] EC, FWS, paras. 799-805.
[482] EC, FWS, paras. 820-827;
[483] EC, FWS, paras. 806-807.-
[484] EC, Answer to Panel Question 267, paras. 115-132.
[485] EC, Answer to Panel Question 267, paras. 115-132.
[486] EC, FWS, paras. 808-817, 828-857; EC, Answer to Panel Question 267, paras. 115-132.

BCI deleted, as indicated **[***]**

4.295 Moreover, the EC submits that Dr. Keunecke's report does not endorse the US cost to government measure of market rent. On the question of using cost rather than value as a measure of benefit, Dr. Keunecke's report states only that *if one accepts* the US legal standard of cost to government, the required lease rate paid by Airbus is too low. Dr. Keunecke does not state that cost is the appropriate measure of market, and the EC notes that he cannot logically do so, as his report's analysis of observed market rates of return on commercial real estate (before the recommended premium for industrial real estate) is based on observed rents as a percentage of value, rather than cost.[487]

4.296 The EC posits, moreover, that the US argument – that the cost-to-government standard is required because the government's investment in creating the infrastructure reflects the savings to the recipient – rests on the flawed premise that Airbus would itself have borne the cost of reclaiming the land and flood protection measures had the city of Hamburg not done so. In fact, the EC argues that evidence it has provided demonstrates that had Hamburg not performed the land reclamation project, Airbus would have located the entire A380 FAL in Toulouse, **[***]**.[488]

4.297 According to the EC, this documentary evidence demonstrates not only that Airbus did not benefit from the land reclamation and flood protection measures, but, additionally, that **[***]**. Airbus located a portion of the final assembly in Hamburg in order to prevent loss of MSF for the A380. Accordingly, **[***]**.[489]

4.298 According to the EC, cost does not provide a reliable measure of benefit to the recipient arising from government economic programs such as land reclamation, because, unlike the case of a private investor, the rental cost to the lessee and the total return to the lessor are not symmetrical. As Dr. Keunecke observed in his report, no private investor (which would include Airbus) with returns limited to lease income, would have reclaimed the land at the Mühlenberger Loch, because the cost would far exceed the value created. However, as a government investor, the City of Hamburg could anticipate other sources of return in addition to the lease payments, including returns generated from the increased economic activity in the form of higher tax revenue generated from increased employment and profits at Airbus and its many local suppliers. This, in turn, would accelerate regional development, thereby generating even greater tax revenue. Accordingly, providing the land to Airbus at market value could trigger economic expansion sufficient to justify the investment by the City. The EC notes that this was not mere speculation on the part of the City of Hamburg, but the finding of an economic consulting firm retained by the City before agreeing to the investment.[490]

4.299 Finally, the EC argues that the US assertion that the City of Hamburg should at least have extracted a rent premium above market because the reclaimed land was adjacent to an existing Airbus facility is equally without merit. The US fails to note that Hamburg and Toulouse were in competition for the location of the A380 final assembly line. In Toulouse, where sufficient land was available to accommodate the entire final assembly facility, Airbus paid **[***]** per square meter for land. For the Hamburg site, Airbus agreed to pay rent on the basis of a **[***]** per square meter market value. That is already a **[***]** premium over the value of comparable land in Toulouse. Competition from Toulouse put a limit on any so-called "premium" that Hamburg could demand.[491]

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[487] EC, SCOS, para. 12. RPQ

[488] EC, Comments on US Answer to Panel Question 155, paras. 154-156.

[489] EC, Comments on US Answer to Panel Question 155, paras. 148-164;EC, Comments on US Answer to Panel Question 219, paras. 380-387.

[490] EC, SCOS, para. 27; EC, Answer to Panel Question 267, para. 115-132.

[491] EC, SCOS, para. 23.

BCI deleted, as indicated **[***]**

4.300 The EC notes that the special-purpose facilities, however, are unlike raw land reclamation. These facilities were built to the specifications requested by Airbus, and the value of the facilities will be used up in whole or substantial part during the lease. In that case, the fair market rent, and accordingly any benefit, is best assessed based on a market return on the cost of constructing the facilities. The EC observes that this is precisely the approach followed by the Hamburg Real Estate Experts Committee, which found the rent agreed to by Airbus to reflect market.[492]

(ii) Bremen

4.301 The EC argues that in Bremen, the specific use by Airbus of the extension of the runway is adequately remunerated.[493]

4.302 The EC points out that as the US itself notes, Airbus pays fees for the use of Bremen airport in accordance with the general fee schedule. The EC notes that the US has not argued that these fees are not at market. Rather, the US seems to imply that Bremen should calculate a fee for Airbus which allows for a return on the costs of building the extension. However, for the reasons given in respect of Hamburg, costs to the government are irrelevant for determining the benefit to the recipient.[494]

(iii) Toulouse

4.303 The EC argues that the US allegations that the sale to Airbus France of a portion of the ZAC Aéroconstellation and the lease of EIG was for less than adequate remuneration is without merit. The EC indicates that a commercial appraiser confirmed that the price of the land purchased by Airbus France in the ZAC Aéroconstellation was consistent with market. As such, no benefit within the meaning of Article 1.1(b) of the SCM Agreement was thereby conferred. The EC considers that the US offers no credible reason why the Panel should ignore direct evidence of the *market price* for industrial land in the ZAC, in comparable ZACs or as provided in the Atisreal appraisal, in favour of the *cost* incurred by French authorities. The EC considers, moreover, that in evaluating the EIG lease, the US grossly overstated the amount of land included in the lease and also overstated the required lease rate of return.[495]

4.304 The EC notes that the US nonetheless asserts "benefits" to Airbus by reference to the cost incurred by the French authorities to create the ZAC. However, it is not relevant to the "benefit" inquiry whether the French authorities recover those costs by virtue of the purchase price paid by Airbus for land. The Appellate Body has stressed that the inquiry in Article 1.1(b) is whether a financial contribution confers a "benefit" on a recipient, relative to a market benchmark. Moreover, the Appellate Body has held that a cost-to-government approach "is at odds with the ordinary meaning of Article 1.1(b), which focuses on the "*recipient* and not on the *government* providing the 'financial contribution'".[496]

(iv) Regional infrastructure measures

4.305 The EC argues that certain of the regional infrastructure measures do not confer a benefit on Airbus because they were given to a company other than Airbus and/or do not relate to LCA.

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[492] EC, Answer to Panel Question 92, para 240; EC, Answer to Panel Question 184, paras. 128-136; EC, SWS, para. 364.

[493] EC, SWS, Executive Summary, para. 36.

[494] EC, FWS, paras. 871-874.

[495] EC, FWS, paras. 922-938; EC, Answer to Panel Question 185, paras. 145-146; EC, Answer to Panel Question 271, paras. 157-165.

[496] EC, FWS, paras. 922-938; EC, SWS, paras. 368-398.

BCI deleted, as indicated **[***]**

(c) Specificity of regional aid

4.306 The EC submits that German, Spanish and British authorities provided grants under generally available schemes at EC, national or sub-national level. Those grants were not limited to "certain enterprises" located within a designated region within the jurisdiction of the granting authority. Rather they were available for all companies in that region, according to objective criteria. These criteria conformed to the requirements of Article 2.1(b) of the SCM Agreement and footnote 2 thereto. Just as any other company in the designated region, Airbus could benefit from a regional aid scheme that in itself is perfectly in line with the SCM Agreement.[497]

4.307 Further, the EC explains why in its view the grants for Airbus facilities in Nordenham (Germany), Sevilla, La Rinconada, Toledo, Puerto de Santa Maria, Puerto Real (Spain) and Broughton (United Kingdom) are not specific within the meaning of Article 2.2 of the SCM Agreement. The EC notes in particular that Article 2.2 does not make regional aid, *i.e.*, aid generally available to all enterprises in specifically designated regions, specific.[498] In fact, such aid is quite clearly non-specific under Article 2.2. With regard to the US argument concerning Article 8.2(b), the EC explains that the US misunderstands the dynamics of the Uruguay Round negotiations. The "green lighting" of regional aid was a key EC policy objective, against the background of a definition of specificity which was changing throughout the negotiations.[499] The EC argues that the US blatantly distorts the negotiating history of the provision, effectively claiming that federal states should have an inbuilt advantage under the SCM Agreement, an outcome agreed by nobody.[500]

4.308 Finally, the EC points out that several of the Spanish measures concern activities which are not connected the manufacture of Airbus LCA (*e.g.*, military aircraft). The EC further explains that the support to Broughton was not regional aid, but was granted under two schemes which are generally available in Wales. The EC argues that the US is alleging specificity on the basis of a previous application for a regional aid grant, which was refused.[501]

G. WHETHER THE GERMAN GOVERNMENT HAS SUBSIDIZED AIRBUS BY ITS DECISION IN 1998 FORGIVING AT LEAST DM 7.7 BILLION OF DEUTSCHE AIRBUS' GOVERNMENT DEBT

1. Arguments of the United States

4.309 The US argues that Deutsche Airbus relied almost entirely on Launch Aid and other German government subsidies to underwrite its early participation in the Airbus project. The US observes that by the late 1990s, the total accumulated debt that Deutsche Airbus owed to the German government amounted to at least DM 11,000,000,000 (in principal alone), including DM 9,400,000,000 related to A300/A310 and A330/A340 Launch Aid and other, smaller loans ("repayable grants") that the government had provided to the company. In 1998, the German government allowed Deutsche Airbus to pay DM 1,735,000,000 to "settle" its DM 9,400,000,000 debt. The government forgave the remaining DM 7,700,000,000.[502]

4.310 The US notes that the EC does not dispute these facts. Nevertheless, it would have the Panel believe that the elimination of DM 7,700,000,000 in debt did not confer a benefit on the company. Its

[497] EC, FNCOS, Executive Summary, para. 15. *See, also,* EC, FWS, Executive Summary, para. 51
[498] EC, SWS, Executive Summary, para. 37. *See, also,* EC, SNCOS, Executive Summary, para. 7.
[499] EC, SNCOS, para. 225.
[500] EC, SNCOS, para.226.
[501] EC, SNCOS, paras. 233-239.
[502] US, FWS, Executive Summary, para. 60. *See, also,* US, SWS, Executive Summary, para. 57 and US, FNCOS, Executive Summary, para. 13.

BCI deleted, as indicated **[***]**

theory is that the 1998 transaction was a fair-value payment for the net present value of the outstanding debt.[503] The US argues that whether this transaction is called debt forgiveness or a settlement for fair value does not matter. Either way, it is a subsidy.[504]

4.311 The US points out that as the panel stated in *Korea – Commercial Vessels*, debt forgiveness is "comparable to a cash grant, as funds that were previously provided as a loan, against interest, are now provided for free, given the removal of the repayment obligation." Therefore, the German government's forgiveness of Deutsche Airbus' repayment obligations constitutes a financial contribution to Deutsche Airbus within the meaning of Article 1.1(a)(1)(i). It also confers a benefit on Deutsche Airbus. The US submits that debt forgiveness is comparable to a cash grant, and therefore confers a benefit – and thus constitutes a subsidy – for the same reasons. Finally, the US asserts that the debt forgiveness is specific because it was effectuated through an *ad hoc* agreement between the German government and Deutsche Airbus.[505]

4.312 Although the US does not accept the EC characterization of the 1998 transaction, the characterization does not change the fact that the transaction conferred a benefit. The US asserts that under either characterization, the German government effectively turned potential benefits that Deutsche Airbus might have enjoyed in the future from savings on debt provided interest-free by the German government into an actual cash grant of DM 7.7 billion provided in 1998.[506]

4.313 The US considers that the EC wrongly accuses it of responding to the EC characterization of the 1998 transaction by asserting a new claim. In fact, the US simply has responded to the EC on its own terms, demonstrating that even if, *arguendo*, the EC characterization of the 1998 transaction were accurate, the transaction still conferred a benefit. The EC theory that the US really is challenging the German government's 1989 aid package to Deutsche Airbus rather than the 1998 debt settlement, and that the aid package is outside the Panel's terms of reference because it was not identified in the US panel request is mistaken. First, the US panel request refers, in relevant part, not only to the German government's "forgiveness" of debt owed by Deutsche Airbus but also to its earlier "assumption ... of ... debt accumulated by Deutsche Airbus."[507]

4.314 Second, the EC mistakes the relevance of the 1989 aid package to the US claim. The US explains that it is not challenging the aid package in and of itself. It is challenging the 1998 debt settlement transaction. That transaction appears to be a forgiveness of the approximately DM 7,700,000,000 difference between the face amount of the debt and the amount the company actually paid the government. In light of the EC response, the US re-examined the transaction from the point of view of the EC characterization. That necessarily entailed consideration of the elements that determined the fair value of the debt, notably its highly preferential repayment terms. This showed that following the EC characterization leads economically to the same result as originally observed by the US.[508]

2. Arguments of the European Communities

4.315 The EC argues that the 1998 settlement of outstanding repayment obligations owed the German Government by Deutsche Airbus does not constitute a subsidy.

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[503] US, SWS, Executive Summary, para. 57.
[504] US, FNCOS, Executive Summary, para. 13.
[505] US, FWS, Executive Summary, para. 61
[506] US, SWS, Executive Summary, para. 58.
[507] US, SWS, Executive Summary, para. 59. *See, also,* US closing statement, first meeting Executive Summary, para. 21-23 and US, SNCOS, Executive Summary, para. 12
[508] US, SWS, Executive Summary, para. 60.

BCI deleted, as indicated **[***]**

4.316 The EC argues, first, that the US failed to make a *prima facie* case showing that Airbus SAS – the only company which is currently producing LCA in the EC and, in the US view, causing present adverse effects to US interests – actually benefits from the alleged subsidy.[509]

4.317 Second, the EC argues that the premise on which the US argument is based – *i.e.*, the existence of DM 9.4 billion in debt owed the German government – is factually incorrect. No such debt existed on Deutsche Airbus' books, as confirmed by, *inter alia*, the company's financial statements.[510] The EC argues that, therefore, the US assertions that the 1998 settlement constituted "debt forgiveness" fail.[511] According to the EC, the 1998 settlement reflected the fair market value of the repayment claims that the German government actually held in 1998 against Deutsche Airbus, *i.e.*, claims for repayment of prior financial contributions subject to certain conditions.[512] Accordingly, the 1998 settlement does not constitute a subsidy.

4.318 Specifically, the EC argues that the repayment claims at issue in the 1998 settlement were valued by an independent international auditing firm, which set out its findings on the fair market value of those claims in a report provided to the Panel.[513] The EC notes that the US has not challenged the robustness of that valuation.[514] The contemporaneous valuations by independent financial experts formed the basis for the 1998 settlement.[515] The settlement amount even exceeded the value placed on the claims held by the German government, which – the EC argues – precludes a finding of a benefit.[516]

4.319 The EC further explains that the settlement amount in excess of the value determined by the international auditing firm can be seen as the application to the projected cash flow stream of a lower discount rate than used in the valuation. The EC argues that it shows that the actual settlement amount implies a discount rate that equals the risk free German government borrowing rate. According to the EC, this means that the parties discounted the stream of *likely* future payments by Deutsche Airbus to the Government as if those payments were certain. This results in assigning the highest possible present value to the stream of future payments.[517]

4.320 The EC argues that, for these reasons, the 1998 settlement does not confer a benefit or constitute a subsidy.

4.321 The EC also argues that instead of rebutting the contemporaneous evidence showing that the 1998 settlement was made on market terms, the US raises a legally and factually new claim, challenging, in addition to the 1998 settlement, the terms of the 1989 restructuring by arguing that Deutsche Airbus received a substantial financial benefit "in the form of an interest rate of zero".[518] According to the EC, the US concedes that the allegedly "highly preferential repayment terms" emanate from the terms of the 1989 restructuring, *i.e.*, a legally and factually distinct measure from the 1998 settlement.[519] The EC points out that this new claim against a new measure appears neither in the US first written submission, nor in its panel request, and thereby falls outside the jurisdiction of

[509] EC, FWS, Executive Summary, para. 57.
[510] EC, FWS, para. 1197.
[511] EC, FWS, paras. 1175-1176.
[512] EC, FWS, paras. 1175-1176.
[513] EC, FWS, para. 1186-1202. *See, also*, EC, FNCOS, para. 18.
[514] EC, SNCOS, para. 243.
[515] EC, FWS, para. 1176.
[516] EC, FWS, paras. 1193, 1202.
[517] EC, SNCOS, paras. 247-248.
[518] EC, FNCOS, para. 108. EC, SWS, paras. 586-590.
[519] EC, SNCOS, paras. 247-248. .

this Panel.[520] The Panel cannot, therefore, make findings or recommendations concerning the 1989 restructuring as a measure at issue.[521] The EC notes that the US subsequently confirmed that it is not challenging the 1989 restructuring "in and of itself", but that it is challenging the 1998 settlement for which the 1989 restructuring is "factual background".[522] Yet, the EC asserts that the US characterization of its approach cannot distract from the fact that the new US challenge is not merely a new argument, but rather a new claim which relates to a different measure that is outside the terms of reference of the Panel.[523] According to the EC, the US cannot challenge, as conferring a subsidy through the *1998* settlement, measures that were put in place in the *1989* restructuring.[524] In this regard, the EC notes, again, that the 1998 settlement was based fully on the terms of the 1989 restructuring and did not provide any advantage to Deutsche Airbus (as evidenced also by contemporaneous documents).[525]

4.322 Finally, the EC argues that even if the Panel were to find that the new US claim is within its terms of reference or that it is entitled to assess the 1989 restructuring of Deutsche Airbus as "factual background" to its claim of subsidization from the 1998 settlement, the US claim would fail nonetheless. The EC explains that it is the US burden to demonstrate that the 1989 restructuring itself constitutes a subsidy and that the US has failed to so demonstrate.[526] Thus, even if the US approach was correct as a matter of law, which it is not, the US claims regarding two "cherry-picked" elements of the 1989 restructuring – the repayment terms and the KfW investment addressed below – must fail, because in these proceedings the US neither established nor claimed that the 1989 restructuring constitutes a subsidy.[527] The US decision to limit its challenge cannot alleviate it of its burden to demonstrate that the 1989 restructuring constitutes a subsidy when challenging certain elements thereof.[528] The EC, moreover, submits that the 1989 restructuring is consistent with the actions a private investor in the shoes of the German government would have undertaken to minimize its losses.[529]

H. WHETHER THE GERMAN GOVERNMENT'S 1989 INVESTMENT IN DEUTSCHE AIRBUS OR THE SUBSEQUENT 1992 TRANSFER OF ITS OWNERSHIP SHARE IN DEUTSCHE AIRBUS TO THE DAIMLER GROUP IS A SPECIFIC SUBSIDY TO AIRBUS

1. Arguments of the United States

4.323 The US argues that the German government's transfer of its ownership share in Deutsche Airbus to the Daimler Group is a specific subsidy to Airbus.[530] The US submits that in 1989, the German government agreed to make an equity infusion into Deutsche Airbus by purchasing a 20 percent share of the company for DM 505,000,000 (EUR 258,000,000). Three years later, the German government agreed to give the shares to DASA, without compensation. The US first asserts that the equity infusion is a subsidy because the German government's decision to provide the DM 505,000,000 infusion to Deutsche Airbus was inconsistent with the usual investment practice of private investors in Germany. The US then asserts that the 1992 share transfer is a subsidy because it

[520] EC, SWS, paras. 586-590.
[521] EC, Answer to Panel Question 187, para. 150.
[522] EC, SNCOS, para. 249.
[523] EC, SWS, paras. 585-591.
[524] EC, Answer to Panel Question 187, paras. 153-156.
[525] EC, SWS, paras. 565-570, 593-594. *See, also,* EC closing statement, first meeting, para. 23.
[526] EC, SNCOS, para. 255. *See, also,* EC, Answer to Panel Question 187, paras. 157-160, 165.
[527] EC, Answer to Panel Question 187, para. 157.
[528] EC, Answer to Panel Question 187, para. 162.
[529] EC, FWS, paras. 1177-1180; EC, Answer to Panel Question 100, para. 276.
[530] US, FWS, Executive Summary, para. 62.

BCI deleted, as indicated **[***]**

was, in effect, a DM 505,000,000 (EUR 258,000,000) grant. The US also asserts that both subsidies were specific to Airbus.[531]

4.324 The US contends that Airbus benefits from equity infusions provided by the German government at moments when a market-oriented investor would not have made such investments due to the dire financial condition of the German Airbus company.[532] The US notes that the EC responded that the government' action was consistent with the usual practice of private investors. The US considers that the EC relies on a false benchmark that it holds up as a market benchmark. The EC asserts that "at the same time" that the government made its investment a private investor, "Daimler (through MBB)," also made an investment in Deutsche Airbus. However, the US asserts that the EC omits the fact that Daimler's willingness to make its investment depended heavily on the government first providing a substantial aid package which included the government's own investment.[533]

4.325 In addition, the US considers that the EC errs in its attempt to dis Crédit the evidence relied upon by the US. In the US view, the EC incorrectly suggests that the US based its assessment of Deutsche Airbus' equity-worthiness solely on an assessment of the financial condition of the company's parent (MBB). While noting the dire state MBB was in when Daimler invested in MBB, the US points in particular to the financial distress that Deutsche Airbus was in at the time and was expected to be in for the foreseeable future.[534]

4.326 The US points out that the EC's only basis for calling the original stock purchase a commercial transaction is a comparison to an investment by Daimler Benz. However, Daimler's investment was not independent of the German government's equity infusion such that it might corroborate the commercial nature of the infusion. As for the German government's later return of Deutsche Airbus shares to MBB, the US argues that the EC has yet to provide any explanation of why both Daimler and the then-Director General for Trade at the European Commission described the transaction as compensation for the withdrawal of the German exchange rate insurance scheme following an adverse dispute settlement panel report.[535]

2. Arguments of the European Communities

4.327 The EC argues that neither the German government's 1989 investment in Deutsche Airbus, nor the 1992 transfer to MBB of its shares in Deutsche Airbus, constitutes a subsidy.

4.328 The EC explains, first, that the US failed to make a *prima facie* case and show that either of the alleged subsidies benefits Airbus SAS, which today develops, manufactures and sells LCA alleged to cause adverse effects to the US interests.[536]

4.329 Second, with respect to the 1992 share transfer, the EC explains that this transaction could not have conferred a benefit on Deutsche Airbus because it was MBB that received the shares in Deutsche Airbus held by the German government.[537] The EC notes that the US has not explained how a subsidy to one company – which did not manufacture LCA at the time and does not do so today – can morph into a subsidy to a company that does.[538] The EC also explains that the participation of KfW in Deutsche Airbus was conceived, from the very beginning, as a *temporary* measure and that Daimler,

[531] US, FWS, Executive Summary, para. 62.
[532] US, SWS, Executive Summary, para. 61.
[533] US, SWS, Executive Summary, para. 61.
[534] US, SWS, Executive Summary, para. 62.
[535] US, SNCOS, Executive Summary, para. 11.
[536] EC, FWS, paras. 1203, 1212.
[537] EC, FNCOS, para. 111
[538] EC, FNCOS, para. 111.

via MBB, exercised its commitment to take over KfW's 20 percent stake in Deutsche Airbus.[539] The EC provides evidence showing that the determination of the value of KfW's shares in 1992 was based on the advice of two independent international respected accounting auditing firms and that the transfer of the KfW's shares to MBB was not free of charge, as the US asserts.[540] In fact, in addition to the market value of the shares in 1992, the transfer price of KfW shares also included additional compensation envisioned under the terms of the 1989 restructuring.[541] Therefore, contrary to the US assertions, the transfer was not free of charge. It also did not benefit Deutsche Airbus.[542] Finally, the EC notes that the US accepts that the 1992 share transfer was part of a transaction that amended certain terms of the 1989 restructuring, and that the US agrees that, on balance, this transaction did not affect positively or negatively the economic position of Deutsche Airbus. As such, the 1992 transfer cannot constitute a subsidy.[543]

4.330 The EC also reacts to the US conditional challenge to the 1989 investment by KfW in Deutsche Airbus.[544] The EC explains that the investment did not constitute a subsidy as it was not made on terms more favourable than those available at market, as evidenced by the fact that a private investor – Daimler Benz, through MBB – invested in Deutsche Airbus at the same time and on the same conditions. As such, the investment was consistent with the usual investment practice of private investors.[545]

4.331 The EC argues that this conclusion is not undermined by the fact that the investments by the German government and Daimler Benz in Deutsche Airbus were part of the 1989 restructuring of Deutsche Airbus. While the US argues that the "separation of the alleged 'restructuring package' … from the KfW capital injection is artificial", the EC argues that it is an artificiality that the US has created by challenging only a particular aspect of the 1989 restructuring package.[546] In fact, it is an artificiality that the US has created by "cherry-picking" certain elements of the 1989 restructuring for challenge, while ignoring others.[547] Moreover, the EC submits that a financial restructuring is not *per se* a subsidy.[548] As such, it is not possible to conclude that the investment by KfW is a subsidy without a complete assessment of the 1989 restructuring of Deutsche Airbus.[549] The EC recalls its arguments that the 1989 restructuring is outside the Panel's terms of reference and notes that the US clarified that it is not challenging the 1989 restructuring "in and of itself".[550] Finally, the EC argues that even if the Panel were to take account of the 1989 restructuring as factual background, the US failed to demonstrate that the 1989 restructuring itself constitutes a subsidy.[551] The EC submits that the 1989 restructuring is consistent with the actions a private investor in the shoes of the German government would have undertaken to minimize its losses.[552]

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[539] EC, FWS, paras. 1206-1207. *See, also,* EC, FWS, para. 1213.
[540] EC, FWS, paras. 1208-1209. *See, also,* EC, FNCOS, para. 112.
[541] EC, SWS, Executive Summary, para. 44.
[542] EC, SWS, para. 602.
[543] EC, SWS, para. 603.
[544] EC, FWS, Executive Summary, para. 58.
[545] EC, FWS, paras. 1214-1216.
[546] EC, Comments on US Answer to Panel Question 157, paras. 175-176.
[547] EC, Answer to Panel Question 187, paras. 157-162.
[548] EC, Comments on US Answer to Panel Question 224(a), paras. 405-411.
[549] EC, SNCOS, Executive Summary, para. 8. .
[550] EC, SNCOS, para. 261.
[551] EC, Answer to Panel Question 187, paras. 152, 157-160, 165. *See, also,* EC, Comments on US Answer to Panel Question 157, para. 179;
[552] EC, FWS, paras. 1177-1180; EC, SWS, para. 564; EC, Answer to Panel Question 100, para. 269; Question 187, paras. 161. 163-166.

BCI deleted, as indicated **[***]**

4.332 Finally, the EC argues that, in case the Panel agrees with the US attempt to revoke the conditionality of its claim against the 1989 KfW investment, the Panel must deny the US assertion that the DM 505 million invested by the German government can constitute a subsidy in 1989 and again constitute a subsidy of the same amount in 1992.[553]

I. WHETHER CERTAIN CAPITAL CONTRIBUTIONS AND 1998 TRANSFER OF DASSAULT SHARES TO AÉROSPATIALE ARE SPECIFIC SUBSIDIES TO AIRBUS SAS

1. Arguments of the United States

4.333 The US argues that the equity infusions that the French government provided to Aérospatiale are specific subsidies.[554] The US explains that in the late 1980s and in the 1990s, the French government made a series of equity infusions into the French Airbus company Aérospatiale. First, in 1987 and 1988, the French government made two infusions of FF 1,250,000,000, for a total of FF2,500,000,000. Then, in 1992, the government injected another FF 1,400,000,000 into Aérospatiale through the state-controlled bank Crédit Lyonnais. Two years later, in 1994, the French government provided another FF 2,000,000,000 infusion into Aérospatiale. Finally, in 1998, the French government transferred its 45.76 percent share in the capital of Dassault Aviation S.A. ("Dassault") to Aérospatiale. The share transfer was worth approximately FF 5,280,000,000.[555]

4.334 The US discusses Aérospatiale's financial condition and performance at the time of each of the equity infusions and contends that each of the decisions to invest in the company was inconsistent with the usual investment practice of private investors. Therefore, according to the US, each equity infusion was a subsidy within the meaning of the SCM Agreement. The US also contends that each infusion was specific to Airbus.[556]

4.335 In the US view, the EC fails to rebut the US showing that French equity infusions to Aérospatiale from 1987 to 1994 were not consistent with the usual investment practice of private investors. The US notes that the EC explains why Aérospatiale was in critical need of additional funds in the 1987 to 1994 time period, but it does not explain why a private investor would have provided them. Its discussion of the views of Boeing's and Aérospatiale's management ignores that the relevant test is the usual investment practice of private investors, not the views of management.[557] The US notes that to make its case with respect to the French infusions, the EC relies on evidence such as statements by management (rather than potential private investors) and *ex post* information about returns supposedly realized on those investments. The EC does not provide any evidence of contemporaneous studies or analyses by the French government on the investment prospects of Aérospatiale. It also looks selectively at indicators of financial performance, ignoring Aérospatiale's abysmal balance sheet, its troublesome financial ratios, and the poor prospects it would have faced if it had not received very significant additional government financing.[558]

4.336 Furthermore, the US points out that the EC improperly relies on evidence newly included with its second written submission, which is not "objective," as it consists almost entirely of internal documents from Aérospatiale, Airbus GIE, and Crédit Lyonnais. Other evidence focuses on demand for aircraft in general, rather than the prospects for Airbus in particular.[559]

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[553] EC, Comments on US Answer to Panel Question 161, paras. 206-210.
[554] US, FWS, Executive Summary, para. 63
[555] US, FWS, Executive Summary, para. 63
[556] US, FWS, Executive Summary, para. 64.
[557] US, FNCOS, Executive Summary, para. 15.
[558] US, SWS, Executive Summary, para. 63.
[559] US, SNCOS, Executive Summary, para. 10.

BCI deleted, as indicated **[***]**

4.337 With respect to the French government's December 1998 transfer to Aérospatiale of its 45.76 percent equity stake in Dassault Aviation, the US notes that the EC argues that "nothing of economic significance occurred," because the French government effectively did nothing more than transfer its Dassault Aviation shares to itself.[560] The US contends that while the EC may believe this is true from the government's perspective, the transaction provided a significant benefit to Aérospatiale.[561] The US considers that the EC mistakenly assumes that the relevant perspective is that of the French government rather than that of Aérospatiale, which unquestionably received a valuable asset for which it paid nothing.[562]

4.338 The US asserts that the main problem with the EC argument is that it focuses on the intentions and perspective of the grantor of the infusions. The US explains that under the SCM Agreement, the relevant perspective is that of the recipient. From that perspective, the infusions at issue in this dispute unquestionably provide a benefit and, therefore, constitute subsidies.[563]

4.339 The US also notes that the EC argues that when Aérospatiale was later combined with Matra Hautes Technologies to form ASM, the value of its "45.76 percent stake in Dassault was fully captured in the price charged for ASM shares in the public offering that took place in 1999." According to the US, neither argument is correct. The US explains that the problem with the EC's first argument is that it assumes that the relevant point of view is that of the government rather than that of Aérospatiale. Moreover, the EC assertion that "nothing of economic significance occurred" is belied by the fact that in order to persuade the private owners of Dassault Aviation to consent to what amounted to a tie-up with Aérospatiale, the French government had to give up the valuable double voting rights associated with its shares in Dassault Aviation.[564]

4.340 As for the EC's second argument, the US notes that the EC ignores that the French government received no compensation for giving up voting control in Dassault Aviation. Also, the price charged for ASM shares in the 1999 public offering was based not on independent "fairness opinions," but on valuations by investment banks (post-dating the actual Dassault Aviation transaction) that sought to ratify a previously identified outcome.[565]

2. Arguments of the European Communities

4.341 The EC rebuts the US allegations that the four subscriptions of new capital made by the French State in Aérospatiale in years 1988, 1989, 1992 and 1994 and the transfer of Dassault shares to Aérospatiale in 1998 constitute subsidies. The EC submits that the US did not establish that these alleged subsidies have benefited Airbus SAS, which is the only company that produces Airbus LCA (*i.e.*, the product which, in the US view, causes adverse effects to US interests) in the EC.[566] Additionally, the EC notes that the US ignores that the capital increases in Aérospatiale concerned a company which no longer manufactures LCA.[567]

4.342 The EC also rebuts the US allegation that the four subscriptions of new capital by the French State in Aérospatiale in 1988, 1989, 1992 and 1994 were not in accordance with the usual investment practice of private investors.[568] In the EC view, the US conclusion that the French State did not act

[560] US, SWS, Executive Summary, para. 64.
[561] US, FNCOS, Executive Summary, para. 15.
[562] US, SNCOS, Executive Summary, para. 10.
[563] US closing statement, first meeting Executive Summary, para. 25.
[564] US, SWS, Executive Summary, para. 64.
[565] US, SWS, Executive Summary, para. 65.
[566] EC, FWS, Executive Summary, para. 55.
[567] EC, FNCOS, Executive Summary, para. 17.
[568] EC, SWS, Executive Summary, para. 41.

BCI deleted, as indicated **[***]**

consistently with "usual investment practice" is fundamentally wrong. This is because the US based its analysis solely on data concerning Aérospatiale's past financial performance and did not take account of Aérospatiale's future prospects at the time each investment was made. The data regarding past performance put forward by the US also were exaggerated.[569] In the EC view, the US errs in assuming that a "usual investor" invests solely on the grounds of a company's past performance. The EC also asserts that for industries, such as the LCA industry, with long and costly development cycles, it is imperative to invest even during periods of weak performance.[570] The French State's prospects of a favourable return on each of the investments into Aérospatiale at the time were very good, which also is confirmed by later developments.[571]

4.343 The EC also argues that Boeing's own case underscores the forward-looking nature of investors' behaviour and explains that poor financial performance did not stop Boeing from investing in its future.[572] The EC notes that despite abysmal financial performance in the early 1990s, Boeing dramatically increased its investment in commercial aircraft assets by 82per cent and assumed significant additional debt. Boeing's assessment of positive future prospects driven by forecasts of dramatic growth in LCA passenger demand led it and its investors to look beyond the firm's poor performance in recent years and to increase investment in the future.[573] In the late 1980s and early 1990s, Aérospatiale and its shareholder drew the same conclusion.[574]

4.344 The EC explains that while the past performance of Aérospatiale may not have been as robust as Aérospatiale or the French State might have wished, investors do not invest on the grounds of a company's past performance – to the contrary, they assess, first and foremost, companies' future prospects. While the US expressly acknowledged this approach as being correct (in its response to Question 26 from the Panel, the US stated that "investors commit capital based on their assessment on potential earnings in the years ahead" and "evaluate company's future prospects"), it seems to have ignored the contemporaneous evidence of Aérospatiale's future prospects that the EC provided. In any event, in its second written submission, the EC provides to the Panel an even more comprehensive and detailed overview of the contemporaneous evidence of the very favourable prospects for the LCA industry and expected high demand for Airbus planes that, according to the EC, was available to informed investors, including the French State, at the time of each of the challenged capital contributions. The EC also provides evidence which it asserts shows that the French State, Aérospatiale's sole shareholder, was closely informed about the business plans and prospects of the company. It is in light of all of this evidence that the EC concludes that the US position is untenable.[575]

4.345 With regard to the French State's 1998 transfer of its shares in Dassault Aviation to Aérospatiale, the EC argues that it was not an "investment" and did not have any economic effect on Aérospatiale.[576] The EC explains that unlike the four capital subscriptions, the contribution of the Dassault Aviation shares by the French State was made to facilitate the consolidation and privatization of the French aerospace industry and that the French State was adequately compensated for the transfer of its shares in Dassault Aviation to Aérospatiale.[577] The EC asserts that the French state acted as any market investor would have – namely, by pooling assets in its different aerospace holdings together before selling them, in order to realize a higher return. The EC points out that the

[569] EC, FWS, Executive Summary, para. 55.
[570] EC, FWS, para. 1139.
[571] EC, FNCOS, Executive Summary, para. 17.
[572] EC, FWS, para. 1142.
[573] EC, SWS, para. 532.
[574] EC, SWS, para 533.
[575] EC, SWS, Executive Summary, para. 41.
[576] EC, FNCOS, Executive Summary, para. 17.
[577] EC, FWS, Executive Summary, para. 56.

BCI deleted, as indicated **[***]**

US has not established that this action would have been contrary to the usual investment practice of private investors. Further, the EC submits that since the French State was fully compensated for the value of Dassault Aviation shares in the context of Aérospatiale's subsequent privatization, in which Dassault Aviation shares were valued independently from those of Aérospatiale, the US also cannot establish a subsidy on any other grounds.[578]

4.346 The EC also argues that with respect to the capital contributions and share transfer by the French State, it presented voluminous contemporaneous evidence showing the capital contributions and share transfer were consistent with the usual investment practice of private investors. The French State did not secure the 30 percent control premium on the transfer of Dassault Aviation shares because it was legally impossible for the State to sell its control.[579]

4.347 Finally, the EC points out that the US assertion that "while Aérospatiale was able to obtain billions of francs in subsidized capital, Boeing was forced to assume 'significant additional debt'" speaks volumes about the arguments brought by the US in this case. Boeing's additional debt is irrelevant to the question of whether a specific capital increase in Aérospatiale constitutes a subsidy or not. There is ample evidence that each of the challenged investments was done with the expectation of a significant return.[580]

J. WHETHER RESEARCH AND DEVELOPMENT FUNDING THAT THE EUROPEAN COMMISSION AND THE MEMBER STATES PROVIDE TO AIRBUS ARE SPECIFIC SUBSIDIES

1. Arguments of the United States

4.348 The US argues that the EC and the Airbus governments also subsidize Airbus by helping to fund its research and development efforts. The US explains that the subsidies primarily take the form of straight cash grants, although in some cases they have taken the form of non-commercial loans. The primary vehicles for the subsidies at the European Commission level are the so-called EC Framework Programs, which the EC has maintained for many years. At the member State level, and at the sub-national level, the vehicles are dedicated programs that the governments have established for the specific purpose of funding aeronautics research.[581]

(a) EC Framework Programs

4.349 First, the US argues that the R&D funding that the EC provides to Airbus under the EC "Framework Programs" are specific subsidies. The US submits that for many years, the EC has provided grants to Airbus under the so-called EC Framework Programs to assist the company in funding its research and development efforts. The EC provides the grants to research consortia that Airbus leads or in which it is a key participant. Each grant is for an individual, discrete research project focusing on a particular aeronautics technology or production process. A primary goal of the grants is to "improv{e} the competitiveness of the European aeronautical industries... ."[582]

4.350 The US notes that the EC has confirmed that all of the funding that the EC provides to Airbus under the Framework Programs takes the form of grants. Article 1.1(a)(1)(i) of the SCM Agreement

[578] EC, SWS, Executive Summary, para. 42
[579] EC, SNCOS, Executive Summary, para. 8.
[580] EC, FCCS, Executive Summary, para. 11.
[581] US, FWS, Executive Summary, para. 65.
[582] US, FWS, Executive Summary, para. 66.

BCI deleted, as indicated **[***]**

includes grants among the types of "direct transfers of funds" that constitute financial contributions within the meaning of the SCM Agreement.[583]

4.351 The US argues that grants confer benefits because, as the panel stated in *US – Cotton*, they "place the recipient in a better position than the recipient otherwise would have been in the marketplace." Therefore, since EC Framework Program funding takes the form of grants, it necessarily confers benefits – and thus constitutes subsidies – under Article 1.1 of the SCM Agreement. In addition, the US argues that the subsidies are specific to Airbus and/or the aeronautics industry because each Framework Program has a sub-budget that is specific to the aeronautics industry, and because research proposals must be aeronautics-related.[584]

(b) German funding

4.352 Second, the US argues that the R&D funding that German Federal Authorities provide to Airbus under their research and development programs are specific subsidies. The US explains that for many years, the German Federal Government and the sub-federal ("Länder") governments of Hamburg, Bremen, and Bavaria have provided grants to Airbus to help fund its civil aeronautics research and development efforts. The Federal government has provided at least EUR 695,000,000 – including EUR 217,000,000 since 1995 under a series of Aeronautics Research Programs ("Luftfahrtforschungsprogramme" or "Lufo" 1, 2, and 3). The Länder governments have provided tens of millions of euros of additional funds.[585]

4.353 The US notes that the EC concedes that all of the civil aeronautics R&D funding that the German Federal and sub-federal governments provide to Airbus takes the form of grants. Therefore, for the same reasons that the EC framework grants are subsidies, the German Federal and sub-federal grants are subsidies. In addition, the US argues that the subsidies are specific because Germany disburses the subsidies pursuant to programs that are dedicated specifically to aeronautics.[586]

(c) French funding

4.354 Third, the US argues that the R&D funding that French authorities provide to Airbus under their research and development program are specific subsidies. The US explains that between 1986 and 2005, the French Government budgeted over EUR 1.2 billion in grants to the aeronautics industry for civil aeronautics research and development ("recherche amont de l'aéronautique"). Based on public information, DPAC budgeted EUR 391,000,000 from 1986 to 1993, and EUR 809,000,000 from 1994 to 2005. During the Annex V process, the EC conceded that Airbus received a substantial amount of the DPAC funding from 1994 to 2005, although it refused to provide any information regarding the 1986 to 1993 time period.[587]

4.355 The US notes that the EC confirms that all of the R&D funding that French authorities provide to Airbus takes the form of grants. Therefore, for the same reasons that the EC framework grants are subsidies, the French government's grants are subsidies. In addition, the US argues that the subsidies are specific because France provides the grants pursuant to a budget that is dedicated to

[583] US, FWS, Executive Summary, para. 67.
[584] US, FWS, Executive Summary, para. 68.
[585] US, FWS, Executive Summary, para. 69.
[586] US, FWS, Executive Summary, para. 70.
[587] US, FWS, Executive Summary, para. 71.

BCI deleted, as indicated **[***]**

"aeronautic construction," and the government limits access to the grants to aeronautics manufacturing companies.[588]

(d) UK funding

4.356 Fourth, the US argues that the R&D funding that UK authorities provide to Airbus under their research and development programs are specific subsidies. The US explains that for many years, the UK Department of Trade and Industry ("DTI") has provided aeronautics-related research and development grants to Airbus research consortia that Airbus leads or in which it is a key participant. Since 1992, DTI has agreed to provide tens of millions of pounds in grants to Airbus research consortia under the CARAD program (subsequently renamed the Aeronautics Research Programme ("ARP")). In addition, in 2004, the UK replaced the CARAD program with the so-called "Technology Program" ("TP"). DTI has committed additional millions of pounds to Airbus under the TP program.[589]

4.357 The US notes that the EC concedes that all of the funding the DTI has agreed to provide to Airbus research consortia under CARAD/ARP and TP has taken the form of grants. Therefore, the UK's grants under CARAD/ARP and TP are subsidies for the same reasons that the EC framework grants are subsidies. In addition, the subsidies are specific because CARAD/ARP grants are limited to entities carrying out research in aeronautics technologies and TP grants are awarded through calls for proposals that are limited to aeronautics-related technologies.[590]

(e) Spanish funding

4.358 Fifth, the US argues that the R&D funding that Spanish authorities provide to Airbus under their research and development program are specific subsidies. The US submits that like the German, French, and UK governments, the Spanish Government provides funding to Airbus to help underwrite Airbus' R&D efforts. The US explains that the funding takes the form of loans with better than commercial terms. The US explains that the Spanish government disburses the funding through two programs, the Plan Tecnológico Aeronáutico ("PTA"), and the Programa de Fomento de Innovación Técnica ("PROFIT"). Airbus received the PTA loans between 1993 and 2003, and the PROFIT loans between 2000 and 2007.[591]

4.359 Article 1.1(a)(i) of the SCM Agreement includes loans among the types of "direct transfers of funds" that constitute financial contributions within the meaning of the SCM Agreement. Thus, the loans are financial contributions under the SCM Agreement. In addition, they confer benefits on Airbus because Spain provides the loans on better than commercial terms. Thus, the loans are subsidies within the meaning of Article 1.1 of the SCM Agreement. In addition, they are specific because the government explicitly limited access to funding under the programs to aeronautics companies involved in the manufacturing, design, supply and maintenance of aircraft and aircraft parts, and to engineering services companies and research institutions and universities developing specific technologies with aeronautics use.[592]

[588] US, FWS, Executive Summary, para. 72.
[589] US, FWS, Executive Summary, para. 73.
[590] US, FWS, Executive Summary, para. 74.
[591] US, FWS, Executive Summary, para. 75.
[592] US, FWS, Executive Summary, para. 76.

BCI deleted, as indicated **[***]**

(f) Relevant amounts and specificity

4.360 The US notes that the EC admits that Airbus has received EUR 648.9 million in R&D subsidies. However, that number understates the amount actually received, as it reflects an arbitrary determination that certain recipients of LCA-related R&D subsidies are "relevant companies" and others are not.[593] The US notes that the EUR 648.9 million figure includes only the subsidies granted to what the EC describes as the "relevant companies"; it does not include the subsidies received by other Airbus entities, such as Airbus' parent company EADS, and the EC has not explained why the Panel should disregard those subsidies.[594]

4.361 The US clarifies that it is not saying that the benefit of grants to non-Airbus companies went to Airbus. However, because the EC has refused to provide information on grants to companies that are Airbus companies, it has given the Panel an incomplete number in describing the amount of R&D subsidy. The number is higher than the EUR 650 million the EC asserts. But, because the EC has withheld relevant information, it is not possible to know how much higher.[595]

4.362 The US points out that the EC deems grants to certain entities to be "not relevant," based on its mistaken view that the US had to show that subsidies benefiting Airbus LCA models continued to benefit those models following corporate restructurings leading to the creation of Airbus SAS.[596] Adding back in the amounts the EC arbitrarily excludes, the total R&D subsidies Airbus actually has received under both the EC Framework Programs (FPs) and national and regional programs likely exceeds EUR 3 billion.[597]

4.363 Further, the US notes that the EC responds to its showing that FP grants are specific by arguing that "{t}he Second, Third, Fourth and Fifth Framework Programmes do not have sub-budgets specific to the aeronautics industry." The EC does not dispute the existence of such a sub-budget in the Sixth Framework Programme. With respect to the Second through Fifth Framework Programs, the EC seems to be arguing semantics. Although it does not acknowledge the existence of formal "sub-budgets," it does seem to acknowledge that the programs "allocate . . . portions of their budget to research activities such as 'aeronautics and space' or 'aeronautics.'"[598]

4.364 The US notes that in addition to making a semantic argument, the EC argues that specificity should be analyzed not at the level of the sub-budget but at the level of the entire Framework Program. The US explains that accepting that argument, however, would lead to absurd results. A Member could make virtually any subsidy to "certain enterprises" non-specific simply by formally joining it under one roof with other subsidies to other certain enterprises and calling the combined subsidies a "program." The US argues that the SCM Agreement does not support such a formalistic approach. With respect to the *de facto* specificity of aeronautics R&D grants under the Framework Programs, the relevant numbers show predominant use by Airbus (as well as showing Airbus' receipt of disproportionately large amounts of FP aeronautics funding).[599] The US considers that the EC contention that grants under certain programs are not specific is based on an artificial and unsubstantiated theory that specificity under Article 2 of the SCM Agreement must be determined at the broadest level of aggregation of the activities of the granting authority.[600]

[593] US, FNCOS, Executive Summary, para. 16.
[594] US, FNCOS, Executive Summary, para. 16.
[595] US comments on EC, SNCOS, Executive Summary, para. 18.
[596] US, SNCOS, Executive Summary, para. 8.
[597] US, SWS, Executive Summary, para. 66.
[598] US, SWS, Executive Summary, para. 67.
[599] US, SWS, Executive Summary, para. 68.
[600] US, SNCOS, Executive Summary, para. 8.

BCI deleted, as indicated **[***]**

4.365 The US notes that with respect to R&D subsidies provided by member State governments, the EC admits certain grant amounts but asserts that other amounts are "not relevant." As it gives no explanation for its assertion of what is relevant and what is not, its argument should be rejected.[601]

4.366 In the case of grants under Germany's LuFo program, the EC contends that certain amounts are not relevant because they were only committed but not yet received by July 1, 2005. However, a subsidy within the meaning of Article 1 of the SCM Agreement includes "potential direct transfers of funds" as well as an actual direct transfer of funds. Thus, even if the EC were correct in its characterization of the grants at issue that would not be a basis for excluding those amounts from the Panel's consideration.[602]

4.367 The US also notes that the EC argues that the US has not shown that loans provided to Airbus by the Spanish government under the PTA program confer a benefit on Airbus because the US has not performed a comparison to a market benchmark. However, in view of the terms of the loans as demonstrated by the US, they are, by definition, preferential to terms available in the market. In the US view, the EC also errs in arguing that loans provided by Spanish authorities under the PROFIT program are outside the Panel's terms of reference, as such loans plainly were covered by the US panel request. The US considers that the EC argument that PROFIT loans are not specific is equally erroneous. In addition, as with the EC Framework Programs, the EC mistakenly argues that for specificity purposes, PROFIT should be analyzed at the level of the broad "umbrella" under which it is implemented, rather than at the individual program level.[603]

4.368 Finally, with regard to the UK's Technology Programme, the EC itself has acknowledged that the program is sub-divided into 43 "research themes" targeting a limited set of industries. Each of the research themes has its own budget and tends to be highly industry-specific. The R&D funding provided to Airbus and the aeronautics industry under the Technology Programme is therefore specific within the meaning of Article 2.1 of the SCM Agreement.[604]

2. Arguments of the European Communities

4.369 The EC considers that it demonstrates that the US overstated the amount of support that the EC, Germany and its Länder Bavaria, Hamburg and Bremen, France, the United Kingdom and Spain provided to Airbus SAS under research and technology ("R&T") programmes. The EC examines the US allegations with regard to every R&T programme challenged and demonstrates that the US inflated the amount of R&T support in four ways.[605]

4.370 First, the EC makes clear that the US allegations with regard to R&T funding by France and one of the Spanish R&T programmes are outside the Panel's terms of reference. The EC asserts that in its panel request, the US has not properly identified the challenged French R&T funding and has not mentioned the relevant Spanish programme at all.[606]

4.371 Second, the EC shows that the US includes support for companies other than Airbus SAS or its subsidiaries, despite the fact that the latter are the only producers of LCA in the EC. The EC points out that the US included in its estimates: (1) other participants in collaborative research projects[607],

[601] US, SWS, Executive Summary, para. 69.
[602] US, SWS, Executive Summary, para. 70.
[603] US, SWS, Executive Summary, para. 71.
[604] US, SWS, Executive Summary, para. 72.
[605] EC, FWS, Executive Summary, para. 59.
[606] EC, FWS, Executive Summary, para. 60.
[607] EC, SWS, paras. 615-619.

BCI deleted, as indicated **[***]**

(2) the non-Airbus activities of companies with wide-ranging activities[608] and (3) other recipients other than Airbus SAS.[609] The EC argues that the US does not explain how such funding passed through to Airbus SAS. This applies to large parts of the support provided under the R&T programmes of the EC (EC Framework Programmes), Bavaria, Hamburg, Bremen, France and the UK.[610]

4.372 Third, the EC asserts that the US includes support which falls outside the temporal scope of Article 5 of the SCM Agreement[611] since it was provided before 1995.[612] This concerns two of the challenged EC Framework Programmes and parts of the R&T support provided by the German Federal government[613], France, the United Kingdom and Spain.[614]

4.373 Fourth, the EC maintains that the US included support under R&T programmes that are not specific within the meaning of Article 2 of the SCM Agreement. The EC explains that this applies to the EC Framework Programmes and to certain R&T programmes of the United Kingdom and Spain.[615] The EC considers that the US includes payments made under R&T programmes that are not specific since they are extremely broad, cover varying research areas and are open to a broad range of sectors.[616]

4.374 The EC concludes that the total amount of R&T support provided to Airbus SAS between 1995 and 2005 under the programmes in question, and within the scope of the panel request, is *de minimis* when considered in light of Airbus SAS' annual research budget, R&T expenditure and its turnover.[617]

4.375 The EC argues that the US inflates the actual R&T support for Airbus by including support for recipients other than Airbus SAS.[618] The EC states that the US has inflated the amount of R&T support to EUR 3 billion, around 5 times higher than the precise information on payments to Airbus provided by the EC.[619] The EC explains that the US included in its EUR 3 billion figure amounts provided not only to the current producer of LCA in Europe, Airbus SAS, but also to a wide range of other recipients and also inflated the amount of French R&D support. Airbus SAS received only a *de minimis* level of support.[620]

4.376 In its second written submission, the EC contends that the US still fails to substantiate its vastly inflated figures with regard to R&T support to Airbus SAS in the EC. The EC points out that the US has, in particular, not demonstrated how R&T support to companies other than Airbus SAS was passed on to Airbus SAS.[621]

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[608] EC SOS, para. 287.
[609] EC SOS, para. 288.
[610] EC, FWS, Executive Summary, para. 61.
[611] EC, FWS, Executive Summary, para. 62.
[612] EC, FNCOS, Executive Summary, para. 19.
[613] With regard to support by the German federal government, the EC provided information on the amounts Germany had disbursed to Airbus SAS by 1 July 2005 and on the amounts Germany had committed by then, *see* EC, SWS, para. 630.
[614] EC, FWS, Executive Summary, para. 62.
[615] EC, FWS, Executive Summary, para. 63.
[616] EC, FNCOS, Executive Summary, para. 19.
[617] EC, FWS, Executive Summary, para. 64, s*ee also,* EC, FNCOS, Executive Summary, para. 19.
[618] EC, FNCOS, Executive Summary, para. 19.
[619] EC SOS para. 283.
[620] EC, SNCOS, Executive Summary, para. 9.
[621] EC, SWS, Executive Summary, para. 46.

BCI deleted, as indicated **[***]**

4.377 In its closing statement at the second Panel meeting, the EC stated that it welcomed the US statement that "it is not saying that the benefit of grants to non-Airbus companies went to Airbus." The EC therefore presumes that the US had dropped its allegation of EUR 3 billion of R&T support to Airbus.[622]

4.378 With regard to the EC Framework Programmes, the EC maintains that they are neither *de jure* nor *de facto* specific. According to the EC, the US allegation that "*aeronautics-specific sub-budgets exist under each Framework Program*" is factually incorrect and cannot serve as a basis for finding *de jure* specificity.[623] Concerning the US claim on *de facto* specificity that "*within each FP's aeronautics sub-budget, Airbus is the predominant user of the grants*", the EC points out that specificity must be assessed for the programme as a whole. This also applies to the assessment of *de jure* specificity.[624] At the level of the programme, it is clear that aeronautics companies, and even less so Airbus SAS, are not the predominant users of R&T support.[625]

4.379 The EC also contends that new US exhibits relating to the UK Technology Programme do not indicate its specificity within the meaning of Article 2.1 of the SCM Agreement. In the same way, the EC also contends that the Spanish PROFIT programme, in addition to not being within the scope of the panel request, is also clearly non-specific.[626]

4.380 Finally, concerning these and the remaining R&T programmes of Germany, Bavaria, Hamburg, Bremen, France, the UK and Spain, the EC sets out in detail why the actual level of R&T support to Airbus SAS is just a fraction of the inflated US estimate and confirms that it has reported all payments to Airbus SAS under the relevant R&T programmes.[627]

K. WHETHER THE SUBSIDIES HAVE CAUSED ADVERSE EFFECTS TO THE INTERESTS OF THE UNITED STATES

1. Arguments of the United States

4.381 The US argues that for over thirty years, the governments of France, Germany, the United Kingdom, and Spain (the "Airbus governments") have been giving Airbus the means to "win the battle" against its US competitors in the market for large civil aircraft ("LCA"). The US explains that they have done so systematically and methodically in pursuit of a "European industrial policy" to create the world's largest producer of LCA. The US claims that they have succeeded. The US indicates that in less than four decades, Airbus has gone from a zero percent market share to its current position as the world's largest producer.[628] The US asserts that the Airbus governments maintain a formal and institutionalized "European industrial policy" toward Airbus. A core part of that policy has been the systematic and coordinated provision of massive subsidies that Airbus has used to develop a family of LCA targeted at its US competitors.[629]

4.382 The US points out that since Airbus delivered its first LCA in 1974, two US producers (Lockheed and McDonnell Douglas) have been driven from the market, and in 2003 Airbus displaced Boeing as the world's largest LCA producer. By 2005, Airbus' share of the world market had increased to 57 percent while Boeing's fell to 43 percent – a drop of 25 percentage points over the last

[622] EC, SNCOS, Executive Summary, para. 10.
[623] EC, SWS, Executive Summary, para. 47.
[624] EC, SWS, para. 626.
[625] EC, SWS, Executive Summary, para. 47.
[626] EC, SWS, Executive Summary, para. 47.
[627] EC, SWS, Executive Summary, para. 48.
[628] US, FWS, Executive Summary, para. 1.
[629] US, FWS, Executive Summary, para. 4.

BCI deleted, as indicated **[***]**

decade and 19 percentage points in the last five years.[630] Tens of thousands of US workers have lost their jobs.[631] Further, the subsidization of Airbus jeopardizes the durability of any recent improvement in Boeing's competitive situation. Indeed, the Airbus governments have recently "reaffirmed their agreement to support Airbus."[632]

4.383 The US states that if the losses that it has suffered were the result of fair competition, it would not be pursuing this dispute. The US values competition and acknowledges Europe's right to pursue its own interests in the LCA sector in a WTO-compatible manner. But the US maintains that its losses are not the result of fair competition. The Airbus governments created and fuel Airbus' success with massive amounts of WTO-inconsistent subsidies.[633] The US argues that the provision of these subsidies to Airbus by the EC and the Airbus governments is inconsistent with Article 5 because, as demonstrated in its submissions, they have caused both injury to the US domestic LCA industry within the meaning of Article 5(a) and serious prejudice to the interests of the US within the meaning of Article 5(c).[634]

(a) Conditions of Competition in the LCA Market

4.384 The US explains that Boeing and Airbus are the world's only remaining LCA producers. Both companies compete head to head for virtually every LCA sale in the world in a largely "zero sum" competition – a win for one producer is almost always a loss for the other. Competition between Boeing and Airbus is driven by the performance characteristics of their aircraft and the price (net of all concessions) at which they offer their respective LCA.[635]

4.385 The US argues that Boeing and Airbus develop, produce, and market families of aircraft to supply demand for LCA that operate efficiently over a variety of different routes. The long-term viability of an LCA producer depends on continued innovation and periodic launches of new aircraft. Yet to do so, the producer must incur enormous up-front designing, engineering, and testing costs over a period of years before a single aircraft can be delivered to a customer. For an LCA manufacturer, decisions with respect to product launches drive its subsequent pricing and production decisions.[636]

4.386 The US notes that the EC has plainly different views about how competition in the LCA market occurs and which aspects of that competition are most relevant to the Panel's analysis. The US also notes that on virtually every significant point, the statement of Mr. Christian Scherer of Airbus coincides with its view of these matters, rather than the EC's.[637] Mr. Scherer explained how Airbus and Boeing "compete to develop new and improved aircraft." This level of Airbus-Boeing competition – the competition to create the family of LCA that will best match customer needs – fundamentally shapes the day-to-day competition on sales and price. The US agrees. Yet Mr. Scherer also explained that, Boeing had, until quite recently, experienced a "failure to develop new aircraft." Mr. Scherer perceives that Airbus, not Boeing, has been dominant in new product launches in recent decades, and this perception is in fact quite broadly shared in the industry. Although Mr. Scherer did

[630] US, FWS, Executive Summary, para. 77. *See, also,* US, FWS, Executive Summary, para. 2.
[631] US, FWS, Executive Summary, para. 2.
[632] US, FWS, Executive Summary, para. 77. *See, also,* US, FWS, Executive Summary, para. 2.
[633] US, FWS, Executive Summary, para. 3.
[634] US, FWS, Executive Summary, para. 78.
[635] US, FWS, Executive Summary, para. 79.
[636] US, FWS, Executive Summary, para. 80.
[637] US, Comments on EC, SNCOS, Executive Summary, para. 19

not say so, it is quite clear that Launch Aid has played an important role in giving Airbus this competitive advantage at this most fundamental level of competition.[638]

4.387 The US notes that in a spontaneous remark, Mr. Scherer explained that both Airbus and Boeing had an incentive to try to maintain stable production rates in the down market cycle that began in 2001. As the US has shown in its submission, Airbus was successful in this, while Boeing was not. In Mr. Scherer's words, Boeing "fell off a cliff." This shift in deliveries is what drove the enormous shift in the market share of Airbus, which Airbus has mostly maintained.[639]

4.388 The US points out that Mr. Scherer also explains why, in his view, Airbus was successful in maintaining production (and gaining market share) in a period of falling demand, while Boeing was unsuccessful. He tells of hearing from customers "that Boeing was responding very slowly to requests for technical assistance *and concessions*" – in his view, giving customers "not as much attention as we would have," and that Boeing salespeople were far less flexible in negotiations on price with customers than the Airbus sales force. In short, Airbus was willing and able to use price to win orders, when Boeing was not. Further, according to Mr. Scherer, this situation reversed only in 2004, when Boeing finally got tired of losing sales to Airbus and reluctantly capitulated on price concessions. The SCM Agreement has a term for this: "price depression."[640]

4.389 The US notes that it was in this period that Airbus was completing the launch of and delivering the first A340-500/600s, beginning the enormously expensive and risky launch of the A380, and preparing for the coming launch of the A350, and in this same period that Airbus took sales and market share from Boeing through more flexible pricing. And, as the US explained in its opening statement at the second Panel meeting, the evidence shows that, especially during this period, Airbus would have faced significantly greater financial constraints if not for Launch Aid. The US wonders: How is it that Airbus was the producer that was launching all the new aircraft, winning all the new customers, gaining all the new market share, winning more competitions on price, in a period when it faced real financial constraints? The US concludes that it is inconceivable that Launch Aid did not play a key causal role in this.[641]

4.390 The US points out that as Mr. Scherer noted, "when demand decreases . . . there tends to be much greater competition by producers to win sales on price." The US explains that the downcycle that began in 2001 provided Airbus with the opportunity to complete its full LCA family, launch the A340-500/600, A380, and A350 in rapid succession, and gain nearly 20 points of market share at Boeing's expense. At that point, the US initiated these proceedings against the EC and the Airbus governments for providing the subsidies to Airbus that are the cause of this situation.[642]

4.391 If the EC had its way, this harm would be ignored as "historical" adverse effects, of purely academic interest, if one focuses only on a short-term snapshot of the LCA market in which the surge in demand in the last two years is used to portray everything as just fine. But everything is not fine. The adverse effects manifested during the 2001-2005 period are continuing in the form of ongoing losses of follow-on orders by customers captured by Airbus during this period, sustained lower pricing, and unrecovered market share. Moreover, Airbus is launching a new aircraft – the A350 – which Mr. Scherer confirmed is positioned to compete aggressively with the 787 and 777 on both technology and price. And it is absolutely clear that, if this Panel does not confirm that Launch Aid has impermissibly distorted the LCA market in favor of Airbus and caused adverse effects in

[638] US, Comments on EC, SNCOS, Executive Summary, para. 20.
[639] US, Comments on EC, SNCOS, Executive Summary, para. 21.
[640] US, Comments on EC, SNCOS, Executive Summary, para. 22.
[641] US, Comments on EC, SNCOS, Executive Summary, para. 23.
[642] US, Comments on EC, SNCOS, Executive Summary, para. 24.

BCI deleted, as indicated **[***]**

contravention of the EC and Airbus governments' commitments under the SCM Agreement, the Launch Aid already committed for the A350 will be enhanced and the adverse effects will continue. The current surge in demand will not last forever. Mr. Scherer reminded us that the LCA industry is cyclical and that demand can turn down suddenly and unexpectedly.[643]

4.392 Finally, the US points out that Mr. Scherer not only confirms the basic US explanation for how Launch Aid was causing adverse effects in the 2001-2004 period, but also confirms the views that underlie the US subsidized product arguments. According to Mr. Scherer, two aircraft models will compete with one another if they have seating capacities within 15 to 20 percent of each other. The LCA market therefore forms a continuum in which all aircraft compete with their neighbours on the spectrum but in which there are no sharp dividing lines.[644]

(b) Subsidized and like product

4.393 The US asserts that "as early as 1973, Airbus Industrie proposed the development over time of five related aircraft types." The US argues that the EC and the Airbus governments have subsidized, and Airbus has developed, a family of aircraft in order to compete against the family of aircraft offered by Boeing. Airbus' business strategy has, accordingly, focused heavily on its integrated family. The US submits that because subsidies are provided to Airbus for the development of an LCA family, and because subsidies for the development of each major Airbus LCA model benefit the production and marketing of its full LCA family, the "subsidized product" is the Airbus LCA family as a whole.[645]

4.394 The US argues that Launch Aid benefits the Airbus family as a whole in at least six ways: (1) it enables Airbus to be present in all segments of the LCA market, as the EC agrees any competitive LCA producer must; (2) technologies or production facilities developed as part of the launch of one Airbus LCA model are used for other models; (3) Airbus uses "commonality," or common elements among different LCA models that reduce the cost of operating multiple Airbus LCA models, as a central feature in selling the entire Airbus LCA fleet to customers; (4) Airbus uses one Airbus LCA model to sell other LCA models in "package" deals, either simultaneously or consecutively; (5) Launch Aid reduces the debt burden on Airbus of building each individual LCA model, which in turn allows Airbus to move on to launch the next model much more easily and quickly; and (6) Launch Aid provides Airbus with additional cash flow that allows it to reduce prices of any LCA model whenever it concludes that a price reduction is necessary to capture orders that would otherwise have gone to Boeing. Thus, each provision of Launch Aid benefits the entire Airbus LCA family and has adverse effects on the entire like Boeing family. Accordingly, the "subsidized product" for each of the subsidies, and for all of the subsidies taken together, is Airbus LCA.[646]

4.395 The US asserts that Airbus markets its LCA products as a whole and prominently features the commonality between its different LCA types. The US notes that the EC submission acknowledges that an LCA producer cannot succeed by producing a single LCA model that competes independently in a particular segment of the LCA market. Rather, to succeed in *any* segment of the LCA market, a producer must offer a range of products to meet the diverse needs of customers. The Airbus governments have therefore subsidized the full range of Airbus LCA so that each individual model could compete successfully. The "subsidized product," therefore, is Airbus LCA as a whole.[647]

[643] US, Comments on EC, SNCOS, Executive Summary, para. 25.
[644] US, Comments on EC, SNCOS, Executive Summary, para. 26.
[645] US, FWS, Executive Summary, para. 81.
[646] US, SWS, Executive Summary, para. 86.
[647] US, FNCOS, Executive Summary, para. 25.

BCI deleted, as indicated **[***]**

4.396 The US argues that the panel in *US – Softwood Lumber Dumping* found that the identical definition of "like product" that appears in the Antidumping Agreement has no relevance for determining what may or may not be included in a single "product under consideration." Further, it is well established that a range of related, if not necessarily like, products can be grouped as a single "subsidized product" or "product under consideration" under the SCM Agreement, and likewise under the Antidumping Agreement. The recently circulated panel decision in *Japan – DRAMS CVD* provides an example in addition to those previously identified.[648]

4.397 The US notes that the EC insists that, as a legal matter, when each individual item that benefits from a subsidy is not a "like product" to every other such item, then there must be several separate "subsidized products" and several separate "like products" that correspond to them. The US considers that the EC confuses the definition of the subsidized product with the definition of the like product.[649] The EC also argues that not every Airbus LCA model is "like" every other Airbus LCA model or every Boeing LCA model. In the US view, the EC confuses the identification of the "like product" with the identification of the "subsidized product." This confusion is particularly evident in the EC discussion of the panel report in *Indonesia – Autos*, where the identity of subsidized product was undisputed. Indeed, the reasoning of the *Indonesia – Autos* panel, which defines the "like product" narrowly with respect to the "subsidized product," would support a *broader* approach to the definition of the "subsidized product."[650]

4.398 The US asserts that the EC argues that the Panel *must* define the subsidized products based on whether the various items meet the "like product" test or compete with one another directly, and specifically not with reference to the way in which the US has shown these particular subsidies to have provided benefits to Airbus' production and sales. But, it cannot be overlooked that the subsidies at issue in this dispute have been provided to facilitate the development of the Airbus LCA family as a whole. The US believes that assessing the effect of the subsidy by breaking up the object of subsidization – the Airbus LCA family – into several distinct products fails to be "reasonable and coherent."[651] The US argues that "there are no clear dividing lines between the five categories proposed by the EC."[652] The US argues that even if it were useful or reasonable to divide the LCA market into a number of submarkets, the EC's proposed division is not supported by the evidence. The US observes that "in its own documents Airbus itself does not follow the particular five-market segmentation that the EC advocates here."[653] And even if the Panel were to find any merit whatsoever in the EC market segmentation, the EC contention that no Airbus models compete with the Boeing 747 is manifestly erroneous.[654]

4.399 The US argues that just as the "subsidized product" in this dispute is the Airbus LCA family, the "like product" produced in the US is the Boeing LCA family. The Boeing and Airbus LCA families, however, have "characteristics closely resembling" one another within the meaning of footnote 46 to the SCM Agreement. This is unsurprising, given that Airbus has purposely developed its LCA family to compete directly with the Boeing LCA family.[655]

[648] US, SNCOS, Executive Summary, para. 18.
[649] US, SNCOS, Executive Summary, para. 18.
[650] US, SWS, Executive Summary, para. 87.
[651] US, SNCOS, Executive Summary, para. 19.
[652] US, SWS, para. 650.
[653] US, SWS, para. 651.
[654] US, SWS, Executive Summary, para. 88.
[655] US, FWS, Executive Summary, para. 82.

BCI deleted, as indicated **[***]**

(c) Reference period

4.400 The US considers that the EC focus on market developments after Panel establishment is legally and factually misplaced. The US submits that it has demonstrated the validity of its claim, set forth in its request for the establishment of this Panel, that the challenged subsidies have caused adverse effects to the interests of the US. The US considers that the EC has chosen not to rebut this showing. Instead, the EC contends that the only question for the Panel is whether the adverse effects referred to in the US panel request have ceased to exist. Most of the trends that demonstrate the adverse effects to the interests of the US over the 2001-2005 period have continued unabated through 2006 and, to the extent data are available, into 2007. Where the trends show small improvements in 2006 when compared to 2005, these are largely due to temporary factors such as the 2006 delays in A380 production and A350 design rather than any elimination of the effects of the subsidies. In any event, the EC's exclusive focus on data for 2006 shows that it cannot contest that adverse effects had existed in the period through 2005; the EC certainly makes no effort to do so.[656] The US considers that the EC wants the Panel to believe that the EC subsidies to Airbus are not causing adverse effects to the interests of the US, because Boeing is still alive. But, being alive is not relevant to the issue of adverse effects. What is relevant, among other things, is that Boeing has suffered a 20-point market share loss and price erosion due to Airbus subsidies.[657]

4.401 The US considers that the EC argument is also legally incorrect. The US notes that in *EC – Biotech*, the EC asked the panel to decline to rule on a disputed measure on the basis that the measure had allegedly ceased to exist after the establishment of the panel. The panel refused, finding that (1) it had the authority to make findings on the WTO-consistency of the measure even if it had ceased to exist subsequent to the establishment of the panel, (2) that such findings would help "secure a positive solution" to the dispute, and (3) that it did not need to make findings on whether the measure was still in existence in order to make the recommendation required by Article 19.1 of the DSU. The reasoning of the *Biotech* panel applies equally in the present dispute.[658]

4.402 The US finds no support for the EC view that the US *claims* that the contested measures in this dispute have breached the EC obligations under Article 5(a) and 5(c) of the SCM Agreement must be evaluated "at the time when a panel makes its decision" rather than at the time of panel establishment. To the contrary, the Panel's terms of reference require it to examine "the *matter* referred to the DSB by the US" in its 2005 request for panel establishment. The "matter" includes the "claims" contained in the panel request. Therefore, the Panel must examine the claim of the US that the subsidies were causing adverse effects in 2005. Any assertion by the EC that material injury ceased to exist after the establishment of the Panel should be left to the compliance stage.[659]

4.403 In addition, the US notes that the EC contends that the appropriate starting point for the Panel's adverse effects analysis is 2004, not 2001. The US points out that the 2001-2003 period was not aberrational, as the EC claims; if anything, it is the increase in LCA demand in 2005 and 2006 that is historically anomalous. Moreover, if the EC were correct in its contention that changes in market share from 2001 to 2003 were due to temporary phenomena unrelated to subsidization, one would expect the relative market shares of Boeing and Airbus to return to their "normal" levels after the market recovered in 2004. Yet this has not occurred.[660]

[656] US, SWS, Executive Summary, para. 91.
[657] US, FCCS, Executive Summary, para. 4.
[658] US, SWS, Executive Summary, para. 92.
[659] US, FNCOS, Executive Summary, para. 29
[660] US, SWS, Executive Summary, para. 89.

BCI deleted, as indicated **[***]**

4.404 Indeed, the LCA market and industry operate under unusually long time horizons. It takes several years to develop a new aircraft and bring it to market. Similarly, LCA sales typically are for deliveries over several years with options to purchase additional aircraft over a time frame that is longer still. The subsidies at issue are long-term loans intended to fund the launch of LCA that are produced and sold over a period of decades; any measurement of their effects must therefore take into account their long-term nature.[661]

4.405 The US notes that, in its report in the *US – Cotton Subsidies (Article 21.5)* dispute, "the Appellate Body reasoned that where subsidies have been found to insulate producers from market signals over a long period of time, trends in market share and prices in the most recent period are not dispositive as to whether there is present serious prejudice."[662] According to the US, "this reasoning would apply even more strongly in the present dispute, where the effect of the subsidy is to facilitate Airbus launch decisions that, by their nature, have even more long-term effects on Airbus production and pricing in the LCA market than could subsidies to an agricultural commodity with a single year's growing cycle."[663] "Accordingly, under the approach of the Appellate Body, the Panel is entitled to consider all facts, especially the nature of the subsidies and the market at issue, in determining whether the EC and Airbus government subsidies have caused adverse effects. More particularly, the application of the Appellate Body's reasoning would lead the Panel to reject the EC's efforts to artificially restrict the Panel's focus to trends in the 2004-2006 period, without reference to what occurred before 2004 or the particular supply-creating effects of these subsidies."[664]

(d) Injury Within the Meaning of Article 5(a)

4.406 The US asserts that since 2001, Airbus has significantly increased its share of the LCA market relative to total US demand. Airbus increased its share of US LCA deliveries from 30 percent in 2001 to 48 percent in 2005. Measured by value (at list prices), Airbus' share of the US market increased from 28 percent in 2001 to 53 percent in 2005, or by 25 percentage points over the period. By any measure, this increase in the relative volume of LCA imports is significant, even after taking into account the overall decline in US demand during the period. For example, if Boeing had simply been able to maintain its 2001 share of the US LCA market by value, its LCA sales in the US would have been 54 percent greater in 2005 than they were.[665]

4.407 The US notes that a significant share of the Airbus LCA delivered in the US market during the 2001-2005 period were sold to customers new to Airbus, including both start-up airlines and previous Boeing customers. In each case, Boeing was a strong competitor for the initial order. Although the actual price that each airline paid to Airbus, taking into account all concessions on the sale, is not available to the US, publicly available information indicates that Airbus price undercutting played a key role in winning these customers. Boeing also lost the most significant campaigns that did occur in the US market during this period on the basis of price undercutting by Airbus.[666]

4.408 The US argues that the pricing pressures of these campaigns has had a direct and measurable impact on the prices Boeing has been able to obtain for those sales that it has made in the US market. Indexed pricing data for 2001-2005 provided as business confidential information ("BCI") by Boeing shows that the average price for B737s fell during this period. In addition, while the price of each LCA is contractually agreed at the time of a firm order, Boeing had to reduce prices on undelivered

[661] US, SWS, Executive Summary, para. 90.
[662] US, Comments on Appellate Body Report in *US – Upland Cotton*, para. 7.
[663] US, Comments on Appellate Body Report in *US – Upland Cotton*, para. 7.
[664] US, Comments on Appellate Body Report in *US – Upland Cotton*, para. 8.
[665] US, FWS, Executive Summary, para. 83. *See, also*, US, SWS, Executive Summary, para. 98.
[666] US, FWS, Executive Summary, para. 84.

BCI deleted, as indicated **[***]**

aircraft for certain major customers because of downward trends in market pricing under pressure from Airbus. Pricing trends for B747 and B777 sales in the US market were similar. The US points out that one would ordinarily expect that in the absence of price suppression, producers would over time increase prices generally in line with increases in their costs. Both Airbus and Boeing typically include price escalation clauses in their sales contracts to reflect cost increases from the year of order to the year of delivery. However, Boeing has been unable to maintain its US pricing for its LCA in line with cost increases.[667]

4.409 In the US view, these data demonstrate that Boeing has experienced price depression (actual price decreases) and price suppression (price increases lower than what would be expected) for its US LCA sales. Given the evidence of aggressive Airbus pricing in US sales campaigns, the price depression and price suppression are attributable to subsidized imports.[668]

4.410 The US points out that data provided by Boeing relating to the factors enumerated in Article 15.4 of the SCM Agreement show a steep decline in the financial results of Boeing's LCA business over the past five years. This decline has occurred despite deep cuts in costs and steady gains in productivity.[669]

4.411 The US asserts that Airbus' gains in its share of the US market have come at the expense of Boeing, thus linking the subsidized imports to the significant adverse impact on Boeing's LCA production and sales figures. Moreover, the decline in Boeing's prices is a function of the pricing of subsidized imports from Airbus. The deterioration in the other relevant indicators of the economic health of Boeing's LCA operations follows directly from this loss of market share and loss of revenue. Any injury resulting from the decline in total demand – a factor that affected both Airbus and Boeing – is distinguishable from injury resulting from loss of market share to Airbus. As Airbus recognized, "For our competitor, the effects of loss of market share and the contraction of the market itself are cumulative." According to the US, no other factors have caused the material injury to Boeing.[670]

4.412 The US notes that material injury is defined to include a threat of material injury. The evidence also shows that a threat of material injury is "clearly foreseen and imminent."[671]

4.413 The US argues that the improvement in Boeing's financial performance in 2006 does not undermine the US material injury claim. In 2006, Airbus could not effectively market either its A380 (because of production problems) or its A350 (which had to be redesigned). What 2006 shows is how the absence of a subsidized and aggressively marketed new Airbus aircraft improves the fortunes of the US LCA industry – and, by contrast, how significant the adverse effects of Launch Aid and the other Airbus subsidies have been. However, Airbus can be expected to overcome the technical problems with A380 production, and the A350 with fully revised technical specifications will be back in the market in the very near future. If Launch Aid is permitted to continue, the adverse effects seen in recent years will continue as well.[672]

4.414 The US notes that the EC discusses at length the improvement in Boeing's financial condition in 2006 (while neglecting to mention that Airbus, too, had record deliveries and performance in the same year) and argues that, whatever may have been the case in the past, Boeing cannot be said to be experiencing material injury at the present time. However, the relevant question for an adverse effects

[667] US, FWS, Executive Summary, para. 85.
[668] US, FWS, Executive Summary, para. 86.
[669] US, FWS, Executive Summary, para. 87.
[670] US, FWS, Executive Summary, para. 88.
[671] US, FWS, Executive Summary, para. 89.
[672] US, FNCOS, Executive Summary, para. 30.

BCI deleted, as indicated **[***]**

claim under the DSU and the SCM Agreement is whether the EC was in breach of its obligation under Article 5(a) when the Panel was established. Moreover, the improvement in the financial condition of Boeing must be placed in the context of unusually high demand in 2005 and 2006 in this cyclical industry. Indeed, the events of 2006 demonstrate how significantly relief from subsidized competition improves the fortunes of the US LCA industry.[673]

(e) Serious Prejudice to the Interests of the US

4.415 The US submits that adverse effects from subsidies also include "serious prejudice to the interests of another Member" as provided in Article 5(c). Article 6.3 further provides that serious prejudice "may arise in any case where one or several" particular market effects of the subsidy are demonstrated. The US argues that several of the effects of the subsidies described in Article 6.3 apply in this dispute.[674]

(i) Subsidized Airbus LCA Have Displaced or Impeded Imports of US-Produced LCA in the EC Market

4.416 The US notes that Airbus increased its share of the EC LCA market by 9 percentage points from 2001 to 2005 measured by volume[675] and maintained all of its increased market share in 2006.[676] By value, Airbus increased its share by 12 percentage points over the period. The growth in Airbus' market share – and concomitant decline in Boeing's share – demonstrates that Airbus LCA have displaced Boeing LCA in the EC market.[677] According to the US, a significant portion of the shift in EC market share is attributable to two particular campaigns – easyJet and Air Berlin. Both airlines were Boeing customers looking to expand their fleets, the competitions were directly between Boeing and Airbus, and the wins for Airbus were losses for (and significant displacements of) Boeing. Other lost sales campaigns have resulted in additional displacement of Boeing LCA in the EC market.[678]

4.417 The US considers that the EC fails to respond to its argument; instead it segments and breaks up the data in a way that magnifies random fluctuations and obscures trends. In the US view, the data speak for themselves – significantly fewer Boeing LCA are being imported into the EC than was the case just a few years ago.[679]

4.418 The US notes that the EC contends that the Panel should evaluate the US displacement and impedance claims under Article 6.3(a) and Article 6.3(b) by examining the market share of *orders* rather than the market share for actual *deliveries*. However, the text of Article 6.3(a) refers to the displacement or impedance of "imports" and "exports" of a like product of a Member. The ordinary meaning of the terms "imports" and "exports" includes actual *Articles* or *things* that cross international borders – that is, deliveries.[680] The US argues that the EC focus on orders rather than deliveries is erroneous: the US notes that the EC agrees that the ordinary meaning of the terms "imports" in Article 6.3(a) and "exports" in Article 6.3(b) carries "the notion of movement of goods." As contracts for the future "movement of goods," orders are certainly relevant to an analysis of likely *future* trends in the LCA market, but the "movement of goods" that has actually occurred and is now occurring is captured by data on actual deliveries. Moreover, an exclusive analytical focus on *order* data leads to factually inaccurate conclusions, particularly in third-country markets where there are a relatively

[673] US, SWS, Executive Summary, para. 98.
[674] US, FWS, Executive Summary, para. 90.
[675] US, FWS, Executive Summary, para. 91.
[676] US, SWS, Executive Summary, para. 94.
[677] US, FWS, Executive Summary, para. 91.
[678] US, FWS, Executive Summary, para. 92.
[679] US, SWS, Executive Summary, para. 94.
[680] US, FNCOS, Executive Summary, para. 27.

BCI deleted, as indicated **[***]**

small number of transactions. This can be seen, for example, in an examination of the LCA market in Mexico.[681]

(ii) Subsidized Airbus LCA Have Displaced or Impeded Exports of US-Produced LCA in Third-Country Markets

4.419 The US observes that from 2001 to 2005 Airbus has increased its share in markets other than the US and the EC by a 20 percentage points (measured by volume) or 19 percentage points (measured by value). In the two largest third-country markets in the 2001-2005 period, Airbus gained 24 percentage points of market share at Boeing's expense in China and 18 percentage points in Australia. Other significant markets where Airbus significantly increased market share include Singapore, Korea, Brazil, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"), Mexico, and India. Large new orders in third-country markets, most evidently India, threaten further displacement of Boeing exports to these markets for years to come.[682]

4.420 Boeing regained only five percentage points of its share of these markets in 2006 and remains well below its share in 2001 and 2002. These markets other than the EC and the US have grown substantially over the 2001-2005 period and have continued to grow in 2006. Total deliveries by Boeing and Airbus have increased in each year (except for a very small drop from 2003 to 2004). Thus, the shift in market share in third-country markets largely results from Airbus gaining more of the increased demand than Boeing. With respect to particular third-country markets identified in the US first written submission, Boeing's loss of market share to Airbus continued in 2006 in most markets.[683]

(iii) Subsidized Airbus LCA Have Undercut Prices and Taken Sales of Boeing LCA

4.421 The US argues that from the late 1990s through at least 2005, Airbus won a series of campaigns at major low-cost carriers in the US, Europe, and Asia. Public and confidential evidence shows that aggressive Airbus pricing was the key factor in Airbus' winning, and Boeing's losing, these key campaigns.[684] Airbus has captured market share through a strategy of aggressive product launch and aggressive pricing at key, strategic campaigns. In many cases, Airbus has succeeded in capturing key customers from Boeing. Even where Boeing has been able to maintain customers, the increased competition from Airbus on the basis of price has resulted in depressed market prices and, accordingly, reduced revenues. The public evidence, which is largely confirmed by the confidential evidence provided by the EC, is that Airbus, not Boeing, took the lead in driving prices downward in recent years.[685]

4.422 According to the US, that Airbus uses price undercutting to increase its share of the LCA market is well recognized in the industry. The US points out that Airbus admits that retaining its targeted market share is more important to it than profitability, stating that "one percent in profitability matters more than one percent in market share, provided it remains at an average 50 percent market share."[686]

4.423 The US argues that a number of significant sales campaigns can be identified, based on available information, in which the customer was in the market for new aircraft, invited Boeing and

[681] US, SWS, Executive Summary, para. 93.
[682] US, FWS, Executive Summary, para. 93.
[683] US, SWS, Executive Summary, para. 95.
[684] US, SWS, Executive Summary, para. 96.
[685] US, FNCOS, Executive Summary, para. 28.
[686] US, FWS, Executive Summary, para. 94. *See, also*, US, SWS, Executive Summary, para. 98.

BCI deleted, as indicated **[***]**

Airbus to bid against one another, chose the Airbus LCA over an equally qualified Boeing LCA, and did so because of the Airbus price. For example, easyJet officials remarked that "it surprised all of us to see just how aggressive Airbus was in the final round of sealed bids." Public data from easyJet indicates a purchase price of $19.36 million per aircraft in 2001 US dollars, a discount of 56 percent off the $44 million list price. Taking into account additional guarantees and services to be provided by Airbus, easyJet concluded that "the offer received from Airbus ... was significantly better value than the offer received from Boeing." Other major identifiable lost sales campaigns included Air Berlin/NIKI, AirAsia, Iberia Airlines, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines, Qantas, and Czech Airlines.[687]

4.424 The US asserts that prices of A380 aircraft sold by Airbus in competition with Boeing were so low, in fact, that the impact of recently announced delivery delays has turned them into loss-making contracts. EADS has announced publicly that "A380 loss making contracts" would result in a EUR 600,000,000 reduction in its 2006 pre-tax earnings.[688] Airlines that ordered the A380 would otherwise have expanded their fleets with Boeing LCA.[689]

4.425 With respect to A340-500/600 sales, the US notes that the EC argues that Airbus had the right plane at the right time, while Boeing did not. Once again, however, this concedes the causal link; in the absence of Launch Aid, Airbus would not have been in a position to offer what it claims was the right plane at the right time. According to the US, the evidence therefore confirms that the significant lost sales identified by the US were lost primarily because of subsidies.[690]

4.426 The US submits that when the evidence shows – as it does here – that Airbus has not only taken numerous large sales from Boeing, several of them worth billions of dollars, but also that it has done so primarily by offering a lower price than Boeing, that evidence demonstrates not only "significant ... lost sales," but also the existence of "significant price undercutting" within the meaning of Article 6.3(c). In the course of a sales campaign, each customer engages in a detailed and painstaking review of every contractual term, including the value of proposed concessions contingent on future events (such as residual value guarantees). When the evidence establishes that, in a particular LCA transaction, a customer concludes that Airbus, all other things being equal, offered a lower price than Boeing, this constitutes *prima facie* evidence of price undercutting within the meaning of Article 6.5 and, therefore, of Article 6.3(c).[691]

4.427 The US notes the EC assertion that many LCA sales do not involve "competition" between Airbus and Boeing, and that where sales are not "competitive" there is no possibility for subsidies to cause adverse effects. According to the US, the EC definition of a "competitive" sale excludes many sales in which price competition between Airbus and Boeing is highly relevant. The US points out that a customer may not conduct a formal bidding process, but only if it believes that it is getting a market price. If a customer thinks that holding a competition will drive down the price, it will do so.[692]

4.428 The US also rebuts the EC interpretation of "the term 'non-subsidized like product' as used in Article 6.4 and 6.5 to mean that, if the like product of the complaining Member benefits from *any* specific subsidy – no matter how small or indirect – that Member is affirmatively prevented from

[687] US, FWS, Executive Summary, para. 95.
[688] US, FWS, Executive Summary, para. 96.
[689] US, SWS, Executive Summary, para 96.
[690] US, SWS, Executive Summary, para. 96.
[691] US, FWS, Executive Summary, para. 97.
[692] US, SWS, Executive Summary, para. 84. *See, also,* US closing statement, first meeting, Executive Summary, para. 5.

BCI deleted, as indicated **[***]**

showing that the effect of another Member's subsidy – no matter how large or direct – has caused displacement or impedance of its exports to a third country under Article 6.3(b) or significant price undercutting under Article 6.3(c)."[693] According to the US, "nothing in Articles 6.3, 6.4, or 6.5 suggests that these provisions are intended to deal with subsidies *other* than the challenged subsidies – whether those other subsidies are provided by the responding Member, the complaining Member, or other Members."[694]

(iv) Boeing Has Experienced Price Suppression and Price Depression for Its LCA Sales in the World Market

4.429 The US argues that in the context of this case, the world market is the appropriate market for measuring the price effects of the Airbus subsidies. Boeing provided as BCI the indexed annual prices of all actual, worldwide Boeing LCA orders for the period 2001-2005 for the B737, B767, B747, and B777. These figures show negative trends in Boeing's prices for each aircraft type over the period. Post-order price adjustments further demonstrate the price depressing effects of Airbus' pricing practices. Airbus LCA was the only competition and Airbus was engaged in widespread and aggressive price undercutting during the period. Thus, the evidence demonstrates significant price depression and price suppression in the world LCA market.[695]

4.430 The US contends that prices for Boeing LCA in the world market fell, or failed to rise in keeping with cost inflation, in the period from 2001-2005. Despite two years of unprecedented high demand for LCA, prices for the Boeing 737, 747, and 767 continued to be seriously depressed in 2006. The US argues that aggressive Airbus pricing has altered price expectations of customers in the market and continues to prevent prices from rising. Price trends for the 777 were somewhat different both in 2001-2005 and in 2006. The US argues that its contention that the price suppression and depression is the effect of the subsidy is confirmed by the fact that the effect of price suppression and depression recedes first – and, so far, only – where Airbus' product offering has proven the weakest and at the time when Airbus' ability to leverage its subsidies to lower price to offset the difference is most strained.[696]

(v) Subsidies Cause These Adverse Market Effects

4.431 The US considers that with respect to the issue of adverse effects, the first question is: How do the subsidies work? How do they affect the market and how Airbus acts in the market? The US argues that it has shown that the subsidy distorts the market in two principal ways. It allows Airbus to launch aircraft it could not have launched on the scale and at the pace it has without subsidies. And, its impact on Airbus' cash flow and costs allows it to price aggressively to buy market share, all while maintaining its pace of product development.[697]

4.432 The US notes that the EC does not really contest the first point. And the EC largely avoids responding to the second point through its arguments about the subsidized product. By deciding in advance that there are five separate product markets, the EC decides in advance that, for example, the Launch Aid provided for the A320 can only affect sales of the A320. But this does not respond to the question of how the subsidy works; rather, the EC begs the question.[698]

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[693] US comments on EC, Answer to Panel Question 202, para. 225.
[694] US comments on EC, Answer to Panel Question 202, para. 226.
[695] US, FWS, Executive Summary, para. 98.
[696] US, SWS, Executive Summary, para. 97.
[697] US, FCCS, Executive Summary, para. 26.
[698] US, FCCS, Executive Summary, para. 27.

BCI deleted, as indicated **[***]**

4.433 This leads to the second step in the analysis: what is the product that benefits from the subsidy? Given the way the subsidy works, the analysis must be of the effect of the subsidies on all LCA as a whole. The US notes that the EC says that it is necessary to take account of the differences among the various LCA models. The US agrees. Where the US differs with the EC is in how the US takes account of these differences. According to the US, the EC approach is wrong, because it would force the Panel to ignore how the subsidy actually works.[699]

4.434 After identifying how the subsidies work and the subsidized product, the third and final step in the analysis is whether the adverse effects – the various types of serious prejudice and the material injury – are the result of the subsidies. With regard to displacement and impedance, the subsidy affects what Airbus has to sell, and thus certainly has an effect on market share. With regard to lost sales, price undercutting, and price depression and suppression, the subsidy effects are plainly of sufficient magnitude, and the market is sufficiently competitive, that the effects on Boeing have been significant.[700]

4.435 According to the US, the key facts demonstrating adverse effects are not seriously disputable. First, Airbus increased its share of the world LCA market from 39 percent in 2001 to 57 percent in 2005, and has maintained most of these gains in 2006 and, according to available data, in 2007.[701] Airbus deliveries in 2006 broke the company record set in 2005, and in 2006 it built and delivered more LCA than Boeing for the fourth consecutive year.[702] Second, Boeing lost significant sales to Airbus during this period, often as a result of demonstrable price undercutting by Airbus. Third, the prices that Boeing has been able to receive for the LCA that it did sell during this period have fallen, or failed to increase in keeping with inflation, and largely have not recovered to this day.[703]

4.436 The US notes that none of these facts, as such, are disputed. In addition, the US notes that the EC concedes that the launches of the A300, A310, A320, A330, and A340 – that is, the base model for every LCA that Airbus had ever delivered to a customer before October 2007 – would not have occurred, at least not when and how they did, if the Airbus governments had not provided Launch Aid or other subsidies.[704]

4.437 The US argues that while Launch Aid has been the primary tool that the EC and the Airbus governments have used to subsidize the Airbus LCA family, the other subsidies also shift the costs of LCA development to the governments as part of the same broad strategy.[705] The US asserts that subsidies other than Launch Aid, when provided in combination with Launch Aid, have the effect of amplifying and reinforcing the market-distorting impact of Launch Aid. To the extent that these subsidies to Airbus have effects that are complementary to Launch Aid, their effects should be considered together with Launch Aid.[706] Because the volume and price effects of the various subsidies Airbus has received to develop and market its LCA family "manifest themselves collectively," it is permissible – as the panel stated in *US – Cotton Subsidies*, to "treat them as a 'subsidy' and group them and their effects together."[707]

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[699] US, FCCS, Executive Summary, para. 28.
[700] US, FCCS, Executive Summary, para. 29.
[701] US, SNCOS, Executive Summary, para. 16. *See, also,* US, FNCOS, Executive Summary, para. 26.
[702] US, FNCOS, Executive Summary, para. 26.
[703] US, SNCOS, Executive Summary, para. 16. *See, also,* US, FNCOS, Executive Summary, para. 26.
[704] US, SNCOS, Executive Summary, para. 16. *See, also,* US, FNCOS, Executive Summary, para. 26.
[705] US, FWS, Executive Summary, para. 100.
[706] US, SWS, Executive Summary, para. 85.
[707] US, FWS, Executive Summary, para. 100.

BCI deleted, as indicated **[***]**

4.438 The US argues that subsidies have facilitated and accelerated the introduction of every major Airbus model, precisely as the EC and the Airbus governments designed them to do.[708] The US notes that while it has demonstrated that the Airbus governments provided subsidies that were decisive to the launch of every Airbus LCA model, the EC contests this showing only for the A380. The US asserts that Launch Aid played an indispensable role in the development of the A380. Nonetheless, the EC, by its silence, has left uncontested one of the most important elements of the US adverse effects case – that Airbus and its entire product line would not be what it is today, but for the provision of Launch Aid and other subsidies.[709]

4.439 The US considers that the EC claim in this dispute that Launch Aid was not necessary for the launch of the A380 is contradicted by the evidence. For example, the stated policy of the UK government is to provide Launch Aid only if the recipient demonstrates, *inter alia*, "that Government investment is essential for the project to proceed on the scale and in the time-scale specified in the application." For the French government, the problem was "above all" the crushing financial impact of private financing for the A380, even assuming it could be found, on the balance sheet of Airbus.[710] In addition, the US points out that the British government concluded that the development of the A380 "would not have been possible if it had not been for the commitment of the British Government," and the French government found it "doubtful that the enterprise would be in a position to find outside financing" for the A380.[711]

4.440 Further, the US submits that each new aircraft model that Airbus has added to its LCA family has targeted US LCA models. The US notes that Airbus claims that its aircraft models were designed to "attack" or "kill" competitive US products or "really hurt" a US competitor. The US points out that the fact that the EC and the Airbus governments provide subsidies to help Airbus take actions *intended* to cause adverse effects to the US LCA industry is strong corroborating evidence that those adverse effects, which have in fact occurred, are caused by the subsidies. Indeed, Airbus and the Airbus governments have, through their own admissions, confirmed each major element of the US adverse effects case.[712]

4.441 The US argues that the provision of Launch Aid by the Airbus governments distorts the fundamentals of competition among LCA producers by shifting the enormous costs and risks of aircraft development from the producer to the governments – as a French Senate report puts it, "a sort of insurance policy for the company against industrial risk."[713]

4.442 The US argues that "Launch Aid commits European governments to absorbing much of any possible losses, so even if Airbus is risk averse, it has little incentive not to adopt a risky, aggressive strategy." According to the US, the Airbus governments thus enable Airbus to launch aircraft at an otherwise unsustainable scale and pace, if it could have launched them at all. Thus, they expand the range of the Airbus product family against which US producers must compete and lower the price at which Airbus is able to offer those products.[714] In the US view, the effect of Launch Aid is not only – and not even primarily – to bestow extra money on the LCA manufacturer when it launches. The effect is also to shift much of the risk of launch to the government – and therefore to make the very fact of launch more likely.[715]

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[708] US, FWS, Executive Summary, para. 101.
[709] US, FNCOS, Executive Summary, para. 19.
[710] US, SWS, Executive Summary, para. 80.
[711] US, FWS, Executive Summary, para. 101.
[712] US, FWS, Executive Summary, para. 102.
[713] US, FWS, Executive Summary, para. 99. *See, also*, US, FNCOS, Executive Summary, para. 20.
[714] US, FWS, Executive Summary, para. 99. *See, also*, US, FNCOS, Executive Summary, para. 20.
[715] US, FNCOS, Executive Summary, para. 21.

BCI deleted, as indicated **[***]**

4.443 The US argues that Launch Aid also has a second and independent market-distorting effect on the costs and cash flow of Airbus that gives Airbus an advantage in pricing, particularly in LCA campaigns of strategic importance. The impact of the subsidies on the market's perception of the creditworthiness of Airbus is substantial. The subsidies thus have a direct impact on Airbus' ability to raise additional capital, and thus on its marginal cost of capital. Launch Aid also reduces the cash drain of launch, allowing Airbus to be more flexible in pricing all of its LCA while still maintaining a rapid pace of project development.[716] The US argues that as the subsidies have been instrumental in creating Airbus' LCA product family, they necessarily create supply-side pressure on market prices. Further, the impact of Launch Aid on the overall financial performance of Airbus allows Airbus to keep to an aggressive launch schedule, while simultaneously following its publicly stated policy of pursuing market share, even at the cost of short-term profitability.[717]

4.444 The US points out that what the EC calls the "US cash flow argument" is something else entirely – an alleged US argument that the effect of the subsidy is to give Airbus cash that it somehow "uses" in order to "price down" its aircraft. But this is an argument the US has not made.[718]

4.445 The US further explained that Launch Aid also affects "the marginal production costs and marginal revenue that Airbus receives from each LCA sold and delivered. This occurs in at least two ways. First, ... Launch Aid improves Airbus's overall credit rating and therefore lowers its marginal cost of capital. Given the long lead times between investment at the time of launch and order and customer payment mostly at delivery, lowering Airbus's cost of borrowing has a direct impact on its marginal cost of production. Second, ... if Airbus had obtained a loan with all of the same terms as Launch Aid, except a commercial interest rate, each individual per-aircraft repayment would have to be substantially increased. The EC even calls this increased per-aircraft repayment the 'benefit per aircraft.' .... The lower per-aircraft repayment due to subsidized Launch Aid directly results in greater marginal revenue (or lower marginal costs) for each sale, and does so at the time of delivery for as long as the loan is outstanding.[719]

4.446 The US observes that the report of Dr. Gary Dorman presents an economic model of the business case for a typical aircraft program and shows how the success-dependant, back-loaded, and below-market aspects of Launch Aid fundamentally change the economics of an LCA launch decision.[720] In this model, the present value of the extra profits received because of Launch Aid if the "base case" assumptions turn out exactly as expected is more than $1 billion, or 77 percent of the net present value without Launch Aid. More importantly, when Launch Aid is provided, the decision to launch a new aircraft model is much less sensitive to the level of confidence in the accuracy of the target assumptions.[721]

4.447 The US considers that the EC attempt to rebut the economic model of Dr. Gary Dorman fails, and in any event, the EC has chosen not to contest that Launch Aid was decisive in most of Airbus' key launch decisions. The US argues that the economist selected by the EC to review Dr. Dorman's model, Dr. Wachtel does not consider the particular importance that economies of scale play in the LCA industry. The US points out that as a 1995 study for the British government states, "scale

[716] US, FNCOS, Executive Summary, para. 23. *See, also,* US, SWS, Executive Summary, para. 82.
[717] US, SWS, Executive Summary, para. 82.
[718] US, SNCOS, Executive Summary, para. 20.
[719] US, Answer to Panel Question 230, para. 33 (footnotes deleted).
[720] US, FWS, Executive Summary, para. 99. *See, also,* US, FNCOS, Executive Summary, para. 20.
[721] US, FNCOS, Executive Summary, para. 20.

BCI deleted, as indicated **[***]**

economies are so important in this technology that, if a producer enters a market at all, it will always do so at a scale of production that makes a significant difference to its competitors' sales."[722]

4.448 The US argues that nothing in the EC argument detracts from Dr. Dorman's conclusion that Launch Aid significantly affects the probability that a launch will be profitable and therefore significantly influences the recipient's decision on whether to launch at all. However, the EC argues that the existence of aircraft that would not have been launched without subsidies is part of the "conditions of competition" in the LCA market, a *fait accompli* that the US, and the Panel, have to accept as given. But some subsidies give their recipients a competitive advantage within the market as it exists, while other subsidies fundamentally change the dynamics of the market. Both types of subsidy have an impact on the pricing and marketing decisions of the subsidized entity, just in different ways. And so both types of effect must be actionable under Part III of the SCM Agreement. Launch Aid lets Airbus do more than it could otherwise do given its financial constraints, first in terms of bringing new aircraft models into production, and second in terms of having the pricing flexibility to gain market share with those aircraft models.[723]

4.449 The US provided a statement by Professors Joseph E. Stiglitz and Bruce C. Greenwald of Columbia University that "discusses differences in the effects of different types of subsidies to LCA producers. Their conclusion is that subsidies, like Launch Aid, that directly influence the development, production, or sale of specific aircraft are the subsidies that are most likely to affect competition generally and market pricing in particular. Their statement confirms that Launch Aid, because it has a direct impact on the supply of LCA that Airbus can produce and sell, has a causal relationship with the market behavior of Airbus and its impact on its competitor."[724]

4.450 The US also considers its approach to the effect of the subsidy in this dispute to be consistent with the approach of the Appellate Body in *US – Cotton Subsidies (Article 21.5)*. "According to the Appellate Body, an analysis of whether the 'effect of the subsidy' is significant price suppression (or, presumably, any of the other types of effects described in Article 6.3 of the SCM Agreement) properly includes not only an analysis of the effect of the subsidy on short-term production levels, but a longer-term analysis of whether producers would even be present in a particular market at all in the absence of subsidies."[725] "Thus, ... significant price suppression (or, presumably, another form of serious prejudice) can be caused not only by a subsidy that directly impacts the recipient's short-term production or pricing decisions, but also by a subsidy that facilitates the entry or exit of the subsidy recipient into or out of a particular market and thus the presence or absence of the subsidy recipient in that market over time."[726] "If the Appellate Body's approach is valid with respect to a commodity product such as upland cotton, it would appear to be even more appropriate in the LCA industry, which has vastly longer production cycles and significantly greater barriers to entry than does the production of upland cotton. The United States has demonstrated that the nature and magnitude of the EC and Airbus government subsidies to Airbus are such as to directly affect the outcome of Airbus's individual launch decisions, and therefore the entry of Airbus into various segments of the LCA market, which in turn has effects on the marketability of the entire Airbus LCA family."[727]

4.451 The US notes that the EC response to the US demonstration of the distorting effects of Launch Aid is *not* to contend that Launch Aid has had no impact on Airbus' launch decisions. Rather, the EC contends that the US, by arguing that subsidies created the existing supply, in fact argues that

[722] US, SWS, Executive Summary, para. 79.
[723] US, SNCOS, Executive Summary, para. 20.
[724] US, Answer to Panel Question 230, para. 32 (footnotes deleted).
[725] US, Comments on Appellate Body Report in US – Upland Cotton, para. 2.
[726] US, Comments on Appellate Body Report in US – Upland Cotton, para. 2.
[727] US US, Comments on Appellate Body Report in US – Upland Cotton, para. 3.

BCI deleted, as indicated **[***]**

Boeing should have a monopoly in the LCA market; it then rebuts this straw man by arguing that even without the subsidized Airbus entry, there would have been another competitor with exactly the same product line as Airbus. The US considers that the EC argument is pure speculation devoid of evidentiary support.[728]

4.452 The US notes that the EC argues that even if Airbus was not able to launch any of its LCA models when it did, sooner or later Airbus or some other competitor would have done so. But it does not say when that "other competitor" would have entered the market, or what the technical capabilities and prices of the LCA produced by that "other competitor" would be. Moreover, at the time Airbus launched the A300, A310, A320, A330, and A340, there already was "another competitor" to Boeing, namely McDonnell Douglas, a US company.[729]

4.453 The US notes that the EC further complains that the US has not demonstrated that the subsidies have caused adverse effects because it fails to quantify with precision the benefit that Launch Aid provides to Airbus and asserts that the magnitude of the benefit of Launch Aid and certain other subsidies is too small to produce significant adverse effects. The US considers that the EC contention is incorrect for several reasons. First, the US is under no obligation to provide a detailed quantification and allocation of the subsidy benefit.[730] The US points out that nothing in the SCM Agreement requires a precise quantification of the subsidy benefit in the context of a claim of serious prejudice; what matters is whether the subsidy is of sufficient magnitude to have caused the claimed effects.[731]

4.454 Second, the EC attempt to show a small current benefit from Launch Aid is riddled with significant errors.[732] The US argues that it has shown that the magnitude of the subsidy was large enough to have materially affected all of Airbus' launch decisions because it did affect Airbus' launch decisions – that is a point that the EC mostly does not dispute.[733] The US considers that the EC calculation of the subsidy benefit therefore is not credible. How is it possible that government support played the instrumental role that it has throughout the growth of Airbus, as the EC recognizes, if the magnitude of the support is *de minimis*?[734]

4.455 The US argues that "any reasonable calculation of the magnitude of the subsidy demonstrates that it is – contrary to the EC's claims – very large."[735] The US notes that "the identification of a 'benefit' is only the beginning, not the end, of the inquiry into the effect of the subsidy. In particular, as the panel in *US – Cotton Subsidies* recognized, it is 'common economic sense' that 'the effects of a subsidy may vary depending upon the nature of the subsidy.'"[736] To the extent that a rough calculation of the overall benefit is a useful way to determine the general magnitude of the subsidy, the impact of Launch Aid, over the life of Airbus, is well over $100 billion. This figure represents the additional cost that Airbus would have incurred if it had obtained financing on the terms and conditions of Launch Aid at commercial interest rates for that type of financing. In the US view, the magnitude of the subsidy is more than sufficient to draw the conclusion that Airbus could not have done this.

[728] US, SWS, Executive Summary, para. 81.
[729] US, FNCOS, Executive Summary, para. 22.
[730] US, SWS, Executive Summary, para. 83.
[731] US, SNCOS, Executive Summary, para. 21.
[732] US, SWS, Executive Summary, para. 83.
[733] US, SNCOS, Executive Summary, para. 21.
[734] US, SNCOS, Executive Summary, para. 21.
[735] US, SWS, para. 599.
[736] US, Answer to Panel Question 232, para. 48 (quoting US – Cotton Subsidies (Panel), para. 7.1208).

BCI deleted, as indicated **[***]**

(vi) Conclusions

4.456 According to the US, the EC looks at this dispute through the lens of the "specific characteristics" of the LCA industry, including its status as "one of the last mass-employment industries in economically developed countries, with a highly skilled workforce" and "an industry in which a lot of pride is invested, which is considered strategic and is closely interwoven with defence industries." The US further notes that in the EC view, the massive subsidies provided to Airbus' LCA development and production are justified by these "specific characteristics" of the LCA industry – though, of course, this view has no basis in the SCM Agreement. Perhaps realizing this weakness in its argument, the EC has offered up a number of other defenses, none of which are any more persuasive.[737]

4.457 The US points out that in its statement at the first Panel meeting, the EC reminded it of the Appellate Body's admonition that "'{t}he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.'" Yet, the US argues, on that day the Panel saw a perfect example of the EC disregard of that admonition. The US considers that the EC has improperly designated information as highly sensitive business information ("HSBI") when it did not deserve that status. A concern the US had when the HSBI rules were established was that they could be manipulated in a way that would put the US at a disadvantage in making its case. Regrettably, that concern was borne out by the EC's first submission, and was borne out again at the Panel's first meeting.[738]

4.458 The US considers that the EC oral statement at the first meeting was remarkable both for what it omitted and for its window into how the EC wants the Panel to think about this dispute. Key omissions include the following: (a) The EC refers to the SCM Agreement almost as an after-thought and asks instead that the Panel focus on agreements, such as the Tokyo Round Subsidy Code and the 1992 Agreement, that are not covered agreements and that are outside the Panel's terms of reference; (b) The EC disregards the concerted, systematic, deliberate aspect of the Launch Aid Program; (c) The EC never mentions the $15 billion in Launch Aid that has been provided to Airbus; (d) The EC never mentions the below-market interest rates that are characteristic of Launch Aid; (e) The EC never mentions the amount of Launch Aid debt that is outstanding; (f) The EC never mentions the $4.2 billion in Launch Aid provided for the A380; (g) The EC never mentions explicit commitments of Launch Aid for the A350; (h) The EC never mentions Boeing's 20-point market share loss; (i) The EC never mentions sales campaigns that Boeing lost.[739]

4.459 The US believes that the EC statement was revealing in several respects of how the EC wants the Panel to think about this dispute. The EC notes that much of the EC view is summed up in paragraph 5 of its opening statement. The US notes that there, the EC acknowledges that its support for the LCA industry is driven by a variety of social, non-commercial factors, such as maintaining "mass-employment" and preserving the "pride" invested in the industry. The EC would have the Panel believe that because the LCA industry is special, it is subject to a different set of rules. But that assuredly is not the case. The SCM Agreement is the only relevant standard for the dispute at hand, regardless of the factors that may make the LCA industry different from other industries.[740]

4.460 Curiously, the EC acknowledgment of the LCA industry's exceptional characteristics does not carry over into the EC understanding of the returns that a market player providing Launch Aid type

[737] US, SWS, Executive Summary, para. 1.
[738] US, FCCS, Executive Summary, para. 1 quoting EC First Oral Statement, para. 38 (quoting *US - FSC* (AB), para. 166).
[739] US, FCCS, Executive Summary, para. 2.
[740] US, FCCS, Executive Summary, para. 3.

financing would demand. In any event, whatever the exceptional features of the LCA industry, they do not exempt it from the disciplines of the SCM Agreement. Quite the contrary, the very fact that the SCM Agreement discusses LCA issues in certain footnotes, makes clear that the drafters thought about the Agreement's applicability to LCA and found it applicable.[741]

4.461 Finally, the US notes that in its oral statement, the EC repeatedly appealed to the concept of "fairness."[742] The US points out that what is fair is that the rules that the US and the EC agreed to in the SCM Agreement apply even-handedly. These are rules the EC voluntarily undertook, not rules that would be "forcibly applied" to it, as it argued at the first Panel meeting.[743]

2. Arguments of the European Communities

4.462 The EC submits that to sustain its adverse effects claims, the US must show that the alleged subsidies at present (*i.e.*, the end of 2007) cause adverse effects to its LCA-related interests. The EC maintains that the US failed to establish the required "genuine and substantial relationship of cause and effect" between the alleged subsidies and the specific forms of adverse effects listed in these provisions.[744] In particular, the EC argues that the US failed to establish all necessary elements of the "chain of causation" between the alleged subsidies and the alleged specific forms of adverse effects.[745]

4.463 The EC remarks that under the SCM Agreement, subsidies are, apart from export and local content subsidies, only actionable if they are demonstrated to cause adverse effects. Otherwise, they are legitimate public policy instruments that WTO Members are free to use.[746] The EC also highlights its view that the 1992 Agreement should be the basis against which to judge the existence of adverse effects.

4.464 The EC submits in an introductory section to its submission, and indeed throughout its submission, that the US simply highlights the raw amounts of financing provided to various participants in the EC aerospace industry by EC governments, over a period of four decades.[747] The EC argues that while the US exposition of figures may make for good story-telling, it is a story entirely devoid of either context or the specific content required to state a claim of adverse effects under Articles 1, 5 and 6 of the SCM Agreement, including of (i) significant price suppression and depression, (ii) significant lost sales and price undercutting, or (iii) displaced or impeded US market share.

4.465 The EC argues that given that the US raises claims based on allegedly subsidy-lowered Airbus prising, the US must show that Airbus SAS, the entity that today develops, sells and manufactures Airbus LCA, somehow has subsidies at its disposal with which to cause price suppression, lost sales, displacement, impedance, or material injury. The EC argues that it is not enough for the US to show that some company that does not sell LCA has received those subsidies; the US must show that Airbus SAS, the company that sells LCA, benefits from those subsidies.[748] According to the EC, the burden to show that Airbus SAS receives subsidies is a first critical step in showing that those subsidies cause adverse effects – a first step the US fails to take.

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[741] US, FCCS, Executive Summary, para. 6.
[742] *See, e.g.*, EC First Oral Statement, para. 25.
[743] US, FCCS, Executive Summary, para. 7, citing EC First Oral Statement, para. 6.
[744] EC, FWS, paras. 7, 43, 2015, 2149, 2248.
[745] EC, Comments on *US – Upland Cotton*, paras. 35-38.
[746] EC, FCOS, para. 39.
[747] EC, FWS, Executive Summary, para. 2.
[748] EC confidential closing statement, first meeting, para. 9.

BCI deleted, as indicated **[***]**

4.466 According to the EC, the US adverse effects causation analysis has many deficiencies.[749] The EC considers that the US avoids critical issues, including by refusing to (i) discuss the 1992 Agreement, (ii) demonstrate that the EC producer of LCA benefits from any subsidies that may exist, (iii) recognize the market realities in relation to the definition of the subsidized and like products at issue, (iv) put a proper figure on any alleged subsidisation, or (v) assess how long benefits or effects from any subsidisation may last. According to the EC, the US furthermore fails to demonstrate that the alleged subsidies cause price undercutting, price depression or lost sales taking into account the required legal standards, nor does the US address any of the myriad of non-attribution factors, such as 9/11, Boeing's own admitted mismanagement of customer relations and significant changes in the conditions of competition.

4.467 The EC maintains that the US overly simplistic approach would allow most subsidies to be condemned as causing adverse effects. The EC contends that this is not the approach permitted or laid out in the SCM Agreement. In light of these deficiencies, the EC submits that the US does not show a causal link between subsidies and adverse effects, as required by Articles 5 and 6 of the SCM Agreement. Rather, in the EC's view, the US reasoning boils down to saying that any sales by Airbus necessarily take sales away from Boeing and prevents Boeing from obtaining monopoly profits.[750]

(a) 1992 Agreement – "*Volenti non fit Injuria*"

4.468 The EC argues that, in bringing its claim, the US ignores the agreement concluded with the EC that regulates the type and amount of government support that may be offered to the LCA industry – *i.e.*, the 1992 Agreement.[751] The EC consider this to be a fundamental obstacle to the US claims. According to the EC, the US cannot argue that it suffers adverse effects as a result of measures that were granted on terms that the US expressly consented to: *Volenti non fit Injuria*.[752] The EC considers that this principle is implicit in Articles 5 and 6 SCM Agreement as well as Article 3 DSU, all of which thus support a conclusion that those measures cannot be considered to cause adverse effects.[753]

4.469 In providing financing, the EC respected the terms and conditions set out in Article 4 of the 1992 Agreement and consider that the US has not even attempted to rebut this argument.[754] The EC explains that WTO law should not be interpreted in clinical isolation from the rest of international law. It considers that there can be no conflict between two international agreements if one of the two contains more specific rules. *Lex specialis* prevails over the "later-in-time" rule in such a case.[755]

4.470 The EC also points out that Article 10.1 of the 1992 Agreement provides that parties shall seek to avoid any trade conflict "on matters covered by the present Agreement".[756] The 1992 Agreement, voluntarily signed by the US, makes a careful distinction between pre-1992 and post-1992 government support. The EC considers that the continued application and reliance on the Agreement following the entry into force of the SCM Agreement justifies the EC's reliance on the fact that MSF granted in accordance with the terms of Article 4 of the 1992 Agreement would be

[749] *See, e.g.*, EC, FWS, paras. 7, 1375-1506. EC, SWS, paras. 755-914.
[750] EC, closing statement, first meeting, Executive Summary, para. 24.
[751] EC, FWS, paras. 1353-1359, EC, SWS, para. 676.
[752] EC, SNCOS, Executive Summary, para. 4.
[753] EC, SCCS, para. 3.
[754] EC, FWS, paras. 1353-1359 and EC, SWS, para. 676.
[755] EC, SNCOS, paras. 14-15.
[756] EC, Answer to Panel Question 59 and 60.

BCI deleted, as indicated **[***]**

acceptable to the US.[757] Since 1992, the EC has acted in a transparent manner, regularly consulting with the US and providing the information required by the agreement.[758]

4.471 In this situation, the US should be estopped from claiming adverse effects under Articles 5 and 6.3 of the SCM Agreement. It would run against a fundamental principle of fairness and good faith if the US were allowed to first encourage the EC to adopt certain MSF practices as being compatible with the 1992 Agreement and then challenge these very same practices as being incompatible with the SCM Agreement.[759]

4.472 Moreover, the EC notes that the 1992 Agreement allowed the US to provide billions of dollars in research and development subsidies to Boeing. These *US* subsidies are among the many factors that have played a major role in shaping the *present* conditions of competition.[760]

4.473 Finally, the EC submits, in the alternative, that the US still bears the burden of proving that the alleged subsidies cause adverse effects. The EC submits a host of arguments that demonstrate that the US claims of adverse effects must fail.[761]

(b) Reference Period

4.474 The EC notes that the US argues that the Panel's "present" adverse effects analysis is limited to determining whether adverse effects existed as of the date of establishment of the Panel – *i.e.*, more than three years ago, on 20 July 2005.[762] According to the EC, the US errs.[763] It explains that the disciplines of Part III of the SCM Agreement deal with subsidies that cause *present* adverse effects in the form of *serious* prejudice and *material* injury.[764] That is, according to the EC, in examining the US claims under Articles 5 and 6.3 of the SCM Agreement, the Panel must determine whether there are any *present* adverse effects, based on *current factual conditions*.[765] The Panel must make this assessment based on an appropriate reference period.[766] Citing the panel decision in *US – Upland Cotton*, the EC argues that "the most recent period for which data are available will be the appropriate period."[767]

4.475 Any adverse effects that might have been caused 5, 10, 20 or 30 years ago do not constitute a present violation of Part III of the SCM Agreement.[768] Rather, a complaining Member must show that the use of challenged subsidy measures causes adverse effects *today*.[769] Only with such a showing would the US be entitled to remedy provided in Article 7.8 of the SCM Agreement.[770]

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[757] EC, FWS, paras. 1353-1359 and EC, SNCOS, paras. 11-13.
[758] EC, Answer to Panel Question 59 and 60.
[759] EC, Answer to Panel Question 59 and 60.
[760] EC, SWS, para. 659.
[761] *See, e.g.*, EC, SCOS, para. 23 and EC, FWS, paras. 1999-2259, EC, SWS, paras. 755-914.
[762] US, FWS, note 916.
[763] EC, FWS, paras. 1468-1506.
[764] EC, FWS, paras. 1491-1506.
[765] EC, Comments on *US – Upland Cotton (21.5)*, para. 20.
[766] EC, FWS, paras. 1468-1506; EC, FNCOS, paras. 134-141.
[767] EC, FWS, para. 1479.
[768] EC, FWS, paras. 1792-1794; 1799, 2019-2020, 2073-2075.
[769] EC, Comments on *US – Upland Cotton (21.5)*, paras. 8-28.
[770] EC, Comments on *US – Upland Cotton (21.5)*, paras. 27-28.

BCI deleted, as indicated **[***]**

4.476 The EC cites to the panel and Appellate Body Reports in *US – Upland Cotton (Article 21.5 – Brazil)* in support of its position.[771] The EC also explains that the prevailing US arguments in that dispute are directly contrary to the arguments the US advances in this dispute.[772]

4.477 The EC notes that, before the panel in *US – Upland Cotton (Article 21.5 – Brazil)*, the US argued that the relevant time period for the panel to examine Brazil's claims of significant price suppression was "the immediate present rather than a historical period."[773] The United States in that dispute urged the panel to use marketing year 2006[774] – *i.e.*, a time period extending well after the date of the establishment of the panel in that dispute (28 September 2006).[775] The panel in *US – Upland Cotton (Article 21.5 – Brazil)* agreed with the United States that it was required to assess data and evidence from marketing year 2006 in making its findings on Brazil's present adverse effects claims.[776]

4.478 The EC also notes that the compliance panel in *US – Upland Cotton (Article 21.5 – Brazil)* further reasoned that

> {t}he claim of Brazil under Article 6.3(c) of the SCM Agreement requires an analysis by the Panel as to whether "the effect of the subsidy … is … significant price suppression." While the SCM Agreement does not contain a specific provision on the period to be considered for this purpose, the use of the present tense logically implies the need to make a determination with respect to the present period.[777]

4.479 Moreover, the compliance panel held that it was *required to examine the most current factual information* in making its assessment of Brazil's adverse effects claims. Specifically, the panel noted that it saw "no reason to exclude data relating to MY 2006 to the extent that it is available."[778] The panel continued its reasoning, stating that a

> failure to take into account relevant and available data placed before us pertaining to the period since July 2006 would not be consistent with the requirement under Article 11 of the DSU that a panel 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case ….[779]

4.480 Relying on the panel and Appellate Body decisions in *US – Upland Cotton (Article 21.5 – Brazil)*, the EC also refutes the US reliance on the *EC – Biotech* case.[780] The United States cites to *EC – Biotech* as allegedly mandating the Panel to examine only whether adverse effects existed at the time of the panel request.[781] The EC argues that the *EC – Biotech* decision is not relevant for purposes of this dispute because the case did not involve a claim of *present* adverse effects under Articles 5 and 6 of the SCM Agreement.[782] The *US – Upland Cotton* decisions have firmly

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[771] EC, SWS, paras. 677, 679, 695-696; EC, Comments on *US – Upland Cotton (21.5)*, paras. 27- 28.
[772] EC, Comments on *US – Upland Cotton (21.5)*, paras. 9-11.
[773] EC, Comments on *US – Upland Cotton (21.5)*, note 2.
[774] MY 2006 began on 1 August and continued through 31 July 2007. EC, Comments on *US – Upland Cotton (21.5)*, para. 10.
[775] The date of the establishment of the panel in that dispute was 28 September 2006. EC, Comments on *US – Upland Cotton (21.5)*, para. 10.
[776] EC, Comments on *US – Upland Cotton (21.5)*, para. 11.
[777] EC, Comments on *US – Upland Cotton (21.5)*, para. 14.
[778] EC, Comments on *US – Upland Cotton (21.5)*, para. 16.
[779] EC, Comments on *US – Upland Cotton (21.5)*, para. 17.
[780] EC, Comments on *US – Upland Cotton (21.5)*, paras. 25-26.
[781] US, SWS, paras. 673-684.
[782] EC, Comments on *US – Upland Cotton (21.5)*, paras. 25-26.

established that *claims* of adverse effects under Articles 5 and 6 of the SCM Agreement are particular because they require the establishment – at the time of briefing before the Panel – as to whether adverse effects are *present.* Adverse effects claims necessarily focus on *present* effects of subsidies – not *past* effects predating the period of time before the briefing before the panel.[783] Both *US – Upland Cotton* panels have noted that the text of Article 6.3 ("the effect of the subsidy … *is* significant price suppression") "logically implies the need to make a determination with respect to the present period."[784]

4.481 Second, the *EC – Biotech* case is also inapplicable because it dealt with the question of whether the panel had jurisdiction to rule on whether there was a *measure* existing at the time of the establishment of the panel and whether that measure continued to exist at the end of the proceedings.[785] In this case, there is no dispute concerning any change to the alleged subsidy "measures" at issue since September 2005 (except that time has confirmed the absence of any alleged subsidies for the A350).[786] But even if those measures had been withdrawn or expired, the question before this Panel would be whether there are *continuing* adverse effects *today* from those measures.[787] That is the essence of an Article 5 and 6.3 claim involving "present" adverse effects as confirmed by both *US – Upland Cotton* panels and the Appellate Body.[788] Moreover, in *EC – Selected Customs Matters*, the Appellate Body emphasized that "{e}vidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel."[789]

4.482 The EC identifies data and evidence from the 2004-2007 period as reflecting *current* factual conditions under which, according to the EC, the Panel must assess whether the alleged subsidies cause *present* adverse effects. Both *US – Upland Cotton* panels have noted that *past* effects may be relevant but only if they reflect conditions of competition that are similar to present conditions of competition.[790]

4.483 The US adverse effects claims are based, to a large extent, on evidence of alleged adverse effects from the period 1999-2003. Yet, sales campaigns during that time period were conducted under very different conditions of competition that those in effect today. Therefore, these historic sales campaigns provide the Panel with little, if any, information about the effects of any subsidies under present conditions of competition.

4.484 The EC argues that use of data from the 2001-2003 period to substantiate a finding of displacement or impedance in the European Community market or third country markets under Articles 6.3(a) and 6.3(b) of the SCM Agreement would be inconsistent with Article 6.7(c). Therefore, the EC considers that the Panel is legally precluded from using such information as a basis for assessing the US' displacement or impedance claims. With respect to the remaining US claims of serious prejudice or its claim of material injury, it is not the position of the EC that the Panel is precluded, as a matter of law, from considering information from 2001-2003, or from any other period. Instead, the EC questions the relevance of information from a historical period exhibiting

[783] This contradicts the US arguments at paragraph 678 of its second written submission where the United States argues – contrary to what it argued before the panel in *US – Upland Cotton (Article 21.5 – Brazil)* – that the word "is" allows panels to make findings that adverse effects may have existed at any time, even presumably in the distant past.

[784] EC, Comments on *US – Upland Cotton (21.5)*, para. 14.

[785] EC, Comments on *US – Upland Cotton (21.5)*, paras. 25-26.

[786] EC, Comments on *US – Upland Cotton (21.5)*, paras. 25-26.

[787] EC, Comments on *US – Upland Cotton (21.5)*, paras. 25-26.

[788] EC, Comments on *US – Upland Cotton (21.5)*, paras. 25-26.

[789] EC, Comments on *US – Upland Cotton (21.5)*, para. 26.

[790] EC, Comments on *US – Upland Cotton (21.5)*, para. 25.

BCI deleted, as indicated **[***]**

conditions of competition that are very different from those prevailing in the LCA industry today to establishing the existence or absence of present adverse effects. [791] The EC points out that both *US – Upland Cotton* panels have noted that *past* effects may be relevant to an assessment of present effects, but *only if* they existed under conditions that resemble current factual conditions.[792]

4.485 The EC argues that in presenting its claim, the US ignores that there have been fundamental changes in the LCA markets since 2003. The EC argues that these changed economic circumstances (i) make pre-2004 data largely irrelevant to the Panel's assessment and (ii) have eliminated any basis for finding, on that basis, that adverse effects exist *presently*.[793] Specifically, the EC considers relevant the following facts.[794]

4.486 First, the nature and extent of demand for LCA has changed significantly.[795] The 2001-2003 period following the events of 9/11 was characterized by extraordinarily low demand, few deliveries, low revenues, and significant reductions in LCA prices for new and used LCA.[796] Mr. Christian Scherer, Executive Vice President of Airbus, confirms that this period was a "buyers' market," in which both Airbus and Boeing had every incentive to compete vigorously to win sales campaigns on pricing considerations or other competitive parameters.[797] In comparison, Mr. Scherer confirms that today's conditions of competition in the LCA markets reflect a "sellers' market."[798] Today, demand for LCA has exploded to record highs in line with demand for air travel, and as a result of air traffic liberalization and the economic boom in China, India and the Middle East.[799] Mr. Scherer explains that part of this demand-side development is the rapid growth and success of low-cost carriers in North America, Europe and Asia. The importance and market presence of low-cost carriers has expanded exponentially, as the low fares offered by such airlines have created additional demand for air travel.[800] In the current market conditions reflecting very high demand, Airbus and Boeing generally have less of an incentive to heavily discount LCA prices, including an incentive to use subsidy funds, if available.[801]

4.487 Second, both manufacturers' order backlog has increased dramatically.[802] In the buyers' market following 9/11, Mr. Scherer notes that both Boeing and Airbus had difficulties securing sufficient orders to keep their production lines filled.[803] This has changed since the beginning of 2004. Since then, both Boeing and Airbus have experienced sustained, exponential growth in orders.[804] Mr. Scherer explains that this growth has been far greater than both manufacturers' capability to meet demand. Although Boeing and Airbus are producing at full capacities, at

[791] EC, Answer to Panel Question 204, paras. 279-289.
[792] EC, Comments on US – Upland Cotton (21.5), para. 25.
[793] EC, Comments on *US – Upland Cotton (21.5)*, para. 33.
[794] EC, Comments on *US – Upland Cotton (21.5)*, paras. 25-26.
[795] EC, Comments on *US – Upland Cotton (21.5)*, paras. 25-26.
[796] For further details on the effects of 9/11 on the conditions of competition in the LCA markets, *see* EC, FWS, paras. 1440-1467; EC, Answer to Panel Question 116, paras. 355-368; EC, SWS, paras. 1092-1099; EC, SNCOS, paras. 314, 316, 325, 334; EC, Answer to Panel Question 286, 288, 292, paras. 241-256, 280, 284, 292, 318.
[797] EC, SNCOS, para. 334.
[798] EC, SNCOS, para. 335.
[799] EC, SNCOS, para. 335.
[800] EC, SNCOS, paras. 337-338.
[801] EC, SWS, paras. 1072-1076; EC, SNCOS, para. 316.
[802] EC, Comments on *US – Upland Cotton (21.5)*, para. 33.
[803] EC, SNCOS, paras. 314, 325.
[804] EC, FWS, paras. 1361-1364.

BCI deleted, as indicated **[***]**

increasing rates, both manufacturers' order backlog is ever increasing.[805] For example, the value of Boeing Commercial Airplane's backlog is now $255 billion – it increased by 46 percent in 2007 to more than seven times BCA's revenue in that year.[806] Similarly, Mr. Scherer confirms that the time until delivery for new orders constantly increases. Boeing's new customers must wait four to six years between an order and delivery of its 737NG, 787, and 777 family LCA.[807]

4.488 Third, there have been significant changes in LCA products competing in sales campaigns through the introduction of new LCA and the abandonment of other LCAs.[808] Mr. Scherer explains that the period since the beginning of 2004 is distinct from earlier periods because of changes in the LCA product offerings of Boeing and Airbus that compete in sales campaigns. These changes affect the competitive position of both manufacturers and include the launch of Boeing's 787[809] and 747-8,[810] the launch of Airbus' A350XWB[811] and the entry into service of Airbus' A380.[812] Other LCA, such as Boeing's 717 and 757 and Airbus' A300 and A310, were phased out.[813] Similarly, the Boeing 767 has effectively been replaced by the 787.[814]

4.489 Fourth, critically, Boeing's change in business strategy altered the conditions of competition in the LCA markets since 2004.[815] Over the 1999-2003 period, Boeing CFO James Bell acknowledged that Boeing – as the incumbent LCA supplier – had an "entitlement mentality."[816] Boeing officials readily acknowledge that Boeing had lost its customer focus and had poorly marketed its products, which led the company to lose market share.[817] This changed in 2004, when Boeing replaced its head of sales with Scott Carson. Mr. Scherer notes that under Carson, Boeing started engaging in a noticeable, widespread standardized pricing policy change.[818] Mr. Scherer testified that the "new" BCA was much more price-aggressive in sales campaigns, offering steep discounts to all its customers to a much greater extent than had been observed in the past.[819]

4.490 Finally, changes in the regulatory environment affecting the LCA industry have changed conditions of competition.[820] Mr. Scherer explains that through the de-regulation and liberalization of air traffic, the air transportation business has undergone – and is still undergoing – significant changes.[821] Mr. Scherer notes that the deregulation of state-owned airlines in many countries, as well as the growth of "open sky" agreements, have opened a considerable number of routes.[822] Many new airlines were formed, particularly in China, India, and other parts of Asia, but also in Europe and in the Middle East. Those airlines are now attempting to meet rapidly increasing demand for air travel,

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[805] EC, Answer to Panel Question 210 and 211, paras. 467-504; EC, Comments on US Answer to Panel Question 240, paras. 192-220.
[806] EC, Comments on *US – Upland Cotton*, para. 33.
[807] EC, SNCOS, para. 417.
[808] EC, Comments on *US – Upland Cotton (21.5)*, para. 33.
[809] EC, FWS, paras. 2000-2010, 2191 and 2300 for a discussion of the effect of the launch of the 787 in the 200-300 seat LCA market.
[810] EC, FWS, paras. 1689-1700 for a discussion of the launch of the 747-8.
[811] EC, FWS, para. 2301.
[812] EC, SNCOS, para. 321.
[813] EC, FWS, note 2011; US, FWS, note 904.
[814] EC, FWS, paras. 2000-2010 and 2026.
[815] EC, Comments on *US – Upland Cotton (21.5)*, para. 33.
[816] EC, FWS, para. 1462.
[817] EC, FWS, paras. 1459-1466. 244;
[818] EC, SNCOS, paras. 325-326.
[819] EC, SNCOS, paras. 325-326.
[820] EC, Comments on *US – Upland Cotton (21.5)*, para. 33.
[821] EC, SNCOS, para. 322, 335.
[822] EC, SNCOS, para. 322, 335; EC, FWS, paras. 1745-1746.

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and to build in expectations for future growth. In addition, regulatory pressures increase the need to replace older aircraft, in particular noise constraints and emissions constraints.[823]

(c) Subsidized and like product

4.491 The EC asserts that it corrects the artificial US grouping of all Airbus LCA into a single "subsidized" product and all Boeing LCA into a single like product.[824] The EC argues that the product and market analyses must be based on objective facts taking into account the physical, performance and price characteristics, and the perception of market participants of the products involved.[825]

4.492 The EC presents evidence – including statements from Airbus Executive Vice President Christian Scherer, airline expert Rod Muddle, financiers, airline customers and Boeing itself – to demonstrates that the US single subsidized and single like product theory conflicts with market realities.[826] The EC submits that technologically advanced, sophisticated and made-to-order LCA are not fungible commodities.[827] According to the EC, the differences in physical – particularly seating capacity and range – performance and price characteristics, the perception of market participants, including Boeing and Airbus, and the actual competitive relationships between these products confirm there to be different Airbus LCA competing in different LCA markets.[828]

4.493 The EC identifies five different LCA product markets.[829] Airbus "subsidized" products almost exclusively compete with Boeing "like" products in three of these five product markets.[830] In his testimony, Mr. Scherer confirms the multitude of evidence supporting the existence of the following five LCA markets:[831] (i) the single-aisle (100-200 seat) LCA market, where the Airbus A320 and Boeing 737NG family LCA compete;[832] (ii) the 200-300 seat LCA market, where the Airbus A330 family and A350XWB-800 LCA and Boeing 767 and 787 family LCA compete;[833] (iii) the 300-400 seat market, where the Airbus A340 family, A350XWB-900 and -1000XWB and Boeing 777 family LCA compete;[834] (iv) the 400-500 seat LCA market, where Boeing offers its 747 family LCA with no competing Airbus product;[835] and (v) the 500+ seat LCA market, where Airbus offers its A380 LCA, with no competing Boeing product.[836] The EC also argues that Boeing itself divides its product portfolio into the same separate markets as those proposed by the EC.[837]

4.494 In addition, the EC adduces statements of Boeing executives confirming that the 747-8 is "the only airplane serving the 400- to 500-seat market."[838] Further, the EC provides evidence to demonstrate that the Airbus A380 is not "like" the Boeing 747-8 and that both are sold and marketed

[823] EC, SNCOS, para. 322, 335.
[824] US, FWS, para. 1554.
[825] EC, FWS, paras. 1507-1568.
[826] EC, FWS, paras. 1347-1351, 1427-1439, 1526-1550.
[827] EC, SNCOS, para. 351.
[828] EC, FWS, paras. 1523-1568.
[829] EC, FWS, paras. 1539-1550.
[830] EC, FWS, paras. 1542-1549.
[831] EC, SNCOS, paras. 319-332.
[832] EC, SNCOS, para. 318.
[833] EC, SNCOS, paras. 328-330.
[834] EC, SNCOS, para. 331.
[835] EC, SNCOS, para. 332-333.
[836] EC, SNCOS, para. 332-333.
[837] EC, FWS, paras. 1535-1536.
[838] EC, SWS, para. 730.

in different LCA markets.[839] According to the EC, Boeing executives concur with the EC assessment.[840] The EC adduces the following remark by Boeing's then Vice President Marketing, Randy Baseler, to that effect: "You'll probably see a lot of coverage in which the A380 is compared side-by-side with the Boeing 747-8. So, just to be clear, these two airplanes serve different markets - the 747-8 has about 100 fewer seats. We think there's a market there for both airplanes."[841]

4.495 The EC notes that, to overcome these facts, the US relies on the alleged importance of commonality between Airbus LCA[842] and "bundled" sales (also called "package" deals).[843] The EC argues that the US grossly overstates the importance of commonality and bundled sales.[844] The EC provides evidence to demonstrate that these two factors are not significant enough to warrant conflating different aircraft families into one single LCA market.[845] In addition, the EC submits that these factors do not affect the way in which Boeing, airlines, leasing companies, and other market participants *perceive* the various Airbus product, *i.e.*, as belonging to different LCA markets. [846]

4.496 With regards to the legal arguments regarding "subsidized" and like" products, the EC asserts that it corrects the inaccurate US assertion that the Panel is required to slavishly adhere to the US definition of a single subsidized and like product.[847] The EC argues that Article 11 of the DSU requires the Panel to conduct an objective assessment of the facts and matter before it – not merely rubber-stamp one Member's arguments.[848] The EC asserts that it is fundamentally a question of fact for the Panel to determine the identity and composition of the "subsidized" product and the like product.[849] The EC submits that this is confirmed by the panel's approach in *Korea – Commercial Vessels*.[850] In that dispute, the panel did not find that its causation analysis must slavishly follow a complaining Member's assertions regarding "subsidized product" and "like" product.[851] Instead, that panel concluded after "having considered this question carefully" that "we should make separate serious prejudice findings in respect of each product category {which is} necessary for analytical coherence, *i.e.*, the scope of our final conclusions on serious prejudice will be consistent with the scope of our analysis of price suppression/price depression."[852]

4.497 The EC argues that this objective assessment must be based largely on the physical characteristics of the products, principally their seating capacity and range, and how those differences are perceived in the marketplace.[853] The EC argues that this market-based analysis is consistent with footnote 46 of the SCM Agreement.[854] This provision requires the "like" product to have, *inter alia*, "characteristics closely resembling those of the product under consideration," as confirmed by the panel in *Indonesia – Autos*.[855] The panel in that dispute furthermore emphasized that "innumerable

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[839] EC, FWS, paras. 1731-1738; EC, FCCS, paras. 26-28; EC, SWS, paras. 727-736.
[840] EC, FCCS, para. 25; EC, SWS, paras. 729-730.
[841] EC, FCCS, para. 25.
[842] US, FNCOS, para. 162; US, Answer to Panel Question 39, paras. 228-234; US, SWS, para. 365.
[843] US, FCOS, paras. 65-67. US, Answer to Panel Question 131, paras. 422-428.
[844] EC, SWS, paras. 703-726.
[845] EC, SWS, paras. 705-706; EC, Answer to Panel Question 131; EC, SWS, paras. 720-726; EC, SNCOS, paras. 354-355.
[846] EC, FWS, paras. 1523-1550; EC, SWS, para. 711.
[847] EC, SWS, paras. 737-743; EC, SNCOS, paras. 352-353.
[848] EC, Answer to Panel Question 128-130, paras. 404-419.
[849] EC, SWS, paras. 737-742.
[850] EC, Answer to Panel Question 128-130, paras. 409-410.
[851] EC, Answer to Panel Question 128-130, para. 409.
[852] EC, Answer to Panel Question 128-130, para. 409.
[853] EC, Answer to Panel Question 128-130, paras. 404-419.
[854] EC, Answer to Panel Question 128-130, para. 409.
[855] EC, Answer to Panel Question 128-130, para. 417; EC, FWS, para. 1520.

BCI deleted, as indicated **[***]**

differences among passenger cars and … the identification of appropriate dividing lines between them … does not … justify lumping all such products together where the differences among the products are so dramatic."[856] The EC argues that similar to the panel in *Indonesia – Autos*, the Panel should consider and rely on Boeing, Airbus, airlines, leasing companies and LCA industry experts' perceptions concerning the various LCA markets.[857]

4.498 In addition, the EC argues that a decision regarding subsidized and like product must give meaning not only to the physical similarities required by footnote 46, but also whether those products are in actual competition to each other.[858] The Appellate Body in *US – Upland Cotton* confirmed that "two products would be in the same market if they were engaged in actual or potential competition in that market."[859] Thus, allegedly subsidized aircraft may reasonably be considered to be in the same market if they are engaged in actual or potential competition with each other.[860] According to the EC, the US reliance on AD jurisprudence, in particular *US – Softwood Lumber*, for the definition of "like" product ignores that the primary focus of an adverse effects claims under Part III of the SCM Agreement is the effects of subsidies on actual or potential competition in particular product and/or geographic markets.[861]

4.499 Finally, the EC argues that, in any event, the causation analysis must be conducted on the foundation of appropriate groupings of products that compete in the relevant markets at issue.[862] Indeed, the EC notes that the US presents its own sales-campaign-based causation arguments largely with reference to exactly the same product groupings and markets advocated by the European Communities.[863] Ultimately, determining whether subsidy effects exist or not must be conducted by examining their impact on actual competition between Airbus and Boeing LCA.[864] That actual competition takes place in the competitive LCA markets identified by the EC.

(d) Material Injury

4.500 The EC argues that a claim under Article 5(a) involves two cumulative steps: First, an assessment of whether the domestic industry of another Member is suffering from "material injury;" and, second, whether the identified material injury found in the first step is caused by reason of the "use of any subsidy."[865]

4.501 The EC argues that, given the lack of any credible evidence of material injury to Boeing over the period 2001-2007 or 2004-2007, the Panel need not move on to the second step in the enquiry, *i.e.*, whether the material injury was caused by the effects of the alleged subsidies. [866] The EC explains that, for purposes of its material injury claim, the US agrees with the EC and properly adopted a bifurcated approach, *i.e.*, it first sought to attempt to demonstrate the existence of material injury to Boeing, and in a second step, attempted to prove such material injury was caused by the alleged

[856] EC, Answer to Panel Question 128-130, para. 417.
[857] EC, Answer to Panel Question 129, paras. 437-441.
[858] EC, Answer to Panel Question 129, para. 442; EC, Answer to Panel Question 128 and 130, paras. 406, 411-414.
[859] EC, FWS, para. 1518; EC, Answer to Panel Question 128 and 130, para. 406.
[860] EC, Answer to Panel Question 128 and 130, para. 406.
[861] EC, FWS, para. 1518; EC, Answer to Panel Question 129, paras. 423-427; EC, SWS, paras. 751-753.
[862] EC, FWS, paras. 1518-1519; EC, Answer to Panel Question 128 and 130, paras. 408-410.
[863] EC, Answer to Panel Question 128 and 130, para.413 *citing* US, FWS, paras. 779-787, 804, 806-808.
[864] EC, FWS, paras. 1518-1519; EC, Answer to Panel Question 128 and 130, paras. 408-410.
[865] EC, FWS, para.2146.
[866] EC, Comments on US Answer to Panel Question 240, para. 195.

BCI deleted, as indicated **[***]**

subsidies.[867] According to the EC, this means that, if there is no present "decline{}in the state of the domestic industry, " the Panel need not assess "what factors caused" that state, including alleged subsidies.[868]

4.502 The EC refers to its arguments that the Panel is required to assess the existence of *present* adverse effects from the alleged subsidies. According to the EC, the US must, therefore, demonstrate *present* material injury on the basis of the most recent data available that is complete and reliable. The EC submits that complete and reliable data on the condition of Boeing is available through the end of 2007.[869] Thus, the US cannot meet its burden of demonstrating material injury by relying exclusively on data from the 2001-2004 period.[870]

4.503 The EC adduces extensive evidence to demonstrate that Boeing is not presently materially injured or threatened with material injury.[871] The following table, prepared by the EC, summarizes data regarding Boeing's financial and commercial performance:

[867] EC, Answer to Panel Question 288, paras. 273-275; US, Answer to Panel Question 241, paras. 95-96.
[868] EC, Comments on US Answer to Panel Question 240, para. 195.
[869] EC, Comments on US Answer to Panel Question 240, paras. 192-200.
[870] EC, Comments on US Answer to Panel Question 240, para. 194.
[871] EC, FWS, paras. 2137-2246.

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Trends in Boeing's LCA Operations – 2001-2007[872]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**Change (2004 – 2007)**
Sales (LCA ordered)	316	251	249	277	1,025	1,052	1,421	+414%
Share of global market (by LCA)	50%	47%	47%	45%	51%	56%	50%	+5%
Share of global market (by seats)	41%	51%	35%	46%	55%	59%	49%	+3%
Share of US market (by LCA)	48%	59%	43%	35%	57%	69%	50%	+15%
Share of US market (by seats)	47%	54%	40%	33%	55%	73%	51%	+18%
Contractual backlog at year end (US dollars, millions)	75,850	68,159	63,929	70,449	124,132	174,276	255,200	+262%
Backlog units at year end (LCA)	1,228	1,098	1,066	1,058	1,796	2,455	3,427	+224%
Production (LCA delivered)	527	381	281	285	288	396	440	+54%
Net earnings (US dollars, millions)	1,911	2,107	707	753	1,432	2,733	3,584	+376%
Operating margin	5.45%	7.41%	3.31%	3.78%	6.70%	9.60%	10.74%	+184%
Return on assets (LCA Division-only)	15.9%	20.2%	8.1%	10.2%	19.9%	26.5%	31.2%	+206%
Return on assets (US method)	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
Cash flow (US dollars, millions)	2,244	2,345	977	839	1,206	2,158	2,943	+251%
Employment, applying US exclusions	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
January	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
December	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	n/a	n/a
Wages per employee	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
Utilization of capacity	n/a	n/a	n/a	~100%	~100%	~100%	~100%	-
Productivity (US dollars, thousands)	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**

[872] EC, Comments on US Answer to Panel Question 240, table at para. 199.

BCI deleted, as indicated **[***]**

4.504 The EC explains that the required assessment of the overall picture of the domestic industry, as demonstrated by the above data, establishes that Boeing is not *presently* materially injured.[873] The 2004-2007 period data demonstrates Boeing's LCA business remains vibrant, with Boeing achieving record profit levels (operating profits up 184per cent), record order levels (up 414per cent), and a record order backlog (up 224per cent). In light of this data, the EC argues that the US depiction of "the poor state of the domestic industry,"[874] which the US attributes to "decreased revenues due to dramatically reduced production and sales volume and lower unit prices,"[875] is wildly out of touch with reality.[876]

4.505 The EC explains that this current sales and financial data evidences that Boeing is neither experiencing present material injury nor is threatened with material injury.[877] In particular, the EC points out that, at 3,427 aircraft orders, the 2007 level of the Boeing's backlog – nearly eight times the total number of aircraft Boeing produced in 2007 – is evidence that this robust health is not temporary.[878] In addition to the above empirical data, the EC quotes the remarks of former Boeing Vice President Marketing, Randy Baseler, characterizing the future of Boeing's LCA business in the following glowing terms: "The Future's So Bright, I Gotta Wear Shades."[879]

4.506 The EC further argues that 2006 data provided by the US also corroborates the absence of material injury in that year.[880] The EC also notes that the US recognition that "the state of the domestic industry has improved since the establishment of the Panel" [881] in mid-2005 and explains that this statement implies that the US accepts the absence of present material injury to Boeing.[882]

4.507 The EC argues that, given the lack of material injury to Boeing, the Panel need not move on to the second step in the enquiry, *i.e.*, whether the material injury was caused by the effects of the alleged subsidies. [883]

4.508 In any event, the EC argues that the US has failed to demonstrate a causal link and that the EC arguments rebutting the existence of the various forms of serious prejudice would apply similarly to rebut any causal link between the alleged subsidies and the alleged material injury.[884]

4.509 Finally, the EC notes that the US provided data relating to Boeing's LCA operations as a whole, but fails to provide data relating to each of the properly separated US domestic industries producing LCA for the various separate product markets at issue – *i.e.*, the single-aisle 100-200 seat LCA market, the 200-300 seat LCA market, the 300-400 seat LCA market, and the 400-500 seat LCA

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[873] EC, Answer to Panel Question 261, paras. 82-94; EC, Comments on the US, Answer to Panel Question 240; EC, Comments on US Answer to Panel Question 242, paras. 230-232.

[874] US, Answer to Panel Question 241, para. 96; EC, Comments on US Answer to Panel Question 240, para. 205.

[875] US, Answer to Panel Question 241, para. 96; EC, Comments on US Answer to Panel Question 240, para. 205.

[876] EC, Comments on US Answer to Panel Question 240, para. 205.

[877] EC, FWS, paras. 2137-2246; EC, SWS, paras. 1175-1193; EC, SNCOS, paras. 293-310; EC, Comments on US Answer to Panel Question 240, paras. 192-220; EC, Answer to Panel Question 261, paras. 82-94.

[878] EC, Comments on US Answer to Panel Question 240, table at para. 199; EC, Comments on *US – Upland Cotton* (21.5), para. 33.

[879] EC, FWS, para. 2234.

[880] EC, Comments on US Answer to Panel Question 240, para. 197.

[881] EC, Comments on US Answer to Panel Question 240, para. 197.

[882] EC, Comments on US Answer to Panel Question 240, para. 197.

[883] EC, FWS, paras. 2146-2148.

[884] EC, FWS, paras. 2138, 2148-2158, 2260-2324.

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market.[885] According to the EC, the US also failed for this reason to make a *prima facie* case that the alleged subsidies cause material injury.[886]

(e) Causation

(i) Magnitude of the Subsidy

4.510 The EC argues that the US causation arguments fail to address the crucial issue of the *present* magnitude and age of the alleged subsidies.[887]

4.511 The EC points out that WTO panels and the Appellate Body have repeatedly stressed the importance of determining the magnitude of the subsidy for an objective assessment of an adverse effects claim. Specifically, the Appellate Body explained that "{t}he magnitude of the subsidy is an important factor" in determining whether a subsidy causes effects that are remediable under Part III of the SCM Agreement.[888] In *US – Upland Cotton*, the Appellate Body also found "that a panel should have regard to the magnitude of the challenged subsidy" and that "it might be difficult to decide this question {whether adverse effects are caused} in the absence of such an assessment."[889] The Appellate Body further held that "{a}ll things being equal, the smaller the subsidy for a given product, the smaller the degree to which it will affect the cost or revenue of the recipient, and the smaller its likely impact on the prices charged by the recipient for the product."[890] And the panel in *US – Upland Cotton* found that "with the passage of time a subsidy's effects may diminish. For example a subsidy granted 9 or 10 years ago would indubitably be less likely to affect producer decisions now than it did 8 years ago."[891]

4.512 The EC submits that the US ignores this jurisprudence and fails to provide the annual or per-aircraft magnitude of the alleged subsidies during the relevant reference period. The EC points out that the US fails even to establish that the benefit of subsidies actually passed through Airbus SAS. The US causation theory requires proof that, notwithstanding share transfers leading to the extinction of subsidies, cash extractions and the passage of time, subsidies (most of which were conferred decades ago) provide Airbus SAS with the financial cushion necessary to cause present adverse effects.[892]

4.513 According to the EC, the US failure to provide annual or per-aircraft subsidy magnitudes is telling. The EC explains that it assessed the magnitude of the alleged MSF and R&T subsidies to Airbus and its predecessor companies based on US CVD methodology, as informed by Boeing, and based on the overstated US benchmarks.[893] Even with the overstated US benchmarks, the results of the EC analysis show that the magnitude of any "tied" and allocated subsidies for the A320, A330, A340, family LCA are at *de minimis* levels, *i.e.*, significantly below 1 percent *ad valorem*. Combined with the fact that most of the alleged subsidies were granted 15-25 years ago, th*e de minimis* levels of

[885] EC, Comments on US Answer to Panel Question 240, para. 220; EC, Answer to Panel Question 225, paras. 571-592.
[886] EC, FWS, para. 2137.
[887] EC, FWS, para. 1569.
[888] EC, FWS, para. 1571,1576-1585.
[889] EC, FWS, para. 1576.
[890] EC, FWS, para. 1577.
[891] EC, SWS, para. 947.
[892] EC, SWS, para. 931; EC, FNCOS, para. 156.
[893] EC, FWS, paras. 1572.

these subsidies could not possibly cause the alleged adverse effects.[894] Accordingly, the EC argues, the magnitude of these subsidies strongly militates against the existence of current adverse effects.[895]

4.514 The EC notes that, rather than presenting evidence of any alleged per-aircraft magnitude of subsidies, at the first hearing, the US offered the Panel a subsidy figure of well over $100 billion, allegedly representing the *present value* of the benefits to any of the recipient companies. With its second written submission, the US provides the Panel with a report by its economic consultants, NERA, which concludes that the December 2006 present value of alleged MSF subsidies was between $122 billion and $205 billion.[896]

4.515 The EC argues that the US approach, which led it to calculate first $100 billion and then $200 billion in present benefits to Airbus SAS, is fundamentally flawed.[897] According to the EC, rather than assessing the magnitude of alleged subsidies presently available to Airbus SAS to cause adverse effects (or at the some other time when alleged adverse effects were caused), the US provides flawed information on what it considers to be the *present value* of all alleged MSF subsidies ever granted. That is, the US achieves the unrealistically large subsidy magnitudes that it does by compounding interest on alleged subsidies dating back as far as the 1970s – as if the alleged subsidies lay in a virtual bank account, unused and perpetually accumulating compound interest. The EC explains that under this US compounding methodology, the calculated benefits *increase* with age, *ad infinite*; thereby, assigning the greatest present competitive impact to the oldest measures. MSF loans provided in the 1970s and early 1980s for the A300 and A310 programmes – aircraft no longer produced – account for approximately 70 percent of the alleged US $200 billion in present subsidy benefits.[898]

4.516 The EC considers that the US results are manifestly absurd and inconsistent with panel and Appellate Body precedent. The EC argues that by compounding, rather than expensing and allocating decades-old subsidies, the US methodology is inconsistent with Part III of the SCM Agreement, which is based on the "use," not virtual banking, of subsidies.[899] As such, it is even inconsistent with the US own causation theory, which is based on the alleged use of subsidies to cause launch LCA products and provide cash flow to use in sales campaigns, not their being put in a bank account. Specifically, that theory asserts that the subsidies allegedly associated with the MSF loans provide Airbus SAS and its predecessors with a financial "cushion" that it can use to launch and price down aircraft. In other words, the US theory assumes that the company has spent and continues to spend the subsidies that it receives.[900] Finally, the EC submits that the US compounding methodology defies economic logic, resulting in alleged subsidy amounts that are many times larger than the present market capitalization and net assets of Airbus SAS' parent company, EADS.[901]

4.517 The EC submits that, while arguing that the alleged subsidies provide Airbus with a cash flow "cushion", allowing it to price down aircraft, the US fails to quantify the per-aircraft magnitude of that alleged cushion.[902] The EC argues that, when quantifying the alleged present cash flow effects, their magnitude is *de minimis* – in 2007, for example, they were considerably less than one percent – and similar to the magnitude obtained under the US/Boeing CVD methodology. According to the EC, this

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[894] EC, FNCOS, para. 155; EC, FWS, paras. 1588-1633.
[895] EC, FWS, para. 1575.
[896] EC, SNCOS, para. 381; EC, SWS, para. 916.
[897] EC, SWS, paras. 923-971; EC, Comments on US Answer to Panel Question 230, paras. 63-64.
[898] EC, SWS, paras. 923-971*; see also,* EC, Comments on US Answer to Panel Question 230, paras. 63-64.
[899] EC, SWS, para. 927, 940-946.
[900] EC, SWS, para. 933.
[901] EC, SWS, para. 928, 953-962.
[902] EC, SWS, para. 916.

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is true regardless of whether the inflated US Ellis benchmark or the corrected benchmark developed by Professor Whitelaw is applied, and regardless whether the alleged subsidies are properly treated as tied to particular programmes or improperly treated as untied. The resulting present per-aircraft magnitude of the subsidy in 2007 is too small to cause present adverse effect to US interest.[903]

4.518 The EC also responds to the US assertion that the cash flow benefit from the MSF loans exceeded EADS profits during the 1997-2007 period. The EC explains that, in making its comparison, the US erroneously relies on the principal of the loan, rather than any benefit from alleged below-market interest rates. Moreover, the EC points out that the US errs in its calculation by analyzing EADS' profits, rather than Airbus SAS' profits, and by comparing EADS' actual profit stream with an alleged cash benefit stream based on aircraft deliveries, as projected in the original 1980s business case, rather than *actual* deliveries. The EC explains that, once these US errors are corrected, the alleged cash flow benefit related to the MSF loans is shown to be much less than one percent of Airbus SAS' revenue, *i.e.*, *de minimis*.[904]

4.519 Further, the EC argues that, to show remediable effect from the alleged subsidies, the US must show that, absent the subsidy, Airbus could not or would not have priced its LCA as it did.[905] The EC submits that the corrected cash flow calculation demonstrates that removing the alleged subsidies over the past seven years would have allowed Airbus SAS to price in the exact same manner and to earn a return sufficient to meet its cost of equity.[906] Specifically, if one assumes that, rather than passing the alleged cash flow benefit on to its customer via lower prices, Airbus retained it as increased earnings for its shareholders, the effect of removing these cash flow benefits on Airbus' earnings over the 2001-2007 period was insignificant. Airbus SAS' average return on equity during this period remains at a robust level of approximately 13 percent even after this reduction to earnings. Alternatively, if Airbus did pass the entire benefit on to its customers in the form of reduced prices (*i.e.*, without affecting its earnings), any present benefits from these price reductions would be too small to cause the present adverse effects alleged by the US.[907]

4.520 Finally, the EC submits that, rather than quantifying the per-aircraft magnitude of any alleged subsidies benefiting Airbus LCA, the US improperly relies on affixing the term "subsidized" on each Airbus LCA and using this as its basis for claiming causation. While this approach is tactically understandable given the *de minimis* magnitude of the alleged subsidies, it is legally insufficient to demonstrate the required causal link between the alleged subsidies and the alleged specific forms of adverse effects.[908]

(ii) US Causation Theories

4.521 The EC submits that, to meet the standard of Articles 5 and 6.3 of the SCM Agreement, the US must establish the required "genuine and substantial relationship of cause and effect" between the alleged subsidies and the specific forms of adverse effects listed in these provisions. [909] This involves demonstrating that, absent the alleged subsidies, Boeing's present prices would be higher, [910] Boeing

[903] EC, SWS, paras. 1015, 1016-1024; EC, Comments on US Answer to Panel Question 230, paras. 56-62.
[904] EC, Comments on US – Upland Cotton (21.5), paras. 48-50.
[905] EC, Comments on US – Upland Cotton (21-5), paras. 48.
[906] EC, Comments on US – Upland Cotton (21-5), para. 54.
[907] EC, Comments on US – Upland Cotton (21-5), para. 50-57.
[908] EC, SNCOS, para. 398.
[909] EC, Comments on *US – Upland Cotton*, paras. 35-38.
[910] EC, FWS, paras. 1798-1819, 1999, 2058-2064; EC, Answer to Panel Question 206, paras. 314-321; EC, Comments on *US – Upland Cotton*, paras. 39-42.

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would currently have significantly more sales,[911] or Boeing's present market share in specific markets would be significantly higher.[912] According to the EC, the US fails to meet the standard. Specifically, the EC argues that the US fails to establish causation under (i) its historic product launch causation arguments[913] and (ii) its cash flow causation arguments,[914] as well as (iii) under any "cumulation" of the two causation theories it develops.[915]

US historical product launch causation theory

4.522 The EC responds to what the US terms its "primary" causation argument – *i.e.*, that MSF loans enabled all of Airbus' product launches over a period of four decades and that those product launches allegedly created "additional supply" that is causing competitive harm to Boeing.[916] According to the EC, to succeed in its argument the US must causally link the alleged "additional supply" to the specific forms of present adverse effects listed in Articles 5 and 6.3 of the SCM Agreement, including significant price suppression or depression, specific instances of significant lost sales and price undercutting, and displacement or impedance, amounting to serious prejudice.[917] The EC submits that the US "additional supply" argument based on historic product launches fails to sustain this burden.

4.523 First, the EC argues that the US fails to prove *present* adverse effects, *i.e.*, that *today* Boeing would be better off with a non-Airbus competitor, and absent Airbus and the products it launched over the past four decades.[918] The EC argues that, in practice, "today" refers to the period ending at the end of 2007.[919] According to the EC, the US concedes that, absent Airbus and its various LCA products, Boeing would face active competition in the LCA markets through the various reference periods identified by each party.[920] The EC submits that the acknowledged presence of a viable competitor to Boeing means that Boeing would lose a substantial number of sales, would obtain far less than 100 percent market share, and – as the US recognizes – that competition would have the effect of lowering prices.[921] Against this background, the EC argues that the US failed to show that there is a significant difference – amounting to adverse effects – between the acknowledged competition that Boeing would face in the LCA markets from a non-Airbus competitor, and today's LCA markets, in which Airbus and its various LCA exist.[922]

4.524 Second, the EC argues that, with very few exceptions, the US makes no attempt to attribute specific instances of lost sales, price undercutting, price suppression or depression, and displacement or impedance to the alleged product launch effects.[923] The US cites four instances in which alleged product effects led to lost sales. Yet, even in these limited instances – *i.e.*, sales campaigns involving the A340-500/600 (Thai Airways)[924] and the A380 (Singapore Airlines, Qantas, and Emirates)[925] – the

[911] EC, FWS, paras. 1820-1834, 2058-2064.
[912] EC, FWS, paras. 1933-1948, 2024-2036, 2058-2064.
[913] SWS, paras. 837-914; EC, SNCOS, paras. 364-365, 403-408
[914] EC, Answer to Panel Question 288, paras. 276-284.
[915] EC, Comments on US Answer to Panel Question 230, 231 and 232, paras. 26-95,
[916] EC, SWS, paras. 665, 758, 762, 755-795, 837-869.
[917] EC, SWS, paras. 755-795.
[918] EC, SWS, paras. 837-857.
[919] EC, FWS, paras. 1468-1506; EC, Answer to Panel Question 115, paras. 334-354; EC, SNCOS, paras. 343-349.
[920] EC, Answer to Panel Question 209, paras. 462-464.
[921] EC, FWS, paras. 1391, 1396-1400.
[922] EC, SWS, paras. 858-869.
[923] EC, SWS, paras. 755-762, 796-798.
[924] EC, FWS, paras. 2198-2211.
[925] EC, Answer to Panel Question 291, para. 196.

BCI deleted, as indicated **[*******]**

EC explains that the evidence disproves the US claims for one simple reason: it shows that alleged MSF subsidies for these products were not instrumental in the launch of either aircraft.[926] Thus, the US fails to show how *product* effects – in the form of product attributes, early availability, increased supply, or the like – have resulted in specific instances of competitive harm.

4.525 Based on either of these two deficiencies of the US causation theory, the Panel should end its analysis and find an absence of a causal link.[927] Nonetheless, the EC also addresses the substance of the US arguments. The EC identifies as the centrepiece of the US historic product launch causation argument an economic analysis (the "Dorman report") that allegedly demonstrates that *but for* MSF loans, there would be no Airbus LCA.[928] The EC maintains that certain key assumptions on which the Dorman report is based are unrealistic and result in severely understating LCA programme's expected financial return, as explained in a report by Professor Wachtel.[929] This makes the Dorman model hypersensitive to small changes in budgeted costs or revenues.

4.526 The EC provides additional analysis supporting Professor Wachtel's finding. This additional analysis, according to the EC, demonstrates that the low revenue, profits and financial return forecast by Mr. Dorman's model are driven by his obsolete assumption of 850 programme lifetime deliveries for an allegedly "typical" middle-of-the-market wide-body aircraft programme launched in 2004 with estimated development costs of approximately 10 billion dollars. According to evidence provided by the EC, that number of expected deliveries should be between 1400 and 1750 aircraft, rather than 850.[930] The EC notes that Boeing itself publicly contradicted Mr. Dorman's delivery estimate when it announced that its new aircraft the 787 – which precisely fits Mr. Dorman's criteria – was launched with expected deliveries of 1750 aircraft.[931]

4.527 The EC submits that, when Mr. Dorman's model is run with a more realistic but still conservative assumption of 1375 aircraft deliveries it results in expected programme returns that are robust and **[***]**.[932] The EC notes that the capital budget for the A380, which was prepared by the company prior to the launch of the aircraft in December 2000, concluded that the most likely return from the A380 programme was **[***]**.[933] The EC points out that that the capital budget finds that, if MSF for the A380 were not available, there would be **[***]**.[934] By contrast, Mr. Dorman finds that returns would be halved.[935] Like Mr. Dorman, the **[***]**. In contrast to Mr. Dorman, however, **[***]** of a **[[**HSBI**]]** cost of capital, *i.e.*, the investment remains viable.[936] The EC also relies on the capital budgeting studies for the A330-200 and A340-500/600 to show the same point.[937]

4.528 Thus, in contrast to the Dorman theory, the assessment underlying the actual launch decisions by Airbus GIE/SAS with respect to the A330-200, the A340-500/600, the A380, and the likely assessment by Boeing with respect to its decision to launch the 787, **[***]**.[938] Thus, the EC submits that Mr. Dorman – at Boeing's request – prepared a model for these proceedings that makes the achievement of viable returns on the LCA programme in all but the most fortuitous circumstances

[926] EC, Comments on US Answer to Panel Question 230, para. 35;
[927] EC, SWS, paras. 755-795.
[928] EC, FWS, paras. 2306-2316.
[929] EC, SWS, paras. 796-836.
[930] EC, SWS, paras. 799-821.
[931] EC, SWS, paras. 814.
[932] EC, SWS, paras. 817.
[933] EC, SWS, paras. 767-780.
[934] EC, SWS, para 767.
[935] EC, SWS, para. 803.
[936] EC, FCCS, paras. 35-38.
[937] EC, SWS, paras. 781-794.
[938] EC, SWS, (HSBI), paras. 45-71.

BCI deleted, as indicated **[***]**

dependent on extremely favourable MSF terms.[939] Given unrealistic assumptions of the Dorman report, its conclusions cannot support the US argument that, absent MSF, none of Airbus' products would have been launched.[940]

4.529 The EC also addresses the alleged effect of MSF loans on two groups of LCA launches, and any resulting implications for the US ability to demonstrate causation. With respect to alleged product launch effects on Airbus LCA launches after the 1992 Agreement, the EC submits that the evidence shows that no such effects existed. According to the EC, **[***]** would have been launched even without MSF loans.[941] The EC argues that these analyses represent the best and most relevant evidence regarding the economics of each launch decision, remain un-rebutted by the US, and are supported by additional contemporary evidence.

4.530 The EC notes that the US attempts to challenge these contemporaneous analyses, by relying on a collection of quotes regarding the alleged inability of Aérospatiale, one of the four Associated Manufacturers, to finance the A340-500/600 or A380 without MSF loans.[942] The EC explains that the US distorts the meaning and import of these statements, which in any event cannot rebut the quantitative evidence provided in the launch business cases for these programmes.[943] Crucially, the EC points out that these statements ignore what the US accepts – namely, that Airbus could have turned to risk-sharing supplier financing as an alternative source of financing, which means that the alleged inability to obtain finance did not exist.[944]

4.531 With respect to alleged product launch effects on Airbus LCA prior to the 1992 Agreement, the EC explains that even if, *arguendo*, Airbus would not have been able to launch these pre-1992 LCA without MSF loans, including those launched as long ago as the 1970s, this would not enable the US to demonstrate the existence of present adverse effects, *i.e.*, that Boeing's *current* commercial position would be better but for the alleged subsidies. According to the EC, this is due to the crucial US admission that absent Airbus, there would nonetheless be competition in the LCA markets at issue today.[945] The EC agrees with the US that it is this competition "that holds prices down."[946] The EC submits that by accepting the existence of a competitive duopoly absent Airbus, the US also accepts that each duopolist will secure roughly half of the sales and market share; otherwise, the commercial viability of the other competitor would be negatively impacted over the long-run.[947]

4.532 Against this background, the EC submits that, to demonstrate causation, the US would need to demonstrate how Boeing's present prices and market share in the face of non-subsidized non-Airbus competition would differ from its present prices, sales and market shares in the face of competition from Airbus. The US would need to show that this "difference" in prices, sales and market shares fulfils the conditions of the specific forms of adverse effects enumerated in Articles 5 and 6.3, *i.e.*, that Boeing's present prices, sales, and market share would be significantly higher.[948]

4.533 The EC argues that assessing the difference in competition between Airbus and a hypothetical non-subsidized Boeing competitor is hopelessly speculative. This is because, for decades, Boeing's product launches shaped Airbus' product launches and *vice versa*. As a consequence, it is impossible

[939] EC, FCCS, paras. 35-38.
[940] EC, SWS, paras. 664-666.
[941] EC, SWS, paras. 763-795.
[942] EC, SWS, paras. 767-791.
[943] EC, SWS, paras. 767-791.
[944] EC, SWS, paras. 781-782; 792-794.
[945] EC, SWS, paras. 858-879.
[946] EC, Comments on US Answer to Panel Question 292, para. 421.
[947] EC, SWS, paras. 828-836, 837-857, 858-869.
[948] EC, Answer to Panel Question 206, paras. 314-321.

BCI deleted, as indicated **[***]**

to determine what competition in the various product markets at issue would look like in a counterfactual with a non-Airbus competitor.[949] Accordingly, the EC argues that the US leaves the Panel guessing as to how to link its primary causation argument, which relates to *historic* product launches 20-40 years ago, with its claim of specific forms of *present* adverse effects resulting from alleged Airbus price undercutting.[950] The US requires the Panel to take unwarranted speculative leaps that would be inconsistent with the requirement to find a "genuine and substantial relationship of cause and effect",[951] under Articles 5 and 6.3 of the SCM Agreement. Such speculation is also inconsistent with the Panel's requirement to conduct an objective assessment of the facts under Article 11 of the DSU.[952]

4.534 Moreover, the EC emphasizes that, had the US been concerned with Airbus' existence and product launches as long ago as the 1970s, it could have challenged these alleged subsidy-enabled product launch much earlier, under Article XVI:1 of the GATT 1947, the Tokyo Round Subsidies Code, or even the SCM Agreement when it entered into force in 1995. Instead, the US chose to negotiate the 1992 Agreement with the European Communities, in which it expressly agreed to MSF financing on certain terms and conditions. Accordingly, the US should be estopped from challenging those alleged past effects today.[953]

4.535 The EC argues that, in any event, any product effects would be short-lived.[954] LCA do not retain a performance advantage indefinitely. In the dynamic LCA industry, competitive conditions change over time and do not remain static over a period of 20-37 years. The EC explains that, within, on average, two to three years after any allegedly subsidy-enabled Airbus launch, any enhanced performance advantage enjoyed by those LCA was effectively eliminated through the launch of competing LCA by Boeing, and *vice versa*. According to the EC, once those competitive advantages are extinguished, and with them the ability of a subsidy-enabled product to cause adverse effects, a "launch" subsidy can cause adverse effects only through subsidy-enabled pricing, if any.[955]

4.536 Finally, the EC notes that the US belatedly submits a study by Professors Greenwald and Stiglitz. The US uses this generic report in an attempt to bolster its product launch arguments. The EC explains, however, that the study does not support the US contention the MSF causes present adverse effects. Asked to address a hypothetical extreme case of subsidy enabled product launches, the authors come to the unremarkable conclusion that these would have effects on supply and prices. The EC notes that, not surprisingly, however, the US did not ask Professors Greenwald and Stiglitz to examine the specific facts of this case, including the evidence that post 1992 launches were not dependent on MSF. Moreover, the EC notes that the Greenwald/Stiglitz study similarly does not address other critical factors such as passage of time and its effect on competitive advantage and the continued existence of any effects of a product launch subsidy, the declining magnitude of MSF subsidies, or any other elements that break the chain of causation in the present dispute. This renders the study's conclusions irrelevant for the present dispute.[956]

US cash-flow price effects causation theory

4.537 The EC also responded to US arguments related to its second general theory of causation, the so-called "cash flow" theory. Under its cash flow causation theory, the US asserts that the alleged

[949] EC, SWS, paras. 837-914.
[950] EC, SWS, pars. 837-914, 858-869.
[951] EC, Comments on *US – Upland Cotton*, paras. 35-38.
[952] EC, SWS, para. 839.
[953] EC, SWS, paras. 659 and 855-857.
[954] EC, SWS, paras. 870-912.
[955] EC, SWS, paras. 875-878.
[956] EC, Comments on US Answer to Panel Question 230, paras. 45-49.

BCI deleted, as indicated **[***]**

subsidies enhance Airbus GIE/SAS' cash flow, permitting it to undertake a strategy of aggressive pricing that results in present competitive harm to Boeing and US interests in the form of significantly suppressed or depressed prices, significant price undercutting, significant lost sales, displacement or impedance, and in injury to the US domestic industry.[957] Given the wholly speculative nature of the US product launch theory, and given the US reliance on "price undercutting" as evidence supporting all of its serious prejudice claims, the EC submits that the US must demonstrate (i) that the alleged subsidies provided Airbus with the ability to price down its aircraft, (ii) that Airbus had the opportunity and (iii) the incentive to use the alleged subsidies to price down its aircraft, and (iv) that further evidence suggests that it actually did so.[958] The EC notes the US agreement that "{t}he mere fact that subsidies provide a recipient with additional cash is not sufficient, in and of itself, to demonstrate a causal link between the subsidy and any particular form of serious prejudice".[959]

4.538 The EC argues that the chief flaw in the US cash flow price effects argument is the US failure to demonstrate that a sufficient per-aircraft magnitude of subsidy was available for, and used in, individual sales campaigns to price aggressively during the reference period.[960] The EC posits that the evidence shows conclusively that the alleged subsidies are not the cause of any significant price effects.

4.539 With respect to Airbus' ability to price down its aircraft, the EC notes the US claim that the alleged MSF subsidy provides two benefits: (i) a lower cost of capital, and (ii) below market MSF repayments on the delivery of each aircraft. Neither alleged "benefit" supports a finding of present price effects.[961]

4.540 The EC observes that the first of these "benefits" is neither a "benefit" nor even the effect of a subsidy. It is not a benefit because the same risk reduction and accompanying improvement in the credit rating can be obtained from market financing. The EC explains that Boeing enjoys the same "benefit" from its heavy reliance on risk-sharing suppliers. It is also not an effect of the subsidy because the effect of risk-sharing financing in improving credit ratings exists, whether that financing is provided at market or at below market terms. In any event, the EC notes that the US has not demonstrated any price effect arising from the improved credit rating, let alone that those price effects are caused by allegedly subsidized MSF loans.[962]

4.541 The EC notes, the entire benefit, if any, is captured in the difference between the benchmark rate and the anticipated MSF return, the second basis for the US price effects claim. The EC refers to its arguments on the magnitude of any subsidies and notes that the US agrees that the magnitude of the benefit is the reduction in marginal cost – measured as the difference between what Airbus would have had to repay at market on each actual aircraft delivery and what it did repay.[963] The EC recalls that the US has failed to even quantify the increased cash flow arising from below market financing on present sales of aircraft.[964] The EC undertook this calculation and shows that any benefit from MSF loans for the A320, A330, and A340 aircraft during 2004-2007 is either zero or *de minimis*, whether measured on the basis of the US/Boeing methodology or the US cash flow methodology.[965]

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[957] EC, Comments on US Answer to Panel Question 288, paras. 347-385; EC, Comments on US Answer to Panel Question 290, paras. 396-399.

[958] EC, Answer to Panel Question 289, 191-197.

[959] EC, Comments on US Answer to Panel Question 230, para. 26.

[960] EC, SWS, paras. 1010-1024, 1031-1034.

[961] EC, Comments on US Answer to Panel Question 228, paras. 4-13; EC, Comments on US Answer to Panel Question 230, para. 54.

[962] EC, Comments on US Answer to Panel Question 230, para. 55; EC, SWS, paras. 1036-1046.

[963] EC, Comments on US Answer to Panel Question 230, para. 58.

[964] EC, Comments on US Answer to Panel Question 230, para. 58.

[965] EC, SWS, paras. 1010-1024, 1031-1034.

BCI deleted, as indicated **[***]**

The EC further argues that any price effects from alleged MSF subsidies exist only for as long as there remain outstanding repayment obligations, which at present is not the case for the discontinued A300 and A310, and for orders of the A320, A330, A340-300.[966]

4.542 The EC asserts that even if the Panel were to make the extreme assumption that the size of the price effect was the full amount of any subsidy, the per-aircraft subsidy is simply too small to cause significant price effects. And even here, the EC observes, the US concedes that the effect on price will be less than dollar-for-dollar.[967]

4.543 Further, the EC argues that even if, at present, Airbus had available cash flow from alleged subsidies, the company has no incentive to use any alleged subsidies to lower its prices, in light of present high levels of demand and substantial and growing order backlogs.[968] Moreover, in certain of the challenged sales campaigns, Airbus did not even have the opportunity to lower its price in response to available subsidies, because Airbus was not involved in that sale.[969]

4.544 Finally, the EC recalls that, in the context of its subsidy magnitude related arguments, it established that Airbus could and would have behaved in a similar commercial manner during the 2001-2007 period, even if it had not received the alleged subsidies. As such, the alleged subsidies cannot have changed Airbus' commercial behaviour and, therefore, cannot be the cause of any price-based adverse effects.[970]

Cumulative US causation arguments

4.545 The EC notes that the US, in various instances alleges further caution arguments that are based on a cumulation of product launch and price effects. These arguments are, however, simply variations of their two constituent arguments, and therefore fail for the same reasons.[971]

(iii) Serious Prejudice

4.546 The EC argues that, in additional to its failure to establish causation on a general level, the US also fails to meet its burden of demonstrating that the effects of the alleged subsidies caused the four types of serious prejudice asserted by the United States – significant price undercutting, significant lost sales, significant price suppression or depression, and impedance or displacement. The EC recalls the Appellate Body's finding that "the effect – {serious prejudice} – must result from a chain of causation that is linked to the impugned subsidy."[972]

Intervening Events and Non-Attribution Factors

4.547 The EC explains that, as a general matter, each of the US serious prejudice claims fail to take account of a number of important developments in the LCA markets that had a significant impact on sales and prices of Airbus and Boeing LCA during the reference periods advocated by the parties.[973] These developments took place not only historically – beginning with launch of Airbus and Boeing LCA decades ago, but also in the most recent reference period of 2004-2007. The EC submits that

[966] EC, Comments on US Answer to Panel Question 230, paras. 59-60.
[967] EC, Comments on US Answer to Panel Question 230, paras. 55-62.
[968] EC, SNCOS, paras. 390-391.
[969] EC, SWS, para. 1064-1076.
[970] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, paras. 46-55.
[971] EC, Comments on US Answer to Panel Question 230, para. 66.
[972] EC, Comments on *US – Upland Cotton (21.5)*, para. 36.
[973] EC, FWS, paras. 2077-2136; EC, SWS, paras. 1090-1099, 1148-1174.

BCI deleted, as indicated **[***]**

these "intervening events" or "non-attribution" factors, coupled with the passage of time[974] and the diminishing magnitude of the subsidies,[975] collectively strain and then break the causal link between Airbus LCA launches and alleged present adverse effects. The EC considers that these intervening events are further evidence that the US "historic/product launch causation"[976] and "cash flow"[977] theories cannot be sustained. And more specifically, these intervening events break the causal chain for the various forms of serious prejudice asserted by the US – price undercutting, price suppression/depression, lost sales, and displacement/impedance.[978] The EC considers that among the relevant intervening events that break the causal link are the following:

- Boeing's own launches of new LCA reduced or negated any competitive advantage enjoyed by Airbus at the time of an allegedly subsidy-enabled LCA launch.[979] The EC considers that any enhanced performance-based competitive advantage from Airbus' LCA launches was short-lived.[980] Even assuming, *arguendo*, that the alleged subsidies provided Airbus GIE with a competitive advantage over Boeing at the time of launch of the A300, A310, A320 and A340, the EC notes that Boeing generally responded within two to three years[981] with its own technological advances that allowed it to regain market share and, in some cases, even obtain a dominant market share. It claims that over a number of decades, these reactive Boeing launches put Boeing on either an equal or better footing than Airbus.[982]

- **Boeing's replacement of older version LCA.** The EC argues that in the 200-300 seat LCA market, Boeing's 767 has effectively been replaced by the 787.[983] Similarly, the EC argues that the evidence from the 400-500 seat LCA market demonstrates that the 747-400 has effectively been replaced by the 747-8.[984] And in the 100-200 seat LCA market, earlier versions of the 737 have been replaced by the 737NG family. The EC considers that those launches of new Boeing LCA have been the cause of any negative effects on earlier versions of Boeing products in the same markets – not decades old alleged subsidies to Airbus.[985]

- **Boeing's abandonment of LCA.** The EC notes that it was Boeing's commercial decision – not allegedly subsidized competition from Airbus – to discontinue the technologically outdated 757 programme.[986] Similarly, the EC notes that shortly after its merger with McDonnell Douglas in 1997, Boeing decided to discontinue the performance-plagued 300-400 seat MD-11.[987] These Boeing aircraft were discontinued long before even the US proposed reference period in this dispute.[988] Thus, the EC considers that with respect to these Boeing LCA, the US cannot claim now – long after Boeing decided to discontinue these

[974] EC, FWS, paras. 1792-1794; 1799, 2019-2020, 2073-2075.
[975] EC, FWS, paras. 1800-1805, 2019-2023, 2073-2076.
[976] SWS, paras. 837-914.
[977] EC, Answer to Panel Question 288, paras. 276-284; EC, Comments on US Answer to Panel Question 288, paras. 347-385
[978] EC, SWS, paras. 870-914.
[979] EC, Comments on *US – Upland Cotton (21.5)*, para. 33.
[980] EC, SWS, para. 877.
[981] EC, SWS, para. 877.
[982] EC, SWS, paras. 870-878, 884, 891-893, 901-906.
[983] EC, FWS, paras. 2000-2010 and 2026.
[984] EC, FWS, paras. 1693-1700.
[985] EC, FWS, paras. 2000-2010.
[986] EC, SWS, paras. 881-884.
[987] EC, SWS, paras. 897-900.
[988] EC, SWS, paras. 881-884, 897-900.

BCI deleted, as indicated **[***]**

respective LCA – that it is presently seriously prejudiced for an LCA that was removed from the market by a US company. [989]

- **Airbus' abandonment of LCA.** The EC notes that since 2003, Airbus has effectively phased out its A300 and A310 LCA.[990] It emphasizes that abandoned LCA programmes – even if they were launched decades before as an effect of alleged subsidies – cannot cause present adverse effects.[991]

- **Airbus' launch of new LCA.** The EC argues that a launch by Airbus of new or modified versions of LCA that are either not subsidized or which reflect far lower levels of alleged subsidization than earlier Airbus LCA diminishes the effects of any earlier Airbus subsidies.[992]

- **Enormous order backlog and Boeing's unwillingness – or inability – to meet demand.** The EC alleges that since 2004, both Boeing and Airbus are experiencing an exponential and sustained growth in orders, in particular in the single-aisle and 200-300 seat LCA markets.[993] At the end of 2007, the value of BCA's order backlog stood at $255 billion, representing many times its annual revenue and production capacity.[994] Despite Boeing's moderate increases in production capacity, this backlog is a clear indication that the company is unable to meet demand.[995] The EC considers that the US therefore cannot claim present adverse effects from historic lost sales when Boeing is presently producing at full capacity, suggesting that all production slots at issue in the alleged lost sales campaigns have subsequently been sold, potentially at higher prices.[996] Indeed, the company is reportedly turning down orders for its 737NG.[997] The EC also notes that Boeing itself put a limit on its increases in production capacity.[998] In these circumstances, no lost sales can be significant, as required by Article 6.3(c).

- **Surge in fuel prices.** The dramatic rise in jet fuel prices since late 2004, the EC contends, has greatly reduced the market appeal of the four-engine A340 compared to the twin-engine Boeing 777.[999] Given the market dominance of Boeing's 777,[1000] there is no basis for the US to claim adverse effects with respect to that product. Similarly, the surge in fuel prices and Boeing's offering of the fuel-efficient 787 have greatly reduced the market appeal of its technologically outdated 767.[1001]

4.548 Moreover, the EC considers that with respect to each form of serious prejudice asserted by the US, there are a number of non-attribution factors that further disprove the existence of any causal link. These are addressed in the following sections.

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[989] EC, SWS, para. 900.
[990] EC, FWS, notes 1401 and 2011; EC, SWS, paras. 890-891.
[991] EC, SWS, para. 879.
[992] EC, FWS, paras. 2000-2010.
[993] EC, FWS, paras. 1361-1364.
[994] EC, Answer to Panel Question 286, para. 247.
[995] EC, SNCOS, para. 417.
[996] SNCOS, para. 308.
[997] EC, SWS, paras. 864-865, 885-887, 906.
[998] EC, SWS, para. 865; EC, Answer to Panel Question 286, para. 248.
[999] EC, SWS, para. 907.
[1000] EC, SWS, para. 907.
[1001] EC, FWS, paras. 2000-2010, 2017-2018.

BCI deleted, as indicated **[***]**

EC Responses to US Allegations of Price Undercutting

4.549 With respect to the US claims of significant price undercutting, the EC notes that each of US allegations of serious prejudice is based on the assertion that Airbus undercut Boeing prices.[1002] As a result of such alleged price undercutting, the US argues, Boeing's prices were suppressed/depressed, Boeing allegedly lost sales, and Boeing lost third country market shares.[1003]

4.550 In response, the EC argues that the US allegations of price undercutting are invalid for three fundamental reasons: First, the US failed to demonstrate that Boeing's LCA in competition with Airbus LCA were non-subsidized for the purposes of any claims under Articles 6.3(c) and 6.5 of the SCM Agreement.[1004] Second, the US failed to demonstrate that, based on actual LCA prices, the Airbus prices did, in fact, undercut the Boeing LCA prices.[1005] And third, that a detailed analysis from the sales campaign evidence demonstrated both the absence of price undercutting, and of any causal connection between alleged EC subsidies and Airbus pricing.[1006]

4.551 First, the EC maintains that the US claims of significant price undercutting fail because the US like products – Boeing LCA – are subsidized. The US like products, therefore, fails the "non-subsidized like product" requirement in Article 6.5 of the SCM Agreement.[1007]

4.552 Second, the EC argues that actual transaction prices are *key* for the US to prove that Airbus undercut, *i.e.*, offered a *lower* price, than Boeing.[1008] The EC notes that the US agrees that "the {price undercutting} analysis *must be based upon evidence regarding the actual price*, including all the relevant elements in a particular transaction."[1009]

4.553 Thus, the EC submits that the issue in a price undercutting claim is whether Airbus undercut Boeing's *price*, not whether Airbus made a higher *value* offer.[1010] The EC considers that the US improperly conflates the concepts of price and NPV.[1011] It implies that price undercutting is demonstrated simply by evidence that the customer decided to order from Airbus due to the better value of the Airbus offer.[1012]

4.554 The EC explains that pricing data is the required basis for an assessment of price undercutting, and that merely demonstrating that the NPV of the Airbus offer was better than the NPV of the Boeing offer, in and of itself, does not demonstrate *price* undercutting, unless it has been established that no non-price factor impacted the NPV calculation.[1013] According to the EC, in the LCA industry, non-price factors can and do play an important factor in many customers' NPV assessment.[1014] As Mr. Muddle and Mr. Scherer explain, the actual price of an aircraft is but one of

[1002] EC, FWS, paras. 1340, 1621, 1820-1821, 2058, 2089.
[1003] EC, FWS, paras. 1798-1819, 1820-1834, 1933-1948, 1999, 2024-2036, 2058-2064.
[1004] EC, SWS, paras. 1100-1137.
[1005] EC, Comments on US Answer to Panel Question 281, paras. 280-298.
[1006] EC, FWS, (HSBI), 1829-1833, 1837-1842, 1844-1847, 1850, 1854, 1855-1857, 1859-1862, 1864, 1866-1868, 1870-1873, 1875-1901, 1903-1913, 1915-1920, 1923-1931, 2095-2099, 2101-2108, 2109-2112.
[1007] EC, SWS, paras. 1106-1110.
[1008] EC, Answer to Panel Question 281, paras. 190-203; EC, Comments on US Answer to Panel Question 281, paras. 280-298.
[1009] EC, Comments on US Answer to Panel Question 281, para. 283.
[1010] EC, Answer to Panel Question 281, paras. 190-203; EC, Comments on US Answer to Panel Question 281, paras. 280-298.
[1011] EC, Comments on US Answer to Panel Question 235, para. 115.
[1012] EC, Comments on US Answer to Panel Question 235, para. 115.
[1013] EC, Comments on US Answer to Panel Question 281, paras. 280-298.
[1014] EC, Answer to Panel Question 281, para. 198; EC, Answer to Panel Question 282, paras. 204-210.

BCI deleted, as indicated **[***]**

the many elements that is taken into consideration together with many non-price related factors when a customer evaluates the total Net Present *Value* of an offer.[1015] Customers order aircraft, not only on the basis of the aircraft price, but on the basis of the offers' total value, including the aircraft revenue capacity, operating costs, maintenance costs, delivery slots, financing, etc.[1016] As a result, a clear distinction must be made between "price" and "value".[1017]

4.555 Consequently, in the view of the EC, the fact that the *value* of the Airbus offer is better than the *value* of the Boeing offer, does not necessarily mean that Airbus is offering its aircraft at a lower *price*.[1018] Airbus may very well be offering its aircraft at a significantly higher price than Boeing, yet still be making the better value offer because, for example, it managed to offer the airline earlier delivery slots.[1019]

4.556 The EC considers that, contrary to its assertions, the US has not "presented evidence with respect to customers' evaluations of the *actual price* offered by Airbus and Boeing, taking into account all price concessions and all relevant attributes of the models in question."[1020] For example, the US has not submitted any evaluations of actual prices, instead limiting its evidence to press speculation and statements about NPVs.[1021] Nor did the US take into account the relevant attributes (including operating performance and economics, size, technology, etc.) of the LCA in question in discussing that NPV – or more importantly prices properly adjusted, as required by Article 6.5 of the SCM Agreement.[1022] Indeed, the EC is of the view that the US approach to rely on alleged evidence of better NPVs is inconsistent with the US acknowledgement that, in making their fleet decisions, customers consider a large number of factors, all of which can have an effect on the final *NPV* of an offer.[1023]

4.557 The EC stresses that if the Panel were to uncritically use NPV as the proxy for price, as urged by the US, it would *assume* price undercutting in every sale won by either Airbus or Boeing. The EC submits that only in those particular instances where non-price factors have played no role in the value of the transaction for the purchaser could NPV substitute for "price."[1024]

4.558 Third, the EC submits that the US does not meet the final step in establishing its price undercutting claim, *i.e.*, the establishment of the causal link between alleged subsidies and the significant price undercutting.[1025] The EC submitted extensive evidence from contemporaneous sales campaign documents refuting the US assertions that "product" or "price" effects of any alleged subsidies caused Airbus to offer the price it did in each and every one of the sales campaigns at issue in this dispute.[1026] Thus, according to the EC, based on the evidence existing at the level of a sales campaign, the US did not establish the required causal link between the alleged subsidies and any

[1015] EC, FWS, paras. 1427-1439.
[1016] EC, FWS, paras. 1427-1439; EC, Comments on US Answer to Panel Question 235, para. 115.
[1017] For a discussion on the distinction of "price" and "value", *see* EC, Comments on US Answer to Panel Question 235, para. 110-119.
[1018] EC, FWS, paras. 1427-1439.
[1019] EC, Comments on US Answer to Panel Question 235, para. 110-119; EC, Comments on US Answer to Panel Question 236 120-178 relating to Czech Airlines and Air Asia respectively.
[1020] EC, Comments on US Answer to Panel Question 282, para. 305.
[1021] EC, Comments on US Answer to Panel Question 236, paras. 120-178. EC, Comments on US Answer to Panel Question 281, paras. 280-298.
[1022] EC, Comments on US Answer to Panel Question 236, paras. 124-178.
[1023] EC, Comments on US Answer to Panel Question 282, paras. 299-310.
[1024] EC, Answer to Panel Question 281, paras. 198-203.
[1025] EC, FWS, (HSBI), 1829-1833, 1837-1842, 1844-1847, 1850, 1854, 1855-1857, 1859-1862, 1864, 1866-1868, 1870-1873, 1875-1901, 1903-1913, 1915-1920, 1923-1931, 2095-2099, 2101-2108, 2109-2112.
[1026] EC, Comments on US Answer to Panel Question 236, paras. 124-178.

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alleged lower Airbus pricing. Nor does the EC consider that the general US historical/product launch and cash-flow causation arguments demonstrate such a causal link in these individual sales campaigns, particularly in light of the non-existent or *de minimis* levels of alleged subsidization.[1027]

4.559 Because the EC considers that the US price undercutting claim fails – given the failure of the US to sustain either required step in its price undercutting claims – the US price suppression, price depression and lost sales claims must also fail. This is because all of the US serious prejudice claims are all based on the same "evidence," namely the US alleged evidence of price undercutting.[1028]

4.560 Finally, with respect to the alleged "significance" of the price undercutting, the EC argues that the appropriate legal standard for assessing whether the alleged price undercutting is "significant" is whether *but for* the undercutting, Boeing would have secured the sale.[1029] The EC notes that when asked by the Panel for evidence of "significant" price undercutting, the US provided no information regarding the JetBlue, Frontier Airways, America West, Virgin America or Thai Airways sales campaigns.[1030] The EC points out that for these sales campaigns, there is therefore no evidence that the product or price effects alleged by the US were the *cause* of any alleged price undercutting.[1031] In fact, the EC believes that the considerable weight of the evidence before the Panel demonstrates that Airbus did not undercut the Boeing price in any of the sales campaigns at issue, including the A320 sales campaigns involving JetBlue, Frontier Airlines, America West, Virgin America, easyJet, Air Berlin, Air Asia, Czech, the A340 sales campaigns involving Air Asia, Iberia Airways, South African Airways, and the A380 sales campaigns involving Qantas, Singapore Airlines and Emirates.[1032]

EC Arguments Responding to US Lost Sales Allegations

4.561 The EC has offered extensive evidence and argumentation which it asserts rebuts each and every US claim of significant lost sales.[1033]

4.562 The EC considers that the legal standard for establishing a lost sale requires the US to demonstrate that but for the effect of the subsidy, Boeing would have won the sale – *i.e.*, everything else being equal, the effect of the subsidy was the determining factor in the loss of the sale.[1034] Therefore, if Boeing would have lost the sale even if Airbus had raised its prices by the amount of available alleged subsidy, there is no basis for finding that the subsidy caused the lost sale.[1035] Given the conditions of the LCA markets, the EC considers that the Panel can only determine whether the subsidy is the "but for" cause of a lost sale by conducting a detailed assessment of the facts and circumstances of each sales campaign claimed to have been "lost."[1036] The rebuttal evidence offered by the EC, accordingly, is largely focused on such sales campaigns.

4.563 The EC argues that each of the alleged "lost" sales campaigns involved numerous "non-price" and, hence, non-subsidy factors, and that it established that in each of the sales at issue such non-

[1027] EC, Comments on US Answer to Panel Question 288, paras. 347-385; EC, Comments on US Answer to Panel Question 290, paras. 396-399.
[1028] EC, Answer to Panel Question 282, paras. 193-194.
[1029] EC, Comments on US Answer to Panel Question 236, paras. 120-178.
[1030] EC, Comments on US Answer to Panel Question 236, para. 122.
[1031] EC, Comments on US Answer to Panel Question 236, para. 122.
[1032] EC, Comments on US Answer to Panel Question 236, paras. 124-178.
[1033] EC, Answer to Panel Question 206, paras. 314-321; EC, Answer to Panel Question 291, paras. 307-314; EC, Comments on *US – Upland Cotton*, paras. 39-42.
[1034] EC, Answer to Panel Question 206, para. 318.
[1035] EC, Answer to Panel Question 206, para. 318.
[1036] EC, Answer to Panel Question 206, para. 318.

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subsidy factors were the cause of Boeing not securing the sale.[1037] Examples of relevant considerations include the availability of delivery slots, Boeing's mismanaged customer relationships, product preferences for Airbus products, political considerations, among many other factors discussed in detail in the EC submissions and in the contemporaneous evidence provided.[1038]

4.564 The EC also argues that, given the *de minimis* magnitude of any alleged subsidies available to Airbus, the US cannot establish a causal link between any subsidies and the claimed lost sales. Even if Airbus had reduced its sales prices by the full amount of any allegedly available per-aircraft subsidy, that change in prices would have been so insignificant as to not impact the outcome of the sales campaign at issue. [1039]

4.565 The EC recalls that, as a legal matter, the Panel is called upon to determine whether the alleged subsidies cause present adverse effects, including present serious prejudice.[1040] The EC also considers that the Panel must assess whether any past lost sales, should it find that these were caused by the alleged subsidies, continue to constitute a "significant" lost sale, amounting to present serious prejudice to US LCA-related interests.[1041]

4.566 The EC argues that, as a factual matter, it established that, in light of the particular conditions of competition that have existed in the LCA markets since 2005, any "lost" sale that the US might be able to demonstrates during the period 1999-2005 would no longer constitute prejudice to Boeing.[1042] This is because the huge increase in orders in 2005-2007 resulted in Boeing's production capacity being sold out for years to come, and in an accompanying record large order backlog.[1043] According to the EC, this evidence shows that any delivery slot at issue in an allegedly "lost" sales campaign has been subsequently sold by Boeing.[1044] The EC also refers to the testimony of Christian Scherer who explained that, in periods of extremely high demand such as that existing since 2005, Airbus and Boeing can command premium prices for early delivery slots.[1045] Accordingly, the delivery slots subsequently sold were likely sold at even higher prices than those offered in the sales alleged lost sales campaigns at issue. [1046]

4.567 The EC considers that these facts means that, even if it were established that Boeing lost a sale of a delivery slot during 1999-2005 due to alleged subsidies, this open delivery position constitutes a valuable asset at times of very high demand.[1047] This delivery slot would give Boeing a relative advantage over Airbus in the next sales campaign because Boeing could offer earlier delivery slots to customers that need new LCA quickly to either reduce operating cost or to increase capacity,

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[1037] EC, Answer to Panel Question 291, paras. 307-314; EC, SCOS, paras. 118-149, 157-167. *See, also*, EC, FWS, paras. 1427-1439.

[1038] EC, Answer to Panel Question 291, paras. 307-314; EC, FWS, paras. 1427-1439.

[1039] EC, Answer to Panel Question 205, paras. 290-313; EC, Comments on *US – Upland Cotton (21.5)*, para. 70.

[1040] EC, FWS, paras. 1491-1506; EC, FNCOS, para. 134; EC, Answer to Panel Question 115, paras. 334-354; EC, Answer to Panel Question 133(b), paras. 485-487; SWS, paras. 678-681; EC, Comments on *US – Upland Cotton (21.5)*, paras. 8-28.

[1041] SWS, paras. 837-914; EC, Answer to Panel Question 210, paras. 467-488; EC, Answer to Panel Question 287, paras. 266-268; EC, Answer to Panel Question 288, paras. 285-290; EC, Comments on US Answer to Panel Question 234, paras. 102-109; EC, Comments on *US – Upland Cotton*, paras. 43-73.

[1042] EC, Answer to Panel Question 210, paras. 467-488.

[1043] EC, FWS, pars. 1360-1374; EC, Answer to Panel Question 210, paras. 467-488.

[1044] EC, Answer to Panel Question 210, paras. 467-488; EC, Comments on US Answer to Panel Question 210, paras. 333-350.

[1045] EC, SNCOS, paras. 317-318.

[1046] EC, Answer to Panel Question 204, paras. 287.

[1047] EC, SNCOS, para. 308.

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or both. And when Boeing eventually sold each and every one of the present and future delivery slots at issue in the alleged "lost" sales, it most likely did so at higher prices than it would have secured during the earlier competitive sales campaigns challenged by the US. [1048]

4.568 The EC emphasizes that it is undisputed that neither Boeing nor Airbus could meet demand by increasing capacity. As Mr. Scherer explained "because both producers use thousands of aircraft components from hundreds of suppliers – including many of the same suppliers – to manufacture their products, supply chain constraints can make it difficult and time-consuming to ramp up production."[1049] The EC notes that the US agrees with this assessment that "production capacity at any point in time is limited by the capacity of the supply chain"[1050] and that "it takes time to ramp up existing capacity."[1051] In addition to these limitations on Boeing's ability to significantly and rapidly increase production capacity, there are limitations on Boeing's willingness to do so.[1052] Indeed, Boeing has repeatedly indicated that it is unwilling to increase its LCA production beyond the increase currently underway. [1053]

4.569 Thus, according to the EC, Boeing's (and Airbus') growing and record-high backlog by the end of 2007 is a key fact to consider in objectively assessing whether the alleged subsidies cause present significant lost sales.[1054] Randy Baseler, former Vice President for Marketing for Boeing puts it succinctly: "if a customer came to us and said we want a 777 or a 747 and here's a big pile of money, we couldn't meet the demand."[1055]

4.570 The EC notes that in response, the US argued that the sales that it lost in the 2001-2004 period still cause serious prejudice to Boeing today because "Airbus has been able to win further follow-on orders from some of these airlines."[1056] The EC responds by arguing that whether an airline ordered Airbus aircraft in 2001-2004 and made a follow-on order in 2006, in no way demonstrates how Boeing is suffering present serious prejudice, given that Boeing was more than able to "sell out" all of its slots in the period 2005-2007 and has a huge and increasing backlog of orders by the end of 2007.[1057] In addition, the EC notes that the US assertion is based on a false premise – that these airlines would never again order Boeing aircraft.[1058] The EC argues that the evidence demonstrates that many of these airlines, including Air Berlin, Thai Airways, Singapore Airways, Emirates Airlines, Qantas Airlines and Czech Airlines are not lost to Boeing but continue to order Boeing aircraft.[1059] Thus, the US suggestion that these airlines are somehow "lost" to Airbus, and that,

[1048] EC, Answer to Panel Question 204, paras. 287.
[1049] EC, SNCOS, para. 316.
[1050] EC, Answer to Panel Question 210, para. 483.
[1051] EC, Answer to Panel Question 210, para. 483.
[1052] EC, SWS, para. 865; EC, Answer to Panel Question 286, para. 248.
[1053] EC, SWS, para. 865; EC, Answer to Panel Question 286, para. 248.
[1054] EC, FWS, pars. 1360-1374; EC, Answer to Panel Question 210, paras. 467-488.
[1055] EC, FWS, para. 2202.
[1056] EC, Comments on US Answer to Panel Question 234, para. 106.
[1057] EC, FWS, pars. 1360-1374; EC, SWS, paras. 651, 864, 885-886, 893, 908, 1171, 1175; EC, SNCOS, paras. 416-423. EC, Answer to Panel Question 204, para. 287; EC, Answer to Panel Question 210, paras. 467-488; EC, Comments on US Answer to Panel Question 210, paras. 333-350. EC, Comments on US Answer to Panel Question 234, paras. 102-109.
[1058] EC, Comments on US Answer to Panel Question 234, para. 107. *See, also,* EC, Comments on US Answer to Panel Question 234, paras. 102-106, 108-109.
[1059] EC, Comments on US Answer to Panel Question 234, para. 107. *See, also,* EC, Comments on US Answer to Panel Question 234, paras. 102-106, 108-109.

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therefore, there is some kind of "continued effect"[1060] of a sale that Boeing lost in the 2001-2004 period, is inconsistent with the evidence.[1061]

EC Responses to US Allegations of Displacement or Impedance

4.571 The EC argues that it has set forth considerable contemporaneous documentary evidence to rebut the US claims of displacement or impedance in its various submissions.[1062]

4.572 The EC argues that there are, however, a number of legal flaws in the US displacement and impedance claims. First, the EC maintains that the US claims of impedance and displacement of Boeing LCA in certain third country markets fail because the US like products – Boeing LCA – are subsidized.[1063] The US like products, therefore, fails the "non-subsidized like product" requirement in Article 6.4 of the SCM Agreement.[1064]

4.573 A second legal flaw is that to the extent that the US relies on delivery data from the 2001-2003 period,[1065] the EC views the severe market impacts resulting from 9/11, which remained in effect through 2003, as *force majeure*.[1066] Therefore, it claims that use of delivery data from that severely distorted period to support a finding of displacement or impedance under Articles 6.3(a) or 6.3(b) is inconsistent with Article 6.7(c).

4.574 A third legal flaw asserted by the EC is the bundling by the US of all LCA into one single LCA product market.[1067] The EC has initially rebutted the US claims of displacement and impedance by examining evidence and data using the appropriate different LCA product markets (100-200 seat, 200-300 seat, and 300-400 seat) where competitive sales between Airbus and Boeing take place. [1068] The EC examined and rebutted US arguments using evidence of market share and causation-related evidence in each of the third country markets where the US claimed displacement and impedance.[1069]

4.575 Alternatively, the EC accepted, for purposes of argument, the single LCA product market, and rebutted the US displacement and impedance arguments in the various third country markets.[1070] The EC argues that it provided extensive evidentiary analysis further demonstrating that, even when engaging in the wholly distorted single subsidized product/single like product/single LCA product market analysis, the US cannot sustain a displacement or impedance claim in any third country market.[1071] The EC argues that in conducting that single-market LCA analysis, it showed that in a number of the third country markets addressed, Boeing's market share actually *increased* over the 2001-2006 period.[1072] For these countries, there simply is no evidence of displacement.

[1060] EC, Comments on US Answer to Panel Question 234, para. 105.
[1061] EC, Comments on US Answer to Panel Question 234, paras. 102-109.
[1062] EC, SCOS, paras. 168-172; EC, Answer to Panel Question 207, paras. 322-427; EC, Answer to Panel Question 288, paras. 349-361.
[1063] EC, SWS, paras. 1100-1137; EC, Answer to Panel Question 202, paras. 255-270; EC, Answer to Panel Question 207, paras. 322-323.
[1064] EC, SWS, paras. 1100-1105; EC, Answer to Panel Question 202, paras. 256-270; EC, Answer to Panel Question 207, para. 421.
[1065] EC, Answer to Panel Question 207, para. 422.
[1066] EC, FWS, paras. 1494-1496; EC, Answer to Panel Question 207, para. 422.
[1067] EC, Answer to Panel Question 207, para. 423.
[1068] EC, SCOS, paras. 168-172; EC, Answer to Panel Question 207, paras. 322-427.
[1069] .EC, SCOS, paras. 168-172; EC, Answer to Panel Question 207, paras. 322-427.
[1070] EC, Answer to Panel Question 207, paras. 340-427.
[1071] EC, Answer to Panel Question 207, paras. 342-420.
[1072] EC, Answer to Panel Question 207, paras. 340-427.

BCI deleted, as indicated **[***]**

4.576 Regarding causation, the EC asserts that the appropriate counterfactual for this causation assessment is whether, but for the alleged subsidy, Boeing's deliveries would have been higher. In other words, what extra sales would Boeing have won, and how many more deliveries would it have made, *but for* the alleged subsidies?[1073] The EC states that by not examining each and every sales campaign in the various third country markets which form the statistical basis for its claims of displacement or impedance, the US has failed to make a *prima facie* case of a causal link between the alleged subsidies and the displacement or impedance claimed. Simply examining raw numbers of market share movement (involving a distorted single LCA product market) does not constitute a basis for the Panel to sustain a finding that such a causal link exists today – or that it existed at any time throughout the 2001-2007 period.[1074]

4.577 The EC argues that whether the third country market shares are examined on a single LCA or multiple LCA basis, that the US claims of displacement or impedance fails to demonstrate, as required by Article 6.4 of the SCM Agreement, clear trends in the market share development because as the US acknowledged, "most individual third-country markets import only a small number of LCA in any given year, and it is therefore sometimes difficult to identify a 'representative period sufficient to demonstrate clear trends in the development of the {LCA} market.'"[1075] The sporadic, erratic and very small numbers of deliveries in many third country markets make it very difficult to draw any firm conclusions about meaningful, subsidy-affected, changes in market share – certainly when only deliveries to that market are examined.[1076]

4.578 The EC argues that the US has also failed to demonstrate that Boeing's exports to the third country markets discussed above were displaced or impeded due to "the *effect of* the subsidy."[1077] In those third country markets in which Boeing did lose market share, the EC pointed out that the evidence demonstrates that it did so, not because of any alleged Airbus subsidies, but because of a variety of market-based factors, including the bankruptcy of airlines, the specific fleet choices of airlines, and geopolitical considerations, all of which had nothing to do with the decades old and *de minimis* alleged subsidies benefiting Airbus.[1078]

4.579 The EC rebuts the US arguments that the alleged historical 2001-2005 decline in Boeing's third country market shares in some countries is due to a *single* factor – alleged subsidies benefiting Airbus. The EC argues that the US has failed to demonstrate causation, even apart from the specific non-attribution factors, for the following reasons:

- It does not meet its burden of establishing how Boeing's market share of deliveries in 2001-2005 would have been "different" or *less* adversely affected, if, according to the US "historic causation" theory, Airbus did not exist during that time period but some other LCA competitor did.[1079]

- It fails to establish (much less rebut evidence to the contrary) that the magnitude of any additional cash flow from alleged MSF subsidies was *the* cause of Boeing losing orders/sales

[1073] EC, Answer to Panel Question 206, paras. 314-321.
[1074] EC, Answer to Panel Question 206, paras. 314-321; EC, Answer to Panel Question 207, paras. 322-427.
[1075] EC, Answer to Panel Question 207, para. 337.
[1076] EC, Answer to Panel Question 207, para. 337.
[1077] EC, Answer to Panel Question 207, para. 426.
[1078] EC, Answer to Panel Question 207, paras. 342-420.
[1079] EC, Answer to Panel Question 288, paras. 285-290; EC, Comments on US Answer to Panel Question 288, paras. 347-385; EC, Comments on *US – Upland Cotton*, paras. 43-73.

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during 1998-2002 that resulted in Boeing losing market share of deliveries three years after those orders, during 2001-2005.[1080]

- It does not assert, much less prove, that any subsidized *product* advantage from any Airbus LCA was the cause of Boeing's loss of delivery market share in 2001-2005. Moreover, the EC has established that any such product effects have been superseded by numerous launches of enhanced-performance Boeing LCA since the 1970s and the drastically changed conditions of competition between 2001-2003 and 2004-2007, among other factors.[1081]

- And even if the US had demonstrated those points, its focus on historic 2001-2005 events fails to satisfy the requirement to demonstrate *present* adverse effects.[1082]

4.580 With respect to the specific evidence relating to Boeing's loss of market share in various third country markets, the EC claims that an objective assessment of that evidence reveals that Boeing's market share declined during 2001-2005 for reasons not causally linked to any alleged subsidies. In short, the EC argues that:

- The evidence adduced by the US fails to link Boeing's loss of delivery market share to specific sales it lost to Airbus.[1083]

- By contrast, the evidence shows that Boeing's loss of market share in 2002/2003 was the result of Boeing having to cancel, defer or reschedule many more deliveries than Airbus.[1084]

- More broadly, several other factors explain Boeing's overall loss of market share during the 2001-2005 period.[1085]

4.581 In addition, the EC asserts that it produced evidence showing that there were other factors that were holding down Boeing's delivery market share during the 2001-2005 period. These include over 1000 LCA deliveries on Boeing's order books that had to be cancelled or rescheduled as a result of 9/11 as confirmed by Boeing officials.[1086] This volume of deferrals is enormous – equivalent to nearly the entirety of Boeing's order backlog in 2001 or 2002 – and understandably had a detrimental impact on Boeing's absolute number of deliveries by 2002.[1087] The EC points out that the events of 9/11 had a much less severe impact on the number of Airbus deliveries which remained relatively stable over the 2001-2004 period, in particular due to Airbus' more limited exposure to US legacy carriers affected the most by the crisis and by its much larger share of leasing company customers that did not cancel or reschedule their delivery positions.[1088]

4.582 Second, the EC asserts that Boeing officials themselves admitted that their drop in market share was due to their mismanagement of customer relationships.[1089] These statements are

[1080] EC, Answer to Panel Question 206, paras. 314-321.
[1081] EC, SWS, para. 663.
[1082] EC, SWS, paras. 678-681; EC, Comments on *US – Upland Cotton (21.5)*, paras. 8-28.
[1083] EC, FWS, paras. 2260-2324; EC, Answer to Panel Question 291, paras. 307-314; EC, SCOS, paras. 118-149; 168-172
[1084] EC, FWS, paras. 1440-1458.
[1085] EC, Answer to Panel Question 207, paras. 322-427.
[1086] EC, FWS, paras. 1440-1467; EC, Answer to Panel Question 116, paras. 355-369; EC, SWS, para. 672; EC, SNCOS, paras. 314-316.
[1087] US, FWS, para. 1446.
[1088] EC, Answer to Panel Question 116, paras. 355-369; EC, SWS, para. 672; EC, SNCOS, paras. 314-316.
[1089] EC, FWS, paras. 1459-1466; EC, Answer to Panel Question 288, paras. 370-371.

corroborated by, and entirely consistent with, what Airbus heard from its airline customers, as testified to by Christian Scherer.[1090] Consistent with Boeing's own recognition of its customer management failures, in 2004, Boeing opted to re-organize the entire LCA Division sales team, and fired its sales chief Toby Bright.[1091]

4.583 Third, EC claims that geopolitical factors such as state-owned airlines splitting orders between Boeing and Airbus, and other non-commercial-based decisions explained Boeing's failure to win specific sales campaigns and/or explain its losses of market share in various geographic markets.[1092]

4.584 The EC argues that the US has improperly attributed to the effects of subsidies its loss of market share in various countries where such non-price, non-product-based factors are decisive in Airbus winning a sale.[1093]

4.585 Apart from these general non-attribution factors that impacted many sales campaigns (and hence market share in many third countries), there were particular non-attribution factors that influenced particular sales campaign results. For example, the EC argues that there is no basis for the US claim that it lost market share, and failed to launch the 747X, because of Airbus price undercutting in the A380 Singapore Airlines, Qantas and Emirates sales campaigns.[1094] The US' assertion is that, but for the alleged subsidies, Boeing would have launched the 747X in 2000.[1095] Yet, the EC notes that even if the US were correct, the first delivery of the 747X would have been in 2005, at the earliest. Thus – based on the US own assertion – even if Boeing had won these three sales, the EC argues that this would have had no impact on Boeing's market share decline in the 2001-2004 period.[1096]

4.586 In addition, the EC recalls that it rebutted US claims that Boeing lost market share because of Airbus price undercutting at easyJet (2002), South African Airways (2002), Thai Airways (2003), Iberia (2003), Air Berlin (2004) and Air Asia (2005).[1097] The EC notes that it has provided numerous rebuttals of the US allegations regarding these transactions.[1098] And it claims that the US has failed to demonstrate that Airbus significantly undercut Boeing's price and has failed to demonstrate that any price undercutting (and resulting displacement or impedance) was the effect of the subsidies.[1099]

4.587 The EC also rebuts US legal and factual claims that there is allegedly a world-wide displacement or impedance of Boeing's LCA market shares. The EC notes that there is no legal basis for the US claims regarding because impedance or displacement is only recognized in third country markets in the case of Article 6.3(b) and the EC market under Article 6.3(a).[1100]

[1090] EC, SNCOS, para. 322.
[1091] EC, SNCOS, para. 325.
[1092] EC, Answer to Panel Question 288, paras. 372-374.
[1093] EC, Answer to Panel Question 206, paras. 314-321; EC, Answer to Panel Question 288, paras. 272-290.
[1094] EC, FWS, paras. 1701-1725. *See, also,* EC, FWS, paras. 1660-1725.
[1095] EC, FWS, paras. 1670-1672.
[1096] EC, FWS, paras. 1660-1725.
[1097] EC, FWS, paras. 1874-1898, 1902-1913, 1921-1932, 2094-2112.
[1098] EC, FWS, paras. 1874-1898, 1902-1913, 1921-1932, 2094-2112.
[1099] EC, FWS, paras. 1829-1833, 1837-1842, 1844-1847, 1850, 1854, 1855-1857, 1859-1862, 1864, 1866-1868, 1870-1873, 1875-1901, 1903-1913, 1915-1920, 1923-1931, 2095-2099, 2101-2108, 2109-2112.
[1100] EC, Answer to Panel Question 285, paras. 234-240; EC, Comments on US Answer to Panel Question 285, paras. 315-320.

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4.588 The EC notes that while the US focuses its displacement or impedance claims on deliveries in the 2001-2005 period, it never produced evidence of the effect of subsidies on the orders that generated those deliveries, *i.e.*, three years earlier in the 1998-2002 time period.[1101] The EC contends that the absence of any temporal coincidence between alleged MSF subsidies and Boeing's maintenance of its delivery market share in the 1996-2000 period refutes US arguments that Airbus' alleged subsidy-enabled predatory market activity in the post 9/11 (2001-2003) period allowed it to allegedly use subsides to seize market share.[1102]

4.589 This lack of temporal coincidence is important, the EC asserts, because Airbus received MSF and launched the A320, A330, and A340 models starting in 1984.[1103] By 1996, all of the alleged subsidized A320, A330, and A340 models had been launched, had received orders, and had been delivered for years.[1104] Yet, the EC stated that undisputed data from the 1996-2003 period shows that Boeing had a commanded market share of approximately 60 percent of the US-imagined single LCA market during the 1996-2000 period.[1105] The EC points out that the same alleged subsidy effects must have been present in the 1996-2000 period as existed during the 2001-2003 and during the 2004-2007 period.[1106] Yet, the EC notes that Boeing's share of the orders and deliveries remained in the 60 percent range during the 1996-2000 period.[1107] It points out that during this period, the magnitude of alleged MSF subsidies were also higher than they were during the 2001-2003 period.[1108] The EC noted that the US has never explained how, although the same alleged subsidies and their effects were present during the 1996-2000 period, there were no apparent negative impacts on Boeing's market share of orders or deliveries during that period.[1109]

4.590 Finally, the EC argues that US assertions that Airbus has allegedly maintained a "dominant position over Boeing" since 2001 are false.[1110] Airclaims data through 2007 shows that in a single LCA market, Airbus' average share of total LCA deliveries between 2004-2007 is 51 percent while Boeing's is 49 percent.[1111] Boeing and Airbus' average share of total LCA orders between 2004-2007 is 50 percent.[1112] When the individual competitive LCA markets in the 200-300 seat, and 300-400 seat market are examined, it is Boeing, rather than Airbus, that has more of a competitive advantage in recent years. In the 100-200 single-aisle market, Airbus and Boeing have achieved rough equivalence that would be expected from equally matched duopoly producers in orders and deliveries.[1113] This competitive situation between Boeing and Airbus over the past four years in both orders and deliveries is one of a series of key facts (along with Boeing's record profits and order backlog as of the end of 2007) suggesting that Boeing is not suffering present displacement or impedance.[1114]

[1101] EC, Answer to Panel Question 207, paras. 322-427.
[1102] EC, Answer to Panel Question 287, paras. 257-271; EC, Comments on US Answer to Panel Question 287, paras. 333-346.
[1103] EC, Answer to Panel Question 287, paras. 257-271; EC, Comments on US Answer to Panel Question 287, paras. 333-346; EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, paras. 23-27.
[1104] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, paras. 23-27.
[1105] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, figure 5 at para. 23.
[1106] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 24.
[1107] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 24.
[1108] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 24.
[1109] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 25.
[1110] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 15.
[1111] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 17, figure 1 at para. 16.
[1112] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 17, figure 1 at para. 16.
[1113] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, figure 2 at para. 18.
[1114] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 19.

BCI deleted, as indicated **[***]**

4.591 Finally, the EC argues that Boeing's current operating performance by the end of 2007 is a key factor in determining whether Boeing is suffering present serious prejudice. In light of the fact that all of Boeing's delivery slots are sold out for the next four years, and considering that Boeing is producing at maximum capacity, the US claim of serious prejudice by reason of impedance and displacement in the EC and in certain third country markets must fail.

EC Responses to US Allegations Regarding Price Suppression and Depression

4.592 The EC argues that the US significant price suppression and depression claims involving Boeings various LCA – the 737, 767, 777, and 747 – are unfounded because the US fails to establish that the alleged effects on prices are caused by any alleged EC subsidies or are "significant".[1115] In particular, the EC pointed to the very small magnitude of the alleged subsidies throughout the period 2001-2007 and the decades old age of the subsidies, among other reasons, that explain why the alleged subsidies could not have caused significant price suppression or depression.[1116] And in light of the US acknowledgement that, but for Airbus, there would be other competition,[1117] the EC asserts that it is utterly speculative for the US to assume that competition from a non-Airbus competitor would be different and would not have suppressed or depressed Boeing prices to a similar degree.[1118] The EC notes that this is, after all, the essence of competition.[1119]

4.593 Among the many non-attribution factors that caused lower prices in each of the LCA markets where the US claims significant price suppression, the EC points, first, to the collapse of demand following 9/11, the resulting cancellations of deliveries and the lack of orders that were recognized by market participants to have resulted in lower or stagnant prices.[1120] The EC introduces substantial evidence, including the un-rebutted testimony of Christian Scherer, Airbus SAS Executive Vice President,[1121] establishing that other factors, such as Boeing's pricing strategy and launch of competing, low-priced LCA such as the 787, have been primarily or largely responsible for the lower LCA pricing alleged by the US.[1122] The EC notes that there is a close temporal correlation between 9/11 and the resulting collapse in demand, and declines in LCA prices between 2001 and 2002.[1123] Boeing's former CEO declared this period as the "worst downturn" in the history of commercial aviation.[1124]

4.594 Second, the EC considers that another key non-subsidy factor that had a significant impact on LCA pricing in all LCA markets was **[***]**.[1125] The EC notes that US itself has acknowledged that **[***]** had a significant impact on LCA pricing in all LCA.[1126]

4.595 Third, the EC argues that during the 2001-2002 period, the relatively favourable Euro to US dollar exchange rate granted Airbus a pricing advantage because, although LCA are priced in US

[1115] EC, Answer to Panel Question 213, paras. 506-511; EC, Answer to Panel Question 290, paras. 298-306; EC, Comments on US Answer to Panel Question 237, paras. 179-188; EC, Comments on US Answer to Panel Question 289, paras. 386-390; EC, Comments on US Answer to Panel Question 290, paras. 391-399.
[1116] EC, FWS, paras. 1792-1805, 2019-2023, 2073-2076; EC, SWS, paras. 1031-1034.
[1117] EC, SWS, paras. 870-879; EC, Answer to Panel Question 209, paras. 462-464. *See, also,* EC, SWS, paras. 858-869.
[1118] EC, SWS, paras. 837-914.
[1119] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 71.
[1120] EC, Answer to Panel Question 116, paras. 355-369.
[1121] EC, SCOS, paras. 173-177.
[1122] EC, SWS, paras. 1064-1076, 1148-1161, 1166-1174.
[1123] EC, SNCOS, para. 325; EC, Answer to Panel Question 288, paras. 279-281.
[1124] EC, Answer to Panel Question 116, paras. 357.
[1125] EC, SNCOS, para. 326.
[1126] EC, SNCOS, para. 326.

BCI deleted, as indicated **[***]**

dollars, Airbus keeps its financial accounts, incurs much of its costs, and accounts for its profits, in Euros.[1127] The EC notes that the Euro to US dollar exchange rate in 2000-2002 was over 30 percent better than the rate in 2004-2006.[1128] Indeed, the EC stresses that the exchange rate advantage was exponentially larger than any alleged MSF subsidy magnitude available for aggressive pricing in sales campaigns.[1129]

4.596 When coupled with the lack of demand in the 2001-2003 period, these factors are a far more likely explanation for Boeing's lower prices than the zero or *de minimis* magnitude of alleged subsidies.[1130]

4.597 The EC also argues that the US benchmark for assessing the alleged existence of price suppressing and depressing effects of subsidies – the US Aircraft Manufactures Producer Price Index – was flawed.[1131] The EC considers that the US errs in concluding that the US PPI is both a measure for cost increases faced by Boeing and a proxy for expected LCA pricing.[1132] In fact, the US PPI is neither. According to the EC, the US PPI is a theoretical construct that provides little information about Boeing's actual aircraft manufacturing costs, but considers general cost increases for materials and US labour relevant to LCA.[1133] That is, it does not take into account in which country Boeing's actual sourcing takes place, nor does it reflect Boeing's actual cost developments affected by efficiency improvement measures.[1134] Indeed, the EC argues notes that despite Boeing's cost reductions over the last decade, the US PPI has consistently increased.[1135] As such, the EC submits, the US PPI cannot be used to assess costs or be the baseline for determining whether Boeing's prices are suppressed or depressed.[1136]

4.598 Moreover, the EC explains that, the US PPI increases in line with inflation, while actual LCA pricing is "based on supply and demand."[1137] As a logical consequence, LCA pricing may not increase at the same rate as the US PPI.[1138] The EC notes that the US acknowledges as much when it argues that, "{b}ecause demand has increased substantially {in 2006-2007}, one would expect that prices would have increased substantially."[1139] Thus, the EC concludes that with LCA pricing being a function of a number of factors and fluctuating from one year to the next, it cannot be said to be "suppressed" – *i.e.*, prevented or inhibited from rising – simply because it does not increase in line with the US PPI.[1140] Nor can the US PPI be relevant for assessing price depression. In fact, the EC recalls that, as recognized by the Appellate Body, price depression is an observable phenomenon:

[1127] EC, Answer to Panel Question 205, paras. 307-308.
[1128] EC, Answer to Panel Question 205, para. 307.
[1129] EC, Answer to Panel Question 205, para. 307.
[1130] EC, Answer to Panel Question 116, paras. 355-369; EC, SWS, paras. 1031-1034.
[1131] EC, Answer to Panel Question 213, paras. 506-511; EC, Comments on US Answer to Panel Question 237, paras. 179-188.
[1132] EC, Answer to Panel Question 213, paras. 508-511.
[1133] EC, Answer to Panel Question 213, paras. 506-511.
[1134] EC, Answer to Panel Question 213, para. 510.
[1135] EC, Answer to Panel Question 213, paras. 506-511; EC, Comments on US Answer to Panel Question 237, paras. 179-188.
[1136] EC, Answer to Panel Question 213, paras. 506-511; EC, Comments on US Answer to Panel Question 237, paras. 179-188.
[1137] EC, Comments on US Answer to Panel Question 237, para. 388.
[1138] EC, Answer to Panel Question 213, paras. 506-511; EC, Comments on US Answer to Panel Question 237, paras. 179-188.
[1139] EC, Answer to Panel Question 213, paras. 506-511; EC, Comments on US Answer to Panel Question 237, paras. 179-188.
[1140] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 67.

BCI deleted, as indicated **[***]**

actual prices fall.[1141] No alleged cost-related index is necessary for assessment the direction in which actual prices move.[1142]

4.599 And even if the US PPI were the correct measure by which to compare actual pricing, the US must prove that Boeing's prices did not increase in line with the US PPI because of the alleged subsidies.[1143] As the Appellate Body concluded "{t}he effect – price suppression {or price depression} – must result from a chain of causation that is linked to the impugned subsidy."[1144] The EC concludes that the US has failed to establish this chain of causation.[1145] It simply assumes that Boeing's failure to increase prices in line with the US PPI is the result of the alleged subsidies.[1146] Specifically, when LCA prices do not increase at the same rate as the US PPI, the US attributes the price disparity to the alleged subsidies.[1147] Yet, when LCA prices increase at a higher rate than the US PPI, the US does not attribute this to a lack of subsidies impacting the market, but readily attributes that price increase to favourable market conditions.[1148] The US cannot square these two positions.[1149]

4.600 Turning to the US price suppression claims with respect to individual Boeing LCA, the EC explains that uncontested evidence shows that Boeing's launch of the 787, a replacement for the outdated Boeing 767, had a depressing effect on Boeing 767 pricing.[1150] In addition, the EC emphasizes that the lack of causation is further demonstrated by the fact that there was no competition between the A330 and the Boeing 767 during 2004-2006.[1151] Thus, the EC asserts that any prices secured by Boeing for the 767 – and hence, any alleged price suppression or depression – were due to other, non-subsidy related factors.[1152]

4.601 With respect to the 747's allegedly suppressed/depressed prices, the EC argues that the evidence demonstrates that other non-subsidy related factors were the cause for the failure of Boeing's 747 prices to grow at the same rate as the US PPI over the 2001-2006 period.[1153] In addition to submitting evidence demonstrating that Airbus was not even involved in most of the 747 orders that were allegedly secured at suppressed prices,[1154] the EC has provided a significant amount of (un-rebutted) evidence that demonstrates that any pricing pressure felt on the Boeing 747 was caused by:[1155]

- The fact that the 747 is almost at the end of its product life;[1156]
- The fact that global air traffic has changed over the last decade to deemphasize long-haul, hub-to-hub services;[1157] and

[1141] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 58.
[1142] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 67.
[1143] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 69.
[1144] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 69.
[1145] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 69.
[1146] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 69.
[1147] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 69.
[1148] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 69.
[1149] EC, Comments on US, Comments on *US – Upland Cotton (21.5)*, para. 69.
[1150] EC, FWS, paras. 2000-2010.
[1151] EC, FWS, paras. 2011-2015.
[1152] EC, FWS, paras. 2000-2023.
[1153] EC, FWS, paras. 1726-1758.
[1154] EC, FWS, paras. 1728-1738; FCOS, para. 52.
[1155] EC, FWS, paras. 1739-1757.
[1156] EC, FWS, paras. 1752-1756.
[1157] EC, FWS, paras. 1745-1751.

BCI deleted, as indicated **[***]**

- The effect of geopolitical events such as the 1991 Gulf War, the 1997 Asian financial crisis and the terrorist attacks of September 2001 on demand for 747s.[1158]

4.602 Regarding 777 prices, the EC notes the US acknowledgement that the "combination of particular market factors … appear to have been of sufficient magnitude as to **[***]**."[1159] Thus, having looked at the conditions of competition in the industry, the EC argues that the US acknowledges that Boeing 777 prices are not significantly suppressed or depressed in 2006.[1160]

4.603 The lack of a causal link for the US price suppression/depression claims is further demonstrated, according to the EC, by Boeing's record profits and the projected future profits at the end of 2007. The EC recalls that Boeing's profits during 2005-2007 were based on prices secured for LCA orders in the period 2001-2004, reflecting the average three year gap between order and delivery that existed at that time. The EC considers that Boeing's record-high profit margins during the 2006-2007 period are inconsistent with the US argument that Boeing's prices were significantly suppressed during the earlier 2002-2004 period. Indeed, Boeing's 2006 operating margins exceeded those of any previous year since 1995, and Boeing's 2007 and 2008 margins are expected to reach "record" level.[1161]

4.604 Nor is there any evidence, the EC asserts, of significant price suppression caused with respect to orders in the most recent 2006-2007 period. Indeed, it notes that sales prices for Boeing LCA have **[***]**. In April 2007, Boeing's CEO stated that Boeing's LCA pricing today is "better than it was 2-3 years ago."[1162] In June 2007, a Boeing executive explained that Boeing is "happy with where we are with prices now."[1163] In line with improving prices, Boeing predicted near the end of 2007 that its record-setting operating margins will not only continue, but continue to increase.[1164] These increasing prices are consistent with the record levels of demand for Boeing 737, 787, and 777 LCA during the 2005-2007 period. In view of this strong demand, the EC considers that Airbus had no incentive to lower its sales prices in sales campaigns with Boeing during the 2005-2007 period. And even if it had, the zero or *de minimis* magnitude of any allegedly available per-aircraft subsidies would be too small to cause any significant price effects.

4.605 Finally, even if the Panel were to conclude that significant price suppression existed in the 2001-2005 period, that price suppression is no longer "significant," *i.e.*, "important or meaningful," in light of Boeing's current financial performance. And even if Boeing were experiencing some minor prejudice in the form of lower revenue today from suppressed prices in historic sales – which it is not – this prejudice could not be considered "serious," within the meaning of Articles 5(c) and 6.3 of the SCM Agreement.[1165]

(f) Conclusions

4.606 The EC contends it has demonstrated that, today (as of the end of 2007), there are no present adverse effects to US interests, including Boeing. Boeing's generally dominant share of LCA markets at a time of sky-rocketing demand, its record-high backlog and lengthy wait for open aircraft delivery

[1158] EC, FWS, paras. 1741-1745.
[1159] EC, Comments on US Answer to Panel Question 282, para. 308.
[1160] EC, Comments on US Answer to Panel Question 282, para. 308.
[1161] *See, e.g.*, EC, SWS, paras. 1148-1174, EC, Answer to Panel Question 261.
[1162] EC, SNCOS, paras. 424-431.
[1163] EC, SNCOS, paras. 424-431.
[1164] EC, Answer to Panel Question 210 and 214, EC, Comments on US Answer to Panel Question 210.
[1165] *See, e.g.*, EC, SNCOS, paras. 424-431.

positions, its high and anticipated record profit margins, its record level of orders, the rising prices it receives for its LCA, and its many other rapidly rising financial and commercial indicators conclusively demonstrate this.[1166] The EC argues that it has shown that the present per-aircraft magnitude of any alleged MSF subsidies available to Airbus SAS for the A320, A330, and A340 models is *de minimis*, or even non-existent, and, in light of their nature and the present conditions of competition, cannot be the cause of the alleged adverse effects. Alleged subsidies for the A380, which does not compete with any Boeing product, cannot cause present adverse effects. And the A350-XWB is non-subsidized.[1167] In any event, Airbus frequently had neither the incentive – given, for example, Airbus' five-year backlog of single-aisle LCA orders – nor the opportunity – given wide-spread non-competition for LCA sales – to use any available subsidy to aggressively price its LCA. Moreover, the EC asserts it has demonstrated that, given the impact of numerous non-subsidy factors, the effects of any alleged subsidized pricing were not the determining factor in the sales campaigns raised by the US as evidence of adverse effects.[1168]

4.607 But even assuming, arguendo, that the effect of any alleged subsidies to Airbus caused Boeing to lose certain sales between 1999-2005, those alleged "lost sales" are not today significant given the huge order backlog and the fact that Boeing sold all the early "lost" order slots to other customers at what were likely higher prices. Similarly, historic price suppression is no longer "significant" both because prices have generally increased between 2004-2005 and 2006-2007 and because Boeing's 2006-2007 operating margins, largely reflecting present deliveries from orders made in the years 2002-2005, are at or near record levels.[1169] Meanwhile, the US steadfastly refuses to show how – in light of their age, nature, and magnitude – the alleged subsidies caused the particular lost sales, price suppression, and displacement it claims existed during 1999-2005. Instead, its causation arguments – including the hopelessly speculative "historical product launch causation" counterfactual, wishing away Airbus and 40 years of LCA market developments – boil down to affixing a "subsidized" label on all Airbus products and then presuming that, so tainted, they cause the competitive harms alleged.[1170]

4.608 The EC argues that the US raises sweeping claims against more than 70 measures and alleges these to be prohibited subsidies or subsidies causing adverse effects to the US LCA interests. At the same time, however, the US chooses to ignore the specifics of the LCA market and the relevant legal framework it agreed to, namely the 1979 Agreement and the 1992 Agreement which specifically deal with LCA. On numerous occasions, the US fails to identify proper recipients of the alleged subsidies and, in so doing, fails to make a *prima facie* case demonstrating how the alleged subsidies benefit the EC producer of LCA that is alleged to cause adverse effects to US interests. Finally, the EC considers that the US fails to demonstrate a "genuine and substantial relationship of cause and effect" between the alleged subsidies and the adverse effects it claims – a claim which is at odds with economic reality, as Boeing is in excellent financial health.[1171]

4.609 The EC considers that the US arguments in this dispute are based on unfounded presumptions and evidentiary shortcuts.[1172] As the Panel assesses whether the US has met its burden of establishing

[1166] EC closing statement, second meeting, Executive Summary, para. 11.
[1167] EC closing statement, second meeting, Executive Summary, para. 12.
[1168] EC closing statement, second meeting, Executive Summary, para. 13.
[1169] EC closing statement, second meeting, Executive Summary, para. 14.
[1170] EC closing statement, second meeting, Executive Summary, para. 15.
[1171] EC, FWS, Executive Summary, para. 93.
[1172] EC, SCCS, para. 23.

BCI deleted, as indicated **[***]**

causation by positive evidence, the EC respectfully requests it to keep in mind some of the more consequential and unwarranted inferential leaps taken by the US.[1173] In particular, the US:

- Selects a grouping of subsidized products and like products with no basis in the evidence of physical, performance and price characteristics, the perception of market participants, including Boeing and Airbus, and the actual competitive relationships between these products;

- Ignores the dissimilar nature, age, magnitude, and impact of individual MSF loans from four different governments over a 40-year period, in favour of an alleged effect from a non-existent "Launch Aid Program";

- Ignores the dissimilar nature, age, magnitude, and impact of alleged subsidies in the form of infrastructure measures, EIB loans, research & technology grants, capital contributions and restructuring measures, alleging that these measures all have the same effect as, and merely augment the effect of, the "Launch Aid Program";

- Ignores the changing conditions of competition in LCA markets and focuses its claims almost exclusively on sales campaigns, prices and market share data from the historical 1999-2005 period, rather than the appropriate 2006/2007 reference period;

- Fails to undertake the required sales campaign-specific assessment of causation, thereby glossing over the many factors that affect the outcome and pricing of an LCA sale;

- Refuses to determine the magnitude of any subsidies on a per-aircraft basis allegedly available, today, to Airbus to affect pricing decisions in individual sales campaigns, and instead ignores well-accepted allocation and amortization principles, the SCM Agreement, CVD practice, and logic in employing a "compounding" methodology to derive a nebulous subsidy amount of "well over $100 billion"; and

- Concedes there would be active competition, but then fails to take into account the impact of competition when assuming that every sale Boeing fails to win is a "lost sale" due to alleged Airbus subsidies and that every price that is lower than the US' "expected price" is so exclusively as a result of alleged Airbus subsidies.[1174]

4.610 In combination with the affirmative evidence offered by the EC – demonstrating, among other things, the absence of present adverse effects and the absence of a causal link between the challenged measures and any alleged effects – the US cannot overcome this rebuttal.[1175]

4.611 The EC requests that the Panel reject all claims advanced by the US in this dispute.[1176]

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties Australia, Brazil, Canada, China, Japan and Korea are set out in their written and oral submissions to the Panel, and in their answers to questions. The third

[1173] EC, SCCS, para. 23.
[1174] EC closing statement, second meeting, Executive Summary, para. 16. .
[1175] EC closing statement, second meeting, Executive Summary, para. 17.
[1176] EC, SWS, Executive Summary, para. 75. *See, also,* EC, FWS, Executive Summary, para. 94..

parties' arguments, based on the summaries submitted by them pursuant to paragraph 13 of the Panel's working procedures, are presented in this section.[1177]

A. AUSTRALIA

5.2 In its Third Party Submission, Australia states that these proceedings raise significant systemic issues as well as important questions of legal interpretation. In its submission Australia focused on a select few issues. However, Australia points out that the fact that it has not commented on a particular issue should not be taken as an indication that it accepts the views of either party on that issue.[1178]

1. The 1979 and 1992 Agreements

(a) The 1979 and 1992 Agreements as applicable law

5.3 Australia considers that the EC argument that the 1979 and 1992 Agreements constitute law that is applicable to this dispute invites an examination of the position of these agreements in relation to the WTO Agreement.[1179] Australia notes that the 1979 Agreement is one of the Plurilateral Trade Agreements listed in Annex 4 to the WTO Agreement. The Plurilateral Trade Agreements are listed in Appendix 1 to the DSU as falling within the coverage of the DSU, provided that the parties to each Agreement have taken a decision setting out the terms for the application of the DSU to that Agreement. Australia notes that the parties to the 1979 Agreement have not taken such a decision. Accordingly, the 1979 Agreement is not a covered agreement under the DSU.[1180]

5.4 Australia notes that the EC asserts that the 1992 Agreement can be invoked as a defence in this dispute, arguing that Article 7.2 of the DSU permits defences to be drawn from non-WTO law. However, Article 7.2 deals only with defences based on covered agreements cited by parties to a dispute, and not with defences based on non-covered agreements.[1181] Australia points out that the Appellate Body has made it clear, in light of DSU Article 7.2 that the DSU operates in relation to covered agreements only. It is not the function of panels to seek to clarify the provisions of non-covered agreements. The 1979 Agreement falls into the latter category. The 1992 Agreement also falls into the latter category. In Australia's view, the Panel in this dispute should decline to use the WTO dispute settlement system to determine rights and obligations in the 1979 and 1992 Agreements.[1182]

(b) The 1979 and 1992 Agreements as aids to interpretation of the SCM Agreement

5.5 Australia notes that the EC relies on Article 31(3)(c) of the Vienna Convention in support of its argument that the 1979 and 1992 Agreements can be drawn on to assist with interpreting the SCM Agreement.[1183] Australia does not consider that the rules of international law contained in the 1979 and 1992 Agreements, which are only applicable in the relations between subsets of parties to the SCM Agreement, can be taken into account under Article 31(3)(c) of the Vienna Convention in

[1177] China and Korea did not submit executive summaries of their oral statements. The presentation therefore refers to the full text of their oral submissions.

[1178] Executive Summary of the Third Party Submission of Australia (hereinafter Australia Third Party Submission Executive Summary), para. 1.

[1179] Australia Third Party Submission Executive Summary, para. 2.

[1180] Australia Third Party Submission Executive Summary, para. 3.

[1181] Executive Summary of the Opening Statement of Australia at the Meeting with Third Parties (hereinafter Australia Opening Statement Executive Summary), para. 3.

[1182] Australia Third Party Submission Executive Summary, para. 4.

[1183] Australia Third Party Submission Executive Summary, para. 5.

BCI deleted, as indicated **[***]**

interpreting the SCM Agreement. More generally, given that the application of Article 31(3)(c) has potentially significant systemic implications for the WTO dispute settlement system, Australia submits that the Panel in this dispute should approach the issue with a degree of caution.[1184]

5.6 At the Panel meeting with the third parties Australia noted that the Panel did not consider it necessary to determine whether the 1992 Agreement[1185] fell within the scope of Article 31(3)(c) of the *Vienna Convention on the Law of Treaties 1969*. Should the Panel have cause to consider the application of that provision, Australia reiterates its view that the 1979 Agreement[1186] and the 1992 Agreement are not covered by Article 31(3)(c). Neither agreement is a rule of international law which is applicable in the relations between all the parties to the SCM Agreement, as required by Article 31(3)(c).[1187] Australia notes that the Panel's preliminary ruling expressly states that it does not address certain arguments made by the EC in relation to the relevance of Article 4 of the 1992 Agreement.[1188] In Australia's view, the Panel should reject these arguments.[1189] Finally, Australia observes that the Panel's preliminary ruling dealt at some length with the EC argument that the 1992 Agreement gives rise to an estoppel. Australia points out that no claim of estoppel has been accepted by a panel or the Appellate Body. Australia does not accept the EC position on estoppel in this dispute.[1190]

2. Applicability of the SCM Agreement to Pre-1995 subsidies

5.7 Australia notes that the US asserts that subsidies have been provided by the EC over a number of decades, beginning with the provision of Launch Aid for the development of the first large civil aircraft (LCA) in the Airbus family, the A300, in the 1970s.[1191] Australia contends that as a number of these alleged subsidies were provided prior to the entry into force of the SCM Agreement on 1 January 1995, the question arises as to whether those alleged subsidies properly fall within the scope of the SCM Agreement.[1192]

5.8 Australia notes that Article 28 of the Vienna Convention provides that, absent a contrary intention, a party is not bound by a treaty in relation to 'any situation which ceased to exist' before entry into force of the treaty for that party. The use of the word 'situation' suggests something that subsists and continues over time. Article 28 also necessarily implies that, absent a contrary intention, treaty obligations do apply to any 'situation' which has not ceased to exist.[1193] Australia considers that the Panel in this dispute should draw on guidance provided by the Appellate Body in relation to Article 28 of the Vienna Convention in determining whether payments made prior to the entry into

[1184] Australia Third Party Submission Executive Summary, para. 6.
[1185] Australia Opening Statement Executive Summary, para. 1 citing, the *Agreement between the Government of the US and the European Economic Community Concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft 1992*
[1186] Australia Opening Statement Executive Summary, para. 1 citing, the *Agreement on Trade in Civil Aircraft 1979*
[1187] Australia Opening Statement Executive Summary, para. 1.
[1188] Australia Opening Statement Executive Summary, para. 2 citing, the Preliminary Ruling (WT/DS316), 11 July 2007, para. 58.
[1189] Australia Opening Statement Executive Summary, para. 2.
[1190] Australia Opening Statement Executive Summary, para. 4 citing, the Second Written Submission of the EC, para. 41.
[1191] Australia Third Party Submission Executive Summary, para. 7.
[1192] Australia Third Party Submission Executive Summary, para. 8.
[1193] Australia Third Party Submission Executive Summary, para. 9.

BCI deleted, as indicated **[***]**

force of the SCM Agreement can be properly characterised as forming part of a 'situation' or subsidy continuum which continued to exist after entry into force of the SCM Agreement.[1194]

3. In Fact Export Contingency

5.9 Australia notes that the US alleges that the Launch Aid granted to Airbus for the A380, the A340-500/600, and the A330-200 models was contingent in fact on export performance, and accordingly, is a prohibited subsidy under Article 3.1(a) of the SCM Agreement. Australia considers that in making this argument the US focuses primarily on the export propensity of the LCA product at the expense of an examination of the total configuration of the facts. In Australia's view, this leads to a misapplication of the Appellate Body guidance on export contingency and the Panel's findings in *Australia – Automotive Leather II*.[1195]

5.10 Australia recalls that, in establishing export contingency three elements must be established: (1) the granting of a subsidy; (2) that is 'tied to'; (3) actual or anticipated exportation or export earnings. The second element is at the very heart of the legal standard and must be considered independently from the third element and evidence of export orientation. Consequently, evidence of the export nature of a product supports the establishment of a relationship of conditionality but is not conclusive of this second element.[1196]

5.11 The second sentence of footnote 4 to Article 3.1(a) explicitly states that the mere fact that a subsidy is granted to enterprises which export cannot by itself support a finding of export contingency. This does not mean that export propensity is irrelevant to the analysis of contingency—it simply means that it is only one of several facts to be taken into account. Careful consideration needs to be given in the present case to the evidence used to support export contingency and the weight it should be accorded. If disproportionate emphasis is given to export propensity, this would undermine the second sentence of footnote 4.[1197]

5.12 In Australia's view there are two main deficiencies with the US analysis of in fact export contingency in the present case. First, by focusing on export propensity the US conflates product sales generally with export sales. This leads to the erroneous conclusion that sales performance is export performance. Second, the US focuses on the contractual requirement to repay the loan and its connection with sales performance. However, it is not clear on the facts presented the extent to which the repayment of Launch Aid is mandatory. Moreover, it appears that Airbus receives payment of Launch Aid whether or not there are any sales. Therefore, the US has failed to explain why a link between the requirement to repay the loan and sales performance establishes a tie between the grant of an alleged subsidy and export performance.[1198]

5.13 Australia points out that in meeting the legal standard of export contingency under footnote 4 of Article 3.1, the relationship of conditionality between the granting of the subsidy and export performance is paramount. Australia observes that the Appellate Body in *Canada – Aircraft* noted that to establish export contingency, the requisite relationship of contingency 'must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case'.[1199] In Australia's view, such relevant facts could include: an analysis of the nature of the product; the design and form of the subsidy; the export

[1194] Australia Third Party Submission Executive Summary, para. 10.
[1195] Australia Third Party Submission Executive Summary, para. 11.
[1196] Australia Third Party Submission Executive Summary, para. 12.
[1197] Australia Third Party Submission Executive Summary, para. 13.
[1198] Australia Third Party Submission Executive Summary, para. 14.
[1199] Australia Opening Statement Executive Summary, para. 5 citing, *Canada – Aircraft*, para. 167.

BCI deleted, as indicated **[***]**

propensity of the product; performance requirements or conditions attached to the granting of the subsidy; any distinction made between domestic and export sales in relation to repayment requirements; the level of sales requirements relative to domestic demand; and official statements by governments indicating the intention behind the granting of the subsidies. The possibility that there may also be some sales that do not involve exportation may not sever the tie to anticipated exportation.[1200]

5.14 Australia considers that the US characterization of export performance as an 'exchange of commitments'[1201] is a lesser standard than that required under footnote 4 of Article 3.1. The Panel's analysis of the relationship of conditionality between the granting of the subsidy and export performance should be based on the total configuration of facts. The loan contracts may contain provisions whereby Airbus promises to make loan repayments based on sales. The issue is therefore to what extent the text of these contracts is representative of the true nature of the loans, and to what extent it can be said that the granting of the subsidy is conditional upon the promise to repay based on export sales.[1202]

5.15 Australia considers that one relevant factor in determining to what extent sales or production targets amount to export performance is the point at which repayment of the loans is due. For instance, if the loans require a certain level of sales that could only be achieved by exporting, then that would indicate that the performance requirements necessitate exports.[1203]

5.16 Australia does not agree that 'motivations' or 'reasons' are necessarily irrelevant to the test for in fact export contingency.[1204] Such 'motivations' or 'reasons' may be objectively ascertained from official statements by a government and may shed light on whether the granting of the subsidy is tied to exportation.[1205]

5.17 Australia considers that the EC approach, namely that to be contingent upon export performance a subsidy must be a 'consequence of' export performance,[1206] seriously undermines the standard for in fact export contingency in the first sentence of footnote 4 to Article 3.1. The fact that the grant of a subsidy is not the consequence of actual exportation does not mean that the grant of a subsidy is not tied to export performance and therefore contingent upon export performance within the meaning of the SCM Agreement.[1207]

5.18 Australia notes that the EC has raised some legitimate concerns in relation to the likelihood of export propensity in the case of small export dependent economies or in the case of a global market.[1208] Australia considers that the second sentence in footnote 4 of the SCM Agreement has relevance in this regard. Export propensity is only one element in demonstrating the requisite relationship of conditionality or dependence between the granting of a subsidy and export

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[1200] Australia Opening Statement Executive Summary, para. 6, citing, Second Submission of the US of 28 June 2007, paras. 244.

[1201] Australia Opening Statement Executive Summary, para. 7, citing, Second Submission of the US of 28 June 2007, paras. 134, 142, & 161-167 and 136, & 210-214.

[1202] Australia Opening Statement Executive Summary, para. 7.

[1203] Australia Opening Statement Executive Summary, para. 8.

[1204] Australia Opening Statement Executive Summary, para. 9, citing, Second Submission of the US of 28 June 2007, paras. 231-232.

[1205] Australia Opening Statement Executive Summary, para. 9.

[1206] Australia Opening Statement Executive Summary, para. 10, citing, Second Submission of the US of 28 June 2007, paras. 144, 148-160.

[1207] Australia Opening Statement Executive Summary, para. 10.

[1208] Australia Opening Statement Executive Summary, para. 11, citing, the Second Written Submission of the EC, paras. 228-231.

BCI deleted, as indicated **[***]**

performance. Contingency must still be established. Export propensity must not be confused with export contingency and must be assessed on an analysis of the total configuration of the facts. Establishing a relationship of contingency allows a differentiation to be made between situations where the size of a country's economy, and its general dependence on exports, would lead to a positive finding of export propensity and thereby discrimination against small export dependent economies.[1209]

5.19 Australia notes that for the EC, the term 'anticipated' in footnote 4 of the SCM Agreement means an export that has not yet taken place at the moment when the subsidy is deemed to exist but will occur subsequently.[1210] Australia considers that this interpretation is problematic as it requires an analysis after the fact and renders 'anticipated' exportation as 'actual' exportation. The ordinary meaning of the term 'anticipate' involves an element of probability, that is, exportation is likely to occur but it may not occur. Further, the Appellate Body has found that it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result.[1211,1212]

4. Adverse Effects

5.20 Australia notes that the US claims that the provision of the alleged subsidies to Airbus by the EC and the Airbus Governments has caused adverse effects to its interests under Article 5 of the SCM Agreement.[1213]

(a) Temporal issues regarding the US claim of adverse effects

5.21 Australia considers that there are two temporal issues in relation to the US claim of adverse effects. First, whether adverse effects should be assessed at the time when the panel makes a decision or at the time of the panel establishment. Second, what is an appropriate representative period for assessing adverse effects. According to Australia, in addressing these issues the Panel in this dispute should draw on guidance in *US – Upland Cotton*.[1214] Australia notes that Part III of the SCM Agreement provides minimal direction as to the specific time period within which to conduct an evaluation of adverse effects. *US – Upland Cotton* refers to a 'recent period'[1215] but does not specify how long that period should be. However, the case does seem to suggest that consideration of developments over a period longer than one year provides a more robust basis for evaluation and puts developments in a broader temporal context.[1216]

5.22 In Australia's view, the appropriate reference period for adverse effects must be assessed on a case-by-case basis taking into account all the relevant facts and circumstances. Relevant factors include: (a) that subsidization is alleged to have occurred for over thirty years; (b) the nature of the alleged subsidies, including long term loans; (c) that product development and sales in the large civil aircraft industry occur over long timeframes; (d) that the average useful life of an aircraft is over 20 years; (e) that neither the SCM Agreement nor the DSU preclude the Panel from considering evidence of adverse effects subsequent to the date of panel establishment (*i.e.*, 20 July 2005), provided that the

[1209] Australia Opening Statement Executive Summary, para. 11.
[1210] Australia Opening Statement Executive Summary, para. 12, citing, the Second Written Submission of the EC, paras. 232-250.
[1211] Australia Opening Statement Executive Summary, para. 12, citing, *Canada – Aircraft*, para. 171.
[1212] Australia Opening Statement Executive Summary, para. 12.
[1213] Australia Third Party Submission Executive Summary, para. 15.
[1214] Australia Third Party Submission Executive Summary, para. 16.
[1215] Australia Opening Statement Executive Summary, para. 17, citing, Third Party Submission of Australia, 7 May 2007, paras. 35-36.
[1216] Australia Opening Statement Executive Summary, para. 17, citing, *US – Upland Cotton*, Panel Report, para. 7.1199.

BCI deleted, as indicated **[***]**

evidence relates to measures that were within the panel's terms of reference; and (f) the reference in Article 6.4 of the SCM Agreement to 'an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year'.[1217]

(b) Causation

5.23 Australia considers that, depending on the facts and circumstances of a particular case, aggregation of subsidies to assess whether they are causing adverse effects is permissible under the SCM Agreement. In such circumstances a complainant is not required to demonstrate adverse effects with respect to each subsidy individually.[1218]

(c) Magnitude of the subsidy and methodology

5.24 Australia notes that in terms of methodology, Part III and Part V of the SCM Agreement serve different purposes.[1219] As stated by the Appellate Body in *US – Upland Cotton*, the provisions of Part V 'must not be automatically transposed into Part III'.[1220] Those provisions may nevertheless provide context for the interpretation on Part III in appropriate cases.[1221]

5.25 Australia does not consider that Part III of the SCM Agreement calls for a precise quantification or allocation of the subsidy benefit.[1222] The magnitude of a subsidy benefit is only relevant to a serious prejudice claim to the extent that it confirms whether the subsidy is of sufficient magnitude to cause the claimed effects.[1223] Accordingly, there is no basis for the EC to suggest in this dispute that the US is required to allege a precise per-aircraft magnitude of subsidy.[1224]

(d) Relevance of the concepts of 'subsidized product' and 'like product'

5.26 Australia notes that in light of Articles 5(a), 5(c), 6.3, 15.1, and footnote 46 of the SCM Agreement, it is clear that when assessing the US claim of adverse effects, it is necessary to identify both the 'subsidized product' (*i.e.*, 'product under consideration') and the corresponding 'like product'. Further, Australia notes that, in elaborating on the requirements for establishing serious prejudice under Articles 6.3(b) and 6.3(c), the SCM Agreement refers to 'non-subsidized like product' in Articles 6.4 and 6.5 respectively.[1225]

[1217] Australia Opening Statement Executive Summary, para. 18.
[1218] Australia Opening Statement Executive Summary, para. 19, citing, *US – Upland Cotton*, Panel Report, 7.1290-7.1307, s*ee also*, Third Party Written Submission of Brazil, 7 May 2007, para. 56; and Third Party Submission of Canada, 7 May 2007, paras. 61 & 62.
[1219] Australia Opening Statement Executive Summary, para. 14, citing, Second Submission of the US of 28 June 2007, para. 600-601; and Third Party Written Submission of Brazil, 7 May 2007, para. 37-38
[1220] Australia Opening Statement Executive Summary, para. 14, citing, *US – Upland Cotton*, Appellate Body Report, para. 438.
[1221] Australia Opening Statement Executive Summary, para. 14.
[1222] Australia Opening Statement Executive Summary, para. 13, citing, Second Submission of the US, 28 June 2007, para. 600-602; and Third Party Written Submission of Brazil, 7 May 2007, para. 37-38.
[1223] Australia Opening Statement Executive Summary, para. 13, citing, *US – Upland Cotton*, Panel Report, para. 7.1173 & 7.1177; *US – Upland Cotton*, Appellate Body Report, para. 461.
[1224] Australia Opening Statement Executive Summary, para. 13.
[1225] Australia Third Party Submission Executive Summary, para. 17.

BCI deleted, as indicated **[***]**

(e) US' characterization of the 'subsidized product' and the 'like product'

5.27 Australia notes that in order to demonstrate its claim of adverse effects the US has grouped all the Airbus LCA models together under the banner of the Airbus LCA family. According to the US the 'subsidized product' for the purposes of this dispute is the Airbus LCA family. Similarly, the US has grouped all the Boeing LCA models together and asserted that the 'like product' for the purposes of this dispute is the Boeing LCA family. Australia notes that the EC acknowledges the existence of some sort of 'family concept' in relation to LCA.[1226]

5.28 In Australia's view, one of the key issues for the Panel in this dispute is whether the US characterisation of the 'subsidized product' and the 'like product' provides an appropriate point of comparison for the purposes of assessing whether the alleged subsidies have caused adverse effects to the interests of the US.[1227]

(f) Legal considerations in determining the 'subsidized product' and the 'like product'

5.29 Australia argues that in assessing a claim of adverse effects it is necessary to first identify the 'subsidized product' before identifying the 'like product'. However, the two concepts are obviously closely related.[1228] Australia notes that there appears to be little guidance in the SCM Agreement or WTO cases regarding the complaining WTO Member's determination of the 'subsidized product'. However, given that the definition of 'like product' under the SCM Agreement in footnote 46 requires that the 'like product' be 'identical' or have 'characteristics closely resembling' the subsidized product it seems reasonable to assume that there must be limitations on the scope of the 'subsidized product'.[1229] Australia has highlighted a number of WTO cases which provide guidance on the determination of 'like product'. *Indonesia – Autos* seems to be of particular relevance to the present dispute.[1230]

5.30 In light of the relevant WTO cases, Australia submits that the Panel should satisfy itself of the following issues when examining the US characterisation of the 'subsidized product' and the 'like product':

(i) Is it reasonable for the US, having predominantly sought to establish the existence of subsidies on the basis of particular models of Airbus LCA, to shift focus, in relation to its claim of adverse effects, to the Airbus LCA family as the 'subsidized product'? In other words, does a claim under the SCM Agreement require a consistent approach in establishing the existence of a subsidy and in establishing adverse effects?

(ii) In terms of physical characteristics (*e.g.*, length, height, wingspan, seating capacity, cargo capacity, and range) and price, is it appropriate to suggest, for example, that the Boeing 747 (as the notional 'like product') has 'characteristics closely resembling' those of the Airbus A320 (as the notional 'subsidized product')?

(iii) How does the LCA industry analyse market segmentation? What are the airlines' (*i.e.*, consumers') tastes and habits in purchasing a range of LCA models to form their fleet?

[1226] Australia Third Party Submission Executive Summary, para. 18.
[1227] Australia Third Party Submission Executive Summary, para. 19.
[1228] Australia Third Party Submission Executive Summary, para. 20.
[1229] Australia Third Party Submission Executive Summary, para. 21.
[1230] Australia Third Party Submission Executive Summary, para. 22.

BCI deleted, as indicated **[***]**

(iv) How widely should the 'accordion of likeness' be stretched in terms of the definition of 'like product' under the SCM Agreement?

(v) Does the US grouping of various LCA models together result in individual product characteristics being ignored so that it could affect the outcome of the case?

(vi) Would it be appropriate to disaggregate the US grouping of products on the basis of the physical characteristics (*e.g.,* length, height, wingspan, capacity and range), end-uses, and consumers' perceptions?[1231]

5.31 Australia points out that contrary to what the EC has suggested,[1232] Australia's third party submission does not 'urge this Panel to follow the findings of the panel in *Indonesia – Autos*'. Australia considers that in assessing a claim of adverse effects it is necessary first to identify the 'subsidized product' before identifying the 'like product'.[1233] Australia also reiterates that in *Japan – Alcoholic Beverages II* the Appellate Body highlighted that the concept of likeness was flexible and depends on 'the particular provision…as well as...the context and the circumstances that prevail in any given case'.[1234] In addition, Australia recalls that the Appellate Body has held that the grouping of products may be an acceptable analytical tool when assessing likeness.[1235]

5.32 Finally, Australia notes that in *Korea – Commercial Vessels* the Panel indicated that it was always for the complaining party in a WTO dispute to determine the basis and nature of its own complaint, including the breadth or narrowness of the description of the 'subsidized product'. The Panel stated that it was then up to the complainant to demonstrate causation in relation to this 'subsidized product'.[1236]

5. General Infrastructure

5.33 Australia considers that Article 1.1(a)(1)(iii) excludes "general infrastructure" from what is deemed a financial contribution in the context of the provision of goods and services by government. The Appellate Body has noted in regard to sub-paragraph (iii), that general infrastructure is infrastructure of a general nature.[1237] Australia submits that the Panel should take into account its observation that 'general infrastructure' in this context means the provision, by government, of goods and services that are generally available or multi-user.[1238]

5.34 Australia considers that a broad definition, as advocated by the EC, of 'general infrastructure'[1239] as infrastructure that fulfils public policy goals finds no support in the

[1231] Australia Third Party Submission Executive Summary, para. 23.
[1232] Australia Opening Statement Executive Summary, para. 15, citing, Second Written Submission by the European Communities, 28 June 2007, para. 745.
[1233] Australia Opening Statement Executive Summary, para. 15, citing, *Korea – Commercial Vessels*, paras. 7.555-7.556.
[1234] Australia Opening Statement Executive Summary, para. 15, citing, *Japan – Alcoholic Beverages II*, Appellate Body Report, pp.19-21.
[1235] Australia Opening Statement Executive Summary, para. 15, citing, *Korea – Alcoholic Beverages*, Appellate Body Report, paras. 141-144.
[1236] Australia Opening Statement Executive Summary, para. 16, citing, *Korea – Commercial Vessels*, paras. 7.559-7.560; s*ee also*, Third Party Written Submission of Brazil, 7 May 2007, paras. 52-53.
[1237] Australia Opening Statement Executive Summary, para. 20 citing, *US – Softwood Lumber IV*, Appellate Body Report, para. 60. *See, also*, Australia Third Party Submission Executive Summary, para. 24.
[1238] Australia Third Party Submission Executive Summary, para. 24.
[1239] Australia Opening Statement Executive Summary, para. 21, citing, First Written Submission of the EC, paras. 710-724.

BCI deleted, as indicated **[***]**

SCM Agreement. If this were the test, then virtually every financial contribution by government towards infrastructure would be excluded from the definition of 'subsidy' in the SCM Agreement, even if granted to a specific enterprise. Such an interpretation would seriously undermine the discipline of the SCM Agreement.[1240]

5.35 Further, Australia does not accept that '{a}s long as the infrastructure is potentially accessible by the public or providing common goods to the public, it should be treated as "general infrastructure"'.[1241] Such a test would be too broad.[1242]

5.36 Australia submits that the Panel needs to analyse whether the infrastructure is for exclusive or limited use by enterprises. Australia does not consider that sub-paragraph (iii) requires a presumption that government funded infrastructure is general unless evidence demonstrates that its use is limited exclusively to certain users. Further, infrastructure is not necessarily of a general nature simply because limitations on its use to certain users are temporary. Ultimately, any analysis of infrastructure needs to be undertaken on a case-by-case basis, taking into account all the relevant facts and circumstances, including the terms and conditions relating to its use.[1243]

5.37 According to Australia, the 'general infrastructure' exclusion under Article 1 of the SCM Agreement should be distinguished from specificity analysis under Article 2. It is also a separate consideration from the question of whether a benefit has been conferred by government which is required in order to complete the analysis of the existence of a subsidy.[1244]

6. Regional Specificity

5.38 Australia notes that the EC argues that Article 2.2 involves a two-step test: (i) the subsidy is limited to a designated geographic region; and (ii) the subsidy is limited to certain enterprises within that designated geographic region. However, Australia draws the Panel's attention to the fact that under such a two-step test for regional specificity it is difficult to envisage a situation covered by Article 2.2 that would not already be covered by Article 2.1(a).[1245]

7. Extinguishment of Subsidies

5.39 Australia notes that the EC argues that any benefit conveyed by a financial contribution is presumptively 'extinguished' for purposes of the SCM Agreement when the recipient firm (or segments thereof) is sold at 'arms length' and for 'fair market value'. In Australia's view, in addressing this issue, the Panel should examine all relevant facts in this dispute, including any provisions made in loan contracts between governments and Airbus SAS in relation to the transfer of obligations to successor entities.[1246]

[1240] Australia Opening Statement Executive Summary, para. 21.
[1241] Australia Opening Statement Executive Summary, para. 22, citing, Third Party Submission of Korea, 23 April 2007, para. 47.
[1242] Australia Opening Statement Executive Summary, para. 22.
[1243] Australia Opening Statement Executive Summary, para. 23.
[1244] Australia Opening Statement Executive Summary, para. 24.
[1245] Australia Third Party Submission Executive Summary, para. 25.
[1246] Australia Third Party Submission Executive Summary, para. 26.

BCI deleted, as indicated **[***]**

8. Withdrawal of the subsidy

5.40 Finally, Australia notes that the EC states erroneously that Article 4.7 requires the withdrawal of the subsidy in terms of withdrawal of the benefit amount, not the subsidy.[1247] However, Article 4.7 is clear that it is the subsidy that must be withdrawn, not the benefit.[1248]

B. BRAZIL

1. Introduction

5.41 In its third party submission, Brazil discusses the following specific issues of particular importance to Brazil in this dispute:

- The rights and obligations under the SCM Agreement apply in all respects to the aircraft sector.
- Subsidies provided before 1 January 1995 should be excluded from the scope of the proceeding.
- Failure of the EC to cooperate in the Annex V information gathering process threatens to undermine the WTO dispute settlement process and should result in the application of inferences, including adverse inferences, where appropriate.
- "Launch aid" severely distorts the competitive conditions in the market for civil aircraft. Upon considering all of the characteristics of launch aid, the Panel should find that launch aid confers a benefit and should examine carefully the EC arguments regarding the duration or expiration of the benefit of launch aid subsidies.
- The Panel should avoid a narrow interpretation of *de facto* export contingency under Article 3.1(a) of the SCM Agreement.
- In evaluating whether the subsidies to Airbus are causing adverse effects or the threat thereof, the Panel should (a) take into account the conditions of competition in the LCA market, (b) give substantial discretion to the US to define the "subsidized product," and (c) examine other critical legal issues relevant to its consideration of the US claims of serious prejudice and material injury.[1249]

2. The SCM Agreement applies in all respects to the aircraft sector

5.42 Brazil considers that the SCM Agreement establishes the rights and obligations applicable to assessing the US claims in this dispute. In Brazil's view, the 1979 Agreement and the 1992 Agreement are outside the Panel's terms of reference. To the extent relevant to the Panel's review, the 1979 Agreement actually places an additional burden on the EC not to cause further distortions in the civil aircraft market. Moreover, the 1992 Agreement cannot serve to carve EC subsidies to its aircraft

[1247] Australia Opening Statement Executive Summary, para. 25, citing, Second Written Submission of the EC, para. 224.
[1248] Australia Opening Statement Executive Summary, para. 25.
[1249] Executive Summary of the Third Party Submission of Brazil (hereinafter Brazil Third Party Submission Executive Summary), para. 1.

BCI deleted, as indicated **[***]**

industry out of the obligations under the SCM Agreement, in particular because it is not a WTO covered agreement to which all WTO Members are a party.[1250]

5.43 At the Panel meeting with the third parties, Brazil noted that in its preliminary ruling, the Panel found no basis for applying the 1992 Agreement to the temporal scope of the dispute[1251] but did not address whether the 1992 Agreement was relevant to other substantive issues.[1252] Among other things, the Panel's conclusion was based on lack of jurisdiction and on its finding that the SCM Agreement prevails over the 1992 Agreement.[1253] For the same reasons, Brazil considers that the Panel should find no basis for applying the 1992 Agreement to the substantive claims under the SCM Agreement in this dispute.[1254]

5.44 Brazil also objects to the use of the 1992 Agreement to interpret provisions of the SCM Agreement. A bilateral treaty such as the 1992 Agreement simply does not reflect the common intentions of all WTO Members, and as a result, it cannot be used to inform what WTO Members intended when drafting the SCM Agreement. Any other interpretation would lead to absurd and prejudicial results, with third parties seeing their WTO rights affected by a bilateral treaty to which they were not a party and with the provisions of the SCM Agreement potentially being interpreted differently for different WTO Members. Alternatively, any interpretation of the SCM Agreement based on the 1992 Agreement can only apply to the bilateral relations between the US and the EC.[1255]

3. Subsidies provided before 1 January 1995 should be excluded from the scope of this proceeding

5.45 Brazil notes that the US has presented a number of claims based on subsidies provided prior to 1 January 1995, the date the SCM Agreement entered into force. Consistent with the text and as interpreted in accordance with customary rules of interpretation of public international law, Brazil maintains that the SCM Agreement cannot bind a WTO Member in relation to any act that has taken place before 1 January 1995.[1256]

5.46 Accordingly, Brazil considers that the temporal scope of any dispute under the SCM Agreement is limited to subsidies actually granted or maintained on or after 1 January 1995. One-time grants provided prior to 1 January 1995, for example, should be excluded. Recurring subsidies and subsidy programmes in which contributions are actually provided on or after 1 January 1995 should be covered, including any contributions provided on or after 1 January 1995 that are pursuant to commitments, decisions, or other actions taken prior to that date. Brazil also considers that launch aid that was granted prior to 1 January 1995 and that remains subject to the repayment of interest or principal after that date should be within the scope of this dispute, including, under certain circumstances, situations where the relevant launch aid was fully repaid after 1 January 1995.[1257]

[1250] Brazil Third Party Submission Executive Summary, para. 2.

[1251] Executive Summary of the Opening Statement of Brazil at the Meeting with the Third Parties (hereinafter Brazil Opening Statement Executive Summary), para. 5, citing, Preliminary Ruling, para. 89.

[1252] Brazil Opening Statement Executive Summary, para. 5, citing, Preliminary Ruling, para. 58.

[1253] Brazil Opening Statement Executive Summary, para. 5, citing, Preliminary Ruling, footnote 141.

[1254] Brazil Opening Statement Executive Summary, para. 5.

[1255] Brazil Opening Statement Executive Summary, para. 6. *See, also,* Brazil Opening Statement, para. 7.

[1256] Brazil Third Party Submission Executive Summary, para. 3.

[1257] Brazil Third Party Submission Executive Summary, para. 4.

BCI deleted, as indicated **[***]**

4. The EC failure to cooperate in the Annex V process threatens to undermine the WTO dispute settlement process and should result in the application of inferences, including adverse inferences, where appropriate

5.47 In Brazil's view, the Annex V process is particularly critical in cases such as this one in which the relevant information is almost exclusively contained in confidential documents held by the subsidizing Member.[1258] Brazil points out that Annex V of the SCM Agreement establishes an information gathering process that is a critical and integral part of the SCM Agreement. In Brazil's view, the Annex V process is mandatory.[1259] In the interest of the timely and efficient resolution of disputes and consistent with the text of Annex V, Members should consent to the initiation of Annex V procedures and should fully cooperate in providing requested information, particularly because information about subsidies is often only available to the subsidizing Members.[1260]

5.48 Brazil notes that at the outset of this proceeding, the EC refused to consent to three requests by the US to initiate the procedures under Annex V of the SCM Agreement. The EC also failed to respond fully to questions and "follow-up" questions from the Annex V Facilitator. In Brazil's view, the EC actions in withholding evidence in the Annex V process severely prejudiced the rights of third parties to protect their interests in this proceeding within the meaning of Article 10 of the DSU.[1261]

5.49 To the extent that the EC continues to withhold relevant evidence, Brazil encourages the Panel to use its discretion under paragraph 7 of Annex V of the SCM Agreement to draw adverse inferences where appropriate and thereby adopt effective sanctions to ensure that Annex V remains an effective tool for the resolution of disputes under the SCM Agreement.[1262]

5. "Launch aid" severely distorts the markets for aircraft and constitutes a specific subsidy

5.50 Brazil considers that launch aid is a particularly distortive type of subsidy because it shifts the enormous up-front expense and commercial risk of developing new aircraft to taxpayers. Although Brazil agrees with the EC that the LCA industry has special characteristics, it rejects the notion that this justifies subsidies inconsistent with a Member's WTO obligations.[1263]

5.51 Brazil agrees with the legal test articulated by the US for determining whether a benefit was conferred, *i.e.*, a benefit corresponds to some form of advantage and 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 commercial market. Launch aid takes the form of a loan for which repayment is success-dependent and, thus, may not earn a commercial rate of return if relevant aspects are taken into account, including the risks inherent in the development and marketing of new aircraft, the nature of the launch aid (including its success-dependent and back-loaded features and lack of security), the relevant interest rates (including the nature of any obligation to pay interest), the fact that credit ratings are affected by the expectation of continuing government support, and any other preferential features, including the waiver of normal fees. The Panel should account for these aspects in establishing an appropriate commercial benchmark for determining whether the launch aid

[1258] Brazil Opening Statement Executive Summary, para. 2.
[1259] Brazil, Third Party Submission, para. 16.
[1260] Brazil Third Party Submission Executive Summary, para. 5.
[1261] Brazil Third Party Submission Executive Summary, para. 6.
[1262] Brazil Third Party Submission Executive Summary, para. 7. *See, also,* Brazil Opening Statement Executive Summary, para. 5.
[1263] Brazil Third Party Submission Executive Summary, para. 8.

subsidies in this proceeding have conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement.[1264]

5.52 Based on the evidence provided by the US, Brazil considers that the US has presented a *prima facie* case that launch aid granted without any interest obligation confers a benefit on Airbus. Moreover, when the launch aid does require the payment of interest or royalties, the EC admission that such launch aid was granted on terms and conditions more favourable than even its own proposed commercial benchmarks means that the US has established that launch aid confers a benefit on Airbus. Brazil considers that the additional statements by officials from member States of the EC and by Airbus further demonstrate that launch aid confers a benefit on Airbus.[1265]

5.53 Brazil disagrees with the EC assertion that the test for whether launch aid confers a benefit should be based solely on the reasonableness of sales forecasts.[1266] This test has no support in the SCM Agreement. Based on its reference to governments securing an "adequate rate of return" and ensuring "adequate recoupement of its contribution,"[1267] the EC is attempting to resurrect the "cost to government" approach to examining the existence of a benefit, which has been rejected in past cases.[1268] Brazil also objects to the use of risk-sharing suppliers in determining the appropriate commercial benchmark for assessing the benefit of launch aid to a civil aircraft producer. The terms and conditions for risk-sharing suppliers are substantially distorted by the government subsidies for the underlying project and would not reflect the situation without government intervention.[1269]

5.54 Regarding the duration and expiration of the benefits of subsidies to Airbus, Brazil urges the Panel to examine the issues carefully and to ensure that its findings in this dispute do not lead to interpretations that would undermine the disciplines set out in the SCM Agreement. In the absence of guidance in the SCM Agreement regarding the quantification of subsidies, the Panel should not, as the EC argues, require the US to allege a precise per aircraft subsidy rate in accordance with strict methodologies or thresholds. Moreover, although the general magnitude of the subsidies may be relevant, the Panel should also consider the nature of launch aid, which necessarily distorts the market and facilitates the ability of Airbus to launch aircraft that would not otherwise be developed or at least not developed at the same time or at the same cost.[1270]

5.55 At the Panel meeting with the third parties, Brazil asserted that absent launch aid, certain new aircraft would not be developed and sold in the market or would be developed and sold much later at a higher cost. Therefore, a beneficiary of launch aid is able to be more aggressive in producing and marketing aircraft than a competing producer without launch aid.[1271]

5.56 Brazil also notes that subsidies are not a requirement for the development and launch of new aircraft, even if a producer is located in a developing country. For example, to finance the design and

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[1264] Brazil Third Party Submission Executive Summary, para. 9.
[1265] Brazil Third Party Submission Executive Summary, para. 10.
[1266] Brazil Opening Statement Executive Summary, para. 7, citing, First Written Submission of the EC, paras. 442-478 and Second Written Submission of the EC, paras. 151-157.
[1267] Brazil Opening Statement Executive Summary, para. 7, citing, Second Written Submission of the EC, paras. 154 and 157.
[1268] Brazil Opening Statement Executive Summary, para. 7, citing, *Canada-Aircraft I (AB)*, para. 156.
[1269] Brazil Opening Statement Executive Summary, para. 8.
[1270] Brazil Third Party Submission Executive Summary, para. 11. *See, also*, Brazil, Third Party Submission, para. 37, citing *US-Cotton (AB)*, para. 467.
[1271] Brazil Opening Statement Executive Summary, para. 3.

BCI deleted, as indicated **[***]**

development of its EMBRAER 170/190 family of aircraft with four models ranging from 70 to 118 seats, EMBRAER did not rely on launch aid.[1272]

6. The Panel should avoid a narrow interpretation of *de facto* export contingency

5.57 In examining US claims that certain launch aid constitutes prohibited export subsidies under Article 3.1(a) and footnote 4 of the SCM Agreement, Brazil considers that the Panel should not interpret the applicable provisions so narrowly as to effectively prevent a finding of *de facto* export contingency in certain sectors where there may indeed be a global market or in industries with substantial export orientation.[1273] In particular, the Panel should examine export contingency as of the date the subsidy is granted. In the relevant agreements to provide launch aid (*i.e.*, to provide the subsidy) in this proceeding, each government required a certain rate of return, and thus, the provision of the launch aid was contingent on agreement between the government and Airbus to the specified contractual rate of return and the projected sales. If this return could only be reached through actual or anticipated exportation or export earnings as evidenced by, for example, market data in the launch aid agreement itself, Brazil considers that this may be sufficient to demonstrate *de facto* export contingency. Likewise, the relevant launch aid contracts were concluded in the expectation that a certain amount of sales would occur, according to "reasonable forecasts". If this amount could only be reached through actual or anticipated exportation, this should also be sufficient to demonstrate *de facto* export contingency.[1274]

5.58 At the Panel meeting with the third parties, Brazil stated that based on the information available to it, certain instances of launch aid in this dispute do appear to constitute prohibited subsidies because they are contingent on export performance within the meaning of Article 3.1(a) of the SCM Agreement. If the evidence demonstrates that the launch aid contracts were concluded on the basis of a rate of return that could only be achieved through sales forecasts that inevitably imply exportation of subsidized products, the Panel should find that such evidence may be sufficient to demonstrate *de facto* export contingency.[1275]

5.59 Brazil notes that in *Canada-Aircraft*, the Panel stated that, in order to rebut Brazil's *prima facie* case, Canada should have, *inter alia*, "adduce{d} ... evidence demonstrating that TPC assistance to the Canadian regional aircraft industry would have been granted irrespective of anticipated exportation or export earnings."[1276] Likewise, in order to rebut the US *prima facie* case here, the EC must present evidence demonstrating that the *same* launch aid would have been granted *irrespective of anticipated exportation or export earnings*.[1277] Brazil concludes that if the launch aid at issue here is endorsed by the Panel, it will open a loophole for Members to provide export incentives under the guise of "royalty-based" or similar *de facto* export performance based financing. In Brazil's view, the Panel should ensure that its findings do not open such a loophole, and it should not otherwise interpret Article 3.1(a) of the SCM Agreement so narrowly that a finding of *de facto* export contingency is no longer possible.[1278]

[1272] Brazil Opening Statement Executive Summary, para. 4.
[1273] Brazil Third Party Submission Executive Summary, para. 12.
[1274] Brazil Third Party Submission Executive Summary, para. 13.
[1275] Brazil Opening Statement Executive Summary, para. 9.
[1276] Brazil Opening Statement Executive Summary, para. 10, citing, *Canada-Aircraft I (Panel)*, para. 9.344.
[1277] Brazil Opening Statement Executive Summary, para. 10.
[1278] Brazil Opening Statement, para. 18.

BCI deleted, as indicated **[***]**

7. The US has made a *prima facie* case that the subsidies to Airbus cause adverse effects or the threat thereof

5.60 Brazil considers that the conditions of competition in the LCA market are critical to the Panel's analysis of adverse effects under Article 5 of the SCM Agreement. Brazil disagrees with the EC argument that there is often a lack of competition in the LCA market. Given that Boeing and Airbus are the only surviving LCA producers, if Airbus wins a sales campaign, Boeing necessarily loses a sale, even if Boeing was not asked to compete for the sale.[1279]

5.61 Brazil also agrees with the US description of the competitive conditions in the LCA market, including the large but infrequent orders of LCA and the likelihood that airlines purchasing subsidized aircraft will continue purchasing the same model or models from the same family due to commonality of spare parts, pilot and crew training, special tooling, and ground support equipment. Accordingly, subsidies that distort a customer's purchasing decisions have adverse effects that are far greater than in most other sectors and are also likely to affect future aircraft sales.[1280]

5.62 Moreover, the nature of aircraft production is such that the continued development of new aircraft and technology is necessary to remain competitive. Brazil agrees with the US and with the logic contained in the Dorman Report that subsidies significantly distort the market because they enable a producer to reduce the risk of launching new aircraft, lower its costs, divert internal funds to other uses, and otherwise make decisions that are inconsistent with normal commercial considerations.[1281]

5.63 Regarding the determination of the "subsidized product" in this dispute, Brazil considers that the Panel should afford the US substantial discretion as the complaining party to define the subsidized product or products to which its claims apply.[1282] Brazil also agrees with the criteria proposed by the US for determining the "like product" in this dispute, although Brazil does not take a position regarding whether the entire Boeing family of LCA is the appropriate like product or products in this case.[1283] Brazil notes that the SCM Agreement provides no definition for "subsidized product" and no textual support for the proposition that the subsidized product has to conform to a particular configuration, be it narrow or wide.[1284]

5.64 In its Third Party submission and at the Panel meeting with the third parties, Brazil provided the following comments on some of the important issues regarding the US adverse effects-related claims and arguments:

- Brazil notes that the SCM Agreement does not specify what type of market (monopoly, duopoly or a perfectly competitive market) should prevail in any given context of international trade. If the evidence shows, for example, that a certain aircraft *would not exist* but for a subsidy and that the entire market for that kind of product would be supplied by a single non-subsidized firm, there are strong grounds for a *prima facie* case that the subsidy causes serious prejudice within the meaning of Article 6.3.

[1279] Brazil Third Party Submission Executive Summary, para. 14.
[1280] Brazil Third Party Submission Executive Summary, para. 15.
[1281] Brazil Third Party Submission Executive Summary, para. 16.
[1282] Brazil Third Party Submission Executive Summary, para. 17. *See, also*, Brazil Opening Statement Executive Summary, para. 11
[1283] Brazil Third Party Submission Executive Summary, para. 17
[1284] Brazil Opening Statement Executive Summary, para. 11.

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- Brazil submits that contrary to the EC position, price need not be the only reason for lost sales, provided it is one of the material factors causing the lost sales.

- Brazil disagrees with the EC assertion that adverse effects are extinguished, for example, by the launch within two or three years of a technologically equal or superior competing aircraft by Boeing. The continuing distortive effect of subsidies in the market does not disappear with the launch of a competing aircraft.

- Brazil disagrees with the EC position that Boeing's healthy financial and market position at the peak of the business cycle precludes the possibility that the US is suffering serious prejudice caused by the subsidy. The relevant issue is whether Boeing's market share would be greater absent the subsidized Airbus product.

- Brazil agrees with the US that if data on exports to certain third country markets is insufficient, the Panel may conduct an analysis of displacement or impedance under Article 6.3(b) of the SCM Agreement based on the aggregate of all third country markets.

- Brazil considers that the effect of subsidies may be gauged not only as aircraft are physically delivered to customers, but also as orders are secured by manufacturers subsidized by their governments.

- Brazil disagrees with the EC two-step analysis of displacement or impedance under Article 6.3(b) of the SCM Agreement requiring proof first that 'displacement' or 'impedance' is caused by the effects of challenged subsidies and second that such displacement or impedance rises to the level of serious prejudice. Brazil notes that displacement or impedance in the sense of Article 6.3(b) is an instance of "serious prejudice" within the meaning of Article 5(c). There is no additional requirement to show that such displacement or impedance rises to the level of serious prejudice. The panel in *US-Cotton* made it clear that a finding of an effect under Article 6 is sufficient for a finding of serious prejudice under Article 5(c). In *Indonesia-Autos*, the panel found that "{i}f the type of analysis set forth in Article 6.4 is appropriate in this case, then the complainants arguably could make a *prima facie* case of displacement or impedance simply by demonstrating that the market share of a subsidized product has increased over an appropriately representative period." Thus, Brazil considers that if the demonstration required by Article 6.4 is made for a *single* third country market (or for third country markets considered as a whole) under Article 6.4, this amounts to a *prima facie* case of serious prejudice within the meaning of Article 5(c) of the SCM Agreement. [1285]

- With respect to material injury under Article 5(a) of the SCM Agreement, Brazil agrees with the US that evidence that Boeing's performance was improving in 2006 does not mean that the US did not suffer adverse effects from subsidized Airbus products.[1286]

5.65 Brazil points out that the precise quantification of subsidies is not required in a dispute under Part III of the SCM Agreement. In addition to the findings of the Appellate Body in *US-Cotton (AB)* directly on this point,[1287] the absence of a *de minimis* provision under Part III of the SCM Agreement and the use of the language "effect of the subsidy" in Article 6.3 of the SCM Agreement support the lack of any requirement to quantify the subsidy. Thus, the Panel should not adopt any specific

[1285] Brazil, Third Party Submission, paras. 63-64, citing, *Indonesia-Autos (Panel)*, paras. 14.208-14.211. *See, also*, Brazil Third Party Executive Summary, para. 18.
[1286] Brazil Third Party Submission Executive Summary, para. 18.
[1287] Brazil Opening Statement Executive Summary, para. 13, citing, *US-Cotton (AB)*, paras. 464-467.

BCI deleted, as indicated **[***]**

calculation or allocation methodologies for purposes of this case and should not require the US to demonstrate a precise per-aircraft subsidy rate.[1288]

5.66 Brazil notes that the EC contends that Airbus LCA would have been viable without the challenged launch aid.[1289] In Brazil's view, the EC arguments are not relevant in demonstrating causation in this case. The possibility that certain aircraft would have been launched without the preferential terms provided by launch aid does not undermine arguments in relation to the effects of alleged subsidies on the pace and conditions by which such aircraft were actually introduced into the market.[1290]

5.67 Brazil points out that according to the EC, the competitive advantage enjoyed by Airbus in launching a more technologically advanced aircraft earlier than it would have done absent subsidies was quickly neutralized or eliminated when Boeing launched a competing or superior aircraft.[1291] As a legal matter, Brazil objects to the EC argument that the actions of a producer of the like product to remedy the adverse effects caused by subsidies either breaks the causal link between the subsidies and the adverse effects or removes the adverse effects. Such an interpretation is not supported by the SCM Agreement and would lead to the absurd result that a commercial response to reduce the adverse effects of subsidization would lessen the likelihood that the subsidizing Member would be found to violate its WTO obligations, despite causing the adverse effects in the first place.[1292]

5.68 Brazil notes that the EC would have the Panel require the US to provide evidence showing that funds received in the past under launch aid contracts is directly linked to cash flow or "free money" that Airbus has chosen at the time of sale to spend on reducing prices in each and every sales campaign. Given the fungible nature of the funds provided and the fact that the subsidies benefited Airbus far in advance of the actual sale of any particular aircraft, such test is not required and would impose an impossible evidentiary burden on a complainant.[1293]

5.69 Moreover, the EC argues that the US must also prove that Airbus had the incentive and commercial opportunity to use the additional cash flow from subsidies to lower sales prices. Brazil considers that the EC approach lacks the common sense that the EC advocated in *Korea-Vessels*.[1294] It follows from basic principles of economics and, in fact, from common sense that a significant magnitude of subsidy-induced cash flow would reduce a producer's costs and affect prices. A complainant should not be required to further demonstrate that the subsidized producer had the incentive and commercial opportunity to lower prices for its products.[1295]

5.70 Brazil disagrees with the EC assertion that the lower development costs provided by launch aid do not affect pricing. Because it lowers per unit costs of aircraft and improves the recipient's cash flow, launch aid enables Airbus to offer more aggressive pricing on its products.

5.71 Brazil notes that the EC contends that to show that displacement or impediment under Articles 6.3(a) and 6.3(b) of the SCM Agreement is caused by the "effect of the subsidy," the US must

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[1288] Brazil Opening Statement Executive Summary, para. 13.

[1289] Brazil Opening Statement Executive Summary, para. 14, citing, Second Written Submission of the EC, paras. 757-795.

[1290] Brazil Opening Statement Executive Summary, para. 14.

[1291] Brazil Opening Statement Executive Summary, para. 15, citing, Second Written Submission of the EC, para. 914.

[1292] Brazil Opening Statement Executive Summary, para. 15.

[1293] Brazil Opening Statement Executive Summary, para. 16.

[1294] Brazil Opening Statement Executive Summary, para. 17, citing, *Korea-Vessels*, Annex F-1 (Second Oral Statement of the EC, para. 41).

[1295] Brazil Opening Statement Executive Summary, para. 17.

BCI deleted, as indicated **[***]**

conduct a sales-campaign by sales-campaign analysis.[1296] Such an approach lacks any support under the SCM Agreement or past practice. It is simply not a requirement for the complainant to present evidence relating to each sale of a subsidized product (whether aircraft or any other product) and demonstrate that the subsidy caused the relevant displacement or impediment on a sale-by-sale basis.[1297]

5.72 Brazil agrees that the challenged subsidies should be cumulated in examining whether they are causing adverse effects to US interests if such subsidies "manifest themselves collectively."

5.73 Brazil notes that the EC argues that the US cannot meet its burden of demonstrating serious prejudice under Articles 6.3(b) and 6.3(c) of the SCM Agreement because the various like Boeing products are subsidized and because Articles 6.4 and 6.5 refer to comparisons only with the "non-subsidized like product."[1298] The drafters' use of "non-subsidized like product" in Articles 6.4 and 6.5 (as well as in paragraph 5 of Annex V), however, was intended merely to ensure that the analysis excluded the like product of third countries and was limited to a comparison of the subsidized product and the like product of the complainant. In short, Brazil considers that alleged subsidies to Boeing are no defence to the US claims in this dispute.[1299]

5.74 In Brazil's view, the Panel should disregard the EC attempts to use US subsidies to Boeing as a defence against the US claims. Alleged claims regarding US subsidies to Boeing will be considered by the panel in DS353.

C. CANADA

1. Introduction

5.75 Canada states that it is participating in this proceeding because of its role as one of the world's major producers of civil aircraft and its systemic interest in the interpretation of the SCM Agreement.[1300]

2. *De facto* Export Contingency

5.76 Canada considers that the US has failed to accurately apply the test for *de facto* export contingency set out in footnote four of the SCM Agreement.[1301] Canada argues that instead of applying this test, the US attempts to establish only that repayment of the financing was tied to actual or anticipated exportation or export earnings.[1302] Canada notes that the US paraphrases the test as: "(1) the 'granting' of a subsidy; (2) that is 'tied to' (3) 'actual or anticipated exportation or export earnings'." By inserting the word "that" the US has obscured the locus of the inquiry. In Canada's

[1296] Brazil Opening Statement Executive Summary, para. 18, citing, Second Written Submission of the EC, paras. 1142-1143.
[1297] Brazil Opening Statement Executive Summary, para. 18.
[1298] Brazil Opening Statement Executive Summary, para. 19, citing, Second Written Submission of the EC, para. 1100-1137.
[1299] Brazil Opening Statement Executive Summary, para. 19.
[1300] Executive Summary of the Third Party Submission of Canada (hereinafter Canada Third Party Submission Executive Summary), para. 1.
[1301] Canada Third Party Submission Executive Summary, para. 2. Canada asserts that this standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.
[1302] Canada Third Party Submission Executive Summary, para. 2.

view, the text is clear in establishing the locus of the "tied to" inquiry as "the granting of the subsidy". Therefore, the relevance of repayment is limited to the light it sheds on whether the granting of the subsidy was export contingent. Repayment is not dispositive.[1303]

5.77 Canada asserts that the SCM Agreement locates the "tied to" inquiry in the granting of the subsidy rather than its repayment for good reason. A tie between repayment of a subsidy and sales can provide governments with an effective mechanism for establishing when repayments are due without creating any incentive to export. Indeed, requiring repayment of a subsidy only when export sales are made could be a device for using subsidies to develop domestic sales in preference to export sales.[1304]

5.78 According to Canada, the US errs in conflating the terms "export performance", "exportation" and "export earnings", with the term "sales". By conflating these terms, the US would have it that any subsidy provided in the form of royalty-based financing is prohibited if the level of anticipated repayment factored in even a single export sale. This nullifies the final sentence of footnote four.[1305]

5.79 Canada considers that if the US is arguing that the granting of the financing was conditioned on full repayment, it has provided no evidence. Even if such evidence was provided, it would be absurd to characterize a full repayment requirement as an export contingency. Every prior finding of a prohibited export subsidy was based on a positive, direct correlation between subsidization and exportation. Here, the correlation is the inverse: repayments triggered by export sales only reduce any benefit to Airbus.[1306]

5.80 Canada notes that the US argues that the contractual commitments to repay Launch Aid on a per plane basis are sufficient in this globalized market to establish that the granting of the alleged subsidies is export contingent. This turns Article 3.1 on its head. As is clear from footnote four, the locus of the inquiry in Article 3.1 is the granting of the subsidy, not the repayment of the financial contribution.[1307]

5.81 The US further asks the Panel to accept the proposition that the per plane repayment requirements in the member State financing at issue are "like" the best endeavours performance targets set out in the grant contract in *Australia – Leather*. However, the two cases are in no way analogous. *Australia – Leather* involved targets that, if met, would result in additional subsidization. In the case before the Panel, each sale, export or domestic, when made, only triggers repayment of the financial contribution.[1308]

5.82 Canada points out that by its own admission, the entire US case on export contingency depends on the repayment schedules in the relevant financial contribution agreements. Canada notes that in its second submission, for example, the US claims that "{i}t is this contractual tie that distinguishes the provision of Launch Aid from the provision of a subsidy based on the mere expectation that the subsidy would result in exportation."[1309] However, the simple fact that the repayment schedules are incorporated into the financial contribution agreements does not make the granting of the alleged subsidies contingent upon export performance. In *Australia – Leather*, the

[1303] Canada Third Party Submission Executive Summary, para. 3.
[1304] Canada Third Party Submission Executive Summary, para. 4.
[1305] Canada Third Party Submission Executive Summary, para. 6.
[1306] Canada Third Party Submission Executive Summary, para. 7.
[1307] Executive Summary of the Oral Statement of Canada at the Meeting with the Third Parties (hereinafter Canada Oral Statement Executive Summary), para. 2.
[1308] Canada Oral Statement Executive Summary, para. 3. *See, also,* Canada Third Party Submission Executive Summary, para. 5.
[1309] Canada Oral Statement Executive Summary, para. 4.

BCI deleted, as indicated **[***]**

panel took into account a number of circumstances to find that export performance was one of the conditions of the granting of the subsidies. The two cases are dissimilar, since the per plane repayment schedules in this case are based on all sales – export and domestic – and therefore the agreements are neutral as to export performance. This neutrality suggests no tie between export performance and the granting of the alleged subsidy.[1310]

5.83 Canada asserts that the repayment terms confer no subsidy on Airbus based on its export performance. Indeed, if Airbus failed to make a single export sale of the relevant planes, the Airbus governments would have no recourse against Airbus under these contracts. Further, repayments triggered by export sales can only reduce the conferral of benefit to Airbus. These facts alone are sufficient to dispose of the US claim.[1311]

5.84 Canada notes that the US complains that the EC ignores its arguments in respect of the repayment terms and answers an argument that the US did not make. But in fact it is the US that misunderstands the importance of the contractual terms of repayment for the granting of the subsidies in question. The most that these terms can show in respect of the granting of the subsidy is an expectation of export sales. In Canada's view, as is clear from the last sentence of footnote four to the SCM Agreement, mere expectation of export sales is not sufficient to establish that a subsidy is export contingent.[1312]

5.85 Canada notes that in its second written submission, the EC elaborated on its argument that the test for export contingency in Article 3.1 requires a finding of contingency in respect of both elements of the definition of subsidy in Article 1– the financial contribution and the benefit conferred by that financial contribution.[1313] In Canada's view, the reference in Article 3.1 to subsidies "within the meaning of Article 1" supports the EC view that export contingency must be proven in respect of both the financial contribution requirement established by Article 1.1(a) and the benefit thereby conferred element established by Article 1.1(b). Canada has previously noted the importance of the words "the granting of" in footnote four for identifying the relevant locus for the export contingency inquiry. The reference to "the granting of" also serves to emphasize the importance of conducting the contingency inquiry in respect of the conferral of benefit element of a subsidy.[1314]

5.86 Canada points out that a failure to examine whether an export contingency relates to the conferral of benefit would lead to the absurd result that an alleged export contingency, which withdraws benefit rather than confers benefit on export, is sufficient to qualify a subsidy as prohibited. That interpretation of export contingency would run counter to every prior finding of a prohibited export subsidy in WTO dispute settlement cases, all of which relied on a positive and direct correlation between subsidization and exportation. Yet that is exactly the interpretation advanced by the US in this dispute. The Panel should reject that interpretation.[1315]

3. Infrastructure

5.87 Canada notes that the US claims that certain infrastructure projects are subsidies, but fails to first establish that they are not excluded from the SCM Agreement as "general infrastructure" by Article 1.1(a)(1)(iii).[1316] Canada identifies problems with the US definition of general infrastructure

[1310] Canada Oral Statement Executive Summary, para. 5.
[1311] Canada Oral Statement Executive Summary, para. 6.
[1312] Canada Oral Statement Executive Summary, para. 7.
[1313] Canada Oral Statement Executive Summary, para. 8.
[1314] Canada Oral Statement Executive Summary, para. 9.
[1315] Canada Oral Statement Executive Summary, para. 10.
[1316] Canada Third Party Submission Executive Summary, para. 8.

and elaborates on the principles it identified in its written submission as relevant to the Panel's analysis of the US infrastructure claims.[1317]

5.88 In Canada's view, the most relevant ordinary meaning of "general" is "not specifically limited in application; relating to a whole class of objects, cases, occasions, etc". According to Canada it is possible to say therefore, that where a government provides infrastructure and does not specifically limit its public availability, there is no financial contribution. Canada considers that this meaning of "general" is confirmed by the exclusion's roots in proposals that infrastructure available "for general public use" be excluded from the SCM Agreement.[1318]

5.89 In Canada's view, the context of the term "general infrastructure" supports a presumption that infrastructure is general unless a government specifically restricts usage by the general public. First, the term is in Article 1. It is the only exclusion in the SCM Agreement where the legal analysis can be completed without any consideration of whether the measure confers a benefit. Second, the drafters only reference infrastructure in an exclusion, indicating their primary purpose was to ensure that general infrastructure was excluded, rather than ensuring that certain infrastructure was included.[1319] Finally, the object and purpose of Article 1 supports a presumption that infrastructure is general unless specifically limited. As the panel in *US – Export Restraints* found, the Article 1 subsidy definition "was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the coverage of the Agreement." Article 1.1(a)(1)(iii) should not be interpreted to unduly broaden the scope of the Agreement.[1320]

5.90 Canada notes that the US claims that public road network improvements constitute "the provision of goods or services other than general infrastructure". However, the US identifies no limits on the use of the roads at issue by the public as a result of the improvements. The Bremen runway extension could raise different issues if the new portion is indeed for exclusive use by Airbus. Restrictions on the use of a distinguishable element of infrastructure can justify separate consideration of that element.[1321]

5.91 Canada submits that limitations on the use of infrastructure to certain users do not necessarily deprive infrastructure of its general nature if there is a reasonable expectation that general use will resume in the foreseeable future. A temporary right of exclusive use may, however, require independent consideration to determine if an exclusive right itself constitutes provision of a good (or service).[1322]

5.92 Canada notes that the US first written submission merely asserted its view that the infrastructure at issue was "other than general". At the prompting of the Panel, the US finally offered a definition of general infrastructure in its answer to Panel question 20.[1323] Canada points out that in this definition, the US restricted the concept of general infrastructure to infrastructure that "must include, involve or affect all or nearly all the parts of a whole territory or community; must be completely or nearly universal, as opposed to partial, particular or local in order to qualify as general infrastructure." According to Canada, this is an impossible standard. For one thing, it would create a host of new definitional problems such as what constitutes a "whole territory or community". But more fundamentally, it would be an impossible standard to meet. Infrastructure such as a harbour

[1317] Canada Oral Statement Executive Summary, para. 11.
[1318] Canada Third Party Submission Executive Summary, para. 9.
[1319] Canada Third Party Submission Executive Summary, para. 10.
[1320] Canada Third Party Submission Executive Summary, para. 11.
[1321] Canada Third Party Submission Executive Summary, para. 13.
[1322] Canada Third Party Submission Executive Summary, para. 14.
[1323] Canada Oral Statement Executive Summary, para. 12.

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facility might never satisfy this definition. And for WTO Members as geographically large as Canada, or either of the disputing Parties, it is hard to imagine any element of the physical infrastructure that could be said to include, involve or affect all or nearly all of its territory or community.[1324]

5.93 The guiding principles identified by Canada in its written submission are more consistent with the margin of appreciation that WTO Members accorded themselves for determining what constitutes general infrastructure. This margin of appreciation has appropriate boundaries. As Canada demonstrated in its written submission, the concept of general infrastructure is closely tied to its availability for use by the public and covers the provision of basic goods and services underpinning the economy.[1325]

5.94 While public policy considerations are at the core of any government decision to provide general infrastructure, Canada is not arguing that a public policy justification is by itself sufficient. The fact that infrastructure is provided exclusively to one company for public policy reasons does not preclude another Member from establishing, through evidence, that it is something other than general infrastructure because it is not a basic good or service underpinning the economy or because there is no actual or potential general availability.[1326] Canada argues that the presumption that government-provided infrastructure is "general" absent proof to the contrary reflects the standard rule under the DSU that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". In this case, the US has the burden to establish that the infrastructure it is challenging is "other than general infrastructure".[1327]

5.95 Canada disagrees with the proposition advanced by Australia that the facts and circumstances surrounding the provision of general infrastructure need to be examined to determine whether it confers a benefit to an enterprise. General infrastructure, by its nature, is presumed to have wide-ranging benefits and so the fact of benefit to an enterprise is not relevant to the question of whether it constitutes a financial contribution. Australia is blending the 'benefit' and 'financial contribution' tests, something the Appellate Body has repeatedly cautioned against. In the structure of Article 1, it is only once infrastructure has been determined to be a financial contribution – that is to say infrastructure "other than general infrastructure" – that the analysis proceeds to the question, under Article 1.1(b), as to whether it also confers a benefit on a recipient.[1328]

5.96 Canada considers that the concept of disproportionate or predominant use by certain enterprises is an issue to be considered under Article 2 of the SCM Agreement and is not appropriate in the context of Article 1.1(a)(iii). As noted in Canada's written submission, this concept is not appropriate because it would introduce an element of redundancy to the analysis under Articles 1 and 2 and would disadvantage Members with little economic diversification. Also, establishing whether infrastructure is general or not based on subsequent private use would make the status of the measure at the time of its creation uncertain. Whether a government action will result in a subsidy should be clear before, not after, a government takes action.[1329]

5.97 Similarly, the US has challenged the AéroConstellation industrial site, in part, because it was a site "tailor-made" for a specific sector of the economy. Caution needs to be exercised with this line

[1324] Canada Oral Statement Executive Summary, para. 13.
[1325] Canada Oral Statement Executive Summary, para. 14.
[1326] Canada Oral Statement Executive Summary, para. 15.
[1327] Canada Oral Statement Executive Summary, para. 16.
[1328] Canada Oral Statement Executive Summary, para. 17.
[1329] Canada Oral Statement Executive Summary, para. 18. *See, also,* Canada Third Party Submission Executive Summary, para. 12.

BCI deleted, as indicated **[***]**

of reasoning, as an airport or harbour could also be classified as "tailor-made" for a specific sector of the economy, even though they are more properly understood as basic goods underpinning the economy and available for public use. In regard to the US argument that the French Government should have sold land at the AéroConstellation site at a price that reflected its own costs, Canada considers that a more appropriate benchmark for the sale of land is the market value of the land as determined by reference to prevailing market rates in accordance with Article 14(d) of the SCM Agreement.[1330]

5.98 In respect of land reclamation, it is hard to conceive of a more durable asset than land. Any reasonable consideration of possible use and availability by the public of new lands, where title is retained by the state, must necessarily take a very long view. In the case of the Mühlenburger Loch facility, the lease terms to Airbus provide the Panel with a valuable encapsulation of that aspect of the project that is exclusive to Airbus. In Canada's view, the lease provides a useful basis for determining whether Airbus has received terms more favourable than those it would have received on a comparable commercial lease in the prevailing market.[1331]

5.99 Canada notes that the US also argues that EC State Aid rules offer guidance in defining when infrastructure is a subsidy. However, those rules represent the internal practice of the EC and are in no way related to the SCM Agreement. As such, they have no relevance at all to the proper interpretation of Article 1.1(a)(iii) of the SCM Agreement.[1332]

4. Serious Prejudice

5.100 Canada considers that there are two fundamental deficiencies in the US serious prejudice analysis. First, the US approach to "like product" is, on the facts of this case, incorrect. Second, assessing the effect of all the alleged subsidies in the aggregate does not account for differences in their nature and effect.[1333]

(a) Like Product

5.101 Canada notes that the US claims of serious prejudice are premised on its assertion that there is only one subsidized product at issue in this dispute, which is the entire family of LCA aircraft produced by Airbus. However, this ignores the market realities in the civil aircraft sector which recognize that the family of LCA aircraft include a number of different and distinct products. Recognizing the vulnerability of its position, the US has asked the Panel to defer to the US in its identification of the subsidized product.[1334]

5.102 Canada sees no basis in the SCM Agreement to require deference by this Panel to either of the disputing parties' views on subsidized product and corresponding like product. Whether the dispute implicates one or several subsidized products is a matter for the Panel to determine, as the trier of fact. As trier of fact, the Panel acts pursuant to its obligation under Article 11 of the DSU to make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[1335]

[1330] Canada Oral Statement Executive Summary, para. 19.
[1331] Canada Oral Statement Executive Summary, para. 20.
[1332] Canada Oral Statement Executive Summary, para. 21.
[1333] Canada Third Party Submission Executive Summary, para. 15.
[1334] Canada Oral Statement Executive Summary, para. 23.
[1335] Canada Oral Statement Executive Summary, para. 24.

BCI deleted, as indicated **[***]**

5.103 In this regard, and contrary to the assertions of the US, Canada considers the definition of like product in footnote 46 of the SCM Agreement is highly relevant context for determining whether there are one or more subsidized products at issue. In particular, the requirement in footnote 46 that there be a close correspondence between the subsidized product and like product, based on the characteristics of the like product, would be rendered meaningless if the complainant could simply assert that a number of discrete products with very different characteristics were a single subsidized product.[1336]

5.104 Canada notes that to support its request for deference to its unilateral grouping of all LCA into a single product, the US relies on a case decided under the Anti-Dumping Agreement. However Anti-Dumping jurisprudence is inapposite – since, in the context of the AD Agreement, the determination of dumped and like product only arises for a panel in a review of determinations already made by a domestic investigating authority. In reviewing a determination of an investigating authority, a panel may not engage in a *de novo* review and may not substitute its views for that of the investigating authority. Those strictures do not apply here.[1337]

5.105 According to Canada, it is not accurate to claim, as the US does here, that "because subsidies are provided to Airbus for the development of an LCA family…. the 'subsidized product' is the Airbus LCA family as a whole." Canada explains that the identification of a "like product" and its corresponding subsidized product in the serious prejudice analysis, is, by virtue of the definition in footnote 46, focused on the characteristics of the products at issue, not the characteristics of the subsidy.[1338] It follows that the fact that a complainant has challenged multiple subsidies in one panel request does not justify aggregating a number of discrete products into a single "like product". To consider otherwise would be to blur the distinction between the scope of a panel proceeding, which is set by the panel request, and the definition of "like product", which is set by footnote 46.[1339]

5.106 In Canada's view, the US misses the point when it seeks to support its "like product" claim by noting that royalty-based financing for individual Airbus models actually benefit the entire Airbus LCA production because the "subsidies for the development of each major Airbus LCA model benefit the production and marketing of its full LCA family". It is the characteristics of the products being compared that are relevant to whether they are "like". Company-wide benefits of a subsidy have nothing to do with the actual characteristics of the products produced by that company.[1340]

5.107 Canada notes that the US 'family'-related arguments essentially propose that the Airbus 380 is somehow 'like' the Boeing 737. However, the 737 is a narrow body aircraft with a seating capacity of approximately 120 to 200 seats and a range of approximately 3,000 to 6,000 km. The A380 is a wide body aircraft of over 500 seats and a range of 15,000 km. It is inconceivable that an A380 could displace or impede or price undercut a 737 as they are simply not considered by the market to be in competition.[1341]

5.108 Canada points out that the panel in *Indonesia – Autos* dismissed a similar argument. A key reason why that panel rejected the argument that all passenger cars should be considered a "like

[1336] Canada Oral Statement Executive Summary, para. 25.
[1337] Canada Oral Statement Executive Summary, para. 26.
[1338] Canada Third Party Submission Executive Summary, para. 16, citing, Footnote 46: "Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, *i.e.*, alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."
[1339] Canada Third Party Submission Executive Summary, para. 17.
[1340] Canada Third Party Submission Executive Summary, para. 18.
[1341] Canada Third Party Submission Executive Summary, para. 19.

BCI deleted, as indicated **[***]**

product" of the "Timor" car was the lack of substitutability between the Timor, a small budget car, and passenger cars at the high end of the market, for example a Rolls-Royce. The *Indonesia – Autos* panel found that it was "almost inconceivable" that a subsidy for Timors could displace or impede Rolls-Royces or that there could be any meaningful price undercutting analysis between these two models.[1342]

5.109 Canada notes that the panel in *Indonesia – Autos* found that "one reasonable way" to approach the like product issue is to look at the manner in which the industry at issue has analyzed market segmentation. Canada agrees that industry analyses of market segmentation can be a useful tool in conducting a like product analysis and would urge the Panel to conduct its analysis in a manner that distinguishes among products based on characteristics that the market itself considers significant and distinctive.[1343]

(b) Causation and the US Aggregated Analysis

5.110 In Canada's view, the US errs by examining only whether a causal link exists between the aggregated grouping of subsidies and the aggregated grouping of effects set out in Article 6.3(a) to (c). There are two aspects to this error. First, subsidies were aggregated without regard for their nature and effect. Second, the US failed to establish a nexus between alleged subsidies and the adverse effects claimed.[1344]

(i) Aggregation of Subsidies

5.111 Canada notes that the US serious prejudice claim remains predicated on the aggregated effects of all alleged subsidies, regardless of the amount, age, nature or type of benefit in respect of all Boeing LCA. In Canada's view, this approach is not consistent with the approach of prior panels, particularly the panel in *US – Upland Cotton*, and it is inconsistent with the rigour required by Article 6.3 of the SCM Agreement.[1345] Canada states that the aggregation of a number of subsidies for a serious prejudice analysis is appropriate to the extent the subsidies that are aggregated share a similar nature and effect in relation to the like product. Canada notes that the *US – Upland Cotton* panel aggregated certain subsidies and declined to aggregate others because of what it considered to be their different nature and effect.[1346]

5.112 Canada considers that the caution exercised by the *US – Upland Cotton* panel in recognizing that "due attention must be paid to each subsidy at issue" was appropriate because of the dangers of any cumulative assessment. An aggregate assessment may result in a finding of serious prejudice even if not all of the subsidies result in serious prejudice. Overly broad aggregation can, therefore, leave Parties with inadequate guidance as to what actions are required by a subsidizing Member to comply with a recommendation from the DSB to withdraw the adverse effects caused by subsidies in the aggregate.[1347]

5.113 Canada argues that in this case, it is not appropriate for the US to aggregate: 1. the effect of four decades of subsidies regardless of when they were granted and expended; and 2. research and

[1342] Canada Third Party Submission Executive Summary, para. 20.
[1343] Canada Third Party Submission Executive Summary, para. 21.
[1344] Canada Third Party Submission Executive Summary, para. 22.
[1345] Canada Oral Statement Executive Summary, para. 27.
[1346] Canada Third Party Submission Executive Summary, para. 23.
[1347] Canada Third Party Submission Executive Summary, para. 24. *See, also,* Canada Oral Statement Executive Summary, para. 28.

BCI deleted, as indicated **[***]**

development programs with other forms of subsidies without considering how such subsidies relate to the subsidized products and the adverse effects claimed.[1348]

(ii) Aggregation of Subsidies Regardless of When Granted and Expended

5.114 It is highly speculative that royalty-based financing granted and expended between 1969 and 2001 could have any continuing effect on Airbus pricing decisions, and therefore on Boeing LCA. This is particularly true as repayment obligations are triggered by each sale. Canada questions whether the receipt of such subsidies, in what is the distant past from a corporate standpoint, could trigger current price undercutting or establish an ongoing risk of price undercutting.[1349]

5.115 Canada notes that the EC submission lays out what it refers to as the "US/Boeing methodology" for allocating subsidies over time. According to Canada, whether or not the Panel adopts this methodology, the Panel should decline to aggregate subsidies granted prior to the review period with more recent subsidies absent persuasive evidence from the US that the earlier subsidies have an ongoing effect.[1350]

(iii) Aggregation of Research and Development (R&D) Programs

5.116 Similarly, Canada considers that R&D programs should only be aggregated after analyzing their nature and effects to determine if they are sufficiently similar to other alleged subsidies to warrant aggregation. Canada notes that there is no such analysis in the US first submission.[1351]

5.117 Canada points out that R&D frequently results in benefits that go beyond the particular interests of a producer. R&D programs may therefore not be appropriate to aggregate with financing for the launch of a new aircraft. The view that R&D is distinctive is supported by Part IV of the SCM Agreement on non-actionable subsidies. The provisions of this Part have lapsed by operation of Article 31 of the SCM Agreement and Members have taken no action to extend its application. However, as the *US – Upland Cotton* panel and the Arbitrator in *US – FSC (Article 22.6 – US)* found, these provisions "can nevertheless be instructive in understanding the overall architecture of the Agreement with respect to the different types of subsidies it sought and seeks to address."[1352]

5.118 Canada notes that Part IV, Article 8.2(a) established that "assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms" qualified conditionally for non-actionable status. Thus, Article 8(2)(a) indicates that, for the drafters of the SCM Agreement, these R&D programs were distinctive. Automatic protection for qualifying subsidies under this provision has lapsed, but the provision does support giving separate consideration to R&D programs from other subsidies.[1353]

5.119 Canada notes that the R&D programs are also distinctive in this proceeding as they involved a number of different entities, many with no direct connection to Airbus. In such circumstances, the US has the burden of demonstrating how the benefits were passed through to Airbus.[1354]

[1348] Canada Third Party Submission Executive Summary, para. 25.
[1349] Canada Third Party Submission Executive Summary, para. 26.
[1350] Canada Third Party Submission Executive Summary, para. 27.
[1351] Canada Third Party Submission Executive Summary, para. 28.
[1352] Canada Third Party Submission Executive Summary, para. 29.
[1353] Canada Third Party Submission Executive Summary, para. 30.
[1354] Canada Third Party Submission Executive Summary, para. 31.

BCI deleted, as indicated **[***]**

(iv) The US fails to demonstrate the causal link required under Article 6.3

5.120 Canada maintains that Article 6.3 requires that there must be a link between the subsidy and its effect. If an allegation of displacing imports under Article 6.3(a) is made, the "causal link", between the subsidy and the displacing of the imports must be demonstrated. If an allegation of significant price undercutting under Article 6.3(c) is made, the causal link between the subsidies and the price undercutting must be demonstrated, and so on for each effect alleged.[1355]

5.121 This was the approach in *US – Upland Cotton*. That panel conducted one examination to determine whether all the elements of the allegation under Article 6.3(c) were fulfilled and a separate examination to determine whether all the elements of the allegation under Article 6.3(d) were fulfilled. The panel identified the causal link between the alleged effect and the alleged subsidies as one of the elements to be demonstrated under Article 6.3(d).[1356]

5.122 Canada submits that here, the US is required to demonstrate the causal link for each of Article 6.3(a) to Article 6.3(c) since it alleges each of these effects. Further, for its allegation relating to Article 6.3(c), the US is required to demonstrate that the requisite causal link exists between the subsidies and each of the alleged effects of significant price suppression, significant price depression and lost sales. Canada argues that by simply examining the existence of a causal link between the aggregated grouping of subsidies and the aggregated grouping of effects, the US has failed to perform a causal analysis for each alleged effect in Article 6.3(a) to Article 6.3(c). Rather, by adopting a global causal analysis the US has obscured the elements required to be demonstrated under Article 6.3.[1357]

5.123 According to Canada, the US global causal theory is two-fold: 1. the cumulative effect of the subsidies allowed the development of Airbus LCA, "that would not have been undertaken at all, or at the same pace, without subsidies"; and 2. the cumulative effect of the subsidies provides Airbus with a financial cushion that permits it "to further a policy of pricing its LCA in order to obtain market share." In respect of the first aspect, it is speculative to assert that, absent subsidies, there would be no competition affecting the US producer. Canada notes that the US has not substantiated such a claim. Moreover, the focus in Article 6.3 is on determining the effects of subsidies in the relevant markets on the complainant's products. The benchmarks for this exercise are not the markets absent the products of the subsidizing Member, but the markets absent the effects of the subsidies at issue. The second aspect of the US causal theory – that subsidies support an Airbus pricing policy designed to obtain market share – does, in theory, relate directly to each inquiry in Article 6.3(a) to (c). However, the US never engages in this analysis with respect to each of the effects it has alleged.[1358]

5.124 Last, Canada agrees with the views of Japan that a non-attribution analysis is important in respect of other known factors that could be causing the alleged serious prejudice. As Japan's written submission explained, while the SCM Agreement does not provide an explicit requirement to conduct a non-attribution analysis in serious prejudice cases, it is an implicit obligation of any causal test. Previous WTO reports have recognised the importance of ensuring that the effects of other factors are not improperly attributed to the challenged subsidies in the context of Article 5.3(c). In this regard, the requirements identified for a non-attribution analysis in Part V of the SCM Agreement, and related jurisprudence, establish a reasonable roadmap for this Panel to follow.[1359]

[1355] Canada Third Party Submission Executive Summary, para. 32.
[1356] Canada Third Party Submission Executive Summary, para. 33.
[1357] Canada Third Party Submission Executive Summary, para. 34.
[1358] Canada Third Party Submission Executive Summary, para. 35.
[1359] Canada Oral Statement Executive Summary, para. 29.

BCI deleted, as indicated **[***]**

5. Conclusion

5.125 Canada takes the view that the application of the SCM Agreement to specific measures requires rigorous analysis that cannot be abbreviated because of the complexity of the dispute. Canada argues that the US serious prejudice claim is so general that it fails the legal tests provided for in Part III of the SCM Agreement. In regards to *de facto* export contingency under Article 3.1(a) and the test for determining whether infrastructure is subject to the SCM Agreement pursuant to Article 1.1(a)(1)(iii), the US has not tied its analysis to the text of these provisions, considered in context and in the light of the Agreement's object and purpose.[1360]

D. CHINA

1. Introduction

5.126 In its third party submission and at the Panel meeting with the third parties China presents its views on the following two legal issues: (i) in fact export contingency under Article 3.1(a) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"); and (ii) the non-attribution analysis under Article 15.5 of the SCM Agreement in the context of joint claims under Article 5(a) and (c).[1361]

2. In fact export contingency under Article 3.1(a) of the SCM Agreement

5.127 China notes that in this dispute, the US seems to argue that certain Launch Aids – in the form of loans – are in fact contingent upon export performance in that (i) the Airbus governments tied the *repayment* of such aids to the sales of LCA, and (ii) given the limited demand in the European market, the *repayment* was necessarily tied to substantial exports.[1362] In China's view, the finding of in fact export subsidies in the form of loans, as a matter of rules under footnote 4 to Article 3.1(a) of the SCM Agreement, shall be focused on the "*granting*" – instead of the "*repayment*" – of the loans.[1363]

5.128 First, in accordance with Article 3.1(a) and footnote 4 thereto of the SCM Agreement, three elements must be demonstrated in order to find in fact export contingency, *i.e.*, (i) "the granting of a subsidy"; (ii) "is … tied to …"; and (iii) "actual or anticipated exportation or export earnings".[1364] In this regard, China recalls that the Appellate Body in *Canada – Aircraft* further clarified the above three elements in finding in fact export contingency. As to "the granting of a subsidy", the Appellate Body held, *inter alia*, that the initial inquiry must be on whether the *granting authority* imposed a condition based on export performance in *providing* the subsidy, and that the prohibition under Article 3.2 and footnote 4 of the SCM Agreement is on the "*granting* of a subsidy" and not on receiving it.[1365] Based upon the above quoted and other holdings by the Appellate Body, China submits that in finding in fact export contingency, the focus should be placed on the *granting* of a

[1360] Canada Third Party Submission Executive Summary, para. 36.

[1361] Executive Summary of the Third Party Submission of China (hereinafter China Third Party Submission Executive Summary), para. 2.

[1362] China Third Party Submission Executive Summary, para. 3. *See, also,* Opening Statement of China at the Meeting with the Third Parties (hereinafter China Opening Statement), para. 2.

[1363] China Third Party Submission Executive Summary, para. 4.

[1364] China Third Party Submission Executive Summary, para. 5. *See, also,* China Opening Statement, para. 3.

[1365] China Third Party Submission Executive Summary, para. 6. *See, also,* China Opening Statement, para. 4.

subsidy and it must be demonstrated by the total configuration of the facts that there is a conditionality between the *granting* of a subsidy and the actual or anticipated export.[1366]

5.129 Second, in China's view, the same rule well applies to a subsidy in the form of a loan. In such a case, in order to determine whether the loan constitutes a subsidy in fact contingent upon export, it must be established that the granting authority imposes a condition based on export performance when *providing* the loan. In reality, the actors of granting and repaying the loan are different, respectively the government and the subsidy recipient. Therefore, in light of the above quoted holdings of the Appellate Body, China submits that Article 3.1(a) is not intended to prohibit the repayment of a loan contingent upon export performance. In any event, when considering in fact export contingency, the granting of a loan has nothing to do with how the debtor will repay the loan subsequently, which is more closely related to the finding of a benefit. Thus, one should not blur the distinction between the granting of a loan and the repayment of a loan when discussing the issue of in fact export contingency.[1367]

5.130 Furthermore, after observing two relevant WTO cases, *Canada – Aircraft* and *Australia – Leather*, China submits that the relevant facts of a particular case must sufficiently prove the "tie" between the "granting of a subsidy" and the "actual or anticipated exportation" and that the export orientation of a subsidy recipient alone does not sufficiently demonstrate the existence of in fact export contingency.[1368]

3. Non attribution analysis in the context of joint claims under Article 5 (a) and (c)

5.131 China notes that in its first written submission, the US claims the adverse effects under both paragraphs (a) and (c) of Article 5 of the SCM Agreement. As to its Article 5(a) claim, the US submits that the subsidized imports of Airbus LCA into the US market have caused injury to the US domestic LCA industry.[1369]

5.132 At the outset, in view of the cross-reference to Part V in footnote 11 to Article 5(a), China submits that, when a complaining party files an Article 5(a) claim and asserts injury, it is obligated to firstly demonstrate on a *prima facie* basis that the *subsidized imports*, through the effects of subsidies, cause injury to the domestic industry, in accordance with Article 15 of the SCM Agreement.[1370]

5.133 As to the non-attribution analysis under Article 15.5, China submits that a complaining party filing an Article 5(a) claim is also required to conduct such an analysis. The US also shares such a position. In addition, recalling the Appellate Body's interpretation in *US – Hot-Rolled Steel* of the parallel provision of Article 3.5 of the *AD Agreement*, China submits that a complaining party is obligated under Article 15.5 of the SCM Agreement to *separate and distinguish* the injurious effects of *the other known factors* from those of the subsidized imports.[1371] Furthermore, China submits that

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[1366] China Third Party Submission Executive Summary, para. 7. *See, also,* China Opening Statement, para. 5.

[1367] China Third Party Submission Executive Summary, para. 8. *See, also,* China Opening Statement, para. 6.

[1368] China Third Party Submission Executive Summary, para. 9.

[1369] China Third Party Submission Executive Summary, para. 10.

[1370] China Third Party Submission Executive Summary, para. 11. *See, also,* China Opening Statement, para. 7.

[1371] China Third Party Submission Executive Summary, para. 12. *See, also,* China Opening Statement, para. 8.

BCI deleted, as indicated **[***]**

the non-attribution requirement under Article 15.5 is particularly relevant when a Member files claims under both paragraphs (a) and (c) of Article 5 of the SCM Agreement for the following reasons.[1372]

5.134 First, an Article 5(c) claim requires the demonstration of any scenario of serious prejudice as prescribed under Article 6.3, any of which is a manifest indication of a downturn of the export performance of the complaining Member's domestic industry. Accordingly, if the complaining Member allegedly establishes the existence of any serious prejudice scenario, it seems appropriate to infer that the relevant domestic industry must have been, more or less, adversely affected or "injured" by its *poor export performance*.[1373]

5.135 Second, Article 15.5 of the SCM Agreement explicitly requires the investigating authority (in this case, the complaining Member) not to attribute the injury caused by *export performance* to that caused by subsidized imports. Thus, it is obvious that when a Member makes joint claims under Article 5(a) and (c), it is manifestly obligated to conduct a non-attribution analysis on the injury caused by the downturn of the export performance of its domestic industry.[1374]

5.136 Third, "injury to the domestic industry" and "serious prejudice" are two different legal concepts. "Injury to the domestic industry" under Article 5(a) is the injury caused by subsidized ***imports*** to the domestic industry in the *home market* of the complaining Member. While "serious prejudice" under Article 5(c) as elaborated in Article 6.3 are the adverse situations caused by "*the effect of the subsidy*" in the market of the subsidizing Member, in a third country market, or in the same market, as the case may be.[1375]

5.137 Fourth, there are separate legal requirements under the SCM Agreement on how to find injury and how to establish the various cases of serious prejudice respectively. Therefore, an Article 5(a) claim is legally distinct and independent from an Article 5(c) claim.[1376]

4. Conclusion

5.138 In conclusion, China submits that,

1. in order to determine the existence of in fact export contingency under Article 3.1(a) of the SCM Agreement, it must be demonstrated based on all relevant facts that the granting – instead of repayment or anything else – of a subsidy is in fact tied to or contingent upon actual or anticipated exports. Meanwhile, the export orientation of a subsidy recipient alone does not sufficiently demonstrate the existence of in fact export contingency; and

2. a complaining Member filing an Article 5(a) claim shall be subject to the obligations under Part V, which includes, *inter alia*, the non-attribution requirement under Article 15.5 of the SCM Agreement. This is particularly important where the complaining Member also files an Article 5(c) claim, knowing that the export performance of its domestic industry, besides the subsidized imports, is also causing injury to the domestic industry.[1377]

[1372] China Third Party Submission Executive Summary, para. 13.

[1373] China Third Party Submission Executive Summary, para. 14. *See, also,* China Opening Statement, para. 9

[1374] China Third Party Submission Executive Summary, para. 15. *See, also,* China Opening Statement, para. 10.

[1375] China Third Party Submission Executive Summary, para. 16. *See, also,* China Opening Statement, para. 11.

[1376] China Third Party Submission Executive Summary, para. 17. *See, also,* China Opening Statement, para. 12.

[1377] China Third Party Submission Executive Summary, para. 18.

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E. JAPAN

1. Subsidy measures that came into existence prior to January 1, 1995 are subject to the SCM Agreement if they provided a benefit on or after that date

5.139 In its Third Party Submission, Japan points out that an important threshold question before the Panel is whether the SCM Agreement applies to subsidy measures that came into existence prior to January 1, 1995, the date on which the SCM Agreement entered into force. Japan explains below that Article 28 of the Vienna Convention supports the conclusion that subsidies granted prior to 1995 are not automatically beyond the reach of the SCM Agreement.[1378]

5.140 Japan notes that Article 28 of the Vienna Convention provides that, "{u}nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or *any situation which ceased to exist* before the date of the entry into force of the treaty with respect to that treaty" (emphasis supplied). As applied to the alleged subsidies conferred on Airbus before 1995, the Panel should consider two key questions: (1) whether the SCM Agreement contains any provision indicating the intention of the WTO Members with respect to the temporal limitations of the Agreement, and, (2) whether the alleged EC and member state subsidy measures under challenge were "situations" that continued "to exist" on January 1, 1995 or thereafter.[1379]

5.141 Japan notes that the text of the SCM Agreement demonstrates that its drafters did not intend its disciplines to be limited only to subsidies that were granted on or after January 1, 1995. Japan's position accords with the Panel's preliminary analysis of this issue.[1380] For example, the language of Article 28.1 of the SCM Agreement implies that Members *could* challenge pre-WTO programs after the grace period had expired. It also appears that individual subsidies granted before January 1, 1995 could be challenged under Part II of the SCM Agreement even during the grace period, because Article 28.1 refers only to "subsidy programmes" and not to individual subsidies. Similarly, Annex IV, paragraph 7, recognizes that Members may allocate benefits to future production arising from "{*s*}*ubsidies granted prior to the date of entry into force of the WTO Agreement*" (emphasis supplied) and that are being challenged under Part III of the SCM Agreement. Further, the provisions most directly at issue here – Articles 1, 5, 6, and 7[1381] – contain no temporal limitations whatsoever. The absence of any such limitation for pre-1995 subsidies is significant.[1382]

5.142 Japan notes that the Appellate Body has applied Article 28 on a number of occasions in finding that pre-1995 measures were covered by other WTO Agreements, and these findings are directly relevant to the present dispute. For example, in *Canada – Patent Term*, the Appellate Body concluded that "treaty obligations *do* apply to 'any situation' which has *not* ceased to exist – that is, to

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[1378] Executive Summary of the Third Party Statement of Japan (hereinafter Japan Third Party Submission Executive Summary), para. 1.

[1379] Japan Third Party Submission Executive Summary, para. 2.

[1380] Japan Third Party Submission Executive Summary, para. 3. *See,* Panel Letter to Parties to Third Participants (11 January 2007).

[1381] Japan Third Party Submission Executive Summary, para. 3. Japan considers that these provisions are most directly at issue here because, in this dispute, the US advances its claim on prohibited subsidies only in relation to certain Launch Aids (US First Written Submission, para. 321), all of which the US argues came into existence on or after January 1, 1995.

[1382] Japan Third Party Submission Executive Summary, para. 3. Japan notes that Article 27 of the SCM Agreement, concerning the special and differential treatment of developing countries, contains several such temporal limitations.

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any situation that arose in the past, but continues to exist under the new treaty."[1383] The facts of *Canada – Patent Term* are directly analogous to the present dispute because the patent protection at issue, which came into effect before the TRIPS Agreement entered into force for Canada, remained in place and thus had continuing "effects" after entry into force of the TRIPS Agreement – just as alleged subsidies that came into effect remained in place and thus had continuing effect on or after January 1, 1995.[1384]

5.143 Japan submits that the Panel should determine whether each alleged pre-1995 EC or EC member state subsidy is covered by the SCM Agreement by evaluating whether the subsidy "situation," to use the terms of Article 28 of the Vienna Convention, "ceased to exist" prior to 1995, or if it continued into 1995 or beyond. In this regard, Japan would like to express to the Panel its views as to the appropriate test for the Panel to apply in conducting this analysis.[1385]

5.144 Japan explains that under the logic of the SCM Agreement's provisions, a subsidy "situation" is ongoing so long as the benefit of that subsidy continues to exist. For example, the benefits of a subsidy bestowed prior to 1995 might be properly allocated over future production extending into or beyond 1995.[1386] In this case the subsidy would be subject to the SCM Agreement, because the subsidy "situation" had continued to exist.[1387]

5.145 In Japan's view, the analysis should begin by reviewing the SCM Agreement's definition of a subsidy, set forth in Article 1.1. As the Appellate Body has observed, "Article 1.1 does not address the *time* at which the 'financial contribution' and/or the 'benefit' must be shown to exist."[1388] Indeed, the Appellate Body goes on to state that normally it "may {be} presume{d} … that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution'."[1389] This supports the provisions of Part III, mentioned above, which indicate that, in certain circumstances, "benefits" may extend over a period of time subsequent to the conferral of the underlying financial contribution. For example, Annex IV, which provides guidelines for the calculation of subsidy rates for purposes of Article 6.1(a), at paragraph 7 requires the inclusion of subsidy benefits "allocated to future production."[1390]

5.146 Interpreting the SCM Agreement definition of subsidy in light of Article 28 of the Vienna Convention, Japan notes that the concept of "situation" in Article 28 corresponds closely to the concept of "benefit" in the sense that a subsidy "situation" would continue should the benefits

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[1383] Japan Third Party Submission Executive Summary, para. 4, citing, *Canada – Patent Term*, Appellate Body Report, at para. 72 (emphasis in original).

[1384] Japan Third Party Submission Executive Summary, para. 4.

[1385] Japan Third Party Submission Executive Summary, para. 5.

[1386] Japan Third Party Submission Executive Summary, para. 6. Japan notes that Annex IV to the SCM Agreement, at para. 7, anticipates that some benefits may properly be allocated to future production. As explained by the panel in *US – Upland Cotton*, Panel Report, at para. 7.1179, that the benefit methodologies set forth in Part V of the SCM Agreement are not binding in an analysis conducted under Part III. Nevertheless, benefit calculation methodologies set forth in Part V suggest methodologies that may serve as a reference for Part III analyses as well.

[1387] Japan Third Party Submission Executive Summary, para. 6.

[1388] Japan Third Party Submission Executive Summary, para. 7, citing, *US – Lead Bar*, Appellate Body Report, at para. 60 (emphasis in original).

[1389] Japan Third Party Submission Executive Summary, para. 7, citing, *US – Lead Bar*, Appellate Body Report, at para. 62.

[1390] Japan Third Party Submission Executive Summary, para. 7. Japan recognizes that Article 6.1 of the SCM Agreement and Annex IV are no longer in force. However, as noted by the panel in the *US– Upland Cotton*, provisions of the SCM Agreement that have lapsed can be useful in understanding the "overall architecture" of the SCM Agreement with respect to the different types of subsidies it sought and seeks to address. *US– Upland Cotton*, Panel Report, at para. 7.907, n.1086.

BCI deleted, as indicated **[***]**

accruing from that subsidy continue as well. Accordingly, the task of the Panel is to determine, for each alleged subsidy that was conferred prior to January 1, 1995, whether the benefits of that subsidy continued in effect on or after that date.[1391]

2. The Panel is authorized to take into account evidence of any continuing adverse effects after the date of establishment of the Panel

5.147 Concerning the adverse effects which the Panel should examine, Japan is of the view that nothing in the SCM Agreement or the DSU precludes the Panel from considering evidence of continuing adverse effects (or absence thereof) subsequent to the date of panel establishment, provided that the evidence related to measures that were within the Panel's terms of reference. Japan notes that the US acknowledges that a panel may examine evidence that pre-dates or post-dates the establishment of a panel,[1392] in line with the position it has taken in prior cases.[1393]

5.148 Japan's position is that the Panel is authorized to consider evidence concerning continuing adverse effects, beyond the date of panel establishment, of a subsidy measure within the Panel's terms of reference. The Appellate Body has indicated that evidence that post-dates the panel establishment is not precluded from the panel's assessment.[1394] The same logic can be applied by the Panel in this dispute to evaluate evidence generated after the date of panel establishment concerning any continuing adverse effects of the challenged subsidy measures.[1395]

5.149 Japan respectfully requests the Panel to carefully examine post-panel establishment evidence that it considers relevant to the evaluation of claimed adverse effects and, where the Panel considers such evidence probative, to provide a detailed explanation of its reasoning. Given the rapidly evolving conditions of competition for the US and EC LCA industries, it is possible that highly probative evidence concerning continuing adverse effects (or the lack thereof) will come to light for the period following the date of panel establishment. In analogous scenarios, the Appellate Body has stressed the importance of consideration of the most recent available evidence.[1396] As explained in the next section, such post-panel establishment evidence may assist the Panel in determining, among other things, possible causes of the adverse effects *other than* the alleged subsidies.[1397]

5.150 At the Panel meeting with the third parties Japan reiterated that it has observed that neither the SCM Agreement nor the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") precludes a panel from considering evidence of continuing adverse effects (or the absence thereof) subsequent to the date of panel establishment, provided that the evidence relates to measures that were within the panel's terms of reference.[1398] Japan clarified its position by noting

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[1391] Japan Third Party Submission Executive Summary, para. 8.

[1392] Japan Third Party Submission Executive Summary, para. 9, citing, Opening Statement of the US, First Meeting of the Panel (March 20, 2007), at para. 182.

[1393] Japan Third Party Submission Executive Summary, para. 9, citing, *EC – Customs Matters*, at para. 183.

[1394] Japan Third Party Submission Executive Summary, para. 10, citing, *EC – Customs Matters*, at para. 188 (emphasis supplied). *EC - Trademarks/GIs*, Panel Report, para. 7.20.

[1395] Japan Third Party Submission Executive Summary, para. 10.

[1396] Japan Third Party Submission Executive Summary, para. 11, citing, as an example *Mexico –Rice*, Appellate Body Report, at para. 166.

[1397] Japan Third Party Submission Executive Summary, para. 11.

[1398] Executive Summary of the Oral Statement of Japan at the Meeting with the Third Parties (hereinafter Japan Oral Statement Executive Summary), para. 7, citing, Third-Party Submission of Japan, paras. 12-14.

BCI deleted, as indicated **[***]**

that, consistent with the Appellate Body's finding in *EC – Customs Matters*,[1399] this Panel is authorized to examine evidence both that pre-dates – as well as post-dates – the establishment of the Panel. In this regard, with reference to paragraph 694 of the EC second written submission, Japan also makes clear that while it believes that the Panel may consider post-panel establishment evidence of claimed adverse effects, it is not required to do so.[1400]

3. Demonstrating causation requires detailed analysis of relevant facts and economic data

5.151 Japan expresses its views on the analysis required to determine whether the claimed adverse effects were caused by the subsidies the US has alleged, or by other factors. Such a determination is required under Article 5 of the SCM Agreement. In the case of adverse effects through injury to the US domestic industry, pursuant to Article 5(a), the SCM Agreement requires application of the causation test set forth in Article 15.5, which requires a demonstration of a causal relationship between the subsidized imports based on an examination of all relevant evidence and of any known factors other than the subsidized imports that are injuring the domestic industry.[1401]

5.152 Japan notes that in the case of adverse effects resulting from serious prejudice, under Articles 5(c) and 6 of the Agreement, the SCM Agreement does not provide an express test for evaluating the causes of the serious prejudice. However, the Appellate Body in *US – Upland Cotton* explained that in evaluating claims of serious prejudice under Article 6.3 of the SCM Agreement, it is "necessary to ensure that the effects of other factors on prices are not improperly attributed to the challenged subsidies."[1402] Japan respectfully submits that the Panel should refer to the causation tests set forth in Article 15.5 of the SCM Agreement and in the other WTO Agreements as relevant context for its examination of the US claims in this case, as the Appellate has found previously.[1403]

5.153 Finally, Japan also submits that the analysis required to evaluate the causes of the claimed adverse effects for purposes of Article 5 is closely related to the selection of the appropriate reference period, as addressed above. In Japan's view, the Panel should, in its causation analysis, take into account the features of the market for the goods at issue *during the entire reference period*. As explained in Section II, there is no doctrine requiring panels to reject evidence of adverse effects subsequent to the date of panel establishment, and there may be compelling reasons why it may be appropriate for panels to consider such evidence.[1404]

[1399] Japan Oral Statement Executive Summary, para. 7, citing, *EC – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, para. 188.

[1400] Japan Oral Statement Executive Summary, para. 7, citing, Third Party Submission of Japan, paras. 12-14.

[1401] Japan Third Party Submission Executive Summary, para. 12.

[1402] Japan Third Party Submission Executive Summary, para. 13, citing, *US – Upland Cotton*, Appellate Body Report, para. 437.

[1403] Japan Third Party Submission Executive Summary, para. 14, citing, *US – Hot-Rolled Steel*, Appellate Body Report, at para. 228; *US – Lumber ITC Investigation*, Appellate Body Report (21.5), at para. 132; *US – Wheat Gluten*, Appellate Body Report, at para. 69.

[1404] Japan Third Party Submission Executive Summary, para. 15.

BCI deleted, as indicated **[***]**

4. The Panel is authorized to examine alleged subsidies whose adverse effects have ceased to exist

5.154 Japan agrees with the US that the Panel has the authority to examine and to issue findings concerning an alleged subsidy even where the adverse effects of that subsidy have ceased to exist, provided that they existed at the time the Panel was established.[1405]

5.155 Japan considers that the first step in interpreting a WTO Agreement is, of course, to examine the text of the Agreement itself.[1406] Articles 7.1, 7.4 and 7.5 of the SCM Agreement, which provide for the rules on consultations and a panel establishment as remedies for actionable subsidies, do not indicate that a panel may not examine and rule upon an alleged subsidy where the adverse effects have ceased to exist between the time of the panel request and the issuance of the report.[1407]

5.156 This conclusion is supported by the jurisprudence. The Appellate Body in *US – Upland Cotton* ruled that measures that had expired prior to the date of panel establishment could be challenged, provided that benefits accruing to the complaining Member under the covered agreements were still being impaired by the measures *at the time of the panel request*.[1408] Thus, it is the time of the panel request that governs, and the possibility that adverse effects may have ceased after the establishment of the panel does not impair the ability of the panel to rule on the consistency of the alleged subsidy with the SCM Agreement.[1409]

5.157 Japan further notes that there are also numerous GATT and WTO decisions in which panels have made findings with respect to measures that had been withdrawn after the establishment of the panel.[1410] These analogous cases further show that the cessation of adverse effects after the establishment of a panel does not affect the panel's authority to issue findings concerning the alleged subsidies.[1411]

5.158 Japan notes that an important reason for this doctrine is that it may help to secure a positive solution to the dispute, which is the aim of the WTO dispute settlement system as expressed in Article 3.7 of the DSU. In *EC – Biotech*, the panel, in line with the decisions referred to above, held that it had authority to make findings on a measure within its terms of reference even if that measure had subsequently ceased to exist.[1412] It observed that the challenged measure, even if it had ceased to exist, might subsequently be re-introduced, and that a finding that it was inconsistent with WTO obligations might help to prevent this from occurring. In the present case, if any cessation of adverse effects of the subsidies at issue is due to temporary phenomena, the adverse effects could reappear if conditions change. A remedy based on a ruling that the subsidies were inconsistent with the

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[1405] Japan Oral Statement Executive Summary, para. 8, citing, US Second Submission, para. 670. Japan does not express a view as to whether, as a factual matter in this dispute, alleged adverse effects are still occurring.

[1406] Japan Oral Statement Executive Summary, para. 9, quoting the Appellate Body statement, "{a} treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted." *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted November 6, 1998, para. 114.

[1407] Japan Oral Statement Executive Summary, para. 9.

[1408] Japan Oral Statement Executive Summary, para. 10, citing, *US – Subsidies on Upland Cotton*, WT/DS267/AB/R (2005), adopted March 21, 2005, para. 270.

[1409] Japan Oral Statement Executive Summary, para. 10.

[1410] Japan Oral Statement Executive Summary, para. 11, citing, cases cited in *Upland Cotton*, at n.214; *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS64/R, adopted July 23, 1998, at n.642.

[1411] Japan Oral Statement Executive Summary, para. 11.

[1412] Japan Oral Statement Executive Summary, para. 12, citing, *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, adopted November 21, 2006, para. 7.1308.

BCI deleted, as indicated **[***]**

SCM Agreement might therefore help to secure a positive outcome by preventing the recurrence of adverse effects.[1413]

5.159 It is of course true that the withdrawal of a subsidy or the ending of adverse effects after the establishment of the panel could affect the nature of the recommendation made by the panel, as noted by the Appellate Body in *US – Upland Cotton*.[1414] However, as also observed by the Appellate Body in that case, this is *not* dispositive of the question whether the panel has authority to address claims with respect to the measure before it.[1415]

5. Arm's-length, fair market value transactions extinguish alleged subsidies

5.160 Japan notes that many of the subsidies alleged by the US in this dispute were bestowed upon corporate entities that were predecessors to Airbus SAS.[1416] Japan respectfully submits that the Panel should closely examine whether the EC has demonstrated that the privatizations have been accomplished at arm's length and for fair market value and any alleged benefits have in fact been extinguished, based on the specific facts pertinent to the current case. Japan sets out below relevant precedents in this regard.[1417]

5.161 Japan points out that the Appellate Body has indicated in its analysis of possible extinguishment of subsidies – that a benefit flowing from a financial contribution is *presumptively* extinguished when the firm that received the subsidy is sold at "arm's length" and for "fair market value."[1418] The Appellate Body, in this respect, has indicated an important limitation in the context of the privatization of government-owned assets. As the Appellate Body held in that case, "{p}rivatization at arm's length for fair market value may result in extinguishing the benefit," but does not necessarily do so.[1419] The outcome of the analysis will depend on the unique factual circumstances of each case.[1420]

5.162 According to Japan, there is no basis in the SCM Agreement, in the applicable jurisprudence, or in logic, for the proposition that a partial transfer should not be subject to the same rebuttable presumption of extinguishment as set forth by the Appellate Body in *US – CVDs on EC Products*. Thus, in the Article 21.5 phase of that case, the panel reviewed a revised determination in which the US Department of Commerce found that a subsidy was partially extinguished where the majority, but not all, of the company's shares were sold at arm's length and for fair market value.[1421]

[1413] Japan Oral Statement Executive Summary, para. 12.

[1414] Japan Oral Statement Executive Summary, para. 13, citing, *US – Upland Cotton*, para. 272.

[1415] Japan Oral Statement Executive Summary, para. 13, citing, *US – Upland Cotton*, para. 272.

[1416] Japan Third Party Submission Executive Summary, para. 16, citing, EC, FWS, (5 April 2007), at paras. 192-97.

[1417] Japan Third Party Submission Executive Summary, para. 16.

[1418] Japan Third Party Submission Executive Summary, para. 17, citing, *US – CVDs on EC products*, Appellate Body Report, at para. 127.

[1419] Japan Third Party Submission Executive Summary, para. 17, citing, *US – CVDs on EC products*, Appellate Body Report, at para. 127 and *US – Lead Bar*, Appellate Body Report, at para. 62. Japan notes that the applicable jurisprudence examined the issue of extinguishment in the context of countervailing measures. However, because the definition of subsidy set forth in Article 1 of the SCM Agreement (including the concept of "benefit") applies equally to the provisions governing prohibited and actionable subsidies, Japan considers that the principles enunciated in those cases apply equally in the present dispute.

[1420] Japan Third Party Submission Executive Summary, para. 17, citing, *US – CVDs on EC products*, Appellate Body Report, at para. 127.

[1421] Japan Third Party Submission Executive Summary, para. 18, citing, *US – CVDs on EC Products*, Panel Report, at paras. 7.130-7.158.

BCI deleted, as indicated **[***]**

6. Mere anticipation of exports is not proof of *de facto* export contingency

5.163 Japan expresses its views on the applicable standard for determining whether an alleged export subsidy is "contingent … in fact … upon export performance" for purposes of SCM Agreement Article 3.1(a). Japan is of the view that mere anticipation of future exports at the time of subsidy bestowal does not, by itself, prove that the subsidy is contingent upon export performance. Japan also notes that while the term "contingent" in Article 3.1(a) has the same meaning as applied to both *de jure* and *de facto* export contingency, demonstrating the latter is inherently more difficult.[1422]

5.164 Japan considers that Footnote 4 to SCM Agreement Article 3.1(a) is central to the Panel's analysis in determining whether the alleged export subsidies are contingent in fact upon export performance. In Japan's view, the Panel's task in applying footnote 4 is to determine whether the *granting* of the alleged export subsidies at issue was *tied* to *actual or anticipated* export activity. As described by the Appellate Body in *Canada – Aircraft*, the footnote 4 test for *de facto* export contingency "requires proof of three different substantive elements".[1423] Each test must be independently applied to the relevant facts. The mere fact of anticipated export activity, standing alone, cannot suffice to establish *de facto* export contingency for a given subsidy.[1424] Similarly, like mere anticipation of export performance, an exporter's export orientation, standing alone, is insufficient.[1425]

5.165 Japan further observes that the *de facto* export contingency analysis is necessarily fact-intensive, and will differ based on the unique facts of each case. The Appellate Body in *Canada – Aircraft*, for example, cautioned that, in performing the analysis required by footnote 4, "there can be no general rule as to what facts or what kinds of facts *must* be taken into account,"[1426] none of which facts had been given undue emphasis.[1427] Japan submits that a similarly broad approach is warranted in this dispute and that the Panel should examine the specific factual elements pertinent to this case.[1428]

5.166 At the Panel meeting with the third parties, Japan pointed out that Article 1.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") provides that a subsidy shall be deemed to exist if:

> (a) (1) there is a financial contribution…where: …
>
> (i) a government provides goods or services other than general infrastructure…; and…
>
> (b) a benefit is thereby conferred. (Emphasis added.)

[1422] Japan Third Party Submission Executive Summary, para. 19, citing, as an example *Canada – Aircraft*, Appellate Body Report, at para. 167.

[1423] Japan Third Party Submission Executive Summary, para. 20, citing, *Canada – Aircraft*, Appellate Body Report, at para. 169 (emphasis in original).

[1424] Japan Third Party Submission Executive Summary, para. 20, citing, *Canada – Aircraft*, Appellate Body Report, at para. 171.

[1425] Japan Third Party Submission Executive Summary, para. 20, citing, *Canada – Aircraft*, Appellate Body Report, at para. 173.

[1426] Japan Third Party Submission Executive Summary, para. 21, citing, *Canada – Aircraft*, Appellate Body Report, at para. 169.

[1427] Japan Third Party Submission Executive Summary, para. 21, citing, *Canada – Aircraft*, Appellate Body Report, at paras. 169-70.

[1428] Japan Third Party Submission Executive Summary, para. 21.

BCI deleted, as indicated **[***]**

The SCM Agreement does not define the term "general" in this regard, but the plain language of Article 1 makes clear that the exception applies only to "general infrastructure" and does not apply to infrastructure of any kind.[1429]

5.167 Japan notes that Canada in its third-party submission presents its views on how the Panel should determine whether alleged subsidies constitute "general infrastructure." Japan agrees with Canada that analysis of whether a "subsidy" exists under Article 1 and whether that subsidy is "specific" under Article 2 are distinct issues and require separate analyses under the SCM Agreement. Japan is not, however, sure if Canada's argument is correct when it asserts that the tests for *de facto* specificity under Article 2.1(c), such as predominant use or disproportionate benefit, are not relevant at all to the analysis of whether an alleged subsidy constitutes "general infrastructure" under Article 1.1(a)(1)(iii), and that the fundamental test is whether the government has limited use of the infrastructure "exclusively to certain users."[1430] Japan believes that, under some circumstances, the *de facto* specificity analysis under Article 2 could help inform the Panel's determination of whether infrastructure is "general" under Article 1. The Panel should analyze all relevant information – including the *de facto* specificity criteria under Article 2, where warranted – when determining whether the infrastructure at issue is "general."[1431]

5.168 Moreover, Canada's proposed test of whether the government has limited use of the infrastructure "exclusively to certain users" essentially seems to be equal to the *de jure* specificity test set out in Article 2.1(a).[1432] In effect, therefore, Canada seems to be arguing that the *de jure* specificity criteria set out in Article 2.1(a) – whether the granting authority "explicitly limits access to a subsidy to certain enterprises" – are relevant to the identification of "general" infrastructure under Article 1, but that the *de facto* specificity criteria set out in Article 2.1(c) are not relevant to that same determination. Japan believes that there is no textual support for differentiating application of the *de jure* and *de facto* specificity criteria in this regard.[1433]

5.169 Japan points out that pursuant to the Vienna Convention on the Law of Treaties, the Panel should interpret the phrase "general infrastructure" in accordance with the ordinary meaning of the term. The ordinary meaning of the term "general" could support the Panel's examination of the *de facto* specificity criteria for the purposes of determining whether infrastructure is "general" or not. The word "general" is defined as "*(1) involving or belonging to the whole of a body, group, class, or type: applicable or relevant to the whole rather than to a limited part…(2) involving or belonging to every member of a class, kind or group: applicable to everyone in the unit referred to, applicable or pertinent to the majority of individuals involved*…"[1434] The *de facto* specificity criteria, including predominate use or disproportionate use, thus could be relevant to a determination of whether the infrastructure at issue is "applicable or pertinent to the majority of individuals involved," or is "applicable to everyone in the unit referred to."[1435]

5.170 Japan addresses another aspect of the test for determining whether infrastructure is "general." Japan notes that the EC would include within the meaning of "general" infrastructure those projects that fulfill a "public policy objective (e.g., unemployed workers may participate in a government

[1429] Japan Oral Statement Executive Summary, para. 1.
[1430] Japan Oral Statement Executive Summary, para. 2, citing, Third-Party Submission of Canada, paras. 33 and 39.
[1431] Japan Oral Statement Executive Summary, para. 3.
[1432] Japan Oral Statement Executive Summary, para. 4, citing, Third-Party Submission of Canada, paras. 27 and 39.
[1433] Japan Oral Statement Executive Summary, para. 4.
[1434] Japan Oral Statement Executive Summary, para. 5, citing, the Webster's Third New International Dictionary (Merriam-Webster, 1971), p. 944.
[1435] Japan Oral Statement Executive Summary, para. 5.

BCI deleted, as indicated **[***]**

training scheme…)," and states that WTO members left "a large margin of appreciation to decide for themselves what they consider to constitute 'general infrastructure'."[1436] Japan notes that there is no textual support in the SCM Agreement for this position. Nor is it consistent with the ordinary meaning of the term "general." Japan considers that such a broad test would make it effectively impossible to distinguish between "general infrastructure" and "infrastructure."[1437]

F. KOREA

1. Introduction

5.171 In its Third Party Submission, the Republic of Korea ("Korea") focuses on:

- the standard of proof required to establish a *prima facie* case in a subsidy dispute;
- the meaning of general infrastructure under Article 1.1(a)(1)(iii) of the SCM Agreement;
- the interpretation of "benefit" within the meaning of Article 1.1(b) of the SCM Agreement; and
- *de facto* contingency of export subsidies under Article 3.1(a) of the SCM Agreement.[1438]

2. The standard of proof required to establish a *prima facie* case in a subsidy dispute

5.172 Korea observes that while it does not wish to take a particular side in this proceeding, it would like to set out the standard of proof, in its view, required to establish a *prima facie* case in a subsidy dispute.[1439]

(a) The legal standard to establish a *prima facie* case

(i) "Evidence sufficient to demonstrate"

5.173 Korea submits that as a basic rule, a Member claiming a violation of a provision of WTO Agreements by another Member must "assert and prove its claim" by putting forward "evidence and legal argument sufficient to demonstrate" the inconsistency of the challenged action with the defending Member's obligations under the WTO Agreements. Korea asserts that a submission is insufficient where only facts or only legal arguments are provided.[1440] Korea further notes that the legal standard the Appellate Body sets for *prima facie* evidence is relatively high and clearly excludes mere allegations and conjectures of the facts. Likewise, mere claims that certain measures violate relevant WTO Agreements without further substantiations are also insufficient.[1441]

[1436] Japan Oral Statement Executive Summary, para. 6, citing, EC First Written Submission, paras. 712, 716.

[1437] Japan Oral Statement Executive Summary, para. 6.

[1438] Executive Summary of the Third Party Submission of Korea (hereinafter Korea Third Party Submission Executive Summary), para. 2.

[1439] Korea Third Party Submission Executive Summary, para. 3.

[1440] Korea Third Party Submission Executive Summary, para. 4. *See, also,* Korea Opening Statement, para. 2.

[1441] Korea Third Party Submission Executive Summary, para. 5.

BCI deleted, as indicated **[***]**

(ii) Prima facie evidence sets a higher standard than Article 6.2 of the DSU

5.174 Korea points out that established case law shows that *prima facie* evidence is a higher standard than that required under Article 6.2 of the DSU for the establishment of a Panel.[1442] In *Thailand – H Beams* the Panel elaborated that Article 6.2 of the DSU does not relate directly to the sufficiency of the subsequent written and oral submissions of the parties in the course of the proceedings, which may develop the arguments in support of or against the claims set out in the panel request. Nor does the Article determine whether or not the complaining party will manage to establish a *prima facie* case of violation of an obligation under a covered agreement in the actual course of the panel proceedings.[1443]

(b) Other factors relevant to *prima facie* evidence

5.175 Having established the basic standard for *prima facie* evidence, there are several other relevant issues to consider.[1444]

(i) Difficulty of collecting information to prove a case

5.176 According to established case law, the burden of proof and consequently the standard for establishing *prima facie* evidence are not lowered where the complaining Member has difficulties in obtaining relevant information. The complaining Member must nevertheless prove its claim.[1445] Therefore, if a Member cannot obtain sufficient information to establish a *prima facie* case, its claim should fail. In Korea's view, this rule is of particular importance to this proceeding.[1446]

(ii) The Panel's obligation to investigate under Article 13 of the DSU does not override the party's obligation to establish prima facie evidence

5.177 The Appellate Body held in *Japan – Agricultural Products II* that the Panel's authority under Article 13 of the DSU to engage in fact-finding does not relieve the complaining party of the requirement to present a *prima facie* case on its own.[1447] A Member cannot rely on the Panel to find a violation of WTO Agreements and the Panel should refrain from deciding the issue if the party fails to establish *prima facie* evidence. Korea submits that this ruling is of significant importance in this proceeding as well.[1448]

(iii) Summary

5.178 The DSU does not allow derogation from the above described standard of proof simply because relevant evidence is difficult to obtain. Korea argues that while the Panel is free to make a decision based on the facts before it, this does not relieve the complaining Member of the requirement to first establish a *prima facie* case.[1449]

[1442] Korea Third Party Submission Executive Summary, para. 6.
[1443] Korea Third Party Submission Executive Summary, para. 7.
[1444] Korea Third Party Submission Executive Summary, para. 8.
[1445] Korea Third Party Submission Executive Summary, para. 9. *See, also,* Korea Opening Statement, para. 3.
[1446] Korea Third Party Submission Executive Summary, para. 10.
[1447] Korea Third Party Submission Executive Summary, para. 11.
[1448] Korea Third Party Submission Executive Summary, para. 12.
[1449] Korea Third Party Submission Executive Summary, para. 13.

BCI deleted, as indicated **[***]**

(c) Standard of Review by the Panel under Article 11 of the DSU

5.179 Further to the arguments concerning *prima facie* evidence, Korea believes that established case law (*EC – Hormones*) requires the Panel to review and evaluate each and all evidence on the record carefully to determine whether the measures challenged by the US do constitute financial contributions by the EC and the Airbus Governments that confer benefits specifically on Airbus.[1450]

3. The meaning of general infrastructure under Article 1.1(a)(1)(iii) of the SCM Agreement

5.180 Korea notes that the US alleges that the Airbus Governments have provided subsidies to Airbus in the form of expanding and upgrading infrastructure, as well as other facilities, within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. Korea notes that the US thereby fails to analyse whether the infrastructures at issue are "general" in accordance with the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[1451]

5.181 Korea requests the Panel to interpret the term "general infrastructure" under Article 1.1(a)(1)(iii) of the SCM Agreement carefully, based on general rules of treaty interpretation as stipulated in the 1969 Vienna Convention. Such interpretation, Korea believes, dictates[1452] that goods and services, to the extent they constitute infrastructure and either affect all or most people or things or are not specialised or limited, must be considered to be "general infrastructure" in the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement and not to constitute a subsidy. Once these conditions have been satisfied, whether such "general infrastructure" is, in the specific circumstances, used by a limited number of people or enterprises is irrelevant. As long as the infrastructure is potentially accessible by the public or providing common goods to the public, it should be treated as "general infrastructure", hence no financial contribution by the government.[1453]

4. The interpretation of "Benefit" within the meaning of Article 1.1(b) of the SCM Agreement

5.182 Korea notes that the US claims that the EC and the Airbus Governments provide subsidies within the meaning of Article 1 of the SCM Agreement to Airbus, through measures such as Launch Aid, corporate restructurings, share transfer, debt forgiveness and equity infusions. The EC argues that these measures did not confer benefits in the meaning of Article 1.1(b) of the SCM Agreement on Airbus.[1454] It is Korea's view that measures as those at issue only constitute a subsidy if they clearly confer a benefit on the recipient. This requires a thorough analysis of the relevant factual circumstances.[1455]

5.183 In *Canada – Aircraft*, the Appellate Body confirmed that a financial contribution only confers a "benefit", if it is provided on more advantageous terms than those available to the recipient on the market. The Panel in *Brazil – Aircraft* further elaborated that the beneficiary must be the producer not a third party and that "market" to which reference must be made is the commercial market.[1456]

[1450] Korea Third Party Submission Executive Summary, para. 14.
[1451] Korea Third Party Submission Executive Summary, para. 15.
[1452] Opening Statement of Korea at the Meeting with the Third Parties (hereinafter Korea Opening Statement), para. 5.
[1453] Korea Third Party Submission Executive Summary, para. 16.
[1454] Korea Third Party Submission Executive Summary, para. 17.
[1455] Korea Third Party Submission Executive Summary, para. 18.
[1456] Korea Third Party Submission Executive Summary, para. 19. *See, also,* Korea Opening Statement, para. 6.

BCI deleted, as indicated **[***]**

5.184 It is Korea's view that, in order to demonstrate that a contribution confers a benefit, the contribution must be (1) provided to the recipient (2) on terms more advantageous than (3) those available on the market. All three criteria must be fulfilled separately and individually.[1457]

5.185 Regarding the first element, Korea agrees that a benefit within the meaning of Article 1.2 of the SCM Agreement only exists where an enterprise targeted by an investigation is the actual beneficiary. The second element, "on terms more advantageous", requires a detailed inquiry including the circumstances under which a financial contribution is provided. A benefit is not conferred where the recipient provides adequate commercial consideration. With regard to the third element, Korea generally agrees that the commercial market will provide an appropriate benchmark for the comparison of terms available for a certain investment or transaction. Nevertheless, it is necessary to acknowledge that under particular circumstances, the general market may encounter a systematic failure or that an undistorted commercial market does not exist in a particular sector, as acknowledged by the Appellate Body in *US – Certain Products from the EC*.[1458]

5.186 Korea is of the view that a finding of benefit should include a detailed analysis of the conditions established in *Canada – Aircraft*. The US must establish a *prima facie* case as to all three criteria and cannot plainly state that a benefit is conferred.[1459]

5. *De facto* contingency of export subsidies under Article 3.1(a) of the SCM Agreement

5.187 Korea notes that the US argues that the Launch Aids that Airbus has received for the aircrafts A380, A340-500/600 and A330-200 are prohibited export subsidies under Article 3.1(a) of the SCM Agreement. The EC contests that claim.[1460]

5.188 Korea notes that the Panel and the Appellate Body have previously addressed the issue of a *de facto* export subsidy on various occasions. In particular, the Appellate Body in *Canada – Aircraft* set out a three elements test for demonstrating *de facto* export contingency. Accordingly, (1) the "granting of a subsidy" must be (2) "tied to" (3) "actual or anticipated exportation or export earnings".[1461]

5.189 Korea is of the view that, in order to establish that the Launch Aid is "tied to" export performance, the US has to prove that the Launch Aid would not have been granted to Airbus if the Airbus Governments had known that no export sales may ensue from the Launch Aid. In other words, the US has to prove that the grant of a subsidy is contingent upon export sales, and not mere sales.[1462]

5.190 Korea respectfully submits that the Panel reviews evidence on the record carefully and determines whether the US has duly satisfied various legal thresholds in setting forth its legal claims in accordance with applicable jurisprudence.[1463]

[1457] Korea Third Party Submission Executive Summary, para. 20. *See, also,* Korea Opening Statement, para. 7.

[1458] Korea Third Party Submission Executive Summary, para. 21.

[1459] Korea Third Party Submission Executive Summary, para. 22. *See, also,* Korea Opening Statement, para. 8.

[1460] Korea Third Party Submission Executive Summary, para. 23.

[1461] Korea Third Party Submission Executive Summary, para. 24. *See, also,* Korea Opening Statement, para. 9.

[1462] Korea Third Party Submission Executive Summary, para. 25. *See, also,* Korea Opening Statement, para. 10.

[1463] Korea Opening Statement, para. 11.

BCI deleted, as indicated **[***]**

VI. INTERIM REVIEW

A. INTRODUCTION

6.1 On 4 September 2009, we submitted our Interim Report to the parties. On 16 October 2009, the United States and the European Communities submitted written requests for review of precise aspects of the Interim Report. On 6 November 2009, the United States and the European Communities submitted written comments on each other's requests for interim review. Neither party requested an additional meeting with the Panel.

6.2 Due to changes as a result of our review, the numbering of paragraphs and footnotes in the final report has changed from the Interim Report. The text below refers to the paragraph and footnote numbers in the Interim Report regarding which the parties requested review. Where we have made changes, a reference to the corresponding paragraph or footnote number in the final report is included (in parentheses) for ease of reference. We have also corrected a number of typographical and other non-substantive errors throughout the report, including those identified by the parties, which are not referred to specifically below.

6.3 In order to facilitate understanding of the interim review comments and changes made, the following section is structured to follow the organization of the report itself, with the review requests of the parties, and their comments, addressed sequentially.

B. GENERAL COMMENTS

1. Use of the term "EC"

6.4 The European Communities notes that the term "EC" is used in the Interim Report when referring to the European Communities, while the term "United States", which the European Communities describes as a "full reference", is used when referring to the United States of America. In light of this, the European Communities requests the Panel to replace the term "EC" by the term "European Communities" in all instances where the European Communities is mentioned or used as a noun, referring in support to a footnote in its answers to the Panel's questions filed 30 April 2007, which states "{t}he European Communities would also ask the Panel to avoid adopting the irritating US habit of systematically abbreviating the European Communities to "EC"."[1464]

6.5 The United States did not comment on this aspect of the European Communities' request.

6.6 Although we have referred to the European Communities variously, using both the term "European Communities" and the abbreviated term "EC" throughout these proceedings and the use of the abbreviated term "EC" is common in WTO dispute settlement and other areas, we have determined to grant the European Communities' request, and will refer to the European Communities by its preferred designation.

6.7 In this context, we note that as a result of the entry into force of the Lisbon Treaty, the European Union succeeds and replaces the European Community with respect to all rights and obligations of the latter in the WTO. However, all the arguments and presentations in this dispute, including the requests for interim review and comments thereon predate the entry into force of that

[1464] Comments of the European Communities on the Panel's Interim Report (hereinafter "EC, Request for Interim Review"), p. 2, citing, EC, Replies to Questions of the Panel Following the Panel's First Substantive Meeting with the Parties, footnote 2. The European Communities implies that it made more than one request in this regard, but refers only to this submission.

BCI deleted, as indicated **[*******]**

treaty. Therefore, we have not referred to the European Union in our final report. However, we recognize the significance of the entry into force of the Lisbon Treaty, and have included the following footnote in the final report at the beginning of the report, and, in view of the length of the document, again at the beginning of our findings:

> "On 1 December 2009, the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community."

2. Specific references to BCI/HSBI exhibits

6.8 The European Communities comments that there are numerous references to BCI/HSBI Exhibits in which the Panel does not precisely indicate the source and/or the specific location of the information used by the Panel, and requests the Panel to provide specific references to page numbers, paragraphs, bullet points, etc. when referring to BCI/HSBI information.[1465]

6.9 The United States requests that the Panel decline the European Communities' request, stating its view that where the Panel has relied on HSBI evidence, it has adequately identified the location of the relevant information, particularly when citations to HSBI documents are considered in conjunction with the text of the report, such that the parties are aware of the context in which the HSBI document in question is considered relevant by the Panel.[1466]

6.10 The European Communities cites only one instance as an example of "missing" specific references, and identifies no instance in which the lack of more specific references to pages or paragraphs of BCI or HSBI exhibits has affected its ability to comprehend the Panel's analysis. We have, in each instance where we refer to BCI or HSBI exhibits, specifically identified the relevant exhibits and sources, and in some, but not all cases, indicated specific page or paragraph numbers. There is, however, no rule or consistent practice in this regard. We agree with the United States that the relevant information is adequately identified when considered in context with the analysis set out in the Interim Report, and consider that the degree of precision sought by the European Communities is not, in all instances, necessary. This is particularly the case as the European Communities does not even suggest that any particular reference is, in its view, insufficiently clear to allow it to understand the relevance of the cited information to the Panel's decision. We therefore deny the European Communities' request to systematically provide more detailed references for all citations of BCI/HSBI exhibits throughout the report. However, we have added such specific references to the extent possible in light of our consideration of such evidence in the context of the interim review, and particularly where references to HSBI information were made by the parties in their requests for interim review or comments thereon.

3. Consistency and accuracy in names

6.11 The European Communities contends that the Interim Report is inconsistent in its references to "BAe" and "BAE Systems", argues that those entities are distinct companies that existed at various

[1465] EC, Request for Interim Review, p. 2.
[1466] US, Comments on EC Request for Interim Review, para. 7.

points in time and requests that the Panel "review its report and amend it" such that it accurately reflects the particular companies at issue.[1467]

6.12 The United States did not comment on this issue.

6.13 As we noted in footnote 1764 of the Interim Report (now footnote 2057), the "original" British Airbus partner in 1979 was the crown corporation, British Aerospace Corporation.[1468] The successor entity to British Aerospace Corporation was the public limited company, British Aerospace PLC. The European Communities refers to this company as "BAe" in its submissions.[1469] In 1999, this company merged with Marconi Electronic Systems to become BAE Systems PLC. We have revised the Interim Report to use the term "British Aerospace" to refer to British Aerospace PLC, the UK Airbus partner prior to the 1999 merger, and the term "BAE Systems" to refer to BAE Systems PLC, the UK Airbus partner following the 1999 merger.

6.14 The European Communities also requests that the Panel use the term "Broughton, Wales" consistently when referring to "Broughton", and use the term "UK Department" rather than the term "British Department".[1470]

6.15 The United States did not comment on this request.

6.16 With the exception of one instance of usage of "British Department" at paragraph 7.1906 (now paragraph 7.1917) of the Interim Report, the European Communities did not provide any specific indications as to where in the Interim Report it noted the inconsistencies to which it refers in this regard. Nonetheless, we have reviewed the Interim Report and made every effort to ensure that that consistent references to "Broughton, Wales" and "UK Department" are made, as appropriate.

4. Text in French or Spanish

6.17 The European Communities observes that the Interim Report contains references to text provided in Spanish or French, referring in this regard to paragraphs 7.418 and 7.547 of the Interim Report. The European Communities notes that in other WTO disputes an English translation has been provided in the report itself under similar circumstances, referring to Panel Report, *Mexico – Telecoms* at, *inter alia*, paragraph 7.93, where the Spanish version of text cited in the body of the Report in English was provided in a footnote.[1471] In view of this, the European Communities requests the Panel to include a translation of any Spanish or French text included in the Interim Report.[1472]

6.18 The United States did not comment on the European Communities' request in this regard.

6.19 The Interim Report quotes in the original Spanish and French language the text of exhibits that were submitted by the parties **only** in those languages, which are, we recall, working languages of the WTO.[1473] In *Mexico – Telecoms*, the English text in the body of the report was quoted from a WTO document, the English version of Mexico's schedule, while the footnote quoted from another WTO document, the authentic Spanish version of that schedule submitted by Mexico – that is to say,

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[1467] EC, Request for Interim Review, p. 2.
[1468] Interim Report, para. 7.183, at footnote 1764.
[1469] EC, FWS, para. 60.
[1470] EC, Request for Interim Review, p. 2.
[1471] Panel Report, *Mexico – Measures Affecting Telecommunications Services* ("*Mexico – Telecoms*"), WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, 1537, para. 7.93.
[1472] EC, Request for Interim Review, p. 2.
[1473] We recall that the Panel did require the translation by the parties of exhibits in non-WTO working languages, principally German, into English, where it deemed necessary.

BCI deleted, as indicated **[***]**

both versions already existed. In this case, we considered exhibits submitted by both parties in original French and Spanish versions in our deliberations, without translation into English. Thus, references to text in Spanish and French accurately reflect our deliberations, and form part of our findings. Therefore, we have determined not to translate into English those sections of the Interim Report that quote text in Spanish or French prior to issuance of the final report to the parties. However, we do note that those sections will be translated prior to circulation of the final report to the Members and the public, such that the Spanish version of the final report will be entirely in Spanish, the French version of the final report will be entirely in French, and the English version of the final report will be entirely in English.

C. PRELIMINARY RULING

1. Paragraph 7.46

6.20 According to the United States, the last sentence of paragraph 7.46 of the Interim Report may be read to suggest that the Panel is applying Article 28 of the Vienna Convention on the Law of Treaties (VCLT) as a rule of international law to adjudicate the rights and obligations of Members under the covered agreements. The United States argues that panels and the Appellate Body cannot apply rules of international law other than the provisions of the WTO Agreement. The United States submits that, pursuant to Article 3.2 of the DSU, panels do not clarify rules of international law that are not found in the covered agreements, although such rules may be relevant to clarifying the provisions of the covered agreements under the customary rules of interpretation of public international law, specifically as reflected in Article 31.3(c) of the VCLT.[1474] The United States suggests that the Panel replace the last sentence in paragraph 7.46 of the Interim Report with a proposed text it considers to be a more appropriate formulation of the relationship between Article 5 of the SCM Agreement and Article 28 of the VCLT.[1475]

6.21 The European Communities objects to the United States' request to modify the last sentence of paragraph 7.46 of the Interim Report.[1476] First, the European Communities considers that the United States' concern is fully addressed in footnote 1536 at the end of paragraph 7.46 of the Interim Report, which states that the Appellate Body has said in previous disputes that the principle codified in Article 28 of the VCLT is relevant to the interpretation of the covered agreements. Second, the European Communities argues that the Appellate Body has qualified Article 28 of the VCLT as a "general principle of international law", with the result that the United States is mistaken in arguing that Article 28 can only be taken into account in the context of Article 31.3(c) of the VCLT.[1477]

6.22 The principle of non-retroactivity embodied in Article 28 of the VCLT has been recognized by the Appellate Body to be a "general principle of international law" relevant to the interpretation of obligations contained in the WTO Agreements in many disputes. The United States' comment appears to have given rise to a disagreement between the parties as to the basis on which Article 28 of the VCLT may be applied by the Panel. The United States maintains that Article 28 can only be given effect as a rule of interpretation through Article 31.3(c) of the VCLT, while the European Communities appears to consider this approach too narrow and suggests that Article 28 of the VCLT

[1474] US, Request for Interim Review, para. 3.

[1475] US, Request for Interim Review, para. 3. The United States also suggests that the Panel may need to make conforming edits to the remaining paragraphs in this section, but does not specify where or what changes it would consider necessary or appropriate.

[1476] EC, Comments on US Request for Interim Review, p. 2.

[1477] EC, Comments on US Request for Interim Review, p. 2. The European Communities cites to the Appellate Body Report in Panel Report, *Brazil – Measures Affecting Desiccated Coconut ("Brazil – Desiccated Coconut")*, WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report WT/DS22/AB/R, DSR 1997:I, 189, p. 15.

may be given effect as a general principle of international law, independently of Article 31.3(c) of the VCLT. In our view, it is unnecessary to engage in this debate, as neither party disputes that the interpretation of Article 5 of the SCM Agreement should be consistent with the principle of non-retroactivity embodied in Article 28 of the VCLT. We therefore have made revisions to paragraph 7.46 and footnote 1536 (paragraph numbering unchanged, now footnote 1829) to clarify that we interpret Article 5 of the SCM Agreement consistently with the principle of non-retroactivity embodied in Article 28 of the VCLT, in accordance with the approach taken by the Appellate Body in prior disputes.

2. Paragraph 7.92 and footnote 1613

6.23 The United States requests that the Panel remove footnote 1613 of the Interim Report in its entirety.[1478] According to the United States, footnote 1613 might be read as applying Article 30 of the VCLT when it is not a provision of the covered agreements, and thus cannot be applied to adjudicate rights and obligations of members in WTO dispute settlement proceedings. The United States considers that Article 30 of the VCLT could only be relevant if it were being relied upon in order to apply a customary rule of interpretation reflected in Article 31.3(c) of the VCLT. The United States considers that footnote 1613 of the Interim Report does not purport to interpret anything in the WTO Agreement, and so the discussion of Article 30 in footnote 1613 of the Interim Report is not relevant to any application by the Panel of customary rules of interpretation of public international law to the text of the WTO Agreement.

6.24 The European Communities considers that the United States' request to remove footnote 1613 of the Interim Report is without merit and should be rejected.[1479] The European Communities contends that the footnote appears in the context of the Panel's interpretation of Article 23 of the DSU in paragraph 7.92 of the Interim Report and that the United States is therefore wrong to assert that the footnote does not interpret anything in the text of the WTO Agreement.[1480] Moreover, the European Communities asserts that conflict rules, such as those embodied in Article 30 of the VCLT, always apply in the context of international litigation. Finally, the European Communities observes that if footnote 1613 of the Interim Report is removed, the text of 7.92 of the Interim Report would be deprived of reasoning that supports the Panel's conclusions in that paragraph.

6.25 Our view, as expressed at the end of paragraph 7.92 of the Interim Report, is that in the absence of a reservation concerning the interpretation or application of Article 23 of the DSU, a Member cannot be considered to have "waived" it rights under Article 23 of the DSU to initiate a WTO dispute by means of an agreement that it entered into *prior* to entry into force of the DSU. This view is consistent with the principle embodied in Article 30 of the VCLT, rather than an application of Article 30 of the VCLT by the Panel. We have revised footnote 1613 (now footnote 1906) to clarify our position in this regard.

D. IDENTITY OF THE ALLEGED SUBSIDY RECIPIENT AND PASS-THROUGH, EXTINCTION AND EXTRACTION OF SUBSIDIES

1. Paragraph 7.248

6.26 The United States requests that the first sentence of paragraph 7.248 of the Interim Report be modified to remove any suggestion that reports of the Appellate Body are binding except with respect

[1478] US, Request for Interim Review, para. 4.
[1479] EC, Comments on US Request for Interim Review, p. 2.
[1480] EC, Comments on US Request for Interim Review, p. 2.

to resolving the particular dispute between the parties to that dispute.[1481] The United States also notes that, consistent with Article 17 of the DSU, it would be more accurate to refer to "reports" of the Appellate Body, rather than "decisions". The United States identifies a number of references throughout the Interim Report to "decisions" of the Appellate Body which it requests be modified to "reports".[1482]

6.27 The European Communities does not agree with the United States' request to modify the first sentence of paragraph 7.248 of the Interim Report.[1483] According to the European Communities, the United States' request omits reports subsequent to *Japan – Alcoholic Beverages II* in which the Appellate Body clarified its reasoning about the relevance of adopted Appellate Body reports in subsequent proceedings. The European Communities considers that the current wording of paragraph 7.248 of the Interim Report properly reflects the Appellate Body's position on this issue.[1484]

6.28 The question of the relevance of Appellate Body reports is highly contentious among Members, and it is not necessary for us to address it in order to resolve the dispute before us. The changes requested by the United States do not affect or undermine our reasoning on the substantive issues before us. We therefore have amended paragraph 7.248 (numbering unchanged), and made conforming changes, both where identified by the United States, and where identified by us, throughout the final report, to refer to Appellate Body "report" rather than "decision".

2. Paragraph 7.275 and Footnote 1925

6.29 The European Communities requests that the Panel revise footnote 1925 of the Interim Report in order to acknowledge the effect of the public offering of EADS shares on the ownership interests of the former partners in Airbus Industrie.[1485] According to the European Communities, the Panel's statement, at footnote 1925 of the Interim Report, that Dasa and SEPI effectively held the same proportional interests in Airbus Industrie, only through EADS and the contractual partnership, ignores the effect of the public offering of EADS shares. The European Communities proposes a modification of footnote 1925 of the Interim Report which it considers more accurately depicts the ownership structure of Airbus following the reorganization of Airbus Industrie in 2001.

6.30 The United States disputes the European Communities' assertion that footnote 1925 of the Interim Report ignores the effect of the public offering of EADS shares, referring to various paragraphs of the Interim Report which indicate that the Panel was aware of the contractual relations between the various Airbus entities and the public offering of EADS shares.[1486] The United States submits that the details of the Airbus ownership structure that existed following the reorganization of Airbus Industrie (*i.e.*, the information that the European Communities seeks to include in footnote 1925 of the Interim Report) were not critical to the Panel's analysis because the new structure maintained the overall interests of DaimlerChrysler and the Spanish government in Airbus Industrie as a whole. According to the United States, the Panel does not ascribe to the new ownership structure

[1481] US, Request for Interim Review, para. 5.
[1482] US, Request for Interim Review, para. 6; referring to paras. 7.73, 7.75, 7.82, 7.86, 7.203, 7.212, 7.225, 7.226, 7.233, 7.236, 7.239, 7.241, 7.250, 7.255, 7.1295, 7.1637, 7.1664, 7.1678, 7.1695, 7.1740, 7.1835 and 7.2066 of the Interim Report (now paragraphs 7.73, 7.75, 7.82, 7.86, 7.203, 7.212, 7.225, 7.226, 7.233, 7.236, 7.239, 7.241, 7.250, 7.255, 7.1305, 7.1648, 7.1675, 7.1689, 7.1706, 7.1751, 7.1846 and 7.2077).
[1483] EC, Comments on US Request for Interim Review, p. 2.
[1484] EC, Comments on US Request for Interim Review, p. 2.
[1485] EC, Request for Interim Review, p. 3.
[1486] US, Comments on EC Request for Interim Review, paras. 8 - 10.

of Airbus following the EADS transaction the same significance that the European Communities does.[1487]

6.31 In our view, the modification proposed by the European Communities is unnecessarily complicated and confusing. Paragraph 7.275 of the Interim Report explains why we rejected the European Communities' argument (described at paragraph 7.274 of the Interim Report) that as "minority shareholders" of EADS, DaimlerChrysler and the Spanish government would be unlikely to re-inject into EADS the cash that they had allegedly "extracted" prior to the transactions that led to the creation of EADS. The point that is made in paragraph 7.275 of the Interim Report is simply that it is inaccurate to portray DaimlerChrysler and the Spanish government as "minority shareholders" in the newly-created EADS when the EADS transactions were structured in such a way as to preserve the *status quo* among the former Airbus partners and both DaimlerChrysler and the Spanish government were part of the contractual partnership that controlled EADS and Airbus. However, it is possible that that footnote 1925 of the Interim Report could be understood to suggest that DaimlerChrysler and the Spanish government held the same overall ownership interest in Airbus through EADS as they did through the Airbus Industrie partnership. This was not the case of course, owing to the public offering of approximately 30 percent of the EADS shares. However, as the United States notes, the fact that DaimlerChrysler and the French government may each have indirectly held only 24 percent of the shares in Airbus SAS following the EADS transactions is immaterial, because through the EADS contractual partnership, DaimlerChrysler, the French government and the Spanish government jointly exercised voting rights with respect to 65.48 percent of the shares of EADS (and thus Airbus SAS). For practical purposes, the nature of control that the former Airbus partners exercised over Airbus SAS through EADS was the same as the control that they had previously exercised through Airbus Industrie. In light of the foregoing, we have revised footnote 1925 (now footnote 2218) in order to more accurately set forth the facts.

3. Section VII.E.1 Attachment: Corporate History of Airbus, paragraph 2

6.32 The European Communities requests the Panel to change the statement that a GIE does not have as its goal the *making* of profits, with the statement that a GIE does not have as its goal the *retaining* of profits.[1488] According to the European Communities, this modification more accurately reflects the fact that a GIE distributes profits to its members, and in that sense, may in fact have the goal of making profits, although it is to distribute them, rather than retain them.

6.33 The United States has not made any comments in respect of this request.

6.34 We have made the requested change.

4. Section VII.E.1 Attachment: Corporate History of Airbus, paragraph 3

6.35 The European Communities notes its view that certain transactions and changes are not reflected in the graph following paragraph 3 of the Attachment in the Interim Report, specifically:

(a) the 1989 acquisition of Deutsche Airbus by Daimler;

(b) the 1999 merger of British Aerospace with Marconi Electric Systems to become BAe Systems; and

[1487] US, Comments on EC Request for Interim Review, para. 10.
[1488] EC Request for Interim Review, p. 3.

BCI deleted, as indicated **[***]**

(c) the 1999 merger between Aérospatiale and Matra Hautes Technologies, to create Aérospatiale Matra.[1489]

6.36 The United States notes that the Panel has in fact recognized each of the above three corporate transactions in the Interim Report.[1490] According to the United States, the graph following paragraph 3 of the Attachment in the Interim Report reflects the Panel's determination, inherent in its findings, that those specific corporate transactions, which did not alter the ownership interests of the Airbus partners, were not relevant to its analysis.[1491] The United States requests that the Panel decline the European Communities' request on the basis that the request amounts to the European Communities' disagreement with the Panel's conclusion as to the relevance of information proffered by the European Communities.

6.37 We agree with the United States that each of the specific corporate transactions is noted in the Interim Report, specifically at footnotes 1762, 1761 and 1764 of the Interim Report (now footnotes 2054, 2055 and 2057), and again at footnotes 2232, 2233 and 2235 of the Attachment, albeit they are not explicitly noted in the diagram following paragraph 3. Nonetheless, for the sake of clarity, we have added a reference to each of the transactions as part of the diagram following paragraph 3 (numbering unchanged) of the Attachment.

5. Section VII.E.1 Attachment: Corporate History of Airbus, paragraph 6

6.38 The European Communities requests that the Panel cite to the source for the lower portion of the graph, below the box for EADS.[1492]

6.39 The United States submits that, if the Panel were to consider that a specific citation for the source of the information in the lower part of the graph is necessary, paragraph 7.183 of the Interim Report and the sources cited therein would serve the purpose.[1493]

6.40 We have made the change requested by the European Communities. However, we have not relied on paragraph 7.183 of the Interim Report, as suggested by the United States, but rather have reviewed the relevant submissions and exhibits for the additional references.

E. THE ALLEGED LA/MSF MEASURE FOR THE A350

1. Paragraph 7.300

6.41 The European Communities considers that paragraph 7.300 of the Interim Report does not properly reflect the arguments it made in respect of the United States' claim concerning the alleged LA/MSF commitment for the A350. In particular, the European Communities recalls that its submissions referred to the alleged A350 LA/MSF "commitment" in quotation marks. Moreover, the European Communities asserts that the paragraphs of its submissions cited in the Interim Report only referred to "financing for the A350" not LA/MSF for the A350. Finally, the European Communities notes that the same paragraphs cited in the Interim Report also mention that "{n}ot a single Euro of MSF has been disbursed or scheduled for future disbursement in support of A350 development". The

[1489] EC Request for Interim Review, p. 3.

[1490] US Comments on EC Request for Interim Review, para. 11; referring to the following footnotes of the Interim Report: footnote 1762 (Daimler-Benz and Deutsche Airbus); footnote 1761 (Aérospatiale and Matra Hautes Technologies) and footnote 1764 (British Aerospace and Marconi Electronic Systems).

[1491] US Comments on EC Request for Interim Review, para. 11, referring to paras. 7.199 and 7.275 of the Interim Report.

[1492] EC Request for Interim Review, p. 4.

[1493] US Comments on EC Request for Interim Review, para. 12.

BCI deleted, as indicated **[***]**

European Communities asks that these details be reflected in the characterisation of its arguments in paragraph 7.300 of the Interim Report.[1494]

6.42 The United States considers that paragraph 7.300 of the Interim Report correctly reflects the arguments the European Communities advanced in respect of its claim concerning the alleged A350 LA/MSF measure. The United States cites several passages from the European Communities' submissions, which it argues support the characterisation of the European Communities' arguments found in paragraph 7.300 of the Interim Report. Thus, the United States asks the Panel to dismiss the European Communities' request for modifications to paragraph 7.300 of the Interim Report.[1495]

6.43 The European Communities was not always consistent in how it referred to the "commitment" in question and how it described the type of financing being negotiated between Airbus and the relevant European Communities member States in respect of the A350. For instance, in paragraph 132 of its second written submission, the European Communities uses the word "commitment" both with and without quotation marks. Moreover, while the European Communities refers in this paragraph to negotiations between Airbus and the relevant European Communities' member States on the "terms for financing of the A350", it also refers to negotiations on the "terms of these agreements", citing a discussion in its first written submission about the terms and conditions of LA/MSF. Similarly, in the same paragraph, the European Communities mentions "the price at which A350 MSF would be provided".

6.44 In our view, it can reasonably be understood that in this paragraph, the European Communities described the type of financing being negotiated between Airbus and the French, German, Spanish and UK governments as "MSF", not unlike other LA/MSF "agreements" it described in its first written submission. We therefore decline the European Communities' request to amend paragraph 7.300 of the Interim Report by placing the word "commitment" in quotation marks, and by removing the reference to "LA/MSF" in the characterisation of its argument.

6.45 On the other hand, we consider it appropriate to make the additional change requested by the European Communities, to ensure completeness in presenting its arguments, and have revised paragraph 7.300 (numbering unchanged) to do so.

2. Paragraph 7.307

6.46 The European Communities asks the Panel to delete the language in paragraph 7.307 of the Interim Report indicating that it had argued that financing *in the form of LA/MSF* for the A350 was being negotiated with Airbus as of 20 July 2005.[1496]

6.47 The United States observes that paragraph 7.307 of the Interim Report contains an expression of the Panel's own views, not a summary of the European Communities' argument. Therefore, according to the United States, there is no basis for making the change requested by the European Communities.[1497]

6.48 Paragraph 7.307 of the Interim Report sets out our findings of fact concerning the existence of the alleged A350 LA/MSF commitment measure. As originally drafted, it might be understood to imply that the European Communities shares the Panel's view that the facts before it demonstrate that "the EC member States had in principle agreed to provide Airbus with financial assistance for the

[1494] EC, Request for Interim Review, p. 4.
[1495] US, Comments on EC Request for Interim Review, paras. 13-16.
[1496] EC, Request for Interim Review, p. 4.
[1497] US, Comments on EC Request for Interim Review, para. 17.

BCI deleted, as indicated **[***]**

A350 in the form of LA/MSF on terms and conditions *to be negotiated*." Given the European Communities' argument about what it actually argued in this regard, we consider it appropriate to avoid implying that the European Communities agrees with the Panel's conclusion in this regard, and have revised paragraph 7.307 (numbering unchanged) accordingly.

F. WHETHER EACH OF THE INDIVIDUAL GRANTS OF LA/MSF FOR THE A300, A310, A320, A330/A340, A330-200, A340-500/600 AND A380 MODELS OF LCA CONSTITUTES A SUBSIDY WITHIN THE MEANING OF ARTICLE 1 OF THE SCM AGREEMENT

1. Paragraph 7.374 and footnote 2155

6.49 The European Communities requests that the second sentence of paragraph 7.374 and footnote 2155 of the Interim Report be modified to more accurately reflect what it asserts is the fact that for two of the challenged LA/MSF contracts, revenues generated from aircraft sales were not the only means through which repayment of the respective loans was required.[1498]

6.50 The United States argues that the two contractual provisions cited in footnote 2155 of the Interim Report, as understood by the Panel, describe "minor" mechanisms that supplemented, rather than supplanted, the basic levy-based repayment scheme. Therefore, according to the United States, even if one were to accept that those mechanisms may have existed for two of the LA/MSF contracts, the primary repayment mechanism has always been per-aircraft levies.[1499] The United States also argues that it is far from unambiguous that Article 6.5 of the German A380 contract provides for **[***]**.[1500] Thus, the United States submits that the European Communities' requests should be rejected.

6.51 In addition, the United States requests that the words "in almost all cases" be deleted from the third sentence of paragraph 7.374 of the Interim Report in order to more accurately reflect what it asserts is the fact that the primary repayment mechanism under the challenged LA/MSF contracts has always been per-aircraft levies.[1501]

6.52 The European Communities argues that the two departures referenced in footnote 2155 of the Interim Report are not "minor", as the United States describes, but rather an integral part of the repayment schedules specified in the respective LA/MSF contracts. Thus, according to the European Communities, making the changes to paragraph 7.374 of the Interim Report requested by the United States would result in an incomplete description of the repayment requirements under each of the relevant contracts.[1502]

6.53 In order to set out the relevant characteristics of the LA/MSF contracts in question more specifically, we have modified paragraph 7.374 and footnote 2155 (paragraph numbering unchanged, now footnote 2449).

[1498] EC, Request for Interim Review, pp. 4-5.

[1499] Comments of the United States of America on the EC's Request for Review of Precise Aspects of the interim Report (hereinafter "US, Comment on EC, Request for Interim Review"), paras. 18-19, referring to Request by the United States of America for Review of Precise Aspects of the Interim Report (hereinafter "US, Request for Interim Review"), para. 7.

[1500] US, Comment on EC, Request for Interim Review, paras. 20-22.

[1501] US, Request for Interim Review, para. 7; US, Comment on EC, Request for Interim Review, paras. 18-23.

[1502] Comments of the European Communities on the US Request for Review of Precise Aspects of the Panel's Interim Report (hereinafter "EC, Comments on US Request for Interim Review"), p.3.

BCI deleted, as indicated **[***]**

2. Paragraph 7.375

6.54 The United States requests that the phrase "as a general matter" be deleted from the penultimate sentence of paragraph 7.375 of the Interim Report. The United States asserts that this language is superfluous and does not accurately reflect what the United States demonstrated in its submissions. In particular, the United States submits that it has shown that Airbus' repayment obligations under each of the LA/MSF contracts are dependent on the success of the particular LCA project, not just "as a general matter".[1503]

6.55 The European Communities argues that the change requested by the United States would render the relevant sentence in paragraph 7.375 of the Interim Report "simply incorrect" because it asserts that the facts contained in that paragraph demonstrate that Airbus repayment obligations are not "entirely" dependent on the success of the particular LCA project.[1504]

6.56 We have revised the penultimate sentence of paragraph 7.375 (numbering unchanged) to more clearly reflect our views.

3. Table 1 (following paragraph 7.380) and footnote 2172

6.57 The European Communities requests that the source of each of the figures contained in Table 1 following paragraph 7.380 of the Interim Report be identified, and asks the Panel to change its factual finding in respect of the amount of "financial contribution" associated with the challenged Spanish A380 LA/MSF contract, which is explained in original footnote 2172 of the Interim Report. The European Communities alleges that there is evidence before the Panel, including HSBI, which confirms that the appropriate amount of the financial contribution was EUR **[***]** million or at least that this was the "maximum" amount of funding associated with the Spanish A380 contract.[1505]

6.58 The United States argues that the European Communities' request should be rejected, because the European Communities failed to provide any evidence in support of its factual assertion during the appropriate phase of this panel proceeding, including in response to a specific Panel question. In any case, the United States submits that the other evidence, including HSBI, which the European Communities now refers to in support of its request, has not been demonstrated by the European Communities to more accurately represent the amount of Spanish LA/MSF for the A380.[1506]

6.59 Turning first to the European Communities' request that the source of the figures contained in Table 1 be identified, we have made the requested modification in order to more clearly identify the source of each of the relevant values. As a result of our review of those sources, we have also corrected three of the figures in Table 1.

6.60 As regards the European Communities' request concerning footnote 2172 of the Interim Report, we note that the Panel explicitly asked the European Communities, in Panel Question 259, to explain the differences between the amounts of "financial contribution" referred to in the Spanish A380 contract and in the European Communities' first written submission. The explanation provided by the European Communities in response to that question was less detailed and referred to fewer pieces of evidence than the explanation now given in its request for interim review. Even assuming we were willing to consider the newly cited evidence, however, in our view, that evidence does not advance its cause any further. In particular, we note that the European Communities places

[1503] US, Request for Interim Review, para. 8.
[1504] EC, Comments on US Request for Interim Review, p. 3.
[1505] EC, Request for Interim Review, pp. 5-6.
[1506] US, Comment on EC, Request for Interim Review, paras. 24-26.

BCI deleted, as indicated **[***]**

considerable reliance on the amount of non-recurring costs identified in the Airbus A380 business case, and argues that, in the light of other information contained in the Spanish A380 LA/MSF contract, it is possible to conclude that the "financial contribution" associated with the Spanish A380 contract was even less than the EUR **[***]** million figure it had initially asserted to be the correct amount in its first written submission. Although we have been able to verify all of the numbers the European Communities has referred to in its request for interim review, we note that the non-recurring cost figure the European Communities relies upon *pre-dates* the Spanish A380 LA/MSF contract by approximately one year.[1507] Absent a substantiated explanation as to why reliance should be placed on cost information contained in Airbus A380 business case, which pre-dates the Spanish A380 contract by more than 12 months, we would in any case reject the European Communities' argument in this regard.

6.61 Therefore, we dismiss the European Communities' request. However, we have revised Table 1 following paragraph 7.380 and footnotes 2171 and 2172 (paragraph numbering unchanged, now footnotes 2465 and 2484) so as to clearly identify that the EUR **[***]** million we have considered as being provided for the Spanish A380 LA/MSF is a "maximum" amount.

4. Paragraph 7.407

6.62 The United States asks that a footnote be added to the first sentence of paragraph 7.407 of the Interim Report explaining that it contests the view advanced by the European Communities that the rates of return of the LA/MSF contracts must be determined by taking into account the "internal rate of return" ("IRRs"). The United States also requests that the we reflect its arguments regarding the lack of substantiation for the European Communities' IRR calculations.[1508]

6.63 The European Communities considers that the additional references requested by the United States would be duplicative and confusing, noting that the United States' arguments concerning the relevance of royalty payments to the calculations of the IRRs are already reflected elsewhere in the Interim Report. In addition, the European Communities submits it has substantiated the IRR calculations it has advanced in this dispute.[1509]

6.64 In order to fully reflect the United States' arguments, we have modified paragraph 7.407, and made a consequential change to footnote 2205 (paragraph numbering unchanged, now footnote 2518).

5. Paragraph 7.409

6.65 The United States submits that it did not argue, as it asserts is described in paragraph 7.409 of the Interim Report, that potential royalty payment obligations are "relevant" or "play only a marginal role" in determining the rate of return expected by the EC member State governments providing LA/MSF. The United States requests that the last sentence of paragraph 7.409 of the Interim Report be replaced with proposed language it asserts more correctly describes its argument.[1510]

6.66 The European Communities opposes the United States' request. The European Communities submits that it is inaccurate for the United States to now argue that it "did not accept" that royalty payments "play only a marginal role" given that this is precisely what the United States expert, Ellis,

[1507] The A380 business case – Exhibit EC-362 (HSBI) – is dated 8 December 2000. The Spanish A380 LA/MSF contract – Exhibit US-73 (BCI) – is dated 27 December 2001.
[1508] US, Request for Interim Review, paras. 9-10.
[1509] EC, Comments on US Request for Interim Review, pp. 3-4.
[1510] US, Request for Interim Review, paras. 11-13.

BCI deleted, as indicated **[***]**

stated to the Panel and precisely the element of the Ellis statement that the United States chose to repeat verbatim in its second written submission.[1511]

6.67 First, we note that paragraph 7.409 of the Interim Report does not say that the United States considers that royalty payment obligations are relevant to the determination of the appropriate IRRs of the LA/MSF contracts. Rather, it states that the United States does not consider "*expectations* of royalty payments to be *irrelevant*". Second, although the United States now submits that it did not argue that they play a "marginal role", this is not, in our view, what can reasonably be understood from its submissions. For instance, when discussing royalty payments required under the UK A380 contract, the United States concluded that they were "essentially meaningless", not because the payment of royalties fell outside of the UK government's expectations, but because according to the government's expectations, reflected by the delivery schedule, there would be only a few sales that could actually generate such payments.[1512] Similarly, the United States submitted that "{e}ven for the other Launch Aid contracts at issue, royalties become due only after a number of deliveries that, according to Airbus' and the governments' own forecasts, at best will be achieved only by the very end of the 17-year period described in the European Communities' ITR report as the life of a plane."[1513] Thus, the United States did not negate the relevance of royalty payments to the governments' expected returns from LA/MSF. Rather, the United States minimized the importance of such payments to the overall expected return. Thus, we do not consider that paragraph 7.409 of the Interim Report erroneously describes the United States' argument.

6.68 However, we recognize that in addition to making these statements, the United States has also observed that it was likely that a market investor would not take such royalty payments into account, but instead look to recover its investment and make a commercial return over a much shorter period of time.[1514] Therefore, while we decline to make the changes requested by the United States, we have modified paragraph 7.409 (numbering unchanged) so as to include the latter *additional* perspective of the United States, which is not reflected in the interim report. We have also added a footnote to the end of paragraph 7.412 (numbering unchanged) to reflect a further consideration relevant to our evaluation of the effect of royalty payments on the IRR.

6. Paragraph 7.416

6.69 The European Communities asks the Panel to reconsider its findings in respect of the internal rate of return ("IRR") of the French A340-500/600 LA/MSF contract. The European Communities explains that Articles 6.2 and 6.4 of this contract prescribe **[***]** – one intended to reimburse the principal loaned plus interest for the A340-500/600 project, **[***]**. The European Communities notes that **[***]** were taken into account and separately identified in the ITR Report, submitted as Exhibit EC-13 (BCI). However, for the purpose of the calculations shown in Exhibit EC-597 (HSBI), the European Communities **[***]** in order "to preserve space to demonstrate the alleged effect of taxation" on LA/MSF. The European Communities suggests that this explains why the Panel was unable to match the repayment values used to calculate the internal rate of return contained in Exhibit EC-597 (HSBI) with those derived from Article 6.2 of the A340-500/600 LA/MSF contract. According to the European Communities, **[***]** must be taken into account in order to determine the IRR the French government expected to obtain from the A340-500/600 contract. Finally, the European Communities observes that, for the French A330-200 LA/MSF contract, the Panel accepted an IRR that was calculated taking into account a similar repayment structure involving **[***]** – one to repay the principal loaned plus interest for the A330-200 project, **[***]**. The European Communities

[1511] EC, Comments on US Request for Interim Review, pp. 4-5.
[1512] US, Answer to Panel Question 142.
[1513] US, Answer to Panel Question 142.
[1514] US, Answer to Panel Question 142.

BCI deleted, as indicated **[***]**

therefore asks the Panel to take a consistent approach in respect of the French A340-500/600 contract and equally accept the internal rate of return calculated on the basis of the **[***]** contractually prescribed repayment streams.[1515]

6.70 The United States recalls that in its answer to Panel Question 42 it had observed that:

> "{a}ccording to the French A340-500/600 Launch Aid contract, Airbus was required **[***]**."

Thus, the United States disputes the European Communities' inclusion of the **[***]** into its calculation of the IRR for LA/MSF provided for the A340-500/600, and asks the Panel to reject the European Communities' request.[1516]

6.71 In its first written submission, the European Communities explained that in return for French government LA/MSF for the A330-200 and A340-500/600, Airbus was required to pay "a levy for the MSF (including interest) invested in the variant **[***]**".[1517] The IRR calculations relied upon by the European Communities for both LA/MSF measures were first presented in the ITR Report, Exhibit EC-13 (BCI). The ITR Report identified **[***]** in the cash-outflows column of its calculations for each LA/MSF measure, **[***]**. The only contractual provision specifically referred to in these submissions was Article 6.4 of the French A340-500/600 contract.[1518]

6.72 The European Communities was asked in Panel Question 69 to explain how the "implicit" rates of return it had presented with its first written submission were calculated, "with reference to all of the relevant data used in their calculation". In addition to the written response provided to that question, the European Communities presented Exhibit EC-597 (HSBI), which it described as measuring "the rate of return for the MSF contracts covering the A320, A330/A340 basic, A330-200, A340-500/600, and A380".[1519] For the French A330-200 and French A340-500/600 LA/MSF contracts, this Exhibit **[***]**, which was labelled "MSF repayments". The European Communities' response did not explain how the IRR was specifically determined for either of the French A330-200 and French A340-500/600 LA/MSF contracts. In this respect, the European Communities' Answer to Panel Question 69 provided little, if any, additional insight into what was set out in its first written submission.

6.73 In the Interim Report, we rejected the IRR calculated by the European Communities for the A340-500/600 because, on the basis of the information contained in Exhibit EC-597 (HSBI), the repayment amounts used to determine the IRR were greater than those derived from the actual LA/MSF contract, when read in the light of the schedule of forecast deliveries. In other words, we rejected the European Communities' inclusion of **[***]** it argues were called for under the French A340-500/600 LA/MSF contract. However, we accepted the IRR the European Communities calculated for the French A330-200 LA/MSF contract, even though this also appears to have been determined taking into account **[***]**.

6.74 In light of the arguments in the European Communities' request for interim review, we have reconsidered our findings in respect of the IRRs of these LA/MSF contracts. We note that, even accepting the European Communities' explanations and IRRs for both the French A330-200 and A340-500/600 LA/MSF contracts, our findings on whether such measures constitute subsidies do not

[1515] EC, Request for Interim Review, pp. 6-7.
[1516] US, Comment on EC, Request for Interim Review, para. 27.
[1517] EC, FWS, paras. 335 and 336.
[1518] EC, FWS, footnote 250.
[1519] EC, Answer to Panel Question 69.

BCI deleted, as indicated **[***]**

change. The only impact of accepting both IRR calculations would be on the amount of benefit associated with the French A340-500/600 contract. However, as we never quantified this amount precisely, the difference of approximately 2 percentage points between the IRR proposed by the European Communities and that identified in the Interim Report makes little difference. Thus, ultimately, even accepting the entirety of the European Communities' submissions on the IRRs associated with these two LA/MSF measures, our findings effectively remain the same.

6.75 In view of the foregoing, we have modified the report by adding new paragraphs 7.416-7.421 to describe and evaluate how the European Communities determined the IRRs for, primarily, the French A340-500/600 LA/MSF contract (and by implication the French A330-200 LA/MSF contract), concluding that, despite having some doubt as to the appropriateness of the European Communities' methodology for determining the IRR (discussed below at paragraphs 7.412 to 7.414, we need not come to a firm conclusion on the question, as even accepting the entirety of the European Communities' arguments, the measures would nevertheless constitute subsidies for the purpose of Article 1.1 of the SCM Agreement. We have also made consequential amendments to paragraph 7.415 (numbering unchanged) and 7.1959 (now paragraph 7.1970) and to Tables 5 and 7 setting out our findings on the rates of return for the LA/MSF measures.

7. Paragraph 7.426

6.76 The European Communities requests the Panel to insert footnotes next to each figure contained in Table 5 referring to the precise source of information used by the Panel to make its finding, as well as, where appropriate, an explanation as to how the figure was calculated.[1520]

6.77 The United States considers there to be no reason for the Panel to add references to sources underlying the findings set out in paragraph 7.426 of the Interim Report and Table 5. In its view, the explanations already provided are detailed enough to understand the basis of the Panel's findings.[1521]

6.78 In order to more clearly explain our findings, and the sources for the figures referred to in Table 5, we have revised paragraph 7.426 (now paragraph 7.431) and Table 5.

8. Paragraph 7.429

6.79 The United States requests that the first sentence of paragraph 7.429 of the Interim Report be modified because, in its view, it incorrectly characterizes the "dispute" between the parties on the question of the market interest rate benchmark for the challenged LA/MSF measures to be centred on the appropriate project-specific risk premium. The United States submits that while the European Communities' objection to this issue related only to the value of the risk premium, the United States noted that the risk premium could not be considered in isolation. Specifically, the United States observes that it argued that the risk premium must be considered together with the corporate borrowing rate, and that these together represent the hybrid-equity nature of LA/MSF. Accordingly, the United States asks that the first sentence of paragraph 7.429 of the Interim Report be modified to reflect this understanding of the parties' arguments.[1522]

6.80 The European Communities considers the Panel's characterisation of the "dispute" between the parties in the first sentence of paragraph 7.429 of the Interim Report to be accurate, and therefore asks the Panel to reject the United States' request. The European Communities recalls that the parties agreed that a benchmark would properly include three components: the relevant risk-free rate, a

[1520] EC, Request for Interim Review, p. 7.+
[1521] US, Comment on EC, Request for Interim Review, paras. 28-30.
[1522] US, Request for Interim Review, para. 14.

corporate risk premium and a project-specific risk premium. The European Communities submits that the nature of the loans at issue – equity, debt or hybrid – was a central part of the disagreement between the parties as to the correct project-specific risk premium.[1523]

6.81 The text in paragraph 7.429 of the Interim Report with which the United States takes issue states that the dispute between the parties as to the appropriate market interest rate benchmark "...is focused on only one aspect of the particular benchmarks that have been proposed – the value of the project specific risk premium". It is true that the parties were also in disagreement about whether LA/MSF was essentially a hybrid financing instrument or debt-like, and that the United States' proposed project-specific risk premium was advanced in the context of its view that LA/MSF was a hybrid financing instrument. However, the United States' submissions on these points, and the European Communities' difference of opinion, are recorded in the paragraphs describing each parties' arguments on the appropriate project-specific risk premium. Therefore, we do not consider it is necessary to make the modification requested by the United States. Nevertheless, we have modified paragraph 7.429 (now paragraph 7.434), in order to avoid creating the impression that the level of the project-specific risk premium was the *only* aspect of the benchmark issue on which the parties held differing views.

9. Paragraphs 7.430 – 7.464

6.82 The United States asks that, "in the interests of completeness", a footnote be added at the end of paragraph 7.457 of the Interim Report reflecting the emphasis placed by the United States and its expert on the high-risk nature of aircraft development and the risk-shifting nature of LA/MSF.[1524]

6.83 The European Communities submits that the information the United States requests be included at the end of paragraph 7.457 of the Interim Report is already reflected in paragraphs 7.432 and 7.433 of the Interim Report. Accordingly, the European Communities asks the Panel to reject the United States' request.[1525]

6.84 The particular passage from the Ellis Report that the United States asks the Panel to insert in a footnote at the end of paragraph 7.457 of the Interim Report is already quoted in paragraph 7.433 (now paragraph 7.438). We therefore reject the United States' request.

10. Paragraph 7.476

6.85 The United States requests that paragraph 7.476 of the Interim Report be drafted so as to express the full range of reasons supporting the Panel's decision to reject the European Communities' project-specific risk premium.[1526]

6.86 The European Communities submits that the additional text requested by the United States serves no additional purpose not already met by paragraph 7.475 of the Interim Report, which according to the European Communities, already expresses the statements the United States requests should be included in paragraph 7.476. The European Communities therefore objects to the United States' request.[1527]

[1523] EC, Comments on US Request for Interim Review, p.5.
[1524] US, Request for Interim Review, para. 15.
[1525] EC, Comments on US Request for Interim Review, pp.5-6.
[1526] US, Request for Interim Review, para. 16.
[1527] EC, Comments on US Request for Interim Review, p.6.

BCI deleted, as indicated **[***]**

6.87 We have amended paragraph 7.476 (now paragraph 7.481) in order to more fully reflect the reasons underlying our rejection of the European Communities' project-specific risk premium.

11. Paragraph 7.483

6.88 The European Communities asks the Panel to insert a footnote next to each figure shown in Table 7 explaining how it was calculated and citing the specific source of information relied upon.[1528]

6.89 The United States submits that the data contained in Table 7 is adequately referenced, but considers that it may be useful to reflect in the accompanying footnotes some additional information on the sources of the listed values.[1529]

6.90 We have revised Table 7 and related footnotes with a view to providing a clearer and more precise understanding of how each figure was calculated and the information on which it was based. As a result of our review, certain figures in the table have also been revised.

G. WHETHER LA/MSF AS A PROGRAMME IS A SUBSIDY WITHIN THE MEANING OF ARTICLE 1 OF THE SCM AGREEMENT

1. Paragraphs 7.495 and 7.508

6.91 The United States argues that paragraphs 7.495 and 7.508 of the Interim Report incorrectly describe the argument it advanced in respect of the alleged LA/MSF Programme as being premised on the alleged Programme having "normative value". The United States asserts, however, that its analysis of whether the alleged LA/MSF Programme is a "measure" was premised on the ordinary meaning of the word "measure", in context and in the light of the object and purpose of the WTO Agreement. The United States recalls that it also argued, "as a separate and distinct matter", that even assuming that the "test" the European Communities derives from Appellate Body Reports such as *US – Zeroing(EC)* is appropriate, that "test" has been satisfied by the United States' description of the alleged LA/MSF Programme. Accordingly, the United States requests that paragraphs 7.495 and 7.508 of the Interim Report be modified to more accurately reflect the full scope of the United States' argument in respect of the alleged LA/MSF Programme, in particular as set out in the United States' answer to Panel Question 136.[1530]

6.92 The European Communities considers that paragraphs 7.495 and 7.508 of the Interim Report do not suggest that the United States' argument in respect of the alleged LA/MSF Programme was premised on it having "normative value". Moreover, it notes that paragraph 7.495 of the Interim Report expressly refers to the United States' answer to Panel Question 136. Thus, the European Communities opposes the United States request for modifications to paragraphs 7.495 and 7.508 of the Interim Report.[1531]

6.93 The United States' interim review request appears to rest on the view that the "test" set out in *US – Zeroing(EC)* should not have been at the centre of the Panel's evaluation of its claim because it is a "test" relevant only in disputes where an unwritten measure is challenged "as such". The United States emphasizes that it did not challenge the alleged LA/MSF Programme "as such", but rather as a "measure" that is opposable in WTO dispute settlement proceedings. Although the United States acknowledges that it also argued, "as a separate and distinct matter", that even assuming that the *US –*

[1528] EC, Request for Interim Review, p.8.
[1529] US, Comment on EC, Request for Interim Review, paras. 31-32.
[1530] US, Request for Interim Review, para. 17.
[1531] EC, Comments on US Request for Interim Review, p6.

BCI deleted, as indicated **[***]**

Zeroing(EC) "test" were relevant, the LA/MSF Programme satisfied its criteria because it possessed *inter alia* "normative value", it asserts that this line of argument was not its primary position. Rather the United States' characterizes this as its *response* to the European Communities' arguments.

6.94 In the Interim Report, we explicitly recognized that the United States is not challenging the alleged LA/MSF Programme "as such", explaining that, in evaluating the United States' claim, our first step taken was to assess whether the United States had established the *existence* of the alleged LA/MSF Programme as a "measure". Therefore, we did not treat the United States' complaint as an "as such" claim. We did, however, apply the criteria in *US – Zeroing(EC)* to evaluate the United States' claim, but only to determine whether the "measure" the United States characterised as having "normative value" actually exists. In other words, we relied upon the "test" in *US – Zeroing(EC)* as guidance for what must be established in order to demonstrate the existence of an unwritten measure with "normative value". We did not rely upon this "test" for the purpose of evaluating the merits of any "as such" claim.

6.95 In its first written submission, the United States concluded that in the light of the evidence introduced, "the specific content of {the}Launch Aid program and the future conduct it will entail {was} clear".[1532] In other words, the United States expressed the view in its first written submission that the evidence before the Panel clearly demonstrated that the unwritten measure it was challenging unavoidably necessitated certain future conduct. Moreover, in its first oral statement, the United States confirmed that it was making a complaint against an unwritten LA/MSF Programme in response to the European Communities' suggestion to the contrary, characterizing it as a measure that "creates expectations among the public and among private actors" demonstrating that it has "normative value".[1533] In its second oral statement, the United States asserted:

> "In the present dispute, we have shown that a measure that is not set forth in a single written instrument – the Launch Aid Program – is in fact a measure and in fact possesses the qualities the Appellate Body identified in *US – Zeroing (EC)*".

Neither of these oral statements was prefaced by any explanation that the United States was only responding to the European Communities' counter-argument. Later in its second oral statement and again in its answer to Panel Question 136, the United States explained that it considered it was not necessary to show that the measure possessed "normative value" in order to show it existed as a "measure". However, in light of its previous submissions, it was not apparent that this was in fact the United States' *primary* argument. Nevertheless, both of the United States' lines of argument are recognized in the Interim Report, which addresses and rejects each one.

6.96 Thus, in light of the foregoing, we see no need to make the changes the United States requests, and therefore deny the United States' request. However, in order to ensure that our views in this regard are clear, we have modified the footnotes to paragraphs 7.495, 7.508, 7.513 and 7.570 (now paragraphs 7.500, 7.513, 7.518 and 7.575).

2. Footnote 2469

6.97 The European Communities asks the Panel to modify footnote 2469 of the Interim Report so that it properly describes the repayment terms contained in Article 6.5 of the German A380 LA/MSF contract, as the European Communities describes those terms.[1534]

[1532] US, FWS, para. 106.
[1533] US, FNCOS, para. 25.
[1534] EC, Request for Interim Review, p. 8.

BCI deleted, as indicated **[***]**

6.98 The United States argues that Article 6.5 of the German A380 LA/MSF contract does not unambiguously support the European Communities' reading of that provision. It therefore asks the Panel to remove any discussion of this provision from footnote 2469 of the Interim Report or to bring it into conformity with the language used in footnote 2155 of the Interim Report.[1535]

6.99 We have revised footnote 2469 (now footnote 2807), albeit not in the terms proposed by the European Communities, to bring it into conformity with the description of the same provision in footnote 2155 (now footnote 2449).

3. Footnote 2473

6.100 The United States requests that the last sentence in footnote 2473 of the Interim Report be removed because it considers that there was no reason to expect the United States to have been able to know that Airbus had not sought LA/MSF in respect of certain models, given that the European Communities provided only one LA/MSF application, which was for the German A380 contract. Moreover, the United States submits that had it obtained access to all the relevant documents, it would not likely have been able to establish the negative proposition that Airbus had not sought LA/MSF from the German, Spanish and UK governments for the A330-200.[1536]

6.101 The European Communities argues that the United States misconstrues footnote 2473 of the Interim Report and Panel Question 3(a), on which it is based. According to the European Communities, the Panel is entitled to assume that, having introduced in its answer to Panel Question 3(a) a distinction between instances in which Airbus sought LA/MSF and instances in which it did not, the United States considered that there were indeed instances in which Airbus did not seek LA/MSF. Accordingly, the European Communities opposes the United States' request, and suggests that at most, footnote 2473 of the Interim Report could be clarified by placing the Panel's view in the context of the United States' answer to Panel Question 3(a).[1537]

6.102 We have modified footnote 2473 (now footnote 2811) and moved it to the end of the first sentence of paragraph 7.522 (now paragraph 7.527) in order to clarify the meaning of the last sentence of that paragraph.

4. Footnote 2478

6.103 The European Communities asks the Panel to delete footnote 2478 of the Interim Report because it considers that it is "speculative" to assert that the terms of any LA/MSF provided by the UK government for the A340-500/600 would have been "non-commercial". The European Communities argues that footnote 2478 of the Interim Report refers to a measure that never existed, and according to the European Communities, the Panel should not make findings on non-existent measures. In addition, the European Communities asserts that the proposed agreement was not finalised, implying that it cannot demonstrate the terms that would have been finally negotiated and agreed between the parties. The European Communities also asserts that the final agreement might not have been concluded in 1998, a fact that would be relevant to identifying the appropriate market interest rate benchmark.[1538]

6.104 The United States disagrees with the European Communities' request. According to the United States, the European Communities' request is not only based on an incorrect understanding of

[1535] US, Comment on EC, Request for Interim Review, para. 33.
[1536] US, Request for Interim Review, para. 18.
[1537] EC, Comments on US Request for Interim Review, pp.6-7.
[1538] EC, Request for Interim Review, p.8.

BCI deleted, as indicated **[***]**

the relevance of footnote 2478 of the Interim Report to the Panel's analysis, but is itself based only on speculation.[1539]

6.105 In our view, the European Communities has misunderstood footnote 2478. The footnote does not indicate a view that any LA/MSF provided by the UK government for the A340-500/600 *would have been* "non-commercial", but rather simply that the UK government's LA/MSF *proposal* or *offer* was "non-commercial" *at the time it was made*. We therefore deny the European Communities' request.

H. WHETHER LA/MSF FOR THE A380, A340-500/600 AND THE A330-200, CONSTITUTES, IN EACH CASE, A PROHIBITED EXPORT SUBSIDY WITHIN THE MEANING OF ARTICLE 3 OF THE SCM AGREEMENT

1. Paragraph 7.583, second sentence

6.106 The European Communities asks the Panel to revise the description of its argument set out in the second sentence of paragraph 7.583 of the Interim Report, by replacing the words "will actually" with "may". The European Communities states that it does not argue that the export must occur in order for there to be a finding that a measure providing for a subsidy contingent upon export exists. In addition, the European Communities submits that it does not use the term "actually" in the manner advocated by the United States.[1540]

6.107 The United States observes that the passage the European Communities requests be revised is taken verbatim from the European Communities' own second written submission. Thus, the United States requests that the Panel decline the European Communities' request to modify paragraph 7.583 of the Interim Report.[1541]

6.108 Although the European Communities now contends that its argument on what constitutes an "anticipated" export should be understood to mean that it holds the view that an "anticipated" export is an export that "may" take place in the future, the actual language used in the European Communities' submissions indicates that it argued that an "anticipated" export is one that "*will*" take place in the future, not one that "*may*" take place.[1542] This view is reflected in the first sentence of paragraph 7.583 of the Interim Report, where the statement in this regard made by the European Communities in its second written submission is quoted. Therefore, we reject the European Communities' request to replace the verb "will" with "may" in the second sentence of paragraph 7.583 of the Interim Report, because to do so would misrepresent what was explicitly stated in the European Communities' own submissions.

6.109 The European Communities contends that it does not use the word "actually" in the sense advocated by the United States, and for this reason, this word should be removed from the second sentence of paragraph 7.583 of the Interim Report. However, the second sentence of paragraph 7.583 of the Interim Report does not suggest that the European Communities considers the term "actually" in the same manner as the United States. Rather it merely explains what we understand to be the

[1539] US, Comment on EC, Request for Interim Review, paras. 34-37.
[1540] EC, Request for Interim Review, p.9.
[1541] US, Comment on EC, Request for Interim Review, paras. 38-40.
[1542] EC, SWS, paras. 235 ("...the term 'anticipated' (also juxtaposed to the meaning of the term 'actual') means an export that has not yet taken place at the moment when the subsidy is deemed to exist, but **will** take place in the future.") and 238 ("an 'anticipated' export is one that has not yet occurred at the moment when the subsidy is deemed to exist, and by definition is therefore envisaged to be one that **will** occur subsequently.") (Emphasis added).

BCI deleted, as indicated **[***]**

European Communities' view of the meaning of "anticipated exportation or export earnings" in footnote 4 of the SCM Agreement.[1543]

6.110 Our understanding of the European Communities' interpretation of the term "anticipated exportation or export earnings" as articulated in the Interim Report was developed not only from the European Communities' explanations of what it considered this term to mean,[1544] but also from the arguments it advanced to reject the United States' interpretation of the same language, particularly in paragraphs 233 to 235 of its second written submission:

> "Thus, the United States is interpreting the term 'actual' as if it means 'real' – that is, 'actually' has taken place in the past or 'actually' takes place in the future; whilst it is interpreting the term 'anticipated' (in juxtaposition to the term 'actual') as if it means 'potential', so that, according to the United States, whether or not the 'anticipated' export ever 'actually' takes place is irrelevant to the question of whether or not there is a subsidy contingent upon export performance. Thus, for the United States, the required condition is not export, but 'the anticipating of' export; this necessarily involves an enquiry into the hypothetical 'state of mind' or 'intent' of a natural person whose thoughts are imputable to the defending Member; with mere anticipation or consideration being sufficient to demonstrate contingency.
>
> The European Communities submits that, on any interpretation, including that advanced by the United States, the facts evidently do not support a finding of export contingency.
>
> However, quite apart from this factual point, the European Communities additionally submits that the United States' arguments are also based on a legally erroneous interpretation of the term 'actual or anticipated'. The correct interpretation, as indicated in the submissions of the European Communities, is that the term 'actual' means an export that exists (that is, has already taken place) at the moment when the subsidy is deemed to exist within the meaning of Article 1 of the *SCM Agreement*; whilst the term 'anticipated' (also juxtaposed to the meaning of the term 'actual') means an export that has not yet taken place at the moment when the subsidy is deemed to exist, but will take place in the future."[1545]

Nonetheless, we recognize that the European Communities did not use the adverb "actually" when explaining that it understood an "anticipated" export to be an export that is not a 'potential' export, but one that will take place in the future. We therefore have removed it from the second sentence of paragraph 7.583 (now paragraph 7.588).

[1543] In this regard, we note that Australia appears to have taken a similar view of the European Communities' argument. See Australia, Third Party Oral Statement, 24 July 2007, para. 15. ("The fact that the grant of a subsidy is not the consequence of **actual** exportation does not mean that the grant of a subsidy is not tied to export performance and therefore contingent upon export performance within the meaning of the SCM Agreement".) (Emphasis added.)

[1544] In addition to EC, SWS, paras. 235 and 238, see also EC, SNCOS, paras. 126 ("Correctly interpreted, the term 'actual or anticipated' in footnote 4 simply confirms that the provision captures the whole range of possibilities, that is, exports that currently exist at the time of the initial grant (actual exports) **as well as those that occur in the future (anticipated exports)**") and 144 ("Furthermore, as the EC has already explained, and contrary to what the United States appears to believe, a measure may be a subsidy contingent upon export regardless of whether the export **occurs before or after the initial grant**"). (Emphasis added.)

[1545] EC, SWS, paras. 233 - 235 (Footnote omitted, emphasis added).

BCI deleted, as indicated **[***]**

2. Paragraph 7.625, third, fourth, fifth and final sentences; paragraph 7.626 first sentence; paragraph 7.627; and paragraph 7.628, fourth and fifth sentences

6.111 The European Communities asks the Panel to "more precisely and accurately" state its arguments concerning the interpretation of Article 3.1(a) and footnote 4 of the SCM Agreement in several sentences in paragraphs 7.625 to 7.628 of the Interim Report, and further requests that the Panel then re-consider the conclusions drawn from those arguments. In particular, the European Communities asks the Panel to "more precisely and accurately" state its arguments in paragraphs 7.625 of the Interim Report, third, fourth, fifth and final sentences and 7.626 of the Interim Report, first sentence. It indicates that "it cannot recognize its submissions" in paragraph 7.627 of the Interim Report, and asks the Panel to re-consider the statements made in paragraph 7.628 of the Interim Report, fourth and fifth sentences. To this end, the European Communities presents alternative text which it considers could be used to replace the text it considers misrepresents or misunderstands its arguments.[1546]

6.112 The United States asks that the Panel reject the changes requested by the European Communities. The United States argues that to the extent that the Interim Report does not describe the European Communities' argument in terms that European Communities would prefer, the European Communities has only its own failure to present a single and coherent argument on export contingency to blame. According to the United States, the Interim Report faithfully reflects the actual text of the European Communities' own submissions, often by quoting and citation to European Communities' submissions. Moreover, the United States submits that the European Communities' requests to replace the Panel's understanding of its argument in several of the relevant passages with the verbatim language of Article 3.1(a) of the SCM Agreement is tautological.[1547]

6.113 In the Interim Report, we set out and evaluated two characterisations of the European Communities' interpretation of Article 3.1(a) and footnote 4 of the SCM Agreement. One is the Panel's own, which the European Communities now asks be revised (paragraphs 7.625 to 7.628 of the Interim Report). The other is that put forward by the United States (paragraphs 7.632 and 7.633 of the Interim Report). After carefully reviewing and reconsidering the European Communities' arguments concerning the interpretation of Article 3.1(a) and footnote 4 of the SCM Agreement, we deny the European Communities' requests to alter the description of its arguments in the manner requested.

6.114 There are essentially two reasons for our decision. First, subject to certain clarifying adjustments, the language used in the Interim Report to describe the European Communities' submissions accurately reflects the core of its arguments in respect of the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement as made in its submissions. Second, the alternative text the European Communities proposes in its request for interim review, for the most part, does not provide any additional insight into its interpretation of Article 3.1(a) and footnote 4, and would, in any case, alter the meaning of relevant passages of the Report in ways we consider would not accurately convey our understanding.

6.115 In its first written submission, the European Communities argued that Article 3.1(a) and footnote 4 contain three "requirements" – "the required condition: actual or anticipated export performance, exportation or export earnings; the required consequence: the grant of a subsidy; and the required contingent relationship (or contingency) between condition and consequence".[1548] In its first non-confidential oral statement, the European Communities argued that the United States had "failed

[1546] EC, Request for Interim Review, pp.9-11.
[1547] US, Comment on EC, Request for Interim Review, paras. 38-52.
[1548] EC, FWS, para. 567. The EC explained the three "requirements" in paragraphs 570-582. EC, FNCOS, para. 73.

BCI deleted, as indicated **[***]**

to demonstrate any of the requirements of Article 3.1(a) and footnote 4 of the SCM Agreement: the United States has not demonstrated any condition of export performance; neither that the grant of a subsidy is the consequence of that condition being fulfilled; nor the required contingency".[1549] Similarly, in its answer to Panel Question 79, the European Communities recalled that "consistent with the case law, it distinguishes three elements of the prohibition on export subsidies: the required condition (export performance or exportation or export earnings); the required consequence (the grant of a subsidy); and the required relationship between the first two things (the required contingency)" and that "{i}n order to assess the United States claims, and to fully appreciate the arguments of the European Communities made in its first written submission (and eventually also in its rebuttal), it is essential to keep the distinctions between these three elements constantly in mind".[1550]

6.116 This presentation of the legal framework of Article 3.1(a) and footnote 4 is one that cannot be found in previous WTO dispute settlement proceedings dealing with prohibited export subsidies. In our view, it is a novel understanding of the elements of Article 3.1(a) and footnote 4, and for this reason, we reject the modifications to paragraph 7.625 of the Interim Report requested by the European Communities. However, we have made some modifications to this paragraph (now paragraph 7.630) in order to more precisely articulate the European Communities' arguments.

6.117 The European Communities is also concerned about certain statements in paragraphs 7.627 and 7.628 of the Interim Report which it considers indicate that it is arguing that "the existence of a subsidy contingent in fact upon export performance can *only* be demonstrated by adducing a document pursuant to which a recipient is legally required to satisfy a performance obligation that cannot be achieved without exports". The European Communities submits that it never made this argument.[1551]

6.118 Paragraph 7.627 of the Interim Report states that "according to the European Communities, contingency in fact upon anticipated export performance arises when the measure granting a subsidy legally requires the recipient to satisfy a performance condition that cannot be achieved without exports, irrespective of whether those exports (or that performance) actually takes place". In paragraph 7.628, we concluded that "we see nothing in the ordinary meaning of the word 'contingent' to support the view that the required link between the anticipation of export performance and the granting of a subsidy can only be established by proving the existence of a legal obligation to achieve that anticipated performance." Thus, in the Interim Report, we did not indicate that the European Communities argued that it is necessary to *adduce a document* pursuant to which a recipient is legally required to satisfy a performance obligation that cannot be achieved without export in order to establish that a subsidy is, in fact, granted contingent upon anticipated export performance. Rather, the focus of the relevant paragraphs was our understanding of the circumstances the European Communities considered would show that a subsidy is granted contingent, in fact, upon anticipated export performance. They did not address the *type of evidence* that could be used to demonstrate those circumstances.

6.119 In this regard, we note that, in its second non-confidential oral statement, the European Communities presented what it described as "a succinct and simple re-statement of how the European Communities sees the overall design and architecture of Article 3.1(a) and footnote 4", in particular at paragraphs 116-122. The European Communities expressed the "hope{} that the Panel may return to this statement as a point of reference to guide it in its future deliberations".[1552] The European Communities drew from the contents of this oral statement to answer Panel Question 175.

[1549] EC, FNCOS, para. 68.
[1550] EC, Answer to Panel Question 79.
[1551] EC, Request for Interim review, pp. 10 and 11.
[1552] EC, SNCOS, para. 115.

BCI deleted, as indicated **[***]**

Paragraph 7.626 of the Interim Report quotes passages from both submissions which are relevant for the purpose of understanding the European Communities' interpretation of Article 3.1(a) and footnote 4 of the SCM Agreement.

6.120 In order to fully appreciate the European Communities' "re-statement" of its interpretation of Article 3.1(a) and footnote 4, it is important to understand the meaning it gives to "actual or anticipated" exports. The European Communities submitted a detailed exposition of its view on the meaning of this term in its second written submission, in particular at paragraphs 233, 235, 237-238 and 244-245. Based on that exposition, it is in our view clear that the European Communities is of the view that an "anticipated" export is not an export that is "anticipated" in the sense that it is expected by a granting authority at the time of the granting of a subsidy. Rather, according to the European Communities, an "anticipated" export is one that has not yet occurred but will take place in the future.

6.121 We find it difficult to understand how it would ever be possible to show, at the time of the granting of a subsidy, that an export that has not yet taken place will occur, if not by demonstrating the existence of an obligation or requirement to export at that very same moment. This leads us to conclude that the European Communities must be arguing that the grant of a subsidy that is contingent upon *anticipated* export performance can *only* be demonstrated by showing that a subsidy has been granted pursuant to a measure requiring the recipient to satisfy a performance condition that cannot be achieved without exports, irrespective of whether those exports (or that performance) actually takes place. Although rejecting this characterisation of its arguments in the Interim Report, the text proposed by the European Communities to replace the description of its arguments found in the Interim Report provides little, if any, clarification of how its views differ from the description in the Interim Report.[1553] Moreover, we observe that in its own submissions the European Communities stated:

> "By arguing that the required condition is the "anticipating of" exports – whether or not the "anticipated" export ever "actually" (as that term is understood by the United States) takes place - the United States is arguing that the requirement of contingency that is at the heart of the provision can be replaced by mere consideration – that is, consideration by the granting Member that exports *might* occur in the future, rather than imposition by the granting Member of a requirement that the recipient export in order to obtain the subsidy."[1554]
>
> "...the EC is saying that the measure enacting the initial grant must provide that the subsidy is granted contingent upon export, and that the measure must also provide that it is only export (whether in the past or in the future) that completes the grant and triggers the right to receive or retain the funds unconditionally."[1555]

[1553] For instance, the EC requested that we replace the sentence "In other words, according to the EC, contingency *in fact* upon *anticipated* export performance arises when the measure granting a subsidy *legally requires* the recipient to satisfy a performance condition that cannot be achieved without exports, irrespective of whether those exports (or that performance) actually takes place" appearing in paragraph 7.627 with "In other words, according to the EC, contingency *in fact* upon *anticipated* export performance arises when ***the facts demonstrate the existence of a*** measure granting a subsidy ***contingent upon export performance.*** The EC requested similar modifications elsewhere in this paragraph, and asked the Panel to take them into account in paragraph 7.628, where we evaluated the EC' argument. However, merely replacing the characterisation of its argument with text that essentially repeats the language of Article 3.1(a) does little to clarify what the EC understands that provision to mean.

[1554] EC, SWS, para. 245 (emphasis added).

[1555] EC, SWS, para. 122 (emphasis added).

BCI deleted, as indicated **[***]**

> "To succeed, the United States had to cite a provision in the measure stating that if the condition referred to in Article 3.1(a) (export performance) is fulfilled then the legal consequence referred to in Article 3.1(a) (the grant of the subsidy) results".[1556]
>
> "The United States has "failed to demonstrate any of the requirements of Article 3.1(a) and footnote 4 of the SCM Agreement: the United States has not demonstrated any condition of export performance; neither that the grant of a subsidy is the consequence of that condition being fulfilled; nor the required contingency".[1557]

6.122 Having carefully reviewed the European Communities original arguments in this context, and taking as a whole its arguments on the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement, and in particular its interpretation of "anticipated" export performance, we can only understand its legal argument to express the view that a subsidy will be contingent upon anticipated export performance **only** when the measure granting the subsidy requires the recipient to satisfy a performance condition that cannot be achieved without exports, irrespective of whether those exports, or that performance, actually takes place. Thus, we believe we have correctly understood and accurately described the European Communities' arguments on this issue.

6.123 For all of the above reasons, we deny the European Communities' request to make changes to paragraphs 7.626 to 7.628 of the Interim Report. However, in the light of our reconsideration of its arguments, we have modified paragraphs 7.625-7.631 (now paragraphs 7.630 – 7.637) in order to more clearly articulate our understanding of the European Communities' arguments.

3. Paragraph 7.633

6.124 The European Communities argues that the final sentence of paragraph 7.633 of the Interim Report, and consequently paragraph 7.636 of the Interim Report, are not an appropriate characterisation of its arguments. In particular, the European Communities asserts that it "has repeatedly stated that a measure providing for a subsidy contingent upon export is WTO-inconsistent whether or not exports occur, as the Panel itself records in para. 7.626 of the interim report".[1558]

6.125 The United States notes that paragraphs 7.633 and 7.636 of the Interim Report accurately reflect the United States' understanding of the European Communities' arguments. Therefore, the United States argues that there is no reason to amend these paragraphs, and asks the Panel to reject the European Communities' request.[1559]

6.126 As noted above,[1560] the characterisation of the European Communities' arguments on the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement set out and evaluated in paragraphs 7.633 to 7.636 of the Interim Report was that advanced by the United States. This is explicitly stated in the relevant passages. To avoid any confusion, we have made some modifications to paragraphs 7.633 and 7.636 (now paragraphs 7.639 and 7.642) reiterating this fact.

4. Paragraph 7.645, second bullet point and paragraph 7.655, seventh bullet point

6.127 The European Communities asserts that the United Kingdom government sought repayment of LA/MSF for the A380 over **[***]** deliveries, and not the **[***]** deliveries mentioned in

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[1556] EC, FWS, para. 591 (emphasis added).
[1557] EC, FNCOS, para. 68 (emphasis added).
[1558] EC, Request for Interim Review, p.11.
[1559] US, Comment on EC, Request for Interim Review, para. 53.
[1560] See paragraph 6.113 above.

BCI deleted, as indicated **[***]**

paragraph 7.645 of the Interim Report, second bullet point, and paragraph 7.655 of the Interim Report, seventh bullet point. The European Communities requests that these passages be corrected accordingly.[1561]

6.128 The United States does not oppose the European Communities' request, and proposes specific language which it considers could give effect to the European Communities' request.[1562]

6.129 We have carefully reviewed the facts, and have revised the second bullet point of paragraph 7.645, and the seventh bullet point of paragraph 7.655 (now paragraphs 7.651 and 7.661) to more clearly reflect the facts.

5. Paragraph 7.655, fourth bullet point, items (h) and (i)

6.130 The European Communities requests that additional text be inserted into paragraph 7.655 of the Interim Report, fourth bullet point, items (h) and (i) in order to ensure that the Report records its response to the United States' allegations concerning the evidence identified in those passages.[1563]

6.131 The United States submits that the European Communities' requests seek to have reflected in items (h) and (i) of paragraph 7.655 of the Interim Report arguments that either do not, or do not entirely, match the matters discussed therein. Accordingly, the United States asks that should the Panel make any modification to these passages of the Interim Report, it should mirror the limited focus of the matters set out in those passages.[1564]

6.132 We have reviewed the European Communities' arguments and consider that much of the language it requests be inserted in the relevant passages does not constitute a *specific* response to the precise evidence identified by the United States, but rather a general response to the United States' reliance on this and other "additional" evidence overall. Therefore, it does not belong in the passages the European Communities asks to modify. Nevertheless, we have included the European Communities' arguments in paragraph 7.655 (now paragraph 7.661) in order to ensure that they are recorded in the Report, and have in addition modified paragraph 7.655 (now paragraph 7.661), fourth bullet point, item (i), so as to capture what we understand to be the European Communities' specific response to the evidence identified therein.

6. Paragraphs 7.674 - 7.682

6.133 The United States requests that, "in the interest of completeness", a footnote be added to the end of paragraph 7.673 of the Interim Report noting the European Communities' alleged refusal to provide the French, Spanish, and UK A380 LA/MSF applications, and the German and Spanish A380 project appraisals, as well as the absence of any explanation for the European Communities' alleged refusal. The United States declares that it does not understand the European Communities to dispute the fact that it did not provide these documents.[1565]

6.134 The European Communities submits it is incorrect to state that it "refused to provide" the French, Spanish and UK A380 LA/MSF applications because such documents were never requested by either the United States (in the Annex V process) or the Panel. Accordingly, the European Communities asks the Panel to not only reject the United States' request, but also to revise footnotes

[1561] EC, Request for Interim Review, p.11.
[1562] US, Comment on EC, Request for Interim Review, para. 54.
[1563] EC, Request for Interim Review, pp.11-12.
[1564] US, Comment on EC, Request for Interim Review, paras. 55-56.
[1565] US, Request for Review, para. 19.

2745, 2760, 2816 and 2908 and paragraph 7.677 of the Interim Report, which record the United States' assertion that the European Communities "refused to provide" a particular LA/MSF application, with text it considers would provide a more even-handed account. As regards the United States' comments concerning the "critical project appraisals", the European Communities explains that Germany and Spain **[***]**. The European Communities recalls that in its response to Question 13(f) of the Facilitator during the Annex V process, it explained that it had provided all copies of "the available critical project appraisals". Thus, the European Communities asks the Panel to reject the United States' request because it submits that it is incorrect to assert that (i) it "failed to provide" the German and Spanish "critical project appraisal" documents for the A380, when there were no such documents available; and that (ii) it "offered no explanation" for not providing these documents, given that it noted in its answer to Question 13(f) of the Facilitator that it had provided all "available" copies.[1566]

6.135 No questions posed during the Annex V process *specifically* requested the European Communities to provide copies of the relevant LA/MSF applications. Although it could be argued that the relevant A380 LA/MSF applications fell within the scope of the information requested under the more general questions asked by the Facilitator,[1567] in our view, such questions were too broad to conclude that the European Communities should have realised that the United States was requesting it to provide copies of the A380 LA/MSF applications. This is particularly so when such questions are considered in the context of the many specific questions asked by the United States for particular documents. In this light, the United States' allegation that the European Communities failed to provide the LA/MSF application for the German A380 contract, recorded in footnotes 2745, 2760 and 2816, and paragraph 7.677 of the Interim Report, is not entirely accurate. While these passages of the Interim Report do not express any view on the part of the Panel as to whether the United States is correct, leaving them as they are may create the impression that the Panel agrees with the United States. Thus, we have made several changes to footnotes 2745, 2760 and 2816, and paragraph 7.677 (now footnotes 3087, 3103, and 3163, and paragraph 7.683) in order to clarify this point.

6.136 On the other hand, the European Communities **was** specifically asked by the Facilitator to provide copies of "any 'critical project appraisals'", in Question 13(f).[1568] The European Communities notes that in answering this question, it explicitly stated that it had provided "a copy of the available critical project appraisals", which included the French and UK government "critical project appraisals" for the A380. However, it did not explain, as it has now in its comments to the United States request for interim review, that the reason no German and Spanish "critical project appraisals" were provided was that these governments applied a "continuous" approach to critically appraising the projects. Had the European Communities explained this in its answer to Question 13(f), the United States would have at least known that the German and Spanish "critical project appraisals" were recorded in various documents. The United States could thereafter have asked the Panel to request the European Communities to produce these documents during the course of the Panel proceeding. In this light, we have modified footnotes 2901 and 2904 (now footnotes 3248 and 3251) to reflect the United States' concerns.

[1566] EC, Comments on US Request for Interim Review, pp.7-9.

[1567] For instance, Question 23 reads: "Please provide information and documents that relate to Airbus member State support for the development and/or production of the A380, including but not limited to: (a) ... (b)". EC, Answers to Questions by the Facilitator under Annex V, Exhibit US-5 (BCI).

[1568] Question 13(f) reads: "Please provide information and documents that relate to the implementation and use of launch aid by Airbus, broken down by Airbus entity, Airbus member State, Airbus model, including, but not limited to: ... (f) all risk assessments performed with respect to that government support, including any "critical project appraisals". EC, Answers to Questions by the Facilitator under Annex V, Exhibit US-5 (BCI).

BCI deleted, as indicated **[***]**

7. Paragraph 7.677

6.137 The United States argues that the Panel's conclusion in paragraph 7.677 of the Interim Report, that the UK A380 LA/MSF contract was concluded at least in part on the condition or because of the UK government's anticipation of exportation, does not reflect any consideration of the UK A380 Project Appraisal or the related HSBI comments provided by the United States. The United States requests that paragraph 7.677 of the Interim Report be modified to reflect consideration of this evidence.[1569]

6.138 The European Communities submits that the HSBI comments the United States refers to in support of its request asserted that the UK A380 critical project appraisal established that the UK government *anticipated* exportation or export earnings. The European Communities submits that the United States provides no basis for the Panel to take these comments into account for the purpose of the conclusion reached in paragraph 7.677 of the Interim Report, and therefore asks the Panel to reject the United States requested amendment.[1570]

6.139 The United States' HSBI appendix to its first written submission raised the UK A380 critical project appraisal in order to support two of its assertions: (i) that the UK government anticipated exports; and (ii) that the UK government contractually "tied" repayment of LA/MSF to Airbus making a number of sales that must have necessarily involved exports. The United States' reliance on the UK critical project appraisal in this regard is already noted and considered in paragraphs 7.645 (footnote 2741) (anticipated exports), footnote 2813 and 7.672 (footnote 2897) (export contingency) of the Interim Report. Paragraph 7.677 of the Interim Report evaluates the evidence and arguments the United States advanced that were "additional" to those already set out and addressed in the previous paragraphs of the Interim Report in respect of the question of export contingency. We therefore consider the changes requested by the United States to be unnecessary and redundant, and decline to make them.

8. Paragraph 7.679

6.140 The United States submits that the first sentence of paragraph 7.679 of the Interim Report is incorrect when it states that "{t}he only other specific piece of evidence the United States relies upon is the statement reportedly made by French Prime Minister, Lionel Jospin in March 2000 ....". The United States submits that this statement does not reflect any consideration of the French A380 Project Appraisal or the related HSBI comments provided by the United States in its first written submission. The United States requests that paragraph 7.679 of the Interim Report be modified to reflect consideration of this evidence.[1571]

6.141 The European Communities contends that the HSBI comments the United States refers to in support of its request asserted that the French A380 critical project appraisal established that the French government *anticipated* exportation or export earnings. The European Communities notes that these comments have already been taken into account by the Panel at paragraphs 7.645-7.646 of the Interim Report. Thus, the European Communities asks the Panel to reject the United States' requested amendment.[1572]

6.142 The United States relies on the French government critical project appraisal for the A380 in essentially the same way that it relies upon the UK government's critical project appraisal for the

[1569] US, Request for Interim Review, para. 20.
[1570] EC Comment on US, Request for Interim Review, p.9.
[1571] US, Request for Interim Review, para. 21.
[1572] EC Comment on US, Request for Interim Review, p.9.

BCI deleted, as indicated **[***]**

A380, that is, to support two of its assertions: (i) that the French government anticipated exports; and (ii) that the French government contractually "tied" repayment of LA/MSF to Airbus making a number of sales that must have necessarily involved exports. The Interim Report notes and considers the United States' reliance on the French government's critical project appraisal for the A380 in paragraphs 7.645 (footnote 2741) (anticipated exports) and 7.672 (footnote 2897) (export contingency) of the Interim Report. Moreover, the particular paragraphs of its HSBI appendix the United States requests be reflected in paragraph 7.679 of the Interim Report deal with the question whether the French government anticipated exports. However, this is not what paragraph 7.679 of the Interim Report is about. Paragraph 7.679 of the Interim Report evaluates the evidence and arguments the United States advanced that were "additional" to those already set out and addressed in the previous paragraphs of the Interim Report in respect of the question of export contingency. In this light, we decline to make the changes requested by the United States, as we did with respect to the United States' request concerning paragraph 7.677 of the Interim Report.[1573] However, we have modified paragraph 7.679 (now paragraph 7.685) in order to clarify our views.

9. Paragraphs 7.690-7.710

6.143 The European Communities asks the Panel to evaluate the United States' in law export contingency claims before its in fact export contingency claims. According to the European Communities, "one cannot measure indirect evidence against a standard without first having a precise and clear understanding of what that standard is. In the present case, that precise and clear understanding would be the meaning of in law contingency."[1574]

6.144 The United States argues that the European Communities has provided no explanation as to what aspects of the claims compel the Panel to follow its preferred order of analysis. The United States recalls that, as the European Communities has recognized throughout these proceedings, the legal standard for *de jure* and *de facto* export contingency claims is the same. In its view, the Panel does not need to conduct an analysis of *de jure* claims first in order to "understand" the standard it must apply to *de facto* claims.[1575]

6.145 The European Communities' request presupposes that the legal standard applicable to claims of in fact export contingency cannot be ascertained without first determining what the legal standard is for in law export contingency claims. However, as we note in the Report, the legal standard applicable to in law and in fact export contingency claims under Article 3.1(a) of the SCM Agreement is the same.[1576] The only difference between the two types of claims is the evidence that may be relied upon for the purpose of their substantiation. Moreover, we note that in other dispute settlement proceedings, panels faced with in fact export contingency claims have not evaluated them by first determining what the legal standard is for in law export contingency and then assessing whether the facts before them satisfied this standard. Indeed, given that the legal standard is the same, it would in our view make little sense to do so. We therefore deny the European Communities' request.

[1573] See paragraph 6.139 above.
[1574] EC, Request for Interim Review, p.12.
[1575] US, Comment on EC Request for Review, para. 57.
[1576] See below, paras. 7.696 - 7.701 (corresponding to paras. 7.690-7.695 of Interim Report).

BCI deleted, as indicated **[***]**

I. WHETHER CERTAIN EUROPEAN INVESTMENT BANK LOANS TO AIRBUS ARE SPECIFIC SUBSIDIES WITHIN THE MEANING OF ARTICLES 1 AND 2 OF THE SCM AGREEMENT

1. Paragraphs 7.744, 7.747, 7.781, 7.795, 7.814, 7.854, 7.856, 7.857, 7.862 and 7.875

6.146 The European Communities argues that the Interim Report incorrectly characterised the EIB's lending activities as "not-for-profit" in paragraphs 7.744, 7.747, 7.781, 7.795, 7.814, 7.854, 7.856, 7.857, 7.862 and 7.875 of the Interim Report. According to the European Communities, all of the evidence before the Panel only confirms that the EIB is "a not-for-profit institution". In the view of the European Communities, nowhere in the evidence before the Panel was there any reference that the "lending activities" of the bank have a "non-profit nature". The European Communities argues that the Interim Report confuses the non-profit nature of the EIB as *an institution* with the nature of its *lending activities*. Accordingly, it asks the Panel to rectify this alleged error of assessment in the relevant paragraphs.[1577]

6.147 The United States considers that the European Communities' requests are based on a highly selective reading of the Interim Report and the relevant evidence. The United States points to various pieces of evidence reviewed by the Panel that it argues show that the interest rates charged to EIB clients cover only the costs of EIB borrowing and operations but do not provide for any profit, and which, when combined, lead the Panel to conclude in paragraph 7.747 of the Interim Report that EIB lending is non-commercial.[1578]

6.148 Our finding concerning whether the evidence about the nature and function of the EIB (beginning at paragraph 7.741 of the Interim Report) demonstrates that the EIB's loans are provided at non-commercial interest rates, is set out in paragraph 7.747 of the Interim Report. This paragraph does not draw any conclusion about whether the EIB's lending activities are not-for-profit. Rather, it concludes that "... the evidence ... reviewed on the nature of the EIB's lending activities (especially its non-profit-making nature) indirectly supports the view that the rate of return it obtains on the loans it grants to borrowers (including those challenged by the United States in this dispute) is below the rate of return that would be demanded by a commercial lender, thereby conferring a benefit within the meaning of Article 1.1(b) of the SCM Agreement." Eight of the nine remaining paragraphs identified by the European Communities all refer to the findings made in respect of the "nature of the EIB's lending activities" in paragraph 7.747 of the Interim Report, namely, that the evidence before the Panel indirectly supports the view that the EIB's loans are provided at non-commercial interest rates. Thus, contrary to the European Communities' view that all 10 of the cited paragraphs refer to the EIB's not-for-profit *lending activities*, only paragraph 7.744 of the Interim Report explicitly describes the EIB's *lending activities* as not-for-profit.

6.149 While it is true that there is no evidence that explicitly characterises the EIB's *lending activities* as not-for-profit, the evidence that has been submitted, in our view, strongly suggests this to be the case. In this regard, we note particularly Exhibits US-160 and US-151 (both referred to in the Interim Report). In both exhibits, statements authored by the EIB indicate that as a "not-for-profit institution" it is able to pass on the benefits of its ability to borrow funds on the capital markets at AAA credit rating levels to its clients at "fine rates". The statements explain that the interest rates charged include only "a small margin {above its borrowing cost} to cover operating expenses", namely, "administrative expenses and other costs". Thus, in describing the level of interest charged on its client loans, the EIB makes no mention of any profits. On the contrary, the EIB's statements indicate that the interest rates charged to clients only cover costs. This is consistent with Article 19 of the EIB Statute, which provides that:

[1577] EC, Request for Interim Review, pp.12-13.
[1578] US, Comment on EC, Request for Interim Review, paras. 58-60.

BCI deleted, as indicated **[***]**

> "Interest rates on loans to be granted by the Bank and commission on guarantees shall be adjusted to conditions prevailing on the capital market and shall be calculated in such a way that the income therefrom shall enable the Bank to meet its obligations, to cover its expenses and to build up a reserve fund as provided for in Article 24."[1579]

6.150 While the European Communities contests the characterisation of the EIB's lending activities as "not-for-profit", it has not at any stage during these proceedings asserted that the EIB includes a *profit* margin in the interest rates charged on its client loans. Neither has the European Communities pointed to any evidence before us that could substantiate such an assertion. It is true that in addition to needing to cover expenses, the EIB must, according to Article 19 of its Statute, also "build up a reserve fund". The European Communities explained during the proceedings in this dispute that "{i}f the EIB's reserve is reduced (for example as a result of loan losses and/or the use of funds sitting on EIB's reserve fund to finance a capital increase) then the EIB may need to increase its interest rate in order to ensure compliance with its obligations under Article 24 of the EIB Statute which requires it to build up a 10% reserve fund".[1580] Thus, in addition to covering its costs, the interest rates charged by the EIB on its loans may also contain a margin for its reserve fund. However, even assuming, arguendo, that any such reserve fund margin could be viewed as akin to a profit margin, it is clear from the European Communities' own description that it will not always be included in the interest rate charged by the EIB.

6.151 In view of the foregoing, we deny the European Communities' request to amend paragraphs 7.744, 7.747, 7.781, 7.795, 7.814, 7.854, 7.856, 7.857, 7.862 and 7.875 of the Interim Report. However, we have modified paragraph 7.744 (now paragraph 7.750), in order to more accurately reflect the evidence.

2. Paragraph 7.753 and footnote 3041

6.152 The European Communities requests that the last sentence in footnote 3041 of the Interim Report, where it contends the Panel "speculated" that the funds used to finance the 2002 loan to EADS might well have been sourced from the Eurodollar bond market, be deleted.[1581]

6.153 The United States considers that the statement at issue reflects an appropriate exercise of the Panel's discretion when evaluating the evidence and should therefore not be deleted as the European Communities requests. Nevertheless the United States suggests that footnote 3041 of the Interim Report could be modified to clarify that the statement in the last sentence, while not based on evidence specifically on the point being made, is an appropriate inference to draw from the evidence that is before the Panel.[1582]

6.154 At paragraph 7.753 of the Interim Report, we considered the relevance of the Eurodollar Bond Index relied upon by the United States for the purpose of constructing its market interest rate benchmark for the 2002 loan to EADS. Footnote 3041 of the Interim Report reflects one aspect of our thinking with respect to that issue, and therefore, we decline to make the change requested.

3. Paragraphs 7.760 and 7.779

6.155 The European Communities requests that references to "project-specific" obligations and costs in paragraphs 7.760 and 7.779 of the Interim Report be deleted. According to the European

[1579] Exhibit EC-157.
[1580] EC, Answer to Panel Question 179.
[1581] EC, Request for Interim Review, p.13.
[1582] US, Comment on EC, Request for Interim Review, paras. 61-65.

BCI deleted, as indicated **[***]**

Communities, its submissions on the obligations and costs discussed in these paragraphs used the term "project-related". Moreover, the European Communities argues that the word "specific" has a distinct meaning in the context of the SCM Agreement as a result of which the term used in the Interim Report may be misunderstood.[1583]

6.156 The United States submits that the change in terminology requested by the European Communities would not accurately reflect the nature of those obligations and costs and is therefore not warranted. Accordingly, the United States asks the Panel to reject the proposed changes.[1584]

6.157 We recognize that, overall the European Communities did not use the term "project-specific", but rather the term "project-related" in its submissions when describing the "additional" costs it argued are incurred in connection with EIB financing. However, in responding to Panel Question 176, the European Communities explained that the costs associated with EIB financing were additional to those incurred with bond financing instruments because the latter "were made for 'general corporate purposes' and were not project-specific". Thus, although the European Communities generally described the costs at issue as "project-related", when comparing them to the costs associated with the bond instruments used by the United States to establish the proposed interest rate benchmark, the European Communities also indirectly described them as "project-specific" costs. In light of the foregoing, we have replaced the term "project-specific" with the term "project-related" in paragraphs 7.760 and 7.779 (now paragraphs 7.766 and 7.785), except where the former is used in the context of explaining the European Communities' argument in respect of the costs associated with bond financing.

4. Paragraphs 7.783, 7.791 and 7.793

6.158 The European Communities does not agree with the conclusion expressed at paragraph 7.791 of the Interim Report that *one* of the purposes of a commitment fee is to compensate a lender for the risk that a borrower's credit rating will deteriorate between the time the interest rate is set in a loan contract and the disbursement of funds to that borrower. According to the European Communities, the evidence before the Panel, and the position of the European Communities, only confirmed that a commitment fee is requested in return for tying up the capital of the lender and to compensate the lender for committing to a loan. Thus, the European Communities asserts that there is no connection between the commitment fee and the creditworthiness evolution of the borrower. In its view, a commitment fee has to do with the lender's liquidity constraint, not the borrower's credit standing.[1585]

6.159 The United States submits that there is no merit to the European Communities' request. The United States points out that both the NERA EIB Report and Brealey and Myers support the view that commitment fees are intended to compensate lenders for agreeing, at the time of the conclusion of a loan contract, to provide funding at a later date on interest rate terms reflecting, *inter alia*, the credit worthiness of the borrower at the time the loan contract was concluded. Thus, the United States suggests that should the Panel decide to make any changes to the relevant paragraphs, it should be only to remove any reference to the European Communities' agreement with this proposition.[1586]

6.160 During the proceedings in this dispute, when asked to elaborate its view on the meaning of "commitment fee", the European Communities drew support from the same passage of the Brealey and Myers text relied upon by the United States.[1587] This passage, which also informed our own

[1583] EC, Request for Interim Review, p.13.
[1584] US, Comment on EC, Request for Interim Review, paras. 66-68.
[1585] EC, Request for Interim Review, p. 13.
[1586] US, Comment on EC, Request for Interim Review, paras. 69-72.
[1587] EC, Answer to Panel Question 179.

understanding, explained that a commitment fee was an extra cost charged by banks in exchange for which a borrower:

> "receives a valuable option: It has guaranteed access to the bank's money at a fixed spread over the general level of interest rates. This amounts to a put option, because the firm can sell its debt to the bank on fixed terms even if its own creditworthiness deteriorates or the cost of credit rises". (emphasis added)

As we understand it, this passage suggests that a commitment fee is not only related to the risk associated with a lender's "liquidity constraint" ("cost of credit"), as the European Communities now argues, but also the creditworthiness of the borrower. Moreover, in explaining that a commitment fee is a cost "associated with commercial loans guaranteeing the borrowing entities immediate access to a lending bank's money 'at a fixed spread over the general level of interest rates'", the European Communities noted:

> "By contrast to the types of loans considered by Brealey, the challenged EIB loans extended under 'open-rate' contracts do not guarantee the entities access to EIB funds at a fixed spread over a general level of interest. This is true irrespective of whether or not the borrower's 'credit worthiness deteriorates' or 'cost of credit rises'."[1588]

6.161 Thus, while the European Communities argued that commitment fees are ordinarily charged on commercial loans when a borrowing entity is offered "immediate access" to a loan "at a fixed spread over the general level of interest rates", it is less than clear, on the basis of the arguments advanced during the proceeding, that the European Communities did not consider such fees to, at least in part, compensate for the risk that the borrower's credit rating might deteriorate, *in addition* to the possibility that the cost of credit for the bank might increase.

6.162 Nevertheless, as it has now clarified its argument in this regard, we have made changes to paragraphs 7.784, 7.791 and 7.793 (now paragraphs 7.790, 7.797, and 7.799) to accurately reflect the European Communities' position. Despite this clarification, we have left unchanged our overall conclusion on the purpose of a commitment fee.

5. Paragraphs 7.733-7.833

6.163 The European Communities expresses its disagreement with the benefit/benchmark analysis for the EIB loans contained in paragraphs 7.733 to 7.883 of the Interim Report. The European Communities contends that the evidence it had advanced was wrongly dismissed, and that more credibility and weight was unjustifiably ascribed to the United States' proposed benchmarks.[1589] Apart from making this statement, the European Communities has neither identified any particular error in the Interim Report, nor asked for any specific changes to the text of any of the relevant paragraphs.

6.164 The United States did not comment on this aspect of the European Communities' request for interim review.

6.165 Given that the weighing of evidence, including its credibility, is the task of the Panel, and in the absence of any substantiated arguments supporting any specific requests from the European Communities, we consider that there is no need to make any changes in response to the European Communities' comments in this regard.

[1588] EC, Answer to Panel Question 179 (emphasis added, footnotes omitted).
[1589] EC, Request for Interim Review, p.13.

BCI deleted, as indicated **[***]**

6. Paragraph 7.966

6.166 The European Communities requests that the word "would", used twice in the last sentence of paragraph 7.966 of the Interim Report, be replaced with the word "may", in order to, in its view, ensure consistency between the analyses made in paragraphs 7.966 and 7.963 of the Interim Report.[1590]

6.167 The United States considers that the European Communities' request appears to be premised on a misunderstanding of the Panel's reasoning. According to the United States, the analyses set out in paragraphs 7.966 and 7.963 of the Interim Report do not raise any questions of consistency.[1591]

6.168 We consider it useful to modify the explanation in paragraph 7.966 of the Interim Report to avoid any confusion about our views. To this end, we have revised paragraph 7.966 (now paragraphs 7.792 – 7.793), albeit not in the terms proposed by the European Communities.

7. Paragraphs 7.983-7.984 and 7.987-7.989

6.169 The United States considers that the Panel could assist the positive resolution of this dispute by providing alternative findings that complete the specificity analysis under the assumption that, as the United States proposed, "disproportionately large amounts of subsidy" and "predominant use" should be examined in the light of the i2i Programme.[1592]

6.170 The European Communities opposes the United States' request, noting that the Panel has already thoroughly addressed and assessed the United States' arguments and factual assertions on this issue. The European Communities submits that based on that assessment, the Panel concludes that the i2i was not a "programme" and was not a correct basis for the specificity analysis in the context of Article 2.1(c) of the SCM Agreement.[1593]

6.171 The United States' contention that the i2i is the relevant "programme" for the purpose of performing a *de facto* specificity analysis under Article 2.1(c) of the SCM Agreement is described and evaluated in paragraphs 7.971 to 7.982 of the Interim Report. Our conclusion leave leaves little, if any, room for doubt that we rejected the United States' contention. The United States asserts that alternative findings would contribute to a positive resolution of the dispute, but has not explained how such alternative findings would have this effect.[1594] In light of the above, we consider there is no need to prepare alternative findings on this question, and we deny the United States' request that we do so.

8. Paragraphs 7.983, 7.987 and 7.998

6.172 The European Communities proposes the insertion of a new footnote in paragraphs 7.983, 7.987 and 7.998 of the Interim Report to give more support to the observations made in those paragraphs.[1595]

6.173 The United States considers that the language proposed by the European Communities finds no support in the Panel's evaluation of specificity under Article 2.1(c), nor the evidence on the record

[1590] EC, Request for Interim Review, p.14.
[1591] US, Comment on EC, Request for Interim Review, paras. 73-76.
[1592] US, Request for Interim Review, para. 22.
[1593] EC, Comments on US Request for Interim Review, p.10.
[1594] Assuming the United States is concerned with the ability of the Appellate Body to "complete the analysis" were it to overturn the Panel's finding and consider that the i2i is the relevant "programme", there are, in our view, sufficient facts discussed in paragraphs 7.971 to 7.982 of the Interim Report to enable it to do so.
[1595] EC, Request for Interim Review, p.14.

BCI deleted, as indicated **[***]**

or even Article 2.1(c) of the SCM Agreement. Equally, the United States submits that the European Communities' own submissions do not provide support for the language it requests be added to paragraphs 7.983, 7.987 and 7.998 of the Interim Report.[1596]

6.174 In our view, there is no need to add the proposed text to paragraphs 7.983, 7.987 and 7.998 of the Interim Report in order to strengthen the observations made therein, and we therefore deny the European Communities' request.

9. Paragraph 7.996

6.175 The European Communities asserts that the funding amounts referred to in paragraph 7.996 and footnote 3449 of the Interim Report (citing Exhibits US-176 to US-181) refer to "signed" amounts of funding within the European Communities, rather than "disbursed amounts of funding".[1597]

6.176 The United States argues that the European Communities has provided no evidence to support the assertions it now makes, and notes that it is not entitled to introduce new evidence at the interim review stage of these proceedings.[1598]

6.177 We agree with the United States that the European Communities' position is an assertion without supporting evidence. Nevertheless, without modifying the text of paragraph 7.996 (now paragraph 7.1003), we consider it useful to insert a footnote in the relevant passage to reflect the European Communities' assertion.

J. WHETHER THE GERMAN, FRENCH, UK, AND SPANISH GOVERNMENTS HAVE SUBSIDIZED AIRBUS THROUGH THE PROVISION OF INFRASTRUCTURE AND INFRASTRUCTURE-RELATED GRANTS

1. Paragraphs 7.1012 and 7.1035

6.178 The European Communities requests that the Panel amend its description of the European Communities' argument concerning the evaluation of general infrastructure in paragraphs 7.1012 and 7.1035 of the Interim Report to more accurately reflect the European Communities' argument as presented, referring in this regard to paragraph 340 of the European Communities' second written submission.[1599]

6.179 The United States did not comment on the European Communities request in this regard.

6.180 The change proposed by the European Communities would amend our paraphrasing of its argument to incorporate the wording actually used in the European Communities' second written submission, which is the source referred to in the relevant footnotes. We therefore grant the European Communities' request, and have modified the relevant text in both paragraphs 7.1012 and 7.1035 (now paragraphs 7.1019 and 7.1042, respectively).

[1596] US, Comment on EC, Request for Interim Review, paras. 77-82.
[1597] EC, Request for Interim Review, p.14.
[1598] US, Comment on EC, Request for Interim Review, para. 83.
[1599] EC, Request for Interim Review, p. 15.

BCI deleted, as indicated **[***]**

2. Paragraph 7.1036

6.181 The European Communities further requests, in view of its comments on paragraphs 7.1012 and 7.1035 of the Interim Report, that the Panel amend paragraph 7.1036 of the Interim Report to delete the phrase "a proposition with which both parties appear to agree".[1600]

6.182 The United States asks that the Panel deny the European Communities' request in this regard, asserting that nothing in the comments referred to would support finding that the European Communities does not agree with the notion that there is no infrastructure that is inherently "general".[1601] Moreover, the United States notes that the European Communities does not object to the final sentence of footnote 3529 of the Interim Report which is appended to the phrase to which the European Communities objects. That footnote notes the Panel's understanding that the European Communities is not arguing that certain types of infrastructure are general *per se*, and that the European Communities argues that three factors should be considered in determining whether infrastructure is "general", and that the type of infrastructure is only one of those three.

6.183 In our view, the mere fact that the European Communities argues for a two-stage approach in determining whether limitations on the use of infrastructure are relevant to the determination whether it is general does not demonstrate that it disagrees with the proposition that there is no infrastructure that is inherently general. The European Communities points to no submission or argument it made during the proceedings which would demonstrate its disagreement with this proposition. Moreover, the European Communities argues that the term "infrastructure" means "basic goods and services in a society which underpin its economic performance" and that "general infrastructure" is provided for the benefit of the public at large, where the relevant good or service is accessible by the public at large, or where it "enables" members of the public at large, thereby fulfilling a public policy objective.[1602] The European Communities argues that determining whether infrastructure is "general" requires consideration of three factors:

> "(i) the substance of government action related to basic installations, facilities and services needed to support social as well as economic development; (ii) their public policy objective and (iii) their designation for public use by either being publicly accessible, by enabling access by members of the public at large, or by providing common goods to the public".[1603]

Based on the foregoing, its seems clear to us that the European Communities did not argue that the *nature* of infrastructure is determinative of whether it is general. Thus, we maintain our interpretation of the European Communities' position as appearing to agree with the proposition that there is no infrastructure that is inherently "general" *per se*, and deny the requested amendment.

3. Paragraph 7.1044, footnote 3547

6.184 The European Communities requests the Panel to amend its description of the facts concerning the upgrading of existing and building of new dykes in footnote 3547 to paragraph 7.1044 of the Interim Report, to reflect the European Communities' factual assertions.[1604]

6.185 The United States did not comment on this aspect of the European Communities comments.

[1600] EC, Request for Interim Review, pp. 15-16.
[1601] US, Comments on EC Request for Interim Review, paras. 84-88.
[1602] EC, FWS, para. 716.
[1603] EC, Answer to Panel Questions 90, 186 and 221; EC, FWS, para. 724.
[1604] EC, Request for Interim Review, p. 16.

BCI deleted, as indicated **[***]**

6.186 The European Communities seeks to include, in the Panel's description of the factual background of the Mühlenberger Loch project, its assertions that the upgrading of existing and building of new dykes around the existing Airbus facility and the reclaimed land "were part of the federal and regional flood protection programme for the whole of the river Elbe for the period 2002-2012. The programme, which was started in the early 1990s, required the authorities to make improvements to the existing dykes."[1605] However, the European Communities cites no evidence in support of these assertions. Paragraph 756 of the European Communities' first written submission, where these assertions are first made, cites Exhibits EC-545 and EC-549, albeit not as support for these specific assertions of fact. In any event, neither of these documents refers to the federal and regional flood protection programme, or links the work undertaken in the Mühlenberger Loch area with any required improvements to flood protection in the area. Indeed, both documents indicate that most, if not all, of the flood protection measures were necessary as a result of the land reclamation project. Thus, while we do not doubt that the work was undertaken in a manner consistent with the need for flood protection in the area and with the applicable standards, and that it was carried out consistently with the general flood protection programme, we see no basis for the conclusions proposed by the European Communities, and therefore deny this aspect of its request.

4. Paragraph 7.1059

6.187 The European Communities requests that the Panel amend paragraph 7.1059 of the Interim Report to add a footnote describing the Hamburg Real Estate Experts Committee and specifically its independence and autonomy, asserting that this would be commensurate with the Panel's description of the United States' real estate experts in footnote 3560 to paragraph 7.1048 of the Interim Report.[1606]

6.188 The United States observes that it understands that the fact that the Panel did not include the European Communities' assertions in this regard reflects that they were not relevant to the Panel's ultimate analysis.[1607] The United States does not specifically object to the European Communities' request, but requests that, should the Panel grant it, it should clearly indicate that these are the European Communities' arguments, not undisputed facts, and refer in addition to the United States' counterarguments at paragraphs 365-371 of its second written submission.

6.189 We grant the European Communities' request in part, by adding a footnote to paragraph 7.1059 (now paragraph 7.1066) describing the function of the Experts Committee. However, we have not included the European Communities' assertions as to the independence and autonomy of the Experts Committee, which the United States specifically disputed, and as to which we made no findings.

5. Paragraph 7.1061

6.190 The European Communities requests the Panel to add a sentence at the end of paragraph 7.1061 of the Interim Report summarizing the European Communities' argument concerning possible returns other than rent that justified Hamburg's investment in the creation of the land.[1608]

6.191 The United States did not comment on this aspect of the European Communities' request.

[1605] EC, Request for Interim Review, p. 16.
[1606] EC, Request for Interim Review, p. 16.
[1607] US, Comments on EC Request for Interim Review, para. 90.
[1608] EC, Request for Interim Review, p. 16.

BCI deleted, as indicated **[***]**

6.192 We have added a sentence to paragraph 7.1061 (now paragraph 7.1069) summarizing the European Communities' arguments in this regard, which were already partially reflected in paragraph 7.1055 of the Interim Report (now paragraph 7.1062 below), albeit in terms different from those proposed by the European Communities.

6. Paragraph 7.1080

6.193 The European Communities requests an amendment to paragraph 7.1080 of the Interim Report to more fully reflect the European Communities' argument that the amount the United States asserted Hamburg authorities invested in the creation of land at Mühlenberger Loch was an early estimate, and that the aggregate costs were lower, to indicate specific evidence relied upon in this regard, with a footnote reference to Exhibit EC-548, and to add a parenthetical indicating that these were the total costs foreseeable in 2006.[1609]

6.194 The United States considers that the first part of the European Communities' request is unnecessary, since the panel rejected the estimate cited by the European Communities as not representing all the relevant costs.[1610] The United States further requests that if the Panel grants the first part of the European Communities' request, it also include a more detailed explanation of the United States' argument and evidence relied upon in this regard.[1611] Finally, the United States objects to the second part of the European Communities' request, asserting that the assertion made by the European Communities is new, and that the European Communities has offered no evidentiary support for it.

6.195 We have modified paragraph 7.1080 (now paragraph 7.1088) to more fully reflect both parties' arguments, and the evidence relied upon by them, albeit in different terms than suggested by either party.

7. Paragraph 7.1087

6.196 The European Communities requests that the Panel amend the second sentence of paragraph 7.1087 of the Interim Report to reflect the "equal importance" the European Communities asserts it ascribed to the two aspects of its argument discussed in this paragraph.[1612]

6.197 The United States objects to the European Communities' request, asserting that the sentence in question reflects the Panel's characterization of the extent of the European Communities' reliance on a particular argument, and that while the European Communities may not agree with that characterization, it has provided no explanation for why that characterization is unfounded.[1613]

6.198 The sentence which the European Communities seeks to amend clearly describes our understanding as to the extent of the European Communities' reliance on the view that land reclamation is a government task. As the European Communities has made no argument now, and refers to none made previously, that would suggest that our understanding in this respect is unwarranted, we deny the European Communities' request.

[1609] EC, Request for Interim Review, p. 16.
[1610] US, Comments on EC Request for Interim Review, para. 93.
[1611] US, Comments on EC Request for Interim Review, para. 94.
[1612] EC, Request for Interim Review, p. 17.
[1613] US, Comments on EC Request for Interim Review, para 98.

BCI deleted, as indicated **[***]**

8. Paragraph 7.1086, footnote 3652

6.199 The European Communities requests the Panel to amend footnote 3652 of the Interim Report to reflect the correct source, and supplement the text of the footnote to more fully reflect the European Communities' argument.[1614]

6.200 The United States did not comment on this aspect of the European Communities' comments.

6.201 The European Communities is correct that the footnote as originally drafted cites the wrong source. The text the European Communities seeks to add to the footnote is based on the correct source which should have been cited, and therefore reflects the European Communities' argument as originally presented. We therefore grant the European Communities' request, and have amended footnote 3652 (now footnote 4004) to refer to the correct source and adding additional text.

9. Paragraph 7.1087, footnote 3655

6.202 The European Communities requests that the Panel supplement footnote 3655 of the Interim Report to cite paragraphs 1079-1089 of the European Communities' second written submission in addition to the cited reference.[1615]

6.203 The United States objects to this request, asserting that the paragraphs to which the European Communities seeks to add a reference do not deal with the question whether land reclamation conferred a benefit within the meaning of Article 1.1(a) of the SCM Agreement, but with the adverse effects caused by the provision of the infrastructure in question, noting the location of those paragraphs in the European Communities' second written submission, and the location of the Panel's consideration of those paragraphs in its Interim Report.

6.204 The European Communities provides no justification for its request. The reference in footnote 3655 of the Interim Report is the specific source for the text quoted in paragraph 7.1087 of the Interim Report, to which the footnote is appended. Moreover, we agree with the United States that the paragraphs referred to by the European Communities do not address the question of benefit, which is the subject of this section of the Interim Report, and thus are not relevant to the Panel's analysis here. We therefore deny the European Communities' request.

10. Paragraph 7.1120

6.205 The European Communities disagrees with the Panel's conclusion in paragraph 7.1120 of the Interim Report that the cost of the runaway extension was DM 40 million, arguing that it did not accept the amount of DM 40 million "as an accurate estimate, as the cost of the runway extension". The European Communities argues that there is evidence on the record showing that the actual cost of the runway extension was much lower. Consequently, the European Communities requests the Panel to revisit the evidence in the record on this matter and concludes that the City of Bremen actually paid **[***]** or at least an amount not exceeding **[***]**.[1616]

[1614] EC, Request for Interim Review, p. 17.
[1615] EC, Request for Interim Review, p. 17.
[1616] EC, Request for Interim Review, pp. 17-18.

BCI deleted, as indicated **[***]**

6.206 The United States objects to the European Communities' request in this regard, asserting that the statement that the parties do not disagree about the accuracy of the DM 40 million figure as an estimate of the cost of the runway extension is correct as a matter of fact.[1617]

6.207 Our conclusion in paragraph 7.1120 of the Interim Report was not that the European Communities accepted the amount of DM 40 million as the cost of the runway extension, but merely that that the European Communities did not dispute that this figure represented the planned expenditures, *i.e.*, an accurate estimate of the cost of the runway extension as of the date of the estimate. We continue to understand the European Communities not to dispute the accuracy of this figure as an *estimate* at the time of the costs of the runway extension. The European Communities argued, and maintains, that the estimate turned out to be wrong, and that the actual cost of the runway extension was a different, lesser amount. We considered those arguments, and concluded that the evidence presented by the European Communities did not demonstrate what the actual costs of the runway extension alone were, distinct from other aspects of the project. We therefore accepted the estimated amount, rather than the amount the European Communities asserted was the actual cost, for purposes of our analysis.

6.208 In arguing that we should revise our findings in paragraph 7.1120 of the Interim Report, the European reiterates its argument, which we rejected in the Interim Report, relying on the same exhibits, and suggesting no further relevant analysis. Taking the evidence proffered by the European Communities at face value, Exhibits EC-621 and EC-622 are, respectively, undated excerpts from (1) a budgetary plan showing amounts expensed in 1988, amounts budgeted for 1989 and 1990, and amounts committed for 1990 and (2) an overview from the City of Bremen showing actual payments for the "Relocation of the River Ochtun /extension of the runway" between 1987 and 1994. Since the latter document does not distinguish between the amounts spent for the extension of the runway, the measure at issue in this dispute, the amounts spent for the restoration of the runway and amounts spent on other aspects of this project, it is, in our view, insufficient to substantiate the European Communities' argument as to the actual cost of the runway extension. And since the former document does not show the actual expenditures for the extension of the runway, but a combination of expensed amounts for 1988, budgeted amounts for 1989 and 1990, and commitments for 1990, it is similarly insufficient to substantiate the European Communities' argument as to the actual cost of the extension. Moreover, the figures in the columns labelled "commitments" "budgeted" and "expensed" in Exhibit EC-621 do not sum to the total in the note referring to the "total costs of the extension", and the figures in that note do not sum to the total referred to in the heading of the note as the total costs of the extension. While the European Communities argues that the evidence demonstrates that the total amounts expended were less than the estimated amount, we simply cannot reach a conclusion as to the actual amount expended on the basis of the evidence before us. We therefore conclude that nothing in the European Communities' argument as now formulated, or the evidence relied upon, substantiates the amount of the actual expenditure on the runway extension, and therefore deny the European Communities' request to revisit the evidence and change our conclusion.

6.209 However, we recognize that the phrase "accurate estimate" is not clear in context, given the European Communities' position that the actual costs were lower, implying that the estimate was not "accurate", since it turned out to be wrong. Therefore, we have modified paragraph 7.1120 (now paragraph 7.1128) to clarify its meaning in this regard.

11. Paragraph 7.1124

6.210 The European Communities requests the Panel to modify the third sentence of paragraph 7.1124 of the Interim Report, to reflect that it argued that "aircraft weight bears a

[1617] US, Comments on EC Request for Interim Review, paras. 100-102.

relationship to use of the runway extension, for the simple reason that heavier aircraft require longer runways".[1618]

6.211 The United States objects to the European Communities' request, asserting, *inter alia*, that the cited European Communities' statement concerns the need for longer runways in the abstract, and does not address the question whether heavier Airbus aircraft actually required the use of the extended Bremen runway.[1619]

6.212 The point made in paragraph 7.1124 of the Interim Report is that the European Communities did not argue, and did not provide any evidence, that Airbus aircraft use the extended runway **because** they are heavier than other aircraft landing at Bremen airport. On the other hand, the United States submitted evidence indicating that other aircraft, heavier than Airbus aircraft using the extended runway, did not, barring emergencies, use the extended runway. Thus, we concluded that Airbus paid fees on the basis of aircraft weight – as did all other users of the Bremen airport – but that the fees paid by Airbus did not relate to the use of the extended runway. The European Communities does not now assert that it provided evidence that heavier aircraft require use of the extended runway, but merely that it argued that this was the case in general. Since this general proposition, even accepting it as true, does not demonstrate that Airbus paid fees for the use of the extended runway, we see no basis for the European Communities' request. We therefore deny the European Communities' request, but have modified paragraph 7.1124 (now paragraph 7.1131) to make our point more clearly.

12. Paragraph 7.1131

6.213 The European Communities requests the Panel to modify the first sentence of paragraph 7.1131 of the Interim Report by deleting the phrase "and particularly with the development and production of the A380 aircraft", asserting that the cited reference, EC, FWS, paragraph 916, while noting that Airbus France, Air France, SIDMI, CUS-Elyo, Exxon Mobil, STTS and 3R purchased land at the site, does not state that all of these companies, at the Aéroconstellation site or otherwise, were engaged "particularly with the development and production of the A380".[1620]

6.214 The United States considers that the statement in question is not properly understood as indicating that the companies that purchased the land were engaged particularly with the development and production of the A380, but rather that the statement reflects the Panel's understanding based on evidence submitted by the United States that, *inter alia*, the site was designed and built specifically for Airbus and related business, particularly in connection with A380 production.[1621] Accordingly, while the United States agrees with the European Communities' that the reference to paragraph 916 of the European Communities' first written submission may not sufficiently reference the facts underlying the Panel's statement, it suggests that rather than deleting the statement, which the United States considers factually correct as drafted, the Panel could reflect the United States' evidence in support of this statement in footnote 3741 of the Interim Report.

6.215 We note in this regard that paragraph 7.1131 of the Interim Report does not state that land in the ZAC Aéroconstellation was sold to companies "engaged particularly with the development and production of the A380" but rather that the land was sold to companies "involved in the aeronautical industry, and particularly with the development and production of the A380 aircraft" (footnote omitted). This statement reflects our understanding, based on, *inter alia*, evidence referred to by the United States in its Comments on the EC request for Interim Review, that the development of the

[1618] EC, Request for Interim Review, p. 18, referring to EC, Answer to Panel Question 96, para. 257.
[1619] US, Comments on EC Request for Interim Review, para. 103.
[1620] EC, Request for Interim Review, pp. 18-19.
[1621] US, Comments on EC Request for Interim Review, para. 107.

BCI deleted, as indicated **[***]**

ZAC Aéroconstellation was undertaken to provide a suitable site for Airbus A380 final assembly line, and related businesses, *i.e.*, companies involved in the aeronautical industry, and involved in the development and production of the A380. We therefore deny the European Communities' request, but have modified paragraph 7.1131 (now paragraph 7.1139) to more clearly explain our views.

13. Paragraph 7.1167, footnote 3840

6.216 The European Communities requests the Panel to delete the phrase "the production of A380 aircraft" from the second sentence of footnote 3840 of the Interim Report, arguing that the cited reference, the European Communities' second confidential oral statement at paragraph 31, does not state that all of the companies, at the Aéroconstellation site or otherwise, were engaged in "the production of A380 aircraft".[1622]

6.217 The United States suggests that the European Communities appears to misunderstand the statement in that footnote, which it considers to indicate that, had the French authorities not done so, "Airbus could have created the EIG facilities itself because they are necessary for its A380 production activities and for those of the other companies purchasing land in the ZAC that participate in the production of A380 aircraft." The United States proposes alternative text should the Panel agree with the United States' understanding and decide to modify the footnote.[1623]

6.218 The European Communities seems to be of the view that because we cited a reference, that reference must itself reflect the entirety of the statement in connection with which it is cited. This is not the case here. The source referenced in footnote 3840 of the Interim Report, the European Communities' second confidential oral statement at paragraph 31, is cited to reflect that the European Communities itself recognized that had the French authorities not created the EIG facilities, Airbus would have done so itself. The remainder of the sentence reflects our view as to why Airbus would have done so – because those facilities were necessary to its activities in the production of A380 aircraft, and those of other companies also involved in production of that aircraft at the ZAC site. Therefore, we deny the European Communities' request, but we have modified footnote 3840 (now footnote 4192) to more accurately reflect our views.

14. Paragraph 7.1171

6.219 The European Communities observes that paragraph 7.1171 of the Interim Report states that the Aéroconstellation project "was undertaken to suit Airbus' needs (…)", while at paragraphs 7.1131 and 7.1169, and footnotes 3839 and 3840 of the Interim Report, the Panel notes the project's utility for Airbus France as well as the other companies purchasing land at the site, and requests that the Panel "adopt a consistent approach to this question".[1624]

6.220 The United States does not consider there to be any inconsistency in the passages referred to by the European Communities, and therefore asks the Panel to decline the European Communities' request.[1625]

6.221 Paragraph 7.1171 of the Interim Report sets out our conclusion that the ZAC Aéroconstellation was not a measure of general infrastructure, which rests on our consideration of the facts concerning its creation and provision, which in our view demonstrated that "the development of the ZAC Aéroconstellation was undertaken to suit Airbus' needs, and in particular its needs in

[1622] EC, Request for Interim Review at p. 19.
[1623] US, Comments on EC Request for Interim Review, paras. 110-111.
[1624] EC, Request for Interim Review at p. 19.
[1625] US, Comments on EC Request for Interim Review, para. 114.

connection with the assembly and testing of A380 aircraft." This conclusion is not inconsistent with the other statements referred to by the European Communities, which merely reflect that other companies located at the site are also involved in the assembly and testing of A380 aircraft, and thus the development of the ZAC is useful to them in those activities, as well as in their other aeronautical industry activities at the site. We therefore deny the European Communities' request and make no changes.

15. Paragraph 7.1193

6.222 The European Communities requests the Panel to replace the first sentence of paragraph 7.1193 of the Interim Report with text quoted from the second sentence of the European Communities' first written submission at paragraph 739, which states "However, even if regional aid programmes were considered to limit access to the subsidy under Article 2.1(a) of the SCM Agreement to those enterprises located in the designated area, such programmes could be non-specific within the meaning of Article 2.1(b) of the SCM Agreement". The European Communities further requests, "for the same reason" that the Panel replace the reference to Article 2.2 at the end of the second sentence of paragraph 7.1193 of the Interim Report by "Article 2.1(a)". The European Communities notes that at paragraphs 896-907 (Nordenham) and 970-973 (July 2003 grant in Andalusia) of its first written submission, it explained its view that these regional aid grants are non-specific under Article 2.1(b), and requests the Panel to reflect this in paragraph 7.1193 of the Interim Report.[1626]

6.223 The United States requests the Panel to reject the European Communities' request to amend paragraph 7.1193 of the Interim Report, arguing that the requested change would not accurately reflect the European Communities' arguments as made.[1627] The United States notes that the Panel did not cite only the second sentence of paragraph 739 of the European Communities' first written submission, but the paragraph as a whole, which in the United States' view, taken in context, confirms that the Panel's description of the European Communities' argument is accurate. The United States considers that no change is necessary, but proposes alternative text should the Panel decide to amend paragraph 7.1193 of the Interim Report.[1628]

6.224 While the United States is correct that we did not rely on only the second sentence of the cited reference, and that therefore simply quoting that sentence would not accurately reflect the European Communities' argument summarized in this paragraph, we do consider that the summary as originally drafted may not fully reflect the European Communities' argument. However, the European Communities' proposed text does not, in our view, accurately summarize the European Communities' argument in this regard. We therefore have made certain clarifying changes to paragraph 7.1193 (now paragraph 7.1201), albeit in different terms from those proposed by the European Communities.

16. Paragraph 7.1227 and footnote 3920

6.225 The European Communities requests that the Panel reconsider the statement in footnote 3920 of the Interim Report that:

> "Although the EC asserts that the programme under which the Andalusian grants were made was generally available throughout Andalusia, the information before us supports the United States' assertions concerning the limitation to a "designated

[1626] EC, Request for Interim Review, p. 19.
[1627] US, Comments on EC Request for Interim Review, paras. 116-118.
[1628] US, Comments on EC Request for Interim Review, para. 119.

BCI deleted, as indicated **[***]**

> geographical region within the jurisdiction of the granting authority. Exhibits US-240, US-242."

The European Communities considers this statement to be incorrect as a matter of fact.[1629] The European Communities reviews evidence it submitted on this question, and requests the Panel to find that the July 2001 grant to Puerto Santa Maria and the July 2002 grant to Sevilla were not specific subsidies within the meaning of Article 2.2 of the SCM Agreement.

6.226 The United States opposes the European Communities' request, noting that the European Communities does not provide any new explanation or point to other evidence in the record, but rather asks the Panel to review, *de novo*, the arguments and evidence before the Panel, on the basis that the European Communities disagrees with the Panel's conclusion, which the United States, referring to evidence and arguments it submitted, considers to be correct.[1630]

6.227 With respect to paragraph 7.1227 of the Interim Report, the European Communities notes that, in the case of the EUR 7.6 million grant from Castilla-La Mancha in March 2004, it had argued that this grant was made under a programme providing funds throughout the granting authority, *i.e.*, the government of Castilla-La Mancha, citing its first written submission as paragraphs 979-981 and Exhibits EC-136 and EC-137. The European Communities further notes that the United States appears not to dispute this.[1631] The European Communities considers that this should be reflected in this paragraph and the subsequent analysis, and requests the Panel to find that the EUR 7.6 million grant from Castilla-La Mancha was not specific within the meaning of Article 2.2 of the SCM Agreement.

6.228 The United States opposes this aspect of the European Communities' request, again asserting that the European Communities asks the Panel to conduct a *de novo* review of arguments and evidence it has already reviewed before coming to its conclusion.[1632] The United States points out that the EUR 7.6 million Castilla-La Mancha grant is co-funded by the European Regional Development Fund, citing the second to last paragraph of the preamble of Exhibit EC-136, and asserts that it is, as such, specific under Article 2.2 of the SCM Agreement, referring to arguments at paragraph 511 of its first written submission. The United States notes that the European Communities has not disputed the participation of the European Regional Development Fund in this grant, and therefore requests the Panel to reject the European Communities' request to modify paragraph 7.1227 of the Interim Report and its subsequent analysis.[1633]

[1629] EC, Request for Interim Review, pp. 19-20.

[1630] US, Comments on EC Request for Interim Review, paras. 121-122.

[1631] EC, Request for Interim Review, p. 20. The EC asserts in particular, that United States did not contest that the legal bases for the grant from Castilla-La Mancha are the Decree 53/1998 and the Orden 25 July 2002, and that under these the regional government may grant subsidies throughout the region of Castilla-La Mancha to companies active in all economic sectors. EC, Request for Interim Review, p. 20, footnote 15.

[1632] US, Comments on EC Request for Interim Review, para. 123.

[1633] The United States also recalls that the EC had opportunity to clarify any aspect of the Castilla La Mancha grant, as it did with the other subsidies at issue in this dispute, in response to questions posed by the Annex V Facilitator. The Facilitator asked the EC and the Airbus governments to provide numerous categories of information regarding each of the grants, including the reasons for approval of the grants, all agreements or other documents providing the legal basis for the grants, and whether the grant "was part of a broader support program run by the Spanish, Castilla-La Mancha or Andalusian government, as the case may be, and, if so, a complete description of each such program, including the terms and conditions for access to funding under such program." Question 76(f), Exhibit US-4 (BCI). The EC did not respond to these questions. *See* Exhibit US-5 (BCl). US, Comments on EC Request for Interim Review, para. 123, footnote 60.

BCI deleted, as indicated **[***]**

6.229 Although the United States objects to the Panel reviewing *de novo* the evidence on which its conclusions in the Interim Report were based, in our view, it is appropriate for us to do just that in the face of a request for interim review asserting a factual error in the Interim Report. We therefore have reconsidered the evidence and arguments presented by the parties in this regard.

6.230 The European Communities, referring to its first written submission and supporting exhibits, maintains that the July 2001 grant to Puerto Santa Maria and the July 2002 grant to Sevilla were both made under a scheme of the Andalusian government, and that the applications and disbursements were managed by the *Consejería de Trabajo e Industria de la Junta de Andalucía*. The United States acknowledged that the government of Andalusia "provided" the grant to Puerto Santa Maria, and "authorized" the grant to Sevilla.[1634] Citing information submitted by the United States, Exhibits US-240 and US-242, we originally concluded that these grants were provided as part of an Andalusian government development plan for a particular geographic region within Andalusia, the Bahía de Cadiz, and thus were limited to "enterprises located within a designated geographical region within the jurisdiction of the granting authority".

6.231 Having reconsidered the evidence, we are persuaded that this conclusion was incorrect as a matter of fact. Page 14,291 of Exhibit US-240, cited by the United States, provides that the funds were granted "for a plan of action for the Bahía de Càdiz Centre (*Polígono Parque Industrial Bahía*)". Having carefully considered the evidence again, we cannot conclude that the "Plan" referred to in Exhibit US-240 is an Andalusian government development plan for the Bahia de Cadiz.[1635] It appears that the facts surrounding this grant were confounded with the facts surrounding the July 2003 grant to Puerto Real, which was made pursuant to a programme directed toward aiding development in the Bahia de Cadiz area, and which the European Communities acknowledged is not generally available throughout Andalusia.[1636] However, that programme did not come into effect until after the application for the July 2001 Puerto Santa Maria grant had been made, and thus is not relevant to the question of specificity of that grant. The United States did not assert any other basis of specificity with respect to this grant.[1637] In the absence of any other arguments or evidence of specificity, we have changed our conclusion, and determine that the 2001 grant to Puerto Santa Maria was not provided to an enterprise in a designated geographical region within the territory of the granting authority, and is therefore not specific under Article 2.2 of the SCM Agreement.

6.232 Turning to the 2002 grant to Sevilla, we recall that this grant was co-financed by the government of Andalusia and the European Regional Development Fund.[1638] The United States asserted specificity on the basis that "subsidies under the European Regional Development Fund {ERDF} are necessarily limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority," and thus are specific within the meaning of Article 2.2 of the SCM Agreement".[1639] The European Communities did not dispute the fact that the grant was co-financed by the ERDF. However, the European Communities asserted that this grant was made under the same programme as the 2001 Puerto Santa Maria grant, and asserted that it was similarly not limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority", that is, the government of Andalusia. As noted above, the

[1634] US, FWS, para. 505-506.

[1635] Exhibit US-242, also originally cited in this regard, does not even mention the Bahia de Cadiz, since it concerns the 2002 grant to Sevilla, with respect to which the United States did not assert this basis of specificity, and is therefore irrelevant.

[1636] EC, FWS, paras. 970-971.

[1637] As noted above, in footnote 1635, Exhibit US-242, also originally cited in this regard, concerns the 2002 grant to Sevilla, and is therefore irrelevant to the question of specificity with respect to the grant to Puerto Santa Maria.

[1638] US, FWS, para. 506, Exhibit US-242.

[1639] US, FWS, para. 507.

BCI deleted, as indicated **[***]**

United States acknowledged that the government of Andalusia authorized the grant to Sevilla.[1640] The United States' assertion of specificity thus implies that the fact of co-financing makes the ERDF, in effect, the granting authority, within the meaning of Article 2.2 of the SCM Agreement, with respect to the portion of this grant it financed, despite that the government of Andalusia administered the provision of the grant. The European Communities did not address this implication of the United States' argument, and, as noted, did not dispute the fact of co-financing.

6.233 In our view, it is reasonable to conclude that, while "authorized" by the government of Anadalusia, in the sense that the government of Anadalusia processed the applications and handed out the funds, the ERDF may be considered a granting authority within the meaning of Article 2.2 of the SCM Agreement for the 75 percent of this grant which it financed. As the United States noted, and the European Communities did not dispute, the purpose of the ERDF is "to provide investment in socially and economically challenged areas of Europe."[1641] Were we to accept the European Communities' position that this grant was not specific because it was authorized by the government of Andalusia under a progamme generally available in Andalusia, this would imply that European Communities' funds directed to particular regions in the European Communities, which can clearly be considered "designated geographical region{s} within the jurisdiction of the {ERDF}", could be sheltered from a finding of specificity under Article 2.2 by putting the administration of such grants in the hands of local governments. In our view, such an outcome would create a loophole in the SCM Agreement disciplines on regional subsidies, thereby undermining the object and purpose of that Agreement. We therefore deny the European Communities' request that we find that this grant was not specific under Article 2.2 of the SCM Agreement.

6.234 With respect to the 2004 grant to Castilla-La Mancha, the sole basis for a finding of specificity asserted by the United States was the fact that the ERDF co-financed the grant, a fact which is not disputed by the European Communities. For the reasons just discussed, we maintain our conclusion that this grant was specific and deny the European Communities' request that we find that this grant was not specific under Article 2.2 of the SCM Agreement.

6.235 In view of the above, we have amended paragraph 7.1227 and footnote 3920 (now paragraphs 7.1235 – 7.1237 and accompanying footnotes) to clarify our views and conclusions concerning these grants. In addition, we have made consequential conforming changes to paragraphs 7.1234 (now paragraph 7.1244), 8.1(b)(iv) and 8.3(c) (numbering unchanged) reflecting our amended conclusions.

K. WHETHER THE GERMAN GOVERNMENT'S TRANSFER OF ITS OWNERSHIP SHARE IN DEUTSCHE AIRBUS TO THE DAIMLER GROUP IS A SPECIFIC SUBSIDY TO AIRBUS

1. Paragraph 7.1235

6.236 The European Communities considers that the phrase "various transactions" in the first sentence of paragraph 7.1235 of the Interim Report is imprecise and requests that the sentence be reworded.[1642]

6.237 The United States has not made any comment in respect of this request.

6.238 We have made the changes requested by European Communities in paragraph 7.1235 (now paragraph 7.1245).

[1640] US, FWS, para. 505-506.
[1641] US, FWS, para. 506, footnote 608, citing, e.g., UK Government ERDF website, Exhibit US-245.
[1642] EC, Request for Interim Review, p. 20.

BCI deleted, as indicated **[***]**

L. WHETHER THE GERMAN GOVERNMENT HAS SUBSIDIZED AIRBUS BY FORGIVING AT LEAST DM 7.7 BILLION OF DEUTSCHE AIRBUS' GOVERNMENT DEBT

1. Paragraph 7.1302 and footnote 4060

6.239 The European Communities requests the Panel to add to its summary of the European Communities' argument at the end of paragraph 7.1302 of the Interim Report to describe it fully. In this regard, the European Communities suggests specific changes to paragraph 7.1302 of the Interim Report and the addition of a reference in footnote 4060 of the Interim Report. [1643]

6.240 The United States has not made any comment in respect of this request.

6.241 At paragraphs 297 – 301 of its Response to Panel Question 103, the European Communities explained the due process concerns that it alleges would arise if the United States were permitted to broaden the scope of the dispute to include a challenge to an element of the 1989 restructuring of Deutsche Airbus. We recall that the European Communities argued that the United States' argument, that the question whether the 1998 settlement could be considered a settlement for fair market value should involve a consideration of the terms of the original debt obligation in 1989 (specifically, the interest rate that the original debt carried), was in fact an attempt by the United States to enlarge the scope of the dispute to challenge an element of the 1989 restructuring of Deutsche Airbus. According to the European Communities, this constitutes a "new claim against a different measure" to the 1998 settlement that was not covered by the U.S. panel request or addressed in the United States' First Written Submission.[1644] At paragraphs 297-298 of its Response to Panel Question 103, the European Communities contended that it would be "seriously prejudiced and injured in its rights, as a defendant" if it were required to defend itself against "such a new and complex" claim.[1645] Specifically, the European Communities stated that it had never understood the United States to be challenging the terms of the 1989 restructuring, noting that "the terms of reference of a panel are not a moving target that can be adjusted as the complainant likes, and at the expense of the defending party."[1646] In addition, the European Communities refers to the factual complexity of the 1989 restructuring (including difficulties that arise from the fact that the measure occurred some 17 years previously), as well complex legal issues concerning the scope, meaning and temporal application of Article 6.1 of the SCM Agreement, and submitted that it cannot be expected to form a position on such issues overnight.[1647]

6.242 We have revised paragraph 7.1302 (now paragraph 7.1312) in order to more fully reflect European Communities' arguments as outlined above. However, we have used different language from that proposed, in order to more closely reflect the arguments actually made by the European Communities in paragraphs 297 – 298 of its Response to Panel Question 103.

2. Paragraph 7.1304

6.243 The European Communities requests an addition to paragraph 7.1304 of the Interim Report describing the European Communities' responses to the United States' arguments concerning the

[1643] EC Request for Interim Review, pp. 20-22.
[1644] EC, Answer to Panel Question 103, para. 301.
[1645] EC Answer to Panel Question 103, para. 298.
[1646] EC Answer to Panel Question 103, para. 297 and footnote 179.
[1647] EC Answer to Panel Question 103, paras. 299 and 300.

BCI deleted, as indicated **[***]**

nature of the benefit conferred on Deutsche Airbus by the 1998 settlement. The European Communities does not explain why it makes this request.[1648]

6.244 The United States takes the view that the additions proposed by the European Communities do not accurately reflect the European Communities' arguments as presented in paragraphs 245 and 246 of its Second Oral Statement.[1649] Indeed, the United States submits that much of what is reflected in the text proposed by the European Communities is nowhere to be found in the paragraphs of the European Communities' submissions to which the European Communities refers; *i.e.*, paragraphs 245-246 of European Communities' second non-confidential oral statement.[1650] The United States therefore requests that, if the Panel decides to modify paragraph 7.1304 of the Interim Report, it do so in a way that more accurately reflects the arguments that the European Communities actually made.[1651] [1652]

6.245 Assuming that the reason for its request is that the European Communities wishes to have additional elements of its arguments on this particular issue reflected in the Report, we are of the view that the European Communities' proposed text does not accurately summarize the arguments that it made at paragraphs 245 – 246 of its second non-confidential oral statement, although it generally reflects those arguments. Therefore, we have revised paragraph 7.1304 (now paragraph 7.1314) in different terms than those suggested by the European Communities, to more fully reflect its arguments.

3. Footnote 4074

6.246 The European Communities considers that footnote 4074 of the Interim Report imprecisely identifies the scope of the United States' claims concerning elements of the 1989 restructuring and requests that the Panel modify it. [1653]

6.247 The United States has not made any comment in respect of this request.

6.248 The European Communities' request appears to be related to the request that it makes to modify paragraph 7.1235 of the Interim Report[1654] in order to clarify that the United States has challenged only two elements of the 1989 restructuring of Deutsche Airbus. While we do not consider that there is any reason to deny the European Communities' wish for clarity on this point, in our view the European Communities' suggested modification incorrectly narrows the universe of transactions underlying the total DM 9.4 billion in accumulated claims outstanding to the German government that are being challenged by the United States to the two particular elements of the 1989 restructuring. The United States has, in fact, challenged transactions other than those arising from the 1989 restructuring that are also reflected in the DM 9.4 billion amount outstanding in 1998. The first two sentences of paragraph 7.1310 of the Interim Report distinguish between two levels of potential

[1648] EC Request for Interim Review, pp. 20-21.
[1649] US, Comments on EC Request for Interim Review, para. 124.
[1650] US, Comments on EC Request for Interim Review, para. 126.
[1651] US, Comments on EC Request for Interim Review, para. 126.
[1652] We note it may be that the United States mistakenly referred to the version of the European Communities' second non-confidential oral statement submitted on 27 July 2007, which contained different paragraph numbering to the versions submitted on 14 November 2007 and 7 December 2007. The relevant version of the European Communities' second non-confidential oral statement is that submitted on **7 December 2007**, following a series of communications between the parties and the Panel between 7 August 2007 and the submission of the revised version of the European Communities' second non-confidential oral statement on 7 December 2007.
[1653] EC Request for Interim Review, p. 21.
[1654] See paragraphs 6.236 - 6.238 above.

subsidies; namely, the original transactions between Deutsche Airbus and the German government, the principal amounts of which amounted to DM 9.4 billion by 1998, and the settlement of those claims in 1998 for a payment of DM 1.75 billion. Footnote 4074 of the Interim Report explains that some of the transactions that are part of the first level of transactions have in fact been challenged by the United States as subsidies in this dispute. It further explains that elements of the 1989 restructuring arrangement fall within this first level category of transactions. The footnote also makes clear that the United States does not challenge all of the transactions comprising the 1989 restructuring, and thus, appears to address the European Communities' concern. In light of the foregoing, we have revised footnote 4074 (now footnote 4434) in order to make this point more clearly.

M. WHETHER THE EQUITY INFUSIONS THAT THE FRENCH GOVERNMENT PROVIDED TO AEROSPATIALE ARE SPECIFIC SUBSIDIES

1. Paragraph 7.1315

6.249 The European Communities requests that the Panel revise its findings that the initial FF 1.25 billion capital contribution to Aérospatiale was made in 1987 (rather than 1988) and that the "second" capital contribution of FF 1.25 billion was made in 1988 (rather than 1989) to conclude that either: (i) the two contributions were made, respectively, in 1988 and 1989; or (ii) as a matter of cash flow, both contributions were in 1988.[1655] The European Communities contends that it correctly reported the capital contributions as taking place in 1988 and 1989, as these were the years in which the respective contributions were approved by Aérospatiale's Assemblée Générale and recorded as permanent capital by the company.[1656] The European Communities asserts that both contributions were actually received in 1988, should the Panel wish to record the capital contributions on a cash basis.[1657]

6.250 The United States requests that the Panel decline the European Communities' request to modify its finding in paragraph 7.1315 of the Interim Report.[1658] The United States notes that the arguments presented by the European Communities as to the timing of the capital contributions were considered and rejected by the Panel in paragraph 7.1315 of the Interim Report, noting that in footnote 4083 of the Interim Report, the Panel refers to the paragraph of the European Communities' first written submission that cites to Exhibits EC-172 and EC-173. The United States notes that the European Communities' only reference to Exhibit EC-746 in its submissions was in connection with its arguments concerning the benefit conferred by the capital contributions.[1659] Moreover, the United States submits that this exhibit simply evidences a decision by Aérospatiale's Assemblée Générale to increase the capital of the company, reflecting one of the steps in the chain of events *following* the capital contribution made by the French government in 1987, but not altering the underlying evidence that the French government made the capital contribution in 1987.[1660]

[1655] EC, Request for Interim Review, p. 21.

[1656] EC, Request for Interim Review, p. 21; referring to the following exhibits: Procès-Verbal de l'Assemblée Générale Extraordinaire du 27 avril 1988, Exhibit EC-746 (BCI); Aérospatiale Comptes de l'Exercice 1988, Exhibit EC-172, p. 17; Rapport du Conseil D'Administration à l'Assemblée Générale Extraordinaire du 10 février 1989, Exhibit EC-747 (BCI); Aérospatiale Comptes de l'Exercice 1989, Exhibit EC-173, p. 43.

[1657] EC, Request for Interim Review, p. 22.

[1658] US, Comments on EC Request for Interim Review, para. 131.

[1659] US, Comments in EC Request for Interim Review, para. 129; referring to EC, SWS, para. 549. In addition, we note that reference to Exhibit EC-747 was made in the context of the European Communities' arguments concerning the benefit conferred by the financial contributions; see EC, SWS, para. 548.

[1660] US, Comments on EC Request for Interim Review, para. 130.

BCI deleted, as indicated **[***]**

6.251 The fourth sentence of paragraph 7.1315 of the Interim Report states: "The exhibits to which the EC refers in support of its assertions that the relevant dates of the two capital contributions are 1988 and 1989, rather than 1987 and 1988 as alleged by the United States, actually record the capital contributions as having been made in 1987 and 1988." The exhibits in question, Exhibit EC-172, *Aérospatiale Comptes de l'Exercice 1988* (at p. 32) and Exhibit EC-173, *Aérospatiale Comptes de l'Exercice 1989* (at p. 43) are referred to in paragraph 1132 of the European Communities' first written submission. Exhibits EC-746 and EC-747, to which the European Communities now refers in support of its arguments that the dates of the relevant capital contributions were 1988 and 1989, refer to the actions of Aérospatiale, the recipient of the capital contributions by the French government, to increase its outstanding share capital as a result of the French government's financial contributions. There is no reason why the dates on which Aérospatiale undertook this corporate action should be indicative of the dates on which the funds were actually provided to it. In short, there is nothing in the two exhibits to which the European Communities now refers (Exhibits EC-746 and EC-747) that contradicts or calls into question our factual conclusions concerning the dates of the capital contributions by the French government based on Exhibits EC-172 and EC-173. We therefore deny the European Communities' request.

2. Paragraph 7.1332 and footnote 4125

6.252 The European Communities requests that the Panel delete footnote 4125 of the Interim Report in favour of a substantially expanded description of evidence addressed by the European Communities at paragraphs 1110-1124 and 1131-1160 of its first written submission, paragraphs 531-541 of its second written submission, and in Exhibits EC-166, EC-167 (BCI), EC-169 through EC-181, EC 184 through EC-186 and EC-723 through EC-745.[1661] In addition, the European Communities requests that, to fully reflect the arguments made and evidence provided by the European Communities, the Panel add to paragraph 7.1332 of the Interim Report or elsewhere, a description of the evidence provided by the European Communities at paragraphs 545 through 550 of its second written submission.[1662]

6.253 The United States has not made any comments in respect of these requests.

6.254 The European Communities appears to object to what it considers to be the Panel's "relegation" of evidence it provided in support of its arguments concerning future prospects for Aérospatiale and for the aerospace industry more generally to a one-sentence footnote.[1663] However, the discussion of the European Communities' arguments in the paragraphs that follow paragraph 7.1332 of the Interim Report (*i.e.*, paragraphs 7.1333 through 7.1340 of the Interim Report) make extensive and detailed reference to the same sections of the European Communities' submissions that the European Communities now requests be included in the substantially expanded discussion that it proposes. The evidence referred to at paragraphs 545 through 550 of the European Communities' second written submission indicates information relating to the condition and prospects of Aérospatiale that the French government was legally entitled to receive in its capacity as a shareholder of the company. This evidence appears to have been submitted in order to demonstrate that the French government, as sole shareholder of Aérospatiale, was closely informed about the business plans and prospects of the company. In light of the foregoing, rather than the expanded discussion requested by the European Communities, we have revised footnote 4125 (now footnote 4485) to indicate that the evidence in question is discussed further in paragraphs 7.1334 through 7.1340, 7.1355, 7.1359 and 7.1363 (now paragraphs 7.1344 through 7.1350, 7.1365, 7.1369, and

[1661] EC, Request for Interim Review, p. 22.
[1662] EC, Request for Interim Review, p. 22.
[1663] EC, Request for Interim Review, p. 22.

BCI deleted, as indicated **[***]**

7.1373), and have revised the footnotes in those paragraphs to explicitly identify the exhibits to which the European Communities' refers in support of the arguments described in those paragraphs.

3. Paragraph 7.1336

6.255 The European Communities requests that, to fully reflect the arguments made and evidence provided by the European Communities, the Panel insert several sentences in a footnote at the end of paragraph 7.1336 of the Interim Report.

6.256 The United States has not made any comment in respect of this request.

6.257 We have revised footnote 4133 (now footnote 4493) to more fully reflect the arguments of the European Communities.

4. Paragraph 7.1364

6.258 The European Communities requests that the Panel include a citation to the "very pessimistic statements made by management in its annual reports about prospects for recovery in the short to medium term" referred to in paragraph 7.1364 of the Interim Report.

6.259 The United States has submitted a list of evidence referred to in the submissions which the Panel might refer to in this regard.[1664]

6.260 The pessimistic statements of Aérospatiale's management in its annual reports that are referred to in paragraph 7.1364 of the Interim Report are those that are specifically described in paragraph 7.1362 of the Interim Report, and referenced in footnotes 4166, 4167, 4168 and 4169 of the Interim Report, which may have been inadvertently overlooked. Given that we did, in fact, address the matters raised by the European Communities, we deny the request, and make no changes in this regard.

[1664] US, Comments on EC Request for Interim Review, paras. 132-133. Specifically, the United States points to the following:

- Message from Louis Gallois, the Chairman of Aérospatiale, in Aérospatiale's 1993 Annual Report, that "Economic conditions will remain very difficult in 1994." US, FWS, para. 603; Aérospatiale Annual Report 1993, Message from the Chairman, Exhibit US-300, p. 3/3.
- Statement by Airbus management, as reflected in a press report, that there was a "poor outlook for military and civil sales for the next two years." US, FWS, para. 603; France rules out Aérospatiale sell-off, Flight International, 9 March 1994, Exhibit US-299.
- Statement in the Aérospatiale Annual Report for 1994 that "An upturn in orders remains uncertain for 1995, particularly new aircraft orders", Exhibit EC-293; and that "The outlook was gloomy in the short-term due to the fragile financial health of airline customers."; "Aérospatiale posts FFr 2.3bn loss", Financial Times, 26 March 1993, Exhibit US-295.
- Statement from a 1994 report of the U.S. National Research Council to the effect that long-term optimism about the market for new commercial aircraft contrasts with considerable pessimism concerning the next several years, in which most observers believe that sales will continue to decline from their 1992 peak for several more years, perhaps through 1996. EC, FWS, para. 1119; National Research Council, High Stakes Aviation: U.S.-Japan Technology Linkages in Transport Aircraft, 1994, pp. 65-66, Exhibit EC-170.

BCI deleted, as indicated **[***]**

N. WHETHER RESEARCH AND TECHNOLOGICAL DEVELOPMENT FUNDING THAT THE EUROPEAN COMMISSION AND THE MEMBER STATES PROVIDE TO AIRBUS ARE SPECIFIC SUBSIDIES

1. Paragraph 7.1410

6.261 The European Communities requests that a sentence be added to the end of paragraph 7.1410 of the Interim Report, recalling that it had expressed the view, in answering question 279 of the Facilitator during the Annex V process, that the United States' claims against the PROFIT scheme were outside of the Panel's terms of reference.

6.262 The United States did not comment on the European Communities' request.

6.263 We have revised paragraph 7.1410 (now paragraph 7.1421) to record the European Communities' position.

2. Paragraph 7.1413, third sentence and footnote 4292

6.264 The European Communities notes that the third sentence of paragraph 7.1413 of the Interim Report states that the European Communities did not provide information requested during the Annex V process "in respect of all of the alleged measures" because it considered some of the challenged measures to be outside of the temporal scope of the dispute. The European Communities asks that this sentence be amended to more accurately reflect what it asserts is the fact that it did not provide requested information during the Annex V process in respect of only *two* of the challenged R&TD measures for the reason that it considered these to be outside of the temporal scope of the dispute.[1665]

6.265 The United States did not comment on the European Communities' request.

6.266 During the Annex V process, the European Communities refused to provide information in respect of five groups of R&TD measures: (i) grants made under the 2nd FP; (ii) loans provided under the PROFIT; (iii) the French government R&TD grants between 1986 and 1994; (iv) various R&TD measures relating to the A350; and (v) various alleged R&TD measures involving German länder governments.[1666] The United States in its first written submission pursued its claims only in respect of the first three groups of measures. While the language in used in paragraph 7.1413 is not inaccurate, we have revised that paragraph (now paragraph 7.1424) to be more precise by explicitly identifying the measures for which the European Communities refused to provide information during the Annex V process.

3. Paragraphs 7.1419, 7.1425, 7.1431, 7.1437 and 7.1443

6.267 The European Communities requests that the statements contained in paragraphs 7.1419, 7.1425, 7.1431, 7.1437 and 7.1443 of the Interim Report indicating that it did not contest the publicly available information submitted by the United States in Exhibits US-317, US-319, US- 314, US-322 and US-324 be deleted. The European Communities considers they wrongly suggest that the European Communities accepted that the publications submitted by the United States give an accurate account of the projects in which Airbus participated. The European Communities justifies its request by pointing to paragraph 1231 of its first written submission and Exhibit EC-194 (BCI).[1667]

[1665] EC, Request for Interim Review, p.23.
[1666] EC, Answers to Questions by the Facilitator under Annex V, Exhibit US-5 (BCI).
[1667] EC, Request for Interim Review, p.23.

BCI deleted, as indicated **[***]**

6.268 The United States argues that the only disagreement reflected in paragraph 1231 of the European Communities' first written submission and Exhibit EC-194 (BCI) appears to be with the companies the European Communities considers to be "relevant", and not with the facts reflected in the evidence submitted by the United States and referred to in paragraphs 7.1419, 7.1425, 7.1431, 7.1437 and 7.1443 of the Interim Report.[1668]

6.269 In our view, paragraph 1231 of the European Communities' first written submission and Exhibit EC-194 (BCI) do not specifically contest the publicly available information submitted by the United States in Exhibits US-317, US-319, US-314, US-322 and US-324. Rather the European Communities' submissions set out the European Communities' own account of the projects and the payments it considers were provided to the "relevant" Airbus entities under the Second to Sixth EC Framework Programmes.[1669] In other words, the European Communities' submissions do not contest that, for example, MBB received funding under the Second Framework Programme for the ASANCA project, as indicated in Exhibit US-317. Rather, they reject the view that the "relevant" Airbus companies, as defined by the European Communities, participated in and received funding under this project. We therefore decline to make the changes to paragraphs 7.1419, 7.1425, 7.1431, 7.1437 and 7.1443 of the Interim Report requested by the European Communities. However, in light of the European Communities comments, we have modified paragraphs 7.1416, 7.1422, 7.1428, 7.1434 and 7.1440 (now paragraphs 7.1427, 7.1433, 7.1439, 7.1445 and 7.1451), to ensure the European Communities' arguments are not misunderstood.

4. Paragraphs 7.1416-7.1445

6.270 The European Communities asserts that the projects identified in footnotes 4307, 4325, 4340, 4356 and 4373 of the Interim Report do not relate to LCA, and for this reason they should be excluded from the findings concerning payments made to Airbus under the Second to Sixth EC Framework Agreements. The European Communities asks the Panel to instead focus on the information contained in Exhibits EC-969, 970, 971, 972 and 993 (all BCI).[1670]

6.271 The United States argues that the European Communities' request merely reasserts the argument that it made in response to Panel Question 277, and should for this reason alone be rejected. In addition, the United States argues that, like that response, the European Communities' request does not point to any submission from European Communities discussing evidence before the Panel that would substantiate its assertion of non-relevance. The United States therefore asks the Panel to reject the European Communities' request.[1671]

6.272 We recall that we asked the European Communities in question 277 to, *inter alia*, "provide a breakdown of all LCA-related projects" under each of the EC Framework Programmes at issue. In response, the European Communities first referred to Exhibits EC-189 through EC-193 (all BCI), which it had already submitted, stating that the information contained therein was over-inclusive in the sense that it included "all projects in which the relevant companies have participated – whether or not they have been judged to be LCA relevant". However, it did not explain which of projects listed in these exhibits were not "LCA relevant". The European Communities then referred to Exhibits EC-968 to EC-972 (all BCI), stating that these contained "payment information ... with regard to other

[1668] US, Comment on EC, Request for Interim Review, paras. 134-136.

[1669] In Exhibit EC-194, the EC provided information for both "Airbus entities" (Airbus UK, Airbus France, Airbus Deutschland, Airbus Spain, Airbus S.A.S and the "Airbus" operations of their predecessor companies) as well as "non-Airbus entities such as" (EADS Deutschland, GIE EADS CCR, GIE Airbus Industrie and BAE Systems).

[1670] EC, Request for Interim Review, p.23.

[1671] US, Comment on EC, Request for Interim Review, para. 137.

BCI deleted, as indicated **[***]**

entities ... detailing the EC contribution for each project and the amounts received by each of those entities". Again, the European Communities did not specifically identify which of the projects listed were (or were not) "LCA relevant". Comparing the two sets of Exhibits, we note that the only difference between them is that the latter disclose funding paid to entities the European Communities does not consider to be "relevant" Airbus entities. In other words, the same projects are identified in both sets of Exhibits.

6.273 The European Communities asks the Panel to rely upon Exhibits EC-969 through EC-972 and EC-993 for the purpose of identifying the relevant LCA-related projects. However, these Exhibits list several projects the European Communities now asserts were in fact **not** LCA-related, namely: EUROMESH and All Electric Aircraft (2nd Framework Programme); BRAIN, CRASHWORTHINESS and IMAGES 2000 (3rd Framework Programme); ENHANCE, EDAVCOS, ELGAR, EUROSUP, ISAWARE and PROFOCE (4th Framework Programme); C-WAKE (5th Framework Programme); and TATEM and SMIST (6th Framework Programme). The remaining projects listed in footnotes 4307, 4325, 4340, 4356 and 4373 of the Interim Report, and which the European Communities now asserts were not LCA related, cannot be found in Exhibits EC-189 to EC-193, even though the European Communities described these latter Exhibits to be "over-inclusive" in the sense that they identified projects that were not LCA-related.

6.274 Almost all of the projects identified in footnotes 4307, 4325, 4340, 4356 and 4373 of the Interim Report are listed in Exhibit EC-194 (BCI). However, the European Communities did not refer to this Exhibit in its answer to Panel Question 277. Moreover, in the introductory page of this Exhibit, the European Communities seeks to explain the discrepancies between the lists contained in this Exhibit and the Exhibits submitted by the United States. However, the European Communities' explanation does not identify any of the listed projects as not being related to LCA.

6.275 Thus, having carefully reviewed the European Communities' submissions, and in view of the above discussion, we deny the European Communities' request to revise footnotes 4307, 4325, 4340, 4356 and 4373 of the Interim Report.

5. Paragraphs 7.1425, 7.1427, 7.1430, 7.1431, 7.1433, 7.1442, 7.1443 and 7.1445

6.276 The European Communities asserts that it submitted the total amounts of funding received by "all relevant companies" and "all additional entities requested by the Panel" under the Third, Fourth and Sixth EC Framework Programmes in Exhibits EC-193 (BCI), EC-969 (BCI), EC-970 (BCI), EC-972 (BCI) and EC-993 (BCI). The European Communities asserts that these Exhibits confirm that the contributions identified in footnotes 4324, 4325, 4326, 4340, 4341, 4372, 4373 and 4374 of the Interim Report were not actually made. It therefore asks that the references to "*inter alia*" the BRAIN, IMAGES 2000, ENHANCE, EDAVCOS, ELGAR, EUROSUP, ISAWARE, PROFOCE, SMIST and TATEM projects be removed from these footnotes and, consequently, that an amendment be made to the relevant numbers of and values of projects and contributions identified in paragraphs 7.1425, 7.1427, 7.1430-7.1433 and 7.1445 of the Interim Report.[1672]

6.277 The United States argues that the European Communities' request is essentially a restatement of the argument it made in response to Panel Question 277. The United States recalls that in its comments on the European Communities' response to this question, it noted that the European Communities had not disclosed amounts of funding provided to several Airbus entities in allegedly 64 of 145 R&TD projects funded through the Framework Programmes. The United States notes that the

[1672] EC, Request for Interim Review, pp.23-24.

BCI deleted, as indicated **[*******]**

Interim Report at least partially agrees with its assessment of the facts. Accordingly, the United States asks the Panel to reject the European Communities' request.[1673]

6.278 As explained in the Interim Report, the starting point of our findings on the values of contributions received by Airbus under the Third, Fourth and Sixth EC Framework Programmes was the list of projects submitted by the United States in Exhibits US-314, 317 and 319. These Exhibits contained synopses published by the European Commission of the aeronautics-related projects supported under each of the relevant EC Framework Programmes, listing for each project, the individual participants, endorsers, coordinators and partners. The projects listed in footnotes 4324, 4325, 4326, 4340, 4341, 4372, 4373 and 4374 of the Interim Report, which the European Communities requests be disregarded and deleted from the Interim Report, were identified in Exhibits US-314, 317 and 319; and in each case, one or more Airbus entities were listed as a participant, endorser, coordinator and/or partner. However, the European Communities did not provide any details of any payments received by these Airbus entities under those programmes. While the European Communities contends that these Airbus entities did not receive any contributions under the relevant projects, it has not explained why they were listed in the publicly available project synopses authored by the European Commission. In the absence of any substantiated explanation from the European Communities, the Interim Report treated each identified entity as being a beneficiary of R&TD funding provided under each relevant project. Accordingly, we deny the European Communities' request to amend footnotes 4324, 4325, 4326, 4340, 4341, 4372, 4373 and 4374 and paragraphs 7.1425, 7.1427, 7.1430-7.1433 and 7.1445 of the Interim Report.

6. Paragraphs 7.1436, 7.1437 and 7.1439

6.279 The European Communities explains that the contributions listed in Exhibits EC-968 to EC-972 (all BCI) that were received by "BAE Systems" corresponds to all contributions received by all divisions of BAE Systems (including BAE (Operations) Ltd.), as they existed at the relevant time. In particular, it notes that a grant of EUR **[*******]** to BAE Systems for the C-Wake project under the Fifth Framework Programme appears in Exhibit EC-971 (BCI). Accordingly, it asks that the reference to "C-Wake" be deleted from paragraph 7.1436 and footnotes 4356 and 4357 of the Interim Report, with a consequential amendment being made to the relevant numbers of projects and contributions identified in paragraphs 7.1437 and 7.1439 of the Interim Report.[1674]

6.280 The United States asks the Panel to reject the European Communities' request for the same reasons it argues the Panel should reject the European Communities' previous request.[1675]

6.281 The European Communities' request relates to what is effectively a difference in how the European Communities has described the BAE companies receiving funds under the Framework Programme ("BAE Systems") and how the relevant BAE company is named in the publicly available information ("BAE (Operations) Ltd"). We accept the European Communities' explanation and have modified our findings to reflect the amount for BAE (Operations) Ltd, which is referred to in Exhibit EC-971 (BCI) as "BAE Systems".

7. Paragraph 7.1461

6.282 The European Communities submits that instead of attributing to Airbus the total amount of French government aeronautics research funding provided to all recipients between 1986 and 1993, it would be more appropriate to "fill the perceived 'evidentiary gap'" concerning the amount of French

[1673] US, Comment on EC, Request for Interim Review, paras. 138-139.
[1674] EC, Request for Interim Review, p.24.
[1675] US, Comment on EC, Request for Interim Review, paras. 138-139.

BCI deleted, as indicated **[***]**

government support provided to Airbus, by attributing to Airbus **[***]** of the total amount of funds provided to all recipients between these years. This would represent the same proportion of the French government's total funding to aeronautics projects in the years 1994 to 2005 that was actually received by Airbus in those years, which the European Communities submits is confirmed in Exhibit EC-209 (BCI).[1676]

6.283 The United States did not comment on the European Communities' request.

6.284 We recall that the European Communities was specifically asked in Panel question 278 to provide a "break-down of all LCA-related projects funded by the French government between 1986 to 1993". The European Communities failed to do so because it said that neither the French government nor Airbus was able to locate the relevant contracts. Instead, the European Communities submitted that the proportion of total government funding that Airbus would have received would have been "far less" than the EUR 391 million alleged, citing the fact that Airbus had only received EUR **[***]** million out of the EUR 809 million provided to all recipients between 1994 to 2005 as supporting this conclusion. At paragraph 7.1461 of Interim Report we dismissed the European Communities' response, observing, *inter alia*, that:

> "the explanation the EC has provided for its failure to submit the requested information and the approach it suggests might be adopted by the Panel in order to arrive at an appropriate R&TD figure are less than satisfactory. ... we recall that where a party refuses to supply information requested by a panel, it is open to that panel to draw inferences from the full configuration of facts that are before it. "

6.285 The European Communities now asks the Panel to reconsider its findings and conclude that it would be appropriate to attribute to Airbus **[***]** of the total amount of funds provided to all recipients between 1986 and 1993, that is, **[***]** of EUR 391 million, instead of the entire amount. However, in making this request, the European Communities points to no facts that would suggest that the funding Airbus received during the relevant period (1986-1993) represented the same or a similar proportion of total funds granted to all recipients as the proportion of total funding it actually received in the subsequent period (1994-2006). Thus, the European Communities refers to no facts to support its view that it would be appropriate to allocate to Airbus **[***]** of total funds granted by the French government between 1986 and 1993 as opposed to any other proportion that is less than 100%. We therefore deny the European Communities' request.

8. Paragraph 7.1481

6.286 The European Communities requests that paragraph 7.1481 of the Interim Report be amended to reflect what it asserts was an argument "directly relevant to the benefit analysis" conducted in paragraph 7.1491 of the Interim Report, which made in paragraph 630 of its second written submission.[1677]

6.287 The United States did not comment on the European Communities' request.

6.288 The focus of the European Communities' request is on the underlined statement in the following excerpt from paragraph 630 of the European Communities' second written submission:

> "The European Communities confirms that the total amount of R&T support that has been *committed* to Airbus SAS under the *Luftfahrtforschungsprogramm* (LUFO) I to

[1676] EC, Request for Interim Review, p.24.
[1677] EC, Request for Interim Review, p.24.

BCI deleted, as indicated **[***]**

> III by 1 July 2005 for the period until 2007 is **[***]**.{} However, there is no guarantee of funding to Airbus SAS. The amount *disbursed* depends on the amount of eligible costs incurred by Airbus Germany." (underline added, footnote omitted).

In our view, nothing in this statement can be reasonably understood to be "directly relevant" to the question of benefit addressed in paragraph 7.1491 of the Interim Report. Indeed, there is no indication at all in this paragraph that the statement now referred to by the European Communities was intended to articulate its views on the question of whether funding committed under the LuFo III programme, but not disbursed, conferred any benefit of Airbus. We therefore decline to make the requested changes.

9. Paragraphs 7.1502, 1551 and 1552

6.289 The European Communities asks that the reference to "...and the EC member States ... " be removed from paragraphs 7.1502, 7.1551 and 7.1552 of the Interim Report, noting in this regard that the EC Framework Programmes are funded solely from the EC budget and disbursed by the European Commission.[1678]

6.290 The United States did not comment on the EC request.

6.291 We have modified paragraphs 7.1502, 7.1551 and 7.1552 (now paragraphs 7.1513, 7.1562 and 7.1563) to delete the reference to "...and the EC member States ... ".

O. ADVERSE EFFECTS

1. Paragraph 7.1610

6.292 The European Communities requests the Panel to modify the second sentence of paragraph 7.1610 of the Interim Report to indicate that BAe, a UK company, and not the United Kingdom, joined the Airbus consortium in 1979. The European Communities also requests the Panel to modify the third sentence of this paragraph by omitting the United Kingdom, because BAE Systems did not merge into EADS.

6.293 The United States did not comment on this request.

6.294 The European Communities is correct as a matter of fact with respect to both aspects of its request, and we therefore have modified paragraph 7.1610 (now paragraph 7.1621) to correctly reflect the facts.

2. Paragraph 7.1664

6.295 The United States requests that, in order to correctly reflect the cited panel report, the references to "subsidized product" in lines 10 and 12 of paragraph 7.1664 of the Interim Report should both be modified to read "dumped product."[1679]

6.296 The European Communities agrees with the United States' request.[1680]

[1678] EC, Request for Interim Review, pp.24-25.
[1679] US, Request for Interim Review, para. 23.
[1680] EC, Comments US, Request for Interim Review, p. 11.

BCI deleted, as indicated **[***]**

6.297 The Panel report at issue concerned a US Department of Commerce investigation of alleged dumping, and therefore we have made the requested changes to paragraph 7.1664 (now paragraph 7.1675), in order to correctly reflect the facts of that dispute.

3. Paragraph 7.1693, footnote 4785

6.298 The European Communities requests that the Panel amend footnote 4785 of the Interim Report to indicate that the last A300 was delivered in July 2007, whereas the last A310 was delivered in 1993, asserting that this change reflects more accurately the timing of the last deliveries of these aircraft, and requests a similar clarification in paragraph 7.1963 of the Interim Report.[1681]

6.299 The United States did not comment on this request.

6.300 The European Communities cites no source for the date of 1993 for the last delivery of the A310. According to the Airclaims information submitted by the European Communities, there were 7 orders for A310 aircraft in 1993 and 1995, and 9 A310 aircraft were delivered to customers between 1994 and 1998.[1682] Moreover, footnote 4785 and paragraph 7.1963 of the Interim Report do not refer to delivery dates, but rather to production dates. The European Communities gives no reason for proposing to change the reference to delivery dates, rather than the production dates mentioned. In the absence of any evidence to support the European Communities' assertion as to the last delivery date for the A310, which is contradicted by information before the Panel, and the absence of any justification for consideration of the last delivery date, rather than the last production date referred to by the Panel, we deny the European Communities' request.

4. Paragraphs 7.1741-1747

6.301 The United States notes that, as part of the assessment of whether imports of Boeing LCA were displaced in the EC market, paragraphs 7.1742-7.1747 of the Interim Report reproduce data presented by the United States on the quantity of LCA deliveries. However, the United States points out that, although the Panel noted, at paragraph 7.1729 of the Interim Report, that the United States also presented data on the value of LCA deliveries (as measured by list prices) in the EC market, the analysis at paragraph 7.1741 of the Interim Report does not reflect the consideration of this data, while paragraph 7.2103 of the Interim Report makes clear that the Panel did consider comparable data on market share measured by value in the context of its material injury analysis.[1683] The United States reiterates its view, as explained during the proceeding, that "the similarity of estimated market shares by value and by volume suggests that the companies are selling relatively similar mixes of high-value and low-value aircraft at any given time."[1684] Accordingly, the United States asserts that the similarity of the trends in market share whether measured by quantity of aircraft or estimated value (at list prices) of aircraft corroborates the validity of the data on units delivered relied upon by the Panel and confirms that the Panel's analysis, which is based on units delivered, is not distorted by changes in the relative mix of high-value and low-value aircraft within the single LCA product category. The United States suggests that the displacement analysis in the Interim Report would be strengthened by taking note of the market share data based on value.[1685]

6.302 The European Communities agrees with the United States on the need for alternative factual findings regarding market shares in the EC market, recalling its own request for alternative factual

[1681] EC, Request for Interim Review, p. 25.
[1682] Exhibit EC-21.
[1683] US, Request for Interim Review, para. 24.
[1684] US, Request for Interim Review, para. 25, citing US, FWS, para. 734.
[1685] US, Request for Interim Review, para. 26.

BCI deleted, as indicated **[***]**

findings.[1686] However, the European Communities considers that the Panel should make alternative factual findings on market shares based on value not only for the EC market, as requested by the United States, but also for the third country markets at issue in the dispute for specific product groupings, reiterating its view that such alternative factual findings would assist the Appellate Body in completing the analysis in the event it would reverse the Panel's findings. To this end, the European Communities submitted, in its Comments on the United States' Request for Interim Review, a series of tables presenting market share data measured by value. The European Communities explains the methodology it used in preparing those tables, and cites the sources of the data it presents. The European Communities requests the Panel to make alternative factual findings based on that data for all country markets at issue (i) covering all LCA and (ii) broken down by the LCA product groupings that the European Communities suggested.

6.303 With respect to the United States' request, we note that in our analysis of displacement or impedance in the EC market, we focussed on deliveries of LCA as the appropriate measure, as had been argued by the United States, rather than on orders, as had been argued by the European Communities.[1687] The United States had submitted delivery information based on both quantities of LCA delivered, and value as measured by list prices, in support of its assertion that both Airbus and Boeing "are selling relatively similar mixes of high-value and low-value aircraft at any given time."[1688] This assertion was not disputed by the European Communities. Nor did the European Communities argue that the trends in market share measured by numbers of deliveries was distorted by changes in the relative mix of high-value and low-value LCA within the single like product considered in the Panel's analysis. Therefore, we did not find it necessary to, and did not, make any findings concerning market share in the EC market on the basis of the value of LCA delivered. Moreover, as discussed elsewhere in the Interim Report, the list prices of LCA are not an accurate measure of the price of LCA actually sold and delivered, and thus it is less than clear that market share value information, measured by list price of LCA delivered, is particularly meaningful. We therefore deny the United States' request.

6.304 With respect to the European Communities' request, we deny it for the same reasons as discussed below in connection with our decision to deny the European Communities' other request in this regard.[1689]

5. Paragraphs 7.1762-7.1781

6.305 The European Communities notes that the Interim Report sets out market share developments between 2001 and 2006 in individual third country markets on an aggregate basis in paragraphs 7.1762-7.1781 of the Interim Report. The European Communities requests that the Panel make alternative findings with respect to market share developments in individual third country markets based on the product groupings that it suggested during the course of the proceedings. The European Communities asserts that such alternative factual findings would enable the Appellate Body to complete the analysis were it to disagree with the Panel's product-related findings. The European Communities considers that its arguments should be fully presented in the report in a fair and balanced manner, and submits that this necessitates presentation of the data by product grouping in tabular form. The European Communities also indicates that it was unaware of criticisms stated by the Panel in the Interim Report concerning its presentation of data. Specifically, the European Communities refers to the Panel's comments that (i) that the European Communities did not count deliveries of Boeing 747 aircraft, (ii) that the European Communities did not count deliveries of

[1686] EC, Comments on US Request for Interim Review, pp. 25-30. See paragraphs 6.305 - 6.314 below.
[1687] Interim Report at paragraphs 7.1734- 1739.
[1688] US, Request for Interim Review, para. 25, citing US, FWS, para. 734.
[1689] See below, beginning at paragraph 6.309

BCI deleted, as indicated **[***]**

Boeing 757 aircraft into the EC market and (iii) that the European Communities treated deliveries to a leasing company as deliveries to the country of the leasing company and not as deliveries to the country of the operating airline. the European Communities notes that the Panel did not request it to present data in this form.

6.306 The European Communities submitted, in its Request for Review of the Interim Report, tables setting out market share developments in individual country markets by product grouping, correcting for the Panel's criticisms described above, and asks that the Panel use this data, or derive the same data itself from the record evidence, to (i) record the European Communities' arguments and (ii) make alternative factual findings regarding market share developments in the country markets at issue broken down by products.[1690] The European Communities observes that the source of the data it presents, Airclaims, has never been contested, and that both parties, and the Panel, have relied on data from this source.

6.307 The United States objects to the European Communities' request, and asks that the Panel decline to incorporate the tables submitted by the European Communities in the final report, and decline to make alternative factual findings based on these tables.[1691] The United States contends that the Panel's criticisms of the European Communities' counting methodology could not have come as a surprise to the European Communities, given that these methodological issues were matters of contention between the parties. The United States notes in this regard, for example, that the European Communities argued specifically that deliveries made through leasing companies should be excluded from the market share calculation,[1692] and that whether deliveries of the Boeing 747 were relevant to claims of displacement and impedance, or indeed any claims of serious prejudice at all, was addressed at length by both parties.[1693] Thus, the United States considers that the Panel did not deny the European Communities a fair opportunity to present its case, but rather decided that the European Communities' methodological approach to presenting aircraft delivery data was not appropriate.

6.308 The United States notes that, as the European Communities states, the data underlying the tables the European Communities has now presented is not in dispute and is on the record before the Panel. In the United States' view, however, to present that data tabulated according to one set of methodological assumptions rather than another is not simply to rearrange the evidence, but, in effect, to make an argument about the meaning of the evidence in a particular legal context. In the United States' view, that the Panel rejected the European Communities' arguments in the Interim Report does not entitle the European Communities to another opportunity to reframe its arguments at the interim review stage or to present its arguments in a different way, in light of the Panel's decisions on the methodological issues.[1694] The United States considers that to include the tables submitted by the European Communities with its Request for Interim Review would imply, wrongly, that the European Communities made arguments with respect to Article 6.3(a) and 6.3(b) during the proceedings on the basis of that data, as presented in the newly-submitted tables, which the European Communities did

[1690] EC, Request for Interim Review, pp. 25-30. While the paragraphs referred to in the EC's Comments set out the Panel's consideration of market share developments in individual third country markets, the EC also submitted newly tabulated data for the EC market, which the panel addressed at paragraphs 7.1727-7.1747 of the Interim Report, without any further discussion concerning that data in its Request for Interim Review.

[1691] US, Comments on EC Request for Interim Review, para. 140.

[1692] US, Comments on EC Request for Interim Review, para. 141, citing, *e.g.*, EC, Answer to Panel Question 207, paras. 333-334, 350, 357-358, 364, 382, 389. The United States disagreed. US, Comments on EC Answer to Panel Question 207, paras. 275-277.

[1693] US, Comments on EC Request for Interim Review, para. 141, citing, *e.g.*, EC, FWS, paras. 1670-1757; U.S. SWS, paras. 654-656.

[1694] US, Comments on EC Request for Interim Review, para. 142.

not do. Thus, the United States respectfully requests the Panel to reject the European Communities' request.[1695]

6.309 While the European Communities characterizes the presentation of market share data in the Interim Report as "reflect{ing} the arguments by the United States"[1696], in fact it is clear that the presentation of market share data reflects our own conclusions as to the relevant subsidized and like product in this dispute. Having concluded that the relevant subsidized and like product is all Airbus and all Boeing LCA, respectively,[1697] we went on to examine the evidence on the basis of that single product, as indicated in paragraph 7.1731 of the Interim Report. We followed the same approach with respect to our consideration of market share in individual third country markets, as set out in paragraph 7.1749 of the Interim Report. In considering the question of market share, we relied on the data presented by the United States, whose accuracy was not disputed by the European Communities, as this data accorded with our own view of the relevant subsidized and like product, while the data presented by the European Communities did not. The European Communities had submitted market share data broken down by the product groupings it asserted the Panel should find to be separate subsidized and like products in this dispute. Having rejected that approach, the European Communities' data as presented was not suitable as a basis for our analysis of market share. Nonetheless, we reviewed the European Communities' data, and concluded that "it provides an inaccurate and incomplete picture of LCA deliveries to the EC market between 2001 and 2006", noting specific concerns with the European Communities' counting methodology in presenting the data in question.[1698]

6.310 While the European Communities indicates that it was surprised by our criticisms concerning the data it presented, those criticisms did not relate to the presentation of data on the basis of the product groupings advocated by the European Communities during the proceedings, but rather to the European Communities' counting methodology in preparing the tables of data submitted.[1699] Moreover, some of these methodological issues were the subject of arguments from the parties, including extensive argument concerning whether the Boeing 747 and Airbus A380 were relevant to the consideration of the United States' claims at all. The European Communities argued throughout that the Panel should not consider the Boeing 747 to be like any Airbus LCA, and should not consider the Airbus A380 to be like any Boeing LCA, views disputed by the United States, and ultimately rejected by us in finding a single subsidized and a single like product. Further, the European Communities suggested that deliveries by leasing companies should not be included in calculating market share,[1700] while the United States took the opposing view.[1701] For the European Communities

[1695] US, Comments on EC Request for Interim Review, para. 143.

[1696] EC, Request for Interim Review, p. 25.

[1697] Interim Report, paras. 7.1639-7.1669.

[1698] Interim Report, para. 7.1745. See also, Interim Report, para 7.1767, where we noted that "the data presented by the EC in respect of deliveries to third country markets presents the same concerns as the information it presented on deliveries to the EC market."

[1699] We note that we have spot-checked the newly-submitted figures on numbers of LCA delivered, and when aggregated to comport with our conclusions regarding subsidized and like product, they do not yield the same figures as the data on deliveries we relied on in the Interim Report. The European Communities never disputed the figures on deliveries presented by the United States on which we relied. In our consideration of the data as originally submitted by the European Communities, we undertook a similar exercise of aggregations. That exercise resulted in greater differences from the data submitted by the United States, on which we relied, than the aggregation of the newly-submitted data, but the latter still shows differences. Thus, in order to serve as the basis for factual findings, we believe the newly-submitted data would have to be carefully examined in an effort to determine the reason(s) for these discrepancies. That effort should, in our view, necessarily include the views of the United States, were we to undertake such a task.

[1700] E.g., EC, Answer to Panel Question 207, paras. 333-334, 350, 357-358, 364, 382 and 389,

[1701] US, Comments on EC Answer to Panel Question 207, paras. 654-656.

BCI deleted, as indicated **[***]**

to now submit data in which it includes deliveries of the Boeing 747 and deliveries by leasing companies in its tabulation of deliveries to the different markets being considered is inconsistent with the positions it took throughout the proceedings. In our view, this demonstrates that the newly tabulated data does not, in fact, record the European Communities' arguments as made during the proceeding.

6.311 We agree with the United States that the presentation of data on the basis of a particular set of underlying assumptions is effectively the presentation of an argument in a particular legal context, not simply a question of organizing data. It is clear to us that the presentation of new arguments, which is what the European Communities' newly tabulated data effectively does, is not permissible at this interim review stage of the proceedings. As the European Communities itself argues in a different context, a party cannot change its arguments at this stage of the proceeding, nor is the Panel entitled to mischaracterise a party's arguments in its report.[1702] It would, in our view, be entirely inappropriate for us to make alternative findings on the basis of these newly-submitted data, as any such findings would necessarily be based on evidence and arguments not previously before us, and to which the United States has had only the most minimal opportunity to respond. To include such newly-submitted evidence, thereby allowing it to appear as if the arguments based on that evidence had been made during the proceeding, would in our view be unfair, and would deprive the United States of the due process to which it entitled in dispute settlement in the WTO. Thus, even were we inclined to make alternative findings on the basis of the product groupings asserted by the European Communities, at most such findings would involve consideration of the evidence originally put before the Panel by the European Communities, and not these newly-submitted tables. However, we do not consider alternative findings on the question of market share developments on the basis of the product groupings proposed by the European Communities to be necessary in any event.[1703]

6.312 The European Communities suggests that alternative findings would allow the Appellate Body to "complete the analysis" in the event it disagreed with our product-related findings. However, regardless of the evidence on which alternative findings might be made, it is not clear to us, and the European Communities provides no elaboration, as to how such findings would allow the Appellate Body to "complete the analysis". Even were we to make alternative findings with respect to market share developments on the basis of the product groupings asserted by the European Communities, this would not allow for the independent resolution of the dispute by the Appellate Body. Our finding of a single subsidized and like product is a fundamental premise of our entire analysis of serious prejudice, including the analysis of causation, and our overall findings. Thus, it is not apparent to us how, if at all, factual findings concerning market share for separate product groupings could be related to our findings regarding causation based on the premise of a single subsidized and like product. We can see little to be gained from making such alternative findings, as they would not be sufficient, in our view, to allow resolution of this dispute on the basis of the European Communities' view of distinct product categories.

6.313 The question whether to consider LCA as a single subsidized and like product or to consider different products on the basis of the distinctions argued by the European Communities was a critical, and hotly disputed, issue in this dispute. That we might decide that issue in line with the United States' position was clearly a possibility from the outset, one of which the European Communities must have been well aware. That the European Communities chose, despite that possibility, to argue

[1702] See, EC, Comments on US Request for Interim Review, p. 21.

[1703] We note that the most significant alternative findings we made concern the question of interpretation of the term "benefit" in the context of the EC's pass-through argument, which is a matter of legal interpretation that has not previously been definitively addressed. That is a very different matter from making alternative factual conclusions based on a legal argument that has been rejected by the Panel for reasons grounded in the text of the Agreement and previous dispute settlement reports.

its entire case on the basis of its own view of the appropriate subsidized and like products, that is, on the basis of multiple distinct subsidized and corresponding like products, rather than presenting arguments and evidence responding directly to the claims as formulated by the United States and the evidence it presented in support of those claims, represents a strategic and tactical choice by the European Communities which it was entitled to make. However, its exercise of this choice, and its presentation of evidence and argument based on its own view of the underlying issue of like and subsidized product does not, in our view, mean that, having rejected the European Communities' position, we are nonetheless required to make alternative findings regarding the United States' claims of displacement and impedance as if we had decided the product issues in line with the European Communities' position.

6.314 For all of the foregoing reasons, we deny the European Communities' request to include in the final report the newly presented tabulations of data on deliveries of LCA to the EC and third country markets,[1704] and decline to make alternative findings with respect to market share on the basis of the product groupings put forward by the European Communities, either on the basis of the newly presented data, or on the basis of the originally-submitted evidence.

6. Paragraph 7.1773

6.315 The European Communities requests the Panel to amend the sixth sentence of paragraph 7.1773 of the Interim Report to correct a misstatement.[1705]

6.316 The United States did not comment on this request.

6.317 The European Communities is correct, and we have therefore corrected paragraph 7.1773 (now paragraph 7.1784) to reflect, as shown in Table 28, that Airbus' 100 percent market share in 2004 reflects orders for two aircraft, not one aircraft as originally stated.

7. Paragraph 7.1790

6.318 The United States requests a modification of the penultimate sentence of paragraph 7.1790 of the Interim Report to more accurately reflect its position.[1706] The United States recalls that it explained, in response to a question from the Panel, that

> "{W}hen the evidence demonstrates that a customer, after making an "analytical and exhaustive review" of all {relevant} factors, found a difference in price that was significant enough to have a major impact on the outcome of the sale, the evidence demonstrates the existence of price undercutting within the meaning of Articles 6.3(c) and 6.5."[1707]

In other words, the United States asserts it did not contend that the simple fact that a customer chose one LCA model over another is sufficient evidence of price undercutting. Rather, the United States' argument was that when a customer monetizes all relevant factors, it is making a price comparison that, in the words of Article 6.5, is "made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability."[1708] If, having made this price

[1704] As discussed above, for these same reasons, we deny the European Communities' request to include newly-presented tabulations of data on value of deliveries to the EC and third country markets. See paragraphs 6.301 to 6.304.

[1705] EC, Request for Interim Review, p. 30.

[1706] US, Request for Interim Review, paras. 27-30.

[1707] US, Answer to Panel Question 235, para. 62 (emphasis added).

[1708] SCM Agreement, art. 6.5.

comparison, it finds that one LCA model has a lower net price than a competing LCA model, all such factors having been taken into consideration, the United States argued that the customer's analysis is relevant evidence of the existence of price undercutting within the meaning of Articles 6.3(c) and 6.5.[1709] The United States contends that the difference between its actual argument and the argument attributed to it in paragraph 7.1790 of the Interim Report is not immaterial. Although one might conclude from the mere fact that a customer chose one LCA model over a competing LCA model, the customer determined that the LCA model it chose offered better value, this would not – as the text in paragraph 7.1790 of the Interim Report would seem to suggest – necessarily mean that the chosen LCA model had a lower price. According to the United States, airlines do not always make their decisions among competing LCA solely on the basis of price, and therefore an airline's choice of one LCA model over another does not necessarily indicate price undercutting. But where a customer specifically finds that, having taken all relevant factors into account, one LCA model is in fact offered at a lower price than another – and where such price difference has a major impact on the outcome of the sale – then the customer's finding is relevant evidence of "significant price undercutting," as that term is used in Articles 6.3(c) and 6.5 of the SCM Agreement.[1710] The United States therefore requests that the Panel revise the penultimate sentence of paragraph 7.1790 of the Interim Report.

6.319 The European Communities did not comment on this request.

6.320 Having reviewed the submissions cited by the United States in support of its request, we consider that its proposed text does more accurately represent the thrust of its argument in this regard, and in the absence of any objection from the European Communities, we therefore have modified the penultimate sentence of paragraph 7.1790 (now paragraph 7.1801).

8. Paragraph 7.1856

6.321 The United States requests that the Panel amend the first sentence of paragraph 7.1856 of the Interim Report to more accurately reflect its argument.[1711] That sentence notes that the United States presented, "as evidence of the magnitude of the subsidy," a report by NERA Economic Consulting. The United States notes that, as stated elsewhere in the Interim Report, the figures calculated by NERA represent an estimate of the additional debt burden, in 2006 dollars, that Airbus would have had to carry if it had obtained financing on commercial terms.[1712] The United States considers that such a figure, while clearly relevant to the question of whether the magnitude of the subsidies is sufficient to cause the alleged effects, does not necessarily represent the amount of the "benefit" of LA/MSF, as that term is used in Articles 1.1(b) and 14 of the SCM Agreement. In the United States' view, while the use of the term "benefit" in conjunction with an explanation of the actual methodology used in the NERA quantification report, as in paragraph 7.1954 of the Interim Report, is not necessarily inappropriate, the use of the term "benefit" in paragraph 7.1856, without further explanation, could be misleading.

6.322 The European Communities agrees with the United States' request to replace the term "benefit" in the first sentence of paragraph 7.1856 of the Interim Report.[1713] However, the European

[1709] The United States also considered that, if the difference in price was significant enough to have a major impact on the outcome of the sale, then the price undercutting would be “significant price undercutting” within the meaning of Article 6.3(c).

[1710] The United States notes that paragraph 8.1824 {sic} correctly summarizes the U.S. argument on this point. US, Request for Interim Review, footnote 24. We presume this to be a reference to paragraph 7-1824 of the Interim Report.

[1711] US, Request for Interim Review, paras. 31-32.

[1712] US, Request for Interim Review, para. 31, citing Interim Report, para. 7.1937, footnote 5305.

[1713] EC, Comments on US Request for Interim Review, pp. 20-21.

BCI deleted, as indicated **[***]**

Communities disagrees that the language proposed by the United States represents an accurate description of the way in which the United States and NERA have characterised these figures. The European Communities maintains that the United States itself described NERA's figures as calculations "express{ing} **[***]** uniformly in current dollars"[1714], and that NERA describes its figures as the "cumulative amount of cash that Airbus saves over time by paying less than market".[1715] Moreover, the European Communities notes that in describing the relevance of these figures to its arguments, the United States stated that "the relevant counterfactual for determining the effect of the subsidy is *not* to consider what the LCA market would be like if Airbus had launched all of its aircraft when it did and was an additional $178.2 billion in debt"[1716], but rather that that these figures were evidence that Airbus could not have launched its products as and when it did absent LA/MSF.[1717] Thus, in the European Communities' view, the United States did not frame the relevance of these figures in terms of "the net present impact of LA/MSF on the balance sheet of Airbus" – *i.e.*, the United States did not make the argument that it now asks the Panel to include in the description of the United States' arguments. The European Communities asserts that the United States cannot change its arguments at this stage of the proceeding, nor is the Panel entitled to mischaracterise the United States' arguments in its report.

6.323 While the United States asserts that the figures it presented based on the NERA report are relevant to the question whether the magnitude of the subsidies is sufficient to cause the alleged effects, it argues that they do not necessarily represent the amount of the "benefit" of LA/MSF, as that term is used in Articles 1.1(b) and 14 of the SCM Agreement. However, the NERA report states that

> "{t}he analysis performed in the Ellis Report shows the existence of a benefit to Airbus under each provision of launch aid, because in every case the benchmark commercial rate exceeded the stated launch aid rate. That analysis, however, did not quantify the benefit in "dollar" terms nor show the total benefit to Airbus over time. The purpose of this report is to do so."[1718]

In introducing that report during the Panel's second meeting, the United States stated:

> "Because the ITR methodology does not accurately measure the full magnitude of the subsidy benefit, the economists at NERA Consulting have made an estimate of the total benefit to Airbus from Launch Aid".[1719]

Thus, it seems clear to us that, even if not a measure of "benefit" as that term is used in Articles 1.1(b) and 14 of the SCM Agreement, the NERA calculations were intended as evidence of the benefit of the LA/MSF subsidies to Airbus, measured, as the United States put it, in terms of "the impact of Launch Aid on the present financial condition of Airbus".[1720] In light of the foregoing, we have modified the first sentence of paragraph 7.1856 (now paragraph 7.1867) to more closely reflect the United States' argument, albeit not in the terms suggested by either party.

[1714] EC, Comments on US Request for Interim Review, pp. 20-21, citing, US, SWS, para. 612.
[1715] EC, Comments on US Request for Interim Review, pp. 20-21, citing, Exhibit US-606 (BCI).
[1716] EC, Comments on US Request for Interim Review, pp. 20-21, citing, US, SWS, para. 614 (emphasis and underlining added).
[1717] EC, Comments on US Request for Interim Review, pp. 20-21, citing, US, SWS, para. 614.
[1718] NERA Economic consulting, *Quantification of Benefit of Launch Aid* (24 May 2007), Exhibit US-606 (BCI)
[1719] US, SWS, para. 611.
[1720] US, SWS, para. 612.

BCI deleted, as indicated **[***]**

9. Paragraph 7.1861

6.324 The European Communities requests that the Panel replace the term "benefit" in the last sentence of paragraph 7.1861 of the Interim Report with the term "effect" to properly reflect the European Communities' argument.[1721]

6.325 The United States did not comment on this request.

6.326 Although the European Communities cites no source for its requested correction, we agree that, in context, the term "effect" is more appropriate to reflect the European Communities' argument, and in the absence of any objection from the United States, we grant the European Communities' request, and have made the requested change to make the change to paragraph 7.1861 (now paragraph 7.1872).

10. Paragraph 7.1863

6.327 The United States requests that the Panel amend the second sentence of paragraph 7.1863 of the Interim Report to reflect the United States' view that the European Communities' benefit calculation methodology referred to does not accurately reflect U.S. countervailing duty law.[1722] The United States recalls its argument in this regard:

> "The EC tendentiously refers to the ITR approach as the "US/Boeing methodology," *e.g.*, EC FWS para. 1588-1590, although it is in fact no such thing. The United States does not endorse the erroneous benefit calculation and allocation methodologies developed by ITR; indeed, many of these errors are at direct variance with the CVD methodologies used by the EC and the United States. Further, Boeing's 1997 comments on the U.S. CVD regulations submitted to the U.S. Department of Commerce, submitted by the EC as Exhibit EC-325, cannot plausibly be read to endorse the many errors in the ITR methodology."[1723]

6.328 The European Communities asks the Panel to deny the United States' request, and the United States' request with respect to paragraph 7.1952 of the Interim Report, which the European Communities considers deals with essentially the same issue.[1724] The European Communities contends that it did, in fact, apply the United States' CVD methodology, drawing on Boeing's 1997 comments to the US Government concerning proposed CVD regulations) for insights on applying the methodology to LCA and specifically to LA/MSF. The European Communities notes that it identified the specific provisions of the United States' CVD regulations applied in the ITR report, described the manner in which it applied Boeing's comments on those regulations and provided detailed worksheets showing its calculations.[1725] In the European Communities' view, the United States relies, in its request for interim review, on an unsubstantiated footnote to the US Answer to Panel Question 42, which the European Communities notes does not refer to any United States' CVD regulation or practice that the European Communities allegedly failed to apply or allegedly applied incorrectly.

[1721] EC, Request for Interim Review, p. 30.

[1722] US, Request for Interim Review, para. 33.

[1723] US, Request for Interim Review, para. 33, citing, US, Answer to Panel Question 42, para. 250, footnote 313.

[1724] EC, Comments on US Request for Interim Review, p. 21.

[1725] EC, Comments on US Request for Interim Review, p. 21, citing, EC, SWS, paras. 948-950, 997-1008. *ITR Subsidy Magnitude Report*, 5 February 2007. Exhibit EC-13 (BCI/HSBI). *ITR Response to US Assertions that ITR's Method of Calculating the Magnitude of Subsidies is Flawed*, 21 May 2007. Exhibit EC-660 (BCI/HSBI).

BCI deleted, as indicated **[***]**

The European Communities also notes that the US Response to Question 42 set out an alternative calculation for one grant of LA/MSF which assertedly illustrated a correct "CVD-style", but without references to the United States' CVD regulations or practice. The European Communities disputed this calculation as containing various factual errors regarding the grant of LA/MSF in question, and failing to follow United States' CVD regulations or practice.[1726] Thus, in the European Communities' view, the United States has failed to substantiate its assertions that the European Communities did not apply United States' CVD methodology, and the Panel should deny the United States' requests regarding paragraphs 7.1863 and 7.1952 of the Interim Report.

6.329 While the European Communities is correct that the United States did not cite to specific provisions of US law and regulations in disputing the European Communities' arguments in this regard, the United States clearly disagreed with the European Communities' allocation methodology, which it asserted contained numerous errors, which the United States contended "are at direct variance with the CVD methodologies used by the European Communities and the United States."[1727] The United States then went on at some length to give examples of these errors, in the course of which it is made clear that the United States' interpretation of an appropriate allocation methodology under its own laws and regulations differs from that on which the European Communities' calculations were based.

6.330 Having found that there was no requirement to allocate the subsidies at issue in this dispute on a per-aircraft basis, we did not attempt to adjudicate the disagreement between the parties on the appropriateness of the allocations presented by the European Communities. Thus, there is no finding as to the correct interpretation of US law and regulation in this context. In order to make explicit the parties' positions on this question, we have modified the second sentence of paragraph 7.1863, and footnote 5166 (now paragraph 7.1874and footnote 5524), and made conforming modifications to paragraph 7.1952 (now paragraph 7.1963)[1728], to reflect that the European Communities relied on its own interpretation of United States' countervailing duty law and regulations, which interpretation the United States did not accept as correct.

11. Paragraph 7.1891

6.331 The European Communities requests the Panel to clarify the context of the phrase "allegedly designated BCI" in the fourth sentence of paragraph 7.1891 of the Interim Report. Specifically, the European Communities requests the Panel to indicate that this phrase refers to the sources of the data that Dorman used in his cash-flow analysis, which the European Communities contends the United States never disclosed. According to the European Communities, this failure made it impossible to assess the confidentiality designation of the data.[1729]

6.332 The United States considers that the sentence should be corrected, but not in the way suggested by the European Communities.[1730] According to the United States, the "cash flows" addressed in paragraph 7.1891 of the Interim Report are the inflows of LA/MSF disbursements, and the outflows of LA/MSF repayments. The simulation of the French A380, A340-500/600, and A330-200 LA/MSF packages are based on the cash flows that Dr. Dorman "derived from documents

[1726] EC, Comments on US Request for Interim Review, p. 21, citing, *ITR Response to US Assertions that ITR's Method of Calculating the Magnitude of Subsidies is Flawed*, 21 May 2007, paras. 25-29. Exhibit EC-660 (BCI/HSBI)

[1727] US, Answer to Panel Question 42, para. 250, footnote 313.

[1728] See below, paragraphs 6.340 - 6.345.

[1729] EC, Request for Interim Review, p. 30.

[1730] US, Comments on EC Request for Interim Review, para. 144.

BCI deleted, as indicated **[***]**

designated as BCI."[1731] The United States contends that, although Dr. Dorman does not say so explicitly, the only possible documents "designated as BCI" that could contain confidential information related to these LA/MSF packages at the time his report was prepared, before any of the written submissions to the Panel, would be the documents provided by the European Communities during the Annex V process, which the United States provided to the Panel, together with the Dorman Report, with its first written submission.[1732] Thus, the United States contends that the source of the information was provided and disclosed, allowing for any person with access to the relevant BCI to examine and verify the cash flow data used by Dr. Dorman, and notes that the final two sentences of this paragraph of the Interim Report state that the Panel did precisely this.[1733]

6.333 We have reviewed the Dorman report in this regard, and having reconsidered the description of how Dr. Dorman undertook to conduct his simulation, it now seems clear that he relied on information drawn from LA/MSF contracts, designated BCI during the Annex V process, made available to him for purposes of preparing his report, and which the United States submitted with its first written submission. Given that we have been able to confirm the United States' explanation of the source of the data, and that it was designated BCI, we deny the European Communities' request. However, we have modified paragraph 7.1891 (now paragraph 7.1902) to clarify the facts.

12. Paragraph 7.1893

6.334 The European Communities requests that the Panel modify the first sentence of paragraph 7.1893 of the Interim Report, so as to avoid the implication that the European Communities endorsed the Ellis benchmark as a market benchmark, which the European Communities maintains it does not.[1734]

6.335 The United Stated did not comment on this request.

6.336 While it is not apparent to us that the paragraph as originally drafted gives rise to the implication that concerns the European Communities, in order to alleviate those concerns, we have modified paragraph 7.1893 (now paragraph 7.1904) in order to clarify it, albeit in somewhat different terms than proposed by the European Communities.

13. Paragraphs 7.1917-7.1918, 7.1919-7.1920, 7.1926-7.1927, and 7.1928

6.337 The United States observes that, with respect to the business cases for the A340-500/600 and A330-200, the European Communities' "cash flow analysis" for the A320, and the A330/A340 launch documents provided by the European Communities, these paragraphs of the Interim Report do not appear to reflect the Panel's consideration of the comments provided by the United States.[1735] Because the European Communities designated the information discussed in these paragraphs as HSBI, the United States' comments are necessarily largely HSBI as well. The United States requests that the Panel's consideration of the United States' comments with respect to each of these aspects be incorporated in the final report, although it makes no specific suggestions in this regard.

[1731] US, Comments on EC Request for Interim Review, para. 145, citing, Dorman Report at 5 n.13 (Exhibit US-70).

[1732] US, Comments on EC Request for Interim Review, para. 145, citing, Exhibits US-35, US-36, US-78, US-116. The United States notes that Dr. Dorman's use of the term, "designated as BCI", should be understood as referring specifically to documents that have been "designated as BCI" within the meaning given to that term in this dispute. US, Comments on EC Request for Interim Review, footnote 77.

[1733] US, Comments on EC Request for Interim Review, para. 145.

[1734] EC, Request for Interim Review, p. 31.

[1735] US, Request for Interim Review, paras. 34 - 37, citing US, Comments on EC Answer to Panel Question 262 (HSBI Appendix), paras. 10-12, 7-9, 3 and 4-6.

BCI deleted, as indicated **[***]**

6.338 The European Communities expresses no view on these aspects of the United States' request.[1736]

6.339 The submission referred to by the United States comments on and criticizes various aspects of the European Communities' arguments concerning the evidence discussed in these paragraphs of the Interim Report. That submission is designated as HSBI almost in its entirety, and is not susceptible of meaningful non-confidential summary. In the absence of any objection from the European Communities these aspects of the United States' request, and given that we did, in fact, consider the United States' comments in making our decision, we have added footnote references to the relevant paragraphs of those comments to paragraphs 7.1917-7.1918, 7.1919-7.1920, 7.1926-7.1927, and 7.1928 (now paragraphs 7.1928 - 7.1929, 7.1930 - 7.1931, 7.1937 - 7.1938 and 7.1939) to reflect that consideration.

14. Paragraph 7.1952

6.340 The European Communities requests the Panel to add, at the end of paragraph 7.1952 of the Interim Report, a reference to the European Communities' calculation of the potential cash flow effect of the alleged subsidies, in order to properly reflect the European Communities' argument.[1737]

6.341 The United States does not object to this request, but suggests an alternative formulation to that proposed by the European Communities in order to make clear that any addition reflects the European Communities' argument, and not a conclusion of the Panel.[1738]

6.342 We have no objection to expanding the summary of the European Communities' argument in this respect, but agree that it should be clear that the statement refers to European Communities' argument, and not a Panel conclusion. We have therefore modified paragraph 7.1952 (now paragraph 7.1963) to reflect the European Communities' argument, albeit in different terms than those proposed by the European Communities.

6.343 The United States also requests a modification to paragraph 7.1952 of the Interim Report.[1739] As it noted in its comments with respect to paragraph 7.1863 of the Interim Report, the United States considers the assertion that the European Communities' benefit calculation methodology is based on "United States' law and regulations governing the calculation and allocation of subsidy amounts in countervailing duty investigations" to be erroneous. In the United States' view, the final report should reflect that this is merely an assertion by the European Communities, one that the United States strongly disputes.

6.344 The European Communities objects to this request, for the same reasons that it objected to the United States' request with respect to paragraph 7.1863 of the Interim Report, discussed above.[1740]

6.345 For the same reasons as discussed above at paragraph 6.329 with respect to paragraph 7.1863 of the Interim Report, we have modified the second sentence of paragraph 7.1952 and footnote 5335 (now paragraph 7.1963 and footnote 5701), in order to make clear the disagreement between the parties on US law and regulations in the CVD context as relied on by the European Communities in this case.

[1736] EC, Comments on US Request for Interim Review, p. 21.
[1737] EC, Request for Interim Review, p. 31.
[1738] US, Comments on EC Request for Interim Review, para. 147.
[1739] US, Request for Interim Review, para. 38.
[1740] EC, Comments on US Request for Interim Review, p. 21. See paragraph 6.328, above.

BCI deleted, as indicated **[***]**

15. Paragraph 7.1954

6.346 The European Communities requests the Panel to delete the parenthetical describing the benchmark rates used in its calculation of the magnitude of the subsidies in paragraph 7.1954 of the Interim Report. The European Communities considers that this parenthetical suggests that the European Communities endorsed the United States' benchmark rates, which it did not.[1741]

6.347 The United States objects to this request, noting that the statement does not suggest that the European Communities endorsed the relevant figures, but merely reports the fact that ITR "used" those figures. The United States considers this an accurate statement which the European Communities does not dispute.[1742] Moreover, the United States notes that this paragraph summarizes the United States' argument, which indicated that the NERA and ITR reports used the same benchmark rates, which the United States considers an important point.

6.348 In our view, the parenthetical phrase in question simply states the fact, which the European Communities does not dispute, that the ITR report "used" the Ellis Report benchmark rates in its calculations, a point made by the United States in its argument. We do not consider that this statement of fact can be reasonably understood as implying that the European Communities endorsed those rates in any way. We therefore deny the European Communities' request.

6.349 The United States notes that, in assessing the United States' arguments with respect to the magnitude of the subsidy, the Interim Report appears not to reflect the United States' arguments based on the amount by which per-delivery repayments would have had to increase in order to repay LA/MSF at benchmark interest rates.[1743] According to the United States, the Panel does appear to have recognized elsewhere in its report (e.g., in paragraph 7.1997 of the Interim Report) that repayments of LA/MSF would have been greater if LA/MSF had been provided on commercial terms, and states that this consideration would also seem to be relevant to the issue of the magnitude of the subsidy, although it makes no specific suggestions for action by the Panel.

6.350 The European Communities did not comment on this aspect of the United States' request.

6.351 Having considered the United States' comments, we have added a footnote to paragraph 7.1954 (now paragraph 7.1965) to indicate that the United States presented arguments concerning the benefit from LA/MSF calculated on the basis of the amount by which each per-aircraft repayment would have to be increased in order to repay the LA/MSF at a commercial rate.

16. Paragraph 7.1958

6.352 The European Communities requests the Panel to modify its finding, in the second sentence of paragraph 7.1958 of the Interim Report, that the European Communities focused on the interest rate differentials and failed to take into account the financial contribution at issue.[1744] The European Communities contends it discussed at length the proper interest rates that should be applied to determine the amount and magnitude of any subsidy, and did take the principal amount of LA/MSF into account when calculating subsidy magnitudes. The European Communities asserts that its calculations are based on the difference between (i) the amount of interest paid under the MSF

[1741] The EC notes that it consistently described these rates as "inflated", "overstated" and "flawed". EC, Request for Interim Review, p. 31, citing, *e.g.*, EC, FWS, paras 551, 553 and 1590.

[1742] US, Comments on EC Request for Interim Review, para. 148.

[1743] US, Request for Interim Review, para. 39, citing, US, SNCOS, paras. 184-186; US, Comments on EC Answer to Panel Question 289, paras. 221-225.

[1744] EC, Request for Interim Review, p. 31.

agreement and (ii) the amount of interest that would be paid at the benchmark rate, which calculations are a function of both the applicable interest rates and the amount of loan principal.[1745] Consequently, the European Communities requests that the Panel delete paragraph 7.1958 of the Interim Report, save for the first sentence, and adapt the numbering of the issues addressed in subsequent paragraphs accordingly.

6.353 The United States objects to the European Communities' request, asserting that the European Communities' objection misses the point that the Panel develops in paragraph 7.1958 of the Interim Report.[1746] The United States notes that it is undisputed that the ITR report contains purported values for the amount of the subsidy benefit in Euros, and not simply in basis points, but considers that the text the European Communities proposes to delete does not suggest otherwise. Rather, in the United States' view, the text proposed for deletion states that an assessment of the magnitude of the subsidy for purposes of a serious prejudice analysis requires more than a simple calculation of the benefit, whether in Euros or in basis points, explaining that an analysis of the nature and effects of the subsidy - such as whether the total amount of subsidized LA/MSF provided equals 1 percent or 100 percent of the total development costs - is also relevant to determining the magnitude of the subsidy's effects.[1747] The United States maintains that, as it argued during the dispute, one of the flaws in the ITR analysis is that it treats the subsidy as if it were a lump-sum grant disbursed in the year an aircraft model is launched, thus ignoring the **effect** of the subsidy in, for example, shifting programme risk from Airbus to the governments and enabling aircraft launches that would not otherwise occur.[1748] In the United States' view, this is the point that the Panel makes in the paragraph 7.1958 of the Interim Report, and the point is correct. The United States proposes that the Panel modify the paragraph to clarify this point.

6.354 We consider that the United States has correctly understood the import of paragraph 7.1958 of the Interim Report. We therefore deny the European Communities' request, and have modified paragraph 7.1958 (now paragraph 7.1969) to clarify our views.

17. Paragraph 7.1961

6.355 The European Communities requests that the Panel modify the EUR **[***]** million figure for the subsidy amount from the extension of the runway at Bremen airport referred to in paragraph 7.1961 of the Interim Report, so as to conform it to paragraph 7.1120 of the Interim Report, where the Panel concluded that the subsidy amount was DM **[***]** million, or approximately EUR **[***]** million. The European Communities further requests that, if the Panel accepts the European Communities' request for changes in paragraph 7.1120 of the Interim Report, it also modify paragraph 7.1961 of the Interim Report accordingly.[1749]

6.356 The United States recalls that it objected to the proposed changes to paragraph 7.1120 of the Interim Report, and therefore disagrees with this aspect of the European Communities' request.[1750]

6.357 We have corrected paragraph 7.1961 (now paragraph 7.1972) to conform to our finding set out in paragraph 7.1120 (now paragraph 7.1128) that the amount of the financial contribution in

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[1745] EC, Request for Interim Review, p. 31, citing, EC, FWS, paras 1593-1595. ITR Subsidy Magnitude Report, exhibit EC-13 (HSBI and BCI). EC, SWS, para. 1012. ITR Cash Flow Effect of Member State Financing, 20 May 2007, Exhibit EC-661 (BCI).

[1746] US, Comments on EC Request for Interim Review, para. 149.

[1747] US, Comments on EC Request for Interim Review, para. 150.

[1748] US, Comments on EC Request for Interim Review, para. 151, citing, *e.g.*, US, SNCOS, paras. 182-183.

[1749] EC, Request for Interim Review, p. 32.

[1750] US, Comments on EC Request for Interim Review, para. 153.

BCI deleted, as indicated **[***]**

connection with the Bremen airport runway extension was **[***]**, and not "over EUR 40 million". We do not see any reason to convert the amount stated in DM to an amount in EUR, and the European Communities has not suggested any.

P. CONCLUSIONS AND RECOMMENDATION

1. Paragraph 8.6

6.358 The United States suggests that, for greater certainty, and in light of the Panel's findings reflected in paragraphs 7.169 through 7.177 of the Interim Report, the recommendation in paragraph 8.6 of the Interim Report should be expressed in the active voice (as is the recommendation in paragraph 8.7 of the Interim Report).

6.359 The European Communities did not comment on this request.

6.360 A change to the active voice would more closely track the text of Article 4.7 of the SCM Agreement, and would parallel the recommendation in paragraph 8.7 of the report. In the absence of any objection from the European Communities, we grant the United States' request, and have revised paragraph 8.6 (numbering unchanged) accordingly.

Q. BCI/HSBI DESIGNATIONS

1. Footnote 2158 and paragraph 7.410

6.361 The European Communities requests that the list of contracts containing royalty provisions identified in footnote 2158 of the Interim Report and those referred to in paragraph 7.410 of the Interim Report should be placed in square brackets in order to maintain consistency with the Panel's square bracketing of the number of such contracts in paragraph 7.374 of the Interim Report.[1751]

6.362 The United States did not comment on the European Communities' request.

6.363 We grant the European Communities' request and have modified footnote 2158 and paragraph 7.410 (now footnote 2452, paragraph numbering unchanged) accordingly.

2. Paragraphs 7.426 and 7.483 (tables 5 and 7)

6.364 The United States asks the Panel to remove the square brackets from the interest rates identified in Tables 5 and 7 of the Interim Report for the Spanish A320 and A330/A340 LA/MSF contracts, because it considers the two interest rates to be information that is in the public domain. The United States points in particular to its paragraph 223 of its first written submission, which cites Exhibit US-19.[1752]

6.365 The European Communities did not comment on this request.

6.366 The Spanish A320 and A330/A340 LA/MSF interest rate information identified in Tables 5 and 7 of the Interim Report comes from Exhibit EC-597 (HSBI), which contains the European Communities' IRR calculations using information that is HSBI, in particular the forecast delivery schedule. The European Communities' calculation is confirmed in the text of the contracts themselves, which are designated BCI. Thus, the bracketed interest rates contained in Tables 5 and 7

[1751] EC, Request for Interim Review, p.5.
[1752] US, Comment on EC, Request for Interim Review, para. 154.

BCI deleted, as indicated **[*******]**

were not derived from the information contained in Exhibit US-19, but from BCI. Moreover, in revealing that Spanish government support for CASA's involvement in the development of Airbus LCA was provided in the form of reimbursable advances at zero interest, the information in Exhibit US-19 does not explicitly refer to the Spanish A320 and A330/A340 LA/MSF contracts. Rather, it refers to funding provided by the Spanish government for Airbus LCA models pursuant to Intergovernmental Agreements entered into by the Spanish government since 1969. While it may be inferred from this information that the interest rate information disclosed in Exhibit US-19 referred to the Spanish A320 and A330/A340 contracts, in the absence of any explicit connection with these contracts, and given that the interest rates identified in Tables 5 and 7 were sourced from BCI, we have taken a cautious approach and deny the United States' request.

3. Paragraph 7.1916

6.367 The United States asserts that, in the text immediately prior to footnote 5259 in paragraph 7.1916 of the Interim Report, the bracketed text ("thus **[***]**") is simply a conclusion drawn from publicly available information and is not BCI.[1753]

6.368 The European Communities did not comment on this request.

6.369 Given that the information originally bracketed pertains to the sales and financial performance of the A380, and that the European Communities did not object to the United States' view that this information is not BCI, we conclude that the statement is not properly designated as BCI and have deleted the brackets from paragraph 7.1916 (now paragraph 7.1927).

4. Paragraph 7.1960

6.370 The European Communities requests the Panel to bracket as BCI the amounts of **[***]** and **[*******]** as well as the figures **[*******]** and **[***]** in the second sentence of paragraph 7.1960 of the Interim Report. The European Communities asserts that to leave these figures would enable a reader to reverse-engineer the data designated BCI in the LA/MSF section of the report.[1754]

6.371 The United States did not comment on this request.

6.372 In order to ensure the confidentiality of information designated as BCI elsewhere in the report, by precluding calculations that would allow that information to be derived from information not designated as BCI, and in the absence of any objection from the United States, we grant the European Communities' request and have modified paragraph 7.1960 (now paragraph 7.1971) to designate this information as BCI by enclosing it in brackets.

[1753] US, Request for Interim Review, para. 55.
[1754] EC, Request for Interim Review, p. 31.

BCI deleted, as indicated **[***]**

VII. FINDINGS

A. GENERAL INTRODUCTION

7.1 The United States' complaint in this dispute alleges more than 300 separate instances of subsidization, over a period of almost forty years, by the European Communities[1755] and four of its member States, France, Germany, Spain and the United Kingdom, with respect to large civil aircraft ("LCA") developed, produced and sold by the company known today as Airbus SAS. The measures that are the subject of the United States' complaint may be grouped into five general categories: (i) "Launch Aid" or "member State Financing"; (ii) loans from the European Investment Bank; (iii) infrastructure and infrastructure-related grants; (iv) corporate restructuring measures; and (v) research and technological development funding. The United States claims that each of the challenged measures is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and that the European Communities and the four member States, through the use of these subsidies, cause adverse effects to the United States' interests within the meaning of Articles 5 and 6 of the SCM Agreement. In addition, the United States claims that seven of the challenged "Launch Aid" or "member State Financing" measures are prohibited export subsidies within the meaning of Article 3 of the SCM Agreement.

7.2 On 6 October 2004, the United States requested consultations with the European Communities and certain EC member States (France, Germany, Spain and the United Kingdom) with regard to the challenged measures.[1756] The United States requested the establishment of this Panel on 31 May 2005.[1757] Following the 24 February 2006 submission of the report of the Designated Representative in the information-gathering procedure under Annex V of the SCM Agreement, the Panel temporarily set aside its time-table, recommencing its work in September 2006.

7.3 This Report addresses the United States' claims in four parts. First, in parts VII.C and VII.D, we set forth our decision of 11 July 2007 with respect to the European Communities' request for preliminary ruling of 25 October 2005 and address other preliminary matters. Next, in part VII.E, we evaluate the United States' claims with respect to whether each of the challenged measures is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and whether seven of those challenged measures are export subsidies. Finally, with respect to those measures we find to be specific subsidies, we address in part VII.F the United States' claims that the European Communities and the four member States, through the use of those subsidies, cause the claimed adverse effects to the United States' interests within the meaning of Articles 5 and 6 of the SCM Agreement. We set forth our conclusions and recommendation in Section VIII.

B. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION, AND BURDEN OF PROOF

1. Standard of Review

7.4 Article 11 of the DSU provides the standard for decision-making by WTO panels, requiring them to make an "objective assessment" of the matter, including an objective assessment of the facts,

[1755] As previously noted, see footnote 1 above, on 1 December 2009, the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

[1756] WT/DS316/1, attached at Annex A.

[1757] WT/DS316/2, attached at Annex B.

BCI deleted, as indicated **[***]**

and the applicability of and conformity with the relevant covered agreements, and to "make such other findings as will assist the DSB in making the recommendations or in giving the ruling provided for in the covered agreements."

2. Relevant Principles of Treaty Interpretation

7.5 With respect to the question of legal interpretation, Article 3.2 of the DSU provides that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31.1 of the Vienna Convention on the Law of Treaties ('Vienna Convention')",[1758] which is generally accepted as such a customary rule, provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.6 There is a considerable body of WTO case law dealing with the application of these provisions on treaty interpretation in dispute settlement in the WTO. It is clear that interpretation must be based above all on the text of the treaty,[1759] but that the context of the treaty also plays a role. It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[1760] Furthermore, panels "must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement."[1761]

3. Burden of Proof

7.7 While the parties have not generally raised burden of proof as an issue, we have kept in mind the general principles applicable to burden of proof in WTO dispute settlement, which require that a party claiming a violation of a provision of a WTO Agreement by another Member must assert and prove its claim.[1762] In this dispute, the United States, which has challenged certain measures and their effects, thus bears the burden of demonstrating that the disputed measures are specific subsidies, and in some cases export subsidies, and that through the use of those subsidies, the European Communities and certain member States cause adverse effects to the United States' interests. It is generally for each party asserting a fact to provide proof thereof.[1763] Therefore, it is also for the European Communities to provide evidence for the facts which it asserts.

7.8 We have also kept in mind that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party

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[1758] Done at Vienna, 23 May 1969, 1155 United Nations Treaty Series 331 (1980); 8 *International Legal Materials* 679 (1969).

[1759] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 11.

[1760] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents (US)")*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 45.

[1761] Appellate Body Report, *India – Patents (US)*, para. 46.

[1762] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India ("US – Wool Shirts and Blouses")*, WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323, p. 337.

[1763] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 337.

BCI deleted, as indicated **[***]**

presenting the *prima facie* case.[1764] Finally, we recall that the Appellate Body also stated that "{a} complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."[1765]

C. PRELIMINARY RULING[1766]

1. Introduction

7.9 On 6 October 2004, the United States requested consultations with the Governments of Germany, France, the United Kingdom and Spain, and with the European Communities, pursuant to Articles 1 and 4 of the DSU, Article XXIII:1 of GATT 1994 and Articles 4, 7 and 30 of the SCM Agreement, with regard to measures affecting trade in large civil aircraft. Pursuant to this request, the United States held consultations with the European Communities on 4 November 2004.[1767]

7.10 On 31 May 2005, the United States requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII:2 of GATT 1994 and Articles 4, 7 and 30 of the SCM Agreement.[1768]

7.11 On 20 July 2005, the DSB established the Panel with the following terms of reference:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS316/2, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[1769]

7.12 On 25 October 2005, the European Communities submitted a request to the Panel for preliminary rulings addressing two distinct sets of issues. First, the European Communities asks the Panel to find that certain measures alleged by the United States to constitute prohibited or actionable subsidies fall outside the 'temporal scope' of these proceedings. Second, the European Communities asked the Panel to find that certain measures fall outside the Panel's terms of reference because the measures did not exist at the time of the establishment of the Panel, were not identified in the request for consultations, or were not identified in the request for the establishment of a panel in accordance with Article 6.2 of the DSU.[1770]

7.13 The first set of issues involves a consideration of the temporal scope of application of Article 5 of the SCM Agreement and the relevance, if any, of the *Agreement between the European Community and the Government of the United States concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft* (the 1992 Agreement) to the

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[1764] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones) ("EC – Hormones")*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 104.

[1765] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US – Gambling")*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475), para. 140.

[1766] Originally transmitted to the parties and third parties on 11 July 2007.

[1767] WT/DS316/1;G/L/697; G/SCM/D62/1, 12 October 2004.

[1768] WT/DS316/2, 3 June 2005.

[1769] WT/DSB/M/194.

[1770] European Communities, Request for Preliminary Rulings, 25 October 2005, (hereinafter "EC, Original Request"), para. 8.

BCI deleted, as indicated **[***]**

determination regarding measures which are properly within the scope of this dispute. We address these issues first, before turning to consider those related to the alleged non-existence of the measures, alleged lack of consultations, and alleged failure to comply with Article 6.2 of the DSU.

2. Issues relating to the temporal scope of this dispute

(a) Background

7.14 On 7 November 2006, the European Communities submitted an updated request for preliminary rulings, updating and partially replacing its request of 26 October 2005 in relation to its arguments concerning the 'temporal scope' of this dispute.[1771] In its updated request, the European Communities submits that the measures included in the United States' Panel request which pre-date 1 January 1995 (the effective date of the SCM Agreement) and/or 17 July 1992 (the effective date of the 1992 Agreement) fall outside the temporal scope of this dispute.

7.15 As modified by the updated request for preliminary rulings, the European Communities requests the Panel to rule that:

(a) all alleged prohibited and actionable subsidies granted by the European Communities before 1 January 1995 are excluded from the temporal scope of the proceedings; and

(b) any alleged government support committed prior to 17 July 1992 is excluded from the temporal scope of the proceedings.

7.16 On 22 December 2006, the Panel issued a communication, the relevant parts of which are set forth below:

> "1. After carefully considering the Parties' and Third Party submissions and responses to written questions concerning the European Communities' preliminary ruling request to exclude certain challenged measures from the temporal scope of this proceeding, the Panel informs the Parties as follows:
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> 2. The Panel understands that the European Communities, in the light of the content of the United States' First Written Submission, are no longer pursuing their claims regarding the temporal scope of Article 3 of the SCM Agreement. Therefore, on the basis of the facts and arguments presented by the Parties to date, the Panel considers that, for the moment, it is not necessary for it to rule on this aspect of the European Communities' request for a preliminary ruling.
>
> 3. The Panel also understands that the European Communities has acknowledged that the alleged measures identified in paragraphs 34-36, 38, 39, 41, 42, 44, 45, 49, 51, 53, 55 and 56 of the European Communities' response of 8 December 2006 to Panel Question 3, fall entirely or "partially" within the temporal scope of this proceeding; and that the European Communities' request for a preliminary ruling is, to this extent, limited to the other alleged measures identified, in paragraphs 23-38, 40, 41, 43, 47, 48, 50 and 54 of the European Communities' response of 8 December 2006 to Panel Question 3, as allegedly falling entirely or "partially" outside of the temporal scope of this proceeding.

[1771] European Communities, Updated Request for Preliminary Rulings, 7 November 2006, (hereinafter "EC, Updated Request"), para. 3.

BCI deleted, as indicated **[***]**

> 4. On the basis of the facts and arguments that the Panel has thus far considered, and without prejudice to any views that it may develop during the course of this proceeding in the light of additional facts and arguments that may be introduced by the Parties and Third Parties, the Panel is not convinced by the European Communities' assertions that (i) as a general matter, "subsidies granted" or "brought into existence" prior to 1 January 1995, cannot fall within the scope of Article 5 of the SCM Agreement; and (ii) "alleged government support committed prior to 17 July 1992" is outside of the temporal scope of this proceeding, because of the *Agreement between the European Community and the Government of the United States concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft*. Furthermore, the Panel considers that it is not currently in a position to determine whether the measures identified in paragraphs 23-38, 40, 41, 43, 47, 48, 50 and 54 of the European Communities' response of 8 December 2006 to Panel Question 3, fall outside of the scope of Article 5 of the SCM Agreement. The Panel therefore invites the Parties and Third Parties to proceed on the understanding that all of the alleged measures challenged by the United States continue to fall within the scope of this proceeding.
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> 5. The reasons for the Panel's views on this aspect of the European Communities' request for a preliminary ruling will be disclosed to the Parties in due course."[1772]

7.17 We recall that in response to a question from the Panel concerning the temporal scope of application of the SCM Agreement, the European Communities confirmed that the measures that are alleged by the United States to be prohibited subsidies under Part II of the SCM Agreement (namely, the LA/MSF in respect of the Airbus A380, A340-500/600 and the A330-200) all came into existence after 1 January 1995.[1773] The Panel further notes that the United States has made no claims under Article 3 with respect to subsidies granted prior to 1 January 1995. Therefore, it is not necessary for the Panel to address the European Communities' request for a preliminary ruling on the temporal scope of application of Part II of the SCM Agreement.

7.18 Also in response to a question from the Panel, the European Communities has accepted that certain of the measures challenged by the United States fall within the scope of Article 5 of the SCM Agreement because the sums were disbursed after 1 January 1995.[1774] At issue, however, are the remaining challenged measures which the European Communities maintains are outside the scope of Article 5 of the SCM Agreement. The European Communities requests the Panel to exclude these remaining measures from this dispute on the basis that, to the extent that they were 'granted' or 'brought into existence' prior to 1 January 1995, they are outside the 'temporal scope' of Article 5 of the SCM Agreement.

[1772] Panel Communication to the parties, 22 December 2006 (footnotes omitted).

[1773] European Communities, Answer to Panel Question 1 of 8 December 2006 (hereinafter "EC, Answer to Panel Question X of 8 December 2006"), paras. 4-6. During the First Meeting of the Panel, the European Communities objected to the use by the United States of the term 'launch aid' to describe the provision by the member States of the European Communities of financing for large civil aircraft design and development to the Airbus companies. The European Communities refers to such financing as 'member State Financing' (MSF). For purposes of this Preliminary Ruling, we use the term LA/MSF to refer to the financing described by the United States as 'launch aid' and by the European Communities as 'MSF'. This question is addressed further in the Panel's findings at paragraph 7.291.

[1774] EC, Answer to Panel Question 3 of 8 December 2006, paras. 22-57. The measures in question are set forth in Section VII.C Attachment, following para. 7.158.

BCI deleted, as indicated **[***]**

(b) Article 5 of the SCM Agreement

(i) Arguments of the European Communities

7.19 The European Communities submits that the temporal scope of the SCM Agreement must be determined in accordance with Article 28 of the *Vienna Convention on the Law of Treaties* (VCLT), which sets out the general rule that treaty provisions do not apply retroactively.[1775] The European Communities' principal argument is that, consistent with the principle of non-retroactivity embodied in Article 28 of the VCLT, Article 5 of the SCM Agreement applies to subsidies that were granted after 1 January 1995, while subsidies granted prior to 1 January 1995 fall outside the temporal scope of Article 5.[1776]

7.20 The European Communities contends that the focus of the obligation contained in Article 5 of the SCM Agreement is on the conduct, or act of a Member in bringing about adverse effects through the use of subsidies.[1777] The European Communities argues that, consistent with the principle of non-retroactivity reflected in Article 28 of the VCLT, in order to be subject to Article 5 of the SCM Agreement, a Member's conduct in bringing about adverse effects to the interests of other Members must have occurred after 1 January 1995.[1778] The European Communities contends that the conduct or act of the Member to which Article 5 is addressed may be the "bringing into existence of a subsidy within the meaning of Article 1 of the SCM Agreement."[1779] Therefore, according to the European Communities, Article 5 of the SCM Agreement does not apply to government *conduct in bringing into existence* a subsidy if that conduct occurred prior to 1 January 1995.

7.21 The European Communities notes that a subsidy within the meaning of Article 1.1 of the SCM Agreement consists of two elements; namely, a financial contribution, which confers a benefit.[1780] According to the European Communities, a subsidy is only is 'brought into existence' when the financial contribution has been made and the benefit has been conferred.[1781] For the European Communities, it is not sufficient to subject a Member to the obligations of Article 5 that the adverse effects of a subsidy granted by a Member prior to 1 January 1995 are felt by Members subsequent to 1 January 1995. Nor is it sufficient to bring a subsidy within the scope of Article 5 that the 'benefit' of

[1775] EC, Updated Request, paras. 10-13.

[1776] Consistent with this approach, the European Communities argues that LA/MSF committed and paid prior to 1 January 1995 is outside the temporal scope of Article 5 because the grants of LA/MSF constitute completed 'acts' for purposes of Article 28 of the VCLT. The European Communities also argues that EIB loans to EADS and the Airbus companies which were provided in full prior to 1 January 1995 are outside the temporal scope of Article 5. In relation to the measures that the United States has challenged as infrastructure subsidies, the European Communities argues that the extension of the runway at Bremen Airport, which occurred in 1988 and 1989, falls outside the temporal scope of Article 5 because the 'financial contribution' (*i.e.*, the provision of the runway) was a completed act by 1 January 1995. Subsidies alleged to have arisen out of certain share transfers and equity infusions relating to the Airbus companies are also, according to the European Communities, outside the temporal scope of Article 5 to the extent that such transfers or infusions took place before 1995, because at that point, they became completed 'acts'. In relation to research and development funding which the United States has challenged as involving actionable subsidies, the European Communities argues that grants or disbursements made after 1 January 1995 pursuant to programmes established prior to 1 January 1995 are within the temporal scope of Article 5, while grants or disbursements which were made prior to 1 January 1995 are outside the temporal scope of Article 5 and should be excluded from these proceedings.

[1777] EC, Updated Request, paras. 27-28. Reiterated in the Second Written Submission of the European Communities, (hereinafter "EC, SWS"), para. 11.

[1778] EC, Updated Request, para. 27.

[1779] EC, Answer to Panel Question 2 of 8 December 2006, para. 18. EC, SWS, para. 11 (emphasis added).

[1780] EC, SWS, para. 16.

[1781] EC, SWS, para. 16.

BCI deleted, as indicated **[***]**

the financial contribution was conferred subsequent to 1 January 1995 if the financial contribution was made prior to that date.[1782] The consequence of this approach is that, in order to be subject to Article 5 of the SCM Agreement, the financial contribution *and* the benefit components of a subsidy (and obviously, the adverse effects) must take place subsequent to 1 January 1995.[1783] The European Communities characterises the obligation contained in Article 5 in the following manner:

> "The drafters of the SCM Agreement created the (negative) duty to abstain from granting new actionable subsidies after 1995. Had they intended also to create an additional (positive) duty for Members to revise all their pre-1995 subsidies because of their possible economic effect as 'continuing benefits' after 1995 they would have done so in Part IX on transitional arrangements."[1784]

7.22 The European Communities argues that for the Panel to determine otherwise would be contrary to the non-retroactivity principle because it would effectively require Members to carry out full reviews of all individual subsidies that they had granted prior to 1 January 1995 in order to determine whether "they could produce 'continuing benefits' and could retroactively fall foul of Article 5 of the SCM Agreement."[1785]

7.23 The European Communities submits that, although the conduct of a Member in bringing a subsidy into existence may result in economic effects which continue after completion of that conduct, this circumstance does not transform what is properly characterised as a completed "act" for purposes of Article 28 of the VCLT into a "situation" which continues to exist.[1786] The European Communities contends that a "situation" of a continuing character, for purposes of Article 28 of the VCLT "asks for more than bringing a subsidy into existence pre-1995 with economic effects post-1995."[1787] The European Communities posits a subsidy programme involving recurring grants of subsidies as an example of a 'situation' of a continuing character in the field of subsidies.[1788] The European Communities contrasts such programmes with the one-off granting of a subsidy, which the European Communities contends would not fall within the temporal scope of Article 5 if the conduct in question had occurred before 1 January 1995, even if the adverse effects caused by that conduct arise subsequent to that date.[1789]

7.24 The European Communities considers that its interpretation of Article 5 is indirectly confirmed by paragraph 7 of Annex IV of the SCM Agreement which sets forth the method for calculating the total *ad valorem* subsidization of a product for purposes of the presumption of serious prejudice in Article 6.1(a).[1790] The European Communities regards paragraph 7 of Annex IV as

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[1782] In other words, the European Communities argues that if a Member made a financial contribution before 1 January 1995, part or all of the benefits of which are conferred after 1 January 1995, this conduct would not, consistently with the principle of non-retroactivity, be subject to Article 5 of the SCM Agreement.

[1783] EC, Updated Request, para. 30; EC, Answer to Panel Question 5 of 8 December 2006, para. 67.

[1784] EC, Answer to Panel Question 5 of 8 December 2006, para. 67.

[1785] EC, SWS, para. 17.

[1786] EC, Answer to Panel Question 2 of 8 December 2006, paras. 19 and 20. *See, also*, Answer of the European Communities to Panel Question 57 (hereinafter "EC, Answer to Panel Question X"), paras. 5-8; EC, SWS, paras. 12 and 16.

[1787] EC, Answer to Panel Question 2 of 8 December 2006, para. 20.

[1788] EC, Answer to Panel Question 2 of 8 December 2006, para. 20; EC, Answer to Panel Question 57, paras. 6-7. The European Communities argues therefore that, post-1995 grants made pursuant to subsidy programmes which were established prior to 1 January 1995 would be subject to Article 5 of the SCM Agreement because such grants effectively constitute new state conduct.

[1789] EC, Updated Request, para. 27.

[1790] EC, Updated Request, para. 29; EC, Answer to Panel Question 5 of 8 December 2006, paras. 66-67.

addressing an exceptional situation in which subsidies granted prior to 1 January 1995 are included in the *ad valorem* subsidization calculation, provided their benefits are allocated to future production.[1791] According to the European Communities, if Article 5 had been intended generally to apply to subsidies granted prior to 1 January 1995, this specific exception would not have been necessary.

7.25 The European Communities also argues that Article 5, in obligating Members not to cause adverse effects "through the use of any subsidy within the meaning of Article 1" necessarily requires reference to the definition of 'subsidy' in Article 1 of the SCM Agreement and therefore excludes subsidies provided prior to 1 January 1995.

(ii) Arguments of the United States

7.26 As an initial matter, the United States notes that it is not a party to the VCLT.[1792] However, the United States does not regard this circumstance as problematic to the resolution of the issues raised by this request for preliminary rulings because it is not seeking to interpret Article 5 of the SCM Agreement in a retroactive manner.[1793] The United States submits that Members undertook the obligation contained in Article 5 as of the date of entry into force of the WTO Agreement and that the relevant issue is how the Panel determines the precise content of that obligation.

7.27 The United States argues that the act, fact or situation that is the focus of the obligation contained in Article 5 of the SCM Agreement is the *causing* of adverse effects to the interests of a Member through the use of subsidies and that this act, fact or situation of causing adverse effects to the United States through the use of the subsidy measures at issue in this dispute has continued to exist after 1 January 1995.[1794] The United States supports its construction of Article 5 of the SCM Agreement on the basis that the "positioning of 'through the use of' as a subordinate, modifying clause accords with the focus of the provision, which is the causation of adverse effects, and not on the grant of a subsidy."[1795] The United States contrasts the structure of the obligation in Article 5 with the prohibition in Article 3.2 which, in providing that a Member "shall neither grant nor maintain" prohibited subsidies, focuses squarely on the grant or maintenance of a prohibited subsidy, rather than on causing certain effects through the use of the subsidy.[1796]

7.28 The United States notes that the term 'use' in Article 5 appears as a noun which names a fact or situation; namely, the 'act of using, fact of being used', rather than as a verb.[1797] According to the United States, the term 'use' as it appears in Article 5 does not carry any temporal connotation to indicate that the obligation in Article 5 applies only at the time at which the subsidy is initially granted.[1798] On the contrary, the United States contends that Article 5, in focusing on the act, fact or situation of *causing adverse effects* through the use of subsidies, reflects that there may be a lag

[1791] EC, Updated Request, para. 29.
[1792] United States, Comments on EC, Answer to Panel Question 2 of 8 December 2006, ("US, Comments on EC, Answer to Panel Question X of 8 December 2006"), para. 2. The United States notes that the European Communities itself is also not a party to the VCLT.
[1793] US, Comment on EC, Answer to Panel Question 2 of 8 December 2006, para. 2.
[1794] United States, Answer to Panel Question 2 of 8 December 2006, (hereinafter "US, Answer to Panel Question X of 8 December 2006"), para. 1; US, Comments on EC Answer to Panel Question 2 of 8 December 2006, para. 6.
[1795] US, Answer to Panel Question 2 of 8 December 2006.
[1796] US, Answer to Panel Question 2 of 8 December 2006, para. 2, at footnote 1.
[1797] US, Answer to Panel Question 2 of 8 December 2006, para. 2.
[1798] US, Answer to Panel Question 2 of 8 December 2006, para. 2.

BCI deleted, as indicated **[***]**

between the initial commitment of a subsidy and the adverse effects it causes, and that the subsidy and the adverse effects caused thereby need not be contemporaneous.[1799]

7.29 The United States submits that its interpretation of Article 5 is consistent with Part III of the SCM Agreement generally, which it argues is addressed to an ongoing 'situation' in which adverse effects are being caused over time through the use of subsidies, rather than the discrete 'act' of making a financial contribution.[1800] In support, the United States notes that Article 6.4 provides that claims of displacement or impedance for purposes of Article 6.3(d) of the SCM Agreement are required to be examined 'over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year.' In addition, Article 6.3(d) requires that the effects in question follow a consistent trend over a period when subsidies have been granted.[1801]

7.30 The United States argues that the text of Article 5 of the SCM Agreement does not distinguish between subsidy measures that came into existence prior to 1 January 1995 and those that came into existence after 1 January 1995.[1802] The United States contends that contextual support for this position can be found in the provisions of Article 28 dealing with transitional arrangements. According to the United States, Article 28.1, which conditionally exempts subsidy programmes established before 1 January 1995 from Part II of the SCM Agreement for a three-year transition period, confirms that the only obligations in the SCM Agreement that did not apply to subsidy programmes established before 1 January 1995 were those of Part II.[1803]

7.31 In response to the European Communities' argument that paragraph 7 of Annex IV of the SCM Agreement should be regarded as an exceptional circumstance where subsidies granted prior to 1 January 1995 may be taken into account in determining whether a subsidy has caused adverse effects for purposes of Article 5, the United States argues that paragraph 7 of Annex IV actually confirms the United States' conclusion that the SCM Agreement does not exclude subsidy measures that came into existence prior to 1 January 1995 from its temporal scope.[1804] The United States argues that this provision is not an 'exception' to a general rule of non-retroactivity in Part III of the SCM Agreement; it simply sets out a methodology for determining *which* subsidies granted prior to 1 January 1995 should be taken into account for purposes of Article 6.1.[1805]

(iii) Arguments of Third Parties

7.32 Australia observes that, in considering the application of Article 28 of the VCLT to Article 5 of the SCM Agreement, the Panel may be called on to determine whether "payments made prior to the entry into force of the SCM Agreement can be characterised as forming part of a 'situation' or subsidy continuum which continued to exist after entry into force of the SCM Agreement."[1806] In this regard, Australia submits that the Panel should draw on the guidance provided by the Appellate Body on the

[1799] US, Answer to Panel Question 2 of 8 December 2006, para. 3.
[1800] US, Comments on EC Answer to Panel Question 2 of 8 December 2006, para. 6.
[1801] US, Comments on EC Answer to Panel Question 2 of 8 December 2006, para. 6.
[1802] United States, Response to Updated Request for a Preliminary Ruling Submitted by the European Communities, 29 November 2006, (hereinafter "US, Answer to EC, Updated Request"), para. 15.
[1803] US, Answer to Panel Question 8 of 8 December 2006, para. 20.
[1804] US, Answer to EC, Updated Request, para. 17.
[1805] US, Answer to Panel Question 6 of 8 December 2006, para. 14.
[1806] Third Party Submission of Australia, 7 May 2007, (hereinafter "Australia Third Party Submission") para. 24.

application of Article 28 of the VCLT to 'situations'.[1807] Australia also notes that the SCM Agreement contains provisions which require an examination of a representative period for purposes of establishing the effects of subsidization, and that, depending on the nature of the subsidy granted, such effects may continue to exist through the ongoing conferral of a benefit to the subsidized product.[1808]

7.33 Brazil argues that the relevant 'act' in the subsidies context is the provision of the subsidy by the government 'in the form of a financial contribution conferring a benefit within the meaning of Article 1 of the SCM Agreement'.[1809] According to Brazil, a single 'act' cannot constitute a 'situation' that continues over time "without more, such as the continuing application of a WTO-inconsistent measure."[1810]

7.34 Based on this approach, single grants made prior to 1 January 1995 would be excluded from the temporal scope of Article 5, while 'recurring subsidies' and contributions made after 1 January 1995 would fall within the scope of Article 5, even where they are made pursuant to commitments, decisions or actions taken prior to 1 January 1995.[1811] Brazil supports this interpretation of Article 5 by noting that the obligation 'not to cause adverse effects' contained in Article 5 is qualified by reference to the Member's 'use' of any subsidy *referred to in paragraphs 1 and 2 of Article 1*.[1812] In addition, Brazil argues that active verbs 'grant,' 'maintain,' and 'use' suggest that the drafters intended that the SCM Agreement would cover only subsidies *within the meaning of Article 1* that were actually provided after 1 January 1995.[1813]

7.35 Finally, Brazil considers that the absence of any transition provisions expressly according WTO Members the right to challenge pre-WTO subsidies under Parts II and III of the SCM Agreement further supports Brazil's interpretation of the temporal scope of Article 5.[1814]

7.36 Japan submits that the text of the SCM Agreement demonstrates that its drafters did not intend its disciplines to be limited only to subsidies granted on or after 1 January 1995.[1815] In this regard, Japan notes that Article 28.1 of the SCM Agreement, by providing a three-year grace period during which Members could not challenge certain subsidy programmes under Part II of the SCM Agreement "implies that Members *could* challenge such pre-WTO programmes after the grace period had expired."[1816]

[1807] Australia, Third Party Submission, para. 24. Australia refers to the Appellate Body Report, *Canada – Term of Patent Protection* ("*Canada – Patent Term*"), WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, 5093 in this regard.

[1808] Australia, Third Party Submission, para. 24. The provisions of the SCM Agreement to which Australia refers are Article 6.3(d) and Article 6.4, discussed below.

[1809] Brazil, Third Party Comments regarding the Request for Preliminary Rulings by the European Communities, 5 December 2006, ("hereinafter Brazil, Third Party Comments"), para. 17.

[1810] Brazil, Third Party Comments, para. 13; Third Party Written Submission of Brazil, 7 May 2007, ("hereinafter Brazil Third Party Submission"), para. 13.

[1811] Brazil, Third Party Comments, para. 18; Brazil, Third Party Submission, paras. 10-15.

[1812] Brazil, Third Party Comments, para. 19.

[1813] Brazil, Third Party Comments, para. 19; Brazil, Third Party Submission, para. 14.

[1814] Brazil, Third Party Comments, para. 19.

[1815] Third Participant Submission of Japan, 7 May 2007 (hereinafter "Japan Third Party Submission"), para. 4. Brazil and Japan were the only Third Parties to specifically address the question of the temporal scope of Article 5 of the SCM Agreement.

[1816] Japan Third Party Submission (emphasis in original). The European Communities and the United States also addressed the significance of Article 28 and Annex IV, paragraph 7 to the contextual interpretation of Article 5. These arguments are considered below.

BCI deleted, as indicated **[***]**

7.37 Similarly, Japan notes that paragraph 7 of Annex IV of the SCM Agreement recognizes that members may allocate benefits to future production arising from "subsidies granted prior to the date of entry into force of the WTO Agreement" that are being challenged under Part III of the SCM Agreement.

7.38 Finally, Japan notes that the relevant provisions of the SCM Agreement in this dispute; namely, Articles 1, 5, 6 and 7, contain no temporal limitations, and contends that the absence of such limitations is significant, as the drafters expressly provided for temporal limitations in other parts of the SCM Agreement, such as Article 27.[1817]

7.39 According to Japan, the relevant inquiry for the Panel in the present dispute is to determine whether each alleged pre-1995 subsidy 'situation' had 'ceased to exist' prior to 1995, or whether it continued into 1995 or beyond.[1818] Japan submits that, in conducting this analysis, the Panel should consider a subsidy situation to be ongoing "so long as the benefit of that subsidy continues to exist."[1819]

(iv) Responses of the Parties to the Arguments of Third Parties

7.40 The United States argues that Brazil has erroneously equated the 'provision' of a subsidy to the making of a 'financial contribution' in determining whether a subsidy was 'provided' before 1 January 1995. According to the United States, to the extent that it is even relevant to determine when a particular subsidy was 'provided' for purposes of the application of Article 5, the analysis cannot be limited to the point in time when the financial contribution was made. The United States refers in support to the observation of the Appellate Body in *US – Lead and Bismuth II* that the definition of subsidy in Article 1.1 does not address the time at which the 'financial contribution' and/or 'benefit' must be shown to exist.[1820]

7.41 The United States also disputes Brazil's characterization of the obligation contained in Article 5 of the SCM Agreement as essentially an obligation to avoid 'providing' certain subsidies.[1821] The United States contends that the obligation contained in Article 5 is rather, an obligation not to *cause adverse effects* through the use of a subsidy; an obligation which the United States argues is of a fundamentally different nature to the obligation not to 'grant' prohibited subsidies in Article 3.2. The United States contends that the provisions of Parts II and III of the SCM Agreement "each apply in their own way upon the entry into force of the SCM Agreement, obligating Members henceforth not to grant or maintain a certain class of subsidies and not to cause adverse effects through a broader group of subsidies."[1822] According to the United States, the absence of any transition provisions expressly according Members the right to challenge pre-WTO subsidies under Parts II and III of the SCM Agreement is "completely consistent with the different character of the obligations in Parts II

[1817] Japan Third Party Submission, para. 5.
[1818] Japan Third Party Submission, para. 6.
[1819] Japan Third Party Submission, para. 8.
[1820] United States, Comments on the Third Party Comments of Brazil, 18 December 2006 (hereinafter "US, Comments on the Third Party Comments of Brazil"), para. 5; referring to Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*"), WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595, para. 60. The United States notes that, in the *US – Lead and Bismuth II* dispute, the alleged subsidies countervailed involved financial contributions (principally equity infusions) made by the British government during 1977-1978 and 1985-1986, the benefits of which were allocated by the USDOC over the subsequent 18 years. No party to that dispute contested that a pre-1995 financial contribution resulting in post-1995 benefits could amount to an actionable subsidy under Part V of the SCM Agreement (at footnote 11).
[1821] US, Comments on the Third Party Comments of Brazil, para. 6.
[1822] US, Comments on the Third Party Comments of Brazil, para. 8.

and III and in no way suggests that the obligations must be read in a way that is contrary to their express meaning."[1823]

7.42 In response to Japan's comments, the European Communities disagrees with what it regards as Japan's unsupported contention that individual subsidies could have been challenged during the grace period provided for subsidy programmes in Article 28.1. According to the European Communities, there is no contrary intention expressed in the SCM Agreement that the drafters intended to overcome the presumption of non-retroactivity for individual subsidies granted prior to 1 January 1995.[1824]

7.43 With respect to Japan's argument that express temporal scope limitations are contained in other provisions of the SCM Agreement, such as Article 27, the European Communities responds that Article 27 does not concern the question of specific temporal rules for past conduct, but exempts developing countries for a period *after* entry into force of the SCM Agreement. According to the European Communities, if subsidies provided prior to 1 January 1995 had been intended to be subject to Article 5, the exemption concerning special and differential treatment of developing countries contained in Article 27.3 would have covered subsidies provided prior to 1 January 1995, when it did not.[1825]

(v) Evaluation by the Panel

7.44 We recall that Article 5 of the SCM Agreement provides, in relevant part:

> "No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members..."

7.45 There is nothing in the text of Article 5 of the SCM Agreement to indicate that the obligation it sets forth should operate in a retroactive manner. We consider that Members undertook to be bound by the obligation contained in Article 5 of the SCM Agreement as of 1 January 1995. It is important to emphasize, however, that accepting to be bound by the obligation contained in Article 5 as of 1 January 1995 is not necessarily the same as agreeing that only subsidies granted after 1 January 1995 may be subject to adverse effects claims under Part III of the SCM Agreement. Whether or not this is so depends on the content of the obligation contained in Article 5.

7.46 Based on its ordinary meaning, Article 5 imposes an obligation on Members not to cause adverse effects to the interests of other Members through the use of subsidies as defined in Article 1.[1826] As the United States observes, the predicate of the sentence in Article 5 is to 'cause adverse effects to the interests of other Members', while the phrase 'through the use of' is an adverbial phrase that describes the manner in which the Member should not cause the adverse effects.[1827] Article 5 thus comprises an obligation not to cause certain results through a specific causal pathway, rather than an obligation not to engage in certain conduct. This is reflected in the remedy envisaged for subsidies which have been determined to have resulted in adverse effects within the meaning of Article 5: Members shall either withdraw the subsidy *or* shall take appropriate steps to remove the

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[1823] US, Comments on the Third Party Comments of Brazil.
[1824] EC, SWS, para. 14.
[1825] EC, SWS, para. 14.
[1826] We note that, in contrast to Article 5, Article 3 is formulated as a prohibition on the act of granting or maintaining export subsidies, as these subsidies are regarded as harmful *per se*. Article 5 is directed towards the adverse effects which can be shown to have been caused by the use of subsidies by a Member, including by use of the narrow class of subsidies whose grant or maintenance is prohibited in Article 3.
[1827] US, Answer to Panel Question 2 of 8 December 2006, para. 2.

BCI deleted, as indicated **[***]**

adverse effects.[1828] The Appellate Body has indicated in previous disputes that the principle codified in Article 28 of the VCLT is a general principle of international law that is relevant to the interpretation of the covered agreements.[1829] In our view, it is the obligation not to cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, that is to be interpreted consistently with the principle of non-retroactivity reflected in Article 28 of the VCLT.

7.47 Article 28 of the VCLT, entitled 'Non-retroactivity of treaties' provides:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."[1830]

7.48 In *Canada – Patent Term*, the Appellate Body explained the application of Article 28 of the VCLT in the following terms:

> "Article 28 of the *Vienna Convention* covers not only any 'act', but also any 'fact' or 'situation which ceased to exist'. Article 28 establishes that, in the absence of a contrary intention, treaty provisions do *not* apply to 'any situation which ceased to exist' before the treaty's entry into force for a party to the treaty. Logically, it seems to us that Article 28 also necessarily implies that, absent a contrary intention, treaty obligations *do* apply to any 'situation' which has *not* ceased to exist – that is, to any situation that arose in the past, but continues to exist under the new treaty."[1831]

7.49 As the above statement makes clear, the non-retroactivity principle reflected in Article 28 of the VCLT distinguishes between discrete 'acts' and 'facts' on the one hand, and 'situations' on the other. It is not a violation of the non-retroactivity principle for a treaty to apply to situations that are in existence when the treaty comes into force, even if they first arose at an earlier date.[1832]

[1828] In contrast, where a Member is determined to have granted or maintained a prohibited subsidy contrary to Article 3, the remedy contained in Article 4 calls for the Member to withdraw the subsidy without delay.

[1829] Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut* ("*Brazil – Desiccated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, p. 14; Appellate Body Report, *Canada – Patent Term*, paras. 71-72; Appellate Body Report, *EC – Hormones*, para. 128; Appellate Body Report, *European Communities – Trade Description of Sardines* ("*EC – Sardines* "), WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359, para. 200.

[1830] Article 28 of the VCLT has been described as reflecting a general principle of international law, or according to the Panel in *Brazil – Desiccated Coconut*, "an accepted principle of customary international law"; Panel Report, *Brazil – Measures Affecting Desiccated Coconut* ("*Brazil – Desiccated Coconut* "), WT/DS22/R, adopted 20 March 1997, as upheld by Appellate Body Report WT/DS22/AB/R, DSR 1997:I, 189, para. 279. We therefore see no need to concern ourselves with the question of whether the Article 28 itself is binding on the United States. In any case, the United States does not appear to dispute the application of the principle, whether its source is in customary law, general principles or the VCLT. The Panel notes that the United States was the complaining party in *Canada – Patent Term* in which the Appellate Body applied Article 28 of the VCLT to obligations under the TRIPS Agreement.

[1831] Appellate Body Report, *Canada – Patent Term*, para. 72.

[1832] International Law Commission Commentary on the draft Vienna Convention, Yearbook of the ILC, 1966, Vol. II, Comment 3 on draft Article 24, p. 212; referred to by the Appellate Body in *Canada – Patent Term*, para. 73.

BCI deleted, as indicated **[***]**

7.50 We note that the dictionary definition of 'act' includes "a thing done; a deed".[1833] When considering the manner in which Article 28 of the VCLT applied to provisions of the TRIPS Agreement, the Appellate Body in *Canada – Patent Term*, described the term 'act' (in the context of interpreting Article 70.1 of the TRIPS Agreement) as "something that is 'done'".[1834] By contrast, a 'situation', for purposes of Article 28 of the VCLT has been defined as "a set of circumstances; a state of affairs".[1835] In *Canada – Patent Term*, the Appellate Body described the concept of 'situation' in Article 28 of the VCLT as suggesting "something that subsists and continues over time".[1836]

7.51 Both the European Communities and the United States agree that nothing in the SCM Agreement reveals an intention on the part of the drafters to apply Article 5 (or any other provision of the SCM Agreement) to an "act or fact which took place or a situation which ceased to exist" prior to 1 January 1995.[1837] Where they differ is over the characterisation of the obligation contained in Article 5 as addressing either the discrete 'act' of bringing a subsidy into existence, or the 'situation' of causing adverse effects through the use of subsidies, for purposes of the non-retroactivity analysis. The European Communities argues that, in the context of Article 5, the non-retroactivity principle applies to the 'act' of a Member in bringing into existence a subsidy. As this conduct is necessarily completed when the subsidy is brought into existence, subsidies brought into existence prior to 1 January 1995 are 'completed acts' and are therefore outside the temporal scope of application of Article 5, even if the 'economic effects' of such subsidies may continue to be felt subsequently.[1838] We do not agree.

7.52 We consider that Article 5 addresses a set of circumstances or state of affairs (*i.e.*, a 'situation') rather than specific acts of a Member. While 'cause' is used as a verb in Article 5, it does not connote specific action on the part of a Member. Rather, it describes a particular relationship between the antecedent conduct of a Member and subsequent events which ultimately are attributed to that Member. To the extent that Article 5 involves 'acts' or conduct, they relate to the 'use' of the subsidy, and not the 'bringing into existence' or granting of the subsidy. We consider that our characterisation of the obligation in Article 5 as a 'situation' rather than an 'act' is consistent with other provisions of Part III of the SCM Agreement (*e.g.*, Article 6.3(d) and Article 6.4) which require an examination of a representative period for the purposes of establishing the effects of subsidization. These provisions suggest that Part III generally is concerned with a situation that subsists and continues over time, rather than with specific acts performed by Members.

7.53 The European Communities argues that, because the obligation in Article 5 relates to the use of a "subsidy referred to in paragraphs 1 and 2 of Article 1", the temporal scope of Article 5

[1833] *Shorter Oxford English Dictionary*, 5th ed., Oxford, OUP 2002, p. 21.

[1834] Appellate Body Report, *Canada – Patent Term*, para. 58.

[1835] *Shorter Oxford English Dictionary*, 2002, p. 2852.

[1836] Appellate Body Report, *Canada – Patent Term*, para. 72. The panel in that dispute had characterised the protection accorded to inventions by patents granted under a pre-1989 Canadian patent regime as a 'situation which has not ceased to exist' at the date of the application of the TRIPS Agreement for Canada, and found that this situation could not be related to 'acts which occurred' before that date, and thereby brought within the scope of Article 70.1 of the TRIPS Agreement.

[1837] EC, Updated Request, para. 13.

[1838] In this regard, the European Communities argues that a 'continuing situation' for purposes of the SCM Agreement is a subsidy programme involving recurring grants of subsidies. Thus, for the European Communities, grants made subsequent to 1 January 1995, even if pursuant to a pre-1995 programme, would be subject to Article 5 of the SCM Agreement, while grants made prior to 1 January 1995 would not. EC, Answer to Panel Question 57, paras. 6-7. However, as we have indicated, it is the obligation contained in Article 5 of the SCM Agreement that must be characterised as either an 'act' or 'situation' in order to be construed consistently with the non-retroactivity principle reflected in Article 28 of the VCLT.

BCI deleted, as indicated **[***]**

necessarily depends on the bringing into existence of such a 'subsidy'.[1839] We understand the European Communities to be arguing that, through the definition of 'subsidy' in Article 1.1, the temporal scope of the obligation contained in Article 5 is limited to adverse effects caused through the use of financial contributions conferring benefits that came into existence after 1 January 1995.

7.54 Article 1.1 of the SCM Agreement provides as follows:

> "For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), *i.e.*, where:
>
> > (i) a government practice involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion), potential direct transfers of funds or liabilities (*e.g.*, loan guarantees);
> >
> > (ii) government revenue that is otherwise due is foregone or not collected (*e.g.*, fiscal incentives such as tax credits);
> >
> > (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> >
> > (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
>
> or
>
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
>
> and
>
> (b) a benefit is thereby conferred."[1840]

7.55 We do not read the reference in Article 5 to the definition of 'subsidy' in Article 1 as limiting the application of the SCM Agreement to financial contributions made and benefits conferred subsequent to 1 January 1995. Article 1.1 sets forth the circumstances in which a 'subsidy' is 'deemed to exist' for purposes of the SCM Agreement. It does not impose on Members an obligation to which the non-retroactivity principle reflected in Article 28 of the VCLT could apply.

7.56 We recall further that 'subsidy' in Article 1.1 of the SCM Agreement is a compound definition. As the Appellate Body observed in *Brazil – Aircraft*, the issues and respective definitions of 'financial contribution' and 'benefit' are separate legal elements in Article 1.1, which *together*

[1839] EC, SWS, paras. 18 and 19. Brazil makes a similar argument in its Third Party Comments at para. 19.

[1840] Footnote omitted.

BCI deleted, as indicated **[***]**

determine whether a 'subsidy' exists.[1841] In *US – Lead and Bismuth II*, the Appellate Body rejected an argument that the use of the present tense of the verb 'is conferred' in Article 1.1(b) of the SCM Agreement indicated that an investigating authority must demonstrate the existence of 'benefit' only at the time the 'financial contribution' is made. In rejecting this argument, the Appellate Body observed in particular that "Article 1.1 does not address the *time* at which the 'financial contribution' and/or the 'benefit' must be shown to exist."[1842]

7.57 In addition, there are significant contextual factors that militate against the interpretation of Article 5 advocated by the European Communities. Specifically, paragraph 7 of Annex IV to the SCM Agreement indicates that the drafters did not regard the temporal scope of Part III of the SCM Agreement as confined to financial contributions made, or subsidies otherwise brought into existence, after 1 January 1995. We recall that paragraph 7 of Annex IV to the SCM Agreement, which sets forth the method for calculating the total *ad valorem* subsidization of a product for purposes of the presumption of serious prejudice in Article 6.1(a) of the SCM Agreement, required that certain subsidies granted prior to 1 January 1995 be included in the total *ad valorem* subsidization calculation. Paragraph 7 of Annex IV provided:

> "Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization."

This is an express textual recognition that the 'adverse effects' that are the subject of Article 5 can be 'caused' through the use of subsidies granted prior to 1 January 1995, at least to the extent that the benefits of such subsidies can be allocated to the period subsequent to 1 January 1995. Although Article 6.1 and Annex IV have now expired (pursuant to the provisions of Article 31 of the SCM Agreement), they did form part of the original framework for determining when a Member could be considered to have caused 'adverse effects' (*i.e.*, serious prejudice to the interests of another Member) through the use of a subsidy for purposes of Article 5.1(c), and thus provide an important indication of the intended scope of Article 5.[1843]

7.58 The European Communities argues that paragraph 7 of Annex IV should be regarded as an exception which proves the general rule that only post-1995 subsidies can be subject to adverse effects claims. According to the European Communities, paragraph 7 of Annex IV concerned the 'allocation' of a subsidy to 'future production'; a concept which it contends is "different from the idea that a pre-1995 subsidy 'continues to confer a benefit' post-1995." The European Communities argues that paragraph 7 of Annex IV provided a valuation rule "in the narrow circumstance that any benefits incurred in relation to {pre-WTO} subsidies *are allocated to future production"*,[1844] and in this sense, the relevant conduct for purposes of determining the temporal scope of paragraph 7 of Annex IV is

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[1841] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft ("Brazil – Aircraft ")*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 157.

[1842] Appellate Body Report, *US – Lead and Bismuth II*, para. 60.

[1843] We recall that the Panel in *US – Upland Cotton* noted that provisions of the SCM Agreement that have lapsed may nevertheless be useful in understanding the overall architecture of the SCM Agreement with respect to the different types of subsidies it sought and seeks to address; Panel Report, *United States – Subsidies on Upland Cotton ("US – Upland Cotton")*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299, para. 7.907 (footnote 1086). A similar view was expressed in the Decision by the Arbitrator, Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the* SCM Agreement ("*US – FSC (Article 22.6 – US)* "), WT/DS108/ARB, 30 August 2002, DSR 2002:VI, 2517, footnote 66.

[1844] EC, SWS, para. 21.

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the allocation of the subsidy to future production.[1845] The European Communities contends that if Part III of the SCM Agreement had been intended to apply generally to subsidies granted prior to 1 January 1995 "irrespective of their benefit allocation", a provision such as paragraph 7 of Annex IV would have been unnecessary and redundant.[1846] The European Communities therefore considers that Annex IV and Article 6.1(a) are unique and exceptional provisions of the SCM Agreement which include specific rules on the quantification of a subsidy which are normally found in Part V.[1847]

7.59 We do not agree. Paragraph 7 of Annex IV recognises that a subsidy granted prior 1 January 1995 may, in certain circumstances (*i.e.*, where its benefits are allocated to future production) be relevant to the serious prejudice determination in Article 5(c) and thus, may give rise to adverse effects under Article 5. Its significance to the present dispute is as a rebuttal of the European Communities' core argument that Article 5 was intended to apply only to subsidies brought into existence subsequent to 1 January 1995. Paragraph 7 of Annex IV is a clear indication that subsidies granted prior to the entry into force of the SCM Agreement are considered subject to the obligation concerning adverse effects contained in Article 5.

7.60 Moreover, we disagree with the European Communities that the purpose of paragraph 7 of Annex IV was to set forth exceptional circumstances that would be deemed to constitute serious prejudice for purposes of the adverse effects determination in Article 5. We can conceive of no plausible reason why the drafters would provide that serious prejudice could be presumed on the basis of pre-1995 subsidies while precluding the possibility that serious prejudice arising from pre-1995 subsidies could be affirmatively demonstrated. We consider that the role of Annex IV was to specify an agreed methodology for the total *ad valorem* calculation contemplated by Article 6.1(a). Paragraph 7 of Annex IV set forth how pre-1995 subsidies were to be included in that calculation. In this context, we consider paragraph 7 of Annex IV to be indicative of, rather than an exception to, the drafters' intentions regarding the subsidies that would be subject to the obligations of Part III.

7.61 As regards the contextual significance of Article 28.1 of the SCM Agreement to the temporal scope of Article 5, the European Communities argues that the fact that Article 28.1(b) grants Members a transitional period of three years in which to bring their existing subsidy *programmes* into conformity with the SCM Agreement, "shows *a fortiori* that individual cases of subsidization before 1995 are not covered by the SCM Agreement at all."[1848]

7.62 According to the United States, Article 28.1 of the SCM Agreement makes clear that subsidy programmes established before the date of entry into force of the SCM Agreement *are* subject to the SCM Agreement; however, it grants Members a window of three years to bring inconsistent programmes into conformity with the obligations of Part II.[1849] The United States contends that the necessary implication of this temporary exemption of inconsistent measures from the obligations of Part II of the SCM Agreement, is that such programmes are otherwise subject to Part I and to Parts III through XI.[1850]

[1845] EC, SWS, para. 22.
[1846] EC, Updated Request, para. 29.
[1847] EC, SWS, para. 22.
[1848] EC, Updated Request, para. 25. *See, also,* EC, Answer to Panel Question 8 of 8 December 2006, para. 77.
[1849] Japan makes a similar argument in its Third Party Submission, 7 May 2007, para. 4.
[1850] US, Answer to EC, Updated Request, para. 16.

BCI deleted, as indicated **[***]**

7.63 We recall that Article 28 provides:

> "28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:
>
> (a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and
>
> (b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.
>
> 28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry."

We do not consider Article 28.1 to be of contextual assistance in deciding whether subsidies granted prior to 1 January 1995 may be subject to the obligations of Article 5. The wording of Article 28.1(b), particularly the final phrase "*until then* shall not be subject to Part II," indicates that the three year period during which Members were required to bring their WTO-inconsistent measures into conformity with the SCM Agreement operated only as a temporary exemption from the application of the provisions of Part II.[1851] In other words, it may be inferred from Article 28 that WTO-inconsistent subsidy *programmes*, established prior to 1 January 1995 and continuing in effect after that date, were generally intended to fall within the temporal scope of Part II, subject to the three-year grace period granted by Article 28.1. If such subsidy programmes were generally intended to fall within the temporal scope of the SCM Agreement for purposes of Part II (*i.e.*, as regards the prohibition on the granting or maintaining of prohibited export subsidies) then, in the absence of any contrary intention expressed in the text or implied from the structure of the SCM Agreement, they would likewise fall within the temporal scope of Part III of the SCM Agreement (*i.e.*, for purposes of the obligation not to cause, through the use of subsidies, adverse effects to the interests of other Members). Thus, Article 28.1 suggests that subsidy programmes established prior to 1 January 1995 and maintained subsequent to this date are subject to Part III - it does not tell us whether subsidies granted by Members prior to 1 January 1995 are subject to Part III.

7.64 Based on the foregoing, we construe the obligation contained in Article 5 of the SCM Agreement as an obligation not to cause adverse effects to the interests of other Members through the use of subsidies as defined in Article 1. For purposes of the application of the non-retroactivity principle reflected in Article 28 of the VCLT, we characterise Article 5 as addressing a 'situation'; namely, causing adverse effects through the use of subsidies. Consistent with Article 28 of the VCLT, Article 5 applies to any such "situation" which exists as of the effective date of the SCM Agreement, even if that situation arose as a result of the granting of a subsidy prior to that date. In other words, our interpretation of the temporal scope of application of Article 5 is based on the ordinary meaning of the terms of Article 5 in their context and in the light of the object and purpose of the SCM Agreement. In this regard, we note in particular that paragraph 7 of Annex IV demonstrates that subsidies granted prior to 1 January 1995 were considered relevant to the serious prejudice determination in Article 5(c) and thus, could give rise to adverse effects under Article 5.

[1851] Part II of the SCM Agreement relates to prohibited export subsidies. Article 3.2, which is contained in Part II of the SCM Agreement, prohibits Members from granting or maintaining export subsidies referred to in Article 3.1. Article 4.7 provides that, should a panel find that a Member has granted or maintained a prohibited export subsidy in contravention of Article 3.2, it shall recommend that the subsidizing Member withdraw the subsidy without delay.

BCI deleted, as indicated **[***]**

7.65 In conclusion, we therefore reject the European Communities' request for a preliminary ruling that all alleged prohibited and actionable subsidies granted by the European Communities prior to 1 January 1995 be excluded from the temporal scope of these proceedings.

(c) Relevance of the 1992 Agreement Between the European Communities and the United States to the Temporal Scope of These Proceedings

(i) Introduction

7.66 In its updated request for preliminary rulings, the European Communities asks the Panel to rule that any alleged government support committed prior to 17 July 1992, the effective date of the 1992 Agreement, is excluded from the temporal scope of these proceedings. In support of this request, the European Communities advances various arguments regarding the relevance of the 1992 Agreement to the rights and obligations of the parties in this dispute. In this Preliminary Ruling, we address only those which relate to the European Communities' claims regarding the temporal scope of Article 5 of the SCM Agreement made in its request and updated request for preliminary rulings. These arguments concern the relevance of Articles 2 and 10 of the 1992 Agreement to the question whether alleged government support committed prior to the effective date of the 1992 Agreement is outside the temporal scope of application of Article 5 of the SCM Agreement, and should therefore be excluded from these proceedings. We do not address in this Preliminary Ruling the European Communities' 'defence' that Article 4 of the 1992 Agreement constitutes the appropriate 'benchmark' for the assessment of LA/MSF under the SCM Agreement.[1852] Nor do we consider the European Communities' arguments that Article 4 of the 1992 Agreement is relevant to the questions of the existence of a subsidy under Article 1 of the SCM Agreement, and the causation of adverse effects under Article 5 of the SCM Agreement.[1853]

7.67 However, before turning to consider the European Communities' arguments, we consider it useful to provide a brief description of the provisions of the 1992 Agreement. The 1992 Agreement was concluded by the United States and the European Communities on 17 July 1992.[1854] It had been negotiated against a background of differences between the European Communities and the United States over support measures to their respective large civil aircraft industries.[1855] In the preamble to the 1992 Agreement, the parties recognised the need to promote a more favourable environment for international trade in large civil aircraft and to reduce trade tensions in the area. They also acknowledged that the disciplines in the GATT Agreement on Trade in Civil Aircraft should be strengthened with a view to progressively reducing the role of government support. The parties expressed their agreement as being in pursuit of their common goal of preventing trade distortions resulting from direct or indirect government support for the development and production of large civil

[1852] First Written Submission of the European Communities (hereinafter "EC, FWS"), paras. 394-404.
[1853] EC, SWS, paras. 148-157.
[1854] On 6 October 2004, the United States notified the European Communities that it was abrogating the 1992 Agreement ; Note verbale No. 55 of the US mission to the EU to the General Secretariat of the Council of the EU, 6 October 2004. However, the European Communities considers that the 1992 Agreement is still in force between the parties. We need not resolve this issue in order to decide the European Communities' preliminary ruling request, and therefore express no views on it.
[1855] One manifestation of these differences was the United States' challenge to an exchange rate guarantee Agreement between the German Government and Deutsche Airbus as an export subsidy inconsistent with Article 9 of the *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade* (the "Tokyo Round Subsidies Code"). On 4 March 1992, a GATT Panel concluded that the exchange rate guarantee scheme resulted in a subsidy granted on exports and that the scheme was prohibited by Article 9 of the Tokyo Round Subsidies Code, as an export subsidy covered by Item (j) of the Illustrative List. GATT Panel Report, *German Exchange Rate Scheme for Deutsche Airbus*, *SCM*/142, 4 March 1992, unadopted.

aircraft, introducing greater disciplines on such support, and encouraging the adoption of such disciplines multilaterally within the GATT. The fifth recital to the preamble noted the parties':

> "{I}ntention to act without prejudice to their rights and obligations under the GATT and under other multilateral Agreements negotiated under the auspices of the GATT..."

In Article 1, the parties agreed to act in conformity with the interpretative note to Article 4 of the GATT Aircraft Agreement on Trade in Civil Aircraft. Article 2 of the 1992 Agreement, entitled 'Prior government commitments' specified the following:

> "Government support to current large civil aircraft programmes, committed prior to the date of entry into force of this Agreement, is not subject to the provisions of this Agreement except as otherwise provided below. The terms and conditions on which support is granted shall not be modified in such a manner as to render it more favourable to the recipients: however, *de minimis* modifications shall not be deemed inconsistent with this provision."

7.68 Article 3 imposed a prohibition on the grant of direct government support to both existing and future large civil aircraft programmes "other than what has already been firmly committed for the production of large civil aircraft." Article 4 established qualitative and quantitative parameters for the provision of support for the development of new large civil aircraft programmes or derivative programmes. Article 5 set limitations for the provision of indirect government support and Article 6 restricted the parties from assuming liability for specific loans made available by aircraft manufacturers to airlines, other than through official export credit financing consistent with OECD guidelines. Article 7 excluded equity infusions from the scope of the 1992 Agreement. Article 8 was a transparency provision which required the parties to regularly and systematically exchange all public information of a kind governments make available to their respective national elected assemblies relating to matters covered by the 1992 Agreement. Article 8.2 provided that, in relation to prior government commitments for large civil aircraft programmes described in Article 2, the parties shall separately provide a complete list of such commitments already disbursed or committed, and shall each notify the other party of any changes which render the terms and conditions of such support commitments more favourable to the recipient. Article 9 permitted a party, in certain unforeseen, exceptional circumstances, and subject to the fulfilment of certain conditions, to derogate temporarily from the disciplines laid down in the 1992 Agreement.

7.69 Article 10 of the 1992 Agreement provided as follows:

> "Avoidance of trade conflicts and litigation
>
> 10.1 Parties shall seek to avoid any trade conflict on matters covered by the present Agreement.[(3)]
>
> 10.2 They will not self-initiate action under their national trade laws with respect to government supports granted in conformity with this Agreement for as long as this Agreement is in force. However, nothing in this paragraph shall prevent a Party from abrogating this Agreement on grounds of non-compliance by the other Party.
>
> 10.3 In order to avoid trade conflict they will strongly encourage private parties to request the use of the provisions of Article 11 to resolve any disputes on matters covered by this Agreement. If, however, private petitioners request that action be taken under national laws on matters covered by this Agreement, the petitioners'

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government will immediately inform the other Party and offer to enter into consultations in accordance with Article 11. The Party against whom such action is brought shall have the right either to suspend the application of some or all of the provisions of the present Agreement or to terminate the Agreement 15 days after the conclusion of consultations.

10.4 In the conduct of any investigations of trade allegations concerning products covered by this Agreement that have been initiated under national trade laws as the result of private petitions, Parties shall, consistent with their law take account of representations concerning compliance with the terms of this Agreement.

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(3) Action with respect to 'matters covered by the present Agreement' refers to trade actions relating to direct and indirect government support as defined by this Agreement. It does not include actions relating to dumping, intellectual property protection, or anti-trust or competition laws."

(ii) Arguments of the European Communities

7.70 The European Communities argues that, without prejudice to its arguments regarding the temporal scope of the SCM Agreement, the European Communities and the United States have agreed to limit the temporal scope of the SCM Agreement *inter se* in relation to pre-1992 government support measures for large civil aircraft. According to the European Communities, this agreement between the parties as to the temporal scope of disputes related to the application of the SCM Agreement to measures of support to large civil aircraft is embodied in the 1992 Agreement.[1856]

The 1992 Agreement as 'applicable law'

7.71 The European Communities argues that, in its examination of the matter referred to it in this dispute, the Panel should directly apply the provisions of the 1992 Agreement.[1857] The European Communities contends that Article 2 of the 1992 Agreement constitutes an agreement between the European Communities and the United States to 'grandfather' all government support to large civil aircraft programmes committed prior to the entry into force of the 1992 Agreement. The effect of this 'grandfathering' provision is, according to the European Communities, that all such support is deemed to be compatible with the 1979 *Agreement on Civil Aircraft* and the Tokyo Round Subsidies Code. Moreover, the European Communities argues that, by continuing to apply the 1992 Agreement after the entry into force of the SCM Agreement on 1 January 1995, the parties thereby also deemed such measures to be compatible with that subsequent Agreement, and consequently, have agreed that such measures would not be challenged in WTO dispute settlement proceedings.

The 1992 Agreement as a "relevant rule of international law" applicable to the interpretation of the SCM Agreement

7.72 The European Communities also argues that the Panel should take into account the 1992 Agreement in its interpretation of the SCM Agreement as a "relevant rule of international law

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[1856] EC, Updated Request, paras. 36 and 37.

[1857] This broader argument regarding the significance of the 1992 Agreement to the determination of the present dispute was made by the European Communities in its Updated Request, at paras. 34-71 and was reiterated by the European Communities in its Answer to Panel Question 9 of 8 December 2006, para. 79.

applicable in the relations between the parties".[1858] Specifically, the European Communities argues that the 1992 Agreement can be used to interpret an 'outer temporal scope' for this dispute, applicable between the United States and EC.[1859] In this regard, the European Communities argues that the 1992 Agreement, as an agreement between the United States and the European Communities not to re-open their settled dispute on pre-1992 measures of support to the large civil aircraft industry, 'informs' the interpretation of the SCM Agreement.[1860]

7.73 The European Communities points to Article 31(3)(c) of the VCLT as the basis on which the Panel may use the 1992 Agreement in order to interpret an outer temporal scope for this dispute. The European Communities submits that the 1992 Agreement, as a bilateral agreement between the United States and the European Communities, is a relevant rule of international law applicable in the relations between the parties within Article 31(3)(c) because the term 'parties' in Article 31(3)(c) of the VCLT should be taken to refer to parties to the particular dispute only, rather than parties to the Agreement being interpreted (in this case, the SCM Agreement).[1861] The European Communities disagrees with the view expressed by the panel in *EC – Biotech*, that Article 31(3)(c) of the VCLT requires that the rules of international law to be taken into account in interpreting the WTO Agreements at issue are those applicable in the relations between the WTO Members, rather than those Members that are parties to the dispute in question.[1862] The European Communities refers the Panel to the reports of the Appellate Body in *US – Shrimp*, *US – FSCs* and *EC – Computer Equipment* in support of its contention that the term 'parties' in the text of Article 31(3)(c) of the VCLT refers to the parties to the particular dispute only, and not the entire membership of the WTO.[1863] In this regard, the European Communities also refers the Panel to the Report of the Study Group of the International Law Commission on Fragmentation of International Law, the International Law Commission's Commentaries on the Draft Articles on the Law of Treaties, and the practice of other international bodies.[1864]

The 1992 Agreement as giving rise to an estoppel against the United States

7.74 In addition, the European Communities argues that the 1992 Agreement was part of a 'mutually agreed solution' to a dispute between the European Communities and the United States over

[1858] EC, Original Request, paras. 122-146. We note that, although Section IV of this request was updated and replaced by the European Communities' Updated Request for Preliminary Rulings (pursuant to para. 3 of EC, Updated Request) which did not contain the argument made in the original request that the 1992 Agreement is a "relevant rule of international law" applicable in the relations between the parties within the meaning of Article 31(3)(c) of the VCLT, the European Communities has clarified in its Answers to the Panel's questions that it intended to retain the argument based on Article 31(3)(c) of the VCLT as a narrower and alternative claim to the broader argument as to the applicability of the 1992 Agreement which it advanced in the Updated Request for Preliminary Rulings, in the event that the Panel were to reject the broader claim: EC, Answer to Panel Question 9 of 8 December 2006, paras. 78 and 79. The European Communities also reiterated the argument based on Article 31(3)(c) of the VCLT in its FWS, paras. 95, 134, 150, in its non-confidential opening statement at the first meeting with the Panel, (hereinafter, "EC, FNCOS"), para. 24 and in its second written submission, paras. 42-68.

[1859] EC, Original Request, para. 151.

[1860] EC, Original Request, para. 152.

[1861] EC, Original Request, paras. 127-129; EC, Answer to Panel Question 10 of 8 December 2006, paras. 81-87.

[1862] EC, Answer to Panel Question 10 of 8 December 2006, para. 81; Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products ("EC – 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, DSR 2006:III-VIII, para. 7.68.

[1863] EC, Original Request, paras. 127-128; EC, Answer to Panel Question 10 of 8 December 2006, para. 82.

[1864] EC, Answer to Panel Question 10 of 8 December 2006, paras. 83-85.

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support to large civil aircraft.[1865] According to the European Communities, the mutually agreed solution between the parties involved an agreement, embodied in Article 10.1 of the 1992 Agreement, to avoid trade conflicts on matters covered by the 1992 Agreement (*i.e.*, government measures of support to large civil aircraft committed subsequent to 17 July 1992) and an agreement, embodied in Article 2, to 'grandfather' government measures of support committed prior to 17 July 1992.[1866] The European Communities contends that the mutually agreed solution evidenced by the 1992 Agreement "must at least give rise to an estoppel preventing a party to such an agreement from reneging on its terms."[1867] The European Communities contends that the parties, through their conduct, continued to apply the 1992 Agreement after the entry into force of the SCM Agreement by continuing to measure their respective measures of support to large civil aircraft against the benchmarks of the 1992 Agreement rather than against the SCM Agreement.[1868] The European Communities states:

> "It would run against a fundamental principle of fairness and good faith if the United States were allowed to first encourage the European Communities to adopt certain MSF practices as being compatible with the 1992 Agreement and then challenge these very same practices as being incompatible with the SCM Agreement."[1869]

7.75 In response to a question from the Panel concerning the legal basis on which we may apply the principle of estoppel in the present dispute, the European Communities submits that in *EC – Export Subsidies on Sugar*, the Appellate Body accepted that it is reasonable to analyse the good faith obligation contained in Article 3.10 of the DSU in light of the general international law principle of estoppel.[1870] The European Communities submits that, based on the reports of the panels in *Argentina – Poultry Anti-Dumping Duties*[1871] and *Guatemala – Cement II*,[1872] the principle of estoppel applies in the context of WTO dispute settlement proceedings where (i) there is a clear and unambiguous statement of fact; (ii) that statement was made voluntarily, unconditionally and is authorised by one party; and (iii) is relied on in good faith by another party.[1873]

7.76 The European Communities argues that the United States collaborated in the conclusion and implementation of the 1992 Agreement as the practical way in which the legality of support to large civil aircraft would be determined between the parties. According to the European Communities, the United States should not now be permitted to challenge as prohibited or actionable subsidies under the

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[1865] EC, FNCOS, para. 25; EC, SWS, paras. 39-41.

[1866] EC, SWS, para. 39.

[1867] EC, FNCOS, para. 25. In addition, the European Communities argues that, through the 1992 Agreement, the parties agreed upon certain benchmarks for government support for large civil aircraft going forward, however, as we have indicated, this Preliminary Ruling addresses only the issue of the relevance of the 1992 Agreement to the temporal scope of this dispute.

[1868] EC, Answer to Panel Question 60, para. 35.

[1869] EC, Answer to Panel Question 60, para. 35.

[1870] EC, Answer to Panel Question 59, para. 22. The European Communities contends therefore that the mutually agreed solution embodied in the 1992 Agreement gives rise to estoppel under Article 3.10 of the DSU; EC, SWS, para. 41.

[1871] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil ("Argentina – Poultry Anti-Dumping Duties*"), WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727, para. 7.38.

[1872] Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico ("Guatemala – Cement II*"), WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295, paras. 7.71-7.72.

[1873] EC, Answer to Panel Question 60, para. 23.

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SCM Agreement the very same measures in which it "acquiesced and, indeed, actively contributed to (if not encouraged)".[1874]

(iii) Arguments of the United States

7.77 The United States makes several arguments in response to the European Communities' arguments regarding the relevance of the 1992 Agreement to the present dispute.

The 1992 Agreement as 'applicable law'

7.78 First, the United States argues that there is no express provision in the SCM Agreement establishing its temporal scope of application, and no legal basis for the Panel to use the 1992 Agreement to impute a temporal scope into the SCM Agreement.[1875] In this regard, the United States notes that the covered Agreements which it cited in its request for the establishment of a panel include the DSU, the GATT 1994, and the SCM Agreement. Further, the United States notes that the definition of 'covered Agreements' in Article 1.1 of the DSU; namely, Agreements listed in Appendix 1 to the DSU, is a closed list which does not include the 1992 Agreement and that the 1992 Agreement is also not one of the instruments included within GATT 1994 according to the GATT incorporation clause. Thus, according to the United States, it is the SCM Agreement and the GATT 1994, and not the 1992 Agreement, that contain the relevant obligations of the parties to this dispute.[1876] The United States argues that, where the drafters of the SCM Agreement intended to exclude a particular matter from its disciplines, or qualify the disciplines applicable to a particular matter, they did so explicitly.[1877] The United States notes that there is no exemption, qualification or safe harbor with respect to the challenged measures in this dispute which were provided prior to 1992.[1878] The United States draws contextual support for this position from footnotes 15, 16 and 24 of the SCM Agreement, which carve out civil aircraft from the 'deemed' serious prejudice provision in Article 6.1 of the SCM Agreement and the 'non-actionable' subsidy provision in Article 8.2 of the SCM Agreement. According to the United States, these specific carve-outs relating to civil aircraft confirm that, in other respects, the SCM Agreement applies to civil aircraft subsidies.[1879]

7.79 The United States also points to Article 32 of the SCM Agreement in support of its contention that the 1992 Agreement does not establish an outer temporal scope for this dispute. Article 32.2 of the SCM Agreement requires that reservations to the SCM Agreement obtain the consent of the Members. The United States notes that the European Communities neither sought a reservation with respect to the alleged subsidies granted to Airbus prior to 17 July 1992, nor did the United States (or any other Member) consent to any such reservation.[1880] The United States notes that there is nothing in the SCM Agreement to indicate that Article 32.5, which obliges each Member to take all necessary steps to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the SCM Agreement, does not apply to the alleged subsidy measures granted to Airbus prior to 17 July 1992, or to matters addressed by the 1992 Agreement in general.[1881]

[1874] EC, FNCOS, para. 26.
[1875] US, Answer to EC, Updated Request, paras. 31, 34-40, 41-45.
[1876] US, Answer to EC, Updated Request, para. 30.
[1877] US, Answer to EC, Updated Request, para. 35. The United States refers to the following provisions of the SCM Agreement in this regard: Articles 3.1, 5. 6.9 and 7.1; Article 8; Articles 27.2 and 27.3; Article 29 and the second paragraph of item (k) in Annex I.
[1878] US, Answer to EC, Updated Request, para. 35.
[1879] US, Answer to EC, Updated Request, para. 36.
[1880] US, Answer to EC, Updated Request, para. 38.
[1881] US, Answer to EC, Updated Request, para. 39.

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7.80 The United States also notes that, to the extent that Article 1.2 of the DSU provides for its rules and procedures to apply subject to such special or additional rules and procedures on dispute settlement as are contained in the covered Agreements or identified in Appendix 2 to the DSU, neither Article 1.2 of the DSU, nor Appendix 2, makes any reference to the 1992 Agreement or to the alleged subsidy measures granted to Airbus prior to 17 July 1992.[1882]

7.81 Further, the United States contends that acceptance of the European Communities' argument that the 1992 Agreement constitutes applicable law in this dispute would effectively mean, either that the SCM Agreement can be interpreted differently as between the European Communities and the United States than as between other Members, or that the interpretation of the SCM Agreement depends not on what Members had negotiated in that Agreement, but on the terms of a separate bilateral Agreement between two Members.[1883] According to the United States, neither of these outcomes can be supported.

The 1992 Agreement as a "relevant rule of international law" applicable to the interpretation of the SCM Agreement

7.82 The United States argues that the 1992 Agreement does not constitute a relevant rule of international law 'applicable in the relations between the parties' within the meaning of Article 31(3)(c) . The United States agrees with the views expressed by the panel in *EC – Biotech*, that Article 31(3)(c) of the VCLT should be interpreted as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted.[1884] As the 1992 Agreement is not applicable in the relations between all parties to the SCM Agreement, the United States argues that Article 31(3)(c) of the VCLT does not provide a basis for it to be taken into consideration by the Panel when interpreting the SCM Agreement.[1885] The United States submits that none of the Appellate Body reports cited by the European Communities in relation to the interpretation of Article 31(3)(c) of the VCLT suggests that the term 'parties' in Article 31(3)(c) refers to parties to the particular dispute only, and not all of the Members of the WTO.[1886]

The 1992 Agreement as giving rise to an estoppel against the United States

7.83 The United States submits that the Panel should reject the European Communities' arguments regarding estoppel as having "absolutely no basis in the covered Agreements."[1887] The United States notes that Article 3.10 of the DSU does not use the term 'estoppel' and submits that the provision does not even implicitly support the European Communities' argument that the principle of estoppel can be grounded in the 'good faith' obligation embodied in Article 3.10.[1888] The United States also challenges the European Communities' reliance on the panel and Appellate Body reports in *EC –*

[1882] US, Answer to EC, Updated Request, para. 40.
[1883] US, Answer to EC, Updated Request, para. 45.
[1884] United States, Answer to the Request for a Preliminary Ruling submitted by the European Communities, 15 November 2006 (hereinafter "US, Answer to EC, Original Request"), para. 98. Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.68-7.70. United States, Answer to Panel Question 1, (hereinafter "US, Answer to Panel Question X"), paras. 2-3.; US, Comments on EC, Answer to Panel Question 10 of 8 December 2006, para. 54
[1885] US, Comment on EC Answer to Panel Question 10, paras. 50-56; US, Answer to Panel Question 1, para. 2.
[1886] US, Answer to Panel Question 1, para. 13.
[1887] Second Written Submission of the United States (hereinafter, "US, SWS"), para. 37.
[1888] US, SWS, para. 38.

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Export Subsidies on Sugar in support of its estoppel argument. According to the United States, these reports actually undermine the European Communities' position.[1889]

7.84 In addition, the United States argues that the European Communities' estoppel argument should fail on its own terms, as the 1992 Agreement does not constitute a 'clear and unambiguous statement of fact' that the measures covered by that Agreement would not be subject to WTO dispute settlement.[1890] The United States argues that, contrary to the European Communities' assertions, the text of the 1992 Agreement actually confirms that pre-1992 subsidies are *not* immune from challenge under the SCM Agreement.[1891] Moreover, the United States argues that the fifth recital in the preamble to the 1992 Agreement confirms that the United States and the European Communities expressly reserved their rights under the GATT when they entered into the 1992 Agreement.[1892]

7.85 According to the United States, Article 2 of the 1992 Agreement simply provides that the provisions of the 1992 Agreement do not apply to government support committed prior to 17 July 1992, not that such support was deemed to be consistent with the 1979 *Agreement on Trade in Civil Aircraft* or the Tokyo Round Subsidies Code, or that pre-1992 subsidies are exempted from the GATT/WTO disciplines.[1893] The United States considers that the commitment of the parties in Article 10.1 to seek to avoid trade conflict on matters covered by the 1992 Agreement relates to the self-initiation of actions under national trade laws, as is made clear by Article 10.2.[1894]

(iv) Arguments of Third Parties

7.86 Australia considers that, on the issue whether the 1992 Agreement may constitute applicable law to this dispute, the Panel should take full account of the statement of the Appellate Body at paragraph 56 of its report in *Mexico – Taxes on Soft Drinks* that the DSU operates in relation to covered Agreements only.[1895] In this regard, Australia notes that the 1992 Agreement is not a covered Agreement under the DSU. In addition, Australia does not consider that the rules of international law contained in the 1992 Agreement, which are only applicable in the relations between a subset of parties to the SCM Agreement, can be taken into account under Article 31(3)(c) of the VCLT in interpreting the SCM Agreement.[1896] Australia urges the Panel to approach the question of the application of Article 31(3)(c) of the VCLT to the SCM Agreement with "a degree of caution", given its "potentially significant systemic implications for the WTO dispute settlement system."[1897]

7.87 Brazil disagrees with the European Communities that the 1992 Agreement is relevant to this dispute.[1898] Moreover, Brazil considers that Article 6.1 of the 1979 *Agreement on Trade in Civil Aircraft* does not authorize the Panel to apply a less restrictive standard for government support in the civil aircraft sector. Brazil considers that the 1992 Agreement does not qualify as a "relevant rule of

[1889] US, SWS, para. 38.
[1890] US, SWS, para. 45.
[1891] US, Answer to EC, Updated Request, para. 46.
[1892] US, Answer to EC, Updated Request, para. 47.
[1893] US, Answer to EC, Updated Request, para. 48.
[1894] US, Answer to EC, Updated Request, para. 49.
[1895] Australia, Third Party Submission, paras. 8 and 9. The statement in question is: "We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system 'serves to preserve the rights and obligations of Members under the *covered Agreements*, and to clarify the existing provisions of *those Agreements*.' (emphasis added)."
[1896] Australia, Third Party Submission, para. 15.
[1897] Australia, Third Party Submission, para. 15.
[1898] Brazil, Third Party Submission, para. 4.

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international law applicable in the relations between the parties" within Article 31(3)(c) of the VCLT because it is not binding on all of the parties to the SCM Agreement.[1899]

(v) Evaluation by the Panel

The 'application' of the 1992 Agreement

7.88 We recall that Article 3.2 of the DSU provides that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the *covered Agreements*, and to clarify the existing provisions of *those Agreements*."[1900] The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU.[1901] In the present dispute, the Panel's terms of reference are:

> "To examine, in the light of the relevant provisions of the covered Agreements cited by the United States in document WT/DS316/2, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those Agreements."

7.89 Article 7.2 of the DSU requires panels to "address the relevant provisions in any covered Agreement or Agreements cited by the parties to the dispute." The 'covered Agreements' cited by the United States in document WT/DS316/2 include the DSU, the GATT 1994 and the SCM Agreement. As the 1992 Agreement is not a covered Agreement cited by the United States in document WT/DS316/2, or contained in the list of covered Agreements in Appendix 1 to the DSU, or one of the instruments included in the GATT 1994, we do not have jurisdiction to determine of the rights and obligations of the parties under the 1992 Agreement.

7.90 However, the European Communities argues that, although the 1992 Agreement is not a covered Agreement, and a determination of the rights and obligations of the parties under the 1992 Agreement is therefore beyond the jurisdiction of the Panel, the 1992 Agreement may nevertheless constitute law that the Panel may apply in order to resolve the claims under the covered Agreements.[1902]

7.91 Whether presented as the direct application of what the European Communities contends is an agreement to 'grandfather' support measures to large civil aircraft committed prior to 17 July 1992, or as a rule relevant to the 'interpretation' of a modified temporal scope of application of Article 5 of the SCM Agreement for disputes between the parties concerning support measures to large civil aircraft, the European Communities is effectively inviting the Panel to find that the United States agreed, in the 1992 Agreement, to waive its rights under the WTO Agreements to challenge certain measures in WTO dispute settlement proceedings.[1903] In essence, we are confronted with the question whether it is possible for a Member to have waived its rights under the WTO Agreements in an agreement which it

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[1899] Brazil, Third Party Submission, para. 4.

[1900] Emphasis added.

[1901] Appellate Body Report, *India – Patents (US)*, para. 92.

[1902] The European Communities notes the distinction between jurisdiction and applicable law; arguing that although this Panel does not have jurisdiction to adjudicate a dispute between the parties under the 1992 Agreement, whether as a preliminary question or as part of a broader dispute, it may nonetheless examine the 1992 Agreement as part of the law applicable to its resolution of the claims under the covered Agreements: EC, SWS, paras. 80-84.

[1903] The estoppel claim is similarly a claim that the United States should, in light of the waiver of its rights under the WTO Agreements and the detrimental reliance of the European Communities on such waiver, be prevented from reasserting those rights.

entered into *prior* to entering into the WTO Agreements, and if so, whether and on what basis a WTO panel could enforce such a waiver.[1904]

7.92 We recall that Article 23 of the DSU states that Members *shall* have recourse to the rules and procedures of the DSU when they "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered Agreements." As the Appellate Body has stated, the fact that a Member may initiate a WTO dispute whenever it considers that any benefits accruing to it are being impaired by measures taken by another Member implies that that Member is *entitled* to a ruling by a WTO panel.[1905] Assuming, for the sake of argument, that a Member can waive its rights under the WTO Agreements pursuant to a non-WTO Agreement, we cannot conceive that a Member can be considered to have waived such rights by means of an agreement which it entered into *prior* to entering into the WTO Agreements. The SCM Agreement, which came into effect on 1 January 1995, does not make any reference to the antecedent 1992 Agreement, and as the United States points out, the European Communities has not made any reservations regarding the application or interpretation of the SCM Agreement.[1906]

7.93 The European Communities argues that the 'continued application' of the 1992 Agreement after the entry into force of the SCM Agreement evidences the parties' intention to apply the provisions of the 1992 Agreement (particularly Article 2 which, according to the European Communities, deems all pre-1992 support measures to be compatible with the Tokyo Round Subsidies Code) to the SCM Agreement. We consider that the fact that the parties may have continued to engage in the exchanges of information required under Article 8 of the 1992 Agreement subsequent to the entry into force of the SCM Agreement, and that the United States had refrained from initiating a complaint against the European Communities concerning the compatibility of certain EC measures with the SCM Agreement, is insufficient to constitute a subsequent Agreement between the European Communities and the United States which modifies the application of the SCM Agreement between them.

7.94 Even if it were somehow possible to find that a Member had prospectively waived certain of its rights under the WTO Agreements in a prior Agreement in the manner contended for by the European Communities (a contention which we reject), and assuming such waiver were enforceable in WTO dispute settlement (an issue which we need not and do not decide), any such waiver would need to be clear and unambiguous. Here we come to the fundamental weakness of all of the European Communities' arguments regarding the relevance of the 1992 Agreement to the present dispute: we are simply unable to construe the 1992 Agreement, and Article 2 in particular, as constituting an agreement that the parties would not challenge support measures to large civil aircraft committed prior to 17 July 1992 in subsequent WTO dispute settlement proceedings.

[1904] As noted above, *see* footnote 1854, the parties disagree whether the 1992 Agreement is in force between them, an issue we need not resolve and do not address.

[1905] Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages ("Mexico – Taxes on Soft Drinks*"), WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3, para. 52.

[1906] Moreover, we note that Article 30(3) of the VCLT provides that, when all of the parties to an earlier treaty are also parties also to the later Agreement but the earlier treaty is not suspended in operation, the earlier treaty applies *only to the extent that its provisions are compatible with those of the later treaty*. This is also consistent with our view that, even if the 1992 Agreement could be considered a bilateral Agreement expressly modifying the application of the GATT/Tokyo Round subsidies rules in the way for which the European Communities contends, it precedes the SCM Agreement, and in the absence of any provision in the SCM Agreement to the effect that the SCM Agreement is subject to, or not to be considered incompatible with, the 1992 Agreement, the SCM Agreement would prevail over the 1992 Agreement to the extent of any inconsistency between them.

BCI deleted, as indicated **[***]**

7.95 We understand Article 2 of the 1992 Agreement as drawing a line between new support measures for large civil aircraft, which would be subject to the limitations agreed in the 1992 Agreement, and previously existing commitments, which would not be subject to the limitations agreed in the 1992 Agreement and therefore did not need to be modified to conform to the requirements of Articles 3 through 7 of the 1992 Agreement, but equally could not be modified to provide even greater benefits to the recipients. In other words, we construe Article 2 of the 1992 Agreement as providing that, with the exception of the notification obligation contained in Article 8.2, the relevant measures of support committed prior to the effective date of the 1992 Agreement were to be outside the scope of the 1992 Agreement. Moreover, the context of Article 2 suggests that the parties in fact intended to preserve their rights to challenge pre-1992 measures for inconsistency with the GATT/WTO subsidies disciplines. We note in particular that the fifth preambular paragraph of the recitals indicated that the 1992 Agreement was intended to operate without prejudice to the parties' rights and obligations under the GATT and other multilateral Agreements negotiated under the auspices of the GATT, which would include the SCM Agreement.

7.96 The European Communities contends that, while the fifth paragraph of the recitals may be read as preserving the right of either side to challenge both pre-1992 and post-1992 measures as being inconsistent with the parties' GATT-related rights and obligations, this is qualified once the preamble is read in the context of the rest of the 1992 Agreement.[1907] Specifically, the European Communities contends that the obligation of the parties in Article 10.1 to 'seek to avoid' trade conflict, preserved the parties' rights to avail themselves of GATT dispute settlement only in respect to the 'matters covered by the present Agreement ' (*i.e.*, support measures committed after 17 July 1992), because Article 2 made clear that support measures committed prior to 1992 were outside the scope of the 1992 Agreement (because "Article 2 of the 1992 Agreement already contained the negotiated settlement between the parties on pre-1992 governmental support measures")[1908]. We are not persuaded by this argument. We consider it unconvincing because it depends on the prior acceptance of the very issue that it ultimately seeks to establish (*i.e.*, that Article 2 deemed pre-1992 measures to be compatible with the GATT/WTO subsidies rules). Moreover, we disagree with the European Communities that Article 10 of the 1992 Agreement related to GATT/WTO dispute settlement at all. We note that, in Article 10.1 of the 1992 Agreement, the parties agreed to "seek to avoid any trade conflict" on "matters covered by the present Agreement".[1909] It is clear from Articles 10.2 through 10.4, however, that the obligation to "avoid any trade conflict" in Article 10.1 related to action by government or private parties under *national trade laws*, not GATT/WTO dispute settlement proceedings. For example, in Article 10.2, the parties agreed not to 'self-initiate' action under their national trade laws with respect to government supports granted in conformity with the 1992 Agreement. Article 10.3 concerned the parties' conduct in the event that private parties petitioned for specific action under national trade laws, and Article 10.4 dealt with the conduct of the parties in investigations which, notwithstanding Articles 10.1 through 10.3, were nonetheless initiated under national trade laws.[1910]

7.97 The object and purpose of the 1992 Agreement also fails to support an interpretation of Article 2 as an agreement to 'grandfather' pre-1992 measures of support to large civil aircraft for purposes of the GATT/WTO subsidies rules. While the object and purpose of the 1992 Agreement

[1907] EC, Original Request, paras. 139-142.
[1908] EC, Original Request, paras. 141-142.
[1909] The footnote to Article 10.1 defines the latter phase as "trade actions relating to direct and indirect government support as defined by this Agreement ".
[1910] Thus, Article 10.1 does not even preclude national trade law actions, much less GATT trade actions or WTO dispute settlement. It is merely an obligation to 'seek to avoid' trade conflicts on a particular subject, which the parties discharge by taking certain actions (and refraining from taking others, *i.e.*, self-initiation) in the context of investigations and other actions initiated under their respective national trade laws.

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appears to have been to establish agreed (reduced) levels of governmental support measures to large civil aircraft in an effort to reduce trade tensions between the parties, the 1992 Agreement is silent on the status under the GATT and the Tokyo Round Subsidies Code of governmental supports committed prior to 17 July 1992 and we find no evidence that the object and purpose of the 1992 Agreement was additionally to grandfather measures of support to large civil aircraft committed prior to 17 July 1992 for purposes of GATT/WTO disciplines.

7.98 In conclusion, we consider that there is no basis for directly applying the provisions of the 1992 Agreement to determine a particular temporal scope for this dispute in the manner for which the European Communities contends. Moreover, we do not consider that the 1992 Agreement contains any agreement that the parties would not invoke their rights under the WTO Agreements to challenge support measures to large civil aircraft committed prior to 17 July 1992.

The 1992 Agreement as a relevant rule of international law applicable to the interpretation of the SCM Agreement.

7.99 The European Communities argues that the Panel should take the 1992 Agreement into consideration in its interpretation of the temporal scope of application of the SCM Agreement for purposes of this dispute. The European Communities argues that Article 31(3)(c) of the VCLT provides a basis for us to do so, because the 1992 Agreement constitutes a relevant rule of international law applicable in the relations between the parties. Although presented as an argument relating to the 'interpretation' of the SCM Agreement, the European Communities has not specifically indicated how the 1992 Agreement should influence our interpretation of the actual terms in Article 5 of the SCM Agreement, other than to argue that we should 'interpret' a particular temporal scope of application of the SCM Agreement for this dispute because the parties agreed in Article 2 of the 1992 Agreement to exclude pre-1992 measures from GATT/WTO dispute settlement proceedings. In reality, this is an argument that a particular group of measures (*i.e.*, support measures for large civil aircraft committed by either of the parties prior to 17 July 1992) should be excluded from the disciplines of the SCM Agreement based on the 1992 Agreement, rather than an argument about the interpretation of provisions of the SCM Agreement, or of specific terms within those provisions.

7.100 It is not necessary for us to determine whether, for purposes of Article 31(3)(c) of the VCLT, the 1992 Agreement constitutes applicable law between the parties that we must take into account in interpreting the SCM Agreement.[1911] Even if it were (and we emphasize that on this issue we express no view), as we have previously indicated, we do not agree with the European Communities that the 1992 Agreement constitutes an agreement between the parties to 'grandfather' pre-1992 measures of support for large civil aircraft for the purposes of subsequent GATT/WTO proceedings.[1912]

[1911] In *EC – Approval and Marketing of Biotech Products*, the European Communities argued that provisions of the *Convention on Biological Diversity* and the *2000 Cartagena Protocol on Biosafety to the Convention on Biodiversity* informed the meaning and effect of various provisions in the SPS Agreement and the GATT 1994. The Panel rejected this argument because not all of the parties to the *dispute* were parties to the conventions in question. That situation is different from the one before this Panel, where both parties to the dispute are parties to the 1992 Agreement. We note that, in *EC – Approval and Marketing of Biotech Products*, the Panel expressed the view (at para. 7.68 and footnote 243) that the term 'the parties' in Article 31(3)(c) of the VCLT suggests that the rules of international law to be taken into account in interpreting the WTO Agreements at issue in a dispute are those which are applicable in the relations *between the WTO Members* (and not merely the parties to the dispute). Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.68 and footnote 243.

[1912] We recall that Article 2 of the 1992 Agreement provides:

"Government support to current large civil aircraft programmes, committed prior to the date of entry into force of this Agreement, is not subject to the provisions of this Agreement except as otherwise provided below. The terms and conditions on which support is granted shall not be modified in such a manner as to

BCI deleted, as indicated **[***]**

Consequently, even if we were to interpret the temporal scope of the SCM Agreement 'taking into account' the 1992 Agreement pursuant to Article 31(3)(c) of the VCLT, there is nothing in the 1992 Agreement that would lead us to 'interpret' the SCM Agreement as not applying to measures of support to large civil aircraft committed by the parties prior to 17 July 1992.

The 1992 Agreement gives rise to an estoppel preventing consideration of measures of support provided prior to the effective date of the 1992 Agreement

7.101 The European Communities also argues that the conclusion and implementation of the 1992 Agreement between the European Communities and the United States, in which the United States agreed to the European Communities providing a certain level and type of support to its large civil aircraft industry, "must at least give rise to an estoppel" preventing the United States from subsequently challenging such support in WTO dispute settlement proceedings. In response to a question from the Panel concerning the basis on which we are to apply the principle of estoppel in WTO dispute settlement proceedings, the European Communities argues that the good faith obligation contained in Article 3.10 of the DSU, can reasonably be analysed "in the light of the general international law principle of *estoppel*."[1913]

7.102 In the present dispute, the European Communities argues that, based on the established case law of previous panels,[1914] the principle of estoppel applies in WTO dispute settlement proceedings where: (i) there is a clear and unambiguous statement of fact; (ii) that statement was made voluntarily, unconditionally and is authorized by one party; (iii) and is relied on in good faith by another party.[1915]

7.103 The European Communities argues that Article 2 of the 1992 Agreement "constitutes the definitive settlement on any outstanding controversy between the European Union and the United States over {pre-1992 government support to the LCA industry}."[1916] According to the European Communities, "by grandfathering pre-1992 measures in Article 2 of the 1992 Agreement read in

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render it more favourable to the recipients: however, *de minimis* modifications shall not be deemed inconsistent with this provision."

[1913] The European Communities refers to the statement in the Panel Reports, *European Communities – Export Subsidies on Sugar, Complaint by Australia ("EC – Export Subsidies on Sugar (Australia)")*, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499, para. 7.74, Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Brazil ("EC – Export Subsidies on Sugar(Brazil)")*, WT/DS266/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 6793 and Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Thailand ("EC – Export Subsidies on Sugar(Thailand)")*, WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 7071), and subsequently confirmed in the Appellate Body Report, *European Communities – Export Subsidies on Sugar* ("*EC – Export Subsidies on Sugar*"), WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, 6365, para. 312, that the principle of good faith embodied in Article 3.10 of the DSU applies to the initiation (as well as conduct and implementation) of dispute settlement proceedings. According to the European Communities, a Member therefore acts inconsistently with Article 3.10 of the DSU if it requests the establishment of a panel in violation of the principle of good faith. EC, Answer to Panel Question 59, para. 21.

[1914] Citing the panel reports in *Argentina – Poultry Anti-Dumping Duties*, para. 7.38 and *Guatemala – Cement II*, para. 7.71-7.72. In our view, these panels did *not* establish that the principle of estoppel applies in WTO dispute settlement proceedings; rather, the respective panels proceeded on the basis that, even if *arguendo* a principle of estoppel in the terms contended for did exist, it was not established on the specific facts of the case.

[1915] EC, Answer to Panel Question 59, para. 23.

[1916] EC, Answer to Panel Question 59, para. 27.

conjunction with Article 10 (*e contrario*) the United States made a clear and unambiguous statement that it will not attack these measures anymore."[1917]

7.104 However, as already discussed, we do not consider that Article 2 of the 1992 Agreement can be interpreted as an agreement between the parties that pre-1992 support measures are deemed to be compatible with the GATT/WTO subsidies disciplines, or that the parties thereby waived their rights to challenge pre-1992 measures as being inconsistent with those disciplines. Even assuming *arguendo* that the Panel were to accept the European Communities' submissions as to the basis for applying the principle of estoppel in the context of WTO dispute settlement (on which we express no view), we would also reject the European Communities' request for preliminary rulings on this ground because we consider that Article 2 falls far short of being a "clear and unambiguous statement" in the sense required by the first element of the European Communities' own definition of the principle of estoppel. We also note that, although the European Communities asserts that it has complied with its obligations under the 1992 Agreement concerning the level of support it has provided to its large civil aircraft industry, it has not identified any behaviour that would amount to detrimental reliance on the alleged representation made by the United States.

7.105 In conclusion, we reject the European Communities' request for a preliminary ruling that any alleged government support committed prior to 17 July 1992 is excluded from the temporal scope of these proceedings.

3. Non-Temporal Scope Issues

(a) Background

7.106 As part of its 26 October 2005 request for preliminary rulings, the European Communities asked the Panel to rule that alleged subsidies to support the Airbus A350, along with five other alleged subsidy measures, are outside the Panel's terms of reference.[1918] In addition to LA/MSF for the A350, the alleged subsidy measures the subject of this request for preliminary rulings are: (i) EIB financing to Aérospatiale for the Super Transporteurs; (ii) funding from the French government for civil aeronautics-related R&D projects in which Airbus participated; (iii) the provision by certain enumerated German, French and UK research institutions of civil aeronautics R&D-related goods or services to Airbus; (iv) financial contributions to develop, expand, and upgrade facilities and other infrastructure for the Airbus companies in certain locations in Germany, France, Spain and the United Kingdom; and (v) the assumption of debt by the Spanish government on behalf of the Spanish Airbus company, CASA.[1919]

7.107 The European Communities purports to identify three general flaws in the United States' request for the establishment of a panel. First, the European Communities asserts that the measures concerning LA/MSF for the A350 are outside the Panel's terms of reference because they did not exist at the time of the request for the establishment of a panel.[1920] Second, the European Communities argues that LA/MSF for the A350 and various other measures were not subject to consultations.[1921] Finally, the European Communities argues that the United States' descriptions of certain of the

[1917] EC, Answer to Panel Question 59, para. 28.
[1918] EC, Original Request, para. 8.
[1919] This Preliminary Ruling does not address the European Communities' objection that the argument made by the United States in its Opening Oral Statement that Deutsche Airbus received a benefit from the 1998 debt settlement, on the basis that the fair value of the German Government's claims "already embedded a substantial benefit to Deutsche Airbus in the form of an interest rate of zero", constitutes a new claim that falls outside the Panel's terms of reference.
[1920] EC, Original Request, para. 12.
[1921] EC, Original Request, paras. 12 and 36.

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measures in the panel request failed to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue.[1922]

(b) Support for the Airbus A350

(i) Arguments of the European Communities

7.108 The European Communities claims that the LA/MSF measures for the Airbus A350 identified by the United States in Section (1) of its panel request fall outside the Panel's terms of reference because these measures did not exist at the time of the establishment of the Panel.[1923]

7.109 The European Communities recalls that in *EC – Chicken Cuts*, the Appellate Body confirmed that "{t}he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[1924] The European Communities also notes that the Panel in *US – Upland Cotton* excluded from its terms of reference a measure that was not yet in existence at the date when the panel request was submitted to the DSB, even though the measure had come into existence by the time that the panel was established.[1925]

7.110 According to the European Communities, Airbus' shareholders approved the industrial launch of the A350 on 7 October 2005.[1926] The European Communities contends therefore, that no government measures relating to the financing of the A350 existed at the time of the establishment of this Panel by the DSB on 20 July 2005.[1927]

(ii) Arguments of the United States

7.111 The United States argues that the existence or non-existence of the challenged measures is a question of fact that is not an appropriate issue for a preliminary ruling.[1928]

7.112 The United States notes that in *EC – Chicken Cuts*, the Panel examined the complainants' and respondents' arguments on the issue of the existence of the measure and reached its decision in its final report, not in a preliminary ruling.[1929] The United States submits that a more relevant report for present purposes is the Panel report in the *EC – Biotech* dispute. In that dispute, the existence or non-existence of the challenged measure was one of the central issues that the parties addressed over the course of the proceeding, and the Panel reached its decisions on the issue in its final report after fully developing the factual record during the proceeding.[1930]

[1922] EC, Original Request, para. 52.

[1923] EC, Original Request, para. 29. The European Communities also contends that launch aid for the A350 was not identified in the request for consultations, paras. 22-23.

[1924] Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* ("*EC – Chicken Cuts*"), WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157, para. 156.

[1925] EC, Original Request, para. 20.

[1926] EC, Original Request, para. 21,

[1927] EC, Original Request, para. 21.

[1928] US, Answer to EC, Original Request, para. 26.

[1929] US, Answer to EC, Original Request, para. 26.

[1930] The United States recalls that, despite the European Communities' denials regarding the existence of the measure in that dispute, the Panel in that dispute found that the facts demonstrated the European Communities did, in fact, maintain a *de facto* moratorium.

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7.113 Moreover, the United States contends that the measures relating to LA/MSF for the A350 do exist, and that they existed at the time of the establishment of this Panel.[1931] The United States argues that, while it is true that Airbus' shareholders approved the industrial launch of the A350 on 7 October 2005, Airbus typically ensures that LA/MSF measures are committed before it decides on the industrial launch of an aircraft, as the measures are an important part of the financing that makes the launch possible.[1932] According to the United States, LCA manufacturers make at least two 'launch' decisions when deciding to develop a new model of LCA. In addition to the 'industrial' launch (when the manufacturer confirms its decision to begin development of the model), there is also an earlier 'commercial' launch, the purpose of which is to determine whether there are enough potential customers for the new aircraft to merit an industrial launch. The United States notes that the 'commercial' launch of the A350 took place on 10 December 2004; more than seven months prior to the establishment of this Panel.[1933]

7.114 The United States also points to facts which it contends contradict the European Communities' assertion that no government measures relating to the financing of the A350 existed on 7 October 2005; namely, media comments from the CEO of Airbus on the day of the industrial launch "confirming that Airbus had in fact already received {LA/MSF} commitments from all four governments, and that the commitments were 'legally binding'"; EADS's 2005 financial statements which state that certain EU countries had already committed to fund the development of the A350 commercial aircraft programme; and a statement by the German Economics Minister in December 2004, confirming that state subsidies for the A350 were already included in the budget.[1934] The United States contends that, prior to the date of establishment of the Panel, the Airbus governments had made a legally binding commitment to provide LA/MSF for the A350, and that this commitment to make a financial contribution, as a 'potential direct transfer of funds', is a subsidy capable of being challenged in WTO dispute settlement.[1935]

7.115 The United States also questions the European Communities' refusal to respond to the Facilitator's specific request for information and documents relating to LA/MSF for the A350 as part of the Annex V process in this dispute.[1936] The United States contends that it would have been relatively simple for the European Communities to have stated that no such measures existed, rather than refusing to provide information about them. The United States considers that, by so refusing, the European Communities "appears to concede that the measures do in fact exist."[1937]

(iii) Evaluation by the Panel

7.116 We do not understand there to be a dispute over the question whether measures included in a panel's terms of reference must be in existence at the time of the establishment of the panel.[1938] What

[1931] US, Answer to EC, Original Request, paras. 31-38.

[1932] US, Answer to EC, Original Request, para. 31. Therefore, according to the United States, the significance of the industrial launch of the A350 on 7 October 2005 is that it demonstrates that LA/MSF measures for the A350 were in place prior to that date, not subsequently

[1933] US, Answer to EC, Original Request, para. 32, footnote 12. By way of example, the United States notes that the UK government's contract for LA/MSF for the A380 was dated 12 March 2000, some nine months prior to the industrial launch of the A380 in December 2000; at para. 34.

[1934] US, Answer to EC, Original Request, para. 31. The European Communities contends that the evidence provided by the United States does not establish the existence of LA/MSF to the A350; EC, FWS, paras. 345-360.

[1935] US, Answer to Panel Question 2, paras. 15-18.

[1936] US, Answer to EC, Original Request, para. 36.

[1937] US, Answer to EC, Original Request, para. 36.

[1938] We recall that the Appellate Body has indicated that the term "specific measures at issue" in Article 6.2 of the DSU suggests that, as a general rule, the measures included in a panel's terms of reference

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the parties do dispute is the factual issue of whether or not LA/MSF for the A350 was in existence at the time of the establishment of this Panel.

7.117 We consider that the issue of whether or not there were any 'measures' in existence regarding LA/MSF for the A350 at the time of the establishment of the Panel is a disputed question of fact in this case. Both parties have presented evidence and argument on this issue in the written submissions, which we will be required to assess in order to resolve this issue.[1939] We agree with the United States that, where the existence or non-existence of a challenged measure is a disputed question of fact, it is not an appropriate matter for determination in a preliminary ruling. We therefore reject the European Communities' request for a preliminary ruling on whether or not LA/MSF for the A350 falls within the scope of our terms of reference on the grounds that the measure allegedly did not exist at the time of the establishment of the Panel.

(c) Measures Allegedly Not Previously Subject to Consultations

(i) Arguments of the European Communities

7.118 Alternatively, and in addition to its argument concerning the non-existence of the measure, the European Communities argues that the LA/MSF measures for the A350 should be excluded from the Panel's terms of reference because they have not been subject to consultations, as required by Articles 4.4 and 6.2 of the DSU.[1940]

7.119 The European Communities also requests that we exclude other measures from our terms of reference on the same grounds. These measures relate to: financing to Aérospatiale Super Transporteurs as described in Section (2)(f) of the United States' panel request; funding from the French government for civil aeronautics-related R&D projects in which Airbus participated (Section (6)(e) of the United States' panel request); and the provision by certain enumerated German, French and UK research institutions of civil aeronautics R&D -related goods and services to Airbus (Section (6)(f) of the United States' panel request).[1941]

7.120 The European Communities argues that only measures that have been subject to consultations can properly be included in a request for the establishment of a panel. In support of this contention, the European Communities refers the Panel to statements of the Appellate Body in *US – Upland Cotton* and *EC - Chicken Cuts*.[1942] Relying on the Appellate Body Report in *US - Upland Cotton*, the European Communities argues that even though there does not have to be a "precise and exact identity" between the scope of the consultations and the request for the establishment of a panel, the complaining party cannot include additional measures in its panel request and thereby "expand the scope of the dispute".[1943]

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must be measures that are in existence at the time of the establishment of the panel; Appellate Body Report, *EC – Chicken Cuts*, para. 156.

[1939] We recall that, in *Korea –Alcoholic Beverages*, the Panel considered that the issue before it was "one that requires a weighing of evidence" and "{a}s such it is not an issue appropriate for a preliminary ruling in this case." Panel Report, *Korea – Taxes on Alcoholic Beverages ("Korea –Alcoholic Beverages")*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44, para. 10.16.

[1940] EC, Original Request, para. 12.

[1941] EC, Original Request, paras. 88-89.

[1942] EC, Original Request, paras. 31-32; citing the Appellate Body, *US – Upland Cotton*, para. 293 and Appellate Body, *EC – Chicken Cuts*, para. 156 (footnote 315).

[1943] Appellate Body Report, *US – Upland Cotton*, para. 293.

BCI deleted, as indicated **[***]**

(ii) Arguments of the United States

7.121 The United States contends that it is well established that it is the panel request, and not the consultation request, that establishes a panel's terms of reference.[1944] The United States also notes that the Appellate Body has said that it does not believe "Articles 4 and 6 of the DSU . . . require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel," provided that the "essence" of the challenged measures had not changed.[1945]

7.122 In relation to LA/MSF for the A350, the United States notes that its panel request specifically refers to LA/MSF for the A350. The United States also contends that, contrary to the European Communities' assertions, it did ask questions about LA/MSF for the A350 during the initial round of consultations on 4 November 2004, and that during the second round of consultations on 23 March 2006, it provided the European Communities with written questions concerning LA/MSF for the A350, which the European Communities refused to answer.[1946] Moreover, the United States argues that, in its first written submission, it has established a *prima facie* case that the LA/MSF which the Airbus governments have committed to provide for the A350 is the same in its essential respects to all of the LA/MSF they provide to Airbus.[1947]

7.123 The United States has indicated that it does not intend to pursue its claim with respect to the 1997 EIB loan to Aérospatiale for the Super Transporteurs programme owing to the European Communities' confirmation that this loan was never drawn by Aérospatiale. However, the United States is still pursuing its claim in relation to a 1993 EIB loan to Aérospatiale for the Super Transporteurs programme.[1948] As regards the challenge to this measure the United States notes that its panel request refers specifically to financing from the EIB to Aérospatiale Super Transporteurs, that its request for consultations made specific reference to the provision by the EIB "to the Airbus companies" of "research and development and other loans on preferential terms, including financing for the A320, the A321, the A330/A340, and the A380," and that its request for consultations also lists financing by the EIB "to the Airbus companies" for "large civil aircraft design, development, and other purposes" before then listing specific examples of such financing.[1949] According to the United States, the 'essence' of the challenged measures; namely, subsidized loans from the EIB to the Airbus companies for the development of Airbus aircraft, is the same in both the consultation request and the panel request.[1950] The United States also contends that it raised the issue of the EIB's loans for Aérospatiale Super Transporteurs during the consultations with the European Communities on 4 November 2004.[1951] Moreover, the United States contends that its Statement of Available Evidence included a reference to a portion of the EIB website entitled "Loans activity, Breakdown by Sector –

[1944] US, Answer to EC, Original Request, para. 39, referring to Appellate Body Report, *US – Upland Cotton*, para. 293.

[1945] US, Answer to EC, Original Request, para. 39, citing Appellate Body Report, *US – Upland Cotton*, para. 285 (emphasis in original); Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* ("*Mexico – Anti-Dumping Measures on Rice*"), WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853, para. 137, citing Appellate Body Report, *Brazil – Aircraft*, para. 132.

[1946] US, Answer to EC, Original Request, para. 37.

[1947] US, Answer to EC, Original Request, para. 39.

[1948] US, Answer to Panel Question 12, para. 80, and First Written Submission of the United States (hereinafter "US, FWS"), para. 407.

[1949] US, Answer to EC, Original Request, para. 72.

[1950] US, Answer to EC, Original Request, para. 72.

[1951] US, Answer to EC, Original Request, para. 73.

BCI deleted, as indicated **[***]**

Industry" in which all loans to Airbus companies, including two loans for the Aérospatiale Super Transporteur project, are listed.[1952]

7.124 As regards the provision by certain enumerated German, French and UK research institutions of civil aeronautics R&D-related goods or services to Airbus (Section (6)(f) of the panel request), the United States advises that, although it considers its panel request in respect of the measures described in Section (6)(f) of its panel request to conform with the requirements of Article 6.2 of the DSU, it has decided not to pursue its claims with respect to these measures in this dispute. Accordingly, there is no need for the Panel to address the European Communities' arguments concerning the measures described in Section (6)(f) of the panel request.[1953]

(iii) Evaluation by the Panel

7.125 We recall that Article 4.4 of the DSU reads in relevant part:

"Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint."

Article 6.2 of the DSU provides:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

7.126 We recall that the Appellate Body has stated that Articles 4 and 6 of the DSU "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[1954] It is well established that Articles 4 and 6 of the DSU do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[1955] In this regard, we recall that Article 4.4 of the DSU requires only that the request for consultations must identify "the measures at issue", as opposed to the "*specific* measures at issue" as required by Article 6.2 of the DSU. As the Appellate Body in *Brazil - Aircraft* stated:

> "We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel. As stated by the Panel, '{o}ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained

[1952] US, Answer to EC, Original Request, para. 74.
[1953] US, Answer to EC, Original Request, para. 75.
[1954] Appellate Body Report, *Brazil – Aircraft*, para. 131.
[1955] Appellate Body Report, *Brazil – Aircraft*, para. 132.

BCI deleted, as indicated **[***]**

> during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel."[1956]

We are also mindful of the Appellate Body's statement in *US – Upland Cotton*:

> "We also note that Article 4.2 of the DSU calls on a WTO Member that receives a request for consultations to 'accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member'. *As long as the complaining party does not expand the scope of the dispute*, we hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request. According to Article 7 of the DSU, it is the request for the establishment of a panel that governs its terms of reference, unless the parties agree otherwise."[1957]

Finally, we recall that in *US – Upland Cotton*, the Appellate Body indicated that a panel's determination of the scope of the consultations should be limited to an analysis of the request for consultations.[1958]

7.127 With these considerations in mind, we now turn to examine the text of the consultation request and the panel request in order to determine whether there is a sufficient degree of identity between the measures that were the subject of consultations and the specific measures identified in the request for the establishment of the panel to warrant a conclusion that the challenged measures were subject to consultations as required by Article 4 of the DSU.

Launch aid for the Airbus A350 (Section (1) of the panel request)

7.128 The sections of the consultation request pertaining to LA/MSF read:

> "The provision by the member States of financing for large civil aircraft design and development to the Airbus companies (hereinafter "launch aid"). This financing provides benefits to the recipient companies including financing for projects that would otherwise not be commercially feasible. The non-commercial terms of the financing include no interest or interest at below-market rates and a conditional repayment obligation that is tied to the success of the aircraft model being financed; if a model is not successful, some or all of the financing is forgiven.…
>
> The subsidies in question include those relating to Airbus models A300, A310, A320 family, A330/340, A330-200, A340-500/600, and most recently the A380."[1959]

The section of the United States' panel request pertaining to LA/MSF in respect of the A350 reads:

> "The provision by the member States of financing for large civil aircraft design and development to the Airbus companies (hereinafter "launch aid"). This financing

[1956] Appellate Body Report, *Brazil – Aircraft*, para. 132. In this connection, we recall that the Panel on *Brazil - Aircraft* stated (at para. 7.9) "...to limit the scope of the panel proceedings to the identical matter with respect to which consultations were held could undermine the effectiveness of the panel process."

[1957] Appellate Body Report, *US – Upland Cotton*, para. 293 (footnotes omitted, emphasis added).

[1958] Appellate Body Report, *US – Upland Cotton*, para. 287.

[1959] *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Request for Consultations by the United States, WT/DS316/1-G/L/697-G/SCM/D62/1 (12 October 2004) (footnotes omitted) (hereinafter "US, Consultation Request").

BCI deleted, as indicated **[***]**

> provides benefits to the recipient companies including financing for projects that would otherwise not be commercially feasible. The non-commercial terms of the financing may include no interest or interest at below-market rates and a repayment obligation that is tied to sales. If the aircraft is not successful, some or all of the financing need not be repaid. Specific examples of the financing at issue include:
>
> (a) French financing for the Airbus A300, A310, A320, A330/340, A330-200, A340-500/600, A380 and A350;
>
> (b) German financing for the Airbus A300, A310, A320, A330/340, A380 and A350;
>
> (c) United Kingdom financing for the Airbus A300, A310, A320, A330/340, A330-200, A340-500/600, A380 and A350; and
>
> (d) Spanish financing for the Airbus A300, A310, A320, A330/340, A330-200, A340-500/600, A380 and A350."[1960]

7.129 We consider that there is a sufficient identity between the measures described in the request for consultations and the specific measures as described in the panel request. We note that the consultation request indicates that the measures in question 'include' LA/MSF relating to the aircraft models specified therein. The consultation request therefore indicates that the alleged subsidies to the specific aircraft models are part of a class or category of measures identified as 'launch aid' for large civil aircraft design and development to the Airbus companies. In the panel request, the United States provides particular examples of the specific measures it identifies as 'launch aid' for large civil aircraft design and development to the Airbus companies. We do not consider that the United States has 'broadened the scope of the dispute' by including in the panel request 'launch aid' for the A350 as one of the examples of the specific measures that are described in the same terms in both the consultations and panel requests. We consider that the essence of the challenged measures; namely, 'launch aid' for large civil aircraft design and development to the Airbus companies, is the same in both requests.

> EIB financing to Aérospatiale for the Super Transporteurs (Section (2)(e) of the panel request).

7.130 The section of the United States' consultation request dealing specifically with EIB financing refers to:

> "The provision by the EC and the member States, through the European Investment Bank ("EIB"), to the Airbus companies, including Airbus' parent company EADS, of research and development and other loans on preferential terms, including financing for the A320, the A321, the A330/340, and the A380."[1961]

Section (2)(e) of the United States' panel request, pertaining to EIB financing to Aérospatiale Super Transporteurs reads:

> "(2) In addition to launch aid, the provision by the EC and the member States, through the European Investment Bank ("EIB"), to the Airbus companies, of

[1960] *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Request for the Establishment of a Panel by the United States, WT/DS316/2 (3 June 2005) (footnotes omitted), (hereinafter "US, Panel Request").

[1961] US, Consultation Request.

BCI deleted, as indicated **[***]**

> financing for large civil aircraft design, development, and other purposes. Specific examples of the financing at issue include: ...
>
> (e) Financing to Aérospatiale Super Transporteurs;"[1962]

7.131 In our view, the United States has not "broadened the scope of the dispute" by specifying EIB financing to Aérospatiale Super Transporteurs in the panel request. We note that the consultation request specifically refers to the provision by the EIB "to the Airbus companies" of "research and development and other loans on preferential terms, *including* financing for the A320, the A321, the A330/A340, and the A380". The panel request also lists financing by the EIB "to the Airbus companies" for "large civil aircraft design, development, and other purposes" and then provides specific examples of the financing at issue. We consider that the essence of the challenged measures; namely, subsidized loans from the EIB to the Airbus companies for the development of Airbus aircraft (which category includes Aérospatiale Super Transporteurs), is the same in both requests.

> Funding from the French government for civil aeronautics-related R&D projects in which Airbus participated (Section (6)(e) of the panel request).

7.132 Section (6)(e) of the United States' panel request refers to:

> "The provision by the EC and the member States of financial contributions for aeronautics-related research, development, and demonstration ("R&D"), undertaken by Airbus, whether alone or with others, or in any other way to the benefit of Airbus, including: …
>
> (e) Funding from the French government, including regional and local authorities, since 1986 for civil aeronautics-related R&D projects in which Airbus participated."[1963]

7.133 The European Communities argues that the measures described in Section (6)(e) are not included in the consultation request.[1964]

7.134 We recall, however, that there is a section of the request for consultations dealing specifically with funding for civil aeronautics-related R&D projects in the following terms:

> "The provision by the EC and member States of research and development loans and grants in support of large civil aircraft development. These loans and grants directly benefit the Airbus companies."[1965]

7.135 We consider that the specific measures identified in Section (6)(e) of the United States' panel request fall within the scope of this description of the measure in the request for consultations.

[1962] US, Panel Request.
[1963] US, Panel Request.
[1964] EC, Original Request, para. 73.
[1965] US, Consultation Request.

BCI deleted, as indicated **[***]**

Provision by certain enumerated German, French and UK research institutions of civil aeronautics R&D-related goods and services to Airbus (Section (6)(f) of the United States' panel request).

7.136 The United States advises that it has decided not to pursue its claims with respect to these measures in this dispute.[1966] Accordingly, there is no need for us to address the European Communities' objections to these measures.

7.137 In conclusion, for the reasons stated above, we reject the European Communities' request for a preliminary ruling that the measures identified in Sections (1), (2)(e) and (6)(e) of the United States' panel request be excluded from our terms of reference on the grounds that they were not subject to consultations.

(d) Measures Allegedly not Adequately Identified in the Panel Request

(i) Arguments of the European Communities

7.138 The European Communities challenges a number of other measures as being outside the Panel's terms of reference on the grounds that, in its request for the establishment of a panel, the United States described these measures in an overly broad, ambiguous or overly inclusive manner.[1967] According to the European Communities, the United States has thereby failed to comply with the basic obligation under Article 6.2 of the DSU to identify the 'specific measures at issue' in its request for the establishment of a panel.[1968]

7.139 Where a measure is not explicitly identified in the text of a request for the establishment of a panel, the European Communities contends that WTO jurisprudence has established that there must be a description of the specific measures at issue in the panel request that *effectively* achieves the same result.[1969] According to the European Communities, the complainant is under a duty to identify, with sufficient precision, the 'specific measures at issue' in its panel request, and a respondent is not required to engage in research or guesswork in determining what the specific measures are supposed to be, particularly in complex cases potentially involving numerous measures.[1970] Moreover, the European Communities argues that with respect to programmes and schemes subject to the disciplines of the SCM Agreement, WTO jurisprudence indicates that broad descriptions of measures at issue "may be acceptable as long as the group of measures in question has clearly been limited by some *restricting or specifying reference(s)* which, *in light of the circumstances of the case*, nonetheless enable the 'specific measures at issue' to be ascertained."[1971] According to the European Communities, depending on the specific circumstances and type of measure, "other specifying elements may be necessary, such as the nature of the financial contribution, the amount thereof or the

[1966] US, Answer to EC, Original Request, para. 75.
[1967] EC, Original Request, para. 36.
[1968] EC, Original Request, para. 36.
[1969] EC, Original Request, para. 45; citing Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* ("*Canada – Wheat Exports and Grain Imports*"), WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739, para. 6.10, (subpara. 20 of the preliminary ruling reproduced therein).
[1970] EC, Original Request, para, 47.
[1971] EC, Original Request, para. 48. The European Communities cites the following reports in support: Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779, para. 127; Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10, subpara. 20 of the preliminary ruling reproduced therein; Panel Report, *US – Upland Cotton*, para. 7.123-7.128.

BCI deleted, as indicated **[***]**

date on which it was provided, the purpose of the grant, or the recipient."[1972] The European Communities notes that the inclusion or non-inclusion of a measure in the panel's terms of reference must be demonstrated "*on the face* (text) of the panel request."[1973]

(ii) Arguments of the United States

7.140 The United States argues that its panel request identifies the specific measures at issue in accordance with Article 6.2 of the DSU.

7.141 According to the United States, the Appellate Body report in *US – Carbon Steel* made clear that a panel reviewing a panel request under Article 6.2 must consider the panel request as a whole, and may take into account the attendant circumstances.[1974] Such 'attendant circumstances' are the circumstances surrounding the filing of the panel request, such as the consultation request, the consultations, the Statement of Available Evidence, the DSB's consideration of the panel requests and such other facts.[1975] The United States also argues that the European Communities has not been prejudiced in any way by the description of the measures in the panel request.[1976] Specifically, the United States points to the fact that the European Communities received a first set of questions from the facilitator in the Annex V process on 7 October 2005, following an earlier exchange of draft questions on 23 September 2005. The United States contends that, given the level of detail in the questions, and the fact that its first written submission was not due until February 2007, the European Communities cannot seriously assert that it has been unable to begin preparing its defence.[1977]

7.142 The United States also refers to the procedural history of this dispute as indicating that the European Communities' request for preliminary rulings "had nothing to do with addressing alleged shortcomings in the US panel request, and everything to do with increasing the complexity of the matter, avoiding the need to provide information on the challenged measures in the Annex V process, and forcing delay."[1978] The United States also raises the European Communities' refusal to provide details of its concerns regarding the lack of specificity in the United States' panel request when the request was considered by the DSB as demonstrating that the European Communities' approach to its concerns regarding the United States' panel request is "strikingly different from the approach suggested by the Appellate Body and prior panels."[1979] Finally, the United States points to the fact

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[1972] EC, Original Request, para. 50.

[1973] EC, Original Request, para. 51; citing the Panel Report, *US – Upland Cotton*, para. 7.123-7.128; 7.137-7.144; 7.145-7.152; 7.172-7.181; and Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 145-156, particularly para. 154.

[1974] US, Answer to EC, Original Request, para. 45; referring to Appellate Body Report, *US - Carbon Steel*, paras. 128-133.

[1975] US, Answer to EC, Original Request, para. 60; citing Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, 4107, para. 5.32.

[1976] US, Answer to EC, Original Request, para. 41.

[1977] US, Answer to EC, Original Request, para. 78.

[1978] Specifically, the United States refers to the further consultations which were held on 23 March 2006 and the second request for the establishment of a panel in this dispute which it filed on 10 April 2006. The United States contends that, since the time at which the United States filed the second panel request that ultimately led to the composition of a panel in DS347, the European Communities has fully understood the nature of the United States' case and has been able to prepare its defence in this dispute. US, Answer to EC, Original Request, para. 79.

[1979] US, Answer to EC, Original Request, para. 82; referring to the Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC* "), WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619, para. 166, and Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10, subpara. 65.

BCI deleted, as indicated **[***]**

that it consented to the European Communities receiving extended time during which to prepare its first written submission (12 weeks compared to the two to three weeks proposed in the DSU) as demonstrating the lack of prejudice to the EC.[1980]

(iii) Evaluation by the Panel

7.143 A panel's terms of reference are based on the request for establishment of a panel. We recall that, when faced with an issue relating to the scope of its terms of reference, a panel is required to scrutinize carefully the request for establishment of a panel to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.[1981] Article 6.2 of the DSU provides:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint *sufficient to present the problem clearly*. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."[1982]

7.144 We recall that the requirement of precision in the request for establishment of a panel flows from the two essential purposes of the terms of reference; namely, to define the scope of the dispute, and to serve the due process objective of notifying the parties and third parties of the nature of a complainant's case.[1983] Compliance with the requirements of Article 6.2 must be determined on the merits of each case, after a consideration of the panel request as a whole, and in light of attendant circumstances.[1984] Moreover, such compliance must be demonstrated on the face of the request for establishment of a panel, and defects in the request for the establishment of a panel cannot be cured in the subsequent submissions of the parties during the panel proceedings.[1985]

7.145 In the sections that follow, we set forth the specific measure contained in the United States' panel request which the European Communities challenges on the basis that it fails to meet the requirements of Article 6.2 of the DSU, followed by the arguments advanced by the European Communities and the United States, respectively, in relation to the specific measure. Finally, we set out our analysis, based on the foregoing principles, and our conclusion with respect to each specific measure.

> Funding from the French government for civil aeronautics-related R&D projects in which Airbus participated (Section (6)(e) of the United States' panel request)

7.146 Section (6)(e) of the panel request refers to:

> "The provision by the EC and the member States of financial contributions for aeronautics-related research, development, and demonstration ("R&D"), undertaken

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[1980] US, Answer to EC, Original Request, para. 80.

[1981] Appellate Body Report, *US – Carbon Steel*, para. 126; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 142.

[1982] Emphasis added.

[1983] Appellate Body Report, *US – Carbon Steel*, para. 126.

[1984] Appellate Body Report, *US – Carbon Steel*, para. 127. "Attendant circumstances" that a panel may examine when evaluating a panel request include the consultations that were held concerning the measure and the DSB's consideration of the requests for a panel and the establishment of the Panel; Panel Report, *US – Lamb*, para. 5.32.

[1985] Appellate Body Report, *US – Carbon Steel*, para. 127.

BCI deleted, as indicated **[***]**

> by Airbus, whether alone or with others, or in any other way to the benefit of Airbus, including: ...
>
> (e) Funding from the French government, including regional and local authorities, since 1986 for civil aeronautics-related R&D projects in which Airbus participated."

7.147 The European Communities argues that the phrase 'research, development, and demonstration' used by the United States in its panel request is unclear and overly broad.[1986] The reference to 'funding' could, in the European Communities' view, relate to any funding ever provided by French authorities.[1987] According to the European Communities, 'funding' by the 'French government, including regional and local authorities' could cover any of the hundreds, if not thousands, of authorities in France. The European Communities submits that the failure to specify *which* governmental institutions or authorities are of particular concern creates unacceptable uncertainty, especially in larger countries with complex administrations and wide networks of sub-national authorities.[1988] The European Communities argues that it is impossible for it to know which alleged actions taken by which French authorities over the past 20 years the United States is interested in pursuing.[1989]

7.148 The United States disputes the European Communities' contention that the phrase 'funding for civil aeronautics-related R&D projects in which Airbus participated' could be understood to mean 'any funding ever provided by French authorities'. The United States contends that it used the same term; namely, 'funding for civil aeronautics-related R&D projects in which Airbus participated' to describe the European Communities, German, UK and Spanish R&D measures, in Section (6)(a) through (d) of its panel request and notes that the European Communities has not raised concerns over compliance with Article 6.2 in that context, nor has the European Communities explained why the term was sufficiently clear with respect to the European Communities, German, United Kingdom and Spain R&D measures, and unclear and broad with respect to the French R&D measures.[1990]

7.149 The United States also raises attendant circumstances surrounding the filing of its Panel request. In this regard, the United States contends that it raised the issue of French R&D subsidies during consultations and provided the European Communities with five specific written questions about French funding for R&D projects related to civil aircraft in which Airbus participated between 1986 and 2003.[1991] The United States notes that the Statement of Available Evidence appended to its consultation request included several documents addressing French government funding for R&D for civil aircraft projects, including funding to Airbus.[1992] In addition, the United States notes that, when the United States' panel request was first on the agenda of the DSB, the United States made specific reference to the nature of the R&D subsidies in its statement to the DSB.[1993]

[1986] EC, Original Request, para. 57.
[1987] EC, Original Request, para. 57.
[1988] EC, Original Request, para. 59.
[1989] EC, Original Request, para. 61.
[1990] US, Answer to EC, Original Request, para. 63. We note that in its first written submission, the European Communities responded that in Sections (6)(a) through (d) of the panel request, the United States has included additional specifying elements, such as the name of the R&D programme, which the European Communities claims helped it to identify the specific measures at issue; EC, FWS, para. 183.
[1991] US, Answer to EC, Original Request, para. 64.
[1992] US, Answer to EC, Original Request, para. 64.
[1993] US, Answer to EC, Original Request, para. 65; Minutes of Meeting held in the Centre William Rappard, 13 June 2005, WT/DSB/M/191, 28 June 2005, para. 3.

BCI deleted, as indicated **[***]**

7.150 In the Panel's view, Section (6)(e) of the panel request, considered as a whole and in light of attendant circumstances, identifies the measures at issue in a manner sufficient to present the problem clearly. We do not consider that the reference to funding for "civil aeronautics-related R&D projects in which Airbus participated" can be read as covering any funding ever provided by French authorities. In addition, while the terms "funding" by "the French government, including regional and local authorities" might, if read in isolation, cover "hundreds if not thousands of 'authorities' in France", we do not consider that funding for "civil aeronautics-related R&D projects in which Airbus participated" can be so broadly construed, especially when considered in the light of the attendant circumstances described in the arguments of the United States.[1994]

> Financial contributions to develop, expand, and upgrade facilities and other infrastructure for the Airbus companies in certain locations in German, France, Spain and the United Kingdom (Section (3) of the United States' panel request).

7.151 Section (3) of the United States' panel request reads:

> "The provision by the EC and the member States of financial contributions to develop, expand, and upgrade facilities and other infrastructure for the Airbus companies. Specific instances include public investments by German authorities in Hamburg, Nordenham, Bremen, and Varel, by French authorities in the Toulouse region, by UK authorities at Broughton, and by Spanish authorities at numerous locations in Spain (such as Puerto Real, Illescas, Puerto de Santa Maria, and La Rinconada)."

7.152 The European Communities challenges the descriptions of "public investments by French authorities in the Toulouse region", and "public investments" by "German authorities in Hamburg, Nordenham, Bremen, and Varel"; by "UK authorities at Broughton" and "by Spanish authorities at numerous locations in Spain (such as Puerto Real, Illescas, Puerto de Santa Maria, and La Rinconada)" as insufficiently clear in light of the fact that local administrations undertake an immense number of infrastructure measures of varying scale and scope each year and the specification of the United States' claim is insufficient to enable the European Communities to identify the specific measures the United States seeks to challenge.

7.153 The United States contends that the European Communities' assertion that the description of the measures in Section (3) of the United States panel request is insufficient under Article 6.2 of the DSU is not credible, particularly in light of the attendant circumstances.[1995] The United States gives the example of the public investments by German authorities in Hamburg: According to the United States, the measure in question is the expenditure by Hamburg of approximately EUR 751 million to develop land and expand facilities at Airbus' Hamburg production facility.[1996] The United States notes that it listed this measure in its consultation request, it submitted two written questions on the Hamburg project in advance of the consultations between the parties on 4 November 2004 and it discussed the measure at length with the European Communities during the consultations.[1997] The United States notes that it appended to its consultation request no fewer than nine different Hamburg government documents describing the Hamburg infrastructure project in detail.[1998] In addition, the United States notes that, at the first DSB meeting at which the United States panel request was on the agenda, the US representative made specific reference to the City of Hamburg spending

[1994] US, Answer to EC, Original Request, paras. 64-67.
[1995] US, Answer to EC, Original Request, para. 56.
[1996] US, Answer to EC, Original Request, para. 56.
[1997] US, Answer to EC, Original Request, para. 56.
[1998] US, Answer to EC, Original Request, para. 56.

BCI deleted, as indicated **[***]**

EUR 751 million to fill in a protected wetland on the River Elbe to create additional land for Airbus's use at its production cite in Hamburg.[1999]

7.154 With respect to the other alleged infrastructure subsidies, the United States notes that it submitted specific written questions about the Nordenham, Varel, Bremen, Toulouse, Broughton, Wales, Illescas, Puerto de Santa Maria, Puerto Real and La Rinconada measures to the European Communities in advance of the consultations on 26 October 2004.[2000] The United States notes that it also included documents about these other infrastructure subsidies in the Statement of Available Evidence appended to its request for consultations.[2001]

7.155 In the Panel's view, the 'public investments' referred to in Section (3) of the panel request relate to the development, expansion and upgrading of facilities and other infrastructure *for* the Airbus companies. Infrastructure '*for* the Airbus companies' is clearly narrower than infrastructure that might in some way *benefit* the Airbus companies. For example, contrary to the European Communities' suggestion, we do not consider that it is plausible to read the reference to "infrastructure for the Airbus companies" as potentially covering insignificant infrastructure measures such as a new stop sign near an Airbus company plant. Moreover, we consider that this section of the panel request, when considered in the light of attendant circumstances, identifies the measures at issue in a manner sufficient to present the problem clearly.

> The assumption of debt by the Spanish government on behalf of the Spanish Airbus company CASA (Section (4) of the United States' panel request).

7.156 The United States advises that, although it considers its request under this section consistent with the requirements of Article 6.2 of the DSU, it has decided not to pursue its claims with respect to these measures. Accordingly, there is no need for the Panel to address the European Communities' contentions on these measures.[2002]

> The provision by certain enumerated German, French, and UK research institutions of civil aeronautics R&D-related goods or services to Airbus (Section (6)(f) of the United States' panel request).

7.157 The United States advises that, although it considers its panel request in respect of these measures to conform with the requirements of Article 6.2 of the DSU, it has decided not to pursue its claims with respect to these measures in this dispute.[2003] Accordingly, there is no need for us to address the European Communities' objections to these measures.

[1999] US, Answer to EC, Original Request, para. 57; referring to WT/DSB/M/191, 28 June 2005, para. 3.

[2000] US, Answer to EC, Original Request, para. 59. The United States contends that neither the European Communities, France, German, Spain nor the United Kingdom expressed confusion about the nature of the measures at issue at that time.

[2001] US, Answer to EC, Original Request, para. 59.

[2002] US, Answer to EC, Original Request, para. 75.

[2003] US, Answer to EC, Original Request, para. 75.

BCI deleted, as indicated **[***]**

7.158 In conclusion, for the reasons stated above, we reject the European Communities' request for a preliminary ruling that the measures identified in Sections (6)(e) and (3) of the United States' panel request be excluded from our terms of reference on the grounds that the descriptions of these measures fail to meet the requirements of Article 6.2 of the DSU.

Section VII.C Attachment: Annex A to the Preliminary Ruling of the Panel

Measures which the European Communities Agrees Are Subject to Article 5 of the SCM Agreement because they came into existence after 1 January 1995

Nature of Measure	Alleged amount of financial contribution	Details of Existence
MSF for A330/A340[2004]		
Germany	DM 126.8 million and DM 66.7 million	Disbursed in 1995 and 1996, respectively.
France	€75.93 million and €21.518 million	Disbursed in 1995 and 1996, respectively.
Spain	€19.28 million	Disbursed in 1995.
EIB Loans		
EIB loan to EADS for R&D related to the Airbus A380	€700 million	Granted in 2002[2005]
EIB loan to Aérospatiale for Super Transporteur program (Super Transporteur A) 1993	€112,614,303	Some disbursements were made in 1996.
EIB loan to Aérospatiale for Super Transporteur program (Super Transporteur B) 1997	€38,098,547	EC says this loan was never drawn on and was therefore cancelled.[2006]
Infrastructure		
Alleged infrastructure support provided by the City of Hamburg to Airbus Deutschland		EC concedes this is within the temporal scope of the SCM Agreement (see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 42).

[2004] Based on EC, Answer to Panel Questions of 8 December 1996, paras. 22-38.

[2005] The European Communities concedes that this loan is within the temporal scope of the SCM Agreement: *see* EC, Answer to Panel Questions of 8 December 1996, para. 39.

[2006] EC, Answer to Panel Questions of 8 December 1996, para. 40. It remains however, within the temporal scope of the dispute, even on the European Communities' definition.

BCI deleted, as indicated [***]

Nature of Measure	Alleged amount of financial contribution	Details of Existence
Alleged infrastructure support provided by French authorities by creating the AéroConstellation Industrial Site in Toulouse		EC concedes this is within the temporal scope of the SCM Agreement (see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 44).
Grant by German Land of Lower Saxony for Airbus's Nordenham Site (*US, FWS, para.488*)	€6 million	Grant approved in June 2002. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45
Grant by Welsh Assembly to BAE Systems for Airbus's Broughton, Wales facility (*US, FWS, para 490*)	£19.5 million	Announcement made 24 September 2000. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45
Regional grants by Spanish Government to EADS-CASA's Sevilla and La Rinconada Facilities (*US, FWS, para 494*)	€2.2 million to EADS-CASA in Sevilla €814,000 to EADS-CASA at La Rinconada	Announced April 2001. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45.
Spanish government grant to Airbus España for Airbus España's Toledo Facility (*US, FWS, para 496*)	€37.9 million	Approved March 2003. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45.

Nature of Measure	Alleged amount of financial contribution	Details of Existence
Regional grant by Spanish Government for EADS-CASA's La Rinconada Facility (*US, FWS, para 498*)	€43.1 million	Order approving grant issued July 2003. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45.
Grant by Spanish Government for EADS-CASA's Puerto de Santa Maria Plant (*US, FWS, para 500*)	€5.9 million	Order approving grant issued July 2003. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45.
Grant by Spanish Government for EADS/Airbus España's Puerto Real Facility (*US, FWS, para 502*)	€13.1 million	Order approving grant issued July 2003. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45.
Grant by Government of Andalusia for EADS-CASA's Puerto de Santa Maria Plant (*US, FWS, para 504*)	€8.6 million	Grant provided July 2001. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45.
Grant by Andalusian Government for EADS-CASA's Sevilla facility (*US, FWS, para 506*)	€35.7 million	Grant authorized July 2002. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45.

Nature of Measure	Alleged amount of financial contribution	Details of Existence
Grant by Andalusian Government for EADS/Airbus España's Puerto Real Facility (*US, FWS, para 508*)	€17.5 million	Grant authorized in July 2003. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 2006 on Preliminary Ruling Request by the European Communities, para. 45.
Grant by Government of Castilla-La Mancha for Airbus España's Illescas Facility (*US, FWS, para 510*)	€7.6 million	Grant approved March 2004. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 45
Alleged Forgiveness of Debt of Deutsche Airbus by German Government (*US, FWS, para. 515 et seq)*	Forgiveness of DM7.7 billion in debt owed by Deutsche Airbus	Decision taken in 1998. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 46.
French Government's transfer of its 45.76% share in Dassault to Aérospatiale (*US, FWS, para. 607 et seq*)	Translated into equity infusion of FF5.28 billion	Transfer effected December 1998. EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 49.
R&D Funding		
Alleged measures of support under the Fourth Framework Program	At least €195.3 billion	EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 51.

BCI deleted, as indicated **[***]**

Nature of Measure	Alleged amount of financial contribution	Details of Existence
Alleged measures of support under the Fifth Framework Program	€509 million	EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 51.
Alleged measures of support under the Sixth Framework Program	€450 million	EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 51.
German government civil aeronautics R&D grants under Aeronautics Research Programs: LuFo 1, LuFo 2 and LuFo 3. (*US, FWS, para 663*)	€217 million	1995-2007 EC concedes within temporal scope: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 52.
Länder R&D Grants (*US, FWS, para. 667)*	€44 million	All are post 1995 EC says that Airbus did not benefit from any R&T funding from Bavaria, but concedes that the claims themselves fall within the temporal scope: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 53.
French Government R&D Funding (*US, FWS, para 678*)	€262 million	Grants between 1995 and 2005 EC says that the French R&D funding from 1995 to 2005 is properly before the Panel: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 54

BCI deleted, as indicated **[***]**

Nature of Measure	Alleged amount of financial contribution	Details of Existence
UK R&D (*US, FWS, para 686)* - CARAD program -TP program (established 2004)	£28 million disbursed since 1992 £5.5 million committed since 2004	EC says any disbursements made post 1 January 1995 under these programs are within the temporal scope of Article 5: see EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 55.
Spanish authorities' R&D Funding programs (*US, FWS, para 692 et seq*) - PTA (1993-2003) - PROFIT (2000-2003; 2004-2007)	Airbus alleged to have received PTA I loans between 1993 and 1998 and PTA II loans between 1999 and 2003. Airbus alleged to have received €1.5 million under PROFIT I	EC says that payments under these programs occurring after 1 January 1995 are within temporal scope: See EC, Response to Panel Questions of 8 December 1996 on Preliminary Ruling Request by the European Communities, para. 56.

BCI deleted, as indicated [***]

BCI deleted, as indicated **[***]**

D. OTHER PRELIMINARY MATTERS

1. Requests for Enhanced Third Party Rights

7.159 On 9 November 2005, Brazil submitted a request for enhanced third party rights in this panel proceeding; similar requests were received from Canada on 23 November 2005 and from Korea on 13 October 2006. After careful consideration of this issue in light of all comments received from parties and third parties, on 23 October 2006 we informed the parties and third parties of our decision declining to grant enhanced third party rights to any third party. We indicated in our communication of that date that we would issue our reasons in due course. We set out the reasons for our decision below.

(a) Arguments of the Parties and Third Parties

7.160 Brazil seeks "enhanced" third party rights in this proceeding, including specifically, the rights to: 1) attend the entirety of all substantive meetings of the Panel with the Parties; 2) present oral statements and oral observations at the substantive meetings of the Panel with the Parties; 3) receive copies of all submissions to the Panel, including answers to the questions posed by the Panel or the parties; and 4) review and comment on the interim Panel Report, in particular the summary of Brazil's arguments in the draft descriptive part of the Panel report.[2007]

7.161 Brazil argues that it has a significant economic interest in this dispute because it is the fourth largest aircraft manufacturer in the world. Brazil draws attention to the unique nature of the aircraft industry, which develops a few product types at very high costs. According to Brazil, the impact of WTO-inconsistent subsidies on aircraft manufacturers is greater than that of subsidies given to other sectors. Brazil notes that it was a party to three prior dispute settlement proceedings in the WTO involving subsidies in the aircraft sector, and submits that it has concerns regarding the interpretation of certain provisions of the SCM Agreement as applied to the aircraft sector. Brazil considers that fundamental fairness requires that it be granted enhanced third party rights in this dispute because absent such rights it cannot fully present its views to the Panel. In Brazil's view, the systemic implications of the outcome of the dispute for developing countries should also be considered. Finally, Brazil argues that granting of the enhanced rights it is seeking in this case will not blur the line between the rights of parties and those of third parties.

7.162 Canada considers that, if the Panel chooses to grant enhanced third party rights to Brazil, fundamental fairness dictates that the same enhanced rights should be granted to Canada.[2008] Canada asserts that, like Brazil, it has a significant economic interest in the aircraft sector, and notes that it was a party to the same three previous dispute settlement proceedings concerning subsidies in the aircraft sector as Brazil. To the extent that this Panel's findings may have consequences for the development and production of civil aircraft, they are just as likely to have a significant impact on Canada's aircraft sector as Brazil's. Moreover Canada asserts that, like Brazil, it has interests and perspectives on the WTO disciplines governing the civil aircraft sector that are distinct from those of the United States and the European Communities.

7.163 Korea has no objection to Panel's granting Brazil and Canada the requested rights given their substantial commercial and systemic interests, but contends that should the Panel decide to grant enhanced third party rights to Brazil and Canada the same rights should be accorded to Korea and other third parties, as a matter of due process.[2009] Korea is concerned that differentiated application of third party rights could result in discrimination amongst third parties, which would adversely affect

[2007] Letter from Brazil to the Panel, dated 9 November 2005, para. 12.
[2008] Letter from Canada to the Panel, dated 23 November 2005.
[2009] Letter from Korea to the Panel, dated 13 October 2006.

BCI deleted, as indicated **[***]**

the integrity of the WTO dispute settlement system. Korea asserts that it has strong economic interests in the aircraft sector, and that therefore, the outcome of this case could have implications for Korea. Moreover, Korea asserts that it also has a significant systemic interest in this dispute, as it has been, and is currently, involved, as a primary party, in several WTO disputes on subsidies.

7.164 Both parties ask the Panel to deny the requests for enhanced third party rights. The European Communities asserts that enhanced third party rights are justified only in very special circumstances, and maintains that this case does not present such circumstances as to warrant their grant.[2010] The European Communities disagrees with Brazil's assertion that Brazil has a significant economic interest in these proceedings and that past panels have granted enhanced third party rights in such circumstances. In the European Communities' view past panel proceedings show that a third party may be granted enhanced rights only if the impugned measure had a *direct economic impact* upon it. This is not the case with Brazil in the dispute at hand, since it is neither benefiting from any EC measure nor operating a similar scheme. A general "economic interest" is simply not enough. Second, the European Communities asserts that the grant of enhanced third party rights to Brazil would disturb the rights of other third parties. As a matter of due process, it is appropriate to provide the same procedural rights to all third parties in this dispute. Yet, only Canada, which expressly made its request conditional upon the Panel's decision to grant enhanced third party rights to Brazil[2011], had requested enhanced third party rights in this case and there is no reason to grant such rights. Third, the European Communities points out that enhanced third party rights are closely connected to the issue of access to highly confidential information.[2012] Given that Canada made its request conditional upon Brazil's request, the European Communities requests the Panel to refuse the grant of enhanced third party rights to Canada as well.

7.165 The United States asserts that none of the rationales that existed for previous panels to grant enhanced third party rights exist in this case.[2013] The effect of the disputed measures cannot be an issue, as the dispute does not cover the aircraft sector as a whole, but is limited to subsidies provided for the development and production of large civil aircraft, namely, passenger aircraft with more than 100 seats and analogous air freighters. The aircraft producers in Brazil and Canada produce regional jets, which are both smaller than large civil aircraft and have a shorter range. There is no claim that the economic benefits of the measures derive from an international agreement, or that there is relevant past practice in the aircraft sector. And, Brazil and Canada are entirely ordinary third parties; they are not complaining parties in a dispute regarding the measures covered by this dispute. Brazil does not claim to apply measures similar to the disputed measures and, in fact, emphasizes the differences between its situation and the situations of the European Communities and the United States. Thus, Brazil has no direct economic interest in the outcome of the dispute, and its trade policy interest is no different from that of any other Member that has a stake in the analysis of Members' rights and obligations under the SCM Agreement. As such, there is no reason for the Panel to grant the requests for enhanced third party rights. The United States also notes that the European Communities has indicated its willingness to allow public viewing of the reading of oral statements, and that both the European Communities and the United States have a practice of making their WTO submissions publicly available. Therefore, there is little need to enhance third parties rights to attend panel meetings or receive submissions. Finally, the United States notes the admonition to guard against an

[2010] Letter from the European Communities, dated 29 September 2006.

[2011] At the time the European Communities filed its submission in this regard, Korea had not yet made its request. The European Communities did not seek to file any subsequent additional comments on this matter.

[2012] At the time the European Communities filed its submission in this regard, we had not yet adopted procedures for the handling of confidential information in this dispute. The procedures ultimately adopted, which are attached to our Report at Annex E, contain provisions governing third party rights with respect to such information.

[2013] Letter from the United States, dated 29 September 2006, para. 18.

BCI deleted, as indicated **[***]**

inappropriate blurring of the distinction drawn in the DSU between parties and third parties, and asserts that granting Brazil's request would be inconsistent with that principle.

(b) Evaluation by the Panel

7.166 The DSU establishes the rights of third parties in panel proceedings in paragraphs 2 and 3 of Article 10 of the DSU and paragraph 6 of Appendix 3 to the DSU. Under these provisions, third parties have the right to receive the submissions made by the parties up to the first meeting of the panel, to make submissions to the panel, to present their views during a session of the first substantive meeting of the panel set aside for that purpose, and to be present during the entirety of such a session.[2014] It is well-established that panels have the discretion to grant additional rights to third parties, subject to the requirements of due process and the need to guard against an inappropriate blurring of the distinction drawn in the DSU between the rights of parties and those of third parties.[2015] However, all third parties in a panel proceeding may be presumed to have a "substantial interest" in the matter before the panel[2016], and additional third party rights have so far been granted in panel proceedings for specific reasons only.[2017] Previous panels have granted enhanced third party rights on the basis of, *inter alia*, the significant economic effect of the measures at issue on certain third parties[2018], the importance of trade in the product at issue to certain third parties[2019], the significant trade policy impact that the outcome of the case could have on third parties maintaining measures similar to the measures at issue[2020], at least one of the parties agreeing that enhanced third

[2014] We also note that, in accordance with Article 10.4 of the DSU, nothing precludes a Member participating as a third party in a panel proceeding from requesting the establishment of another panel to examine the measures at issue.

[2015] Panel Report, *EC – Export Subsidies on Sugar (Australia)*, Panel Report, *EC – Export Subsidies on Sugar (Brazil)*, Panel Report, *EC – Export Subsidies on Sugar (Thailand)*, para. 2.7; Panel Report, *US – Upland Cotton*, para. 9; Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* ("*EC – Tariff Preferences*"), WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS/246/AB/R, DSR 2004:III, 1009, Annex A, para. 7; Appellate Body Report, *United States – Anti-Dumping Act of 1916* ("*US – 1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793, para. 150; Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities* ("*US – 1916 Act (EC)*"), WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593, Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan* ("*US – 1916 Act (Japan)*") WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831,para. 6.32; Appellate Body Report, *EC – Hormones*, para. 154; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador* ("*EC – Bananas III (Ecuador)*"), WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, 1085, Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras* ("*EC – Bananas III (Guatemala and Honduras)*"), WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 695, Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico* ("*EC – Bananas III (Mexico)*"), WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 803, Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States* ("*EC – Bananas III (US)*"), WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943, para. 7.9.

[2016] Article 10.2 of the *DSU* indicates that the term "third party" is used throughout the *DSU* to refer to a Member that has "a substantial interest" in a matter before a panel, and which has notified its interest to the DSB.

[2017] Panel Reports, *US – 1916 Act*, para. 6.33.

[2018] Panel Reports, *EC – Bananas III*, para. 7.8; Panel Report, *EC – Tariff Preferences*, Annex A, para. 7. *See, also*, Panel Reports, *EC – Export Subsidies on Sugar*, para. 2.5.

[2019] Panel Reports, *EC – Export Subsidies on Sugar*, para. 2.5.

[2020] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7.

BCI deleted, as indicated **[***]**

party rights should be granted[2021], claims that the measures at issue derived from an international treaty to which certain third parties were parties[2022], third parties having previously been granted enhanced rights in related panel proceedings[2023], and certain practical considerations arising from a third party's involvement as a party in a parallel panel proceeding.[2024]

7.167 In this case, Brazil has not presented us with any similar reasons in support of its request for enhanced third party rights. As noted, the requests of Canada and Korea are conditional upon the granting of Brazil's request, and do not contain any additional arguments in support of those requests. While we accept that Brazil, and Canada, have an interest in the aircraft sector, we consider this interest to be insufficient to justify granting enhanced third party rights.[2025] Neither manufactures large civil aircraft, and neither has claimed that it has any trade interests in large civil aircraft, for instance as a supplier to producers of large civil aircraft. Brazil has not claimed that regional aircraft produced in Brazil compete with large civil aircraft, or that it maintains any measures similar to those at issue in this dispute. To the contrary, Brazil claims that it does not confer subsidies for the development and production of new aircraft products.[2026] While Brazil has been a party, either as complainant or defendant, in several WTO disputes involving the aircraft sector, these disputes involved a product – regional aircraft – and measures that are not at issue in this dispute. Brazil has not explained how, in the light of the foregoing, the measures at issue have a significant economic or trade policy effect on Brazil. While we accept that Brazil has a general systemic interest in the interpretation of the SCM Agreement, this does not differentiate Brazil from any other WTO Member, whether appearing as a third party in this dispute or not. Finally, both parties agree that enhanced third party rights are not warranted in this case.

7.168 We therefore decline Brazil's request for "enhanced" third party rights in these proceedings, and the requests of Canada and Korea.[2027]

[2021] Panel Reports, *EC – Bananas III*, para. 7.8.

[2022] Panel Reports, *EC – Bananas III*, para. 7.8.

[2023] Panel Reports, *EC – Bananas III*, para. 7.8.

[2024] Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada* ("*EC – Hormones (Canada)*"), WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235, para. 8.17.

[2025] Brazil notes that it is a manufacturer of aircraft, albeit not the LCA at issue in this dispute, and submits that it has a significant economic interest in "the aircraft sector" (Letter from Brazil to the Panel, dated 9 November 2005, para. 6), that any findings concerning the relevant provisions of the SCM Agreement "in relation to the aircraft sector" are necessarily of direct and substantial economic interest to Brazil (*IbId.*, para. 6), that trade-distorting subsidies in "the aircraft sector" are considerably greater than the impact of similar policies on other industries (*IbId.*, para. 7), and that the interpretation of the SCM Agreement "as applied to the aircraft sector" may affect the way Brazil and other Members apply the relevant disciplines of the SCM Agreement to the "civil aircraft sector" (*IbId.*, para. 8). Canada makes similar claims. Letter from Canada to the Panel, dated 23 November 2005. Korea makes a general claim of "strong economic interests in the aircraft sector", although it does not assert that it has any LCA manufacturing operations. Letter from Korea to the Panel, dated 13 October 2006.

[2026] Letter from Brazil to the Panel, dated 9 November 2005, para. 7.

[2027] Brazil has requested the Panel to grant it the "enhanced" third party right "to review and comment on the interim Panel Report, in particular the summary of Brazil's arguments in the draft descriptive part of the Panel report". In *EC – Bananas III*, the panel referred to the "normal practice" of permitting third parties to review the draft of the summary of their arguments in the descriptive part of the report (Panel Reports, *EC – Bananas III*, para. 7.9). Insofar as Brazil is merely requesting the Panel to permit Brazil to review and comment on the summary of its arguments contained in any descriptive sections of the Panel's draft report, the Panel sees no reason to depart from the normal practice in WTO panel proceedings. We note that, while both the United States and the European Communities oppose Brazil's request for "enhanced" third party rights, the United States considers that "the ability to comment on the description of its arguments in the draft descriptive

BCI deleted, as indicated **[***]**

2. Decision on Proper Respondent

7.169 The Panel takes note of the letter from the European Communities dated 23 May 2008, in which the European Communities requests that the Panel "decide, prior to the issuance of an interim report, who is the proper respondent in this dispute".[2028] The Panel notes that this request brings before it once more a matter that first arose in 2005 during the Annex V process for gathering information, and was raised before the Panel as well at that time. The European Communities states that it "has consistently pointed out that the only proper respondent in this case is the European Communities, which represents itself in these proceedings (and it is not therefore correct to speak of the European Communities 'representing' its member States)."[2029] The European Communities is "concerned that the identity of the respondent, and eventually the identity of the entity to which any recommendations might or might not be addressed, could give rise to significant legal ambiguity, potentially adverse to the interests of the European Communities."[2030]

7.170 We recall that on 12 October 2004, the United States filed a request for consultations "with the Governments of Germany, France, the United Kingdom, and Spain (the "member States"), and with the European Communities ("EC"), ... with regard to measures affecting trade in large civil aircraft."[2031] The subsequent request for establishment of this Panel noted that "The United States held consultations with the European Communities and the member States on 4 November 2004. These consultations provided some helpful clarifications, but unfortunately did not resolve the dispute."[2032] The claims set forth in that request concern, *inter alia*, alleged subsidies provided by the governments of Germany, France, Spain and the United Kingdom, and by the EC.

7.171 When questions concerning the role of the member States in this dispute first arose in the Annex V process, the United States noted that its panel request

> "was directed to all four individual member States in their own right as Members of the WTO, and the EC has insisted on representing their interests in the dispute to date. ... If the EC is unable to represent the member States in this Annex V proceeding, the United States requests the Facilitator to direct questions concerning member State measures (as well as any further correspondence and submissions concerning these measures) directly to the member States, which, it should be recalled, are WTO Members in their own right."[2033]

The European Communities responded that it "has never said that it "represents" its member States but takes full responsibility in these proceedings for the actions of its member States and will to the best of its ability provide documents that are properly requested wherever they may be located..." and went on to request that the term "and certain member states" be dropped from the name of the case.[2034]

7.172 On 23 November 2005, the European Communities submitted a request to the Panel, asking that this dispute be designated "European Communities – Measures Affecting Trade in Large Civil

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part of the report" is "a right routinely provided to third parties, not an "enhanced right"." (Letter from the United States to the Panel, dated 29 September 2006, footnote 20).

[2028] Letter from the European Communities, 23 May 2008.
[2029] *Id.*
[2030] *Id.*
[2031] US, Consultations Request.
[2032] US, Panel Request.
[2033] Letter from the United States, 3 October 2005.
[2034] Letter from the European Communities, 6 October 2005

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Aircraft (DS316)" to reflect that the European Communities "was the only respondent".[2035] In response, the United States reiterated that it had:

> "requested consultations, and the establishment of a Panel, with respect to the governments of Germany, France, Spain, and the United Kingdom, in addition to the EC. Therefore, all five WTO Members are properly respondents in this dispute. While the EC is representing the interests of the member States in the dispute, that representation does not change their legal status as respondents".[2036]

The United States further noted that although it had "addressed its submissions in a way that has respected the EC's wish that it serve as the representative of the member States, {it} repeatedly made clear during the Annex V process that the US questions were directed to the member States as well as the EC." In response, the European Communities stated that it:

> "is entirely false to claim that the European Communities "represents" its member States in this dispute or that these member States have the status of respondents. The violations that are alleged by the United States all relate to matters for which the European Communities bears responsibility in the WTO and the European Communities is therefore the only proper respondent."[2037]

The European Communities went on to state that it would "fully understand if the Panel did not wish to take a position on this matter immediately, especially since this may not be necessary for the purposes of resolving the dispute."[2038] The Panel did not take any action with respect to the European Communities' request.

7.173 Since this exchange of views in 2005, as well as prior to it, the European Communities has made all submissions and communications in this dispute to the Panel. Representatives of the EC member States in question (France, Germany, Spain, and the United Kingdom) appeared before the Panel at the two meetings it held with the parties, and the meeting it held with third parties, but did not speak or make any submissions.[2039] In addition to representatives of the European Communities and outside advisors, representatives of these four member States have been designated as "Approved Persons" with access to Business Confidential Information and Highly Sensitive Business Information submitted in this dispute, in accordance with the procedures adopted by the Panel in this regard. Individuals designated as "Approved Persons" have contacted the Secretariat to arrange access to the confidential information submitted in this dispute in accordance with the applicable procedures, but have made no substantive submissions or representations at any time to the Panel. Thus, it is clear to us that, whatever the interests of the four member States in this dispute, they have taken no actions to make those interests known to the Panel directly.[2040]

7.174 On 23 May 2008, as noted above, the European Communities requested that the Panel resolve the "outstanding issue" of "who is the proper respondent in this dispute."[2041] Fundamentally, in our

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[2035] Letter from the European Communities, 23 November 2005.
[2036] Letter from the United States, 9 December 2005.
[2037] Letter from the European Communities, 13 December 2005
[2038] *Id.*
[2039] For example, the "EC Delegation list" provided to the Panel before the first meeting identifies representatives of France, Germany, Spain and the United Kingdom, as well as representatives of other member States of the European Communities who also appeared at that meeting.
[2040] Of course, what their role may be in the context of preparations for these proceedings is unknown to us. However, we do not consider this of any relevance to the question before us, but rather a purely internal matter between the European Communities and the governments of its member States France, Germany, Spain, and the United Kingdom.
[2041] Letter from the European Communities, 23 May 2008.

view, there is no issue to be resolved. The United States requested consultations and the establishment of this Panel asserting claims concerning, *inter alia*, alleged subsidies provided by the European Communities and by the governments of each of four EC member States, France, Germany, Spain, and the United Kingdom, which subsidies allegedly cause adverse effects to the interests of the United States. Each of these five is, in its own right, a Member of the WTO, with all the rights and obligations pertaining to such membership, including the obligation to respond to claims made against it by another WTO Member.[2042] The Dispute Settlement Body established this Panel on the basis of the United States' request, establishing our terms of reference, which thus encompass claims against the five Members of the WTO identified by the United States in its request. The fact that four of those Members are member States of the European Communities, which is itself a Member of the WTO, does not affect their individual status as Members of the WTO against whom another Member, the United States, has brought claims of violation of various provisions of the WTO Agreements. Whether these four WTO Members choose to appear and actively defend their interests before the Panel separate from the actions of the European Communities is a matter entirely within their discretion, subject to the obligations of their status as member States of the European Communities. However, those obligations do not affect their status in this dispute.

7.175 We note that the European Communities informed the Panel, on 8 July 2008, that "the four member States referred to by the United States share the European Communities' view that they are not the proper parties to this dispute – and have acted in reliance on this fact".[2043] The views of the four member States, and of the European Communities, in this regard, do not change our conclusions. Nor does the fact, asserted by the European Communities, that France, Germany, Spain the United Kingdom "acted in reliance" on their own, and/or the European Communities' view as to their status. As Members of the WTO, identified as having violated various provisions of the WTO Agreements in the requests for consultations and for establishment of this Panel, they are respondents in this dispute. The European Communities has indicated to this Panel that "the violations that are alleged by the United States all relate to matters for which the European Communities bears responsibility in the WTO..."[2044] However, it does not follow from this, as the European Communities asserts, that it is the only "proper respondent."[2045] Whatever responsibility the European Communities bears for the actions of its member States does not diminish their rights and obligations as WTO Members, but is rather an internal matter concerning the relations between the European Communities and its member States.

7.176 That the member States against whom the United States has made claims have chosen not to participate in this dispute directly by making oral and written submissions does not affect their rights or status as respondent parties to this dispute. Similarly, the fact that the European Communities has made all submissions in this dispute does not affect the rights and status of the four member States as

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[2042] We recognize that Article IX:1 of the Marrakesh Agreement establishes limitations on the cumulative number of votes of the European Communities and its member States, in the event a matter is decided by a vote of WTO Members. This provision does not, in our view, have any relevance to our conclusions here.

[2043] Comments by the European Communities on Comments by the United States on the Panel and Appellate Body Reports in *US – Upland Cotton (Article 21.5 – Brazil*), 8 July 2008, para. 94. *Brazil).* We note the suggestion of the United States that we disregard this portion of the European Communities' submission as "not within the scope of the comments that the Panel invited." Letter from the United States, 9 July 2008. While this is strictly speaking true, we nonetheless take note of these comments, as well as the subsequent letters regarding this matter submitted by both parties. We are not inclined to disregard any relevant submissions on a matter which requires some action or decision from us. To do so would, in our view, be inconsistent with our obligations in resolving this dispute.

[2044] Letter from the European Communities, 13 December 2005.

[2045] *Id.*

BCI deleted, as indicated **[***]**

respondent parties to this dispute.[2046] The manner of any WTO Member's participation in dispute settlement is up to it to decide. We need not and do not decide whether the European Communities "represents" the member States in this dispute in some formal sense. Nor does the title given to the dispute have any legal significance with respect to the rights and obligations of Members against whom claims are made, or with respect to their individual or direct participation in the dispute.[2047]

7.177 Finally, we note the statement by the European Communities that,

> "{s}hould the Panel, in spite of the position of the four member Sates and the arguments of the European Communities, nevertheless decide to address recommendations to those four member States, it follows logically that they would be entitled to defend their interests individually, *inter alia*, by commenting on the

[2046] Thus, for instance, the four member States may, if they wish, comment on the interim report of the Panel when it is issued. To date, the Panel has not communicated directly with the member States, acting on the understanding that the European Communities was transmitting the Panel's communications to them insofar as necessary and relevant, was coordinating their participation in this dispute, and was communicating their concerns to the Panel. Should this not be the case, the member States are free to request that the Panel provide copies of the interim report directly to their representatives, mindful of the limitations imposed by the special procedures for confidential information in this case. As noted above, how a WTO Member chooses to participate in WTO dispute settlement is, from the perspective of the WTO Agreements, a matter entirely within its own discretion, although of course, it may be subject to non-WTO obligations such as those that may exist between the European Communities and its member States.

[2047] In this context, we note that there is no consistent practice in the titles of disputes concerning measures taken by the European Communities and/or one or more of its member States. It is not unusual for a dispute to name only the European Communities, despite the fact that the claims concern a measure of a single member State, while other disputes name only the member State concerned, yet organs of the European Communities participate actively in the dispute. *See, e.g.*, DS7 - *European Communities — Trade Description of Scallops* (concerning a French measure, mutually agreed solution communicated by Canada and the European Commission)*; Denmark – Measures Affecting the Enforcement of Intellectual Property Rights* (concerning Denmark's alleged failure to make provisional measures available in the context of civil proceedings involving intellectual property rights, mutually agreed solution communicated by the United States, Denmark and the European Commission); DS86 - *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights* (concerning Sweden's alleged failure to make provisional measures available in the context of civil proceedings involving intellectual property rights, mutually-agreed solution communicated by the United States, the European Commission and Sweden); DS124 - *European Communities — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs* (concerning lack of enforcement of intellectual property rights by Greece, mutually agreed solution communicated by the United States and the European Commission); DS125 - *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs* (mutually agreed solution communicated by the United States, Greece and the European Commission); DS135 - *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products;* (concerning measures imposed by France, submissions made by the European Communities) *Belgium – Administration of Measures Establishing Customs Duties for Rice* (mutually agreed solution notified by United States and the European Commission); DS291 - *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report, (concerning measures taken by the European Communities and by its member States affecting imports of agricultural and food imports, submissions made by the European Communities); DS301 - *European Communities — Measures Affecting Trade in Commercial Vessels* (concerning certain measures taken by the European Communities and by its member States, submissions made by the European Communities).

We are unaware of any dispute involving claims against the European Communities and one or more of its member States in which the member State has made submissions and representations separate from or in addition to those made by the European Communities. We are also unaware of any case in which a question such as the one before us was raised.

> interim report. In addition, France and Spain would request to receive the interim report in French and Spanish, respectively".[2048]

Whatever may be the extent of the right of a WTO Member to participate in dispute settlement in its preferred WTO working language, in our view, this is not a right that can be exercised in this dispute at this late stage of the proceedings. As noted above, the European Communities has made all submissions and representations throughout this proceeding, both during the Annex V process, and before this Panel. All such submissions and representations have been in English – there have been no requests for translation, and there were no requests for interpretation at any of the Panel's meetings with the parties and third parties. The Panel has communicated with the parties and third parties exclusively in English. To provide the interim report in all three WTO working languages would significantly delay these proceedings, which, due to the number and complexity of the claims, and the volume of materials submitted, have already gone on for much longer than is the norm in WTO dispute settlement. We consider this situation to be analogous to that addressed in *United States – Continued Dumping and Subsidy Offset Act of 2000*,[2049] where the Appellate Body found that the right to issuance of separate panel reports, which is explicitly provided for in Article 9.2 of the DSU, was not unqualified, and concluded that the Panel in that case did not act inconsistently with Article 9.2 in denying a request for separate reports that was not made in a timely manner.[2050] Similarly, we consider that the request made by the European Communities in this case is not timely. In addition, we note that the request made by the European Communities in this case does not concern a right explicitly provided for in the DSU or any other provision of the WTO Agreements, and is in any event conditional on whether we address recommendations to the member States involved in this dispute, a decision that will be known only when we have completed our decision-making process. Moreover, the Members whose right to defend their interests would assertedly be served by receiving our interim report in translation have not previously participated directly in this dispute, and even now have not made any requests directly to the Panel. In light of the foregoing, we therefore deny the European Communities' conditional request for translated versions of the interim report.

E. WHETHER THE CHALLENGED MEASURES ARE SPECIFIC SUBSIDIES WITHIN THE MEANING OF ARTICLES 1 AND 2 OF THE SCM AGREEMENT

1. Identity of the Alleged Subsidy Recipient and pass-through, extinction and extraction of Subsidies

(a) Introduction

7.178 The European Communities submits that the United States' claim of adverse effects in this dispute cannot be sustained because the United States has failed to demonstrate that Airbus SAS, the legal entity responsible for the development and manufacture of Airbus LCA since 2001, benefited or continues to benefit from a large number of the alleged subsidies that are the focus of the United States' complaint.[2051] The European Communities raises three lines of argument in support of this submission.

7.179 First, the European Communities argues that the United States has failed to establish that the alleged benefits conferred by various financial contributions received by entities other than

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[2048] Comments by the European Communities on Comments by the United States on the Panel and Appellate Body Reports in *US – Upland Cotton (Article 21.5 – Brazil*), 8 July 2008, para. 95.

[2049] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000* ("*US – Offset Act (Byrd Amendment)*"), WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375.

[2050] *Id.*, para. 314.

[2051] EC, FWS, paras. 42, 161-162, 194; EC, FNCOS, paras. 28-32; European Communities, non-confidential oral statement at the second meeting with the Panel (hereinafter "EC SNCOS"), paras. 50-76.

BCI deleted, as indicated **[***]**

Airbus SAS and its subsidiaries prior to 2001 "passed through" to Airbus SAS. According to the European Communities, it is for the United States to affirmatively demonstrate, as part of its *prima facie* case, how the benefit conferred by such financial contributions "passed through" to Airbus SAS. The European Communities contends that, absent this demonstration, none of the financial contributions at issue can be considered to have conferred a benefit on Airbus SAS and they should therefore be excluded from the Panel's adverse effects analysis.

7.180 Second, the European Communities submits that certain transactions involving the shares of the Airbus partner, Aérospatiale, the parent company of Airbus SAS, European Aeronautic Defence and Space Company EADS N.V. (EADS), and Airbus SAS, have "extinguished" any benefits that could be said to have accrued to Airbus SAS in respect of subsidies received by entities other than Airbus SAS and its subsidiaries.[2052]

7.181 Third, the European Communities asserts that two particular transactions in which "cash" was paid to shareholders of certain Airbus partners in connection with the consolidation of Airbus Industrie under EADS in 2000 "extracted" a corresponding portion of the benefit conferred by alleged financial contributions provided to those specific Airbus partners, thereby also "extinguishing" a portion of any subsidies that Airbus SAS could currently enjoy. The European Communities argues that it is also possible to regard the cash "extractions" as withdrawals of subsidies pursuant to Articles 4.7 and 7.8 of the SCM Agreement.

7.182 Before turning to evaluate these three lines of argument, we believe it is useful to describe the forms of industrial organization used by the various Airbus partners since the constitution of Airbus Industrie in 1970 to develop and manufacture Airbus LCA.

7.183 Prior to 2001, no single legal entity produced the family of Airbus LCA as a "product", or for that matter, any of the individual Airbus LCA that are the subject of this dispute. The family of Airbus LCA was produced by a consortium of French, German, Spanish and (from 1979) United Kingdom aerospace companies (the Airbus partners), operating in a form of partnership arrangement through the French entity, Airbus GIE.[2053] The Airbus Industrie consortium was originally established in 1970 between the French aerospace manufacturer, Aérospatiale Société Nationale Industrielle (Aérospatiale)[2054] and the German aerospace manufacturer, Deutsche Airbus GmbH (Deutsche Airbus).[2055] The Spanish aerospace manufacturer, Construcciones Aeronáuticas S.A. (CASA) became

[2052] EC, SNCOS, para. 56.

[2053] Airbus Industrie GIE was registered under French law as a "*Groupement d'intérêt économique*" (GIE) which is a French legal framework that allows its members to carry out collectively certain economic activities while maintaining their separate legal identities, and which does not have as its goal the retaining of profits. A GIE has a separate legal personality from its members, although in other respects, it resembles a partnership. For example, the sharing of Airbus Industrie's profits and losses among the Airbus partners is based on their membership rights*; see* GATT Panel Report, *German Exchange Rate Scheme for Deutsche Airbus* ("*EEC – Airbus*"), 4 March 1992, unadopted, SCM/142, para. 2.6.

[2054] Aérospatiale was founded in 1970 through the merger of three French aerospace companies, Sud Aviation, Nord Aviation and Société d'Etudes et de Réalisation d'Engins Balistiques. It was owned directly and indirectly by the French government until its merger with Matra Hautes Technologies in 1998 to form Aérospatiale-Matra S.A. (Aérospatiale-Matra). The French government sold a portion of its shares in Aérospatiale-Matra in a public offering in 1999. In 2000, Aérospatiale-Matra joined with Dasa and CASA to form EADS. In connection with the formation of Airbus SAS in 2001, the LCA business of Aérospatiale-Matra was transferred to an Airbus SAS subsidiary, Airbus France SAS. Therefore, from 1998 until its liquidation in 2001, the French Airbus partner was Aérospatiale-Matra; EC, FWS, paras. 52-53.

[2055] Deutsche Airbus was founded in 1967 to assume work for the development of a European widebody aircraft that had originally begun in 1965 as a joint venture among five German companies: Blohm-Hamburger Flugzebau GmbH, Messerschmitt AG, Vereinigte Flugtechnische Werke (VFW), Siebel and Dornier. By 1969, the first three of these companies had merged to form Messerschmitt-Bölkow-Blohm GmbH (MBB); Exhibit EC-26. MBB originally held 60 percent of the interests in Deutsche Airbus, with Dornier and

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a member of the consortium in 1971.[2056] British Aerospace Corporation, a United Kingdom aerospace manufacturer, subsequently joined the consortium in 1979.[2057] Through this partnership arrangement, the Airbus partners in France, Germany, Spain and the United Kingdom produced specific parts of Airbus LCA, which were then assembled in France by Aérospatiale.[2058] The entity Airbus GIE did not carry out any production activities; rather, it coordinated the production efforts of the Airbus partners, allocated revenues and profits to each of the partners and assumed responsibility for areas such as marketing, sales, aircraft delivery and customer service. In 2000, the Airbus partners consolidated their LCA-related activities under EADS. This consolidation involved each of the French, German and Spanish Airbus partners placing their Airbus-related design, engineering, manufacturing and production assets and activities (including their corresponding membership interests in Airbus Industrie GIE) into legal entities that would become wholly owned subsidiaries of the newly formed EADS, in return for shares in EADS representing the agreed values of the Airbus partners' corresponding contributions.[2059] In 2001, EADS and BAE Systems placed their Airbus-related assets and operations and their membership rights in Airbus GIE under the common control of a newly-created holding company, Airbus SAS.[2060] Finally, in 2006, EADS purchased BAE Systems'

VFW each holding 20 percent. MBB took over VFW in 1981. Prior to Daimler-Benz AG acquiring control of MBB in 1989, the German federal states of Bavaria, Hamburg and Bremen held 52.3 percent of the capital stock of MBB; Monopolkommission, *Zusammenschlussvorhaben der Daimler Benz AG mit der Messerschmitt-Bolkow-Blohm GmbH*, Sondergutachten 18, 1989 (hereinafter "*Monopolkommssion* Report"), Exhibit US-30, para. 138. In late 1989, as part of the German government's plans to restructure Deutsche Airbus, Daimler-Benz A.G. acquired control of MBB by merging its subsidiary Deutsche Aerospace AG (Dasa) with MBB. Deutsche Airbus has been a wholly owned subsidiary of Dasa since 1992. In 2000, Dasa merged with Aérospatiale-Matra and CASA to form EADS. In 2001, EADS transferred Dasa's LCA operations to an Airbus SAS subsidiary, Airbus Deutschland GmbH; EC, FWS, paras. 54-56.

[2056] CASA was founded in 1923 and was Spain's largest aerospace and defence manufacturer. CASA was 99 percent owned by Sociedad Estatal de Participaciones Industriales (SEPI), a Spanish government holding company entrusted with the management and privatisation of certain Spanish government controlled companies. In 2000, CASA was merged into the EADS structure. In 2001, CASA's LCA activities were transferred to an Airbus SAS subsidiary, Airbus España SL; EC, FWS, paras. 57-58.

[2057] British Aerospace Corporation was formed in 1977 as a Crown corporation without shares, wholly owned by the United Kingdom government. Its formation was the result of the merger of the United Kingdom aerospace companies Hawker Siddeley Aviation Ltd, Hawker Siddeley Dynamics Ltd, Scottish Aviation Ltd and the British Aircraft Corporation (Holdings) Ltd. In 1981, the assets and business of the British Aerospace Corporation were transferred to the newly incorporated British Aerospace PLC, a United Kingdom public limited company. The United Kingdom government sold 51.57 percent of its shares in British Aerospace PLC in a public offering in 1981 and, subject to retaining a share to ensure that the company remained under United Kingdom control, sold the remainder of its shares in British Aerospace PLC in 1985. In 1999, British Aerospace PLC merged with Marconi Electronic Systems to become BAE Systems PLC (BAE Systems). In 2001, BAE Systems placed its LCA business into Airbus UK Limited in exchange for a 20 percent share in Airbus SAS. EC, FWS, paras. 59-61.

[2058] By 1999, Aérospatiale was the partner responsible for flight control systems, cockpits, power plant integration, ground and flight testing, complex structural sections, equipped subassemblies and technical publications. Dasa produced the major fuselage sections containing hydraulic equipment, secondary flight control systems, wing assemblies and commercial furnishing, as well as equipping the wings furnished by BAE Systems. Dasa also carried out final assembly of A321 and A319 aircraft, as well as some cabin outfitting and customization of the cabins of the A300/A310 and the A320 family. BAE Systems was the partner in charge of the wings for the entire Airbus product line, and equipped wings for the A320 family by installing hydraulic, electrical and environmental control system hardware. CASA's role in the Airbus consortium was to produce the carbon fibre horizontal tails used in all Airbus aircraft, including integrated fuel tanks. CASA also designed fuselage panels and interior panels for the A320 family and produced nose and landing gear doors for the A300/A310 family and passenger doors for the A330/A340 family*; see* Aérospatiale-Matra Offering Memorandum, 25 May 1999, Exhibit EC-53, pp. 90-91.

[2059] These subsidiaries are Airbus France S.A.S., Airbus Deutschland GmbH and Airbus España SL.

[2060] Airbus SAS, a *société par actions simplifiée* (a joint stock or limited liability company) incorporated under French law, was created in 2001 in order to hold all of the LCA-related design, engineering,

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20 percent interest in Airbus SAS, and Airbus SAS became a wholly-owned subsidiary of EADS. A history of the Airbus Industrie consortium and the legal steps through which the LCA operations conducted by the Airbus partners through Airbus Industrie were consolidated under EADS, and then reorganized under Airbus SAS (as a wholly-owned subsidiary of EADS) is set forth in Section VII.E.1 Attachment, following para. 7.289.

7.184 In the evaluation that follows, we use the term "Airbus Industrie" to refer to the Airbus consortium as it operated between 1970 and 2001; *i.e.*, each of the four Airbus partners: Aérospatiale (subsequently Aérospatiale Matra), Deutsche Airbus,[2061] CASA, and British Aerospace (subsequently BAE Systems), and Airbus GIE *collectively*. Where we refer to the Airbus GIE as an entity distinct from the Airbus partners, we use the term "Airbus GIE".

(b) "Pass-through"

(i) Arguments of the Parties

European Communities

7.185 According to the European Communities, the United States has failed to establish that many of the alleged subsidies "in fact benefit the only EC producer of LCA, Airbus SAS".[2062] The European Communities contends that "the United States posits claims against "Airbus", which it defines as Airbus SAS, a company which has existed only since July 2001".[2063] According to the European Communities, as Airbus SAS has existed only since 2001, subsidies allegedly granted prior to that date cannot possibly have been granted to Airbus SAS. The European Communities acknowledges the possibility that subsidies provided to predecessor producers of LCA in the European Communities (and their related companies), and to companies related to Airbus SAS, *might* provide a relevant benefit to Airbus SAS; however, the European Communities contends that this must be affirmatively demonstrated.[2064] The European Communities argues that the United States has failed to make a *prima facie* case because it has not shown that alleged subsidies provided to the Airbus LCA operations of the Airbus partners, or to Airbus GIE prior to 2001 "passed through" to Airbus SAS when the Airbus partners restructured their relationships to one another and established Airbus SAS in 2001. The European Communities alleges that the United States has therefore failed to make a *prima facie* case in respect of the following claims:

(a) "Launch Aid"/"member State Financing" granted to the following entities: Airbus France S.A.S. (in respect of the A380); Airbus Deutschland GmbH (in respect of the A380); EADS Airbus S.L. (in respect of the A380); BAE Systems (in respect of the A380); Aérospatiale (in respect of the A340-500/600); CASA (in respect of the A340-500/600); and Aérospatiale (in respect of the A330-200);[2065]

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manufacturing and production activities of the former Airbus Industrie consortium located in France, Germany, Spain and the United Kingdom (organized into French, German, Spanish and British operating subsidiaries) and all of their membership interests of the Airbus partners in Airbus GIE.

[2061] Deutsche Airbus AG was a subsidiary of MBB until MBB's merger with Daimler Benz's subsidiary Deutsche Aerospace AG (Dasa) in 1992, after which it was an indirect subsidiary of Daimler-Benz. Although Dasa was originally founded as Deutsche Aersopace AG in 1989, its name was changed to Daimler-Benz Aerospace AG in 1995, and then to DaimlerChrysler Aerospace AG in 1998 (following the merger of Daimler-Benz AG with Chrysler Corporation). We refer to this entity as "Dasa" throughout this report.

[2062] EC, FNCOS, para. 28.

[2063] EC, FWS, para. 194.

[2064] EC, FNCOS, para. 31.

[2065] EC, FNCOS, para. 67

BCI deleted, as indicated **[***]**

(b) Loans for the development of new models of Airbus LCA provided by the European Investment Bank (EIB) to various Airbus partners between 1988 and 1993;[2066]

(c) Research and technological development (R&TD) support provided to "Airbus" and "Airbus research consortia" under the European Communities' Second, Third, Fourth, Fifth and Sixth Framework Programmes, where the participant entities were entities other than Airbus SAS and its subsidiaries;[2067]

(d) R&TD support provided by the German federal government and by the governments of Bavaria, Hamburg and Bremen to entities other than Airbus Germany, as the relevant subsidiary of Airbus SAS;[2068]

(e) R&TD funding provided by the French government between 1986 to 2005 to entities other than Airbus France as the only relevant subsidiary of Airbus SAS;[2069]

(f) Capital increases made by the French State in Aérospatiale between 1987 and 1994 and the French State's transfer of its interest in Dassault Aviation to Aérospatiale in 1998;[2070] and

(g) The 1998 settlement of outstanding payment obligations of Deutsche Airbus to the Federal German government, the 1989 KfW investment in Deutsche Airbus, and the 1992 transfer of KfW's interest in Deutsche Airbus to MBB.[2071]

7.186 The European Communities argues that the United States has the burden of establishing, as part of its *prima facie* case, that alleged subsidies granted to the recipients pursuant to the above-referenced transactions "currently benefit Airbus SAS or have any causal connection to the adverse effects alleged by the United States."[2072] According to the European Communities, this requirement follows from the obligation contained in Article 5 of the SCM Agreement, not to cause adverse effects to the interests of other Members. The European Communities contends that the "adverse effects" which are the focus of Articles 5 and 6 are defined as particular types of competitive harm that are the *effect of the subsidy* and which are transmitted through a recipient company's *products*.[2073] According to the European Communities, this explains why the Appellate Body has stated that a prerequisite to finding causation is that the challenged subsidy does, in fact, benefit the product identified by the complaining Member as subsidized.[2074] In the context of the present dispute, the European Communities argues that the United States is thus required to establish (i) that the alleged subsidies

[2066] EC, FWS, paras. 1056-1059. The EIB loans in question are those provided to: Aérospatiale in 1993 for the Super Transporteur programme; Aérospatiale in 1988 and 1992 for production of the A330/340; British Aerospace in 1988 and 1989 for the A320; British Aerospace in 1990 and 1991 for the A330/340; CASA in 1989 and 1990 for the A320 and A330/340; and Airbus GIE in 1990 for the A321.

[2067] The European Communities requests the Panel to disregard grants made to entities other than Airbus SAS, Airbus Germany, Airbus France, Airbus Spain and Airbus UK under each of the Second, Third, Fourth, Fifth and Sixth Framework Programmes; EC, FWS, paras. 1233-1242.

[2068] EC, FWS, paras. 1253 - 1272.

[2069] EC, FWS, para. 1276.

[2070] EC, FWS, para. 1109.

[2071] EC, FWS, paras. 1172-1173, 1203 and 1212.

[2072] EC, FWS, para. 194; EC, SWS, para. 89.

[2073] EC, Answer to Panel Question 121, para. 375.

[2074] EC, Answer to Panel Question 121, para. 375, referring to Appellate Body Report, *US – Upland Cotton*, para. 472.

BCI deleted, as indicated **[***]**

are provided, or "passed through" to Airbus SAS, as the entity presently developing, producing and selling LCA, and (ii) that the challenged measures benefit the particular subsidized products.[2075]

United States

7.187 The United States argues that the concept of "pass-through" does not apply to the particular circumstances at issue in this dispute. According to the United States, "pass-through" is a concept that applies, for example, in the countervailing duty context, where the focus is on establishing the precise *ad valorem* rate of subsidization benefiting the recipient so that an offsetting or "countervailing" duty may be imposed on imports of the recipient's products.[2076] The United States also considers the concept of pass-through to apply in the context of a claim under Part III of the SCM Agreement in circumstances where a subsidy is provided directly to an entity that does not produce (and is not related to an entity that produces) the product alleged to be involved in causing adverse effects. In such a case, it would be necessary to show that the subsidy "passed through" to the producer of the product at issue, in order to demonstrate that the product at issue is a "subsidized product".[2077]

7.188 According to the United States, the only basis on which the European Communities argues that "pass-through" is required to be demonstrated in the present dispute is that the legal form through which Airbus LCA were produced was restructured from a consortium to a company limited by shares.[2078] The United States contends that there is nothing in the text of Article 5 that requires a complaining Member to show that subsidies provided to producers of the product at issue continue to benefit (or "pass through" to) a new corporate entity established by the restructuring and rationalization by the recipient producers of their existing legal relationship.[2079]

7.189 The United States argues that, for purposes of determining the existence of a subsidy within the meaning of Article 1 of the SCM Agreement, "nothing changed" with the creation of Airbus SAS. The subsidies that had been provided to the Airbus partners as members of the Airbus Industrie consortium benefit the development and production of various Airbus LCA models which continue to be produced and sold by Airbus SAS.[2080] According to the United States, the reorganization in 2000 of the Airbus LCA activities of the four Airbus partners and Airbus GIE under EADS, and the subsequent integration of those activities under Airbus SAS in 2001, does not necessitate a "pass-through" analysis.

(ii) Evaluation by the Panel

7.190 In its request for the establishment of a Panel, the United States challenges certain measures provided "to the Airbus companies", which it defines to include:

> "Airbus SAS, its predecessor Airbus GIE and current and predecessor affiliated companies, including each person or entity that directly, or indirectly through one or more intermediaries or relationships, controls or controlled, or is or was controlled by, or is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France S.A.S., Airbus UK Limited, European Defence and Space Company ("EADS"), and BAE Systems."[2081]

[2075] EC, FWS, para. 1172; EC, FNCOS, para. 116; EC, Answer to Panel Question 121, para. 375.
[2076] US, Answer to Panel Question 16, para. 110.
[2077] US, Answer to Panel Question 16, para. 111.
[2078] US, Answer to Panel Question 16, para. 112.
[2079] US, Answer to Panel Question 16, para. 114.
[2080] US, Answer to Panel Question 16, para. 118.
[2081] WT/DS316/2, 3 June 2005.

BCI deleted, as indicated **[***]**

7.191 In its submissions, the United States indicates that it uses the term "Airbus" to refer "interchangeably to the various Airbus companies."[2082] Thus, we disagree with the European Communities that the "United States posits claims against "Airbus", which it defines as Airbus SAS".[2083] It is clear from the United States' panel request that the United States' claims in this dispute relate to measures provided "to the Airbus companies", by which it means not only Airbus SAS, but also "its predecessor Airbus GIE and current and predecessor affiliated companies" of both Airbus SAS and Airbus GIE.

7.192 The United States presents its claims on the basis that the "subsidized product" at issue in this dispute is the family of Airbus LCA.[2084] We consider that the "producer" of this subsidized product prior to 2001 was the consortium Airbus Industrie; *i.e.*, *each of* the Airbus partners and their respective affiliates, *and* Airbus GIE. We base this conclusion on the fact that, between 1970 and 2001, Airbus LCA were produced by a consortium of European aerospace manufacturers (the Airbus partners) whose LCA activities were integrated through Airbus GIE.[2085] In other words, each of the Airbus partners was, through its participation in the Airbus Industrie consortium, a manufacturer of Airbus LCA. Based on the foregoing, we consider that, for purposes of our analysis of the United States' claims in this dispute, a financial contribution provided to any Airbus partner or affiliated entity, or to Airbus GIE, in relation to the development and/or production of an Airbus LCA, potentially confers a benefit on the Airbus Industrie consortium, as the "producer" of Airbus LCA. Indeed, we do not understand the European Communities to contend otherwise.

7.193 The European Communities argues, however, that the United States must demonstrate that financial contributions which conferred a benefit on the Airbus Industrie consortium (*i.e.*, financial contributions provided to any of the Airbus partners, their affiliates or to Airbus GIE) *currently benefit Airbus SAS*. According to the European Communities, "there is a threshold requirement for the complaining Member to establish that the *producers* alleged to be the source of the adverse effects actually enjoy a subsidy."[2086] The European Communities argues, therefore, that the United States must establish that the alleged subsidies that were provided to the Airbus Industrie consortium "passed through" to Airbus SAS, the only entity that currently produces Airbus LCA in the European Communities. We have already rejected the European Communities' attempt to characterize the United States' claims as confined to subsidies that were granted to Airbus SAS, rather than Airbus SAS and its predecessor Airbus GIE and their respective affiliated companies. It will, of course, be necessary for us to be satisfied that any subsidies which we may find to exist, do in fact subsidize Airbus LCA, in order to find that the effects of such subsidies are the various forms of adverse effects alleged. However, we do not consider that Articles 5 and 6 of the SCM Agreement require that causation be demonstrated through the type of "pass-through" analysis that has been applied by panels in the specific context of Part V of the SCM Agreement. Nor do we consider that a "pass-through" analysis is necessary in the circumstances at issue here; namely, where the direct recipient of the financial contribution is the producer of the subsidized product.

7.194 The question whether it is necessary to conduct a "pass-through" analysis in WTO law has previously arisen in situations where a financial contribution is provided to an entity in respect of a product but the "benefit" is alleged to be conferred on an *unrelated entity* producing a *different product*. Article VI:3 of the GATT and footnote 36 of Article 10 of the SCM Agreement have been held to require an investigating authority in a countervailing duty investigation to conduct a pass-through analysis where the recipient of the subsidy is not the producer of the product under investigation, but a producer of a product upstream in the production process of the product under

[2082] US, FWS, para. 44.
[2083] EC, FWS, para. 194.
[2084] *See*, Section VII.F.4 of this Report.
[2085] EC, FWS, para. 45.
[2086] EC, SNCOS, para. 20 (emphasis added).

BCI deleted, as indicated **[***]**

investigation.[2087] The dispute in *US – Softwood Lumber IV* concerned countervailing duties levied by the United States on imports of softwood lumber, including remanufactured lumber, from Canada to offset subsidies granted to timber harvesters in relation to the harvesting of timber (*i.e.*, the input into the production of lumber). The Appellate Body upheld the panel's findings that Article 10 of the SCM Agreement and Article VI:3 of the GATT required the USDOC to conduct a pass-through analysis in circumstances in which a subsidy is received by a producer of an input product and the imported product subject to the countervailing duty investigation is a different, downstream product produced by an unrelated producer using the subsidized input.[2088] We note that the source of the obligation to conduct a pass-through analysis in *US – Softwood Lumber IV* is Article VI:3 of the GATT and Article 10 of the SCM Agreement, provisions of Part V of the SCM Agreement, which are not directly relevant to our consideration of the United States' claims in this dispute.[2089]

7.195 More recently, in *Mexico – Olive Oil*, another dispute involving the provisions of Part V of the SCM Agreement, the panel rejected an argument that whenever there is any arm's length transaction between unrelated companies in the chain of production of an imported product subject to a countervailing duty investigation, a pass-through analysis must be conducted.[2090] The panel in *Mexico – Olive Oil* noted that, given that the Appellate Body in *US – Softwood Lumber IV* found that where an input product and a further manufactured product are both covered by the definition of the product subject to the countervailing duty investigation, a pass-through analysis is *not* required, even if the producers of the respective products are *unrelated* and operating at arm's length, then *a fortiori*, the mere existence of an arm's length transaction between firms involving the product under investigation somewhere between the receipt of the subsidy and the export of the merchandise should not, by itself, give rise to an obligation to conduct a pass-through analysis under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.[2091]

7.196 In *US – Upland Cotton*, a dispute involving the provisions of Part III of the SCM Agreement, the panel rejected the United States' argument that Brazil was required to establish the precise extent to which United States subsidies provided in respect of "upland cotton" production were actually "passed through" to the exporter, after "upland cotton" been processed and sold, before being traded.[2092] The panel considered that, given the textual differences between Parts III and V of the SCM Agreement, "pass-through" principles developed in the context of Part V of the SCM Agreement were not directly applicable to the panel's examination of serious prejudice under Articles 5(c) and 6.3(c) of the SCM Agreement.[2093] The Appellate Body found that the panel had not

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[2087] GATT Panel Report, *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada ("US – Canadian Pork"*), adopted 11 July 1991, BISD 38S/30; Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* ("*US – Softwood Lumber IV*"), WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report, WT/DS257/AB/R, DSR 2004:II, 641.

[2088] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* ("*US – Softwood Lumber IV*"), WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571, para. 167. The Appellate Body reversed the Panel's finding that USDOC's failure to conduct a pass-through analysis in respect of arm's length sales of lumber by tenured harvesters/sawmills to unrelated remanufacturers was inconsistent with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

[2089] *See, also*, Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities ("Mexico – Olive Oil"*), WT/DS341/R, adopted 21 October 2008, para. 7.142.

[2090] Panel Report, *Mexico – Olive Oil*, para. 7.143.

[2091] Panel Report, *Mexico – Olive Oil*, para. 7.143. The panel also considered that it is not necessary to identify the particular recipient or recipients of the benefit, and the particular manner in which the subsidy is bestowed, in order to determine that a "benefit" has been conferred, and therefore that a subsidy exists within the meaning of Article 1.1(b); para. 7.152.

[2092] Panel Report, *US – Upland Cotton*, para. 7.1180.

[2093] Panel Report, *US – Upland Cotton*, para. 7.1181.

erred in its assessment of the amount of the subsidies for the purpose of its analysis under Article 6.3(c) of the SCM Agreement.[2094] The Appellate Body said:

> "As we have already noted, the requirement in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement that countervailing duties on a product be limited to the amount of the subsidy accruing to that product finds no parallel in the provisions on actionable subsidies and pertinent remedies under Part III of the SCM Agreement. Therefore, the need for a "pass-through" analysis under Part V of the SCM Agreement is not critical for an assessment of significant price suppression under Article 6.3(c) in Part III of the SCM Agreement. Nevertheless, we acknowledge that the "subsidized product" must be properly identified for purposes of significant price suppression under Article 6.3(c) of the SCM Agreement. And if the challenged payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant suppression of prices of that product in the relevant market."[2095]

7.197 We understand the Appellate Body to mean that, in order to demonstrate causation under Article 6 (in that dispute, that the effect of a subsidy which had been found to exist was significant price suppression within the meaning of Article 6.3(c)), it is necessary to link the subsidy to the product alleged to be involved in causing the serious prejudice. In situations where a subsidy is provided directly to an entity that does not produce, and is not related to an entity that produces, the product alleged to be involved in causing the serious prejudice, a complaining party will need to demonstrate how such a product is in fact, subsidized, for purposes of the causation analysis under Article 6.

7.198 In arguing that "subsidies paid to entities that no longer exist, much less manufacture and sell LCA, cannot be assumed to benefit Airbus SAS", the European Communities essentially asks the Panel to treat the Airbus Industrie consortium (and the various legal entities which comprised the consortium), as a different producer of Airbus LCA from Airbus SAS. We are unable to do so.

7.199 We acknowledge that the change in legal organization of the producer of Airbus LCA, from a *groupement d'intérêt économique* to a *société par actions simplifiée* is legally significant as a matter of corporate law. The legal rights and obligations of the Airbus partners (and their respective owners) changed from those of aerospace manufacturers and members of a consortium, to those of shareholders of a publicly listed company (EADS) which, through its subsidiary Airbus SAS, owned the LCA-related assets and conducted the LCA-related activities of the former Airbus partners and Airbus GIE. However, based on the economic realities of the production of Airbus LCA, we consider the Airbus Industrie consortium (*i.e.*, each of the Airbus partners, their respective affiliates and Airbus GIE) to be the *same producer* of Airbus LCA as Airbus SAS. In this regard, we recall that, in response to a question from the Panel, the European Communities indicated that all of the LCA operating assets and all of the LCA design, manufacturing and marketing activities of the former Airbus partners and Airbus GIE were grouped in Airbus SAS and its subsidiaries.[2096] Moreover, in granting merger clearance to the proposed combination of Aérospatiale-Matra, Dasa and CASA to form EADS, the European Commission expressed the view that there was no indication that the operation would affect the *quality or nature of control* of Airbus Industrie, nor would it have any impact on the work share distribution between the Airbus partners.[2097]

[2094] Appellate Body Report, *US – Upland Cotton*, para. 473.
[2095] Appellate Body Report, *US – Upland Cotton*, para. 472.
[2096] EC, Answer to Panel Question 81, para. 165.
[2097] European Commission, Merger Procedure Article 6(2) Decision, Case No. COMP/M.1745 – EADS, 11 May 2000, Exhibit US-479, para. 16.

BCI deleted, as indicated **[***]**

7.200 In other words, for purposes of our analysis of the United States' claims under Articles 5 and 6 of the SCM Agreement, we do not consider that the changes to the corporate structure of the producer of Airbus LCA are such as to require the United States to demonstrate, as part of its *prima facie* case, the "pass-through" to the entity Airbus SAS of benefits conferred by financial contributions that had been provided to the Airbus Industrie consortium. If we find that any of the alleged financial contributions provided to the Airbus Industrie consortium conferred a benefit within the meaning of Article 1.1(b), and thus constitute subsidies, we would be satisfied that those subsidies do, in fact, subsidize Airbus LCA for purposes of our adverse effects analysis under Articles 5 and 6.

7.201 We now turn to the European Communities' arguments that various transactions nonetheless had the effect of "extinguishing" a portion of any alleged subsidies that we may otherwise find to have been bestowed on Airbus SAS.

(c) Extinction of benefit

(i) Arguments of the parties

European Communities

7.202 The European Communities contends that, quite apart from the issue which it identifies as "pass-through", it has demonstrated that "most" of the alleged subsidies at issue in this dispute "have been extinguished, repaid, withdrawn or extracted in a series of arm's length, fair market value transactions" with the result that Airbus SAS does not "currently enjoy subsidies that could cause the adverse effects alleged by the United States."[2098]

7.203 According to the European Communities, WTO panels and the Appellate Body have consistently made clear that any benefit that may have been conferred by a financial contribution (and therefore a subsidy which is deemed to exist) is presumptively "extinguished" for purposes of the SCM Agreement when the recipient firm (or segments thereof) is sold at "arm's-length" and for "fair market value".[2099] In this regard, the European Communities refers to the reports of the panels and Appellate Body in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* as establishing the "principle" that the sale of a company at arm's-length and for fair market value presumptively "removes any benefit of prior subsidies" to the purchaser of that company.[2100] Although the above-referenced cases arose out of countervailing duty determinations challenged under Part V of the SCM Agreement, the European Communities argues that the "extinction principle" enunciated in those cases is based on the definition of "subsidy" in Article 1.1, and that it is therefore as relevant to Part III of the SCM Agreement as it is to Part V.[2101] While also acknowledging that the aforementioned cases involved the privatization of formerly state-owned

[2098] EC, FWS, paras. 196-197; SWS, para. 90.

[2099] EC, FWS, para. 198. According to the European Communities, this "principle" is "rooted in the "benefit to the recipient" principle" and is part of the definition of "subsidy" in Article 1.1.; EC, SNCOS, para. 59; Answer to Panel Question 197, para. 222.

[2100] EC, FWS, paras. 198-202; Answer to Panel Question 197, para. 223; Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom ("US – Lead and Bismuth II*"), WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report, WT/DS138/AB/R, DSR 2000:VI, 2623; Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities ("US – Countervailing Measures on Certain EC Products*"), WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report, WT/DS212/AB/R, DSR 2003:I, 73; Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities, Recourse to Article 21.5 of the DSU by the European Communities ("US – Countervailing Measures on Certain EC Products (Article 21.5 – European Communities)*"), WT/DS212/RW, adopted 27 September 2005.

[2101] EC, Answer to Panel Question 197, para. 222.

BCI deleted, as indicated **[***]**

enterprises, the European Communities contends that a statement of the Appellate Body in *US – Countervailing Measures on Certain EC Products* extends the application of the principle to private-to-private sales.[2102]

7.204 Based on the "extinction" principle that the European Communities argues was established in the aforementioned cases, and the asserted extension of that principle to private-to-private sales, the European Communities argues that (i) the French State's sale of shares in Aérospatiale-Matra through a public offering in 2000; (ii) the combination of the LCA-related assets and activities of the Airbus partners to form EADS and the public offering of EADS shares in 2000; (iii) market sales of EADS shares by various EADS shareholders (including the French State) between 2001 and 2006; and (iv) the sale by BAE Systems of its interest in Airbus SAS to EADS in 2006, each effectively "extinguished" a portion of any subsidies currently enjoyed by Airbus SAS. The specific transactions which the European Communities alleges have resulted in the "extinction" of a portion of any subsidies to Airbus SAS are set forth below:[2103]

Date	Transaction	Percentage Sold	Percentage of benefit extinguished
1999 and 2000	Alleged privatization of Aérospatiale through combination of Aérospatiale with Matra Hautes Technologies to form Aérospatiale-Matra and the sale by the French State of a portion of its shares in Aérospatiale Matra to the public	50%	50 % of benefit to Aérospatiale extinguished
2000	Combination of Aérospatiale-Matra, Dasa and CASA to form EADS and the public offering of EADS shares[2104]	16.42%	16.42 % of benefit to EADS extinguished
2001	Sales by both Lagardère and the French State of their respective direct shareholdings in EADS on the market	3%	3 % of benefit to EADS extinguished
2004	Hedged forward sale by DaimlerChrysler of its direct shareholdings in EADS	2.75%	2.20 % of benefit to Airbus SAS extinguished
2006	Irrevocable forward sale by DaimlerChrysler of indirect EADS shareholding	7.5%	6 % of benefit to Airbus SAS extinguished (80% of 7.5%)
2006	Issuance by Lagardère of mandatory exchangeable bonds (convertible into its	2.5% (2007) 2.5% (2008)	6 % of benefit to Airbus SAS

[2102] EC, FWS, paras. 213-215; Answer to Panel Question 197, para. 223. The European Communities also contends that the compliance Panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – European Communities*) established the principle that a partial (rather than full) sale of a company may remove a corresponding part of the subsidy; EC, FWS, paras. 216-219; Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – European Communities)*, at paras. 7.88-7.176.

[2103] EC, Answer to Panel Question 111, para. 316.

[2104] The combination of the French, German and Spanish Airbus partners to form EADS was preceded by the "extraction" of cash by DaimlerChrysler (as the owner of Dasa) and the Spanish government (as the owner of CASA). The European Communities argues that these "cash extractions" extinguished (or constituted repayment of) a portion of the benefits of subsidies received by Dasa and CASA, respectively. The "extraction" arguments are considered separately in Section VII.E.1(e) below.

BCI deleted, as indicated **[***]**

	indirect EADS shareholding on specified dates)	2.5% (2009)	extinguished (80% of 7.5%)
2006	Exercise of put option and sale by BAE Systems of its 20 % interest in Airbus SAS to EADS	20 %	20 % of benefit to Airbus SAS extinguished

United States

7.205 According to the United States, the European Communities' "extinction" argument is built on a flawed attempt to analogize the aforementioned transactions to the transactions at issue in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products*. The United States argues that the transactions identified by the European Communities as "extinguishing" a portion of the benefit of any subsidies currently enjoyed by Airbus SAS lack some or all of the features that were essential to the findings regarding subsidy extinction in those cases.[2105] The United States notes that *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* dealt with the effects of full privatizations on the extent to which subsidies granted to enterprises prior to their privatization may be countervailed under Part V of the SCM Agreement.[2106] According to the United States, an essential feature of the privatization transactions at issue in those disputes was that they involved the transfer of all or substantially all of the state's interest in an entity to a buyer at arm's length and for fair market value, including a complete transfer of control.

7.206 Second, the United States argues that the European Communities fails to address the significance of the fact that the cases on which it relies for the "principle" of extinction involved reviews of countervailing duty determinations by an investigating authority under Part V of the SCM Agreement.[2107] According to the United States, the European Communities has failed to take account of the differences between the nature of the inquiry in a countervailing duty dispute under Part V of the SCM Agreement and a dispute under Part III of the SCM Agreement.[2108]

7.207 Specifically, the United States notes that an investigating authority in a countervailing duty proceeding is required to determine whether a countervailable subsidy exists and, if so, the amount of subsidy to be offset through countervailing duties. By contrast, a panel in a dispute under Part III of the SCM Agreement is required to determine whether the respondent Member, through the use of subsidies, has caused adverse effects to the interests of a complaining Member.[2109] The United States contends that, even if a transaction may (*arguendo*) result in a previously provided subsidy no longer being countervailable for purposes of Part V of the SCM Agreement, this does not necessarily mean that it is no longer capable of causing adverse effects under Part III of the SCM Agreement.[2110]

7.208 The United States further submits that the European Communities' arguments regarding the "extinction" and "extraction" of the alleged subsidies are completely irrelevant to the United States' causation argument.[2111] According to the United States, its causation case is essentially that the alleged subsidies in this dispute (namely, LA/MSF, together with other subsidies) distort the LCA market by (i) permitting the launch of LCA models that could not otherwise have been launched; (ii) enabling Airbus to invest in multiple LCA launches more quickly than it otherwise could; and (iii)

[2105] US, Answer to Panel Question 56, para. 321.
[2106] US, Answer to Panel Question 16, para. 121.
[2107] US, Answer to Panel Question 56, para. 322.
[2108] US, Answer to Panel Question 56, para. 323.
[2109] US, Answer to Panel Question 56, para. 342.
[2110] US, Answer to Panel Question 56, para. 343.
[2111] US, Answer to Panel Question 169, para. 221.

enabling Airbus to use its limited funds to reduce prices for already launched LCA models.[2112] Therefore, according to the United States, at any given moment, the impact of the alleged subsidies includes both (i) the existence of Airbus LCA models that would not have been launched in the past without the alleged subsidies; and (ii) the present impact of subsidies that are currently being provided for the development of new Airbus LCA models on the financial constraints currently experienced by Airbus as a whole.[2113]

7.209 Finally, the United States argues that the European Communities has failed to demonstrate that the specific transactions which it contends "extinguished" a portion of prior subsidies to the Airbus partners and Airbus SAS were sales of shares that occurred at arm's length and for fair market value.[2114]

(ii) Arguments of Third Parties

Australia

7.210 Australia argues that the elements for establishing the existence of "benefit" are the same in the context of Part III and Part V of the SCM Agreement and that both Parts III and V rely on the continuing existence of benefit as the basis for establishing the further element of injury.[2115] Consequently, Australia contends that the rebuttable presumption that a privatization on arm's-length terms and for fair market value results in the extinguishment of benefit, as recognized by the Appellate Body in *US – Countervailing Measures on Certain EC Products*, in the context of Part V of the SCM Agreement, likewise applies to the existence of benefit under Part III of the SCM Agreement.[2116] Australia also argues that the question whether a subsidy is partially or completely extinguished upon the sale of shares in a subsidized entity depends on the nature and consequences of that sale.[2117]

Brazil

7.211 According to Brazil, the panel and Appellate Body findings in *US – Countervailing Measures on Certain EC Products* relate to the existence of a benefit for purposes of finding subsidization under Article 1.1 and applying countervailing duties under Part V of the SCM Agreement. Because the identification of the "subsidized product" (including the existence of benefit under Article 1.1) is also a necessary first step in an analysis of serious prejudice under Part III, Brazil contends that past

[2112] US, Answer to Panel Question 169, para. 222.

[2113] US, Answer to Panel Question 169, para. 222. The United States also argues that the 2006 transactions, and DaimlerChrysler's 2004 hedged forward arrangement, which could not take place until 2007, occurred after the establishment of this Panel and therefore can have no bearing on the resolution of this dispute; US, SWS, paras. 529-530.

[2114] In relation to this issue, the United States argues (i) that several of the transactions in question are not actual sales of shares; (ii) that several of the transactions were sales for between one percent and 9.95 percent of the entities concerned, and therefore involved significantly less that "all or substantially all" of the shares in the relevant entities; (iii) that none of the transactions resulted in the seller no longer having any controlling interest in the relevant companies; and (v) that several of the transactions occurred after the establishment of this Panel and therefore have no bearing on the resolution of this dispute; US, SWS, paras. 529-536.

[2115] Australia Answers to Third Party Questions, 10 September 2007, at 2. Australia notes that the only real difference between Parts III and V is that nothing in Part III calls for a precise quantification or allocation of the benefit of the subsidy.

[2116] Australia Answers to Third Party Questions, 10 September 2007, at 2.

[2117] Australia Answers to Third Party Questions, 10 September 2007, at 2. In this regard, Australia contends that the Panel will need to examine all relevant facts, including provisions made in loan contracts between the governments and Airbus SAS in relation to the transfer obligations to successor entities; Australia, Third Party Submission, 7 May 2007, para. 57.

BCI deleted, as indicated **[***]**

interpretations of Article 1.1 in relation to determining subsidization would appear to be applicable in the context of any disputes under the SCM Agreement, including those relating to prohibited subsidies under Part II and actionable subsidies under Part III.[2118]

7.212 Brazil argues that the relevant transactions cited by the European Communities are not privatizations and thus do not appear to raise the presumption that the benefit of prior subsidies was extinguished.[2119] Brazil also notes that the reports of the panel and Appellate Body in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* addressed the question whether privatization of the recipient extinguished the benefit for purposes of imposing countervailing duties under Part V of the SCM Agreement. Brazil contends that Part V of the SCM Agreement requires the calculation of the precise amount of the subsidy in order to ensure that countervailing duties are not levied in excess of the amount of the subsidy under Article 19.4 of the SCM Agreement, while precise quantification of the amount of the subsidy is not required in cases under Parts II and III of the SCM Agreement.[2120] According to Brazil, given the absence of any requirement to precisely quantify the subsidy, and given the absence of any *de minimis* provision under Parts II and III of the SCM Agreement, a "partial" extinguishment of the benefit would still mean that the recipient is benefiting from the subsidies, albeit arguably to a lesser extent. Therefore, even assuming *arguendo* that partial share transfers may extinguish a portion of the benefit to the recipient in certain circumstances, such a finding should not affect the Panel's findings regarding the existence of benefit.[2121]

Japan

7.213 Japan submits that the Panel should closely examine whether the European Communities has demonstrated that the privatizations have been accomplished at arm's length and for fair market value, and that any alleged benefits have in fact been extinguished, based on the specific facts of the case.[2122] Japan argues that there is no basis in the SCM Agreement, in the applicable jurisprudence, or in logic, for the proposition that a partial transfer of a firm should not be subject to the same rebuttable presumption of extinguishment as set forth by the Appellate Body in *US – Countervailing Measures on Certain EC Products*.[2123]

(iii) Evaluation by the Panel

7.214 The European Communities argues that most of the alleged subsidies which the Panel may find to exist have been "extinguished" by a series of allegedly arm's length, fair market value transactions involving changes in ownership of Aérospatiale, or EADS, with the result that "Airbus SAS does not *currently enjoy* subsidies that could cause the adverse effects alleged by the United States."[2124] This argument raises a threshold question; namely, whether a subsidy which is found to exist must additionally be found to confer a present, or continuing, benefit on the recipient firm producing the subsidized product in order for that subsidy to be potentially capable of causing adverse effects for purposes of Article 5 of the SCM Agreement.

[2118] Brazil Answers to Third Party Questions, 10 September 2007, para. 5.
[2119] Brazil Answers to Third Party Questions, 10 September 2007, para. 7.
[2120] Brazil Answers to Third Party Questions, 10 September 2007, paras. 6-7; Third Party Written Submission, para. 37.
[2121] Brazil Answers to Third Party Questions, 10 September 2007, para. 7.
[2122] Japan Third Party Submission, para. 19.
[2123] Japan Third Party Submission, para. 22, citing the Panel Report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – European Communities)*, paras. 7.130-7.158.
[2124] EC, SWS, para. 90. Emphasis added.

BCI deleted, as indicated **[***]**

7.215 We recall that Article 5 of the SCM Agreement provides, in relevant part:

> "No Member should cause, through the *use* of any *subsidy referred to in paragraphs 1 and 2 of Article 1*, adverse effects to the interests of other Members, i.e.….."[2125]

The concept of "adverse effects" under Article 5 of the SCM Agreement is concerned with effects to the "interests of other Members". Paragraphs (a), (b) and (c) of Article 5, describe these effects as:

(i) "injury to the domestic industry of another Member;

(ii) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;

(iii) serious prejudice to the interests of another Member."[2126]

Article 6.3 provides that serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) "the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted."

7.216 Implicit in the European Communities' argument is the assumption that a "subsidy referred to in paragraphs 1 and 2 of Article 1" can only cause adverse effects pursuant to Article 5 if it can be shown to *presently* confer a "benefit" on a recipient. This assumption appears to rest on an analogy with the countervailing duty context, in which a Member's right to impose countervailing duties on a product is limited to the *amount* of the subsidy accruing to that product. The European Communities argues that the present existence of the benefit conferred by a financial contribution is likewise a prerequisite to a determination that a Member has caused, through the use of a subsidy, adverse effects to the interests of another Member pursuant to Article 5 of the SCM Agreement.

7.217 We do not agree. In order to make a successful claim under Article 5 of the SCM Agreement, a complaining Member must establish that a Member has caused, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, one or more of the enumerated adverse effects to the interests of another Member. One element of a complaining Member's adverse effects claim will therefore be establishing the existence of a "subsidy referred to in paragraphs 1 and 2 of Article 1". We note the following statement by the Appellate Body in *Canada – Aircraft* regarding the definition of "subsidy" in Article 1.1 and the meaning of the term "benefit" in Article 1.1(b):

[2125] Emphasis added.
[2126] Footnotes omitted.

BCI deleted, as indicated **[***]**

> "The definition of "subsidy" in Article 1.1 has two discrete elements: "a financial contribution by a government or any public body" and "a benefit is thereby conferred". The first element of this definition is concerned with whether the government made a "financial contribution", as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the "financial contribution". That being so, it seems to us logical that the second element in Article 1.1 is concerned with the "benefit… conferred" on the recipient by that governmental action. Thus, subparagraphs (a) and (b) of Article 1.1 define a "subsidy" by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient....
>
> We also believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. 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."[2127]

7.218 Article 1.1 is phrased in the present tense; *i.e.*, a subsidy "shall be deemed to exist" where there "is a financial contribution" and "a benefit is thereby conferred". The grammatical construction of Article 1.1 suggests that the "financial contribution" and the "benefit" come into existence at the same time. This construction is supported by the adverb "thereby", the ordinary meaning of which is "by that means".[2128] As the Appellate Body in *Canada – Aircraft* made clear, the focus of the inquiry into the existence of a "benefit" pursuant to Article 1.1(b) is whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution. We therefore have difficulty understanding the coherence of a concept such as "continuing benefit" within the legal framework of Article 1 of the SCM Agreement. To the extent that a concept such as "continuing benefit" relates to how the *effect* of a subsidy is to be analyzed over time, we consider this to be an aspect of the causation analysis to be undertaken pursuant to Articles 5 and 6 of the SCM Agreement and part of the assessment of the "effects" of a subsidy under those provisions. If a financial contribution is provided on better terms than would have been available in the market, a benefit is "thereby" conferred, a subsidy is deemed to exist, and there is the possibility, which the complaining Member may proceed to establish, that the "use" of this subsidy has caused adverse effects to the interests of other Members.

7.219 The European Communities' concept of "continuing benefit" appears to conflate the concepts of "benefit", which relates to the terms on which a financial contribution was provided compared with a market benchmark, and "effects" which relate to the impact of the subsidy in the marketplace at a point in time which is typically subsequent to the time when the subsidy was granted. We note the observations of the panel in *US – Upland Cotton* on this interpretational error:

> "The concept of "benefit" is a definitional element of a subsidy pursuant to Article 1.1(b) of the SCM Agreement. Inasmuch as we are not required to calculate an amount of "benefit", we cannot logically be required to conduct any sort of precise

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[2127] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft")*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, paras. 156-157.

[2128] The *New Shorter Oxford English Dictionary* defines "thereby" as "by that means, as a result of that; through that"; *New Shorter Oxford English Dictionary*, Oxford University Press, Oxford, 1999, p. 3275. *Black's Law Dictionary* defines "thereby" as "by that means; in consequence of that"; *Black's Law Dictionary*, Sixth Edition, West Publishing Co., St. Paul, 1990, p. 1478.

BCI deleted, as indicated **[***]**

> "expensing" of the "benefit". Moreover, we see no textual basis for reading the different terms – "benefit" and "adverse effects"/"serious prejudice" – synonymously. Were we to discern an identity between the concept of "benefit" to a recipient and the concept of "adverse effects" to another Member's interests, we would effectively reduce the provisions of Part III to redundancy. As a treaty interpreter, the Panel is precluded from doing so." [2129]

7.220 We also recall the different context in which investigating authorities are required to demonstrate the existence, during the relevant period of investigation or review, of a continued benefit from a prior financial contribution, pursuant to Part V of the SCM Agreement. This requirement arises from Article VI:3 of the GATT and Article 10 of the SCM Agreement which permit offsetting, through countervailing duties, no more than the *ad valorem* amount of the subsidy determined to have been granted on the manufacture or production of a *product*.[2130] In addition, Articles 19.4 and 21.1 limit the imposition of countervailing duties to the *amount* of the subsidy found to exist, calculated in terms of the subsidization per unit of the subsidized and exported *product*. The provisions of Part V of the SCM Agreement thus give rise to a pragmatic need to link a subsidy to imported *products* in order to assess the effect of the subsidized imports. As the panel in *US – Upland Cotton* observed:

> "In view of the contrast in the text, context, legal nature and rationale of the provisions in Part III of the SCM Agreement relating to a multilateral assessment as to whether a Member is causing, through the use of any subsidy, "adverse effects" in the form of "serious prejudice to the interests of another Member" and Part V of the Agreement relating to obligations of a Member in conducting unilateral countervailing duty investigations, we decline to transpose directly the quantitative focus and more detailed methodological obligations of Part V into the provisions of Part III of the SCM Agreement."[2131]

7.221 As we have explained, we do not suggest that, under Article 5 of the SCM Agreement, it is unnecessary to link a subsidy provided to a recipient to a particular product or products in order to demonstrate that a Member has caused, through the use of that subsidy, the asserted adverse effects to the interests of the complaining Member.[2132] However, this does not mean that a complaining Member is required to establish that the "benefit" to the recipient is "current" or "continuing" in order to establish that link and demonstrate that use of that subsidy has caused adverse effects to the complaining Member's interests.[2133] There may well be circumstances where, given the nature of the subsidy, the passage of time between its receipt and the alleged adverse effects, the recipient's position in the market and exogenous market considerations, it is difficult to demonstrate more than a tenuous causal link between the subsidy and the alleged adverse effects. However, this is an inherent part of the causation analysis to be undertaken pursuant to Articles 5 and 6, and does not entail an obligation to demonstrate the "continuity of benefit" of a previously granted subsidy.

[2129] Panel Report, *US – Upland Cotton*, para. 7.1179 (footnotes omitted).

[2130] Article VI:3 of the GATT and footnote 36 of Article 10 of the SCM Agreement provide that the term "countervailing duty":

"{S}hall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise".

[2131] Panel Report, *US – Upland Cotton*, para. 7.1177.

[2132] *See*, paras. 7.194 - 7.200.

[2133] In this regard, we recall that the panel in *US – Upland Cotton* regarded the fact that the legal and regulatory provisions governing the payment of many of the subsidies at issue in that dispute had expired as immaterial to its serious prejudice analysis; Panel Report, *US – Upland Cotton*, para. 7.1201. *See, also,* Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry ("Indonesia – Autos")*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201, para. 14.206.

BCI deleted, as indicated **[***]**

7.222 We conclude that, provided the United States, as the complaining Member, establishes (i) the provision of a financial contribution in accordance with Article 1.1(a)(1); (ii) which thereby confers a benefit, within the meaning of Article 1.1(b) and (iii) specificity, in accordance with Article 2, a subsidy that is actionable under Part III of the SCM Agreement will be "deemed to exist", and the United States will successfully make out a claim under Article 5; provided it is able to demonstrate that the European Communities and certain member States have caused, through the use of that subsidy, adverse effects to the interests of the United States. We can find nothing in Article 5 of the SCM Agreement that would require the United States to establish additionally that all or part of the "benefit" found to have been conferred by the provision of a financial contribution continues to exist, or presently exists.

7.223 We therefore dismiss the European Communities' arguments that particular alleged subsidies have been extinguished through a series of arm's length, fair market value transactions as unfounded, resting as they do upon a flawed interpretation of Article 5 of the SCM Agreement.

(d) Alternative findings

7.224 We consider that the foregoing findings are sufficient to resolve this issue. Nonetheless, and in the interest of ensuring a positive resolution of this dispute in the event the foregoing findings are reversed on appeal, we consider it appropriate to make alternative findings on the European Communities' arguments that, in the context of a claim under Part III of the SCM Agreement, the existence of a benefit conferred by a financial contribution provided to a recipient is presumptively extinguished by the subsequent sale of the recipient to an arm's-length purchaser for fair market value.

7.225 The European Communities asks us to interpret Article 5 as requiring a complaining Member to establish not only the existence of a subsidy pursuant to Article 1.1 of the SCM Agreement, but also that the financial contribution confers a "present" or "continuing" benefit on the recipient, as a prerequisite to demonstrating that a Member has caused, through the use of that subsidy, adverse effects to the interests of another Member. Had we accepted the European Communities' view, then it would be necessary for us to address the European Communities' arguments that it is possible to derive from the prior panel and Appellate Body reports in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* the principle that sale of a producer on arm's-length terms and for fair market value presumptively removes the benefit of any prior subsidies to the purchaser of that producer. We would also have to consider the European Communities' argument that application of this principle to certain transactions involving changes in ownership of the Airbus partners, EADS and Airbus SAS results in the "extinction" of a portion of any subsidies to Airbus SAS. We consider these questions, in the alternative, below.

7.226 The disputes in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* involved the WTO-consistency of countervailing duties imposed or maintained by the United States on products imported from formerly state-owned producers to offset subsidies received by those producers prior to their privatization. The European Communities argues that the reports of the panels and Appellate Body in these cases establish the "principle" that "the sale of a company at arm's length and for fair market value removes any benefit of prior subsidies to the buyer."[2134]

7.227 According to the United States, the panel in *US – Countervailing Measures on Certain EC Products* found that a subsidy may be extinguished as the result of a sale of the subsidized entity where (i) the sale is at arm's length and for fair market value, *and* (ii) the sale involves *all or substantially all of the subsidized entity* and results in a *relinquishment of any controlling interest* the seller had in the entity.[2135] The United States contends that none of the transactions identified by the

[2134] EC, Answer to Panel Question 197, para. 223.
[2135] US, Answer to Panel Question 168, para. 203.

BCI deleted, as indicated **[***]**

European Communities satisfies this second requirement, and that the European Communities, in purporting to apply the principle enunciated by the panel in that dispute, is actually formulating a new principle in which it is only necessary to satisfy the requirements in (i) above in order for a subsidy to be extinguished.

7.228 The European Communities, for its part, argues that the United States has confused the principle enunciated in *US – Countervailing Measures on Certain EC Products* with the facts to which that principle was applied in that dispute.[2136] The European Communities rejects the United States' assertion that the "Airbus governments" nevertheless retain controlling interests in Airbus SAS sufficient to enable them to exert control over the company.[2137] According to the European Communities, the transactions that it has identified (which are set forth in paragraph 7.204 of this Report) *cumulatively* have resulted in the transfer to private owners of 79.26 percent of Airbus SAS, with the result that none of Aérospatiale-Matra, Dasa, CASA nor BAE Systems today produces LCA or has a "controlling interest" in Airbus SAS.[2138] The European Communities argues that the Panel Report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – European Communities)* extends the "principle of extinguishment" from single event changes of control to cover graduated sales undertaken in tranches over a period of time.[2139]

7.229 Before beginning our evaluation of the European Communities' arguments, we set forth below our understanding of the issues in dispute and conclusions of the panels and Appellate Body in the two cases on which the European Communities relies.

7.230 In *US – Lead and Bismuth II*, the panel found that the changes in ownership of the subsidized, state-owned producer which lead to the creation of the privatized producers should have caused the USDOC to examine whether the production of leaded bars by those privatized producers, and not the state-owned producer, was subsidized.[2140] It therefore found that the countervailing duties imposed pursuant to the USDOC's 1995, 1996 and 1997 administrative reviews were not in accordance with Articles 19.1, 19.4 and 21.2 of the SCM Agreement, Article VI:3 of the GATT 1994 and the object and purpose of countervailing duties as expressed in footnote 36 to Article 10 of the SCM Agreement, and were therefore inconsistent with Article 10.[2141]

7.231 On appeal, the United States argued that subsidies are bestowed on production, and that a mere change in ownership of the recipient of a financial contribution does not have an automatic or immediate effect on production. Rather, legal successorship to a subsidized producer is sufficient to maintain the connection between the subsidies and the recipient. The Appellate Body rejected this

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[2136] EC, Comments on US Answer to Panel Question 168, para. 313.

[2137] US, Answer to Panel Question 168, paras. 216-217. The European Communities notes that neither the United Kingdom nor German governments hold any shares in EADS or Airbus SAS, while the French and Spanish governments own minority stakes in EADS (15.2 percent and 5.54 percent, respectively), and can hardly be said to be in a position to exert control over EADS or Airbus SAS; European Communities, Comments on US, Answer to Panel Question 168, paras. 322-323.

[2138] EC, Comments on US, Answer Question 168, para. 320.

[2139] Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – European Communities)*, paras. 7.119, 7.175.

[2140] Panel Report, *US – Lead and Bismuth II*, para. 6.70. The subsidies countervailed were equity infusions made by the British government to a state-owned entity, British Steel Corporation (BSC) between 1977 and 1986. BSC was privatized in 1988 and shares of the newly formed entity, British Steel plc (BSplc), were sold in a public offering that was agreed to be at arm's length, for fair market value and consistent with commercial considerations. The countervailing duty determinations were made against United Engineering Steels Limited (UES), an entity that was originally a joint venture between BSC and a privately-owned entity, and in 1995, became a wholly-owned subsidiary of BSplc. UES was renamed British Steel Engineering Steels (BSES) in 1995.

[2141] Panel Report, *US – Lead and Bismuth II*, para. 6.86.

argument, and affirmed the panel's finding that, given the changes in ownership leading to the creation of the privatized producers, in order to determine whether any subsidy was bestowed on production by these entities, it was necessary under Article 21.2 of the SCM Agreement to determine, based on information relating to the changes in ownership, whether a "benefit" accrued to each of the privatized producers.[2142] The Appellate Body also found that, given the panel's factual findings that the privatized producers had each paid fair market value for the productive assets and goodwill they acquired from the state-owned producer, there was no error in the panel's conclusion that, in the specific circumstances of the case, the "financial contributions" that had been bestowed on the state-owned producer between 1977 and 1986 could not be deemed to confer a "benefit" on the privatized producers.[2143]

7.232 In *US – Countervailing Measures on Certain EC Products*, the panel considered the WTO-consistency of 12 countervailing duty determinations against imports of certain steel products originating in the EC.[2144] The European Communities challenged the application by the USDOC of two different methodologies to determine whether non-recurring subsidies granted to state-owned recipients prior to their change in ownership (through privatization) remained countervailable against imports from the privatized producer.[2145] The panel noted that the changes of ownership in question concerned privatizations of state-owned companies, and that the privatizations involved full changes of ownership, in the sense that the governments had sold all, or substantially all, of their ownership interests and no longer had any controlling interests in the privatized producers.[2146]

7.233 The United States argued that the relevant "recipient" for purposes of determining the existence of a "benefit" following a change in ownership is the legal person that received the financial contribution. According to the United States, if the privatized producer can properly be considered the successor entity to the state-owned producer, the benefit of subsidies conferred on the latter should be regarded as passed-through to the former.[2147] The United States argued that there was no reason why payment of fair market value for shares in the legal entity that was the recipient of the subsidy should be regarded as "extinguishing" the benefit of any subsidy conferred on the recipient legal entity. The United States based this argument on what it considered to be the fundamental distinction in corporate law between a company and its owners, a distinction which it contended was supported by the Appellate Body's reports in *Canada – Aircraft* and *US – Lead and Bismuth II*.[2148]

7.234 The panel held that privatization at arm's length and for fair market value rebuts any presumption that the benefit from prior financial contributions (or subsidization) continues to accrue to the privatized producer.[2149] According to the panel, where subsidization improves a company's profitability, it thereby improves its ability to generate returns for its shareholders. In this sense, the panel could see no distinction between the advantage or benefit conferred by a financial contribution

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[2142] Appellate Body Report, *US – Lead and Bismuth II*, para. 62.
[2143] Appellate Body Report, *US – Lead and Bismuth II*, para. 68.
[2144] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 2.1.
[2145] The methodologies were (i) the "gamma" methodology, under which the USDOC determines the extent (if any) to which the privatization transaction price can be considered to have repaid unamortized pre-privatization subsidies, and countervails the remainder; and (ii) the "same person" methodology, under which the USDOC first determines whether the state-owned producer and the privatized producer are distinct legal persons and if not, the benefit of the subsidy granted to the pre-privatization producer is presumed to reside in the post-privatization producer.
[2146] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 2.3.
[2147] The United States argued that money taken out of the new owner's pocket should not be considered as coming out of the company, potentially eliminating subsidies that reside in that company; Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.49.
[2148] Panel Report, *US – Countervailing Measures on Certain EC Products*, paras. 7.35-7.36.
[2149] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.82.

provided to the company, and the benefit thereby enjoyed by the company's shareholders.[2150] The panel therefore rejected the relevance of the legal distinction between a company and its shareholders for purposes of determining the existence of benefit under the SCM Agreement. According to the panel:

> "The concept of benefit is independent of the legal business structure established pursuant to national corporate law. This is so because the SCM Agreement is concerned with identified adverse trade effects of subsidization on the domestic industry producing the like product. The production and export of goods is done by a producer for the purpose of generating an economic benefit to its owners. When the existence of a subsidy improves the ability of a producer to produce and export a good, it necessarily impacts on its profitability, and, therefore, on the rate of return to shareholders."[2151]

7.235 On appeal, the United States argued that the panel's determination that the "recipient" of a benefit should be regarded as the company and its owners together contradicted the Appellate Body's findings in *Canada – Aircraft* and *US – Lead and Bismuth II*, which, according to the United States, established that the recipient of a subsidy cannot be both the legal person and its shareholders. Therefore, the United States argued, the sale of the shares of the recipient-producer can never extinguish the benefit of financial contributions provided to that producer because the producer and its shareholders are different persons.

7.236 The Appellate Body stated that the United States had misconstrued its reports in *Canada – Aircraft* and *US – Lead and Bismuth II*.[2152] The Appellate Body explained that when, in *Canada – Aircraft*,[2153] it had described the "recipient" of a benefit as a "person, natural or legal, or a group of persons" it had not excluded the possibility that a "recipient" could include both a "firm" (*i.e.*, forms of business organizations including corporate associations, partnerships, limited liability partnerships, unincorporated entities) and its owner (*i.e.*, including shareholders, members, proprietors, partners and all other holders of equity interests in the relevant business organization). According to the Appellate Body:

> "In sum, the legal distinction between firms and their owners that may be recognized in a domestic legal context is not necessarily relevant, and certainly not conclusive, for the purpose of determining whether a "benefit" exists under the SCM Agreement, because a financial contribution bestowed on those investing in a firm may confer a

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[2150] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.51. As we discuss in 7.241, we are unable to agree with the panel on this issue. Although an owner may indirectly "benefit" in a financial sense from its investment in a subsidized producer, we do not consider that this indirect "benefit" to an owner of a subsidized producer is the same as the "benefit" conferred by the provision of a financial contribution to the subsidized producer on better than market terms.

[2151] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.50.

[2152] Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities (US – Countervailing Measures on Certain EC Products)*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5, para. 115.

[2153] Appellate Body Report, *Canada – Aircraft*, para. 154. The Appellate Body also noted that its statements in *US – Lead and Bismuth II* were made in the context of responding to the United States' arguments in that dispute that the analysis of the existence of a "benefit" should be on "legal or natural persons" and not on "productive operations"; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 110.

BCI deleted, as indicated **[***]**

> benefit "upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.""[2154]

7.237 However, the Appellate Body also considered that the panel had gone too far in asserting that, for purposes of the benefit determination, no distinction should be made between a firm and its owners. The Appellate Body noted that the panel should have confined its findings to the specific circumstances before it, which involved one kind of change in ownership (*i.e.*, a privatization at arm's length and for fair market value where the government transfers all or substantially all the property and retains no controlling interest in the firm) and only one kind of benefit (*i.e.*, a benefit conferred by a non-recurring financial contribution to a state-owned enterprise before privatization).[2155] The Appellate Body also disagreed with the panel's finding that a privatization at arm's length and for fair market value necessarily always extinguished any benefit accruing to the privatized producer from prior financial contributions.[2156] Specifically, the Appellate Body disputed the implication that a benefit could never continue to exist for a new owner following a privatization at arm's length and for fair market value.[2157]

7.238 In short, while the Appellate Body recognized, in the context of a dispute under Part V of the SCM Agreement, that there was a "rebuttable presumption" that a benefit ceases to exist following the privatization of a subsidized producer at arm's-length and for fair market value,[2158] the Appellate Body explicitly confined its analysis and findings (as well as those of the panel) to the specific facts and circumstances before it:

> "As we explained, the "core legal question" before the Panel was to determine whether a "benefit", within the meaning of the SCM Agreement, continues to exist following privatization at arm's length and for fair market value. In considering this core legal question, the Panel examined a very precise set of facts and circumstances, namely, a benefit resulting from a prior non-recurring financial contribution bestowed on a state-owned enterprise where, following a privatization at arm's length and for fair market value, the government transfers all or substantially all the property and retains no "controlling interest in the privatized producer." The Panel did not examine other situations, for instance, situations where a "benefit" is conferred through recurring financial contributions, or where the seller retains a controlling interest in the firm following its change in ownership. The Panel had to consider only one kind of change in ownership (that is, a privatization at arm's length and for fair market value where the government transfers all or substantially all the property and retains no controlling interest in the firm) and only one kind of benefit (that is, a benefit originating from a non-recurring financial contribution bestowed to the state-

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[2154] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 115 (footnote omitted).

[2155] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 116-117. The Appellate Body was concerned that the panel's overly broad finding that a firm and its owners are, for all purposes of the SCM Agreement, virtually the same, could be interpreted as entitling investigating authorities to assume, in *all* cases that, where a subsidy is bestowed on a firm indirectly (*i.e.*, by providing a financial contribution to a firm's owners), the firm will receive a "benefit" equivalent to the full amount of the financial contribution, irrespective of the means and conditions imposed by a government for the provision of that financial contribution to owners of a firm; at para. 118.

[2156] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 121,

[2157] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 121. The Appellate Body considered that this is because market conditions may be such that the actual exchange value of the continuing benefit of past non-recurring financial contributions bestowed on a state-owned enterprise are not in fact reflected in the market price; at para. 122.

[2158] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 127.

owned enterprise before privatization). The Panel should have confined its findings to those specific circumstances."[2159]

7.239 Returning to the issues in the dispute before us, we recall that the European Communities asks us to recognize, on the basis of the reports discussed above, the existence of a "principle" that the sale of a producer at arm's-length and for fair market value presumptively extinguishes the "benefit" conferred by any financial contributions previously provided to that producer. In light of the Appellate Body's clear indication that the panel's findings in *US – Countervailing Measures on Certain EC Products* should be confined to the "very precise set of facts and circumstances" at issue in that dispute, we do not consider that it would be appropriate for us to do so.

7.240 Moreover, for reasons that we will proceed to explain, we are unable to agree with the reasoning underlying the panel's decision in *US – Countervailing Measures on Certain EC Products* and are likewise unable to find specific support for that reasoning in the Appellate Body's report. As we see it, the panel's assessment of the post-privatization "benefit" conferred by financial contributions provided to a state-owned producer prior to its privatization in *US – Countervailing Measures on Certain EC Products* was based on two core legal considerations. The first was that the privatized firm and its new owners *together* should be considered to be the "recipient" of the benefit to be assessed.[2160] The second was that the relevant inquiry for assessing the "benefit" to this "recipient" (*i.e.*, the privatized firm and its new owners, considered together) is to ask what this recipient "gets for free"; *i.e.*, the value of any subsidy that the new owners of the privatized firm cannot be considered to have "paid for" in the fair market price.[2161]

7.241 As to the first consideration, the panel appeared to explain its assessment of "benefit" from the perspective that the relevant "recipient" comprised the privatized firm and its new owners *together*, on the basis that (i) the value of a company is based on its ability to generate returns for its shareholders, and (ii) when a subsidy improves the profitability of a company, it thus improves the rate of return to its shareholders.[2162] However, we can find nothing in the Appellate Body's reports in *Canada – Aircraft* or in *US – Lead and Bismuth II* to support the panel's contention that a firm and its owners must *necessarily* together be considered the "recipient" for purposes of evaluating the effect of a change of ownership of a firm on the existence of subsidies previously granted to that firm.[2163] A firm's general economic interests may be aligned with those of many other actors, but this does not mean that such other actors, along with the firm, should *necessarily* be considered to be the recipient for purposes of determining the benefit conferred by a financial contribution provided to the firm. For example, if we assume that a subsidy improves a firm's profitability, which in turn enhances its ability to meet its debt obligations (thereby lowering its risk of defaulting on its debt obligations), the firm's unsecured creditors might also be said to "benefit" from a subsidy granted to a firm. If a general alignment of economic interests between a firm and its owners were a sufficient basis for concluding that the benefit conferred by a financial contribution provided to a firm be *necessarily* assessed from the perspective of the firm and its owners together, as the recipient, then it would seem to follow that the general alignment of economic interests between a firm and its creditors (or any other actors whose economic interests are aligned with the firm) should likewise be relevant to assessing the benefit conferred by a financial contribution provided to a firm. In our view, nothing in the SCM Agreement or reports of the Appellate Body suggests that this would be appropriate.

[2159] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 117.

[2160] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.54. We note that the panel in *US – Lead and Bismuth II* adopted a similar approach to the identity between a company and its owners in the context of determining the existence of "benefit" under Article 1.1(b); Panel Report, *US – Lead and Bismuth II*, para. 6.82.

[2161] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.72.

[2162] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.51.

[2163] Moreover, the Appellate Body in *US – Countervailing Measures on Certain EC Products* explicitly did not support this contention; at paras. 116-117.

BCI deleted, as indicated **[***]**

7.242 As to the second consideration; namely, that the "benefit" is to be measured according to what the subsidized producer *and its new owners*, considered together, "get for free", the panel explained:

> "When a state-owned company/producer receives subsidies from the government, the advantage conferred by the subsidy should be reflected in the fair market value (sale price) of the state-owned enterprise to be privatized. Thus, if upon privatization, fair market value is paid for all productive assets, goodwill, etc. employed by the state-owned producer, the Panel fails to see how the subsidies bestowed to the state-owned producer could subsequently be considered to still confer a "benefit" on the privatised producer (in the sense of the company together with its owners) who has paid fair market value for all the shares and assets, reflecting, we must assume, the value of past subsidization."[2164]

7.243 In our view, the fact that the purchaser of a subsidized producer pays fair market value to acquire that producer indicates that the acquisition transaction itself was not on terms more advantageous than those that would have been available to the purchaser on the market for comparable investment opportunities, and therefore did not involve a (new) subsidy to the purchaser. However, we fail to see the relevance of the fact that a purchaser of a subsidized producer pays fair market value to acquire that producer to the question of the continued existence of a benefit conferred by the original provision of a financial contribution to the subsidized producer. The panel indicates that the new owner, having effectively "paid for" the benefit of any financial contribution previously provided to the producer would, as a profit-maximizer, ultimately recoup its investment in the privatized producer by obtaining a "market return" on the entirety of its investment in the privatized producer.[2165] We do not see why the fact that new owners may cause a previously subsidized producer to compete in a market-oriented manner should necessarily eliminate the benefit which that producer may nonetheless enjoy from prior financial contributions that were provided on non-market terms. Much will depend on the nature of the prior subsidization and the markets in which the producer competes. Indeed, the fact that "the owners' investment in the privatized company will be *recouped* through the privatized company providing its owners a market return on the full amount of their investment" suggests that the "benefit" conferred by prior financial contributions is ultimately not in fact "paid for" by the new owner.

7.244 In this regard, in assessing the existence of benefit on the basis of what a particular "recipient" can be said to "get for free", the panel appears to us to conflate the two different financial contributions (the financial contribution originally provided to the producer and the financial contribution involved in the sale of an interest in that firm to the new owner) and the two relevant markets according to which the benefit conferred by the respective financial contributions is to be assessed. As the Appellate Body has indicated, a financial contribution will only confer a "benefit" if it is provided on terms that are more advantageous than those that would have been available in the market.[2166] Article 14 of the SCM Agreement provides guidance as to how the relevant market should be identified.[2167] It is clear from the terms of Article 14 that the "relevant market" is related to the type of the financial contribution under consideration.[2168] A conclusion that, on a change in

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[2164] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.72.

[2165] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.60.

[2166] Appellate Body Report, *Canada – Aircraft*, para. 149.

[2167] Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea ("Japan – DRAMs (Korea)")*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, para. 173.

[2168] For example, Article 14(b) provides that a financial contribution in the form of a loan shall not be considered as conferring a benefit on the recipient firm unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a *comparable commercial loan* which the firm could actually *obtain on the market*. In other words, the terms of Article 14(b) suggest that the relevant "market" for assessing whether a benefit was conferred by a financial contribution in the form of a loan is a commercial loan market.

ownership of a subsidized producer, the "benefit" conferred by previous financial contributions is to be re-evaluated on the basis of whether the new owner acquired the producer on arm's length terms and for fair market value, appears to us to involve a re-evaluation of the benefit conferred by the original financial contribution provided to the producer based on a different market that is unrelated to that financial contribution; *i.e.*, the market in which the new owners compete, with other potential investors, to acquire the producer. It is not clear to us why, simply as a result of a change of ownership of the producer, the "relevant market" for re-assessing the benefit conferred by earlier financial contributions to a producer, whatever their original form and the original market benchmarks, should become the market of potential investors in the producer's equity securities or assets.[2169] The approach adopted by the panel in *US – Countervailing Measures on Certain EC Products* to determining the benefit in such circumstances therefore appears to us to be at odds with the approach to benefit contemplated in Article 14 of the SCM Agreement.

7.245 The United States argues that the consequence of accepting the European Communities' argument would be the constant extinction of subsidies provided to publicly traded corporations, opening a major loophole in the SCM Agreement that Members could not possibly have contemplated.[2170] The European Communities notes that it has not claimed that public trading in EADS shares has reduced the amount of any subsidy; it has instead, confined its extinction arguments to "significant sales by government, industry or institutional shareholders, analogous to the kinds of sales which have already been found to extinguish or reduce benefit from past financial contributions."[2171] The European Communities argues that the question whether sales of shares in a publicly traded corporation will reduce the amount of "benefit" conferred on that corporation for purposes of the SCM Agreement will depend on factors such as: whether the price of the shares fully reflects the residual value of any subsidy; whether the sellers and purchasers form part of an economic unit with the corporation or are revenue seeking investors; whether the sellers completely exit the corporation or continue to share ownership of the economic unit; and whether the former or new owners have other economic activities to which the benefit could be transferred.[2172]

7.246 We agree with the United States that, if one accepts the "principle" for which the European Communities argues; namely, that the sale of a producer at arm's-length and for fair market value presumptively removes any benefit conferred by financial contributions previously provided to that producer, there is no meaningful basis for distinguishing the transactions which the European Communities alleges have resulted in the extinction of a portion of the benefit conferred by financial contributions provided to the various Airbus-related entities in this dispute, on the one hand, from daily trading in the shares of a subsidized producer, on the other.[2173] Recognition of a principle according to which changes in the underlying ownership of a subsidized producer automatically or presumptively eliminate the benefit conferred by prior financial contributions to that producer where

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[2169] We are therefore unable to agree with the panel in *US – Countervailing Measures on Certain EC Products* that the market conditions under which privatizations occur "serve as a benchmark for assessing the benefit to the privatized producer, as envisaged by Article 14."; para. 7.72.

[2170] US, Comments on EC Answer to Panel Question 197, para. 177. The implications of re-evaluating the existence of "benefit" in the case of a partial change in ownership were discussed by the United States and the European Communities in *US – Countervailing Duties on Certain EC Products*, however, the panel in that case did not consider it necessary to address the issue; Panel Report, *US – Countervailing Duties on Certain EC Products*, para. 7.62.

[2171] EC, Answer to Panel Question 197, para. 225.

[2172] EC, Answer to Panel Question 197, para. 225. The European Communities notes that the Panel is not called upon to solve all possible problems or to promulgate general rules on these matters.

[2173] US, Answer to Panel Question 168, para. 214. Although the United States had raised the issue of changes in ownership of publicly traded corporations before the panel in *US – Countervailing Measures on Certain EC Products*, the panel considered it unnecessary to address the issue because all of the challenged determinations before it involved sales by a government of all or substantially all of their ownership interests in the relevant subsidized producers; at para. 7.62.

BCI deleted, as indicated **[***]**

the new owners can be said to have acquired their interest in the producer on arm's-length terms and for fair market value would, in our view, potentially eviscerate the subsidies disciplines of the SCM Agreement. This is particularly evident where the subsidized producer is a corporation whose shares are publicly traded.

7.247 For the foregoing reasons, we are unable to agree with the reasoning adopted by the panel in *US – Countervailing Measures on Certain EC Products.* Moreover, we do not consider that the reasoning of the panel in this respect was endorsed by the Appellate Body, beyond the specific facts and circumstances that were before it; namely, "a benefit resulting from a prior non-recurring financial contribution bestowed on a state-owned enterprise where, following a privatization at arm's length and for fair market value, the government transfers all or substantially all the property and retains no "controlling interest in the privatized producer.""[2174]

7.248 Therefore, in the context of these alternative findings, to the extent that prior reports of the Appellate Body support the conclusion that, in a dispute under Part III of the SCM Agreement, changes in the ownership of a subsidized producer give rise to a rebuttable presumption that the benefit conferred by prior subsidies is extinguished, we consider that this would only be where (i) benefits resulting from a prior non-recurring financial contribution, (ii) are bestowed on a state-owned enterprise, and (iii) following a privatization at arm's length and for fair market value, (iv) the government transfers all or substantially all the property and retains no controlling interest in the privatized producer.

7.249 The European Communities does not argue that the transactions that it alleges have resulted in the "extinction" of subsidies bestowed on Airbus SAS fulfil all of the above criteria. For example, the European Communities does not argue, much less demonstrate, that the transactions in question (with the exception of the stock exchange sales of EADS shares) were on arm's length terms.[2175] More significantly, none of the transactions in question involved transfers by a government of all or substantially all of a state-owned producer, including a complete relinquishment of control. It is clear that the public offerings of shares in Aérospatiale-Matra and EADS were not transactions in which the governments in question retained "no controlling interest in the privatized producer."[2176]

7.250 We are unable to agree with the European Communities' argument that the compliance Panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* extended the extinction "principle" to "graduated and partial sales undertaken in tranches rather than single-event changes of

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[2174] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 117; Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.62.

[2175] The concept of "arm's length" is not defined in the SCM Agreement. However, the compliance panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* considered various dictionary definitions of the term, all of which highlighted the independence of parties in arm's length transactions; paras. 7.133-7.134. We are not persuaded, on the basis of the evidence presented to us, that any of the transactions to which the European Communities refers in paragraph 7.204 (other than the stock exchange sales of EADS shares) were "arm's length" transactions.

[2176] Although the French government sold a portion of its shares in Aérospatiale-Matra to the public in 1999, it retained (directly or indirectly) a shareholding of approximately 48 percent. Moreover, the French government exercised control over Aérospatiale-Matra through a shareholders' agreement with Lagardère (which held 33 percent of the shares of Aérospatiale-Matra immediately after the public offering) in addition to holding a so-called "Golden Share" (*action spécifique*) giving it special veto rights. Similarly, the French government and DaimlerChrysler continued to control the operations of Airbus Industrie following the public offering of shares in the newly formed EADS in 2000. Immediately following the public offering of shares in EADS, 60 percent of the share capital of EADS was held in equal proportions by SOGEADE (in which the French state held a 50 percent interest) and DaimlerChrysler, which jointly controlled EADS through a contractual partnership, in which the Spanish government (through SEPI) also exercised voting rights; EADS Offering Memorandum, Exhibit EC-24, p. 132.

control".[2177] We recall that the compliance Panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* considered the consistency of the USDOC's new privatization methodology and its application to three sunset review re-determinations with Article VI:3 of GATT 1994 and Articles 10, 14, 19.4, 21.1 and 21.3 of the SCM Agreement. One of the privatizations at issue was the French government's privatization of Usinor, which occurred in incremental stages over a three year period through four types of share offerings to four different classes of purchasers.[2178] The USDOC had separately considered the sales transactions pertaining to the four different categories of share offerings, and applied its new privatization methodology to each of the four categories of share offerings in order to evaluate whether the sales transactions in each share offering occurred at arm's-length and for fair market value. In response to the European Communities' argument that the original panel had discussed the arm's length and fair market value factors in the context of the privatization of a firm as a whole, the compliance panel found that there was nothing in the original panel's report that would require an investigating authority to examine the conditions of a privatization by looking at the *company as a whole*.[2179] The compliance panel concluded that it did not consider the USDOC's segmented analysis of the French government's privatization to be unreasonable given the circumstances of the privatization and found that it was applied in a transparent manner.[2180] We are unable to find anything in the compliance panel's reasoning or report that purports to extend or modify the express holding of the Appellate Body by suggesting that transactions in which a government transfers less than all of substantially all of the privatized producer or retains a controlling interest in the privatized producer are presumed to extinguish the benefit conferred by financial contributions provided to that producer.[2181]

[2177] EC, SNCOS, para. 59.

[2178] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.107. The offerings were to each of the following groups (i) French resident nationals and European Communities or European Economic Area nationals in France; (ii) current and qualifying former employees of Usinor throughout the world; (iii) stable shareholders comprising various institutional investors, both public and private; and (iv) the general public in the French and international financial markets. The USDOC had determined that the Usinor privatization was at arm's length and for fair market value with the exception of the employee/former employee offering, which constituted 5.16 percent of the sale.

[2179] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.117-7.118.

[2180] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.119, 7.122.

[2181] We note that the reasoning of the panel in *US – Countervailing Measures on Certain EC Products* itself does not support the extension of the "extinction" principle for which the European Communities contends to cases of partial, rather than full, changes of ownership of a subsidized producer. We recall that the panel's analysis was based on the following legal conclusions: First, the benefit conferred by a financial contribution provided to the subsidized firm (which translates into increased profitability) is commensurate with the benefit conferred by that financial contribution on the subsidized firm's owners (in the form of improved returns on the investment in the subsidized firm), so the existence of "benefit" should be based on an assessment of the benefit to the "recipient" (in the sense of the owners of the subsidized firm and the subsidized firm *together*); and second, the new owner of the subsidized firm has effectively paid for the value of the subsidy as part of the fair market price paid, so there can be no "benefit" remaining in the "recipient" owner-firm unit. The second conclusion can only be valid where there has been a complete sale of a subsidized firm; *i.e.*, where new owners *replace* old owners. This is because, in the case of a "partial" sale of a firm, the "recipient" in the above analytical framework would, presumably, be the subsidized producer *plus* the new owner *plus* the existing (selling) owner, as this existing owner would continue to be an owner (although with a reduced interest in the firm) following the transaction. From the perspective of this "recipient" owner-firm unit, there would be no change in the net benefit when a new owner purchases a part of a firm for fair market value because the fair market value paid by the new owner for its interest in the firm (a sum which would include a proportionate value of the subsidization) is paid to the selling owner and thus remains with the "recipient" owner-firm unit. Where there is a new issuance of shares in a subsidized firm, rather than the sale by an owner of less than all of its equity in a producer, the fair market value of the equity interests paid by new subscribers (a sum which, according to the analytical framework adopted by the panel in *US – Countervailing Measures on Certain EC Products*, includes a proportionate value of the subsidization) is paid to the firm, and thus also remains with the "recipient" owner-firm unit.

BCI deleted, as indicated **[***]**

7.251 Moreover, certain of the transactions identified by the European Communities at paragraph 7.204 were not transfers of ownership interests by a government, but by private persons. The European Communities contends that the "extinction" principle applies equally in the case of private-to-private sales. In particular, the European Communities refers to a statement by the Appellate Body in *US – Countervailing Measures on Certain EC Products* that the fact that a sale is a privatization *weakens* the conclusion that the benefit of prior subsidies is always extinguished, noting that while a conclusion that a benefit has been extinguished "may be defensible in the context of transactions between two private parties taking place in reasonably competitive markets", it should not give rise to an irrebutable presumption in the context of a privatization.[2182] According to the European Communities, the Appellate Body's statement suggests that in private-to-private sales, where it is less likely that the sale price could be influenced by the seller's intervention in the market, an arm's-length sale for fair market value *can* be irrebutably presumed to extinguish the benefit of prior subsidies.

7.252 We do not consider that this can be what the Appellate Body intended. As we have already discussed, a principle that subsidies bestowed on a producer are extinguished whenever there is a change in ownership of the producer would potentially eviscerate the subsidies disciplines of the SCM Agreement. Moreover, we have difficulty understanding, in the abstract, how a government's capacity to influence the market in which the sale of the subsidized producer occurs impacts the question of the continued existence of the "benefit" conferred by a financial contribution previously provided to that producer. The former pertains to the question whether the sale transaction is actually for "fair market value" and thus whether any financial contribution provided by the transaction in which the government sold its interest in the subsidized producer conferred a benefit on the purchaser.

7.253 What arguably distinguishes privatizations from private-to-private sales, however, is the implications of a change from state to private ownership. As the panel in *US – Countervailing Measures on Certain EC Products* observed, a privatization is a very particular and complex change in ownership, which involves a fundamental transformation of a government-owned and controlled entity into a privately-owned, market-oriented company.[2183] Following a privatization, there is no longer an identity (in a legal or economic sense) between the authority bestowing the subsidy on the producer, the owner of the subsidized producer and the subsidized producer itself.

7.254 It may even be possible to characterize a privatization as the "realization" by a Member of the market value of its "investments" in a particular enterprise. We note that the panel in *US – Countervailing Duties on Certain European Communities Products*, recognized the unique nature of privatizations in this regard:

> "Furthermore, since the fair market value paid to the state-owned producer is deemed to include (*de facto*) the value of the advantage or benefit already received, the Panel considers that the privatization transaction for fair market value includes the repayment to the government of the subsidy as valued by the market at the time of privatization." [2184]

7.255 We would, therefore, reject the European Communities' argument that the reports of the panels and Appellate Body in *US – Lead and Bismuth II* and *US – Countervailing Duties on Certain European Communities Products* established a "principle" that an arm's-length, fair market value sale of all or part of a subsidized producer, whether by a government or private owner, presumptively extinguishes the benefit (or a portion thereof) conferred by prior financial contributions provided to that entity. Accordingly, we consider that there is no basis for finding that the transactions specified

[2182] Appellate Body Report, *US – Countervailing Duties on Certain EC Products*, para. 124.
[2183] Panel Report, *US – Countervailing Duties on Certain EC Products*, para. 7.60.
[2184] Panel Report, *US – Countervailing Duties on Certain EC Products*, para. 7.72.

BCI deleted, as indicated **[***]**

in paragraph 7.204 of this Report extinguish or otherwise reduce the "benefit" to Airbus SAS conferred by financial contributions provided to Airbus Industrie or Airbus SAS.

7.256 We now turn to the European Communities' related argument, that the "extraction" of cash from a subsidy recipient can, in certain circumstances, "extinguish" a portion of the "benefit" conferred by financial contributions previously provided to the recipient, and the additional argument that such "extractions" nonetheless amount to the withdrawal of a subsidy pursuant to Articles 4.7 and 7.8 of the SCM Agreement.

(e) Extraction of benefit and withdrawal of subsidies

(i) Introduction

7.257 The European Communities argues that two transactions that occurred in conjunction with the formation of EADS in 2000 had the effect of "extracting" or removing a portion of the benefit conferred by any financial contributions that may have been provided to Dasa and CASA. The European Communities also argues that the cash "extracted" as a result of these two transactions can be regarded as "withdrawals" of the equivalent value of previously provided subsidies for purposes of Articles 4.7 and 7.8 of the SCM Agreement.

7.258 The transactions that involved the so-called "cash extractions" are (i) the retention by DaimlerChrysler, as shareholder of Dasa, of cash and cash equivalents immediately prior to the transfer by Dasa of its LCA-related assets and activities to EADS;[2185] and (ii) the retention by SEPI (as the shareholder of CASA) of cash and cash equivalents immediately prior to CASA's combination in EADS.[2186] The so-called "extractions" formed part of the series of transactions leading to the combination of Aérospatiale-Matra, Dasa and CASA in 2000 to form EADS and were a consequence of the Airbus partners' agreement that the activities of Aérospatiale-Matra, Dasa and CASA in the aeronautics, space and defence sectors would be contributed to EADS in return for shares representing agreed proportions of interests in EADS.[2187] By way of background, the European Communities explains that the transactions occurred because the "value" of Dasa's LCA-related assets and

[2185] The United States challenges the accuracy of the European Communities' assertion that the Dasa "cash extraction" amounted to EUR **[***]**; US, Comments on EC's Answer to Panel Question 200, para. 207. The United States notes that the EADS Offering Memorandum states that, as part of the implementation of the agreements regarding the creation of EADS, "Dasa cash and cash equivalents" of EUR 1,749 million were to be "retained by DaimlerChrysler"; Exhibit EC-24, pp. F-12 (Note G) and F-79. According to the United States, the figure of EUR **[***]** appears to be based on a description in the EADS Offering Memorandum of the internal reorganization of Dasa in which all of the assets and liabilities of Dasa, other than certain excluded assets, were contributed to a Dasa subsidiary which Dasa would then contribute to EADS. One group of "excluded assets" (*i.e.*, assets retained by *Dasa*) was "a cash amount of Euro 3,133 million"; Exhibit EC-24, p. 142.

[2186] According to the EADS Offering Memorandum, SEPI extracted an amount of EUR 340 million from CASA "by way of distribution of reserves and reduction of capital". The cash extraction corresponding to CASA's shareholders other than SEPI amounted to EUR 2.45 million; EADS Offering Memorandum, dated 9 July 2000, Exhibit EC-24, p. 143.

[2187] The legal steps through which the LCA operations conducted by the Airbus partners through Airbus Industrie were consolidated under EADS and then reorganized under Airbus SAS are set forth in Section VII.E.1 Attachment, following para. 7.289. Although the European Communities refers to the "contribution of Dasa to EADS", the evidence before us indicates that the entity Dasa was not itself contributed to EADS. Dasa remained a subsidiary of DaimlerChrysler and a *shareholder* of EADS; EADS Offering Memorandum, dated 9 July 2000, Exhibit EC-24, p. 143. Prior to the EADS combination, the LCA-related assets and activities of Dasa were reorganized into various subsidiaries, including (i) a subsidiary called DaimlerChrysler Aerospace Beteiligungs GmbH, which held 99.99 percent of the shares in DaimlerChrysler Aerospace Airbus GmbH, which in turn held 37.9 percent of the membership rights in Airbus GIE; and (ii) a subsidiary called EADS Deutschland GmbH, to which various other assets and liabilities of Dasa were contributed. These Dasa subsidiaries were then contributed to EADS.

BCI deleted, as indicated **[***]**

activities, and of CASA, each as contributed to EADS, needed to reflect the corresponding percentage interests that DaimlerChysler and the Spanish government were to hold in EADS.[2188] As a result, DaimlerChrysler (as the shareholder of Dasa) and SEPI (as the shareholder of CASA) retained cash and cash equivalents of Dasa and CASA, respectively, so that the adjusted values of the Dasa and CASA contributions to EADS reflected the respective proportionate interests of DaimlerChrysler and the Spanish government in EADS (*i.e.*, 37.3 percent and 6.2 percent) that had been agreed upon by the Airbus partners.

(ii) Arguments of the Parties

European Communities

7.259 The European Communities submits that an economically analogous situation to one in which the benefit or advantage conferred by a financial contribution is "extinguished" by the arm's-length, fair market value purchase of a subsidized producer, is where cash is "extracted" from a subsidized producer "in a manner that ensures that it is no longer used to advantage production in the industry at issue".[2189] In support of this argument, the European Communities submits that the decisions of the panels and Appellate Body in the *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* are founded on "economic common sense – that a company's value reflects the residual value of any subsidies it may have received"[2190] and that, based on this proposition, where the residual value of a subsidy is removed from a company, the value of that subsidy is correspondingly reduced.[2191] According to the European Communities:

> "In economic terms, the position of the entity from which cash is extracted is no longer improved in any sense by the prior subsidization. As such, it no longer enjoys the enhanced ability to compete or to generate returns for its shareholders. Consistent with economic common sense, such 'cash extraction' from a recipient such that it no longer enjoys prior advantage, is necessarily also a form of elimination of benefit within the meaning of the SCM Agreement."[2192]

7.260 The European Communities argues that the transactions in which cash from Dasa and CASA was "extracted" by their respective shareholders (DaimlerChysler and SEPI) prior to the contribution of Dasa and CASA to EADS, "reduce any subsidy benefits in CASA and Dasa up to the full amount of the extraction".[2193] According to the European Communities, it is appropriate to regard those transactions as involving "value drawn away" from those entities and therefore cash retained by the shareholders of those entities for activities unrelated to LCA production. Specifically, the European Communities argues that (i) the extraction by DaimlerChrysler of **[***]** from Dasa, by way of the retention of cash and cash equivalents;[2194]and (ii) the extraction by SEPI (the entity through which the Spanish government held its stake in CASA) of EUR 342 million from CASA, by way of distribution of reserves and reduction of capital,[2195] reduced by a corresponding amount any subsidy "benefit" that Dasa and CASA, respectively, may have enjoyed as of July 2000.[2196]

[2188] EC, FWS, paras. 253-254.
[2189] EC, FWS, para. 224.
[2190] EC, Answer to Panel Question 112, para. 317.
[2191] EC, Answer to Panel Question 112, para. 317.
[2192] EC, FWS, para. 225.
[2193] EC, FWS, para. 263.
[2194] As previously indicated, the United States considers the relevant amount to be only EUR 1,749 million; US, Comments on European Communities' Answer to Panel Question 200, para. 207.
[2195] A further EUR 2.4 million was retained and distributed to CASA's shareholders other than SEPI.
[2196] EC, FWS, para. 255.

BCI deleted, as indicated **[***]**

7.261 The European Communities contends that, prior to these transactions, DaimlerChrysler was the sole shareholder of Dasa, and the Spanish government (through its holding company SEPI) was the sole shareholder of CASA. According to the European Communities, following the transactions, DaimlerChrysler and SEPI effectively became minority owners of the assets of Dasa and CASA respectively, because their interests in those assets came to be held indirectly through their shareholding in EADS, which (from 2001 onwards) held interests in Airbus SAS, which in turn, held the interests in the LCA-related assets and activities of Dasa and CASA (as Airbus Deutschland and Airbus España, respectively).[2197] The European Communities contends that DaimlerChrysler and SEPI thus "had a strong disincentive to re-inject the extracted cash into EADS, because doing so would require that they share it with each other and all other EADS shareholders, rather than keeping it to themselves."[2198]

7.262 In addition, the European Communities argues that the repayment or "extraction" of a subsidy constitutes a withdrawal of a subsidy for purposes of Articles 4.7 and 7.8 of the SCM Agreement. The European Communities contends that, although the Dasa cash extraction did not "repay" to the German government subsidies that had been provided to Dasa or Deutsche Airbus by the German government or other German government granting authorities, the "benefit" of those subsidies has, nonetheless, been removed or taken away. The European Communities argues that such removal or taking away, while not a "repayment" as such, is a form of "withdrawal" of a subsidy under Articles 4.7 and 7.8 of the SCM Agreement.[2199]

7.263 On the other hand, the European Communities argues that the CASA "extraction" *is* clearly a repayment to the Spanish government of previously conferred subsidies and therefore constitutes a withdrawal of those subsidies pursuant to Articles 4.7 and 7.8.[2200] The European Communities contends that it does not matter whether the Spanish government specifically received the cash from CASA as the "repayment" of prior alleged subsidies as such (*i.e.*, in its capacity as grantor of those alleged subsides), or as a distribution of dividends (*i.e.*, in its capacity as a shareholder of CASA). According to the European Communities, "drawing subsidized value away from CASA still amounts to withdrawal of prior subsidies, because it amounts to "removing" or "taking away" the incremental contribution of alleged prior subsidies to the value of the company."[2201]

United States

7.264 The United States argues that the European Communities' "extraction" theory is inconsistent with one of the basic tenets of the decisions of the panels and Appellate Body in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products*, which is that subsidized entities and shareholders should ordinarily be considered as a single "recipient" for purposes of the SCM Agreement. The United States contends that the European Communities' argument that cash is removed from the subsidized entity when it is paid to that entity's shareholder shows that the European Communities is actually treating the subsidized entity and its shareholder as distinct from each other.[2202] The United States contends that the European Communities' "unsubstantiated assertion" that the Spanish government and DaimlerChrysler would have a strong disincentive, as minority shareholders in EADS, to re-inject the extracted cash into EADS is insufficient justification for breaking the shareholder-company unit for purposes of this aspect of the subsidy analysis.[2203] Moreover, the United States argues that accepting the European Communities' argument would make

[2197] EC, Answer to Panel Question 199, para. 242.
[2198] EC, Answer to Panel Question 199, paras. 241-243.
[2199] EC, Answer to Panel Question 200, para. 247.
[2200] EC, SNCOS, para. 6.
[2201] EC, Answer to Panel Question 200, para. 251.
[2202] US, Comments on EC Answer to Panel Question 199, para. 197.
[2203] US, Comments on EC Answer to Panel Question 199, para. 203.

BCI deleted, as indicated **[***]**

it a relatively simple matter to artificially "extract" subsidies in connection with a non-arm's length sale of a company in which the selling shareholder retains a controlling interest. This would be accomplished by the shareholder attributing more cash to the subsidized entity before "extracting" it.[2204]

7.265 The United States also disputes the European Communities' assertion that the transfer of funds or other assets by the recipient of a subsidy to an entity other than the granting authority can constitute the "withdrawal" of the subsidy for purposes of the SCM Agreement. According to the United States, Articles 4.7 and 7.8 are not drafted in the passive voice; they do not require merely that the subsidies shall be withdrawn. Rather, they require that the *subsidizing Member* withdraw the subsidy in the sense that the "Member must affirmatively do something by "remov{ing}" or "taking away" the subsidy."[2205]

(iii) Evaluation by the Panel

Cash "extractions" and the extinction of benefits conferred by prior financial contributions

7.266 The European Communities' argument that the "extraction" of cash from Dasa and CASA prior to the contribution of those entities to EADS extinguished a portion of the benefit conferred on Airbus SAS by financial contributions provided to those entities rests on the same approach to Article 5 of the SCM Agreement as the European Communities' extinction argument; namely, that in order for a subsidy to be potentially capable of causing adverse effects within the meaning of Article 5, a complaining Member must have demonstrated that a subsidy which is found to exist additionally confers a present or "continuing" benefit on a recipient. We have already indicated that we reject this approach to evaluating claims of adverse effects under Article 5 of the SCM Agreement.[2206] We consider our findings in this regard sufficient to resolve the issue. Nonetheless, and in the interest of ensuring a positive resolution of this dispute in the event our findings are reversed on appeal, we consider it appropriate to make alternative findings on the European Communities' arguments that, in the context of a claim under Part III of the SCM Agreement, the existence of a benefit conferred by a financial contribution provided to a recipient may, under certain conditions, be extinguished by a demonstration that the residual value of prior subsidization has been "extracted" from the subsidized recipient.

7.267 Accordingly, we set forth below our alternative findings on the basis of an interpretation of Article 5 that would require a complaining Member to establish not only the existence of a subsidy pursuant to Article 1.1 of the SCM Agreement, but also that the financial contribution confers a "present" or "continuing" benefit on the recipient, as a prerequisite to demonstrating that a Member has caused, through the use of that subsidy, adverse effects to the interests of another Member.

Alternative finding on cash "extractions"

7.268 We therefore consider whether the cash and cash equivalents retained by DaimlerChrysler and SEPI, the parent companies of Dasa and CASA, respectively, prior to the combination of Dasa's

[2204] US, Comments on EC Answer to Panel Question 199, para. 199. The United States also notes that the European Communities' extraction theory offers no reason why the value of the subsidies should be assumed to have been extracted (on a Euro for Euro basis) when cash is transferred to the shareholder. The United States notes that the European Communities' argument implicitly assumes that each Euro of cash extracted by DaimlerChrysler and CASA eliminates a Euro's worth of LCA subsidies, even though the value of Dasa and CASA prior to their contributions to EADS included more than the alleged subsidies they received (*e.g.*, retained earnings, non-subsidized contributions to capital, appreciated assets); US, Comments on EC Answer to Panel Question 199, paras. 200-202.

[2205] US, Answer to Panel Question 222, para. 292.

[2206] *See*, paras. 7.194 - 7.200.

aerospace-related assets and activities, and the shares of CASA, in EADS, can be considered to have "removed the incremental contribution of alleged prior subsidies to the value of" Dasa and CASA, and can be regarded as "extinguishing" the benefit to Airbus SAS conferred by prior financial contributions provided to Dasa and CASA.

7.269 The European Communities does not argue that every time cash leaves a company for reasons other than expenditure on production (*e.g.*, through payments of dividends to shareholders) it is appropriate to consider the benefit of prior financial contributions to that company to have been correspondingly diminished. Indeed, the European Communities posits that there are circumstances in which a cash extraction would not remove the benefit of a subsidy; namely, where the cash distribution would have occurred in the absence of the subsidy, or where the distribution constitutes nothing more than a "transfer of resources between a company and its sole owner, forming an economic entity", especially where the owner does not have other businesses to which the benefit could be transferred.[2207]

7.270 While agreeing with the United States that money that is simply moved from the company to the owner's pocket has not really left the company-shareholder unit, the European Communities observes that the Appellate Body in *US – Countervailing Measures on Certain EC Products* had rejected the panel's conclusion that, for purposes of the benefit determination under the SCM Agreement, no distinction should be drawn between a company and its owners.[2208] According to the European Communities, there may be instances where a shareholder's interest in a company changes to such an extent that, although it remains a shareholder, an extraction of cash from the company in favour of the shareholder "effectively moves the money beyond the reach of the "company-shareholder unit.""[2209]

7.271 We understand the European Communities to argue that, in order for a cash disbursement to reduce the benefit of prior financial contributions to a company, (i) there must be a causal relationship of some sort between the cash "extraction" and the subsidy and (ii) the "extraction" must effectively move the money beyond the reach of the "company-shareholder unit".[2210] We have difficulty accepting the proposition that a cash disbursement by a company reduces the benefit conferred by prior financial contributions to that company in the circumstances described by the European Communities. However, even if we were to accept, *arguendo*, that the benefit conferred by prior financial contributions could be reduced or eliminated by "extractions" of cash in the circumstances suggested by the European Communities, we do not consider that the Dasa and CASA "extractions" fall within those circumstances, and we would therefore reject the European Communities' arguments in any case.

7.272 The European Communities argues, in accordance with the two requirements it posits as relevant to determining when subsidy benefits will be extinguished by cash "extractions" that: (i) the incremental value of Dasa and CASA depended on the alleged subsidies (and could not have been extracted in the absence of those alleged subsidies); and (ii) the cash was removed from the company-shareholder unit in both cases because the interests of both DaimlerChrysler and the Spanish government in EADS following the combination were as minority shareholders in a larger entity (in which they could be presumed to have a "strong disincentive" to re-inject the extracted cash).

7.273 However, the European Communities has not provided any evidence to substantiate its assertion that the incremental value of Dasa and CASA could not have been extracted in the absence of the alleged subsidies. We are unconvinced by the European Communities' argument that, when

[2207] EC, Answer to Panel Question 198, para. 236.
[2208] EC, Answer to Panel Question 199, para. 240.
[2209] EC, Answer to Panel Question 199, para. 241.
[2210] EC, Answer to Panel Question 199, para. 241.

BCI deleted, as indicated **[***]**

cash was withdrawn from those entities in advance of their contribution to EADS, the payments "served necessarily to extract from the company any value it otherwise may have enjoyed, ensuring that any financial contribution at issue assuredly no longer conferred a benefit within the meaning of Article 1.1 of the SCM Agreement."[2211] As the United States observes, this reasoning assumes that the "extracted" cash represented the subsidies previously provided to Dasa and CASA, rather than contributions to a company's cash position from other (non-subsidized) sources.[2212]

7.274 As regards the second criterion, the European Communities argues that DaimlerChrysler and the Spanish government extracted the cash from Dasa and CASA while each was the sole shareholder of the relevant entity.[2213] Moreover, the European Communities argues that after extracting the cash, DaimlerChrysler and the Spanish government each sold the remaining assets of Dasa and CASA to EADS and "were no longer the sole shareholders of those assets".[2214] The European Communities contends that as minority shareholders of EADS (with DaimlerChrysler owning 30 percent of EADS and the Spanish government owning 5.5 percent of EADS), DaimlerChrysler and the Spanish government had a "strong disincentive to re-inject the extracted cash into EADS, because doing so would require that they share it with each other and all other EADS shareholders, rather than keeping it to themselves."[2215]

7.275 We consider this to be an incomplete and inaccurate assessment of the economic realities of the two transactions. Although the European Communities characterizes DaimlerChrysler as a "minority shareholder" in EADS following the contribution of Dasa's aerospace-related assets and activities to EADS, DaimlerChrysler and a grouping of the French government, Lagardère and French financial institutions were to jointly control EADS through a contractual partnership, to which the Spanish government, through SEPI, was also a party.[2216] The former "owners" of the aeronautics-related assets and activities of Dasa and CASA (*i.e.*, DaimlerChrysler and the Spanish government, respectively), were to jointly control the new "owner" of those assets and activities (EADS and subsequently Airbus SAS) through the EADS contractual partnership, to which both Dasa and SEPI were parties.[2217] Although the EADS transaction altered the legal ownership of the aeronautics-related assets and activities of Dasa and CASA, it was structured so as to maintain the overall interests of DaimlerChrysler and the Spanish government *in Airbus Industrie as a whole*.[2218] Therefore, considered from the perspective of the economic unit engaged in the production of Airbus LCA, we reject as a factual matter the assertion that the cash "extractions" by DaimlerChrysler and the Spanish government moved the cash out of the "company-shareholder unit".

[2211] EC, Answer to Panel Question 112, para. 320.

[2212] US, SWS, para. 542.

[2213] As a factual matter, the evidence presented to us indicates that the Spanish government was not the sole shareholder of CASA. At the time of the EADS transaction, Dasa owned 0.71 percent of the shares in Casa, which it contributed to EADS; EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, page. 142.

[2214] EC, Answer to Panel Question 199, para. 242. We assume that the European Communities uses the term "assets" in a general sense to refer to the LCA-related assets and operations of Dasa and CASA. The evidence before us indicates that the Spanish government exchanged its *shares* in CASA (not assets of CASA) for shares in EADS, while Dasa (rather than DaimlerChrysler) contributed shares in Dasa's reorganized subsidiaries and Dasa's shareholding in CASA to EADS in exchange for shares in EADS; EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, page. 140.

[2215] EC, Answer to Panel Question 199, para. 243.

[2216] EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, pp. 132-133.

[2217] *See,* Section VII.E.1 Attachment, following para. 7.289.

[2218] Rather than holding and exercising their membership interests in Airbus Industrie directly through subsidiaries such as Dasa and CASA, DaimlerChrysler (through Dasa) and the Spanish government (through SEPI) were members of a contractual partnership that exercised voting rights in respect of 65.48 percent of the outstanding shares of EADS. As a practical matter, the nature of control that DaimlerChrysler and the Spanish government exercised over the LCA activities of Airbus through EADS was substantially the same as the control that they had previously exercised over the LCA activities of Airbus as members of the Airbus Industrie consortium.

BCI deleted, as indicated **[***]**

7.276 Thus, even assuming *arguendo* that a cash disbursement by a subsidy recipient could potentially reduce the benefit conferred by prior financial contributions to that recipient under the conditions specified by the European Communities, we do not consider that the Dasa and CASA "extractions" satisfy those conditions. As a result, we would ultimately reject the European Communities' "extraction" arguments even if we were to accept the European Communities' more general arguments as to the conditions under which the benefit conferred by prior financial contributions provided to a subsidized producer could be reduced or eliminated by "extracting" cash from that producer.

7.277 It is not necessary for us to decide on the merits of the European Communities' more general arguments as to whether, and if so, the conditions under which, the benefit conferred by prior financial contributions provided to a subsidized producer could be considered to have been reduced or eliminated by "extracting" cash from that entity. However, we make the final observation that in *US – Countervailing Measures on Certain EC Products*, the Appellate Body acknowledged that a financial contribution provided to the owners of a firm may nonetheless confer a benefit upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of the GATT 1994.[2219] This being so, it is difficult to see how a firm could eliminate a subsidy simply by transferring funds to its owners.[2220]

Cash "extractions" and the "withdrawal" of subsidies within the meaning of Articles 4.7 and 7.8 of the SCM Agreement

7.278 We now consider whether the cash and cash equivalents retained by DaimlerChrysler and SEPI, respectively, prior to the combination of Dasa's aerospace-related assets and activities, and the shares of CASA, in EADS, can be treated as being equivalent to the "withdrawal" of subsidies to Dasa or CASA within the meaning of Articles 4.7 and 7.8 of the SCM Agreement.[2221]

7.279 In relation to the so-called "extraction" of cash from Dasa which the European Communities contends is equivalent to the withdrawal of a subsidy, we note that the cash and cash equivalents were retained by DaimlerChrysler (*i.e.*, Dasa), and were not transferred to the German government. The European Communities indicates that it is not arguing that the cash "extraction" by DaimlerChrysler constitutes the "repayment" of subsidies granted to Dasa and Deutsche Airbus by the granting authority; *i.e.*, the German government.[2222] However, the European Communities contends that there are circumstances in which the transfer of funds or other assets by the recipient of a subsidy to an entity *other than the granting authority* could nevertheless constitute "withdrawal" of the subsidy for purposes of the SCM Agreement.[2223] Such circumstances would include, the European Communities contends, distributions of cash from a previously-subsidized firm to the owners of that firm, provided the transfer results in the removal of the "incremental value contributed to the recipient by the subsidy."[2224]

7.280 According to the United States, "withdrawal" of a subsidy requires the subsidizing *Member* to affirmatively act to remove or take away the subsidy. The United States notes that, although the Panel in *Australia – Automotive Leather II (Article 21.5 – US)* found that repayment of a subsidy by the recipient was one way to "effectuate withdrawal of the subsidy by a subsidizing Member", the

[2219] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 115.

[2220] In this regard, the United States observes, correctly in our view, that to find that subsidies are "extracted" by a transfer of money from a subsidized firm to its owner would be to create opportunities for the laundering of subsidies; US, SWS, para. 549.

[2221] EC, FWS, paras. 253-254; EC, Answer to Panel Question 200, paras. 248-249.

[2222] European Communities, confidential oral statement at the second meeting with the Panel ("EC, SCOS"), para. 5.

[2223] EC, Answer to Panel Question 222, para. 558.

[2224] EC, Answer to Panel Question 222, para. 559.

BCI deleted, as indicated **[***]**

"repayment" in question was a payment back to the granting government, with the government providing nothing in return.[2225] The United States notes also that its interpretation of "withdraw" for purposes of Article 4.7 and 7.8 does not exclude other ways in which Members may come into compliance with the SCM Agreement; for example, under 7.8 of the SCM Agreement, a Member whose use of subsidies has been found to cause adverse effects may also "take appropriate steps to remove the adverse effects." In addition, the United States contends that the sale of a subsidized entity at arm's length for fair market value involving all or substantially all of the entity could result in the "extinction" of subsides, and thus be a situation which would "obviate the need for a Member to take further action to come into compliance with its SCM Agreement obligations."[2226]

7.281 The "withdrawal" of a subsidy is the remedy envisaged by Article 4.7 (in relation to prohibited subsidies) and one of two possible remedies available under Article 7.8 (in relation to actionable subsidies). In *Australia – Automotive Leather II (Article 21.5 – US*), the Panel found that a recommendation to "withdraw the subsidy" provided for in Article 4.7 of the SCM Agreement is not limited to prospective action, and may encompass repayment of the prohibited subsidy.[2227]

7.282 In *Brazil – Aircraft (Art. 21.5 – Canada)*, the Appellate Body analysed the meaning of the term "withdraw" in Article 4.7 of the SCM Agreement as follows:

> "{W}e observe first that this word has been defined as "remove", or "take away", and as "to take away what has been enjoyed; to take from." This definition suggests that "withdrawal" of a subsidy, under Article 4.7 of the SCM Agreement, refers to the "removal" or "taking away" of that subsidy.[2228]

In *Australia – Automotive Leather II (Article 21.5 – US)*, the Panel determined that the ordinary meaning of "withdraw the subsidy" in Article 4.7 could encompass "taking away" or "removing" the financial contribution that had been found to give rise to a prohibited subsidy.[2229]

7.283 We do not consider it necessary to address in detail the United States' arguments as to situations that would constitute the "withdrawal" of a subsidy for purposes of Articles 4.7 and 7.8 of the SCM Agreement. We are not persuaded by the European Communities' contention that a "withdrawal" of a subsidy could arise where a previously subsidized firm distributes cash to its owners *provided* the transfer results in the removal of the "incremental value contributed to the recipient by the subsidy". In any case, we do not consider that, as a factual matter, the Dasa cash "extraction" can be said to have "removed the incremental value" of subsidies granted to Dasa and therefore Airbus Industrie. As discussed earlier, given the circumstances surrounding the contribution of the LCA-related assets and activities of Dasa to EADS, and more particularly, the relationship between DaimlerChrysler, Dasa and Airbus Industrie prior to the "extraction", and DaimlerChrysler, Dasa, and EADS, immediately following the "extraction" and EADS contributions, we can see no basis for concluding that the "incremental value" of any subsidy granted to Dasa and therefore Airbus Industrie was removed by the cash "extraction".

[2225] US, Answer to Panel Question 222, para. 293.

[2226] US, Answer to Panel Question 222, para. 292, footnote 382.

[2227] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States* ("*Australia – Automotive Leather II (Article 21.5 – US)*"), WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189, para. 6.39.

[2228] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU ("Brazil – Aircraft (Article 21.5 – Canada)")*, WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067, para. 45.

[2229] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather ("Australia – Automotive Leather II")*, WT/DS126/R, adopted 16 June 1999, DSR 1999:III, 951, para. 6.27.

BCI deleted, as indicated **[***]**

7.284 We also reject the European Communities' withdrawal argument as regards the cash and cash equivalents retained by SEPI (as shareholder of CASA) prior to the contribution of CASA to EADS. The European Communities has acknowledged that a transfer of funds to a granting authority by the recipient of a subsidy should not be considered to be the "repayment" or withdrawal of a subsidy where: (i) "a granting authority provides something of equal value in exchange for cash or other assets from the recipient of a subsidy"; or (ii) the granting authority owns the subsidized entity and has not "left the company-shareholder unit".[2230] We consider that the CASA cash extraction clearly falls within *both* of the specific circumstances that the European Communities has itself identified as not resulting in the withdrawal of a subsidy for purposes of Articles 4.7 or 7.8.

7.285 First, the so-called "extraction" of EUR 340 million from CASA was made by SEPI in return for a reduction in the equity of CASA (in order to value CASA appropriately for purposes of its combination into EADS). In other words, the Spanish government (through SEPI) "provided something of equal value" (*i.e.*, the reduction of capital in its subsidiary CASA) in exchange for the cash from CASA. Second, based on the circumstances of the consolidation of the French, German and Spanish Airbus partners under EADS (in which SEPI continued to exercise the same control through the contractual partnership controlling EADS as it did through its membership interest in Airbus GIE held by CASA) we do not regard the "extracted" cash as having "left the company-shareholder unit" in any economically meaningful sense.

(f) Conclusion

7.286 In summary, for purposes of our assessment of the United States' claims under Article 5 of the SCM Agreement, we consider Airbus SAS to be the same producer of Airbus LCA as the consortium Airbus Industrie. We do not consider it necessary for the United States to affirmatively demonstrate the "pass-through" to Airbus SAS of the benefit conferred by financial contributions that had been provided to Airbus Industrie (including the Airbus partners and Airbus GIE and their affiliates) prior to 2001 in order to make out a *prima facie* case under Article 5 of the SCM Agreement.

7.287 Nor do we consider it necessary for the United States to demonstrate the "continuity" of benefits conferred by prior financial contributions provided to Airbus Industrie or Airbus SAS as a prerequisite to establishing that the European Communities has caused, through the use of a subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of the United States, pursuant to Article 5 of the SCM Agreement.

7.288 We therefore reject the European Communities' arguments (i) that the benefits conferred by certain financial contributions provided to Airbus Industrie or Airbus SAS have been extinguished by the series of allegedly arm's-length, fair market value transactions set forth in paragraph 7.204 of this Report; and (ii) that the so-called "extractions" of cash and cash equivalents of Dasa and of CASA, by DaimlerChrysler and SEPI, respectively, effectively extinguished a portion of the benefits previously conferred by financial contributions that had been provided to Dasa and CASA.

7.289 Finally, we reject the European Communities' argument that the retention of cash and cash equivalents of Dasa and CASA, by DaimlerChrysler and SEPI, respectively, constituted a "withdrawal" or "repayment" of subsidies previously provided to those entities within the meaning of Articles 4.7 and 7.8 of the SCM Agreement.

[2230] EC, Answer to Panel Question 222, para. 560.

BCI deleted, as indicated **[***]**

SECTION VII.E.1 ATTACHMENT: CORPORATE HISTORY OF AIRBUS

1. The Airbus Industrie consortium: 1970 - 2000[2231]

1. From its inception in 1970 until the creation of Airbus SAS in 2001, the "Airbus companies" were organized as a consortium of national European aerospace manufacturers. The Airbus consortium (Airbus Industrie) was originally established in 1970 as a *Groupement d'intérêt économique* (Airbus GIE) between the French aerospace manufacturer, Aérospatiale Société Nationale Industrielle (Aérospatiale)[2232] and the German aerospace manufacturer, Deutsche Airbus GmbH (Deutsche Airbus).[2233] The Spanish aerospace manufacturer, Construcciones Aeronáuticas S.A. (CASA) became a member of Airbus Industrie in 1971.[2234] British Aerospace Corporation, a United Kingdom aerospace manufacturer, subsequently joined the consortium in 1979.[2235]

2. Airbus Industrie was registered under French law as a "*Groupement d'intérêt économique*" (GIE) which is a French legal framework that allows its members to carry out collectively certain

[2231] For purposes of the following discussion, the term "Airbus Industrie" refers to the Airbus consortium; *i.e.*, Airbus GIE and the Airbus partners collectively. Where we refer to the legal entity Airbus GIE, separately from the Airbus partners, we use the term "Airbus GIE".

[2232] Aérospatiale was founded in 1970 through the merger of three French aerospace companies, Sud Aviation, Nord Aviation and Société d'Etudes et de Réalisation d'Engins Balistiques. It was owned directly and indirectly by the French government until its merger with Matra Hautes Technologies in 1998 to form Aérospatiale-Matra S.A. (Aérospatiale-Matra). The French government sold a portion of its shares in Aérospatiale-Matra in a public offering in 1999. In 2000, Aérospatiale-Matra joined with Dasa and CASA to form EADS. In connection with the formation of Airbus SAS in 2001, the LCA business of Aérospatiale-Matra was transferred to an Airbus SAS subsidiary, Airbus France SAS. Therefore, from 1998 until its liquidation in 2001, the French Airbus partner was Aérospatiale-Matra S.A. (Aérospatiale-Matra); EC, FWS, paras. 52-53.

[2233] Deutsche Airbus was founded in 1967 to assume work for the development of a European widebody aircraft that had originally begun in 1965 as a joint venture among five German companies: Blohm-Hamburger Flugzebau GmbH, Messerschmitt AG, Vereinigte Flugtechnische Werke (VFW), Siebel and Dornier. By 1969, the first three of these companies had merged to form Messerschmitt-Bölkow-Blohm GmbH (MBB); Exhibit EC-26. MBB originally held 60 percent of the interests in Deutsche Airbus, with Dornier and VFW each holding 20 percent. MBB took over VFW in 1981. Prior to Daimler-Benz AG acquiring control of MBB in 1989, the German federal states of Bavaria, Hamburg and Bremen held 52.3 percent of the capital stock of MBB; *Monopolkommssion* Report, Exhibit US-30, para. 138. In late 1989, as part of the German government's plans to restructure Deutsche Airbus, Daimler-Benz A.G. acquired control of MBB by merging its subsidiary Deutsche Aerospace AG (Dasa) with MBB. Deutsche Airbus has been a wholly owned subsidiary of Dasa since 1992. In 2000, Dasa merged with Aérospatiale-Matra and CASA to form EADS. In 2001, EADS transferred Dasa's LCA operations to an Airbus SAS subsidiary, Airbus Deutschland GmbH; EC, FWS, paras. 54-56.

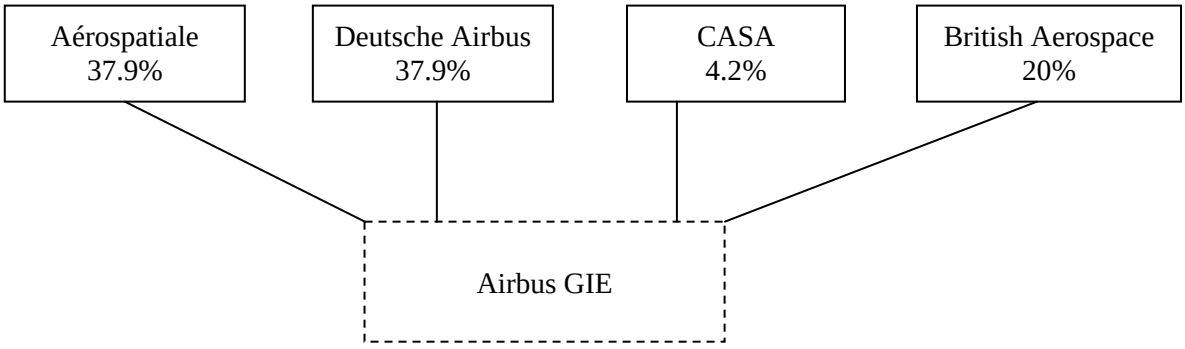
[2234] CASA was founded in 1923 and was Spain's largest aerospace and defence manufacturer. CASA was 99 percent owned by Sociedad Estatal de Participaciones Industriales (SEPI), a Spanish government holding company entrusted with the management and privatisation of certain Spanish government controlled companies. In 2000, CASA was merged into the EADS structure. In 2001, CASA's LCA activities were transferred to an Airbus SAS subsidiary, Airbus España SL; EC, FWS, paras. 57-58.

[2235] British Aerospace Corporation was formed in 1977 as a Crown corporation without shares, wholly owned by the United Kingdom government. Its formation was the result of the merger of the United Kingdom aerospace companies Hawker Siddeley Aviation Ltd, Hawker Siddeley Dynamics Ltd, Scottish Aviation Ltd and the British Aircraft Corporation (Holdings) Ltd. In 1981, the assets and business of the British Aerospace Corporation were transferred to the newly incorporated British Aerospace PLC, a United Kingdom publicly limited company. The United Kingdom government sold 51.57 percent of its shares in British Aerospace PLC in a public offering in 1981 and, subject to retaining a share to ensure that the company remained under United Kingdom control, sold the remainder of its shares in British Aerospace PLC in 1985. In 1999, British Aerospace PLC merged with Marconi Electronic Systems to become BAE Systems PLC (BAE Systems). In 2001, BAE Systems placed its LCA business into Airbus UK Limited in exchange for a 20 percent share in Airbus SAS; EC, FWS, paras. 59-61.

economic activities while maintaining their separate legal identities, and which does not have as its goal the retaining of profits. A GIE has a separate legal personality from its members, although in other respects, it resembles a partnership. For example, the sharing of Airbus Industrie's profits and losses among the Airbus partners is based on their membership rights.[2236] Through this partnership arrangement, the Airbus partners in France, Germany, Spain and the United Kingdom produced specific parts of Airbus LCA, which were then assembled in France by Aérospatiale.[2237] The entity Airbus GIE did not carry out any production activities; rather, it coordinated the production efforts of the Airbus partners, allocated revenues and profits to each of the partners and assumed responsibility for areas such as marketing, sales, aircraft delivery and customer service.

3. Between 1979 and 2000, the four members of Airbus Industrie (hereafter, the Airbus partners) held the following interests in the Airbus Industrie consortium (directly or indirectly, through various entities incorporated in the jurisdictions of the Airbus partners): Aérospatiale (37.9 percent); Deutsche Airbus AG (37.9 percent); CASA (4.2 percent); and British Aerospace PLC (20 percent).[2238] The structure of Airbus GIE from 1979 until 2000 is illustrated in the diagram below.

Corporate structure of Airbus Industrie from 1979 to 2000[2239]



[2236] *See*, GATT Panel Report, *German Exchange Rate Scheme for Deutsche Airbus* ("*EEC – Airbus*"), 4 March 1992, unadopted, *SCM*/142, para. 2.6.

[2237] By 1999, Aérospatiale was the partner responsible for flight control systems, cockpits, power plant integration, ground and flight testing, complex structural sections, equipped subassemblies and technical publications. DASA produced the major fuselage sections containing hydraulic equipment, secondary flight control systems, wing assemblies and commercial furnishing, as well as equipping the wings furnished by BAE Systems. DASA also carried out final assembly of A321 and A319 aircraft, as well as some cabin outfitting and customization of the cabins of the A300/A310 and the A320 family. BAE Systems was the partner in charge of the wings for the entire Airbus product line, and equipped wings for the A320 family by installing hydraulic, electrical and environmental control system hardware. CASA's role in the Airbus consortium was to produce the carbon fibre horizontal tails used in all Airbus aircraft, including integrated fuel tanks. CASA also designed fuselage panels and interior panels for the A320 family and produced nose and landing gear doors for the A300/A310 family and passenger doors for the A330/A340 family*; see* Aérospatiale-Matra Offering Memorandum, 25 May 1999, Exhibit EC-53, pp. 90-91.

[2238] Two other European aerospace companies, Fokker and Belairbus, participated in certain Airbus programmes as associated manufacturers, although they did not become partners in Airbus GIE.

[2239] In 1998, Aérospatiale merged with Matra Hautes Technologies to form Aérospatiale-Matra S.A.; see footnote 2054. In 1989, Daimler-Benz acquired control of Deutsche Airbus' parent company, MBB; see footnote 2055. In 1999, British Aerospace merged with Marconi Electronic Systems to become BAE Systems; see footnote 2057.

BCI deleted, as indicated **[***]**

2. Consolidation of the activities of the Airbus partners under EADS in 2000

4. In July 2000, the French, German and Spanish Airbus partners merged their activities in the aeronautic, space and defence sectors by contributing all of the shares of the subsidiaries of Aérospatiale-Matra and Dasa, respectively, and all of the shares of CASA, to the newly formed European Aeronautic Defence and Space Company EADS N.V. (EADS), a public limited liability company (*naamloze vennootschap*) organized under the laws of the Netherlands.[2240] Prior to these contributions, Aérospatiale-Matra and Dasa had each conducted internal reorganizations of the subsidiaries in which they held the assets and liabilities related to their Airbus-related and non-Airbus-related activities.[2241] The contributions were made in exchange for shares in EADS issued in proportion to the relative values of the respective contributions of Aérospatiale-Matra, Dasa and SEPI.[2242] Immediately following these transactions, approximately 60 percent of the share capital of EADS was held in equal proportions by DaimlerChrysler and SOGEADE,[2243] which jointly controlled EADS through a Dutch law contractual partnership.[2244]

5. Immediately following these transactions, EADS owned all of the subsidiaries of Aérospatiale-Matra and Dasa that had previously conducted the Airbus-related design, engineering, manufacturing and production activities located in France and Germany, and all of the shares of former Spanish Airbus partner, CASA. EADS also held (through its subsidiaries) the membership interests in Airbus GIE that had previously been held by Aérospatiale-Matra, Dasa and CASA. EADS in turn, was controlled, through a contractual partnership, by the former owners of Aérospatiale-Matra, Dasa and CASA. BAE Systems continued to hold its 20 percent interest in Airbus GIE.

[2240] Shares of EADS are listed on the Paris, Frankfurt and Spanish Stock Exchanges.

[2241] Aérospatiale Matra Airbus was the Aérospatiale-Matra subsidiary which held Aérospatiale Matra's Airbus-related assets and liabilities, including its 37.9 percent membership interest in Airbus GIE. Other Aérospatiale-Matra subsidiaries held assets that were not related to Aérospatiale-Matra's LCA activities, such as Aérospatiale-Matra's helicopter, defence, space transport, satellite and telecommunications businesses. Dasa's Airbus-related activities had been grouped into a subsidiary called DaimlerChrysler Aerospace Airbus Beteiligungs GmbH, which held a 99.99 percent of the shares of DaimlerChrysler Aerospace Airbus GmbH, which in turn held a 37.9 percent membership interest in Airbus GIE. Dasa separately held a direct 0.71 percent interest in CASA, which it also contributed to EADS pursuant to the combination transactions. Assets and liabilities relating to activities other than the Airbus-related activities were grouped into other Dasa subsidiaries, with the exception of (i) liabilities relating to Dornier aircraft; (ii) all claims and liabilities relating to the Fokker group; (iii) Dasa AG's participating interests in MTU, Temic Telefunken microelectronic GmbH and debis AirFinance B.V.; and (iv) a cash amount of Euro 3,133 million; EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, pp. 140-144.

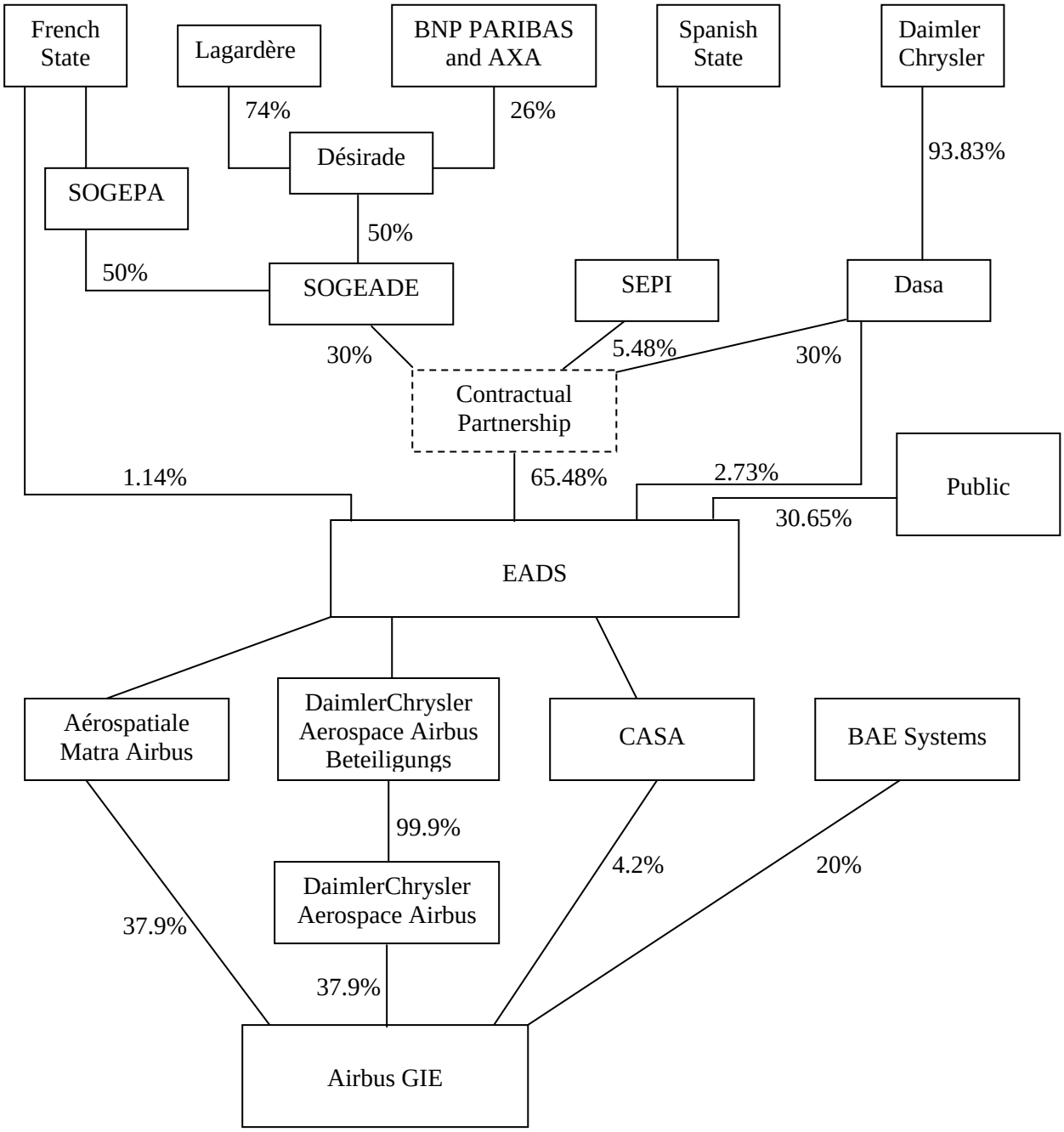
[2242] Aérospatiale-Matra was subsequently wound up, so that the EADS shares issued to Aérospatiale-Matra were distributed by Aérospatiale-Matra to its own shareholders simultaneously with the liquidation of Aérospatiale-Matra on the basis of one EADS share for every one Aérospatiale-Matra share. Simultaneously with these transactions, EADS issued shares, and the French government, Lagardère and the French financial institutions BNP PARIBAS and AXA sold EADS shares, in a public offering; EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, pp. 140-144.

[2243] Société de gestion de l'aéronautique, de la défense et de l'éspace (SOGEADE) is a French partnership limited by shares (*société en commandite par actions*). SOGEADE is 50 percent owned by the French government (through a French government-owned holding company, Société de Gestion de Participations Aéronautique (SOGEPA)) and 50 percent owned by Lagardère Group; EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, pp. 137-138.

[2244] SEPI's voting rights in respect of its 5.48 percent interest in EADS were also exercised through this contractual partnership; EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, p. 132.

BCI deleted, as indicated **[***]**

6. The ownership structure of EADS, and of the former Airbus partners and Airbus GIE, immediately following these transactions is represented below.[2245]



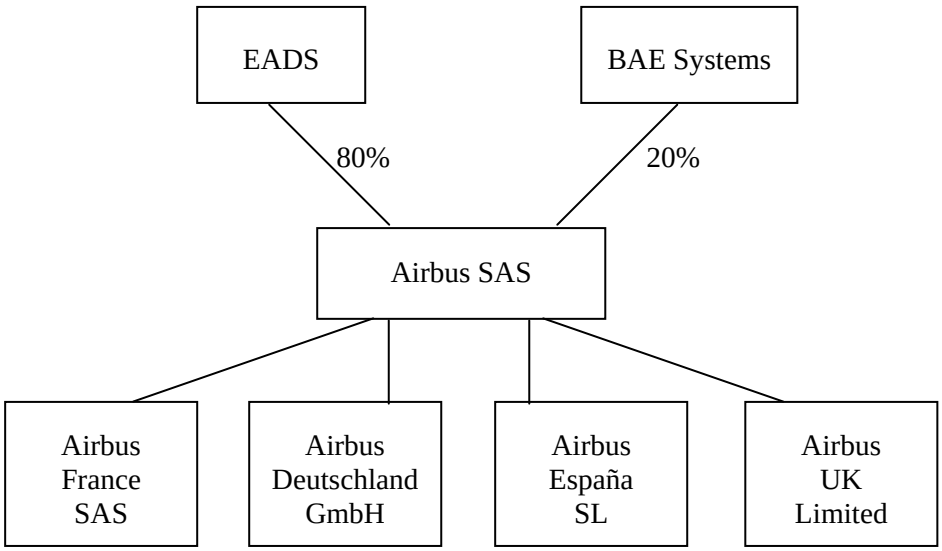
[2245] EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, p. 132. The portion of the diagram illustrating the ownership interests in Airbus GIE is compiled from information presented in the EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, at pp. 38, 65, 74, 141 and 142.

BCI deleted, as indicated **[***]**

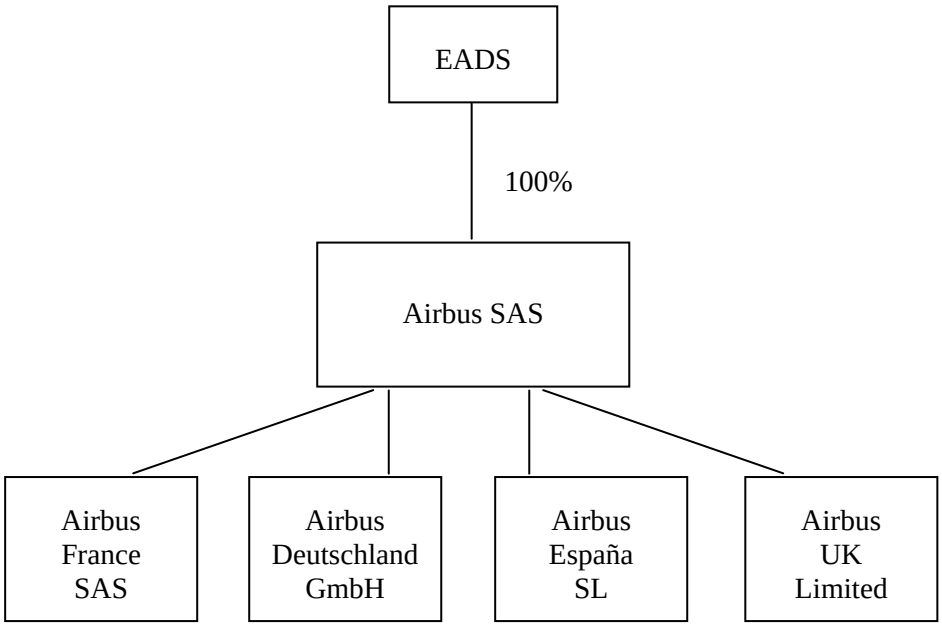
3. Termination of Airbus Industrie and integration of the activities of Airbus Industrie in Airbus SAS in 2001

7. In 2001, EADS and BAE Systems placed their Airbus-related design, engineering, manufacturing and production activities located in France, Germany, Spain and the United Kingdom (organized into French, German, Spanish and British operational companies, respectively), and all of their membership rights in Airbus GIE, under the common control of a newly-created holding company, Airbus SAS, a *société par actions simplifiée* under French law. EADS held an 80 percent interest in Airbus SAS (and had effective control over its operations) while BAE Systems, with the remaining 20 percent interest, enjoyed specific minority rights. Finally, in October 2006, EADS purchased BAE Systems' 20 percent interest in Airbus SAS, so that Airbus SAS became a wholly owned subsidiary of EADS.

Corporate structure of Airbus SAS from 2001 to 2006



Corporate structure of Airbus SAS since 2006



BCI deleted, as indicated **[***]**

2. Launch Aid / member State Financing

(a) Introduction

7.290 The United States challenges a form of LCA development funding, which it calls "Launch Aid" ("LA"), allegedly provided by four member States of the European Communities to Airbus over a period of 37 years from 1969 to 2006. According to the United States, LA is a form of highly preferential financing that amounts to a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement. The United States challenges the alleged provision of LA for the development of seven different models and three variants of Airbus LCA, as well as an alleged LA Programme implemented by the same EC member States. The alleged product-specific LA measures that are the subject of the United States' complaint are:

(i) LA for the A300, as evidenced by *inter alia*, the -

Agreement of 29 May 1969 between the Government of the Republic of France and the Government of the Federal Republic of Germany regarding the realization of the Airbus A-300-B ("1969 A300 Agreement");[2246]

Agreement of 23 December 1971 between the Governments of the Spanish State, the French Republic, the Federal Republic of Germany, and the Kingdom of the Netherlands concerning the realization of the Airbus A300B ("1971 A300 Agreement");[2247]

(ii) LA for the A310, as evidenced by *inter alia*, the -

Agreement between the Governments of the Federal Republic of Germany, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and Spain concerning the Airbus programme (the "1981 A310 Agreement");[2248]

(iii) LA for the A320, as evidenced by *inter alia*, the -

[2246] Exhibit US-11.

[2247] Exhibit EC-992 (BCI). Other documents evidencing LA/MSF for the A300 include: (i) 29 separate Agreements, Protocols and Conventions, and amendments thereto, between the French government and Aérospatiale, Exhibit EC-603 (BCI); and (ii) 16 separate Contracts and amendments thereto, between the Spanish government and Construcciones Aeronáuticas S.A., Exhibit EC-605 (BCI). Initially, the European Communities submitted a series of (German language) contracts, and amendments thereto, entered into between the German government and Deutsche Airbus GmbH, in respect of LA/MSF granted for the A300. Because of the amount of time the European Communities alleged it would take to translate all 661 pp. of these documents into English, the European Communities withdrew its original submission and replaced it with a shorter "model contract". EC Letter to the Panel of 15 May 2007. We understand the contract contained in this new Exhibit (EC-601 (BCI)) to be representative of the German LA/MSF contracts for the A300, including relevant amendments.

[2248] Exhibit EC-942 (BCI). Other documents evidencing LA/MSF for the A310 include: (i) 10 separate Protocols and Conventions between the French government and Aérospatiale, Exhibit EC-604 (BCI); and (ii) eight separate Contracts and amendments thereto, between the Spanish government and Construcciones Aeronáuticas S.A., Exhibit EC-606 (BCI). Initially, the European Communities submitted a series of (German language) contracts, and amendments thereto, entered into between the German government and Deutsche Airbus GmbH, in respect of LA/MSF granted for the A310. Because of the amount of time the European Communities alleged it would take to translate all 357 pp. of these documents into English, the European Communities withdrew its original submission and replaced it with a shorter "model contract". EC Letter to the Panel of 15 May 2007. We understand the contract contained in this new Exhibit (EC-602 (BCI)) to be representative of the German LA/MSF contracts for the A310, including relevant amendments.

BCI deleted, as indicated **[***]**

Final Contract for the termination and liquidation of the cooperation agreements between the Ministry of Industry, Trade and Tourism and Construcciones Aeronáuticas, S.A. relating to the provision of repayable funds for the financing of development costs for the Airbus A320, 1 September 1992 ("Spanish 1992 A320 contract");[2249]

Memorandum of Understanding between the French State and Aérospatiale Société Nationale Industrielle concerning the development of the Airbus A320, 8 July 1987 ("French A320 contract");[2250]

Allocation Contract between the Federal Republic of Germany and Deutsche Airbus GmbH for the implementation of the A320 development programme, 11 December 1985 ("German A320 contract");[2251]

Agreement A28B/385 of 21 March 1985 between H.M. Secretary of State for Defence and British Aerospace PLC for Launch Aid for the A320 Work Programme, ("UK A320 contract");[2252]

Agreement between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium concerning the programme Airbus A320, done in Bonn on 6 February 1991 ("1991 A320 Agreement");[2253]

(iv) LA for the A330/A340, as evidenced by *inter alia*, the -

Cooperation Agreement between the Ministry of Industry and Construcciones Aeronáuticas, S.A. relating to the provision of a repayable, interest-free advance for the financing of development costs for the Airbus A330/A340, 1 June 1988 ("Spanish 1988 A330/A340 contract");[2254]

Agreement AE12B/75 between the Secretary of State for Defence and British Aerospace PLC governing the investment by H M Government in the United Kingdom workshare of the Programme to Launch the A330 and A340 Aircraft, 1988 ("UK A330/A340 contract");[2255]

Memorandum of Understanding between the State and Aérospatiale concerning the programme A330/340, 26 March 1993 ("French A330/A340 contract");[2256]

[2249] Exhibit EC-93 (BCI). One of several earlier contracts entered into for the same purpose and referred to in this Exhibit was: Contrato de colaboración entre el Ministerio de Industria y Energía y Construcciones Aeronáuticas, S.A. para la aportacion de un anticipo reintegrable sin interes, con destino a la financiación de los gastos de desarrollo del nuevo avión Airbus A20, 28 February 1984 (hereinafter "Spanish 1984 A320 contract"), Exhibit EC-946 (BCI).

[2250] Exhibit EC-83 (BCI), as amended on the same day by Avenant au Protocole d'Accord entre l'État Français et l'Aérospatiale Société Nationale Industrielle concernant le développement de l'Airbus A320, 8 July 1987, Exhibit EC-945 (BCI).

[2251] Exhibit EC-95 (BCI). (Original German language title: Zuwendungsvertrag zwischen der Bundesrepublik Deutschland vertreten durch den Bundesminister für Wirtschaft und der Deutsche Airbus GmbH zur Verwirklichung des Entwicklungsprogramms AIRBUS A 320, 11 December 1985).

[2252] Exhibit EC-94 (BCI).

[2253] Exhibit US-16

[2254] Exhibit EC-84 (BCI), supplemented by a second contract: Contrato de colaboración entre el Ministerio de Industria y Energía y Construcciones Aeronáuticas, S.A. para la aportacion de un anticipo reintegrable sin interes, con destino a la financiación de los gastos de desarrollo del Airbus A330/A340, 30 July 1990 (hereinafter "Spanish 1990 A330/A340 contract"), Exhibit EC-947 (BCI).

[2255] Exhibit EC-86 (BCI).

BCI deleted, as indicated **[***]**

Agreement between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium concerning the program AIRBUS A330/A340 signed in Madrid on 26 July 1995 ("1995 A330/A340 Agreement");[2257]

(v) LA for the A330-200, as evidenced by *inter alia*, the -

Agreement between the signatory authority of the agreement acting on behalf and for the account of the State, on the one hand, and Aérospatiale, on the other hand, concerning the development of the Airbus A330-200, 28 November 1996 ("French A330-200 contract");[2258]

(vi) LA for the A340-500/600, as evidenced by *inter alia,* the -

Memorandum of Understanding between the State and Aérospatiale concerning the program A340-500 and A340-600, 15 January 1999 ("French A340-500/600 contract"),[2259]

Framework Cooperation Agreement between the Ministry of Industry and Energy and the company Construcciones Aeronáuticas S.A. on financing the participation of the said company in the development of the program Airbus A 340-500 and A 340-600 ("Spanish A340-500/600 contract");[2260]

(vii) LA for the A380, as evidenced by *inter alia*, the -

Agreement (of 20 March 2002) between the aeronautical program service (SPAé) as signatory authority of the agreement acting on behalf and for the account of the State, on the one hand, and the company Airbus France, on the other hand ("French A380 contract"),[2261]

Loan Contract between the Federal Republic of Germany, represented by the Federal Ministry of Economics and Technology, and Airbus Deutschland GmbH ("German A380 contract"),[2262]

Cooperation Agreement between the Ministry of Science and Technology (MCYT) and the company EADS Airbus S.L. on financing the participation of the said company in the development of the Airbus A-380 family program ("Spanish A380 contract"),[2263]

[2256] Exhibit EC-96 (BCI), which took into account payments made to Aérospatiale under three previous Conventions, including Convention No. 8890024 dated 9 December 1988, Exhibit EC-948 (BCI).

[2257] Exhibit US-28 (BCI). Although asked to provide a copy of the German LA/MSF contract for the A330/A340 in Panel Question 253, the European Communities did not do so. The European Communities instead referred the Panel to another document, Exhibit EC-887 (HSBI), which it asserts incorporated the same "repayment provisions" as the requested contract. Thus, the European Communities does not contest, and indeed, its Answer to the Panel's question recognizes, that the German government entered into a LA/MSF contract with Deutsche Airbus GmbH for the A330/A340.

[2258] Exhibit US-78 (BCI), also evidenced by Protocole d'Accord Entre L'État et Aérospatiale relatif au programme Airbus A330-200, 23 December 1996, Exhibit EC-90 (BCI).

[2259] Exhibits US-35 (BCI) and EC-91 (BCI), also evidenced by Convention (du 29 Décembre 1998) entre l'autorité signataire de la convention agissant au nom et pour le compte de l'Etat, d'une part, et Aérospatiale (hereinafter "French A340-500/600 convention"), Exhibit US-36 (BCI).

[2260] Exhibit US-37 (BCI); Exhibit EC-87 (BCI).

[2261] Exhibit US-116 (BCI).

[2262] Exhibit US-72 (BCI).

[2263] Exhibit US-73 (BCI).

BCI deleted, as indicated **[***]**

Agreement of 12 March 2000 between the Secretary of State for Trade and Industry; BAE Systems (Operations) Limited; and British Aerospace Public Limited Company ("UK A380 contract");[2264] and

(viii) LA for the A350.[2265]

7.291 The European Communities contests the United States' claims of subsidization on various grounds. In doing so, it asks the Panel not to refer to the challenged measures as "Launch Aid". According to the European Communities, the term "Launch Aid" is "suggestive and oversimplifying" and should therefore be replaced with what it considers is a more neutral term – "member State Financing" ("MSF").[2266] We have decided that for the purpose of evaluating the United States' claims, it is not necessary for us to take a view on the appropriateness of using one or other of the nomenclatures advanced by the parties. Thus, in the analysis that follows we refer to the challenged measures as "LA/MSF" or, when referring to a specific contract or measure, we use the relevant short titles, e.g., the "UK A380 contract" or the "A380 contract".

7.292 The parties' submissions on the question whether the challenged LA/MSF measures amount to specific subsidies give rise to two matters that we believe it is useful to resolve before proceeding to decide the merits of the United States' complaint under the provisions of the SCM Agreement.

7.293 The first matter relates to the question whether an alleged LA/MSF measure for the A350 existed at the time this panel was established. As noted in our preliminary ruling, we see this issue as involving a disputed question of fact that should be resolved in the context of our evaluation of the substance of the United States' claims.[2267] Thus, in the sections that follow, we begin our assessment of the United States' complaint by first turning to examine whether the alleged LA/MSF measure for the A350 existed at the time of the establishment of this panel, and whether any such measure amounts to a subsidy within the meaning of Article 1 of the SCM Agreement.

7.294 The second matter relates to another issue that was also, in part, addressed in our preliminary ruling, namely, the question whether it is appropriate to evaluate the legitimacy of LA/MSF contracts concluded prior to 1995 under the rules of the SCM Agreement. In our preliminary ruling, we rejected two of the arguments advanced by the European Communities in the context of this question, in particular, the submissions that LA/MSF measures pre-dating the entry into force of the SCM Agreement cannot be evaluated in terms of their compliance with the SCM Agreement because they: (i) do not fall within the temporal scope of Article 5 of the SCM Agreement; and (ii) were "grandfathered" under the 1992 Agreement.[2268] A third argument, that was not advanced in the European Communities' request for a preliminary ruling, is taken up after our assessment of the question relating to the alleged LA/MSF measure for the A350. This argument concerns the relevance of the 1979 Tokyo Round Subsidies and Countervailing Measures Code to our assessment of the legality of a number of LA/MSF measures pre-dating the entry into force of the SCM Agreement.

7.295 Thereafter, and with a view to evaluating the merits of the United States' claims on a measure-by-measure basis, we turn to examine the parties' arguments in respect of the extent to which the challenged LA/MSF measures are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

[2264] Exhibit US-79 (BCI).

[2265] The evidence the United States contends demonstrates the existence of a LA contract for the A350 is described and evaluated in the following section of this report.

[2266] EC, FWS, para. 289.

[2267] *See*, Section VII.C.2 above.

[2268] *See*, paras. 7.98 - 7.105 above.

BCI deleted, as indicated **[***]**

(b) The alleged LA/MSF Measure for the A350

7.296 Airbus launched the newest of its models of LCA, the A350, in December 2004.[2269] Press reports described the A350 as a "long-range, fuel-efficient version of Airbus' A330 airliner and a rival to the {Boeing} 7E7" (*i.e.*, the Boeing 787).[2270] The development cost of the A350 was initially budgeted at approximately EUR 4 billion.[2271] On 1 December 2006, just over one year after the industrial launch of the A350,[2272] Airbus launched a redesigned version of the A350. This new model of LCA was called the A350XWB, and like the A350, it was designed to be a long-range, fuel-efficient aircraft (featuring advanced technologies such as a "Carbon Fibre Reinforced Plastic panelled fuselage") intended to compete with Boeing's 777 and 787.[2273] Press reports indicated that the A350XWB would cost Airbus approximately EUR 10 billion.[2274]

7.297 The United States argues that, prior to the establishment of this panel, the French, German, Spanish and UK governments had each individually agreed to support the development of the A350 by lending Airbus "at least" USD 1,700 million in the form of LA/MSF.[2275] The United States characterizes LA/MSF as a particular form of long-term preferential financing granted to Airbus by the above-mentioned four EC member State governments for the development of each new Airbus model of LCA on unsecured, back-loaded, success-dependent and below-market interest rate repayment terms.[2276] The United States claims that the alleged A350 LA/MSF measure amounts to a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.

7.298 To substantiate its assertions in respect of the alleged A350 LA/MSF measure, the United States relies upon numerous press Articles and statements attributed to Airbus, the European Commission and government Ministers and officials reported in publicly available media sources, as well as a copy of the German government's "Federal Budget Plan" for 2005 and EADS' Financial Statements. These include the following examples:

> a report published by Bloomberg on 3 December 2004, quoting the German Economy and Labour Minister, Wolfgang Clement, as responding to a question asking "whether state subsidies for the Airbus A350 are already included in the budget" by answering "'Yes, of course.'"[2277]

[2269] EC, FWS, footnotes 57 and 58.

[2270] Laurence Frost, *Airbus Plans New Rival to Boeing's "Dreamliner"*, Associated Press & Local Wire (23 November 2004) Exhibit US-132.

[2271] *See*, e.g, Bundeshaushaltsplan (Federal Budget Plan) 2005, Budget Plan 09 (Economics Ministry), Chapter 02, Part 09, Item 870 93-634, Exhibit US-17MM; and Jean-Michel Belot and Tim Hepher, *Airbus A350 Unleashes New War with Boeing*, Reuters (10 December 2004) Exhibit US-139.

[2272] The industrial launch of the A350 took place on 7 October 2005. The commercial launch took place on 4 December 2004. *See*, e.g., Jean-Michel Belot and Tim Hepher, *Airbus A350 Unleashes New War with Boeing*, Reuters (10 December 2004) Exhibit US-139; and Robert Wall, *Airbus Gets Go-Ahead for A350*, Aviation Week & Space Technology (9 October, 2005) Exhibit US-47.

[2273] *See*, e.g., EC, FWS, para. 88.

[2274] *See*, e.g., Ross Tieman, *Airbus finds Pounds 6.7bn for wide-body jet*, The Evening Standard, (1 December 2006) Exhibit EC-671

[2275] In particular, the United States alleges that the German government committed at least EUR 390 million and possibly as much as EUR 650 million; the Spanish government at least EUR 110 million and possibly as much as EUR 130 million; and the UK government at least GBP 379 million. The United States asserts that the French government had also entered into a loan commitment, but that it had not publicly disclosed the amount. US, FWS, para. 305.

[2276] US, FWS, para. 306. A more detailed exposition of the United States' description of LA/MSF is provide in paras. 7.329-7.331 of this Report.

[2277] Claudia Rach, *Germany's Clement Comments on Regulator Law, Subsidies, EADS*, Bloomberg (3 December 2004), Exhibit US-446.

BCI deleted, as indicated **[***]**

a report published by *AFX News Limited* on 13 April 2005 quoting France's Transport Minister, Gilles de Robien, as saying that the French government was "again studying ... the A350 project within the framework of reimbursable loans";[2278]

a report published by *Agence France Press* on 19 May 2005 quoting European Commission spokeswoman, Francoise Le Bail, as stating that in the context of the A350 that "the launch investment is WTO legal and as things currently stand it is part of the commercial landscape for aircraft development in the EU";[2279]

a report in the 7 October 2005 edition of *The Associated Press – Business News* that Airbus CEO, Gustav Humbert, had stated that "Airbus has received 'legally binding' pledges of government aid to develop its new A350 plane";[2280]

a report in the 9 October 2005 edition of *Aviation Week* that "{a}ll four 'Airbus governments' – Britain, France, Germany and Spain – have set aside funds for such loans and expressed backing for the project in writing";[2281]

a report in the 21 October 2005 edition of *Cinco Días* that "El Ministerio de Industria español condicionó la financiación del desarrollo del A-350 con 110 millones de euros a que ...";[2282]

a statement found in EADS' 2005 "Financial Statements and Corporate Governance" indicating that "certain EU countries have already committed to fund the development of the A350 commercial aircraft program";[2283]

an entry in the 2005 German "Federal Budget Plan" ("Bundeshaushaltsplan") making a EUR 650 million provision for the A350 project;[2284]

a report in the 11 April 2006 edition of *Flight International* indicating that the UK Trade and Industry Secretary had reiterated that the UK government was "keen to do launch investment for the A350, as we did for the A380";[2285]

a report in the 6 July 2006 edition of the *Daily Post* (North Wales) recounting that "{t}he UK government has already said it will give £379m in repayable loans for the

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[2278] *France's Robien sees little risk for Airbus if subsidies case goes to WTO*, AFX News, FinanzNachrichten.de (13 April 2005) Exhibit US-138.

[2279] *EU backs new Airbus aid request, despite US opposition*, Agence France Presse (19 May 2005) Exhibit US-60.

[2280] *Airbus says government aid pledges are 'legally binding'*, Associated Press (7 October 2005) Exhibit US-48.

[2281] Robert Wall, *Airbus Gets Go-Ahead for A350*, Aviation Week & Space Technology (9 October 2005) Exhibit US-47.

[2282] Antonio Ruiz del Árbol, *Germany wants to steal part of Spain's manufacturing rights for the A-350*, Cinco Días (21 October 2005) Exhibit US-135.

[2283] EADS Financial Statements and Corporate Governance (2005), Registration Document - Part 1, Risk Factors, Availability of Government Financing, at 11, Exhibit US-77

[2284] Bundeshaushaltsplan (Federal Budget Plan) 2005, Budget Plan 09 (Economics Ministry), Chapter 02, Part 09, Item 870 93-634, Exhibit US-17MM.

[2285] Murdo Morrison, *EADS vows UK Airbus jobs secure*, Flight International (11 April 2006) Exhibit US-134.

BCI deleted, as indicated **[***]**

> A350 carbon composite wing work at the Welsh site and more may be needed with a major redesign of the jet on the cards";[2286]
>
> a report in the 19 April 2006 edition of *Cinco Días* that "{t}he {Spanish} Government will have to increase its investment in the plane's development costs in amount up to 130 million euros";[2287]
>
> a report in the 5 October 2006 edition of *Reuters Update* that "France has agreed to pay aid for the development costs of Airbus's A350 aircraft but will not pay anything immediately ...";[2288] and
>
> a report published by *AFP* on 9 March 2007 quoting Airbus Chief Executive, Louis Gallois, as stating that "{w}e are not putting away refundable launch investment".[2289]

7.299 The United States recalls that the European Communities refused to provide any information or documents on the alleged LA/MSF measure for the A350 during consultations or in response to the Facilitator's questions during the Annex V Process. It describes this refusal as an attempt by the European Communities to shield its measure from panel review.[2290] Nevertheless, the United States asserts that the publicly available information it has presented is sufficient to establish the existence of a challengeable measure for the A350 in the form of a "financial contribution" that "confers a benefit" upon Airbus, thereby constituting a subsidy within the meaning of Article 1.1 of the SCM Agreement. In particular, the United States submits that each of the alleged commitments to provide LA/MSF for the A350 is a "potential direct transfer of funds", within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement,[2291] which "confers a benefit" because: (i) "the very moment that the Airbus governments commit the Launch Aid, Airbus knows it will receive below-market financing for at least 33 percent of its development costs ... {and it} can then take that knowledge into account in its pricing decisions"; (ii) the commitment to provide LA/MSF "demonstrates to customers that the Airbus product line will be further extended"; and (iii) it "affects the perceptions of credit rating agencies, assuring them that a source of financial support is readily available".[2292]

[2286] David Jones, *Give Airbus Cash to Beat the Spanish*, Daily Post (North Wales) (6 July 2006) Exhibit US-133.

[2287] Antonio Ruiz del Árbol, *The changes in the A350 design will cost Spain 130 million*, Cinco Días (19 April 2006) Exhibit US-136. Other Articles and evidence referred to by the United States included: *Airbus CEO: 7E7 rival would have more seats*, Reuters (28 Sept. 2004) Exhibit US-131; Laurence Frost, *Airbus Plans New Rival to Boeing's "Dreamliner"*, *Associated Press & Local Wire* (23 November 2004) Exhibit US-132; Robert Wall, *A350 Faces Busy Time Until Industrial Launch*, Aviation Week & Space Technology (20 June 2005) Exhibit US-83; Kevin Done and Peter Spiegel, *EADS firm on launch aid for the A350*, Financial Times (14 Sept. 2005) Exhibit US-84; Jean-Michel Belot and Tim Hepher, *Airbus A350 Unleashes New War with Boeing*, Reuters (10 December 2004) Exhibit US-139; Robert Wall, Michael Mecham and Andy Nativi, *Counterattack; Airbus fights back. The manufacturer redefines A350, eyes 100-plus orders at Paris air show*, Aviation Week & Space Technology (23 May 2005) Exhibit US-140; Scott Hamilton, *A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge*, Leeham Co. LLP, at 1 (6 June 2006) Exhibit US-141; Jane Wardell, *Emirates airlines is looking at revamped Airbus A350XWB and Boeing Dreamliner*, Associated Press (17 May 2006) Exhibit US-142; Andrea Rothman, *Airbus to Spend $12 Billion to Develop A350 Jet, People Say (Update 1)*, Bloomberg (3 November 2006) Exhibit US-143; and Communiqué text, Airbus Ministerial meeting at Farnborough International (17 July 2006), reprinted in UK House of Commons Hansard Written Answers (24 July 2006) (pt. 1989, Column 1014W) Exhibit US-63.

[2288] *France clears A350 aid, no immediate payment*, Reuters (5 October 2005) Exhibit US-137.

[2289] AFP, *Airbus weighing up state-backed loans for A350: Gallois* (9 March 2007) Exhibit US-449

[2290] US, Answer to EC Preliminary Ruling Request, para. 40.

[2291] US, Answer to Panel Questions 2 and 4.

[2292] US, Answer to Panel Question 2.

BCI deleted, as indicated **[***]**

7.300 The European Communities rejects the United States' claim, arguing that no commitment of the kind alleged to exist by the United States was in place at the time of the establishment of this panel. At most, the European Communities submits that the only commitment that existed at the relevant time was a general in principle agreement to negotiate the terms of LA/MSF for the A350.[2293] However, the European Communities emphasizes that no interest rates, repayment schedules or other terms were ever actually agreed or committed and no funding contracts ever concluded.[2294] Furthermore, the European Communities asserts that not a single EUR of LA/MSF has been disbursed or scheduled for future disbursement in support of A350 development. Absent any agreement on the "price" at which A350 LA/MSF would be provided, the European Communities argues that "there is no basis for asserting that this hypothetical funding could have conferred a benefit".[2295]

7.301 A "subsidy" is defined in Article 1.1 of the SCM Agreement by reference to two discrete elements: a "financial contribution by a government or any public body within the territory of a Member" (Article 1.1(a)(1)) and the conferral of a "benefit" (Article 1.1(b)).[2296] It follows that in order for the United States' claim of subsidization to succeed, it must in the first instance establish that each of the alleged LA/MSF commitments for the A350 existed in the form of a "financial contribution" at the time that this panel was established, that is on 20 July 2005.[2297] Second, the United States must show that any such financial contribution "confers a benefit" upon Airbus. Thus, we start our evaluation of the United States' claim by reviewing the definition of "financial contribution" contained in Article 1.1(a)(1)(i) of the SCM Agreement, which reads:

> "For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), *i.e.*, where:
>
> (i) a government practice that involves a direct transfer of funds (e.g., grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g., loan guarantees)".

7.302 The United States considers that each the alleged financing commitments made by the four EC member State governments amounts to a "potential direct transfer{} of funds". Article 1.1(a)(1)(i)

[2293] EC, FWS, para. 358; EC, SWS, para. 132.

[2294] EC, FWS, para. 358.

[2295] EC, SWS, para. 132 and footnote 111.

[2296] It is also defined as "any form of income or price support in the sense of Article XVI of GATT 1994" (Article 1.1(a)(2)) that confers a "benefit" (Article 1.1(b)).

[2297] In *EC – Chicken Cuts*, the Appellate Body stated that "{t}he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel. However, measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference." Appellate Body Report, *EC – Chicken Cuts*, para. 156. We do not understand there to be any disagreement between the parties on the relevance of the general principle pronounced by the Appellate Body to the present set of circumstances. Indeed, the United States' claim against the alleged A350 measure involves arguments and factual circumstances that are distinctly different from those that confronted the Appellate Body in *EC – Chicken Cuts*, which focussed on the question whether two subsequent measures taken by the European Communities amended two original measures that fell clearly within the panel's terms of reference. Appellate Body Report, *EC – Chicken Cuts*, para. 158. Similarly, in *Chile – Price Band System*, an original measure was found to have been merely amended by a subsequent measure in such a way that did not change "its essence", thereby bringing the subsequent measure (adopted after the establishment of the panel) within the panel's terms of reference. Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Price Band System*"), WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473), para. 139.

defines a financial contribution as including "potential direct transfers of funds or liabilities (*e.g.*, loan guarantees)". The explicit identification of "loan guarantees" as an example of "potential direct transfers of funds or liabilities" is instructive for the purpose of understanding the types of measures that may constitute "potential direct transfers of funds or liabilities". A loan guarantee may be described as a legally binding promise to repay the outstanding balance of a loan when the loan recipient defaults on its repayments. Thus, it is the promise to repay an outstanding loan in the event of default that is the financial contribution (*i.e.*, the potential direct transfer of funds), not the funds that may be transferred in the future in the event of default.

7.303 Article 14(c) of the SCM Agreement establishes guidelines for calculating the amount of a subsidy in terms of the benefit conferred by a loan guarantee for the purpose of countervailing duty investigations. Although not intended to define the circumstances when a loan guarantee will confer a benefit in disputes involving Part III of the SCM Agreement, Article 14(c) does provide useful context for the present analysis. This provision describes the benefit of a loan guarantee as the difference in the amount that a recipient pays for a loan guaranteed by the government and a comparable commercial loan absent the loan guarantee:

> "a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;"

7.304 In our view, the fact that a loan guarantee will confer a benefit on a recipient when it enables that recipient to obtain the guaranteed loan at a below market price implies that the benefit of a potential direct transfer of funds arises from the *mere existence* of an obligation to make a direct transfer of funds in the event of default. Thus, when assessing whether a transaction involves a "potential direct transfer{} of funds", the focus should be on the existence of a government practice that involves an obligation to make a direct transfer of funds which, *in and of itself*, is claimed and capable of conferring a benefit on the recipient that is separate and independent from the benefit that might be conferred from any future transfer of funds. This can be contrasted with financial contributions in the form of direct transfers of funds, which will result in a benefit being conferred on a recipient when there is a government practice that involves a direct transfer of funds.

7.305 We recall that the United States considers that the alleged LA/MSF commitment for the A350 "confers a benefit" because (i) "the very moment that the Airbus governments commit the Launch Aid, Airbus knows it will receive below-market financing for at least 33 percent of its development costs ... {and it} can then take that knowledge into account in its pricing decisions"; (ii) the commitment to provide LA/MSF "demonstrates to customers that the Airbus product line will be further extended"; and (iii) it "affects the perceptions of credit rating agencies, assuring them that a source of financial support is readily available".[2298] In other words, the United States considers that it is the *commitment* to provide the alleged LA/MSF, and not the LA/MSF itself, which confers a benefit upon Airbus.[2299] As we see it, such a commitment (if it could be established as a matter of fact) might

[2298] US, Answer to Panel Question 2.

[2299] We note that, in its FWS, the United States' focus appeared to be on the alleged benefit accruing to Airbus from an actual grant of LA/MSF for the A350, as opposed to the benefit associated with a *commitment* to provide the alleged LA/MSF. US, FWS, paras. 308 and 309, where it states and refers to examples it contends demonstrate that "Airbus officials have already confirmed that the A350 Launch Aid will confer a benefit on Airbus". However, the United States clarified its position in its answers to Panel Questions 2 and 4, indicating that its complaint, including its arguments in respect of benefit, was focused on the alleged *commitment* to provide LA/MSF on the same essential terms and conditions as previous grants of LA/MSF.

BCI deleted, as indicated **[***]**

well amount to a potential direct transfer of funds in terms of Article 1.1(a)(1)(i) of the SCM Agreement. However, the facts advanced by the United States do not persuade us that a commitment to provide LA/MSF for the A350 *on the terms and conditions* asserted by the United States actually existed at the relevant time.

7.306 The evidence submitted by the United States to support its claim includes no letters of intent, loan contracts or other legally binding documents attesting to the alleged commitments or their content. Although one of the media reports the United States relies upon quotes Airbus' then CEO as stating in October 2005 that it had received "'legally binding' pledges of government aid to develop its new A350 plane", the same report also quoted the Airbus CEO as adding that "the details of this support should be and will be negotiated throughout the next two months".[2300] Likewise, the evidence relating to the provision made in the German government's 2005 budget plan suggests that it had made a commitment to support the development of the A350 with LA/MSF. However, it also makes clear that the precise terms and conditions of the financing were subject to negotiation, stating that the maximum "amount of the loan ... *under discussion*" at the time would be 33% of the "assumed" total development costs.[2301] We believe the message conveyed through the entry found in EADS' 2005 Financial Statements and Corporate Governance document indicating that "certain EU countries have already committed to fund the development of the A350 commercial aircraft program" should be understood in the same vein.[2302] In other words, at some point during 2005 (which the European Communities appears to accept pre-dated the establishment of this panel), the relevant EC member State governments each agreed to support the development of the A350, but the precise details and content of this support were still to be finalised in October 2005 and remained subject to negotiations. This is consistent with other evidence we have reviewed such as the report in the 9 October 2005 edition of *Aviation Week* that "{a}ll four 'Airbus governments' – Britain, France, Germany and Spain – have set aside funds for such loans and expressed backing for the project in writing".[2303] Thus, although a commitment on the part of the relevant EC member States to support the development of the A350 appears to have existed prior to 20 July 2005, the *precise details and content* of this support remained to be settled.

7.307 We recall that it is not merely an alleged commitment to provide government support of any kind that is the subject of the United States' complaint, but a commitment to provide a specific sum of money through LA/MSF granted for the development of Airbus LCA on unsecured, back-loaded, success-dependent and below-market interest rate repayment terms. To substantiate its assertion that it was LA/MSF of this kind that was committed by the EC member State governments, the United States advances evidence of reports and statements describing the support being considered as "reimbursable loans"[2304], "launch investment"[2305], "loans"[2306], "repayable loans"[2307] or "refundable

[2300] Exhibit US-48.
[2301] Exhibit US-17MM (English translation, emphasis added).
[2302] Exhibit US-77.
[2303] Robert Wall, *Airbus Gets Go-Ahead for A350*, Aviation Week & Space Technology (9 October 2005) Exhibit US-47. While the industrial launch of the A350 took place on 7 October 2005, Airbus was reported on 10 December 2004 to have already "won approval from its shareholders" to seek orders for the A350; and on 23 May 2005, it was reported that Airbus Chief Commercial Officer, John Leahy, had said that orders for the A350 would be approaching 200 by the end of 2005. The commercial launch of the A350 had therefore taken place well in advance of 20 July 2005, implying that all of the relevant EC member States governments were aware of Airbus' intentions and therefore in a position to provide commitments of in principle financial support before the establishment of this panel. Jean-Michel Belot and Tim Hepher, *Airbus A350 Unleashes New War with Boeing*, Reuters (10 December 2004) Exhibit US-139. Robert Wall, Michael Mecham and Andy Nativi, *Counterattack; Airbus fights back. The manufacturer redefines A350, eyes 100-plus orders at Paris air show*, Aviation Week & Space Technology (23 May 2005) Exhibit US-140.
[2304] Exhibit US-138.
[2305] Exhibits US-60 and US-134.
[2306] Exhibit US-47.

launch investment".[2308] In addition, it is apparent that the United States relies upon the arguments and evidence it has presented in respect of LA/MSF provided for Airbus' other models of LCA.[2309] However, in our view, this evidence is not enough to establish that, *as a matter of fact*, prior to 20 July 2005 the EC member States had committed to providing Airbus with the funding amounts identified by the United States on unsecured, back-loaded, success-dependent and below-market interest rate repayment terms. At most, the facts that are before us at most demonstrate that the EC member States had in principle agreed to provide Airbus with financial assistance for the A350 in the form of LA/MSF on terms and conditions *to be negotiated*.

7.308 As we explain in more detail in the following Sections of our Report,[2310] although the other instances of LA/MSF challenged by the United States in this proceeding share a number of key features, their terms and conditions are not identical. Moreover, there is nothing inherent in the nature of LA/MSF that renders it a form of financing that will *always* involve below-market interest rates. Indeed, for each of the individual grants of LA/MSF challenged by the United States for models of LCA other than the A350, the United States has presented a considerable volume of argument and evidence to support its claims on a *measure-by-measure* basis. The United States has not simply suggested that all such grants of LA/MSF involve below-market interest rates by their very nature.[2311] It follows that a commitment to provide LA/MSF on terms and conditions subject to negotiation, cannot be automatically equated, *as a matter of fact*, with a commitment to provide long-term financing on unsecured, back-loaded, success-dependent and below-market interest rate repayment terms. This implies that not only has the United States misunderstood the commitments made by the EC member State governments prior to 20 July 2005, but also that the commitments actually made could not have conferred the first of the three benefits alleged by the United States, namely, the assurance that Airbus "will receive below-market financing for at least 33 percent of its development costs".[2312] Obviously, in the absence of knowing the precise interest rate terms applicable on whatever LA/MSF was finally agreed, Airbus could not have known with certainty that it would have obtained below-market interest rate financing at the time of the commitments. Indeed, on the basis of the evidence before us, there is nothing to suggest that Airbus could have even been certain that the negotiations on the provision of LA/MSF would have been fruitful.[2313] In our view, a commitment to provide LA/MSF on undisclosed interest rate terms cannot, alone, confer a benefit of the kind the United States asserts to exist.

[2307] Exhibit US-133.

[2308] Exhibit US-449.

[2309] We address the United States' claims of subsidization in respect of each of the individual LA/MSF grants for all models of Airbus LCA preceding the A350 in the next section of our Report.

[2310] *See*, paras. 7.372, 7.375 and 7.525 below.

[2311] The United States has, however, argued that the European Communities applies a LA/MSF Programme (that involves the granting of long-term loans to Airbus for the development of each new model of LCA on unsecured, backloaded, success-dependent and below market interest rate terms) and that the existence of this alleged Programme amounts to a subsidy. We address this claim below at paras. 7.498 *et seq*.

[2312] In addition, we question whether mere knowledge that a loan will be issued at below-market interest rates is sufficient to establish that a commitment to provide the loan confers a benefit for the purpose of Article 1.1(b) of the SCM Agreement.

[2313] In this regard, we note it was reported on 1 December 2006 that Airbus was "expected" to obtain financing for the A350XWB (which replaced the A350 project) without accessing LA/MSF. Ross Tieman, *Airbus finds Pounds 6.7bn for wide-body jet*, The Evening Standard, (1 December 2006) Exhibit EC-671. Moreover, the European Communities has argued that British Aerospace did not avail itself of LA/MSF offered by the UK government for the A340-500/600 because of the "restrictive" number of aircraft sales over which UK authorities demanded repayment. Instead, British Aerospace chose to finance its share of the work tasks for this derivative model of LCA by taking out a loan with a private bank. *See*, e.g., EC, FWS, paras. 474 and 505-506.

BCI deleted, as indicated **[***]**

7.309 The United States considers that the commitment to provide LA/MSF also conferred a benefit upon Airbus, within the meaning of Article 1.1(b), because it "demonstrates to customers that the Airbus product line will be further extended"; and it "affects the perceptions of credit rating agencies, assuring them that a source of financial support is readily available". We have doubts about whether such effects, even if they could be substantiated, demonstrate that the commitment to provide LA/MSF for the A350, *subject to negotiation*, conferred a benefit.

7.310 Article 1.1(b) of the SCM Agreement does not define the notion of "benefit". However, it is well established that a "financial contribution" will confer a "benefit" upon a recipient when it places that recipient in a more advantageous position compared with the position of that recipient in the absence of the "financial contribution".[2314] In *Canada – Aircraft*, both the panel and the Appellate Body considered that the basis for making this comparison was the market. Thus, the panel observed that:

> "a financial contribution will only confer a 'benefit', *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market".[2315]

7.311 Similarly, the Appellate Body explained that:

> "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 on the market."[2316]

7.312 Thus, when examining whether the commitment to provide Airbus with LA/MSF on terms to be negotiated conferred a benefit, a comparison must be made between Airbus' situation with the commitment, and the situation that Airbus would have faced in the absence of the commitment. Although we can accept that it is highly probable that a commitment on the part of the EC member State governments to finance the development of the A350 on terms and conditions subject to negotiation signals "to customers that the Airbus product line will be further extended", the United States has not explained why such a demonstration might not also be probable in the light of a comparable financing commitment from the market. In this regard, we note that the United States does not suggest that Airbus could not have obtained financing for the A350 from the market. Indeed, as we have already noted in footnote 2313, a December 2006 press Article reported that at the time Airbus was "expected" to obtain financing for the A350XWB (which was to replace the A350) without accessing LA/MSF.[2317]

7.313 With respect to the perception of credit rating agencies, the United States has presented evidence in the form of a report published by Fitch Ratings agency in November 2006 which states that "launch aid {for the A350XWB} would be viewed favourably from a credit perspective". The first point to note about this statement is that it refers to "launch aid", without any explanation. It is

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[2314] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/R, adopted 20 August 1999, as upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443 para. 9.112, cited with approval in Appellate Body Report, *Canada – Aircraft*, para. 149.

[2315] Panel Report, *Canada – Aircraft*, para. 9.112; Appellate Body Report, *Canada – Aircraft*, paras. 157-158.

[2316] Appellate Body Report, *Canada – Aircraft*, para. 157.

[2317] In addition, we note that a 15 November 2006 report by FitchRatings indicates that Airbus was considering issuing "hybrid bonds" in order to finance the A350XWB project. Fitch Ratings, *Special Report – Diverging Flight Paths: Boeing and Airbus, Large Commercial Aircraft Update*, 15 November 2006, p. 6. Exhibit US-451.

therefore less than clear that Fitch Ratings is referring to a commitment to provide LA/MSF, *subject to negotiation*. In any case, in the same paragraph, Fitch Ratings reserves its view on the credit rating effect of another form of financing apparently being considered by Airbus at the time (hybrid bonds) because of a lack of information about the particular structure and amount of any such bonds. In other words, Fitch Ratings does not automatically discount the possibility that market financing (in the form of hybrid bonds) for the purpose of funding the development of the A350 might also have had a positive effect on EADS' credit rating.

7.314 Thus, in conclusion, after carefully reviewing the evidence and arguments advanced by the parties, we are not convinced that a clear and identifiable commitment to provide LA/MSF on the terms and conditions specified by the United States existed on the date of establishment of this panel. While the evidence we have examined does suggest that an in principle commitment on the part of the four EC member State governments to support the development of the A350 through LA/MSF did exist, this commitment did not take the form of LA/MSF on backloaded, success-dependent and below market interest rate repayment terms, as the United States alleges, but rather LA/MSF on terms and conditions subject to negotiation. The United States has therefore failed to demonstrate that the LA/MSF measure it challenges existed at the time of the establishment of this panel. Moreover, for the reasons we have outlined above, we consider that the commitments which did exist, did not confer any of the benefits the United States asserts were enjoyed by Airbus. Accordingly, we dismiss the United States' complaint against the alleged USD 1,700 million LA/MSF measure for the A350.

(c) Consistency of LA/MSF with the 1979 Tokyo Round Subsidies and Countervailing Measures Code

(i) Arguments of the Parties

European Communities

7.315 The European Communities submits that, pursuant to the inter-temporal rules of international law, a fact can only be properly assessed in the light of the law contemporaneous to it.[2318] It follows, according to the European Communities, that the legality of the LA/MSF contracts for the A320 and A330/A340, which were concluded between 1985 and 1993, must be determined in the light of the international subsidy disciplines in force at the time of their conclusion, namely, the 1979 Tokyo Round Subsidies and Countervailing Measures Code ("Tokyo Round Subsidies Code"). The European Communities maintains that the same inter-temporal rule is reflected in Articles 14(a) and 14(b) of the SCM Agreement, which it argues require that the existence and amount of subsidies must be established on an *ex-ante* basis, not an *ex-post* basis. In particular, the European Communities notes that Article 14(a) prescribes that the government provision of equity capital shall not be considered to confer a benefit unless the investment decision can be regarded as inconsistent with the usual investment practice *at the time the decision is made*, not at the time the investment decision is reviewed in dispute settlement proceedings. Similarly, the European Communities observes that the assessment envisaged under Article 14(b) requires a comparison between the cost of a government loan to a recipient and the cost of a comparable commercial loan *at the time the government loan is granted*.[2319] Thus, the European Communities contends that should any of the relevant LA/MSF

[2318] EC, Answer to Panel Question 61; EC, SWS, para. 145, referring in both cases to the pronouncement of Judge Huber in the *Island of Palmas Arbitration* that "{a} juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute with regard to it arises or falls to be settled", 2 R. Int'l Arb. Awards (1928) 829 at 845. Exhibit EC-672.

[2319] EC, Answer to Panel Question 61. (Emphasis added).

BCI deleted, as indicated **[***]**

measures "fall into the temporal scope of the SCM Agreement", they should "at least be assessed against the standards of the Tokyo Round Subsidies Code".[2320]

7.316 The European Communities recalls that the Tokyo Round Subsidies Code did not explicitly define a subsidy. However, the European Communities argues that guidance for understanding the types of measures that amounted to subsidies at the relevant time could be found in the "Illustrative List of Export Subsidies" contained in Code's Annex. In particular, the European Communities asserts that the general principle that could be drawn from the "Illustrative List" was that, at the time of the conclusion of the LA/MSF contracts for the A320 and A330/A340, a subsidy was limited to measures involving a cost to the granting government.[2321] The European Communities argues that such a measure cannot be found in the LA/MSF contracts for the A320 and A330/A340, which it contends were agreed on terms that secured returns to the governments that were not "manifestly inadequate" to cover their costs.[2322] Thus, according to the European Communities, the LA/MSF contracts for the A320 and A330/A340 complied with the relevant international subsidy disciplines that were in force at the time of their conclusion.

7.317 The European Communities submits that the Tokyo Round Subsidies Code remains in effect between the parties and is applicable to the assessment of the existence of subsidies in the civil aircraft sector granted prior to 1 January 1995 because of the cross-reference to Articles 8.3 and 8.4 of the Code that is found in Article 6.1 of the 1979 Agreement on Trade in Civil Aircraft.[2323] Moreover, although the European Communities recognizes that the Tokyo Round Subsidies Code is not a "covered agreement", the European Communities argues that it is nevertheless relevant to the present dispute because it falls within the scope of the "agreements" that parties are entitled to cite under the terms of Article 7.2 of the DSU.[2324] In any case, according to the European Communities, if the only international agreements that could be properly brought before a panel were the "covered agreements", all of the disputes in which the Appellate Body has referred to non-covered agreements would have been erroneously decided.[2325]

United States

7.318 The United States submits that there is no legitimate basis for the European Communities' assertion that the Panel must evaluate the relevant LA/MSF measures under the terms of the Tokyo Round Subsidies Code. The United States recalls that the Panel's task in this dispute is defined by its terms of reference, and that these require the Panel to examine the United States' claims in the light of the "covered agreements" cited in the panel request, which do not include the Tokyo Round Subsidies Code.[2326]

7.319 According to the United States, the "covered agreements" provide not only the basis for seizing the WTO dispute settlement system, but also the basis for resolving disputes. Thus, compliance with any non-covered agreement cannot be the subject of a panel's work in a dispute under the DSU. The United States maintains that this principle is expressed in Articles 7.1 and 11 of the DSU, which direct the Panel to resolve the matter before it on the basis of the relevant "covered agreements", not non-covered agreements.[2327] Moreover, the United States notes that it is panel findings and recommendations under the "covered agreements" that are envisaged under Articles 3.2,

[2320] EC, Answer to Panel Question 61.
[2321] EC, FWS, para. 384.
[2322] EC, FWS, para. 388.
[2323] EC, SWS, paras. 143-144.
[2324] EC, SWS, para. 146.
[2325] EC, SWS, para. 146.
[2326] US, FCOS, paras. 30-31; US, SWS, paras. 27-34.
[2327] US, SWS, para. 30.

3.4 and 19.1 of the DSU, not findings and recommendations in respect of non-covered agreements.[2328] Finally, the United States notes that the only place in the DSU that recognizes the relevance of non-covered agreements for the purpose of dispute settlement is Article 3.11. This provision stipulates that disputes for which consultation requests were made under the "GATT 1947 or any other predecessor agreement to the covered agreements" must be resolved through application of "the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement".[2329] According to the United States, the absence of any reference to non-covered agreements or "predecessor agreements" elsewhere in the DSU (apart from Article 8.1, which refers to "predecessor agreements" in the context of describing persons "well qualified" to serve on panels), confirms that such agreements are not relevant other than in the circumstances referred to in Article 3.11.[2330]

(ii) Evaluation by the Panel

7.320 The European Communities maintains that, pursuant to the inter-temporal rules of international law, the LA/MSF contracts for the A320 and A330/A340 cannot be assessed for compliance with the SCM Agreement, but must instead be measured against the standards of the Tokyo Round Subsidies Code, the international legal framework it asserts was in force when the challenged measures were adopted. When considered in this light, the European Communities contends that the LA/MSF contracts were in full conformity with the obligations on the European Communities and the relevant member States at the time of their conclusion. Thus, the European Communities asks the Panel to dismiss the United States' complaint. On the other hand, the United States argues that the European Communities' request finds no support in the DSU, which it submits makes clear that a panel can only rule on the consistency of challenged measures with the provisions of the WTO covered agreements. Because the Tokyo Round Subsidies Code is not a WTO covered agreement, the United States contends that there is no legal basis for any evaluation of the consistency of the relevant LA/MSF measures with the provisions of the Code.

7.321 The main question that is raised by the European Communities' defence is whether, in our evaluation of the United States' claims, we must, pursuant to the inter-temporal rules of international law, apply international subsidy disciplines that were in force at the time of the conclusion of the challenged contracts (the Tokyo Round Subsidies Code), or apply the rules in existence at the time of the present dispute (the SCM Agreement).

7.322 As we understand it, the doctrine of inter-temporal application of international law, as it was pronounced in the *Island of Palmas Arbitration*, has two elements: first, that acts should be judged in the light of the law contemporary with their creation; and second, that rights acquired in a valid manner according to the law contemporaneous with their creation may be lost if not maintained in accordance with changes in international law.[2331] Although doubts have been expressed about the status of the second element as a principle of international law,[2332] the first element, which is the

[2328] US, SWS, para. 31.
[2329] US, SWS, para. 32.
[2330] US, SWS, para. 32.
[2331] *Island of Palmas Arbitration*, 2 R. of Int'l Arb. Awards (1928) 829, 845. The doctrine, in one or more of its manifestations, also appears to have been applied in e.g., *The Grisbadarna Case*, 11 R. Int'l Arb. Awards 155 (1909); *The North Atlantic Coast Fisheries Case*, 11 R. Int'l Arb. Awards 167 (1910); *The Fisheries Case*, (United Kingdom v Norway), ICJ Reports 1951, p. 116; *The Minquiers and Encrehos case*, ICJ Reports 1953, p. 47; and *The Aegean Sea Continental Shelf Case*, ICJ Reports 1978, p. 3.
[2332] *See*, e.g., A. D'Amato, *International Law, Intertemporal Problems* in Encyclopaedia of Public International Law, 1992, pp. 1234-1236 at 1235; and P. C. Jessup, *The Palmas Island Arbitration*, (1928) 22 AJIL pp. 735-752, p. 740.

BCI deleted, as indicated **[***]**

foundation of the European Communities' argument, appears to have obtained wide acceptance.[2333] However, in the circumstances of the present case, we find the European Communities' reliance on this aspect of the doctrine to be misguided.

7.323 We recall that in our preliminary ruling, we concluded that Article 5 of the SCM Agreement establishes an obligation on Members not to cause adverse effects to the interests of other Members through the use of subsidies. In doing so, we dismissed the European Communities' contention that Article 5 does not apply to subsidies granted prior to 1 January 1995. In this light, the European Communities' reliance on the doctrine is misconceived.[2334] The very fact that Article 5 addresses adverse effects caused by the use of subsidies, which may have been granted prior to 1 January 1995, means that such measures must necessarily fall within the scope of the SCM Agreement and therefore be assessed on the basis of the rules of that agreement. In other words, because Article 5 of the SCM Agreement applies to pre-1995 subsidies that cause adverse effects after entry into force of the WTO Agreement, the doctrine of inter-temporal application of international law cannot operate to preclude the application of the SCM Agreement to such subsidies.

7.324 We are also not convinced by the European Communities' argument that the Tokyo Round Subsidies Code is relevant to the panel's evaluation of the United States' claims because, even though it is not a WTO covered agreement, it nevertheless falls within the scope of the "agreements" referred to in Article 7.2 of the DSU. In the first instance, we recall that the Tokyo Round Subsidies Code was terminated one year after the entry into force of the SCM Agreement.[2335] Second, it is clear to us that the word "agreements" in Article 7.2, which is joined to the words "covered agreement" that immediately precede it by the conjunction "or", refers to the plural of a "covered agreement". Therefore, it should not, as the European Communities suggests, be understood as referring to international agreements that are not WTO covered agreements. As we have already noted in our preliminary ruling, Article 7.2 does not give us jurisdiction to determine the rights and obligations of the parties under non-covered agreements for the purpose of the recommendations or rulings envisaged under Article 11 of the DSU.[2336] Such recommendations or rulings must relate to the parties' rights and obligations under the WTO covered agreements, not the rights and obligations of parties under international agreements that are not WTO covered agreements. Additional support for this view is found in Articles 3.2, 3.4 and 19.1 of the DSU, which, as noted by the United States, also envisage panel findings and recommendations in respect of WTO covered agreements, not non-covered agreements. There is therefore no legal basis to support the European Communities' contention that, in the context of the present dispute, the challenged measures must be evaluated under the terms of the Tokyo Round Subsidies Code.[2337]

[2333] *See*, e.g., T.O. Elias, *The Doctrine of Intertemporal Law*, (1980) 74 AJIL 2 pp 285-307; A. D'Amato, *International Law, Intertemporal Problems* in Encyclopaedia of Public International Law, 1992, pp. 1234-1236 at 1235; I. Brownlie, *Principles of Public International Law*, 5th Ed. 1998, pp. 126-128.

[2334] *See*, para. 7.64-7.65 above.

[2335] *See*, Article 3, *Decision on the Transitional Co-Existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization*, adopted by the GATT Committee on Subsidies and Countervailing Measures on 8 December 1994 (*SCM*/186); subsequently taken note of in the WTO Committee on Subsidies and Countervailing Measures at its meeting of 22 February 1995 (G/*SCM*/M/1).

[2336] *See*, 7.89 - 7.105 above.

[2337] In reaching this conclusion, we are not saying that non-covered agreements cannot be relied upon for the purpose of interpreting the rights and obligations of parties under the WTO covered agreements. (*See*, e.g., Appellate Body Report, *EC – Chicken Cuts*, paras. 195-199, where the Harmonized System was used as context for interpreting the European Communities' Schedule of tariff commitments.) However, in the present instance, the European Communities is not asking us to use the Tokyo Round Subsidies Code as interpretative context for one or more provisions of a WTO covered agreement. Rather, it considers that the Panel should

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7.325 Accordingly, for all of the above reasons, we dismiss the European Communities' submission that the LA/MSF contracts for the A320 and A330/A340 cannot be assessed for compliance with Article 5 of the SCM Agreement, but must instead be examined in the light of the 1979 Tokyo Round Subsidies Code.

(d) Whether each of the individual grants of LA/MSF for the A300, A310, A320, A330/A340, A330-200, A340-500/600 and A380 models of LCA constitutes a subsidy within the meaning of Article 1 of the SCM Agreement

(i) Arguments of the Parties

United States

7.326 The United States asserts that the governments of France, Germany, Spain and the UK have provided LA/MSF to Airbus for each new model and major derivative of Airbus LCA developed since 1969 – in particular, the A300, A310, A320, A330/A340,[2338] A330-200, A340-500/600[2339] and A380. The United States describes LA/MSF as a highly preferential form of loan financing that the EC member States designed and use to offset the costs and risks associated with the development of Airbus LCA. It submits that the "face value" of the combined amount of funding made available to Airbus through LA/MSF between 1969 and 2002 is approximately USD 15 billion.[2340] According to the United States, each one of the challenged LA/MSF grants evidences a "financial contribution" that confers a "benefit" on Airbus, and therefore amounts to a subsidy, within the meaning of Article 1.1 of the SCM Agreement.

Financial Contribution

7.327 The United States argues that each of the individual LA/MSF contracts involves a financial contribution in the form of a direct transfer of funds or a potential direct transfer of funds, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[2341] Specifically, the United States argues that the LA/MSF contracts for the A300, A310, A320, A330/340, A330-200 and the A340-500/600 constitute direct transfers of funds inasmuch as the funding amounts foreseen under those contracts have today been disbursed.[2342] As regards the LA/MSF contracts for the A380, the United States contends that these contracts evidence both direct transfers of funds and, to the extent that certain committed funding amounts have yet to be disbursed, potential direct transfers of funds.[2343]

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apply the substantive disciplines of the Tokyo Round Subsidies Code in order to determine the legality of the challenged measures for the purpose of this dispute.

[2338] The European Communities has explained that the notwithstanding the different characteristics and market profile of the A330 and A340, the basic versions of these LCA models are sometimes referred to collectively as the "A330/A340", reflecting the fact that they were launched at the same time. EC, FWS, footnote 53.

[2339] The European Communities points out that the A340-500/600 are in fact two different variants of the A340. However, because of their similarities, they are often referred to collectively as "A340-500/600". EC, FWS, footnote 53.

[2340] US, FWS, paras. 81 and 89; United States, non-confidentical oral statement at the first meeting with the Panel, (hereinafter "US, FNCOS"), para. 5; US, SWS, para. 1.

[2341] US, FWS, paras. 109, 173, 214, 236, 244, 254, 266, 274, 283 and 291.

[2342] US, Answer to Panel Question 4.

[2343] US, Answer to Panel Question 4.

BCI deleted, as indicated **[***]**

Benefit

7.328 Recalling certain observations of the Appellate Body in *Canada – Aircraft* and *US – Lead and Bismuth II*,[2344] the United States submits that a financial contribution will confer a benefit on a recipient, within the meaning of Article 1.1(b) of the SCM Agreement, when provided on terms better than those available to the same recipient in the market. The United States asserts that the financial contributions made available through the LA/MSF contracts confer a benefit on Airbus because they involve loans at interest rates that are substantially below what the market would demand for financing with similar characteristics.

7.329 The particular loan characteristics that are the focus of the United States' allegations are what it describes as the success-dependent, unsecured and back-loaded repayment terms that can be found in each of the challenged LA/MSF contracts. The United States argues that these particular features of LA/MSF transfer a large part of the "substantial risks"[2345] or "extremely high risks"[2346] associated with LCA development from Airbus to the EC member States; a transfer of risks which it contends is not properly accounted for in the level of interest rates charged for this type of financing.

7.330 The United States explains that, under the LA/MSF contracts, Airbus is required to make repayments through a levy on each delivery of the financed product. This levy is established as a fixed amount per aircraft over a specified number of deliveries. For example, a government providing EUR 1 billion for a new aircraft model might require Airbus to repay the financing, plus any return on the financing, via levies on the first 400 deliveries of the aircraft in question. Full repayment of the loan is therefore dependent on Airbus making 400 sales. However, according to the United States, because each loan is success-dependent and unsecured, the government has no recourse to obtain repayment if the expected 400 deliveries fail to materialize. Repayment is entirely dependent on the success of the particular LCA model to which the funding applies.[2347] The United States argues that this means that Airbus receives financing with the obvious benefit of no down-side risk. In other words, when Airbus launches a new aircraft programme, it knows from the outset that it is the government – and not itself – that is assuming the risk that the project will not generate enough sales to repay the government funds. If actual sales are less than expected, Airbus has no obligation to repay the government money.[2348]

7.331 Likewise, the United States argues that the LA/MSF lender governments assume a large part of the risks associated with LCA development by back-loading loan repayments. According to the United States, the EC member States back-load LA/MSF repayments in the following three ways: (i) by tying repayments to aircraft delivery; (ii) by allowing Airbus to make relatively small levy repayments on early deliveries of aircraft and progressively larger repayments on later deliveries; and (iii) by sometimes foregoing levies entirely on an initial tranche of deliveries. The United States argues that the effect of such repayment terms is to initially remove, and then subsequently minimize, the debt service burden on Airbus in the early years of its LCA programmes when costs are still high and revenues from first deliveries – typically highly discounted – are relatively low. In other words, the effect of back-loaded repayment terms is to delay repayment to a moment in the LCA business cycle that best suits Airbus' competitive needs.[2349]

[2344] US, FWS, para. 110, citing Appellate Body Report, *Canada – Aircraft*, para. 153 and Appellate Body Report, *US – Lead and Bismuth II*, para. 68.
[2345] US, FWS, para. 137.
[2346] US, FNCOS, para. 6.
[2347] US, FWS, para. 117.
[2348] US, FWS, para. 121.
[2349] US, FWS, paras. 125-128.

BCI deleted, as indicated **[***]**

7.332 The United States presents a simulation it argues quantifies the effect of the success-dependent and back-loaded repayment terms of LA/MSF on the profitability of LCA programmes.[2350] The United States argues that the results of this simulation demonstrate the extent to which such terms alter the risk/reward trade-off faced by an aircraft manufacturer by transforming net present value losses for an aircraft programme in scenarios in which fewer than the forecast number of deliveries are achieved, into net present value profits for the same programme. The United States maintains that the same simulation shows that, even in cases where the programme remains loss-making, LA/MSF significantly reduces the magnitude of the net present value loss suffered as a consequence of the failed programme.[2351] Furthermore, the United States submits that the simulation also indicates that the net present value of an aircraft programme supported by LA/MSF rises as repayments are increasingly back-loaded (both in terms of minimum numbers of deliveries before repayment obligations commence, and in terms of the "progressivity" of the repayment schedule). Thus, according to the United States, the further repayment is pushed out in time, the greater the commercial and financial benefit to Airbus.[2352]

7.333 Relying upon the conclusions reached in two studies commissioned from NERA Economic Consulting,[2353] the United States contends that the rates of return that a commercial investor would demand for project-specific loans with success-dependent, unsecured, back-loaded repayment terms comparable to those contained in the challenged LA/MSF contracts, would be well above what it asserts were the rates of return associated with each of the challenged measures. In particular, the United States submits that the interest rate differentials between the challenged LA/MSF measures and comparable market financing fall within the range of **[***]** and 24.52 percentage points.[2354] According to the United States, the European Communities' own market interest rate benchmarks arrive at the same conclusion, identifying only marginally smaller interest rate differentials.[2355]

7.334 The United States finds support for its view that the challenged LA/MSF measures confer a benefit on Airbus in the *Canada – Aircraft* dispute, where, the United States submits, financing that was virtually identical to LA/MSF was found to confer a benefit because of the non-commercial interest rates charged to the recipient.[2356] Moreover, the United States argues that both Airbus and the Airbus governments have conceded that LA/MSF confers a benefit. For instance, the United States identifies a line in **[***]**.[2357] The United States also quotes a number of government statements that it suggests explain the advantages of LA/MSF to Airbus.[2358] Finally, the United States contends that the view that LA/MSF confers a benefit upon Airbus is also substantiated by a series of EC State Aid

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[2350] Gary J. Dorman, *The Effect of Launch Aid on the Economics of Commercial Airplane Programs*, 6 November 2006 (hereinafter "Dorman Report"), Exhibit US-70 (BCI). Dr. Dorman is Senior Vice President and Chair of NERA's Global Anti-Trust Practice. His educational credentials include a PhD in Economics, University of California, Berkeley, and a BA, with High Distinction and High Honours in economics, University of Michigan.

[2351] US, FWS, para. 123.

[2352] US, FWS, para. 135.

[2353] NERA Economic Consulting (Dr David M. Ellis, Artur J. Bonifaciuk and Dr James Jordan), *Economic Assessment of the Benefit of Launch Aid*, 10 November 2006, (herinafter "Ellis Report"), Exhibits US-80 (BCI) and US-80 (HSBI), and NERA Economic Consulting, *Answer to Whitelaw Report*, 24 May 2007, (hereinafter "Ellis Answer to Whitelaw"), Exhibit US-534 (HSBI) and US-534a (BCI).

[2354] US, FWS, paras. 116-147 (LA/MSF generally); 178-185 (A300/A310); 195-205 (A320); 219-228 (A330/A340); 237-240 (A330-200); 245-250 and 255-257 (A340-500/600); and 267-270, 275-279, 284-287, 292-296 (A380).

[2355] US, FNCOS, paras. 15-16; US, SWS, paras. 72-77, referring to Exhibit US-448, p. 2.

[2356] US, FWS, paras. 148-151, referring to the up-front provision of funds to Bombardier for aircraft development under the Technology Partnerships Canada programme and the panel's finding in that case that, as a general matter, Canada did not "seek a commercial rate of return on its contributions". Panel Report, *Canada – Aircraft*, paras. 9.313-315.

[2357] US, FWS, para. 152, citing a **[***]**. Exhibit US-68.

[2358] US, FWS, paras. 154-156.

BCI deleted, as indicated **[***]**

decisions, which reviewed funding provided by the French and Spanish governments, respectively, to CASA and Aérospatiale for aircraft development projects.[2359]

European Communities

7.335 The European Communities rejects the United States' claim that each of the disputed LA/MSF measures amounts to a subsidy within the meaning of Article 1 of the SCM Agreement. However, in doing so, it does not contest the United States' allegations in respect of LA/MSF being a "financial contribution", within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. Rather, the focus of the European Communities' rejection of the United States' complaint against the challenged LA/MSF measures is the question whether each confers a "benefit" upon its recipient, within the meaning of Article 1.1(b) of the SCM Agreement. In this context, the European Communities has advanced several lines of defence.

Benefit

Article 4 of the 1992 Agreement

7.336 The European Communities submits that the assessment of whether LA/MSF measures concluded after the entry into force of the SCM Agreement confer a "benefit" must be informed by Article 4 of the 1992 Agreement. According to the European Communities, Article 4 of the 1992 Agreement established the parties' agreed benchmark for levels of acceptable government LCA development support at the time the relevant LA/MSF contracts were concluded.[2360] The European Communities maintains that this alleged benchmark must be taken into account as relevant context when interpreting the notion of "benefit" under Article 1.1(b) of the SCM Agreement,[2361] because it considers the 1992 Agreement to be an instrument containing rules of international law applicable between the parties, within the meaning of Article 31(3)(c) of the VCLT.[2362] Thus, the European Communities argues that any financial contributions provided through the post-1995 LA/MSF measures may be found to have conferred a "benefit" on Airbus only if incompatible with Article 4 of the 1992 Agreement. In this regard, the European Communities alleges that each of the challenged LA/MSF measures complied with the terms of domestic support established under Article 4 of the 1992 Agreement, and therefore did not confer a benefit upon Airbus, within the meaning of Article 1.1(b) of the SCM Agreement.[2363]

"Reasonableness of repayment forecasts"

7.337 According to the European Communities, the Appellate Body in *US – Countervailing Measures on Certain EC Products* explained that "fair" market transactions are not always the appropriate benchmarks for the purpose of establishing the existence of subsidies under the SCM Agreement. Quoting from the Appellate Body's ruling, the European Communities argues that in particular situations, it is necessary when considering whether a financial contribution confers a benefit to take account of "the ability of governments to obtain certain results from markets by

[2359] US, FWS, paras. 158-163, referring to Decision 97/807/EC of 30 April 1997, OJ (1997) L 331/10, *Aid granted by Spain to the Aerospace Company Construcciones Aeronáuticas, SA*, (Spanish government funding for development of a new 70/80 seat turboprop aircraft), Exhibit US-81; Press Release, *The Commission Approves a French R&D Scheme for the Aeronautics Sector*, IP/96/665 of 18 July 1996, (French government funding for Aérospatiale's development of the A330-200), Exhibit US-89; and Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Aid No. N369/98, (French government funding for Aérospatiale's development of the A340-500/600), Exhibit US-3.

[2360] EC, FWS, paras. 395-404; EC, SWS, paras. 148-150.

[2361] EC, FWS, paras. 398, 399 and 441.

[2362] EC, FWS, paras. 131-150.

[2363] EC, FWS, paras. 405-441.

shaping the circumstances and conditions in which markets operate" and to remember that markets can be "severely affected" by government policies.[2364] Because of the LCA industry's alleged close association with heavy government intervention and international regulation,[2365] the European Communities suggests that it is a sector where considerations of the kind expressed by the Appellate Body need to be taken into account when evaluating whether government support in the form of LA/MSF amounts to subsidization under the SCM Agreement. Thus, the European Communities submits that the appropriate methodology for determining whether LA/MSF for the A330-200, A340-500/600 and A380 confers a "benefit", within the meaning of Article 1.1(b) of the SCM Agreement, should not involve assessing whether each of the challenged contracts conforms to "'perfect' market conditions".[2366] Rather, the European Communities argues that this determination should be made by testing the reasonableness of the forecast number of sales over which repayments are intended to secure the rate of return agreed to in each of the relevant contracts.[2367]

7.338 The European Communities finds "indirect" support for its view that the reasonableness of the repayment forecasts is the "decisive factor"[2368] for determining whether LA/MSF constitutes a subsidy in footnote 16 of the SCM Agreement. Although attached to an expired provision (Article 6.1), the European Communities considers that it provides relevant context for understanding whether LA/MSF amounts to a subsidy within the meaning of Article 1 of the SCM Agreement. In particular, the European Communities argues that the text of footnote 16 envisages a situation where there is less than full repayment of a royalty-based financing instrument – a situation where actual sales fall below the level of forecast sales. According to the European Communities, footnote 16 provides that the failure to achieve the sales forecast envisaged under a royalty-based financing instrument (*i.e.*, less than full repayment of royalty-based financing) cannot in itself be deemed to cause serious prejudice.[2369] By implication, the European Communities submits, it follows that when actual sales match or exceed the level of forecast sales under a royalty-based financing instrument, there can be no finding of serious prejudice.[2370] The European Communities maintains that this result represents a recognition by the drafters of the SCM Agreement that the relevant test for determining whether LA/MSF constitutes a subsidy is the reasonableness of the repayment forecast.[2371] Thus, to the extent that a repayment forecast is reasonable, the European Communities argues that full repayment of LA/MSF will be achieved, thereby generating its targeted rate of return. It is only when the repayment forecast is not a reasonable one that, according to the European Communities, a benefit will be conferred.[2372]

[2364] EC, FWS, para. 445, referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 123-124.

[2365] The European Communities maintains that this is reflected not only in the alleged "billions of dollars" of government support (allegedly including royalty-based financing) enjoyed by Boeing, the only other credible producer of LCA, but also in Article 6.1 of the *1979 Trade in Civil Aircraft Agreement*, which reads: "They {*i.e.*, the Signatories} shall take into account the special factors which apply in the aircraft sector, in particular the widespread governmental support in this area, their international economic interests, and the desire of producers of all signatories to participate in the expansion of the world civil aircraft market." EC, FWS, paras. 444-447.

[2366] EC, FWS, para. 447; EC, Answer to Panel Question 73; EC, SNCOS, para. 86.

[2367] EC, FWS, paras. 442-478; EC Answers to Panel Questions 62 and 63; EC, SWS, paras. 151-157. The European Communities asks the Panel to treat this argument as equally relevant to showing that certain pre-1995 LA/MSF measures (specifically, the A320 and A330/A340 contracts) were not subsidies within the meaning of the SCM Agreement, should it dismiss the European Communities' specific defences advanced in relation to these measures based on the temporal scope of the SCM Agreement and the relevance of the Tokyo Round Subsidies Code. EC, Answer to Panel Question 62.

[2368] EC, FWS, para. 455; EC Answers to Panel Questions 62 and 63.

[2369] EC, FWS, para. 451.

[2370] EC, FWS, para. 452.

[2371] EC, FWS, paras. 455-456; EC, Answer to Panel Question 63.

[2372] EC, FWS, para. 455.

BCI deleted, as indicated **[***]**

7.339 In the European Communities' view, the United States shares its interpretation of Article 1, citing the following extract from a communication made by the United States to the WTO Negotiating Group on Rules on 19 March 2003 as support for the proposition that the United States considers LA/MSF would be a subsidy only if the market forecasts on which repayment obligations are based are not reasonable:

> "As to the definition of subsidy, more explicit rules are needed as to royalty-based schemes. These programmes provide government funds with a repayment obligation based on future sales. Similar to the granting of government loans or the government purchase of equity, these schemes need to be judged against a market or commercial standard. Obviously, if royalty-based financing is based on assumptions and sales projections that would be rejected by the market a benefit has been bestowed."[2373]

7.340 The European Communities asserts that all of the LA/MSF granted for the A330-200, A340-500/600 and A380 was provided on the basis of "very prudent" sales forecasts, with full repayment of principal plus interest, set at least 25 basis points above the government cost of funds, being required from a number of sales that was less than Airbus' expectations over a maximum of 17 years (consistent with Article 4 of the 1992 Agreement).[2374] The European Communities explains that while the Airbus business case informed and set the outer limits of the returns expected by the EC member States over the life of each aircraft,[2375] it was not automatically reflected in the terms of the contracts. Moreover, the European Communities maintains that because Airbus had to fund 67% of the A330-200, A340-500/600 and A380 projects itself, its business case for each of these LCA projects was "realistic and sober", implying that the EC member States' forecasts were "conservative" and intended to ensure faster repayment.[2376] This allowed the EC member State governments to "agree to a structure of levies and repayment schedules that ensures adequate recoupement of ... contributions plus a real return at rates which would not be rejected at the market".[2377]

"Alternative Legal Argument"

7.341 In a final set of submissions, the European Communities presents what it characterizes as an "alternative legal argument", that it asks the Panel to consider in the event that it were to dismiss all of its other arguments on the question whether LA/MSF amounts to a subsidy.[2378] Pursuant to this "alternative" argument, the European Communities proceeds on the "hypothesis" that the Panel were to find that the market provides the appropriate benchmark for determining the existence of a "benefit" under Article 1.1(b) of the SCM Agreement. In this context, the European Communities argues that the financing provided under the challenged LA/MSF measures does not involve subsidization within the meaning of the SCM Agreement because the cost of such financing to Airbus was at least the same, if not greater, than the cost of similar financing available on the market.[2379]

7.342 The European Communities describes LA/MSF as repayable, project-specific debt financing granted to Airbus for the purpose of developing LCA. According to the European Communities, the terms and conditions of the challenged LA/MSF contracts vary considerably, both within and between the relevant EC member States, depending upon the particular Airbus LCA project supported.[2380]

[2373] EC, FWS, paras. 457-458; and EC, SNCOS, para. 80, both submissions quoting *Subsidies Disciplines Requiring Clarification and Improvement*, Communication from the United States dated 19 March 2003, TN/RL/W/78, p. 5.

[2374] EC, FWS, para. 467; EC, SWS, para. 157; EC, SNCOS, para. 84; EC, SCOS, paras. 46-56.

[2375] EC, FWS, paras. 465 and 469.

[2376] EC, FWS, para. 464-477; EC, SCOS, paras. 46-56.

[2377] EC, SWS, para. 157; EC, SNCOS, paras. 80-86.

[2378] EC, Answer to Panel Question 67.

[2379] EC, FWS, paras. 479-553; EC, SWS, paras. 158-214; EC, Answer to Panel Question 170.

[2380] EC, FWS, paras. 291, 302.

BCI deleted, as indicated **[***]**

However, it recognizes that in general, a number of similarities can be identified in terms of the type or form of financing provided under each contract. For instance, the European Communities explains that repayments under each of the LA/MSF contracts are, in general, linked to aircraft deliveries in the sense that they are made through the application of graduated, per-aircraft, levies that increase over the course of the repayment period.[2381] Moreover, the European Communities asserts that for certain LA/MSF contracts, royalty payments are required once the full amounts of principal and interest have been amortized through the operation of the per-aircraft repayment levies. Thus, the European Communities explains that through the operation of per-aircraft levies and/or royalties, the repayment mechanism established in the LA/MSF contracts does not depend upon Airbus making profits but relies on there being a sufficient number of deliveries of the financed LCA.

7.343 The European Communities recognizes that these features of LA/MSF result in member States assuming a portion of the risk that would otherwise fall on the aircraft manufacturer. However, the European Communities notes that, in contrast to the manufacturers themselves, the lender governments do not face the risks associated with securing profitable sales in a competitive market. In other words, instead of the risk of a return dependent on profits, the lenders of LA/MSF face only the risk that the borrower will fail to build and deliver a sufficient number of aircraft to repay the agreed principal and interest. The European Communities describes this as "development risk" and "market risk", and argues that it is no different from the type of risk faced by Airbus "risk-sharing suppliers".[2382]

7.344 The European Communities presents its own economic studies, addressing all but the LA/MSF contracts for the A300 and A310, which it contends dismiss the conclusions reached in the studies presented by the United States. The European Communities argues that the studies commissioned from Professor Robert Whitelaw of New York University's Stern School of Business and International Trade Resources LLC,[2383] show that the United States both underestimates the rate of return associated with each instance of financing and inflates the appropriate market interest rate benchmarks for loans comparable to LA/MSF.[2384] According to the European Communities, the effective rate of return associated with each of the challenged measures should be properly determined as a function of the delivery forecasts contained in Airbus' business case as well as taxation, considerations which together did not play a role in the calculations of the rates of return advanced by the United States.[2385] Moreover, the European Communities asserts that the appropriate market interest rate benchmark for all LA/MSF contracts should apply a project-specific risk premium derived from "risk-sharing supplier" contracts for the A380 that is less than half the value used by the United States.[2386] Nevertheless, the European Communities recognizes that even accepting the entirety of the conclusions reached in the economic studies it has presented, the effective rates of return associated with the LA/MSF contracts are, in most cases, below the market benchmark for comparable financing. However, it argues that when the costs associated with the public policy

[2381] EC, FWS, paras. 319-321.
[2382] EC, FWS, paras. 303-307.
[2383] Robert Whitelaw, *Economic Assessment of member State Financing*, 3 February 2007 (hereinafter "Whitelaw Report"), Exhibit EC-11 (BCI/HSBI); Robert Whitelaw, *Rebuttal Report*, 24 May 2007 (hereinafter "Whitelaw Rebuttal Report"), Exhibit EC-656 (BCI/HSBI); International Trade Resources LLC, *Calculating Magnitude of the Subsidies Provided to the Recipient Entities*, 5 February 2007 (hereinafter "ITR Report"), Exhibit EC-13 (BCI/HSBI); International Trade Resources LLC, *Answer to US Assertions that ITR's Method of Calculating the Magnitude of Subsidies is Flawed*, 21 May 2007 (hereinafter "ITR Report (Answer)"), Exhibits EC-660 (BCI/ HSBI); and International Trade Resources LLC, *Updated Subsidy Magnitude and Cash-Flow Calculations*, 12 July 2007) (hereinafter "ITR Report (Update"), Exhibit EC-839 (BCI).
[2384] EC, FWS, paras. 487-498; EC, SWS, paras. 168-198; EC, SNCOS, paras. 88-111. The European Communities argues that the same methodological errors exist in respect of the benchmark rates of return calculated for the LA/MSF contracts relating to the A300 and A310. EC, Answer to Panel Question 77.
[2385] EC, FWS, paras. 482, 536-547.
[2386] EC, FWS, paras. 481, 483-535.

BCI deleted, as indicated **[***]**

obligations of each contract are taken into account, the difference between the effective rates of return and market interest rate benchmarks set out in its own economic studies is eliminated.[2387] Thus, the European Communities concludes that any financial contributions made through the challenged LA/MSF measures do not confer a "benefit" on Airbus, within the meaning of Article 1.1(b) of the SCM Agreement.

(ii) Arguments of Third Parties

Australia

7.345 Australia agrees with Brazil that other Airbus risk sharing suppliers are not appropriate as an element in determining a commercial benchmark for assessing benefit because the terms for risk-sharing suppliers may be distorted by the government finance contributed for the underlying project.[2388]

7.346 Australia rejects Korea's argument about market failure situations. The major implication of accepting Korea's statement for Australia, is to allow different standards for establishing subsidisation within narrowly defined goods markets that have been distorted by widespread market intervention. Therefore, Australia does not agree that because a market is distorted, a government measure may not constitute a financial contribution conferring a benefit. [2389]

7.347 Australia contends that the Panel should avoid reading additional requirements into the text of Article 14(b) and defining the market too narrowly. Article 14(b) establishes benefit based on a "comparable commercial loan" actually obtainable on the market. It further contends that in the narrowly defined market of LCA production in Europe, government intervention has distorted the terms and conditions of loans available to Airbus companies, so that most transactions are not purely commercial. However, Australia argues that it may be possible to find comparable commercial loans in the market for engineering projects involving long term, high-risk loans for large amounts of capital and that operate on a commercial basis. Australia specifically refers to the Panel Report in *Japan – DRAMs (Korea)* which provides some guidance on the evidentiary standard for determining the existence of "benefit" in circumstances where there are no comparable commercial loans which could actually be obtained on the market.[2390]

Brazil

7.348 Brazil first observes that in this proceeding, the European Communities refused to consent to three requests by the United States to initiate the procedures under Annex V of the SCM Agreement, and that it also failed to respond fully to questions and "follow-up" questions from the Annex V Facilitator. This, according to Brazil, severely prejudiced the rights of third parties to protect their interests in this proceeding within the meaning of Article 10 of the DSU.[2391]

7.349 Brazil submits that in the interest of the timely and efficient resolution of disputes and consistent with the text of Annex V, Members should consent to the initiation of Annex V procedures and should fully cooperate in providing requested information, particularly because information about subsidies is often only available to the subsidizing Members. Thus, Brazil encourages the Panel to use

[2387] EC, SWS, paras. 162-167; EC, Answer to Panel Question 170.
[2388] Australia, Answers to Third Party Panel Questions, para.1 .
[2389] Australia, Answer to Third Party Panel Questions, para.2 .
[2390] Australia, Answer to Third Party Panel Questions, para. 3 referring to Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea ("Japan – DRAMs (Korea)")*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, para 7.276.
[2391] Brazil, Third Party Submission, para. 6.

its discretion under paragraph 7 of Annex V of the SCM Agreement to draw adverse inferences where appropriate and thereby adopt effective sanctions to ensure that Annex V remains an effective tool for the resolution of disputes under the SCM Agreement. [2392]

7.350 Brazil submits that, through "LA/MSF", Airbus governments provide below-market interest rates loans for the development of new Airbus aircraft or new models of existing aircraft.[2393] It contends that the repayment of principal (and possibly repayment of interest) on the LA/MSF loans is contingent on the successful sale of a specified number of the finished aircraft. [2394]

7.351 Brazil submits that repayment schedules for LA/MSF are back-loaded by the Airbus governments, which assume Airbus's risks by allowing smaller levy payments on earlier deliveries and progressively larger payments on later deliveries. In some cases, the Airbus governments have allowed Airbus to forego levies entirely on an initial tranche of deliveries. This, according to Brazil, minimizes the debt service during the early years of Airbus's programmes. In addition, Brazil argues that the tie between repayments and deliveries results in a significant lag between the granting of the LA/MSF and the first repayment. Thus, LA/MSF confers a "grace period" to the beneficiary during the crucial and costly stages of development. Moreover, if the expected delivery schedule slips and further repayment is pushed out in time, the commercial and financial benefits to Airbus increase.[2395]

7.352 Brazil asserts that LA/MSF is a subsidy that is particularly distortive to competition[2396] because it shifts the up-front expense and commercial risk of developing new aircraft to taxpayers, allowing its beneficiary to move more aggressively forward on investment and production decisions that would otherwise be abandoned or postponed, and to offer discounted commercial terms to customers. [2397]

7.353 Brazil rejects the European Communities' contention that the special characteristics of the LCA industry justify subsidies inconsistent with a Member's WTO obligations. It asserts that LA/MSF is not a necessary condition for participation in the aircraft market and should not be sanctioned when it violates the SCM Agreement.[2398] Instead, Brazil acknowledges that an aircraft that is developed with assistance provided by LA/MSF would not necessarily, in the counterfactual situation, be introduced in the market without the subsidy, because the aircraft market without the existence of LA/MSF would *not* be the same as the market which is severely distorted by this type of subsidy.[2399]

7.354 Brazil agrees with the United States that a benefit corresponds to some form of advantage and that it 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 commercial market.[2400] However, Brazil finds no support in the SCM Agreement for the European Communities' proposition that

[2392] Brazil, Third Party Submission, para. 5 and 7.
[2393] Brazil, Third Party Submission, paras. 26-27.
[2394] Brazil, Third Party Submission, para. 32. US, FWS, paras. 129-135.
[2395] US, FWS, paras. 129-135.
[2396] Brazil, Third Party Submission, paras. 26-27.
[2397] Brazil, Third Party Submission, para. 27.
[2398] Brazil generally observes that subsidies are not a requirement for the development and launch of new aircraft, even if a producer is located in a developing country. By way of an example, it notes that, to finance the design and development of its 70-118 seat family of aircraft, EMBRAER did not rely on government support, but funded the USD 1 billion in development costs with an initial public offering of stock, contributions from risk-sharing partners, and its retained earnings. Brazil, Third Party Submission, para. 28.
[2399] Brazil, Third Party Submission, para. 28.
[2400] US, FWS, para. 110.

assessment of benefit be based solely on the reasonableness of sales forecasts.[2401] Brazil considers that the European Communities' proposition that the recipient does not receive any benefit because "his repayment obligations (...) provide the government with sufficient guarantees of return", does not address the correct standard to determine the existence of a benefit. [2402]

7.355 According to Brazil, the Panel should find that LA/MSF confers a benefit if the terms and conditions on which it is provided, are more favourable than available in the commercial market, or if no such aid would, in fact, be available in the commercial market.[2403] For Brazil, the terms set out in Article 4 of the 1992 Agreement may give an indication of the cost to the granting government only, but cannot be taken as context for the interpretation of the term "benefit" in Article 1 of the SCM Agreement. In addition, Brazil finds nothing in the text of Article 4 (like Article 14 of the SCM Agreement, for example) that could, according to the WTO jurisprudence, have a bearing on the interpretation of the term "benefit".[2404]

7.356 Brazil maintains that the terms and conditions of LA/MSF are not comparable to commercially available financing[2405] because they do not reflect the risks associated with the development of new aircraft, particularly the risks in deciding whether to launch a new aircraft family.[2406] In fact, Brazil considers that the United States has presented a *prima facie* case that LA/MSF granted without any interest obligation confers a benefit on Airbus. Specifically, Brazil argues that LA/MSF confers a benefit because the Airbus governments do not require Airbus to pay a commercial rate of interest giving due consideration to the credit risk of Airbus, the development risk, *i.e.*, the risk that Airbus will fail in its attempt to design and build the new aircraft, and the market risk, *i.e.*, the risk that Airbus will fail to deliver enough completed aircraft to repay principal and interest. Given the nature of LA/MSF, the commercial benchmark, according to Brazil, should take into consideration the risks inherent in the development and marketing of new aircraft, the nature of the LA/MSF (including its success-dependent and back-loaded features and lack of security), the relevant interest rates (including the nature of any obligation to pay interest), the fact that credit ratings are affected by the expectation of continuing government support, and any other preferential features, including the waiver of normal fees.[2407]

7.357 Brazil further argues that when the LA/MSF does require the payment of interest or royalties, that aid confers a benefit on Airbus. Brazil considers that the additional statements by officials from

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[2401] Brazil, Third Party Submission, para. 29 citing to the European Communities Oral Statement, para. 61.

[2402] Brazil, Third Party Submission, para. 29 citing to the European Communities Oral Statement, para. 61. For Brazil, "sufficient guarantees of return" for a government may not be – and most likely are not – sufficient guarantees of return for an institution constrained by market disciplines. Brazil, Third Party Submission, paras. 26-27.

[2403] Brazil, Third Party Submission, para. 29.

[2404] Brazil, Third Party Submission, para. 30. To this end, Brazil relies on the Appellate Body finding in *Canada – Aircraft*, that Article 14 of the SCM Agreement provides relevant context for determining whether a benefit was conferred within the meaning of Article 1.1(b) of the SCM Agreement. Appellate Body Report, *Canada – Aircraft I*, paras. 153, 155, and 158. Brazil also agrees with the Panel's finding in *Canada – Aircraft I* that a financial contribution in the form of LA/MSF confers a benefit if the provider of such aid "neither seeks nor earns a commercial rate of return." Panel Report, *Canada-Aircraft*, para. 9.314.

[2405] Brazil, Third Party Submission, para. 29.

[2406] Brazil notes that the development of LCA is risky and expensive, requiring significant up-front investments to be undertaken with returns contingent on sales far in the future. Moreover, there is a risk that the predicted manufacturing costs, performance criteria, and sales prices will not be achieved. If the project fails, the initial up-front investments or non-recurring costs are lost. Brazil, Third Party Submission, para. 31.

[2407] Brazil, Third Party Submission, para. 34.

member States of the European Communities and by Airbus further demonstrate that LA/MSF confers a benefit on Airbus.[2408]

7.358 Brazil takes issue with Korea's argument that in determining what is the appropriate market benchmark against which to measure whether a given financial contribution confers benefit, "it is necessary to acknowledge that under particular circumstances, the general market may encounter a systematic failure or {that} an undistorted commercial market does not exist in a particular sector".[2409] It contends that market failure occurs where, for example, a market cannot operate because the goods or services cannot be provided on a commercial basis or where the market, left to its own, yields an allocation of resources that is sub-optimal. It explains, relying on the general economic theory, that in the former situation, the government takes on the role of provider of the goods or services involved, and, in the letter, the private sector may provide the goods or services, with the government intervening as regulator to ensure that resource allocation becomes optimal.[2410]

7.359 Brazil maintains that there is no "market failure" in the aircraft industry, and points that the parties do not allege it either. Thus, even if the existence of "market failure" has any relevance under the SCM Agreement as Korea posits, the Panel does not need to address the possible implications of this issue in the present dispute.

7.360 In Brazil's view, the existence of a benefit should be determined based on a comparison of the financial contribution to a comparable benchmark available in the commercial market, normally of the subsidizing Member. Where a comparable commercial benchmark, does not exist, for example, the domestic market may be so distorted by government intervention that an objective, comparable commercial benchmark is not available, this, according to Brazil, should not be prejudicial for the recipient of the challenged financial contribution (and should not, in and of itself, lead to an affirmative benefit determination). Rather, under these circumstances, a panel may rely on a reasonable and unbiased estimate of a comparable commercial benchmark, including based on a benchmark available in the international market. [2411]

Canada

7.361 Canada rejects the Brazil's argument that subsidies for the underlying project distort the terms and conditions for risk-sharing suppliers such that they cannot be considered appropriate as an element in determining a commercial benchmark for assessing the question of benefit with respect to LA/MSF, as this approach is not supported by the text of the SCM Agreement. If followed, it would leave WTO Members with little, if any, guidance as to how they should benchmark public sector financing if they wish to ensure it does not provide a subsidy. Canada recalls that a similar argument was advanced by the United States in *US – Softwood Lumber IV*, that the term "market conditions" as used in Article 14(d) necessarily implies a market undistorted by the government's financial contribution. In that dispute the Appellate Body stated: "In our view, the United States' approach goes too far. We agree with the Panel that "{t}he text of Article 14 (d) {of the} SCM Agreement does not qualify in any way the 'market' conditions which are to be used as the benchmark …

[2408] Brazil, Third Party Submission, para. 35 referring to US, FWS, paras. 152-157.

[2409] In its Third Party Submission, Korea argues that when a panel is confronted with the factual circumstances of market failure, "the benchmark to determine whether a government action at that particular time confers a benefit should be different from one that is based on the action of a private investor operating in a normal and fully functional market. ... {and} As a result, a government measure may not constitute a financial contribution conferring a benefit in that particular context, as it might otherwise do." Korea, Third Party Submission, para. 63.

[2410] Brazil, Answer to Third Party Panel Question 2, para. 1 referring to Brian R. Binger and Elizabeth Hoffman, Microeconomics With Calculus (Glenview: Illinois, 1988), p. 542 (stating that "competitive markets do not allocate externalities and public goods efficiently").

[2411] Brazil, Answer to Third Party Panel Question 2, para. 2-4.

BCI deleted, as indicated **[***]**

{a}s such, the text does not explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'."[2412]

Korea

7.362 Korea relies on the Appellate Body report in *Canada – Aircraft*, and the Panel report in *Brazil – Aircraft* in arguing that, in order to demonstrate that a contribution confers a benefit, the contribution must be (1) provided to the recipient (2) on terms more advantageous than (3) those available on the market. All three criteria must be fulfilled separately and individually. [2413] With regard to the first element, Korea considers that a benefit exists only where an enterprise targeted by an investigation is the actual beneficiary. It considers that the second element requires a detailed inquiry, which would include examination of the circumstances under which a financial contribution is provided. With regard to the third element, Korea generally considers that the commercial market will provide an appropriate benchmark for the comparison of the terms available for a certain investment or transaction, unless, as acknowledged by the Appellate Body in *US – Certain Products from the EC*, in particular circumstances, the general market encounters a systematic failure, or an undistorted commercial market does not exist in a particular sector. [2414]

7.363 Korea argues that in determining what is the appropriate market benchmark against which to measure whether a given financial contribution confers benefit, it is necessary to acknowledge that under particular circumstances, the general market may encounter a systematic failure or that an undistorted commercial market does not exist in a particular sector. It asserts that when a panel is confronted with such factual circumstances, the benchmark to determine whether a government action at that particular time confers a benefit should be different from one that is based on the action of a private investor operating in a normal and fully functional market. As a result, a government measure may not constitute a financial contribution conferring a benefit in that particular context, as it might otherwise do.[2415]

7.364 Accordingly, Korea argues that the United States cannot plainly state that a benefit is conferred, rather the Panel should closely examine whether the United States has established a *prima facie* case as to three criteria set forth by the Appellate Body in *Canada – Aircraft.* [2416]

(iii) Evaluation by the Panel

7.365 As we have previously noted, a "subsidy" is defined in Article 1.1 of the SCM Agreement by reference to two discrete elements: a "financial contribution by a government or any public body within the territory of a Member" (Article 1.1(a)(1)) and the conferral of a "benefit" (Article 1.1(b)).[2417] Although the United States has addressed both elements of this definition in presenting its complaint, the European Communities has focused its defence entirely upon the question whether LA/MSF confers a "benefit". Thus, the European Communities has not contested the United States' allegation that each of the challenged LA/MSF measures involves a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.366 We are mindful that pursuant to Article 11 of the DSU, we are required to make an objective assessment of the matter identified in our terms of reference. This includes assessing whether the

[2412] Canada, Answer to Third Party Panel Questions, para. 1-2, referring to Appellate Body Report, *US – Softwood Lumber IV*, para 87.
[2413] Korea, Third Party Submission, para. 54-58.
[2414] Korea, Third Party Submission, para. 62.
[2415] Korea, Third Party Submission, para. 63.
[2416] Korea, Third Party Submission, para. 66.
[2417] It is also defined as "any form of income or price support in the sense of Article XVI of GATT 1994" (Article 1.1(a)(2)) that confers a "benefit" (Article 1.1(b)).

BCI deleted, as indicated **[***]**

United States has presented a *prima facie* case demonstrating that the challenged LA/MSF measures are subsidies within the meaning of the SCM Agreement, irrespective of whether the European Communities contests any one or more of the United States' allegations.[2418] Thus, we begin our evaluation of the merits of the United States' complaint by examining whether it has established a *prima facie* case that the challenged LA/MSF measures are "financial contributions". In this context, we recall that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[2419] Thereafter, we examine whether the United States has demonstrated that each of the "financial contributions" we find to exist confers a "benefit" on the recipients, within the meaning of Article 1.1(b) of the SCM Agreement. However, before embarking upon this evaluation, we believe it is useful to first provide a brief overview of the economic and competitive context in which LCA are developed as well as the key features of LA/MSF.[2420]

Overview of LCA Development and Key Features of LA/MSF

7.367 Both parties agree that an outstanding feature of LCA development is that significant start-up costs must be incurred a long time before revenues from the projects associated with those costs are generated.[2421] Consequently, bringing a new LCA model to market requires long-term planning and advance assessment of a wide variety of factors, including future manufacturing needs, market trends, customer demand and prices. This means that at the time a decision is taken to develop a new LCA model and to incur start-up costs, the eventual success of the project remains subject to a high degree of uncertainty. According to the European Communities, the fortunes of a new LCA project may be affected by unexpected market slow-downs, exogenous price movements of complementary goods (e.g., fuel), exchange rate fluctuations, political developments, terrorist attacks, war and other security issues and even human health risks such as SARS.[2422] Thus, the development of LCA is an endeavour that requires "huge up-front investments"[2423] and a commitment of "tremendous resources"[2424] in the face of a business environment that is shaped by factors "whose very foreseeability is impossible by definition".[2425] The European Communities asserts that these "unique" features of the LCA industry have made it susceptible to a high degree of government intervention both in terms of financial support and international regulation. Indeed, the European Communities suggests that given the nature of the LCA industry, such levels of government intervention "may even be considered natural".[2426]

7.368 At present, the worldwide market for LCA is divided between essentially two manufacturers – Airbus and Boeing.[2427] This effective duopoly has existed since 1997 when Boeing merged with

[2418] *See*, Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador ("US – Shrimp (Ecuador)*"), WT/DS335/R, adopted on 20 February 2007, paras. 7.1-7.11.

[2419] Appellate Body Report, *EC – Hormones*, para. 104, citing Appellate Body Report, *US – Wool Shirts and Blouses*, p.14.

[2420] A more detailed exposition of the LCA industry's economic and competitive landscape is set out at paras. 7.367-7.372 and in Section VII.F of this Report, where we evaluate the United States' claims of adverse effects under Article 5 of the SCM Agreement.

[2421] US, FWS, paras. 112-115; EC, FWS, paras. 27-32; Dorman Report, Exhibit US-70 (BCI), pp. 1-2. Airbus launched the A380 on 19 December 2000 and made its first delivery on 15 October 2007.

[2422] EC, FWS, paras. 28 and 32.

[2423] US, FWS, para. 112.

[2424] EC, FWS, para. 31.

[2425] EC, FWS, para. 30.

[2426] EC, FWS, para. 33.

[2427] The United States asserts that although limited LCA production has continued in Russia, Russian LCA producers do not seriously compete with Airbus and Boeing for sales outside of the former Soviet bloc, leaving Airbus and Boeing as the only credible competitors operating in the LCA market. US, FWS, para. 711,

BCI deleted, as indicated **[***]**

McDonnell Douglas, one of two other United States' companies active in the manufacture of LCA over the past 30 years.[2428]

7.369 As we have previously noted, Airbus has existed, in one corporate form or another, as a single economic entity active in the LCA business for over 35 years.[2429] Since its establishment in 1970, the governments of France, Germany, Spain and the UK have to varying degrees entered into LA/MSF agreements with Airbus for the purpose of funding the development of six new models of LCA (the A300, A310, A320, A330, A340 and A380) as well as three variants (the A330-200 and A340-500/600).[2430] The proportion of development costs financed through LA/MSF has diminished over the years, from close to 100% for the early projects (the A300 and A310)[2431] down to a maximum of 33% of development costs for LCA projects financed after the entry into force of the 1992 Agreement (the A330-200, A340-500/600 and A380).[2432]

7.370 Initially, funding for Airbus' first LCA models (the A300 and A310 – respectively launched in 1969 and 1978[2433]) was contracted at the inter-governmental level through a series of agreements between participating EC member States.[2434] These first inter-governmental agreements not only expressed the relevant EC member States' commitment to fund the development of the A300 and A310, but also some of the key terms and conditions attached to the provision of financing, such as the amount of funds to be disbursed and the mode of repayment.[2435] Separate contracts implementing the agreements, in the context of one or more different aspects or phases of the two LCA projects, were entered into at the national level between each financing EC member State and the Airbus "associated manufacturer" located within its territory.[2436] Similarly, LA/MSF for the A320 and

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footnote 875. A more detailed description of the conditions of competition in the LCA market and the competitive positions of Airbus and Boeing is set out in Section VII.F of this Report.

[2428] Apart from McDonnell Douglas, the only other credible United States' manufacturer of LCA was Lockheed, which abandoned its LCA activities in 1981. US, FWS, para. 711.

[2429] *See*, Section VII.E.1(a), para. 7.183 and Attachment to Section VII.E.1 of this Report, following para. 7.289 above.

[2430] Other variants of Airbus LCA models that we understand are not the subject of the United States' complaint against LA/MSF include the A318, A319 and A321.

[2431] The French and Spanish governments funded approximately 100%, and the German government 90%, of the development costs of the A300 and A310 (basic versions). The same three governments funded between 64% and 85% of the development costs of the derivatives of these two models of LCA. EC, Answer to Panel Question 254. *See, also*, ITC Hearing, Inv-No. 332-332, *Global Competitiveness of US Advanced Technology Manufacturing Industries: Large Civil Aircraft*, testimony of Michel Dechelotte, Director of International Affairs, Airbus G*.I.E.*, at 208 (15 April 1993), lines 11, 12 and 20-23, Exhibit US-46; 1997 Sénat Report, at 63, 68, Exhibit US-18; and Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (13 January 1997), Exhibit US-19.

[2432] *See*, e.g., French A330-200 contract, Article 3, Exhibit EC-90 (BCI); French A340-500/600 contract, Article 3, Exhibit EC-91 (BCI); French A380 contract, Article 3, Exhibit EC-92 (BCI); German A380 contract, Article 5.3, Exhibit EC-85 (BCI); Spanish A340-500/600 contract, Preamble, Recital 9, Clause 2, Exhibit EC-87 (BCI); Spanish A380 contract, Preamble, Recital 4, Clause 2, Exhibit EC-88 (BCI); UK A380 contract, Clause 5.6, Exhibit EC-89 (BCI).

[2433] US, FWS, paras. 169-171; EC, FWS, para. 76.

[2434] 1969 A300 Agreement, Exhibit US-11; 1971 A300 Agreement, Exhibit EC-992 (BCI); 1981 A310 Agreement, Exhibit EC-942 (BCI).

[2435] 1969 A300 Agreement, Articles 6 and 7, Exhibit US-11; 1971 A300 Agreement, Exhibit EC-992 (BCI); 1981 A310 Agreement, Articles 8 and 9, Exhibit EC-942 (BCI). A more detailed description of the provisions found in these Agreements is set out at paras. 7.533 - 7.554 below.

[2436] In Answer to Panel Question 78 asking it to submit copies of the LA/MSF contracts for the A300 and the A310, the European Communities submitted copies of: (i) 29 separate Agreements, Protocols and Conventions, and amendments thereto, between the French government and Aérospatiale relating to the A300, Exhibit EC-603 (BCI), and 10 separate Protocols and Conventions between the same parties relating to the A310, Exhibit EC-604 (BCI); (ii) two "model contracts" evidencing the German government's provision of LA/MSF to Deutsche Airbus GmbH for the A300, Exhibit EC-601 (BCI), and the A310, Exhibit EC-602 (BCI);

BCI deleted, as indicated **[***]**

A330/A340 projects, respectively launched in 1984 and 1987,[2437] was agreed between the participating governments,[2438] and implemented at the national level through separate contracts between each relevant EC member State and the Airbus "associated manufacturer" located within its territory.[2439] However, unlike the inter-governmental agreements for the A300 and A310, the inter-governmental agreements for the A320 and A330/A340 were less prescriptive. For instance, they did not specify precise repayment terms, leaving these to be determined through the individual contracts negotiated at the national level.[2440]

7.371 No inter-governmental agreements were concluded in the context of the LA/MSF provided by the governments of France and Spain for the A330-200 and A340-500/600 projects (respectively launched in 1995 and 1997[2441]), nor in the context of the LA/MSF provided by the governments of France, Germany, Spain and the UK for the A380 (launched in 2000).[2442] Instead, for these projects it appears that the EC member States entered into separate national-level contracts, setting forth all relevant terms and conditions, with Aérospatiale and CASA (in respect of the A330-200 and A340-500/600 projects) and with Airbus France, Airbus Deutschland GmbH, EADS Airbus S.L. (Spain), BAE Systems (Operations) Ltd and British Aerospace PLC (in respect of the A380).[2443]

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and (iii) 16 separate Contracts and amendments thereto, between the Spanish government and Construcciones Aeronáuticas S.A. relating to the A300, Exhibit EC-605 (BCI), and eight separate Contracts between the same parties relating to the A310, Exhibit EC-606 (BCI). We note that some of the national-level contracts were entered into, and involved the transfer of funding to Airbus, before the formal launch of the respective LCA models or conclusion of the relevant inter-governmental agreement.

[2437] US, FWS, paras. 189 and 211; EC, FWS, paras. 79, 82 and 84.

[2438] 1991 A320 Agreement, Exhibit US-16; 1995 A330/A340 Agreement, Exhibit US-28 (BCI).

[2439] The national-level contracts include: the French A320 contract, Exhibit EC-83 (BCI); the German A320 contract, Exhibit EC-95 (BCI); the 1992 Spanish A320 contract, Exhibit EC-93 (BCI); the UK A320 contract, Exhibit EC-94 (BCI); the French A330/A340 contract, Exhibit EC-96 (BCI); the 1988 Spanish 1988 A330/A340 contract, Exhibit EC-84 (BCI); and the UK A330/A340 contract, Exhibit EC-86 (BCI). As we have previously noted (footnote 2257 above), the European Communities has recognized that the German government entered into a LA/MSF contract with Deutsche Airbus GmbH for the A330/A340 project. Although asked by the Panel to submit a copy of this contract (Panel Question 253), the European Communities did not do so. In addition, we note that in at least one instance – French LA/MSF for the A320 – funding was provided to Airbus for "preliminary work" undertaken in the context of the A320 before it was actually launched and prior to the conclusion of the relevant inter-governmental agreement.

[2440] *See*, 1991 A320 Agreement, Articulo 8, Exhibit US-16; 1995 A330/A340 Agreement, Articulo 8, Exhibit US-28 (BCI).

[2441] US, FWS, paras. 234 and 243; Exhibit EC-597 (HSBI).

[2442] US, FWS, para. 260; EC, FWS, para. 85. The United States suggests that the four EC member States financing the A380 entered into an inter-governmental agreement concerning the A380 in June 2003 – the Agreement of 16th June 2003 signed at Paris-Le Bourget between the Ministers of the Four Principal Airbus Countries and Airbus, Exhibit US-122 (BCI). US, FWS, paras. 271, 280, 288 and 297. However, we note that the Agreement cited by the United States does not deal with the A380 project in the same way that previous inter-governmental agreements specifically addressed the development of Airbus' predecessor LCA models. To begin with, Airbus is a party to the 2003 Agreement, whereas it was not party to the previous inter-governmental agreements. Moreover, no specific obligation to fund Airbus projects is actually undertaken by the governments. The recitals of the Agreement only express the governments' "willingness ... to continue to provide support to Airbus such as launch investment, research and technology investment and aircraft export sales financing". The same recitals also reveal Airbus' "willingness to provide information to {the governments} for the purpose of enabling them to formulate policy relating to Airbus and to ensure that obligations incurred when support is provided are met". Thus, we do not consider it appropriate to characterize the 2003 Agreement as an "inter-governmental agreement" of the same kind as the inter-governmental agreements that existed in respect of the previous models of Airbus LCA. *See*, further, paras. 7.549 - 7.554 below.

[2443] French A330-200 contract, Exhibit US-78 (BCI); French A340-500/600 contract, Exhibits US-35 (BCI) and EC-91 (BCI); French A340-500/600 convention, Exhibit US-36 (BCI); and Spanish A340-

BCI deleted, as indicated **[***]**

7.372 Thus, in summary, the contractual framework of the challenged LA/MSF measures takes essentially two forms: (i) inter-governmental agreements implemented through individual national-level contracts or other legal instruments entered into by each relevant EC member State government in favour of the Airbus entity located in its territory; or (ii) individual contracts between each relevant EC member State government and the Airbus entity located in its territory. Although the terms and conditions of each of the legal instruments making up the contractual framework of the challenged LA/MSF measures can vary significantly, we agree with the parties that numerous similarities in the type and form of financing can be found.[2444]

7.373 In terms of the disbursement of funds, the contracts that are before us appear to envisage two mechanisms. First, in many cases, funds are transferred in advance of actual development costs being incurred, usually on the basis of projected expenditure. When funds are disbursed in advance, costs actually incurred may be subsequently audited or reviewed by the governments and the funding amounts adjusted to ensure that total borrowing does not exceed the level of development costs it was agreed would be financed.[2445] Second, disbursements up to the agreed amounts may be made after actual costs have been incurred.[2446]

7.374 Repayment of LA/MSF takes essentially the same form under each contract.[2447] In almost all cases, Airbus is required to reimburse all funding contributions, plus any interest at the agreed rate, exclusively from revenues generated by deliveries of the LCA model that is financed.[2448] Such repayments are made in the form of per-aircraft levies and follow a pre-established repayment schedule.[2449] Usually, repayments start with the delivery of the first aircraft. However, in some instances, repayment begins only after Airbus has made a specified number of aircraft deliveries.[2450]

500/600 contract, Exhibits US-37 (BCI) and EC-87 (BCI); French A380 contract, Exhibit US-116 (BCI); German A380 contract, Exhibit US-72 (BCI); Spanish A380 contract, Exhibit US-73 (BCI); and UK A380 contract, Exhibit US-79 (BCI). In 1999, British Aerospace merged with Marconi Electronic Systems to become BAE Systems, see footnote 2057.

[2444] US, FWS, paras. 116-136; EC, FWS, paras. 291, 308-327.

[2445] EC, FWS, paras. 316-318. *See*, in particular, French A380 contract, Article 3 and Annex 4; German A380 contract, Articles 4.2, 4.3 and 5.3; Spanish A380 contract, Tercera and Quinta Clausula; French A340-500/600 contract, Article 4 and Annex 4; Spanish A340-500/600 contract, Segunda and Tercera Clausula; French A330-200 contract, Article 4 and Annex 4; French A330/A340 contract, Article 4; Spanish 1988 A330/A340 contract, Clausula 4; French A320 contract, Article 3; Spanish 1992 A320 contract, Primera Clausula. The European Communities asserts that the same disbursement mechanism was applied in respect of the French A300 and A310 LA/MSF contracts; the German A330/A340, A320, A310 and A300 LA/MSF contracts; and the Spanish A300 and A310 LA/MSF contracts. EC, Answer to Panel Questions 255 and 256.

[2446] UK A380 contract, Article 5; UK A330/A340 contract, Article 2.2; and UK A320 contract, Article 2.2.

[2447] US, FWS, paras. 116-136, 173-177 (A300/A310), 190-194 (A320), 214-218 (A330/A340), 236 (A330-200), 244-245 and 254-255 (A340-500/600); and 266-267, 275, 284 and 292 (A380). EC, FWS, paras. 319-323.

[2448] French A380 contract, Annexe 2, Article 6; German A380 contract, Article 7; Spanish A380 contract, Septima Clausula; UK A380 contract, Article 8, Schedule 3; French A340-500/600 contract, Article 6; Spanish A340-500/600 contract, Quinta Clausula; French A330-200 contract, Article 6; 1995 A330/A340 Agreement, Articulo 8; 1991 A320 Agreement, Articulo 8; 1981 A310 Agreement, Article 9; and 1969 A300 Agreement, Article 7. The German government's repayment claims in respect of LA/MSF provided for the A300, A310, A320 and A330/A340 were **[***]** under a Settlement Agreement that was negotiated in 1989 between the German government, Daimler Benz, MBB and Deutsche Airbus. As we read it, this Settlement Agreement **[***]** the German government's outstanding repayment claims at the time **[***]**. Article 12, EC-887 (BCI) and Articles 14(1) and 14(2), EC-887 (HSBI).

[2449] In addition to repayment through progressive per-aircraft levies, the UK A320 contract **[***]**.

[2450] Spanish A380 contract, **[***]**; UK A380 contract, **[***]**. In addition, we note that one of the Spanish A330/A340 contracts required repayments to the Spanish government **[***]**. Spanish 1990 A330/A340 contract, Article 5, Exhibit EC-947 (BCI). Evidence before us suggests that this was also the case in respect of the Spanish A320 contract. *See*, *Boletín Oficial de las cortes Generales, Congreso de los Diputados, Cuenta*

BCI deleted, as indicated **[***]**

Although the amount of the per-aircraft levies varies between the different contracts, it appears in all cases to be graduated, such that repayment amounts at the beginning of the repayment period are lower than at the end.[2451] In addition, for **[***]** of the contracts, royalty payments on a per-aircraft basis are called for on deliveries made in excess of the number needed to secure repayment of the disbursed principal plus any interest.[2452]

7.375 LA/MSF is provided without any guarantee of repayment in the event that Airbus fails to make the number of deliveries needed to reimburse the full amount of financing obtained from the EC member States. In other words, the scheduled repayments are not secured by any lien on Airbus assets nor are they guaranteed by any third party. The European Communities points out that the governments' claims on revenues generated from the delivery of LCA are, in some cases, guaranteed by one of the companies forming part of the Airbus economic entity.[2453] However, notwithstanding this form of guarantee there is no obligation on Airbus (or any company forming part of the Airbus economic entity) to fully (and sometimes even partially) repay LA/MSF in the event that the delivery targets stipulated in the contractual repayment schedules are not achieved.[2454] Thus, we agree with the United States that Airbus' obligation to fully repay the loans provided under the challenged LA/MSF measures is entirely dependent upon the success of the particular LCA project. The fact that it is possible, under certain contracts,[2455] for Airbus to make voluntary repayments notwithstanding the number of sales achieved, does not, in our view, alter this conclusion.

Do the Challenged Measures involve a "Financial Contribution"?

7.376 The United States argues that each of the challenged LA/MSF measures involves a "financial contribution" in the form of either a direct transfer of funds or both direct and potential direct transfers of funds, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. In particular, the United States argues that the LA/MSF contracts for the A300, A310, A320, A330/340, A330-200 and the A340-500/600 constitute *direct* transfers of funds inasmuch as the funding amounts foreseen under those contracts have been disbursed as of the date of the establishment of this panel.[2456] As far as the LA/MSF contracts for the A380 are concerned, the United States contends that these measures evidence both *direct* transfers of funds and, to the extent that certain committed funding amounts have yet to be disbursed, *potential direct* transfers of funds.[2457] The United States has submitted various pieces of evidence it argues substantiate these assertions.[2458] As we have already observed, the

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General del Estado de 1992, 13 January 1997, p.122, Exhibit US-19; Spanish A320 contract, Clausula Segunda, Exhibit EC-93 (BCI).

[2451] French A380 contract, Annex 2, Article 6; German A380 contract, **[***]**; Spanish A380 contract, Septima Clausula; UK A380 contract, Schedule 3; French A340-500/600 contract, Article 6; French A330-200 contract, Article 6; French A330/A340 contract, Article 6; UK A330/A340 contract, Article 2.4; French A320 contract, Article 5; German A320 contract, Article 18; UK A320 contract, **[***]**; 1981 A310 Agreement, Article 9; and 1969 A300 Agreement, Article 7. The European Communities asserts that a similar graduated repayment structure was applied in respect of the Spanish A340-500/600, A330/A340 and A320 LA/MSF contracts. EC, Answer to Panel Question 250; ITR Report, Exhibit EC-597 (HSBI). As regards the German A330/A340 contract, the European Communities has submitted information which suggests that repayments were graduated. Settlement Agreement, Article 14(2), Exhibit EC-887 (HSBI).

[2452] **[***]**.

[2453] German A380 contract, **[***]**; UK A380 contract, **[***]**. EC, Answer to Panel Question 65.

[2454] However, we recall that under the UK A320 contract, Airbus was **[***]**; and that pursuant to the German A380 contract, it appears that Airbus was **[***]**.

[2455] German A380 contract, Article 8; Spanish A380 contract, Septima Clausula; UK A380 contract, Article 5.9 and Schedule 3, paragraph 9.

[2456] US, Answer to Panel Question 4.

[2457] US, Answer to Panel Question 4.

[2458] US, FWS, paras. 173-177 (A300/A310), 190-194 (A320), 214-218 (A330/A340), 236 (A330-200), 244 and 253 (A340-500/600), 266, 274, 283 and 291 (A380), citing *inter alia*, German Federal Budget 1980, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 892 91 - 634, comment to title group 09,

BCI deleted, as indicated **[***]**

European Communities does not dispute the United States' contention that the challenged measures involve "financial contributions". Moreover, we note that the evidence the European Communities relies upon for the purpose of establishing the amounts of funding provided under several of the challenged measures is identical to that submitted by the United States.[2459]

7.377 On the basis of the arguments and evidence that both parties have presented, it appears to us that all of the funds committed under the A300, A310, A320, A330/A340, A330-200, A340-500/600 and the UK A380 contracts have already been provided to Airbus. To this extent, we believe there is no doubt that, as the United States argues, these measures involved *direct* transfers of funds, and therefore, the provision of a "financial contribution by a government or any public body", within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.378 However, we note that not all of the funds committed under the French, German and Spanish A380 contracts have been paid out. In particular, the French A380 contract envisages that certain specific funding amounts would be transferred to Airbus **[***]**.[2460] Similarly, the German and Spanish A380 contracts both provide for **[***]**.[2461] In all three cases, the outstanding instalments reflect the expected development costs of the A380 at the time of the conclusion of the contracts, subject to **[***]** in the year of disbursement.[2462] In other words, the outstanding instalments represent a part of the total (and maximum) amount of funding that it was agreed and planned would be transferred to Airbus for the A380 project. Thus, although the payments under the three contracts have not all been made, it is clear that it was envisaged that the specified funding amounts would be transferred and that Airbus maintains a contractual right to receive them at a predetermined moment in the future so long as it continues to develop the A380.

7.379 The United States argues that the French, German and Spanish A380 contracts exhibit the characteristics of both *direct* transfers of funds (to the extent that funds committed have already been disbursed) and *potential direct* transfers of funds (to the extent that a commitment exists for funds to be disbursed in the future). However, in our view, although a number of the disbursements have not yet been effected, it is more appropriate to characterize the relevant LA/MSF contracts as direct transfers of funds (and in particular "loans") within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. On the basis of the facts that are before us, it is apparent that the undisbursed

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Exhibit US-17N; German Federal Budget 1987, Budget Plan 09 (Economics Ministry), Part 02, Chapter 09, Line Item 892 91-634, comment to Chapter 09 through Federal Budget 1996 Exhibits US-17U through US-17DD; Bundesregierung, 12th Subsidy Report (1987-1990), at 108, Finanzhilfe 63, and all subsequent Subsidy reports until the 16th (1995-1998) Exhibits US-91H through -91L; BT-Drs. 12/1080, at 46 Exhibit US-26; Monopolkommission, at 71, para 118, table 11 Exhibit US-30; 1997 French Senate Report, at 67-68 Exhibit US-18; Collin (Yvon), Senate Report No. 89, Commission des Finances, Projet de Loi de Finances pour 2000, Tome III, Annexe No. 25, Équipment, Transport et Logement: III. - Transports: Transport Aérien et Météorologie et Aviation Civile, at 83 Exhibit US-33; Airbus, Cuadernos CDTI, Centro para el Desarollo Tecnológico Industrial (CDTI) (prepared by the State Secretariat of Industry, Ministry of Science and Technology), July 1993 (at 91, *et seq*.) Exhibit US-54; Boletin Oficial de las Cortes Generales, Congreso de los Diputados, Contestaciones del Gobierno, Serie D, Núm. 547, at 153 (5 June 2003) Exhibit US-27; Balance del Segundo Año del Ministerio de Ciencia y Technología, at 29 (June 2002) Exhibit US-96; House of Lords written answers for 25 February 1997 and 19 March 1997 (question to Mr. Greg Knight) Exhibits US-97 and US-98; Memorandum submitted by the Department of Trade and Industry, Appendix 1, Annex 2 Exhibit US-99; House of Lords written answers for 25 February 1997 Exhibit US-97; *Britain Plans Airbus Aid*, N.Y. Times, at D16 (15 May 1987) Exhibit US-110; and *British Agree on Launch Aid for A330/A340*, Aviation Week & Space Technology, at 33 (18 May 1987) Exhibit US-111.

[2459] *See*, e.g., EC, FWS, paras. 364-366 (A300 and A310) and 369-379 (A320).

[2460] French A380 contract, Annexe 3. Exhibit US-116 (BCI).

[2461] German A380 contract, clause 4.2; and BT-Drs. 14/10002, at 3. Exhibits US-72 (BCI) and US-124 (English translations). Spanish A380 contract, Tercera Clausula. Exhibit US-73 (BCI).

[2462] French A380 contract, Article 3; German A380 contract, clause 4.2-4.3; Spanish A380 contract, Tercera Clausula.

BCI deleted, as indicated **[***]**

funding amounts formed part of the total amount of principal that it was envisaged under the French, German and Spanish A380 contracts would be directly transferred (loaned) to Airbus over a set period of time, as agreed and planned when the respective contracts were concluded. In this sense, the relevant A380 LA/MSF contracts can be contrasted with an open line of credit. A line of credit is not an *ex ante* agreement about the disbursement of specific funding amounts at a pre-determined moment in the future, but rather a lending facility in the form of a promise on the part of a lender to make funding available (in possibly one or more instalments) to a borrower in the event it is requested.[2463] Thus, irrespective of whether all of the funds committed under the French, German and Spanish A380 contracts have been paid out, it is in our view clear from the particular facts that are before us that each of the LA/MSF contracts evidences the existence of a "government practice {that} involves a direct transfer of funds" in amounts and at moments agreed and planned at the conclusion of each contract.[2464] Therefore, we find that the French, German and Spanish A380 contracts are "financial contributions", within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.380 In terms of the amount of the relevant "financial contributions", there is very little difference between the parties' positions,[2465] which we summarize in the following table:

[2463] One such example is the EUR 700 million credit line granted by the European Investment Bank to EADS in 2002. The salient features of this particular credit line are described further at paras. 7.730 - 7.738, where we examine the United States' claim that it amounted to a subsidy within the meaning of Article 1 of the SCM Agreement.

[2464] We note that this finding is consistent with how the European Communities has itself treated the undisbursed funding amounts under the French, German and Spanish A380 contracts for the purpose of determining the internal rate of return of each contract. *See*, paras. 7.404-7.406 below; and Exhibit EC-597 (HSBI).

[2465] *See*, e.g., US, FWS, paras. 175-177, 191-194, 215-218, 234, 244, 253, 265, 272, 282 and 290; US, Answer to Panel Question 226; EC, FWS, paras. 332-337, 364-366, 369-372 and 375-378; EC, Answer to Panel Question 258.

BCI deleted, as indicated **[***]**

Table 1 – Approximate amount of funding provided for under the challenged LA/MSF measures

Aircraft Model	Amount (Millions)			
	France	Germany	Spain	UK
A300	**FF 3,012**[2466]	**DM 2,400**[2467]	**Ptas 3,829**[2468]	**-**
A310	**FF 3,180**[2469]		**Ptas 7,808**[2470]	**-**
A320	**FF 4,133**[2471]	**DM 1,330**[2472]	**Ptas 10,800**[2473]	**GBP 250**[2474]
A330/A340	**FF 7,800**[2475]	**DM 2,930**[2476]	**Ptas 29,400**[2477]	**GBP 447**[2478]
A330-200	**FF 330**[2479]	**-**	**-**	**-**
A340-500/600	**FF 2,110**[2480]	**-**	**Ptas 11,348**[2481]	**-**
A380	**EUR [***]**[2482]	**EUR [***]**[2483]	**EUR [***]**[2484]	**GBP [***]**[2485]

[2466] US, FWS, para. 176; *1997 Senate Report*, at 67, Exhibit US-18; EC, FWS, para. 365.

[2467] Amount for both the A300 and A310. US, FWS, para. 175; *Sundergutachten der Monopolkommission*, table 11, Exhibit US-30; EC, FWS, para. 364.

[2468] US, FWS, para. 177; *Airbus, Cuadernos CDTI, Centro para el Desarollo Tecnológico Industrial (CDTI)* July 1993, at 91, Exhibit US-54; EC, FWS, para. 366.

[2469] US, FWS, para. 176; *1997 Senate Report*, at 67, Exhibit US-18; EC, FWS, para. 365.

[2470] US, FWS, para. 177; *Airbus, Cuadernos CDTI, Centro para el Desarollo Tecnológico Industrial (CDTI)* July 1993, at 91, Exhibit US-54; EC, FWS, para. 366.

[2471] US, FWS, para. 192; *1997 Senate Report*, at 68, Exhibit US-18; US, Answer to Panel Question 226; EC, FWS, para. 370; EC, Answer to Panel Question 258; Exhibit EC-949 (BCI).

[2472] US, FWS, footnote 194; *Sundergutachten der Monopolkommission*, table 11, Exhibit US-30; US, Answer to Panel Question 226; EC, FWS, para. 369; EC, Answer to Panel Question 258; Exhibit EC-949 (BCI).

[2473] US, FWS, para. 193; *Airbus, Cuadernos CDTI, Centro para el Desarollo Tecnológico Industrial (CDTI)* July 1993, at 91, Exhibit US-54; US, Answer to Panel Question 226; EC, FWS, para. 371; EC, Answer to Panel Question 258; Exhibit EC-949 (BCI).

[2474] US, FWS, para. 194; *House of Lords written answers for 25 February and 19 March 1997* (Question to Mr Greg Knight), Exhibits US-97 and US-98; *Memorandum submitted by the Department of Trade and Industry*, Exhibit US-99; UK A320 contract, Article 2.1.1, Exhibit EC-94 (BCI); EC, FWS, para. 372; EC, Answer to Panel Question 258; Exhibit EC-949 (BCI).

[2475] US, FWS, para. 217; *1997 Senate Report*, at 67, Exhibit US-18; US, Answer to Panel Question 226; EC, FWS, para. 376; EC, Answer to Panel Question 258; Exhibit EC-949 (BCI).

[2476] US, FWS, para. 215; *Bundesregierung, 12th Subsidy Report (1987-1990)*, and all subsequent Subsidy reports until the 16th (1995-1998) Exhibits US-91H to 91L; US, Answer to Panel Question 226; EC, FWS, para. 375; EC, Answer to Panel Question 258; Exhibit EC-949 (BCI).

[2477] US, FWS, para. 217; US, Answer to Panel Question 226; EC, FWS, para. 177; EC, Answer to Panel Question 258; Exhibit EC-949 (BCI).

[2478] US, FWS, para. 218; *House of Lords written answers for 25 February and 19 March 1997* (Question to Mr Greg Knight), Exhibits US-97 and US-98; US, Answer to Panel Question 226; EC, FWS, para. 378; EC, Answer to Panel Question 258; Exhibit EC-949 (BCI).

[2479] US, FWS, para. 234; *1997 Senate Report*, at 67, Exhibit US-18; French A330-200 contract, Article 4.2, Exhibit US-78 (BCI); US, Answer to Panel Question 226; Exhibit EC-949 (BCI).

[2480] US, FWS, para. 244; French A340-500/600 contract, Article 4, Exhibits US-35 (BCI) and EC-91 (BCI); Exhibit EC-949 (BCI).

[2481] US, FWS, para. 253; Spanish A340-500/600 contract, Segunda Clausula, Exhibits US-37 (BCI) and EC-87 (BCI); US, Answer to Panel Question 226; Exhibit EC-949 (BCI).

[2482] US, FWS, para. 265; French A380 contract, Article 2, Exhibit US-116 (BCI); EC, FWS, para. 339; Exhibit EC-949 (BCI).

[2483] US, FWS, para. 273; German A380 contract, preamble, Exhibit US-72 (BCI); Exhibit US-124; EC, FWS, para. 339; Exhibit EC-949 (BCI).

[2484] The European Communities asserts that the actual amount of the "financial contribution" provided for under the Spanish A380 contract was only EUR **[***]**. EC, Answer to Panel Question 259. According to the European Communities, the maximum amount of EUR **[***]** set out in the Spanish A380 contract was set on the basis of: (i) a development cost estimate that was greater than the actual estimate assessed by Airbus GIE after conclusion of the contract; and (ii) an expected share in the development costs for CASA that was greater than what was allegedly agreed subsequently. However, in making these factual assertions, the European

7.381 We next turn to consider whether the above "financial contributions" confer a "benefit" upon Airbus, within the meaning of Article 1.1(b) of the SCM Agreement.

Do the Challenged Measures confer a "benefit"?

7.382 We recall that Article 1.1(b) of the SCM Agreement does not define the notion of "benefit". However, it is well established that a "financial contribution" will confer a "benefit" upon a recipient when it places that recipient in a more advantageous position compared with the position of that recipient in the absence of the "financial contribution".[2486] In *Canada – Aircraft*, both the panel and the Appellate Body considered that the basis for making this comparison was the market. Thus, the panel opined that:

> "a financial contribution will only confer a 'benefit', *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market".[2487]

Similarly, the Appellate Body explained that:

> "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 on the market."[2488]

7.383 In essence, the United States' argues that each of the "financial contributions" made available through the challenged LA/MSF measures confers a "benefit" on Airbus, within the meaning of Article 1.1(b) of the SCM Agreement, because each was provided on interest rate terms that are more advantageous than would otherwise be the case if financing on the same or similar terms and conditions had been sought by Airbus from a market lender. In other words, the United States contends that LA/MSF confers a "benefit" because market lenders faced with a request to finance Airbus LCA projects on the same or similar terms and conditions as LA/MSF would demand that Airbus pay a higher rate of interest than did the EC member State governments.

7.384 The European Communities has presented several lines of defence to the United States' allegations. In the first instance, the European Communities rejects the view that the appropriate standard against which to measure whether LA/MSF confers a "benefit" may be found in the interest rates associated with market financing on the same or similar terms and conditions as LA/MSF. For all LA/MSF measures post-dating the entry into force of the 1992 Agreement, the European Communities argues that the question of "benefit" should be resolved by testing whether each relevant LA/MSF contract involves government support that is consistent with Article 4 of the 1992 Agreement. In addition, for all instances of LA/MSF challenged by the United States, with the exception of LA/MSF for the A300 and A310, the European Communities submits that the

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Communities refers to no evidence that supports its stated position. Therefore, we have no choice but to reject the European Communities' factual assertion and rely on the *maximum* amount of funding actually prescribed in the Spanish A380 contract.

[2485] US, FWS, para. 290; UK A380 contract, Article 5, Exhibit US-79 (BCI); Exhibit EC-949 (BCI).

[2486] Panel Report, *Canada – Aircraft*, para. 9.112, cited with approval in Appellate Body Report, *Canada – Aircraft*, para. 149.

[2487] Panel Report, *Canada – Aircraft*, para. 9.112; Appellate Body Report, *Canada – Aircraft*, paras. 157-158.

[2488] Appellate Body Report, *Canada – Aircraft*, para. 157.

BCI deleted, as indicated **[***]**

reasonableness of the repayment forecasts used to establish the repayment terms of each contract should be the focus of our "benefit" analysis.

7.385 Second, and in the alternative, the European Communities contends that, assuming the market is the appropriate benchmark against which to measure whether LA/MSF confers a "benefit", the interest rates advanced by the United States for this purpose overestimate the rates of interest associated with market financing that is comparable with LA/MSF. According to the European Communities, when the full cost of LA/MSF is compared with appropriate market interest rate benchmarks, the challenged LA/MSF measures do not confer a "benefit" upon Airbus.

Article 4 of the 1992 Agreement

7.386 For LA/MSF measures adopted after the entry into force of the 1992 Agreement (17 July 1992), the European Communities contends that the notion of "benefit" under Article 1.1(b) must be interpreted in the light of Article 4 of the 1992 Agreement. According to the European Communities, the 1992 Agreement is an instrument containing relevant rules of international law applicable between the parties, within the meaning of Article 31(3)(c) of the VCLT, and therefore must be taken into account in the present dispute as relevant context when interpreting the notion of "benefit" under Article 1.1(b) of the SCM Agreement.[2489] The European Communities characterizes Article 4 of the 1992 Agreement as a rule prescribing the extent to which the United States and the European Communities agreed that "development support" could be legitimately provided to their domestic LCA manufacturers. The European Communities contends that this rule "influences in particular the interpretation of the appropriate benchmark when determining whether a financial contribution has conferred a benefit on the recipient".[2490] To this end, the European Communities argues that compliance with the "development support" standards established under Article 4 is dispositive of the question whether LA/MSF provided to Airbus after 17 July 1992 conferred a "benefit", within the meaning of Article 1.1(b) of the SCM Agreement.[2491]

7.387 Article 4 of the 1992 Agreement reads as follows:

> "4.1. Government shall provide support for the development of a new large civil aircraft programme only where a critical project appraisal, based on conservative assumptions, has established that there is a reasonable expectation of recoupment, within 17 years from the date of first disbursement of such support, of all costs as defined in Article 6(2) of the Aircraft Agreement, including repayment of governments supports on the terms and conditions specified below.
>
> 4.2. As of entry into force of this Agreement, direct government support committed by a Party for the development of a new large civil aircraft programme or derivative shall not exceed:
>
> > (a) 25 % of that programme's total development costs as estimated at the time of commitment (or of actual development costs whichever is lower); royalty payments on this tranche shall be set at the time of commitment of the development support so as to repay this support at an interest rate no less than the cost of borrowing to the government within no more than 17 years from first disbursement; plus

[2489] A more detailed description of the European Communities' arguments in this regard is set out in our preliminary ruling, at paras. 7.70 - 7.76 above.
[2490] EC, FWS, para. 399.
[2491] EC, FWS, paras. 394-441.

BCI deleted, as indicated **[***]**

> (b) 8 % of that programme's total development cost as estimated at the time of commitment (or of actual development costs, whichever is lower); royalty payments on this tranche shall be set at the time of commitment of the development support so as to repay such support at an interest rate no less than the cost of borrowing to the government plus 1 % within no more than 17 years from disbursement.
>
> These calculations shall be made on the basis of the forecast of aircraft deliveries in the critical project appraisal.

4.3. Royalty payments per aircraft shall be calculated at the time of commitment of the development support to be repaid on the following basis:

> (a) 20 % of aggregate payments calculated in accordance with Article 4.2 is payable on the basis of the delivery of a number of aircraft corresponding to 40 % of forecast deliveries;
>
> (b) 70 % of aggregate payments calculated in accordance with Article 4.2 is payable on the basis of the delivery of a number of aircraft corresponding to 85% of forecast deliveries."[2492]

7.388 Although the European Communities argues that Article 4 serves as relevant context for the *interpretation* of the notion of "benefit", it has not explained exactly how it informs the *meaning* that must be given to this term. Rather, a large part of the European Communities' submissions on this subject are devoted to demonstrating that the post-1992 LA/MSF measures *comply* with the terms of Article 4 of the 1992 Agreement.[2493] In this light, it is not entirely clear to us how the European Communities believes the *meaning* of the word "benefit" in Article 1.1(b) of the SCM Agreement is informed by Article 4 of the 1992 Agreement.

7.389 As we have previously noted, Article 4 establishes a set of qualitative and quantitative parameters for the provision of support for the development of new LCA or derivative programmes.[2494] It identifies the dividing line that was agreed between the United States and the European Communities for acceptable and prohibited "development support" under that Agreement. It contains no definition of a "subsidy" nor does it make any reference to the notion of "benefit". Thus, we see nothing in the language of Article 4 to suggest that it informs the meaning of Article 1.1(b) of the SCM Agreement. Moreover, we cannot simply assume, on the basis of the arguments presented by the European Communities, that "development support" measures taken in compliance with Article 4 of the 1992 Agreement do not have the characteristics of "financial contributions" that confer a "benefit", within the meaning of Article 1.1 of the SCM Agreement. Thus, even assuming that the 1992 Agreement were an instrument containing relevant rules of international law applicable between the parties, within the meaning of Article 31(3)(c) of the VCLT (and once again, we emphasize that on this question, we express no view),[2495] we are not convinced that Article 4 of that Agreement provides any guidance on how to interpret the concept of "benefit" under Article 1.1(b) of the SCM Agreement. Consequently, we dismiss the European Communities'

[2492] Agreement between the European Economic Community and the Government of the United States of America concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft, *Official Journal of the European Communities* of 17.10.1992, No. L 301, p. 32, EC, Request for Preliminary Ruling, 26 October 2005, Exhibit EC-4 (submitted with Request Preliminary Ruling).

[2493] EC, FWS, paras. 405-441.

[2494] *See*, para. 7.68 above.

[2495] *See*, para. 7.100 above.

BCI deleted, as indicated **[***]**

argument that the benchmark to be applied when assessing whether LA/MSF confers a "benefit" should, in effect, be Article 4 of the 1992 Agreement.

"Reasonableness of the repayment forecasts"

7.390 The European Communities asserts that the "decisive factor" for determining whether LA/MSF measures for the A330-200, A340-500/600 and the A380 confer a benefit is the reasonableness of the repayment forecasts. Although, initially, the European Communities advanced this argument in respect of only the LA/MSF measures for the A330-200, A340-500/600 and the A380, it subsequently declared that it could be of equal relevance to certain pre-1995 LA/MSF measures (specifically, the A320 and A330/A340 contracts) if the Panel were to reject its specific defences advanced in relation to these measures based on the temporal scope of the SCM Agreement and the relevance of the Tokyo Round Subsidies Code.[2496] Because we have dismissed these two defences, the following evaluation should be understood as addressing the European Communities' arguments as they relate to all of these measures, namely, LA/MSF for the A320, A330/A340, A330-200, A340-500/600 and the A380.

7.391 The European Communities contends that the reasonableness of the repayment forecasts used to establish the repayment terms in each of the challenged LA/MSF contracts is the most relevant benchmark for assessing the question of benefit because it has a direct impact on the extent to which repayments will be made. Thus, if the repayment terms of LA/MSF are based on a reasonable forecast of LCA sales, it is more likely that it will be repaid in full, and consequently, that the target rate of return will be achieved. It is only when the repayment forecast is not a reasonable one – that is, unreasonably optimistic, spreading repayment over an unreasonably large number of sales, and thereby delaying the point at which the target rate of return is achieved – that a benefit will be conferred.[2497] According to the European Communities, this view is indirectly supported by footnote 16 of the SCM Agreement, which it argues suggests that the drafters of the SCM Agreement were aware of the fact that royalty-based financing in the LCA sector needs to be assessed against the reasonableness of the sales forecast used to establish its terms of repayment. Thus, the European Communities submits that the reasonableness of the repayment forecast contained in the LA/MSF contracts should be "at the heart of any legal assessment **[***]** under the SCM Agreement".[2498]

7.392 The United States disputes the European Communities' contentions. In the view of the United States, the argument that the reasonableness of repayment forecasts is the appropriate benchmark for determining whether LA/MSF confers a benefit ignores the fact that a subsidy may exist irrespective of the reasonableness of a government's expectations about the number of sales needed to secure full repayment of LA/MSF. In particular, the United States argues that if the rate of return obtained by the government for the financing of an LCA project is set at, for example, its own borrowing rate, a LA/MSF recipient will receive an advantage notwithstanding the fact that the repayment terms may be based on a reasonable estimate of the number of sales needed to achieve full repayment of that LA/MSF.[2499] Moreover, according to the United States, footnote 16 of the SCM Agreement does not support the European Communities' argument. In its view, if anything, the very fact that the drafters of the SCM Agreement saw a need to clarify that a particular circumstance involving the implementation of royalty-based financing "does not in itself" constitute deemed serious prejudice, suggests that they presumed the provision of LA/MSF confers a benefit and therefore constitutes a

[2496] EC, Answer to Panel Question 62.
[2497] EC, FWS, paras. 442-463; EC, SWS, paras. 151-157.
[2498] EC, Answer to Panel Question 63.
[2499] US, FNCOS, para. 40; US, SWS, para. 57.

subsidy. The United States considers that there would have been no need to make the clarification otherwise.[2500]

7.393 The United States also notes that footnote 16 is no longer in effect, and in any case that it "explicitly deals not with 'benefit' but with one category of adverse effects – serious prejudice – and then only 'for the purposes of this subparagraph'".[2501] Thus, the United States argues that any relevance of footnote 16 is limited to the specific context in which it is found – the question of "serious prejudice" under Article 6.1(d) of the SCM Agreement. Had the drafters of footnote 16 also intended it to be relevant to the question of "benefit", the United States submits that they could have easily included a footnote to Article 1.1(b) of the SCM Agreement making that point.[2502] However, the drafters did not; and according to the United States, the European Communities' interpretation of the lack of any footnote or cross-reference amounts to a "distortion of customary rules of interpretation of international law".[2503]

7.394 Finally, the United States rejects the European Communities' assertion that its Communication to the Negotiating Group on Rules in March 2003 indicates that it supports the European Communities' interpretation of Article 1. The United States explains that the Communication did not purport to identify the "only" circumstance in which royalty-based financing would bestow a benefit, but rather, only one such circumstance where that result would be "obvious". Moreover, the United States notes that its statement referred to "assumptions and sales projections", which it explains encompass "the very factors the EC ignores: the rate of return and other key terms" of LA/MSF.[2504]

7.395 We believe it is useful to start our evaluation of the European Communities' defence by examining the text of footnote 16 in the immediate context in which it appears, that is, in the light of Article 6.1(d) of the SCM Agreement. The relevant language reads:

> "6.1 Serious prejudice in the sense paragraph (c) of Article 5 shall be deemed to exist in the case of:
>
> ...
>
> (d) direct forgiveness of debt, *i.e.*, forgiveness of government-held debt, and grants to cover debt repayment.[16]
>
> [16] Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph."

Thus, Article 6.1(d) identifies one form of government action that is deemed to cause serious prejudice within the meaning of Article 5(c) – direct debt forgiveness. Although the legal effect of this provision, including footnote 16, has lapsed, we do not preclude that it could nevertheless be useful to understanding the different types of measures that the SCM Agreement was intended to address.[2505]

[2500] US, SWS, para. 62.
[2501] US, FNCOS, para. 38.
[2502] US, FNCOS, para. 38.
[2503] US, SWS, para. 59.
[2504] US, SWS, para. 61.
[2505] We recall that we have already noted that paragraph 7 of Annex IV of the SCM Agreement (which like Article 6.1(d) is no longer in force) provides an important indication of the intended scope of Article 5. *See*, para. 7.64 above.

BCI deleted, as indicated **[***]**

7.396 When read together with Article 6.1(d), footnote 16 indicates a recognition on the part of Members that, in the context of royalty-based financing for civil aircraft programmes, the mere fact that actual aircraft sales may fall below the level of forecast sales cannot, in itself, be taken as evidence of direct debt forgiveness, and therefore cannot be deemed to cause serious prejudice for the purposes of Article 6.1(d). In other words, the fact that royalty-based financing for civil aircraft programmes may not be fully repaid because of a shortfall in actual aircraft sales compared with sales forecasts is not, on its own, enough to characterise lower than expected levels of royalty payments as a form of direct debt forgiveness that must be deemed to cause serious prejudice. To the extent that the effect of footnote 16 is expressly limited to the purposes of Article 6.1(d) – that is, determining whether direct debt forgiveness can be deemed to cause serious prejudice – it is clear that it was not intended to inform the meaning of "benefit" under Article 1.1(b). This is confirmed by the absence of any cross-reference to footnote 16 (or any other text) qualifying the language of Article 1.1(b). In this regard, we note that elsewhere in the SCM Agreement, where Members considered it was necessary to modify the language of a particular obligation to account for civil aircraft, they did so by inserting appropriate footnotes.[2506]

7.397 At most, we consider that the language of footnote 16 may be read to imply that when actual aircraft sales do not fall below the level of forecast sales under a royalty-based financing instrument (*i.e.*, the situation the European Communities suggests evidences the existence of a "reasonable repayment forecast"), it would be inaccurate to characterise that instrument as providing for direct forgiveness of debt. However, this is not the same as saying that all instances of royalty-based financing granted on the basis of a "reasonable repayment forecast" do not confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. In our view, a reasonable repayment forecast, in the terms advanced by the European Communities – *i.e.*, a reasonable number of sales over which a market lender could expect full repayment of loaned principal plus interest[2507] – cannot alone be determinative of whether a royalty-based financing instrument (in this case LA/MSF[2508]) confers a benefit for the purpose of the SCM Agreement. While we can accept that an *unreasonable* repayment forecast may signal that a loan confers a benefit,[2509] we do not believe the opposite will necessarily be the case when LA/MSF is grounded on a reasonable repayment forecast. This is because the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by the lender.

7.398 As we see it, the rate of return attached to a LA/MSF contract may be viewed as the "price" the contractual parties agreed to pay/receive for the particular rights and obligations established thereunder, including those defined by the repayment schedule. Therefore, the rate of return earned on each LA/MSF contract represents not only the envisaged financial gain for the lender (the EC member State governments), but also the apparent financial cost for Airbus. Bearing in mind that it is now well established that the question of benefit under Article 1.1(b) of the SCM Agreement should be resolved by comparing the situation of the recipient of a financial contribution with and without

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[2506] The SCM Agreement contains two other footnotes that refer to civil aircraft – footnotes 15 and 24. Footnote 15 reads: "Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft." Footnote 24 reads: "Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product." Together with footnote 16, these are the only parts of the SCM Agreement that make specific reference to civil aircraft.

[2507] EC, Answer to Panel Question 73.

[2508] We note that neither party has distinguished the challenged LA/MSF measures from "royalty-based financing" falling within the scope of footnote 16. However, strictly speaking, not all of the LA/MSF contracts at issue in this dispute envisage the payment of "royalties" in the sense that we have described at para. 7.374 above, and analysed in more detail at paras. 7.410 below *et seq.*

[2509] For instance, where full repayment is expected over an unrealistically high number of LCA sales, such that no market lender would be willing to agree to make a loan on the same or similar repayment conditions.

that contribution,[2510] we believe that it makes sense to focus the assessment of whether LA/MSF confers a benefit on whether the rate of return of the challenged measures is lower than the rate of return that would be sought by a market lender for financing on the same or similar terms and conditions, taking into account a comparable schedule of repayment. So, for example if a government LA/MSF contract envisaged a zero rate of return on the basis of a reasonable repayment forecast, it would obviously confer a benefit, if in the absence of the zero-interest loan, Airbus could only obtain the same or similar financing from a market lender at a rate of interest of 3%.

7.399 However, the European Communities submits that in the context of LA/MSF, the question of benefit should not be determined through a strict comparison of LA/MSF rates of return with the rates of return attached to comparable market financing instruments. As we understand it, under this line of argument, the European Communities considers reliance on a "'perfect' market"[2511] benchmark for this purpose would be inappropriate because of the heavy government intervention and international regulation it alleges is found in the LCA industry. The European Communities draws support for its position from certain observations made by the Appellate Body in *US – Countervailing Measures on Certain EC Products*, which the European Communities argues stand for the proposition that "fair" market transactions may not always be the most appropriate benchmarks for the purpose of establishing the existence of subsidies under the SCM Agreement, particularly where the market for those transactions has been distorted by government action.[2512] According to the European Communities, the LCA industry is one sector of the economy where the Appellate Body's observations find considerable relevance.

7.400 We are not persuaded by the European Communities' arguments on this point. Even assuming that the particular observations of the Appellate Body relied upon by the European Communities were directly applicable to the present factual circumstances,[2513] the European Communities has provided no evidence or explanation of how alleged government intervention in the LCA industry distorts the behaviour of market lenders such that it renders the rate of return they would ask for financing comparable to LA/MSF an inappropriate benchmark upon which to base a benefit analysis. While we recognize that the LCA industry has particular features that sets it apart from many other industrial sectors,[2514] in the absence of clear arguments and evidence of government action distorting non-government loan markets, we cannot accept the European Communities' assertion that the "reasonableness of repayment forecasts" used to construct LA/MSF contracts is the "decisive factor"[2515] for determining whether a LA/MSF contract confers a benefit and constitutes a subsidy under the SCM Agreement. We therefore dismiss the European Communities' contention.

7.401 Having closely reviewed and considered the arguments and evidence submitted by the parties, we believe that it is appropriate to resolve the question whether LA/MSF confers a benefit by

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[2510] *See*, paras. 7.310-7.312 and 7.382.

[2511] EC, Answer to Panel Question 73.

[2512] EC, FWS, para. 445, referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 123-124.

[2513] The particular observations at issue were made by the Appellate Body in *US – Countervailing Measures on Certain EC Products* in the context of a case where, as we have already explained, the "core legal question" before the panel was whether the benefit resulting from a prior non-recurring financial contribution bestowed on a state-owned enterprise continued to exist following its privatization at arm's length and at fair market value, the government having transferred all or substantially all property and controlling interest. Appellate Body Report, para. 117. Given this "very narrow set of facts and circumstances", it is not apparent to us that the guidance of the Appellate Body the European Communities relies upon is as directly relevant to the question we are faced with under the present set of arguments (*i.e.*, whether the rate of return for comparable market financing is an appropriate benchmark for determining whether LA/MSF confers a benefit) as the European Communities contends.

[2514] *See*, paras. 7.367-7.368 and paras. 7.1883 - 7.1893.

[2515] EC, Answers to Panel Questions 62 and 63.

BCI deleted, as indicated **[***]**

examining whether the cost of the challenged LA/MSF contracts to Airbus is less than the cost that Airbus would be faced with if it sought financing on the same or similar terms and conditions as LA/MSF from the market. We therefore begin our benefit analysis by examining whether the rate of return obtained by the relevant EC member State governments when providing LA/MSF is less than the rate of return that would be asked by a market-based lender for financing on the same or similar terms and conditions as each provision of LA/MSF. It is to this question that we next turn our attention.

Whether the Rates of Return of the LA/MSF Measures are less than the Rates of Return of comparable Market-Based Financing

7.402 The parties have made extensive arguments and submitted much detailed evidence, including expert studies and reports, on the question whether the rates of return obtained by the EC member State governments for the provision of LA/MSF are less than the rates of return that would be required by a market lender for financing on the same or similar terms and conditions as LA/MSF. In doing so, they have presented two very different perspectives and conclusions.

LA/MSF Rates of Return

7.403 In its first written submission, the United States identified what it considers to be the "actual"[2516] rates of return that each EC member State government expected to obtain from each provision of LA/MSF in the event that it was fully repaid. The United States explains that in a number of instances, it derived these rates from information contained in the LA/MSF contracts themselves. However, where the United States did not have access to the relevant LA/MSF contracts, it estimated the rates of return on the basis of information obtained during the Annex V process or information publicly available.[2517] As we understand it, the United States did not factor potential royalty payments foreseen under any of the contracts into its calculations. The rates of return advanced by the United States are the following:[2518]

[2516] The United States argues that "its determination of the benefit conferred by Launch Aid relies on a comparison between a market benchmark and the actual interest rates set out in the Launch Aid contracts". US, SWS, para. 121. (Underline added).

[2517] The United States recalls that during the Annex V process, the European Communities refused to provide any information at all, including copies of the LA/MSF contracts, in respect of the challenged A300, A310, A320 and A330/A340 LCA projects. The United States argues that the logical inference that should be drawn from this failure to provide information, in the light of paragraph 7 of Annex V of the SCM Agreement, is that the missing contracts would demonstrate that each grant of LA/MSF is a subsidy. US, FWS, paras. 167-168. We note that the European Communities subsequently submitted copies of what it considered to be all of the relevant contracts and business cases as Exhibits to its first written submission and in Answer to Panel Questions 78, 246, 248, 249, 252 and 262.

[2518] Ellis Report, Table 4, p. 25. Exhibit US-80 (BCI).

BCI deleted, as indicated **[***]**

Table 2 – LA/MSF rates of return proposed by the United States

Aircraft Model	France	Germany	Spain	UK
A300	**0%**	**0%**	**0%**	**-**
A310	**0%**	**0%**	**0%**	**-**
A320	**0% or below market**	**0% or below market**	**0%**	**[***]**
A330/A340	**[[HSBI]]**	**0%**	**0%**	**[***]**
A330-200	**[[HSBI]]**	**-**	**-**	**-**
A340-500/600	**[***]**	**-**	**[***]**	**-**
A380	**[***]**	**[***]**	**[***]**	**[***]**

7.404 The European Communities rejects the rates of return established by the United States, arguing that they underestimate the actual returns anticipated by the EC member State governments. In the European Communities' view, the rates of return that the EC member State governments expected to obtain from each of the challenged LA/MSF measures must be determined taking into account the contractual repayment terms, including any anticipated royalty payments that would be due over the life of the financed aircraft, and, where relevant, the effects of taxation.[2519] The European Communities describes this as the "implicit rate of return" of each of the LA/MSF contracts – *i.e.*, the percentage rate of return the EC member State governments anticipated from the projected LA/MSF cash-flows at the time the LA/MSF contracts were concluded.[2520] The European Communities calculated an "implicit rate of return" for each of the A320, A330/A340, A330-200, A340-500/600 and A380 LA/MSF contracts.[2521]

Implicit Rates of Return *Before* Taxation

7.405 The European Communities explains that the first step in arriving at the "implicit rates of return" of the LA/MSF measures involves determining each contract's internal rate of return ("IRR").[2522] The European Communities calculated an IRR for each of the challenged LA/MSF contracts (with the exception of the A300 and A310 contracts) by identifying the interest rate that sets at zero the net present value ("NPV") of actual or anticipated LA/MSF receipts[2523] (*i.e.*, LA/MSF-inflows) and expected repayments (including any lump sum payments and royalties) (*i.e.*, LA/MSF-outflows) on the basis of the aircraft delivery forecasts contained in the relevant Airbus business case.

7.406 In particular, for LA/MSF contracts that did not foresee the payment of royalties,[2524] the European Communities identified the IRR as the discount rate that set the NPV of all programmed

[2519] EC, FWS, paras. 537-541; EC, Answer to Panel Question 69; EC, Comment on United States Answer to Panel Question 142.

[2520] EC, Answer to Panel Question 69.

[2521] ITR LLC Report, pp. 4-5, Exhibits EC-13 (BCI) and EC-13 (HSBI); and Table presented in Exhibit EC-597 (HSBI). The European Communities has not submitted any calculation of the rates of return associated with the challenged A300 and A310 LA/MSF measures.

[2522] EC, Answer to Panel Question 69.

[2523] The European Communities appears to have relied upon what it asserts were the actual LA/MSF receipts in respect of the UK A320 contract (**[***]**), the UK A330/A340 contract (**[***]**) and the Spanish A380 contract (**[***]**). Compare Exhibit EC-597 (HSBI) with Exhibits EC-94 (BCI), EC-86 (BCI) and US-73 (BCI). In the case of the two UK contracts, **[***]**, and in any case the European Communities appears to have taken account of the slight variances by adjusting the repayment schedules applied in its analyses. However, in the case of the Spanish A380 contract, we consider the difference to be significant and recall that the European Communities has failed to substantiate its assertion that the amount originally provided for under the relevant contract **[***]** was not in fact transferred to Airbus. *See*, footnote 2484.

[2524] The LA/MSF contracts that *do not* contain any royalty provisions are the **[***]**.

BCI deleted, as indicated **[***]**

disbursements over time and all repayments at zero, taking into account the number and timing of deliveries projected in the relevant Airbus business case. Essentially the same methodology was applied to those measures containing royalty provisions,[2525] with the only difference being that the value of royalty payments anticipated in the light of the number, timing and (for some contracts) the forecast prices of deliveries[2526] projected by Airbus in its business case were taken into account. For instance, the European Communities explains that the UK A330/A340 contract requires full repayment of LA/MSF contributions **[***]**.[2527] However, according to the European Communities, the Airbus business case for this aircraft projects fewer than this number of deliveries over the entire life of the aircraft.[2528] In this light, the European Communities calculated the IRR for the UK A330/A340 contract on the basis of the total repayments (including royalties) anticipated over the number and timing of aircraft deliveries projected in the Airbus business case.[2529] On this basis, the European Communities determined the following IRRs:[2530]

Table 3 – LA/MSF implicit rates of return *before* taxation proposed by the EC

Aircraft Model	Alleged LA/MSF Rates of Return *Before Taxation* (EC)			
	France	Germany	Spain	UK
A320	**[***]**	**[***]**	**[***]**	**[***]**
A330/A340	**[***]**	**[***]**	**[***]**	**[***]**
A330-200	**[***]**	**-**	**-**	**-**
A340-500/600	**[***]**	**-**	**[***]**	**-**
A380	**[***]**	**[***]**	**[***]**	**[***]**

7.407 Although the United States contests the European Communities' view that the rates of return expected by member States from each of the challenged LA/MSF measures must be determined taking into account the IRR for each LA/MSF contract,[2531] we do not understand the United States to contest the general NPV of cash-flows methodology applied by the European Communities to determine these IRRs. Indeed, where it had access to information on LA/MSF disbursements and repayments, the United States appears to have relied upon a similar methodology to derive the values of the interest rates it submits were actually charged by the EC member States for LA/MSF.[2532] Moreover, we note that the United States has itself identified the same rates of return as the European Communities for the Spanish A320, A330/A340 and A380 contracts. Nevertheless, the United States does take issue with at least two particular aspects of the European Communities' calculation. The first is its reliance on projected aircraft deliveries, as opposed to actual deliveries, in order to establish

[2525] The LA/MSF contracts that require royalty payments are the **[***]**. Although royalty payments are envisaged under the **[***]**, the IRR determined by the European Communities for these contracts did not take any such payments into account because they were due **[***]**.

[2526] Under the French A330/A340, A330-200, A340-500/600 and A380 contracts, the value **[***]** is calculated on the basis of **[***]**. The European Communities explains that it used the **[***]**. EC, Answer to Panel Question 247.

[2527] UK A330/A340 contract, Articles 2.4.1-2.4.5.

[2528] The precise number was designated by the European Communities as HSBI. *See*, Exhibits EC-775 (HSBI) and EC-944 (HSBI).

[2529] EC, Answer to Panel Question 69.

[2530] ITR LLC Report, pp. 4-5, Exhibit EC-13 (BCI); and Table presented in Exhibit EC-597 (HSBI). We recall that the European Communities did not undertake any such calculation for the A300 and A310 LA/MSF measures.

[2531] US, SWS, paras. 120-130; US, Comments on EC Answer to Panel Question 249.

[2532] The Ellis Report explains that the interest rate identified for the UK A320 contract was calculated on the basis of "disbursements and repayments until the end of 1999"; the UK A330/A340 contract on the basis of "available disbursements, repayments and delivery data"; and the UK A380 contract on the basis of "initially estimated delivery schedule disclosed in association with the Launch Aid Agreements and interest rates as defined" in the contract. Ellis Report, p.26, Exhibit US-80 (BCI).

BCI deleted, as indicated **[***]**

the amount and timing of LA/MSF repayments; and the second is the European Communities' consideration of royalty payments.[2533]

7.408 To the extent that the IRRs determined by the European Communities are based on the number, timing and (for some contracts) the forecast prices of deliveries projected in the relevant Airbus business case, they are entirely dependent upon the credibility of the Airbus business plan, and therefore inherently contain an element of speculation. Thus, as the United States appears to note,[2534] the IRRs calculated by the European Communities do not result from an absolute legal obligation on Airbus to make repayments over a set period of time at a given interest rate. Rather, they are based on a repayment obligation that is conditional upon Airbus' business plan actually being met.

7.409 As regards the European Communities' consideration of royalty payments,[2535] the United States argues that the royalties foreseen under the LA/MSF contracts are **[***]** – between **[***]** – and are due only after a large number of deliveries have been made. Because of what the United States argues is "the very substantial uncertainty attached to any royalties due this far out into the future and depending entirely on Airbus successfully selling more planes than the specified royalty-based thresholds",[2536] it contends that royalty payment expectations must have played only a marginal role, at most, in the government lenders' financing decisions.[2537] Thus, the United States does not argue that royalty payment expectations are irrelevant, but merely that they must play only a marginal role in determining the rate of return that the EC member State governments anticipated at the moment of concluding the LA/MSF contracts. Moreover, for the United States, a commercial investor would be unlikely to take into account the prospects of any such potential royalty returns, but would instead look to recover its investment and make a commercial return over a much shorter period of time.[2538]

7.410 Royalty payments were factored into the European Communities' IRR calculations for the **[***]** contracts, the **[***]**contracts, and the **[***]** contract. As we understand it, the royalties foreseen under these contracts represent a share in the revenues generated from sales of the financed LCA, *after* the full amount of LA/MSF has been repaid. In our view, the fact that such payments were expressly provided for in these contracts indicates that the EC member State governments to some degree anticipated they could enhance the rate of return that would otherwise be achieved on their LA/MSF investment. However, exactly how much the EC member State governments expected their returns to improve depends upon the number and timing of aircraft deliveries they anticipated would attract the specified royalty payments.

[2533] The United States also asserts that the European Communities has not properly substantiated its calculations because it: (i) failed to disclose the calculations on which its alternative rates were based and the underlying data; (ii) redacted the delivery schedules used in its calculations; and (iii) refused to provide the underlying business cases. According to the United States, such information would have been essential for the United States and the Panel to critically examine its calculations. US, FNCOS, paras. 56-57; US, Comments on EC Answer to Panel Question 249. We recall that the European Communities submitted copies of what it considered to be all of the relevant contracts and business cases as Exhibits to its FWS and in its Answer to Panel Questions 78, 246, 248, 249, 252 and 262. While we consider that the information submitted by the European Communities to support its calculations of the IRR should have been presented in its entirety with the European Communities' first written submission, when the European Communities first revealed its analysis on the LA/MSF rates of return; and although the information the European Communities submitted throughout this proceeding was not as complete as we would have liked, overall it was sufficient to permit us to verify and evaluate the European Communities' assertions in respect of the appropriate IRRs. See, paras. 7.408 - 7.424.

[2534] US, Answer to Panel Question 42.

[2535] In the sense we have described at para. 7.374.

[2536] US, SWS, para. 122. See also, US, comments on EC Answer to Panel Question 249 ("the **[***]** play only a very minor role in the overall return that the government may have expected").

[2537] US, SWS, paras. 121-123; US, Answer to Panel Question 142; US Comment to EC, Answer to Panel Question 249.

[2538] US, Answer to Panel Question 142.

BCI deleted, as indicated **[***]**

7.411 The European Communities argues that the answer to this question lies in the aircraft delivery forecast that the Airbus business case predicts would be achieved over the life of the particular LCA project.[2539] This is because, according to the European Communities, Airbus' business case delivery forecasts informed the parties' repayment expectations in respect of each of the relevant LA/MSF measures, an assertion the European Communities considers can be substantiated by comparing the IRR calculated for the UK A320 and A330/A340 contracts on the basis of the Airbus delivery forecasts (as we understand it, not including royalty payments), with the rate of return actually specified in those contracts. The European Communities explains that both the UK A320 and A330/A340 contracts explicitly envisage a rate of return to the UK government, after full repayment of its LA/MSF contributions, of **[***]**. When the per-aircraft levies specified under these contracts are considered in the light of the delivery forecasts contained in the relevant Airbus business cases, the European Communities argues that the resulting IRRs are virtually identical.[2540]

7.412 As we see it, even if the European Communities were correct in its factual assertion,[2541] the extent to which the repayment terms of the LA/MSF contracts were set by reference to Airbus' business case delivery forecasts is not the only factor that must be taken into account when considering whether royalty payments should form part of the actual rate of return anticipated by the EC member State governments. Another important factor to consider is the credibility of the Airbus business case. Because of the graduated levy-based and success-dependent nature of LA/MSF repayments, Airbus has an economic incentive to stretch the life of each aircraft project as much as possible. The greater the number of sales over which principal repayments and royalties must be paid, the less likely it is that Airbus will have to make those payments if the business plan estimates prove to be optimistic. Thus, although ostensibly required by the terms of the LA/MSF agreements, royalty payments may never be made if attached to a number of aircraft sales, which although identified in the business plan that formed the basis of the parties' expectations on concluding the LA/MSF contracts, cannot realistically ever be achieved.[2542]

7.413 The European Communities argues that the Airbus business case is the product of "an exhaustive internal analysis of the programme's technical and commercial prospects" and "relies on a host of conservative assumptions and methodologies".[2543] In addition, because Airbus has had to find its own sources of funding for the majority (67%) of LCA development costs since the entry into force of the 1992 Agreement, the European Communities submits that its business case delivery forecasts have been, by definition, "realistic and sober".[2544] So much so that they have been "often

[2539] EC, FWS, paras. 537-541; EC, Answer to Panel Questions 68 and 69.

[2540] EC, FWS, para. 549; EC, Answer to Panel Question 69, where it asserts that the IRRs would be **[***]** and **[***]**, respectively.

[2541] We note that apart from the question whether the EC member States actually relied upon the Airbus business cases when developing their own repayment expectations, it is not entirely clear to us that the schedule of forecast deliveries used by the European Communities in its calculations, Exhibit EC-597 (HSBI), matched the information on projected deliveries contained in the Airbus business cases submitted for the A330-200 and the A330/A340. The A330/A340 business case identified the same number of total forecast deliveries over the same years as Exhibit EC-597 (HSBI), but differed in respect of the numbers of deliveries expected in individual years. The business case for the A330-200 identified a slightly lower number of total forecast deliveries, and did not contain a delivery forecast for individual years. Compare Exhibits EC-597 (HSBI) with EC-775 (HSBI), EC-776 (HSBI), EC-944 (HSBI) and EC-956 (HSBI). Nevertheless, for the purpose of the present analysis, we have assumed that the schedules of forecast deliveries used by the European Communities are approximately accurate and therefore reasonably reliable.

[2542] Moreover, for certain contracts, the payment of royalties is limited in time, meaning that even a delay in meeting the business plan sales objectives could result in Airbus not having to make any royalty payments. For instance, Airbus' obligation to pay royalties under the French and German A380 contracts is limited in time to **[***]**. German A380 contract, Section 10.1, Exhibit US-72 (BCI); French A380 contract, Article 7.3, Exhibit US-75 (BCI).

[2543] EC, FWS, para. 466.

[2544] EC, FWS, paras. 465 and 467.

met, and indeed exceeded."[2545] Nevertheless, the European Communities does not suggest that Airbus' business case delivery forecasts are infallible. Indeed, the European Communities recognizes that forecasts are, by their very nature, "informed judgements about how events that have not yet occurred will unfold in the future", and therefore not always reliable.[2546]

7.414 In our view, the further in time the events that are the subject of a forecast are anticipated to take place, the more likely it is that one or more intervening events may impede their fulfilment. In the specific context of the LCA industry, where, as the European Communities notes, the business environment is shaped by factors "whose very foreseeablity is impossible by definition",[2547] the element of uncertainty that is attached to aircraft delivery forecasts that sometimes projected events over multiple decades[2548] cannot be ignored. In this regard, we note that like the IRRs determined for contracts that did not provide for royalties, the IRRs established on the basis of royalty payments are inherently speculative and depend upon achieving the number, timing and (for some contracts) the forecast prices of deliveries projected in the relevant Airbus business case. Thus, while we recognize that the inclusion of royalty payment provisions into the LA/MSF contracts is itself evidence of a certain expectation that royalties would be paid, we nevertheless consider that the IRRs established by the European Communities, taking royalty payments into account, could only represent, at most, the outer limit of what the EC member State governments could have reasonably expected at the time of concluding the contracts.

7.415 Subject to this understanding, and notwithstanding certain deficiencies in the evidence the European Communities has presented to substantiate its submissions,[2549] we believe that for the purpose of the present analysis all but two of the IRRs established by the European Communities may serve as reasonable proxies for the *maximum* rates of return that the EC member State governments could have reasonably anticipated when entering into the LA/MSF agreements. The two IRRs calculated by the European Communities that we cannot accept are those it determined for the Spanish A340-500/600 contract, and the French A330/A340 contract. Before setting out our reasons for rejecting these IRRs, we first address an additional criticism the United States has advanced in respect of the European Communities calculation of the IRR for the French A340-500/600 contract.

7.416 In its first written submission, the European Communities explained that in return for French government LA/MSF funding for the A340-500/600, Airbus was required to pay "a levy for the MSF (including interest) invested in the variant **[***]**".[2550] The European Communities' IRR calculations for this LA/MSF measure identified **[***]** in the cash-outflows column of its calculations, **[***]**.[2551] In other words, the European Communities took **[***]** into account when identifying the IRR for the French A340-500/600 LA/MSF contract – **[***]**. The United States argues that the European Communities' inclusion of the **[***]** repayment stream in its calculations of the IRR for the A340-500/600, instead of the IRR for the A330/A340, is erroneous.[2552] We disagree.

7.417 That revenues from the sale of derivatives of the A330/A340 would **[***]** French LA/MSF for this aircraft is provided for in Article 6.2 of the French A330/A340 contract. This provision

[2545] EC, FWS, para. 467. For instance, as of 31 December 2006 Airbus had sold approximately 3000 A320 aircraft, well above the original business case projections. EC, FWS, para. 331.
[2546] EC, FWS, para. 467.
[2547] EC, FWS, para. 30.
[2548] For instance, the delivery forecast used in the business case for the A380 projected events over multiple decades. Exhibit EC-362 (HSBI).
[2549] See above, footnotes 2533 and 2541.
[2550] EC, FWS, para. 336.
[2551] Exhibit EC-13 (BCI).
[2552] US, Answer to Panel Question 42.

BCI deleted, as indicated **[***]**

prescribes that for each **[***]** Airbus must make a repayment equivalent to **[***]**.[2553] Article 6.4 of the French A340-500/600 contract recalls this obligation[2554] and identifies the **[***]**.[2555] Thus, reading the provisions of the French A340-500/600 and A330/A340 LA/MSF contracts together, it can be inferred that **[***]** were envisaged under the French A340-500/600 contract – **[***]**. Although the **[***]** repayment stream was formally intended to **[***]**, it was not specifically known how much this repayment would be, if any, at the time that the French A330/A340 LA/MSF contract was concluded. As already noted, Article 6.2 of the French A330/A340 contract sets out **[***]**. Thus, the French A330/A340 contract does not specify precisely how much the **[***]** would be, making such repayment entirely speculative at the time the contract was concluded. It follows that the government of France could not have had a clear expectation of how much any derivative aircraft would contribute to the return it received for the A330/A340 contract when it was concluded. Indeed, no consideration of the amount of any expected contribution to repayment of the A330/A340 contract from sales of the A340-500/600 derivative can be found in the A330/A340 cash-flow analysis.[2556]

7.418 In our view, it would be incorrect to include the repayment amounts foreseen only in 1998 (when the French A340-500/600 contract was concluded) in the calculation of the IRR expected by the French government on the A330/A340 contract *at the time it was concluded in 1993*. We are therefore not persuaded by the United States' argument that the **[***]** repayment stream envisaged under the A340-500/600 contract should form part of the calculation of the returns associated with the French A330/A340 contract. While we can see the merit of this position for the purpose of determining the IRR associated with the French A330/A340 contract at the time of the conclusion of the A340-500/600 LA/MSF contract, we consider that it would not make sense when identifying the IRR expected by the French government at the time of the conclusion of the A330/A340 LA/MSF contract.

7.419 The **[***]** prescribed in Article 6.4 of the French A340-500/600 contract was not formally earmarked to repay the principal loaned under that contract. However, the funds were clearly a return for the French government that was specifically provided for in the A340-500/600 financing contract. In other words, it was agreed at the time the loan contract was concluded that the French government would receive **[***]**. In our view, it could be argued that, in practice, a market-based lender in a similar situation to the French government would have included **[***]** into its calculation of the *overall return* it expected from its participation in the A340-500/600 project at the time of the conclusion of the loan contract. However, it could equally be argued that because the **[***]** was not strictly intended to be used to repay the funding provided for the A340-500/600 project, a market-based lender would not have taken it into account when calculating the returns it expected to achieve from *that specific loan* at the time of the conclusion of the contract.

7.420 For present purposes, it is not necessary for us to come to a definitive conclusion about which of these two arguments should prevail, because in either case, our findings in respect of whether the French A340-500/600 LA/MSF measure amounts to a subsidy would not change. Moreover, had the United States raised the same criticism in respect of the European Communities' calculation of the IRR for the French A330-200 contract, (which we note was also based on cash-outflows derived from **[***]**[2557]), we would have come to the same conclusion for the same reasons. Thus, while not rejecting the IRRs calculated by the European Communities for the French A330-200 and A340-500/600 LA/MSF contracts, we will take them into account in the evaluation that follows bearing in mind the views we have expressed about their appropriateness in the preceding paragraphs.

[2553] Article 6.2 **[***]**. The A340-500/600 is not listed in Annexes 1 and 1 *bis* of this contract. Exhibit EC-96 (BCI).

[2554] Article 6.4 **[***]** Exhibit EC-91 (BCI).

[2555] Article 6.4 **[***]** Exhibit EC-91 (BCI).

[2556] Exhibit EC-944 (HSBI).

[2557] EC, FWS, para. 335; Exhibit EC-13 (BCI).

BCI deleted, as indicated **[*******]**

7.421 We next set out our reasons for rejecting the IRRs the European Communities calculated for the French A330/A340 and Spanish A340-500/600 LA/MSF contracts.

7.422 When determining the IRR for the French A330/A340 contract, the European Communities used the repayment schedule set out in the 1988 contract submitted as Exhibit EC-948 (BCI). However, Articles 1 and 6 of this contract indicate that its repayment terms were provisional.[2558] The final repayment provisions for the French A330/A340 LA/MSF contract were established in a Protocole d'Accord concluded in 1993, which the European Communities submitted as Exhibit EC-96 (BCI). The schedule of repayment that was finally agreed involved an initial repayment levy that was about 50% lower than the one used by the European Communities in its calculations. For this reason, we cannot accept the IRR advanced by the European Communities and instead rely upon the interest rate submitted by the United States, which represents the rate of return specified in a 1997 Note prepared by the French Direction des Programmes Aéronautiques Civils, without taking into account possible royalty payments.[2559] We note that this interest rate is marginally above the IRR calculated by the European Communities in Exhibit EC-597 (HSBI).

7.423 Finally, as regards the Spanish A340-500/600 contract, the European Communities explains that it calculated an IRR of **[***]** for this contract by using the methodology it asserts was applied in the contract. In particular, the European Communities identified the relevant **[***]** and added to this **[***]**.[2560] Thus, contrary to what the European Communities has previously stated,[2561] the IRR of the Spanish A340-500/600 contract it relies upon was not determined by identifying the IRR that set the NPV of anticipated LA/MSF inflows and outflows at zero, but rather it was calculated on the basis of an interest rate formula which the European Communities asserts was applied in the contract. The relevant interest rate formula reads:

> **[*******]**[2562]

7.424 When averaged over the entire amount of the loan, it is our understanding that this formula results in an overall interest rate that is equivalent to the **[***]**. The United States seems to contend that the application of this formula results in an interest rate of **[***]**.[2563] On the other hand, relying on estimates of the cost of Spanish government borrowing at the time of the *launch* of the A340-500/600 in the Ellis Report, the European Communities arrives at an IRR of **[***]**.[2564] In our view, both parties' submissions are inappropriate. We note that the Spanish A340-500/600 contract was concluded on 28 December 1998, therefore the relevant government cost of borrowing should be that which existed in 1998, not 1997 when the A340-500/600 was launched.[2565] The Ellis Report estimates this to have been 4.83%.[2566] Adding a premium of **[***]** to this figure results in an interest

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[2558] Exhibit EC-948 (BCI), Article 1 ("The terms relating to this financing are of a provisional nature") and Article 6 ("Reimbursement shall be obtained by **[***]**).

[2559] Exhibit EC-HSBI-0001143, p. 25, submitted during the Annex V proceedings; cited by the United States in the Ellis Report, Exhibit US-80 (HSBI).

[2560] EC, Answers to Panel Questions 249 and 251.

[2561] EC, Answer to Panel Question 69.

[2562] Spanish A340-5007600 contract, Quinta Clausula, Exhibit EC-87 (BCI).

[2563] Ellis Report, Table 5, Exhibit US-80 (BCI).

[2564] EC, Answer to Panel Question 249.

[2565] We note that the first disbursement covered by the Spanish A340-500/600 contract was made in 1998. Tercera Clausula, Spanish A340-500/600 contract. In the absence of clear contractual language supporting the European Communities' position, it is difficult to accept that the Spanish government agreed on 28 December 1998 to provide LA/MSF for the A340-500/600 at an interest rate calculated on the basis of its cost of borrowing in the previous year. The European Communities has provided no particular justification for its approach.

[2566] Ellis Report, Exhibit 3, Exhibit US-80 (BCI). On the other hand, the Spanish government's cost of borrowing for 1997 that was used by the European Communities was estimated in the Ellis Report to be 6.40%.

BCI deleted, as indicated **[***]**

rate of only **[***]**, more than 150 basis points below the interest rate advanced by the European Communities; and approximately 30 basis points above the rate advanced by the United States. Thus, on the basis of our own assessment of the facts, we cannot accept the IRR submitted by the European Communities, nor the interest rate advanced by the United States. In our view, the appropriate interest rate to use for the Spanish A340-500/600 contract is **[***]**.

Implicit Rates of Return *After* Taxation

7.425 The European Communities argues that the effects of taxation on both LA/MSF contributions and repayments must be taken into account when arriving at the "implicit rate of return" associated with all instances of LA/MSF that preceded development of the A380. The European Communities explains that prior to the launch of the A380, the EC member State governments classified LA/MSF as taxable income. According to the European Communities, this meant that the EC member State governments not only received interest repayments on the principal of their LA/MSF contributions, but also that they received an additional return through taxation. Conversely, the European Communities argues that this increased the cost of LA/MSF to Airbus and "considerably" decreased the amount of available funds to dedicate to aircraft development. Thus, in arriving at the "implicit rate of return" for the LA/MSF contracts pre-dating the A380, the European Communities argues that the diminished LA/MSF receipts for Airbus, and the increased returns to the governments must be taken into account.[2567] Accordingly, the European Communities determined the following "implicit rates of return", adjusted for tax effects:

Table 4 – LA/MSF implicit rates of return *after* taxation proposed by the EC

Aircraft Model				
A320	**[***]**	**[***]**	**[***]**	**[***]**
A330/A340	**[***]**	**[***]**	**[***]**	**[***]**
A330-200	**[***]**	**-**	**-**	**-**
A340-500/600	**[***]**	**-**	**[***]**	**-**
A380	**[***]**	**[***]**	**[***]**	**[***]**

7.426 The United States argues that the European Communities' submission on taxation effects is seriously flawed for both factual and legal reasons.[2568] From a factual perspective, the United States argues that the European Communities has failed to substantiate its assertion with any real evidence, characterizing its answer to the Panel's specific request for evidence of the alleged taxation effects as a "non-response". As a legal matter, the United States contends that taxation effects have no bearing on whether a financial contribution confers a benefit, because the standard that must be applied is the market. In this regard, the United States explains that market-based lenders set interest rates without regard to taxes that recipients may subsequently pay to their governments. Moreover, the United States contends that the EC member State governments could not be aware of the precise tax effects of LA/MSF because factors affecting future levels of taxation, such as depreciation and the carrying forward of losses from prior years, could not be known at the time the LA/MSF contracts are concluded. Therefore, according to the United States, it would be inappropriate to adjust the actual LA/MSF rates of return upwards to account for the effects of taxation. The United States considers that this conclusion is also supported by the European Communities' own practice of not taking taxation effects into account when conducting CVD investigations. To this end, the United States

[2567] EC, FWS, paras. 542-545; EC, Answer to Panel Questions 69 and 71; EC, Comment on the United States Answer to Panel Question 141.

[2568] US, SWS, paras. 124-131; US, Answer to Panel Question 141.

cites the following passage from the EU Commission's findings in a 2004 CVD case explaining why taxation effects should be disregarded:

> "According to the information available, it can indeed not be excluded that these grants, at a later stage, may increase a company's overall tax liability. However, this would be a future event, and will depend on many factors, most of which are influenced by commercial decisions made by the company itself. Such factors do not only relate to pricing and sales issues, but also concern other issues that determine overall tax liability, such as decisions concerning depreciation rates, the carrying forward of losses and many other factors. All these decisions influence the tax bracket that will finally be applied to the company in a specific tax year. It is therefore not possible to determine exactly to what extent benefits obtained from DEPB sales have contributed to the applicable tax rate".[2569]

7.427 The implication of the European Communities' argument is that the EC member State governments (and Airbus) knew at the time they entered into the LA/MSF contracts that part of the disbursed principal would be returned to the governments through taxation, thereby effectively diminishing the amount of funds available to Airbus. However, there is little, if any, evidence that demonstrates that this was the case. First, the European Communities has pointed to no clause in any of the relevant LA/MSF contracts to indicate that the EC member State governments and Airbus contemplated the effect of taxation on the costs of the LA/MSF arrangements. Moreover, had Airbus believed taxation to be a genuine issue, one would expect that it would have been highlighted in the one document addressing the aircrafts' commercial viability – the Airbus business case. However, the European Communities has pointed to no such concern being expressed in any of the Airbus business cases that have been submitted.

7.428 Second, in response to the Panel's request that it provide evidence of the alleged taxation requirements and payment by Airbus,[2570] the European Communities furnished the taxation rates allegedly applied in the EC member States at the time of the relevant contracts and a statement from an Airbus executive responsible for taxation matters confirming that Airbus paid all corporate taxes "that were due" in the relevant tax periods.[2571] In our view, this is insufficient to demonstrate that Airbus paid all of the taxes on the *amounts of LA/MSF* which the European Communities argues were subject to taxation. In other words, the European Communities has not substantiated its assertion that the relevant tax rates were applied directly to the *amounts of LA/MSF at issue*, and that Airbus made a corresponding tax payment. In any case, even acknowledging that corporate taxes were paid by Airbus, we understand that they were of a general nature and not specifically attached to LA/MSF. Thus, we agree with the United States[2572] that the extent to which the LA/MSF amounts received had any impact on Airbus' tax burden cannot be determined through the straightforward application of the corporate tax rates in force at the time of the relevant LA/MSF contributions. Although it may well be that some part of the funds received through LA/MSF measures would return to the EC member State governments through the effect of general corporate taxation, identifying this amount would seem to be a more complicated endeavour than implied by the methodology used by the European Communities to derive the tax-adjusted "implied rates of return".

[2569] *Council Regulation (EC) No. 74/2004 of 13 January 2004 imposing a definitive countervailing duty on imports of cotton-type bed linen in India*, recital 50, (emphasis added by the United States), Exhibit US-538, referred to in US, SWS, para. 129.

[2570] Panel Question 71.

[2571] *See, also*, EC, Comments on the United States Answer to Panel Question 142,and Exhibit EC-658 (BCI).

[2572] US, SWS, para. 129.

BCI deleted, as indicated **[***]**

7.429 Finally, even if we were to understand the European Communities' argument on taxation effects differently, that is, as the argument that the taxation of income generated through economic activity facilitated by LA/MSF must be taken into account, we would also reject it. In our view, there is no basis in the SCM Agreement to support the view that the amount of a financial contribution may be reduced for any tax payments made to the government on income generated from economic activity that is facilitated by that financial contribution.

7.430 We are therefore not convinced by the argument that the taxation effects described by the European Communities should be taken into account in setting the "implicit rate of return" for the relevant LA/MSF contracts pre-dating the A380. Consequently, we reject the tax-adjusted "implicit rates of return" determined by the European Communities, and find that they cannot be relied upon to identify the actual rates of return associated with the challenged LA/MSF measures.

7.431 In the light of the foregoing, the LA/MSF interest rates that we will consider in the remainder of our benefit analysis, and which we believe may serve as reasonable proxies for the *maximum* rates of return that the EC member State governments could have reasonably anticipated when entering into the LA/MSF agreements, are the following:

Table 5 – LA/MSF Rates of Return[2573]

Aircraft Model	France	Germany	Spain	UK
A300[2574]	**0%**	**0%**	**0%**	**-**
A310[2575]	**0%**	**0%**	**0%**	**-**
A320	**[***]**	**[***]**	**[***]**	**[***]**
A330/A340	**[[HSBI]]**[2575]	**[***]**	**[***]**	**[***]**
A330-200	**[***]**	**-**	**-**	**-**
A340-500/600	**[***]**	**-**	**[***]**[2576]	**-**
A380	**[***]**	**[***]**	**[***]**	**[***]**

Rates of Return of Comparable Market-Based Financing

7.432 Relying on separate studies prepared specifically for the purpose of this dispute by different economic experts,[2577] the parties have submitted their own individual estimates of the rates of return they consider a market lender would have required to provide financing to Airbus on the same terms and conditions as the relevant provisions of LA/MSF. According to the United States, such rates should reflect both the risks associated with Airbus' general borrowing activities and the specific risks associated with LCA development and the features of LA/MSF. Thus, the United States submits that the commercial rates of return for financing which is comparable to LA/MSF may be constructed on the basis of: (i) ten-year long-term government borrowing rates (representing the general risk-free cost of capital); (ii) ten-year company-specific general borrowing rates (representing the general level of risk associated with lending to Airbus); and (iii) a project-specific risk premium (representing the risk

[2573] Unless otherwise indicated, the maximum rates of return identified in this table are sourced from Exhibit EC-597 (HSBI) (see "IRR Without the Effects of Taxation").

[2574] See above, Table 2. See also further below, paragraph 7.484.

[2575] See above, paragraph 7.422.

[2576] See above, paragraphs 7.423 - 7.424.

[2577] The studies the United States has presented for this purpose are: The Ellis Report, Exhibits US-80 (BCI) and US-80 (HSBI), and Ellis Answer to Whitelaw, Exhibits US-534 (HSBI) and US-534a BCI. The studies the European Communities has presented for this purpose are the Whitelaw Report, Exhibit EC- 11 (BCI/HSBI) and the Whitelaw Rebuttal Report, Exhibit EC- 656 (BCI/HSBI).

BCI deleted, as indicated **[***]**

profile of LCA development and the features of LA/MSF).[2578] The borrowing rates established by the United States in this manner are identified in the following table. For various reasons, the United States argues that they are based on conservative assumptions and therefore understate what it considers would be the true level of market borrowing rates for financing comparable to LA/MSF.[2579]

Table 6 – Market Rates of Return Proposed by the United States

Aircraft Model	France	Germany	Spain	UK
A300	**16.52%**	**15.18%**	**16.60%**	**-**
A310	**18.88%**	**13.99%**	**18.88%**	**-**
A320	**20.49%**	**15.95%**	**24.52%**	**19.59%**
A330/A340	**17.86%**	**14.52%**	**21.19%**	**17.97%**
A330-200	**17.22%**	**-**	**-**	**-**
A340-500/600	**14.47%**	**-**	**15.29%**	**-**
A380	**13.89%**	**13.75%**	**14.07%**	**13.54%**

7.433 The European Communities does not reject the entirety of the United States' construction of the proposed interest rate benchmarks, and applies the same general government and corporate borrowing rates used in the United States' calculations when deriving its own proposed market-based rates of return.[2580] However, the European Communities does take issue with the value that the United States proposes for the project-specific risk premium, arguing that it is overstated because, in the European Communities' view, it is based on the returns that would be expected from equity-based financing. The European Communities presents its own alternative project-specific risk premium based on what it asserts are the returns expected by the risk-sharing suppliers participating in the A380 project. The European Communities argues that this benchmark is more appropriate than the one advanced by the United States because it more closely reflects the debt-like characteristics of LA/MSF. Accordingly, the European Communities established its own estimates of the rates of return for market financing comparable to LA/MSF on the basis of HSBI.[2581] All of the European Communities' proposed market rates of return are lower than those advanced by the United States; in some cases the difference between the two parties' submissions is considerable.

7.434 Thus, although the parties have presented different overall views on the appropriate rates of return that a market lender would demand when providing financing to Airbus on the same or similar terms and conditions as LA/MSF, their disagreement in terms of the overall levels of the relevant market interest rate benchmarks is focused on the value of the project-specific risk premium. It is to this aspect of their calculations that we next turn our attention.

[2578] Ellis Report, pp. 1-23.

[2579] For instance, one of the conservative assumptions that the United States asserts has been adopted in the Ellis Report analysis is the use of government and corporate borrowing rates with a maturity of ten years. The United States argues that the use of a ten year maturity understates the actual credit spreads associated with the LA/MSF contracts, which are open-ended or have a maturity that is significantly longer than ten years. Ellis Report, pp. 7-8, 11.

[2580] EC, FWS, paras. 489-490.

[2581] Whitelaw Report, Exhibit 3, Exhibit EC-11 (HSBI). The European Communities has provided no estimate of any market-based borrowing rates relating to the A300 and A310 contracts.

BCI deleted, as indicated **[***]**

Project-specific risk premium advanced by the United States

7.435 The United States submits that LA/MSF is a "hybrid" finance instrument that has characteristics of both debt and equity.[2582] According to the United States, LA/MSF is debt-like in that it contains a schedule of promised repayments, and in some cases a stated interest rate. However, the United States explains that like equity and unlike debt, LA/MSF does not entitle the EC member State governments to repayment with interest over a specified period of time; it has no fixed maturity, and repayments depend entirely on sales which may or may not occur according to a scheduled forecast. Moreover, like shareholders and unlike ordinary creditors, the United States asserts that in the event that Airbus fails, the EC member State governments have no recourse to obtain repayment, whereas corporate bondholders may declare the debtor company to be in default and pursue whatever remedies they have to recover their initial investment. In addition, the United States notes that while LA/MSF is dependent upon the success of a single project, typical corporate debt is dependent upon the success of the whole company. It is because of precisely this type of repayment structure that the United States contends Fitch Ratings agency has declared that it "'does not treat launch aid as debt'".[2583]

7.436 Given its alleged "hybrid" nature, the United States argues that the most appropriate market interest rate benchmark for LA/MSF is one that reflects both its debt-like and equity-like characteristics. The United States submits that the benchmarks presented in the Ellis Report reflect precisely these characteristics.

7.437 The market interest rate benchmarks identified in the Ellis Report are constructed by adding a 700 basis point project-specific risk premium to the sum of the relevant Airbus entity's cost of debt calculated in the Ellis Report for each of the challenged LA/MSF contracts. This risk premium was derived from the results of a 2004 empirical study of venture capital investments undertaken by Kerins, Smith and Smith ("KSS Study").[2584] Ellis explains that the KSS Study found returns on venture capital investments to range from 16.7% to 57.5%, depending on the diversification of the investor. The project-specific risk premium of 700 basis points was derived from the lowest return in this range (*i.e.*, 16.7%), which represents the return obtained by a "well diversified investor in both venture capital projects and other, less risky, equity investments represented by a stock market index".[2585] The United States characterizes the Ellis Report project-specific risk premium as the opportunity cost of capital for a well-diversified portfolio of venture capital investments including both debt and equity instruments.[2586] In its view, the risk premium is itself "hybrid", which not only matches the essential characteristics of LA/MSF, but also means that the overall Ellis Report market interest rate benchmark "if anything, is biased towards debt and thus too conservative".[2587]

7.438 According to the United States, reliance on the risk associated with venture capital funding for the purpose of establishing the project-specific risk premium for LA/MSF is appropriate for

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[2582] US, FNCOS, paras. 44-49; US, SWS, paras. 89-94; Ellis Answer to Whitelaw Report, pp. 3-5, Exhibit US-534a (BCI).

[2583] US, FNCOS, para. 48, referring to Fitch Ratings, Special Report, *Diverging Flight Paths: Boeing and Airbus Large Commercial Aircraft Industry Update*, (15 November 2006) p. 6, Exhibit US-451.

[2584] Frank Kerins, Janet Kiholm Smith and Richard Smith, *Opportunity Cost of Capital for Venture Capital Investors and Entrepreneurs*, *Journal of Financial and Quantitative Analysis*, vol. 39(2), (June 2004), (hereinafter "KSS Study"), Exhibit US-470.

[2585] Ellis Answer to Whitelaw Report, p.7, Exhibit US-534a (BCI).

[2586] US, Answer to Panel Questions 8 and 9.

[2587] US, Answer to Panel Question 9. In its SWS, the United States explains that the Ellis Report interest rate benchmark is conservative for two additional reasons: because Ellis selected the lowest risk premium indicated in the KSS Study and because it used the corporate debt rate rather than the equity rate or weighted average cost of capital, US, SWS, para. 90. *See, also*, Ellis Answer to Whitelaw Report, p.7, Exhibit US-534a (BCI).

various reasons. In particular, the United States considers LA/MSF to be comparable with venture capital financing because of its project-specific and highly speculative nature.[2588] In this regard, the Ellis Report points to a July 2000 press Article quoting Airbus' then Executive Vice President of Strategy, Philippe Delmas, as saying that: "{g}overnment support for the A3XX should be thought of as 'venture capital'".[2589] The Ellis Report also asserts that "like a provider of {LA/MSF}, {a provider of venture capital} is willing to assume a significant part of the business risk of a project or company ... {and} will provide a significant proportion of the required start-up funds without the certainty or security of a certain level of return".[2590] Moreover, referring to an article appearing in the Review of Economic Studies and an economic finance textbook, the Ellis Report affirms that "venture capital may also take the form of high-yield loans or even levy-based financing comparable to {LA/MSF} loans provided to Airbus".[2591]

7.439 The United States advances a number of confirmations or cross-checks to corroborate the order of magnitude of the 700 basis point project-specific risk premium used in the Ellis Report. First, the proposed 700 basis point risk premium is compared with Ibbotson Associates data on the historical average risk premia associated with investments in the equity of large United States companies.[2592] According to Ellis, Ibbotson Associates is a widely used source of data on equity market risk premia that is accepted and taught in business schools and economics curricula.[2593] Ellis explains that the Ibbotson data show that between 1926 and 2005 the market risk premium for investments in low-risk large company stocks over returns on long-term government bonds has averaged 7.08%.[2594]

7.440 A second cross-check advanced by the United States is the 1997 European Commission State Aid Decision concerning support provided to CASA, allegedly in the form of LA/MSF, by the Spanish government for the development of a regional 70-80 seat aircraft.[2595] According to the United States, in its assessment of the alleged State Aid, the European Commission identified a comparable market interest rate benchmark by applying a risk premium of at least 8% over the ten year Spanish government (risk-free) borrowing rate for a financing package for a project to develop commercial aircraft the repayment of which, as in the case of LA/MSF for LCA, was success dependent.[2596] A third cross-check the United States identifies is the range of discount rates that **[***]**. The United States shows that its own benchmark (including the 700 basis point risk premium) is in the lower portion of this range of discount rates.[2597]

[2588] US, Answer to Panel Question 9, referring to explanations given in the Ellis Report.

[2589] *Airbus gets risk free loans; European Plane Maker Doesn't have to Pay Governments Back if A3XX Superjumbo Fails*, *Seattle Post-Intelligencer*, 25 July 2000, referred to in NERA Economic Consulting, Economic Assessment of the Benefit of Launch Aid, 10 November 2006, (Ellis Report) p. 19, footnote 25, Exhibit US-80.

[2590] Ellis Report, pp. 19-20, Exhibit US-80 (BCI).

[2591] Ellis Report, pp. 19-20, Exhibit US-80 (BCI), referring to Francesca Cornelli and Oved Yosha, *Stage Financing and the Role of Convertible Securities*, Review of Economic Studies (2003) 70, p. 1, and Karl F. Seidman, *Economic Development Finance*, Sage Publications Inc., 2005, p. 260.

[2592] Ellis Report, p. 21, Exhibit US-80 (BCI). Ibbotson Associates uses the total return of the S&P 500 (which includes the 500 common stocks with the largest market capitalization that are actively traded in the United States) as its market benchmark when calculating the equity risk premium.

[2593] Ellis Report, p. 21, Exhibit US-80 (BCI); Ellis Answer to Whitelaw Report, p. 19, Exhibit US-534a (BCI).

[2594] Ellis Report, p 21 and Exhibit 8, Exhibit US-80 (BCI).

[2595] Ellis Report, p. 21, Exhibit US-80 (BCI).

[2596] US, SWS, para. 98; US, Answer to Panel Question 8; Ellis Report, p. 21, Exhibit US-80 (BCI); Ellis Answer to Whitelaw Report p. 16, Exhibit US-534a (BCI).

[2597] US, SWS, para 100; Ellis Answer to Whitelaw Report, p.13-16, Exhibit US-534 (HSBI).

BCI deleted, as indicated **[***]**

7.441 Relying on HSBI, the United States argues that the **[***]** analysis undertaken by the Department of Trade and Industry ("DTI") in the UK government's critical project appraisal for the A380 also confirms the Ellis Report project-specific risk premium and United States' market interest rate benchmarks.[2598] In addition, again relying upon HSBI, the United States submits that the discount rates employed in the Airbus business case for the A380 confirm its proposed project-specific risk premium.[2599]

7.442 The European Communities does not accept the project-specific risk premium proposed by the United States. Relying upon the arguments, analyses and conclusions described in two studies commissioned from Professor Robert Whitelaw,[2600] the European Communities argues that the proposed 700 basis point project-specific risk premium is grossly inflated, and cannot be supported by the United States' cross-checks.[2601]

7.443 The European Communities characterizes LA/MSF as project-specific debt, rather than equity or a hybrid between debt and equity, implying that the risk premium advanced by the United States is inapposite. In the European Communities' view, the fact that LA/MSF loans are project-specific does not render them equity-like.[2602] The project risk associated with LA/MSF is a function of development risks and market risks – both insignificant in the European Communities' view – which are qualitatively different from the risk borne by equity holders.[2603] The European Communities notes that equity returns depend on the profitability of the company as a whole, which is subject to wide fluctuations. By comparison, the European Communities asserts that LA/MSF contracts involve amortizing loans repaid out of project revenue. Thus, in the view of the European Communities, equity is generally riskier than debt. Moreover, the European Communities argues that LA/MSF creditors are not guaranteed a share in the upside rewards afforded to equity holders when profits are high, nor are they required to bear losses when the market is weak. According to the European Communities, these and other differences between LA/MSF and equity investments confirm that LA/MSF is a form of debt that is distinct from equity.[2604] In support of its view, the European Communities quotes several market analysts who have characterized LA/MSF loans as a form of debt, and distinguished them from equity.[2605] For instance, in a 2003 report, Morgan Stanley observed that "{o}nce aircraft start to be delivered, launch aid is repayable. It has no sensitivity to the profitability of the deliveries. It looks like debt; correspondingly, we treat it as such."[2606]

7.444 In any case, the European Communities contends that the United States' project-specific risk premium fails to reflect the characteristics of hybrid financing instruments because it relies upon the KSS Study, which the European Communities alleges uses data relating to returns from risky venture capital investments in the form of Initial Public Offerings ("IPOs") by high-tech firms.[2607] According to the European Communities, venture capital returns do not reflect the risk profile of LA/MSF. Professor Whitelaw asserts that the launch of an Airbus LCA bears risk that is several orders of

[2598] Ellis Report, Exhibit US-80 (HSBI).
[2599] Ellis Answer to Whitelaw Report, Exhibit US-534 (HSBI).
[2600] Whitelaw Report, Exhibit EC- 11 (BCI/HSBI); Whitelaw Rebuttal Report Exhibit EC- 656 (BCI/HSBI), para. 16.
[2601] EC, FWS, paras. 483-486; EC, Answer to Panel Question 66; EC, SWS, paras. 168-200, EC, SNCOS, paras. 89-112; EC, SCOS, paras. 58-70.
[2602] EC, SWS, para. 171
[2603] EC, FWS, paras. 304-306; EC, SWS, para. 172.
[2604] EC, SWS, para. 174
[2605] The European Communities provides quotations to that effect from Morgan Stanley, *see* text at footnote 2606 below, Deutsche Bank, Exhibit EC-674, Citigroup Smith Barney, Exhibit EC-675, and Goldman Sachs, Exhibit EC-676; EC, SWS, footnote 146.
[2606] Morgan Stanley, "Little Scope for Further Downside Risk" 20 June 2003, p. 13, Exhibit EC-673.
[2607] EC, SWS, para. 176; EC, Comments on United States Answer to Panel Question 143.

magnitude lower than venture capital investment.[2608] In support of this assertion, Professor Whitelaw quotes an economic study that describes venture capital projects as "high-risk, potentially high-reward projects";[2609] and refers to a paper by Cochrane, cited by the United States in support of its venture-capital-based risk premium, who notes that the "average arithmetic return to IPO or acquisition is 698% with a standard deviation of 3282%" and that "{v}enture capital investments are like options; they have a small chance of a huge payoff."[2610] Professor Whitelaw recalls that Airbus and Boeing have never experienced a significant commercial failure, asserting that to date, Airbus has never failed to repay an EC member State due to the failure of an aircraft programme.[2611]

7.445 Professor Whitelaw also argues that the Ellis Report risk premium suffers from severe methodological flaws. According to Professor Whitelaw, the Ellis Report appears to have derived the venture capital risk premium by deducting the estimated market cost of capital identified in the KSS Study from the *gross* return achieved by a venture capital fund *before fees and expenses*. However, Professor Whitelaw submits that the premium embedded in the 16.7% gross return identified in the KSS Study is not a risk premium, noting that the KSS Study authors describe it as a fee "to compensate for investment of effort" by the venture capital fund managers.[2612] In Professor Whitelaw's view, this fee applies to venture capital funds that require the expertise and effort of a fund manager – but it would not apply to commercial borrowing rates. Thus, Professor Whitelaw concludes that not only is the fee not project-specific (that is, the fee is applied at the fund level, not the project level), but it is also not a risk premium at all.[2613]

7.446 In his rebuttal report, Professor Whitelaw also denies that the combination of a debt-based general corporate risk premium and an equity-based project-specific risk premium reflects the hybrid character of LA/MSF loans. In particular, Professor Whitelaw argues that the concept of deconstructing the relevant interest rate into compensation for general corporate risk and project-specific risk works only for debt-like securities.[2614] According to Professor Whitelaw, this approach cannot work in the context of equity financing because no project-specific risk premium will exist in a required return on equity.[2615]

7.447 Furthermore, the European Communities argues that the evidence submitted by the United States to corroborate its proposed project-specific risk premium does not "cure the fatal deficiencies in the Ellis report", nor call into question its own proposed market interest rates benchmarks.[2616] The European Communities first criticizes the United States' reliance on Ibbotson Associates' historical measure of the risk premium associated with investments in equity. Professor Whitelaw argues that these data fail to support the project-specific risk premium advanced in the Ellis Report because they are drawn entirely from equity returns and measure market risk associated with equity investments, while the Ellis Report risk premium is not a risk premium at all because it represents a fee to investment managers.[2617] Professor Whitelaw also notes that even if one were to consider the cost of equity investment to be an appropriate cross-check for the project-specific risk premium associated with LA/MSF, the Ibbotson Associates data would not be suitable because they substantially overstate the equity investment risk premium. Professor Whitelaw alleges that there are three reasons for this:

[2608] Whitelaw Rebuttal Report, para. 20, Exhibit EC-656 (BCI) .

[2609] P. Gompers and J. Lerner, *The Venture Capital Revolution*, Journal of Economic Perspectives, 2001, vol. 15(2), p. 145, Exhibit EC-677.

[2610] J. Cochrane, *The Risk and Return of Venture Capital*, Journal of Financial Economics, 2005, vol. 75, pp. 4-5, Exhibit US-471.

[2611] Whitelaw Rebuttal Report, para. 20, Exhibit EC-656 (BCI).

[2612] EC, SNCOS, para. 102, referring to KSS Study, p. 401, Exhibit EC-112.

[2613] Whitelaw Report, paras. 4-10, Exhibit EC-11 (BCI).

[2614] Whitelaw Rebuttal Report, para. 16, Exhibit EC-656 (BCI).

[2615] Whitelaw Rebuttal Report, para. 16, Exhibit EC-656 (BCI).

[2616] EC, FWS, para. 512.

[2617] EC, SCOS, paras. 59-60.

BCI deleted, as indicated **[***]**

(i) that Ibbotson's historical equity investment risk premium is based on a simple average of widely fluctuating historical returns, which implies the existence of an error rate that is "enormous"[2618]; (ii) that Professor Aswath Damodaran, who is described by the European Communities as "a world-renowned scholar whom Ellis and the United States repeatedly cite",[2619] concludes that based on ex-post data of the type Ibbotson uses, the historical equity risk premium should be 4.8%;[2620] and (iii), that current academic literature identifies a variety of reasons why the historical difference between the return on equity investment and the risk-free rate is not an appropriate measure of the expected market equity investment risk premium.[2621] In particular, referring to 15 different academic studies, Professor Whitelaw argues that a substantial body of research now confirms that historical measures such as those used in the Ibbotson Associates data systematically overstate the equity risk premium.[2622]

7.448 Similarly, the European Communities contests the United States' reliance on the discount rates proposed by **[***]** for the purpose of the **[***]** to confirm the magnitude of its proposed risk premium, the so-called "**[***]** measure". According to the European Communities, the Ellis Report concedes that the **[***]** measure captures the risk of equity rather than debt, which Professor Whitelaw considers is an inappropriate measure of the risk associated with LA/MSF.[2623] Moreover, even if one were to consider that a measure of the risk of equity investment were appropriate, the European Communities contends that the **[***]** measure overstates the cost of equity. The European Communities notes that in identifying the appropriate discount rate, **[***]** relied upon the Capital Assets Pricing Model ("CAPM"). Professor Whitelaw explains that this model equates the expected return on a proposed investment with the interest rate attached to a risk-free security (such as a government security or a treasury bill) plus a risk premium calculated as the market risk premium multiplied by a "beta" factor.[2624] The market risk premium is defined in the Whitelaw Report as an estimate of the difference between the expected return investors demand to invest in the so-called market portfolio and the return they would obtain on risk-free government bonds; and the "beta" factor is defined as the relative perceived risk of the particular investment in question.[2625] Professor Whitelaw argues that in applying the CAPM, **[***]** used a market risk premium from Ibbotson Associates, which for reasons already explained, the European Communities considers to overstate the equity risk premium. In addition, according to Professor Whitelaw, the "beta" factor applied by **[***]** was also too high for reasons explained using HSBI.[2626] Finally, the European Communities rejects the **[***]** measure on the basis that it was proposed by **[***]** in a negotiation where **[***]** had an interest in adopting an inflated discount rate, which an auditing firm rejected as excessive and which **[***]** itself decided to abandon at a later stage.[2627]

7.449 The European Communities is also critical about the United States' reliance on the **[***]** analysis conducted by the DTI in the UK critical project appraisal for the A380 project. The European Communities rejects the view that this appraisal confirms the United States' project-specific risk premium on various grounds. First, Professor Whitelaw alleges that the Ellis Report misunderstands the **[***]** analysis carried out in the UK critical project appraisal.[2628] Second, according to Professor Whitelaw, the Ellis Report's assessment of the **[***]** analysis carried out in the UK critical project appraisal fails to take into account how the distinctive repayment characteristics of

[2618] EC, SCOS, para. 61.
[2619] EC, SWS, para. 188.
[2620] Aswath Damodaran, *Damodaran on valuation*, 41 (2d ed 2006), Exhibit EC-678.
[2621] Whitelaw Report, para 23, Exhibit EC-11 (BCI).
[2622] EC, SCOS, para 63.
[2623] EC, FWS, para. 517.
[2624] Whitelaw Report, paras. 15-16 and 43-44, Exhibit EC-11 (BCI).
[2625] Whitelaw Report, paras. 44 and 16, Exhibit EC-11 (BCI).
[2626] EC, FWS, para. 518; EC, SCOS, para. 64; Whitelaw Report, paras. 18-19, Exhibit EC-11 (HSBI).
[2627] EC, FWS, paras. 519-521; and EC, SCOS, para. 64.
[2628] EC, FWS, para. 524.

BCI deleted, as indicated **[***]**

LA/MSF loans affect the recovery rate. Professor Whitelaw submits that, together with the expected default rate, a loan's recovery rate enters the calculation of the expected loss which is the critical determinant of relative bond yields across rating categories.[2629] Professor Whitelaw argues that the Ellis Report implicitly assumes that LA/MSF has a recovery rate equal to the historical averages for bonds in certain rating categories. However, Professor Whitelaw argues that in reality there is no reason to expect LA/MSF to have the same recovery rate as a bond with a similar probability of default. For bonds, the entire principal balance falls due at maturity. If a bond defaults one day before maturity, the principal is lost, except for what may eventually be recovered in bankruptcy or settlement proceedings. By contrast, Professor Whitelaw asserts that LA/MSF is typically repaid incrementally on each delivery of an aircraft. If Airbus defaults by ending a project after making 95% of the anticipated deliveries, the loss to a member State is trivial.[2630] Thirdly, the European Communities argues that because of the context in which it was prepared, the UK government's critical project appraisal employs very conservative forecasting methodologies. The European Communities submits that the approach chosen reflects a desire to ensure that the UK government would structure LA/MSF loans for the A380 so as to comply with the terms of the 1992 Agreement, which the European Communities recalls requires governments to prepare a critical appraisal of the project based on conservative assumptions. The European Communities asserts that the critical project appraisal was also intended to assist the UK government in its negotiations with BAE over the structure and terms of this financing.[2631] Fourthly, the European Communities observes that, as noted by the United States itself, the UK government ultimately "disregarded" the advice in the appraisal regarding how to structure the repayment schedule.[2632] In any case, the European Communities emphasizes that the delivery projections in the appraisal have no bearing on the French, German and Spanish LA/MSF agreements for the A380.[2633] Finally, in the light of certain HSBI, the European Communities argues the **[***]** analysis found in the UK critical project appraisal, once correctly modified and reinterpreted by Professor Whitelaw, does not in fact support the United States' project-specific risk premium or its market interest rate benchmarks.[2634]

7.450 The European Communities disputes the United States' contention that the CASA State Aid Decision supports its project-specific risk premium, arguing that the 8% risk premium applied by the European Commission in its decision is *obiter dicta*, in the sense that it was irrelevant to the outcome of the case.[2635] More generally, the European Communities argues that the risk premium used in that case was specific to the particular facts before the European Commission and would not necessarily be applied by the European Commission for the purpose of evaluating LA/MSF for LCA activities.[2636] The European Communities submits that the 8% risk premium applied to the CASA loan also reflects the crisis in the regional aircraft industry during the early-to-mid 1990s. According to the European Communities, extreme market conditions prompted the European Commission to propose an elevated risk premium. [2637]

7.451 The European Communities also criticizes the United States' assertion that the similarity between the discount rates used in the Airbus business case for the A380 and the Ellis Report benchmark confirm the credibility of the United States' proposed project-specific risk premium. In this regard, the European Communities' main argument is that the discount rates used in the business

[2629] Professor Whitelaw explains that the recovery rate for bonds is the percent of the principal that an investor recovers (through bankruptcy or other means of settlement) when a bond issuer defaults on its obligation. Whitelaw Report, Exhibit EC-11 (HSBI) , para. 31.
[2630] Whitelaw Report, Exhibit EC-11 (HSBI) , para. 34.
[2631] EC, FWS, paras. 526-527.
[2632] EC, FWS, para. 528.
[2633] EC, FWS, para. 530.
[2634] Whitelaw Rebuttal Report, Exhibit EC-656 (HSBI) , paras. 40-45.
[2635] EC, SWS, para. 193.
[2636] EC, FWS, para. 535.
[2637] EC, SWS, paras. 194-199.

BCI deleted, as indicated **[***]**

case reflect the risks borne by shareholders, which differ in kind from the risks borne by LA/MSF lenders.[2638]

7.452 Other evidence the European Communities relies upon to support its view that the project-specific risk premium applied by the United States is inflated includes a **[***]**.[2639] According to the European Communities, the repayment terms of this contract were, like LA/MSF, tied to aircraft deliveries. The European Communities explains that the agreed interest rate for this loan was **[***]** basis points above the London Interbank Offered Rate ("LIBOR"). Thus, the European Communities submits that if a loan had been granted to Airbus by a market lender at the time of the launch of the **[***]**, the interest rate would have been no higher than **[***]**.[2640] This is less than the 15.41% benchmark predicted by the Ellis Report for this model. Moreover, when in 2003, the parties to the contract agreed to eliminate the risk sharing provision and converted the instrument into an instalment loan with a fixed repayment schedule, the loan margin was **[***]** from **[***]** to **[***]** basis points. According to the European Communities, the difference between these two margins, *i.e.*, **[***]** basis points, corresponds to the project-specific risk premium charged by the **[***]**, and represents only a fraction of the 700 basis point risk premium advanced by the United States.

7.453 Moreover, the European Communities asserts that even if one were to assume that the cost of equity were an appropriate basis from which to derive the project-specific risk premium for market financing comparable to LA/MSF, the risk premium advanced by the United States would still overstate the true value of what such a premium should be for LA/MSF.[2641] Relying on the CAPM the Whitelaw Report arrives at an upper limit (a "ceiling") for the cost of equity, which the European Communities considers the United States' benchmark should not exceed.[2642] In particular, the Whitelaw Report presents three different estimates of the equity market risk premium drawn from recent academic literature, coming to the conclusion that taken together, they suggest a conservative estimate of the equity market risk premium of approximately 4.5%.[2643] The Whitelaw Report argues that as illustrated by the KSS Study, beta factors for projects or firms that are undiversified and have high total risk are not necessarily high. Using a beta factor of one and an equity market risk premium of 4.5%, Professor Whitelaw finds a total risk premium of 450 basis points, which he adds to the country-specific risk free rates in the Ellis Report to arrive at country-specific costs of equity capital

[2638] EC, SCOS, paras. 66-67.

[2639] Exhibit EC-113 (BCI); EC, FWS, paras. 505-506; EC, Answer to Panel Question 64.

[2640] As explained in footnote 388 of the European Communities' first written submission, in December 1997, the 1-year LIBOR was at 6.079%. **[***]** to this rate yields approximately **[***]**.

[2641] EC, FWS, paras. 507-508.

[2642] Whitelaw Report, Exhibit EC-11 (BCI), paras. 41-54.

[2643] Whitelaw Report, Exhibit EC-11 (BCI), paras. 45-49, referring to G. Donaldson, M. Kamstra and L. Kramer, *Estimating The Ex-Ante Equity Premium*, working paper, 2006; L. Pastor, M. Sinha and B. Swaminathan, *Estimating The Intertemporal Risk-Return Tradeoff Using The Implied Cost Of Capital*, working paper, 2006; J. Claus and J. Thomas, *Equity Premia As Low As Three Percent? Evidence From Analysts' Earning Forecasts For Domestic And International Stock Markets*, Journal of Finance, 2001, vol. 56; J. Graham and C. Harvey, *The Equity Risk Premium In January 2006: Evidence From The Global CFO Outlook Survey*, working paper, 2006. *See, also*, EC-Second BCI/HSBI Oral Statement, para 63, referring in addition to Oliver J. Blanchard, *Movements in the equity premium*, Brookings Papers on Economic Activity, 1993, vol. 2, pp.75-138; Lubos Pástor and Robert Stambaugh, *The Equity Premium and Structural Breaks*, Journal of Finance, 2001, vol. 56 (1), pp.1207-1239; William R. Gebhardt, Charles M. C. Lee, and Bhaskaran Swaminathan, *Toward an implied cost of capital*, Journal of Accounting Research, 2001, 39, 135–176; Irwin Friend, Randolph Westerfield, and Michael Granito, *New evidence on the capital asset pricing model*, Journal of Finance, 1978, vol. 33, pp.903–917; Steven N. Kaplan and Richard S. Ruback, *The valuation of cash flow forecasts: An empirical analysis*, Journal of Finance, 1995, vol. 50, pp.1059–1093; Alon Brav, Reuven Lehavy, and Roni Michaely, *Using expectations to test asset pricing models*, Financial Management, Autumn 2005; Charles M.C. Lee, David Ng, and Swaminathan, B, *International Asset Pricing: Evidence from the Cross Section of Implied Cost of Capital* (November 1, 2003). 14th Annual Conference on Financial Economics and Accounting (FEA).

BCI deleted, as indicated **[***]**

for the aerospace industry. In the European Communities' view, these values are not suitable benchmarks for LA/MSF but they can be viewed as reliable upper bounds.[2644]

7.454 The United States refutes all of the European Communities' criticisms of the evidence it advances to confirm the value of its proposed 700 basis points project-specific risk premium.[2645] The United States rejects the European Communities' argument that LA/MSF is project-specific debt, rather than a hybrid between debt and equity on the grounds that LA/MSF has equity-like qualities. The United States recalls that repayment of LA/MSF depends entirely on sales and the providers of LA/MSF hold a shareholder's risk with respect to non-repayment. The United States considers the European Communities' claim that the **[***]** contract illustrates that financing comparable to LA/MSF is properly characterized as debt to be inapposite.[2646] According to the United States, the **[***]** contract has many more debt-like characteristics than LA/MSF so that if it were characterized as debt, it would have no bearing on the proper characterization of LA/MSF. The United States also rejects the European Communities' assertion that it has added an equity risk premium to the cost of debt, which the European Communities argues would be inappropriate. The United States recalls that its proposed project-specific risk premium is a hybrid itself, not a pure equity premium, and that for this reason it reflects the hybrid nature of LA/MSF.[2647]

7.455 Additionally, the United States defends its reliance on the project-specific risk premium derived from the KSS Study on various grounds. In the United States' view, LA/MSF has equity like qualities and thus its risk profile is comparable to that of venture capital investments.[2648] The United States argues that the results of the KSS Study are relevant to estimating the cost of capital for private venture capital investment whether in the form of debt, equity or hybrid financing.[2649] According to the United States, this is confirmed in the KSS Study itself where it states that the authors used "a database of high tech IPOs to estimate opportunity cost of capital for venture capital investors and entrepreneurs".[2650] The United States contests the European Communities' attempt to suggest that the returns on venture capital investments are too extreme to serve as the basis for establishing a risk premium for LA/MSF. In this respect, the United States argues that the calculation of the Ellis Report project-specific risk premium relies on the returns to well-diversified portfolios that contain venture capital investments. The United States asserts that such portfolios generate much lower returns – on average about 16.7% – than the 698% average arithmetic return to IPO or acquisition quoted by the EC.[2651] Finally, although recognizing that the 16.7% figure identified in the KSS Study represents a gross return on an investment in a venture capital fund, including fees paid to the fund managers, the United States nevertheless argues that it is appropriate to derive the project-specific risk premium from this figure, noting that KSS defined this return as "... the cost to an entrepreneurial venture of raising capital from a venture capital fund".[2652]

7.456 The United States also rejects the European Communities' criticisms of its confirmatory analyses. With regard to the Ibbotson Associates data, the United States contends that the project-specific, delivery-contingent and non-recourse nature of LA/MSF gives it equity-like risk exposure which is certainly higher than the risk associated with investing in the large, established United States

[2644] EC, FWS, para. 508.
[2645] United States, confidential oral statement at the first meeting with the Panel (hereinafter "US, FCOS"), para. 28; US, SWS, para. 80.
[2646] US, SWS, para. 88.
[2647] US, SWS, para. 93; Ellis Answer to Whitelaw Report, Exhibit US-534a (BCI) , pp. 10-11.
[2648] US, Answer to Panel Question 143, paras. 40-43.
[2649] US, SWS, para. 94; US, Answer to Panel Question 143.
[2650] KSS Study, Exhibit US-470, p. 385.
[2651] United States, non-confidential oral statement at the second meeting with the Panel (hereinafter "US, SNCOS"), para. 59.
[2652] Ellis Answer to Whitelaw Report, Exhibit US-534a (BCI) , pp. 11-12.

BCI deleted, as indicated **[***]**

companies surveyed in the Ibbotson Associates data.[2653] The United States also rejects the academic literature which the European Communities relies upon to argue that the Ibbotson Associates data overstate the equity risk premium. In the view of the United States, the literature advanced by the European Communities is extremely recent and thus would not have been known to managers when the LA/MSF was provided. In addition the United States argues that it does not represent a consensus approach to measuring equity risk. The United States rejects the European Communities' criticisms of the **[***]** measure because of its equity-like nature and reliance on Ibbotson Associates data for essentially the same reasons.[2654] The United States also defends its comparison of the Ellis Report project-specific risk premium with the **[***]** measure on the ground that it reflects a methodology relied upon by an actual market participant in an actual transaction. Moreover, the United States argues that the European Communities' point concerning the rejection of the **[***]** measure by an auditing firm is irrelevant, because the question resolved by the auditing firm was whether the figure was an appropriate discount rate for the German government not whether the same value was appropriate in the context of LA/MSF to Airbus.[2655] The United States also responds to Professor Whitelaw's criticism of the beta factor used in its analysis relying on HSBI.[2656]

7.457 In terms of the CASA State Aid Decision, the United States considers that the European Communities is not only wrong to dismiss the 8% risk premium on the ground that it was "obiter dicta",[2657] but also that the European Communities grossly overstates the relative risk associated with regional aircraft projects compared to projects for new LCA.[2658] The United States also rejects the European Communities' criticisms of its cross-check based on the UK government's critical project appraisal of the A380 project.[2659]

7.458 As regards the **[***]** contract, the United States does not consider it to be an example of commercial, success-dependent financing that is comparable to LA/MSF.[2660] In the United States' view, the risk premium in the **[***]** case is lower than in the case of LA/MSF because **[***]** did not accept the same level of risk as the governments did under the LA/MSF contracts. According to the United States, this is borne out by many key differences between the terms of the **[***]** contract and the terms of LA/MSF granted by the governments of France and Spain for the same project. These include: (a) that the participants in the **[***]** pledged only **[***]**, in contrast to the French government which provided EUR 321 million for the same project; (b) that the **[***]** required repayment over **[***]** deliveries, almost **[***]** deliveries less than the French government accepted; (c) on the day when the **[***]** contract was signed, **[***]** knew that Airbus had already sold enough A340-500/600 to repay the loan over the **[***]** scheduled deliveries; (d) **[***]** the back-loaded repayment terms which are typical of the LA/MSF contracts; (e) the repayment schedule in the **[***]** was structured so that **[***]** would receive full repayment after **[***]** years instead of **[***]** years under the French and Spanish LA/MSF contracts; (f) the interest rate on the **[***]** is substantially **[***]** than the interest rate on the corresponding French and Spanish contracts; (g) the **[***]** contract contained **[***]**; and (h) the **[***]** provides for a significant step up in the **[***]**.[2661]

7.459 The European Communities denies the correctness of the United States' assertion that the **[***]** loan agreement had little or no downside risk, arguing that it did in fact incur delivery risk. According to the European Communities, Airbus had only **[***]** firm orders at the time it entered into

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[2653] Ellis Answer to Whitelaw Report, Exhibit US-534 (HSBI) , p. 19; US, SWS, para. 98.
[2654] US, SWS, para. 100.
[2655] US, FCOS, paras. 30-31.
[2656] Ellis Answer to Whitelaw, Exhibit US-534 (HSBI) , p. 14.
[2657] United States, confidential oral statement at the second meeting with the Panel (hereinafter "US, SCOS"), para. 16.
[2658] US, FCOS, para. 33.
[2659] Ellis Answer to Whitelaw Report, Exhibit US-534 (HSBI) , pp. 16-18; and US SCOS, para 21.
[2660] US, FCOS, paras. 5-15.
[2661] US, SWS, paras. 103-109.

the **[***]** contract. Thus it had no guarantee that **[***]** deliveries would ultimately be made.[2662] However, the European Communities does recognize that the risk incurred by the **[***]** is not fully comparable with the risk incurred by the EC member State governments granting LA/MSF for the A380, identifying two differences – fewer technological advances in the A340-500/600 as compared with the A380, and repayment over fewer deliveries under the **[***]** contract. Nevertheless, the European Communities considers these distinctions do not explain the large disparity between the risk premium applied to the **[***]** and the one calculated in the Ellis Report. [2663]

7.460 Finally, the United States criticizes the cost of equity ceiling advanced by the European Communities because, in its view: (i) the equity ceiling wrongly assumes that the risk of a single project cannot exceed the risk of a company's equity; (ii) the beta factors used in the calculation of the equity ceiling are based on the risk associated with a sample of diversified companies engaged in multiple projects or of companies not primarily engaged in the commercial aircraft business, as opposed to LCA-focused companies or projects; and (iii) the European Communities' determination of an equity risk premium is largely based on very recent research that does not represent a consensus approach to measuring equity risk.[2664] Furthermore, the United States argues that the European Communities is incorrect in assuming that debt cannot have a risk level greater than the Whitelaw equity ceiling. For its part, the European Communities objects to the United States' criticism of the sample of companies used for the purpose of deriving the beta factors, arguing that there is in excess of 40% overlap between the basket of aerospace companies Professor Whitelaw employs and the companies the Ellis Report uses in support of the **[***]** cross-check.[2665] Moreover, the European Communities notes that while it may be possible to locate instances in which debt could be riskier than equity when considering firms with different risk profiles, Airbus SAS' risk profile is similar to that of the companies used to calculate the ceiling.[2666]

7.461 Having closely reviewed and carefully considered the parties' detailed arguments, counter-arguments and the various expert economic studies and opinions that have been submitted, we believe there are a number of deficiencies with the project-specific risk premium advanced by the United States which, in our view, imply that it probably overstates the appropriate level of project-specific risk that may be reasonably associated with LA/MSF provided for at least a number of the challenged Airbus LCA projects.

7.462 In essence, the project-specific risk premium advanced by the United States is based on the alleged risk associated with holding a diversified portfolio of venture capital investments. While it would not be inaccurate to characterize LA/MSF, because of its unsecured, success-dependent and graduated repayment terms, as a form of financing that is inherently speculative, we do not consider this renders it *entirely* comparable with venture capital investments. There are several reasons to believe that the level of risk associated with venture capital financing is typically higher than the risk associated with LA/MSF. We find that Professor Whitelaw has convincingly argued that virtually all venture capital financing consists of equity or equity-like instruments,[2667] which we believe do not entirely match the characteristics of LA/MSF. As Professor Whitelaw explains, venture capitalists typically provide financing through instruments that are convertible to equity because they are interested in the high equity returns associated with successful ventures. Such instruments ensure an equity return in the event the financed venture is successful, leaving the investor in a preferential position in case the venture fails.[2668] By contrast, while LA/MSF may be considered to have some

[2662] EC, Answer to Panel Question 63.
[2663] EC, Answer to Panel Question 63.
[2664] US, SWS, paras. 110-113; Ellis Answer to Whitelaw Report, Exhibit US-534 (HSBI) , pp 20-21.
[2665] EC, SWS, para. 210.
[2666] EC, SWS, paras. 213-214.
[2667] Whitelaw Rebuttal Report, Exhibit EC-656 (BCI) , paras. 8-14.
[2668] Whitelaw Rebuttal Report, Exhibit EC-656 (BCI) , para. 12.

BCI deleted, as indicated **[***]**

equity-like qualities, such as the fact that lender governments have no recourse in the event of non-repayment, LA/MSF contracts are generally conceived as amortizing loans repaid out of project revenue.

7.463 Moreover, as explained in an Article appearing in the Journal of Economic Perspectives, venture capital is provided to firms that are "typically small and young, plagued by high levels of uncertainty and large differences between what entrepreneurs and investors know. ... {T}hese firms typically possess few tangible assets and operate in markets that change very rapidly. Venture capital organizations finance these high-risk, potentially high-reward projects, purchasing equity or equity-linked stakes while the firms are still privately held."[2669] By contrast, by the time of the launch of the A380, Airbus had developed into a relatively large firm with over 30 years experience, substantial capital assets and revenues, and a track record of successful LCA development, sometimes even exceeding expectations (although it is equally apparent that it is not entirely clear yet whether several of the Airbus LCA models developed immediately prior to the A380 will be as successful as initially expected).[2670,2671]

7.464 One of the reasons the United States advances to support its assertion that the project-specific risk premium identified in the Ellis Report is conservative is that it reflects the risk associated with holding a well-diversified venture capital portfolio as opposed to the risk associated with financing individual venture capital projects. However, as we have already noted, there are reasons to believe that venture capital financing is inherently more risky than LA/MSF, even when considered in the form of a portfolio. In addition, it is not entirely clear to us that the figure of 700 basis points the United States derives from the "cost of venture capital financing"[2672] identified in the KSS Study captures *only* the risk associated with venture capital financing. As the European Communities points out, KSS describe this "cost" to include "management fees".

7.465 The United States views the various cross-checks it has presented as evidence supporting the alleged conservative nature of its proposed project-specific risk premium. However, we are not convinced that they fully corroborate the 700 basis points advanced by the United States.

7.466 First, we note that there appear to be good reasons to believe that the Ibbotson Associates historical risk premium for investing in large company stocks is overstated. We recall that Ibbotson Associates' data was not only used by the United States to cross-check its proposed project-specific risk premium, but it was also relied upon in the construction of the **[***]** measure. Estimates based on ex-post data of the type Ibbotson Associates uses in its database show that the risk premium associated with an investment in equity may be below 7.08%.[2673] Moreover, Professor Whitelaw points out that current academic literature identifies a variety of reasons why the historical difference between the market return for an investment in equity and the risk-free rate may not be an appropriate

[2669] P.Gompers and J. Lerner, "The venture capital revolution", Journal of Economic Perspectives, 15-2, (2001), Exhibit EC-677, at 145, quoted in Whitelaw Rebuttal Report, Exhibit EC-656 (BCI), para. 18.

[2670] EC, SCOS paras. 47-48; EC, Answer to Panel Question 171; EC, Comments on US, Answer Panel Question 142.

[2671] US, Comments on EC Answer to Panel Question 171, indicating that the Airclaims CASE database shows that, by end of 2006, Airbus had made 419 deliveries of the A330/A340 and 95 deliveries of the A340-500/600. However, according to the forecast delivery information submitted by the European Communities, Exhibit EC-597 (HSBI), there is a significant difference between Airbus' delivery expectations at the time these LCA were launched and the position which in reality was achieved in 2006, with actual deliveries falling far short of expectations.

[2672] Underline added.

[2673] Professor Aswath Damodoran concludes that based on ex post data, the equity risk premium should be 4.8%. Aswath Damodaran, *Damodaran on Valuation*, Exhibit EC-678.

BCI deleted, as indicated **[***]**

measure of the expected equity investment risk premium.[2674] According to the European Communities, a substantial body of research also confirms that historical measures such as Ibbotson Associates systematically overstate the premium above the risk-free interest rate that should be paid for equity investment.[2675] Second, we are inclined to agree with the European Communities that the 8% risk premium identified in the CASA State Aid Decision is context specific, as it relates to financing for regional aircraft development at a particular moment in time. The European Communities convincingly argues that the risk premium identified in that Decision was elevated because of the severe overcapacity and low demand confronted by the European regional aircraft industry in the early 1990s.[2676] Third, turning to the United States reliance on the **[***]** analysis undertaken in the UK government's critical project appraisal for the A380, we agree with the European Communities that the UK government's failure to take into account how the distinctive repayment characteristics of LA/MSF affect its recovery rate undermines the United States' submission that the appraisal supports its market interest rate benchmark and project-specific risk premium.[2677]

7.467 We also note that the equity risk premium used in the European Communities' calculation of the equity ceiling, which is based on relatively recent scientific evidence, supports the view that the Ellis Report estimate may be on the higher side. We are also not persuaded that the differences identified by the United States between the **[***]** loan and LA/MSF explain the entirety of the **[***]** basis points difference between the 700 basis points Ellis Report project-specific risk premium and the **[***]** basis points risk premium applied in the **[***]** contract.

7.468 Finally, we note that the United States seeks to apply one and the same project-specific risk premium to construct the market interest rate benchmarks associated with all models of LCA

[2674] Whitelaw Report, Exhibit EC-11 (BCI) , paras. 21-29, citing L. Calvet, M. Gonzalez-Eiras and P. Sodini, *Financial Innovation, Market Participation, and Asset Prices*, Journal of Financial and Quantitative Analysis, 2004, vol. 39, pp. 431-459; E. Fama and K. French, *The Equity Premium*, Journal of Finance, 2002, vol. 57, pp. 637-659; R. Jagannathan, E. McGrattan and A. Scherbina, *The Declining US Equity Premium*, Federal Reserve Bank of Minneapolis Quarterly Review, 2000, vol. 24, pp. 3-19; M. Lettau, S. Ludvigson and J. Wachter, *The Declining Equity Premium: What Role Does Macroeconomic Risk Play ?*, Review of Financial Studies, 2008, vol. 21, 1653-1687; J. Siegel, *The Shrinking Equity Premium*, Journal of Portfolio Management, 1999, vol. 26, pp. 10-16.

[2675] EC, SCOS, para. 63, citing L. Calvet, M. Gonzalez-Eiras and P. Sodini, 2004, "Financial Innovation, Market Participation, and Asset Prices," *Journal of Financial and Quantitative Analysis*, 39, 431-459; E. Fama and K. French, 2002, "The Equity Premium," *Journal of Finance*, 57, 637-659; M. Lettau, S. Ludvigson and J. Wachter, 2006, "The Declining Equity Premium: What Role Does Macroeconomic Risk Play?" *Review of Financial Studies*, forthcoming; J. Siegel, Fall 1999, "The Shrinking Equity Premium," *Journal of Portfolio Management*, 26, 10-16; R. Jagannathan, E. McGrattan and A. Scherbina, Fall 2000, "The Declining U.S. Equity Premium," *Federal Reserve Bank of Minneapolis Quarterly Review*, 24, 3-19; E. Dimson, P. Marsh and M. Staunton, 2003, "Global Evidence on the Equity Risk Premium," *Journal of Applied Corporate Finance*, 15, 27-38; W. Goetzmann and P. Jorion, 1999, "Global Stock Markets in the Twentieth Century," *Journal of Finance*, 54, 953-980; Elton, Edwin J., 1999, "Expected return, realized return, and asset pricing tests", *Journal of Finance* 54, 1199–1220; Brown Stephen J., William N Goetzmann, and Stephen Ross, 1995, Survival, *Journal of Finance* 50, 853-873; Mehra, Rajnish and Edward C. Prescott, 1985, The Equity Premium: A Puzzle, *Journal of Monetary Economics* 15, 145-161; Kocherlakota, Narayana R., 1996, The Equity Premium: It's Still a Puzzle, *Journal of Economic Literature* 34 (1), 42-71; Cochrane John H., 1997, Where is the market going? Uncertain facts and novel theories, *Economic Perspectives* 21, 3-37; Siegel, Jeremy J. and Richard H. Thaler, 1997, Anomalies: The Equity Premium Puzzle, *Journal of Economic Perspectives* 11 (1), 191-200; Burr, Barry B., 1998, 20% + again? Keep dreaming, *Pensions and Investments* 26, 33-34; Benore, Charles, 1983, A survey of investor attitudes toward the electrical power industry, Paine Webber Mitchell Hutchens, Inc., New York; Siegel, Jeremy J., 1992, The equity premium: Stock and bond returns since 1802, *Financial Analysts Journal* January/February, 28-38.

[2676] EC, SWS, paras. 194-199.

[2677] *See*, paragraph 7.449 above.

BCI deleted, as indicated **[***]**

developed by Airbus. Although the European Communities has not disputed this aspect of the Ellis Report project-specific risk premia, we are not convinced that it is the best approach to identifying the most appropriate project-specific risk premium for *each* of the challenged LA/MSF contracts. Various pieces of evidence and arguments presented by the parties indicate that the risk associated with LCA development will vary over time depending upon a variety of factors. These factors include the conditions of competition in the aircraft industry and differences in the levels of technology associated with developing different models of LCA.[2678] In our view, a project-specific risk premium may even vary over time because of the levels of risk that the finance industry is willing to accept at different moments in its own economic cycle. Moreover, if the project-specific risk premium is intended to relate to the risk of default attached to LA/MSF for a particular LCA development project, it would seem to follow that, all things being equal, it should be greater for earlier LCA development projects, when Airbus had relatively less experience – or conversely, the risk premium associated with development of a later model of LCA should be lower in the light of successful prior experience. The Ellis Report appears to recognize this when it explains that the 700 basis points project-specific risk premium relates to LA/MSF in the aggregate, asserting that "a 40 percent risk premium or something of that order of magnitude would probably be quite appropriate for the earlier years of Airbus' existence given the high-risk of LA/MSF and the project-specific repayment during the early life of the company".[2679]

7.469 All of the above considerations lead us to conclude that the United States' proposed project-specific risk premium may not be an appropriate proxy for the project-specific risk premium that a market lender would ask Airbus to pay in return for financing on the same or similar terms and conditions as LA/MSF for *all* of the challenged LA/MSF contracts. In our view, in order to evaluate the suitability of the United States' proposed project-specific risk premium, it is important to bear in mind the nature of and circumstances surrounding each of the different LCA development projects financed under the challenged LA/MSF measures. Thus, in respect of the earliest models of Airbus LCA, namely, the A300 and A310, when Airbus was in its very early stages of existence, a project-specific risk premium derived from the risk associated with investing in a well-diversified portfolio of venture capital investments, appeals to us as a reasonable proxy for the *minimum* project-specific risk premium that it would be appropriate to associate with market financing comparable with LA/MSF. However, for subsequent models of Airbus LCA, and in particular, the A320, A330/A340, A330-200 and A340-500/600, the project-specific risk premium proposed by the United States' probably overstates the *maximum* that we believe the evidence before us suggests would be appropriate; whereas, because of the acknowledged technological challenges associated with the A380 project, our sense is that the United States' project-specific risk premium could be reasonably accepted to represent the *outer limit* of the risk premium that a market lender would ask Airbus to pay for financing on the same or similar terms and conditions as the A380 LA/MSF contracts.

Project-specific risk premium advanced by the EC

7.470 The European Communities presents its own project-specific risk premium, constructed by Professor Whitelaw on the basis of the returns the Airbus "risk-sharing suppliers" expected to achieve on the financing they provided for the purpose of developing the A380.[2680] According to the European Communities, WTO jurisprudence confirms that the Panel should prefer a more specific market interest rate benchmark over one that is of a more general nature. Thus, the European

[2678] *See*, e.g., EC, FWS, paras. 305 and 484 (identifying "development risk" – "the risk that Airbus will fail to design and build the aircraft" and "market risk" – "the risk that Airbus will not deliver enough completed aircraft to repay {LA/MSF} principal and interest"); and EC, SWS, paras. 195-198 (discussing risk factors that apparently affected the European regional aircraft industry between 1991 to 1993).

[2679] Ellis Report, Exhibit US-80 (BCI), footnote 28.

[2680] Whitelaw Report, Exhibit EC-11 (HSBI) , paras. 36-54; Whitelaw Rebuttal Report, Exhibit EC-656 (HSBI) , paras. 21-36.

BCI deleted, as indicated **[***]**

Communities calls upon the Panel to reject the more general project-specific risk premium advanced by the United States in favour of its own proposed project-specific risk premium, derived from the returns expected by Airbus' "risk-sharing suppliers" from their financial participation in the same project (A380) undertaken by the same company (Airbus) in the same market (LCA).[2681] Like the United States, the European Communities proposes one and the same project-specific risk premium for each of the challenged LA/MSF measures, with the exception of the A300 and A310, for which the European Communities has presented no market interest rate benchmark. The value of the European Communities' proposed project-specific risk premium is less than **[***]** the 700 basis points proposed by the United States.

7.471 The European Communities advances various reasons to justify reliance on the Airbus A380 risk-sharing supplier contracts for the purpose of identifying an appropriate project-specific risk premium for LA/MSF, including because, in its view, they are widely used in the LCA industry, contain similar terms and conditions and involve comparable risk. In particular, the European Communities asserts that "financing through risk-sharing suppliers is an important funding source for the development of Airbus and Boeing aircraft", allegedly covering an "estimated 60 percent of the development costs for the Boeing 787."[2682] Moreover, the European Communities notes that in the case of both LA/MSF and risk-sharing supplier financing, one party finances a fraction of development costs in return for repayment with revenues generated from the delivery of aircraft, not profits.[2683] Indeed, in this respect, Professor Whitelaw asserts that "the terms of the risk-sharing supplier agreements are similar to those of the member states" LA/MSF contracts,[2684] noting however that risk-sharing suppliers face two sources of risk not faced by the EC member States, namely, uncertainty in respect of their own development costs; and uncertainty on the timing of repayments.[2685]

7.472 The methodology used by Professor Whitelaw to construct the proposed project-specific risk premium involved the following steps: (i) computing the internal rate of return anticipated for each contract in a selected sample of A380 risk-sharing supplier contracts; (ii) calculating the weighted average internal rate of return of the sampled contracts; and (iii) subtracting the interest rate associated in the Ellis Report with average risk-free government borrowing and the average Airbus general corporate borrowing risk premium for the year 2001, thereby arriving at the project-specific risk premium.[2686] Thus, Professor Whitelaw first selected a sample of risk-sharing supplier contracts. For each selected contract, Professor Whitelaw calculated the internal rate of return as the discount rate that equates the present value of the risk-sharing supplier's investment in the development work on the A380 and the present value of Airbus' anticipated repayment of those development costs. Professor Whitelaw then computed the weighted average return for the selected contracts, arriving at a single overall benchmark rate of return for the A380. Professor Whitelaw justifies a single rate of return for all of the A380 LA/MSF on the following basis:

> "{b}y the time of the launch of the A380, Airbus was controlled 80% by EADS, and the Airbus GIE was in the process of combining into the single entity, Airbus S.A.S. Therefore, country-specific rates are less justified. Also, due to the creation of the Euro and the European Central Bank, the risk-free rates of France, Germany and

[2681] EC, SNCOS, para. 89, referring to Panel Report, *Canada – Aircraft* (no paragraph citation provided by the European Communities).
[2682] EC, FWS, para. 501.
[2683] Whitelaw Report, Exhibit EC-11 (BCI), para. 36.
[2684] European Communities, confidential oral statement at the first meeting with the Panel (hereinafter "EC, FCOS"), para. 23.
[2685] EC, FCOS, para. 23.
[2686] Whitelaw Report, Exhibit EC-11 (BCI), para. 39.

BCI deleted, as indicated **[***]**

> Spain were converging and that of the UK was virtually identical to the average of the other three."[2687]

7.473 To finally arrive at the project-specific risk premium, Professor Whitelaw subtracted the Ellis Report risk-free rate and the Ellis Report average general Airbus corporate borrowing rate from the single rate of return calculated for all A380 LA/MSF contracts.

7.474 The European Communities advances three alternative cross-checks to confirm its proposed project-specific risk premium. The European Communities' arguments in respect of two of these, the **[***]** financing agreement and the cost of equity ceiling, have already been set out and discussed.[2688] The third cross-check is the **[***]** analysis performed by the DTI in the UK critical project appraisal for the A380, as modified and reinterpreted by Professor Whitelaw.[2689] This measure is presented and discussed by the parties in their HSBI submissions.[2690]

7.475 The United States considers the European Communities' proposed project-specific risk-premium to be unreliable for several reasons. First, the United States argues that the European Communities has failed to provide sufficient evidence to support its proposed risk premium, noting that the European Communities submitted only five pages from one single contract between one risk-sharing supplier and Airbus.[2691] Second, the United States argues that the sample of risk-sharing supplier contracts used by Professor Whitelaw is selective, biased and too small, and for this reason renders Professor Whitelaw's calculation subject to errors.[2692] For instance, the Ellis Report declares that the "{s}ample selection bias due to the particular business environment for these suppliers of the A380 is enough to disqualify the use of the Whitelaw analysis, let alone the substantial inclusion in that small sample of subsidized suppliers."[2693] Third, according to the Ellis Report, the limited information provided by the European Communities on the repayment terms of one of the risk-sharing supplier contracts, though not strictly sufficient to satisfactorily assess its relative risk, shows that it involves significantly lower risk than LA/MSF contracts. Thus, the Ellis Report argues that the lower risk attached to the supplier contracts results in a sharp downward bias in Professor Whitelaw's project-specific risk premium.[2694]

7.476 Apart from different repayment terms, the Ellis Report identifies another alleged feature of the risk-sharing supplier contracts that indicates acceptance of a lower level of risk compared with LA/MSF, namely, minimum purchase obligations undertaken by Airbus. To support this contention, the Ellis Report relies on a report by Fitch Ratings agency suggesting that many of the Airbus suppliers are shielded from risk by contractual commitments requiring Airbus to make minimum purchases of supplies, thus assuming some of the risk from delays or project failure.[2695] The Ellis Report also argues that for various reasons, the internal rates of return on the supplier contracts are typically lower than the true expected rates of return to the suppliers. The Ellis Report bases this view on the assertion that the expected return on a manufacturing project typically includes a number of potential sources of return, such as future business opportunities that increase the expected return of the project above the calculated internal rate of return and reduce its risk. Firms also engage in bidding strategies such that the price bid for a particular contract may reflect other opportunities with the same customer. Also, unlike the capital provided by banks or financial institutions, a supplier's

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[2687] Whitelaw Report, Exhibit EC-11 (BCI), footnote 31.
[2688] *See*, paras. 7.452-7.453 and 7.459.
[2689] EC, SWS, para. 357; EC, Comments on US Answer to Panel Question 215.
[2690] *See, also,* Whitelaw Rebuttal Report, Exhibit EC-656 (HSBI) , paras. 40-45.
[2691] US, SCOS, para. 31; US, Comments on EC Answer to Panel Question 171; Ellis Answer to Whitelaw Report, Exhibit US-534a (BCI) , p. 22.
[2692] Ellis Answer to Whitelaw Report, Exhibit US-534a (BCI) , pp 21-22.
[2693] Ellis Answer to Whitelaw Report, Exhibit US-534a (BCI) , p. 28.
[2694] Ellis Answer to Whitelaw Report, Exhibit US-534 (HSBI) , pp. 23-24.
[2695] Ellis Answer to Whitelaw Report, Exhibit US-534 (HSBI) , p. 23.

capital is tied up to the input that the supplier is manufacturing. Because suppliers have a narrower range of choices than investors, their required rate of return will be lower than that of investors.[2696] Ellis also suggests that many suppliers received government funding to underwrite their cost of participating in the A380 project, implying that the returns on their contracts cannot be viewed as fully commercial.[2697] Finally, the United States adopts Brazil's argument that LA/MSF reduces the risk associated with Airbus itself, and therefore, for this reason alone, distorts the risk-sharing supplier benchmark.[2698]

7.477 The United States rejects the proposition that the European Communities' cross-checks substantiate its project-specific risk-premium. The United States' arguments against the **[***]** financing agreement and the cost of equity ceiling have been set out and discussed previously.[2699] The United States also advances two objections to the revised UK **[***]** analysis presented in Professor Whitelaw's Rebuttal Report.[2700] In particular, the United States argues that in presenting this information, the European Communities was offering new factual evidence not as a rebuttal, but as an attempt to bolster its flawed criticism of the United States' benchmark. The United States considers the introduction of this evidence contravenes paragraph 15 of the Panel's Working Procedures, and accordingly asks the Panel to reject both the new evidence and the argument the European Communities has made in reliance on that new evidence. The second United States' objection relates to its inability to verify the accuracy of the new information submitted in the Whitelaw Rebuttal Report.[2701]

7.478 The European Communities rejects the United States' criticisms.[2702] Professor Whitelaw responds to the United States' criticisms regarding the sampling of risk-sharing supplier contracts, asserting that the sample used comprised 100% of the contracts for which an internal rate of return could be calculated. In addition, Professor Whitelaw notes that the total agreed amount of A380 development costs assumed by the risk-sharing suppliers included in the sample represents 42.09 percent of total value of development costs for all A380 risk-sharing suppliers contracts.[2703] Second, referring mostly to HSBI evidence, the European Communities argues that there are only modest differences between the repayment terms of the risk-sharing supplier contracts and LA/MSF, and that these differences are offset by two sources of risk not faced by the member States: *i.e.*, the risk of cost overruns and the risk in the timing of their receipts.[2704] The European Communities also dismisses the United States' reliance on the Fitch Ratings agency report, arguing that the latter did not know whether the A380 suppliers received minimum purchase commitments.[2705] Third, the European Communities rejects the idea that the risk-sharing suppliers are not fully-fledged market actors. Moreover, according to the European Communities, the notion that the risk-sharing suppliers have fewer options for their investment capital than investors such as banks and pension funds is irrelevant. In the view of the European Communities, what matters is that risk-sharing suppliers provide alternative sources of market financing. Similarly, the European Communities does not see any reason to believe that the prospect of obtaining future contracts with Airbus would have affected the terms of the supply agreements. In this regard, the European Communities alleges that the United States does not offer any evidence for this argument and the European Communities does not see any aftermarket for the sort of products sold by the risk-sharing suppliers nor any incentive for them to

[2696] Ellis Answer to Whitelaw Report, Exhibit US-534 (HSBI) , p. 25; US, SWS, paras. 115-118.
[2697] Ellis Answer to Whitelaw Report, Exhibit US-534 (HSBI) , p. 24.
[2698] US, SCOS, para. 40.
[2699] *See*, paras. 7.454, 7.458 and 7.460.
[2700] US, SCOS, paras. 23-24.
[2701] United States, HSBI Appendix to US, SCOS (hereinafter "US, SCOS-HSBI Appendix"), para. 24.
[2702] EC, FNCOS, paras. 14 to 17.
[2703] EC, SOS (HSBI), paras. 84-88.
[2704] EC, SOS (HSBI), paras. 78-80; EC, FCOS, para 23.
[2705] EC, SOS (HSBI), para. 83.

BCI deleted, as indicated **[***]**

reduce their returns.[2706] Fourth, the European Communities argues that the United States has offered no evidence that government financing for the risk-sharing suppliers affects the terms of the finance contracts agreed with Airbus. Moreover, the European Communities argues that even if this were the case, the resulting change to the benchmark rate would be negligible.[2707] Fifth, with regard to the argument that LA/MSF reduces the risk associated with Airbus, the European Communities argues that there is no evidence to support the hypothesis that the risk-sharing suppliers would accept lower returns based on the possibility that Airbus would receive LA/MSF on terms and amounts unknown to them.[2708]

7.479 Having closely reviewed and carefully considered the parties' detailed arguments, counter-arguments and the various expert economic studies and opinions that have been submitted, we believe there are a number of deficiencies with the project-specific risk premium advanced by the European Communities which, in our view, imply that it under-estimates the appropriate level of project-specific risk that may be reasonably associated with LA/MSF for all of the challenged measures.

7.480 In principle, we agree with the view that the returns associated with market financing actually provided to Airbus for the same project as LA/MSF would serve as an appropriate basis from which to derive the relevant project-specific risk premium. Indeed, such an approach would be preferable to the one used by the United States to calculate its own proposed project-specific risk premium. However, we are not persuaded that the project-specific risk premium advanced by the European Communities is derived from data having these characteristics. In the first instance, we note that Professor Whitelaw used information from only a sample of the risk-sharing supplier contracts to construct the proposed project-specific risk premium.[2709] Although Professor Whitelaw asserts that the contracts used amounted to 100% of those for which an internal rate of return could be calculated, we have no way of verifying this assertion because the European Communities has submitted little if any of the underlying data used in Professor Whitelaw's calculations. Specifically, the European Communities has provided a table summarizing various pieces of information that appear to be taken and derived from the sampled risk-sharing supplier contracts, and five pages of one of those contracts.[2710] Even on the basis of only the number of risk-sharing supplier contracts actually sampled we find this to be clearly insufficient to substantiate the European Communities' assertions in respect of the appropriate project-specific risk premium. Moreover, we note that the one contract that the European Communities has submitted shows that there is at least one major difference between the repayment terms under this contract and LA/MSF which we believe reduces its relative level of risk.[2711] We are also of the view that there is some logical merit to the United States' arguments suggesting that the risk-sharing suppliers had incentives to lower their expected rates of return.[2712] We furthermore agree with the view expressed by Brazil and the United States that government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing, thereby limiting its comparability with LA/MSF. Moreover, there is information

[2706] EC, SOS (HSBI), paras. 94-97.
[2707] EC, SOS (HSBI), paras. 89-91.
[2708] EC, SNCOS, para. 14; EC, SOS (HSBI), para. 92.
[2709] We note that the Ellis Answer to Whitelaw Report appears to assert that the Whitelaw sample of risk-sharing supplier contracts was selected from "thousands" of contracts. Ellis Answer to Whitelaw, Exhibit US-534a (BCI) , p.22.
[2710] Whitelaw Report, Exhibit EC-11 (HSBI) , Exhibit 1; and Risk-Sharing Supplier Contract Re A380, Exhibit EC-117 (HSBI).
[2711] Compare repayment provisions of the Risk-Sharing Supplier Contract Re A380, Exhibit EC-117 (HSBI), with e.g., UK A380 LA/MSF contract, Schedule 3, para. 3, Exhibit US-79 (BCI).
[2712] US, Comments on EC Answer to Panel Question 174.

BCI deleted, as indicated **[***]**

contained in the Airbus A380 business case which suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants.[2713]

7.481 Thus, notwithstanding its potential, the shortcomings in the evidence relied upon by Professor Whitelaw to derive the European Communities proposed project-specific risk premium and the notable differences between the risks assumed by the risk-sharing suppliers compared with the EC member State governments, lead us to conclude that the European Communities' project-specific risk premium for the A380 is unreliable and understates the risk premium that a market operator would have reasonably demanded Airbus pay for financing on the same or similar terms as LA/MSF for this particular model of LCA. In addition, we note that as with the United States, the European Communities seeks to apply one and the same project-specific risk premium to construct the market interest rate benchmarks associated with all models of LCA developed by Airbus. For reasons already explained, we are not convinced that this is the best approach to identifying the most appropriate project-specific risk premium for each of the challenged LA/MSF contracts.[2714] As we observed in the context of our evaluation of the proposed project-specific risk premium advanced by the United States, in order to assess the suitability of a project-specific risk premium for market financing comparable to LA/MSF, it is important to bear in mind the nature of and circumstances surrounding each of the different LCA development projects financed under the challenged LA/MSF measures. Thus, while we consider it reasonable to conclude that the earliest models of Airbus LCA, namely, the A300 and A310, would have attracted a project-specific risk premium at least matching the project-specific risk premium advanced by the United States, for subsequent models of Airbus LCA, and in particular, the A320, A330/A340, A330-200 and A340-500/600, the project-specific risk premium proposed by the United States' probably overstates the maximum project-specific risk premium we believe the evidence before us suggests would be appropriate. Conversely, we find that the project-specific risk premium advanced by the European Communities for the same models underestimates the reasonable project-specific risk premium that a market lender would have asked Airbus to pay for financing on the same or similar terms and conditions as LA/MSF for all of these models of LCA, as well as the A380.

Conclusion on Whether the Financial Contributions Confer a Benefit

7.482 We recall that in order to determine whether the financial contributions made under the LA/MSF agreements confer a benefit on Airbus, within the meaning of Article 1.1(b) of the SCM Agreement, we must focus on whether LA/MSF places Airbus in a more advantageous position than would otherwise be the case if it were left to find financing on the same or similar terms and conditions on the market. In the light of the parties' arguments and the particular circumstances of this dispute, we consider it appropriate to resolve this question by examining whether the cost of the challenged LA/MSF contracts to Airbus is less than the cost that Airbus would be faced with if it sought financing on the same or similar terms and conditions as LA/MSF from market lenders.[2715]

7.483 In terms of the cost of LA/MSF to Airbus, we have found that the estimates advanced by the European Communities, before alleged taxation effects, are in almost all cases an appropriate basis for conducting the required comparison, bearing in mind that we consider they represent the *maximum* rate of return that the EC member State governments could have reasonably expected at the time they entered into the LA/MSF contracts. In one instance, we have relied upon the rates of return proposed

[2713] Exhibit EC-362 (HSBI), p. 29. Similarly, the Ellis Answer to Whitelaw Report asserts that a number of the suppliers used in the Whitelaw analysis received "launch aid-like financing or other government subsidies which reduces their cost of capital and therefore the returns required on contracts with Airbus". Ellis Report to Whitelaw Report, Exhibit US-534 (HSBI) , p. 24.

[2714] *See*, para. 7.468 above.

[2715] *See*, para. 7.401 above.

BCI deleted, as indicated **[***]**

by the United States,[2716] and in one other case, we have identified the most appropriate value ourselves.[2717]

7.484 For the six A300 and A310 LA/MSF measures for which the European Communities did not submit an estimate of the relevant rates of return, we believe the estimates of **[***]** for each contract advanced by the United States accurately reflect the EC member State governments' expectations in respect of these contracts. In this regard, we note that although the European Communities has presented extensive, multi-layered, arguments on the questions surrounding the actual rates of return associated with LA/MSF, at no stage has it specifically contested the **[***]** interest rate allegation advanced by the United States for these contracts. Moreover, we have found nothing in the relevant agreements that undermines the argument that the EC member State governments did not expect to obtain any particular return on the full repayment of their LA/MSF contributions for the A300 and A310 at the time they concluded the respective contracts.[2718]

7.485 However, as far as the cost of market financing comparable to LA/MSF is concerned, we have found that neither of the proposals made by the parties on the appropriate project-specific risk premium can be reasonably applied as the perfect standard against which to measure whether all of the challenged LA/MSF contracts confer a benefit. Starting with LA/MSF provided for the A300 and A310, we have found that the project-specific risk premium advanced by the United States represents a reasonable proxy for the *minimum* project-specific risk premium that it would be appropriate to associate with market financing comparable to LA/MSF. We recall that the European Communities has not advanced any alternative project-specific risk premium for these Airbus LCA models. It follows that the appropriate market interest rate for determining whether the French, German and Spanish government LA/MSF contracts for these Airbus LCA models confer a benefit is the market interest rate benchmark advanced by the United States, which we view as representing a reasonable estimate of the lowest interest rate that a commercial lender would have demanded in return for financing the same LCA projects on comparable terms and conditions to LA/MSF.

7.486 In terms of the models of LCA developed between the A310 and the A380, our findings on the appropriate project-specific risk premium lead us to conclude that the most appropriate market interest rate benchmarks against which to measure whether the challenged LA/MSF measures conferred a benefit lie in the range of interest rates advanced by both of the parties – that is, above the interest rate benchmarks proposed by the European Communities but below the benchmark levels submitted by the United States.

7.487 Finally, we recall that we have found the United States' project-specific risk premium for the A380 could be reasonably accepted to represent the outer limit of the risk premium that a market lender would ask Airbus to pay for financing comparable with LA/MSF; whereas, we consider the project-specific risk premium advanced by the European Communities to understate the appropriate level of risk associated with financing such a project on terms and conditions comparable with LA/MSF. Accordingly, we find that the most appropriate market interest rate benchmarks against which to measure whether the challenged A380 LA/MSF contracts conferred a benefit lie in the range of interest rates above those submitted by the European Communities and up to the values advanced by the United States.

7.488 Our specific findings may be illustrated in tabular form as follows:

[2716] *See*, paras. 7.416-7.422 above.
[2717] *See*, paras. 7.423-7.424 above.
[2718] *See*, 1969 A300 Agreement, Articles 6 and 7; French A300 Protocole D'Accord, Article 5, Exhibit EC-603 (BCI); 1981 A310 Agreement, Article 9, Exhibit EC-942 (BCI). We note that the latter Agreement envisaged royalty payments after repayment of the loan principal.

BCI deleted, as indicated **[***]**

Table 7 – LA/MSF Rates of Return Compared with Market Rates of Return

	LA/MSF Contract	LA/MSF Rate of Return[2719]	Market Rate of Return[2720]	Differential
FRANCE	**A300**	**0%**	**at least 16.52%**	**at least 16.52%**
	A310	**0%**	**at least 18.88%**	**at least 18.88%**
	A320	**[***]**	**above 13.49%[2721] but less than 20.49%**	**more than [***] + [[HSBI]][2722] but less than [***]**
	A330/A340	**[[HSBI]]**	**above 10.86%[2722] but less than 17.86%**	**more than [[HSBI]][2723] but less than [[HSBI]][2724]**
	A330-200	**[***]**	**above 9.2%[2722] but less than 17.22%**	**more than [[HSBI]][2725] but less than [***]**
	A340-500/600	**[***]**	**above 7.47%[2722] but less than 14.47%**	**more than [***] + [[HSBI]][2723] but less than [***]**
	A380	**[***]**	**more than 6.89%[2722] and up to 13.89%**	**from ([***] + [[HSBI]][2723]) to [***]**
GERMANY	**A300**	**0%**	**at least 15.18%**	**at least 15.18%**
	A310	**0%**	**at least 13.99%**	**at least 13.99%**
	A320	**[***]**	**more than 8.95%[2722] but less than 15.95%**	**more than ([***] + [[HSBI]][2723]) but less than [***]**
	A330/A340	**[***]**	**more than 7.52%[2722] but less than 14.52%**	**more than ([***] + [[HSBI]][2723]) but less than [***]**
	A380	**[***]**	**more than 6.75%[2722] and up to 13.75%**	**from ([***] + [[HSBI]][2723]) to [***]**
SPAIN	**A300**	**0%**	**at least 16.60%**	**at least 16.60%**
	A310	**0%**	**at least 18.88%**	**at least 18.88%**

[2719] See above, Table 5.

[2720] All figures that are not marked with a footnote in this column are sourced from Table 6.

[2721] This figure is intended to represent the market interest rate benchmark proposed by the European Communities. However, because the European Communities has designated its market interest rate benchmarks HSBI, they cannot be revealed in the text of our Report. In order to disclose an approximate measure of the relevant range of market interest rate benchmarks, we have substituted the EC market interest rate benchmark based on HSBI with the "Market based General Corporate Borrowing Rates for the Airbus Companies" identified in Exhibit 6 of the Ellis Report (which we note were relied upon by the European Communities in establishing its benchmarks). See. e.g., Whitelaw Report, Exhibit EC-11 (BCI), para. 40. In all cases, the actual market interest rate benchmark advanced by the European Communities is less than **[***]** of 700 basis points greater than the relevant value taken from the "Market based General Corporate Borrowing Rates for the Airbus Companies" identified in Exhibit 6 of the Ellis Report.

[2722] This HSBI figure is the project-specific risk premium calculated by the European Communities, which can be found in Exhibits 2 and 3 of the Whitelaw Report, Exhibit EC-11 (HSBI).

[2723] 10.86% plus the European Communities' proposed project-specific risk premium, minus the **[[**HSBI**]]** rate of return shown in the second column.

[2724] 17.86% minus the **[[**HSBI**]]** rate of return shown in the second column.

[2725] 9.2% plus the European Communities' proposed project-specific risk premium, minus **[***]**.

BCI deleted, as indicated **[***]**

	LA/MSF Contract	LA/MSF Rate of Return[2719]	Market Rate of Return[2720]	Differential
	A320	**[***]**	**more than 17.52%[2722] but less than 24.52%**	**more than ([***] + [[HSBI]][2723]) but less than [***]**
	A330/A340	**[***]**	**more than 14.19%[2722] but less than 21.19%**	**more than ([***] + [[HSBI]][2723]) but less than [***]**
	A340-500/600	**[***]**	**more than 8.29%[2722] but less than 15.29%**	**more than ([***] + [[HSBI]][2723]) but less than [***]**
	A380	**[***]**	**more than 7.07%[2722] and up to 14.07%**	**from ([***] + [[HSBI]][2723]) to [***]**
UK	**A320**	**[***]**	**more than 12.59%[2722] but less than 19.59%**	**more than ([***] + [[HSBI]][2723]) but less than [***]**
	A330/A340	**[***]**	**more than 10.97%[2722] but less than 17.97%**	**more than ([***] + [[HSBI]][2723]) but less than [***]**
	A380	**[***]**	**more than 6.54%[2722] and up to 13.54%**	**from [[HSBI]][2726] to [***]**

7.489 According to the United States, all of the LA/MSF contributions provided to Airbus at a zero rate of interest do not seek a commercial rate of return, and therefore must confer a benefit.[2727] Although it is not necessary, for the purpose of resolving this dispute, to decide whether the United States is correct as a general matter,[2728] it is possible to confirm from the above table that in the cases where LA/MSF was provided to Airbus at no interest cost, the same financing could have been obtained from the market only at positive rates of interest. Thus, we find that the financial contributions made available through the A300 and A310 agreements, and the Spanish A320 and A330/A340 contracts, conferred a benefit upon Airbus and therefore constitute subsidies within the meaning of Article 1.1 of the SCM Agreement.

7.490 We come to the same conclusion in respect of all of the other challenged LA/MSF measures. Indeed, even relying on the European Communities' own estimates of the rates of return and market interest rate benchmarks, it is clear that the financial contributions provided in the form of LA/MSF conferred a benefit on Airbus.[2729] Moreover, had we not rejected the taxation-adjusted LA/MSF rates of return advanced by the European Communities, the same would also be true for all but the French A330-200 LA/MSF contract.

7.491 The European Communities argues that the fact that the interest rates associated with the challenged LA/MSF measures might be less than those that would be attached to comparable market-based financing instruments does not automatically imply that they confer a benefit. According to the

[2726] 6.54% plus the European Communities' proposed project-specific risk premium, minus **[***]**.

[2727] US, FWS, paras. 184 (A300 and A310 contracts), 198 and 200 (Spanish 1992 A320 contract), 223 and 225 (Spanish A330/A340), asserting that such a result follows from the panel's finding in *Canada – Aircraft* that loans made under the Technology Partnership Canada programme conferred a benefit because, "as a matter of policy, {they did} not seek a commercial rate of return". Panel Report, *Canada – Aircraft*, paras. 9.313-315.

[2728] Nevertheless, in our view, a situation where market-based financing for LCA development is provided at a zero rate of return to the lender would be extraordinary and highly unlikely.

[2729] Compare the third column of Table 7 with Exhibit EC-597 (HSBI).

BCI deleted, as indicated **[***]**

European Communities, the public policy obligations attached to "most"[2730] of the relevant contracts must also be taken into account. In particular, the European Communities contends that the challenged LA/MSF measures may contain public policy obligations that are not present in commercial loans.[2731] Thus, the European Communities explains that "to enable an 'apples-to-apples' comparison between a MSF loan and a commercial loan, the effective price paid under the MSF loan must reflect the additional obligations for the recipient that would not be present in a commercial loan. In return for accepting these obligations, Airbus Ams/NatCos, as commercial operators, would logically expect to pay less for other elements of the MSF contract."[2732] When the costs associated with such public policy obligations are taken into account, the European Communities submits that the rates of return associated with the challenged LA/MSF contracts would need to be significantly adjusted to a level that would "call into question the existence of the *de minimis* benefit indicated" by the values found in Whitelaw and ITR Reports.[2733]

7.492 The United States argues that the European Communities' reliance on the alleged existence of public policy obligations to increase the effective rates of return associated with the LA/MSF contracts is "extremely vague and not supported by any evidence".[2734] In addition, the United States submits that even if there were a theoretical justification for the European Communities' position, it would be inappropriate to take account of supposed obligations associated with LA/MSF while ignoring other obligations and costs associated with commercial financing (e.g., bank fees, regulatory and credit agency fees, and costs associated with employees engaged on an ongoing basis in financing related activities).[2735]

7.493 It is a well established principle in WTO dispute settlement that the party asserting a particular fact, claim or defence must prove that assertion with evidence and/or legal argument.[2736] In the present case, the European Communities states that it has "substantiated its position on the matter",[2737] noting that it has provided copies of all of the challenged LA/MSF contracts to the Panel. Thus, the European Communities urges the Panel to take the alleged public policy obligations into account when performing the benefit analysis.[2738] In our view, the European Communities' arguments are clearly not enough to fulfil its burden of proof on this matter.

7.494 The European Communities asks the Panel to accept that "public policy obligations", that would not be found in comparable market-based financing instruments, were contained in "most" of the challenged LA/MSF contracts and that these imposed a level of costs on Airbus that at least cancels out the difference between the LA/MSF rates of return and market interest rate benchmarks presented in the economic studies it relies upon. However, apart from the case of one draft contract,[2739] it does not specifically indicate which of the relevant contracts contains such obligations, nor where they might be found. Neither does it quantify or even suggest how to quantify the resulting

[2730] EC, Answer to Panel Question 170.
[2731] EC, SWS, paras. 162-167.
[2732] EC, SWS, para. 167.
[2733] EC, Answer to Panel Question 170.
[2734] US, SNCOS, para. 60; US, Answer to Panel Question 140; US, Comments on the EC's Answer to Panel Question 170.
[2735] US, Answer to Panel Question 140; US, Comments on the EC's Answer to Panel Question 170.
[2736] Appellate Body Report, *US – Wool Shirts and Blouses*, p.14.
[2737] EC, Comments on the United States' Answers to Panel Question 140.
[2738] EC, Answer to Panel Question 170; EC, Comments on the United States' Answers to Panel Question 140.
[2739] The European Communities discusses the alleged **[***]** imposed on British Aerospace by the UK government in the draft LA/MSF contract for the A340-500/600, Exhibit EC-874 (BCI). It is less than clear to us that an obligation to provide the UK government with **[***]** amounts to a "public policy obligation". In any case, we note that the particular draft LA/MSF contract discussed by the European Communities was never concluded and is not the subject of the United States' complaint.

adjustment it argues must be made to the LA/MSF rates of return, stating only that this "would be a matter for commercial negotiation or an independent assessment".[2740] Furthermore, the only description it provides of the type of obligations it is talking about is that they are "e.g., requirements for Airbus to maintain employment levels and to accept rather burdensome reporting requirements".[2741] Thus, in effect, the European Communities urges us to review each of the over 20[2742] relevant LA/MSF contracts that have been submitted in this dispute and: (i) determine which ones contain the type of "public policy obligations" it has described; (ii) come to a view about how much additional cost such obligations would impose on Airbus; and (iii) determine whether this additional cost would be enough to demonstrate that the financial contributions made available through those LA/MSF measures do not confer a benefit. In our view, such a task would amount to the Panel making the case for the European Communities. Therefore, even assuming that we were to accept the premise that any public policy obligations contained in the challenged LA/MSF contracts should be taken into account when considering the question of benefit (a premise upon which we make no ruling),[2743] we find that the European Communities has failed to adduce sufficient factual arguments to persuade us that it has reasonably substantiated its assertion.

7.495 In any case, we note that the European Communities raises the costs of public policy obligations as a factor that may alter the benefit analysis solely in the context of the (tax adjusted) LA/MSF rates of return it has relied upon. Because we have rejected these rates, we question the continued relevance of the European Communities' argument. Finally, we agree with the United States that if our benefit analysis were to take the costs associated with public policy obligations into account, we would also need to consider whether to factor costs that are unique to market-based financing into our determination.

7.496 For all of the above reasons, we therefore dismiss the European Communities' contention that the costs of public policy obligations contained in "most" of the challenged LA/MSF measures are enough to call into question the existence of a benefit indicated by our comparison of LA/MSF rates of return with the rates of return associated with market financing on the same or similar terms as LA/MSF.

Whether the LA/MSF subsidies are specific within the meaning of Article 2 of the SCM Agreement

7.497 The United States considers that each of the subsidies conferred upon Airbus through the LA/MSF contracts is specific, within the meaning of Article 2 of the SCM Agreement because *inter alia*, each individual grant of LA/MSF is made pursuant to a specific contract between the relevant EC member State government and Airbus.[2744] The European Communities has not contested the

[2740] EC, Answer to Panel Question 170.

[2741] EC, Answer to Panel Question 170; EC, SWS, para. 166. Again, the European Communities also discusses certain **[***]** appearing in the draft UK LA/MSF contract for the A340-500/600 in the same context. However, as we have previously noted, it is less than clear to us how such obligations amount to "public policy obligations". In any case, we note that the particular draft LA/MSF contract discussed by the European Communities was never concluded and is not the subject of the United States' complaint.

[2742] Excluding the over 45 LA/MSF contracts for the A300 and A310 submitted by the EC.

[2743] The extent to which the cost of public policy obligations should be taken into account when identifying a market interest rate benchmark for the purpose of determining whether a loan granted by a public entity amounts to a subsidy under the SCM Agreement is a matter that merits serious reflection. This is particularly so in the case of public policy obligations connected with the establishment or continuation of economic activity that impacts international trade. In our view, subsidies containing public policy obligations of this kind may be precisely the types of measures that the adverse effects provisions of the SCM Agreement are intended to address. Thus, to take such "public policy costs" into account when establishing the existence of a subsidy would seem to be incompatible with the objectives of Part III of the SCM Agreement.

[2744] US, FWS, paras. 186-188, 206-210, 229-233, 251, 258, 271, 280, 288 and 297.

BCI deleted, as indicated **[***]**

United States' submission. We agree with the United States. Each of the challenged LA/MSF contracts involves a unique transfer of funds at below-market interest rates to one particular company, Airbus. It follows that the subsidies granted under each of the contracts are explicitly limited to Airbus – explicitly limited to "certain enterprises" within the meaning of Article 2.1(a) of the SCM Agreement. We therefore find that each of the subsidies granted pursuant to the challenged LA/MSF contracts is specific within the meaning of Article 2 of the SCM Agreement, and can therefore be challenged under Part III of the Agreement.

3. Whether LA/MSF as a Programme is a Subsidy Within the Meaning of Article 1 of the SCM Agreement

(a) Arguments of the United States

7.498 The United States alleges that the governments of France, Germany, Spain and the UK (the "Airbus governments")[2745] have maintained a formal and institutionalized industrial policy towards Airbus, a central part of which has been the "systematic and coordinated" provision of LA/MSF subsidies to assist Airbus develop a family of LCAs.[2746] The United States considers that this record of support evidences the existence of a LA/MSF Programme, which as a distinct measure, separate from the individual grants of LA/MSF that it challenges, is a subsidy that causes adverse effects to the United States' interests within the meaning of Articles 5 and 6 of the SCM Agreement.[2747] To this end, the United States argues that the alleged LA/MSF Programme is a "financial contribution" (in the form of "a government practice {that} involves ... direct transfers of funds or potential direct transfers of funds") that confers a benefit, "for example by enhancing {Airbus'} credit rating". According to the United States, this alleged subsidy causes adverse effects to its interests by enabling Airbus to launch new aircraft more quickly and simultaneously reduce prices to gain market share.[2748]

7.499 The United States recognizes that there is no single written instrument that sets forth the alleged LA/MSF Programme. However, it asserts that the existence of the LA/MSF Programme can be established on the basis of several alleged facts, which considered together demonstrate that the Airbus governments have systematically provided Airbus with a significant portion of the capital needed and sought by Airbus to develop each and every new LCA model through unsecured loans granted on back-loaded and success-dependent repayment terms, at below-market interest rates.[2749] The alleged facts the United States relies upon include: (i) the existence of institutional apparatus established under various inter-governmental agreements to support the systematic application of LA/MSF; (ii) the provision of LA/MSF on essentially the same terms and conditions in respect of each new model of LCA developed by Airbus; (iii) statements by officials of the Airbus governments expressing their alleged commitment to the continuity of the LA/MSF Programme, (iv) statements by executives of Airbus and EADS allegedly evidencing reliance on LA/MSF; and (v) the perceptions of LA/MSF held by different credit rating agencies.[2750]

7.500 The United States considers that the alleged LA/MSF Programme is a measure with "normative value", possessing the qualities of the types of unwritten measures that the Appellate Body in *US – Zeroing (EC)* found can be challenged "as such" in WTO dispute settlement proceedings.[2751] However, the United States does not challenge the alleged LA/MSF Programme "as such", asserting

[2745] US, FWS, para. 1.
[2746] US, FWS, paras. 85-89.
[2747] US, SNCOS, paras. 34 and 36.
[2748] US, SNCOS, para. 36; US, Answer to Panel Questions 138 and 139.
[2749] US, FWS, para. 87; US, FNCOS, para. 20; US, Answer to Panel Question 3.
[2750] US, Answer to Panel Question 3.
[2751] US, FNCOS, para. 25; US, SNCOS, para. 36. See also, US, FWS, para. 106, where the United States concludes that "{i}n the light {of the evidence}, the specific content of {the}Launch Aid program and **the future conduct it will entail** is clear}". (Emphasis added).

BCI deleted, as indicated **[***]**

that nothing in the Appellate Body report suggests that an unwritten measure with "normative value" may only exist in the context of an "as such" challenge.[2752] Moreover, the United States argues that it need not necessarily establish the existence of the alleged LA/MSF Programme by satisfying the test identified by the Appellate Body in that dispute.[2753] In its view, like the panels in *Japan – Apples* and *EC – Biotech*, the Panel in the present controversy should examine the merits of its claim in accordance with Articles 3.2 and 11 of the DSU – that is, by interpreting the ordinary meaning of the word "measure" in context and in the light of the object and purpose of the WTO Agreement, and by conducting an objective assessment of the evidence submitted in support of the alleged measure's existence.[2754] In any case, the United States considers that even assuming that the test set out by the Appellate Body in *US – Zeroing (EC)* were relevant, it has established the existence of the alleged measure, having demonstrated: (i) the precise content of the alleged LA/MSF Programme; (ii) that it is attributable to the four Airbus governments; and (iii) that it is of general and prospective application in the sense that whenever Airbus seeks LA/MSF to support the development of a new model of LCA, the Airbus governments provide it on the same core terms.[2755]

7.501 The United States describes the precise content of the alleged LA/MSF programme as consisting of "the consistent, up-front provision by the Airbus governments of a significant portion of the capital that Airbus needs to develop each new LCA model through loans that are (a) unsecured, (b) repayable on a success-dependent basis (*i.e.*, through per sale levies), (c) with the levy amounts greater for later sales than earlier sales (*i.e.*, back-loaded), and (d) with interest accruing at rates below what the market would demand for the assumption of similar risk".[2756] According to the United States, each and every LA/MSF contract has featured these core characteristics. While accepting that differences exist among the specific terms and conditions of the various LA/MSF contracts, the United States argues that these do not mean that the LA/MSF Programme does not have a precise content because, in its view, differences in the details of one LA/MSF contract compared with another have only a marginal impact on the benefit conferred by the particular subsidy at issue, and in any case, do not change the core content and essence of the alleged LA/MSF Programme.[2757]

7.502 The United States asserts that the alleged LA/MSF Programme is incontestably attributable to the Airbus governments - France, Germany, Spain and the UK - pointing to the relatively sophisticated intergovernmental institutions and national bureaucracies allegedly set up by these countries to oversee the funding and development of Airbus, as well as various statements made by government representatives and heads of State.[2758]

7.503 The United States argues that the alleged LA/MSF programme is of general and prospective application, and that this is demonstrated not only by the consistent funding of Airbus LCA development on the same core terms and conditions, but also by the "A380 Launch Aid Agreement", certain statements made by the member State governments and the European Commission, and the actions of market analysts such as Moody's and Fitch Ratings, that the United States asserts, in responding to the statements of the member State governments, have put a value on the alleged LA/MSF Programme and rely on its availability in making their projections of Airbus' financial health.[2759]

[2752] US, SNCOS, paras. 35 and 36.
[2753] US, SNCOS, para. 39; US, Answer to Panel Question 136; US Comments to EC, Answer to Panel Question 173.
[2754] US, Answer to Panel Question 136; US Comments to EC, Answer to Panel Question 173.
[2755] US, Answer to Panel Question 3; US Comments to EC, Answer to Panel Question 173.
[2756] US, Answer to Panel Question 3
[2757] US, Answer to Panel Question 3.
[2758] US, FWS, paras. 95-101.
[2759] US, FWS, paras. 102-106; US, FNCOS, paras. 22-25; US, Answer to Panel Questions 3 and 137.

BCI deleted, as indicated **[***]**

7.504 Finally, the United States submits that even if the Panel disagreed with its view that the alleged LA/MSF Programme has general and prospective value, it should still find, on the basis of the totality of the evidence, that the alleged Programme constitutes a challengeable measure.[2760]

(b) Arguments of the European Communities

7.505 The European Communities rejects the United States' contention that the four Airbus governments have maintained an unwritten LA/MSF Programme pursuant to which development funding for each new model of Airbus LCA has been provided on the same essential terms and conditions. According to the European Communities, the facts do not support the existence of such a Programme because they show that: (i) LA/MSF has not always been sought to finance development of Airbus LCA; (ii) when development financing has been sought, it has not always been in the form of LA/MSF; (iii) when LA/MSF has been sought, it has not always been provided; and (iv) when LA/MSF has been provided, it has been on terms and conditions that vary widely both as between member States and as between the different Airbus LCA projects.[2761]

7.506 The European Communities submits that given the nature of its claim, in order for the United States to make out its case, it must establish: (i) that the EC member States concerned did, in fact, adopt a "Launch Aid Program"; and (ii) the precise content of the challenged programme, including its alleged prospective application. The European Communities argues that the United States has failed to make any such demonstration.[2762]

7.507 In terms of the evidence advanced by the United States for the purpose of substantiating the first element, the European Communities considers that it has, at most, referred to certain inter-governmental agreements concerning co-operation and co-ordination in respect of new Airbus LCA models. However, the European Communities points out that none of these agreements contain any undertakings committing the four EC member State governments to granting subsidized LA/MSF, either for the LCA models covered under the individual agreements or any future models of Airbus LCA. The European Communities considers that neither of the two inter-governmental agreements whose text it alleges was discussed by the United States (the 1969 Agreement and the 2003 Agreement) advances its claim. In particular, the European Communities characterizes the contents of the 2003 Agreement as evidence of merely a general expression of support, not any commitment on the part of the Airbus governments to provide LA/MSF loans for any existing or future LCA development programme on subsidized terms. Similarly, the European Communities notes that the governments of Spain and the UK were not party to the 1969 Agreement, implying that it cannot speak to concerted action involving all four Airbus governments. Moreover, the European Communities recalls that under that Agreement, France and Germany affirmed their commitment to "'European cooperation in the field of aeronautics'" only in "very general terms". According to the European Communities, such a "vague commitment to cooperate in unspecified ways" does not represent an expression of the two governments' joint intention to grant LA/MSF loans on particular terms and conditions. In any case, the European Communities submits that any affirmation made in 1969 by the two governments does not constitute *prima facie* evidence of the same two governments' joint intention with respect to aeronautics today.[2763]

7.508 The European Communities argues that the evidence advanced by the United States in respect of the alleged inter-governmental institutional structures does not establish any "grand" structure surrounding and supporting past grants of LA/MSF. The European Communities explains that

[2760] US, Answer to Panel Question 136.
[2761] EC, SWS, paras. 120-129.
[2762] EC, FWS, paras. 342-344; EC, FCOS, paras. 2-10; EC, SWS, paras. 107-129; EC, Comments on US Answer to Panel Questions 136 and 137.
[2763] EC, Comments on US Answer to Panel Questions 136 and 137.

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although the four governments meet in various frameworks to discuss a range of matters relating to the aerospace industry, none of the institutions identified by the United States is dedicated to LA/MSF. According to the European Communities, none of the institutions are responsible for granting LA/MSF or fixing its terms and conditions. Neither is the provision of LA/MSF or its terms and conditions ever discussed by the EC member States in these fora.[2764] In any case, even if an inter-governmental institutional structure did once exist, the European Communities asserts that its past use for the purpose of discussing LA/MSF does not infer that the member States have collectively adopted an overarching general rule in the form of a LA/MSF Programme.[2765]

7.509 Similarly, the European Communities submits that the statements made by private actors the United States refers to in support of its claim do not show that the EC member State governments have collectively adopted a general rule governing the provision of LA/MSF. In particular, the European Communities characterizes one of the statements made by Moody's Ratings agency as being merely an expression of its expectation that past individual instances of "government support" might be repeated in the future. However, according to the European Communities, neither the repetition of governmental action over time nor private expectations regarding that action prove that the government has adopted a general rule governing its future conduct. Moreover, the European Communities contends that the statement made by Moody's does not suggest that the terms of any "government support" would be below-market. In any case, the European Communities argues that the United States overstates the importance of private parties' expectations in assessing the existence of an unwritten rule of general application, suggesting in the light of *US – OCTG from Argentina*, that such evidence may be probative when concerned with a written statement of government policy.[2766]

7.510 On the question whether the United States has demonstrated the precise content of the alleged LA/MSF Programme, the European Communities considers the evidence advanced by the United States does not support its position. First, the European Communities points to what it contends are significant differences between the LA/MSF contracts, arguing that this undermines the United States' assertion that LA/MSF was granted on the same four uniform "core terms".[2767] In addition, the European Communities contends that the "core" contractual terms and conditions identified by the United States cannot support the existence of an unwritten norm to provide LA/MSF because, in its view, they are too generic. Thus, the European Communities argues that "there is nothing 'precise' about a description that is generic enough, and at a high enough level of abstraction, to apply to many different forms of financing other than MSF".[2768]

7.511 The European Communities considers that the United States has failed to demonstrate how the alleged LA/MSF Programme actually operates, and what conduct it requires of the four governments. Without demonstrating these and other key elements of the alleged unwritten LA/MSF Programme, the European Communities submits that the United States cannot be found to have established its existence.[2769] Moreover, the European Communities notes that three models of LCA, the A321, A319 and A318, were developed without LA/MSF; and that Airbus' rejection of the UK government's offer to finance development of the A340-500/600 shows that, contrary to what the United States argues, LA/MSF is not automatic, but subject to terms and conditions negotiated separately with each of the four member State governments. In the European Communities' view,

[2764] EC, Answer to Panel Question 172.
[2765] EC, Comments on US Answer to Panel Questions 136 and 137.
[2766] EC, Comments on US Answer to Panel Questions 136 and 137.
[2767] EC, SWS, paras. 116-117.
[2768] EC, SWS, para. 119.
[2769] EC, Comments on US Answer to Panel Questions 136 and 137.

these facts also undermine the existence of the unwritten LA/MSF Programme that is defined by the United States.[2770]

7.512 Finally, the European Communities submits that the reality of how the EC member States may provide LA/MSF to Airbus for any future LCA projects is very different from what is implied by the United States' alleged unwritten LA/MSF Programme. If Airbus were to seek LA/MSF in the future from one or more of the four governments, the European Communities argues that each of the governments would consider the request on its own merits, in light of the situation at the time, and according to criteria to be developed by each government. Thus, the European Communities asserts that there are no general and prospective rules governing the provision of LA/MSF by the four governments, and therefore that the United States has failed to prove its case.[2771]

(c) Evaluation by the Panel

7.513 The United States claims that the alleged LA/MSF Programme is a measure with "normative value" that satisfies the definition of a "subsidy" found in Article 1 and causes adverse effects to its interests within the meaning of Article 5 of the SCM Agreement.[2772] However, the United States does not challenge the alleged LA/MSF Programme "as such", explaining that the focus of its claim is not "on something about a measure that mandates or necessarily results in a breach each time the measure is applied, which is the essence of an 'as such' claim".[2773] Indeed, the United States questions whether "it is even possible to successfully claim that a measure 'as such' breaches Article 5 of the SCM Agreement, as that would require showing that the measure will mandate particular effects in the future, such as displacement and impedance, which involve marketplace factors independent of the measure".[2774] Thus, as we understand it, the United States' claim is rooted in the very existence of the alleged LA/MSF Programme, which it contends, *in and of itself*, constitutes a subsidy to Airbus that causes adverse effects. For this claim to succeed, we consider that the United States must demonstrate: (i) the existence of the alleged LA/MSF Programme; (ii) that the alleged Programme is a subsidy within the meaning of Article 1 of the SCM Agreement; and (iii) that the subsidy causes adverse effects within the meaning of Article 5 of the SCM Agreement. We start our evaluation by addressing the first of these elements.

(i) Does the alleged LA/MSF Programme exist?

7.514 The United States describes the alleged measure at issue as a "Programme" operated by the Airbus governments that involves the systematic and coordinated provision of unsecured long-term loans covering a significant amount of the capital that is needed and sought by Airbus for the development of each and every new model of LCA on back-loaded and success-dependent repayment terms and at below-market interest rates.[2775] Although it acknowledges that there is no single written document that attests to the existence of such a deliberate system of financing, the United States argues that the alleged measure's existence is nevertheless evidenced by a series of alleged facts or "individual components that could themselves be considered measures".[2776] These include the alleged existence of institutional apparatus established under various inter-governmental agreements to support the systematic application of LA/MSF, the provision of LA/MSF on essentially the same terms and conditions in respect of each new model of LCA developed by Airbus, various statements

[2770] EC, SWS, para. 121.
[2771] EC, Comments on US Answer to Panel Questions 136 and 137.
[2772] US, FNCOS, para. 25; US, SNCOS, para. 36. See also, US, FWS, para. 106, where the United States concludes that "{i}n the light {of the evidence}, the specific content of {the} Launch Aid program and **the future conduct it will entail** is clear". (Emphasis added).
[2773] US, SNCOS, para. 37
[2774] US, SNCOS, para. 37.
[2775] US, FWS, para. 87; US, FNCOS, para. 20; US, Answer to Panel Question 3.
[2776] US, SNCOS, para. 34.

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made by officials of the Airbus governments and executives of Airbus and EADS, and the perceptions held by different credit rating agencies and one bank.[2777]

7.515 It is now well established that "In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[2778] Thus, the fact that the alleged existence of the LA/MSF Programme is not evidenced in any single written document does not mean that it cannot amount to a "measure" that may be challenged in WTO dispute settlement proceedings. Indeed, as the United States points out, acts attributable to WTO Members not expressed in written form have previously been the subject of WTO dispute settlement.

7.516 In *Japan – Apples*, the panel treated nine inter-related and cumulative legal and administrative requirements imposed by the government of Japan on the importation of United States' apple fruit as comprising one single sanitary and phytosanitary measure for the purpose of evaluating the United States' complaint against those requirements.[2779] In following the same approach, the implementation panel explained that the original panel had treated "the requirements imposed by Japan as several elements of one single measure, essentially because all the requirements were presented as part of a systemic approach".[2780] Similarly, in *EC – Biotech*, the panel agreed with the complainants that the European Communities had applied a "general *de facto* moratorium on the approval of biotech products between June 1999 and August 2003". Notwithstanding the absence of any single document explicitly establishing its existence, the panel found that the alleged *de facto* moratorium existed as "a measure which is the result of other measures (decisions)".[2781] It arrived at this conclusion after conducting a detailed assessment (covering approximately 190 pages) of various facts the complainants had argued demonstrated the existence of the alleged moratorium. These included the operation of the European Communities' relevant approval procedures, documents and statements made by European Communities and EC member State officials, and the histories of individual applications for the approval of biotech products over the period in question.[2782]

7.517 In *US – Zeroing (EC)*, the panel found that the United States' "zeroing methodology", which was not expressed in written form, represented a well-established and well-defined norm that was challengeable as a measure in WTO dispute settlement proceedings, and that this measure was "as such" inconsistent with the United States' obligations under the Anti-Dumping Agreement.[2783] The panel reached this conclusion after closely examining the parties' arguments and various pieces of evidence on the existence and application of the zeroing methodology over time, including the United States' recognition that it had been unable to identify an instance where the USDOC had not applied the methodology, the standard computer programmes used by the USDOC to calculate margins of dumping in investigations, and expert opinions regarding the use and the content of the zeroing methodology. The panel also noted that the United States had not contested that the zeroing

[2777] *See*, para. 7.499 above.

[2778] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, para. 81.

[2779] Panel Report, *Japan – Measures Affecting the Importation of Apples* ("*Japan – Apples*"), WT/DS245/R, adopted 10 December 2003, as upheld by Appellate Body Report WT/DS245/AB/R, DSR 2003:IX, 4481, paras. 8.5-8.20.

[2780] Panel Report, *Japan – Measures Affecting the Importation of Apples – Recourse to Article 21.5 of the DSU by the United States* ("*Japan – Apples (Article 21.5 – US)*"), WT/DS245/RW, adopted 20 July 2005, DSR 2005:XVI, 7911, paras. 8.28-8.30.

[2781] Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1292.

[2782] Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.438-7.1295.

[2783] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521, paras. 7.91-7.106.

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methodology was a deliberate policy.[2784] On appeal, the Appellate Body upheld the panel's finding, concluding *inter alia*, that the evidence before the panel was sufficient to establish that the "zeroing methodology" was a "measure" that could be challenged "as such". In doing so, the Appellate Body made the following observations:

> " ... a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document. If a panel were to do so, it would act inconsistently with its obligations under Article 11 of the DSU to 'make an objective assessment of the matter' before it.
>
> When an 'as such' challenge is brought against a 'rule or norm' that is expressed in the form of a written document—such as a law or regulation—there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged. The situation is different, however, when a challenge is brought against a 'rule or norm' that is *not* expressed in the form of a written document. In such cases, the very existence of the challenged 'rule or norm' may be uncertain.
>
> In our view, when bringing a challenge against such a 'rule or norm' that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged 'rule or norm' is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the 'rule or norm' may be challenged, as such. This evidence may include proof of the systematic application of the challenged 'rule or norm'. Particular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such.[2785]

7.518 We recall that the United States has explicitly described the alleged LA/MSF Programme as a measure with "normative value" in the sense that it "'creates expectations among the public and among private actors'";[2786] a measure that "possesses the qualities the Appellate Body identified in *US – Zeroing (EC)*".[2787] To this extent, we believe that the situation before us is similar to that faced by the panel and the Appellate Body in *US – Zeroing (EC)*, in the sense that as with the European Communities in *US – Zeroing (EC)*, the United States in the present controversy complains about the existence of an alleged unwritten measure with "normative value" that it considers to be WTO-inconsistent *independent of its application*. However, the United States explains that unlike the claim at issue in *US – Zeroing (EC)*, its complaint against the LA/MSF Programme is not based on the typical subject of an "as such" complaint, namely, something about a measure that mandates or

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[2784] Panel Report, *US – Zeroing (EC)*, paras. 7.103.

[2785] Appellate Body Report, *US – Zeroing (EC)*, paras. 196-198, (footnote omitted).

[2786] US, FNCOS, para. 25, citing Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257, para. 187.

[2787] US, SNCOS, para. 36. See also US, FWS, para. 106, where the United States concludes that "{i}n the light {of the evidence}, the specific content of {the} Launch Aid program and **the future conduct it will entail** is clear". (Emphasis added).

BCI deleted, as indicated **[***]**

necessarily results in WTO-inconsistent conduct. Rather, the United States' claim is focussed on a breach "resulting from the Launch Aid Program itself".[2788]

7.519 We are mindful that the distinction between "as such" and "as applied" claims "does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement".[2789] A measure "need not fit squarely within one of these two categories" in order to be susceptible to WTO dispute settlement.[2790] However, in order to be the proper subject of WTO dispute settlement proceedings, a challenged measure must first be shown to actually exist. Given the United States' explicit characterisation of the alleged LA/MSF Programme as a measure with "normative value" in the sense that it "'creates expectations among the public and among private actors'";[2791] a measure that "possesses the qualities the Appellate Body identified in *US – Zeroing (EC)*",[2792] we find the Appellate Body's guidance in that case on how to establish the existence of such a measure to be particularly instructive. As both parties appear to recognize, the existence of a challenged measure must be established on the basis of an objective assessment of all relevant facts and circumstances;[2793] and as we read it, the Appellate Body's guidance in *US – Zeroing (EC)* explains how to undertake such an assessment for the purpose of demonstrating the existence of an unwritten measure that is claimed to have general and prospective application in the sense of a "rule or norm".

7.520 It follows that regardless of the nature of a complaint, when challenging the WTO-consistency of an alleged *unwritten measure* that is alleged to have *normative value*, the criteria laid down by the Appellate Body in *US – Zeroing (EC)* will be relevant to determining whether any such measure actually exists. Therefore, when confronted with a complaint against an unwritten measure that is considered to have general and prospective application, as we are here faced with in respect of the alleged LA/MSF Programme, a panel must not lightly assume its existence. The arguments and evidence advanced by the complaining party to demonstrate its existence must be carefully and rigorously examined with a view to assessing whether the complainant has clearly established at least the precise content of the alleged unwritten measure, that it is attributable to the responding Member and that it has general and prospective application. It is only by satisfying this "high threshold" that a complainant will succeed in establishing the existence of the challenged measure. Conversely, where any one of the above elements cannot be established, the complaining party will have failed to make its case.

7.521 We recall that the United States describes the precise content of the alleged unwritten LA/MSF Programme as consisting of the consistent up-front provision, by the Airbus governments, of a significant portion of the capital that is needed and sought by Airbus to develop each new LCA model, through unsecured loans granted on back-loaded and success-dependent repayment terms and at interest rates below what the market would demand for the assumption of similar risk.[2794] The United States considers that the alleged unwritten LA/MSF Programme is incontestably attributable to four EC member States – France, Germany, Spain and the UK[2795] – and that it has general and prospective application in the sense that "whenever an Airbus company seeks Launch Aid from an Airbus government for development of a new LCA model, it receives Launch Aid consisting of the same essential terms."[2796] According to the United States, the evidence that confirms the existence of

[2788] US, SNCOS, para. 37.
[2789] Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology* ("*US – Continued Zeroing* "), WT/DS350/AB/R, adopted 19 February 2009, para. 179.
[2790] Appellate Body Report, *US – Continued Zeroing*, para. 179.
[2791] US, FNCOS, para. 25, citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.
[2792] US, SNCOS, para. 36.
[2793] US, Answer to Panel Question 136; EC, Comments on US Answer to Panel Questions 136 and 137.
[2794] US, Answer to Panel Question 3; US, FNCOS, paras. 19-26; US, SNCOS, paras. 39-46.
[2795] US, Answer to Panel Question 3.
[2796] US, Answer to Panel Question 3.

an unwritten measure of this kind includes the challenged LA/MSF contracts, inter-governmental institutional structures and national bureaucracies allegedly charged with supporting the operation of the alleged LA/MSF Programme, various statements made by European Communities, EC member State and Airbus officials, and the alleged perceptions of different credit rating agencies and one bank that the challenged LA/MSF Programme is an established part of the financial landscape in which Airbus operates.[2797] We review each of these categories of evidence together with the parties' arguments in the following sections.

The LA/MSF contracts

7.522 One of the main EC criticisms of the United States' description of the alleged LA/MSF Programme is that it is not "precise" enough to confirm its status as an unwritten measure.[2798] The European Communities notes that significant differences exist between the terms and conditions of the challenged LA/MSF contracts, both as between the various LCA projects that received LA/MSF, as well as between the various EC member States that funded them.[2799] In its view, these differences serve to undermine the United States' submission that all LA/MSF contracts included the same four "core terms", and therefore that the alleged Programme exists.[2800] Similarly, the European Communities argues that the four "core terms" of LA/MSF that are the focus of the United States' description are too generic to support the existence of an unwritten measure as the "very same attributes are displayed by market-based instruments such as development financing offered by Boeing and Airbus risk-sharing suppliers, as well as by loans secured from commercial banks".[2801] According to the European Communities, "there is nothing 'precise' about a description that is generic enough, and at a high enough level of abstraction, to apply to many different forms of financing other than MSF".[2802] The European Communities maintains that the content of a subsidy programme would usually include some or all of a series of "key elements", including information on "how and when requests for support must be made"; "the terms and conditions governing eligibility for support"; and "how satisfaction of these conditions must be demonstrated".[2803] It argues that the United States' description of the alleged LA/MSF Programme fails to identify any of these elements.

7.523 We do not consider there to be any generally applicable standard or particular set of facts that define the precise content of a "subsidy programme". The "key elements" identified by the European Communities may usefully circumscribe the general contours of one or more subsidy programmes, but not even the European Communities contends that all subsidy programmes must exhibit such features. Thus, the fact that the United States' description of the precise content of the LA/MSF Programme does not explicitly refer to the "key elements" identified by the European Communities does not, for that reason, render it inadequate.

7.524 In principle, we see no reason why the precise content of an unwritten measure alleged to have "normative value" has to arrive at a certain level of specificity in order to be susceptible to challenge in WTO dispute settlement under the SCM Agreement. If a WTO Member considers in good faith that a measure exists that nullifies or impairs benefits that accrue to it under the SCM Agreement, then regardless of how generic its content may be, the WTO Member is entitled to

[2797] US, SNCOS, paras. 39-66.
[2798] EC, SWS, paras. 116-119; EC, Comments on US Answer to Panel Question 136.
[2799] EC, SWS, para. 117.
[2800] EC, SWS, paras. 116-117.
[2801] EC, SWS, para. 119.
[2802] EC, SWS, para. 119.
[2803] EC, Comments on US Answer to Panel Question 136. The other "key elements" identified by the European Communities are: "the nature and duration of any support granted"; "the purposes for which any support can be used by the recipient"; "the terms and conditions governing any repayments"; and "whether the government is obliged to provide support when eligibility conditions are met".

BCI deleted, as indicated **[***]**

seek redress through WTO dispute settlement.[2804] Of course, it may be more difficult to establish that a measure which possesses a generic content breaches a WTO obligation compared with a measure that is more specific. However, we see no reason to exclude the possibility that even measures with generic content might be WTO-inconsistent. In any case, the United States' description of the precise content of the alleged LA/MSF Programme includes more than just a reference to LA/MSF contracts granted on the same four "core terms". Rather, it is the Airbus governments' consistent up-front provision of a significant portion of the capital that is needed and sought by Airbus to develop each new LCA model, in the form of long-term loans on the same four "core terms", that defines the precise content of the alleged LA/MSF Programme at the centre of the United States' complaint. In our view, this description is sufficiently detailed to permit a clear understanding of the precise content the United States asserts defines the alleged unwritten LA/MSF Programme measure. Indeed, were such a Programme described in a written document, we would have no doubt about its existence as a matter of fact.

7.525 As to the differences that exist between the terms and conditions of the various LA/MSF contracts, it is true that the EC member States did not adopt a standard approach or apply the same contractual template when entering into LA/MSF agreements. Overall, the vast majority of terms and conditions of each LA/MSF contract are different, reflecting not only the individual characteristics of the Airbus entity and LCA development project being funded, but also the policy objectives, legal culture and particular demands of the relevant EC member State funding the project. For instance, the financing provided under the first series of LA/MSF contracts represented a much larger proportion of development costs compared with the LA/MSF contracts entered into after the entry into force of the 1992 Agreement.[2805] Not all of the EC member State governments required the payment of royalties; and when royalties were called for, they were envisaged in different forms and over varying periods of time.[2806] Moreover, the structure of the back-loaded and success-dependent repayment terms found in each contract was not always the same;[2807] and in terms of interest rates, where these were identified in the contracts, they were usually set at different levels, at times through the application of different formulas.[2808] There are other terms and conditions that vary between the contracts. However, in the light of our findings in respect of the individual LA/MSF measures, there is no doubt that all of the challenged LA/MSF contracts may be characterised as unsecured loans granted to Airbus on back-loaded and success-dependent repayment terms, at below-market interest rates, for the purpose of developing various new models of LCA. While not demonstrating that the LA/MSF

[2804] Article 3.3 of the DSU provides that the WTO dispute settlement system exists to address "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". In *US – Corrosion-Resistant Steel Sunset Review* the Appellate Body addressed the scope of "measures" that may be subject to WTO dispute settlement, observing that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch." Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. Article 7.1 of the SCM Agreement provides that "{e}xcept as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member."

[2805] *See*, paras. 7.369,7.2100, 7.2102, 7.2104 and 7.2106.

[2806] *See*, para. 7.410.

[2807] *See*, para.7.374. Thus, for example, each of the four LA/MSF contracts for the A380 requires repayment in different ways and amounts. The German A380 contract appears to require Airbus to make interest payments **[***]**. In addition to those payments, **[***]**. The French A380 contract fixes a **[***]**. The Spanish A380 contract envisages repayment of **[***]**. The UK A380 contract identifies **[***]**.

[2808] For example, compare Spanish A380 contract, Septima Clausula, with the UK A380 contract, Schedule 3, German A380 contract, Article 6.

BCI deleted, as indicated **[***]**

Programme described by the United States actually exists, the contracts do show that every time LA/MSF was provided in the past, it involved the four "core terms" the United States identifies.

7.526 The European Communities argues that another reason why the United States cannot demonstrate the existence of the alleged LA/MSF Programme is that Airbus has not always sought LA/MSF to finance the development of LCA.[2809] In particular, the European Communities notes that "for example" no LA/MSF was sought from any of the Airbus governments for the A318, A319 and A321 models; that no German, Spanish and UK LA/MSF was requested for the A330-200; and that no German government LA/MSF was asked for in order to develop the A340-500/600.[2810]

7.527 Although we consider that the United States' description of the precise content of the alleged LA/MSF Programme has not always been crystal clear, it is apparent from the entirety of its arguments and submissions that the United States characterizes the precise content of the alleged LA/MSF Programme in the terms we have expressed above, that is, as the consistent provision of LA/MSF on the same essential conditions whenever *sought* by Airbus.[2811] Because LA/MSF was not *sought* by Airbus from the above-mentioned EC member State governments for the relevant LCA projects,[2812] it follows that the absence of LA/MSF for these models from the same Airbus governments does not undermine the existence of the LA/MSF Programme described by the United States. However, we note that the UK government did not conclude a LA/MSF agreement with British Aerospace for the purpose of developing the A340-500/600, even though British Aerospace had initially requested LA/MSF from the UK government.

7.528 According to the United States, the absence of UK LA/MSF for the A340-500/600 does not detract from its assertion that an alleged LA/MSF Programme exists, because LA/MSF for this derivative was in fact *offered* by the UK government. Thus, according to the United States, the fact that British Aerospace ultimately declined to avail itself of the LA/MSF offered by the UK government "does not change the fact that the government made the commitment".[2813]

7.529 The Heads of Terms Agreement the European Communities has submitted as evidence of the draft contract negotiated between British Aerospace and the UK government offered financial support

[2809] EC, SWS, paras. 121 and 128.

[2810] EC, SWS, para. 121. In addition, we note that LA/MSF for the first model of Airbus LCA, the A300, was provided by only the French, German and Spanish governments, but not the UK government. *See*, para. 7.369. We have also found that as of 20 July 2005 no LA/MSF had been committed by the Airbus governments for the A350, notwithstanding the fact that it had been launched.

[2811] When asked to explain what conclusions it considered could be drawn about the existence of the alleged LA/MSF Programme from the absence of German, Spanish and UK LA/MSF for the A330-200 (Panel Question 3), the United States argued that French government LA/MSF for the A330-200 was essentially additional French government LA/MSF for the A330/A340. We are unclear as to why the United States did not point out, or at least suggest, that Airbus had not *sought* or *asked for* LA/MSF for this model, (which would have been consistent with its overall description of the content of the alleged LA/MSF Programme), given that it has challenged this contract as a LA/MSF measure that is separate and distinct from the LA/MSF provided for the A330/A340.

[2812] In its answer to Panel Question 173, the European Communities suggests that Deutsche Airbus "turned to a risk-sharing supplier" financing for the A340-500/600 only after it realized that it could not obtain LA/MSF from the German government. However, the European Communities has submitted no specific evidence demonstrating that Deutsche Airbus had actually requested the German government to provide LA/MSF for the A340-500/600.

[2813] US, Answer to Panel Question 3, referring to various pieces of evidence including House of Commons Hansard Written Answers, 2 February 1998, (statement of Mrs. Beckett), Exhibit US-467; and House of Commons Hansard Written Answers, 15 December 1998, (statement of Mr. Battle) ("{T}he Government agreed on 2 February 1998 to invest up to GBP 123 million in a public-private partnership with British Aerospace on the development of the Airbus A340-500/600") Exhibit US-468.

BCI deleted, as indicated **[***]**

for the A340-500/600 on unsecured, back-loaded and success-dependent repayment terms.[2814] Moreover, although nothing in the Heads of Terms Agreement suggests that the **[***]** internal rate of return[2815] requested by the UK government represented a below-market interest rate for the risk being assumed under the proposed contract, when compared with a market interest rate benchmark constructed on the basis of the same methodology applied by the European Communities to identify appropriate market benchmarks for other LA/MSF contracts, it is evident that the **[***]** rate of interest was non-commercial.[2816] The European Communities has emphasized that the **[***]** interest rate charged by the UK government was equivalent to the interest rate obtained by British Aerospace on the **[***]** commercial loan that was ultimately used to finance the A340-500/600 project. However, as we have previously noted, the level of risk taken on by the commercial lender under this contract was less than that assumed generally under the Airbus governments' LA/MSF contracts.[2817] It follows that the Heads of Terms Agreement drafted for the purpose of British Aerospace's participation in the A340-500/600 project featured the same four "core terms" found in other LA/MSF contracts.

7.530 Thus, while we understand that the Airbus governments did not provide LA/MSF for each and every model of LCA developed by Airbus, the evidence we have reviewed does show that whenever Airbus *sought* LA/MSF it was offered by each of the Airbus governments on the same four "core terms", and in all but one case, the terms and conditions of that LA/MSF were agreed between the parties.

7.531 It is important to note, however, that although it was possible to establish on the basis of the express terms of each of the LA/MSF contracts that they were granted on unsecured, back-loaded and success-dependent repayment terms, it was not equally apparent from the face of each contract that the rate of return asked by the relevant EC member State government was below-market. The non-commercial nature of the interest rates charged for the LA/MSF contracts was a fact we established only after reviewing the extensive evidence and arguments submitted by the parties on appropriate market interest rate benchmarks for the LA/MSF contracts. In other words, below-market interest rates are not an *explicit* feature of the LA/MSF contracts. Moreover, 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. Indeed, it is clear that the interest rate advantage obtained by Airbus varied across the different LA/MSF contracts, in general diminishing with every new model of LCA, suggesting that LA/MSF is not synonymous with any particular degree of subsidy intensity (or level of below-market interest rates). In our view, this fact undermines the existence of the alleged unwritten LA/MSF Programme because it shows that to the extent that past instances of LA/MSF might be argued to evidence a broader co-ordinated financing programme, they do not support a conclusion that such a programme would necessarily involve the provision of loans in the future at below-market interest rates.

7.532 In any case, even if LA/MSF were granted in the future on the same four "core terms" identified by the United States, this would not, on its own, demonstrate the existence of the unwritten LA/MSF Programme. We agree with the European Communities that past governmental action may

[2814] Exhibit EC-874 (BCI), Heads of Terms Agreement for the A340-500/600.

[2815] Exhibit EC-874 (BCI), Article 10.2 and Schedule 5.

[2816] As we have previously explained, the market interest rate benchmarks proposed by the European Communities for the purpose of determining whether the LA/MSF contracts involved subsidization were constructed by adding the individual project-specific risk premium identified by the European Communities to the general corporate borrowing rate identified in the Ellis Report for the relevant Airbus borrowing entity. *See*, paras. 7.433 and 7.470 - 7.473 above. In 1998, the year in which the Heads of Terms Agreement was prepared, the Ellis Report identified the general corporate borrowing rate for British Aerospace as 6.24%. Adding the project-specific risk premium proposed by the European Communities to this interest rate brings it above **[***]**, therefore showing that even by the European Communities' own standards, the UK government's proposed LA/MSF for the A340-500/600 was at non-commercial interest rates.

[2817] *See*, paras. 7.452, 7.458 and 7.467 above.

BCI deleted, as indicated **[***]**

be repeated in the future simply because, on the individual merits of a future case, the government reaches the same decision as it did in the past. The repetition of government action over time does not necessarily prove that the government has adopted a general rule governing its future conduct.[2818] Thus, even assuming *arguendo* that it could be concluded from the LA/MSF contracts we have reviewed that each LA/MSF contract is by definition a form of financing that involves below-market interest rates, something more than the repeated conduct evidenced by the provision of LA/MSF to Airbus each time it sought support for LCA development would be needed to prove the existence of the unwritten LA/MSF Programme that is the subject of the United States' complaint.

Inter-governmental Institutional Structures

7.533 The United States asserts that its description of the alleged LA/MSF Programme is supported by the existence of "entire institutional structures that have been created and that continue to operate with the sole and express purpose of administering the Launch Aid Program".[2819] The United States identifies the "core" institutions forming part of these alleged structures as the "Airbus Inter-governmental Committee", the "Airbus Executive Committee" and the "Airbus Executive Agency". It also points to the "Airbus Ministers Conference" and the "Permanent Working Group for Sales Financing" as other relevant institutions. According to the United States, the alleged structures were first established under the 1969 A300 Agreement, in order to "work with Airbus to ensure the success of each new LCA model, including through the provision of Launch Aid";[2820] a "mission" which the United States contends was reinforced and continued through the conclusion of successive inter-governmental agreements and decisions.

The 1969 Agreement

7.534 As its title and preamble suggest, the 1969 Agreement evidences an intention on the part of the governments of France and Germany to co-operate in the field of aeronautics and, in particular, to support Sud-Aviation[2821] and Deutsche Airbus GmbH ("Associated Manufacturers") in the development of a single LCA, the Airbus A300-B. This intention is given effect over thirteen Articles addressing various aspects of the development and production of the A300, including its financing.[2822] The 1969 Agreement envisaged that the French and German governments would provide a specified amount of funding for the development of the A300 in the form of loans ("avances remboursables") to be repaid through a series of graduated levies on the sale of each aircraft, the value of which (as a percentage of sales revenue) was explicitly identified.[2823] Both development and production of the A300 was to be divided between the two Associated Manufacturers involved, in proportion to each government's respective contribution to development costs through "avances remboursables".[2824] However, the costs of A300 series production were not financed under the Agreement, which explicitly provided that these would be the responsibility of each of the Associated Manufacturers.[2825] The Agreement left the choice of engines subject to the approval of the Parties[2826]

[2818] EC, Comments on US Answer to Panel Questions 136 and 137.
[2819] US, SNCOS, para. 43.
[2820] US, SNCOS, para. 43.
[2821] At the time of the conclusion of the 1969 Agreement, Sud-Aviation was a government-owned entity. *See*, para. 7.183 and footnote 2054.
[2822] The Agreement is structured around the following six chapter headings: "Organisation"; "Division of Work"; "Financial Provisions"; "Engines and Equipment"; "Participation of Third Country Industries"; and "Final Provisions".
[2823] Articles 6 and 7. The total amount of funding identified in the Agreement was set on the basis of price conditions ("conditions de prix") existing on 1 January 1968, and was subject to revision in the light of any evolution in the general economic conditions ("conditions économiques générales") since 1 January 1968. Article 6.
[2824] Articles 3.1 and 4.2.
[2825] Article 9.

BCI deleted, as indicated **[***]**

and envisaged that outsourcing to enterprises in third countries would be possible.[2827] It also required the "Work Coordinator"[2828] to invite all competent suppliers based in the Signatory countries to participate in possible equipment supply opportunities.[2829]

7.535 An organisational apparatus was established to oversee the Agreement's implementation. This consisted of three bodies: the Inter-governmental Committee ("AIC"); the Executive Committee ("AEC"); and the Executive Agency ("AEA"). The management of the governments' participation in the project was delegated to the AIC, which was specifically tasked with informing the parties of the "technical, industrial, commercial and financial developments in the project and to guard over or ensure the application of the provisions of {the} agreement, defining when needed the necessary procedures and examining with the companies the problems that occur during the life of the programme".[2830] The AIC was also mandated with establishing the AEC, a body "composed of one member per country and charged with those responsibilities that the parties delegate to it".[2831] It was envisaged that both committees would be supported by the AEA, established within the French government administrative service, which would act as the Committees' executive arm and source of information regarding "any part of the programme".[2832] One of the main tasks specifically attributed to the AEA was to enter into a Framework Agreement with the Work Coordinator implementing all relevant provisions of the Agreement.[2833] The Work Coordinator was directed to enter into a similar agreement with each of the Associated Manufacturers assuring their functions *vis-à-vis* the AEA and defining, in particular, the division of work and responsibilities, mutual pricing rules, risk sharing conditions between the Associated Manufacturers and joint profits.[2834]

7.536 Other particular tasks identified in the Agreement for the relevant Committees included monitoring that a balanced division of work was achieved[2835], declaring the final amounts of "avances remboursables" transferred by each government for the purpose of identifying the final sums to reimburse[2836], agreeing with the Work Coordinator on the "modalities" for supervising implementation of the repayment provisions[2837], and the preparation of an annual report to the parties, including an analysis of the financial situation.[2838]

[2826] Article 10.
[2827] Article 12.
[2828] At the time of the conclusion of the 1969 A300 Agreement, the "Work Coordinator" was Sud-Aviation. However, this position was shortly thereafter transferred to Airbus Industrie GIE, which was constituted on 18 December 1970. Exhibit US-11.
[2829] Article 11.
[2830] Exhibit US-11, Article 1. English translation provided by the United States of original French language, which reads: "an Intergovernmental Committee" was created to: "inform them of technical, industrial, commercial and financial developments in the project and to guard over or ensure the application of the provisions of this present agreement, defining when needed the necessary procedures and examining with the companies the problems that occur during the life of the programme".
[2831] Exhibit US-11, Article 1. English translation provided by the United States of original French language, which reads: "an Executive Committee composed of one member per country and charged with those responsibilities that the Parties delegate to it".
[2832] Exhibit US-11, Article 1. English translation provided by the United States of original French language, which reads: "any part of the programme".
[2833] Article 2.1.
[2834] Article 2.2.
[2835] Article 3.2 (AIC).
[2836] Article 7.1 (AIC).
[2837] Article 7.1 (AEA).
[2838] Article 8 (AIC).

BCI deleted, as indicated **[***]**

7.537 The 1969 Agreement was extended to the government of the Netherlands on 28 December 1970, and the government of Spain on 23 December 1971.[2839] The latter agreement indicates that the entry of both governments into the A300 project resulted in them receiving a representative on the AIC.[2840] It also indicates that the government of Spain was represented on the AEC.[2841] Apart from three specific questions considered to directly affect the interests of the Spanish government and its industry, the vote of the Spanish government representative on the AIC was limited to consultation ("voix consultative").[2842] In terms of substance, the 1971 A300 Agreement *inter alia*, declared CASA[2843] to be an Associated Manufacturer, and conferred upon it both a portion of A300 series production and, **[***]**.[2844] The Agreement also indicated that any "avances remboursables" from the government of Spain would be repaid with **[***]** of the repayments identified in Article 7 of the 1969 Agreement.[2845] Finally, another element of note is that the Agreement **[***]**.[2846]

The 1981 Agreement

7.538 The governments of France, Germany, Spain and the UK entered into an agreement on 28 September 1981 confirming the continued relevance of the 1969, 1970 and 1971 Agreements for the development and production of the A300 and extending the key principles of those agreements to the development and production of the A310.[2847] The 1981 Agreement comprised fourteen Articles addressing essentially the same matters contained in the 1969 Agreement.[2848] As with the financing provided for development of the A300, the 1981 Agreement envisaged that certain specified amounts of funding would be made available for the development of the A310 in the form of loans to be repaid through a series of graduated levies on the sale of each aircraft, the value of which (as

[2839] *The Agreement between the Governments of the Kingdom of the Netherlands, the Federal Republic of Germany, and the French Republic concerning the realization of the Airbus A300B (1970)*; cited *inter alia*, in Article 3 of Exhibit US-16; and *the Agreement of the 23rd of December 1971 between the Governments of the Spanish State, the French Republic, the Federal Republic of Germany, and the Kingdom of the Netherlands concerning the realization of the Airbus A300B*, Exhibit EC-992 (BCI). The parties have not submitted a copy of the former 1970 Agreement between the governments of France, Germany and the Netherlands.

[2840] 1971 A300 Agreement, Article 2, para. 4 ("The representatives of the four Contracting Parties on the Intergovernmental Committee ...").

[2841] 1971 A300 Agreement, Article 2, para. 7. As the parties have not submitted a copy of the 1970 A300 Agreement, we cannot confirm whether the government of the Netherlands was also granted representation on the AEC. However, an organisational chart submitted by the United States as Exhibit US-49 (BCI) suggests that this may have been the case. The 1981 A310 Agreement (discussed below) appears to confirm this.

[2842] Article 2. As the parties have not submitted a copy of the 1970 A300 Agreement, we cannot confirm whether it contained the same or a similar provision in respect of the voting rights of the government of the Netherlands.

[2843] At the time, CASA was a publicly-owned enterprise of the Spanish government. *See*, footnote 2234.

[2844] Article 4. As the parties have not submitted a copy of the 1970 A300 Agreement, we cannot confirm whether it contained the same or a similar provision.

[2845] Article 5.

[2846] Article 6.

[2847] *The Agreement between the Governments of the Federal Republic of Germany, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and Spain concerning the Airbus programme* (the "1981 Agreement"), Exhibit EC-942 (BCI).

[2848] The Agreement is structured around the following seven chapter headings: "General"; "Organisation"; "Pursuit of the Airbus A300 Programme and Distribution of Work in the Airbus A310 Programme"; "Financing of the A310 Programme"; "Equipment"; "Participation of Third Country Industries"; "Final Provisions".

BCI deleted, as indicated **[***]**

a percentage of sales revenue) was explicitly identified.[2849] It also provided that a specified amount of the development costs of the A310 would be assumed by the governments of Belgium and the Netherlands (carried out respectively by Belairbus and Fokker), and that an agreement would be signed with the two governments in due course.[2850] An agreement was concluded with the governments of Belgium and the Netherlands in 1982.[2851]

7.539 Development work was divided in proportion to each government's respective contribution to development costs through "avances remboursables".[2852] The Associated Manufacturers (which now included British Aerospace[2853]) were given responsibility for series production of the element of the A310 each had developed.[2854] However, again, the costs of A310 series production were not financed under the Agreement, which explicitly provided that these would be the responsibility of each of the Associated Manufacturers.[2855] As with the previous agreements, the 1981 Agreement also envisaged that outsourcing to enterprises in third countries would be possible.[2856] Moreover, Airbus Industrie was required to invite all competent suppliers based in the Signatory countries to participate in possible equipment supply opportunities and to provide a list of the invited suppliers and the reasons underlying their eventual selection to the AEA.[2857]

7.540 The same organisational apparatus consisting of the AIC, AEC and AEA that was established under the previous agreements was maintained.[2858] The UK government's participation in the AIC and AEC was recalled;[2859] and the AEA was opened to include representation from not only the French government, but also the governments of Germany and the UK.[2860] The French, German and UK governments were given full voting rights in the committees. However, the Spanish government's voting rights were limited to four specific areas that essentially mirrored those found in the 1971 Agreement.[2861]

7.541 As the implementing agency, the AEA was once again tasked with entering into a Framework Agreement ("Accord Cadre") with Airbus Industrie GIE in order to give effect to all relevant provisions of the Agreement. The Framework Agreement was required to stipulate: that Airbus Industrie and the Associated Manufacturers undertook to satisfactorily complete the development of the A310 and obtain the necessary certificates; that all additional development costs would be borne by Airbus Industrie and the Associated Manufacturers; and that Airbus Industrie would conclude a contract with each of the Associated Manufacturers, by virtue of which the latter would share responsibility of Airbus Industrie before the AEA, and which would define division of work and

[2849] Exhibit EC-942 (BCI), Articles 8-10. The specified funding amounts were set on the basis of the economic conditions ("conditions économiques") prevailing in January 1978, and were subject to revision in the light of any cost variations from January 1978 to the date of disbursement, on the basis of a formula to be developed by each granting country. Article 8.3.

[2850] Exhibit EC-942 (BCI), Article 8.6.

[2851] *The Agreement between the Governments of the Kingdom of Belgium, the Federal Republic of Germany, Spain, the French Republic, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland concerning the program Airbus (1982)*, referred to in Article 3 of US-16. The parties have not submitted a copy of this agreement.

[2852] Article 8.2.

[2853] Preamble. At the time, British Aerospace was a public company. *See*, footnote 2057.

[2854] Article 5.1.

[2855] Article 10.1.

[2856] Article 12.

[2857] Article 11.

[2858] Exhibit EC-942 (BCI), Articles 2.1, 2.6 and 2.7.

[2859] Exhibit EC-942 (BCI), Articles 2.2 and 2.6. The UK government's participation in the AIC commenced as of 1 January 1979 as a result of British Aerospace's entry into Airbus Industrie GIE with a 20% share. *See*, e.g., Exhibit EC-941 (BCI).

[2860] Article 2.7.

[2861] Article 2.4.

BCI deleted, as indicated **[***]**

responsibilities.[2862] Other particular tasks identified in the Agreement for the relevant committees included: reporting on progress in respect of various phases of the project;[2863] declaring the final amounts of the "avances remboursables" transferred by each government for the purpose of identifying the final sums to reimburse;[2864] and agreeing with Airbus Industrie GIE on the "modalities" for supervising implementation of the repayment provisions.[2865] The Permanent Working Group on Sales Finance was reconfirmed (having been established by Decision of the AIC in 1973), and opened to participation of the Spanish and UK governments.[2866]

The 1991 Agreement

7.542 On 6 February 1991, the governments of France, Germany, Spain, the UK and Belgium concluded another agreement concerning the development, production and sales financing of the A320.[2867] This Agreement comprised seventeen Articles addressing essentially the same matters contained in the previous agreements relating to the A300 and A310, but with respect to the A320, and with the addition of a more detailed obligation on support for export sales financing and a provision on the possibility of extending the Agreement to the A321 and other derivatives of the A320.[2868] Each government's expected financial contribution ("aportacíones nacionales") to the Associated Manufacturers (which now included Belairbus[2869]) for the purpose of developing the A320 was identified,[2870] and it was prescribed that repayments would be made from aircraft sales revenues.[2871] However, unlike the previous agreements, the 1991 Agreement did not specify the form or value of such repayments.

7.543 Development work and production was divided between the five national actors, in proportion with the work undertaken in each territory and each government's respective contribution to development costs.[2872] However, again, the costs of production of the A320 were not financed under the Agreement, but left to the Associated Manufacturers.[2873] As with the previous agreements, it was envisaged that outsourcing to enterprises in third countries would be possible.[2874] Moreover, Airbus Industrie and the Associated Manufacturers were required to invite all competent suppliers, especially those based in the Signatory countries, to participate in possible equipment supply opportunities and to provide a list of the invited suppliers and the reasons underlying their eventual selection to the AEA.[2875] The Agreement also prescribed that the governments of France, Germany, Spain and the UK would support A320 export financing (the Spanish government's obligation being limited to

[2862] Article 3.
[2863] Article 8.6 (AEA).
[2864] Article 9.1 (AIC).
[2865] Article 9.5 (AEA).
[2866] Article 10.2.
[2867] *The Agreement between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium concerning the Airbus A320 programme* (the "1991 Agreement") Exhibit US-16..
[2868] The Agreement is structured around the following nine chapter headings: "General Considerations"; "Organisation"; "Development"; "Equipment"; "Production"; "Participation of Third Country Industries"; "Financing of Export Sales "; "Derived Versions"; and "Final Provisions".
[2869] Preamble.
[2870] Articulo 5. The specified funding amounts were set on the basis of the economic situation ("situación económica") in January 1982, and were subject to revision in accordance with an adjustment formula that reflects the corresponding national indexes. Article 6.1.
[2871] Articulo 8 ("The respective national contributions to development costs shall be reimbursed by Airbus Industrie from aircraft sales revenues").
[2872] Articulo 5.2, 5.3 and 11.
[2873] Articulo 12.
[2874] Articulo 13 and 14.
[2875] Articulo 10.

BCI deleted, as indicated **[***]**

purchases made by Spanish airlines).[2876] The responsibilities of the Permanent Working Group on Sales Financing were extended to include the A320.[2877]

7.544 The AIC, AEC, AEA and Permanent Working Group on Sales Financing were maintained and their mandate and responsibilities extended to cover the A320.[2878] The government of Belgium was granted representation on the AIC and AEC for the purpose of the A320 project; while it was clarified that the government of the Netherlands would not be represented in committee meetings for the purpose of the A320.[2879] Once again, the French, German and UK governments were given full voting rights in the committees; whereas the Spanish and Belgian government's voting rights were limited to four specific areas.[2880]

7.545 Finally, the AEA was once again tasked with entering into a Framework Agreement ("Acuerdo Marco") with Airbus Industrie GIE in order to give effect to all relevant provisions of the Agreement. The Framework Agreement was required to contain: a commitment from Airbus Industrie and the Associated Manufacturers that they undertook to satisfactorily complete the development of the A320 and to obtain the necessary certificates; a definition of development work, costs and technical stages; an explanation of how reimbursement amounts would be made by Airbus Industrie to the Associated Manufacturers, and a plan of these repayments; a commitment from Airbus Industrie that it would conclude a contract with each of the Associated Manufacturers, by virtue of which the latter would share responsibility of Airbus Industrie before the AEA; and a commitment from Airbus Industrie that it would immediately inform the AEA in the event of any change to the development work.[2881] Other particular tasks identified in the Agreement for the relevant committees included monitoring the progress of the various phases of the project,[2882] and discussion of compensation proposals in the event that a balanced division of production was not achieved.[2883]

The 1994 Agreement

7.546 The same five governments concluded a very similar agreement concerning the development, production and sales financing of the A330/A340 on 25 and 26 April 1994.[2884] The Agreement comprised fourteen Articles covering essentially the same matters set out in the 1991 Agreement, but applying them to the A330/A340.[2885] It identified each government's maximum expected financial contribution to the development project,[2886] and prescribed that final amounts would be determined by the AIC, in the light of estimates obtained from Airbus Industrie.[2887] Like all previous agreements, the 1994 Agreement stipulated that repayments of the amounts advanced by the governments would

[2876] Articulo 15.1.
[2877] Articulo 15.2.
[2878] Articulo 3.1, 3.5 and 12.
[2879] Articulo 3.1.
[2880] Articulo 3.2, 3.3 and 3.4.
[2881] Articulo 4.
[2882] Articulo 11 (AIC).
[2883] Article 9.1 (AIC).
[2884] *Agreement between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium concerning the program Airbus A330/A340 of 25/26 April, 1994* (the "1994 Agreement") Exhibit US-28.
[2885] The Agreement is structured around the following eight chapter headings: "General Considerations"; "Organization"; "Development"; "Equipment"; "Production; "Financing of the export sales"; "Derived versions"; and "Final Dispositions".
[2886] Articulo 5.
[2887] Articulo 6.1. The funding amounts specified in the contract were to be readjusted following a re-adjustment formula containing respective national indexes. Article 6.2.

BCI deleted, as indicated **[***]**

be made from aircraft sales revenues.[2888] However, it did not specify the form or value of such repayments.

7.547 Production was divided between the five national industries, to the extent possible, in proportion with each government's respective contribution to development costs.[2889] However, again, the costs of production of the A330/A340 were not financed under the Agreement, but left to the Associated Manufacturers.[2890] As with the previous agreements, it was envisaged that outsourcing to enterprises in third countries would be possible.[2891] Moreover, Airbus Industrie and the Associated Manufacturers were required to invite all competent suppliers, especially those based in the Signatory countries, to participate in possible equipment supply opportunities and to provide a list of the invited suppliers and the reasons underlying their eventual selection to the AEA.[2892] The Agreement also prescribed that the governments of France, Germany, Spain and the UK would support A330/A340 export financing (the Spanish government's obligation being limited to purchases made by Spanish airlines).[2893] Finally, the Agreement explained that consultations would be undertaken to decide the modalities for extending its provisions to derivatives of the A330/A340.[2894]

7.548 In terms of organisational apparatus, the same committees identified in the 1991 Agreement were maintained for the purpose of implementing the governments' participation in the A330/A340 project.[2895] The AEA was again tasked with entering into a Framework Agreement ("Acuerdo Marco") with Airbus Industrie GIE in order to give effect to all relevant provisions of the Agreement. The Framework Agreement was required to contain: a commitment from Airbus Industrie that, together with the Associated Manufacturers, it undertook to satisfactorily complete the development of the A330/A340 and to obtain the necessary certificates; a definition of development work and technical stages so that the AEA could supervise and evaluate the project's implementation; a commitment from Airbus Industrie to provide a document, agreed with the Associated Manufacturers, which would define respective national contributions to the development costs, as well as a calendar of predicted expenses; a commitment from Airbus Industrie to provide various pieces of information including all information necessary for the supervision over the development programme, including its financial statement; a commitment from Airbus Industrie that it would immediately inform the AEA in the event of any change to the development work; and the conclusion as soon as possible of contracts between Airbus Industrie and each of the Associated Manufacturers, by virtue of which the latter would share responsibility of Airbus Industrie before the AEA.[2896] Other particular tasks identified in the Agreement for the relevant committees included monitoring the progress of the various phases of the project,[2897] and consideration of claims relating to unbalanced distribution of production work.[2898]

The 2003 Agreement

7.549 The French, German, Spanish and UK governments entered into an agreement with Airbus SAS on 16 June 2003 setting out certain principles and obligations applicable to the four

[2888] Articulo 8 ("The respective national contributions to development costs shall be reimbursed by Airbus Industrie from aircraft sales revenues").
[2889] Articulo 10.
[2890] Articulo 11.
[2891] Articulo 7.
[2892] Articulo 9.
[2893] Articulo 12.
[2894] Articulo 13.
[2895] Articulo 3.
[2896] Articulo 4.
[2897] Articulo 11 (AIC).
[2898] Article 9.1 (AIC).

BCI deleted, as indicated **[***]**

governments' continued support for Airbus LCA programmes.[2899] The Agreement's preamble describes its context in the following three recitals:

> "Having regard to the change in the structure of Airbus to an integrated company and the investment of the Four Principal Airbus Countries in Airbus national companies;
>
> Having regard to the willingness of the Four Principal Airbus Countries to continue to provide support to Airbus such as launch investment, research and technology investment and aircraft export sales financing; {and}
>
> Having regard to Airbus' willingness to provide information to the Four Principal Airbus Countries for the purpose of enabling them to formulate policy relating to Airbus and to ensure that obligations incurred when support is provided are met".

7.550 It then sets out an obligation on Airbus, upon request, to provide the AIC and/or AEC with various pieces of information "relating to Airbus and to the Airbus Programmes", defined as "the A380 programme, programmes launched on or after the date of this Agreement and their derivatives, and any other Airbus programmes not covered by specific Framework Agreements with Airbus".[2900] The Agreement states that the purpose of the information transfer is to enable "each of the Four Principal Airbus Countries to formulate policy in relation to Airbus and to ensure that obligations incurred when support is provided are met".[2901] A non-exhaustive list of ten pieces of information that must be provided on request is included, describing information such as "financial updates relating to each Airbus Programme and to the financial status of Airbus", "reports on Airbus Programmes technical developments", "forecasts and effective aircraft sales detailed by customers and comparisons with aircraft sales of Airbus' competitors", and "Airbus' business and product development strategy".[2902] A series of provisions are also included relating to confidentiality.[2903]

7.551 Unlike previous inter-governmental agreements, the 2003 Agreement does not concern any one particular Airbus LCA development project. Its main focus is the A380, but other unspecified projects launched on or after the date of the Agreement and their derivatives were also covered. In addition, other Airbus projects not dealt with under specific Framework Agreements concluded prior to the 2003 Agreement also fell within its scope.[2904] The Agreement takes note of the four governments' willingness to continue to support Airbus LCA development with "launch investment". While it does not define "launch investment", the references to past Airbus LCA development projects strongly suggests that what is intended is LA/MSF in the terms we have previously described. However, it is clear that no commitment is made by the governments to provide "launch investment" for any particular model of LCA.

7.552 As far as the A380 is concerned, the United States asserts that the Airbus governments had already decided at the end of 2000 to support its development by means of LA/MSF. To substantiate its assertion, the United States points to a press release dated 15 March 2002 issued by the French Ministre de l'Equipement, des Transports et du Logement. This press release in part reads:

[2899] *Agreement of 16th June 2003 signed at Paris-Le Bourget between the Ministers of the Four Principal Airbus Countries and Airbus*, Exhibit US-122 (BCI).

[2900] Articles 1 and 3.

[2901] Article 3.1.

[2902] Article 3.2.

[2903] Article 6.

[2904] We understand the latter to be a reference to the Framework Agreements that were called for under prior inter-governmental agreements between the AEA and Airbus Industrie.

BCI deleted, as indicated **[***]**

> "Agreement on the financing of the Airbus A380
>
> Jean-Claude Gayssot welcomes the signing of the protocol under which the State will advance EUR 1,213 million to Airbus France for the development of the future A380 LCA.
>
> For France, this signature is the realization of the decision taken at the end of the year 2000 by the various European countries concerned to support this programme in proportion to their respective industries' involvement in the development of the new aircraft.
>
> The advance is granted at market rate and will be repayable as the aircraft are delivered. This financing therefore complies with all the provisions of the European/US agreement of July 1992 governing support for over-100-seater aircraft programmes ...".[2905]

7.553 The United States considers that the underlined part of the above press release evidences the existence of an accord between the Airbus governments on the provision of LA/MSF for the A380. The United States notes that during the Annex V process, the European Communities denied the existence of any such agreement, and "did not attempt to resolve the discrepancy between their assertion and the French Transport Ministry's press release".[2906]

7.554 In terms of the A350, the United States argues that the Airbus governments committed to providing LA/MSF for this project by the time this panel had been established. However, we have concluded elsewhere that the United States' assertion cannot be substantiated on the basis of the evidence and arguments before us.[2907]

Airbus Ministers Conference

7.555 The United States argues that the Airbus Ministers Conference is part of the inter-governmental institutional structure established "to operate for the sole and express purpose of administering the Launch Aid Program".[2908] However, the United States has advanced no evidence or additional arguments to explain exactly how it considers this body operates as a matter of fact. According to the European Communities, the Airbus Ministers Conference is a "meeting held at the annual aircraft shows in Le Bourget, Berlin and Farnborough" where Ministers from France, Germany, Spain and the UK meet "to discuss a range of topics with Airbus officials – such as the company's financial condition, the status of existing LCA programmes, and plans for future Airbus LCA".[2909] While the European Communities has also not submitted any evidence to substantiate its factual assertions, the United States appears to accept this aspect of the European Communities' explanation of the Airbus Ministers Conference functions.[2910] On the other hand, the United States does not accept the European Communities' contention that neither the provision of LA/MSF nor its terms and conditions are discussed or coordinated in this body.[2911]

[2905] Press Release, *Accord pour le Financement de l'Airbus A380*, French Ministry of Transport (15 March 2002), Exhibit US-45, (underline added).

[2906] US, FWS, footnote 84.

[2907] The United States' assertion that the Airbus governments had committed to providing LA/MSF of the A350 is examined at paras. 7.296 and 7.314 of this Report above.

[2908] US, SNCOS, para. 43.

[2909] EC, Answer to Panel Question 172.

[2910] US, Comments on EC Answer to Panel Question 172.

[2911] EC, Answer to Panel Question 172; US Comments to EC, Answer to Panel Question 172.

BCI deleted, as indicated **[***]**

Overall assessment of the inter-governmental institutional structures

7.556 The European Communities asserts that none of the inter-governmental institutions identified by the United States provide LA/MSF or fix its terms.[2912] Moreover, according to the European Communities, the provision of LA/MSF or its terms and conditions are never discussed by the EC member States governments in the various fora. The European Communities describes the present-day function of the AIC, which it notes meets twice per year, as a "forum for Airbus GIE/SAS and the member States to exchange information on a range of issues" including Airbus' financial status, sales financing, technical developments, export credits, aviation emissions and air traffic. It explains that "in some cases, the AIC may work with Airbus GIE/SAS to allocate development work (known as 'work share') with respect to specific LCA programmes."[2913] It also asserts that the role of the AEC has steadily declined since the late 1980s, and that its functions have now largely been subsumed within the AIC.[2914] As regards the AEA, the European Communities discloses that it is today "defunct", and that the Framework Agreements it used to negotiate with Airbus Industrie on behalf of the AEC are no longer concluded. Similarly, the European Communities describes the Airbus Ministers Conference as a meeting held once a year between Ministers from the France, Germany, Spain and the UK, to discuss "a range of topics with Airbus officials – such as the company's financial conditions, the status of existing LCA programmes, and plans for future Airbus LCA".[2915] Finally, the European Communities alleges that the Permanent Working Group for Sales Financing has no nexus with LA/MSF loans, as it addresses issues relating to aircraft sales financing and export credits.[2916]

7.557 According to the United States, the functions of the institutional fora identified by the European Communities support the existence of a LA/MSF Programme with the precise content it has defined because they all "facilitate the ultimate decisions by the Airbus governments to provide Launch Aid and on what terms".[2917] The United States emphasizes that "{e}ven if the EC were correct in its assertions {that the inter-governmental entities do not decide whether to grant LA/MSF or its terms}", the European Communities has itself confirmed that they "provide the support necessary for the responsible officials to make" such decisions, thereby supporting the existence of the alleged LA/MSF Programme.[2918]

7.558 We are not persuaded by the United States' arguments. Since their creation in 1969, the inter-governmental institutions have played a role in administering the EC member States' participation in Airbus LCA development projects. However, this role has varied between different LCA projects in both substance and form, becoming increasingly limited. For instance, whereas the Committees' functions in respect of the earliest projects covered aspects including entering into Framework Agreements and the establishment of "modalities" through which to monitor the execution of specific repayment provisions; by the time of the A380, the role of the Committees that continued to exist[2919] was reduced to essentially the exchange of information. Indeed, the role of the Committees in the development of the A380 was not prescribed in any inter-governmental agreement because no inter-governmental agreement was ever concluded for the A380. Instead, an agreement requiring the exchange of information between Airbus and the AIC and/or AEC was concluded between the Airbus governments and Airbus SAS.

[2912] EC, Answer to Panel Question 172.
[2913] EC, Answer to Panel Question 172.
[2914] EC, Answer to Panel Question 172.
[2915] EC, Answer to Panel Question 172.
[2916] EC, Answer to Panel Question 172.
[2917] US Comments and EC, Answer to Panel Question 172.
[2918] US Comments and EC, Answer to Panel Question 172.
[2919] We note that the United States has not contested the European Communities' assertion that the AEA is "now defunct".

BCI deleted, as indicated **[***]**

7.559 Over time, participation in the Committees has also fluctuated. Although invited,[2920] the UK government did not initially participate in the Committees for the purpose of the A300 project. The UK government was only afforded representation on the Committees in 1979, when it joined the governments of Spain and the Netherlands, each respectively represented in the AIC since 1970 and 1971. Subsequently, the government of Belgium joined the A310, A320 and A330/A340 projects, contributing development funds on the same terms agreed with other participants in the respective inter-governmental agreements, and accordingly receiving representation on at least two of the three Committees. On the other hand, the government of the Netherlands did not participate in projects after the A310, and its representation on the Committees was limited accordingly. Thus, at most, the evidence before us suggests that if the Committee's operations point to the existence of any "Programme" of support, it would be a Programme involving the governments of Belgium (which was granted essentially the same voting rights as Spain in respect of the A320 and A330/A340 projects) and the Netherlands.

7.560 The agreements at issue say nothing about whether the three Airbus Committees were involved in the development of the A330-200 and the A340-500/600, two models which received LA/MSF, and therefore according to the United States' own description, models that must fall within the scope of the alleged LA/MSF Programme.[2921] Likewise, there is no evidence indicating that the Committees or the Airbus Ministers Conference were involved in Airbus' launch of the A350. Indeed, we have already concluded that the United States has failed to demonstrate that any commitment to provide LA/MSF for this LCA model had been made by the Airbus governments by the time of the establishment of this Panel.[2922]

7.561 Like the European Communities, we see no apparent connection between the Permanent Working Group for Sales Financing and the provision of LA/MSF or the existence of the alleged LA/MSF Programme. Moreover, on the basis of the evidence that is before us, we cannot conclude that the Airbus Ministers Conference is more than what the European Communities says it is – a forum where information is exchanged between the Airbus governments and Airbus executives. While we have some sympathy with the United States' view that "it is implausible that the governments and Airbus meet at least three times each year to discuss matters including 'the company's financial status' but never discuss the provision of billions of Euros of government financing representing one-third of the cost of developing an LCA model",[2923] the United States has pointed to no evidence that directly substantiates its position. In any case, even if there were evidence demonstrating that the Airbus governments "discuss" the provision of LA/MSF loans in the Airbus Ministers Conference, the weight given to such evidence would depend upon to extent to which it could substantiate the precise content of the alleged unwritten LA/MSF Programme. In other words, evidence of mere discussions on the provision of LA/MSF would not alone establish the existence of the unwritten LA/MSF Programme defined by the United States.

7.562 Finally, we note that the scope of the inter-governmental agreements that were the source of the Airbus Committees' existence, mandates and operations, went beyond the provision of LA/MSF for the purpose of LCA development. The Agreements also covered LCA production, outsourcing of development and production work, equipment supplies, sales financing, and in some cases, rules on the purchase of engines and commitments to purchase LCAs. Thus, contrary to the submission of the United States, the Airbus Committees were not created or continued for "the sole and express purpose of administering the Launch Aid Program". If, in fact, the Committees do have a "sole" purpose, it

[2920] *See*, preamble of the 1969 A300 Agreement.

[2921] Although Articulo 13 of the 1994 Agreement provided that consultations would be undertaken to decide the modalities for extending its provisions to derivatives of the A330/A340, the United States has not argued or advanced any evidence suggesting that any such consultations or extension actually took place.

[2922] *See*, para. 7.314 above.

[2923] US, Comments on EC Answer to Panel Question 172.

BCI deleted, as indicated **[***]**

could perhaps be better characterized as the general management and administration of the varying participation of individual EC member States in Airbus LCA development on a project-by-project basis.

National Bureaucracies

7.563 The United States asserts that the Airbus governments maintain "dedicated bureaucracies" that perform the administrative tasks involved in maintaining the LA/MSF "system" and which coordinate the provision of LA/MSF to Airbus. In the case of France, the United States argues that "a special unit" exists (the "cellule d'avions de transport de plus de 100 places") in the "Direction des Programmes Aéronautiques Civils", which monitors Airbus and the LA/MSF "system"; participates in the inter-governmental institutions; and administers the provision of LA/MSF to Airbus.[2924] In Germany, the United States asserts that the office of the Coordinator for the Aerospace Industry and for Aeronautics Research, within the Federal Ministry of Economics and Technology, is responsible for administering the LA/MSF "system".[2925] In Spain, the United States points to the Ministry of Science and Technology, which it contends is responsible for administering the "'system of reimbursable advances'" and participating in the "'Council of Ministers of the four countries, the {Airbus} Executive Committee and the other bodies that manage and coordinate the system'".[2926] Finally, the United States argues that the "UK Launch Aid system" is administered by the "aerospace team" located within the Aerospace and Defence Unit of the Department of Trade and Industry. The United States contends that this Unit is responsible for "'relations with civil aerospace companies, and launch investment'".[2927]

7.564 According to the European Communities, the "cellule d'avions de transport de plus de 100 places" that exists within the Direction des Programmes Aéronautiques Civils ("DPAC") consists of one staff member. DPAC functions within the Direction Générale de l'Aviation Civil, and is responsible for international co-operation in aeronautics and civil aviation, air safety, air traffic management, R&T for the aerospace sector and external communications. The European Communities asserts that the single staff member working in the "cellule d'avions de transport de plus de 100 places" passes 40% of his time on matters relating to LA/MSF loans for Airbus, with the remainder being devoted to a range of policy and other issues relating to the LCA industry.[2928] In Germany, the European Communities explains that the "aerospace industry and technology" unit within the Coordinator for Aeronautics and Space, is responsible for various tasks including evaluating requests for government financing such as LA/MSF and export credits, providing information to Parliament and the public on aeronautics matters, administering existing financing instruments, implementing the federal R&T programme, and addressing an array of issues relating to national and international air transport. The European Communities states that 10 staff members work in this unit, with two devoting approximately 30% of their time to the LA/MSF loans provided to Airbus and other entities.[2929] In Spain, the European Communities asserts that approximately 50% of the work carried out by one of eight staff members in the Aeronautics Department of the Centre for the Development of Industrial Technology ("CDIT"), located within the Ministery of Industry, Tourism and Trade, relates to LA/MSF loans for Airbus. The European Communities notes that the CDIT is responsible for the promotion of R&D activities in all sectors of the economy.[2930] Finally, the European Communities explains that out of a total of 18 staff working for the Aerospace, Marine and Defence unit of the UK Department of Business, Enterprise and Regulatory Reform, the

[2924] US, FWS, para. 97; US, SNCOS, para. 44; US, Answer to Panel Question 137; Exhibit US-50.
[2925] US, FWS, para. 99; Exhibit US-34.
[2926] US, FWS, para. 100; Exhibit US-54.
[2927] US, FWS, para. 98; Exhibit US-52.
[2928] EC, Answer to Panel Question 172.
[2929] EC, Answer to Panel Question 172.
[2930] EC, Answer to Panel Question 172.

BCI deleted, as indicated **[***]**

equivalent time of 1.4 staff members is spent on LA/MSF loans for Airbus, and 1 staff member on LA/MSF loans for other entities. In addition to various forms of government support to the aerospace industry, the Aerospace, Marine and Defence unit is responsible for aviation emission issues, military and marine procurement, industrial and strategic planning and aerospace research.[2931]

7.565 The European Communities considers that it is not surprising to find that the member States act through "bureaucrats" when fulfilling their obligations under the LA/MSF contracts. In this sense, the European Communities describes the role of the national bureaucrats as "no different than that of the 'dedicated' loan officers at a bank", declaring that "the fact that banks have employees dedicated to considering loan requests and reviewing the ongoing performance of existing loans does not say anything about the terms on which those loans are provided, or suggest that future loans will be conferred to the same recipient".[2932] Thus, the European Communities explains that the essence of the functions of the national bureaucrats is to administer and monitor LA/MSF loans to all recipients, not only those provided to Airbus. According to the European Communities, this involves reviewing requests for development cost reimbursement; ensuring that disbursements occur on time and in accordance with contractual terms; processing repayments; and analyzing technical and commercial information provided by recipients, in line with the loan contracts. The European Communities emphasizes that the bureaucrats serve only to undertake these functions, conduct analyses and make recommendations. They do not decide whether to provide LA/MSF to Airbus.[2933]

7.566 The evidence and arguments submitted by the parties on the existence and functions of the alleged "dedicated bureaucracies" makes clear that each of the four Airbus governments currently direct a limited amount of resources within their national civil service to the task of managing their participation in Airbus' LCA development projects through LA/MSF. In our view, it is not surprising to find civil servants managing and monitoring the implementation of the LA/MSF contracts. As the lending contractual party, each government providing LA/MSF will want to ensure that its decisions are well informed, obligations maintained and rights enforced. The fact that each of the four Airbus governments go about doing so by engaging their respective national civil servants does not, in our view, provide support for the existence of the unwritten LA/MSF Programme the United States describes. The resources the four EC member States have allocated are not exclusively dedicated to LA/MSF for Airbus, and it is clear that this is not the focus of the administrative entities housing the relevant bureaucracies. Moreover, there is nothing in the evidence to indicate that the relevant civil servants co-ordinate their actions, or assist in co-ordinating the actions of their governments, in respect of LA/MSF provided to Airbus. Neither is it apparent from the evidence and arguments that they participate in any "system" of LA/MSF. Thus, while the existence of bureaucrats involved in managing each government's participation through LA/MSF in Airbus' LCA development activities does not contradict the existence of the alleged unwritten LA/MSF Programme, we consider that, on its own, this fact provides little, if any, support for the United States' position.

Statements by EC, EC member State and Airbus officials and employees

7.567 The United States submits that various statements made since 2000 by the EC member States, the European Commission and Airbus officials confirm the existence of the challenged LA/MSF Programme.[2934] In particular, the United States identifies the following statements by:

[2931] EC, Answer to Panel Question 172.
[2932] EC, Answer to Panel Question 172.
[2933] EC, Answer to Panel Question 172.
[2934] US, FWS, paras. 102-104.

BCI deleted, as indicated **[***]**

French President Jacques Chirac, January 2005 –

> "The A380 is the success of European industrial policy, which has helped make Airbus the world's leading aircraft manufacturer", reported in Aviation Week & Space Technology, 24 January 2005.[2935]

British Prime Minister Tony Blair, January 2005 (same day as President Chirac) –

> "The A380 is the result of unprecedented co-operation between the four countries ... ", reported in Airbus Press Release dated 18 January 2005.[2936]

European Commission, 19 January 2005 –

> "... for the EU, the A380 represents the fruit of European state-level co-operation"[2937]

UK Secretary of Trade and Industry, Stephen Byers, 2000 –

> "This is the largest ever Government investment in a project of this kind, and reflects our approach to industrial policy. We are not standing to one side and leaving everything to the market, nor intervening to prop up failing industries ... ", reported in Daily Record, 14 March 2000.[2938]

European Commission, October 2003 –

> "However, the member States will retain a crucial responsibility for providing support in terms of R&D programmes, repayable launch aid and contributions to ESA programmes, as well as remaining the industry's major customers through defence procurement."[2939]

European Commission, May 2005 –

> "In the view of the Commission, the launch investment is WTO legal and as things stand it is part of the commercial landscape for aircraft development in the EU", reported by Agence France Press, 19 May 2005.[2940]

French Transport Minister, Gilles de Robien, May 2005 –

> "The French state has given its financial support to the A380 programme and we expect to continue in this vein thanks to the help of the European Union which is using all means at its disposal

[2935] Exhibit US-58.
[2936] Exhibit US-44.
[2937] Exhibit US-43
[2938] Exhibit US-64.
[2939] Exhibit US-59.
[2940] Exhibit US-60.

BCI deleted, as indicated **[***]**

> against American pressure", reported by AFX News Limited, 24 May 2005.[2941]

EADS spokesman, Rainer Ohler, June 2006 –

> "'As far as we can see, the negotiations have not led to anything,' ... He stopped short of saying that Airbus would request the aid – which could run into billions of euroes – but called the money 'indispensable' for establishing what he called a level playing field with Boeing. 'Launch aid is the only available system right now', he said", reported in International Herald Tribune, 19 June 2006.[2942]

Airbus Ministers, 24 July 2006 –

> "reaffirmed their agreement to support Airbus to continue to innovate and to develop programmes in the context of international competition."[2943]

French Prime Minister, Dominique de Villepin, 2006 –

> On the role of the state in EADS, "{the state is there} to defend a strategic long term vision, which is guarantor of jobs and economic dynamism of the company. I can ensure you that the State will fully play its part", reported in La Dépêche du Midi, 14 November 2006.[2944]

Airbus CEO, Louis Gallois, March 2007 –

> "We are not putting away refundable launch investment" (in the context of the A350XWB), reported by AFP.[2945]

7.568 The European Communities rejects the United States' reliance on these statements, arguing that they do not demonstrate the four EC member State governments adopted any rules of general and prospective application governing the grant of LA/MSF, and thus any unwritten LA/MSF Programme.[2946]

7.569 A first observation that may be made in respect of the above statements is that none contains any explicit reference to the existence of any type of unwritten LA/MSF Programme. Second, the particular context of each statement is, for the most part, either the A380 or the possibility of LA/MSF for the A350. So, for example, the statements made by the UK Secretary of Trade and Industry, Stephen Byers, and the French Minister for Transport, Gilles de Robien, relate to the respective government's decisions to provide LA/MSF for one project – the A380.[2947] Likewise, the statements made by President Chirac, Prime Minister Blair and the European Commission referring to "European

[2941] Exhibit US-61.
[2942] Exhibit US-62.
[2943] Exhibit US-63.
[2944] Exhibit US-638, English translation provided by the United States.
[2945] Exhibit US-449.
[2946] EC, Comments on US Answer to Panel Questions 136 and 137.
[2947] The declaration made by Louis Gallois, Airbus CEO, that Airbus was "not putting away refundable launch investment" can be viewed in a similar light, namely, as a statement that Airbus considered LA/MSF to be a possible source of financing for one project – the A350.

industrial policy", "unprecedented co-operation between the four countries"[2948] and "the fruit of European state-level co-operation"[2949] do not suggest the existence of any coordinated system of LA/MSF funding for Airbus LCA projects. Rather, they simply disclose that four EC member State governments co-operated with each other for the purpose of realizing one project – the A380. Moreover, these statements do not single out the provision of LA/MSF by each individual member State as the tool through which they cooperated. Indeed, given the variety of support measures taken for the A380 by each of the four EC member States[2950], it is quite plausible that what the authors of the statements had in mind was co-operation in the sense of support, in all its guises, for the A380. We see the reaffirmation of the Airbus governments' "agreement to support Airbus to continue to innovate and to develop programmes in the context of international competition" in essentially the same light, that is, as a statement expressing ongoing support, in general, for Airbus LCA development projects. Thus, at most, the above statements seem to reflect only a shared desire to support the A380 and A350 projects and Airbus' LCA business in general.

7.570 The European Commission's 2003 observation that "member States will retain a crucial responsibility for providing support in terms of R&D programmes, repayable launch aid and contributions to ESA programmes, as well as remaining the industry's major customers through defence procurement"[2951] was made in the context of a Communication expressing the Commission's point of view on how the EU could play a role in fostering an improved environment for the purpose of enhancing the operation of the EC aerospace industry in general. In terms of LA/MSF, the Communication notes only that, in the Commission's vision, the EC member States would "retain a crucial responsibility for providing" "repayable launch aid". To read this statement as support for the existence of the unwritten LA/MSF Programme described by the United States would, in our view, be stretching its intended meaning beyond what may be reasonably inferred from its plain language and context. Similarly, the statement made by French Prime Minister, Dominique De Villepin, quoted by the United States, was made in response to a question asking him whether, in the light of recent setbacks, the French government would use its representative on the board of EADS to exercise more rigorous control.[2952] In this light, it is difficult to understand the French Prime Minister's statement as providing any support at all for the existence of the alleged unwritten LA/MSF Programme measure.

7.571 Finally, the statements that perhaps do lend a degree of support to the United States' factual assertion, in the sense that they could be understood to be consistent with the existence of an unwritten LA/MSF Programme measure, without substantiating its existence, are those made by the EC Commission and the EADS spokesman identifying LA/MSF as "part of the commercial landscape for aircraft development in the EU" or "the only available system right now'". However, because the time horizon of the "commercial landscape" or "system" considered in these statements is not revealed, it is difficult to attribute to them any positive probative value for the purpose of substantiating the United States' allegations.

Perceptions of Credit Rating Agencies

7.572 The United States submits that the existence of the LA/MSF Programme is also evidenced by what it asserts is the fact that credit rating agencies see it as an established feature of the financial

[2948] Exhibit US-44.
[2949] Exhibit US-43.
[2950] Apart from LA/MSF for the A380, other support measures applied by the four EC member States that are the subject of this dispute include various research and development grants, the provision of infrastructure and one loan from the European Investment Bank. The United States complaint against these measures is evaluated in the following sections of this Report.
[2951] Exhibit US-59.
[2952] Exhibit US-638 ("In the light of recent setbacks, will the State use its representative on the board of the aeronautic and defence group to exercise more rigorous control over EADS?")

BCI deleted, as indicated **[***]**

landscape that informs their projections of Airbus' financial health.[2953] In particular, the United States points to the following statements made by:

Moody's, 15 March 2002 –

> "The new rating also reflects the forecast that Government support in the form of refundable advances will continue for the development programs of Airbus for up to 1/3 of the development cost of each new aircraft program; thus offsetting some of the pressure on the company's cash flows over the near-term".[2954]

Moody's, 6 February 2003 –

> "EADS's A3 long-term debt rating reflects the leading worldwide market positions held by several of its businesses, as well as the company's strong balance sheet, which should remain solid during the current severe downcycle in the commercial aircraft market. The rating also considers the expectation for continuing government support, which is primarily in the form of refundable advances for up to 1/3 of the development cost of each new aircraft program on the Airbus level."[2955]

Moody's, 9 March 2007 –

> "Moody's considers EADS as a Government Related Issuer (GRI) and as part of its rating review has increased the level of support for EADS to High from Medium. The change in the support assessment reflects the higher degree of government support for EADS that has become evident in the course of the company's current financial challenges. ... "[2956]

Moody's, 12 March 2007 –

> "Moody's has raised the level of potential support from medium-high to high to reflect the accumulation of indices that Airbus is perceived as economically, socially and politically critical for a wide range of stakeholders" noting "an entrenched inclination for state protection".[2957]

Fitch Ratings, 15 November 2006 –

> "With the A380 delays significantly reducing cash generation, and the deferrals and cancellations to further reduce it, combined with the buyout of BAE and the increased costs associated with designing the all-new A350XWB versus the original A350 concept, Airbus may be forced to seek additional launch aid for the A350XWB. In a vacuum, additional launch aid would be viewed favourably from a credit

[2953] US, FWS, para. 104; US, FNCOS, paras. 24-25; US, SNCOS, para. 46; US Answer to Panel Question 137.
[2954] Exhibit US-57.
[2955] Exhibit US-56.
[2956] Exhibit US-464.
[2957] Exhibit US-450.

BCI deleted, as indicated **[***]**

> perspective, as well. Unfortunately, the continuing trade dispute between the United States and the EU regarding Boeing and Airbus subsidies continues, and additional launch aid to Airbus would only increase tensions and reduce the likelihood of a negotiated settlement".[2958]

Credit Suisse, 15 June 2006 –

> "Airbus is the second largest civil aircraft manufacturer after Boeing, with a market share within the range of 50% and rising. Supported by a European government launch aid, Airbus has developed an extremely competitive product range, competing with Boeing in all segments..."[2959]

7.573 The European Communities argues that the credit rating agencies' statements do not support the existence of the unwritten LA/MSF Programme defined by the United States because they do not take into account the specific terms of individual LA/MSF contracts. In its view, the credit rating agencies' statements represent broad assessments of LA/MSF without any consideration of its precise details,[2960] that express an expectation that past individual instances of "government support" might be repeated in the future.[2961] However, the European Communities considers that an expectation that past government action might be repeated in the future does not demonstrate the existence of a general rule taking the form of the unwritten LA/MSF Programme challenged by the United States.

7.574 We find the above statements provide little, if any, support for the existence of the unwritten LA/MSF Programme defined by the United States. First, we note that two of the statements do not even mention LA/MSF. In particular, the two Moody's statements made in 2007 indicate only a general expectation of government *support* for EADS and Airbus. As we have previously noted, LA/MSF is but one of the instruments used by the EC governments to support Airbus' LCA business. Moreover, it would not be unreasonable to read the Moody's statements as referring to support from all EU public entities, not only the governments of France, Germany, Spain and the UK. Certainly, there is no indication that their focus was limited to support provided only by these four governments. To the extent that the other statements do mention LA/MSF, we agree with the European Communities that the fact that the credit rating agencies and Credit Suisse could not have been aware of its precise details, and in particular, the extent to which any contract may involve below-market interest rate terms, reduces their probative value. Because LA/MSF does not involve non-commercial financing by definition, it does not automatically follow that the statements should be understood as referring to LA/MSF on the same four "core" terms identified by the United States. In any case, as regards the two Moody's statements from 2002 and 2003, the perception articulated is that LA/MSF would continue for "each *new* aircraft program".[2962] It is a forward looking assessment, that does not address whether or not instances of LA/MSF received in the past were part of a broader unwritten LA/MSF Programme. Similarly, the Fitch Ratings statement speculates only that *additional* LA/MSF might be a possibility for the A350. Finally, the statement from Credit Suisse simply observes that the Airbus family of LCA was developed with the support of LA/MSF. The statement does not reveal or suggest whether LA/MSF support was provided individually by the relevant EC member States or through the application of any kind of LA/MSF Programme. Thus, we do not consider the Credit Suisse statement to demonstrate a perception that the four relevant EC member States have acted through the unwritten LA/MSF Programme measure that is challenged by the United Sates.

[2958] Exhibit US-451.
[2959] Exhibit US-465.
[2960] EC, SWS, paras. 111-112.
[2961] EC, Comments on US Answer to Panel Questions 136 and 137.
[2962] Emphasis added.

BCI deleted, as indicated **[***]**

(ii) Conclusion

7.575 We have explained that in order to establish the existence of the alleged unwritten LA/MSF Programme it has described, the United States must demonstrate at least its precise content, that it is attributable to governments of France, Germany, Spain and the UK, and that it has general and prospective application.[2963] Although the United States argues that the Panel need not necessarily find that the alleged LA/MSF Programme has general and prospective application in order to establish its existence,[2964] we recall that the United States has explicitly described the challenged LA/MSF Programme as a measure that '"creates expectations among the public and among private actors', demonstrating that it has 'normative value'".[2965] In other words, the alleged "normative value" of the challenged LA/MSF Programme is a central element of the alleged measure that the United States describes. In our view, this alleged "normative value" must therefore be demonstrated as a matter of fact in order for us to find in favour of the United States.

7.576 Overall, having carefully reviewed and considered the evidence and arguments advanced by the United States, we are not convinced that the United States has met the "high threshold" that must be overcome in order to establish the existence of the alleged unwritten LA/MSF Programme.

7.577 Individually, no piece or category of evidence relied upon by the United States positively demonstrates the existence of the alleged unwritten LA/MSF Programme. Some pieces of evidence appear not to be inconsistent with the existence of an unwritten Programme of the kind described by the United States. However, other evidence is clearly contradictory. Thus, while the facts surrounding the development of Airbus LCA show a history and general policy to support Airbus through LA/MSF, this support has not always been expressed by the same four EC member States or for the same LCA projects. Likewise, the institutions created under the first inter-governmental agreements to manage the different Members' participation in various Airbus LCA projects have at different times involved fewer or more countries than the four EC member States the United States asserts systematically operated the unwritten LA/MSF Programme. Importantly, the functions of these institutions evolved over the years, becoming more limited by the time of the A380. Apparently the institutions were not used at all to manage LA/MSF provided for the A330-200 and A340-500/600 projects.

7.578 As we have previously explained, the evidence and arguments advanced by the parties do not lead us to conclude that LA/MSF, by definition, involves below-market financing. Therefore, in our view, it cannot be concluded with the degree of certainty needed to overcome the "high" evidentiary threshold that the United States must satisfy that any LA/MSF granted in the future will involve non-commercial interest rates. In addition, we note that several of the statements relied upon by the United States evidence a general perception that Airbus has been and will be supported in its LCA operations by the EC member States. However, in our view, a perception that government support will be available for Airbus does not prove that this support will be implemented by means of the unwritten LA/MSF Programme described by the United States. Moreover, it is less than clear that the temporal horizon of many of the statements referred to by the United States covered all Airbus LCA projects since 1969. Indeed, many of the statements were expressly focussed on only the A380 or the A350.

[2963] *See*, paras. 7.514 - 7.521 above.

[2964] US, Answer to Panel Question 136.

[2965] US, FNCOS, para. 25, citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187. See also US, SNCOS, para. 36, and US, FWS, para. 106, where the United States concludes that "{i}n the light {of the evidence}, the specific content of {the} Launch Aid program and **the future conduct it will entail** is clear". (Emphasis added).

BCI deleted, as indicated **[***]**

7.579 Thus, for all of the above reasons, we find that the totality of the evidence and arguments the United States has advanced does not demonstrate the existence of the alleged unwritten LA/MSF Programme.

7.580 Had we found that the United States did not have to establish the general and prospective application of the alleged unwritten LA/MSF Programme, our conclusion would be the same – namely, that the United States has not demonstrated that such an unwritten LA/MSF Programme exists. First, we note that in general terms, a "programme" may be described as a planned series of events. Thus, we query whether a "programme" of any kind can exist without having general and prospective application. Second, it is not entirely clear to us what the United States means when it argues that the evidence it has adduced supports the existence of an unwritten LA/MSF Programme that is not of general and prospective application. If the focus of the United States' position is the repetition of the same government action over a limited period of time, (*i.e.*, the Airbus governments' provision of LA/MSF to Airbus, whenever sought, on the same four core terms between 1969 and 2002), we recall our view that the mere repetition of the same government action over time does not necessarily demonstrate that the government acted pursuant to a rule that applied generally over that same period.[2966] Moreover, there is evidence that points to the non-existence of any such unwritten LA/MSF Programme, including: the fact that between 1969 and 2002 the same four EC member States did not always participate, or participated with other EC member States, in Airbus LCA projects funded through LA/MSF; the evolving role and function of the inter-governmental institutions; and the fact that the latter were not apparently used for the purpose of the LA/MSF provided for the A330-200 and A340-500/600. Thus, on the basis of our understanding of the United States' argument, we find that the facts do not substantiate its claim.

7.581 Having concluded that the United States has not demonstrated the existence of the alleged unwritten LA/MSF Programme, we need not evaluate the United States' claims that the alleged Programme is a subsidy that causes adverse effects to its interests within the meaning of Article 5 of the SCM Agreement. Accordingly, we dismiss the United States' complaint against the alleged unwritten LA/MSF Programme.

4. Whether LA/MSF for the A380, A340-500/600 and the A330-200, constitutes, in each case, a prohibited export subsidy within the meaning of Article 3 of the SCM Agreement

(a) Arguments of the United States

7.582 The United States claims that the LA/MSF contracts for the A380, the A340-500/600 and the A330-200 constitute prohibited subsidies under Article 3 of the SCM Agreement. In particular, the United States submits that each of these instances of LA/MSF involves a subsidy that is contingent, both in law and in fact, upon anticipated export performance within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement, and therefore, pursuant to Article 3.2 of the SCM Agreement, must not be granted or maintained. According to the United States, irrespective of whether its claim is viewed as one of in law or in fact export contingent subsidies, the elements are the same: the EC member State governments provide subsidies in the form of financing for the development of LCA models on terms that are better than what Airbus could obtain in the market; these subsidies are provided through contracts in which funding is tied to Airbus making repayments over a specified number of sales of the LCA model being financed; and, in each case, the number of sales that must be made for Airbus to fulfil its repayment commitment cannot be reached without exporting.[2967]

7.583 Relying on the Appellate Body's findings in *Canada – Aircraft*, the United States argues that a determination that a subsidy is contingent upon export performance involves proving three

[2966] *See*, para. 7.532 above.
[2967] US, FWS, paras. 343-386; US, Answer to Panel Question 10.

elements: (i) the "granting" of a subsidy; (ii) that is "tied to"; (iii) "actual or anticipated exportation or export earnings".[2968] To the extent that it has demonstrated that each of the challenged LA/MSF measures amount to subsidies within the meaning of Article 1 of the SCM Agreement, the United States asserts that the first element of this test has been satisfied.[2969] As regards the third element, the United States submits that for each of the challenged LA/MSF measures, the EC member State governments anticipated that the financed projects would result in exportation or export earnings because they were fully aware of the global nature of the LCA market and the fact that Airbus is a highly export-oriented company, as evidenced by, *inter alia*, information contained in Airbus' Global Market Forecasts, Airbus' LA/MSF applications and the governments' own market appraisals.[2970]

7.584 In terms of establishing the second element – the existence of contingency between the granting of a subsidy and actual or anticipated export performance – the United States argues that the legal standard that must be applied is the same for subsidies that are alleged to be contingent in law, or contingent in fact, upon export performance. Thus, recalling certain observations of the Appellate Body in *Canada – Aircraft*, the United States submits that when examining whether the grant of a subsidy is "tied to" export performance, either in law or in fact, it is necessary to assess whether it is "conditional" on export performance or "dependent for its existence" on export performance. Consistent with the views of the Appellate Body, the United States notes that the type of evidence that may be employed to demonstrate the two types of contingency will be different.[2971]

7.585 In respect of *in law* contingency, the United States concurs with the views it asserts were expressed by the Appellate Body in *Canada – Autos*, where it found that contingency in law upon export performance may be established "when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure".[2972] The United States recalls, however, that the Appellate Body explained that this did not mean that in law contingency could only be established *expressis verbis*, but that it could also be found "by necessary implication from the words actually used in the measure".[2973] Thus, the United States argues that the terms and conditions of each of the challenged LA/MSF contracts demonstrate in law contingency because, when read in the light of the number of LCA sales the EC member State governments expected would be achieved in Europe and abroad, the "words actually used" in those contracts – in particular, the contractual terms tying the provision of LA/MSF to repayment over a specific number of LCA sales – give rise to the "necessary implication" that the provision of LA/MSF is contingent, in law, upon export performance.[2974]

7.586 In contrast, the United States notes that a finding that a subsidy is *in fact* contingent upon export performance must be "*inferred* from the total configuration of facts constituting and surrounding the granting of the subsidy, none of which is likely to be decisive in any given case".[2975] The United States observes that pursuant to footnote 4 of the SCM Agreement, such facts must establish that "the granting of a subsidy, without having been made legally contingent upon export

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[2968] US, FWS, para. 343, citing Appellate Body Report, *Canada – Aircraft*, para. 169.

[2969] US, FWS, paras. 344 (A380 contracts); 362 (A340-500/600 contracts); and 377 (A330-200 contract).

[2970] US, FWS, paras. 345-351 (A380 contracts); 363-371 (A340-500/600 contracts); and 378-382 (A330-200 contract).

[2971] US, FWS, para. 326-327, citing Appellate Body Report, *Canada – Aircraft*, para. 167.

[2972] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Autos*"), WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985, para. 100, cited in US, FWS, para. 328.

[2973] Appellate Body Report, *Canada – Autos*, para. 100, cited in US, FWS, para. 328 (emphasis added by the United States); and US, Answer to Panel Question 146.

[2974] US, Answer to Panel Questions 10 and 146; US, FWS, paras. 352-357 (A380 contracts); 372-373 (A340-500/600 contracts); and 384 (A330-200 contract).

[2975] US, FWS, para. 329, referring to Appellate Body Report, *Canada – Aircraft*, para. 167.

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performance, is in fact tied to actual or anticipated exportation or export earnings".[2976] In this regard, the United States notes that the existence of a "tie" between the granting of a subsidy and export performance may be demonstrated when there is a relationship of "conditionality" or "dependence" between the subsidy and exports.[2977] The United States submits that such a relationship can be found in the facts surrounding the decisions to provide the challenged LA/MSF measures, and in particular: (i) the existence of a contractual tie between the provision of LA/MSF and Airbus' commitment to repay LA/MSF through revenues generated from LCA sales necessarily involving exports; and (ii) the EC member State governments' anticipation of export performance.[2978]

(b) Arguments of the European Communities

7.587 The European Communities rejects the United States' claims, contesting both the United States' legal argument and the inferences it has drawn from the facts it asserts and evidence it adduces. According to the European Communities, in order to find that a measure is a prohibited export subsidy within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement, the following three elements must be established: (i) the required condition (export performance); (ii) the required consequence (grant of a subsidy); and (iii) the required contingent relationship (contingency).[2979]

7.588 In respect of the first element – the required condition of export performance – the European Communities considers that when it comes to assessing whether the EC member State governments "anticipated exportation or export earnings", within the meaning of footnote 4 of the SCM Agreement, the term "anticipated" must be understood as meaning "an export that has not yet taken place at the moment when the subsidy is deemed to exist, but {that} will take place in the future".[2980] Thus, contrary to what the European Communities alleges the United States to have argued, the European Communities contends that an "anticipated" export is not a "potential" export, but one that will take place in the future.[2981] According to the European Communities, if this were not the case, the export performance condition would be fulfilled on the basis of the mere "consideration by the granting Member that exports *might* occur in the future".[2982] Therefore, were the United States correct, it would be possible to apprehend subsidies simply because they have *effects* in a global market, even though the object and purpose of Article 3.1 is to prohibit subsidies that create an incentive for companies to *favour* exports and thereby distort international trade. In this regard, the European Communities notes that the SCM Agreement addresses the adverse *effects* of subsidies on the interests of other Members, including export interests, under Part III, not Part II.[2983] Thus, the European Communities contends that the United States has based its claim on an erroneous understanding of what "anticipated exportation or export earnings" is intended to mean. In any case, the European Communities argues that the evidence the United States relies upon to prove the existence of the required export performance condition, including the terms of the disputed LA/MSF contracts and the market forecasts contained in various documents, shows only a concern with performance, not *export* performance.[2984]

[2976] US, FWS, para. 330.
[2977] US, FWS, para. 331, referring to Appellate Body Report, *Canada – Aircraft*, paras. 170-171.
[2978] US, FWS, paras. 352-357 (A380 contracts); 372-373 (A340-500/600 contracts); and 384 (A330-200 contract); US, SWS, paras. 135-144; 161-209.
[2979] EC, FWS, paras. 556, 567-582; EC, Answer to Panel Question 79.
[2980] EC, SWS, para. 236.
[2981] EC, SWS, paras. 232-250.
[2982] EC, SWS, para. 245; EC, SNCOS, para. 127.
[2983] EC, FWS, paras. 575-576 and 686-688; EC, SWS, paras. 245-249.
[2984] EC, FWS, paras. 615-629 (A380 contracts), 674-677 (A340-500/600 contracts), and 678-682 (A330-200 contract) arguing, in the context of the United States' *in fact* export subsidy claim, that the evidence relied upon by the United States, if at all relevant, shows "only a concern with profit, wherever it may be earned in the global market".

BCI deleted, as indicated **[***]**

7.589 As far as the required consequence – the grant of a subsidy – is concerned, the European Communities submits that in order to demonstrate the existence of a subsidy contingent upon export performance, that subsidy must be granted as a consequence, that is, as a result of, export performance. The European Communities argues that the United States has failed to establish that any such subsidy was granted through the LA/MSF measures because "the consequence of the condition being fulfilled is that {Airbus} agrees to pay" the EC member State governments. In other words, according to the European Communities, the consequence of any export sale under the terms of the LA/MSF contracts is not the grant of a subsidy, but "the reverse ... a 'negative subsidy'".[2985] Thus, the European Communities argues that the United States has failed to demonstrate the required consequence because its legal argument is "ill conceived". Moreover, the European Communities submits that the United States errs because it allegedly bases its claim on the notion that the subsidy at issue is the LA/MSF contract itself, when it is instead "the difference between the terms of the loan and the relevant benchmark".[2986] The European Communities finds support for this view in the fact that Article 4.7 of the SCM Agreement requires Members found to have granted an export contingent subsidy to withdraw the subsidy without delay. The European Communities argues that in the case of a subsidy provided through a loan at below-market interest rates, Article 4.7 does not require the withdrawal of the financial contribution transferred as the loan, but only the amount represented by the subsidy "benefit".[2987]

7.590 On the third element – contingency between the required condition (export performance) and the required consequence (the grant of a subsidy) – the European Communities, like the United States, submits that the legal standard that must be applied is the same for subsidies that are alleged to be contingent, either in law or in fact, upon export performance. The European Communities also agrees with the United States that when examining whether the grant of a subsidy is contingent upon export performance, it is necessary to assess whether it is "conditional" on export performance.[2988] Moreover, like the United States, the European Communities notes that while the legal standard for proving contingency doesn't change, the evidence required to demonstrate in fact or in law export contingency may be different.[2989] In this regard, the European Communities emphasizes that demonstrating the existence and precise content of an in fact contingency claim is "a much more difficult task" compared with an in law claim.[2990]

7.591 The European Communities contends that the United States has, for various reasons, failed to demonstrate the required *in fact* contingency between the condition (export performance) and the consequence (the grant of a subsidy). First, the European Communities submits that contrary to what it alleges is argued by the United States, the existence of sales-dependent repayment terms that are neutral as to the origin of those sales, or the fact that the EC member State governments envisaged a return from their LA/MSF investment, cannot prove the existence of any contingency.[2991] Second, the European Communities argues that unlike the position it contends is advanced by the United States, the anticipation of export sales, the export orientation of Airbus, or the fact that Airbus operates in a

[2985] EC, FWS, paras. 630-635 (A380 contracts), 599-601, 676-677 (A340-500/600 contracts), and 603-604, 680-681 (A330-200 contract); EC, SWS, paras. 220-226.

[2986] EC, FWS, paras. 630-635 (A380 contracts), 676-677 (A340-500/600 contracts), and 680-681 (A330-200 contract).

[2987] EC, SWS, paras. 223-224, citing in support, Decision by the Arbitrator, *Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the* SCM Agreement ("*Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*"), WT/DS222/ARB, 17 February 2003, DSR 2003:III, 1187, paras. 3.60-3.64.

[2988] EC, FWS, paras. 581.

[2989] EC, FWS, para. 606.

[2990] EC, FWS, para. 607, citing Appellate Body Report, *Canada – Aircraft*, paras. 167-168.

[2991] EC, FWS, paras. 642-645 (A380 contracts), 676-677 (A340-500/600 contracts), and 680-681 (A330-200 contract).

BCI deleted, as indicated **[***]**

global market, are all factors that do not demonstrate contingency.[2992] Moreover, the European Communities argues that all of these factors taken together cannot prove the existence of contingency because, *inter alia*, the United States' assertion that full repayment of the LA/MSF contributions can only be obtained by making the required number of sales specified in the contracts (which themselves can only be achieved through exports) is false due to the possibility of early repayment.[2993] In this regard, the European Communities submits that the sales-dependent delivery terms of the LA/MSF contracts "have nothing to do with export contingent subsidies", but rather reflect two "legitimate commercial" considerations: (i) that deliveries of aircraft provide the most reliable indication that sufficient cash-flow will be on hand to make repayments;[2994] and (ii) that timing repayment with deliveries allocates the risk between Airbus and the EC member State government in accordance with the parties' agreement.[2995] Thus, the European Communities concludes that the fact that "some deliveries will be exports is not the result of any condition imposed by {the EC member State governments}, but is instead the result of the particular sources of demand in the marketplace. Any 'choice' {Airbus} has between export versus domestic sales is driven not by the measure but instead by the location of the customers".[2996] In any event, the European Communities notes that none of the provisions that the United States relies upon as evidence of a commitment to export oblige Airbus to make any sales at all, let alone export sales. According to the European Communities, Airbus' right to retain the funds advanced under each of the LA/MSF contracts is not subject to any condition that it sell aircraft. Thus, the European Communities submits there can be no export contingency.[2997]

7.592 The European Communities relies upon many of the same legal and factual arguments when contesting the United States' *in law* export contingent subsidy claims.[2998] Thus, the European Communities contends that the United States has failed to demonstrate that the language of the LA/MSF contracts, either on its own or by necessary implication,[2999] proves the existence of: (i) the required export performance condition, because the terms of the relevant measures "refer only to sales, without favouring either domestic or export sales";[3000] (ii) the required consequence, because the contract terms secure repayment of the loan, and therefore do not amount to a subsidy, but rather a "negative subsidy";[3001] and (iii) the required contingency, because there is no obligation on Airbus to repay LA/MSF,[3002] and in any case, repayments may be made on an accelerated basis with income that is not generated from LCA sales.[3003] In addition, to the extent that the United States pursues its complaint in reliance on documents and information that cannot be found in the text of the challenged

[2992] EC, FWS, paras. 646-651 (A380 contracts), 676-677 (A340-500/600 contracts), and 680-681 (A330-200 contract).
[2993] EC, FWS, paras. 653-656 (A380 contracts), 676-677 (A340-500/600 contracts), and 680-681 (A330-200 contract).
[2994] EC, FWS, paras. 657-661 (A380 contracts), 676-677 (A340-500/600 contracts), and 680-681 (A330-200 contract).
[2995] EC, FWS, paras. 662-664 (A380 contracts), 676-677 (A340-500/600 contracts), and 680-681 (A330-200 contract).
[2996] EC, FWS, paras. 665 (A380 contracts), 676-677 (A340-500/600 contracts), and 680-681 (A330-200 contract). Additional submissions on the arguments and evidence presented by the United States in support of its in fact export contingent subsidy claims are set out at EC, SWS, 296-325.
[2997] EC, SNCOS, para. 153; EC, Comment on United States Answer to Panel Question 145.
[2998] EC, FWS, paras. 584-598 (A380 contracts), 599-602 (A340-500/600 contracts), and 603-604 (A330-200 contract); EC, SWS, paras. 258-295.
[2999] EC, FWS, para. 592; EC, SWS, paras. 258-295.
[3000] EC, FWS, paras. 585-588, 594-598 (A380 contracts), 599-602 (A340-500/600 contracts) and 603-604 (A330-200 contract).
[3001] EC, FWS, paras. 589, 594-598 (A380 contracts), 599-601 (A340-500/600 contracts) and 603-604 (A330-200 contract).
[3002] EC, SNCOS, para. 153; EC, Comment on United States Answer to Panel Question 145.
[3003] EC, FWS, paras. 590, 594-598 (A380 contracts), 599-601 (A340-500/600 contracts) and 603-604 (A330-200 contract).

measures, the European Communities asks the Panel to dismiss the United States' allegations on the ground that they are not properly constituted *in law* contingency claims.[3004]

7.593 Finally, the European Communities asks the Panel to dismiss several allegedly "new claims" made by the United States after the first substantive meeting of the parties. According to the European Communities, the United States, for the first time in its second written submission and then again in its answer to Panel Question 144, referred to various provisions of the challenged LA/MSF contracts in support of its new "claim{} that a commitment to provide {LA/MSF} was given in return for a commitment on the part of Airbus to export, and that for this reason the measure should be construed as a subsidy contingent upon export".[3005] The European Communities submits that the Panel is not "entitled, at this stage of the proceedings, to re-arrange the evidence, and change or broaden the seven distinct claims set out in the US first written submission, which the European Communities has rebutted".[3006] Thus, the European Communities asks the Panel to set these allegedly new claims aside on the grounds that they are inconsistent with: (i) "Article 4 of the DSU (as regards the inadequacy of consultations)"; (ii) "Article 6.2 of the DSU (as regards the inadequacy of the panel request)"; and (iii) "paragraphs 5, 6 and 15 of the Working Procedures, according to which the United States is deemed to have already presented the facts of the case and its arguments, no good cause being even asserted let alone shown for the attempt at such a radical enlargement of the case at this late stage".[3007]

(c) Arguments of Third Parties

(i) Australia

7.594 In Australia's view, the focus by the United States on the export propensity of the LCA product leads to a misapplication of the Appellate Body guidance on export contingency and the Panel's findings in *Australia – Automotive Leather II*. Recalling the three elements necessary to establish export contingency, Australia notes that evidence of the export nature of a product *supports* the establishment of a relationship of conditionality but is not conclusive of this second element.[3008] It further submits that the second sentence of footnote 4 to Article 3.1(a) explicitly states that the mere fact that a subsidy is granted to enterprises which export cannot by itself support a finding of export contingency. This, according to Australia, means that export propensity is only one of several facts to be taken into account. Careful consideration needs to be given in the present case to the evidence used to support export contingency and the weight it should be accorded. Australia submits that if disproportionate emphasis is given to export propensity, this would undermine the second sentence of footnote 4.[3009]

7.595 According to Australia, there are two main deficiencies with the United States' analysis of in fact export contingency in the present case. First, by focusing on export propensity the United States conflates product sales generally with export sales, which leads to the erroneous conclusion that sales performance is export performance. Second, the United States focuses on the contractual requirement to repay the loan and its connection with sales performance.[3010] Australia notes that the United States relied, *inter alia*, on the findings on the grant contract in *Australia – Automotive Leather II* to support

[3004] EC, SWS, para. 268.
[3005] EC, SNCOS, para. 151.
[3006] EC, Comments on US Answer to Panel Question 144.
[3007] EC, SNCOS, para. 149.
[3008] Australia, Third Party Submission, para. 22.
[3009] Australia, Third Party Submission, para. 26.
[3010] Australia, Third Party Submission, para.25.

its claim that contingency has been established. In Australia's view, the United States has misapplied the panel's findings in *Australia – Automotive Leather II.* [3011]

7.596 Australia argues that it is not clear on the facts presented the extent to which the repayment of LA/MSF is mandatory. Instead, it appears that Airbus receives payment of LA/MSF whether or not there are any sales. Therefore, the United States has failed to explain why a link between the requirement to repay the loan and sales performance establishes a tie between the grant of an alleged subsidy and export performance.[3012]

7.597 Australia further contends that in fact export contingency must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy.[3013] Such relevant facts could include, among other things, the motivations or reasons for granting a subsidy, once objectively ascertained. For instance, according to Australia, the motivation or reason of the government in granting the loan with a repayment requirement linked to sales performance may be a relevant fact in determining whether any production targets in the loan contracts are linked to exports. Hence, for Australia, the weight that should be accorded to motivations or reasons should be assessed on the basis of where they sit in relation to all the other evidence relating to whether subsidies were in fact export contingent.[3014]

(ii) Brazil

7.598 Brazil agrees with the panel and the Appellate Body in *Canada-Aircraft I.* The Panel's analysis of *de facto* export contingency should be based on the total configuration of the facts constituting and surrounding the granting of the subsidy. For Brazil, to the extent supported by relevant evidence, the motivations or reasons for granting the subsidies should be taken into consideration by the Panel as part of this total configuration of the facts. [3015]

(iii) Canada

7.599 Canada submits that the United States has failed to accurately apply the test for *de facto* export contingency set out in footnote four of the SCM Agreement.[3016] In Canada's opinion, instead of applying this test, the United States attempts to establish only that repayment of the financing was tied to actual or anticipated exportation or export earnings.[3017]

7.600 Canada considers that the United States has obscured the locus of the inquiry when it paraphrased the test and inserted the word "that" into it, *i.e.*: (1) the 'granting' of a subsidy; (2) that is 'tied to' (3) 'actual or anticipated exportation or export earnings'. Canada argues that the text is clear in establishing the locus of the "tied to" inquiry as "the granting of the subsidy". Therefore, according to Canada, the relevance of repayment is limited to the light it sheds on whether the granting of the subsidy was export contingent, and that repayment is not dispositive. [3018]

7.601 Canada maintains that the reason why the SCM Agreement locates the "tied to" inquiry in the granting of the subsidy rather than its repayment is because a tie between repayment of a subsidy and sales can provide governments with an effective mechanism for establishing when repayments are due without creating any incentive to export. It contends that requiring repayment of a subsidy only when

[3011] Australia, Third Party Submission, para.27.
[3012] Australia, Third Party Submission, paras.28-30.
[3013] Australia, Third Party Oral Statement 24 July 2007, para 9, quoting *Canada-Aircraft* at para 167.
[3014] Australia, Third Party Answer to Panel question 6 .
[3015] Brazil, Third Party Answers to Questions, Para 11.
[3016] Canada, Third Party Submission, para. 3.
[3017] Canada, Third Party Submission, para. 6.
[3018] Canada, Third Party Submission, para. 7-8.

export sales are made could be a device for using subsidies to develop domestic sales *in preference to* export sales.[3019]

7.602 Canada rejects United States' attempt to associate its approach with the approach taken by the panel in *Australia – Leather*. For Canada, the facts surrounding the two cases are different because the contract at issue in the *Australia – Leather* conditioned *continuing grants* to the beneficiary on the satisfaction of sales targets, which were effectively export performance targets, whereas in this case, continuing grants are not conditioned on meeting export performance targets. Canada contends that the United States errs in conflating the terms "export performance", "exportation" and "export earnings" with the term "sales". By conflating these terms, the United States would have it that any subsidy provided in the form of royalty-based financing is prohibited if the level of anticipated repayment factored in even a single export sale. Canada maintains that this nullifies the final sentence of footnote four. [3020]

7.603 Canada submits that the United States has provided no evidence that the granting of the financing was conditioned on full repayment. Even if such evidence was provided, for Canada, it would be "absurd" to characterize a full repayment requirement as an export contingency. Canada argues that every prior finding of a prohibited export subsidy was based on a positive, direct correlation between subsidization and exportation. Here, the correlation is the inverse: repayments triggered by export sales only reduce any benefit to Airbus. [3021]

7.604 In addition, Canada submits that inferring motivations can be a highly subjective matter, particularly when the motivations at issue are those of a government. It refers in this context to the Appellate Body in *Japan – Alcoholic Beverages II*.[3022] It contends that it may be extremely difficult for a panel to weigh the relative significance of those reasons to establish legislative or regulatory intent and a panel should exercise great care in trying to do so. According to Canada, a panel should consider many relevant factors in assessing whether a subsidy is in fact contingent upon export performance, depending on the circumstances of a particular case, based on "the total configuration of the facts constituting and surrounding the granting of the subsidy".[3023]

(iv) China

7.605 China contends that the finding of in fact export subsidies in the form of loans, pursuant to footnote 4 to Article 3.1(a) of the SCM Agreement, must focus on the "*granting*" - instead of the "*repayment*" - of the loans, and that it must be shown, based on the total configuration of the facts, that there is a conditionality between the *granting* of a subsidy and the actual or anticipated export. In this connection, China refers the Panel to the Appellate Body Report in *Canada – Aircraft*, which clarified the three elements relevant to the finding of an in fact export contingency.[3024]

7.606 China adds that in case of a loan, in order to determine whether the loan constitutes a subsidy in fact contingent upon export, it must be established that the granting authority imposes a condition based on export performance when *providing* the loan. Therefore, according to China, Article 3.1(a) is not intended to prohibit the repayment of a loan contingent upon export performance. In any event, the manner in which a debtor will repay the loan subsequently is not relevant to the consideration of

[3019] Canada, Third Party Submission, para. 10.
[3020] Canada, Third Party Submission, para. 11-13.
[3021] Canada, Third Party Submission, para. 14.
[3022] Canada, Answer to Third Party Panel Questions, para. 4 referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 119.
[3023] Canada, Answer to Third Party Panel Questions, para. 5 referring to Appellate Body Report, *Canada – Aircraft*, para. 167.
[3024] China, Third Party Submission, paras. 5-13.

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in fact export contingency of a granted loan. Rather, this issue is more relevant to the finding of a benefit, and is not to be blurred with the granting of a loan. [3025]

7.607 Lastly, China submits that the relevant facts of a particular case must sufficiently prove the "tie" between the "granting of a subsidy" and the "actual or anticipated exportation" and that the export orientation of a subsidy recipient alone does not sufficiently demonstrate the existence of in fact export contingency. [3026]

(v) Japan

7.608 Japan contends that mere anticipation of future exports at the time of subsidy bestowal does not, by itself, prove that the subsidy is contingent upon export performance. It notes that while the term "contingent" in Article 3.1(a) has the same meaning as applied to both *de jure* and *de facto* export contingency, demonstrating the latter is inherently more difficult.[3027]

7.609 Japan argues that footnote 4 to SCM Agreement Article 3.1(a) is central to the Panel's analysis in determining whether the alleged export subsidies are contingent in fact upon export performance. It refers to the Appellate Body Report in *Canada – Aircraft*, noting that the footnote 4 test for *de facto* export contingency requires proof of three different substantive elements,[3028] each of which must be independently applied to the relevant facts.[3029]

7.610 Finally, Japan observes that the *de facto* export contingency analysis is necessarily fact-intensive, and will differ based on the unique facts of each case. It notes that the Appellate Body in *Canada – Aircraft* cautioned that, in performing the analysis required by footnote 4, "there can be no general rule as to what facts or what kinds of facts *must* be taken into account,"[3030] none of which facts had been given undue emphasis.[3031] Hence, Japan submits that a similarly broad approach is warranted in this dispute and that the Panel should examine the specific factual elements pertinent to this case. [3032]

(vi) Korea

7.611 Korea recalls that panels and the Appellate Body have previously addressed the issue of *de facto* export subsidy on various occasions. In particular, the Appellate Body in *Canada – Aircraft* set out a three element test for demonstrating *de facto* export contingency. Accordingly, (1) the "granting of a subsidy" must be (2) "tied to" (3) "actual or anticipated exportation or export earnings". Korea is of the view that, in order to establish that the LA/MSF is "tied to" export performance, the United States has to prove that the LA/MSF would *not* have been granted to Airbus, if the Airbus Governments had known that no export sales may ensue from the LA/MSF. In other words, the

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[3025] China, Third Party Submission, paras. 14-15.

[3026] China, Third Party Submission, paras. 16-22 referring to Appellate Body Report, *Canada – Aircraft* (WT/DS70/AB/R), para. 175, and Panel Report, *Australia – Automotive Leather II*, paras. 9.66-71.

[3027] Japan, Third Party Submission, para. 23 referring to Appellate Body Report, *Canada – Aircraft*, para. 167.

[3028] Japan, Third Party Submission, para. 25 referring to Appellate Body Report, *Canada – Aircraft*, para. 169 (emphasis in original).

[3029] Japan, Third Party Submission, para. 25 referring to Appellate Body Report, *Canada – Aircraft*, para. 173.

[3030] Japan, Third Party Submission, para. 26 referring to Appellate Body Report, *Canada – Aircraft*, para. 169.

[3031] Japan, Third Party Submission, para. 26 referring to Appellate Body Report, *Canada – Aircraft*, paras. 169-70.

[3032] Japan, Third Party Submission, para. 26.

BCI deleted, as indicated **[***]**

United States has to prove that the grant of a subsidy is contingent upon *export* sales, and not mere sales.[3033]

(d) Evaluation by the Panel

(i) The European Communities' Request to Dismiss Certain Allegedly New Claims made in the United States' Second Written Submission

7.612 The European Communities asks the Panel to disregard a series of allegedly "new claims" made by the United States over a series of paragraphs of its second written submission[3034] as well as its answer to Panel Question 144 because it considers them to be incompatible with the United States' obligations under Article 4 of the DSU (as regards the inadequacy of consultations), Article 6.2 of the DSU (as regards the inadequacy of the panel request), and paragraphs 5, 6 and 15 of our Working Procedures. It is not entirely clear to us whether the European Communities' submissions in respect of Articles 4 and 6.2 of the DSU are grounded in the view that the United States' has advanced "new claims" not already set out in its request for consultations and panel request, or (in the case of Article 6.2 of the DSU) the alleged absence of any indication in the United States' panel request of the precise evidence it relies upon to make out its in fact export contingency claims.[3035] For the reasons articulated in the following sections, we decline the European Communities' request on either of these grounds. Moreover, we are also not persuaded by the European Communities' contention that the relevant passages of the United States' second written submission and answer to Panel Question 144 contravene paragraphs 5, 6 and 15 of our Working Procedures.

New claims allegedly not identified in the request for consultations and the panel request

7.613 We find it useful to begin our analysis by recalling how "claims" and "arguments" have been defined and distinguished in previous dispute settlement proceedings. In *Korea – Dairy*, the Appellate Body explained that:

> "By '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties. ...
>
> ... Both 'claims' and 'arguments' are distinct from the 'evidence' which the complainant or respondent presents to support its assertions of fact and arguments."[3036]

7.614 The Appellate Body has also observed that it has:

[3033] Korea, Third Party Submission, para. 69-74, referring to Appellate Body Report, *Canada – Aircraft*, para. 169 and 173.

[3034] In particular, paragraphs 163 to 209. EC, SNCOS, paras. 148 and 153.

[3035] EC, Comments on US Answer to Panel Question 144 where it states: "Just as a panel request must include the identification of the measure, so, in the case of an 'in fact' claim, it must include the identification of the precise evidence on which the in fact claim is based."

[3036] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy* "), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 139 (footnotes omitted).

BCI deleted, as indicated **[***]**

> "... consistently distinguished between the *claims* of a Member regarding the application of the various provisions of the *WTO Agreement*, and the *arguments* presented in support of those claims. Claims, which are typically allegations of violation of the substantive provisions of the *WTO Agreement*, must be set out clearly in the request for the establishment of a panel. Arguments, by contrast, are the means whereby a party progressively develops and supports its claims. These do not need to be set out in detail in a panel request; rather, they may be developed in the submissions made to the panel."[3037]

7.615 In its second written submission, the United States introduces the paragraphs which the European Communities asserts present "new claims", describing them as "an extended discussion of the actual U.S. argument {on export contingency} to eliminate any confusion that may have been engendered by the European Communities' response to the U.S. first written submission".[3038] It then explains its view that LA/MSF involves an exchange of performance commitments on the part of the parties, whereby "the government commits to disburse Launch Aid according to a set schedule in exchange for which the company commits to repay the Launch Aid amounts on the basis of a specified levy per sale over an agreed-to number of sales".[3039] Finally, the United States proceeds to "elaborate on the demonstration in its first written submission that the provision of the Launch Aid subsidy is contractually tied to anticipated exportation".[3040] For each of the seven LA/MSF measures the United States claims to be export subsidies, it first recalls how in its first written submission, it discussed their respective repayment provisions, demonstrating how by conditioning the provision of LA/MSF on a specific number of LCA sales that could not be achieved without exporting, the governments "necessarily tied the aid to substantial exports". Thereafter, the United States identifies and discusses various contractual terms and conditions it asserts "corroborate the existence of this tie".[3041]

7.616 The United States' answer to Panel Question 144 explains the extent to which it relies upon the same evidence to demonstrate "anticipated exportation or export earnings" and in fact contingency upon export performance. In doing so, the United States repeats its view that the exchange of performance commitments in the LA/MSF contracts demonstrates the existence of a "tied to" relationship, and therefore export contingency. It also refers to the discussion in its second written submission of various contractual provisions of the seven challenged LA/MSF contracts.

7.617 In our view, the passages that are the focus of the European Communities' concern do not introduce new *claims*, but merely expand and explain the United States' arguments on the issue of contingency by further articulating the United States' theory of contingency and discussing various aspects of the evidence submitted with its first written submission. The United States does not, in the relevant paragraphs, complain that the European Communities "has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement" that was not previously mentioned in its consultations request or its panel request. Indeed, the United States makes no reference at all in the relevant passages to any provision of any WTO covered agreement. Thus, to the extent that the European Communities' concern with the contents of paragraphs 163 to 209 of the United States' second written submission and its answer to Panel Question 144 is that it introduces "new claims" not identified in the United States' request for consultations and its panel request, we find that it cannot be sustained.

[3037] Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* ("*Dominican Republic – Import and Sale of Cigarettes*"), WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367, para. 121 (footnote omitted).

[3038] US, SWS, para. 162.

[3039] US, SWS, para. 164.

[3040] US, SWS, para. 167.

[3041] US, SWS, paras. 168, 175, 182, 188, 193, 199 and 204.

BCI deleted, as indicated **[***]**

United States' alleged failure to identify in its panel request the precise facts relied upon to make out its in fact export contingency claims

7.618 It is now well established that Article 6.2 explains how a complainant wanting to bring a matter to WTO dispute settlement is required to request the establishment of a panel. In particular, Article 6.2 imposes an obligation on a complaining Member to ensure that its panel request: (i) is made in writing; (ii) indicates whether consultations were held; (iii) identifies the specific measures at issue; and (iv) provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[3042]

7.619 Apart from requiring the identification of the specific measures at issue, Article 6.2 does not call upon a complainant to additionally set out or describe the precise facts relied upon for the purpose of establishing the merits of its claim(s).[3043] The precise facts a complainant relies upon to substantiate its claims will typically constitute the evidence submitted in support of its complaint during the course of a panel proceeding. Article 6.2 of the DSU is not concerned with how or when such evidence must be presented, but only the proper identification of "claims" and "measures" for the purpose of ensuring that a panel request is "sufficient to present the problem clearly". In this light, we see no legal basis to support the European Communities' allegation that the United States' panel request failed to comply with Article 6.2 of the DSU because, in respect of its claims under Article 3.1(a) of the SCM Agreement, the United States did not identify in this document the precise facts it considers demonstrate that the alleged subsidies are in fact contingent upon export performance.

New facts and arguments allegedly introduced in contravention of the Working Procedures

7.620 The European Communities considers that the United States' discussion in paragraphs 163 to 209 of its second written submission and in its answer to Panel Question 144 introduced new arguments and factual evidence in contravention of its obligations under paragraphs 5, 6 and 15 of our Working Procedures. These paragraphs read:

> "5. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case, their arguments and their counter-arguments, respectively. Third parties may transmit to the Panel written submissions after the first written submissions of the parties have been submitted.
>
> 6. At its first substantive meeting with the parties, the Panel shall ask the United States to present its case. Subsequently, and at the same meeting, the European Communities will be asked to present its point of view. Third parties will be asked to present their views thereafter at the separate session of the same meeting set aside for that purpose. The parties will then be allowed an opportunity for final statements, with the United States presenting its statement first.
>
> 15. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure will be granted upon a

[3042] For example, Appellate Body Report, *Korea – Dairy*, para. 120; Appellate Body Report, *US – Carbon Steel*, para. 125; Appellate Body Report, *European Communities – Selected Customs Matters* ("*EC – Selected Customs Matters*"), WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791, para. 129.

[3043] This is in contrast to the provisions of Article 4.2 of the SCM Agreement, which require a Member to include a "statement of available evidence" with a request for consultations regarding such a subsidy. We note the European Communities makes no claim under Article 4.2.

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> showing of good cause. The other party shall be accorded a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting."

7.621 The Panel's Working Procedures used in this dispute were adopted, in accordance with Article 12.1 of the DSU, after consultations with both the United States and the European Communities. Apart from the references to third parties, paragraphs 5 and 6 broadly follow the provisions set out in the Working Procedures contained in Appendix 3 of the DSU, explaining what is expected of the parties (and third parties) in terms of the submissions that must be made leading up to and during the first substantive meeting of the parties. Neither of the two paragraphs requires the parties to make all arguments and counter-arguments and present all supporting facts by the time of the first substantive meeting of the parties. Whether complaining or responding party, the arguments and counter-arguments in respect of the claims at issue will be first set out in the parties' first written submission and explained orally through the statements made during the first substantive meeting of the parties. However, as paragraphs 8 and 9 of our Working Procedures make clear, the parties' submissions do not end with the first substantive meeting of the parties, and arguments will continue to be progressively clarified and developed in the rebuttal submissions, the parties' oral statements made at the second substantive meeting of the parties and in response to the Panel's questions. These paragraphs read:

> "8. Formal rebuttals shall be made at a second substantive meeting of the Panel. The European Communities shall have the right to take the floor first, to be followed by the United States. The parties shall submit, prior to that meeting, written rebuttals to the Panel.
>
> 9. The Panel may at any time put questions to the parties and to the third parties and ask them for explanations either in the course of the substantive meeting or in writing. Answers to questions shall be submitted in writing by the date(s) specified by the Panel. Answers to questions after the first meeting shall be submitted in writing at the same time as the written rebuttals, unless the Panel specifies a different deadline."

7.622 There is therefore no basis in the Working Procedures of this Panel proceeding to support the European Communities' contention that the United States was required to present all of its arguments by the time of the first substantive meeting of the parties.

7.623 Paragraph 15 of our Working Procedures establishes certain rules and a precise deadline for the submission of factual evidence. In particular, it stipulates that "all factual evidence" must be submitted no later than during the first substantive meeting, with the exception of evidence necessary for the purpose of rebuttals or answers to questions, and any other instance where "good cause" can be shown. Moreover, where any new evidence is admitted after the first substantive meeting on showing "good cause", an appropriate period of time must be set aside for the party that did not submit that evidence to provide its comments. One of objectives of paragraph 15 is to secure both parties' due process rights by: (i) setting a deadline for the submission of "all factual evidence" supporting or rebutting either party's claims and arguments; (ii) allowing for the possibility that new factual evidence may be accepted after this deadline if "good cause" is shown; and (iii) clarifying that the acceptance of any new evidence will give rise to an appropriate period of time being afforded to the other party to comment.

7.624 We recall that the passages in the United States' second written submission and answer to Panel Question 144 that are at the centre of the European Communities' concern expand and explain certain arguments first presented by the United States in its first written submission by discussing various aspects of evidence already submitted with its first written submission. In particular, the

focus of the United States' discussion in the relevant passages is on various contractual provisions of each of the LA/MSF contracts it considers to be a prohibited export subsidy. There is therefore no doubt that the factual evidence discussed by the United States had already been submitted by the time of the first substantive meeting of the parties. Moreover, while it is true that the United States did not refer to or discuss precisely the same contractual provisions in submissions made prior to its second written submission, this does not amount to the presentation of new factual evidence, but rather the elaboration of arguments in the light of different aspects of evidence already submitted. In our view, the process of highlighting, examining and testing different aspects of duly submitted evidence by either party for the purpose of supporting or rebutting each other's claims and arguments is a central and indispensable element of the panel process. We can see no reason why parties should be precluded from developing their arguments over the course of a panel proceeding on the basis of different aspects of evidence submitted in good time.

7.625 In any case, paragraph 8 of our Working Procedures makes clear that "rebuttals" include the parties' second written submission presented prior to the second substantive meeting of the parties. It follows that even assuming *arguendo* that it were incorrect to conclude that the relevant passages of the United States' second written submission and answer to Panel Question 144 did not refer to evidence already submitted by the first substantive meeting of the parties, the United States would not have acted inconsistently with paragraph 15 of our Working Procedures because it was entitled to introduce factual evidence after the first substantive meeting of the parties "with respect to evidence necessary for purposes of rebuttals".

7.626 Finally, we note that the European Communities did in fact respond to the United States' discussion of the various contractual provisions in its second written submission when making is oral statement at the second substantive meeting of the parties. Moreover, it also had occasion to do so when commenting on the United States' answer to Panel Question 144.

7.627 For all of the above reasons, we therefore decline the European Communities' request to set aside and disregard the arguments presented and evidence referred to by the United States in paragraphs 163 to 209 of its second written submission and its answer to Panel Question 144.

(ii) Whether the LA/MSF Measures Amount to Subsidies that are In Fact Contingent upon Anticipated Export Performance

7.628 Although the United States makes both in law and in fact export contingent subsidy claims, it describes its complaint as "principally a claim of *de facto* contingency".[3044] In addition, the United States has explained that it is not pursuing claims based on the allegation of contingency upon *actual* export performance. Accordingly, we begin our evaluation of the United States' challenge by focusing on the claim that the LA/MSF measures for the A380, A340-500/600 and A330-200 amount to subsidies that are *in fact* contingent upon *anticipated* export performance.

7.629 The prohibition on subsidies that are contingent upon export performance is contained in Article 3.1(a) of the SCM Agreement. This Article reads:

> "3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5] ...

[3044] US, Answer to Panel Question 10.

BCI deleted, as indicated **[***]**

> [4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.
>
> [5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement."

7.630 In *Canada – Aircraft*, the Appellate Body held that the language of footnote 4 indicates that "satisfaction of the standard for determining *de facto* export contingency … requires proof of three different substantive elements: first, the '*granting*' of a subsidy; second, 'is ... *tied to* ...'; and third, 'actual or anticipated exportation or export earnings".[3045] The United States relies on this guidance as the starting point of its legal argument.[3046] Although the European Communities presents its own interpretation of the obligations contained in Article 3.1(a) and footnote 4 using slightly different terminology,[3047] it shares the view that a finding of *de facto* export contingency requires proof of the three elements identified by the Appellate Body. Thus, there appears to be no disagreement between the parties as to the legal standard that must be applied when determining whether a subsidy is contingent *in fact* upon export performance.[3048] However, the parties' views diverge when it comes to explaining what it means to satisfy this standard, and therefore, what the United States must demonstrate in order to prove its case. Whereas the position advanced by the United States appears to us, in general, to follow the findings and observations made by the Appellate Body in previous dispute settlement proceedings,[3049] in certain respects, the European Communities' analysis proposes a somewhat different picture of how the obligations set out in Article 3.1(a) and footnote 4 of the SCM Agreement must be understood and applied.

7.631 In its second non-confidential oral statement, the European Communities presented what it described as "a succinct and simple re-statement of how the European Communities sees the overall design and architecture of Article 3.1(a) and footnote 4". The European Communities expressed the "hope{} that the Panel may return to this statement as a point of reference to guide it in its future deliberations".[3050] The European Communities drew from the contents of this oral statement to answer Panel Question 175. The salient passages from these submissions are reproduced below:

> "The European Communities invites the Panel to consider first the case of an 'ad hoc' subsidy contingent *in law* upon export performance. The evidence consists of the text of the measure. The text of the measure provides that a subsidy is granted contingent upon export performance. In other words, the text of the measure provides that *if* there is export performance, *then* a subsidy is granted. That is the essence of contingency. The measure itself constitutes the *initial grant* of the subsidy. The fact of export fulfils the condition and thus *completes the grant*. The export occurs after the initial grant. At the time of the initial grant, the export is an 'anticipated' export, in the sense that it is in the future.

[3045] Appellate Body Report, *Canada — Aircraft*, para. 169.

[3046] US, FWS, para. 343.

[3047] As described above at paras. 7.587 to 7.590, the European Communities argues that Article 3.1(a) and footnote 4 contain three "requirements" – "the required condition: actual or anticipated export performance, exportation or export earnings; the required consequence: the grant of a subsidy; and the required contingent relationship (or contingency) between condition and consequence". See also, EC, FWS, paras. 567, 570-582; EC, FNCOS, paras. 68 and 73; EC, Answer to Panel Question 79.

[3048] EC, FWS, paras. 567-583.

[3049] *See*, paras. 7.583-7.586 above; and, in particular, US, FWS, paras. 325-333; US, SWS, paras. 132-136 and 148-160.

[3050] EC, SNCOS, para. 116.

BCI deleted, as indicated **[***]**

> As soon as such measure exists (that is, the initial grant is in place), it could be the subject of panel proceedings, and would be found to be a prohibited subsidy in law. It would be immaterial whether or not export had occurred."[3051]
>
> "... At the moment when the measure is enacted (that is, the initial grant is made) the export might already exist or have occurred (that is, be actual), or the export might be expected in the future (that is, be anticipated). In either case, if there is a subsidy contingent in law upon export, it is prohibited, and this already from the moment of initial grant. This remains so even if the export is anticipated, but never occurs. Faced with such a prohibited measure, a complaining Member does not have to wait for the measure to be used before commencing panel proceedings.
>
> Thus, the European Communities is not saying that the export must occur before there is a prohibited measure and panel proceedings are brought. Rather, the European Communities is saying that the measure enacting the initial grant must provide that the subsidy is granted contingent upon export, and that the measure must also provide that it is only export (whether in the past or in the future) that completes the grant and triggers the right to receive or retain the funds unconditionally. That is what contingency ("ifness") means. Anticipation or consideration or motivation (that is, the Member grants the subsidy *because* it anticipates exports) is not contingency. "'Becauseness" is not "ifness" and is not to be confused with it."[3052]

In order to fully appreciate the European Communities "re-statement" of its interpretation of Article 3.1(a) and footnote 4, it is important to understand the meaning it gives to "actual or anticipated" export performance. The European Communities submitted a detailed exposition of its view on the meaning of this term in its second written submission, where *inter alia* it stated:

> "... the term "actual" means an export that exists (that is, has already taken place) at the moment when the subsidy is deemed to exist within the meaning of Article 1 of the *SCM Agreement*; whilst the term "anticipated" (also juxtaposed to the meaning of the term "actual") means an export that has not yet taken place at the moment when the subsidy is deemed to exist, but will take place in the future.
>
> ...
>
> Dictionary meanings do not by themselves determine, but are relevant to, assessing ordinary meaning. The *Shorter Oxford English Dictionary (fifth edition 2002)* provides two non-obsolete meanings of the term "actual" (when used as an adjective, as in footnote 4) : "Existing in act or fact; real" and "In action or existence at the time; present, current.". The second of these unequivocally confirms the European Communities' interpretation. As regards the first meaning, the United States might attempt to glean support for its position from the term "real", but the term "existing", especially when read together with the second meaning, also brings the first meaning closer to the European Communities' position. On balance, therefore, the dictionary meanings of the term "actual" support the European Communities, not the United States : an "actual" export is one that already exists at the moment when the subsidy is deemed to exist.
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> The same dictionary does not contain an entry for the precise term "anticipated" (including when used as an adjective, as in footnote 4 of the *SCM Agreement*). It does

[3051] EC, SNCOS, paras. 117 and 118.
[3052] EC, Answer to Panel Question 175 (footnote omitted).

BCI deleted, as indicated **[***]**

> contain entries for the term "anticipate" (when used as a verb) and "anticipation" (when used as a noun).[219] All of the several dictionary meanings under the entries "anticipate" and "anticipation" indicate a temporal connotation : "before the due time"; "too soon"; "in advance of the time"; "future event"; "beforehand"; "earlier"; "look forward to"; "in advance of the expected time". This strongly supports the view that an "anticipated" export is one that has not yet occurred at the moment when the subsidy is deemed to exist, and by definition is therefore envisaged to be one that will occur subsequently.
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> [219] These two dictionary entries must be treated with caution in the context of the present dispute, because footnote 4 does not provide that the required condition is that the granting authorities "anticipate"; or that there is "anticipation" by the granting authorities; but rather that the required condition is "export", whether "actual or anticipated" (see further below)." [3053]

7.632 Thus, the European Communities argues that an anticipated export is one that has not yet occurred but will take place in the future. According to the European Communities, an anticipated export cannot be an export that a granting authority expects will take place in the future or sees as a mere future possibility because in its view, "footnote 4 does not provide that the required condition is that the granting authorities 'anticipate' or that there is anticipation by the granting authorities, but rather that the required condition is export, whether actual or anticipated." It follows that for the European Communities, the grant of a subsidy that is contingent upon anticipated export performance should be understood to mean a subsidy granted contingent upon an export that has not yet occurred at the time of the grant of the subsidy but that will occur in the future.

7.633 Reading the entirety of the European Communities' submissions together leads us to conclude that it is arguing that a subsidy will be contingent, in fact, upon anticipated export performance when the total configuration of the facts show that the measure granting a subsidy *requires* the recipient to satisfy a performance condition that cannot be achieved without exports, irrespective of whether those exports (or that performance) actually takes place. Where a subsidy is granted subject to such an obligation to perform, it is legally certain at the time of the grant of the subsidy that the recipient must perform in order to obtain the subsidy. If it can then be inferred from the total configuration of the facts that the granting authority, at the same moment, anticipated that the satisfaction of the performance obligation would involve exports, then the subsidy would be contingent *in fact* upon that *anticipated* export performance. In the light of the European Communities' rejection of the possibility that an "anticipated" export may be one that is *expected* by the granting authority, we find it difficult to see how else an export that has "not yet taken place at the moment when the subsidy is deemed to exist, but {that} will take place in the future" can be demonstrated to exist at the time of the granting of a subsidy. In this regard, we observe that in its own submissions, the European Communities states:

> "By arguing that the required condition is the "anticipating of" exports – whether or not the "anticipated" export ever "actually" (as that term is understood by the United States) takes place - the United States is arguing that the requirement of contingency that is at the heart of the provision can be replaced by mere consideration – that is, consideration by the granting Member that exports *might* occur in the future, **rather**

[3053] EC, SWS, paras. 235 and 237-238.

BCI deleted, as indicated **[***]**

> **than imposition by the granting Member of a requirement that the recipient export in order to obtain the subsidy**."[3054]

Thus, we understand the European Communities to argue that contingency *in fact* upon *anticipated* export performance arises when the measure granting a subsidy *legally requires* the recipient to satisfy a performance condition that cannot be achieved without exports, irrespective of whether those exports (or that performance) actually takes place. In our view, this interpretation of the relvant legal standard finds no basis in the language of Article 3.1(a) or footnote 4 or the jurisprudence of previous panels and the Appellate Body.

7.634 The ordinary meaning of the word "contingent" has been held in previous dispute settlement proceedings to be "conditional" or "dependent for its existence on something else".[3055] Likewise, the expression "tied to" has been interpreted as connoting to "limit or restrict as to ... conditions".[3056] In our view, these meanings do not suggest that a relationship of contingency between the granting of a subsidy and anticipated exportation can *only* be demonstrated, in fact, when a subsidy recipient is *required* to satisfy a performance obligation that cannot be achieved without exports. To put it another way, we see nothing in the ordinary meaning of the word "contingent" to support the view that the required link between the anticipation of export performance and the granting of a subsidy can *only* be established by proving the existence of a *requirement* to achieve that anticipated performance. In this regard, it is instructive to recall that the subsidies found to be contingent *in fact* upon *anticipated* export performance in the *Canada – Aircraft* and *Australia – Leather* cases *were not* granted based on a requirement that exports take place in the future.

7.635 In *Canada – Aircraft*, the panel was asked to determine whether the "actual application" of the Technology Partnerships Canada ("TPC") programme constituted a subsidy contingent in fact upon export performance. The "TPC assistance" at issue involved the provision of royalty-based financing for a number of "high technology" projects in the Canadian regional aircraft sector. The royalty-based repayment terms of the financing contracts before the panel required the recipients to make repayments only if they made sales. The contracts *did not require* the recipients to achieve any particular level of sales performance. Nevertheless, even in the absence of any such legal performance obligations, the panel found that the "TPC assistance" constituted a subsidy contingent *in fact* upon *anticipated* export performance. In doing so, it relied upon 16 considerations derived from the materials and arguments submitted by the parties, none of which included the existence (or not) of any *requirement or obligation* to make sales.[3057] Similarly, in *Australia – Leather*, the panel was asked to determine whether three subsidy payments made under a grant contract to Howe, an Australian automotive leather manufacturer, were contingent in fact upon export performance. Under the grant contract, payments were scheduled to occur in three instalments, with the first payment upon conclusion of the contract and subsequent payments to be made on the basis of Howe meeting performance targets, including a "best endeavours" sales target. Thus, again, the subsidies at issue in *Australia – Leather* did not involve a *requirement* to achieve any particular sales performance. Nevertheless, the panel found, on the basis of all the facts before it (none of which pointed to the existence of any *requirement* to make sales), that the grants were contingent *in fact* upon *anticipated* exportation.[3058]

7.636 In our view, limiting the scope of the prohibition on subsidies that are contingent *in fact* upon *anticipated* exportation to only those subsidies that are granted subject to the existence of a

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[3054] EC, SWS, para. 245 (emphasis added).

[3055] *See*, Panel Report, *Canada – Aircraft*, para. 9.331; Appellate Body Report, *Canada – Aircraft*, para. 166.

[3056] Appellate Body Report, *Canada – Aircraft*, para. 170.

[3057] Panel Report, *Canada – Aircraft*, paras. 9.316-9.348.

[3058] Panel Report, *Australia – Automotive Leather II*, paras. 9.46-9.72.

BCI deleted, as indicated **[***]**

performance obligation that can only be achieved through export sales, would create significant potential for circumvention. It would mean that so long as Members did not include any legal performance obligation in a contract granting a subsidy, they could escape the disciplines of the prohibition in Article 3.1(a), even if it could be established on the basis of the facts that the grant of the subsidy *depended* upon the granting authority's anticipation of export performance – that is, when it is clear from the facts surrounding the granting of the subsidy that it was provided to a particular enterprise precisely *because* of the granting authority's anticipation of exportation. For instance, a government subsidy programme that is ostensibly open to all businesses may provide subsidies only to those applicants indicating in their application that exports are likely to arise. Such a programme would not involve subsidization contingent upon any export performance requirement. However, the fact that subsidies would be granted to only those entities holding export performance expectations shows that the anticipation of export performance was in fact a condition for the granting of each subsidy. Under the European Communities' theory of contingency, such a subsidy programme would escape the prohibited subsidy disciplines of the SCM Agreement. In our view, the text of Article 3.1(a) and footnote 4 does not envisage such an outcome.

7.637 Thus, we find that the European Communities' interpretation of the legal standard for determining whether a subsidy is contingent *in fact* upon *anticipated* export performance pursuant to Article 3.1(a) and footnote 4 cannot be sustained.

7.638 The United States has advanced a second interpretation of the European Communities' theory of contingency, which it argues is "deeply flawed". The United States explains:

> "... the EC's theory of the two steps involved in the granting of a subsidy tied to anticipated exportation amounts to a different legal standard for *de jure* export contingency and *de facto* export contingency ... The EC asserts that 'if there is a subsidy contingent in law upon export, it is prohibited, and this already from the moment of initial grant'. However, following the EC's reasoning, a subsidy contingent in fact upon export performance – in particular, a subsidy tied to anticipated exportation or export earnings – would be prohibited only on the basis of the 'completing {of} the grant'. This is because it would be impossible to determine, solely on the basis of what the EC calls the 'initial grant', whether any consequence will flow from the occurrence or non-occurrence of exportation; therefore, it would be impossible to determine whether the subsidy is, in fact, tied to exportation that 'will occur'.
>
> By contrast, an interpretation of 'anticipated exportation' according to its ordinary meaning, in context, and in light of the object and purpose of the SCM Agreement is consistent with a single legal standard for *de jure* and *de facto* export contingency. Following that interpretation, there simply is a 'granting of a subsidy' – not an initial, conditional grant followed by a 'completing' of the grant, whereby the grant is made unconditional. Based on the granting of a subsidy, the subsidy may be found to be contingent, either in law or in fact, upon export performance. At that point, it is possible to determine whether the granting of the subsidy is tied to 'anticipated exportation' – *i.e.*, exportation that is 'expected' – whether as a matter of law or as a matter of fact. There is no need to wait for the subsequent occurrence or non-occurrence of exportation to determine whether the subsidy is in fact tied to exportation that 'will occur'."[3059]

7.639 Thus, according to the United States, the European Communities' theory of what must be demonstrated in order to prove contingency in fact upon anticipated exportation would require it to

[3059] US, Comments on EC Answer to Panel Question 175 (footnotes omitted).

demonstrate that the challenged LA/MSF measures each involve the granting of a subsidy only once any anticipated export performance is realized. In effect, the United States argues that the European Communities' "if-then"[3060] standard of contingency may be understood to mean contingency in the following sense: *if* anticipated export performance is realized, *then* a subsidy will be granted. We are not convinced that this is how Article 3.1(a) and footnote 4 of the SCM Agreement are intended to operate.

7.640 In *Canada – Aircraft* the Appellate Body held that the standard of contingency set out in footnote 4 requires a demonstration of "a relationship of conditionality or dependence"[3061] between the granting of a subsidy and export performance. One way of describing this standard may well be in terms of an "if-then" relationship between export performance (either actual or anticipated exportation or export earnings) and the granting of a subsidy. However, it would be wrong to conclude that this means that the contingency standard focuses on a relationship between the *realization* of anticipated export performance and the granting of a subsidy.

7.641 Among the meanings of the verb "anticipate" is "{t}ake into consideration before due time", "{o}bserve ... before due time", "look forward to",[3062] "be aware of (a thing) in advance and act accordingly" and "expect, foresee, regard as probable".[3063] In our view, all of these meanings suggest the same thing: to "anticipate" exportation means to consider, expect or foresee that exports will take place in the future. Thus, in the specific context of footnote 4 of the SCM Agreement, "anticipated" exportation may be understood to be exportation that a granting authority considers, expects or foresees will occur *after* it has granted a subsidy. We find support for this interpretation in *Canada – Aircraft*, where the Appellate Body observed that:

> "The dictionary meaning of the word 'anticipated' is 'expected'. The use of this word, however, does *not* transform the standard for 'contingent … in fact' into a standard merely for ascertaining 'expectations' of exports on the part of the granting authority. Whether exports were anticipated or 'expected' is to be gleaned from an examination of objective evidence. This examination is quite separate from, *and should not be confused with*, the examination of whether a subsidy is 'tied to' actual or anticipated exports. A subsidy may well be granted in the knowledge, or with the anticipation, that exports will result. Yet, that alone is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation."[3064]

7.642 In our view, this passage confirms that the relationship of "conditionality or dependence" that must be established is not a relationship between the granting of a subsidy and *the realization of* anticipated export performance, but rather a relationship of "conditionality or dependence" between the granting of a subsidy and those expectations themselves. In this regard, we note that the subsidies found to be contingent in fact upon anticipated export performance in the *Canada – Aircraft* and *Australia – Leather* cases were not granted as a *consequence* of the actual realization of anticipated exportation. In both cases, the subsidies found to be prohibited under Article 3.1(a) existed in advance of any *actual* export performance being achieved.[3065] Thus, contrary to what is implied by

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[3060] EC, NCSOS, para. 127.

[3061] Appellate Body Report, *Canada – Aircraft*, para. 171.

[3062] *The New Shorter Oxford English Dictionary*, (Clarendon Press 1993), Vol. I, p. 88.

[3063] *The Concise Oxford Dictionary, Ninth Edition*, (Clarendon Press 1995), p.53.

[3064] Appellate Body Report, *Canada – Aircraft*, para. 172 (footnote omitted, emphasis original).

[3065] In *Canada – Aircraft*, the panel determined that the "assistance" provided under the Technology Partnerships Canada ("TPC") programme amounted to subsidization that was contingent in fact upon anticipated export performance after examining whether "the factual evidence adduced ... demonstrate{d} that had there been no expectation of export sales (*i.e.*, no 'exportation' or 'export earnings') 'ensuing' from the subsidy, the subsidy would not have been granted". The panel rejected Canada's argument that no export contingency existed because TPC assistance was "not conditional on exports taking place" by stating that "{w}hile this

BCI deleted, as indicated **[***]**

the United States' characterization of the European Communities' legal argument, it is not necessary to show that expected exportation or export earnings have *actually materialized* in order to establish a relationship of contingency in fact between the granting of a subsidy and *anticipated* export performance. What must be demonstrated for this purpose is that the grant of a subsidy is "conditional" to, or "dependent" upon, the granting authority's export performance *expectations*. Thus, the legal theory the United States considers to be advanced by the European Communities can find no basis in the language of footnote 4.

7.643 The European Communities contends that an interpretation of footnote 4 that results in finding that anticipated exportation may be established on the basis of mere "consideration by the granting Member that exports *might* occur in the future"[3066] would "effectively convert a prohibition based on contingency into one based on some sort of 'motivation' or 'effects' based test".[3067] According to the European Communities, the Uruguay Round negotiators rejected the "United States' attempts ... to secure a prohibition on subsidies having *effects* on exports" in Part II of the SCM Agreement, agreeing instead to regulate the adverse effects of subsidies on the interests of Members, "notably via exports", under Part III of the SCM Agreement.[3068] Moreover, the European Communities submits that such a reading "would render findings of prohibition more likely in the case of global markets or small or export dependent economies, because exports would appear to loom larger in the set of potential considerations".[3069]

7.644 We disagree. In our view the European Communities is confusing the question of what contingency means with the question of what the subsidy is contingent upon. In concluding that the reference to "anticipated exportation or export earnings" in footnote 4 means to consider that exports will take place before they actually do, or to envisage that exports may take place in the future, we are not saying that the required *contingency* between the granting of a subsidy and anticipated exportation or export earnings may be demonstrated by merely showing that a granting authority anticipated export performance. Rather, we are saying that the required contingency may be demonstrated where the subsidy was granted *because* the granting authority anticipated export performance. As the Appellate Body noted in the *Canada – Aircraft*, the meaning of anticipated exportation "does *not* transform the standard for 'contingent … in fact' into a standard merely for ascertaining 'expectations'

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argument may be relevant in determining whether a subsidy would not have been granted but for actual exportation or export earnings, we find this argument insufficient to rebut a *prima facie* case that a subsidy would not have been granted but for anticipated exportation or export earnings." Panel Report, *Canada – Aircraft*, paras. 9.339 and 9.343, respectively, (emphasis original).

In *Australia – Automotive Leather II*, the panel's finding related to three grant payments provided for under a contract between the Australian government and Howe. The first payment was made at the time the contract was concluded (*i.e.*, before any actual exportation). The remaining two payments were to be made subsequently on the condition that Howe satisfy a "best endeavours" obligation to meet certain specific sales performance targets. Australia accepted that each of the payments provided for under the contract was a subsidy, and the panel found that each subsidy had been granted contingent in fact upon anticipated export performance. Panel Report, *Australia – Automotive Leather II*, paras. 9.45 and 9.71. In coming to this conclusion, the panel noted that it was "clear ... that continued exports, that is, anticipated exportation, was an important condition in the provision of" the subsidies. In addition, it observed that

"{a}t the time the contract was entered into, the government of Australia was aware of {Howe's necessity to continue and probably increase exports}, and thus anticipated continued and possibly increased exports by Howe. In our view, these facts effectively transform the sales performance targets into export performance targets. We thus consider that Howe's anticipated export performance was one of the conditions for the grant of the subsidies."

Panel Report, *Australia – Automotive Leather II*, paras. 9.66 and 9.67.

[3066] EC, SWS, para. 245; EC, SNCOS, para. 127.

[3067] EC, SNCOS, para. 129.

[3068] EC, SWS, para. 245.

[3069] EC, SNCOS, para. 129.

of exports on the part of the granting authority".[3070] It is clear to us, as it was to the Appellate Body in *Canada – Aircraft*, that establishing whether a granting authority anticipates export performance, or whether a relationship of "conditionality" or "dependence" exists between the grant of a subsidy and any such anticipation, involves two separate inquiries. We do not understand the United States to argue anything different. Indeed, the United States has expressly stated that it "does not argue that the governments' expectations of exportation or export earnings alone make the provision of {LA/MSF} contingent upon export performance".[3071]

7.645 Finally, another aspect of the European Communities' legal argument that we do not find convincing is the view that the *subsidy* provided through the challenged LA/MSF contracts is the difference between the interest rate charged under each contract and the interest rate that would be demanded by a market lender offering financing on the same or similar terms and conditions.[3072] The European Communities relies on this argument to allege that the United States cannot "demonstrate that the consequence of the anticipated export" is the granting of a "subsidy" (as opposed to the measure itself or the principal amount of the loan).[3073] According to the European Communities, the United States cannot make out this case because the consequence of any anticipated export performance is the *repayment* of the financial contributions, which does not amount to the granting of a subsidy, but is instead a "negative subsidy".[3074]

7.646 We recall that Article 1.1 of the SCM Agreement defines a "subsidy" as a financial contribution that confers a benefit.[3075] A "subsidy" is, therefore, constituted by *both* a financial contribution *and* a benefit. In the first section of our Report, we concluded that the United States has demonstrated that each of the challenged LA/MSF measures constitute a subsidy within the meaning of Article 1.1.[3076] In other words, we have already found that by entering into the LA/MSF agreements with Airbus, the EC member State governments provided Airbus with a subsidy. Therefore, for the purpose of Article 3.1(a), the "granting of a subsidy" refers to the provision of LA/MSF by the EC member State governments. It does not refer to the moment when, pursuant to the LA/MSF contracts, Airbus is required to make loan repayments.

7.647 Thus, to the extent it is grounded in a conception of contingency and anticipated export performance, and a notion of what it means to grant a subsidy (in the context of a loan), that is not contemplated in the text of Article 3.1(a) and footnote 4, the European Communities' interpretation of the legal standard for determining whether a subsidy is contingent in fact upon anticipated export performance cannot be sustained.

7.648 Correctly interpreted, the legal standard set out in footnote 4 indicates that a subsidy may be found to be contingent *in fact* upon *anticipated* export performance, and therefore prohibited under Article 3.1(a), when there is evidence demonstrating the existence of three distinct elements: (i) the granting of a subsidy; (ii) that is tied to; (iii) anticipated exportation or export earnings. At the heart of this legal standard is the second element, which reflects the notion of contingency set out in Article 3.1(a).[3077] The meaning of "contingent" in Article 3.1(a) is "conditional" or "dependent for its existence upon".[3078] Thus, in order to qualify as a prohibited export subsidy, the grant of the subsidy must be *conditional* or *dependent upon* actual or anticipated export performance; or as we have put it above, a subsidy must be granted *because* of actual or anticipated export performance. Article 3.1(a)

[3070] Appellate Body Report, *Canada – Aircraft*, para. 172 (footnote omitted, emphasis original).
[3071] US, SWS, paras. 135, 211-214.
[3072] EC, FWS, para. 634.
[3073] EC, FWS, para. 634.
[3074] EC, FWS, para. 579; EC, FWS, paras. 589, 594-604.
[3075] *See*, paras. 7.301 and 7.365.
[3076] *See*, paras. 7.482 - 7.490.
[3077] Appellate Body Report, *Canada — Aircraft*, para. 171.
[3078] Appellate Body Report, *Canada – Aircraft*, para. 166.

BCI deleted, as indicated **[***]**

further provides that such export contingency may be the sole condition governing the grant of a prohibited subsidy or it may be "one of several other conditions".[3079] However, it is clear that mere anticipation of export performance on the part of a granting authority – that is, the expectation or consideration that exportation or export earnings will take place in the future – is not enough to show that a subsidy was granted *contingent* upon anticipated export performance. Similarly, the language of the last sentence of footnote 4 indicates that the mere fact that an enterprise exports cannot, alone, be used to establish the required contingency. Nevertheless, the fact that a company is export-oriented "may be taken into account as *a* relevant fact, provided it is one of several facts which are considered and is not the only fact supporting a finding" of export contingency.[3080] Finally, we note that for the purpose of establishing a case of *in fact* contingency, each of the three elements identified above must be separately "*inferred* from the total configuration of facts constituting and surrounding the granting of the subsidy, none of which is likely to be decisive in any given case".[3081]

7.649 With this legal standard in mind, we now turn to examine the United States' factual assertions in respect of each of the challenged LA/MSF contracts on a measure-by-measure basis.

"Granting of a subsidy"

7.650 We have already found that in entering into each of the challenged LA/MSF agreements with Airbus, the EC member State governments provided Airbus with a subsidy. The United States has therefore established the first of the three elements it must demonstrate in order to make out its case under Article 3.1(a). For its claim to succeed, the United States must also show that the provision of LA/MSF by each of the relevant EC member State governments (*i.e.*, the "granting of a subsidy") was contingent in fact upon anticipated exportation or export earnings.

Whether the EC member State governments "anticipated exportation or export earnings"

A380

7.651 The United States argues that the evidence surrounding the decisions of the EC member State governments to provide LA/MSF for the A380 demonstrates not only that the governments anticipated or expected that exportation or export earnings would result from the project, but also that the governments knew Airbus was developing the A380 primarily for the export market, and that export sales would be critical to the project's success.[3082] The evidence the United States relies upon to support its assertions,[3083] and the European Communities' responses thereto,[3084] are set out below:

- The United States argues that in 1999 and 2000, at the time it asserts the Airbus governments were discussing A380 LA/MSF with Airbus, Airbus was stating publicly in its Global Market Forecast ("GMF") that it was developing the A380 primarily for the export market by, for example, asserting that the Asia-Pacific region would account for 55% (1999) and 57%

[3079] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities* ("*US – FSC (Article 21.5 – EC)* "), WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55, para. 111.

[3080] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU ("Canada — Aircraft (Article 21.5 — Brazil)")*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299, paras. 48, 51.

[3081] Appellate Body Report, *Canada – Aircraft*, para. 167.

[3082] US, FWS, para. 345.

[3083] US, FWS, paras. 345-351; United States, HSBI Appendix to US, FWS (hereinafter "US, FWS, HSBI Appendix"), paras. 29-32, 34-36; US, SWS, paras. 137-140; US, Answer to Panel Questions 10 and 144.

[3084] EC, FWS, paras. 615-629; EC, SWS, paras. 298-299, 308-313; European Communities, HSBI Appendix to EC, SWS, "EC, SWS, HSBI Appendix"), paras. 35-44.

(2000) of orders, while "Europe" would account for 23% (1999) and 20% (2000).[3085] The United States considers that essentially the same message was communicated in the Third Quarter 1999 edition of the Airbus A3XX Briefing, which noted that "{t}he market for large passenger aircraft will be concentrated: both geographically, with over half the projected deliveries expected to go to airlines domiciled in the Asia-Pacific region, and in terms of customers, with 20 airlines taking more than 75% of the aircraft."[3086] Moreover, the United States submits that Airbus repeated the assertions made in the 1999 GMF in **[***]**, noting in particular, that **[***]**.[3087] Finally, the United States identifies "other relevant information" in the French government's "critical project appraisal".[3088] The European Communities argues that the GMF is "simply an analytical global market forecast, regularly prepared as part of the company's normal commercial operations, and for reasons entirely unrelated to the matter at hand". Moreover, the European Communities points out that the GMF refers to "Europe" (a broader market than the "EC"). According to the European Communities, it is impossible to infer from the GMF that the terms of any of the A380 LA/MSF contracts vary by reference to geographical region. The European Communities explains that the same observations are applicable in respect of the United States' reliance on the Third Quarter 1999 edition of the Airbus A3XX Briefing. Finally, the European Communities notes that the 2000 GMF post-dates the conclusion of the UK A380 LA/MSF contract.[3089]

- The United States argues that the repayment provisions of the four LA/MSF contracts anticipate a level of A380 sales substantially exceeding the 247 sales Airbus predicted in the 2000 GMF for aircraft with more than 400 seats in Europe between 2000 and 2019. Thus, the United States notes that an annex to the German A380 contract refers to **[***]** forecast A380 deliveries in 20 years;[3090] and that the Spanish A380 contract refers to the expectation that there will be deliveries of **[***]** passenger versions of the A380, and **[***]** cargo versions.[3091] The United States also identifies **[***]** set out in the French and UK A380 "project appraisals", as well as the Airbus business case for the A380.[3092] Moreover, the United States also notes that the French, German, Spanish and UK LA/MSF contracts required Airbus to make full repayment over, respectively, **[***]**, **[***]**, **[***]** and **[***]**[3093] A380 sales.[3094] The European Communities argues that the repayment provisions are origin-neutral, the company being free to repay from the proceeds of any sale, regardless of destination, or from other sources, and even in advance of delivery. Moreover, the European Communities argues that there is no requirement under the LA/MSF contracts for any sales performance at all.[3095] In responding to the United States reliance on the "critical project appraisals", the European

[3085] Exhibits US-356 and US-358.
[3086] Exhibit US-359.
[3087] Exhibit US-357 (BCI). The United States notes that the European Communities did not provide copies of the A380 LA/MSF application submitted by any of the other Airbus companies. We observe, however, that the questions asked by the Facilitator during the Annex V process did not specifically request the European Communities to provide copies of the A380 LA/MSF applications.
[3088] US, FWS, HSBI Appendix, paras. 34 and 36.
[3089] EC, FWS, paras. 617-619.
[3090] Exhibit US-357 (BCI).
[3091] Spanish A380 LA/MSF contract, Septimo, Exhibit US-73 (BCI).
[3092] French A380 project appraisal, DS316-EC-HSBI-00011434, at 9-10; UK A380 project appraisal, DS316-EC-HSBI-0001211, at 35-36, discussed in US, FWS, HSBI Appendix, paras. 29-32. Airbus A380 business case, DS316-EC-HSBI-0001261.
[3093] In fact, the UK government sought full repayment of the principal plus interest loaned under the A380 LA/MSF contract over **[***]** sales. An additional **[***]** payment was required for sales between **[***]** to **[***]**, with **[***]** being owed for sales in excess of **[***]**. EC, FWS, paras. 432-439.
[3094] US, Answer to Panel Question 10.
[3095] EC, FWS, paras. 616, 620 and 621.

BCI deleted, as indicated **[***]**

Communities points out that the exercise of each government's judgment as to the market prospects of a particular investment is exactly the sort of market discipline that the SCM Agreement is in place to encourage.[3096]

- According to the United States', the EC member State governments "specifically referenced the global nature of the A380 project and Airbus' export sales" in various documents.[3097] In particular, the United States refers to: (i) language in the Spanish contract revealing the **[***]**;[3098] (ii) a DTI press release stating that "{w}ithin 25 years Airbus has grown to take 55% of the civil aircraft production market and contributes £1 billion to the UK's trade balance";[3099] and (iii) the statement reportedly made by Prime Minister Blair at the ceremony unveiling the first A380 to the public "{t}he export gains will run into the billions of pounds".[3100] The European Communities argues that the media sources cited by the United States are of low reliability (the European Communities does not admit the accuracy of any of the press statements relied upon by the United States). The European Communities points out that the reports cite only certain components (wings) destined for other parts of the European Communities, *i.e.*, not exported outside of the European Communities, and that the statement from Prime Minister Blair post-dates the contracts. As with the other documents submitted as evidence by the United States, the European Communities argues that it is impossible to infer from the two media releases that the terms of the A380 LA/MSF contracts vary by reference to the European Communities and the rest of the world.[3101]

- The United States submits that when Airbus was seeking LA/MSF, "it pointed to potential export earnings and stressed the importance of the export sales to the project's success".[3102] In support of this submission, the United States asserts that **[***]**;[3103] that Airbus Senior Vice President for Marketing John Leahy was reported in February 2000 as stating that "{a}bout half the demand for the A3XX will come from Asia. ... I am sure that we would not be launching it if there were not key Asian airlines on board";[3104] and that a March 2000 Article in *The Economist* noted Leahy's view that Asia would account for around half of the sales of the A380, reporting that Leahy hoped "to win launch orders from two Asian carriers, one European or Middle Eastern airline and one American. ... encouraged by the responses from Singapore Airlines, Cathay Pacific, Malaysia Air Lines and Emirates."[3105] The European Communities argues that the cited report is of low reliability (the European Communities does not admit the accuracy of any of the press statements relied upon by the United States), and that it is impossible to infer from it any differentiation in the terms of the LA/MSF contracts between the European Communities and the rest of the world.[3106]

- The United States contends that the A380 is an export-oriented project and that Airbus itself is a "highly export-oriented company", with over 84% of total 1992-2005 sales going to

[3096] EC, SWS, HSBI Appendix, para. 36.
[3097] US, FWS, para. 348.
[3098] Spanish A380 LA/MSF contract, Sexto, Exhibit US-73 (BCI).
[3099] Exhibit US-360.
[3100] Exhibit US-361.
[3101] EC, FWS, paras. 622-623.
[3102] US, FWS, para. 349.
[3103] Exhibit US-357 (BCI). In citing this Exhibit, the United States recalls that the European Communities did not provide copies of any other A380 LA/MSF applications. We observe, however, that the questions asked by the Facilitator during the Annex V process did not specifically request the European Communities to provide copies of the A380 LA/MSF applications.
[3104] Exhibit US-362.
[3105] Exhibit US-363.
[3106] EC, FWS, para. 625.

BCI deleted, as indicated **[***]**

export.[3107] In support of this assertion, the United States submits a chart prepared on the basis of information derived from the Airclaims CASE database showing that between 1992 and 2005 an average of 84% of total Airbus sales of aircraft of all sizes have been export sales.[3108] In addition, the United States refers to the 2000 Airbus GMF, which it asserts indicated that "{t}he biggest share (35 per cent) of deliveries will go to airlines in North America. European airlines will take 30 per cent, and Asia-Pacific (including PRC) airlines 24 per cent, leaving just 11 per cent for airlines in Latin America, Africa and the Middle East."[3109] The United States also points to a position paper prepared by the External Advisory Group for Aeronautics which states that the aeronautics industry in Europe "employs a huge workforce and, through exports, contributes strongly to Europe's ability to fund other changes and to develop the quality of life of its citizens."[3110] The European Communities argues that even the United States recognizes that export-orientation is insufficient to demonstrate contingency. Moreover, in respect of the position paper, the European Communities notes that it post-dates the UK A380 contract, and the United States has not demonstrated how its contents are imputable to the European Communities. And, finally, the European Communities submits that it is impossible to infer from the documents submitted by the United States any differentiation in terms of the LA/MSF contracts between the European Communities and the rest of the world.[3111]

7.652 Having carefully reviewed and considered the evidence and related arguments advanced by the parties, as they concern each of the challenged LA/MSF measures, we have no doubt that at the time that Airbus and the EC member State governments concluded the A380 LA/MSF contracts, the latter were fully aware that Airbus was a global company operating in a global market, and that the A380 project would involve Airbus selling much if not most of its production in export markets. This is most apparent from the publicly available market forecasts cited by the United States,[3112] the Airbus A3XX Briefing, the A380 business case, the French and UK government's "critical project appraisals", Deutsche Airbus' A380 LA/MSF application, the sales expectations described in the German and Spanish A380 contract, the language in the Spanish contract revealing the **[***]**, and the repayment schedules of the contracts themselves, which clearly envisaged that repayment would be made over a number of sales that exceeded the Airbus market forecasts for "Europe" over a comparable period of time. The Airclaims data showing that the vast majority of Airbus sales between 1992 to 2005 were made on export markets provides further support for our conclusion.

7.653 One of the main arguments made by the European Communities in responding to the evidence advanced by the United States is that the challenged A380 LA/MSF contracts contained no obligation on Airbus to make any export sales, or any sales at all. In addition, the European Communities has repeatedly argued that it is impossible to infer from the evidence that the terms of the LA/MSF measures varied in any way as a function of whether a sale is destined for the European Communities or elsewhere. We do not consider this line of argument to be directly relevant to whether the EC member State governments "anticipated exportation or export earnings", but rather whether the subsidy granted under those contracts was *contingent* on that anticipation.

[3107] US, FWS, para. 350.
[3108] Airclaims CASE database.
[3109] Exhibit US-358.
[3110] Exhibit US-364.
[3111] EC, FWS, paras. 626-629.
[3112] Although the European Communities notes that the 2000 GMF post-dated the conclusion of the UK A380 contract, we note that the French, German and Spanish A380 contracts were concluded respectively in 2002, 2002 and 2001. Moreover, we recall that the United States also relies upon market forecast information contained in the 1999 GMF that was similar to that in the 2000 GMF, and that the former document was published in advance of the UK entering into the A380 LA/MSF contract with Airbus.

BCI deleted, as indicated **[***]**

7.654 Thus, even accepting that the GMF 2000 post-dated the conclusion of the UK A380 contract, and assuming, *arguendo*, that the press reports and media Articles relied upon by the United States have a relatively low probative value given that the European Communities does not accept their accuracy, we nevertheless conclude that the evidence advanced by the United States clearly establishes that at the time each of the A380 LA/MSF contracts were entered into, each of the EC member State governments "anticipated exportation or export earnings", within the meaning of footnote 4 of the SCM Agreement, in the sense that they expected or considered that exportation or export earnings would result from the development of the A380.

A340-500/600

7.655 As with the A380, the United States argues that the evidence surrounding the decisions of the French and Spanish governments to provide LA/MSF for the A340-500/600 demonstrates that the governments anticipated or expected that exportation or export earnings would result from the project.[3113] The evidence the United States relies upon to support its assertions,[3114] and the European Communities' responses thereto,[3115] are set out below:

- The United States asserts that the Spanish A340-500/600 LA/MSF contract **[***]**.[3116] Similarly, the United States argues that the French government's "critical project appraisal" contained other relevant information, for example, with respect to sales projections and customer lists.[3117]

- According to the United States, in 1997-1998, Airbus was predicting that the substantial majority of its sales of aircraft of all types over the next 20 years would be for export. In support of this assertion, the United States points to the 1997 and 1998 GMFs, which, respectively, predicted that European airlines would represent 25 to 29 percent of its total orders during the period 1997 to 2016, and 25 to 28 percent of its total orders during the period 1997 to 2017.[3118]

- The United States notes that on the date of the LA/MSF contracts for the A340-500/600 were signed, almost half of the firm orders that Airbus had already received were export sales: Virgin Atlantic, Lufthansa and Swissair had ordered a total of 29 A340-500/600s; and Air Canada, Emirates, ILFC (based in the United States), and Egyptair had ordered a total of 23 aircraft.[3119] The United States points to other relevant information in the French government's "critical project appraisal".[3120]

- The United States also refers to an EC State Aid decision concerning the French government's LA/MSF for the A340-500/600, arguing that this decision noted the French government's expectation that the development of the aircraft would allow Airbus to compete for sales throughout the world. In particular, the United States cites the following passage from that decision: "{f}rom a global standpoint, the A340-500/600 program will have only one

[3113] US, FWS, para. 363.
[3114] US, FWS, paras. 363-371; US, FWS, HSBI Appendix, paras. 46 and 48; US, SWS, paras. 137-140; US, Answer to Panel Questions 10 and 144.
[3115] EC, FWS, paras. 674-677; EC, SWS, paras. 314-316, 318-320.
[3116] Spanish A340-500/600 LA/MSF contract, at 2, Exhibit US-37 (BCI).
[3117] US, FWS, para. 365, referring to Exhibit DS316-EC-HSBI-0001143; US, FWS, HSBI Appendix, para. 46.
[3118] Exhibits US-366 and US-367.
[3119] US, FWS, para. 367 referring to Exhibit US-368, containing data derived from the Airclaims database.
[3120] US, FWS, HSBI Appendix, para. 48.

competitor- Boeing. The A340-500/600 will be able to compete with the 747-400 and 777-300. The A340-500 will be able to compete with the Boeing 777-200GW."[3121]

- Finally, the United States argues, once again, that Airbus is an export-oriented company, noting that the table of orders derived from the Airclaims database shows that in the 1992 to 1997 period (*i.e.*, the period predating the French and Spanish decisions to provide LA/MSF for the A340-500/600) 86% of total Airbus sales of aircraft were export sales.[3122]

- The European Communities argues that the United States has provided no evidence to demonstrate that the number of A340-500/600 deliveries needed to fully repay principal and interest exceeds projections of demand in the European Communities for the aircraft. According to the European Communities, the United States has introduced no evidence whatsoever regarding potential demand in the European Communities for this aircraft. The European Communities submits that for this reason alone, the United States' claims in respect of the A340-500/600 must be rejected.[3123]

7.656 Having carefully reviewed and considered the evidence and related arguments advanced by the parties, as they concern the two challenged LA/MSF measures, we have no doubt that at the time that Airbus and the French and Spanish governments concluded the A340-500/600 LA/MSF contracts, the latter were fully aware that Airbus was a global company operating in a global market, and that the A340-500/600 project would involve Airbus selling much if not most of its production in export markets. This is most apparent from the Spanish LA/MSF contract which as the United States has noted, **[***]**; and information from the French government's "critical project appraisal" referred to and discussed by the United States in the HSBI Appendix to its first written submission. The market forecasts for "Europe" (compared with other regions) made in the 1997 and 1998 GMFs and the Airclaims data showing that the vast majority of Airbus sales between 1992 to 1997 were made on export markets provides further support for our conclusion.

7.657 The European Communities submits that the United States has failed to establish "anticipated exportation or export earnings" because it has advanced no data to demonstrate that the number of deliveries needed to fully repay principal and interest under the LA/MSF loans exceeds projections of demand in the European Communities for the A340-500/600. Although the United States has not specifically advanced this information, the evidence discussed in the previous paragraph, in our view, clearly demonstrates that at the time each of the A340-500/600 LA/MSF contracts were entered into, each of the EC member State governments "anticipated exportation or export earnings", within the meaning of footnote 4 of the SCM Agreement, in the sense that they expected or considered that exportation or export earnings would result from the development of the A340-500/600.

A330-200

7.658 Again, the United States argues that the evidence surrounding the decision of the French government to provide LA/MSF for the A330-200 demonstrates that it anticipated or expected that exportation or export earnings would result from the project.[3124] The evidence the United States relies upon to support its assertions,[3125] and the European Communities' responses thereto,[3126] are set out below:

[3121] US, FWS, para. 368 citing from Exhibit US-3.
[3122] US, FWS, para. 369, referring to information derived from the Airclaims CASE database.
[3123] EC, FWS, para. 675.
[3124] US, FWS, para. 382.
[3125] US, FWS, paras. 378-382; US, FWS, HSBI Appendix, paras. 55-56; US, SWS, paras. 137-140; US, Answer to Panel Questions 10 and 144.

BCI deleted, as indicated **[***]**

- The United States points to certain information in the French government's "critical project appraisal" for the A330-200, which it argues shows that the French government expected that LA/MSF for the A330-200 would lead to substantial exportation or export earnings.[3127]

- In addition, the United States notes that in 1995 and 1996, Airbus was already predicting that the substantial majority of its sales of aircraft of all types over the next 20 years would be for export. In this connection, the United States refers to the 1995 GMF where it was predicted that European airlines would represent only 28 percent of its total orders during the 1995-2014 period.[3128]

- Moreover, the United States asserts that on the date that the French government signed the A330-200 LA/MSF contract, 100 percent of the firm orders that Airbus had already received for the A330-200 were export sales.[3129]

- The United States also includes, as evidence it submits shows that Airbus is an export oriented company, the evidence it presented in the context of its claim against the A380. In particular, this evidence is that over 84% of total Airbus sales between 1992 and 2005 were export sales.[3130]

- The European Communities argues that the United States has provided no evidence to demonstrate that the number of A330-200 deliveries needed to fully repay principal and interest exceeds projections of demand in the European Communities for the aircraft. According to the European Communities, the United States has introduced no evidence whatsoever regarding potential demand in the European Communities for this aircraft. The European Communities submits that for this reason alone, the United States' claims in respect of the A330-200 must be rejected.[3131]

7.659 Our conclusion in respect of the evidence submitted to support the contention that the French government "anticipated exportation or export earnings" at the time it entered into the A330-200 LA/MSF contract with Airbus is the same as our conclusion in respect of the LA/MSF contracts for the A380 and A340-500/600. After careful review and consideration of the evidence and the parties' arguments, we have no doubt that at the time that Airbus and the French government concluded the A330-200 LA/MSF contract, the French government was fully aware that Airbus was a global company operating in a global market, and that the A330-200 project would involve Airbus selling much if not most of its production in export markets. This is most apparent from the information contained in the French government's "critical project appraisal" highlighted by the United States in the HSBI Appendix to its first written submission. The market forecasts for "European airlines" made in the 1995 GMF and the Airclaims data showing that the vast majority of Airbus sales between 1992 to 2005 were made on export markets provides further support for our conclusion.

7.660 Again, the European Communities submits that the United States has failed to establish "anticipated exportation or export earnings" because it has adduced no data to demonstrate that the number of deliveries required under each contract to fully repay principal and interest under the LA/MSF loans exceeds projections of demand in the European Communities for the A330-200. Although the United States has not specifically advanced this information, the evidence discussed in

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[3126] EC, FWS, paras. 678-679; EC, SWS, paras. 322-324.
[3127] US, FWS, para. 379; and US, FWS, HSBI Appendix, paras. 55-56.
[3128] US, FWS, para. 380, citing Exhibit US-369.
[3129] US, FWS, para. 381, citing Airclaims database data contained in Exhibit US-368.
[3130] US, FWS, para. 378, incorporating by cross-reference the arguments and evidence presented in Section IV.B.2.c of its FWS.
[3131] EC, FWS, para. 679.

BCI deleted, as indicated **[*******]**

the previous paragraph, in our view, clearly demonstrates that at the time the A330-200 LA/MSF contract was concluded, the French government "anticipated exportation or export earnings", within the meaning of footnote 4 of the SCM Agreement, in the sense that it expected or considered that exportation or export earnings would result from the development of the A330-200.

Whether the granting of the LA/MSF was "tied to" anticipated exportation or export earnings

7.661 The United States submits that various provisions of the challenged LA/MSF contracts, when considered in the light of other relevant information, demonstrate that the grant of each subsidy measure was in fact "tied to" anticipated exportation or export earnings, within the meaning of footnote 4 of the SCM Agreement. The main argument advanced by the United States in support of this submission is focussed on an alleged exchange of commitments between Airbus and the EC member States that necessarily involves Airbus having to make "substantial" exports. In particular, the United States asserts that each time Airbus contracted with the EC member States under the challenged LA/MSF measures, the two parties exchanged performance commitments, pursuant to which the EC member States agreed to provide Airbus with development funding in accordance with a set schedule, and in return Airbus agreed to make repayments with revenue generated from a specified number of LCA sales that could only be achieved through exports. The United States argues that other information corroborates this alleged "tie" between the subsidy measures and the EC member States' anticipated exportation or export earnings. This includes: the preambular language of a number of the LA/MSF contracts; various provisions in the LA/MSF contracts setting out Airbus' repayment obligations, representations and warranties, and reporting requirements; contractual termination and adjustment provisions; Airbus' contractual undertaking to complete the development projects; various statements reportedly made by government officials; and information contained in the UK and French governments' "critical project appraisals" for a number of the aircraft models.[3132] The European Communities argues that the United States grossly distorts the terms of the LA/MSF contracts and latches onto a host of irrelevant provisions that have no conceivable connection to export performance, much less establish a "necessary" relationship between the alleged subsidy and export. At most, according to the European Communities, these provisions confirm the member States' concern with ensuring the commercial and technical viability of the programme they are financing.[3133] The evidence identified by the United States, and the European Communities' specific responses thereto,[3134] are set out below:

French LA/MSF for the A380

- The United States notes that Articles 6.2 and 6.3 of the French A380 LA/MSF contract require Airbus to repay the loaned principal through per-aircraft levies on the **[*******]** sales. The United States observes that if sales are fewer than expected, the French government has no other recourse to obtain repayment. According to the United States, these repayment provisions show that the French government conditioned the provision of LA/MSF on repayment over **[*******]** sales, a level of sales that could not be achieved without substantial exports. In particular, on the basis of evidence it has submitted showing that Airbus had, in 2000, forecast a total size of the market segment for aircraft with more than 400 seats in "Europe" of 247 aircraft, the United States argues that it follows that the French government

[3132] US, FWS, paras. 352-360 (A380), 372-375 (A340-500/600) and 383-386 (A330-200); US, FWS, HSBI Appendix, paras. 39-42, 50-53, 57-60; US, FNCOS, paras. 65-75; US, SWS, paras. 141-143, 161-192 (A380), 193-203 (A340-500/600) and 204-209 (A330-200); US SOS-HSBI Appendix paras. 2-7; US, Answer to Panel Questions 10, 144, 145 and 217; US, Comments on EC Answer to Panel Question 217.

[3133] EC, SNCOS, para. 163.

[3134] EC, FWS, paras. 636-673, 676-677 and 680-681; EC, SWS, paras. 296-325; EC, SNCOS, paras. 158-168; EC, SWS, HSBI Appendix, paras. 35-44; EC, Answers to Panel Questions 79 and 217; Comments on US, Answer to Panel Questions 144, 145 and 217.

BCI deleted, as indicated **[***]**

"tied" its grant of LA/MSF for the A380 to Airbus making at least **[***]** export sales. Indeed, the United States argues that Airbus' actual export requirements are even greater, noting that the Airbus 2000 Global Market Forecast defines the more than 400 seat market segment as including the A340-600 and the Boeing 747 and 777-300. Thus, when the French government **[***]** it necessarily **[***]**.[3135] The European Communities asserts that the repayment provisions impose no obligation on the company to sell, let alone export, a single aircraft. According to the European Communities, the repayment provisions are origin-neutral, Airbus being free to repay from proceeds of any sale, regardless of destination. Airbus retains full commercial freedom and the choice of export versus domestic sale is made according to the demands of the market. Thus, the European Communities contends that the repayment provisions do not demonstrate that the terms of the LA/MSF contract vary at all by reference to the European Communities and the rest of the world.[3136]

- The United States submits that other terms and conditions found in the French A380 LA/MSF contract corroborate the existence of the alleged "contingent" relationship between the grant of the subsidy and anticipated exportation or export earnings. In this regard, the United States points to:

  (a) Article 6.1, which the United States asserts **[***]**. The United States submits that this obligation confirms that the contract represents a commitment on the part of the government in exchange for a commitment on the part of Airbus.[3137]

  (b) Article 1.3, which the United States argues stipulates that Airbus undertakes **[***]**. The United States submits that this provision further demonstrates the "tie" between the government's commitment to provide LA/MSF and Airbus' commitment to **[***]**.[3138] The European Communities argues that a provision in a contract governing the terms of *development* financing, that requires the borrower to do its best to *develop*, is hardly surprising, and shows nothing more than the creditor's interest in the viability of its investment.[3139]

  (c) Article 8.2, which the United States asserts obligates Airbus to **[***]**. The United States submits that this shows that the French government did not simply provide LA/MSF in the hope that it would lead to export performance but that it was provided contingent upon performance by Airbus – to be demonstrated to the government through, *inter alia*, **[***]** – which performance necessarily involves exportation.[3140] The European Communities responds by stating that when governments ask Airbus companies to provide periodic progress reports, they are not implicitly (or "necessarily") asking whether Airbus has exported aircraft. Instead, they seek information on how *development* costs are being incurred, whether milestones in the *development* process have been reached, and whether the project remains viable. In this respect, governments are simply performing due diligence – like any market-based creditor.[3141]

[3135] US, FWS, paras. 353-357, citing Exhibits US-358 and US-365 (BCI); US, FWS, HSBI Appendix, paras. 39-41.
[3136] EC, FWS, paras. 614, 616 and 637; EC, Comments on US Answer to Panel Question 145.
[3137] US, SWS, para. 183.
[3138] US, SWS, para. 184.
[3139] EC, SNCOS, para. 163.
[3140] US, SWS, para. 185.
[3141] EC, SNCOS, para. 164.

BCI deleted, as indicated **[***]**

(d) Article 9.1, which the United States contends stipulates that in the event that Airbus breaches its contractual obligations, the French government **[***]**. According to the United States, this provision further corroborates the link between the French government's performance and Airbus' performance.[3142] The European Communities argues that this provision does not call for termination and discontinuation of LA/MSF funding if the company fails to *export*. Instead, it only states that if the company does not use the funding received to make best endeavours to develop the aircraft as planned, the government will cease providing LA/MSF. Thus, the European Communities contends that the only contingency established through this provision is between the continued receipt of LA/MSF and the obligation on the company to use best endeavours to develop an aircraft.[3143]

German LA/MSF for the A380

- The United States notes that Section 7 of the German A380 LA/MSF contract requires Airbus to make repayments of the loaned principal through per-aircraft levies on the **[***]** sales. The United States observes that if sales are fewer than expected, the German government has no other recourse to obtain repayment. According to the United States, these repayment provisions show that the German government conditioned the provision of LA/MSF on repayment over **[***]** sales, a level of sales that could not be achieved without substantial exports. In particular, on the basis of evidence it has submitted showing that Airbus had, in 2000, forecast a total market size for aircraft with more than 400 seats in "Europe" of 247 aircraft, the United States argues that it follows that the German government "tied" its grant of LA/MSF for the A380 to Airbus making at least **[***]** export sales. Indeed, the United States argues that Airbus' actual export requirements are even greater, noting that the Airbus 2000 Global Market Forecast defines the more than 400 seat market segment as including the A340-600 and the Boeing 747 and 777-300. Thus, when the German government **[***]** it necessarily **[***]**.[3144] The European Communities asserts that the repayment provisions impose no obligation on the company to sell, let alone export, a single aircraft. According to the European Communities, the repayment provisions are origin-neutral, Airbus being free to repay from proceeds of any sale, regardless of destination. Airbus retains full commercial freedom and the choice of export versus domestic sale is made according to the demands of the market. Thus, the European Communities contends that the repayment provisions do not demonstrate that the terms of the LA/MSF contract vary at all by reference to the European Communities and the rest of the world.[3145]

- The United States submits that other terms and conditions found in the German A380 LA/MSF contract corroborate the existence of the alleged "contingent" relationship between the grant of the subsidy and anticipated exportation or export earnings. In this regard, the United States points to:

(a) Section 1, clause 5, which the United States submits identifies certain **[***]**. Moreover, the United States notes that the preamble to the contract reveals that the German government was in possession of **[***]**. The United States asserts that this **[***]** showed that the German government was **[***]**. In particular, the United States points to several pages in the **[***]** where it was stated that **[***]**; and which describe **[***]**. The United States also relies upon a **[***]**.[3146] The European Communities

[3142] US, SWS, para. 186.
[3143] EC, SNCOS, para. 168.
[3144] US, FWS paras. 353-357, citing Exhibits US-358 and US-72 (BCI).
[3145] EC, FWS, paras. 614, 616 and 637; EC, Comments on US Answer to Panel Question 145.
[3146] US, SWS, para. 176, citing Exhibit US-357 (BCI); US, Answer to Panel Question 145.

BCI deleted, as indicated **[***]**

responds by questioning the validity of a single statement made by Airbus Germany (and not an EC member State) in a several-hundred page application as purported evidence of export contingency. The European Communities argues that such statements reveal nothing about any conditions imposed by the government on a recipient.[3147]

(b) Section 12, which the United States asserts provides that **[***]**. The United States maintains that this further demonstrates that the German government relied on **[***]**.[3148]

(c) Section 12, clause 3(b), which the United States submits sets out the right of the government to **[***]**. According to the United States, this also demonstrates reliance on that information (for instance, the overview provided **[***]**) and hence a tie between the provision of LA/MSF and the performance necessarily implied by that information.[3149] The European Communities argues that this provision does not call for termination and discontinuation of LA/MSF funding if the company fails to *export*. Instead, it states only that if the company does not use the funding received to make best endeavours to develop the aircraft as planned, the government will cease providing LA/MSF. Thus, the European Communities contends that the only contingency established through the provision is between the continued receipt of LA/MSF and the obligation on the company to use best endeavours to develop an aircraft.[3150]

(d) Section 2, clause 5, which the United States contends describes **[***]**.[3151]

(e) Appendix 14, referred to in Article 12, clause 3(b) (termination provision), entitled **[***]**.[3152] The European Communities notes that the provisions cited by the United States do not call for termination and discontinuation of LA/MSF funding if the company fails to export.[3153]

Spanish LA/MSF for the A380

- The United States notes that Séptima clausula of the Spanish A380 LA/MSF contract requires Airbus to make repayments of the loaned principal through per-aircraft levies on the **[***]**. The United States observes that if sales are fewer than expected, the Spanish government has no other recourse to obtain repayment. According to the United States, these repayment provisions show that the Spanish government conditioned the provision of LA/MSF on repayment over **[***]** sales, a level of sales that could not be achieved without substantial exports. In particular, on the basis of evidence it has submitted showing that Airbus had in 2000 forecast a total market size for aircraft with more than 400 seats in "Europe" of 247 aircraft, the United States argues that it follows that the Spanish government "tied" its grant of LA/MSF for the A380 to Airbus making at least **[***]** export sales. Indeed, the United States argues that Airbus' actual export requirements are even greater, noting that the Airbus 2000 Global Market Forecast defines the more than 400 seat market segment as including the A340-600 and the Boeing 747 and 777-300. Thus, when the Spanish government **[***]** it

[3147] EC, SNCOS, para. 164.
[3148] US, SWS, para. 177.
[3149] US, SWS, para. 178.
[3150] EC, SNCOS, para. 168.
[3151] US, SWS, para. 179.
[3152] US, SWS, para. 180.
[3153] EC, SNCOS, para. 168.

BCI deleted, as indicated **[***]**

necessarily **[***]**.[3154] The European Communities asserts that the repayment provisions impose no obligation on the company to sell, let alone export, a single aircraft. According to the European Communities, the repayment provisions are origin-neutral, Airbus being free to repay from proceeds of any sale, regardless of destination. Airbus retains full commercial freedom and the choice of export versus domestic sale is made according to the demands of the market. Thus, the European Communities contends that the repayment provisions do not demonstrate that the terms of the LA/MSF contract vary at all by reference to the European Communities and the rest of the world.[3155]

- The United States submits that other terms and conditions found in the Spanish A380 LA/MSF contract corroborate the existence of the alleged "contingent" relationship between the grant of the subsidy and anticipated exportation or export earnings. In this regard, the United States points to:

  (a) The Séptimo preambular paragraph, which the United States quotes as stating that **[***]**. According to the United States, this recognition in the preamble of the contract shows that the Spanish government **[***]** information in providing the LA/MSF. In its view, this statement demonstrates that the Spanish government's expectation **[***]**.[3156]

  (b) The Primera clausula, which the Untied States asserts establishes an obligation on Airbus **[***]**. The United States submits that this obligation confirms that the contract represents a commitment on the part of the government in exchange for a commitment on the part of Airbus.[3157]

  UK A380 contract

- The United States notes that Schedule 3, paragraph 3, of the UK A380 LA/MSF contract requires Airbus to make repayments of the loaned principal through per-aircraft levies on the **[***]**.[3158] The United States observes that if sales are fewer than expected, the UK government has no other recourse to obtain repayment. According to the United States, these repayment provisions show that the UK government conditioned the provision of LA/MSF on repayment over **[***]** sales, a level of sales that could not be achieved without substantial exports. In particular, on the basis of evidence it has submitted showing that Airbus had in 2000 forecast a total market size for aircraft with more than 400 seats in "Europe" of 247 aircraft, the United States argues that it follows that the UK government "tied" its grant of LA/MSF for the A380 to Airbus making at least **[***]**[3159] export sales. Indeed, the United States argues that Airbus' actual export requirements are even greater, noting that the Airbus 2000 Global Market Forecast defines the more than 400 seat market segment as including the A340-600 and the Boeing 747 and 777-300. Thus, when the UK government **[***]** it

[3154] US, FWS, paras. 353-357, citing Exhibits US-358 and US-73 (BCI).
[3155] EC, FWS, paras. 614, 616 and 637; EC, Comments on US Answer to Panel Question 145.
[3156] US, SWS, paras. 189-190.
[3157] US, SWS, para. 191.
[3158] In fact, the UK government sought full repayment of the principal plus interest loaned under the A380 LA/MSF contract over **[***]** sales. An additional **[***]** payment was required for sales between **[***]** to **[***]**, with **[***]** being owed for sales in excess of **[***]**. EC, FWS, paras. 432-439.
[3159] We note that as the UK government sought full repayment of the principal loaned plus interest under the A380 LA/MSF contract over **[***]** sales, it could not have "tied" full repayment of LA/MSF to Airbus making at least **[***]** aircraft sales. Following the United States' logic, the UK government "tied" full repayment of LA/MSF to **[***]** A380 sales.

BCI deleted, as indicated **[***]**

necessarily **[***]**.[3160] The European Communities asserts that the repayment provisions impose no obligation on the company to sell, let alone export, a single aircraft. According to the European Communities, the repayment provisions are origin-neutral, Airbus being free to repay from proceeds of any sale, regardless of destination. Airbus retains full commercial freedom and the choice of export versus domestic sale is made according to the demands of the market. Thus, the European Communities contends that the repayment provisions do not demonstrate that the terms of the LA/MSF contract vary at all by reference to the European Communities and the rest of the world.[3161]

- The United States submits that other terms and conditions found in the UK A380 LA/MSF contract corroborate the existence of the alleged "contingent" relationship between the grant of the subsidy and anticipated exportation or export earnings. In this regard, the United States points to:

  (a) Article 3.1, which the United States asserts shows that BAE Systems (Operations) Ltd and its corporate parent (BAE Systems) made certain representations and warranties to the UK government. Among these was the representation and warranty that **[***]**. The United States submits that such an affirmation would be irrelevant if the relationship between the provision of LA/MSF and Airbus' commitment to performance (which cannot be fulfilled without exportation) were not one of conditionality or dependence.[3162] In other words, according to the United States, the provision shows that in committing to provide LA/MSF, the UK government relied on **[***]**.[3163] The United States contends that the same reliance can also be seen in **[***]**.[3164]

  (b) Article 4.1, which the United States argues sets out a commitment by BAE Systems (Operations) Ltd to **[***]**. The United States notes that the **[***]**. Thus, according to the United States, to obtain LA/MSF, the company had to commit to **[***]**.[3165] The European Communities argues that a provision in a contract governing the terms of *development* financing, that requires the borrower to do its best to *develop*, is hardly surprising, and shows nothing more than the creditor's interest in the viability of its investment.[3166]

  (c) Article 6, which the United States asserts provides that the UK government may **[***]**. The United States maintains that this further demonstrates that the UK government's performance (its provision of LA/MSF) is tied to Airbus' performance, which cannot be accomplished without exportation.[3167] The European Communities

[3160] US, FWS, paras. 353-357, citing Exhibits US-358 and US-79 (BCI); US, FWS, HSBI Appendix, para. 42.

[3161] EC, FWS, paras. 614, 616 and 637; EC, Comments on US Answer to Panel Question 145.

[3162] US, Answer to Panel Question 145.

[3163] US, SWS, paras. 169-171. The United States alleges that during the Annex V process, the European Communities refused to provide BAE Systems' **[***]**. However, it notes that on the basis of the Airbus Deutschland **[***]**, the German government was well aware of, and relied upon, anticipated exportation in deciding to provide LA/MSF. In the light of the European Communities' alleged refusal to provide the a copy of BAE Systems' **[***]**, the United States asks the Panel to draw the "logical inference .. that **[***]**". As we have previously observed, the questions asked by the Facilitator during the Annex V process did not specifically request the European Communities to provide copies of the A380 LA/MSF applications.

[3164] US, SWS, para. 171; US, FWS, HSBI Appendix, para. 30, referring to UK A380 "critical project appraisal" DS316-EC-HSBI-00121, at section 2.3 and pp. 35-36.

[3165] US, SWS, para. 172.

[3166] EC, SNCOS, para. 163.

[3167] US, SWS, para. 173.

BCI deleted, as indicated **[***]**

argues that this provision does not call for termination and discontinuation of LA/MSF funding if the company fails to *export*. Instead, it states only that if the company does not use the funding received to make best endeavours to develop the aircraft as planned, the government will cease providing LA/MSF. Thus, the European Communities contends that the only contingency established through the provision is between the continued receipt of LA/MSF and the obligation on the company to use best endeavours to develop an aircraft.[3168]

(d) Article 7.1(a), which the United States argues provides for the Company to **[***]**. The United States submits that this shows that the UK government did not simply provide LA/MSF in the hope that it would lead to export performance, but that it provided LA/MSF contingent upon performance by Airbus – to be demonstrated to the government through, *inter alia*, **[***]** – which performance necessarily involves exportation.[3169] The European Communities responds by asserting that when governments ask Airbus companies to provide periodic progress reports, they are not implicitly (or "necessarily") asking whether Airbus has exported aircraft. Instead, they seek information on how *development* costs are being incurred, whether milestones in the *development* process have been reached, and whether the project remains viable. In this respect, governments are simply performing due diligence – like any market-based creditor.[3170]

French LA/MSF for the A340-500/600

- The United States notes that Articles 6.2 and 7 of the French A340-500/600 LA/MSF contract require Airbus to make repayments of the loaned principal through per-aircraft levies on the **[***]** sale. The United States observes that if sales are fewer than expected, the UK government has no other recourse to obtain repayment. According to the United States, the French government's project appraisal makes clear that **[***]**.[3171] The European Communities asserts that the repayment provisions impose no obligation on the company to sell, let alone export, a single aircraft. According to the European Communities, the repayment provisions are origin-neutral, Airbus being free to repay from proceeds of any sale, regardless of destination. Airbus retains full commercial freedom and the choice of export versus domestic sale is made according to the demands of the market. Thus, the European Communities contends that the repayment provisions do not demonstrate that the terms of the LA/MSF contract vary at all by reference to the European Communities and the rest of the world.[3172]

- The United States submits that other terms and conditions found in the French A340-500/600 LA/MSF contract corroborate the existence of the alleged "tie". In this regard, the United States points to:

  (a) Article 7, which the United States argues obligates Airbus **[***]**. According to the United States, this obligation confirms that the contract represents a commitment on the part of the government in exchange for a commitment on the part of Airbus.[3173]

[3168] EC, SNCOS, para. 168.
[3169] US, SWS, para. 174.
[3170] EC, SNCOS, para. 164.
[3171] US, FWS, para. 373, citing Exhibit US-36 (BCI); US, FWS, HSBI Appendix, paras. 50-53, referring to Exhibit DS316-EC-HSBI-0001143; US, SCOS, HSBI Appendix, paras. 2-7.
[3172] EC, FWS, paras. 614, 616 and 637; EC, Comments on US Answer to Panel Question 145.
[3173] US, SWS, para. 194.

BCI deleted, as indicated **[***]**

(b) Article 9, which the United States asserts obligates Airbus to **[***]**. The United States submits that this shows that the French government did not simply provide LA/MSF in the hope that it would lead to export performance, but that it provided it contingent upon performance by Airbus – to be demonstrated to the government through, *inter alia*, **[***]** – which performance necessarily involved exportation.[3174] The European Communities responds by asserting that when governments ask Airbus companies to provide periodic progress reports, they are not implicitly (or "necessarily") asking whether Airbus has exported aircraft. Instead, they seek information on how *development* costs are being incurred, whether milestones in the *development* process have been reached, and whether the project remains viable. In this respect, governments are simply performing due diligence – like any market-based creditor.[3175]

(c) Annex 5 of the Protocole, which the United States contends requires Airbus **[***]**. The United States argues that this requirement further reinforces the contractual tie between the provision of LA/MSF and Airbus' export performance.[3176] The European Communities argues that these provisions enable the government to verify, including through contact with the buyer if necessary, that the company is indeed making the required payments on each delivery. The European Communities emphasizes that the provisions do not require that the company repay a greater percentage of LA/MSF, or repay a higher interest rate, if the buyer happens to be in a domestic as opposed to an export market. Thus, the European Communities considers that the periodic statements of deliveries do not imply export contingency.[3177]

(d) Article 10, which the United States asserts requires that in the event that Airbus breaches its obligations, the French government **[***]** further corroborating the link between the government's performance and Airbus's performance.[3178] The European Communities argues that this provision does not call for termination and discontinuation of LA/MSF funding if the company fails to *export*. Instead, it states only that if the company does not use the funding received to make best endeavours to develop the aircraft as planned, the government will cease providing LA/MSF. Thus, the European Communities contends that the only contingency established through this provision is between the continued receipt of LA/MSF and the obligation on the company to use best endeavours to develop an aircraft.[3179]

Spanish LA/MSF for the A340-500/600

- The United States notes that Octavo preambular paragraph and the Quinta clausula of the Spanish A340-500/600 LA/MSF contract require Airbus to make repayments of the loaned principal through per-aircraft levies. The United States recalls that all of the numbers from the LA/MSF agreement's repayment schedule were redacted, so it was not possible for it to determine over how many deliveries Airbus must repay the financing. However, it asserts that the contract anticipates **[***]** worldwide sales of the aircraft over a 20 year period. In the light of the European Communities' refusal to provide the actual information from the repayment schedule, the United States asks the Panel to draw the reasonable inference that

[3174] US, SWS, para. 195.
[3175] EC, SNCOS, para. 164.
[3176] US, SWS, para. 196.
[3177] EC, SNCOS, para. 165.
[3178] US, SWS, para. 197.
[3179] EC, SNCOS, para. 168.

BCI deleted, as indicated **[***]**

Airbus must repay the loan over a similar number of sales.[3180] The European Communities asserts that the repayment provisions impose no obligation on the company to sell, let alone export, a single aircraft. According to the European Communities, the repayment provisions are origin-neutral, Airbus being free to repay from proceeds of any sale, regardless of destination. Airbus retains full commercial freedom and the choice of export versus domestic sale is made according to the demands of the market. Thus, the European Communities contends that the repayment provisions do not demonstrate that the terms of the LA/MSF contract vary at all by reference to the European Communities and the rest of the world.[3181]

- The United States submits that other terms and conditions found in the Spanish A340-500/600 LA/MSF contract corroborate the existence of the alleged "tie". In this regard, the United States points to:

  (a) The United States argues that, as in the Spanish LA/MSF contract for the A380, the contract for the A340-500/600 contains certain representations in the preamble evidencing the information on which the Spanish government relied in deciding to provide LA/MSF. In particular, the United States points to the statement that **[***]**. Thus, by making this statement, the United States notes that the Spanish government states explicitly that in providing LA/MSF for the A340-500/600 it is **[***]**.[3182]

  (b) Article 1, pursuant to which the United States argues that Airbus commits **[***]**. According to the United States, this obligation confirms that the contract represents a commitment on the part of the government in exchange for a commitment on the part of Airbus.[3183]

  French LA/MSF for the A330-200

- The United States notes that Articles 6.2 of the French A330-200 LA/MSF contract requires Airbus to make repayments of the loaned principal through per-aircraft levies on the first **[***]** sales. The United States observes that if sales are fewer than expected, the French government has no other recourse to obtain repayment. According to the United States, the French government's project appraisal makes clear that **[***]**.[3184] The European Communities asserts that the repayment provisions impose no obligation on the company to sell, let alone export, a single aircraft. According to the European Communities, the repayment provisions are origin-neutral, Airbus being free to repay from proceeds of any sale, regardless of destination. Airbus retains full commercial freedom and the choice of export versus domestic sale is made according to the demands of the market. Thus, the European Communities contends that the repayment provisions do not demonstrate that the terms of the LA/MSF contract vary at all by reference to the European Communities and the rest of the world.[3185]

[3180] US, SWS, para. 373, citing Exhibit US-37 (BCI). In the light of the missing information on repayment terms, the United States requested the Panel to either use its authority under Article 13 of the DSU to request the European Communities and Spain to provide the necessary information or else draw the adverse inference that Airbus must repay the aid over **[***]** sales.

[3181] EC, FWS, paras. 614, 616 and 637; EC, Comments on US Answer to Panel Question 145.

[3182] US, SWS, paras. 200 and 201, referring to Exhibit US-37 (BCI) – the first and fourth paragraphs under "Primero".

[3183] US, SWS, para. 202, referring to Exhibit US-37 (BCI) – third paragraph under "Primero".

[3184] US, FWS, para. 384, citing Exhibit US-78 (BCI); US, FWS, HSBI Appendix, paras. 57-60; US, SCOS, HSBI Appendix, paras. 2-7.

[3185] EC, FWS, paras. 614, 616 and 637; EC, Comments on US Answer to Panel Question 145.

BCI deleted, as indicated **[*******]**

- The United States submits that other terms and conditions found in the French A330-200 LA/MSF contract corroborate the existence of the alleged "tie". In this regard, the United States points to:

  (a) Article 6, which the United States asserts obligates Airbus **[*******]**. According to the United States, this obligation confirms that the contract represents a commitment on the part of the government in exchange for a commitment on the part of Airbus.[3186]

  (b) Article 7, which the United States argues requires Airbus to **[*******]**. The United States argues that this shows that the French government did not simply provide LA/MSF in the hope that it would lead to export performance but that it provided LA/MSF contingent upon performance by Airbus – to be demonstrated to the government through, *inter alia*, **[*******]** – which performance necessarily involves exportation.[3187] The European Communities responds by asserting that when governments ask Airbus companies to provide periodic progress reports, they are not implicitly (or "necessarily") asking whether Airbus has exported aircraft. Instead, they seek information on how *development* costs are being incurred, whether milestones in the *development* process have been reached, and whether the project remains viable. In this respect, governments are simply performing due diligence – like any market-based creditor.[3188]

  (c) The United States also points to Annex 5, which it argues requires Airbus **[*******]**. The United States contends that this requirement further reinforces the contractual tie between the provision of LA/MSF and Airbus' export performance.[3189] The European Communities argues that these provisions enable the government to verify, including through contact with the buyer if necessary, that the company is indeed making the required payments on each delivery. The European Communities emphasizes that the provisions do not require that the company repay a greater percentage of LA/MSF, or repay a higher interest rate, if the buyer happens to be in a domestic as opposed to an export market. Thus, the European Communities considers that the periodic statements of deliveries do not imply export contingency.[3190]

  (d) Article 8, which the United States asserts shows that in the event that Airbus breaches its obligations, the French government **[*******]**. According to the United States, this further corroborates the link between the government's performance and Airbus's performance.[3191] The European Communities argues that this provision does not call for termination and discontinuation of LA/MSF funding if the company fails to *export*. Instead, it states only that if the company does not use the funding received to make best endeavours to develop the aircraft as planned, the government will cease providing LA/MSF. Thus, the European Communities contends that the only contingency established through this provision is between the continued receipt of LA/MSF and the obligation on the company to use best endeavours to develop an aircraft.[3192]

[3186] US, SWS, para. 205, referring to Exhibit US-78 (BCI).
[3187] US, SWS, para. 206, referring to Exhibit US-78 (BCI).
[3188] EC, SNCOS, para. 164.
[3189] US, SWS, para. 207, referring to Exhibit US-78 (BCI).
[3190] EC, SNCOS, para. 165.
[3191] US, SWS, para. 208, referring to Exhibit EC-90 (BCI).
[3192] EC, SNCOS, para. 168.

BCI deleted, as indicated **[***]**

Whether the sales-dependent repayment provisions of the challenged LA/MSF measures amount to exchanges of commitments that evidence contingency in fact upon anticipated exportation or export earnings

7.662 Apart from the above-mentioned arguments, the European Communities makes a series of additional submissions it considers demonstrate that the United States has failed to substantiate its claims. The first of these concerns what the European Communities considers to be the implications of the United States' alleged exchange of commitments theory for the types of subsidies that may be caught by the prohibition on export subsidies under Article 3.1(a) of the SCM Agreement.

7.663 The European Communities construes the United States' focus on the repayable nature of LA/MSF as the articulation of a "thesis ... that financial contributions that foresee a return (such as loans) are more susceptible to be found to contain a prohibited export contingent subsidy than financial contributions in the form of outright grants".[3193] However, the European Communities argues that Article 3.1(a) applies equally to all types of financial contributions, with no particular type of subsidy being more susceptible to either escaping or being caught by the prohibition.[3194] In the view of the European Communities, accepting the United States' thesis "would create an incentive for Members to make outright subsidy grants, rather than financial contributions that foresee a return, in order to avoid the prohibition" and thereby "encourage Members to depart from the market disciplines that the SCM Agreement meant to foster".[3195] Thus, the European Communities argues that the United States asks the Panel to adopt an interpretation of Article 3.1(a) of the SCM Agreement that is not only contrary to its text, but also "manifestly absurd and unreasonable".[3196]

7.664 The United States rejects the European Communities' characterization of its arguments, emphasizing that it is "not the foreseeing of a return that makes {LA/MSF} export contingent but the conditioning of the provision of {LA/MSF} on a commitment by Airbus to repay {LA/MSF} over levels of sales that necessarily involve exportation".[3197] Thus, the United States explains that:

> "In committing to provide {LA/MSF}, the Airbus governments could have insisted on any number of conditions or no conditions at all. They could have insisted on repayment over much smaller numbers of sales than actually are set out in the {LA/MSF} contracts (e.g., numbers that could be reached without necessarily exporting). They could have insisted on repayment over a fixed schedule, regardless of sales. They could have foregone repayment – effectively treating {LA/MSF} as a grant. But instead of taking any of these possible approaches, the Airbus governments took the approach of conditioning the provision of {LA/MSF} on repayment over levels of sales derived from Airbus's own Business Case and Global Market Forecasts and the governments' own project appraisals and other analyses, which levels of sales would necessarily involve exportation. Because the provision of {LA/MSF} is tied to export performance in this way it is a prohibited subsidy under Article 3.1(a) of the SCM Agreement."[3198]

7.665 We do not understand the United States' argument to be based on the fact that the EC member States expected to obtain a return from their LA/MSF contributions. Rather, it is the nature of *how* the EC member States structured that return that is at the centre of the United States' claim. Therefore, it does not follow from the United States' exchange of commitments theory that "financial

[3193] EC, FWS, para. 569.
[3194] EC, SNCOS, para. 160.
[3195] EC, SNCOS, para. 161.
[3196] EC, FWS, para. 569.
[3197] US, SWS, paras. 219 and 220.
[3198] US, SWS, para. 143.

BCI deleted, as indicated **[***]**

contributions that foresee a return (such as loans)" would be more susceptible to fall foul of the prohibition of export subsidies established under Article 3.1(a) of the SCM Agreement.

7.666 A second argument the European Communities advances challenges the United States' focus on sales-dependent repayment terms as the sole means available to Airbus to repay LA/MSF. According to the European Communities, each of the challenged LA/MSF contracts, either expressly or by implication, envisages the possibility of repayment via cash-flows generated through business activities other than sales of the aircraft.[3199] In particular, the European Communities notes that the contracts do not prevent the possibility of early repayment at any time. Moreover, the European Communities asserts that other related companies guaranteed Airbus' repayment obligations, implying that "{i}n all cases there are related companies or commercial activities that guarantee alternative sources of repayment".[3200]

7.667 Accelerated repayment provisions are expressly provided for under the German, Spanish and UK A380 LA/MSF contracts, and the Spanish A340-500/600 LA/MSF contract.[3201] The parties' arguments have focussed on the provisions appearing in two of these contracts – the German and UK A380 agreements. The German A380 contract allows Airbus to **[***]**. However, in this event, Airbus must pay **[***]**.[3202] The right to make prepayments under the UK A380 contract is **[***]** of the funding received under the loan.[3203] Should Airbus exercise this right, it would be required to **[***]**.[3204] The United States characterizes these as **[***]** that actually reinforce the "tie" between LA/MSF and export performance by **[***]**.[3205] The European Communities rejects this characterization, arguing that the provisions "ensure that the government does not face dilution of its return if the company elects to prepay", reflecting the government's aim to protect its return.[3206] Although not defined in detail, the prepayment provisions under the German A380 contract appear to envisage that the German government **[***]**. At the very least, this suggests that the German A380 contract creates a **[***]**.[3207]

7.668 In any case, we note that the accelerated repayment possibilities expressly provided for under the German, Spanish and UK A380 LA/MSF contracts, and the Spanish A340-500/600 LA/MSF contract, are only optional. On the other hand, the per-aircraft levies expressly called for under each of the challenged contracts are mandatory and therefore must be complied with after each and every relevant aircraft sale. Thus, we are doubtful about the extent to which the mere *possibility* of early repayment on the part of Airbus from an income stream unassociated with aircraft sales influenced the EC member State governments' decisions to provide LA/MSF. In this regard, we see some merit in the United States' contention that because "there is nothing uncommon about the possibility of accelerating repayment of a loan", were an option to voluntarily prepay a loan enough to sever a "tie" between the provision of a loan and export performance, "it would be virtually impossible to ever find

[3199] EC, FWS, paras. 323, 514, 590 and 673.
[3200] EC, FWS, footnote 570.
[3201] German A380 contract, Section 8, Exhibit US-72 (BCI); Spanish A380 contract, Séptima Clausula, Exhibit US-73 (BCI); UK A380 contract, Article 5.9, Exhibit US-79 (BCI); and Spanish A340-500/600 contract, Quinta Clausula, Exhibit US-37 (BCI).
[3202] German A380 contract, Section 8, para. 2, Exhibit US-72 (BCI).
[3203] UK A380 contract, Article 5.9, Exhibit US-79 (BCI).
[3204] UK A380 contract, Schedule 3, para. 9.1, Exhibit US-79 (BCI).
[3205] US, SWS, paras. 225-226.
[3206] EC, SNCOS, para. 168.
[3207] Although the United States asserts that application of the accelerated repayment provisions under the UK A380 contract would result in **[***]** (US, SWS, para. 225), we have been unable to confirm or reject this assertion on the basis of the UK A380 LA/MSF contract or the facts and arguments the parties have presented.

BCI deleted, as indicated **[***]**

a subsidy provided through a loan contract to be contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement".[3208]

7.669 The European Communities states that the repayments of all of the relevant LA/MSF contracts were guaranteed, implying that sources of funding for the repayment LA/MSF other than revenue from aircraft sales were available. The European Communities focuses its analysis on the German and UK A380 contracts.[3209] Under both contracts, the European Communities asserts that **[***]**.[3210] The European Communities considers that these guarantees place Airbus in the same position as the Howe Leather company in *Australia – Leather*, where the European Communities argues the fact that the assets of Howe's parent company guaranteed a loan provided by the Australian government to Howe was an important factor relied upon by the panel to conclude that it was not a prohibited export subsidy.[3211] The United States argues that because the guarantee under the UK A380 contract "does not ensure repayment of {LA/MSF} regardless of whether Airbus succeeds in delivering **[***]** copies of the A380, it does not sever the tie between the provision of {LA/MSF} and Airbus' commitment to a level of performance that necessarily involves exportation".[3212] Moreover, it considers the European Communities' reliance on the *Australia – Leather* to be inapposite because in that dispute it alleges "the security provided by Howe's parent (in the form of a lien on assets and undertakings) was a true guarantee of repayment of the government loan, as opposed to a 'guarantee' to pay levies due to the government on a per sale basis".[3213]

7.670 The guarantee provided under the UK A380 contract relates to **[***]**.[3214] Similarly, under the German A380 contract, **[***]**.[3215] The European Communities explains that both guarantees will operate when the borrowing Airbus entity **[***]**. We agree with the United States that this type of guarantee is different from the guarantee considered in *Australia – Leather*. In *Australia – Leather*, one of the factors that led the panel to find that a 15-year preferential loan from the Australian government to the Howe Leather company was not a prohibited export subsidy was that it was "secured by a lien on the assets and undertakings of ALH {Howe's parent company}, which is itself responsible for repayment of the loan, and not merely on the assets and undertakings of Howe."[3216] The guarantees provided under the German and UK A380 contracts are clearly of a different kind as they will only come into play if the loan recipients do not make a required repayment following delivery of an aircraft.

7.671 Finally, the European Communities identifies two "countervailing explanations" or "legitimate commercial reasons" that it submits explain why the challenged LA/MSF contracts contain delivery-dependent repayment provisions, which the European Communities submits "have nothing to do with export contingent subsidies".[3217] First, the European Communities notes that Airbus' revenues are generated by and large from LCA sales, with between 83% and 85% of the gross price paid on delivery. According to the European Communities, this makes aircraft deliveries the most reliable indication that sufficient cash-flow will be on hand to make repayments, giving both Airbus and the EC member States a strong commercial incentive to time repayments to coincide with delivery of LCA.[3218] Second, the European Communities submits that timing repayment with

[3208] US, SWS, para. 224.
[3209] EC, FWS, para. 673; EC, Answer to Panel Question 65.
[3210] EC, Answer to Panel Question 65.
[3211] EC, FWS, para. 673.
[3212] US, SWS, para. 228.
[3213] US, SWS, para. 228.
[3214] UK A380 contract, Article 20, Schedule 4, Exhibit US-79 (BCI).
[3215] German A380 contract, Section 14, Exhibit US-72 (BCI).
[3216] Panel Report, *Australia – Automotive Leather II*, para. 9.75.
[3217] EC, FWS, paras. 657-666; EC, FNCOS, para. 80; EC, SNCOS, para. 157; EC, Answer to Panel Question 217; EC, Comments on US Answer to Panel Question 217.
[3218] EC, FWS, para. 659.

BCI deleted, as indicated **[***]**

deliveries allocates the risk between Airbus and the EC member State governments in accordance with the risk each party agreed to accept. A repayment schedule based on repayment dates fixed at the time when the contracts were concluded would result in a distribution of risk that is different from that agreed between the parties.[3219] Thus, the European Communities argues that the Airbus governments agreed to allow repayment upon delivery – "not to induce Airbus to export, but to accommodate the company's cash flow needs and allocate risk".[3220]

7.672 According to the European Communities, the commercial validity of both "countervailing explanations" it advances is confirmed by the fact that Airbus' risk-sharing suppliers use the same repayment term structure as the EC member State governments.[3221] The European Communities emphasizes that such market-based lenders "care only about securing their return, and not whether that return is secured via exports rather than domestic sales".[3222] In its view, the "fact that some deliveries involve exportation was not the parties' reason for constructing the repayment terms {of the LA/MSF contracts} by reference to deliveries. Rather, exports are an incidental feature that results from an exogenous factor – marketplace demand, which turns both Airbus and Boeing into export-oriented firms".[3223] Thus, the European Communities submits that the EC member States' motivations for using deliveries as the trigger for repayment were based on the same legitimate commercial considerations that motivate market actors, and not any desire to grant export contingent subsidies.

7.673 The United States notes that neither of the European Communities' "countervailing explanations" address the level of sales over which LA/MSF is to be repaid, even though in its view this is an essential element of Airbus' contractual obligation that demonstrates that LA/MSF is provided in exchange for an undertaking by Airbus that can be fulfilled only if it exports. Moreover, the United States alleges that the European Communities has advanced no evidence to substantiate its assertions.[3224] In any case, the United States submits that even if the EC member State governments had held non-export-related motivations when agreeing to the repayment terms of the LA/MSF contracts, the "possible existence of additional, non-export-related motivations that could (according to the EC) explain the design of Airbus' obligations ... does not sever the tie between the provision of {LA/MSF} and actual or anticipated exportation or export earnings".[3225]

7.674 Quoting from the Appellate Body Report in *Canada – Aircraft*, the United States recalls that "th{e} relationship of contingency, between the subsidy and export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which is likely to be decisive in any given case".[3226] According to the United States, "the total configuration of the facts" may include "official statements by governments indicating the intention behind the granting of the subsidies".[3227] In the present dispute, the United States alleges that it has adduced ample evidence demonstrating that increasing exports is among the motivations of the Airbus governments for providing LA/MSF. In particular, the United States points to:

(a) the statement by French Prime Minister Lionel Jospin that the French government "will give Airbus the means to win the battle against Boeing";[3228]

[3219] EC, FWS, paras. 662-663.
[3220] EC, Answer to Panel Question 217.
[3221] EC, FWS, paras. 660 and 664; EC, Comments on US Answer to Panel Question 217.
[3222] EC, SNCOS, para. 157.
[3223] EC, FWS, para. 665.
[3224] US, Answer to Panel Question 217.
[3225] US, Answer to Panel Question 217.
[3226] US, Answer to Panel Question 217, quoting Appellate Body Report, *Canada – Aircraft*, para. 167 (italicized emphasis original; underline emphasis added by the United States).
[3227] US, Answer to Panel Question 217, quoting from Australia Third Party Oral Statement, para. 10.
[3228] Exhibit US-1, discussed in US, FWS, paras. 1 and 92.

BCI deleted, as indicated **[***]**

(b) the UK government's statement, upon announcing the provision of LA/MSF for the A380, that "{w}ithin 25 years Airbus has grown to take 55% of the civil aircraft production market and contributes £1 billion to the UK's trade balance";[3229]

(c) the British Prime Minister's statement, upon the public unveiling of the A380, that "{t}he export gains will run into the billions of pounds".[3230]

(d) the communiqué issued by ministers of the Airbus governments at the July 2006 Farnborough air show in which they "reaffirmed their agreement to support Airbus to continue to innovate and to develop programmes in the context of international competition";[3231]

(e) the Spanish A380 LA/MSF contract's identification of **[***]**;[3232]

(f) the acknowledgment in the preamble to the Spanish A340-500/600 LA/MSF contract that **[***]**;[3233]

(g) the statement by Airbus, in its application to the German government for LA/MSF for the A380, that a benefit of providing the requested LA/MSF would be an **[***]**;[3234] and

(h) other evidence that the European Communities has designated as HSBI.[3235]

7.675 In our view, a government's motivation for granting a particular subsidy, to the extent it can be established from the evidence and arguments presented by the parties in dispute, will be highly relevant when evaluating whether a subsidy has been granted contingent in fact upon export performance within the meaning of Article 3.1(a) of the SCM Agreement. In the present instance, the United States has presented evidence of alleged motivations which, in light of all the facts and circumstances, it considers demonstrates that the challenged LA/MSF contracts were entered into contingent in fact upon anticipated export performance. We examine the probative value of this evidence in conjunction with the remainder of the evidence advanced by the United States in the paragraphs that follow.[3236]

7.676 Quite apart from our views on the relevance of the motivations behind the provision of LA/MSF, we do not consider the European Communities to have done enough to substantiate that the two "countervailing explanations" it has advanced actually explain why the EC member States required each of the challenged LA/MSF contracts to be repaid with revenue generated from LCA sales. First, we note that the European Communities has only specifically addressed the relevance of the two "countervailing explanations" in the context of the UK A380 contract,[3237] stating that the same arguments apply *mutatis mutandis* to the other challenged LA/MSF contracts.[3238] Second, even in the context of the UK A380 LA/MSF contract, the European Communities has pointed to no evidence that substantiates the "commercial reasons" it alleges were behind the UK government's provision of LA/MSF on sales-based repayment terms. The one document the European Communities does rely

[3229] Exhibit US-360.
[3230] Exhibit US-361.
[3231] Exhibit US-63.
[3232] Spanish A380 contract, Exhibit US-73 (BCI).
[3233] Spanish A340-500/600 contract, Exhibit US-37 (BCI).
[3234] Exhibit US-357 (BCI).
[3235] US, FWS, HSBI Appendix, paras. 34-36, 55; US SCOS, paras. 5-6.
[3236] *See*, at paras. 7.679-7.690 below.
[3237] EC, FWS, paras. 657-666.
[3238] EC, FWS, para. 614.

BCI deleted, as indicated **[***]**

upon is a French Senate Report concerning the French government's support for civil aircraft construction over the period 1996 to 1997, an extract of which was submitted by the United States in Exhibit US-337.[3239] However, the particular passages of this Report cited by the European Communities in support of its allegations cannot be found in the extract contained in Exhibit US-337. In any case, the French Senate Report predates the French government's LA/MSF contracts for the A380 and A340-500/600. Third, the European Communities refers to evidence and arguments it has submitted in respect of the "nearly identical" financing arrangements between Airbus and its risk-sharing suppliers to show that the EC member States acted according to market principles. However, even if we were to accept that such contracts are sufficiently comparable to the LA/MSF contracts at issue (which we do not),[3240] it does not automatically follow that the EC member States and the risk-sharing suppliers held the same objectives when they agreed to finance development of the A380 through sales-dependent repayment terms.

7.677 In any case, even assuming *arguendo* that the EC member State governments agreed to the particular repayment terms of LA/MSF for commercial reasons, this fact alone would not settle the question whether the LA/MSF subsidies were granted contingent in fact upon export performance, because such motivations would need to be considered together with all other relevant facts and circumstances. In this regard, we recall that "th{e} relationship of contingency, between the subsidy and export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which is likely to be decisive in any given case".[3241] Moreover, we note that Article 3.1(a) of the SCM Agreement provides that export contingency may be the sole condition governing the grant of a prohibited export subsidy or it may be "one of several other conditions".[3242] Thus, even if we were to accept the "countervailing explanations" advanced by the European Communities, this would not necessarily preclude a finding of export contingency, if it could be inferred from the "total configuration of the facts" that at least one of the conditions or reasons for the provision of LA/MSF was the anticipation of export performance.

7.678 Turning to the exchange of commitments themselves, we note that under each of the seven LA/MSF contracts at issue, Airbus was required to repay the loaned principal plus any interest from the proceeds of the sale of a specified number of LCA developed with the financing provided by the EC member States. Although the text of the repayment provisions is neutral as to the origin of the required sales, it is clear from various pieces of information that achieving the level of sales needed to fully repay each loan would require Airbus to make a substantial number of exports.[3243] Exports were therefore not merely incidental to full repayment of the loans; and they could not be replaced with domestic sales in order to achieve the number of sales necessary to fully repay the loans. Moreover, while it is true that the contracts impose no obligation on Airbus to make any sales at all, the European Communities has explained that the EC member States expected their LA/MSF contributions would be fully repaid and achieve their target rate of return.[3244] Indeed, it is on the basis

[3239] Collin (Yvon), *Senate Report No. 367 (1996-1997), Rapport d'Information "Mission de contrôle effectuée sur le soutien public à la construction aéronautique civile," Commission des Finances, du Contrôle Budgétaire et des Comptes Économiques de la Nation*, Exhibit US-337A.

[3240] *See*, para. 7.480 above.

[3241] Appellate Body Report, *Canada – Aircraft*, para. 167 (Italicized emphasis original; underline emphasis added).

[3242] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 111 (emphasis added).

[3243] French A380 contract, Exhibits US-358 and US-365 (BCI); US, FWS, HSBI Appendix, paras. 39-41. German A380 contract, Exhibits US-358 and US-72 (BCI). Spanish A380 contact, Exhibits US-358 and US-73 (BCI). UK A380 contract, Exhibits US-358 and US-79 (BCI); US, FWS, HSBI Appendix, para. 42. French A340-500/600 contract, Exhibit US-36 (BCI); US, FWS, HSBI Appendix, paras. 50-53, Exhibit DS316-EC-HSBI-0001143; US, SCOS, HSBI Appendix, paras. 2-7. Spanish A340-500/600 contract, Exhibits US-37 (BCI), US-366 and US-367. French A330-200 contract, Exhibit US-78 (BCI); US, FWS, HSBI Appendix, paras. 57-60; US, SCOS, HSBI Appendix, paras. 2-7.

[3244] EC, FWS, para. 638.

BCI deleted, as indicated **[***]**

of the EC member States' expectations of full repayment over the number of LCA sales predicted in the Airbus business cases for each of the relevant LCA models, that the European Communities argues the relevant contractual rates of return should be calculated.[3245] The EC member States also knew that Airbus was a highly export-oriented company.[3246] It follows that the EC member States must have been counting on Airbus to make LCA sales that necessarily included a substantial number of exports when concluding the LA/MSF contracts. This means that the EC member States, fully expecting to be repaid, must have held a high degree of certainty that the provision of LA/MSF would result in Airbus making those export sales. In our view, without being decisive, this evidence supports the view that the provision of LA/MSF on sales-dependent repayment terms was, at least in part, "conditional" or "dependent for its existence" upon the EC member States' anticipated exportation or export earnings.

Other "additional" evidence

7.679 We recall that in addition to the evidence demonstrating that each of the LA/MSF contracts involved an exchange of commitments between Airbus and the EC member States, the United States points to various other pieces of information and evidence it alleges corroborate the alleged "tie" between each of the subsidy measures and the EC member States' anticipated exportation or export earnings.

7.680 Starting with the A380, we find the additional evidence advanced by the United States in respect of the German LA/MSF to be compelling. In particular, the preamble to the LA/MSF contract shows that the German government was **[***]**. Moreover, Section 2.5 of the contract obligates Airbus Deutschland **[***]**.[3247] In addition, Section 12 of the LA/MSF contract provides that the German government would be entitled to **[***]**. Section 12 also envisages that the German government may **[***]**. We are satisfied that together with the evidence the United States has advanced concerning the exchange of commitments between Airbus and the German government, the evidence discussed in this paragraph demonstrates that the German A380 LA/MSF contract was, in fact, concluded at least in part on the *condition* or *because* of the German government's anticipation of exportation.[3248]

7.681 We also find persuasive the additional evidence the United States has pointed to in respect of the Spanish A380 contract. In particular, we note that the sixth preambular paragraph that is cited by the United States explicitly states that the Spanish government's support for the A380 project is **[***]**.[3249] The seventh preambular paragraph then goes on to identify that the **[***]**.[3250] We are satisfied that together with the evidence the United States has advanced concerning the exchange of commitments between Airbus and the Spanish government, the evidence discussed in this paragraph

[3245] *See, also,* paras. 7.404-7.406 above.

[3246] In making this point, we recognize that pursuant to footnote 4 of the SCM Agreement, "{t}he mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of {Article 3.1(a)}". Thus, we take Airbus' export orientation into account in conjunction with the other evidence that is before us.

[3247] Exhibit US-72 (BCI) (emphasis added).

[3248] In arriving at this conclusion, we have reviewed and considered all of the facts and circumstances surrounding the granting of the German A380 LA/MSF subsidies to Airbus that were presented and argued by the parties. We have also taken into account the United States' observation that the European Communities did not provide a copy of any German government "critical project appraisal" for the A380, despite being asked to provide a copy of "any 'critical project appraisal" documents in Facilitator Question 13(f) during the Annex V process. To the extent that any such evidence is not explicitly referred to in this paragraph as support for our conclusion, we consider that it does not detract from the United States' case or our findings in respect of this LA/MSF measure.

[3249] Exponen Sexto.

[3250] Exponen Séptimo.

BCI deleted, as indicated **[***]**

demonstrates that the Spanish A380 LA/MSF contract was, in fact, concluded at least in part on the *condition* or *because* of the Spanish government's anticipation of exportation.[3251]

7.682 As regards the UK A380 contract, the United States identifies various pieces of other evidence it argues supports its case. Among these is a statement reportedly made by Prime Minister Blair in January 2005 when speaking at the public unveiling of the A380 where he stated that "{t}he export gains will run into the billions of pounds".[3252] In addition, the United States points to a press release published by the UK Department of Trade and Industry in March 2000 announcing that the UK government had agreed to invest GBP 530 million in the A380 project, explaining that "{w}ithin 25 years Airbus has grown to take 55% of the civil aircraft production market and contributes GBP 1 billion to the UK's trade balance".[3253] On their own, we consider these reported statements to have only a relatively low probative value. Having committed large amounts of public monies to the A380 project, it is in our view only natural to find public officials emphasizing the perceived benefits of government participation in the Airbus project in their public statements, which in the present case, the UK government expected would involve exports. Thus, when read in isolation, the above two statements provide only little support for the United States' submissions.

7.683 The United States also relies upon the representation and warranty made by BAE Systems in Article 3 of the UK LA/MSF contract that **[***]**.[3254] The United States alleges that the European Communities refused to provide a copy of BAE Systems' **[***]**. However, it notes that on the basis of the Airbus Deutschland **[***]**, the German government was well aware of, and relied upon, anticipated exportation in deciding to provide LA/MSF. In the light of the European Communities' alleged refusal to provide a copy of BAE Systems' **[***]**, the United States asks us to draw the "logical inference ... that **[***]**".[3255] In our view, the warranty provided by BAE Systems is significant as it shows that the UK government placed contractual reliance on the accuracy of the representations (and in particular **[***]**) made by BAE Systems in its LA/MSF application when entering the A380 LA/MSF. Thus, overall, although not as clear as in the case of the German and Spanish A380 contracts, we are satisfied that together with the evidence the United States has advanced concerning the exchange of commitments between Airbus and the UK government, the contractual warranty and the two above-mentioned statements demonstrate that the UK A380 LA/MSF contract was, in fact, concluded at least in part on the *condition* or *because* of the UK government's anticipation of exportation.[3256]

[3251] In arriving at this conclusion, we have reviewed and considered all of the facts and circumstances surrounding the granting of the Spanish A380 LA/MSF subsidies to Airbus that were presented and argued by the parties. We have also taken into account the United States' observation that the European Communities did not provide a copy of any Spanish government "critical project appraisal" for the A380, despite being asked to provide a copy of "any 'critical project appraisal" documents in Facilitator Question 13(f) during the Annex V process. To the extent that any such evidence is not explicitly referred to in this paragraph as support for our conclusion, we consider that it does not detract from the United States' case or our findings in respect of this LA/MSF measure.

[3252] Exhibit US-361.

[3253] Exhibit US-360.

[3254] Article 3.1.4, UK A380 LA/MSF contract, Exhibit US-79 (BCI).

[3255] US, SWS, paras. 169-171. As we have previously observed, the questions asked by the Facilitator during the Annex V process did not specifically request the European Communities to provide copies of the A380 LA/MSF applications.

[3256] In arriving at this conclusion, we have reviewed and considered all of the facts and circumstances surrounding the granting of the UK A380 LA/MSF subsidies to Airbus that were presented and argued by the parties. To the extent that any such evidence is not explicitly referred to in this paragraph as support for our conclusion, we consider that it does not detract from the United States' case or our findings in respect of this LA/MSF measure.

BCI deleted, as indicated **[***]**

7.684 Finally in respect of the A380, the United States refers to four provisions of the French A380 contract and one statement reportedly made by French Prime Minister, Lionel Jospin in March 2000, as additional evidence supporting its case that the French A380 LA/MSF contract is a prohibited export subsidy. The first of the contractual provisions relied upon by the United States is Article 6.1. This basically establishes Airbus' repayment obligations, stipulating that Airbus has to make repayments **[***]**. We find it difficult to see what more this adds to Articles 6.2 and 6.3, which the United States relies upon to demonstrate the exchange of commitments. The other contractual provisions the United States submits support its complaint require Airbus to **[***]** (Article 1.3); **[***]** (Article 8.2); and provide the government with the right to **[***]** if Airbus breaches its obligations (Article 9.1). In our view, these provisions are to be understood as concerning the proper advancement of the A380 programme, in the sense of developing the A380 and bringing the project to the point where the particular aircraft is ready for commercial production and sale. The evidence and argument presented by the United States has not persuaded us that the **[***]** should be given a broader meaning, encompassing the attainment or maintenance of any level of LCA deliveries or exports. Thus, we agree with the European Communities that the provisions in the French A380 contract the United States relies upon do not support its complaint.

7.685 The only other specific piece of additional evidence the United States relies upon is the statement reportedly made by French Prime Minister, Lionel Jospin in March 2000 when, responding to questions in French Parliament, he said "{w}e will give Airbus the means to win the battle against Boeing".[3257] The question posed to the Prime Minister is not disclosed. However, the report goes onto say that "{w}ith the creation of ... EADS, Jospin and his government and its European partners had made a commitment to build a strong European aerospace industry". It also explains that Airbus was "currently in the process of securing government support, in the form of low-interest loans" for the A380. We do not believe this statement adds much in the way of support to the United States export contingent subsidy allegations. Thus, overall, on the basis of the total configuration of the facts constituting and surrounding the provision of French LA/MSF for the A380, including the evidence the United States has advanced on the exchange of commitments between Airbus France and the French government, we find that the United States has failed to demonstrate that the French government provided LA/MSF, even in part, on the *condition* or *because* of its anticipation of exports.

7.686 Moving on to the French government's provision of LA/MSF for the A340-500/600, the United States identifies four provisions of the French A340-500/600 contract and certain information found in the French government's critical project appraisal as additional evidence supporting its case that this measure is a prohibited export subsidy. Three of these provisions are very similar to Articles 6.1, 1.3 and 9.1 of the French A380 contract to the extent they establish repayment and reporting obligations on Airbus and grant the French government the right to terminate the contract in the event of breach. In particular, Article 7 requires Airbus to **[***]**; pursuant to Article 9 Airbus must **[***]**; and under Article 10, the government is given the right to **[***]** if Airbus breaches its obligations. We tend to agree with the European Communities that these three provisions do not support the United States' position. The United States also relies upon Annex 5 of the A340-500/600 contract, which requires Airbus **[***]**. Again, we find it difficult to see how this obligation, alone or taken together with evidence on exchange of commitments, demonstrates that the French government provided LA/MSF for the A340-500/600 on the *condition* or *because* of its anticipated export performance. Similarly, we are not persuaded by the information referred to by the United States in the HSBI Appendix to its first written submission on the French government's critical project appraisal. In our view, this information does not advance the United States' case on the question of contingency. Thus, on the basis of the total configuration of the facts constituting and surrounding the provision of French LA/MSF for the A340-500/600, including the evidence the United States has advanced on the exchange of commitments between Aérospatiale and the French government, we find

[3257] Exhibit US-1.

BCI deleted, as indicated **[***]**

that the United States has failed to demonstrate that the French government provided LA/MSF for the A340-500/600, even in part, on the *condition* or *because* of its anticipation of exports.

7.687 The United States relies on two references in the Spanish A340-500/600 contract as additional evidence supporting its case that this measure is a prohibited export subsidy. In particular, the United States relies upon the first preambular paragraph, which in relevant part reads **[***]**. The United States points out that the same preambular paragraph goes on to state: **[***]**. The United States argues that this latter statement means that in providing LA/MSF for the A340-500/600, the Spanish government is **[***]**.[3258] In our view, when read together as a whole, the two statements made in the first preambular paragraph are close (but not identical) to those made in the Spanish A380 contract. One particular difference is that unlike the statements referred to by the United States in the Spanish A380 contract, they do not explicitly identify the Spanish governments' justification for entering into the A340-500/600 contract. Moreover, it is apparent that the information referred to is **[***]** for the purpose of arriving at the conclusion that **[***]**. In addition to the preambular language, the United States relies upon Article 1 of the Spanish A340-500/600 contract. However, as we read it, this simply repeats CASA's obligation to **[***]**. Again, we find it difficult to see how this obligation, alone or taken together with evidence on exchange of commitments, demonstrates that the Spanish government provided LA/MSF for the A340-500/600 on the *condition* or *because* of its anticipated export performance. Thus, on the basis of the total configuration of the facts constituting and surrounding the provision of Spanish LA/MSF for the A340-500/600, including the evidence the United States has advanced on the exchange of commitments between CASA and the Spanish government, we conclude that the United States has failed to establish that the Spanish government provided LA/MSF for the A340-500/600, even in part, on the *condition* or *because* of its anticipation of exports.

7.688 Finally in respect of the provision of French LA/MSF for the A330-200, the United States identifies four provisions of the French contract and certain information contained in the French government's critical project appraisal as additional evidence supporting its case that this measure is a prohibited export subsidy. The provisions set out essentially the same obligations the United States relies upon in the context of the French A340-500/600 contract. In particular, Article 6 requires Airbus to **[***]**; pursuant to Article 7 Airbus must **[***]**; under Article 8, the government is given the right to **[***]** if Airbus breaches its obligations; and pursuant to Annex 5, Airbus must **[***]**. As with the appearance of these provisions in the French A340-500/600 contract, we tend to agree with the European Communities that they do not support the United States' position, whether considered alone or together with the evidence on the exchange of commitments. The information referred to by the United States in the HSBI Appendix to its first written submission on the French government's critical project appraisal also does not advance its case on the question of contingency. Thus, on the basis of the total configuration of the facts constituting and surrounding the provision of French LA/MSF for the A340-500/600, including the evidence the United States has advanced on the exchange of commitments between Aérospatiale and the French government, we find that the United States has failed to demonstrate that the French government provided LA/MSF for the A330-200, even in part, on the *condition* or *because* of its anticipation of exports.

Conclusion

7.689 Having carefully reviewed and considered the evidence and related arguments advanced by the parties as they concern each of the challenged LA/MSF measures, we find that the United States has demonstrated that the German, Spanish and UK A380 contracts amount to prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement. However, we consider that the United States has not shown that the granting of the other challenged LA/MSF

[3258] US, SWS, paras. 200 and 201.

subsidies was contingent in fact upon anticipated export performance, within the meaning of the same provisions.

7.690 The European Communities has argued in this dispute that if the United States' "interpretation of the legal standard {were} accepted, then findings of export contingent subsidies would be more likely in the case of small or export dependent economies ... or in the case of global markets, such as the various types of LCA commercialized by both Airbus and Boeing".[3259] However, we note that the United States has been clear in explaining that it does not consider the concept of export contingency to vary according to the size of an economy, its dependency on exports or the degree to which the market for the allegedly subsidized product is globalized.[3260] Moreover, we do not accept that the scenario advanced by the European Communities is a consequence of our findings in respect of the German, Spanish and UK A380 LA/MSF measures. Indeed, although all of the seven challenged LA/MSF contracts were concluded for the purpose of financing the development of a globalized product manufactured by an export-oriented company for primarily a global market, and subject to sales-dependent repayment terms that could only be satisfied through Airbus making an important number of exports, we have found that the United States has demonstrated that only three of the challenged measures constitute subsidies granted contingent in fact upon anticipated export performance. Our conclusion that the German, Spanish and UK A380 LA/MSF contracts were prohibited export subsidies is based on what we have objectively inferred from the "total configuration of the facts constituting and surrounding the granting of the subsidy".[3261] These facts included not only evidence showing that compliance with the sales-dependent contractual repayment terms would necessarily involve exportation, but also evidence of the three governments' anticipation of export performance, the fact that they counted upon and expected Airbus to fully repay the loaned principal plus interest, as well as other contractual provisions and information advanced by the United States that revealed at least part of the respective government's motivation for entering into each contract.[3262]

7.691 We now turn to examine the United States' second claim in respect of these measures, namely that the LA/MSF contracts for the A380, A340-500/600 and A330-200 constitute subsidies contingent *in law* upon anticipated export performance, within the meaning of Article 3.1(a) of the SCM Agreement.

(iii) Whether the LA/MSF Measures Amount to Subsidies that are Contingent In Law upon Anticipated Export Performance

7.692 In addition to claiming that the provision of LA/MSF for the A380, A340-500/600 and A330-200 was contingent *in fact* upon anticipated export performance, within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement, the United States claims that the same measures were also contingent *in law* upon anticipated export performance, within the meaning of the same legal provisions. The United States presents this additional claim making essentially the same legal argument used to advance its in fact export contingency claims, namely, that each of the seven LA/MSF measures is a prohibited export subsidy because it involved (i) the granting or maintenance of a subsidy; (ii) that is tied to; (iii) anticipated exportation or export earnings.[3263]

7.693 The United States recalls that the Appellate Body in *Canada – Aircraft* noted that the legal standard expressed by the term "contingent" in Article 3.1(a) of the SCM Agreement is the same for subsidies that are contingent in law and those that are contingent in fact, but that the type of evidence

[3259] EC, SWS, para. 229.
[3260] US, Answer to Panel Question 11.
[3261] Appellate Body Report, *Canada – Aircraft*, para. 167.
[3262] *See*, para. 7.680 - 7.683 above.
[3263] US, FWS, para. 343.

BCI deleted, as indicated **[***]**

that can be employed to demonstrate the two types of export contingency is different.[3264] Thus, in advancing its claim that each of the challenged LA/MSF measures was granted contingent *in law* upon anticipated export performance, the United States relies upon essentially the same evidence we have reviewed above to establish that the provision of LA/MSF involved the granting of a subsidy, and that the relevant EC member States anticipated exportation or export earnings at the time LA/MSF was provided.[3265] However, reflecting the nature of its *in law* contingency claim, the United States focuses particular attention on the terms and conditions of the challenged LA/MSF contracts to support its submission that the granting of the subsidies was contingent *in law* upon anticipated export performance. In this regard, the United States argues that the terms and conditions of each of the challenged LA/MSF contracts implicitly substantiate its claim because, when considered in the light of the number of LCA sales the EC member State governments expected would be achieved in Europe and abroad, they demonstrate that the "words actually used" in those contracts – in particular, the contractual terms tying the provision of LA/MSF to repayment over a specific number of LCA sales – give rise to the "necessary implication" that the provision of LA/MSF is contingent *in law* upon anticipated export performance. [3266]

7.694 The European Communities rejects the United States' claim, relying upon many of the same legal and factual arguments raised in the context of the United States' in fact export contingency claim. In addition, to the extent that the United States pursues its complaint in reliance on documents and information that cannot be found in the text of the challenged measures, the European Communities asks the Panel to dismiss the United States' allegations on the ground that they are not properly constituted *in law* contingency claims. [3267]

7.695 As we have understood it, the United States' complaint raises two threshold questions that we believe must be resolved before we can turn to evaluate its substantive merits. These two questions are: (i) whether Article 3.1(a) and footnote 4 envisage the possibility of bringing a claim of subsidization contingent in law upon *anticipated* export performance; and (ii) whether the United States is entitled to rely upon more than just the text of the instrument granting the LA/MSF subsidies in order to demonstrate that they were granted contingent *in law* upon anticipated export performance.

Contingency in law upon anticipated export performance

7.696 We recall that Article 3.1(a) and footnote 4 of the SCM Agreement provide as follows:

> "3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];
>
> ---
>
> [4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[3264] US, FWS, para. 327, citing Appellate Body Report, *Canada – Aircraft*, para. 167.
[3265] US, FWS, paras. 344-351; 361-371; 377-382; US, SWS, paras. 137-140.
[3266] *See*, para. 7.585.
[3267] *See*, para. 7.592.

BCI deleted, as indicated **[***]**

> [5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement."[3268]

7.697 Article 3.1(a) speaks in general terms of subsidies "contingent, in law or in fact, ... upon export performance". Footnote 4, which is placed after the word "fact" in Article 3.1(a), clarifies that "{t}his standard is met when the facts demonstrate that the granting of a subsidy, *without having been made legally contingent upon export performance*, is *in fact* tied to *actual or anticipated exportation or export earnings*".[3269] In our view, when read in isolation, the language of footnote 4 suggests that the concept of "anticipated" exportation or export earnings is limited to claims of "in fact" export contingency.

7.698 Relying upon certain Appellate Body observations in *Canada – Autos*, both parties have expressed the view that the legal standard for the determination of whether a subsidy is contingent in fact or in law upon export performance is the same, and that only the type of evidence that may be relied upon differs. According to the United States, this means that the text of Article 3.1(a) and footnote 4 equate the concepts of "contingent upon" and "tied to", as well as "export performance" and "actual or anticipated exportation or export earnings" for the purpose of both types of claims.[3270] The European Communities appears to agree with the United States.[3271]

7.699 The particular passage from the Appellate Body Report in *Canada – Autos* that both parties rely upon explains:

> "Although we are not examining whether the subsidy in this case is contingent 'in fact' upon export performance, we note that footnote 4 to Article 3.1(a) uses the words 'tied to' as a synonym for 'contingent' or 'conditional'. As the legal standard is the same for *de facto* and *de jure* export contingency, we believe that a 'tie', amounting to the relationship of contingency, between the granting of the subsidy and actual or anticipated exportation meets the legal standard of 'contingent' in Article 3.1(a) of the SCM Agreement." [3272]

7.700 In our view, this Appellate Body statement was more directed to explaining that the legal standard for "contingency" does not vary between an in fact or in law contingency claim, than to affirming that the notion of anticipated exportation or export earnings in footnote 4 applies equally to in law and in fact contingency claims. Nevertheless, when read in the context of footnote 4, we agree with the parties that the concept of export performance described in Article 3.1(a) can be properly understood to refer to actual or *anticipated* exportation or export earnings.

7.701 As we have noted above, footnote 4 clarifies the circumstances when the granting of a subsidy will be contingent in fact upon export performance for the purpose of Article 3.1(a). This contingent relationship is described in terms of the granting of a subsidy being in fact "tied to" actual or anticipated exportation or export earnings. Thus, in the context of a claim that a subsidy is granted contingent in fact upon export performance, footnote 4 equates "tied to" with "contingent", and "actual or anticipated exportation or export earnings" with "export performance". The Appellate Body has noted that footnote 4 does not alter the contingency standard between in fact and in law contingent subsidy claims.[3273] In other words, although not directly applicable to in law contingent

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[3268] Underline added.
[3269] Emphasis added.
[3270] US, FWS, para. 327; US, Answer to Panel Question 216.
[3271] EC, FWS, para. 606; EC, Answer to Panel Question 216.
[3272] Appellate Body Report, *Canada – Autos*, para. 107 (footnote omitted, underline added).
[3273] *See*, para. 7.699 above.

BCI deleted, as indicated **[***]**

subsidy claims,[3274] the Appellate Body has read footnote 4 as informing the notion of what amounts to contingency for the purpose of an in law contingent subsidy claim. In our view, it is equally appropriate to read footnote 4 as informing the meaning of "export performance" for the purpose of in law contingent subsidy claims under Article 3.1(a). Accordingly, we see no obstacle to the United States raising its in law export contingency complaint against the seven LA/MSF measures under Article 3.1(a) of the SCM Agreement.

Evidence the United States asserts demonstrates that the LA/MSF subsidies were granted contingent *in law* upon anticipated export performance

7.702 To a large extent, the evidence the United States relies upon when making its claim of in law export contingency overlaps with the evidence it presents for the purpose of its in fact export contingency claim. As already noted above, the United States uses essentially the same evidence to argue that the provision of LA/MSF involved the granting of a subsidy, and that the relevant EC member States anticipated exportation or export earnings at the time LA/MSF was provided. In addition, under both sets of claims the United States relies upon the sales-dependent repayment terms of the LA/MSF contracts, in conjunction with Airbus' Global Market Forecasts and the project appraisals prepared by the Airbus governments, to establish the elements of in law contingency.[3275] For example, the United States notes that Airbus' 2000 Global Market Forecast projected that orders for aircraft with more than 400 seats by European airlines would total only 247.[3276] Yet, the UK A380 LA/MSF contract requires Airbus to make repayments over **[***]** sales; the German contract requires Airbus to repay over **[***]** sales; the French contract requires Airbus to repay over **[***]** sales; and the Spanish contract requires Airbus to repay over **[***]** sales.[3277] Given a forecast of 247 European sales for all aircraft with more than 400 seats (a segment the United States submits includes not only the A380, but also the Boeing 747 and 777-300), the United States asserts that these numbers translate into UK subsidies tied to at least **[***]** export sales; German subsidies tied to at least **[***]** export sales; French subsidies tied to at least **[***]** export sales; and Spanish subsidies tied to at least **[***]** export sales.[3278] The United States presents similar evidence and arguments in respect of the challenged A340-500/600 and A330-200 contracts.[3279] Thus, the United States submits that, when read in the light of the Airbus Global Market Forecasts and the government project appraisals, the sales-dependent repayment provisions of each of the LA/MSF contracts necessarily imply a tie to export performance.

7.703 The United States argues that its reliance on documents extraneous to the challenged LA/MSF measures is supported by the Appellate Body observations in *Canada – Autos*. In particular, the United States recalls that in *Canada – Autos*, the Appellate Body stated that a subsidy is contingent in law upon export performance not only when "the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure", but also "where the condition to export is clearly, though implicitly, in the instrument comprising the measure."[3280] In that case, the Appellate Body concluded that "for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfilment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the

[3274] We recall in this regard that footnote 4 explicitly confines its direct relevance to situations when "the facts demonstrate that the granting of a subsidy, *without having been made legally contingent upon export performance*, is in fact tied to actual or anticipated export performance ...".

[3275] US, Answer to Panel Question 10.

[3276] Airbus, Global Market Forecast 2000, at 37, Exhibit US-358; US, FWS, para. 346; US, Answer to Panel Question 10.

[3277] US, FWS, para. 353; US, Answer to Panel Question 10.

[3278] US, FWS, para. 354; US, Answer to Panel Question 10.

[3279] US, FWS, paras. 372-375, 383-386; US FWS, HSBI Appendix; US, Answer to Panel Question 10.

[3280] Appellate Body Report, *Canada – Autos*, para. 100.

BCI deleted, as indicated **[***]**

measure".[3281] Thus, the United States argues that when examining whether a subsidy has been granted contingent in law upon export performance, it is appropriate to consider not only the text of the measure, but also how the measure "actually work{s}".[3282] Therefore, according to the United States, reliance on the Global market forecast and the government project appraisals, to the extent they help to understand how the LA/MSF measures actually work, is permissible for the purpose of substantiating its claim of in law export contingency.

7.704 In *Canada – Autos*, the European Communities and Japan brought a complaint against an import duty exemption regime applied by Canada to certain imports of motor vehicles. Two aspects of the regime that were challenged by the complainants concerned: (i) a limitation on imports eligible for duty exemption that was set according to the ratio between a manufacturer's domestic vehicle production and its sales in Canada; and (ii) a requirement that each manufacturer meet certain levels of Canadian value added ("CVA") in order to obtain the duty exemption. The first aspect was challenged as constituting a subsidy granted contingent in law upon export performance within the meaning of Article 3.1(a) of the SCM Agreement; whereas the second was challenged as a prohibited import substitution subsidy under the terms of Article 3.1(b) of the SCM Agreement.[3283]

7.705 Under the prohibited export subsidy claim, the panel was asked to rule upon whether an import duty exemption, granted under the Motor Vehicles Tariff Order ("MVTO") and a number of Special Remission Orders ("SROs"), was contingent in law upon export performance. The MVTO and the SROs established a series of domestic production-to-domestic sales ratios that served to identify the extent to which companies were entitled to import motor vehicles into Canada duty-free. Pursuant to these ratios, car manufacturers were entitled to import cars duty-free to the extent that their domestic production fell short of their domestic sales. Thus, for example, a manufacturer with a production-to-sales ratio of 75:100 would be entitled to import cars duty-free to a value of 25. However, a manufacturer with a 100:100 production-to-sales ratio was not entitled to import cars duty-free. The only way such a manufacturer could take advantage of the duty-free treatment was to export cars, thereby reducing the number of sales of Canadian-made cars in Canada and simultaneously filling this difference with the imported cars.[3284] The panel concluded that the subsidy granted pursuant to the ratio requirements established under the MVTO and the SROs was contingent in law on export performance, noting that:

> "... it is the *law* ... that creates this construct, *i.e.*, an import duty exemption upon condition of meeting certain ratio requirements. It is the *law* that determines what a particular manufacturer beneficiary's ratio requirement will be. And, in the case of a ratio requirement lower than 100:100, although the manufacturer beneficiary has a choice as to the amount of the import duty exemption it wishes to access, it is the *law* that determines the consequences of that choice for the manufacturer beneficiary, or, otherwise put, it is the *law* that then establishes contingency upon export performance."[3285]

[3281] Appellate Body Report, *Canada – Autos*, para. 100.

[3282] US, Answer to Panel Question 146, citing Appellate Body Report, *Canada – Autos*, para. 128.

[3283] In fact, the CVA requirements were also challenged by the European Communities under Article 3.1(a). However, the panel did not make any findings in respect of this claim.

[3284] Panel Report, *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Autos*"), WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043, paras. 10.184-10.189.

[3285] Panel Report, *Canada – Autos*, para. 10.192.

BCI deleted, as indicated **[***]**

In agreeing with the panel, the Appellate Body explained:

> "We start with what we have held previously. In our view, a subsidy is contingent 'in law' upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. The simplest, and hence, perhaps, the uncommon, case is one in which the condition of exportation is set out expressly, in so many words, on the face of the law, regulation or other legal instrument. We believe, however, that a subsidy is also properly held to be *de jure* export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfilment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure."[3286]

The Appellate Body went on to conclude that "for the amount exceeding the duty-free 'allowance' there is ... a clear relationship of contingency between the import duty exemption and export performance"[3287], finding, *inter alia*, that:

> "Regardless of the actual ratio specified for a particular manufacturer, the MVTO ... and the SROs operate, as a matter of law, in such a manner that the more motor vehicles a manufacturer exports, the more motor vehicles the manufacturer is entitled to import duty-free"[3288]

7.706 Under the prohibited import substitution subsidy claim, the panel was asked to determine whether the CVA requirements rendered the availability of the same import duty exemption a subsidy contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.[3289] The CVA requirements were a second condition that beneficiaries had to satisfy in order to qualify for the import duty exemption on motor vehicles. They were prescribed for certain manufacturers in the MVTO and the SROs, and defined to include parts and materials of Canadian origin, direct labour costs, manufacturing overheads, general and administrative expenses and depreciation. The panel found that "depending upon the factual circumstances, a manufacturer might well be willing and able to satisfy a CVA requirement without using any domestic goods whatsoever".[3290] On this basis, the panel concluded that the CVA requirements did not render the measure a prohibited import substitution subsidy.

7.707 The Appellate Body found the panel to have erred in its assessment. In doing so, it first recalled that:

> "In our discussion of Article 3.1(a) in Section VI of this Report, we recalled that in *Canada – Aircraft* we stated that 'the ordinary connotation of 'contingent' is 'conditional' or 'dependent for its existence on something else'.' Thus, a subsidy is prohibited under Article 3.1(a) if it is 'conditional' upon export performance, that is, if it is 'dependent for its existence on' export performance. In addition, in *Canada –*

[3286] Appellate Body Report, *Canada – Autos*, para. 100.
[3287] Appellate Body Report, *Canada – Autos*, para. 105.
[3288] Appellate Body Report, *Canada – Autos*, para. 106 (underline added).
[3289] Article 3.1(b) of the SCM Agreement reads: "Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: ... (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."
[3290] Panel Report, *Canada – Autos*, para. 10.216.

BCI deleted, as indicated **[***]**

> *Aircraft*, we stated that contingency 'in law' is demonstrated 'on the basis of the *words* of the relevant legislation, regulation or other legal instrument.' (emphasis added) As we have already explained, such conditionality can be derived by necessary implication from the words actually used in the measure. We believe that this legal standard applies not only to 'contingency' under Article 3.1(a), but also to 'contingency' under Article 3.1(b) of the SCM Agreement."[3291]

7.708 It went on to conclude that:

> "The Panel's failure to examine fully the legal instruments at issue here and their implications for individual manufacturers vitiates its conclusion that the CVA requirements do not make the import duty exemption contingent 'in law' upon the use of domestic over imported goods. In the absence of an examination of the operation of the applicable CVA requirements for individual manufacturers, the Panel simply did not have a sufficient basis for its finding on the issue of 'in law' contingency. Thus, we conclude that the Panel erred in conducting its 'in law' contingency analysis."[3292]

7.709 The United States argues that the Appellate Body's findings in respect of the panel's assessment of the claim against the CVA requirements supports its reliance upon Airbus' Global Market Forecasts and other evidence (including the French and UK government's critical project appraisals) to show that the challenged LA/MSF contracts constitute subsidies granted contingent in law upon export performance because their repayment terms are linked to a number of LCA deliveries that cannot be achieved without substantial exportation.[3293] The European Communities argues that the United States is not entitled to rely upon any documents other than the legal instruments pursuant to which the subsidies at issue were granted.[3294] In its view, the Appellate Body's findings in *Canada – Autos* do not support the United States' position.

7.710 The starting point of the Appellate Body's examination of the appeals against the panel's findings under both Articles 3.1(a) and 3.1(b) of the SCM Agreement in *Canada – Autos* was the same, namely, that "contingency 'in law' is demonstrated 'on the basis of the *words* of the relevant legislation, regulation or other legal instrument.'"[3295] It then went on to note that "such conditionality can be derived by necessary implication from the words actually used in the measure".[3296]

7.711 As we read it, the Appellate Body's confirmation of the panel's findings in respect of the in law export contingency claim under Article 3.1(a) did not involve looking into facts extraneous to the text of the ratio requirements. The panel and the Appellate Body both established the operation of the ratio requirements by looking to the text of the challenged measure. Likewise, in the context of the prohibited import substitution subsidy claim under Article 3.1(b), the Appellate Body focussed on the panel's failure to fully examine "the specific CVA requirements for specific manufacturer beneficiaries",[3297] "the legal instruments at issue ... and their implications for individual manufacturers".[3298] Thus, the Appellate Body observed:

> "Although the Panel did explain what *types* of costs could be used to satisfy the CVA requirements, the Panel did not, for any MVTO manufacturer or for particular SRO

[3291] Appellate Body Report, *Canada – Autos*, para. 123 (footnotes omitted, underline added).
[3292] Appellate Body Report, *Canada – Autos*, para. 132 (underline added).
[3293] US, Answer to Panel Question 10.
[3294] EC, Answer to Panel Question 216.
[3295] Appellate Body Report, *Canada – Autos*, paras. 100 and 123.
[3296] Appellate Body Report, *Canada – Autos*, paras. 100 and 123.
[3297] Appellate Body Report, *Canada – Autos*, para. 128.
[3298] Appellate Body Report, *Canada – Autos*, para. 132.

BCI deleted, as indicated **[***]**

> manufacturers (with the exception of CAMI), make any findings as to the *actual level* of CVA required. The Panel's statement that 'value-added requirements' are 'not synonymous' with a condition to use domestic over imported goods seems to have been based on 'value-added requirements' considered *in the abstract* as opposed to the actual CVA requirements for the MVTO and SRO manufacturer beneficiaries.
>
> ... the Panel reached its conclusion here without examining the specific CVA requirements in the MVTO 1998 and the SROs. The Panel simply speculated that 'depending upon the factual circumstances', a manufacturer '*might well be* willing and *able* to satisfy a CVA requirement *without using any domestic goods whatsoever*'. (emphasis added) The Panel did not, however, scrutinize the actual CVA requirements for MVTO and SRO manufacturers to see whether they could indeed be satisfied without using domestic goods.
>
> ... It seems to us that whether or not a particular manufacturer is able to satisfy its specific CVA requirements without using any Canadian parts and materials in its production depends very much on the *level* of the applicable CVA requirements. For example, if the level of the CVA requirements is very high, we can see that the use of domestic goods may well be a necessity and thus be, in practice, required as a *condition* for eligibility for the import duty exemption. By contrast, if the level of the CVA requirements is very low, it would be much easier to satisfy those requirements *without* actually using domestic goods; for example, where the CVA requirements are set at 40 per cent, it might be possible to satisfy that level simply with the aggregate of other elements of Canadian value added, in particular, labour costs. The multiplicity of *possibilities* for compliance with the CVA requirements, when these requirements are set at low levels, may, depending on the specific level applicable to a particular manufacturer, make the use of domestic goods only one *possible* means (means which might not, in fact, be utilized) of satisfying the CVA requirements."[3299]

7.712 Thus, the Appellate Body faulted the panel's failure to consider what could be necessarily implied from the *actual CVA requirements prescribed* for each of the beneficiary entities. Notably, in making this finding, the Appellate Body at no stage referred to the panel's failure to take into account any facts extraneous to the instrument being challenged. Indeed, the Appellate Body emphasizes at the beginning of its analysis that a claim under Article 3.1(b) may involve reviewing not only the words of the challenged measure, but also what *those words* necessarily imply.

7.713 We note that the arguments the United States has advanced in support of its claims are based on more than simply the text of the LA/MSF contracts, or the implications that can be necessarily drawn from *that text*. The United States clearly relies upon facts that are extraneous to the LA/MSF contracts themselves, most notably, information contained in the Global Market Forecasts and the government project appraisals. In our view, by relying upon such facts, the United States' claim strays from a complaint about what can be understood from the legal obligations written into the LA/MSF contracts, to a complaint about how those legal obligations can be understood *in the light of relevant facts and circumstances*. Whereas the former represents what we consider to be the essence of an in law export contingency claim, the latter, in our view, defines the contours of a claim that a subsidy measure is contingent in fact upon export performance. Thus, we agree with the European Communities that the United States' claims of in law export contingency against the challenged LA/MSF measures are improperly constituted. Accordingly, we dismiss the United States' claim that the provision of LA/MSF for the A380, A340-500/600 and A330-200 was contingent *in law* upon

[3299] Appellate Body Report, *Canada – Autos*, paras. 128-130.

BCI deleted, as indicated **[***]**

anticipated export performance, within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.

7.714 In any case, as we explain in the following section, even assuming we were incorrect in our assessment of the types of evidence that may be relied upon for the purpose of bringing a claim of in law export contingency under Article 3.1(a) and footnote 4, we would nevertheless dismiss the United States' claims as, even taking into account the evidence it has adduced that is extraneous to the LA/MSF contracts, we do not believe it has established that the subsidies were granted contingent in law upon anticipated export performance.

Whether the evidence the United States relies upon demonstrates that the LA/MSF subsidies were granted contingent *in law* upon anticipated export performance

7.715 We recall that by entering into each of the challenged LA/MSF contracts, the EC member States provided Airbus with a financial contribution that conferred a benefit. In other words, the subsidy made available under the LA/MSF contracts was granted when each EC member State provided the LA/MSF. It follows that for the United States' claim to succeed, it must demonstrate that the provision of LA/MSF was, as a matter of law, conditional or dependent, at least in part, upon the EC member States' anticipation of export performance.

7.716 The text of the challenged LA/MSF contracts provides no explicit support for the United States' claim. Moreover, after examining how the contractual repayment provisions were intended to operate in the light of the evidence adduced by the United States, the EC member States' anticipated export performance does not, as a matter of law, appear to have been a condition for the granting of the subsidies. In this regard, we recall that while it is true that the EC member States must have been counting on Airbus to make LCA sales that necessarily included an important number of exports when concluding the LA/MSF contracts, the fact that Airbus was under no legal obligation to actually sell any LCA means that, on the basis of how the repayment terms were intended to operate, the EC member States could have at most held only a high degree of certainty that each grant of LA/MSF would induce Airbus to make an important number of export sales. The other contractual provisions which the United States appears to rely upon do not add anything to this understanding of how the repayment provisions operate.[3300] Thus, on the basis of the evidence the United States has advanced, the way the LA/MSF repayment provisions were intended to operate shows that, as a matter of law, the EC member States provided the LA/MSF on the basis of their expectation (but not the condition) that Airbus would export. Accordingly, even assuming that the United States was entitled to bring its case relying upon evidence that is extraneous to the LA/MSF contracts, we find that it has failed to demonstrate that the LA/MSF subsidies were granted contingent in law upon anticipated export performance.

[3300] The United States appears to rely upon the same additional contractual provisions described above in the context of the in fact contingency claim for the purpose of its in law contingency claim. US, SWS, paras. 163-209.

BCI deleted, as indicated **[***]**

5. Whether certain European Investment Bank loans to Airbus are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement

(a) Introduction

7.717 The United States claims that at least 12 loans provided by the European Investment Bank ("EIB") to various Airbus entities between 1988 and 2002 constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement. The 12 loans at issue are:[3301]

(i) the 2002 loan to EADS for research and development activities related to the A380 (No. 21650/FR);[3302]

(ii) the 1993 loan to Aérospatiale for production of the Super Transporteurs (No. 6832/FR);[3303]

(iii) the 1992 loan to Aérospatiale for the construction of buildings and installation of industrial equipment for the A330/A340 (No. 16086);[3304]

(iv) the 1991 loan to British Aerospace for the design, development and manufacture of wing boxes for the A330/A340 (No. 15119/UK);[3305]

(v) the 1990 loan to CASA for the design and production of various parts of the A320 and A330/A340 (Loan No. 1.4711/ES);[3306]

[3301] The United States had also challenged a thirteenth loan, the 1997 loan to Aérospatiale for the Super Transporteurs. However, the US withdrew its complaint against this measure after the European Communities confirmed in its first written submission and Exhibit EC-154 (BCI) that the loan at issue was never granted. US, Answer to Panel Question 12; EC, FWS, footnote 807.

[3302] Contrat de Financement entre La Banque Européenne d'investissement et European Aeronautic Defence and Space Company, EADS N.V., Munich, le 2 août 2002 US-158 (BCI), as amended by Avenant Relatif au Contrat de Financement en date du 2 août 2002 entre La Banque Européenne d'investissement et European Aeronautic Defence and Space Company, EADS N.V., Paris, le 5 mai 2004, Luxembourg le 10 mai 2004 Exhibit EC-879 (BCI).

[3303] Aérospatiale Super Transporteur A, Contrat de financement entre La Banque Européenne d'investissement et Aérospatiale Société Nationale Industrielle, Luxembourg, le 4 octobre 1993, Exhibit EC-695 (BCI); and Aérospatiale Super Transporteur A, Accord 3 entre La Banque Européenne d'investissement et European Aeronautic Defence and Space Company, EADS France, Paris, le 7 novembre 2002, Exhibit EC-699 (BCI).

[3304] Aérospatiale-Gramont A330/340 II, Contrat de Financement entre La Banque Européenne d'investissement et Aérospatiale Société Nationale Industrielle, Paris, le 20 juillet 1992 et Luxembourg, le 21 juillet 1992, EC-694 (BCI); and Aérospatiale-Gramont A330/340 II, Accord 2 entre La Banque Européenne d'investissement et European Aeronautic Defence and Space Company, EADS France, Paris, le 7 novembre 2002, EC-698 (BCI).

[3305] British Aerospace-Airbus A330/340 – B, Finance Contract between European Investment Bank and **[***]** and British Aerospace Public Limited Company, London, 15 March 1991, EC-706 (BCI); British Aerospace-Airbus A330/340 – B bis, Finance Contract between European Investment Bank and **[***]** and British Aerospace Public Limited Company, London, 26 June 1991, Luxembourg 26 June 1991, EC-707 (BCI); as amended by Amendment Agreement between European Investment Bank and British Aerospace Public Limited Company and **[***]** and British Aerospace (Operations) Limited, London, 9 September 1999, Luxembourg, 10 September 1999, EC-708 (BCI); Deed of Novation, Amendment and Release between European Investment Bank and BAE Systems PLC and **[***]** and BAE (Operations) Limited, 23 July 2001 Exhibit EC-709 (BCI); and Deed of Amendment between European Investment Bank and BAE Systems PLC, 17 May 2004 Exhibit EC-710 (BCI).

BCI deleted, as indicated **[*******]**

(vi) the 1990 loan to CASA for the design and production of various parts of the A320 and A330/A340 (No. 1.4712/ES);[3307]

(vii) the 1990 loan to British Aerospace for the design, development and manufacture of wing boxes for the A330/A340 (No. 14999/UK);[3308]

(viii) the 1990 loan to Airbus Industrie GIE for research, design and development of the A321 (No. 15007);[3309]

(ix) the 1989 loan to CASA for the design and production of various parts of the A320 and A330/A340 (14081/ES);[3310]

(x) the 1989 loan to BAE Systems for the design and development of wings for the A320 (No. 13802/UK);[3311]

(xi) the 1988 loan to British Aerospace for the design and development of wings for the A320 (No. 13588/UK);[3312] and

(xii) the 1988 loan to Aérospatiale for a new assembly plant for the A330/340, and administrative and services buildings (No. 13764/FR).[3313]

[3306] Proyecto Casa Airbus A320/330/340-B, Contracto de Financiación entre El Banco Europeo de Inversiones y Construcciones Aeronáuticas, S.A. (CASA), Madrid, a 29 junio de 1990, Luxemburgo, a 2 julio de 1990, No. 4711/ES, EC-701 (BCI).

[3307] Proyecto Casa Airbus A320/330/340-C, Contracto de Financiación entre El Banco Europeo de Inversiones y Construcciones Aeronáuticas, S.A. (CASA), Madrid, a 29 junio de 1990, Luxemburgo, a 2 julio de 1990, No. 1.4712/ES, EC-702 (BCI). We note that the United States did not initially identify this loan in its first written submission. It was disclosed for the first time by the European Communities in Exhibit EC-154 (BCI).

[3308] BAE-Airbus A330/340 – A, Finance Contract between European Investment Bank and **[***]** and British Aerospace Public Limited Company, London, 21 December 1990, Luxembourg, 21 December 1990, EC-705 (BCI).

[3309] Airbus Industrie A321 Development Project, Finance Contract between European Investment Bank and Airbus Industrie Financial Services and Airbus Industrie G*.I.E.*, Toulouse, 21 December 1990, EC-692 (BCI).

[3310] Proyecto Casa Airbus A320/330/340-A, Contracto de Financiación entre El Banco Europeo de Inversiones y Construcciones Aeronáuticas, S.A. (CASA), Luxemburgo, a 20 de Julio de 1989, No. 1.4081/ES, EC-700 (BCI).

[3311] BAE-Airbus A320 Project B, Finance Contract between European Investment Bank and BAE Systems p.l.c., London, 2 February 1989, as amended on 14 February 1991, 8 April 1994, 22 October 1996, and 9/10 September 1999, and as novated and amended on 23 July 2001, EC-704 (BCI); as amended by Amendment Agreement between European Investment Bank and British Aerospace Public Limited Company and **[***]** and British Aerospace (Operations) Limited, London, 9 September 1999, Luxembourg, 10 September 1999, EC-708 (BCI); Deed of Novation, Amendment and Release between European Investment Bank and BAE Systems PLC and **[***]** and BAE (Operations) Limited, 23 July 2001 Exhibit EC-709 (BCI); and Deed of Amendment between European Investment Bank and BAE Systems PLC, 17 May 2004 Exhibit EC-710 (BCI).

[3312] BAE-Airbus A320, Finance Contract between European Investment Bank and **[***]** and British Aerospace Public Limited Company, Luxembourg, 18 October 1988, EC-703 (BCI); as amended by Amendment Agreement between European Investment Bank and British Aerospace Public Limited Company and **[***]** and British Aerospace (Operations) Limited, London, 9 September 1999, Luxembourg, 10 September 1999, EC-708 (BCI); Deed of Novation, Amendment and Release between European Investment Bank and BAE Systems PLC and **[***]** and BAE (Operations) Limited, 23 July 2001 Exhibit EC-709 (BCI); and Deed of Amendment between European Investment Bank and BAE Systems PLC, 17 May 2004 Exhibit EC-710 (BCI).

BCI deleted, as indicated **[***]**

7.718 The European Communities contests the United States claims on various grounds. In a first series of arguments, the European Communities asks the Panel to dismiss the United States claims in respect of certain loans because it contends that: (i) the loans granted between 1988 and 1993 are outside the temporal scope of the SCM Agreement; (ii) the loans granted between 1988 and 1993 were granted to Airbus entities other than Airbus SAS or its subsidiaries and the United States has failed to demonstrate that the alleged benefits of these loans "passed through" to Airbus SAS; (iii) eight of the loans have been fully repaid, and therefore do not constitute "existing measures"; and (iv) in respect of one of the loans (to British Aerospace), an entity that is no longer active in the production of Airbus LCA or that is not part of Airbus SAS **[***]**. The European Communities also disputes the United States' specific subsidization claims by arguing that the loans at issue did not confer a benefit on Airbus, and that in any case, the alleged subsidies were not specific within the meaning of the SCM Agreement.

7.719 Elsewhere in this report, we have examined and dismissed the first two of the European Communities' arguments relating to the temporal scope of the SCM Agreement and the issue of "pass through".[3314] In the evaluation that follows, we begin by addressing the two remaining EC arguments that do not relate to the question whether the challenged loans are specific subsidies, before turning to consider the merits of the United States specific subsidy claims under Articles 1 and 2 of the SCM Agreement.

(i) Loans Already Repaid

7.720 The European Communities asks the Panel to reject the United States claims in respect of all but three of the EIB loans due to the fact that they have already been fully repaid, in many cases before the establishment of this panel.[3315] According to the European Communities, in order to challenge loans that have been fully repaid, the United States must explain why the Panel should examine them, and how it could make recommendations and findings, when they are measures that no longer exist. In addition, the European Communities argues that the United States must explain how the non-existing loans cause present adverse effects to its interests.[3316]

7.721 Recalling the Appellate Body's statement in *US – Upland Cotton* where it observed that "there could be a time-lag between payment of a subsidy and any consequential adverse effects"[3317], the United States argues that a subsidized loan may continue to provide a benefit or cause adverse effects after it is repaid, just as a subsidy grant may continue to provide a benefit or cause adverse effects after it is granted.[3318]

7.722 In essence, the European Communities' arguments raise two questions: whether alleged subsidy measures that have expired may be challenged under Article 5 of the SCM Agreement, and whether the United States has done enough to demonstrate that any such expired subsidy measures (*i.e.*, the relevant EIB loans) cause present adverse effects to its interests. In respect of the first question, we understand the European Communities to argue that once a subsidized loan has been fully repaid, the subsidy no longer exists as a measure and therefore cannot cause adverse effects

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[3313] Projet Aérospatiale Gramont A330/340, Contrat de Financement entre La Banque Européenne d'investissement et Aérospatiale Société Nationale Industrielle, Paris, le 21 décembre 1988, EC-693 (BCI); and Projet Aérospatiale Gramont A330/340, Accord 1 entre La Banque Européenne d'investissement et European Aeronautic Defence and Space Company, EADS France, GIE Saint Martin Bail, GIE Gramont Bail, Paris, le 7 novembre 2002, EC-697 (BCI).

[3314] *See*, paras. 7.44 - 7.65 setting out Panel's findings on temporal scope arguments and paras. 7.192 - 7.200 setting out Panel's findings on the pass-through argument.

[3315] The three loans that have not been fully repaid are the **[***]**, the **[***]** and the **[***]**.

[3316] EC, FWS, para. 1001; EC, FNCOS, para. 96; EC, SWS, paras. 481-482.

[3317] Appellate Body Report, *US – Upland Cotton*, para. 273.

[3318] US, Answer to Panel Question 18; US, SWS, footnote 301.

under Article 5 of the SCM Agreement. This line of argument implies that subsidized loans cannot cause adverse effects beyond the date on which they have been fully repaid. We are unable to accept the European Communities' contention. As the Appellate Body has observed:

> "... Article 7.8 of the SCM Agreement provides that, where it has been determined that 'any subsidy has *resulted* in adverse effects to the interests of another Member', the subsidizing Member must 'take appropriate steps *to remove the adverse effects* or ... withdraw the subsidy'. (emphasis added) The use of the word 'resulted' suggests that there could be a time-lag between the payment of a subsidy and any consequential adverse effects. If expired measures underlying past payments could not be challenged in WTO dispute settlement proceedings, it would be difficult to seek a remedy for such adverse effects. Further—in contrast to Articles 3.7 and 19.1 of the DSU—the remedies under Article 7.8 of the SCM Agreement for adverse effects of a subsidy are (i) the withdrawal of the subsidy *or* (ii) the removal of adverse effects. Removal of adverse effects through actions other than the withdrawal of a subsidy could not occur if the expiration of a measure would automatically exclude it from a panel's terms of reference."[3319]

Similarly, the panel in *Indonesia – Autos* noted:

> "If we were to consider that past subsidies were not relevant to our serious prejudice analysis as they were 'expired measures' while future measures could not yet have caused actual serious prejudice, it is hard to imagine any situation where a panel would be able to determine the existence of actual serious prejudice."[3320]

7.723 Although the subsidies that were the focus of the above statements did not involve the granting of loans,[3321] the observations of the Appellate Body and the panel are, in our view, of equal application and relevance to the EIB loans at issue in the present dispute. Thus, while the European Communities may be correct in characterizing a fully repaid EIB loan as a measure that no longer exists, the nature of an adverse effects claim does not preclude the possibility of finding that it may have a consequential impact on the relevant market after its full repayment and, as such, cause adverse effects within the meaning of Article 5 of the SCM Agreement. There is therefore no legal basis to support the European Communities' submission that fully repaid loans that are alleged to be subsidies cannot be challenged under Article 5 of the SCM Agreement. Thus, in light of the above, and consistent with our findings in respect of the temporal scope of this dispute, we reject the European Communities' request to exclude all but three of the EIB loans at issue from our consideration of the United States' claims on the grounds that they are expired measures.

7.724 The second question raised by the European Communities relates to whether the United States has demonstrated that any EIB loans found to be specific subsidies cause present adverse effects to its interests. We will address the European Communities' concerns, to the extent necessary, in the section of our Report that examines the merits of the United States' adverse effects claims.[3322]

[3319] Appellate Body Report, *US – Upland Cotton*, para. 273. (Footnote omitted, emphasis original).

[3320] Panel Report, *Indonesia – Autos*, para. 14.206.

[3321] The Appellate Body's statement in *US – Upland Cotton* was made in the context of Brazil's claims against subsidy payments to United States cotton farmers under the "production flexibility contract" and "market loss assistance" programmes. The panel's statement in *Indonesia – Autos* related to subsidies provided under the National Car programme in the form of an import duty tax exemption and a luxury sales tax exemption.

[3322] Section VII.F of this Report.

BCI deleted, as indicated **[***]**

(ii) 1991 Loan to British Aerospace

7.725 The European Communities asserts that **[***]** continues to **[***]**, even after it transferred all Airbus LCA-related design, engineering, manufacturing and production activities to Airbus SAS subsidiaries in 2001 and sold its 20% shareholding in Airbus SAS to EADS in October 2006. Thus, according to the European Communities, it follows that any benefit conferred by this loan could not have been transferred to Airbus SAS and be causing present adverse effects to United States interests.[3323]

7.726 The United States contends that the European Communities' assertion shows only that Airbus received the entire benefit of a subsidy provided for the A330/A340, while the **[***]**. The United States argues that to assess whether the alleged subsidy caused adverse effects to its interests within the meaning of Article 5 of the SCM Agreement, it suffices to show that the recipient of the loan enjoyed a benefit, thus conferring a subsidy, and that the subsidy was for the development and production of LCA. In any case, the United States notes that even assuming that **[***]**, it must be recalled that **[***]**. Thus, whatever the current **[***]** of the 1991 EIB loan, the United States contends that the loan is properly before the Panel; that Airbus and the A330/A340 in particular have benefited from below-market EIB borrowing rates for 15 years; and that throughout that period, the loan's beneficial terms have contributed to the causation of adverse effects to the interests of the United States' producers.[3324]

7.727 We recall that we have already dismissed the European Communities' argument that the United States must demonstrate that any benefit conferred to entities forming part of the Airbus Industrie consortium via the challenged financial contributions was "passed through" to Airbus SAS or any of its subsidiaries for the purpose of establishing adverse effects.[3325] In doing so, we concluded that the European Communities' reliance on the concept of "pass-through", in the light of the facts of this dispute, was misplaced. In particular, we found that based on the economic realities of Airbus LCA production, the Airbus Industrie consortium is the same producer of Airbus LCA as Airbus SAS. We therefore concluded that it was unnecessary for the United States to show that any benefit of each of the alleged financial contributions to entities forming part of the Airbus Industrie consortium was passed through to Airbus SAS. Thus, for the period from 1991 to October 2006, when either British Aerospace or its successor BAE Systems continued to be involved in Airbus LCA production, it is clear to us that any benefit (in the form of below market interest rates) of the 1991 EIB loan was conferred on the same producer of Airbus LCA.

7.728 We note that publicly available information indicates that the funds obtained by British Aerospace for the A330/A340 under the 1991 EIB loan amounted to EUR 141,274,864.[3326] Moreover, according to the European Communities, as of January 2007, **[***]** of the loaned principal **[***]**.[3327] Thus, to the extent that the EIB loan conferred any benefit, it was for the most part enjoyed between 1991 and October 2006, and can therefore be directly connected with Airbus LCA. As we understand it, the United States argues further that the fact that BAE Systems currently **[***]** means that Airbus received the entire benefit of the EIB loan subsidy provided for the A330/A340. Although we believe that it would not be unreasonable to view the **[***]** of the EIB loan by BAE Systems

[3323] EC, FWS, para. 1058; EC, SWS, para. 483.
[3324] US, Answer to Panel Question 17.
[3325] *See*, paras. 7.190 - 7.200 above.
[3326] Exhibit US-157.
[3327] Exhibit EC-154 (BCI). This Exhibit contains an overview prepared by the EIB of the status of the loans challenged by the United States, as of January 2007. It reveals information including the relevant loan contract numbers, disbursement dates, loan currencies, interest rates and outstanding principal amounts. We do not understand the United States to challenge the accuracy or reliability of the information set out in this Exhibit as it relates to the amount of principal outstanding on the 1991 EIB loan to British Aerospace as of January 2007.

BCI deleted, as indicated **[***]**

after October 2006 as at least suggesting that Airbus SAS received the amount of loan principal outstanding at the time of BAE Systems' withdrawal from Airbus SAS free of charge (*i.e.*, transforming this portion of the loan into a grant of funds), we do not consider it necessary to come to a firm conclusion on the merits of the United States' position. In our view, the fact that any benefit conferred by the loan would have been enjoyed for the most part between 1991 and October 2006, and therefore directly connected with Airbus LCA, is enough to dispose of the European Communities' argument that any benefit conferred by the 1991 EIB loan to British Aerospace could not have been transferred to Airbus SAS and therefore be causing present adverse effects to the United States interests. Accordingly, we reject the European Communities' request to dismiss the United States' complaint against the 1991 EIB loan to British Aerospace because of the fact that BAE Systems has **[***]** while no longer taking part in Airbus LCA production.

(b) Whether Each of the Challenged EIB Loans Amounts to a Subsidy within the Meaning of Article 1 of the SCM Agreement

(i) Are the Loans "Financial Contributions"?

7.729 The United States argues that all of the challenged EIB loans involve direct or potential direct transfers of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, and are therefore financial contributions.[3328] The European Communities does not dispute the United States' contention that all of the measures at issue involve financial contributions in the form of loans. However, in respect of the 2002 loan to EADS for the A380, the European Communities contests the amount of the financial contribution that is at stake. Before turning to examine the European Communities' assertions in respect of the 2002 loan to EADS, we recall that Article 1.1(a)(1)(i) of the SCM Agreement explicitly identifies a "loan" as an example of a "government practice {that} involves a direct transfer of funds", and therefore a financial contribution. Thus, we agree with the parties that to the extent that the EIB finance contracts evidence the existence of loans they are financial contributions within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

- The 2002 loan to EADS

7.730 The finance contract entered into between the EIB and EADS on 2 August 2002 opened a EUR 700 million ("crédit") credit line for the purpose of research and development activities related to the A380 project.[3329] Under the terms of this contract, EADS was entitled to request the EIB to provide it with all or part of the credit line in loan amounts no smaller than **[***]** over a period of two years.[3330] The essential terms and conditions of any eventual disbursement of funds, including the interest rate charged on repayments, were described in the same contract.[3331] EADS requested one disbursement of **[***]**, which it received on **[***]**.[3332] The remaining credit of **[***]** was cancelled on **[***]**.[3333]

7.731 According to the European Communities, the financial contribution provided to EADS under the 2002 finance contract is the one disbursement obtained in **[***]**, which was provided in the form of a loan of **[***]**. The European Communities argues that the remaining undisbursed credit line of **[***]** is irrelevant because it was cancelled in **[***]**.[3334] On the other hand, the United States argues that the relevant amount should not be limited to the **[***]** disbursement, and that it should include the

[3328] US, FWS, paras. 396 and 409; US, Comments on EC Answer to Panel Question 181.
[3329] Article 1.02.A, Exhibit US-158 (BCI).
[3330] Article 1.02.B, Exhibit US-158 (BCI).
[3331] As amended by Exhibit EC-879 (BCI).
[3332] Exhibit US-162 (BCI).
[3333] Article 1.05A, Exhibit US-158 (BCI). EC, Answer to Panel Question 178, referring in addition to Exhibits EC-162 and EC-880 (BCI).
[3334] EC, FWS, para. 1092; EC, SWS, para. 452; EC, Answers to Panel Questions 178 and 181.

BCI deleted, as indicated **[***]**

EUR 700 million credit line. In this regard, the United States identifies two alleged benefits of the finance contract, one arising from the "eventual use of the loan" (by which we understand the United States to be referring to the **[***]** loan), and the other from the "ability to draw on a Euro 700,000,000 line of credit" (*i.e.*, the EUR 700 million credit line).[3335]

7.732 The United States argues that the latter benefit arises from "the very fact"[3336] that the EIB provided EADS with a EUR 700 million credit line. In particular, the United States argues that "EADS ability to draw on a Euro 700,000,000 line of credit gave it valuable liquidity".[3337] Consequently, the United States considers that the European Communities errs when it suggests that the relevant value of the financial contribution at issue should be limited to the amount of funds ultimately disbursed under the 2002 finance contract. The United States argues that the European Communities' approach is contradicted by the SCM Agreement's reference to "potential direct transfers of funds" as a category of "financial contribution" that may confer a "benefit" and thereby constitute a subsidy. The United States observes that a specificity analysis of a subsidy consisting of a potential direct transfer of funds necessarily occurs in advance of any knowledge as to how much of the funds (if any) will actually be disbursed.[3338] Thus, when referring to the alleged benefit arising from EADS' "ability to draw on a Euro 700,000,000 line of credit", we understand the United States to focus on the alleged benefit conferred by what it considers to be a potential direct transfer of funds in the form of the **[***]** credit line.

7.733 Article 1.1(a)(1)(i) defines a financial contribution as including "potential direct transfers of funds or liabilities (*e.g.*, loan guarantees)". As we have previously explained,[3339] the explicit identification of "loan guarantees" as an example of a "potential direct transfers of funds or liabilities" is instructive for the purpose of understanding the types of measures that may constitute "potential direct transfers of funds or liabilities". A loan guarantee may be described as a legally binding promise to repay the outstanding balance of a loan when the loan recipient defaults on its repayments. Thus, it is the promise to repay an outstanding loan in the event of default that is the financial contribution (*i.e.*, the potential direct transfer of funds), not the funds that may be transferred in the future in the event of default.

7.734 Article 14(c) of the SCM Agreement establishes guidelines for calculating the amount of a subsidy in terms of the benefit conferred by a loan guarantee for the purpose of countervailing duty investigations. We have previously noted that although not intended to define the circumstances when a loan guarantee will confer a benefit under Article 1.1(b) in disputes involving Part III of the SCM Agreement, Article 14(c) does provide useful context.[3340] This provision describes the benefit of a loan guarantee as the difference in the amount that a recipient pays for a loan guaranteed by the government and a comparable commercial loan absent the loan guarantee:

> "a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;"

[3335] US Comments to EC, Answer to Panel Question 181.
[3336] US Comments to EC, Answer to Panel Question 181.
[3337] US Comments to EC, Answer to Panel Question 181.
[3338] US Comments to EC, Answer to Panel Question 181.
[3339] *See*, para. 7.302 above.
[3340] *See*, para. 7.303 above.

BCI deleted, as indicated **[***]**

7.735 In our view, the fact that a loan guarantee will confer a benefit on a recipient when it enables that recipient to obtain the guaranteed loan at a below market price implies that the benefit of a potential direct transfer of funds arises from the *mere existence* of an obligation to make a direct transfer of funds in the event of default. Thus, as we have concluded elsewhere in this Report,[3341] when assessing whether a transaction involves a "potential direct transfer{} of funds", the focus should be on the existence of a government practice that involves an obligation to make a direct transfer of funds which, *in and of itself*, is claimed and capable of conferring a benefit on the recipient that is separate and independent to the benefit that might be conferred from any future transfer of funds. This can be contrasted with financial contributions in the form of direct transfers of funds, which will result in a benefit being conferred on a recipient when there is a government practice that involves a direct transfer of funds.

7.736 It is not entirely clear to us whether the United States intended that its arguments should be understood as suggesting that the 2002 finance contract between the EIB and EADS evidences the existence of two types of financial contributions – a direct transfer of funds (the **[***]** loan) and a potential direct transfer of funds (the EUR 700 million credit line). However, in our view, this appears to be the natural implication of what it is saying when it alleges that the finance contract results in EADS receiving two very different types of benefit.

7.737 We recall that between 2 August 2002 (the date of the conclusion of the contract) and **[***]** (the date of the **[***]** disbursement), EADS was entitled to draw down on the EUR 700 million credit line. The United States has argued that the very existence of this credit facility provided EADS with a benefit. In other words, the United States claims that the EIB's obligation to lend money to EADS, *in and of itself*, conferred a benefit upon EADS. From this perspective, we agree with the United States that the finance contract, at least until **[***]**, evidences the existence of a potential direct transfer of funds in the amount of EUR 700 million.[3342] Similarly, the United States has argued that the "eventual use of the loan", that is, the actual disbursement of **[***]** on the terms and conditions set out in the finance contract, conferred a different benefit upon EADS. Thus, as with the European Communities, the United States is also of the view that the finance contract evidences the existence of a financial contribution in the form of a loan amounting to **[***]**. We agree that the **[***]** disbursement amounts to a loan, and therefore a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.738 Thus, in the light of the foregoing analysis, we find that the 2002 finance contract between the EIB and EADS evidences the existence of a financial contribution, in the form of a loan, within the meaning of Article 1.1(a)(1)(i) in the amount of **[***]**. In addition, in the light of the United States' characterisation of the alleged benefit resulting from the mere existence of the EUR 700 million credit line, we also find that the 2002 finance contract evidences the existence of a potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i). We now turn to consider whether these and other financial contributions provided by the EIB to Airbus conferred a benefit within the meaning of Article 1.2 of the SCM Agreement.

[3341] *See*, para. 7.304 above.

[3342] Once EADS obtained the disbursement of **[***]**, the amount of the credit line made available under the contract was **[***]**. The United States has not explained whether its claim extends to this residual amount of the credit line.

BCI deleted, as indicated **[***]**

(ii) Do the Challenged EIB Loans Confer a "Benefit" on Airbus?

Arguments of the United States

7.739 The United States argues that the very purpose of the EIB is to provide financing on terms more favourable than those available for comparable financing in the market.[3343] In particular, the United States notes that Article 18 of EIB Statute explicitly limits EIB lending to situations where "funds are not available from other sources on reasonable terms". Moreover, the United States submits that the EIB operates by using the EC member States' AAA credit rating to obtain large amounts of funds from the money market at advantageous rates, and then passing these rates onto non-AAA credit rated loan recipients. Thus, the United States argues that, like the Technology Partnerships Canada Programme that was at issue in *Canada – Aircraft*, the EIB "neither seeks nor earns a commercial rate of return"[3344] on the loans it provides. Like the panel in that dispute, the United States urges the Panel in the present dispute to find that all of the EIB loans at issue confer a benefit on Airbus.[3345]

7.740 The United States argues that the interest rate charged by the EIB on each of the relevant loans confirms that they were more advantageous than comparable loans offered by a commercial bank. For two of the loans at issue – the 2002 EIB loan to EADS and the 1992 loan to Aérospatiale – the United States has submitted its own market interest rate benchmark analysis and compared this to the interest rate charged by the EIB. In both cases, the United States concludes that the interest rates for comparable commercial financing would be less advantageous than the interest rates charged on the loans from the EIB.[3346] In respect of the remaining loans, the United States did not have access to the actual interest rates charged by the EIB until it received the European Communities' first written submission, when the European Communities submitted a one page overview of the status of the relevant loans.[3347] The European Communities submitted copies of the loan contracts in its second written submission, together with its own analysis of whether the loans were provided at non-commercial interest rates.[3348] Prior to the European Communities' disclosures, the United States had presented information in its first written submission showing that the average annual interest rates charged by the EIB to its customers, as published in the EIB's annual reports from 1996 to 2004, were lower than the contemporaneous market-based corporate borrowing rates determined in the Ellis Report.[3349] The United States argued that in the light of the European Communities' refusal to provide the actual terms of the loans during the Annex V process, the reasonable inference for the Panel to draw is that the nine remaining EIB loans, provided to Airbus between 1988 and 1993, were similarly beneficial.[3350]

7.741 In addition to the interest rate benefit that the EIB allegedly provides to recipients of its loans, the United States submits that the EIB's loans confer another benefit, because the EIB does not charge

[3343] US, FWS, paras. 397-402; US, SWS, paras. 260-268.
[3344] Panel Report, *Canada – Aircraft*, para. 9.314.
[3345] US, FWS, para. 400.
[3346] In particular, the United States asserts that the interest rates charged on the 2002 EIB loan to EADS and the 1992 loan to Aérospatiale were, respectively, **[***]** and **[***]** basis points below the level of interest that would be charged by a commercial lender on comparable loans. US, SWS, paras. 275-276, referring to the study prepared by NERA Economic Consulting, *The EIB Loans to Airbus*, Exhibit US-542 (BCI).
[3347] Exhibit EC-154 (BCI).
[3348] EC, SWS, paras. 420-421 and 491-508, Exhibit EC-722 (BCI). The United States had (through the Facilitator) requested the European Communities to provide a copy of the contracts during the Annex V process, but the European Communities refused because *inter alia*, it considered they were outside of the temporal scope of the SCM Agreement. *See*, EC Reply to Question 81, Exhibit US-5 (BCI).
[3349] US, FWS, paras. 410-416 referring to certain parts of the Ellis Report, Exhibit US-80 (BCI); US, SWS, para. 271; US, Answer to Panel Question 149.
[3350] US, FWS, para. 416.

its borrowers "commitment fees" to compensate for committing to the loans, nor "non-utilization fees" in cases where the borrowers do not use the credit lines the EIB has provided.[3351] Moreover, the United States argues that the EUR 700 million credit line opened for EADS in 2002 confers a benefit because in the view of the United States, the "ability to draw on a Euro 700,000,000 line of credit gave {EADS} valuable liquidity".[3352] Finally, the United States contends that all of the loans at issue granted prior to 1999 conferred a benefit upon Airbus because the EIB did not impose a risk premium.[3353]

Arguments of the European Communities

7.742 The European Communities rejects the United States contention that, by its very nature, EIB lending confers a benefit on loan recipients, and in this case, Airbus. The European Communities points to Articles 19(1) and 24 of EIB Statute, which it explains require the EIB to set interest rates at a level enabling it "to meet its obligations, to cover its expenses and to build up a reserve fund" that is 10% of the prescribed capital. In addition, the European Communities notes that pursuant to Article 19(2) of the EIB Statute, "the bank shall not grant any reduction in interest rates". Thus, according to the European Communities, the EIB does not pass on to borrowers financing that it borrowed in the capital markets "at cost".[3354] Moreover, any suggestion that the EIB's lending results in subsidization due to its operations being run on a not-for-profit basis should be dismissed because profitability is irrelevant to the question whether a measure is a financial contribution that confers a benefit within the meaning of Article 1.1 of the SCM Agreement.[3355]

7.743 The European Communities argues that, contrary to the United States' assertions, the EIB does not structure its loans in a way that confers a benefit on recipients. The European Communities explains that the EIB uses standard form loan agreements and a standard methodology for the calculation of interest rates. In respect of the latter, the European Communities indicates that the EIB establishes interest rates for each loan that it grants on the basis of three separate elements: a base rate (reflecting the EIB's cost of refinancing on the capital markets); a "mark-up" (in order to meet its obligations to cover expenses and build up a reserve fund); and, as of 1999, a risk premium (reflecting a loan's credit risk and replacing the formal requirement of providing a guarantee).[3356] Moreover, the European Communities contends that the fact that the EIB does not charge commitment fees or non-utilization fees is justified because *inter alia,* (i) for "open-rate" contracts (*i.e.*, contracts where the rates are not fixed *ex ante*), there is no certainty as to the timing of availability of funds, and the EIB does not commit to a precise interest rate; and (ii) for "single disbursement" contracts, there is no open commitment as such because the contract is signed and one or more disbursements typically take place a few days later.[3357] The European Communities notes that if a borrower cancels a requested disbursement, then it must pay compensation to the EIB.

7.744 The European Communities argues that the approach taken by the panel in *Canada – Aircraft* should not be applied in the present instance because in that dispute, Canada had refused to provide relevant information on the terms and conditions of the challenged contracts. In contrast, the European Communities points out that in the present dispute, it has disclosed all of the relevant contractual terms and conditions.[3358]

[3351] US, FWS, para. 402, referring to an EIB statement submitted as Exhibit US-160.
[3352] US Comments to EC, Answer to Panel Question 181.
[3353] US, SWS, para. 269.
[3354] EC, FWS, paras. 1061-1062.
[3355] EC, Answer to Panel Question 86; EC, SWS, paras. 485-490.
[3356] EC, FWS, paras. 1069-1070; EC, SNCOS, para. 191.
[3357] EC, Answers to Panel Questions 87 and 179; EC, SNCOS, para. 192.
[3358] EC, Answer to Panel Question 86.

BCI deleted, as indicated **[***]**

7.745 The European Communities rejects the interest rate benchmark analyses presented by the United States for various reasons,[3359] and presents its own analysis showing that in most instances, the EIB loans at issue were not granted at below-market interest rates, when adjusted for the cost of certain alleged additional obligations present in EIB loan contracts.[3360] Where the European Communities' own analysis shows that certain EIB loans were granted at below-market interest rates, the European Communities contends that the Panel should assess whether such loans conferred a benefit by checking whether the interest rate differences fall within the range of 20-50 basis points above or below the relevant benchmark. In the European Communities' view, a benefit could only exist if the interest rates requested by the EIB were convincingly outside of this spread of rates.[3361]

7.746 Finally, the European Communities argues that the general operations of the EIB are similar to those of the World Bank to the extent that the latter can allegedly only lend if it "is satisfied that in the prevailing market conditions the borrower would be unable otherwise to obtain the loan under conditions which in the opinion of the bank are reasonable for the borrower".[3362] The European Communities contends that the same type of provisions define the lending operations of other international lending institutions such as the Asian Development Bank, the European Bank for Reconstruction and Development, the International Bank for Reconstruction and Development, the Inter-American Development Bank and the International Finance Corporation. Thus, the European Communities submits that to find that the EIB's lending operations involve subsidization would mean that loans from all of these other international lending institutions would also, by definition, amount to subsidies.

Evaluation by the Panel

7.747 The United States' allegations in respect of the question of benefit are grounded in essentially two lines of argument: First, that the nature of the EIB's lending operations demonstrates that it grants loans on the basis of non-commercial considerations; and second, that the actual terms and conditions attached to the EIB's loans to Airbus show that they were more favourable to Airbus than comparable market financing because granted at lower interest rates and with no requirement to pay commitment or non-utilization fees. As regards the EUR 700 million credit line opened for EADS in 2002, the United States also considers that a benefit was conferred because it provided EADS with "valuable liquidity".[3363] We evaluate each of the United States' lines of argument in turn.

The EIB's lending operations

7.748 The EIB was established in 1957 pursuant to Article 266 of the Treaty of Rome ("EC Treaty") as the long-term lending arm of the European Communities. As described in Article 267 of that Treaty, the EIB's task is:

> "... to contribute, by having recourse to the capital markets and utilising its own resources, to the balanced and steady development of the common market in the interest of the Community. For this purpose the Bank shall, operating on a non-profit-making basis, grant loans and give guarantees which facilitate the financing of the following projects in all sectors of the economy:

[3359] EC, FWS, paras. 1073-1089 and EC, SWS, paras. 494-499 (as regards the interest rate benchmarks based on the Ellis Report); EC, SNCOS, paras. 188-189 and Exhibit EC-857 (BCI) (as regards the interest rate benchmarks derived in the NERA Economic Consulting Report).

[3360] EC, FWS, paras. 1090-1103; EC, Answer to Panel Question 89; EC, SWS, paras. 500-508; Exhibit EC-722 (BCI); EC, Answer to Panel Question 176; Exhibit EC-876 (BCI).

[3361] EC, SWS, para. 507.

[3362] EC, FWS, para. 1064.

[3363] US Comments to EC, Answer to Panel Question 181.

BCI deleted, as indicated **[***]**

(a) projects for developing less-developed regions;

(b) projects for modernising or converting undertakings or for developing fresh activities called for by the progressive establishment of the common market, where these projects are of such a size or nature that they cannot be entirely financed by the various means available in the individual member States;

(c) projects of common interest to several member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual member States.

In carrying out its task, the Bank shall facilitate the financing of investment programmes in conjunction with assistance from the Structural Funds and other Community Financial Instruments."[3364]

7.749 The Statute of the EIB further provides:

"Article 2

The task of the Bank shall be that defined in Article 267 of {the EC Treaty}.

Article 18

1. Within the framework of the task set out in Article 267 of this Treaty, the Bank shall grant loans to its members or to private or public undertakings for investment projects to be carried out in the European territories of member States, to the extent that funds are not available from other sources on reasonable terms.

2. As far as possible, loans shall be granted only on condition that other sources of finance are also used.

3. When granting a loan to an undertaking or to a body other than a Member State, the Bank shall make the loan conditional either on a guarantee from the Member State in whose territory the project will be carried out or on other adequate guarantees.

4. The Bank may guarantee loans contracted by public or private undertakings or other bodies for the purpose of carrying out projects provided for in Article 267 of this Treaty.

5. The aggregate amount outstanding at any time of loans and guarantees granted by the Bank shall not exceed 250% of its subscribed capital.

6. The Bank shall protect itself against exchange risks by including in contracts for loans and guarantees such clauses as it considers appropriate.

[3364] Exhibit EC-157. The European Communities notes that the objective set out in subparagraph (b) "has progressively been abandoned as measures to create the EC Single Market were of a transitory nature". The European Communities explains that "it has been used for the last time in Spain, during the first years of its accession to the EC". EC, FWS, footnote 809.

BCI deleted, as indicated **[***]**

Article 19

> 1. Interest rates on loans to be granted by the Bank and commission on guarantees shall be adjusted to conditions prevailing on the capital market and shall be calculated in such a way that the income therefrom shall enable the Bank to meet its obligations, to cover its expenses and to build up a reserve fund as provided for in Article 24.
>
> 2. The Bank shall not grant any reduction in interest rates. ... "[3365]

7.750 Thus, the EIB may be characterised as a public purpose supranational banking institution that acts to further EU policy objectives by providing loans across a broad array of economic sectors, "to the extent that funds are not available from other sources on reasonable terms", at interest rates that cover its expenses and enable it to build up a reserve fund. The EIB has described its lending activities in the following terms:

> "{B}acking by the member states gives the EIB the highest possible credit rating (AAA) on the money markets, where it can therefore raise very large amounts of capital on very competitive terms. This in turn enables the Bank to invest in projects of public interest that would otherwise not get the money – or would have to borrow it more expensively."[3366]
>
> "With an excellent 'AAA' credit reputation and operating as a major international borrower on financial markets, EIB is able to raise funds at advantageous rates. Being a not-for-profit institution, the Bank passes on the benefits to its clients in the form of loans at fine rates. Interest rates are based on EIB's borrowing cost and a small margin to cover administrative expenses and other costs."[3367]

7.751 In practice, the funds lent by the EIB are therefore first obtained on the money market by the EIB at interest rates reflecting its AAA credit rating. These funds are then passed on to borrowers at a marked-up interest rate which enables the EIB "to meet its obligations, to cover its expenses and to build up a reserve fund". We understand that the interest rate charged to borrowers has also, since 1999, included a risk premium to reflect the perceived level of a loan's "expected loss".[3368] Prior to the introduction of this risk premium, the European Communities asserts that a loan's credit risk was in general taken into account by the EIB through a requirement for loan guarantees.[3369]

7.752 The United States argues that these features of the EIB's lending operations demonstrate that EIB loans are non-commercial and therefore, in the same way that the non-commercial nature of the loans at issue in *Canada – Aircraft* were found to confer a benefit to their recipients, the EIB loans that are at issue in the present dispute must also confer a benefit on Airbus, within the meaning of Article 1.1(b) of the SCM Agreement. On the other hand, the European Communities rejects the view that the general nature of the EIB's lending activities necessarily means that the EIB did not earn a rate of return on its loans to Airbus that is similar to the rate that would be sought by commercial banks. The European Communities argues that a determination of whether a measure is a subsidy should not be made by focussing on whether the grantor "as an abstract matter 'seeks' a certain rate of

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[3365] Exhibit EC-157.

[3366] *EIB, What Does the Bank Do?* Exhibit US-153. A similar statement is also made in the EIB Annual Report for 2004, submitted as Exhibit US-159.

[3367] *EIB, FAQs, Project & Loans*, Exhibit US-160. A similar statement is also made in another document submitted by the United States as Exhibit US-151.

[3368] EC, FWS, para. 1070; Exhibit EC-842, p. 149.

[3369] EC, SNCOS, para. 191. This alleged aspect of the EIB's lending operations is examined in more detail at paras. 7.815-7.819 below.

BCI deleted, as indicated **[*****]**

return", but rather through "a comparison of the terms on which the challenged financial contribution was extended with the terms available for the recipient at market".[3370]

7.753 We recall that in order to understand whether a financial contribution, in the form of a loan, confers a benefit, an assessment must be made of whether that loan places the recipient in a more advantageous position compared to the position it would have been in had a comparable loan been obtained from a commercial lender.[3371] In making this assessment, we see the non-profit-making nature of the EIB's operations and its mandate to provide financing to the extent funds are not otherwise available "on reasonable terms" as features of the EIB's lending activities that suggest its loans are granted for projects that would be more difficult to successfully realize, or simply unfeasible, on the basis of commercial financing. To this extent, we believe that the evidence we have reviewed on the nature of the EIB's lending activities (especially its non-profit-making nature) indirectly supports the view that the rate of return it obtains on the loans it grants to borrowers (including those challenged by the United States in this dispute) is below the rate of return that would be demanded by a commercial lender, thereby conferring a benefit within the meaning of Article 1.1(b) of the SCM Agreement. However, the parties have submitted other evidence that goes directly to the terms and conditions that the parties assert commercial lenders would have asked Airbus to agree to in order to obtain loans comparable to the EIB loans at issue. The United States has submitted this evidence for the purpose of *confirming* that the EIB loans confer a benefit on Airbus; whereas the intention behind the European Communities' submission is to rebut the United States' allegations and demonstrate that the loans *do not* confer a benefit. We evaluate the parties' submissions in the following sections.

Terms and conditions of the loans to Airbus

The 2002 loan to EADS

7.754 The 2002 EIB loan to EADS was granted for the purpose of one particular project – the development of the A380. It was effected through one disbursement of USD **[*****]** at an interest rate of **[*****]**, payable annually, on a non-amortizing loan with a final maturity of **[*****]** years (*i.e.*, loaned capital plus final year interest payment due on **[*****]**).[3372] The United States alleges that the loan to EADS conferred a benefit for two reasons: (i) because it was granted on interest rate terms that were more advantageous than comparable market financing; and (ii) because EADS did not have to pay any commitment fees or non-utilization fees. We examine each of the United States' allegations in turn.

Interest rate terms

7.755 Initially, the market interest rate benchmarks presented by the United States for all of the EIB loans were based on the country-specific general corporate borrowing rates determined in the Ellis Report.[3373] For the 2002 EIB loan to EADS, the United States asserted that the risk-adjusted commercial borrowing rate that the market would have charged EADS in 2002 on an equivalent long-term loan would have been "in the range of **[*****]** percent, plus applicable commitment and non-utilization fees".[3374] In its second written submission, the United States submitted a revised market interest rate benchmark analysis for this loan, prepared by NERA Economic Consulting (the "NERA EIB Report").[3375] On the basis of this revised analysis, the United States concludes that "the commercial rate for a loan with the characteristics of the 2002 EIB loan to EADS (European

[3370] EC, Answer to Panel Question 86.
[3371] *See*, para. 7.382 above.
[3372] Exhibits US-158 (BCI), US-162 (BCI), EC-168 (BCI) and EC-879 (BCI).
[3373] US, FWS, paras. 404 and 415, referring to Ellis Report, Exhibit 6, Exhibit US-80 (BCI).
[3374] US, FWS, para. 404.
[3375] NERA, The EIB Loans to Airbus (hereinafter "NERA EIB Report"), Exhibit US-542 (BCI).

BCI deleted, as indicated **[***]**

borrower, rated A3/A-, loan in Eurodollars, 10-year maturity) would have been 5.68 percent in **[***]**."[3376]

7.756 The European Communities criticises the United States' market interest rate benchmark on various grounds. In an assessment of the findings of the NERA EIB Report, the European Communities alleges that the United States' benchmark for the 2002 loan to EADS suffers from numerous deficiencies making it unreliable:

> "In relation to the 2002 EIB loan, the EIB has identified the following crucial errors affecting NERA's assessment:
>
> > • the entire 57 basis points 'benefit' claimed by NERA is wholly based on {the} NERA assert{ion}, without evidence, that the USD capital market is so inefficient that it would have cost EADS approximately 63 basis points more to borrow USD than an equivalently rated US corporation{}.
> >
> > • NERA assumes that EADS would have chosen what NERA claims to be the most expensive option to borrow USD (the Eurobond market) even though, according to NERA, it would have been cheaper for a European corporation such as EADS to borrow in the so-called Yankee market.
> >
> > • NERA ascribes {a} wrong credit rating to EADS – in **[***]**, EADS was rated A by S&P, and not A-.
> >
> > • the 57 basis points 'benefit' claimed by NERA simply does not stand up to any analysis with pricing achieved by other comparable European corporate borrowers at the time of the 2002 EIB loan or, indeed, pricing levels that EADS could have achieved in the swap market or through the USD syndicated loan market."[3377]

7.757 As we understand it, the market interest rate benchmark identified in the NERA EIB Report for the 2002 loan to EADS is based on the interest rate that a non-United States corporate borrower with allegedly the same credit rating as EADS would have had to pay on a 10 year "Eurodollar" bond issued on **[***]**.[3378] Eurodollar bonds are USD bonds issued by companies outside of the United States. They may be compared with either "Yankee" bonds, which are USD bonds issued within the United States by companies that are not domiciled in the United States, or domestic USD corporate bonds, which are issued by United States companies in the United States. NERA asserts that in August 2004, the yield on A rated 10 year Eurodollar bonds exceeded Yankee bonds by around 30 basis points; while the yield on A rated Yankee bonds exceeded domestic 10 year USD corporate bonds by about 33 basis points.[3379] In other words, the NERA EIB Report submits that in August 2004, 10 year USD denominated bonds were approximately 63 basis points more expensive for non-United States A rated corporations to issue outside of the United States than A rated United States corporations issuing within the United States. This price difference is explained by NERA as a function of factors such as "cross-border risks (the fact that a foreign company borrowing in USD is exposed to currency risk, plus that if the borrower is outside of the U.S., it may be more

[3376] US, SWS, para. 275.
[3377] EIB Analysis of NERA EIB Report, p. 1, Exhibit EC-857 (BCI) (hereinafter "EIB Analysis of NERA EIB Report"). *See, also*, EC, Answer to Panel Question 180.
[3378] NERA EIB Report, p. 7.
[3379] NERA EIB Report, pp. 3-4.

BCI deleted, as indicated **[***]**

difficult to enforce provisions of the bond indenture, etc) and liquidity differences in the three markets".[3380]

7.758 The first EC criticism of the NERA EIB Report goes to the appropriateness of using the yield associated with a 10 year Eurodollar bond index in August 2004 as the basis of the appropriate market interest rate benchmark. The European Communities notes that NERA does not cite any specific evidence or data sources to substantiate its assertion in respect of the levels of the 10 year Eurodollar or Yankee bond yields on **[***]**. In addition, the European Communities argues that if the indices used by NERA were the Bloomberg 10 year Single A USD Yankees Industrial index and the 10 year Single A EuroDollar EMU index, NERA's assessment cannot be relied upon because the two indices represent "a sort of interpolation between existing bonds" that are not homogeneous.[3381] The European Communities explains that the 10 year Single A USD Yankees Industrial index includes bonds issued by "the State of Israel, Bank of China, the National Bank of Hungary, Poland and BHP". Reflecting the heterogeneity of these bond issuers, the European Communities notes that the range in the spread between 10 year USD bonds issued by A rated domestic industrial issuers and 10 year USD Yankee bonds issued by A rated industrial users showed "extreme volatility with a minimum value of 21 bps and a max value of 35 bps". Likewise, the European Communities observes that the 10 year Eurodollar bond index "currently contains issuers such as the Republic of Italy, the Italian Regione Campania, the Greek subsidiary of Coca Cola and some special entity vehicles related to Transneft, the Russian oil pipeline provider".[3382] The spread between 10 year USD Yankee bonds issued by A rated industrial users and the 10 Year Eurodollar bond issued by EMU A rated industrial users is equally "very volatile with a range of between – 19 bps and 39 bps". Given that the issuers of the bonds used to compile these indices are not all industrial corporations, the European Communities argues that they are unreliable proxies for assessing what the market would have asked a corporation such as EADS to pay in 2004 for USD financing similar to the EIB loan.[3383]

7.759 We agree with the European Communities that the use of a USD bond index that is derived from information about the yields of bonds issued in August 2004 by entities that include governments and other non-industrial corporations does not provide a perfect benchmark for assessing the precise interest rate that a company, like EADS, would have had to pay for this type of USD bond financing in August 2004.[3384] However, in our view, the Eurodollar bond index that the United States appears to have relied upon is not entirely irrelevant.[3385] First, we note that Eurodollar bonds are a form of USD financing available to entities that like EADS are domiciled and operate outside of the United States.[3386] Therefore, Eurodollar bond financing was an option available to EADS at the time

[3380] NERA EIB Report, footnote 5, Exhibit US-542 (BCI). *See, also,* US, Comments on EC Answer to Panel Question 180, where the United States notes that the fact that Eurodollar bonds are not registered with the United States Securities and Exchange Commission means that new issues cannot immediately be sold in the United States, making them less liquid.

[3381] EIB Analysis of NERA EIB Report, p. 3.

[3382] EIB Analysis of NERA EIB Report, p. 3.

[3383] EIB Analysis of NERA EIB Report, p. 3.

[3384] We note that the Eurodollar bond index that the European Communities suggests was relied upon in the NERA EIB Report included companies active in the consumer (non-cyclical), consumer (cyclical), communications, utilities and financial industry sectors. Only two of the 13 borrowing entities included in the index were public administrations – the Republic of Italy and the Italian region of Campania. EIB Analysis of NERA EIB Report, Annex I.

[3385] Although NERA did not attach a copy of the Eurodolloar bond price information it relies upon in the EIB Report, it did explicitly note that the information was drawn from Bloomberg. NERA EIB Report, p.7, Exhibit US-542 (BCI). The United States has not contested the assertion in the EIB Analysis of the NERA EIB Report that NERA relied upon the Bloomberg 10 year Single A EuroDollar EMU index to establish its benchmark.

[3386] "Eurodollar bonds are 1. Denominated in U.S. dollars 2. Issued and traded outside the jurisdiction of any single country 3. Underwritten by an international syndicate 4. Issued in bearer (unregistered) form".

BCI deleted, as indicated **[***]**

the EIB loan was disbursed. Second, although not specific to EADS, the Eurodollar bond index might nevertheless be viewed as representing the average cost of Eurodollar bonds for the group of similarly rated entities that make up that index, only two of which were public administrations.[3387] In other words, the 10 year Single A EuroDollar EMU index which the United States appears to have relied upon acts as a signal of the average cost of 10 year Eurodollar bond financing on the market for A rated entities at the relevant moment.[3388]

7.760 The second EC criticism relates more specifically to the question whether the United States' revised market interest rate benchmark overstates the cost of financing that would have been available to EADS on 20 August 2004. In particular, the European Communities argues that by relying on data from a Eurodollar bond index, the United States assumes that EADS would have chosen what the NERA EIB Report recognizes was the more expensive USD funding option available to EADS compared with Yankee bonds.[3389] The United States explains that NERA used a Eurodollar bond index because it represents "a loan denominated in the same currency as the EIB loan and provided under comparable market circumstances in the same place as the EIB loan was issued", and therefore achieves an "apples-to-apples comparison" with the 2002 loan to EADS.[3390] Thus, the United States argues that "like the EIB loan to EADS, the U.S.- proposed benchmark is a **[***]** loan provided by a non-U.S. lender to a non-U.S. borrower."[3391]

7.761 Fabozzi and Mann describe the Yankee bond market as encompassing "those foreign-domiciled issuers who register with the SEC and borrow dollars via issues underwritten by a U.S. syndicate for delivery in the United States."[3392] In other words, Yankee bonds involve USD financing *in the United States* for entities that are not domiciled in the United States. This compares with Eurodollar bonds, which involve USD financing *outside of the United States* for entities that are not domiciled in the United States.[3393] It is clear to us that the 2002 EIB loan to EADS, as a non-amortizing USD loan issued to a European corporate outside of the United States, bears closer resemblance to the latter than the former. In addition, we note that Eurodollar bonds pay interest (coupons) annually, like the EIB loan; whereas Yankee bonds pay interest semi-annually.[3394] Thus, while we recognize that Yankee bond financing may have been available to EADS in August 2004, we agree with the United States that financing through a Eurodollar bond would be a better proxy for the 2002 EIB loan to EADS.

Frank J. Fabozzi and Steven Mann: *The Handbook of Fixed Income Securities*, Seventh Edition, McGraw-Hill, pp. 396-397. Exhibit US-673.

[3387] *See*, footnote 3384 above.

[3388] Furthermore, we note that the EIB has been declared to be "consistently among the top borrowers" in the Eurodollar bond market (Fabozzi and Mann, p. 397, Exhibit US-673). The EIB described its USD borrowing activities for 2004 (the year in which the loan to EADS was disbursed) in the following terms: "In USD, the Bank was unique among international borrowers in issuing {bonds} in all key benchmark maturities, involving six new global issues for USD 14.5 bn in total, via benchmark transactions in 2, 3, 5 and 10-year maturities and a callable bond. The EIB remained the largest and most frequent USD issuer among supranationals and is the only issuer in its class to offer such a comprehensive yield curve, with maturities ranging from 2005 to 2014". EIB, Activity Report 2004, p. 39, Exhibit EC-714. Recalling that the EIB operates by borrowing funds from the money market and on-lending these to its borrowers, it is possible to speculate on the basis of this information (although we emphasize that there is no evidence before us to confirm) that the Eurodollar bond market might well have been the source of the USD funds disbursed to EADS under the 2002 loan contract.

[3389] EIB Analysis of NERA EIB Report, pp. 2-3, Exibit EC-857 (BCI).

[3390] US, Comments on EC Answer to Panel Question 180.

[3391] US, Comments on EC Answer to Panel Question 180.

[3392] Frank J. Fabozzi and Steven Mann, p. 398, Exhibit US-673.

[3393] Frank J. Fabozzi and Steven Mann, pp. 396-398, Exhibit US-673.

[3394] Frank J. Fabozzi and Steven Mann, p. 396, Exhibit US-673.

BCI deleted, as indicated **[***]**

7.762 The third EC criticism is that the United States' benchmark applies a Standard & Poors credit rating for EADS of A-, when in fact, on **[***]**, EADS had a Standard & Poors credit rating of A. According to the European Communities, the difference means that the United States' proposed benchmark overstates the market interest rate by 6.5 basis points.[3395] The United States responds by noting that even accepting the European Communities' factual assertion and proposed adjustment, the revised market interest rate benchmark would be 5.6138%, still **[***]** basis points **[***]** the interest rate paid on the EIB loan.[3396] We agree with the European Communities that EADS' credit rating on the date of the EIB loan disbursement (**[***]**) should be used when identifying the appropriate market interest rate benchmark.

7.763 Finally, the European Communities argues that the United States Eurodollar bond-based benchmark "does not stand up to any comparison with pricing achieved by other comparable European corporate borrowers at the time of the 2002 EIB loan" in alternative USD financing markets.[3397] The European Communities presents these alternatives as appropriate market interest rate benchmarks, and argues that when properly adjusted and examined together, they demonstrate that the interest rate attached to the 2002 loan to EADS fell within the range of commercial financing options available to EADS at the time and, therefore, did not confer a benefit.

7.764 Initially, the European Communities proposed a market interest rate benchmark of 5.10%, constructed using the value, on **[***]**, of the 10 year Constant Maturity Treasury rate from the United States Treasury Yield Curve (4.24%) (representing the risk-free rate for borrowing in USD at the time when EADS drew down on the EIB loan) and adding to this the "Reuters' 10 year Corporate Bond Spread for Industrials" with the same A3 credit rating as EADS (0.86%) (reflecting the general credit risk of the specific borrower).[3398] Subsequently, the European Communities added an additional 5 basis points to this rate in order "to take into account the valid comment contained in the {NERA EIB Report} with regard to the frequency of interest payments" on US Treasury bonds.[3399] In addition, the European Communities presented three other possible market interest rate benchmarks based on: (i) the interest rate paid by a comparable European corporate borrower (Norsk Hydro A/S) on the USD Yankee bond market; (ii) the interest rate paid by a comparable European corporate borrower (Pearson Plc) in the USD syndicated loan market; and (iii) the interest rate that could have been paid by EADS on the corporate bond "swap market".[3400] Finally, the European Communities adjusted three of these benchmarks to reflect "additional finance-related project cost/obligations" that are "expressly acknowledged by the ratings agencies" to affect the market prices of bonds and loans,[3401] arriving at the following result:

[3395] EIB Analysis of NERA EIB Report, p. 4, Exibit EC-857 (BCI). *See, also*, EC, Answer to Panel Question 180.

[3396] US, Comments on EC Answer to Panel Question 180.

[3397] EIB Analysis of NERA EIB Report, p. 4, Exibit EC-857 (BCI); EC, Comments on US Answer to Panel Question 149.

[3398] EC, FWS, paras. 1097-1099; Exhibit EC-168 (BCI). The European Communities did not submit a copy of the relevant "Reuters' 10 year Corporate Bond Spread for Industrials" Index. In subsequent submissions, the European Communities states that it used the "Moody's index for A3 rated corporates" to determine the relevant spread, Exhibit EC-722 (BCI)) or that it relied upon the "relevant Merril Lynch index" (EC, Answer to Panel Question 180). However, we understand that the credit spread actually used by the European Communities was based on the "Reuters' 10 year Corporate Bond Spread for Industrials" index for corporations with an A3 credit rating, reflecting the fact that Moody's had assigned EADS an A3 credit rating on 15 March 2002. Exhibit EC-168 (BCI).

[3399] EC, Answer to Panel Questions 176 (footnote 62) and 180.

[3400] EIB Analysis of NERA EIB Report, Exhibit EC-857 (BCI), pp. 4-6; EC, Answer to Panel Question 176.

[3401] EC, Answer to Panel Question 176, referring to a Moody's publication which states *inter alia*, that "{i}n order to equalize losses across similarly rated loans and bonds, upward adjustments on loan ratings {of

BCI deleted, as indicated **[***]**

Table 8 – EC Benchmark Analysis for the 2002 EIB Loan

Benchmark	EIB Rate	Benchmark Rate	Adjusted Benchmark Rate
USD Treasury Bond plus Relevant Spread for A3 Corporations	**[***]**	**5.15%**	**5.08%**
Norsk Hydro Yankee Bond	**[***]**	**5.26%**	**5.20%**
Pearson USD Syndicated Loan	**[***]**	**LIBOR/Swaps plus 35.5 basis points**	**No adjustment**
EADS EUR bonds swapped into USD bonds	**[***]**	**5.20%**	**5.14%**

7.765 The European Communities asserts that the above four interest rates represent "EADS' alternative cost of funding for a loan equivalent" to the 2002 loan from the EIB, and should therefore all be considered relevant to the benchmarking exercise.[3402] In this regard, the European Communities argues that "the commercial reality is that it is simply not possible to argue credibly that for any one borrower at any point in time there exists (to the nearest one hundred of one percent) a market benchmark consisting of" one single interest rate.[3403] Thus, in recognition of this alleged reality, the European Communities concludes that all of the four funding options it has identified must be taken into account. When this is done, the European Communities notes that the difference between the interest rate charged by the EIB and the various (adjusted) commercial market interest rate benchmarks, is between minus three and plus nine basis points – on average, a difference of plus 1.5 basis points or 0.015%.[3404]

7.766 The European Communities also considers that any assessment of whether the EIB loans to EADS confer a benefit must take into account what it alleges are the additional costs of various project-related and administrative obligations found in the EIB loans that would not normally be present in the bond instruments used by the United States or the European Communities for benchmarking.[3405] The European Communities describes at least nine such project- related obligations,[3406] and identifies where each is found in each of the EIB loans in dispute.[3407] The European Communities explains that costs of this kind are not typically found in bond instruments because, as illustrated by an EADS bond issued in 2005, bond financing is not project-specific, but for "general corporate purposes".[3408] In respect of administrative costs, the European Communities argues that the main additional administrative cost faced by a borrower taking an EIB loan is time – the time needed to undertake the additional procedural steps, most importantly project appraisal, that

about 0.5 to 1.5 alpha-numeric rating notches}, rather than downward adjustments on bond ratings, appear more appropriate". Moody's Investor Service, *Special Comment 'Credit Loss Rates on Similarly Rated Loans and Bonds'*, December 2004, Summary, Exhibit EC-878.

[3402] EC, Comments on US Answer to Panel Question 149.

[3403] EC, Comments on US Answer to Panel Question 149.

[3404] EC, Answer to Panel Question 176.

[3405] EC, FWS, paras. 1081-1089; EC, Answer to Panel Question 176.

[3406] These are the obligation to: (i) participate in project appraisal; (ii) carry out a project; (iii) use funds solely for the financing of the project; (iv) prepay in the event project costs come under expectations; (v) maintain and insure the project; (vi) not dispose of project assets; (vii) comply with EIB procurement requirements; (viii) comply with project reporting requirements; and (ix) permit EIB project visits. EC, Answer to Panel Question 176.

[3407] Exhibit EC-876 (BCI).

[3408] EC, SWS, paras. 494-495; EC, Answer to Panel Question 176; Exhibit EC-721.

BCI deleted, as indicated **[*******]**

are not required when funding is sought from the bond market.[3409] Taking all such additional costs into account, the European Communities submits that the interest rate offered by the EIB for the 2002 loan to EADS fell within the range of market interest rates at EADS' disposal on **[*******]**, and therefore, did not confer a benefit.[3410]

7.767 The United States rejects the benchmarks established by the European Communities for various reasons. As we understand it, the United States' particular criticism of the first of the European Communities' benchmarks is focussed on the appropriateness of using the Reuters' Corporate Bond Spread for Industrials with an A3 credit rating. According to the NERA EIB Report, the European Communities erred in the construction of its first benchmark because it used the "yield on A-3 rated bonds issued by US *domestic* borrowers, not European borrowers."[3411] Thus, we understand the United States to argue that the use of the Reuters' Corporate Bond Spread for Industrials with an A3 credit rating in the construction of the market interest rate benchmark means that it is less useful as a proxy for the EIB loan to EADS (which was a USD loan granted by a lending institution outside of the United States to a non-United States corporation) than its own benchmark.

7.768 We recall that the European Communities has not submitted a copy of the "Reuters' 10 year Corporate Bond Spread for Industrials" index that was allegedly used to construct the first of its market interest rate benchmarks for the 2002 loan to EADS. Neither has it explained the extent to which the spread data relied upon was limited (or not) to USD bonds issued in the United States. Moreover, although asked to specifically respond to the United States' criticism of its benchmark, the European Communities did not contest the assertion that it relied upon the "yield on A-3 rated bonds issued by US domestic borrowers".[3412] In this light, we find the European Communities' benchmark to be less relevant to the benchmarking exercise than information on the yields attached to USD bonds issued by European A3-rated companies outside of the United States.

7.769 The second benchmark presented by the European Communities was derived from the yield, on **[*******]**, of a Yankee bond issued by Norsk Hydro A/S, maturing in 2014. The European Communities adjusted this yield (5.145%) three times: (i) adding 6.5 basis points to account for the fact that EADS had a "slightly lower" credit rating than Norsk Hydro (which at the time was a single A rated European corporation); (ii) adding a further 5 basis points to reflect the fact that Yankee bonds pay interest semi-annually, whereas the EIB loan to EADS required annual interest payments; and (iii) detracting 6.5 basis points as the cost of the "additional finance-related project cost/obligations" "expressly acknowledged by the ratings agencies" to affect the market prices of bonds and loans.[3413]

7.770 In our view, the European Communities' reliance on data from the Yankee bond market renders its second proposed benchmark a less appropriate commercial proxy for the EIB loan to EADS than the benchmark advanced by the United States. We recall that Yankee bonds are USD bonds issued in the United States to non-United States entities that pay interest semi-annually. In addition, according to Fabozzi and Mann, Yankee bonds are usually issued by high credit quality sovereign and sovereign-guaranteed issuers – whereas Eurodollar bonds are issued mostly by corporations.[3414] Thus, we see interest rates associated with Yankee bond financing to be less appropriate as a proxy for the EIB's USD loan to EADS than bonds issued in the Eurodollar market. Although we recognize the merits of seeking to establish a market interest rate benchmark on the

[3409] EC, SWS, para. 497; EC, Answer to Panel Question 176.
[3410] EC, SNCOS, para.189; EC, Comments on US Answer to Panel Question 149.
[3411] NERA EIB Report, p. 3. (Emphasis original.) US, SWS, para. 279.
[3412] EC, Answer to Panel Question 180.
[3413] EIB Analysis of NERA EIB Report, Exhibit EC-857 (BCI), p. 4; EC, Answer to Panel Question 176.
[3414] Frank J. Fabozzi and Steven Mann, p. 396, Exhibit US-673.

BCI deleted, as indicated **[*****]**

basis of actual Yankee bond financing with the same maturity as the 2002 loan to EADS obtained by a European corporation having a similar credit rating to EADS, we consider the European Communities' benchmark to be a less appropriate proxy for the interest rate that a commercial lender would have charged EADS in August 2004 for a loan having the same characteristics as the 2002 EIB loan to EADS than the revised benchmark advanced by the United States.

7.771 The third European Communities benchmark is based on a syndicated USD loan to a BBB+ rated European publishing company, Pearson Plc, in July 2004, adjusted to account for EADS better credit rating and the 5 year duration of the loan (compared with the 10 year loan to EADS).[3415] The United States argues that the features of this benchmark, like that derived from Yankee bond information, differ from the EIB loan to EADS to the extent that it involves USD lending by United States lenders.[3416] The European Communities has not disclosed the source of the information on the Pearson Plc syndicated loan. Therefore, we cannot verify whether the syndicate involves only United States lenders. However, in our view, there are several other features of the Pearson syndicated loan which render it less appropriate to use as a commercial proxy for the 2002 EIB loan to EADS than the revised benchmark proposed by the United States. In particular, the recipient of the syndicated loan is a publishing company, whose activities are by their nature very different from those of EADS and Airbus. In this regard, we recall that the 2002 EIB loan to EADS was granted for the purpose of the A380 development programme, a project of largely unprecedented proportions in the field of LCA development. Furthermore, the Pearson loan was syndicated, meaning that the risks were spread between different lenders; and as the European Communities has itself noted,[3417] the Pearson loan involved revolving credit of five years, whereas the EIB loan to EADS involved a "10-year bullet". These features render the syndicated loan quite different from the EIB loan to EADS for the A380. This leads us to conclude that it is a less appropriate proxy for the EIB loan at issue than the revised benchmark proposed by the United States.

7.772 The last commercial interest rate benchmark the European Communities proposes for the 2002 EIB loan to EADS is based on what the European Communities submits it would have cost EADS to "swap" (convert) a Euro denominated bond issued on **[*****]** into US dollars. Using historical secondary market trading data for two Euro denominated bonds issued by EADS that were outstanding on **[*****]** – one maturing in 2010 and another in 2018 – the European Communities arrives at an approximate market price "for a theoretical spread to swaps of a 10-year EADS bond issue as at the date on which the EIB interest rate was fixed".[3418] It then converts this spread into "an approximate spread to USD swaps by subtracting the relevant cross country swap level and adding an estimated level of transaction costs". Because no data were available on USD to EUR cross currency swaps for 10 year maturities on **[*****]**, the European Communities derived the relevant cross currency swap from historical "ICAP" data available on Bloomberg.[3419] Transaction costs were estimated on the basis of "ICAP" information to be "half of the bid offer spread on a 10 yr basis swap".[3420] Thus, the European Communities concludes that "EADS USD funding through a hypothetical EUR issue {on **[*****]**} would have cost 5.205%".[3421]

[3415] EIB Analysis of NERA EIB Report, Exhibit EC-857 (BCI), pp. 4-5.

[3416] US Comments to EC, Answer to Panel Question 180.

[3417] EIB Analysis of NERA EIB Report, Exhibit EC-857 (BCI), footnote 8.

[3418] The European Communities defines "spread to swaps" as "the differential between the yield of the bond and the corresponding swap". EIB Analysis of NERA EIB Report, Exhibit EC-857 (BCI), footnote 9.

[3419] The European Communities describes "ICAP" as "a major broker in the derivatives business and has a strong presence in interest rate swaps and cross currency swaps". EIB Analysis of NERA EIB Report, Exhibit EC-857 (BCI), footnote 13.

[3420] EIB Analysis of NERA EIB Report, Exhibit EC-857 (BCI), footnote 15. The European Communities describes the "bid offer spread" as "the difference between the price at which the financial intermediary is willing to purchase – sell the swap".

[3421] EIB Analysis of NERA EIB Report, Exhibit EC-857 (BCI), pp. 5-6.

BCI deleted, as indicated **[***]**

7.773 In commenting on this benchmark, the United States notes that "a hypothetical 'swap' into **[***]** bonds issued by EADS ... bears no resemblance to the loan actually issued by the EIB."[3422] We are also not convinced that the proposed benchmark is an appropriate commercial proxy for what the cost of USD financing comparable with the 2002 EIB loan would have been for EADS.

7.774 Brealey and Myers explain that a typical cross currency swap transaction involving the issuance of a bond would result in the exchange of a series of cash-flows between two parties. In the first instance, the bond issuer would swap funds obtained in one currency on the bond market at a set interest rate with an equivalent amount of financing from a counterpart in another currency. Each year until the bond reaches maturity, the counterpart would provide the bond issuer with the funds needed to make interest payments to the bondholders in the bond currency. In return, the bond issuer would make interest payments in the swap currency on the funds swapped with its counterpart. On maturity of the bond, the counterpart would transfer a sufficient amount of funds in the bond currency to enable the bond issuer to make the final payment of interest and principal to its bondholders. Likewise, the bond issuer would make the last payment of interest and principal in the swap currency to the counterpart.[3423]

7.775 Thus, in essence, as we understand it, the benchmark proposed by the European Communities is based on a theoretical agreement between two parties (EADS and a counterpart) to exchange principal and interest payments in separate currencies. It would involve the exchange of principal denominated in EUR (obtained by EADS from a bond issue) for an equivalent amount in USD. In each year until the bond issue reaches maturity, EADS and the counterpart would exchange interest payments – EADS would make USD interest payments to the counterpart at the rate of interest attached to the USD "swap"; and the counterpart would make EUR interest payments to EADS in an amount to cover the interest payments required on the bond. At maturity, the final interest payments would be made and the principals would be re-exchanged between the two parties. In our view, these features of the European Communities' fourth proposed benchmark show that it is a very different type of financing instrument than the 2002 EIB loan to EADS. We are therefore not convinced that it represents a better proxy for the commercial interest rate that EADS would have been asked to pay for USD financing with the same characteristics as the 2002 loan from the EIB than the revised commercial benchmark advanced by the United States.

7.776 The parties' submissions show that establishing an appropriate market interest rate benchmark for the 2002 loan to EADS is a complex exercise. While we accept that EADS would have had a range of options available to it in August 2004 to obtain funding in USD from the market, the options that the parties have advanced involve financial instruments offering different levels of comparability with the loan from the EIB. We recall that in order to determine whether the 2002 loan to EADS conferred a benefit, we must identify which, if any, of the interest rate benchmarks proposed by the parties can serve as the most appropriate proxy for the interest rate that a commercial lender would charge Airbus for financing having *the same or similar characteristics as the 2002 loan to EADS*. Thus, contrary to what is suggested by the European Communities, the fact that EADS may have sought USD financing in August 2004 from a variety of market sources does not necessarily mean that all such sources represent a range of commercial financing options that are *equally comparable* with the 2002 loan to EADS.

7.777 Overall, on the basis of the arguments and evidence submitted by the parties, we consider that the market interest rate proxy that comes closest in terms of key characteristics and features to the 2002 EIB loan to EADS, and which would be appropriate to use as a commercial benchmark for the purpose of our benefit analysis, should be based on the 10 year Eurodollar bond interest rate advanced

[3422] US, Comments on EC Answer to Panel Question 180.

[3423] Richard A. Brealey and Steward C. Myers, *Principles of Corporate Finance*, Fourth Edition, Mc-Graw Hill Inc., 1991, pp. 642-643.

BCI deleted, as indicated **[***]**

by the United States, adjusted to account for EADS' credit rating on **[***]**. As we have already observed, this benchmark represents the average annual interest rate cost of 10 year USD bond financing outside of the United States on **[***]** for entities with the same credit rating as EADS that are not domiciled in the United States. It therefore bears close resemblance to the 2002 EIB loan to EADS, which was a 10 year non-amortizing USD loan attracting annual interest payments granted outside of the United States to a European company. In contrast, to the extent that the two bond-based benchmarks presented by the European Communities were based on the cost of USD bond financing obtained (i) *within the United States by United States corporations*; or (ii) *within the United States* by a European company (Yankee bond), they represent USD financing options that have less in common with the EIB loan to EADS than Eurodollar bond market financing.

7.778 The differences between the 2002 EIB loan to EADS and the European Communities' two other proposed market benchmarks are more pronounced. As we have noted, the USD syndicated loan option would involve multiple banks taking on the risk of EADS' default; whereas the EIB loan to EADS involves only one bank. Moreover, it is unclear whether the USD financing under the syndicated loan would be provided from within the European Communities or elsewhere. Likewise, compared with the EIB loan to EADS, a EUR denominated bond swapped into USD is a relatively complex finance instrument that would be given effect through a two step process: first, EADS would need to issue a EUR denominated bond; and second, EADS would have to enter into an agreement with a counterpart to exchange principal and interest payments connected with the EUR denominated bond into USD. Thus, whereas the EIB loan to EADS involves one core contractual relationship (between the EIB and EADS), the hypothetical EUR bond USD swap transaction would involve at least two core contractual relationships – one between EADS and its bondholders and another between EADS and its swap counterpart. In our view, this type of financial instrument bears little resemblance to the 2002 EIB loan to EADS. It is therefore a less reliable proxy, compared with the United States Eurodollar bond benchmark, for the interest rate that a commercial lender would charge EADS for USD financing having the same characteristics as the loan from the EIB.

7.779 Having concluded that the most appropriate commercial interest rate benchmark against which to measure whether the 2002 EIB loan to EADS conferred a benefit is the Eurodollar bond interest rate advanced by the United States adjusted to account for EADS' credit rating in **[***]**, we believe that it is not necessary for us to make any definitive findings on whether further adjustments are required to account for the three types of additional costs the European Communities asserts were incurred under the EIB loan contract, but not in connection with the bond instruments used to derive the parties' interest rate benchmarks. This is because even accepting the entirety of the European Communities' arguments and adjusting the United States' market interest benchmark accordingly, our overall assessment is that the EIB loan to EADS would still be advantageous compared with comparable commercial financing.

7.780 The first of the alleged additional costs are the so-called "additional finance-related project cost/obligations". According to the European Communities, "additional finance-related project cost/obligations" reflect "the fact that different financial instruments have different features and that these features are reflected in the market-pricing of these financial instruments".[3424] The European Communities explains that:

> "It is, for example, generally accepted that loans are priced cheaper than bonds. This is because, *inter alia*, (i) lenders have a direct relationship with, and have much greater information on, a borrower, whereas bond investors invest through a financial intermediary (typically an investment bank) (ii) a bilateral loan agreement allows lenders to maintain a constant dialogue with their borrowers, something that a bond issuer does not and cannot do with potentially tens of thousands of bondholders (iii)

[3424] EC, Answer to panel Question 176.

BCI deleted, as indicated **[***]**

> loan documentation tends to have many more protective covenants than bond documentation and (iv) ultimately, recovery rates in the event of default are typically higher in the case of a loan than in the case of a bond."[3425]

7.781 Relying on Moody's assessment of the differences in three-year cumulative loss rates between similarly rated loans and bonds, the European Communities submits that it is possible to quantify the "pricing impact of using bonds to benchmark a loan that has more stringent terms and conditions than the benchmark bonds"[3426], and calls for a 6.5 basis point reduction in the benchmark interest rates derived from bond market information.

7.782 The United States does not specifically contest the European Communities' reliance or interpretation of the Moody's information. However, it notes that even after making the adjustment to the European Communities' benchmarks to account for the alleged "additional finance-related project cost/obligations" between bonds and the EIB loan, two of the European Communities benchmark's continue to show that the 2002 EIB loan to EADS was non-commercial.[3427]

7.783 We agree with the European Communities that, in general, the differences between loan and bond instruments may well translate into differences in the price of borrowing that should be taken into account in the present benefit analysis. However, even assuming that the European Communities is correct in asking for a 6.5 basis point adjustment to be made to the parties' bond-based benchmarks, the interest rate attached to the EIB loan to EADS (5.11%) would still be below the level of the United States' adjusted interest rate benchmark (5.5488%). Thus, even accepting the European Communities' submission that "additional finance-related project cost/obligations" must be taken into account in order to identify an appropriate commercial interest rate benchmark against which to measure whether the EIB loan to EADS conferred a benefit, the interest rate attached to the EIB loan to EADS would still be non-commercial, confirming that it confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

7.784 The two further cost adjustments called for by the European Communities are to account for what it alleges are the "additional project specific costs/obligations" and "additional administrative-related project costs/obligations" incurred by EADS under the EIB loan. The European Communities recognizes that such costs are not easily quantified. Nevertheless, in the benchmark analyses presented in Exhibit EC-722 (BCI), the European Communities estimates what it considers they might have been, when added to the alleged cost of additional financial obligations, for a number of the challenged EIB loans. For instance, in respect of the 1988 EIB loan to Aérospatiale for the A330/A340,[3428] the European Communities submits that the "additional project obligations, financial obligations and administrative obligations" would have cost Airbus at least **[***]** basis points. Conversely, the European Communities considers that the "additional project obligations, financial obligations and administrative obligations" connected with the 1993 EIB loan to Airbus for the Super Transporteurs[3429] (a contract sharing the same type of "project-related additional obligations" as the 1988 loan to Aérospatiale for the A330/A340[3430]) would have cost Airbus less than **[***]** basis points.[3431] For another contract, the European Communities notes that "{e}ven if the other {non-financial} additional obligations are difficult to value precisely, they can definitely be valued at over **[***]** basis point".[3432] Thus, it is clear to us that whatever their precise value, the European

[3425] EC, Answer to panel Question 176.
[3426] EC, Answer to panel Question 176*; see also*, footnote 3401 above.
[3427] US, Comments on EC Answer to Panel Question 176.
[3428] Exhibit EC-693 (BCI).
[3429] Exhibit EC-695 (BCI).
[3430] Exhibit EC-876 (BCI).
[3431] Exhibit EC-722 (BCI).
[3432] Exhibit EC-722 (BCI), analysis prepared in respect of the 1991 EIB loan to British Aerospace for the A330/A340, Exhibit EC-707 (BCI).

BCI deleted, as indicated **[***]**

Communities is not suggesting that the alleged additional project and administrative costs incurred by EADS under the 2002 EIB loan for the A380 project were significant in terms of basis points, and certainly not sufficient to reduce a margin of approximately **[***]** basis points to zero – the difference between the actual interest rate charged on the EIB loan (5.11%) and the United States' adjusted benchmark (5.5488%).

7.785 Moreover, in order to properly take into account the cost of the alleged additional project-related or administrative obligations imposed on EIB borrowers, we believe that it would also be necessary to take into account any similar types of project- related or administrative costs associated with market financing that are not incurred when borrowing from the EIB. The United States submits that seeking to take all such alleged differences into account "would make a benefit analysis virtually impossible". The United States asks how "would one compare the burden associated with applying for EIB loans with the burden (including the efforts of lawyers, bankers, and others) associated with obtaining financing from the market? Or ... how would one compare project-specific 'costs/obligations' identified by the European Communities with the 'costs/obligations' of a borrower having dedicated personnel to maintain relations with investment banks for purposes of regular bond issuances?"[3433] In any event, the United States notes that the European Communities merely asserts that the alleged additional costs "would not normally be present" in the market finance instruments referred to by the United States. According to the United States, had the European Communities undertaken a comparison of the actual "costs/obligations" incurred under the individual EIB loans compared with commercial financing, it would have found that, in fact, the actual costs a company incurs in issuing bonds or raising capital through other market channels do not support its assertions. In this regard, the United States not only points to Boeing's own alleged experience in respect of bond issues,[3434] but also a 2003 study of allegedly several thousand issues between 1990 and 1994 cited in the NERA EIB Report, showing total costs ranging from 0.475% to 1.75% for bond offerings and even higher for other types of commercial financing.[3435] Given this latter evidence, which the European Communities has not contested, we are not convinced that it would be appropriate to take the alleged additional project- related and administrative costs into account in the manner that is suggested by the European Communities. However, as noted above, even if we were to accept the European Communities' proposition, the interest rate charged on the 2002 EIB loan to EADS would still be below the interest rate charged for comparable market funding.

7.786 The European Communities contends that because a borrower will typically consider the terms and conditions offered by different finance providers before taking out a loan, a market interest rate benchmark should be a spread of rates and not a single interest rate. According to the European Communities, it follows that "a difference of 20 to 50 basis points above or below the single benchmark rate" should not be taken as a sign of benefit.[3436] Thus, it would only be where the EIB rate were "convincingly outside this spread of rates" that it could be found to confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.[3437]

7.787 We agree with the European Communities that it would not be unreasonable to expect that two or more different commercial lenders may charge slightly different rates of interest for loans having the same terms and conditions. There are many factors that might affect the level at which a

[3433] US, Comments on EC Answer to Panel Question 176.

[3434] US, Comments on EC Answer to Panel Question 176, revealing that Boeing estimates that investment bank, regulatory and other fees on a USD 1 billion dollar bond issue would be between USD 10 and 20 million (1% and 2%). According to the United States, other costs incurred by Boeing would include costs related to maintaining its credit rating (including credit agency rating fees), maintaining compliance with securities regulations, and engaging employees on an ongoing basis in related activities.

[3435] NERA EIB Report, p. 5 (citing Richard A. Brealey, Stewart C. Myers, and Franklin Allen, *Principles of Corporate Finance*, p. 399), Exhibit US-542 (BCI).

[3436] EC, SWS, para. 507.

[3437] EC, SWS, para. 507; EC, Comments on US Answer to Panel Question 149.

BCI deleted, as indicated **[***]**

commercial lender will set its interest rates to customers. These might include the level of any reserve requirements, differences between lenders in the assessment of the risk associated with a particular loan, access to liquidity, the lender's desired risk exposure and business model, as well as the commercial relationship it has or wants to build with the potential customer. Because these factors might be valued differently by different commercial lenders, it would not be unreasonable to expect to find different lenders offering comparable loans to the same customer at a different interest rate. In a given set of circumstances, all such offers might represent an appropriate range of market interest rates for a comparable loan.[3438] However, in our view, when such a contention is made in WTO dispute settlement, it is up to the party that advances the existence of a range of relevant market interest rates to present credible evidence and convincing argument to establish its parameters. In this instance, we believe the European Communities has failed to make any such presentation. First, the European Communities appears to suggest that the benchmark it has advanced should be considered to be the middle-point in a range of available market interest rates that oscillates "20 to 50 basis points above or below the single benchmark rate". However, it has failed to explain why we should accept this proposition, instead of considering that the benchmarks advanced by the European Communities may fall at the high or low end of the range. Second, the European Communities has not explained exactly why the range of market interest rates that competing lenders would offer for a loan that is comparable with the 2002 EIB loan to EADS should be between 20 and 50 basis points, instead of another set of values. In the absence of any justification for its contention, and in particular, in the light of our findings on the nature of the EIB's lending activities[3439], we are not convinced that it would be appropriate to accept that market lenders would have offered a loan to EADS that is comparable with the loan obtained from the EIB in 2002 at an interest rate as much as 50 basis points below the adjusted United States' benchmark.

Commitment fees and non-utilization fees

7.788 We recall that the United States asserts that EADS benefited from the 2002 loan not only because of the below market interest rates charged by the EIB, but also because it did not have to pay any commitment fees or non-utilisation fees. In support of this assertion, the United States refers to the following statement made by the EIB in a document published on its website:

> "In addition to its usually advantageous lending rates, the EIB charges neither commitment fees nor non-utilization fees, but may charge fees for a project's appraisal and required legal services in appropriate cases."[3440]

7.789 The United States, argues that when a lender commits to provide a borrower with funding at a later date (as the EIB did in respect of the 2002 loan to EADS) it is giving the borrower a "valuable option".[3441] According to NERA, this "valuable option" manifests itself as the right of a borrower to "access ... funds on agreed terms regardless of whether its credit worthiness deteriorates or market conditions change".[3442] NERA submits that in return for tying up its capital in this way, a lender will

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[3438] That a range of interest rates may be charged on comparable commercial loans appears to also have been recognized by the Appellate Body in *Brazil – Aircraft*, where in addressing an alleged claim of export subsidization within the meaning of item (k) of Annex I of the SCM Agreement, it observed that "{i}n any given case, whether or not a government payment is used to secure a '*material* advantage', as opposed to an 'advantage' that is not 'material', may well depend on where the *net* interest rate applicable to the particular transaction at issue in that case stands in relation to the range of commercial rates available." Appellate Body Report, *Brazil – Aircraft*, para. 182 (italics original, underline added).

[3439] *See*, para. 7.753 above.

[3440] Exhibit US-160.

[3441] US, SWS, para. 278, referring to the explanation of commitment fees provided in the NERA EIB Report, p.4, Exhibit US-542 (BCI).

[3442] NERA EIB Report, p.4, footnote 7, Exhibit US-542 (BCI), paraphrasing Richard A. Brealey, Stewart C. Myers, and Franklin Allen, *Principles of Corporate Finance*, pp.856-857, Exhibit US-161.

BCI deleted, as indicated **[***]**

require compensation which will usually take the form of a "commitment fee", quoted as an annual percentage rate paid on the same basis as the loan (annual, semi-annual etc), and calculated on the amount of the loan facility not yet drawn down.[3443] The United States estimates that by not paying commitment fees, Airbus saved "an amount of up to USD 910,000 annually".[3444]

7.790 The European Communities accepts that commitment fees are typically charged by banks on the unused amounts of credit lines granted to borrowers "at a fixed spread over the general level of interest rates".[3445] However, it asserts that the challenged EIB loans did not involve the kind of "valuable option" that would normally attract the payment of such fees.[3446] The European Communities explains that the EIB enters into two types of loan contracts: (i) "single disbursement" contracts, which provide for one disbursement of a fixed amount of funds in a currency, at an interest rate and on a date that is agreed at the time of signature; and (ii) "open-rate" contracts, where the borrower is granted a loan facility with the right to request disbursements within a certain period, in different currencies, maturities, interest rate regimes (fixed or floating) and amounts, pursuant to a framework that is pre-defined in the contract.[3447] The European Communities submits that to charge a commitment fee for the first type of loan contract would not be standard market practice because, given that such contracts involve the disbursement of funds typically within a few days of signature, there is no "open" commitment. With regard to "open-rate" contracts, like the 2002 loan contract with EADS, the European Communities argues that the EIB does not offer the kind of contractual assurances that would merit the application of a commitment fee. This is because "open-rate" contracts do not guarantee entities access to funds at a fixed level of interest, irrespective of whether or not a borrower's "credit worthiness deteriorates" or the "cost of credit rises".[3448] Moreover, the European Communities notes that under such contracts the EIB does not guarantee immediate access to its disbursements.[3449]

7.791 In the particular case of the 2002 EIB loan to EADS, the European Communities explains that the EIB committed to provide EADS with funds at an interest rate to be determined by the EIB in accordance with its internal rules at the time of disbursement, not at the time of signature. The European Communities states that these internal rules require the EIB's board of directors to comply with Article 19.1 of the EIB Statute, which provides that interest rates shall be set to "enable the Bank to meet its obligations, to cover its expenses and to build up a reserve fund". Thus, according to the European Communities, on entering the 2002 loan contract with the EIB, EADS had no certainty or protection in respect of the interest rate that would be charged on any requested disbursement because it had no knowledge of what the EIB's cost of funds, administrative expenses or the level of the EIB's reserve fund, would be at the time of disbursement. Moreover, the European Communities notes that the EIB did not commit to provide EADS with any requested funds within a matter of "one or two days", but expressly reserved the right to take up to 120 days.[3450]

7.792 The European Communities contrasts the above features of the 2002 loan to EADS with a credit facility obtained by EADS in **[***]** from a syndicate of commercial banks which did charge a commitment fee. This credit facility involved a EUR **[***]** revolving credit line to be **[***]** at a an interest rate set at a **[***]** notwithstanding any changes in the relevant banks' cost of funds or the interest rate setting methodology. In addition, pursuant to the credit facility, the bank syndicate was

[3443] NERA EIB Report, p.4, Exhibit US-542 (BCI).
[3444] NERA EIB Report, p. 7, Exhibit US-542 (BCI).
[3445] EC, Answers to Panel Questions 87 and 179.
[3446] EC, Answers to Panel Questions 87 and 179.
[3447] EC, Answer to Panel Question 87.
[3448] EC, Answer to Panel Question 179.
[3449] EC, Answer to Panel Question 179.
[3450] EC, Answer to Panel Question 179, referring to Article 1.02 A b of the 2002 EADS loan contract, Exhibit EC-167 (BCI). *See, also*, EIB Analysis of NERA EIB Report, pp.7-8, Exhibit EC-857 (BCI).

BCI deleted, as indicated **[***]**

required to provide funding within three business days of a request from EADS.[3451] The European Communities argues that these differences show that the "valuable option" that the United States contends is the reason why banks charge a commitment fee was not present in the 2002 EIB loan to EADS.[3452]

7.793 Under the terms of the original loan contract,[3453] the EIB agreed to lend EADS a maximum of EUR 700 million, in up to **[***]** tranches of no less than EUR **[***]** each, at an interest rate to be determined at the time of EADS' request for disbursement, in accordance with the particular interest rate regime chosen by EADS.[3454] EADS was granted the right to choose between three different interest rate regimes: a fixed interest rate ("Taux Fixe"), and two types of variable rates ("Taux Variable – Ecart Variable", "Taux Variable – Ecart Fixe").[3455] The regime chosen by EADS was the fixed rate regime. Article 3.01A of the original contract describes the methodology that would be employed to arrive at the fixed rate of interest charged by the EIB in the following terms:

> **[***]**

7.794 This provision was subsequently modified by amendment of May 2004 (before EADS had requested its first disbursement), which replaced Article 3.01A(ii) with the following text:

> "(ii) increased by a margin of 20/100 percentage points (0.20%) if the Tranche in question is a 'Tranche A' ".[3456]

7.795 The original contract further stipulated that after requesting a disbursement, EADS would be notified of the applicable interest rate (and the date upon which the disbursement would be made) ten to 15 days prior to the disbursement actually being made.[3457] Thus, at the time of *concluding the loan contract*, EADS was aware that the interest rate that it would have to pay on any requested disbursement would be composed of two parts: (i) the interest rate applied by the EIB, on the date of EADS' request for disbursement, to loans presenting the same characteristics as the requested disbursement in terms of currency, repayment schedule, and length and periodicity of interest payments; and (ii) a margin of **[***]** basis points representing the risk premium charged by the EIB.[3458] Apart from the value of the **[***]** basis points risk premium, the prescribed methodology for calculating the fixed interest rate (general EIB lending rate applicable to comparable loans plus an

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[3451] EC, Answer to Panel Question 179, referring to various provisions of the EADS **[***]** Credit Facility, Exhibit EC-881 (BCI), withdrawn and replaced by a similar EUR **[***]** credit facility in **[***]**, Exhibit EC-882 (BCI).

[3452] EC, Answers to Panel Questions 87 and 179.

[3453] Exhibits EC-167 (BCI), US-158 (BCI)

[3454] Article 1.02, Exhibits EC-167 (BCI), US-158 (BCI).

[3455] Article 3.01, Exhibits EC-167 (BCI), US-158 (BCI).

[3456] Article 1.05, Exhibit EC-879 (BCI). The original contract divided each potential disbursement into two equal parts "Sous Tranche A" and "Sous Tranche B" (Article 1.02E, Exhibits EC-167 (BCI), US-158 (BCI)). However, by amendment of May 2004, this division was replaced by another which separated the available credit into two parts: any disbursement that alone or added together with previous disbursements did not exceed **[***]** would be designated "Tranche A"; and any other disbursement that alone or added together with previous disbursements exceeded **[***]** would be designated "Tranche B". (Article 1.03, Exhibit EC-879 (BCI)). In accordance with these terms, the **[***]** disbursement requested by EADS was designated "Tranche A" and therefore subject to the **[***]** basis points risk premium.

[3457] Article 1.02C, Exhibit US-158 (BCI). We note that in the context of "single disbursement" contracts, the European Communities argues that a ten to 15 day delay between the conclusion of a contract and disbursement does not justify payment of a commitment fee. EC, Answer to Panel Question 179, footnote 70. The United States has not argued that the 10 to 15 day notice period is sufficiently long enough to warrant the EIB demanding the payment of a commitment fee.

[3458] EC, Answer to Panel Question 89; Exhibits EC-722 (BCI) and EC-842.

BCI deleted, as indicated **[***]**

additional margin) is the same that is set out in the EIB's standard form contract.[3459] Therefore, the interest rate setting mechanism agreed to under the contract was not unique to EADS, but one that was applied generally by the EIB to other lending activities.

7.796 The United States argues that without knowing more about the precise methodology applied by the EIB in setting interest rates, "it is impossible for the Panel to determine the degree to which interest rates may vary according to date of disbursement and, therefore, the degree of uncertainty a borrower from the EIB actually faces compared with a borrower from a commercial lender".[3460] Moreover, the United States notes that the European Communities has not indicated which factors the EIB does not take into account when it sets interest rates at the date of disbursement. In particular, the United States observes that whereas the European Communities has identified factors such as the EIB's cost of funds, its administrative expenses, and its reserve fund as variables that may affect the interest rates set by the EIB on the date of disbursement, it has said nothing about whether the EIB takes into consideration a deterioration in the creditworthiness of the borrower.[3461] In making this observation, we understand the United States to suggest that to the extent that the EIB does not take into account any deterioration in the creditworthiness of a borrower between the time a loan is granted and the date of disbursement, it acts like a commercial bank that offers a credit facility on agreed terms and therefore, at least to this extent, would be expected to charge a commitment fee. Thus, the fact that EADS did not pay a commitment fee means that the EIB loan was more advantageous to EADS than comparable market financing.

7.797 In our view, the evidence and arguments before us indicate that the purpose of a commitment fee is to compensate a lender for agreeing, at the time of the conclusion of a loan contract, to provide funding at a later date on interest rate terms reflecting *inter alia*, the credit rating of a borrower at the time the loan contract was concluded.[3462] In other words, a commitment fee is at least in part required to compensate a lender for the risk that a borrower's credit rating will deteriorate between the time that it is relied upon to set the contract interest rate and the actual disbursement of funds. We find support for this conclusion in the following passage from Brealey and Myers, upon which both parties have relied:

> "Credit lines are relatively expensive, for in addition to paying interest on any borrowings the company must pay a commitment fee on the unused amount. In exchange for this extra cost, the firm receives a valuable option: It has guaranteed access to the bank's money at a fixed spread over the general level of interest rates. This amounts to a put option, because the firm can sell its debt to the bank on fixed terms even if its own creditworthiness deteriorates or the cost of credit rises".[3463]

7.798 We recall that the EIB charged EADS a fixed interest rate made up of two components. It is unclear to us, from the European Communities' description of how the EIB sets interest rates[3464] and the evidence that is before us, whether the first of these components took into account EADS' creditworthiness. However, our understanding of the second component, the **[***]** basis point risk premium, is that it was in fact (at least in part) established in the light of EADS' creditworthiness *at the time of signature*. In its 2006 Annual Report, the EIB explains that it applies a loan grading

[3459] Article 3.01A, EIB Standard Form Contract 2001, Exhibit EC-609 (BCI). Apart from the risk premium text, essentially the same language is used in Article 3.01A of the Standard Form Contract that existed prior to 2001, Exhibit EC-711 (BCI).

[3460] US, Comments on EC Answer to Panel Question 179.

[3461] US, Comments on EC Answer to Panel Question 179.

[3462] US, SWS, para. 278, referring to NERA EIB Report, p.4, Exhibit US-542 (BCI); US, Comments on EC Answer to Panel Question 179; EC, Answer to Panel Question 179.

[3463] Exhibit US-161, US, SWS, para 278, NERA EIB Report, p. 4, footnote 7, Exhibit US-542 (BCI); EC, Answer to Panel question 179 (quoting all but the first sentence of the above-quoted passage.).

[3464] EC, FWS, paras. 1067-1069.

BCI deleted, as indicated **[***]**

system to determine the credit risk of each loan. This involves consideration of *inter alia*, the borrower's credit rating, the value of any guarantee instruments and securities, the contractual framework and the loan's duration, with a view to establishing the level of general or specific "provisioning" required. Operations with a loan grading of "A-" will attract a 0.20% risk premium,[3465] **[***]**.[3466]

7.799 By applying a fixed risk premium of **[***]** basis points to the disbursement of funds requested by EADS, irrespective of any possible deterioration in EADS' creditworthiness, the EIB provided EADS with at least part of the "valuable option" that we understand would ordinarily justify commitment fees charged by commercial lenders. It follows that to the extent that the EIB did not require EADS to pay a fee to compensate for its commitment to make funding available at a fixed risk premium, irrespective any deterioration in its creditworthiness, its loan to EADS was more advantageous than a comparable loan from a commercial lender.

7.800 Turning to the United States' claim that the EIB loan to EADS conferred a benefit because the EIB did not charge non-utilization fees,[3467] we note that apart from making this allegation, the United States has advanced no specific explanation nor adduced any particular evidence or expert opinion (as it did in respect of the EIB's failure to charge a commitment fee)[3468] that suggests a commercial lender would have required EADS to pay a non-utilization fee for the same type of financing it obtained from the EIB under the 2002 loan contract – namely, a credit line with only a risk premium of **[***]** basis points being fixed at the time of signature (as opposed to, e.g., the full interest rate applicable to the entire disbursement). In the absence of any such evidence or relevant explanation, and given that the European Communities does not accept that the payment of a non-utilization fee was warranted,[3469] we are not convinced that the United States has done enough to establish that the 2002 loan to EADS conferred a benefit because the EIB did not require EADS to pay a non-utilization fee.

Conclusion in respect of the 2002 loan to EADS

7.801 On the basis of the foregoing analysis, and in the light of our findings on the nature of the EIB's lending activities,[3470] we find that the United States has established that the 2002 EIB loan to EADS conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement because: (i) the interest rate charged by the EIB was less than what a market lender would have asked EADS to pay for comparable financing; and (ii) EADS was not required to pay a commitment fee, even though a fixed **[***]** basis points risk premium was charged on part of the loan, irrespective of any possible future deterioration of EADS' credit rating. On the other hand, we find that the United States has failed to demonstrate that the 2002 EIB loan to EADS also conferred a benefit upon EADS because of the EIB's failure to charge non-utilization fees.

[3465] Exhibit EC-842, pp. 149-152.

[3466] *See*, footnote 3456 above.

[3467] The United States describes non-utilization fees as fees charged "in cases where borrowers do not use the credit lines the EIB has provided". US, FWS, para. 402. The European Communities initially described non-utilization fees as "a basis point charge on the amount undrawn". EC, Answer to Panel Question 87. However, in its later submissions, the European Communities suggests that non-utilization fees and commitment fees are essentially two ways of referring "interchangeably" to the same compensation that a bank may seek for "guaranteeing borrowing entities immediate access to a lending bank's money 'at a fixed spread over the general level of interest rates'". EC, Answer to Panel Question 179.

[3468] Indeed, in presenting its revised benefit analysis for the 2002 EADS loan contract, the United States does not repeat its allegation that the loan conferred a benefit because it did not provide for non-utilization fees, focusing only on the absence of commitment fees. US, SWS, paras. 275 and 278. *See, also,* NERA EIB Report, p.4, Exhibit US-542 (BCI), where the alleged failure of the EIB to charge EADS non-utilization fees is not identified as a benefit of the 2002 loan contract.

[3469] EC, Answers to Panel Question 87 and 179.

[3470] *See*, para. 7.753 above.

BCI deleted, as indicated **[***]**

The 1992 loan to Aérospatiale

7.802 The 1992 EIB loan to Aérospatiale was granted pursuant to a contract concluded on 21 July 1992 for the purpose of financing Aérospatiale's construction of buildings and the installation of industrial equipment to be used in the commercialization of the A330/A340. The loan was effected through one disbursement of FRF **[***]** at an interest rate of **[***]**, payable annually, with a maturity of **[***]** years in **[***]**, amortizing in the last eight years from **[***]** (*i.e.*, only interest payments required in the **[***]** years of the loan; principal plus interest being paid annually only from the **[***]** year).[3471] The United States alleges that this loan conferred a benefit on Aérospatiale because: (i) it was granted on interest rate terms that were more advantageous than comparable market financing; and (ii) the EIB did not charge Aérospatiale any commitment fees or non-utilization fees.

Interest rate terms

7.803 As already noted, the United States presented market interest rate benchmarks for all of the EIB loans at issue based on the country-specific general corporate borrowing rates calculated in the Ellis Report for each of the relevant Airbus entities.[3472] These benchmarks were constructed by adding: (i) the average annual interest rate attached to 10-year government bonds issued in France, Germany, Spain and the UK in the years corresponding to the conclusion of the EIB loan contracts (*i.e.*, the risk-free rate of interest); to (ii) the "credit spread" for the Airbus borrower at issue (*i.e.*, an interest rate premium reflecting the additional risk associated with each individual Airbus entity's general borrowing). For Aérospatiale, the United States estimated the "credit spread" in 1992 through the use of a regression model. In essence, this model relied upon information on the actual credit spreads of two 10-year bonds allegedly issued by Aérospatiale in 1993 to estimate what Aérospatiale's credit spreads would have been in each of the years from 1970 to 1992.[3473] Applying this methodology, the United States initially advanced a market interest rate benchmark for the 1992 EIB loan to Aérospatiale of **[***]**.[3474] In its second written submission, the United States revised this benchmark to "incorporate market data on the date of the loan", in response to the European Communities' criticism of its reliance upon annual averages.[3475] On the basis of its updated analysis, the United States submits that the relevant market interest rate benchmark for a loan having similar characteristics to the EIB loan would be "10.46 percent, approximately **[***]** basis points **[***]** than the actual rate the EIB charged {Aérospatiale} of **[***]** percent".[3476]

7.804 The European Communities criticizes the United States' revised benchmark for being based on what it considers to be an erroneous regression model which relies on too few data points and assumes maturities that are not comparable with the actual maturity of the 1992 EIB loan to

[3471] Exhibits US-167 (BCI), EC-694 (BCI) and EC-698 (BCI).
[3472] *See*, para. 7.755 above.
[3473] Ellis Report, pp. 11-16, Exhibit US-80 (BCI). ("Regressions to establish parameters of the credit spread model for Aérospatiale ... were based on yield-to-maturity data on two bonds issued by Aérospatiale in 1993. ... Using the coefficients arrived at in this way, together with data from the French yield curve for the period 1970 to 1992, we were able to construct values of the credit spread for ten year general corporate borrowings for Aérospatiale for those years.") We understand that the United States relied upon the actual credit spreads for the two Aérospatiale bonds in years after 1992. ("The same procedure used to construct credit spreads for the French operating company was followed in the case of the United Kingdom: actual BAE Systems credit spreads were used for the years 1991-2006, and the regression parameters derived were used in those years for which out-of-sample yield curve data were available.")
[3474] US, FWS, para. 411.
[3475] US, SWS, paras. 274-277; NERA EIB Report, pp 3 and 6 ("We agree with the EC's assertion that market conditions fluctuate and that consequently the rate on the loan must be compared with a benchmark 'at the relevant point in time and in the relevant year the EIB loan was made'".) Exhibit US-542 (BCI).
[3476] US, SWS, para. 276.

BCI deleted, as indicated **[***]**

Aérospatiale.[3477] In particular, the European Communities notes that although the chosen explanatory variables are "significant" because "they pass the so called F test", the model's "R^2" value is "only 0.43 in range of 0 to 1, where 1 is the most accurate".[3478] Moreover, the European Communities argues that the regression model does not take into account the relevant features of the relevant loans, observing that whereas the EIB loan to Aérospatiale is **[***]**, the benchmark established by NERA relies upon a "10-year government bond and is assuming a 10-year bullet loan, ignoring the impact of its amortization schedule".[3479]

7.805 The European Communities considers that the flawed nature of the United States' regression model for the 1992 EIB loan to Aérospatiale is confirmed by the fact that the credit spreads associated with two 10-year bonds actually issued by Aérospatiale in September 1991 and October 1992 were respectively **[***]** and **[***]** basis points, less than half the **[***]** basis points spread estimated by the United States' model, even though there was "no significant news/improvement on the creditworthiness of Aérospatiale to justify such a sharp reduction in spreads".[3480] Accordingly, the European Communities advances its own market interest rate benchmark, constructed on the basis of the actual **[***]** basis point credit spread that existed in September 1991 and the interest rate it asserts was attached to French government long-term borrowing having allegedly the same maturity as the EIB loan on the actual date of the EIB disbursement to Aérospatiale, 27 July 1992.[3481] Applying this methodology, the European Communities arrives at a market interest rate benchmark for the 1992 EIB loan to Aérospatiale of **[***]**.[3482]

7.806 Information contained in Aérospatiale's annual reports suggests that the credit spreads derived from the United States' regression model may indeed be overstated. The two 10-year bonds the European Communities asserts were issued by Aérospatiale in September 1991 and October 1992 were "domestic bonds" that each raised FRF 1 billion at an interest rate of 9.4% and 8.7%, respectively.[3483] Aérospatiale issued three additional 10-year "foreign bonds" in 1992 and 1993: one in March and June 1992 raising FRF 1.8 billion at an interest rate of 9.125%;[3484] one in February 1993 raising FRF 1 billion at an interest rate of 8.375%; and another in July 1993 raising FRF 1.5 billion at an interest rate of 7%.[3485] As the European Communities notes, the September 1991 and October 1992 bonds were issued with a credit spread above the interest rate paid by the French government on its long-term borrowing (according to the European Communities, respectively **[***]** and **[***]** basis points). Thus, when compared with the actual credit spreads on the corporate bonds Aérospatiale issued in 1991 and 1992, the credit spread outcome of the United States' regression model for Aérospatiale in July 1992 (136 basis points) appears to overestimate what Aérospatiale's

[3477] EC, FWS, para. 1078; EIB Analysis of the NERA EIB Report, p.7, Exhibit EC-857 (BCI).

[3478] EC, FWS, para. 1078. The Ellis Report describes the "adjusted R2" and "F" statistic as "two summary statistics frequently used to assess the validity of a regression ... : adjusted R2 measures the fraction of the variance of the dependent variable explained by the independent variable(s) adjusted for degrees of freedom, and the F statistic is used to test the hypothesis that all of the slope coefficients are zero." Ellis notes that "in this instance the adjusted R2 is relatively high and the F statistic is highly statistically significant; this shows that the regression model does a good job of estimating the credit spread for Aérospatiale's bonds". Ellis Report, p. 14, Exhibit US-80 (BCI).

[3479] EIB Analysis of the NERA EIB Report, p.7, Exhibit EC-857 (BCI).

[3480] EIB Analysis of the NERA EIB Report, p.7, Exhibit EC-857 (BCI).

[3481] Exhibit EC-722 (BCI); EIB Analysis of the NERA EIB Report, p.7, Exhibit EC-857 (BCI).

[3482] Exhibit EC-722 (BCI).

[3483] Aérospatiale 1992 Annual Report, p.61, Exhibit EC-174. We note that Aérospatiale's 1992 Annual Report indicates that a 10-year "domestic bond" for FRF 1 billion was issued in November 1992, not October 1992. The European Communities has not submitted a copy of either of these bond instruments.

[3484] Aérospatiale 1992 Annual Report, p.61; Aérospatiale 1993 Annual Report, p.77; and Aérospatiale 1994 Annual Report, p.75, Exhibits EC-174, 175 and 186.

[3485] Aérospatiale 1993 Annual Report, p.77; and Aérospatiale 1994 Annual Report, p.75, Exhibits EC-175 and 186.

BCI deleted, as indicated **[***]**

cost of financing would have been on the market. Nevertheless, overall, we do not find the evidence submitted by the United States to be insufficient for the purpose of establishing that the 1992 EIB loan to Aérospatiale conferred a benefit.

7.807 First, we note that the risk-free rate of interest used in the construction of the United States' revised market interest rate benchmark is 9.10%,[3486] the same risk-free borrowing rate applied by the European Communities to derive its own market interest rate benchmark,[3487] which is **[***]** rate of interest charged by the EIB on the loan to Aérospatiale. In other words, both of the parties agree that the 1992 EIB loan to Aérospatiale was provided at a contract interest rate **[***]** to the risk-free rate of interest associated with French government long-term borrowing. There is no doubt, however, that the market would have required Aérospatiale to pay a premium above the risk-free rate of borrowing for such funding, a premium that the European Communities contends was as much as 62 basis points in October 1992 (just three months after conclusion of the EIB loan contract).

7.808 Second, the alternative benchmark presented by the European Communities implies that the 1992 EIB loan to Aérospatiale provided an advantage of **[***]** basis points relative to comparable financing available on the market. Moreover, even if we were to accept the European Communities' contention that the actual level of the interest charged by the EIB should take into account the cost of the loan guarantee required from Airbus (allegedly having a value of **[***]** basis points),[3488] the difference between the adjusted interest rate charged on the EIB loan **[***]** and the European Communities' market interest rate benchmark **[***]** would still show an advantage to Airbus of **[***]** basis points. According to the European Communities, this advantage could not be reduced to below zero by the alleged "additional project obligations, financial obligations and administrative obligations" associated with the 1992 loan compared with the bond instruments used to construct the benchmark.[3489] Thus, on its face, the European Communities' own benchmark analysis confirms the United States' claim that the interest rate charged by the EIB on the 1992 loan to Aérospatiale was more advantageous than what Aérospatiale could have found on the market.

7.809 The European Communities argues that this interest rate differential is not enough to establish the existence of benefit. In particular, the European Communities argues that the difference of **[***]** basis points is exceptional and should not be taken as demonstrating that the loan confers a benefit upon Airbus. The European Communities submits that a "likely explanation for the substantial divergence{}... is that the EIB might have fixed its conditions prior to or following an important movement in the rate".[3490] The European Communities explains that "if in the morning the EIB fixes its condition for a disbursement and the risk free rate increases in the afternoon, then the EIB rate could appear particularly attractive compared to the new risk free rate of that afternoon."[3491] However, the European Communities has presented no evidence demonstrating that the difference of **[***]** basis points was attributable to any such volatility in daily interest rates, noting that "{u}nfortunately past data is recorded only once per day and therefore it is often impossible to take account of same-day movements in the risk-free rate".[3492] Thus, the European Communities does not assert, as a matter of fact, that any actual volatility in the level of the risk-free rate of interest on 27 July 1992 explains the interest rate differential of **[***]** basis points.

[3486] *I.e.*, the difference between the United States proposed benchmark **[***]** and the **[***]** basis points credit spread calculated for Aérospatiale.

[3487] Exhibit EC-722 (BCI).

[3488] Exhibit EC-722 (BCI).

[3489] Exhibit EC-722 (BCI).

[3490] EC, SWS, para. 506.

[3491] EC, SWS, para. 506.

[3492] EC, SWS, para. 506.

BCI deleted, as indicated **[***]**

7.810 Finally, we recall that in the case of the 1992 EIB loan to Aérospatiale, the contract rate of interest was set at **[***]** as the risk-free interest rate attached to French government long-term borrowing. Therefore, to accept that the loan to Aérospatiale was not granted at below-market interest rate terms, in the context of the European Communities' own market interest rate benchmark, would mean that we would have to accept that a commercial lender would have granted Aérospatiale a loan at an interest rate that did not take into account Aérospatiale's own discrete credit risk. However, we cannot accept this to be a plausible outcome as it implies that a commercial lender would have been prepared to lend funds to Aérospatiale at a rate of return that at most was **[***]** the rate of return it could have obtained from lending to the French government at a time when even according to the European Communities' own evidence, Aérospatiale's borrowing carried a risk premium above the risk-free rate of French government lending.[3493]

Commitment fees and non-utilization fees

7.811 The United States relies on the same evidence advanced in respect of the 2002 loan to EADS to claim that the 1992 loan to Aérospatiale also conferred a benefit upon Airbus because it did not require Aérospatiale to pay any commitment fees or non-utilisation fees.[3494] The European Communities refutes the United States' allegation, on the basis of the same arguments we have already described above.[3495]

7.812 We recall that the 1992 loan to Aérospatiale was concluded on **[***]**. It provided for one single disbursement on **[***]**, to be repaid at an interest rate of **[***]**, agreed and fixed in the contract on the date of signature.[3496] Thus, under the 1992 loan contract, the EIB legally committed itself to providing Aérospatiale with a loan on certain fixed terms and conditions **[***]** before actually transferring the borrowed funds to Aérospatiale. Conversely, Aérospatiale undertook an obligation to take possession of the prescribed funding amount on **[***]** on terms and conditions fixed when the contract was concluded.

7.813 According to the European Communities, it would not be in accordance with market practice for the EIB to demand the payment of a fee for making this type of commitment.[3497] The United States has not contested the European Communities' assertion. Indeed, the characterisation of commitment fees used in the NERA EIB Report that is relied upon by the United States suggests that commitment fees would not normally be demanded by a bank when a borrower has undertaken an *obligation* to borrow, as opposed to merely an *option* to borrow under an open credit line.[3498] In this light, and given the particular circumstances of the 1992 loan to Aérospatiale, which included the EIB making funds available to Aérospatiale at a fixed interest rate merely **[***]** after the loan contract was concluded, the United States has failed to advance sufficient evidence and argument to persuade us that the EIB's failure to charge a commitment fee conferred a benefit upon Aérospatiale.

7.814 On the issue of non-utilization fees, once again we note that apart from alleging that the 1992 loan to Aérospatiale (like all EIB loans) conferred a benefit because the EIB did not charge non-utilization fees, the United States has advanced no specific explanation nor adduced any particular evidence or expert opinion suggesting that a commercial lender would have required Aérospatiale to

[3493] *See*, para. 7.806 above.
[3494] US, FWS, para. 414, citing Exhibits US-160 and US-161.
[3495] *See*, para. 7.790 above.
[3496] *See*, para. 7.802 above.
[3497] *See*, para. 7.790 above.
[3498] The relevant passage of the NERA EIB Report reads: "an important feature of the EIB Loan Contract signed in 2002 is the fact that it gave the European Communities **[***]**. This means that the EIB committed itself to make that amount of funds available to EADS. This is a common occurrence in commercial lending, but banks require compensation for tying up their capital, usually in the form of what is called a 'Commitment Fee'". NERA EIB Report, p.4, Exhibit US-542 (BCI).

BCI deleted, as indicated **[***]**

pay a non-utilization fee for the same type of financing it obtained from the EIB under the 1992 loan contract. In the absence of any such evidence or relevant explanation, and given that the European Communities does not accept that the payment of a non-utilization fee was warranted,[3499] we are not convinced that the United States has done enough to establish that the 1992 loan to Aérospatiale conferred a benefit because the EIB did not require Aérospatiale to pay a non-utilization fee. In any case, were we to understand non-utilization fees as compensation charged by commercial lenders on unused amounts of credit lines, as the parties have suggested,[3500] we would note that the entirety of the amount of financing that was the subject of the 1992 loan agreement was, in fact, transferred to Aérospatiale as stipulated in the contract.[3501] On this basis, there would be no justification for requiring Aérospatiale to pay non-utilization fees.

Absence of a risk premium

7.815 In its second written submission, the United States argued that the European Communities admitted in its first written submission that the EIB did not charge a risk premium on any loans granted prior to 1999. According to the United States, the absence of a risk premium means that the EIB's loans were "by definition preferential to those available in the market, because the EIB (unlike a market lender) did not charge a premium to compensate the risk it assumed in providing financing to the borrower".[3502]

7.816 The European Communities does not contest the United States' view that market lenders would normally charge a premium in return for assuming the risks associated with lending to a particular borrower. However, it rejects the United States' assertion that the EIB's introduction of "risk pricing" in 2000 necessarily implies that all pre-2000 loans conferred a benefit because they did not involve the EIB charging a risk premium. The European Communities explains that the EIB's introduction of "risk pricing" in 2000 was the result of its ongoing efforts to apply "best banking practices" in the area of risk management. The European Communities asserts that following a review of its credit policies, the EIB decided to introduce "risk pricing" as "an alternative (total or partial) to {the} external {loan} guarantees" required under Article 18.3 of its Statute. Thus, the application of a risk premium on a particular loan as of 2000 was intended to place the EIB "in a position similar to that it would have been if the loan benefited from an external guarantee". In other words, the European Communities submits that the introduction of risk premia did "not entail a relaxation of (or variation to) a consistent existing credit policy". Rather, it merely represented another option for the bank to apply in the context of managing the risk associated with its loans.[3503]

7.817 To support its assertions, the European Communities submits four pages from the EIB's 2006 Annual Report, which describe its risk management practices.[3504] We have closely reviewed this document and find that it does not substantiate the totality of what the European Communities is alleging. While it states that the EIB does attempt to "align its risk management systems to changing economic conditions and evolving regulatory standards" with a view to following "best market practice", it says nothing about why the EIB decided to introduce a risk premium in 2000 or whether it was intended, as the European Communities contends, to operate as a partial or total alternative to the loan guarantees required under Article 18.3 of its Statute. Thus, although we consider the European Communities' explanation to make some intuitive sense, we cannot accept it as a matter of fact on the basis of the evidence that has been presented.

[3499] EC, Answers to Panel Question 87 and 179.
[3500] *See*, footnote 3467 above.
[3501] *See*, para. 7.802 above. Exhibits EC-167 (BCI) and EC-698 (BCI) confirm that the amount of agreed funding was transferred to Aérospatiale on **[***]**.
[3502] US, SWS, para. 269.
[3503] EC, SNCOS, para. 190.
[3504] Exhibit EC-842.

BCI deleted, as indicated **[***]**

7.818 Moreover, while the European Communities' explanation of why the EIB introduced a risk premium suggests that risks associated with EIB lending prior to 2000 were taken into account by means of "external guarantees", the European Communities has not explained how the particular guarantee provided under the 1992 loan to Aérospatiale served to compensate the EIB for the risks associated with lending to Aérospatiale in the same way that a market lender would have sought compensation for the same risks under a commercial loan.

7.819 In this light, we find that the European Communities has failed to advance sufficient evidence and argument to persuade us that the absence of a risk premium on the EIB 1992 loan to Aérospatiale did not confer a benefit upon Airbus. We therefore uphold the United States' claim that the 1992 loan to Aérospatiale conferred a benefit, within the meaning of Article 1.1(b) of the SCM Agreement, because it did not include a risk premium.

Conclusion in respect of the 1992 loan to Aérospatiale

7.820 On the basis of the foregoing analysis, and in the light of our findings on the nature of the EIB's lending activities,[3505] we find that the 1992 loan to Aérospatiale conferred a benefit on Aérospatiale, within the meaning of Article 1.1(b) of the SCM Agreement, because it was granted: (i) at an interest rate **[***]** to the cost of borrowing for the French government and was therefore more advantageous than the interest rate that would have been available to Aérospatiale on the market for comparable financing; and (ii) on interest rate terms that did not include a risk premium. On the other hand, we find that the United States has failed to establish that the 1992 loan to Aérospatiale also conferred a benefit because the EIB did not require Aérospatiale to pay any commitment fees or non-utilization fees.

The other EIB loans

7.821 We recall that in addition to the 2002 loan to EADS for the A380 and the 1992 loan to Aérospatiale for the A330/A340, the United States claims that ten other loans provided by the EIB to various Airbus entities were subsidies within the meaning of the SCM Agreement. These loans are: (i) the 1993 loan to Aérospatiale for the Super Transporteurs; (ii) the 1991 loan to British Aerospace for the A330/A340; (iii) the 1990 loan to CASA for the A320 and A330/A340 (No. 14711/ES); (iv) the 1990 loan to CASA for the A320 and A330/A340 (No. 14712/ES); (v) the 1990 loan to British Aerospace for the A330/A340; (vi) the 1990 loan to Airbus Industrie GIE for the A321; (vii) the 1989 loan to CASA for the A320 and A330/A340; (viii) the 1989 loan to British Aerospace for the A320; (ix) the 1988 loan to British Aerospace for the A320; and (x) the 1988 loan to Aérospatiale for the A330/340. The United States argues that all of these loans conferred a benefit on Airbus because: (a) each loan was granted on interest rate terms that were more advantageous than comparable market financing; (b) the EIB did not charge the respective borrowers any commitment fees or non-utilization fees; and (c) the EIB did not charge a risk premium on each loan.

Interest rate terms

7.822 During the Annex V process, the United States (through the Facilitator) requested the European Communities to provide information on the terms and conditions of the each of the challenged EIB loans, including all of the relevant loan contracts.[3506] The European Communities responded by providing information only with respect to two of these loans: the 2002 loan to EADS

[3505] *See*, para. 7.753 above.

[3506] *See*, e.g., Questions 81 and 82 for the EC Pursuant to Annex V of the SCM Agreement, 7 October 2005, Exhibit US-4 (BCI).

BCI deleted, as indicated **[***]**

for the A380 and the 1992 loan to Aérospatiale for the A330/A340.[3507] In the absence of information on the actual terms and conditions of the remaining ten loans, the United States endeavoured to substantiate its claims on the basis of publicly available information. On the question of benefit, the United States presented information in its first written submission demonstrating that in each of the years between 1996 and 2004, the average annual interest rates charged by the EIB to its borrowers were lower than the general corporate borrowing rates for the different Airbus entities calculated in the Ellis Report.[3508] This information was presented in the form of the following table:

Table 9 – US EIB Average Interest Rate Information

	1996	1997	1998	1999	2000	2001	2002	2003	2004
EIB Average	**7.87**	**7.21**	**6.70**	**5.91**	**6.06**	**5.64**	**4.74**	**4.06**	**3.82**
Germany	**8.04**	**7.53**	**6.56**	**6.48**	**7.14**	**6.75**	**6.75**	**6.14**	**6.11**
France	**8.13**	**7.47**	**6.63**	**6.60**	**7.27**	**6.89**	**6.83**	**6.20**	**6.17**
UK	**9.25**	**8.41**	**6.82**	**6.21**	**6.54**	**6.20**	**6.10**	**5.76**	**6.12**
Spain	**10.56**	**8.29**	**6.82**	**6.72**	**7.41**	**7.07**	**6.93**	**6.19**	**6.17**

7.823 The United States argues that in the light of the European Communities' refusal to disclose the actual terms and conditions of the loans, the reasonable inference for the Panel to draw on the basis of the information set out in this table is that the remaining ten EIB loans it challenges were provided to Airbus on beneficial interest rate terms.[3509]

7.824 The European Communities disclosed the interest rates it alleges were charged by the EIB for the first time in Exhibit EC-154 (BCI) to its first written submission. The interest rates were listed in a one page overview of the status of the challenged loans as of January 2007 prepared by the EIB, which also included information on the relevant loan contract numbers, disbursement and repayment dates, loan currencies and outstanding principal amounts.[3510] In its second written submission, the European Communities submitted copies of the EIB loan contracts it considered to be relevant, together with its own benefit analysis for all of the loans.[3511] According to the information contained in the European Communities' analysis, the remaining ten EIB loans involved the transfer of funds to Airbus through 22 disbursements at different interest rates, sometimes under separate contracts. The European Communities performed a distinct benefit analysis for each individual disbursement of funds, in effect treating each disbursement as a separate loan. Overall, in the light of all of its arguments, including the contention that a proper benefit analysis must take into account a 20 to 50 basis points range of market interest rates above and below the relevant market interest rate benchmark, the European Communities concludes that none of the 22 disbursements conferred a benefit on Airbus.

7.825 In the following sections, we examine the arguments and evidence the parties have advanced on whether the ten loans cited above in paragraph 7.821 confer a benefit in more detail, focussing in

[3507] *See*, e.g., Questions 81 and 82 for the EC Pursuant to Annex V of the SCM Agreement, 7 October 2005, Exhibit US-5 (BCI).

[3508] Prior to 1996, the EIB's Annual Reports did not contain any information on the average interest rates charged to its borrowers. US, FWS, para. 415, footnote 491 citing EIB Annual Reports from 1997 to 2004, Exhibits US-168 to US-175.

[3509] US, FWS, paras. 410-416; US, SWS, para. 271; US, Answer to Panel Question 149.

[3510] Exhibit EC-154 (BCI).

[3511] Previously, in Answer to Panel Question 89, the European Communities had set out its own benefit analysis in respect of the 1988 loan to Aérospatiale for the A330/A340 and the 1990 loan to British Aerospace for the A330/A340. However, on that occasion, the European Communities provided no evidence to substantiate the facts used as the basis for its analysis.

BCI deleted, as indicated **[*****]**

the first instance on the European Communities' disclosure of what it asserts were the actual interest rates charged by the EIB. We then review the parties' positions on the relevant market interest rate benchmarks, before turning to conclude on the merits of the United States' claims.

What were the interest rates charged by the EIB?

7.826 According to the European Communities, the interest rates charged by the EIB for the relevant disbursements were either fixed for the entire duration of the contract (*single interest rate* disbursements), or revised during the course of the loan through the application of an interest rate revision clause or simply due to the loan contracts being modified or restructured (*revised interest rate* disbursements).

7.827 The European Communities' benefit analysis indicates that 13 of the disbursements under the challenged loans were made at a single interest rate. For these disbursements, the European Communities took the interest rate set by the EIB as the starting point of its benefit analysis. Where necessary, the European Communities adjusted each rate to account for the alleged basis points value of the securities provided under the relevant loans. The European Communities argues that adjustments for loan securities were necessary because the bonds used in the establishment of the market interest rate benchmarks were unsecured. Therefore, in order to ensure a proper comparison, the European Communities submits that the basis points value of the loan securities had to be taken into account in the benefit analysis.

7.828 The European Communities made loan security adjustments to the single interest rate disbursements effected under two loans to British Aerospace[3512] and two loans to Airbus Industrie and Aérospatiale[3513]. In the case of British Aerospace, the European Communities asserts that the loans from the EIB were **[*****]**.[3514] The European Communities valued this security at **[*****]** basis points because it alleges that this was the amount by which the EIB increased the relevant interest rate when it agreed to release the security in **[*****]**.[3515] The two loans to Airbus Industrie and Aérospatiale[3516] were secured, respectively, by a loan guarantee and an assignment of receivables. The European Communities valued each security at **[*****]** basis points, explaining that "the security is given a relatively low value, to reflect the fact that state-ownership of the relevant companies had already ensured a relatively high rating profile (and the higher rating profile the less valuable the security)".[3517] It therefore made an upward adjustment of **[*****]** basis points to the corresponding interest rates.

7.829 After carefully reviewing the arguments and evidence submitted by the European Communities in respect of the above-mentioned loan security adjustments,[3518] we are satisfied that both the need for and the value attributed by the European Communities to each security is reasonable

[3512] In particular, the European Communities made a security adjustment to one of two disbursements under each of the 1990 and 1991 loans to British Aerospace for the A330/A340.

[3513] Both disbursements under the 1990 loan to Airbus Industrie for the A321, and one disbursement under the 1993 loan to Aérospatiale for the Super Transporteurs.

[3514] EC, Answer to Panel Question 89; Exhibit EC-722 (BCI).

[3515] EC, Answer to Panel Question 89.

[3516] The two EIB loans to Aérospatiale were: the 1989 loan for the A330/A340 and the 1993 loan for the Super Transporteurs.

[3517] Exhibit EC-722 (BCI), p.2.

[3518] EC, Answer to Panel Question 89; Exhibits EC-154 (BCI); EC-722 (BCI); EC-705 (BCI), Article 7.01(ii) and Annexure III-A, Revenues Assignment Agreement; EC-706 (BCI), Articles 6.09 and 7.02; EC-695 (BCI), Article 7.01; and EC-692 (BCI), Article 7.01.

BCI deleted, as indicated **[***]**

and can be accepted.[3519] We note that the United States has not specifically contested these adjustments.

7.830 For the nine remaining disbursements, the initial interest rates set by the EIB were subsequently modified due to the loans being amended, or because of interest rate revisions mandated under the contracts. For these disbursements, the European Communities used the interest rate charged by the EIB at the time of the revision or amendment as the starting point of its analysis. For example, according to the European Communities, the 1990 loan to British Aerospace for the A330/A340 was initially effected through two disbursements under separate contracts.[3520] The interest rate terms of one of these disbursements were subsequently modified when amended in 1999, resulting in a reduction of the applicable interest rate on the outstanding loan principal from **[***]** to **[***]**.[3521] For this particular disbursement, the European Communities used the interest rate charged by the EIB following the restructuring (**[***]**) as the starting point of its analysis.

7.831 The European Communities made loan security adjustments to the revised interest rate disbursements effected under two loans to Aérospatiale.[3522] The European Communities asserts that two of the three disbursements under the 1988 loan for the A330/A340, and one disbursement under the 1993 loan for the Super Transporteurs were secured by a loan guarantee from EADS NV as well as real estate mortgages.[3523] Because these securities were offered after 2002, the European Communities decided to value them at **[***]** basis points each because **[***]** by the EIB for the 2002 loan to EADS, which was **[***]**.[3524] For the third disbursement under the 1988 loan for the A330/A340, the European Communities made an upward adjustment of **[***]** basis points, reflecting the value it attributed to the loan security, which was in the form of an assignment of receivables. As we understand it, the European Communities justifies this **[***]** basis point adjustment explaining that "the security is given a relatively low value, to reflect the fact that state-ownership of the relevant companies had already ensured a relatively high rating profile (and the higher rating profile the less valuable the security)".[3525]

7.832 We have carefully reviewed the arguments and evidence submitted by the European Communities in respect of the these loan security adjustments,[3526] and are satisfied that both the need

[3519] As we have previously noted (at para. 7.783 above), we agree with the European Communities that, in general, differences between loan and bond instruments may well translate into differences in the price of borrowing that should be taken into account in the present benchmarking exercise. It seems to us that the value of a security provided under a loan agreement should be taken into account when comparing the interest attached to that loan with the price of unsecured bond financing.

[3520] The first disbursement of **[***]** being made on **[***]** at a fixed interest rate of **[***]**, Exhibit EC-706 (BCI). A second disbursement of **[***]** was made on **[***]** at a revisable interest rate of **[***]**, Exhibit EC-707 (BCI).

[3521] Exhibit EC-708 (BCI).

[3522] All three disbursements under the 1989 loan to Aérospatiale for the A330/A340, and one disbursement under the 1993 loan to Aérospatiale for the Super Transporteurs. As we understand it, the European Communities did not make a security adjustment to the two revised interest rate disbursements granted under each of the 1990 and 1991 loans to British Aerospace because the revised interest rates charged on these disbursements were above the relevant Ellis Report market interest rate benchmarks. In other words, although securities were provided for the purpose of both disbursements (Article 7, Exhibits EC-722 (BCI), EC-705 (BCI) and EC-706 (BCI)), the European Communities took their alleged value into account only for the purpose of adjusting the interest rates charged for one of two disbursements under each loan. *See*, para. 7.828 above.

[3523] Exhibit EC-722 (BCI), pp. 11 and 13.

[3524] Exhibit EC-722 (BCI), p.2.

[3525] Exhibit EC-722 (BCI), p.2.

[3526] Exhibits EC-154 (BCI); EC-722 (BCI); EC-695 (BCI), Article 7.01; EC-699 (BCI), Articles 2.02 and 2.03; EC-697 (BCI), Articles 2.01 and 2.02.

BCI deleted, as indicated **[***]**

for and the value attributed by the European Communities to each security is reasonable and can be accepted. Again, we note that the United States has not specifically contested these adjustments.

7.833 The United States does not explicitly dispute the European Communities' assertions in respect of the values of the interest rates charged by the EIB for each of the relevant disbursements. Indeed, to the extent that these values correspond to those found in Exhibit EC-154 (BCI), we note that the United States has itself relied upon information contained in the same exhibit: (i) to confirm its assertion that the EIB provided a loan to British Aerospace for the A330/A340 in 1991;[3527] and (ii) when it withdrew its complaint against the alleged 1997 EIB loan to Aérospatiale for the Super Transporteurs.[3528] The United States does, however, criticize the European Communities' decision to conduct its benefit analysis for certain loans on the basis of revised interest rates, arguing that it ignores the interest rates applicable from each relevant loan's inception, thereby rendering it incomplete.[3529]

7.834 We agree with the United States that to the extent that the European Communities' benefit analysis is based on the alleged interest rate applicable following the most recent contractual modification or interest rate revision, without also taking into account interest charged over the previous life of the loan, it is only partially relevant to assessing whether the EIB loans conferred a benefit. For example, in the case of the 1990 loan to British Aerospace for the A330/A340, the European Communities' benefit analysis for one of the two **[***]** disbursements made in 1991 relies upon the alleged interest rate (**[***]**) charged on the amount of debt outstanding (**[***]**) at the time the loan was amended (1999).[3530] It says nothing about whether the **[***]** interest rate charged on the same disbursement between 1991 and 1999 conferred a benefit. Thus, the European Communities' focus on revised interest rates means that its analysis does not determine whether the relevant disbursements, as a whole, conferred a benefit. Nevertheless, to the extent that the revised interest rates represent the interest rate terms associated with a particular disbursement for at least part of the life of a loan, they are in our view relevant for the purpose of determining whether the disbursement was provided on beneficial interest rate terms over that same period. With this qualification in mind, we believe that it would be appropriate, in the light of the evidence and arguments that are before us, to rely upon the EIB interest rates disclosed in the European Communities' benefit analysis as the *starting point* of our own evaluation of the United States' claims. These interest rates, and other related information drawn from our understanding of Exhibit EC-722 (BCI), are set out in the following table:

[3527] US, Answer to Panel Question 17.

[3528] At footnote 481 of its FWS, the United States noted that it would not be necessary for the Panel to determine whether the alleged 1997 loan to Aérospatiale for the Super Transporteurs was a subsidy if the European Communities confirmed that the alleged loan was never drawn by Aérospatiale. Information in Exhibit EC-154 (BCI) indicated that the loan had been **[***]**. The Panel asked the United States (Panel Question 12) whether it intended to continue to pursue its claim against this alleged measure "in the light of this information". The US answered that it did not intend to do so. US, Answer to Panel Question 12.

[3529] US, SWS, paras. 272-273.

[3530] The actual amount of debt outstanding at the time was **[***]**, Exhibit EC-708 (BCI), Article 2.4.

BCI deleted, as indicated **[***]**

Table 10 – EIB Interest Rates (as reported in Exhibit EC-722 (BCI))

1988 loan to British Aerospace for the A320 (Loan No. 13588)					
Column (a)	**(b)**	**(c)**	**(d)**	**(e)**	**(f)**
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**-**	**[***]**
[***]					
1989 loan to British Aerospace for the A320 (Loan No. 13802)					
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**-**	**[***]**
[***]					
1990 loan to British Aerospace for the A330/A340 (Loan No. 14999)					
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**-**	**[***]**
2	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
1991 loan to British Aerospace for the A330/A340 (Loan No. 15119)					
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**-**	**[***]**
2	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
[***]					
1990 loan to Airbus Industrie for the A321 (Loan No. 15007)					
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
2	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**

BCI deleted, as indicated **[***]**

1988 loan to Aérospatiale for the A330/A340 (Loan No. 13764)					
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
2	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
3	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
[***]					
1993 loan to Aérospatiale for the Super Transporteurs (Loan No. 6832)					
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
2	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
[***]					
1989 loan to CASA for the A320 and A330/A340 (Loan No. 14081)					
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**-**	**[***]**
2	**[***]**	**[***]**	**[***]**	**-**	**[***]**
3	**[***]**	**[***]**	**[***]**	**-**	**[***]**
[***]					
1990 loan to CASA for the A320 and A330/A340 (Loan No. 14711)					
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**-**	**[***]**
2	**[***]**	**[***]**	**[***]**	**-**	**[***]**
3	**[***]**	**[***]**	**[***]**	**-**	**[***]**

BCI deleted, as indicated **[***]**

1990 loan to CASA for the A320 and A330/A340 (Loan No. 14712)					
Disb. No.	**EIB Interest Rate**	**EIB Interest Rate Applicable From**	**Security Adjustment**	**Adjusted EIB Interest Rates**	**Loan Principal Subject to EIB Interest Rate (Millions)**
1	**[***]**	**[***]**	**[***]**	**-**	**[***]**
2	**[***]**	**[***]**	**[***]**	**-**	**[***]**
3	**[***]**	**[***]**	**[***]**	**-**	**[***]**

Market interest rate benchmarks advanced by the United States

7.835 Although the EC had disclosed all of the alleged interest rates charged by the EIB and provided copies of what it asserts were all of the relevant loan contracts by the time of its second written submission, the United States did not revise the market interest rate benchmarks advanced in its first written submission. We recall that the benefit analysis presented by the United States in its first written submission compared the average annual interest rates charged by the EIB to its borrowers in each year between 1996 and 2004 with the general corporate borrowing rates for the different Airbus entities calculated in the Ellis Report in those same years. Given the European Communities' disclosure, it is now possible to identify the Ellis Report interest rate benchmarks that correspond more precisely with the information set out in the European Communities' benefit analysis about the challenged loans. These are reported in the following table:

Table 11 – Ellis Report Benchmarks

Loan	Disb. No.	Ellis Report Benchmark	Loan	Disb. No.	Ellis Report Benchmark
1988 loan to British Aerospace	1	6.21%	**1993 loan to Aérospatiale**	1	8.49%
1989 loan to British Aerospace	1	6.21%		2	6.17%
1990 loan to British Aerospace	1	11.51%	**1989 loan to CASA**	1	9.46%
	2	11.51%		2	9.46%
1991 loan to British Aerospace	1	6.21%		3	None
	2	11.51%	**1990 loan to CASA (No. 14711)**	1	None
1990 loan to Airbus Industrie	1	None		2	None
	2	None		3	None
1988 loan to Aérospatiale	1	6.20%	**1990 loan to CASA (No. 14712)**	1	None
	2	6.20%		2	None
	3	6.63%		3	None

7.836 In considering the evidentiary value of the Ellis Report benchmarks, we believe it is important to bear in mind that they were constructed on the basis of lending in local currencies, not USD. As such, to the extent that the EIB loans at issue involved USD financing, the Ellis Report provides no relevant market interest rate benchmark. Moreover, as we have explained elsewhere,[3531] the Ellis

[3531] *See*, para. 7.803 above.

BCI deleted, as indicated **[***]**

Report benchmarks were partly derived from interest rate information relating to government bonds with a 10 year maturity. However, the bond-comparable maturity of most of the EIB loans at issue was of a different duration. Finally, we recall that the Ellis Report market interest rate benchmarks were calculated using annual average interest rate data. In the case of the 1992 EIB loan to Aérospatiale, the United States revised the Ellis Report benchmarks precisely because NERA agreed with the European Communities that, for the purpose of assessing whether the EIB loans conferred a benefit, the interest rate charged by the EIB "must be compared with a benchmark 'at the relevant point in time and in the relevant year the EIB loan was made'".[3532] It follows that, by its own logic, the United States' failure to revise the market interest rate benchmarks calculated in the Ellis Report for the remaining EIB loans, after the European Communities' disclosure of the interest rates charged by the EIB, means that the Ellis Report interest rate benchmarks for the EIB loans are less accurate than a benchmark based upon interest rate information for comparable market financing in the same currency, with the same maturity and on the same date as the challenged loans.[3533]

Market interest rate benchmarks advanced by the EC

7.837 The European Communities did not establish a market interest rate benchmark for each of the challenged EIB loans, but only those to Airbus companies other than British Aerospace. This is because, according to the European Communities, the interest rates charged by the EIB on its loans to British Aerospace, adjusted where relevant to account for the cost of the security and other financial, project and administrative obligations, were above the general corporate borrowing rates calculated for British Aerospace in the Ellis Report.[3534]

7.838 For the EIB loans to other Airbus entities, the European Communities constructed market interest rate benchmarks through the application of a methodology similar to that used in the Ellis Report: an estimated credit spread for the relevant Airbus borrowing entity was added to the interest rate attached to government risk-free borrowing at the time (or as close as possible to the time) of each disbursement. The European Communities' benchmarks also took into account the maturity of each disbursement and the fact that a certain number of the loans were made in USD.[3535]

- EC Benchmarks for loans to Airbus Industrie and Aérospatiale

7.839 In the case of the two USD disbursements made under the 1990 loan to Airbus Industrie for the A321, the risk-free rate used by the European Communities was the rate associated with a relevant United States treasury bond having a maturity comparable to that of the two disbursements.[3536] The European Communities then added a credit spread which it based on actual credit spread information relating to a USD bond issued by Elf Acquitaine. The European Communities asserts that Elf Acquitaine "was the only French issuer in the **[***]** market close to the relevant date with a similar rating profile" compared with Airbus Industrie.[3537]

[3532] NERA EIB Report, p.3, Exhibit US-542 (BCI), (underline added).

[3533] In its second non-confidential oral statement, the United States did in fact respond to the benefit analysis presented by the European Communities in its second written submission. However, the United States' comments were limited to criticizing the European Communities' assertion that certain alleged additional loan obligations taken on by EIB borrowers make EIB loans more expensive than commercial loans, and must therefore be taken into account in the benefit analysis. US, SNCOS, para. 122.

[3534] Exhibit EC-722 (BCI), p.2.

[3535] Exhibit EC-722 (BCI).

[3536] The European Communities explains that "{w}here there was no risk free rate available reflecting the precise maturity profile of the relevant EIB loan available, the risk free rate has been derived by linear interpolation of relevant treasury rates". Exhibit EC-722 (BCI), p.2.

[3537] Exhibit EC-722 (BCI), pp 2, 11-13.

BCI deleted, as indicated **[***]**

7.840 The market interest rate benchmarks against which the European Communities compared the interest rates charged by the EIB on the disbursements under the two loans to Aérospatiale were constructed in much the same manner. The disbursement-date value of the credit spread (taken from an actual FRF bond issued by Aérospatiale or the Merrill Lynch Index for A rated or AAA rated corporate bonds) was added to the interest rate attached to a French government FRF bond having a maturity comparable to that of the disbursement.[3538] For one of the disbursements under the 1993 loan for the Super Transporteurs, we understand the European Communities to have added the credit spread identified in the Merrill Lynch Index for A rated corporate bonds having a maturity of 3 to 5 years (similar to the alleged maturity of the disbursement at issue) to the relevant EURIBOR (European Interbank Offer Rate) at the time of the disbursement.[3539]

7.841 The European Communities' market interest rate benchmarks for loans to Airbus Industrie and Aérospatiale are shown in the following table:

Table 12 – EC Market Interest Rate Benchmarks (Loans to Airbus Industrie and Aérospatiale)

Loan	Disb. No.	EC Benchmark	Loan	Disb. No.	EC Benchmark
1990 loan to Airbus Industrie	1	8.79%	**1993 loan to Aérospatiale**	1	6.53%
	1	7.70%		2	Euribor + 0.26%
1988 loan to Aérospatiale	1	4.09%			
	2	3.55%			
	3	3.98%			

- EC Benchmarks for loans to CASA

7.842 For the nine disbursements made under the loans to CASA, the European Communities constructed a market interest rate benchmark on the basis of the cost of borrowing for the Spanish government. The European Communities asserts that this was justified because each of the relevant disbursements was "**[***]** through budgetary allocations".[3540] Thus, in respect of the two disbursements made to CASA in PTAS, the European Communities' market interest rate benchmark is equivalent to the interest rate attached to Spanish government borrowing in PTAS at the time of the relevant disbursements. Because it would have been more expensive for the Spanish government to borrow in USD than for the United States government to borrow in USD at the relevant time, the European Communities determined the market interest rate benchmarks for the seven USD disbursements by adding a "Spain spread" to the value of the relevant United States treasuries. The "Spain spread" was derived from the "spread at issuance (the only data available) on a 10 year maturity Kingdom of Spain bond issue".[3541] The European Communities' market interest rate benchmarks for the loans to CASA are listed in the following table:

[3538] Exhibit EC-722 (BCI), p.2.
[3539] Exhibit EC-722 (BCI), pp. 2 and 13.
[3540] Exhibit EC-722 (BCI), p.3.
[3541] Exhibit EC-722 (BCI), p.3.

BCI deleted, as indicated **[***]**

Table 13 – EC Market Interest Rate Benchmarks (Loans to CASA)

Loan	Disb. No.	EC Benchmark	Loan	Disb. No.	EC Benchmark
1989 loan to CASA	1	9.17%	**1990 loan to CASA (No. 14711)**	1	9.12%
	2	9.17%		2	8.78%
	3	9.28%		3	9.38%
1990 loan to CASA (No. 14712)	1	8.67%			
	2	8.39%			
	3	8.41%			

- EIB interest rates compared with the market interest rate benchmarks

7.843 We recall that in order to determine whether a financial contribution in the form of a loan confers a benefit, an assessment must be made of whether that loan places the recipient in a more advantageous position compared with the position the recipient would have been in had a comparable loan been obtained from a commercial lender.[3542] To this end, both parties' submissions have focussed on showing that the interest rates charged by the EIB were either above or below the interest rates that they consider would have been charged for a comparable loan to the relevant Airbus entity on the commercial lending market. Below we evaluate the merits of the parties' submissions, using the final (adjusted or unadjusted) EIB interest rates identified by the European Communities (reproduced in columns (b) and (e) of Table 10) as the *starting point* of our assessment. We conduct our evaluation on a disbursement-by-disbursement basis, in the same way the European Communities presented its own benefit analysis in Exhibit EC-722 (BCI). In this regard, we agree with the European Communities that to the extent that each of the challenged loans was effected through more than one disbursement of funds on different dates and interest rates, it makes sense to assess whether the entirety of the loan conferred a benefit upon Airbus by examining the interest rates charged on each of the disbursements individually. We begin our evaluation by focusing on the loans to British Aerospace.

- The loans to British Aerospace

7.844 The four EIB loans to British Aerospace that the United States challenges (the 1988 and 1989 loans for the A320 and the 1990 and 1991 loans for the A330/A340) were given effect through three single interest rate disbursements and three revised interest rate disbursements, all in GBP. Comparing the interest rates charged by the EIB on each of these disbursements, as presented and where relevant as adjusted in Exhibit EC-722 (BCI), with the market interest rate benchmarks established in the Ellis Report gives the following result[3543]:

[3542] *See*, para. 7.753 above.

[3543] We recall that the European Communities did not establish its own market interest rate benchmarks for the loans to British Aerospace. *See*, para. 7.837 above.

BCI deleted, as indicated **[***]**

Table 14 – EIB Loans to British Aerospace vs. Ellis Report Market Interest Rate Benchmarks

Loan	Disb. No.	EIB Interest Rate	Ellis Report Benchmark	Variance
1988 loan to British Aerospace	1	**[***]**	6.21%	**[***]**
1989 loan to British Aerospace	1	**[***]**	6.21%	**[***]**
1990 loan to British Aerospace	1	**[***]**	11.51%	**[***]**
	2	**[***]**	11.51%	**[***]**
1991 loan to British Aerospace	1	**[***]**	6.21%	**[***]**
	2	**[***]**	11.51%	**[***]**

[***]
[***]

7.845 For five of the six disbursements, Table 14 shows that the interest rates charged by the EIB were above the market interest rate benchmarks established in the Ellis Report. Two of these were the single interest rate disbursements made under the 1990 loan for the A330/A340. On this basis, it is possible to conclude that the 1990 loan for the A330/A340 was provided to British Aerospace on interest rate terms that were not more advantageous than the interest rate terms the United States asserts would have been available to British Aerospace on the market for a comparable loan. For the three other disbursements (both disbursements under the 1988 and 1989 loans and one of the two disbursements under the 1991 loan), the EIB interest rates in Table 14 reflect those in force *after* the relevant loan contracts had been amended in 1999.[3544]

7.846 As we have previously explained, a benefit analysis that focuses on only the latest applicable interest rate following a contract revision, without also taking into account interest charged by the EIB up to the date of the interest rate revision, is only partially relevant to determining whether the disbursement, as a whole, confers a benefit. Thus, although Table 14 indicates that the interest rates charged by the EIB for the three revised interest rate disbursements were higher than the market interest rate benchmarks established in the Ellis Report, the same result does not automatically follow for the interest rates charged by the EIB on the same disbursements prior to being revised.

7.847 The contract that first amended the interest rates charged on these three disbursements was submitted in Exhibit EC-708 (BCI). On the basis of the information in this contract amendment and other evidence that is before us,[3545] we can make the following findings about the interest rates that were in effect *prior* to the relevant contractual amendment:

[3544] Exhibit EC-708 (BCI).
[3545] Exhibits EC-154 (BCI); EC-703 (BCI); EC-704 (BCI); EC-706 (BCI); and EC-708 (BCI).

BCI deleted, as indicated **[***]**

Table 15 – EIB Loans to British Aerospace (Interest Rates Charged Prior to 1999 Restructuring)

Loan	Disb. No.	EIB Interest Rate	EIB Interest Rate Applicable From	Ellis Report Benchmark	Variance
1988 loan to British Aerospace	1	**[***]**	**[***]**	9.67%	**[***]**
1989 loan to British Aerospace	1	**[***]**	**[***]**	10.19%	**[***]**
1991 loan to British Aerospace	1	**[***]**	**[***]**	11.51%	**[***]**

7.848 Thus, the initial interest rates charged by the EIB on both disbursements under the 1988 and 1989 loans for the A320 were above the corresponding Ellis Report benchmarks. For the disbursement under the 1991 loan for the A330/A340, the initial interest rate charged by the EIB was below the relevant Ellis Report benchmark. However, we recall that Airbus had provided a particular security under this loan, which the European Communities valued at **[***]** basis points.[3546] Adding this to the interest rate charged by the EIB, it is possible to arrive at an adjusted interest rate of **[***]**, which is **[***]** basis points above the corresponding Ellis Report benchmark.

7.849 The interest rates charged on the three disbursements to British Aerospace were revised once again by amendment of 17 May 2004.[3547] The interest rates charged on the two disbursements made under the 1988 and 1989 loans were increased, with retroactive effective from 16 October 2003, to **[***]**. Similarly, the interest rate charged on the disbursement made under the 1991 loan was increased to **[***]**, with retroactive effect from 11 March 2003. In 2003, the corresponding Ellis Report market interest rate benchmark was 5.76%.

7.850 All this confirms the information contained in Table 14 and makes it possible to conclude that the financing provided to British Aerospace under the 1988, 1989 and 1991 loans was agreed on interest rate terms that were not more advantageous than what the Ellis Report suggests would have been available to British Aerospace on the market for comparable loans.

7.851 Finally, we note that Table 14 shows that one single interest rate disbursement was provided to British Aerospace at an interest rate that was **[***]** below the relevant Ellis Report market interest rate benchmark. However, given the complexities associated with establishing market interest rate benchmarks for the above EIB loans, and in the light of our comments on the relatively low evidentiary value of the Ellis Report benchmarks,[3548] we believe that a **[***]** difference between the interest rate charged by the EIB and the market interest rate benchmark calculated in the Ellis Report is not enough to confirm the United States' contention that the interest rate charged by the EIB on this disbursement was more advantageous than comparable market financing.

- The loans to Airbus Industrie and Aérospatiale

7.852 The three EIB loans to Airbus Industrie and Aérospatiale that the United States challenges (the 1990 loan for the A321, the 1988 loan for the A330/A340 and the 1993 loan for the Super Transporteurs) were given effect through two single interest rate disbursements in USD, one single interest rate disbursement in FRF, and four revised interest rate disbursements in FRF. Comparing the interest rates charged by the EIB on each of these disbursements, as presented and where relevant as

[3546] *See*, para. 7.828 above.
[3547] Exhibit EC-710 (BCI).
[3548] *See*, para. 7.836 above.

BCI deleted, as indicated **[***]**

adjusted in Exhibit EC-722 (BCI), with the market interest rate benchmarks advanced by both parties gives the following result:

Table 16 – EIB Loans to Airbus Industrie and Aérospatiale vs. Market Interest Rate Benchmarks

Loan	Disb. No.	EIB Interest Rate	Ellis Report Benchmark	Variance	EC Benchmark	Variance
1990 loan to Airbus Industrie	1	**[***]**	None	-	8.79%	**[***]**
	2	**[***]**	None	-	7.70%	**[***]**
1988 loan to Aérospatiale	1	**[***]**	6.20%	**[***]**	4.09%	**[***]**
	2	**[***]**	6.20%	**[***]**	3.55%	**[***]**
	3	**[***]**	6.63%	**[***]**	3.98%	**[***]**
1993 loan to Aérospatiale	1	**[***]**	8.49%	**[***]**	6.53%	**[***]**
	2	**[***]**	6.17%	**[***]**‡	Euribor + 0.26%	**[***]**

[***]

‡ Although the European Communities did not disclose the relevant EURIBOR rate, we note that on **[***]**, EURIBOR rates ranged between 2.064% (one week) and 2.388% (12 months).[3549] It is therefore reasonable to conclude that the difference between the Ellis Report market interest rate benchmark of 6.17% and the EIB interest rate was **[***]**.

7.853 Table 16 shows that the interest rates charged by the EIB on several of the disbursements made under the three loan contracts were below the market interest rate benchmarks established by both parties. However, the interest rate differentials vary considerably depending upon which party's benchmark is used in the analysis.

7.854 Compared with the European Communities' benchmarks, the Ellis Report benchmarks have a more remote temporal connection with the loans at issue because they are based on annual average interest rate information. On the other hand, the European Communities' benchmarks are based on interest rate information taken from the date, or as close as possible to the date, of the actual loan disbursement or interest rate revision. To this extent, and as we have already noted,[3550] the Ellis Report benchmarks are likely to be less accurate than the benchmarks established by the European Communities, a result we believe the United States acknowledged when it revised the Ellis Report benchmark for the 1992 EIB loan to Aérospatiale in the light of the European Communities' criticism of its reliance on annual average interest rates.[3551] Moreover, we recall that whereas the Ellis Report benchmarks for all of the loans reflect the interest rate terms associated with 10 year borrowing, the European Communities' benchmarks are based on the alleged interest rates charged for borrowing over a term that matches more closely the actual maturity of the loans at issue. In this light, we believe that, for the purpose of determining whether the EIB loans to Airbus Industrie and Aérospatiale conferred a benefit, it would be appropriate to rely upon the market interest rate benchmarks established by the EC.

7.855 Taking the European Communities' market interest rate benchmarks as the relevant point of comparison, we note that the interest rates charged by the EIB were below the relevant benchmarks in respect of both disbursements made under the 1993 loan for the Super Transporteurs (by **[***]** and **[***]** basis points), and disbursements 1 and 3 made under the 1988 loan for the A330/A340 (by

[3549] Euribor Historical Data, www.euribor.org/html/download/euribor_2004.txt, visited by the WTO Secretariat on 3 July 2008.

[3550] *See*, para. 7.836 above.

[3551] *See*, para. 7.803 above.

BCI deleted, as indicated **[***]**

[***] basis points each). Despite this result, the European Communities considers that it cannot be concluded that these four disbursements were granted at below-market interest rates.

7.856 First, as we have previously noted, the European Communities contends that in assessing whether the EIB loans conferred a benefit, we must determine whether the rate charged by the EIB was convincingly outside a spread of interest rates "20 to 50 basis points above or below the single benchmark".[3552] While we accept the reasonableness of the principle underlying the European Communities' contention – namely that market lenders may offer slightly different rates of interest for loans granted on the same or comparable terms and conditions – we have found that the European Communities has failed to properly substantiate its position.[3553] Thus, we cannot accept that the range of market interest rate benchmarks advanced by the European Communities is an appropriate basis for finding that the above four disbursements were not granted on beneficial interest rate terms.

7.857 Second, and only in respect of disbursements 1 and 3 under the 1988 loan, the European Communities asserts that the **[***]** basis points difference between the alleged rate charged by the EIB and its own market interest rate benchmarks would fall to below zero, after taking into account the cost of additional project, financial and administrative obligations attached to EIB loans that would not normally be found in the bond instruments used to establish its market interest rate benchmarks.[3554] Relying on Moody's assessment of the differences in three-year cumulative loss rates between similarly rated loans and bonds, the European Communities submits that it is possible to quantify the "pricing impact of using bonds to benchmark a loan that has more stringent terms and conditions than the benchmark bonds"[3555], and calls for a 6.5 basis point reduction in the benchmark interest rates derived from bond market information.[3556]

7.858 As we have previously noted, we find the logic of the European Communities' position to be, in general, persuasive.[3557] Moreover, we note that the United States has not specifically contested the European Communities' reliance on Moody's assessment, nor has it specifically challenged the European Communities' assertion that on the basis of Moody's assessment, an adjustment of 6.5 basis points would be appropriate.[3558] In this light, we find that when properly adjusted by 6.5 basis points to account for differences between the inherent characteristics of loan instruments compared with bonds, the interest rates charged by the EIB for disbursements 1 and 3 under the 1988 loan do not appear to have conferred a benefit upon Aérospatiale.

7.859 However, we note that the interest rates that are identified in Table 16 as being charged on disbursements 1 and 3 under the 1988 loan reflect the effective interest rates *after* a series of interest rate revisions.[3559] Again, we recall our view that a benefit analysis that focuses on only the latest applicable interest rate following an interest rate revision, without also taking into account interest charged by the EIB up to the date of that revision, is only partially relevant to determining whether the

[3552] EC, SWS, para. 507.
[3553] *See*, para. 7.787 above.
[3554] Exhibit EC-722 (BCI).
[3555] EC, Answer to Panel Question 176*; see also*, footnote 3401 above.
[3556] *See*, para. 7.780 above.
[3557] *See*, para. 7.783 above.
[3558] US, Comments on EC Answer to Panel Question 176.
[3559] The two disbursements at issue granted under the 1988 loan were first transferred to Aérospatiale on **[***]** and **[***]** at a respective annual interest rate of **[***]** and **[***]** Exhibit EC-697 (BCI). The 1988 loan contract envisaged that the interest rate on outstanding disbursement amounts would be revised **[***]** Exhibit EC-693 (BCI), Article 3.01. The interest rates disclosed by the European Communities in its benefit analysis (which we have used as the basis of the values identified in Table 16) were those in force on **[***]** and **[***]**, *see*, Table 10 above. It follows that the original interest rate applicable to disbursement 1 must have been revised at least twice between **[***]** and **[***]**; and at least once in respect of disbursement 3 between **[***]** and **[***]**.

BCI deleted, as indicated **[***]**

terms of the disbursement, as a whole, confer a benefit. Thus, although Table 16 indicates that the *revised interest rates* charged by the EIB on disbursements 1 and 3 under the 1988 loan were above the European Communities' market interest rate benchmarks (when adjusted by 6.5 basis points), the same result does not automatically follow for the interest rates charged by the EIB on the same disbursements prior to the interest rate revision.

7.860 In order to determine whether market interest rate terms were applied to each of the relevant disbursements as a whole, we would need to know the interest rate (or interest rates) charged prior to each revision. However, the European Communities has advanced no information about the precise number of revisions the EIB actually effected. Neither do we know the values of all of the previously applicable interest rates, or the outstanding disbursement values to which they applied. In our view, this is information that the European Communities could have disclosed in answering Panel Question 89, or at the very least, when the European Communities presented its own benefit analysis in respect of each of the challenged loans in Exhibit EC-722 (BCI). In this light, and bearing in mind our findings on the nature of the EIB's lending activities,[3560] we conclude, on the basis of the entirety of the information that is before us, that the interest rates charged by the EIB on disbursements 1 and 3 under the 1988 loan prior to, respectively, **[***]** and **[***]** were below-market. Moreover, given that the (below-market) interest rates previously applicable on disbursement 1 would have been in force for 14 years and that this loan disbursement had a 15 year maturity, we also find that the interest rate terms of this disbursement conferred a benefit on Aérospatiale for almost its entire life.[3561] Similarly, we find that the (below-market) interest rate terms applicable to disbursement 3 ensured that Aérospatiale benefited for approximately eight years of this loan disbursement's 15 year maturity.[3562]

7.861 Turning to the two disbursements made by the EIB to Aérospatiale under the 1993 loan for the Super Transporteurs, we see from Table 16 that both appear to have been provided on interest rate terms that were below-market. One of these disbursements (disbursement 1) was a single interest rate disbursement. It is therefore possible to conclude that this disbursement was provided to Aérospatiale on interest rate terms that were more advantageous than the interest rate terms that the European Communities believes would have been available on the market. However, in respect of the second disbursement, we note that the EIB interest rate shown in Table 16 reflects the interest rate charged by the EIB *after* the last of a series of interest rate revisions.[3563] Again, we recall our view that a benefit

[3560] *See*, para. 7.753 above.

[3561] Disbursement 1 was transferred to Aérospatiale on **[***]** at an initial interest rate of **[***]**. This interest rate was subject to revision **[***]** Exhibit EC-693 (BCI), Article 3.01. The interest rate disclosed by the European Communities in its benefit analysis (which we have used as the basis of the values identified in Table 16) was the interest rate in force on **[***]**, *see*, Table 10 above. The disbursement was fully repaid in advance ("remboursement anticipé") on **[***]**. Exhibit EC-154 (BCI). Thus, disbursement 1 under the 1988 loan was repaid over **[***]**. Exhibits EC-154 (BCI), EC-693 (BCI), EC-697 (BCI) and EC-722 (BCI). Given that we have held the interest rates charged by the EIB on this disbursement prior to **[***]** to be below-market, it is possible to conclude that Aérospatiale paid below-market interest rates for approximately **[***]** out of the **[***]** years of life of this disbursement.

[3562] Disbursement 3 was transferred to Aérospatiale on **[***]** at an initial interest rate of **[***]**. This interest rate was subject to revision **[***]**, Exhibit EC-693 (BCI), Article 3.01. The interest rate disclosed by the European Communities in its benefit analysis (which we have used as the basis of the values identified in Table 7) was the interest rate in force on **[***]**. *See*, Table 10 above. We understand from Exhibit EC-722 (BCI) and EC, Answer to Panel Question 89 that this was the last applicable interest rate, which remained in place until **[***]**, when the loan was repaid in full., Exhibit EC-154 (BCI) Thus, disbursement 3 under the 1988 loan was repaid over **[***]** years, Exhibits EC-154 (BCI), EC-693 (BCI), EC-697 (BCI) and EC-722 (BCI). Given that we have held the interest rates charged by the EIB on this disbursement prior to **[***]** to be below-market, it is possible to conclude that Aérospatiale paid below-market interest rates for approximately **[***]** out of the **[***]** years of life of this disbursement.

[3563] Disbursement 2 under the 1993 loan was transferred to Aérospatiale on **[***]** at a **[***]** interest rate subject to **[***]** Exhibit EC-695 (BCI), Article 3.01B; and Exhibit EC-699 (BCI). The interest rate disclosed by

BCI deleted, as indicated **[***]**

analysis that focuses on only the latest applicable interest rate following an interest rate revision, without also taking into account interest charged by the EIB up to the date of that revision, is only partially relevant to determining whether the terms of the disbursement, as a whole, confer a benefit. Thus, although Table 16 indicates that the *revised interest rate* charged by the EIB on disbursement 2 under the 1993 loan was below the market interest rate benchmarks established by the European Communities, the same result does not automatically follow for the interest rates charged by the EIB on the same disbursement prior to the interest rate revision.

7.862 In order to determine whether favourable interest rate terms were applied to this disbursement as a whole, we would need to know the interest rate (or interest rates) charged prior to the revision. However, again, we note that the European Communities has advanced no information about the precise number of revisions the EIB actually effected. Neither do we know the values of all of the previously applicable interest rates, or the outstanding disbursement values to which they applied. In our view, this is information that the European Communities could have disclosed in answering Panel Question 89, or at the very least, when the European Communities presented its own benefit analysis in respect of each of the challenged loans in Exhibit EC-722 (BCI). In this light, and bearing in mind our findings on the nature of the EIB's lending activities,[3564] we conclude, on the basis of the entirety of the information that is before us, that all of the prior interest rates charged by the EIB on disbursement 2 under the 1993 loan to Aérospatiale were also below-market.

7.863 Finally, we note that for three of the seven disbursements identified in Table 16 (both disbursements made under the 1990 loan for the A321 and one under the 1988 loan for the A330/A340), the interest rate charged by the EIB was greater than the European Communities' market interest rate benchmarks. Both disbursements under the 1990 loan for the A321 were single interest rate disbursements made in USD, for which the United States did not present any market interest rate benchmarks. The other disbursement is the second of the three revised interest rate disbursements made under the 1988 loan to Aérospatiale for the A330/A340.[3565] The European Communities has explained that the interest rate applied to this latter disbursement was revised three times. In other words, four different interest rates were charged by the EIB on this disbursement.[3566] However, the European Communities has disclosed neither the value of the four interest rates, nor the dates of the interest rate revisions or the outstanding disbursement amounts to which they applied. Again, this is information that was in the possession of only the European Communities; information which we consider could have been disclosed by the European Communities when answering Panel Question 89, or at the very least, when the European Communities presented its own benefit analysis in respect of each of the challenged loans in Exhibit EC-722 (BCI). In this light, and bearing in mind our findings on the nature of the EIB's lending activities,[3567] we conclude, on the basis of the entirety of the information that is before us, that all of the prior interest rates charged by the EIB on disbursement 2 under the 1988 loan were below-market. Moreover, given that the below-market interest rates applicable on disbursement 2 under the 1988 contract were in force for 14 out of the loan

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the European Communities in its benefit analysis (which we have used as the basis of the value identified in Table 16) was the interest rate applicable on **[***]**, *see*, Table 10 above.

[3564] *See*, para. 7.753 above.

[3565] This disbursement was transferred to Aérospatiale on **[***]** at an annual interest rate of **[***]** Exhibit EC-697 (BCI). The 1988 loan contract envisaged that the interest rate on outstanding disbursement amounts would be revised **[***]** Exhibit EC-693 (BCI), Article 3.01. The interest rate disclosed by the European Communities in its benefit analysis (which we have used as the basis of the values identified in Table 16) was the interest rate in force on **[***]**, *see*, Table 10 above. It follows that the original interest rate applicable to this disbursement must have been revised at least twice between **[***]** and **[***]**.

[3566] EC, Answer to Panel Question 89.

[3567] *See*, para. 7.753 above.

BCI deleted, as indicated **[***]**

disbursement's 19 year expected maturity, we also find that the interest rate terms of the disbursement conferred a benefit on Aérospatiale for approximately three quarters of its expected life.[3568]

- The loans to CASA

7.864 The EIB loans to CASA challenged by the United States (the 1989 and 1990 loans for the A320 and A330/A340) were given effect through two revised interest rate disbursements in PTAS and seven single interest rate disbursements in USD. Comparing the interest rates charged by the EIB on each of these disbursements, as reported in Exhibit EC-722 (BCI), with the market interest rate benchmarks established by the parties gives the following result[3569]:

Table 17 – EIB Loans to CASA vs. Market Interest Rate Benchmarks

Loan	Disb. No.	EIB Interest Rate	Ellis Report Benchmark	Variance	EC Benchmark	Variance
1989 loan to CASA	1	**[***]**	9.46%	**[***]**	9.17%	**[***]**
	2	**[***]**	9.46%	**[***]**	9.17%	**[***]**
	3	**[***]**	None	-	9.28%	**[***]**
1990 loan to CASA (No. 14711)	1	**[***]**	None	-	9.12%	**[***]**
	2	**[***]**	None	-	8.78%	**[***]**
	3	**[***]**	None	-	9.38%	**[***]**
1990 loan to CASA (No. 14712)	1	**[***]**	None	-	8.67%	**[***]**
	2	**[***]**	None	-	8.39%	**[***]**
	3	**[***]**	None	-	8.41%	**[***]**

[***]

7.865 We recall that the market interest rate benchmarks constructed by the European Communities for the EIB loans to CASA were based on the cost of borrowing to the Spanish government because of the loan guarantees provided by INI, the Spanish government's industrial holding company. By equating the market interest rate benchmarks to the cost of Spanish government borrowing in PTAS and USD, the European Communities is, in effect, suggesting that CASA's credit worthiness, as a separate and independent entity from the Spanish government, and the risk associated with the funded projects, did not affect the EIB's interest rate setting decisions. In other words, the European Communities' benchmarks imply that because of the INI loan guarantees, the loans to CASA should be compared with market financing available to the Spanish government.

7.866 The United States has not challenged the European Communities' approach to establishing the relevant interest rate benchmarks. Neither has it argued that the loan guarantees provided by INI

[3568] The disbursement at issue was made to Aérospatiale on **[***]**. The European Communities explains that the interest rate originally applied to this disbursement was revised three times, the last time on **[***]**, when it was set at **[***]**. This last interest rate was intended to remain in place until maturity on **[***]**. Thus, it was expected that the disbursement would be fully repaid over **[***]** years. EC, Answer to Panel Question 89 and Exhibits EC-154 (BCI), EC-693 (BCI), EC-697 (BCI) and EC-722 (BCI). Given that we have held the interest rates charged by the EIB on this disbursement prior to **[***]** to be below-market, it is possible to conclude that Aérospatiale paid below-market interest rates for approximately **[***]** out of the **[***]** years of its maturity.

[3569] The United States has not advanced any market interest rate benchmarks for the EIB loans disbursed in USD.

BCI deleted, as indicated **[***]**

afforded CASA with any particular advantage that was inconsistent with the European Communities' obligations under the SCM Agreement.[3570] In our view, it follows from the European Communities' own logic that, at least for the purpose of setting the applicable interest rate, the INI loan guarantees transformed the loans to CASA into loans that are akin to loans to the Spanish government. This being the case, a market interest rate benchmark that is based on the cost of Spanish government borrowing would seem to be appropriate.

7.867 Turning to the data presented in Table 17, we note that the *revised interest rates* charged by the EIB for the two disbursements made in PTAS under the 1989 loan were below the Ellis Report and EC market interest rate benchmarks by comparable margins, respectively, **[***]** and **[***]** basis points. However, it does not automatically follow that the previous interest rates charged by the EIB on the same disbursements were also below-market. In order to determine whether favourable interest rate terms were applied to each disbursement as a whole, we would need to know the interest rate (or interest rates) charged prior to the revision.

7.868 The two disbursements made in PTAS under the 1989 loan were first transferred to CASA on **[***]**.[3571] The loan contract indicates that the interest rates charged on the two disbursements were to be determined through application of the EIB's standard interest rate setting mechanism, and that they would be subsequently revised to the extent that the loaned principal remained outstanding on **[***]**.[3572] We understand that it is these revised interest rates (*i.e.*, the interest rates applicable to the outstanding loan principal as of **[***]**) that the European Communities has used in its benefit analysis, and which we have also relied upon as the basis of the relevant EIB interest rate values identified in Table 17. However, the European Communities has not disclosed the initial interest rates charged by the EIB, and neither are these evident from the loan contract. Again, we consider this to be information that was in the possession of only the European Communities; information which we believe could have been disclosed by the European Communities when answering Panel Question 89, or at the very least, when the European Communities presented its own benefit analysis in respect of each of the challenged loans in Exhibit EC-722 (BCI). In this light, and bearing in mind our findings on the nature of the EIB's lending activities,[3573] we conclude, on the basis of the entirety of the information that is before us, that the prior interest rates charged by the EIB on the two disbursements in PTAS made under the 1989 loan contract were also below-market.

7.869 Table 17 indicates that a third, single interest rate, disbursement was made under the 1989 loan in USD. As already noted, unlike the European Communities, the United States has not submitted a comparable market interest rate benchmark for this disbursement. The European Communities' market interest rate benchmark indicates that this disbursement was not granted on interest rate terms that were more advantageous than what CASA could have obtained from a commercial lender for a comparable loan. Therefore, we find that the third, single interest rate, USD, disbursement made under the 1989 loan did not confer a benefit upon CASA.

7.870 Bearing in mind that the funds transferred via the first and second disbursements under the 1989 loan amounted to more than half of the principal made available under the 1989 loan contract, it is possible to conclude that the majority of the funds lent to CASA under the 1989 loan were obtained at preferential interest rates compared with the market, thus conferring upon it a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

[3570] We recall that loan guarantees are explicitly identified in Article 1.1(a)(1)(i) of the SCM Agreement as one type of "potential direct transfer of funds or liabilities", and as such, under certain circumstances, they may amount to subsidies falling within the scope of the SCM Agreement.

[3571] Exhibit EC-154 (BCI).

[3572] Exhibit EC-700 (BCI), Article 3.01.

[3573] *See*, para. 7.753 above.

BCI deleted, as indicated **[***]**

7.871 Of the six single interest rate USD disbursements made to CASA under the two 1990 loans, Table 17 indicates that one was made at an interest rate that was **[***]** basis points below the European Communities' market interest rate benchmark. We note that the principal transferred to CASA under this disbursement represented approximately **[***]** of the funds made available under loan No. 14711.[3574] On this basis, it is possible to conclude that just over **[***]** of the funds borrowed by CASA from the EIB under loan No. 14711 was subject to below-market interest rates, thus conferring a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

7.872 Finally, as we have previously observed, the European Communities contends that in assessing whether the EIB loans conferred a benefit, we must determine whether the rate charged by the EIB was convincingly outside a spread of interest rates "20 to 50 basis points above or below the single benchmark".[3575] However, for the same reasons we have outlined above,[3576] we cannot accept that the range of market interest rate benchmarks advanced by the European Communities is an appropriate basis for finding that the relevant disbursement under the 1990 loan to CASA was not granted on beneficial interest rate terms.

Commitment fees and non-utilization fees

7.873 Once again, the United States relies on the same evidence advanced in respect of its complaint against the 2002 loan to EADS and the 1992 loan to Aérospatiale to claim that each of the remaining challenged EIB loans also conferred a benefit because the EIB did not charge commitment fees or non-utilisation fees.[3577] The European Communities refutes the United States' allegation, on the basis of the same arguments we have already described above.[3578]

7.874 Of the 22 disbursements made under the ten loans reviewed in this section of our Report, the precise disbursement amounts, interest rate values and disbursement dates were, among other terms and conditions, agreed and fixed at the time of signature in respect of seven disbursements. Four of these were disbursements made under each of the four loan contracts between the EIB and British Aerospace.[3579] The other three were the disbursements made under the 1990 loan between the EIB and CASA (No. 14711).[3580] In each case, the EIB legally committed itself to providing British Aerospace and CASA with loans on certain fixed terms and conditions either **[***]**, or on a specified date, ranging between **[***]** and **[***]** after the date of signature.[3581] In return, not only did British Aerospace and CASA undertake an obligation to take possession of the prescribed funding amounts on the dates and interest rate terms fixed in the contract, but they also agreed to being liable to pay a

[3574] *See*, Table 10 above.
[3575] EC, SWS, para. 507.
[3576] *See*, paras. 7.787 and 7.856 above.
[3577] US, FWS, para. 414, citing Exhibits US-160 and US-161.
[3578] *See*, para. 7.790 above.
[3579] All disbursements made under the 1988 and 1989 loans to British Aerospace for the A320; and one of two disbursements made under each of the 1990 loans to British Aerospace for the A330/A340 Exhibits EC-703 (BCI), EC-704 (BCI), EC-705 (BCI) and EC-706 (BCI).
[3580] All disbursements made under the 1990 loan to CASA for the A320 and A330/A340 (No. 14711) Exhibit EC-701 (BCI).
[3581] For each disbursement, the delays between contract signature and disbursement date were: **[***]** under the 1988 loan to British Aerospace, Article 1.02, Exhibit EC-703 (BCI); **[***]** under the 1989 loan to British Aerospace, Article 1.02, Exhibit EC-704 (BCI); **[***]** in respect of disbursement 2 under the 1990 loan to British Aerospace, Article 1.02A, Exhibit EC-705 (BCI); **[***]** in respect of disbursement 1 under the 1990 loan to British Aerospace, Article 1.02B, Exhibit EC-706 (BCI); and respectively **[***]**, **[***]** and **[***]** for the disbursements made under the 1990 loan to CASA (No. 14711), Article 1.02, Exhibit EC-701 (BCI).

BCI deleted, as indicated **[***]**

fee to the EIB in the event that they were to either: (i) request the EIB to defer the disbursements to another date;[3582] or (ii) annul the disbursements altogether.[3583]

7.875 We recall that the United States has not contested the European Communities' assertion that it would not be in accordance with market practice for the EIB to demand the payment of a fee for the type of commitment it made in respect of the above seven disbursements.[3584] Indeed, as we have already noted, the characterisation of commitment fees used in the NERA EIB Report that is relied upon by the United States suggests that commitment fees would not normally be demanded by a bank when a borrower has undertaken an *obligation* to borrow, as opposed to merely an *option* to borrow under an open credit line.[3585] In this light, we are not convinced, given the particular terms (including penalty provisions) applicable to the above seven disbursements, that the United States has done enough to establish that a commitment fee would have been charged by a commercial lender for comparable financing, and therefore that the EIB's failure to charge a commitment fee in each of the above cases conferred a benefit upon British Aerospace and CASA.

7.876 The remaining 15 disbursements made under the ten loan contracts reviewed in this section of our Report, were granted on what the European Communities has described as "open-rate" terms.[3586] However, unlike the 2002 loan to EADS (which was also an "open-rate" contract) the interest rate formulae applied to each of these disbursements did not include a fixed risk premium component. Thus, at the time of the conclusion of each relevant loan, the only commitment made by the EIB in terms of interest rates was to apply one or more contractually specified interest rate calculation methodologies when the time came to set the relevant interest rate for any requested funding disbursement.[3587] As such, the circumstances that both parties have described, which would normally push a commercial lender to require the payment of commitment fees were not present.[3588] It follows that the EIB's failure to charge the relevant Airbus entities a commitment fee under each of the loans at issue did not place Airbus in a position more advantageous than it would otherwise have been in had it obtained comparable financing from the market.

[3582] Article 1.04 ("Deferment Commission"), Exhibits EC-703 (BCI) and EC-704 (BCI); Article 1.05 ("Deferment Commission") Exhibits EC-705 (BCI) and EC-706 (BCI); and Article 1.04 ("Comisión de aplazamiento") Exhibit EC-701 (BCI).

[3583] Article 1.05 ("Annulment of Credit"), Exhibits EC-703 (BCI) and EC-704 (BCI); Article 1.06 ("Annulment of Credit"), Exhibits EC-705 (BCI) and EC-706 (BCI); and Article 1.05 ("Anulación de la apertura de crédito"), Exhibit EC-701 (BCI).

[3584] *See*, para. 7.790 above.

[3585] *See*, footnote 3467 above.

[3586] The relevant disbursements are: disbursement 1 under the 1990 loan to British Aerospace for the A330/A340 (No. 14999), Exhibit EC-705 (BCI); disbursement 2 under the 1991 loan to British Aerospace for the A330/A340 (No. 15119), Exhibit EC-706 (BCI); both disbursements under the 1990 loan to Airbus Industries for the A321 (No. 15007), Exhibit EC-692 (BCI); all three disbursements under the 1988 loan to Aérospatiale for the A330/A340 (No. 13764), Exhibit EC-697 (BCI); both disbursements under the 1993 loan to Aérospatiale for the Super Transporteurs (No. 6832), Exhibit EC-695 (BCI); and all six disbursements made under both the 1989 and 1990 loans to CASA for the A320 and A330/A340 (Nos 14081 and 14712), Exhibits EC-700 (BCI) and EC-702 (BCI)

[3587] *See*, in particular, Articles 1 and 3, disbursement 1 under the 1990 loan to British Aerospace for the A330/A340 (No. 14999), Exhibit EC-705 (BCI); Articles 1 and 3, disbursement 2 under the 1991 loan to British Aerospace for the A330/A340 (No. 15119), Exhibit EC-706 (BCI); Articles 1 and 3, both disbursements under the 1990 loan to Airbus Industries for the A321 (No. 15007), Exhibit EC-692 (BCI); Articles 1 and 3, all three disbursements under the 1988 loan to Aérospatiale for the A330/A340 (No. 13764), Exhibit EC-697 (BCI); Articles 1 and 3, both disbursements under the 1993 loan to Aérospatiale for the Super Transporteurs (No. 6832), Exhibit EC-695 (BCI); and Articles 1 and 3, all six disbursements made under both the 1989 and 1990 loans to CASA for the A320 and A330/A340 (Nos 14081 and 14712), Exhibits EC-700 (BCI) and EC-702 (BCI).

[3588] *See*, paras. 7.789,7.790 and 7.797 above.

BCI deleted, as indicated **[***]**

7.877 Finally, on the issue of non-utilization fees, we repeat the same observations made when examining the United States' complaint in respect of the 1992 loan to Aérospatiale – namely, that apart from alleging that all EIB loans conferred a benefit upon Airbus because the EIB did not charge non-utilization fees, the United States has advanced no specific explanation nor adduced any particular evidence or expert opinion suggesting that a commercial lender would have required the relevant Airbus entities to pay a non-utilization fee for the same type of financing obtained from the EIB under each of the relevant loan contracts. In the absence of any such evidence or relevant explanation, and given that the European Communities does not accept that the payment of a non-utilization fee was warranted,[3589] we are not convinced that the United States has done enough to establish that the remaining ten loans conferred a benefit for this reason.

Absence of a risk premium

7.878 The parties' arguments and submissions concerning the United States' allegation that the EIB failed to charge a risk premium on any loans granted prior to 1999, including the ten loans that we have focused upon in this section of our Report, are set out above in our analysis of the United States' claims in respect of the 1992 EIB loan to Aérospatiale.[3590] We emphasized in that part of our Report that although the European Communities' explanation of why the EIB did not charge risk premia on loans prior to 2000 made some intuitive sense, we could not accept it as a matter of fact in the light of the evidence and argument presented to support the European Communities' position. In particular, we found that the evidence advanced by the European Communities showed that the EIB does attempt, as the European Communities asserts, to "align its risk management systems to changing economic conditions and evolving regulatory standards" with a view to following "best market practice". However, the information presented says nothing about why the EIB decided to introduce a risk premium in 2000 or whether it was intended, as the European Communities asserts, to operate as a partial or total alternative to the loan guarantees required under Article 18.3 of its Statute.[3591] Thus, although we consider the European Communities' explanation to make some intuitive sense, we cannot accept it as a matter of fact on the basis of the evidence that has been presented.

7.879 Moreover, while the European Communities' explanation of why the EIB introduced a risk premium suggests that risks associated with EIB lending prior to 2000 were taken into account by means of "external guarantees", the European Communities has not explained how the particular guarantees or securities provided under the ten loans examined in this section of our Report served to compensate the EIB for the risks associated with lending to the relevant Airbus entities in the same way that a market lender would have sought compensation for the same risks under a commercial loan.

7.880 In this light, we find that the European Communities has failed to advance sufficient evidence and argument to persuade us that the absence of a risk premium on the ten loans examined in this section of our Report did not confer a benefit upon Airbus. We therefore uphold the United States' claim that the each of the ten loans at issue conferred a benefit, within the meaning of Article 1.1(b) of the SCM Agreement, because it did not include a risk premium.

Conclusion in respect of the "other" loans to Airbus

7.881 On the basis of the foregoing analysis, and in the light of our finding that the nature of the EIB's lending activities,[3592] we find that each of the ten EIB loans examined in this section of our Report conferred a benefit upon the relevant Airbus entities, within the meaning of Article 1.1(b) of

[3589] EC, Answers to Panel Question 87 and 179.
[3590] *See*, paras. 7.815-7.816 above.
[3591] *See*, para. 7.817 above.
[3592] *See*, para. 7.753 above.

BCI deleted, as indicated **[*******]**

the SCM Agreement, because: (i) it was either in part or in total granted on below-market interest rate terms;[3593] and/or (ii) the EIB did not charge the relevant Airbus entity a risk premium.[3594]

7.882 On the other hand, we find that the United States has failed to demonstrate that the ten EIB loans examined in this section of our Report individually conferred a benefit upon the relevant Airbus entities because each did not require payment of commitment fees or non-utilization fees.[3595]

The EUR 700 million credit line

7.883 The United States considers that the EUR 700 million credit line opened for EADS at below-market interest rates conferred a benefit upon Airbus because "the very fact" of its existence gave EADS "valuable liquidity".[3596]

7.884 We recall that we have found the EUR 700 million credit line to be a potential direct transfer of funds, and that in order to understand whether a potential direct transfer of funds confers a benefit, the focus should be on whether the existence of the promise to provide the direct transfer confers a benefit.[3597] The United States has submitted evidence which we have accepted demonstrates that the **[*******]** EIB loan to EADS was granted at a below-market interest rate, thereby conferring a benefit upon Airbus. Moreover, the United States has also demonstrated that the same loan benefited EADS due to the absence of commitment fees. However, it has adduced no evidence nor advanced any particular argument to identify and explain the alleged benefit of the *promise* to obtain liquidity on favourable terms for EADS. We are not convinced that simply showing that a credit line has been granted on beneficial terms is enough to establish that it has placed its recipient in a better position than it otherwise would have been in absent availability of the particular credit line. In our view, something more is required to demonstrate that a promise to provide "cheap" financing, *in and of itself*, confers a benefit. Thus, while we are sympathetic to the notion that a potential direct transfer of funds taking the form of a credit line on favourable terms may confer a benefit upon its recipient, we believe that in the context of the EUR 700 million credit line to EADS, the United States has failed to substantiate its claim.

Overall conclusion

7.885 In summary, we conclude that the United States has established that:

(i) the 2002 EIB loan to EADS for the A380 conferred a benefit on EADS within the meaning of Article 1.1(b) of the SCM Agreement, and therefore constituted a subsidy under Article 1.1 of the SCM Agreement, because: (a) the interest rate charged by the EIB was less than what a market lender would have asked EADS to pay for comparable financing; and (b) EADS was not required to pay a commitment fee;[3598]

(ii) the 1992 loan to Aérospatiale for the A330/A340 conferred a benefit on Aérospatiale, within the meaning of Article 1.1(b) of the SCM Agreement, and therefore constituted a subsidy under Article 1.1 of the SCM Agreement, because: (a) it was granted at an interest rate **[*******]** to the cost of borrowing for the French

[3593] These loans are: the 1988 loan to Aérospatiale for the A330/A340; the 1993 loan to Aérospatiale for the Super Transporteur; the 1989 loan to CASA for the A320 and A330/A34; and the 1990 loan to CASA for the A320 and A330/A340 (No. 14711). *See*, paras. 7.852-7.872 above.
[3594] *See*, paras. 7.878-7.880 above.
[3595] *See*, paras. 7.873-7.877 above.
[3596] US Comments to EC, Answer to Panel Question 181.
[3597] *See*, para. 7.735 above.
[3598] *See*, para. 7.801 above.

BCI deleted, as indicated **[***]**

government and was therefore more advantageous than the interest rate that would have been available to Aérospatiale on the market for comparable financing; and (b) it was granted on interest rate terms that did not include a risk premium;[3599]

(iii) the 1988 loan to Aérospatiale for the A330/A340, the 1993 loan to Aérospatiale for the Super Transporteur, the 1989 loan to CASA for the A320 and A330/A340, and the 1990 loan to CASA for the A320 and A330/A340 (No. 14711), each conferred a benefit on the relevant Airbus entity, within the meaning of Article 1.1(b) of the SCM Agreement, and therefore constituted a subsidy under Article 1.1 of the SCM Agreement, because each loan: (a) was either in part or in total granted on below-market interest rate terms; and (b) was granted on interest rate terms that did not include a risk premium;[3600] and

(iv) the 1991 loan to British Aerospace for A330/A340, the 1990 loan to CASA for the A320 and A330/A340 (No. 1.4712/ES), the 1990 loan to British Aerospace for the A330/A340, the 1990 loan to Airbus Industrie GIE for the A321, the 1989 loan to British Aerospace for the A320, the 1988 loan to British Aerospace for the A320, each conferred a benefit on the relevant Airbus entity, within the meaning of Article 1.1(b) of the SCM Agreement, and therefore constituted a subsidy under Article 1.1 of the SCM Agreement, because each loan was granted on interest rate terms that did not include a risk premium.[3601]

7.886 On the other hand, we find that the United States has failed to demonstrate that the 2002 EIB loan to EADS also conferred a benefit upon EADS because of the EIB's failure to charge non-utilization fees;[3602] or that the remaining eleven challenged loans conferred a benefit because the EIB did not charge the relevant Airbus entity either commitment fees or non-utilization fees.[3603]

7.887 Finally, we recall that we have concluded that the United States has failed to demonstrate that the EUR 700 million credit line provided to EADS under the 2002 loan contract conferred a benefit upon Airbus, and was therefore a subsidy within the meaning of Article 1 of the SCM Agreement.[3604]

7.888 In finding, for one or more reasons, that each of the twelve challenged loans constitutes a subsidy, it does not automatically follow, as the European Communities appears to suggest,[3605] that all loans granted by the EIB and other multilateral finance institutions (such as those cited by the European Communities – the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank and the International Finance Corporation) will always amount to subsidies within the meaning of the SCM Agreement. The extent to which any loan provided by one or more of these funding institutions involves the provision of a subsidy is obviously a question that can only be answered in the light of the particular facts surrounding the alleged instance of subsidization. However, as a general matter, it is not entirely clear to us whether such entities may all be properly considered to be "a government or any public body within the territory of a Member" for the purpose of Article 1.1(a)(1). In any case, it is important to bear in mind that although the provision of financial assistance on beneficial terms and conditions of one kind or another would seem to fall squarely within the objectives and *raison d'être* of such organizations, not all cases of support may involve subsidization that is actionable under the SCM Agreement.

[3599] *See*, para. 7.820 above.
[3600] *See*, para. 7.881 above.
[3601] *See*, para. 7.881 above.
[3602] *See*, para. 7.801 above.
[3603] *See*, paras. 7.820 and 7.882 above.
[3604] *See*, para. 7.884 above.
[3605] *See*, para. 7.746 above.

BCI deleted, as indicated **[***]**

7.889 We now turn to evaluate the United States' allegation that the EIB loans which we have found to be subsidies are "specific" within the meaning of Article 2 of the SCM Agreement.

(c) Whether the EIB loan subsidies are specific within the meaning of Article 2 of the SCM Agreement

(i) Introduction

7.890 The United States argues that each of the challenged EIB loans to Airbus was "specific" within the meaning of Articles 2.1(a) and 2.1(c) of the SCM Agreement, and therefore actionable under Part III of the SCM Agreement. The European Communities rejects the United States' claims, and submits that rather than being "specific" within the meaning of these two provisions, the EIB loans were in fact "non-specific" under Article 2.1(b) of the SCM Agreement. Consequently, the European Communities argues that the EIB loans cannot be challenged under Part III of the SCM Agreement.

7.891 Below we review and evaluate the parties' arguments as they relate to the EIB loans which we have found to be subsidies. We start our analysis by addressing the United States' contention that the EIB loans are "specific" under the terms of Articles 2.1(a) and 2.1(c) of the SCM Agreement. Should we find that the subsidies are not specific within the meaning of these provisions, the United States will have failed to establish that the subsidies are subject to Part III of the SCM Agreement, and there will therefore be no need to address the European Communities' assertion that they are non-specific under Article 2.1(b).

(ii) Whether the Loans to Airbus were Specific under Article 2.1(a)

Arguments of the United States

7.892 The United States contends that each of the EIB loans it challenges is specific within the meaning of Article 2.1(a) because the EIB's lending activities are entirely "discretionary", with loans being negotiated individually with each relevant borrower, and granted on the basis of criteria that it alleges the EIB admits are "tailored to each individual project".[3606] To this extent, the United States submits that the challenged EIB loans are not unlike the subsidy measures at issue in the *Japan – DRAMS* dispute, which were found to be specific because "tailored to the needs of the recipient company" rather than being provided "on pre-determined terms (that are therefore not tailored to the recipient company)".[3607]

7.893 In response to a Panel question asking the parties to elaborate their views on the extent to which a subsidy granted on unique terms and conditions to an individual enterprise under a non-specific subsidy programme could be found to be specific within the meaning of Article 2.1(a),[3608] the United States answered that such a subsidy could still be specific under this provision, if granted on terms and conditions sufficiently different from the terms and conditions of other subsidies granted under the same non-specific subsidy programme. According to the United States, the unique terms and conditions of such a subsidy could cause it to fall outside the parameters of the broader non-specific subsidy programme. In such an event, the United States argues that the granting authority,

[3606] US, FWS, paras. 406 and 419, citing Exhibit US-166 (EIB, *The Project Cycle at the European Investment Bank*, at 4-5, 12 July 2001).

[3607] US, Answer to Panel Question 150, citing Panel Report, *Japan – DRAMs (Korea)*, paras. 7.372 and 7.374.

[3608] Panel Question 117 ("What are the parties' views on the extent to which a subsidy granted, through a contract including one or more unique terms and conditions, to an individual enterprise pursuant to a subsidy programme that does not explicitly limit access to subsidies to certain enterprises, may be specific within the meaning of Article 2.1(a) of the SCM Agreement?")

BCI deleted, as indicated **[***]**

through the unique terms and conditions of the subsidy, "explicitly limits access to a subsidy to certain enterprises".[3609]

7.894 The United States argues that in order to assess whether the EIB loans to Airbus were granted on terms and conditions that were sufficiently unique to take them outside of the EIB's broader lending programme, the Panel would need to review a representative sample of other EIB loans. However, the United States submits that the European Communities has failed to disclose this, or any other, information that would be needed to determine the extent to which the terms and conditions of the EIB loans to Airbus differed from those in the EIB's loans to other enterprises. The United States recalls that the European Communities did not provide the information requested during the Annex V process. Furthermore, in the view of the United States, the standard contract templates submitted by the European Communities indicate nothing about how core terms may differ between loans to Airbus and other companies. Indeed, the United States contends that the EIB's standard contract templates show that it is precisely the core terms of the EIB's loan contracts – the terms that, according to the United States, may cause a loan to confer a benefit and thus constitute a subsidy – that vary from contract to contract. In particular, the United States asserts that the templates show that elements such as **[***]** are not pre-determined. The United States also notes that other provisions, such as those **[***]**.[3610] Without information from actual contracts, the United States argues that it is impossible to know the extent to which the variables highlighted by the template differ as between the Airbus loans and loans to other companies.

7.895 The United States considers the European Communities' refusal to provide information that would allow the Panel to make a comparison between the EIB loans to Airbus and those to other enterprises is an instance of non-cooperation in the information-gathering process that is the subject of Annex V of the SCM Agreement. The United States recalls that pursuant to paragraph 7 of that Annex, a panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process. Thus, the United States argues that the reasonable inference to be drawn from the European Communities' alleged lack of cooperation is that the missing information would confirm that the terms and conditions of the EIB's loans to Airbus are sufficiently different from the terms and conditions of other EIB loans as to cause the loans to be specific under Article 2.1(a).[3611]

Arguments of the European Communities

7.896 The European Communities asserts that the EIB is a public purpose lending institution offering loans of a general character that are not limited to any enterprise, industry or group within the meaning of Article 2 of the SCM Agreement. It recalls that the United States Department of Commerce has found EIB loans to be neither *de facto* nor *de jure* specific under United States law.[3612] The European Communities calls upon the Panel to come to the same conclusion under the SCM Agreement.

7.897 The European Communities explains that the EIB provides loans to companies of all sizes, with respect to projects across all sectors of the economy, and without any discrimination as to the "nationality" of the borrowers. According to the European Communities, any company may qualify for financing from the EIB as long as it is sufficiently credit-worthy and the underlying project

[3609] US, Answer to Panel Question 117; US, SWS, para. 294.
[3610] US, Answer to Panel Question 150.
[3611] US, Answer to Panel Question 150.
[3612] EC, FWS, paras. 1014-1016, quoting passages from United States Department of Commerce final determination in the Belgian Steel countervailing duty investigation, Exhibits EC-158 and EC-159, and citing the United States Department of Commerce final determination in the Certain Pasta from Italy countervailing duty investigation (C-475-819).

contributes to the attainment of one of the EIB's policy objectives and its eligibility criteria are satisfied.[3613]

7.898 The European Communities rejects the United States' contention that the EIB loans are tailored to the needs of each individual project in such a way that renders them specific within the meaning of Article 2.1(a) of the SCM Agreement. According to the European Communities, the fact that a loan agreement is negotiated with and limited to a particular borrower is standard banking practice. The European Communities argues that the EIB acts like any other bank when it negotiates loan contracts individually with different borrowers. However, unlike other banks, the EIB Statute and the EIB *Eligibility Guidelines* underpin all aspects of its lending operations by defining the financial, administrative and policy-related limits of the EIB, the context of the finance agreements to be agreed upon with the borrowers, the objectives to which the funded projects must contribute, the appraisal process for each loan application, and the interest rate setting methodology.[3614] Thus, the terms and conditions of the negotiated loans, which the European Communities submits matter for finding that there is subsidization (such as interest rate, maturity, repayment profile), are offered to borrowers on the basis of neutral and universally applied financial, technical, methodological and policy criteria, irrespective of the identity or nationality of the borrower and its corporate needs, in line with the prevailing market conditions.[3615]

7.899 To the extent that any unique terms and conditions do exist in the EIB loans, the European Communities contends that they do not evidence specificity. Rather, the European Communities submits that they result from the application of the same principles and objective criteria to different projects and borrowers. For instance, the European Communities asserts that interest rate differences arise from the fact that each interest rate is set according to the same methodology applied in the context of financial markets that are constantly moving.[3616] In terms of differences in loan maturities, the European Communities explains that these arise from the application of the general principle that the maximum maturity of the loan depends upon the economic life of the assets being financed – a large scale, long-term transport infrastructure project has a different financing requirement than funding for the purchase of new equipment for a small environmental project undertaken by a medium-sized firm.[3617]

7.900 Thus, the European Communities argues that the challenged EIB loans are not like the measure that was found to be specific in *Japan – DRAMS* because they are not tailored to each particular borrower, but are based on generally applicable and horizontally set methodologies and criteria which are pre-determined and independent of each borrower's request for financing. The unique terms and conditions that the European Communities submits matter for a finding of the existence of a subsidy (such as interest rate, maturity, repayment profile), do not depart from the standard criteria and methodology applied to all EIB projects. The European Communities asserts that such a departure would be in contradiction with the EIB Statute, which it asserts rests on the principle of non-discrimination among borrowers.[3618]

Evaluation by the Panel

7.901 Before turning to evaluate the merits of the United States' claims, we believe it is useful to first describe the EIB's lending activities in more detail.

[3613] EC, FWS, paras. 1022, 1051-1053; EC, SWS, para. 426.
[3614] EC, Comments on US Answer to Panel Question 150.
[3615] EC, Comments on US Answer to Panel Question 150; EC, SWS, para. 424.
[3616] EC, Comments on US Answer to Panel Question 150.
[3617] EC, Comments on US Answer to Panel Question 150.
[3618] EC, SWS, para. 423.

BCI deleted, as indicated **[***]**

The EIB's lending operations

7.902 Since its establishment in 1957, the EIB has provided loans with a total value close to EUR 600 billion for over 10,000 projects undertaken in a wide array of economic sectors.[3619] The EIB's lending is not limited to entities having EU nationality. However, the location of the funded project is important as the EIB's task is to "contribute ... to the balanced and steady development of the common market in the interest of the Community".[3620] Thus, funded projects are typically executed within the territory of the EC member States, although the EIB has also funded projects in countries acceding to the EU or in neighbouring States.[3621]

7.903 The EIB grants two types of loans, described by the European Communities as "individual" loans and "global" loans. According to the European Communities, the "main (only)" difference between the two is the method of delivery of the EIB funds to the ultimate borrower, with "individual" loans being negotiated and disbursed directly by the EIB, and "global" loans provided through a financial intermediary (a bank) under mandate from the EIB to apply funds to EIB-eligible projects. Typically, the EIB grants "individual" loans only in relation to projects with an investment cost of at least EUR 25 million. Projects valued at less than this amount are financed through global loans.[3622] We note that all of the loans challenged by the United States were "individual loans".

7.904 The EIB's *Eligibility Guidelines* indicate that in order to qualify for loan financing, a proposed project must contribute to the EIB's policy objectives.[3623] In keeping with its mandate under the EC Treaty, the EIB sets these objectives in a way that reflects the goals and priorities of the EU. One expression of the EIB's objectives is found in the Annex to another EIB publication – *The Project Cycle at the European Investment Bank* (the "*Project Cycle Document*"):

> "PROJECTS ELIGIBLE FOR BANK FINANCING
>
> WITHIN THE EUROPEAN UNION, projects considered for EIB financing must contribute to one or more of the following objectives:
>
> Balanced economic development of the Union and its less favoured regions;
>
> Enrichment of human capital: health and education;
>
> Information technology and communications networks;
>
> Research and development;
>
> Diffusion of innovation;

[3619] Exhibit EC-163 lists all loans granted by the EIB between 1 January 1958 and 31 December 2006.

[3620] Article 267, EC Treaty. Similar language is also found in Article 20.1(b) of the EIB Statute (the EIB "may grant loans or guarantees only where execution of the project contributes to increased economic productivity in general and promotes the attainment of the common market").

[3621] EIB Statute, Article 18.1, Exhibit EC-158. *See, also,* Exhibit EC-163. The neighbouring states that the EIB has financed include Albania, Algeria, Bosnia Herzegovina, Egypt, Serbia and Montenegro, Switzerland and Tunisia. The European Communities explains that approximately 10% of the EIB's lending is made outside of the European Communities pursuant to external mandates. We understand that this includes lending to numerous ACP States.

[3622] EC, FWS, para. 1047; EC, SWS, para. 475.

[3623] EC, FWS, para. 1025. EIB, *Eligibility Guidelines – Checking Consistency of EIB Operations with EU Objectives*, Projects Directorate, May 2004, (hereinafter "*Eligibility Guidelines*") Exhibit EC-161, pp 1, 6, 11, 14, 18, 21, 27, 31 and 34.

BCI deleted, as indicated **[***]**

> Transport, telecommunications and Trans-European Networks (TENs);
>
> Environment: protection and improvement of the natural and urban environment, projects with a positive impact on the regional or global environment (sustainable development and prevention of climate change);
>
> Increasing the competitiveness and integration of European industry;
>
> Development of small and medium-scale enterprises (venture capital funding aimed at stimulating innovation by SMEs and entrepreneurship is undertaken by the European Investment Fund).
>
> Securing the energy supply base and conserving energy."[3624]

7.905 A more recent formulation of the EIB's "main operational objectives" is described in the *Eligibility Guidelines*:

> "(i) EU economic and social cohesion and regional development; (ii) Implementation of the Innovation 2010 Initiative; (iii) Environment; (iv) TENS and other projects of common interest; and (v) human capital."[3625]

7.906 For each of the EIB's five "main operational objectives", the *Eligibility Guidelines* identify the various types of projects that may fall within the scope of each objective in more detail. For instance, the "Environment" objective is expanded into what appear to be five sub-objectives: "Tackling Climate Change"; "Protecting Nature / Biodiversity & Natural Resources"; Improving Environment and Health"; "Promoting Sustainable Use of Natural Resources; Waste Management"; and "Enhancing Urban Environment". The features of the types of projects eligible for EIB funding under each of these sub-objectives are further specified under the "Categories of Investment/ Indicators" heading. Overall, the *Eligibility Guidelines* identify 27 sub-objectives and 95 "Categories of Investment/Indicators".[3626]

7.907 The EIB's operations are directed and managed by a Board of Governors, a Board of Directors and a Management Committee.[3627] The Board of Governors consists of Ministers designated by the EC member States. In addition to setting the general credit policy of the EIB, the Board of Governors is responsible for *inter alia*, appointing the Board of Directors and the Management Committee.[3628] The Board of Directors is comprised of at least one director nominated by one of each of the EC member States, and one director nominated by the Commission.[3629] Members of the Board of Directors are "persons whose independence ... is beyond doubt" and who are "responsible only to the Bank".[3630] The Board of Directors has the sole power to take decisions in respect of granting loans,[3631] and acts on the basis of proposals prepared by the Management Committee. The Management Committee is responsible for the current business of the EIB, including examining whether loan applications comply with the provisions of the Statute,[3632] delivering an opinion to the Board of Directors on proposals for granting loans and preparing decisions of the Board

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[3624] *The Project Cycle at the European Investment*, Annex, p. 9, 12 July 2001 (hereinafter "*Project Cycle Document*") Exhibit EC-608.
[3625] EIB, *Eligibility Guidelines*, p. 3, Exhibit EC-161.
[3626] Exhibit EC-161, Tables 1 to 8.
[3627] Exhibit EC-167, Article 9.1.
[3628] Exhibit EC-167, Article 9.2-9.4.
[3629] EIB Statute, Article 11.2, Exhibit EC-158.
[3630] EIB Statute, Article 11.2, Exhibit EC-158.
[3631] EIB Statute, Article 11.1, Exhibit EC-158.
[3632] EIB Statute, Article 21.4, Exhibit EC-158.

BCI deleted, as indicated **[***]**

of Directors.[3633] Management Committee opinions on whether to grant a loan are delivered to the Board of Directors only after the proposed project has been appraised by the EIB's technical experts.[3634]

7.908 As we understand it, the purpose of the EIB's project appraisal is to assess the extent to which a proposed project is economically, financially and technically sound and that the potential borrower is able to service the potential loan.[3635] The European Communities argues that this reflects the fact that the EIB is obliged under its Statute to employ funds as rationally as possible.[3636] The EIB undertakes appraisals of each loan application using a "standard" set of "criteria", which it explains are "tailored to each individual project".[3637] In addition to checking a project's eligibility in terms of contributing to one or more of the EIB's objectives, the appraisal involves assessing a proposed project's business rationale and economic viability, the technical soundness of the project, its environmental impact and the financial and credit risk attached to the lending.[3638] The full set of appraisal criteria that are applied by the EIB are described in the *Project Cycle Document* in the following terms:

> "5.1. Rationale for Bank financing: eligibility, value added of the operation.
>
> The project's contribution to European Union objectives supported by the EIB{} is ascertained. The analysis also reveals how the Bank's input brings "value added" to the project: this may be apparent in the financial terms offered, in the EIB's active and "catalytic" role in structuring the finance plan, or in the improvement of the project's technical specifications.
>
> 5.2. Market and sector:
>
> This analysis is based on the information gathered during project appraisal and on the **sectoral studies** regularly, carried out by the Projects Directorate. It looks at the sector in question, establishes worst and best-case scenarios based on reasonable projections and assesses the promoter's qualities in relation to the project and the project's ability to meet existing demand.
>
> 5.3. Technical description, capacity:
>
> The Bank's analysis looks at the project's technical soundness and the promoter's ability to implement the technical solutions adopted. It also examines the technical risks and measures taken to attenuate these.

[3633] EIB Statute, Articles 13.3 and 13.4, Exhibit EC-158.

[3634] EC, FWS, para. 1028. The European Communities asserts that these will typically include economists, engineers, lawyers and financial analysts.

[3635] *The Project Cycle Document*, Exhibit US-166, pp. 4-7. We understand that the EIB conducts its own appraisal of projects seeking financing in the form of "individual loans". However, it is unclear from the evidence that is before us whether the same appraisal process is applied to individual projects that seek financing from the intermediaries that receive and on-lend the EIB's "global" loans.

[3636] EC, FWS, para. 1026.

[3637] *The Project Cycle Document*, Exhibit US-166, p.4.

[3638] *The Project Cycle*, Exhibit US-166, pp.5-6. The application of the "standard" set of "criteria" also involves reviewing the "total investment cost" of the project, its "implementation", its "operation" and the "prices, tariffs and financial return from the project".

BCI deleted, as indicated **[***]**

5.4. Investment cost:

The EIB examines the total investment cost. the main project costs compared with those of similar schemes financed by the Bank, the margins for contingencies and price inflation adopted and the impact of taxes on the project and promoter.

5.5. Implementation:

The Bank's analyses cover the following points:

- Technical: establishment of a "technical description" of the project to be **appended to the contract** and serve as a basis for future monitoring.

- Procurement: compliance with current procedures; percentage of project cost subject to international competitive bidding; acceptability to the Bank of procedures envisaged.

5.6. Operation:

Management; measures taken to meet particular risks; evaluation of operating costs; employment.

5.7. Environmental impact:

Environmental situation with and without the project; where appropriate, review of studies of alternative solutions; project's impact on the natural and human environments; definition of the measures adopted to prevent, reduce or mitigate any adverse effects; compatibility with current or proposed environmental legislation; existence of an environmental management plan and promoter's ability to implement and manage it; examination of environmental aspects over the life of the project; project's compatibility with sustainable development objectives - including prevention of climate change - to which the European Union is committed.

In performing the environmental part of its appraisal, the Bank makes use of the variety of studies carried out by the promoter or by independent consultants on its behalf (EIAs, SEAS, SISs, etc.). The Bank examines the mitigating measures proposed, reserving the right to ask for further studies to be undertaken by competent external consultants. **In any event, the EIB ensures compliance with adequate project related conditionality**.

5.8 Prices, tariffs and financial return from the project:

- Calculation of the expected cash flow in real terms.

- Where appropriate, the forecasts and analyses of certain financial ratios may serve as a basis for formulating appropriate tariff policies.

- Sensitivity and/or risk analysis.

5.9. Economic benefits:

Economic justification of the project; economic appraisal of value added of the project and the Bank's input; calculation of the project's economic rate of return;

BCI deleted, as indicated **[***]**

> estimation of external costs/benefits, such as environmental protection, regional development, etc; sensitivity analysis.
>
> 5.10. Financial and credit risk analysis:
>
> The Directorate General for Lending Operations performs **a detailed financial analysis of the borrower** - as well as of **the guarantor** if the operation is backed by a commercial guarantee. This can of course be simplified for the EIB's repeat borrowers.
>
> Where public borrowers promoting infrastructure projects are concerned (*e.g.*, regions or municipalities), a different type of financial analysis is performed, based on documents of a budgetary nature.
>
> The Credit Risk Department casts an objective eye on the **financial viability of the borrower and guarantor**, with whom it has no business relationship."[3639]

7.909 According to the United States, the EIB's admission that its appraisal criteria are "tailored to each individual project" confirms that the loans it grants are assessed against criteria that are unique to each project proposal. On the other hand, the European Communities contends that the EIB's statement should be understood as meaning that the EIB adjusts its general appraisal criteria "to take account of the specifics of the project (the 'input data')".[3640] In our view, when considered in its proper context, the EIB's explanation of how it applies the "standard" appraisal criteria does not appear to be an admission that it conducts appraisals on the basis of criteria that are unique to each of the projects for which a loan has been requested. The *Project Cycle Document* indicates that the EIB reviews project proposals against the same set of general appraisal criteria, which "are all covered by the report submitted to the Board of Directors for a financing decision".[3641] However, given the wide variety of projects financed by the EIB, it is only natural to expect that the application of these general criteria may involve asking and answering slightly different questions depending upon the particular project proposal being reviewed. It is this process of applying the general appraisal criteria, taking into account the particular characteristics of the project under review, that we believe the EIB is referring to when it states that its "standard" appraisal criteria are "tailored to each individual project".

7.910 For instance, the first of the EIB's "standard" appraisal criteria is described as "Rationale for Bank financing: eligibility, value added of the operation". As we have already noted, the starting point of the EIB appraisal of a project is an assessment of its eligibility in terms of contributing to its main operating objectives. Obviously, a project with an environmental scope will be assessed in terms of how it corresponds with the EIB's environmental objectives. Other EIB objectives may not be relevant. Moreover, when examining the environmental features of the proposed project, the appraisal may involve an assessment in terms of one or more of the environmental sub-objectives or "Categories of Investment/Indicators" that are listed in the *Eligibility Guidelines*.[3642] In our view, the fact that part of the EIB's appraisal of this particular project would involve assessing how closely it matches one or more of its environmental priorities, without also examining the extent to which it fulfils other objectives and priorities, does not imply that the EIB applies assessment criteria that are unique to the project being reviewed, thereby placing a limitation on the entities entitled to receive the same type of loan.

[3639] *The Project Cycle*, Exhibit US-166, pp.4-5 (footnote omitted) (emphasis original).
[3640] EC, FWS, para. 1027 and footnote 832.
[3641] *The Project Cycle*, Exhibit US-166, p.4.
[3642] These are briefly discussed at para. 7.906 above.

BCI deleted, as indicated **[***]**

7.911 A similar conclusion may be reached in respect of the other "standard" appraisal criteria applied by the EIB. Because they are of a general nature, they may not necessarily be applied in the same way or have the same relevance to all project proposals. This does not mean that the EIB applies different appraisal criteria and standards when determining whether to fund different projects. Rather, it shows that when the EIB applies its general appraisal criteria, it does so taking into account the particular characteristics of the proposed project.

7.912 In order to be granted, a loan application that obtains a favourable opinion from the Management Committee must be approved by a qualified majority of the Board of Directors. In considering a request for funding, the Board of Directors must also take into account any opinion delivered by the Commission or the EC member State in whose territory the project will be carried out. Where the concerned EC member State delivers an unfavourable opinion, the Board of Directors cannot grant the loan.[3643] Likewise, where an unfavourable opinion is provided by both the Management Committee and the Commission, the Board of Directors may not grant the loan.[3644] However, where an unfavourable opinion is delivered by the Management Committee or the Commission, the Board of Directors may still grant the loan, but only on the basis of a unanimous decision.[3645] Thus, under its formal decision-making procedure, it is possible for the EIB to decide not to grant loans to projects that satisfy all eligibility requirements and appraisal criteria. We note, however, that the European Communities asserts that between 1988 and 2006, the Board of Directors decided not to grant only two out of over 5,000 loan proposals submitted by the Management Committee for approval.[3646] The United States has not contested the European Communities' assertion.

7.913 Finally, once a loan is approved by the Board of Directors, the EIB prepares the finance contract.[3647] As we understand it, this process begins with the use of a standard contract template as the basis for the loan agreement, which is then adjusted to reflect the characteristics of each loan. The European Communities notes that the standard contract template applied by the EIB has changed over the years "essentially to reflect 'technical' developments in law or EIB lending practice".[3648] It has submitted copies of two such templates, prepared by the EIB in 1994 and 2001.[3649] We understand the European Communities to consider both templates to be representative of the contractual provisions relied upon by the EIB around the time of the "individual" loans granted to Airbus that are the subject of the United States' complaint. However, it is unclear from the evidence before us whether the same templates are equally representative of the contractual provisions found in the EIB's "global" loans.[3650]

7.914 Each of the contract templates is comprised of an introduction (identifying the parties), a preamble and 12 Articles, elaborated over more than 20 pages and 40 clauses,[3651] addressing both procedural and substantive features of the EIB's loans.[3652] The 2001 template also includes two

[3643] Statute, Article 20.6.
[3644] Statute, Article 21.7.
[3645] Statute, Articles 21.5 and 21.6.
[3646] EC, FWS, para. 1028.
[3647] *The Project Cycle Document*, Exhibit US-166, p.7.
[3648] EC, Answer to Panel Question 85.
[3649] Exhibits EC-609 (BCI) and EC-711 (BCI).
[3650] We note that the European Communities has provided no copies of loans granted by the EIB's intermediaries when on-lending "global" loans to qualifying projects. Neither has the European Communities argued that the EIB's intermediaries issue loans on the basis of the same contract templates used by the EIB when granting "individual" loans.
[3651] There are 43 clauses under the 12 Articles contained in the 1994 template, which runs over 24 pages; and 45 clauses under the 2001 template, which has 26 pages.
[3652] The Article headings used in each contract template are essentially the same: Article 1 – "Provisions Relating to Payment"; Article 2 – "The Loan"; Article 3 – "Interest"; Article 4 – "Reimbursement";

BCI deleted, as indicated **[***]**

annexes.[3653] In most instances, the provisions found in the templates are detailed, precise and mandatory. However, as the United States observes, there are certain provisions where precise amounts, dates or values are left unspecified. This is true in respect of clauses dealing with, for example, **[***]**. Moreover, the inclusion of one provision found in the 2001 template pertaining to mandatory anticipated repayment will depend upon the particular project to be financed.[3654]

7.915 Where the contract templates leave certain provisions or parts of provisions unspecified, these are finalized in the light of the choices made by the borrower and the particular characteristics of the financed project and loan transaction. For instance, both the 1994 and 2001 templates indicate that borrowers may choose between fixed, variable or floating interest rate regimes.[3655] Specific formulae describe how the interest rates attached to each regime should be calculated. Irrespective of the borrower's choice, the same principle is applied under each formula. Whether fixed, variable or floating, the interest rate will be the same as that offered by the EIB at the date of the disbursement notice for loans to be made under the same interest rate regime, in the same currency, and on the same repayment terms including amortization and maturity, as the loan at issue. Although this principle is expressed in slightly different language in the provisions covering the three interest rate regimes,[3656] its application would seem to guarantee that borrowers obtaining comparable loans from the EIB at the same time and under the same interest rate regime are treated in the same manner. In other words, EIB financing is available on the same interest rate terms for all borrowers seeking funding for comparable projects at the same time. Thus, the fact that comparable projects financed by the EIB may be charged different interest rates can be explained by differences in the conditions on the relevant financial markets used by the EIB to finance its lending.

7.916 Borrowers are also given a choice of different loan currencies. The 1994 template offered the possibility of lending in FRF, USD and DM, depending upon the chosen interest rate regime.[3657] The currency options under the 2001 contract template were either EUR or another currency available to the EIB and negotiated on one of the main financial marketplaces.[3658]

Article 5 – "Payments"; Article 6 – "Specific Commitments"; Article 7 – "Sureties"; Article 8 – "Information and Visits"; Article 9 – "Charges and Costs"; Article 10 – "Acceleration of Loan Maturity"; Article 11 – "Legal Regime Governing the Contract"; and Article 12 – "Final Clauses".

[3653] The annexes are: "A" "Technical Description" – a technical description of the project (which is left blank); and "B" "Definition of EURIBOR and LIBOR" (a textual definition of the two types of bank offer rates).

[3654] Exhibit EC-609 (BCI), Article 4.03.

[3655] Exhibits EC-609 (BCI), Article 3.01; and EC-711 (BCI), Article 3.01 ("Taux Fixe", "Taux Variable" and "Taux Revisable").

[3656] The different formulations include: "for the FIXED-RATE TRANCHE, fixed-rate interest calculated at the annual rate applicable, for each currency, upon each NOTIFICATION … to those operations of THE BANK having the same features, in terms of monies disbursed, amortization regime and term, as the payment in question"; "for the VARIABLE-RATE TRANCHE, … The variable rate, determined by THE BANK for each of the reference periods in accordance with the procedures established by its Board concerning variable-rate loans financed through the resources in question, applicable to those operations of THE BANK having the same features, in terms of monies disbursed, amortization regime and term, as the payment in question"; "for the FLOATING-RATE TRANCHE :…{the} annual rate applicable to the currency of payment, upon each NOTIFICATION …, to those operations of THE BANK carried out in the same currency as that of the payment concerned, for a term identical to that between the dates of each payment." Exhibit EC-711 (BCI), Article 3.01. Very similar language is also found in Exhibit EC-609 (BCI).

[3657] Exhibit EC-711 (BCI), Article 1.03.

[3658] Exhibit EC-609 (BCI), Article 1.03.

BCI deleted, as indicated **[***]**

7.917 Guidance is provided in the templates on how to set a loan's amortization schedule.[3659] However, the precise periods of amortization and loan maturity are not prescribed.[3660] Finally, loan amounts and conditions precedent are also not specified in the contract templates. In respect of the former, we note that the amount of the EIB's lending is not subject to any specific budgetary restrictions or allocations for distinct loans or policy objectives. However, pursuant to its Statute, it must ensure that the aggregate amount of outstanding loans and guarantees at any time does not exceed 250% of its subscribed capital, and that it has sufficient reserves to cover 10% of its subscribed capital.[3661] Moreover, the EIB applies a policy of only providing part of the funding for a project.[3662] Subject to these limitations, it appears that the amount of funds loaned by the EIB will depend upon the particular characteristics of the project. Likewise, conditions precedent used in any particular loan agreement will depend upon the features of the loan transaction and the project being financed.[3663]

> Whether the Airbus loans are specific under Article 2.1(a) because allegedly negotiated individually and granted on a discretionary basis on terms and conditions that are not pre-determined

7.918 We begin our assessment of the United States' claim by reviewing the language of Article 2.1(a) of the SCM Agreement, which reads in pertinent part:

> "2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as 'certain enterprises') within the jurisdiction of the granting authority, the following principles shall apply:

[3659] The 1994 template specifies that an amortization schedule is to be established on the basis of constant annual repayments of capital and interest (under a fixed interest rate regime) and annual repayments of capital in equal instalments (under a variable interest rate regime). Exhibit EC-711 (BCI), Article 4.01A. The 2001 template reveals a similar approach – amortization on the basis of annual or semi-annual repayments of capital in equal instalments under fixed, variable or floating interest rate regimes. Exhibit EC-609 (BCI), Article 4.01A. Pursuant to Article 2.04 of both templates, the amortization schedule is established by the EIB and provided to the borrower after it has executed each disbursement under the contract.

[3660] Two repayment options are provided for in the 1994 template under fixed and variable interest rate regimes: (i) a one-time repayment, at the earliest, after four years, or at the latest, after 10 years; or (ii) annual repayments, with the first repayment after five years and the last after 15 years. Exhibit EC-711 (BCI), Article 4.01. The 2001 template provides that repayments may be made through a one-time payment or through annual or semi-annual instalments, irrespective of interest rate regime. Exhibit EC-609 (BCI), Article 4.01. Neither template prescribes the precise maturity of a loan. The European Communities asserts that the EIB sets the maturity of a loan through the application of "the general principle that the maximum maturity of the loan depends on the economic life of the assets to be financed". EC, Comments on US Answer to Panel Question 150. However, the European Communities has advanced no evidence to substantiate its assertion, and the terms of the templates do not confirm that this is how the EIB actually operates.

[3661] EIB Statute, Articles 18.5 and 24.1, Exhibit EC-158.

[3662] EIB Statute, Article 18.2 ("As far as possible, loans shall be granted only on condition that other sources of finance are also used"), Exhibit EC-158.

[3663] A condition precedent is a provision that requires one party to a contract to fulfil a certain obligation (satisfy a condition) before the other party to the contract is required to execute its own contractual obligation. The 2001 template leaves the conditions precedent blank. Exhibit EC-609 (BCI), Article 1.04. Two conditions precedent are identified in the 1994 template: (i) that documents attesting the establishment of any loan guarantee required under a loan be provided to the EIB by the time of the first request for disbursement of the agreed funding; and (ii) that none of the situations (defined in Article 10 of the contract) that would require a borrower to make an anticipated repayment has occurred. Exhibit EC-711 (BCI), Article 1.04.

BCI deleted, as indicated **[***]**

> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific."

7.919 The specificity principle set out in Article 2.1(a) focuses on whether the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises. It follows from the ordinary meaning of the word "explicit" that it is not any limitation on access to a subsidy to certain enterprises that will make it specific within the meaning of Article 2.1(a), but only a limitation that "{d}istinctly express{es} all that is meant; leaving nothing merely implied or suggested"; a limitation that is "unambiguous" and "clear".[3664] In *US – Upland Cotton*, the panel observed that the concept of specificity under Article 2.1 of the SCM Agreement has to do with whether a subsidy is "sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products".[3665] While we can broadly agree with this statement (particularly in the context of the facts at issue in *US – Upland Cotton*), we would add that it is not only a limitation to a "group of producers of certain products" that is the focus of the concept of specificity. In our view, the notion of specificity extends to understanding whether a subsidy is sufficiently broadly available throughout an economy so as not to benefit "certain enterprises" as defined in Article 2.1 – that is, a particular enterprise or industry or a particular group of enterprises or industries. Thus, a finding of specificity under Article 2.1(a) requires the establishment of the existence of a limitation that expressly and unambiguously restricts the availability of a subsidy to "certain enterprises", and thereby does not make the subsidy "sufficiently broadly available throughout an economy".

7.920 The first and main argument advanced by the United States to substantiate its claim that the EIB loans to Airbus are specific, within the meaning of Article 2.1(a), is grounded on the view that the EIB explicitly limits access to its loans by negotiating them individually, and by granting them on a discretionary basis on terms and conditions that are not pre-determined, but "tailored to each individual project". In essence, we understand the United States to argue that the EIB loans (including those to Airbus) are all one-off, discrete lending transactions and, to this extent, explicitly limited to the counterpart involved in the loan transaction.

7.921 The United States considers that the panel findings in *Japan – DRAMS* support its claim.[3666] At issue in that dispute were a number of determinations made by the Japanese investigating authority ("JIA") in a countervailing duty investigation into certain restructurings of Hynix, a Korean semi-conductor manufacturer, under the Corporate Restructuring Promotion Act. The United States notes that Korea had argued that the subsidies provided through the restructurings were not specific because "the same basic rules that governed Hynix's restructurings – as embodied in the Workout Agreement and later in the Corporate Restructuring Act {"CRPA"} – were the same rules that governed the restructuring of other Korean companies."[3667] However, the panel rejected Korea's submission, upholding the finding made by JIA that "the CRPA merely provided the procedural framework within which the October 2001 and December 2002 restructurings took place, rather than actually determining the terms of those restructurings".[3668] The United States recalls that after making this finding, the panel set out its own views on when it believed a subsidy granted to an individual company under a generally available subsidy programme would not be specific, explaining that in

[3664] *New Shorter Oxford English Dictionary*, Vol. 1, 1993, p.888.
[3665] Panel Report, *US – Upland Cotton*, para. 7.1142.
[3666] US, Answer to Panel Question 150.
[3667] Panel Report, *Japan – DRAMs (Korea)*, para. 7.364.
[3668] Panel Report, *Japan – DRAMs (Korea)*, para. 7.372.

BCI deleted, as indicated **[***]**

order to avoid a finding of specificity, such a subsidy had to be granted "on pre-determined terms (that are therefore not tailored to the recipient company)".[3669]

7.922 The United States asserts that, like the restructurings at issue in *Japan – DRAMS*, the loan subsidies provided to Airbus were granted pursuant to a "procedural framework" set forth in documents such as the EIB Statute and the *Eligibility Guidelines*. According to the United States, this "procedural framework" does not set "pre-determined terms", but identifies steps the EIB follows in exercising its discretion to provide loans. Thus, the United States contends that the EIB loan subsidies to Airbus were not granted "on pre-determined terms (that are therefore not tailored to the recipient company)", but rather "tailored to each individual project".[3670] Like the restructuring measures at issue in *Japan – DRAMS*, the loans to Airbus are therefore specific.

7.923 Having carefully reviewed and considered the arguments and evidence submitted by the parties, we believe that it would not be inaccurate to characterize the EIB's lending activities as constituting a discretionary programme of financing, which involves the granting of loans to entities of all nationalities for activities contributing to the balanced development of a wide array of economic sectors across the EU, on terms and conditions that are not all pre-determined. However, there are various reasons why we consider that the conclusion reached by the panel in *Japan – DRAMs* is not justified in the present case.

7.924 First, in expressing its view on the circumstances needing to be established in order to avoid a determination that a subsidy granted to an individual company under a generally available subsidy programme is specific, the panel in *Japan – DRAMs* was not pronouncing on the correct interpretation of the principle of specificity contained in Article 2.1(a). When read in its full context, it is clear that the panel's statement relates to how it considered the notion of specificity must be understood under Article 2.1 as a whole:

> "As a general matter, ... if an investigating authority were to focus on an individual transaction, and that transaction flowed from a generally available support programme whose normal operation would generally result in financial contributions on pre-determined terms (that are therefore not tailored to the recipient company), that individual transaction would not, in our view, become 'specific' in the meaning of Article 2.1 simply because it was provided to a specific company. An individual transaction would be 'specific', though, if it resulted from a framework programme whose normal operation (1) does not generally result in financial contributions, and (2) does not pre-determine the terms on which any resultant financial contributions might be provided, but rather requires (a) conscious decisions as to whether or not to provide the financial contribution (to one applicant or another), and (b) conscious decisions as to how the terms of the financial contribution should be tailored to the needs of the recipient company."[3671]

7.925 Our characterization of the panel's statement is supported by the fact that Korea's complaint against the JIA's finding of specificity was focused on Article 2, without specifying the precise paragraph(s) or sub-paragraph(s) forming the basis of its claim.[3672] In addition, we note that at the heart of the opinion expressed by the panel is the view that the determinative fact for finding that a

[3669] US, Answer to Panel Question 150, citing Panel Report, *Japan – DRAMs (Korea)*, para. 7.374.
[3670] US, Answer to Panel Question 150.
[3671] Panel Report, *Japan – DRAMs (Korea)*, para. 7.374 (underline added).
[3672] Panel Report, *Japan – DRAMs (Korea)*, para. 7.363. The panel noted in the same paragraph that Japan identified the legal basis of the JIA's specificity decision as Article 2.1(a) of the SCM Agreement. However, the panel at no stage stated that its finding upholding the JIA's determination was limited to this provision.

BCI deleted, as indicated **[***]**

subsidy granted to an individual company under a generally available subsidy programme is specific will be the existence of discretion (*i.e.*, a conscious decision) to grant the financial contribution and set its terms and conditions. If this were the correct standard for finding a subsidy specific under Article 2.1(a) of the SCM Agreement, the implication would be that all subsidies granted pursuant to the exercise of discretion to certain enterprises would be *explicitly* specific within the meaning of Article 2.1(a), irrespective of how that discretion was actually exercised. However, it is clear from Article 2.1(c) of the SCM Agreement that the manner in which a granting authority exercises any discretion to grant subsidies is a consideration that is relevant to determining whether a subsidy is *de facto* specific. Article 2.1(c) reads:

> "(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.
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> [3] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered."[3673]

7.926 Because an inquiry into whether a subsidy is *de facto* specific under Article 2.1(c) becomes relevant when there is the appearance of non-specificity under Article 2.1(a), it follows that the existence of discretion in the granting of a subsidy and setting its terms and conditions cannot be determinative of whether it is specific within the meaning of Article 2.1(a) of the SCM Agreement. Therefore, we cannot accept that the principle pronounced by the panel in *Japan – DRAMS* provides the support the United States contends for its claim under Article 2.1(a) of the SCM.

7.927 Second, the facts underlying the panel's decision in *Japan – DRAMS* are in several important respects different from those of the present dispute. The restructuring measures at issue in *Japan – DRAMS* ("new loans", "debt-to-equity swap" and "extension of maturity and interest rate reduction"[3674]) did not follow from the normal operation of the framework programme (the CRPA) that Korea had argued provided the legal basis of the intervention. The panel noted that Article 1 of the CRPA indicated that its purpose was merely "to facilitate the ordinary corporate restructuring under the market functions by (1) enhancing the accounting transparency of enterprises and setting the systems for efficiently managing credit risks by the financial institutions, while (2) prescribing matters necessary to make the corporate restructuring facilitated swiftly and smoothly."[3675] It was an instrument addressing "procedural matters such as enhanced transparency and facilitation", whose normal operation did not, as a general matter, specifically result in financial contributions.[3676] In contrast, the provision of financial contributions (in the form of loans or loan guarantees) is the *raison d'être* of the EIB.

[3673] Underline added.
[3674] Panel Report, *Japan – DRAMs (Korea)*, para. 7.55.
[3675] Panel Report, *Japan – DRAMs (Korea)*, para. 7.372.
[3676] Panel Report, *Japan – DRAMs (Korea)*, para. 7.372.

BCI deleted, as indicated **[***]**

7.928 The panel in *Japan – DRAMS* also found that evidence on the JIA's record indicated that the substantive terms of the restructurings at issue in that case were the prerogative of the Councils for Creditor Financial Institutions, bodies which were specifically established for each restructured company separately. Moreover, the panel noted that Korea had been unable to identify any record evidence indicating that the terms of the restructurings were determined by the provisions of the CRPA *per se*. Rather, the panel observed that Korea had in fact emphasized the company-specific nature of the restructuring process.[3677] On the other hand, in the present case, we are faced with a very different set of facts. The EIB's loans are available for essentially all projects that contribute to one or more of its broad policy objectives. The EIB's lending activities are guided by a generally applicable operational framework that sets both procedural, and also, in many important respects, clear substantive disciplines on the terms and conditions of its loans. All project proposals are reviewed by essentially the same body, examined subject to the same general appraisal criteria, and the same decision-makers decide on whether to provide the requested funds. Thus, unlike the measure at issue in *Japan – DRAMS*, there is no special decision-making authority set up for each of the loans granted by the EIB.

7.929 Moreover, the contractual terms and conditions, including many of those relating to substantive rights and obligations, are to a large degree prescribed *ex ante* in the EIB's standard contract templates. Where dates and values are left blank in the contract templates, methodologies are in some cases described for arriving at the relevant figure(s), or other general guidance is given in order to finalise the relevant clauses. For instance, interest rate terms are determined through the application of the same interest rate formulae for each interest rate regime, irrespective of the applicant.[3678] The same loan currency options are offered; and general guidance is provided on repayment terms.[3679] Although subject to a degree of discretion, EIB loans are, in our view, financial contributions of a clearly different kind to the one-off and uniquely conceived restructuring measures at issue in *Japan – DRAMS*.

7.930 Finally, contrary to the situation in *Japan – DRAMS*, where the panel found that the JIA's determination was based, in part, on an intermediate factual conclusion that the Government of Korea had the political intent to save a single company, Hynix, from insolvency,[3680] there is no evidence before us to suggest that the loans at issue were granted because of any intention to provide that type of assistance only to Airbus.

7.931 We recall that the specificity principle set out in Article 2.1(a) focuses on whether the granting authority "explicitly limits access to a subsidy to certain enterprises". As we have already noted, it follows from the ordinary meaning of the word "explicit" that it is not any limitation on access to a subsidy that will make it specific within the meaning of Article 2.1(a), but a limitation that "{d}istinctly express{es} all that is meant; leaving nothing merely implied or suggested"; a limitation that is "unambiguous" and "clear".[3681] Above we have found that the normal operation of the EIB's lending programme involves the granting of loans, with a degree of discretion, to entities of all nationalities, on terms and conditions that, to varying degrees, reflect the particular characteristics and features of the funded project and finance transaction, for activities contributing to the development of a wide array of economic sectors across the EU. While it could be argued that the EIB lending objectives, although very broad, do establish an *explicit* limitation on its lending activities, we do not consider these to result in a limitation on the availability of its loans to "*certain enterprises*". In our view, the wide array of economic sectors covered by the EIB's explicit lending objectives means that its operations are expressly intended to benefit recipients well beyond a particular enterprise or

[3677] Panel Report, *Japan – DRAMs (Korea)*, para. 7.372 and footnote 564.
[3678] Discussed at para. 7.914 above.
[3679] Discussed at para. 7.935 above.
[3680] Panel Report, *Japan – DRAMs (Korea)*, para. 7.373.
[3681] *New Shorter Oxford English Dictionary*, Vol. 1, 1993, p.888.

BCI deleted, as indicated **[***]**

industry or group of enterprises or industries. Moreover, the fact the EIB loans to Airbus (and other borrowing entities) may contain one or more terms and conditions that are not exactly the same, does not render access to those loans explicitly limited to the particular recipients. This is because the normal operation of the EIB's lending programme places no explicit limitation on access to the same financing opportunity for any other recipient having the same funding needs for a comparable project. Thus, contrary to what the United States has argued, the fact that the subsidy loans to Airbus were negotiated individually between the EIB and Airbus, and granted on terms and conditions that were not always identical to other loans granted by the EIB, does not mean that they are specific within the meaning of Article 2.1(a) of the SCM Agreement. Bearing in mind that the concept of specificity under Article 2.1 of the SCM Agreement has to do with whether a subsidy is sufficiently broadly available throughout an economy so as not to benefit "certain enterprises", we believe there is, in principle, no express, "unambiguous" and "clear" limitation on access to EIB lending to "certain enterprises". Accordingly, we dismiss the United States claim that the EIB loans to Airbus are specific, within the meaning of Article 2.1(a), because the EIB's lending activities are discretionary, and result in loans being negotiated individually and granted on terms and conditions that are not entirely pre-determined.

> Whether the Airbus loans are specific under Article 2.1(a) because allegedly granted on terms and conditions that take them outside of the parameters of the EIB's lending programme

7.932 The United States advances a second line of argument to support its contention that the EIB loans to Airbus are specific under Article 2.1(a). In particular, the United States argues that the Airbus loans could be found to be specific within the meaning of Article 2.1(a) if granted on terms and conditions sufficiently different from the terms and conditions of loans granted to other recipients under the same programme. However, because of the European Communities' alleged failure to provide information requested on the EIB's lending activities during the Annex V process, the United States considers that the Panel does not have enough information before it to undertake a proper comparison of the terms and conditions of the EIB loans granted to Airbus with loans granted to other recipients. The United States submits that the European Communities' failure to provide the requested information is an instance of non-cooperation, and pursuant to paragraph 7 of Annex V, calls on the Panel to draw the adverse inference that had such information been available, it would have confirmed the United States' claims.[3682]

7.933 The United States' position focuses on the potential differences in the terms and conditions attached to the loans granted to Airbus compared with loans to other recipients. As we have previously observed, although the EIB's loans are generally structured to reflect the terms and conditions found in the EIB's standard contract templates, not all loan terms and conditions are identical. Typically, the final content of several provisions will depend upon the particular characteristics of the proposed project and the finance transaction.[3683] There may well be other reasons to explain differences in terms and conditions, including, for example, motives more closely tied to the exercise of the EIB's discretion to grant loans and evaluate the particular finance needs of any given project. However, having carefully compared the terms and conditions in the EIB loans to Airbus with those in the standard contract templates, it is clear to us that the terms and conditions of the loans at issue closely follow the terms and conditions found in the standard contract templates. Thus, in the absence of any allegation on the part of the United States that the EIB does not use its standard contract templates when setting the terms and conditions of all of its loans, it follows that the loans to Airbus were not granted on terms and conditions outside of the general parameters of the EIB's overall lending programme.

[3682] *See*, paras. 7.893-7.895 above.
[3683] *See*, paras. 7.913-7.917 above.

BCI deleted, as indicated **[***]**

7.934 Nevertheless, even assuming, *arguendo*, that the loan subsidies to Airbus were, as the United States suggests, provided on terms and conditions outside of the parameters of the EIB's lending programme, this would not, in our view, render them specific under Article 2.1(a). This is because, on the basis of the facts that are before us, differences in the contractual terms and conditions offered to Airbus compared with other recipients would not evidence the existence of any express, unambiguous and clear limitation on access to such subsidies, but rather only the EIB's decision to exercise its discretion to grant loans on those particular terms and conditions to Airbus.

7.935 We recall that the manner in which a granting authority exercises its discretion to grant a subsidy is a relevant consideration when inquiring into whether a subsidy is *in fact* specific within the meaning of Article 2.1(c) of the SCM Agreement. Thus, the fact that a granting authority may have exercised its discretion to grant a subsidy under a generally available subsidy programme on terms and conditions that are more favourable than those attached to all other subsidies granted under the same programme may be enough to demonstrate that it has, *in fact*, limited access to a subsidy to certain enterprises within the meaning of Article 2.1(c). However, we do not believe that this course of action evidences that it has explicitly limited access to a subsidy within the meaning of Article 2.1(a).[3684] We therefore dismiss the United States claim that the EIB loans to Airbus were specific within the meaning of Article 2.1(a) of the SCM Agreement because allegedly granted on terms and conditions outside of the parameters of the EIB's overall lending programme.

(iii) Whether the Airbus loans were specific under Article 2.1(c)

Arguments of the United States

7.936 The United States claims that the EIB loans to Airbus are specific, within the meaning of Article 2.1(c) of the SCM Agreement, because they involve amounts of funding that are allegedly "disproportionately large", and because it considers that Airbus was the "predominant user" of the EIB's subsidy programme.[3685]

7.937 According to the United States, in order to determine whether the amount of a subsidy is "disproportionately large" for the purpose of Article 2.1(c), it is first necessary to establish a "baseline" against which to measure disproportionality.[3686] The United States submits that identifying a relevant baseline is a fact-dependent exercise. In its view, such a baseline must, in the first instance, reflect the manner in which the granting authority classifies its subsidization activities.[3687] When subsidies are provided under the auspices of a particular subsidy programme, the progamme may serve as the appropriate baseline. However, where there is no such subsidy programme, the United States argues that other ways in which a granting authority classifies its provision of subsidies should be examined, including any relevant categorisation of subsidization activities on the basis of objectives.[3688]

7.938 The United States considers that an appropriate baseline must also take into account the element of time referred to in the last sentence of Article 2.1(c), that is, "the length of time during which the subsidy programme has been in operation". The United States explains that taking this latter time element into account does not mean that one must compare the amount of subsidy at issue

[3684] While the United States has advanced a claim that the loans to Airbus are specific under Article 2.1(c), it has not argued that the reason for the alleged *de facto* specificity is the existence of differences in the terms and conditions attached to the Airbus loans compared with loans to other recipients. The United States has raised this argument only in the context of its claim under Article 2.1(a). US, Answer to Panel Question 150.

[3685] US, FWS, paras. 405 and 420; US, Answer to Panel Questions 13, 14 and 151.

[3686] US, Answer to Panel Question 119.

[3687] US, Answer to Panel Questions 13 and 119.

[3688] US, Answer to Panel Questions 119, 151 and 218.

BCI deleted, as indicated **[***]**

to all subsidies granted during the entire life of a subsidy programme. According to the United States, such a position would ignore the substantial changes that take place in an economy over a period of decades. It would ignore that technologies change, sectors decline, new sectors emerge, and government priorities evolve. Subsidies targeted towards certain enterprises in an emerging sector might not appear to be disproportionate or otherwise specific when compared with an extremely broad universe that includes subsidies to enterprises in sectors that do not play as significant a role in the economy today as they did fifty years ago. However, the United States argues that looked at in the context of the current economy, the same subsidies may well stand out as disproportionate or otherwise specific.[3689] Thus, when a subsidy programme has been in operation for a relatively long period of time, the United States contends that taking account of the duration of the subsidy programme means identifying a shorter period for analysis that will lead to a more meaningful assessment of disproportionality than an assessment of all subsidies granted during the entire life of the programme.[3690] If this were not the case, the United States argues that subsidies granted pursuant to programmes operating for long periods of time could escape SCM Agreement disciplines even though they may have been disproportionately large relative to other subsidies granted during the same distinct periods.[3691]

7.939 The United States submits that once an appropriate baseline is identified, the amount of the subsidy at issue must be compared with the subsidies granted to other enterprises in the baseline being examined. The amount of a subsidy will not be "disproportionately large" when "the relationship between the subsidy to certain enterprises ... and subsidies to all enterprises in the baseline group is comparable to the relationship between the certain enterprises and all enterprises in the group (measured by indicators that are appropriate in the light of the circumstances, which could include economic output, employment, or other indicators)".[3692] In other words, the United States is of the view that "the subsidy granted to certain enterprises constitutes an appropriate share of the relevant baseline if its relationship to the baseline corresponds to the relationship of certain enterprises to the entire group of enterprises covered by the baseline being examined".[3693]

The 2002 loan to EADS

7.940 The United States submits that the relevant baseline for the 2002 EIB loan to EADS is all EIB lending under the research and development objective of the "Innovation 2000 Initiative" ("i2i"), because it was under the auspices of this objective of this alleged lending programme that the EIB granted the EUR 700 million credit line to EADS.

7.941 The United States argues that the ordinary meaning of the word "programme" implies that a subsidy programme may be found to exist when there are factors indicating that a series of subsidies is circumscribed in a way that distinguishes them as a planned series of subsidies. The United States considers that such factors could include: (i) designation by the granting authority of a series of subsidies as a programme; (ii) a common set of objectives; and (iii) dedicated funding.[3694] According to the United States, various pieces of evidence confirm that all of these factors are present in the EIB's i2i lending.[3695] For instance, the United States notes that the EIB explicitly described i2i as a "dedicated EUR 12-15 billion lending programme" and that, in early 2003, the EIB declared it "had

[3689] US, Comments on EC Answer to Panel Question 183.
[3690] US, Answer to Panel Questions 13, 119, 151 and 218.
[3691] US, Answer to Panel Question 13; US, FNCOS, para. 101; US, SNCOS, para. 129.
[3692] US, Answer to Panel Question 119.
[3693] US, Answer to Panel Question 119.
[3694] US, Answer to Panel Question 218.
[3695] US, Answer to Panel Questions 14, 151 and 218.

BCI deleted, as indicated **[***]**

fully achieved its i2i objectives" upon having committed EUR 14.4 billion in loans by the end of 2002.[3696]

7.942 The United States argues that its focus on research and development lending under the i2i is consistent with the way the EIB analysed its own activities. The United States notes that the EIB described its i2i lending as being made pursuant to one of five "economic sectors": "development of SMEs and entrepreneurship"; "diffusion of innovation"; "research and development"; "information and communications technology networks"; and "human capital formation".[3697] Moreover, the United States asserts that the EIB discusses its lending activities under each sector in its annual activity reports. Thus, the United States observes that in its 2002 Activity Report, the EIB explained that in "2002, the EIB ploughed {Euro} 2.1 billion into 15 R&D projects spanning 6 EU countries, with one pan-European international cooperation project partly located in Switzerland ... ".[3698]

7.943 From a temporal perspective, the United States considers that the relevant baseline for the 2002 loan to EADS should not be set, as the European Communities contends, to correspond with the period of time over which the EIB has conducted all of its lending activities (*i.e.*, since the EIB's establishment in 1957). In the view of the United States, a more meaningful length of time for the baseline would be either the year in which the loan to EADS was granted (2002) or the years from 2000 to 2003, covering the period during which the alleged i2i programme was in existence.[3699]

7.944 The United States asserts that the EUR 700 million credit line represented one third of EIB lending for research and development needs under i2i in 2002, and 18% of its lending for research and development under i2i from 2000 to the end of 2002.[3700] The United States argues that these facts take on particular significance in the light of the high degree of economic diversification within the European Communities, supporting the conclusion that the 2002 loan to EADS is specific under Article 2.1(c) of the SCM Agreement.[3701] Moreover, the United States alleges that the credit line to EADS was the single largest provided to any one company under the alleged i2i programme taken as a whole,[3702] over the period 2000 to 2003 or even between 2000 and 2006.[3703] Thus, the United States also submits that EADS was the predominant user of the alleged i2i subsidy programme, therefore making the EIB loan specific within the meaning of Article 2.1(c) also for this reason.[3704]

The loans granted to Airbus between 1988 and 1993

7.945 As regards the other EIB loans to Airbus granted between 1988 and 1993, the United States notes that during the relevant period the EIB classified its lending activities by economic sectors and lending objectives. The two broad economic sectors used were: (1) "energy and infrastructure," which contained mostly state-owned-and-operated sectors like petroleum, electricity, railways, roads, telecom, water, and sewage; and (2) "industry, services, and agriculture", which includes, *inter alia*, "transport equipment" (the sector for aeronautical engineering). There were eight different lending

[3696] US, Answer to Panel Questions 14 and 218, referring to European Investment Bank, Annual Press Conference 2003, Background Note No. 1: Innovation and Knowledge-Based Economy, p.1, Exhibit US-164.

[3697] US, Answer to Panel Questions 14 and 218, the latter referring to *The Innovation 2000 Initiative, Actively promoting a European economy based on knowledge and innovation*, European Investment Bank, pp. 2-3, Exhibit US-154.

[3698] US, Answer to Panel Question 14, referring to The EIB Group, Activity Report 2002, p.14, Exhibit US-165.

[3699] US, FWS, para. 405; US, Answer to Panel Questions 13 and 14.

[3700] US, FWS, para. 405, referring to Exhibit US-164, p.2 and The EIB Group, Activity Report 2002, p.14, Exhibit US-165; US, Answer to Panel Question 14.

[3701] US, FWS, para. 405; US, Answer to Panel Questions 13, 14 and 119.

[3702] US, FWS, para. 405; US, Answer to Panel Question 14, referring to Exhibit US-474.

[3703] US, Answer to Panel Question 151, footnote 156.

[3704] US, Answer to Panel Question 218.

BCI deleted, as indicated **[***]**

objectives, with the loans to Airbus falling within the "international competitiveness and European integration of large firms" objective. In the light of the EIB's own description of its activities, the United States argues that the appropriate baselines for the 1988 to 1993 loans could be the EIB's lending to the "industry, services and agriculture" sector and also its lending under the "international competitiveness and European integration of large firms" objective.[3705] In terms of the appropriate length of time of the baseline, the United States submits that the period 1988 to 1993 could be used, covering the five years during which the relevant loans were granted to Airbus.[3706]

7.946 The United States asserts that, during the period from 1988 to 1993, Airbus received approximately 10% of all EIB loans granted to the "industry, services and agriculture" sector and approximately 20% of loans under the "international competitiveness and European integration of large firms lending objective".[3707] In addition, the United States notes that over the same five years, Airbus was the largest private recipient of EIB individual loans; that among private enterprises, EIB loans to Airbus were 44% greater than loans granted to the next largest recipient; and that the EUR 1.06 billion in loans to Airbus exceeded the EIB's lending to any industrial sector, with the exception of chemicals and other transport equipment.[3708] On this basis, the United States concludes that the EIB loans granted to Airbus between 1988 and 1993 were "disproportionately large", within the meaning of Article 2.1(c), and therefore *de facto* specific.

Arguments of the European Communities

7.947 The European Communities rejects the United States' claims and argues that the EIB loans were not "disproportionately large", and therefore not *de facto* specific, within the meaning of Article 2.1(c) of the SCM Agreement.

7.948 The European Communities submits that in order to determine whether the challenged loans were granted in disproportionately large amounts for the purpose of Article 2.1(c), it is first necessary to identify the proper universe of funding against which they can be compared. The European Communities argues that the two alternatives advanced by the United States – EIB policy objectives or EIB-supported economic sectors – do not properly constitute distinct universes of funding for this purpose.[3709] According to the European Communities, the appropriate universe of funding that should be used to determine whether the EIB loans involved disproportionately large amounts is all EIB lending (*i.e.*, all "individual" and "global" loans) since 1957. When this is done, the European Communities argues that it is clear that the EIB loans at issue do not involve disproportionately large subsidy amounts. Moreover, the European Communities submits that the same result holds even when examining the relevant loans under different analytical frameworks involving a smaller universe of funding.

The 2002 loan to EADS

7.949 The European Communities submits that the EIB's lending activities under the i2i do not amount to a subsidy programme and cannot therefore be used as an appropriate baseline for the purpose of conducting a disproportionality analysis. The European Communities asserts that the United States has misinterpreted the facts relating to the i2i, arguing that rather than being a subsidy programme, the i2i is merely a manifestation of one of the objectives of the EIB's overall lending

[3705] US, Answer to Panel Question 15.
[3706] US, FWS, para. 420; US, Answer to Panel Questions 13 and 15.
[3707] US, FWS, para. 420, referring to EIB, Annual Report 1988, Tbl. 24, Exhibit US-176; EIB, Annual Report 1989, Tbl. E, Exhibit US-177; EIB Annual Report 1990, Tbl. E, Exhibit US-178; EIB, Annual Report 1991, Tbl. E, Exhibit US-179; EIB, Annual Report 1992, Tbl. E, Exhibit US-180; and EIB, Annual Report 1993, Tbl. E, Exhibit US-181.
[3708] US, FWS, para. 420; US, Answer to Panel Questions 13, 15 and 119.
[3709] EC, FWS, para. 1034; EC, Answer to Panel Question 182.

BCI deleted, as indicated **[***]**

programme.[3710] The European Communities explains that the i2i was launched to reflect the Lisbon Strategy formulated by the European Council in 2000, a strategy which has the goal of making Europe the most competitive and dynamic knowledge based economy in the world by 2010.[3711] According to the European Communities, the i2i was established in order to group together under one name the various elements of EIB policy objectives that were already in place and contributing to the attainment of the Lisbon Strategy in order to demonstrate the EIB's involvement. Thus, the European Communities argues that the i2i is "essentially a successor to the {EIB's} 'industrial competitiveness' and 'advanced technology' objective{s}",[3712] with the "industrial competitiveness" objective being formally replaced by the i2i as a separate EIB eligibility criteria in 2003.[3713]

7.950 The European Communities asserts that the EIB does not ring-fence pools of money for its lending activities under any of its individual policy objectives. As regards the sum of EUR 12-15 billion the United States argues was dedicated to the i2i, the European Communities explains that this figure reflects a lending target based on the EIB's assessment of the possible contribution it could make to the Lisbon Strategy over an initial three-year period based on its experience in the relevant sectors.[3714] The European Communities asserts that as long as the EIB complies with its Statutory obligation to ensure that the aggregate amount of loans and guarantees outstanding at any time does not exceed 250% of its subscribed capital, it can have recourse to the capital markets in order to increase its lending activities. Thus, the European Communities contends that there is no financial ceiling for any of the EIB's objectives and no application for a loan is rejected on such grounds.[3715] In this regard, the European Communities indicates that by April 2003, the EIB Group had in fact lent almost EUR 17 billion under the i2i, more than the EUR 15 billion that had been originally targeted.[3716]

7.951 The European Communities recalls that the EIB provides loans that routinely meet several objectives at the same time. For instance, the European Communities notes that the 2002 loan to EADS, like several other research and development loans granted under the i2i, satisfied multiple EIB policy objectives. In addition to being classified under the i2i objective, the 2002 loan to EADS fell within the scope of the "common interest" and "industrial competitiveness" objectives.[3717] The European Communities argues that the fact that the loans granted under the i2i satisfied multiple objectives provides additional confirmation that the i2i was not a distinct lending programme as the United States argues.[3718]

7.952 The European Communities submits that, to the extent that any of the challenged loans are found to be subsidies, the relevant subsidy programme is the EIB's entire portfolio of lending since 1957.[3719] When examined in the light of this baseline, the European Communities notes that the EUR 700 million credit line to EADS represents only one of 8,400 contracts that together involved a financing commitment amounting to EUR 591.5 billion.[3720] In terms of amounts actually disbursed, the European Communities discloses that between 1957 and 2006, the EIB actually disbursed EUR 497 billion. The European Communities recalls that EADS drew down on only **[***]** of the

[3710] EC, SWS, para. 437.
[3711] EC, SWS, paras. 445-449.
[3712] EC, FWS, para. 1040; EC, SWS, para. 447.
[3713] EC, SWS, para. 459.
[3714] EC, SWS, para. 449.
[3715] EC, SWS, para. 449.
[3716] EC, SWS, para. 450, referring to information contained in Exhibit US-164.
[3717] EC, FWS, paras. 1037-1039.
[3718] Answer to Panel Questions 182 and 218; EC, SWS, para. 439.
[3719] Answers to Panel Questions 182 and 218.
[3720] EC, FWS, para. 1044; EC, Comments on United States Answer to Panel Question 151. Exhibits EC-163 and EC-165.

BCI deleted, as indicated **[***]**

EUR 700 million commitment (i.e, **[***]**); and that it is only this disbursed amount that is relevant for the purpose of a disproportionality analysis under the SCM Agreement.[3721]

7.953 Even using the EIB's i2i lending as the appropriate baseline, the European Communities contends that the 2002 loan to EADS would still not be disproportionately large. Contrary to what is asserted by the United States, the European Communities argues that the EIB's i2i lending did not end in 2003. Although initially conceived for a term of 3 years, the i2i was "extended" to 2010, with its lending aim increased to EUR 50 billion by the end of the decade. Its name was also formally changed to the "Innovation 2010 Initiative", reflecting the target date of the Lisbon Strategy (2010) as opposed to the year of the Strategy's adoption (2000).[3722] When examined over the period from its establishiment in 2000 to 31 December 2006, the EUR 700 million represents 1.5% of the EIB's total funding under the i2i policy objective, which amounted to EUR 45.7 billion and covered 288 projects.[3723] In terms of actual disbursements, the European Communities notes that the **[***]** received by EADS must be compared with the EUR 37 billion disbursed under the i2i as of 8 May 2007, demonstrating that EADS received less than **[***]** of all i2i funding.[3724]

7.954 The European Communities arrives at the same conclusion after examining the loan to EADS in the context of research and development lending under the i2i. Although it contests the United States' use of all research and development lending as an appropriate baseline,[3725] the European Communities nevertheless notes that total EIB commitments in relation to i2i research and development lending during the period 2000 to January 2007 were EUR 22.7 billion. The European Communities notes that the credit line opened for EADS accounts for 3.1% of this total, even before taking into account the fact that EADS only drew down on **[***]** of the available funds.[3726]

7.955 Finally, the European Communities disputes the relevance of the United States' contention that the EADS contract was the largest single credit line to any one company under the i2i, arguing that it fails to take account of the fact that while EADS received one large loan in one year, many other borrowers under i2i (such as Ford) received a number of significant loans across a number of years, which when aggregated, were larger than the 2002 EADS loan contract.[3727] In any case, the European Communities asserts that EADS was only the 11th largest recipient; and that when examined in terms of disbursed amounts, only the joint 30th largest recipient of funds under the i2i objective.[3728]

The loans granted to Airbus between 1988 and 1993

7.956 The European Communities argues that the "industry, services and agriculture sector category" and the "international competitiveness and European integration of large firms lending objective" are policy objectives, and not programmes that can be used as appropriate baselines for the purpose of a disproportionality analysis under Article 2.1(c).[3729] According to the European Communities, in seeking to use data relating to loans falling within the scope of these objectives, the United States relies upon classifications made by the EIB for the purpose of periodically reporting to

[3721] EC, Answer to Panel Question 181.
[3722] EC, SWS, paras. 450-452.
[3723] EC, FWS, para. 1041; EC, SWS, para. 452; EC, Answer to Panel Question 181. Exhibit EC-715.
[3724] EC, Answer to Panel Question 181. Exhibit EC-883 (BCI).
[3725] EC, SWS, paras. 453-454.
[3726] EC, SWS, para. 454; EC, Comments on United States Answer to Panel Question 151.
[3727] EC, SWS, para. 457.
[3728] EC, Answer to Panel Question 181, referring to Exhibit EC-883 (BCI); Comments on United States Answer to Panel Question 151.
[3729] EC, FWS, paras. 1042-1043; EC, SWS, para. 464.

stakeholders and analysts. In the view of the European Communities, such an approach leaves the question of specificity to be resolved in the light of how a granting authority drafts its reports.[3730]

7.957 Moreover, the European Communities contends that the 1988 to 1993 time-frame advanced by the United States is artificial and self-serving.[3731] In this respect, the European Communities argues that the United States has provided no valid explanation for why data relating to total loan amounts reported in this five year period should be accepted instead of data from any other period of time, for example, 10 years, one year, one month or even one week.[3732] In addition, the European Communities considers that a period of time that is shorter than the actual length of the subsidy programme that is at issue would be inconsistent with the wording of Article 2.1(c), which it argues expressly envisages that length of the duration of the "programme" as a whole must be taken into account, and not any part or segment thereof.[3733]

7.958 Thus, the European Communities considers that all of the EIB's lending since 1957 must be taken into account when examining whether the loans to Airbus between 1988 to 1993 are *de facto* specific within the meaning of Article 2.1(c). However, if another approach were to be taken, the European Communities submits that a methodology that would be more objective to the one proposed by the United States would be to compare the loans to Airbus provided in each year with the total value of loans provided by the EIB in the five preceding years. The European Communities asserts that such a comparison shows that the disputed loans did not represent, in any one year, more than 1.6% (on average 0.9%) of total EIB lending over the preceding five years.[3734]

Evaluation by the Panel

7.959 We begin our evaluation of the United States claims by reviewing Article 2.1(c) of the SCM Agreement, which reads:

> "2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> ...
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

[3730] EC, SWS, para. 461.
[3731] EC, SWS, para. 469; EC, Answer to Panel Question 183.
[3732] EC, SWS, paras. 455 and 469.
[3733] EC, Answers to Panel Questions 119 and 183.
[3734] EC, Answer to Panel Question 183.

BCI deleted, as indicated **[***]**

[3] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered."

7.960 The language of Article 2.1(c) suggests that it is intended to address the situation where a challenged subsidy does not appear to be specific within the meaning of the principles set out in Articles 2.1(a) and 2.1(b), but "there are reasons to believe that the subsidy may in fact be specific". When such a situation arises, the first sentence of Article 2.1(c) stipulates that "other factors may be considered". The second sentence of Article 2.1(c) elaborates four "{s}uch factors". In essence, the United States' allegation that the EIB loans to Airbus are in fact specific under Article 2.1(c) is grounded in one of these factors – "the granting of disproportionately large amounts of subsidy to certain enterprises". However, it is also based upon reliance on another factor – "predominant use by certain enterprises".

"the granting of disproportionately large subsidy amounts to certain enterprises"

7.961 Something may be said to be "disproportionate" when it is "lacking proportion".[3735] The ordinary meaning of the word "proportion" includes "a portion, a part, a share, esp. in relation to a whole", "a relative amount or number", "a comparative relation or ratio between things in size, quantity, number, etc.".[3736] These meanings suggest that the inquiry that must be undertaken when assessing whether the amount of a subsidy is "disproportionately large" will involve identifying the relationship between the amount of the subsidy at issue and something else that is "a whole", and determining whether that relationship demonstrates that the amount of subsidy is greater than the amount it would need to be in order to be proportionate – *i.e.*, not lacking proportion. The United States refers to the "something else" against which the amount of the subsidy at issue should be compared as a "baseline"; the European Communities as a "universe" of funding or "reference data".[3737]

7.962 According to the European Communities, the "universe" of funding or "reference data" that should be used for the purpose of a disproportionality analysis under Article 2.1(c) must be drawn from the subsidy programme pursuant to which the challenged subsidy is granted. The European Communities argues that this follows from the fact that Article 2.1(c) identifies the "use of a *subsidy programme* by a limited number of certain enterprises" as one of the factors that may be considered when assessing whether a subsidy is in fact specific.[3738] Moreover, the European Communities notes that the last sentence of Article 2.1(c) explicitly requires that, in applying Article 2.1(c), "the length of time during which the *subsidy programme* has been in operation" must be taken into account.[3739] Thus, the European Communities emphasizes that the language of Article 2.1(c) calls for the consideration of data pertaining to an entire subsidy programme, not a part, component or element of that programme. In its view, a disproportionality analysis must therefore involve comparing the amount of the subsidy at issue with the total amount of subsidies granted under an entire subsidy programme.

7.963 The United States does not share the European Communities' view that the relevant "baseline" for a disproportionality analysis must in all situations be a subsidy programme. In this regard, the

[3735] The New Shorter Oxford Dictionary, Fourth Edition, p.700.
[3736] The New Shorter Oxford Dictionary, Fourth Edition, p.2381.
[3737] US, Answer to Panel Question 119; EC, FWS, para. 1034; EC, Answer to Panel Question 182.
[3738] EC Answers to Panel Questions 119 and 182. Emphasis added by the EC.
[3739] EC, Answer to Panel Question 119.

BCI deleted, as indicated **[***]**

United States notes that the third and fourth factors described in the second sentence of Article 2.1(c) do not refer to a subsidy programme.[3740] According to the United States, this textual difference means that Article 2.1(c) permits the use of a frame of reference that may be different from a subsidy programme when considering these two factors.

7.964 In our view, the language of Article 2.1(c), when interpreted in its proper context and in the light of its object and purpose, suggests that where the subsidy at issue has been granted pursuant to a subsidy programme, that programme should normally be used for the purpose of identifying the "baseline" or "reference data" needed to perform a disproportionality analysis. However, as the United States points out, the absence of any explicit reference to "a subsidy programme" in the language of Article 2.1(c) suggests that it does not *require* that a subsidy programme be used for this purpose in each and every factual circumstance.

7.965 The "granting of disproportionately large amounts of subsidy to certain enterprises" is the third of four specificity factors that Article 2.1(c) identifies as having possible relevance for the determination of whether a subsidy is in fact specific. Contrary to the first factor ("use of a subsidy programme by a limited number of certain enterprises") and the second factor ("predominant use by certain enterprises"), the third factor makes no direct or indirect reference to a subsidy programme. Likewise, the fourth factor ("the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy") includes no reference to a subsidy programme. In our view, it would not have been difficult for the drafters of the SCM Agreement to include a reference to a subsidy programme in the text of the third specificity factor, as they did for the first and second specificity factors. However, the drafters chose not to do so. Thus, on its own, the text of the third specificity factor listed in the second sentence of Article 2.1(c) does not support the view that a disproportionality analysis *must* involve comparing the amount of a subsidy granted under a given subsidy programme with the entire amount of subsidies granted under the same subsidy programme.

7.966 Important context for the interpretation of the four specificity factors can be found in the last sentence of Article 2.1(c). This sentence requires that consideration of "the granting of disproportionately large amounts of subsidy to certain enterprises" (or consideration of any one or more of the remaining three specificity factors) must take into account two matters: (i) "the extent of diversification of economic activities within the jurisdiction of the granting authority"; and (ii) "the length of time during which the subsidy programme has been in operation". For present purposes, it is instructive to note that the last sentence of Article 2.1(c) calls for the duration of "*the* subsidy programme" to be taken into account. The use of the definite Article "the" denotes one particular subsidy programme. It is apparent from the text of the first and second specificity factors that "*the* subsidy programme" stands for the programme that must be considered when evaluating whether there has been "use of a subsidy programme by a limited number of certain enterprises" or "predominant use by certain enterprises". In other words, "*the* subsidy programme" is the subsidy programme pursuant to which the subsidy at issue has been granted.

7.967 As we have already observed, the third and fourth specificity factors make no direct or indirect reference to a subsidy programme. In our view, this implies that there may be situations when the third specificity factor ("the granting of disproportionately large amounts of subsidy to certain enterprises") may be considered in the light of a frame of reference that is different from a subsidy programme.[3741] However, where the subsidy at issue is granted pursuant to a subsidy

[3740] US, Comments on EC Answer to Panel Question 182.

[3741] While we recognise that determining whether a subsidy is specific within the meaning of Article 2.1 involves a case-by-case assessment of the particular facts surrounding the subsidy at issue, in general, we believe that to the extent that a subsidy not granted under a subsidy programme may be characterised as a one-off subsidy, it would be found to be specific within meaning of Article 2.1(a), rendering an assessment of specificity under Article 2.1(c) unnecessary.

BCI deleted, as indicated **[***]**

programme, the language of the last sentence of Article 2.1(c) implies that the duration of that subsidy programme be taken into account when performing a disproportionality analysis. It follows that when the subsidy at issue is granted pursuant to a subsidy programme, the "baseline" or "reference data" needed to conduct a disproportionality analysis should be drawn from that same subsidy programme.

7.968 The European Communities submits that taking into account "the length of time during which the subsidy programme has been in operation", in the context of a disproportionality analysis, involves comparing the amount of the subsidy at issue with the amount of all of the subsidies granted under the same programme for its entire duration. In other words, the European Communities argues that the relevant "baseline" or "reference data" needed to conduct a disporportionality analysis is the total amount of subsidization provided over the entire life of the relevant subsidy programme. On the other hand, the United States considers that taking this time element into account means identifying a period of time that will lead to a meaningful assessment of disproportionality. According to the United States, this period may not always coincide with the entire duration of the relevant subsidy programme.

7.969 The last sentence of Article 2.1(c) provides that: "In applying this subparagraph, *account shall be taken* of ... the length of time during which the subsidy programme has been in operation". To take something into account means to take something into reckoning or consideration; to take something on notice.[3742] Therefore, in the context of the third specificity factor, the last sentence of Article 2.1(c) requires that the length of time during which the relevant subsidy programme has been in operation must form part of the *consideration or reckoning* of whether the amount of a subsidy granted to certain enterprises pursuant to that same subsidy programme is disproportionately large. It follows that the total amount of subsidization provided over the entire life of the relevant subsidy programme does not have to be used as the relevant "baseline" or "reference data" when conducting a disporportionality analysis.

7.970 We recall that the notion of specificity has to do with whether a subsidy is sufficiently broadly available throughout an economy so as not to benefit "certain enterprises".[3743] In our view, this understanding of what specificity means serves as the beacon which guides the interpretation of the entirety of Article 2, including Article 2.1(c). What it means to take account of "the length of time during which the subsidy programme has been in operation" when performing a disproportionality analysis must be understood in this context. Thus, using the total amount of subsidies granted under a subsidy programme over its entire life as the "baseline" or "reference data" for the purpose of determining whether the amount of a subsidy is "disproportionately large" may not always be appropriate if, for example, the subsidy programme has not operated long enough to understand its full impact on an economy. Likewise, establishing a "baseline" or identifying "reference data" on the basis of the total amount of subsidies granted under a long-standing subsidy programme may also be inappropriate if, for example, there has been a material change in the importance of the subsidized activities in the wider economy and/or the granting authority's economic priorities over the life of the subsidy programme. In this regard, we agree with the United States that subsidies targeted towards certain enterprises in an emerging sector might not appear to be disproportionately large when compared with an extremely broad universe that includes subsidies to enterprises in sectors that do not play as significant a role in the economy today as they did over previous decades. However, in the context of the present economy, the same subsidies may well stand out as disproportionately large.[3744] Thus, in our view, where a subsidy to certain enterprises has been granted pursuant to a long-standing subsidy programme, identification of the proper "baseline" or "reference data" against which to measure whether the subsidy is granted in "disproportionately large amounts" will involve taking into account the extent to which it would be reasonable and appropriate to determine whether the subsidy

[3742] The New Shorter Oxford Dictionary, Fourth Edition, p.15.
[3743] *See*, para. 7.919 above.
[3744] US, Comments on EC Answer to Panel Question 183.

at issue is in fact sufficiently broadly available throughout an economy so as not to benefit "certain enterprises" on the basis of the entire duration of the subsidy programme or some shorter period of time.

7.971 According to the United States, once the correct "baseline" is identified, the relationship between the amount of the subsidy granted to certain enterprises and the total amount of subsidies provided to the "baseline" group of enterprises must be compared with the relationship between the "certain enterprises and all enterprises in the {'baseline'} group (measured by indicators that are appropriate in the light of the circumstances, which could include economic output, employment, or other indicators)".[3745]

7.972 We agree with the United States that identifying the relationship between the amount of the subsidy at issue and the "baseline" is not enough to determine whether the challenged subsidy is "disproportionately large". For example, a subsidy granted to certain enterprises in an amount that represents 50% of the total amount of subsidies granted under a relevant subsidy programme says little, if anything, about whether that amount is "disproportionately large". As we have previously explained,[3746] assessing whether the amount of a subsidy is "disproportionately large" involves determining whether the relationship between the amount of the subsidy at issue and a relevant "baseline" demonstrates that the amount of subsidy is greater than the amount that it would need to be in order to be proportionate. Thus, determining whether a 50% share of the total amount of subsidies granted under a particular subsidy programme to certain enterprises is "disproportionately large" involves considering whether the 50% share is greater than what it would need to be in order to say that the certain enterprises received a proportionate amount of all subsidies granted under that same programme. There is no explicit guidance in Article 2.1(c) for how to make this determination. However, the fact that the last sentence of Article 2.1(c) requires that "the extent of diversification of economic activities within the jurisdiction of the granting authority" be taken into account, suggests that evidence of the diversity of economic activity must be considered in the analysis.

7.973 One relevant measure of the extent of economic diversification within the jurisdiction of the granting authority is the proportion of economic activity attributable to the subsidy recipient(s). Taking such evidence into account in the "disproportionality" analysis required under Article 2.1(c) would, in our view, involve comparing the share of the total amount of subsidies granted under a generally available subsidy programme to one or more recipients, with the proportion of economic activity attributable to the same recipient(s) within the jurisdiction of the granting authority. Where the amount of a subsidy granted to one or more recipients under a broadly available subsidy programme represents a proportion of total subsidies granted under the same programme that significantly exceeds the economic activity attributable to the same recipient(s) in the broader economy, the amount of the subsidy at issue would be "disproportionately large". In our view, such a subsidy would not be sufficiently broadly available throughout an economy and would therefore benefit "certain enterprises".[3747]

"predominant use"

7.974 The second specificity factor identified in Article 2.1(c) is "predominant use by certain enterprises". As we have already noted, when read in the light of the first specificity factor ("use of a subsidy programme by a limited number of certain enterprises"), it is clear that this factor indirectly refers to "predominant use" of "a subsidy programme". The ordinary meaning of the word "predominant" includes "constituting the main or strongest element; prevailing".[3748] Thus,

[3745] US, Answer to Panel Question 119.
[3746] *See*, para. 7.961 above.
[3747] Panel Report, *US – Upland Cotton*, para. 7.1142.
[3748] The New Shorter Oxford Dictionary, Fourth Edition, p.2329.

BCI deleted, as indicated **[***]**

"predominant use {of a subsidy programme} by certain enterprises" may be simply understood to be a situation where a subsidy programme is mainly, or for the most part, used by certain enterprises.

7.975 In considering whether there is "predominant use {of a subsidy programme} by certain enterprises" for the purpose of making a finding of specificity, the last sentence of Article 2.1(c) requires that account be taken of: (i) "the extent of diversification of economic activities within the jurisdiction of the granting authority"; and (ii) "the length of time during which the subsidy programme has been in operation". As with determining whether a subsidy has been granted in "disproportionately large amounts", the relevance of these two factors to understanding whether there has been "predominant use {of a subsidy programme} by certain enterprises" will depend upon the particular facts. Thus, for example, where a subsidy programme operates in an economy made up of only a few industries, the fact that those industries may have been the main beneficiaries of a subsidy programme may not necessarily demonstrate "predominant use". Rather, use of the subsidy programme by those industries may simply reflect the limited diversification of economic activities within the jurisdiction of the granting authority. On the other hand, the same subsidy programme operating in the context of a highly diversified economy that is used mainly, or for the most part, by only a few industries would tend to indicate "predominant use".

7.976 Likewise, when taking into account "the length of time during which the subsidy programme has been in operation", the use of a subsidy programme by certain enterprises may not necessarily indicate "predominant use" in the context of a relatively new subsidy programme that has not yet operated for enough time to understand its full impact on an economy. Moreover, it may not always make sense to determine whether there has been "predominant use" over the entire life of a subsidy programme, where that programme has operated for decades that have witnessed a material change in the importance of the subsidized activities in the wider economy and/or the granting authority's economic priorities. As with determining whether a subsidy has been granted under a long-standing subsidy programme in "disproportionately large amounts", a determination of whether there has been "predominant use" of a long-standing subsidy programme should involve taking into account the extent to which it would be reasonable and appropriate to determine whether the subsidy at issue is in fact sufficiently broadly available throughout an economy so as not to benefit "certain enterprises" on the basis of the entire duration of the subsidy programme or some shorter period of time.

7.977 With the above understanding of how to determine whether a subsidy is granted in "disproportionately large amounts" to certain enterprises or whether there is "predominant use" of a subsidy programme by certain enterprises in mind, we now turn to examine the United States' specific allegations in respect of the measures at issue.

The 2002 loan to EADS

7.978 The United States claims that the 2002 loan granted to EADS is specific within the meaning of Article 2.1(c) because in its view: (i) it represents a disproportionately large amount of subsidy granted to certain enterprises when measured against (a) all of the loans granted by the EIB for the purpose of research and development projects under the "Innovation 2000 Initiative" ("i2i") in 2002, or (b) all of the loans granted by the EIB for the purpose of research and development projects under the i2i between 2000 and the end of 2002, in the light of the highly diversified nature of the EU economy; and (ii) it evidences predominant use of the i2i subsidy programme by EADS.

7.979 Before evaluating the merits of the United States' claims, we recall that we have already found that the 2002 finance contract between the EIB and EADS evidences the existence of two financial contributions: a direct transfer of funds in the form of the **[***]** loan; and a potential direct transfer of funds in the form of the EUR 700 million credit line.[3749] Of the two financial

[3749] *See*, para. 7.738 above.

BCI deleted, as indicated **[***]**

contributions, we have found that the United States has established that only the former confers a benefit upon Airbus, and therefore constitutes a subsidy.[3750] Thus, for the purpose of our specificity analysis, the relevant subsidy that must be examined is that conferred by the **[***]** loan, as evidenced by the 2002 finance contract between the EIB and EADS.

> *"the granting of disproportionately large amounts of subsidy to certain enterprises"*

7.980 Both parties have advanced their arguments on whether the 2002 loan to EADS involved "the granting of disproportionately large amounts of subsidy to certain enterprises" by equating the financial contribution provided under the 2002 loan contract with the "amounts of subsidy" referred to in Article 2.1(c). In our view, when the subsidy at issue is provided in the form of a loan granted on below market interest rate terms, the amount of the subsidy benefit – *i.e.*, the amount of the subsidy – will be a function of the interest rate advantage, the amount of the loan principal and the period of repayment. Thus, the amount of principal transferred under a loan may be a useful indicator of the amount of a subsidy, particularly where, as in the present case, there is evidence showing that the interest rate terms of loans provided by the granting authority followed a standard methodology, and the parties in dispute have not argued there to be, in general, any material difference in the subsidy intensity between loans. Thus, given the particular facts that are before us, we believe that the actual amount of principal transferred to the recipients of subsidized loans granted by the EIB may serve as a reasonable proxy of the "amounts of subsidy".

7.981 A "disproportionality analysis" requires the identification of an appropriate "baseline".[3751] The United States argues that the relevant baseline to use for this purpose is the total amount of funds lent by the EIB for research and development projects under the i2i in 2002, or between 2000 and the end of 2002. According to the United States, such an approach mirrors the EIB's own description of its lending activities, which it considers demonstrates that the EIB had set up the i2i as a distinct lending programme with one of its particular objectives being the funding of research and development projects. In this regard, the United States notes that at its launch, the EIB had explicitly described the i2i as "a practical programme aimed at building a Europe based on knowledge and innovation"; a "dedicated EUR 12-15 billion lending programme", which in February 2003 the EIB declared "had fully achieved its objectives" upon having committed EUR 14.4 million in loans by the end of 2002. The United States justifies its focus on i2i lending for *research and development* by recalling that "research and development" was one of five alleged "economic sectors" targeted by i2i; and because "research and development" was a heading used by the EIB for the purpose of reporting the progress of its lending activities in its Activity Reports. Moreover, the United States submits that the distinct research and development focus of the i2i is also evidenced by the fact that the EIB used research and development lending under the i2i as the "principal tool" with which it implemented the formal agreement that existed between the European Commission and the EIB to cooperate "with the aim of optimising their action in the field of research and the exploitation of its results".[3752]

7.982 We are not convinced by the United States' submission. The United States places significant reliance on the EIB's own characterisation of the i2i as a "programme" to conclude that it should be treated as such for the purpose of Article 2.1(c). As a general matter, we doubt whether a granting authority's own description of the nature of its activities can always be given the probative value that the United States attributes to the EIB's statements. Nevertheless, we recognize that the statements of

[3750] *See*, paras. 7.885 and 7.887 above.
[3751] *See*, paras. 7.961-7.970 above.
[3752] US, Answer to Panel Question 14, citing the Joint Memorandum establishing a framework for co-operation between the community research framework programme and the "Innovation 2000 Initiative" between the European Community represented by the Commission of the European Communities and the European Investment Bank, para. 4, Exhibit US-155.

BCI deleted, as indicated **[***]**

the authority responsible for granting subsidies that are alleged to be specific will be relevant to determining whether those subsidies are in fact specific within the meaning of Article 2.1(c). However, their probative value needs to be assessed on a case-by-case basis. In the present instance, when considered in their proper context, the EIB statements provide little, if any, support for the contention that the i2i was a "programme" in the sense that is argued by the United States.

7.983 The first statement the United States relies upon was taken from an undated three page EIB publication introducing the i2i. The first sentence of this publication reads:

> "In order to support the guidelines laid down by the Heads of Government, the EIB is implementing its Innovation 2000 Initiative, a practical programme aimed at building a Europe based on knowledge and innovation. "[3753]

We note, however, that in the very next sentence, the EIB describes the i2i as an "initiative":

> "Adopted by the EIB's Board of Governors at its Annual Meeting in June 2000, this initiative covers a number of operational principles intended to target lending by the EIB Group towards the following five objectives: ..."[3754]

The United States also refers to the EIB's description in the same document of the i2i as a "dedicated EUR 12-15 billion lending programme". This statement is drawn from the following passage:

> "Over the next three years, EIB support for these areas will take the form of a dedicated EUR 12-15 billion lending programme, plus a further EUR 1 billion for developing venture capital operations. Rather than increasing the volume of finance, the Innovation 2000 Initiative will mark a qualitative shift of emphasis in the EIB Group's activities towards sectors of the future with high technological value added."[3755]

In our view, this statement shows that the i2i was not intended to represent a new "programme" in the sense that is argued by the United States, but rather only a "qualitative shift of emphasis" in the EIB's ongoing finance activities without increasing their overall volume. In other words, as we read it, the statement suggests that the i2i was intended to operate as an "innovation"-focused continuation of the EIB's ongoing lending activities.

7.984 According to an EIB press release, the i2i was "put in place by the EIB to support the 'Lisbon Strategy', as chartered by the European Council in March 2000, for building a 'European economy based on knowledge and innovation'".[3756] Similarly, the EIB *Eligibility Guidelines* explain that "{t}he Bank's 'Innovation 2000 Initiative' ... is the Bank's contribution to the Lisbon process, which itself was launched at the Extraordinary EU Summit in Lisbon in March 2000."[3757] The overall goal of the Lisbon Strategy was for Europe "to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable growth with more and better jobs and greater social cohesion'" through a series of actions including increased support for research and development, competitiveness and innovation. In 2004, the EIB described its involvement in the implementation of the Lisbon Strategy through the i2i in the following terms:

[3753] Exhibit US-154 (Underline added).
[3754] Exhibit US-154 (Underline added).
[3755] Exhibit US-154 (Underline added).
[3756] Exhibit US-164.
[3757] *EIB Eligibility Guidelines*, Exhibit EC-161, p. 8 (emphasis original).

BCI deleted, as indicated **[***]**

> "The EIB Group has been involved in the preparation and in the implementation of {the Lisbon Strategy}, focusing its efforts on those innovation areas where particular investment efforts were most required and where supporting EIB loans or EIF venture capital (and guarantees) could be best deployed. Accordingly, in 2000, the Bank launched the 'Innovation 2000 Initiative'. To some extent, i2i built upon the experience gained within the {EIB's} 'Amsterdam Special Action Programme' (ASAP), which ran from 1997-2000 and introduced or reinforced lending for education, health and R&D, as well as investment in venture capital."[3758]

7.985 With this description, the EIB explicitly acknowledges that the lending activities carried out under the i2i were "to some extent" a more focused continuation of lending activities undertaken between 1997 to 2000. Indeed, other evidence confirms that of the five lending objectives targeted under the i2i ("development of SMEs and entrepreneurship"; "diffusion of innovation"; "research and development"; "information and communications technology networks"; and "human capital formation"[3759]), at least four (if not all five) were already the subject of the EIB's lending activities prior to i2i.[3760]

7.986 That the i2i was not a "programme" in the sense argued by the United States is also supported by evidence showing that loans, including the 2002 loan to EADS, were routinely considered by the EIB to satisfy multiple lending "objectives", not only the i2i.[3761] Indeed, the EIB identifies the relevant "eligibility" criteria for the 2002 loan to EADS to be "industrial competitiveness" not i2i.[3762] It is difficult to understand, and indeed, the United States has said little to explain, how the i2i may be characterised as a "programme" distinct from the EIB's other lending in the light of the fact that loans granted thereunder were counted by the EIB for its own reporting requirements as satisfying multiple lending objectives.[3763]

7.987 The United States considers that the EIB's explicit description of the i2i as a "dedicated EUR 12-15 billion lending programme" suggests that it maintained a dedicated budget for i2i lending, thereby supporting the view that the i2i was a "programme" of lending separate to the EIB's other lending activities.[3764] The United States asserts that the EIB's declaration in early 2003 that it "had

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[3758] *EIB Eligibility Guidelines*, Exhibit EC-161, p. 8. "ECOFIN" is the Economic and Financial Affairs Council of the EU. It is composed of the Economics and Finance Ministers of the EU Member States, as well as Budget Ministers when budgetary issues are discussed.

[3759] US, Answer to Panel Questions 14 and 218, the latter referring to *The Innovation 2000 Initiative, Actively promoting a European economy based on knowledge and innovation*, European Investment Bank, pp. 2-3, Exhibit US-154.

[3760] The EIB has consistently provided funding to "European communications infrastructure", "human capital" and "industrial competitiveness" projects since well before launching the i2i. Exhibit EC-713. Moreover, the *Eligibility Guidelines* reveal that the EIB started lending for "ex ante research and development" projects in 1995, and in the area of "education" (*i.e.*, "human capital") in 1981. Exhibit EC-161, pp 11 and 18. As regards the "diffusion of innovation", we see no reason why the same or similar types of projects may not have also been funded by the EIB prior to the launch of the i2i under one of its other lending objectives.

[3761] Exhibit EC-163 indicates that the 2002 loan to EADS fell within three of the EIB's lending policy objectives: "Common Interest (267 – c)", "i2i" and "Int. Compet. and EU. Int." Exhibit EC-163 also identifies many other projects financed by the EIB that were classified under multiple policy objectives, including i2i. One such example is the 2001 EUR 100 million loan for the "Big Education Infrastructure" project, described as falling within five policy objectives: "Economic and Social Cohesion (267a)", "Common Interest (267 – c)", "i2i", "Environment" and "Human Capital". *See, also*, EC, Answer to Panel Question 182, footnote 92.

[3762] Exhibit US-157; and EC, SWS, footnote 418, referring to Exhibit EC-163.

[3763] Exhibit EC-713 contains a table breaking down the individual loans provided by the EIB within the EU in 2002 by six headings, which broadly correspond with its lending objectives. A footnote to this table reads: "As certain financing operations meet several objectives, the totals for the various headings cannot be meaningfully added together."

[3764] US, Answer to Panel Questions 14 and 218

BCI deleted, as indicated **[***]**

fully achieved its i2i objectives" upon having committed EUR 14.4 billion in loans by the end of 2002 supports its position.[3765] We recall, however, that neither the EC Treaty nor the EIB Statute place any legal limits on the amount of lending that the EIB may undertake (apart from requiring that the aggregate amount of outstanding loans and guarantees at any time does not exceed 250% of its subscribed capital, and that its reserves are maintained at a level that covers 10% of its subscribed capital).[3766] Therefore, the "dedicated" funding amount that is referred to in the EIB statement is probably more accurately to be understood as the target volume of lending the EIB's management set for projects supporting the i2i policy objective in 2002. Because projects considered to fall within the i2i may also satisfy other EIB policy objectives,[3767] it follows that the EIB's declared "dedicated" funding amount covered projects that satisfied different and multiple EIB policy objectives that included i2i. In other words, even as an expression of the goals of EIB management for the volume of i2i lending to be achieved in 2002, the "dedicated EUR 12-15 billion" was, in effect, not a target limited to only i2i projects.

7.988 Finally, we note that the United States does not argue that loans granted under i2i were approved under a different application, review or decision-making procedure compared with other EIB loans. Nor does it contend that the loans granted under the i2i were granted on contractual terms and conditions that distinguished them from other loans granted by the EIB. However, in our view, an understanding of the legal regime pursuant to which an alleged subsidy is granted is a relevant and important consideration when making a specificity determination under Article 2.1(c) as it helps to define the relevant "programme". In this respect, we note that no evidence has been presented to us showing that i2i loans were granted pursuant to a legal regime that is different from that created by Article 267 of the EC Treaty and the provisions of the EIB Statute; or that these loans were approved using a review procedure that is different from that described in the EIB's *Project Cycle Document*.

7.989 Having carefully considered the detailed evidence and arguments presented by the parties, we believe that the i2i cannot be properly characterised as a "programme" for the purpose of Article 2.1(c). The EIB was established under the EC Treaty, which gave it a general mandate to lend funds "to all sectors of the economy" for the purpose of contributing "to the balanced and steady development of the common market in the interest of the Community". This mandate is explicitly recalled and implemented through the EIB Statute. Like the EC Treaty, the EIB Statute indicates that the focus of the EIB's lending should be on projects that contribute to an increase in economic productivity in general and promote the attainment of the common market. EIB funding is intended to support and contribute to the attainment of EU policy objectives, which the EIB has consistently identified in various documents including the *Project Cycle Document* and the *Eligibility Guidelines*. Funded projects may qualify for one or more of these objectives and are reported as such in the EIB's Annual Reports. This and other evidence tends to support the view that the "programme" in the present instance is EIB lending as a whole, which constitutes one single discretionary programme of financing.[3768] Thus, the relevant subsidy programme from which to derive the "baseline" must be the entire programme of EIB lending as mandated under the EC Treaty and the EIB Statute, not all of the EIB's lending under the i2i.[3769]

[3765] US, Answer to Panel Questions 14 and 218, referring to European Investment Bank, Annual Press Conference 2003, Background Note No. 1: Innovation and Knowledge-Based Economy, p.1, Exhibit US-164.

[3766] *See*, para. 7.917 above.

[3767] *See*, para. 7.986 above.

[3768] *See*, para. 7.923 above.

[3769] We note that the parties have not argued that we should limit our consideration of the EIB's lending activities to data that relates only to loans granted for the purpose of the production or sale of *goods*. However, in our view, the fact that the SCM Agreement is intended to deal exclusively with subsidies to *goods*, could be understood to mean that the baseline for a disproportionality analysis should ignore any subsidies granted for the provision of services.

BCI deleted, as indicated **[***]**

7.990 However, this does not mean that we agree with the European Communities when it argues that the relevant "baseline" should be the value of the EIB's entire lending activities since 1957. As we have previously explained, when assessing whether a subsidy granted under a long-standing subsidy programme is specific under Article 2.1(c), the identification of the proper "baseline" will involve taking into account the extent to which it would be reasonable and appropriate to determine whether the subsidy at issue is in fact sufficiently broadly available throughout an economy so as not to benefit "certain enterprises" on the basis of the entire duration of the subsidy programme or a shorter period of time. Although the parties in the present dispute have not submitted any data specifically for this purpose, evidence of the EIB's total lending in 2004, the year in which the 2002 loan to EADS was disbursed, indicates that the **[***]** loan represented approximately **[***]** of the all loans disbursed in that year.[3770] Excluding "global" loans from this calculation, which between 1957 and 2006 accounted for approximately 27% of the EIB's loans,[3771] it is possible to estimate that the **[***]** financing received by EADS under the 2002 loan represented **[***]** of all "individual" loans disbursed by the EIB in 2004. Essentially the same result holds if the loan to EADS is considered in the light of the total amount of all loans disbursed in 2002 (EUR 35,214 million)[3772] or even all "individual" loans, which we can estimate would have been approximately EUR 25,700 million.[3773] Given that we have found the i2i to be an "innovation"-focused *continuation* of the EIB's existing lending, using the amount of all EIB lending (actual disbursements) in one calendar year is perhaps too short a period within which to assess whether the amount of the loan to EADS was "disproportionately large". Nevertheless, even when using calendar year data from the year in which the loan was disbursed (2004) or when the loan facility was first agreed (2002), the amount of the loan to EADS represents at most **[***]** of total EIB lending in the form of "individual" loans in each of those two years. Obviously, considering the amount of the loan to EADS in the light of EIB lending data over a longer period would render this proportion smaller. Accepting that the European Communities has a highly diversified economy, we do not believe that these data imply that the 2002 loan to EADS represents a disproportionately large amount of subsidy.

7.991 Thus, in conclusion, we find that the United States has failed to establish that the 2002 loan to EADS involves "the granting of disproportionately large amounts of subsidy to certain enterprises" within the meaning of Article 2.1(c) because the **[***]** loan to EADS was not disproportionately large when considered in the light of the total value of the EIB's lending programme over a period of time that we believe is reasonable and appropriate for the purpose of conducting a disproportionality analysis.

"predominant use"

7.992 The United States relies upon essentially the same facts and arguments advanced in respect of its allegation of "disproportionality" to support its claim that the 2002 loan to EADS evidences "predominant use" of a subsidy programme, making it a specific subsidy within the meaning of Article 2.1(c). Again, the United States' arguments are framed in terms of the amount of the financial contribution received by EADS under the loan compared with: (a) all of the loans granted by the EIB for the purpose of research and development projects under the i2i in 2002, or (b) all of the loans granted by the EIB for the purpose of research and development projects under the i2i between 2000 and the end of 2002, in the light of the highly diversified nature of the EU economy. In addition, the United States also asserts that the loan granted to EADS was the single largest provided to any one

[3770] *EIB Annual Report 2004, Volume I Activity Report*, p. 4, indicating that "Loans disbursed" in 2004 amounted to EUR 38 547 million (excluding EUR 93 million of loans disbursed via the EIB's "Investment Facility"). Exhibit EC-714.
[3771] EC, FWS, para. 1048, Exhibit EC-165.
[3772] *EIB Group Activity Report 2002*, p. 2. Exhibit EC-712.
[3773] (73% of EUR 35,214 million = EUR 25,706 million)

BCI deleted, as indicated **[***]**

company under the alleged i2i programme taken as a whole, over the period 2000 to 2003 or even between 2000 and 2006.[3774]

7.993 We recall that "predominant use {of a subsidy programme} by certain enterprises" may be simply described as the situation where a subsidy programme is mainly, or for the most part, used by certain enterprises. "Predominant use {of a subsidy programme} by certain enterprises" may indicate that a subsidy is in fact specific, within the meaning of Article 2.1(c), when in the light of (i) "the extent of diversification of economic activities within the jurisdiction of the granting authority"; and (ii) "the length of time during which the subsidy programme has been in operation", such predominant use suggests that the subsidy at issue is *not* sufficiently broadly available throughout an economy so as not to benefit "certain enterprises".[3775] In our view, when considering whether there is "predominant use" of a subsidy programme within these terms, the starting point should be the identification of the relevant subsidy programme.

7.994 For the same reasons advanced to support its allegations of "disproportionality", the United States contends that the relevant subsidy programme for the purpose of determining whether the 2002 loan to EADS evidences "predominant use" is the i2i. We have already dismissed the United States' contention, and found instead that the relevant subsidy programme is the EIB's entire lending activities as mandated under the EC Treaty and EIB Statute.[3776] Moreover, we have also concluded that when measured against the estimated value of all "individual" loans disbursed by the EIB in only one year – 2002 or 2004 – the amount of the loan to EADS represents at most **[***]**.[3777] Bearing in mind that the European Communities has a highly diversified economy, and considering that this percentage would be even smaller if the EADS loan amount were measured in the light of EIB lending data over a longer period, we do not consider the 2002 loan to EADS to evidence "predominant use" of a subsidy programme by "certain enterprises".

7.995 We come to the same conclusion when considering the United States' allegations about the size of the loan granted to EADS compared with the size of loans granted to other recipients.[3778] Although there is no precise data before us on the value of EIB loan disbursements per corporate recipient for its entire lending programme (which would have been our preferred level of comparison), we do have information on the value of disbursements made by the EIB to projects qualifying under the i2i between 2000 and 2006 by recipient.[3779] Perusing this information, we cannot see any corporate borrower[3780] that received an "individual" loan that was greater in amount than the **[***]** disbursement received by EADS in 2004. However, there are at least six companies that received seven "individual" loan disbursements in 2000, 2001, 2003, 2005 and 2006 that were greater than **[***]**.[3781] Thus, even when examining the comparative size of the 2002 loan to EADS at the level of the i2i, it does not appear to us that the **[***]** loan disbursement to EADS evidences "predominant use" by EADS, irrespective of whether we review the data from 2000 to 2002 (which the United States asserts would be correct)[3782] or the period 2000 to 2006 (which the European Communities suggests could be used).[3783] Although, as already mentioned, we have no precise details

[3774] *See*, para. 7.944 above.
[3775] *See*, para. 7.974-7.976 above.
[3776] *See*, para. 7.989 above.
[3777] *See*, para. 7.990 above.
[3778] We recall that our specificity analysis is concerned with the **[***]** loan that was actually disbursed, not the EUR 700 million credit line. *See*, para. 7.979 above.
[3779] Exhibit EC-883 (BCI).
[3780] Excluding banks and public entities or public corporations.
[3781] The companies and respective disbursements, including dates, are: Telefonica Finanzas SA **[***]**; Wind Telecomunicazioni SPA **[***]**; Deutsche Telekom AG **[***]**; ENEL Distribuzione SPA **[***]**; One 2 one Personal Communications **[***]**; and Vodafone Group PLC **[***]**. Exhibits EC-883 (BCI) and EC-163.
[3782] E.g., US, Comments to EC, Answer to Panel Question 181.
[3783] E.g., EC, Answer to Panel Question 181.

BCI deleted, as indicated **[***]**

on the value of EIB loan disbursements per corporate recipient for its entire lending programme in any given year, we strongly suspect that considering the loan to EADS within this broader comparison group between 2000 and 2006, or even 2000 and 2003, would render it even less significant compared with other "individual" loans granted to corporate recipients in the same years.[3784]

7.996 Thus, we conclude, on the basis of the foregoing analysis, that the United States has failed to establish that the 2002 loan to EADS involves "predominant use by certain enterprises" of the EIB's lending programme, within the meaning of Article 2.1(c), and is therefore not specific under the terms of this provision.

The loans granted to Airbus between 1988 and 1993

7.997 The United States claims that the loans granted to Airbus between 1988 and 1993 are specific within the meaning of Article 2.1(c) of the SCM Agreement because, in its view, the sum-total of the financial contributions provided thereunder represent a disproportionately large amount of subsidies granted to certain enterprises when measured against: (a) the value of all EIB loans granted between 1988 and 1993 and falling within the then-existing "industry, services and agriculture" category used by the EIB to describe its lending activities; or (b) the value of all of the EIB loans granted between 1988 and 1993 and falling within the EIB's then-existing "international competitiveness and European integration of large firms" objective, in the light of the highly diversified nature of the EU economy. In addition, the United States argues that the challenged loans involved disproportionately large amounts of subsidies because it alleges that: (i) Airbus was the largest recipient of EIB "individual" loans between 1988 and 1993; (ii) among private enterprises, the EIB loans to Airbus from 1988 to 1993 were approximately 44% more than to the next largest recipient; and (iii) the amount of loans received by Airbus between 1988 and 1993 exceeded EIB lending to any entire industrial sector during this period, with the exception of chemicals and other transport equipment.[3785]

7.998 As with the arguments advanced in respect of the 2002 loan to EADS, both parties have presented their positions on the question whether the challenged EIB loans granted to Airbus between 1988 and 1993 involve the granting of disproportionately large amounts of subsidy by focusing on the amount of financial contributions. Although the amount of a financial contribution in the form of a loan is not the amount of the subsidy granted pursuant to that loan, we believe that the amount of principal transferred under a loan may be a useful indicator of the amount of a subsidy, particularly where, as in the present case, there is evidence showing that the interest rate terms of loans provided by the granting authority followed a standard methodology, and the parties in dispute have not argued there to be, in general, any material difference in the subsidy intensity between loans.[3786] Thus, given the particular facts that are before us, we believe that the actual amount of principal transferred to the recipients of subsidized loans granted by the EIB may serve as a reasonable proxy for the "amounts of subsidy".

7.999 The United States contends that publicly available information shows that the entire sum of the financial contributions transferred to Airbus under the challenged loans amounted to EUR 1,061 million.[3787] The figure advanced by the European Communities is essentially the same.[3788]

[3784] Historically, the EIB disburses around 84% of the loan amounts agreed under contract. EC, Answer to Panel Question 181. On this basis, it is possible to identify from Exhibit EC-163 at least 40 "individual" loans "signed" by the EIB between 2000 and 2006 that involved estimated *disbursed* funding amounts in excess of **[***]** – *i.e.*, individual loans with a "signed" value greater than **[***]**.

[3785] US, Answer to Panel Question 15, referring to *inter alia*, Exhibit US-475.

[3786] *See*, para. 7.980 above.

[3787] US, FWS, para. 420, Exhibit US-475. The same amount is arrived at by adding the individual loan values identified in Exhibit US-157 (subtracting the 1997 loan to Aérospatiale for the Super Transporteur, against which the United States no longer pursues its complaint).

BCI deleted, as indicated **[***]**

Thus, there is no apparent disagreement between the parties as to the approximate value of all of the funding amounts received by Airbus under the challenged loans. Moreover, we note that the European Communities has not disputed the United States' decision to present its claims of specificity against the challenged loans on an aggregate basis, as opposed to addressing each loan individually, as it did in respect of the 2002 loan to EADS. Indeed, in its response to the United States' claims, the European Communities has to varying degrees adopted the same approach.

7.1000 In our view, where a series of loans conferring a benefit upon the same recipient has been granted under a single long-standing subsidy programme, it may be appropriate to examine whether the provision of such loans involved the granting of disproportionately large amounts of subsidy, within the meaning of Article 2.1(c), by aggregating the subsidy amounts, particularly where there is a close temporal connection between each loan. However, the fact that all such subsidy amounts have been aggregated must be taken into account in identifying the appropriate duration of the subsidy programme.[3789] Thus, it is conceivable that a party invoking Article 2.1(c) in WTO dispute settlement proceedings may want to conduct a disproportionately analysis by cumulating subsidy amounts granted in, for example, the first two years of a ten year subsidy programme. In this event, it would not, in our view, be appropriate to compare the sum total of these subsidy amounts with all subsidies granted under the programme in only its first or second year of existence. Moreover, in the same factual circumstance, it may also not make sense to compare the cumulated subsidy amount with subsidies that include amounts granted in the *last* two years of the subsidy programme if there has been a material change in the importance of the subsidized activities in the wider economy.[3790] In this context, we see no contradiction (and certainly, the European Communities has not drawn our attention to any) between the approach adopted by the United States in presenting its allegations of specificity against the 2002 loan to EADS and its approach to the eleven other loans, the last of which was granted in 1993.

7.1001 Turning to the substance of the United States' claim, we recall once again, that in order to examine whether the amount of subsidy granted under a particular subsidy programme is disproportionately large for the purpose of Article 2.1(c), an appropriate "baseline" or "reference data" must be chosen.[3791] Moreover, where the subsidy amount at issue is granted pursuant to a subsidy programme, the "baseline" or "reference data" must be derived from that subsidy programme.[3792] In the case of the challenged loans, the United States identifies two possible "baselines": (a) the value of all EIB loans granted between 1988 and 1993 that fall within the then-existing "industry, services and agriculture" category used by the EIB to describe its lending activities; or (b) the value of all of the EIB loans granted between 1988 and 1993 that fall within the EIB's then-existing "international competitiveness and European integration of large firms" objective. We are not convinced by either of these options.

[3788] The European Communities notes on several occasions that the value of the EIB loans (including the full EUR 700 million credit line opened in favour of EADS in 2002) amounts to approximately 0.3% of the EIB's total lending from 1957 to 2006, which it discloses was EUR 591.5 billion. Thus, excluding the EUR 700 million credit line agreed with EADS, the value of the remaining challenged EIB loans the European Communities considers is at stake is approximately EUR 1,075 million. EC, SWS, para. 478; EC, SNCOS, para. 195; EC, Comments on US Answer to Panel Question 151.

[3789] We recall that in considering whether a subsidy has been granted in disproportinately large amounts for the purpose of Article 2.1(c), "account shall be taken ... of the length of time during which the subsidy programme has been in operation". *See*, paras. 7.966-7.970 above.

[3790] Our observations on the effect that material changes in the importance of subsidized activities in the wider economy may have on determining whether a subsidy has been granted in disproportionately large amounts for the purpose of Article 2.1(c) of the SCM Agreement are set out at para. 7.970 above.

[3791] *See*, paras. 7.961-7.970 above.

[3792] *See*, para. 7.967 above.

BCI deleted, as indicated **[***]**

7.1002 As the United States acknowledges, the "industry, services and agriculture" and "international competitiveness and European integration of large firms" are not separate subsidy programmes operated by the EIB, but rather merely classification descriptions used by the EIB when reporting its overall lending activities.[3793] This is clear from the extracts of the EIB Annual Reports submitted by the United States in Exhibits US-176 to US-181. Using these headings as the focus of a "disproportionality" analysis would ignore that, at the time of the challenged loans, the scope of the EIB's lending programme extended beyond the two particular headings chosen by the United States. In particular, the "industry, services and agriculture" heading was one of two economic sectors;[3794] and the "international competitiveness and European integration of large firms" one of five lending objectives,[3795] used by the EIB to describe its operations. As we have already found, it is the EIB's entire lending programme as mandated under the EC Treaty and EIB Statute that must be used as the starting point for the identification of the correct "baseline" to perform a "disproportionality" analysis.[3796]

7.1003 The total value of "individual" loans granted by the EIB within the European Communities between 1988 and 1993 amounted to ECU 62,057 million.[3797] It is unclear from the evidence that is before us whether this amount represented "signed" or "disbursed" amounts of funding.[3798] If the former, then bearing in mind that the EIB has historically disbursed 84% of its "signed" loan amounts,[3799] the value of "individual" loans actually disbursed between 1988 and 1993 could be estimated to be ECU 52,142 million. This means that the EUR 1,061 million loan amount received by Airbus represents approximately 2% of the EIB's entire "individual" loan disbursements over the period between 1988 to 1993. However, in our view, given that the subsidy amount at issue relates to eleven loans granted over a period of six years, and because the EIB operates a lending programme that is long-standing, it would be reasonable and appropriate to consider the relative importance of the loans to Airbus over a longer period than the six years between 1988 and 1993. When doing so, we note that even with the addition of data from just one additional year, the loan amounts granted to Airbus would represent a proportion of all EIB "individual" loan disbursements that is smaller than 2%. Considering that the European Communities has a highly diversified economy, we do not believe that these data support the conclusion that the eleven challenged loans to Airbus evidence the existence of a subsidy that is, in fact, specific within the meaning of Article 2.1(c).

7.1004 Finally, the United States contends that the eleven challenged loans to Airbus involved the granting of disproportionately large amounts of subsidy because: (i) Airbus was the largest recipient of EIB individual loans between 1988 and 1993; (ii) among private enterprises, the EIB loans to Airbus from 1988 to 1993 were approximately 44% more than to the next largest recipient; and (iii) the amount of loans received by Airbus between 1988 and 1993 exceeded EIB lending to any entire industrial sector during this period, with the exception of chemicals and other transport equipment. In particular, the United States argues that "these additional facts show that even looking at the EIB

[3793] *See*, e.g., US, Answer to Panel Question 15.

[3794] The other being "energy and infrastructure".

[3795] The other four lending objectives were: "regional development"; "Community infrastructure"; "energy"; and "protection of the environment and urban development". We note that the extracts of the Annual Reports submitted by the United States do not identify "international competitiveness and European integration of large firms" as an EIB lending objective for the year 1988. *See*, Exhibit US-176.

[3796] *See*, para. 7.989 above.

[3797] Exhibits US-176 to US-181.

[3798] The European Communities asserts that the funding amounts identified in Exhibits US-176 to US-181 represent "signed" amounts of funding within the European Communities. EC, Request for Interim Review, p. 15.

[3799] *See*, footnote 3784 above.

BCI deleted, as indicated **[***]**

loans from perspectives other than those suggested in {its first written submission}, {the loans to Airbus} still were disproportionately large".[3800]

7.1005 We have doubts about whether the United States' factual assertions necessarily imply that the funding amounts obtained by Airbus between 1988 and 1993 involved the granting of disproportionately large amounts of subsidy, within the meaning of Article 2.1(c). For instance, we can see no apparent reason why the simple fact that Airbus may have been the largest private recipient of funds over this period demonstrates, in the light of the highly diversified nature of the European Communities' economy and the long-standing duration of the EIB lending programme, that the EIB's subsidies are *in fact* not sufficiently broadly available throughout an economy to warrant a finding of specificity. Moreover, we are not entirely convinced that it is appropriate, given that many of the loans the United States is challenging in this dispute were to entities that were at least partly government owned,[3801] to remove all information about loans to publicly owned entities from consideration in the analysis. Indeed, the United States has not done so in the other analyses of "disproportionality" it has presented.

7.1006 However, even apart from these doubts, we cannot accept the United States' contention. This is because it is premised on "baseline" information that is drawn exclusively from the EIB's activities in the years in which the loans at issue were granted to Airbus. The United States has not explained why the duration of the "baseline" should be limited to these years, other than to point to the fact that these were the years in which the Airbus loans were agreed. Moreover, as we have articulated above, we believe that given the subsidy amount at issue relates to eleven loans granted over a period of six years, and in the light of the long-standing nature of the EIB lending programme, it would be reasonable and appropriate to take into account information from years in which Airbus did not participate in the EIB's lending programme. Including data on the EIB's lending activities from, for instance, the four years after 1993 into the analysis (*i.e.*, using a ten year "baseline" period from 1988 to 1997) would show that FIAT received more in loans from the EIB than Airbus.[3802] It would also diminish the importance of the loans received by Airbus over this period compared with other industry sectors.[3803]

7.1007 Thus, for all of the above reasons and, in the light of the highly diversified nature of the European Communities' economy and the long-standing duration of the EIB's lending programme, we find that the United States has not established that the three additional facts it points to (described above)[3804] demonstrate that the loans granted to Airbus between 1988 and 1993 were specific within the meaning of Article 2.1(c).

[3800] US, Answer to Panel Question 15, referring to *inter alia*, Exhibit US-475.

[3801] The European Communities points out that "all of the recipients of the challenged loans (other than British Aerospace and Airbus Industrie)" were companies "owned by state". EC, SWS, para. 473.

[3802] *See*, Exhibit EC-163, showing that FIAT received loans worth EUR 83 million (1995), EUR 180 million (1996) and EUR 210 million (1997). In 1998, FIAT obtained an additional loan of EUR 250 million.

[3803] The European Communities argues that had the United States' analysis taken into account the EIB's lending via "global" loans, it would have discovered that value of the loans to Airbus between 1988 and 1993 was less than the value of the loans granted to not only the "Transport equipment" and "Chemicals" sectors, but also "Metalworking and mechanical engineering", "Foodstuffs", "Paper and pulp, printing", "Electrical engineering and electronics" and "Rubber and plastics processing". EC, SWS, para. 476 and Exhibit EC-720. However, we cannot accept this proposition as it suggests that the EIB's "global" loans are granted pursuant to the same decision-making process and on the same essential terms and conditions as "individual" loans, when the evidence before us suggests otherwise. *See*, paras. 7.903 and 7.913 above.

[3804] *See*, para. 7.1004 above.

BCI deleted, as indicated **[***]**

(d) Overall conclusion

7.1008 In summary, we conclude that the United States has failed to establish that each of the 12 challenged EIB loans we have found constitute subsidies[3805] is specific within the meaning of Articles 2.1(a) and 2.1(c) of the SCM Agreement. Accordingly, we dismiss the United States' complaint against these measures and will not consider them further in this dispute.

6. Whether the German, French, UK, and Spanish Governments Have Subsidized Airbus Through the Provision of Infrastructure and Infrastructure-Related Grants

(a) Introduction

7.1009 In this section of our report, we address the United States' claims concerning infrastructure-related measures provided by German authorities in Hamburg, Nordenham, and Bremen; by French authorities in Toulouse; by UK authorities in Broughton, Wales; and by Spanish authorities in numerous locations in Spain.[3806]

7.1010 The United States asserts that the provision by the governments of Germany, France, the UK, and Spain of infrastructure and infrastructure–related grants constitutes specific subsidies within the meaning of Articles 1.1 and 2 of the SCM Agreement. The United States specifically refers to the provision of the Mühlenberger Loch industrial site near Hamburg,[3807] certain grants towards the costs of constructing the A380 assembly line in Hamburg,[3808] the provision of the lengthened runway at Bremen airport,[3809] the provision of the ZAC Aéroconstellation site,[3810] access roads to the ZAC Aéroconstellation site and a linking road between the Aéroconstellation site and the "Itinéraire à grand gabarit" (IGG),[3811] a grant by the German Land of Lower Saxony for the expansion of Airbus' Nordenham facility;[3812] a grant by the Welsh government for Airbus' Broughton, Wales site;[3813] and grants by Spanish local and regional governments for the expansion and modernization of Airbus and EADS plants in Puerto de Santa Maria, Illescas, Puerto Real, Sevilla and La Rinconada.[3814]

7.1011 The United States argues that each of these measures involves a financial contribution within the meaning of Article 1.1(a)(1)(i) or (iii) of the SCM Agreement, each of which confers a benefit on Airbus within the meaning of Article 1.1(b) of the SCM Agreement. The United States argues that the Mühlenberger Loch, Bremen airport, and ZAC Aéroconstellation and access roads are the provision of goods and services other than "general infrastructure", and the remaining measures are outright grants, and thus there is a financial contribution by a government in each case. The United States further asserts that each subsidy asserted is specific, either in law or in fact, or both, to Airbus. In asserting that they confer a benefit, the United States argues that the governments provided the infrastructure in question on better than commercial terms, based on comparison with asserted market benchmarks, or that the measures were grants, and thus conferred a benefit.

[3805] *See*, para. 7.885 above.
[3806] US, FWS, para. 421.
[3807] US, FWS, para. 423.
[3808] US, FWS, para. 446. The United States did not pursue its claim in this regard, US, Answer to Panel question 24, para. 167. We therefore do not address this claim further, and make no findings with respect to it.
[3809] US, FWS, paras. 450-51.
[3810] US, FWS, para. 456.
[3811] US, FWS, para. 456.
[3812] US, FWS, para. 488.
[3813] US, FWS, para. 490.
[3814] US, FWS, para. 486.

BCI deleted, as indicated **[***]**

7.1012 The European Communities argues that the Mühlenberger Loch, Bremen runway extension, and the ZAC Aéroconstellation site and access roads constitute "general infrastructure" within the meaning of Article 1.1(a)(1)(iii), and thus there is no financial contribution, such that these measure are not subsidies and are not properly before the Panel.[3815] In addition, the European Communities argues that assuming these measures did involve a financial contribution, they did not confer a benefit on the recipients.[3816] The European Communities does not make any arguments regarding specificity in connection with these measures.

7.1013 With respect to the measures that are outright grants, the European Communities does not dispute that each involves a financial contribution and confers a benefit on the respective recipient, but generally argues that they are not specific.[3817] The European Communities asserts that certain of them are not specific because they are generally available to enterprises in the particular region,[3818] and certain of them are not specific because the relevant governing legislation establishes objective criteria governing the eligibility for, and the amount of, the grants in question.[3819] In addition, the European Communities argues with respect to certain of these measures that the recipient was not Airbus or that the grant in question was not provided in connection with LCA.[3820]

7.1014 We begin our analysis of the United States' claims by addressing a question which is common to our analysis of the Mühlenberger Loch, Bremen airport, and ZAC Aéroconstellation measures: when does the provision of goods or services in the form of infrastructure constitute the provision of infrastructure which is "**other than general**" within the meaning of Article 1.1(a)(1)(iii) (emphasis added), such that there is a financial contribution by a government. It is not disputed that these measures were provided by a "government" within the meaning of Article 1.1(a)(1). Therefore, should we conclude that these measures involve financial contributions, we shall then go on to determine whether each measure confers a benefit on Airbus and, to the extent disputed, is specific. Finally, we will address the questions of whether the challenged grant measures provided by regional authorities are subsidies and were received by Airbus, and are specific within the meaning of Article 2. With respect to these latter measures, there is no dispute as to the existence of a financial contribution by a government, or as to benefit.

(b) When does the provision of goods or services in the form of infrastructure constitute the provision of infrastructure which is "other than general infrastructure" within the meaning of Article 1.(1)(a)(1)(iii)?

(i) Arguments of the Parties

7.1015 The United States asserts that the infrastructure-related measures in question constitute financial contributions within the meaning of Article 1.1(a)(1)(iii) in that these measures provide infrastructure which is "other than general". The United States asserts that the ordinary meaning of the term "general infrastructure", in context and in light of the object and purpose of the SCM Agreement, leads to an interpretation that "general" infrastructure is infrastructure that is accessible to all or nearly all users on a universal, non-discriminatory basis, where there are no *de jure* or *de facto* limitations on use.[3821] The United States argues that in order to be excluded from Article 1.1(a)(1)(iii) of the SCM Agreement as "general" infrastructure, infrastructure must include, involve, or affect all or nearly all the parts of a whole territory or community; or must be completely

[3815] EC, FWS, paras. 750, 875, 908, and 940.
[3816] EC, FWS, paras. 751, 876 and 909. The European Communities also argues that the provisions of roads is not specific. EC, FWS, para. 945.
[3817] EC, FWS, paras. 709, 948.
[3818] EC, FWS, paras. 892, 962, 967 and 980.
[3819] EC, FWS, paras. 898, 963, 969 and 971.
[3820] EC, FWS, paras. 975-997.
[3821] US, FNCOS, para 79.

or nearly universal, as opposed to partial, particular, or local. Conversely, the United States contends, infrastructure that includes, involves, or affects only a certain enterprise or group of enterprises, or that is open only to a limited number of enterprises or group of enterprises ("specifically limited in application") does not constitute "general" infrastructure.[3822] The United States goes on to argue that the provision of goods is "general infrastructure" "if it is available to all members of the public on the same terms and conditions".[3823] In this context, the United States contends that the mere fact that a government creates infrastructure for reasons of "public policy" or to "foster economic development" or to perform a public task does not make it "general". Thus, for the United States, universal use is the determinative factor of whether certain infrastructure can be regarded as "general infrastructure" for the purpose of Article 1.1(a)(1)(iii) of the SCM Agreement.[3824]

7.1016 The European Communities does not disagree with the view of the United States that universal use is an important factor when determining whether certain infrastructure can be regarded as "general infrastructure" for the purpose of Article 1.1(a)(1)(iii) of the SCM Agreement. However, the European Communities does not accept that this element is the only, or the determinative, factor.[3825] According to the European Communities, the term "general" given its ordinary meaning, in context and in light of its object and purpose, means the opposite of "specific", and the term "infrastructure" means basic goods and services in a society which underpin its economic performance.[3826] Read together, in the European Communities' view, this means that "general" infrastructure is infrastructure provided for the benefit of the public at large, where the relevant good or service is accessible by the public at large, or where it "enables" members of the public at large, thereby fulfilling a public policy objective.[3827] Thus, the European Communities concludes that infrastructure is general because it "benefits society as a whole and reflects legitimate economic development policies".[3828] In support of its view that the challenged measures constitute the provision of "general infrastructure", the European Communities argues that these measures are (i) government actions, related to basic installations, facilities and services needed to support economic development; (ii) further public policy objectives and (iii) are designated for public use by because they are publicly accessible, because they "enable" members of the public at large, or because they provide common goods to the public. [3829]

7.1017 The European Communities considers that the reason general infrastructure measures are carved out from the SCM Agreement is because the negotiators were concerned that the SCM Agreement not interfere with legitimate government choices to pursue public policies for the benefit of the population as a whole.[3830] The European Communities asserts that the provision of general infrastructure is a public function of governments, being one of the important tools for fostering of economic, social and cultural development.[3831] Therefore, the European Communities argues that the negotiators of the SCM Agreement accorded themselves a large margin of appreciation for what they consider to constitute "general infrastructure".[3832]

[3822] US, Answer to Panel Question 20, para. 137.
[3823] US, SWS, para 310.
[3824] US, SWS, para. 304.
[3825] EC, Answer to Panel Question 90, paras. 221-222.
[3826] EC, FWS, paras. 714-715.
[3827] EC, FWS, para. 716; *see also, Id.*, para. 719 (referring to goals of "raising standards of living" and "ensuring full employment," as expressed in preamble to the WTO Agreement, as object and purpose relevant to interpretation of the term "general infrastructure").
[3828] EC, FWS, para. 909.
[3829] EC, FWS para. 909 and para. 923
[3830] EC, FWS, para. 711.
[3831] EC, FWS, para. 711.
[3832] EC, FWS, para. 712.

BCI deleted, as indicated **[***]**

7.1018 According to the European Communities, the negotiating history of the SCM Agreement confirms its interpretation.[3833] The European Communities asserts that many interventions were made in the framework of discussions about the list of non-actionable subsidies (what later became Article 8 of the SCM Agreement), but that the draft text of the Chairman of 2 November 1990 put the "general infrastructure" exception into the definition of the subsidy (what is today Article 1.1(a)(1)(iii) of the SCM Agreement).[3834] The European Communities considers that this attests to a recognition of the fact that measures of general infrastructure could foster a broad range of public policy objectives and should therefore be excluded from the scope of the SCM Agreement.[3835]

7.1019 The European Communities does acknowledge the relevance to the determination whether it is "general" infrastructure of "clearly specified" limitations on use of, or access "restricted by regulation" to, the infrastructure provided.[3836] However, the European Communities argues that merely because the public does not actually use the infrastructure provided, or because use is in fact limited, does not suffice to disqualify the infrastructure in question as "general" infrastructure.[3837] Rather, the European Communities considers that two steps must be distinguished: first, governments may build general infrastructure, and second, governments may limit the use of that general infrastructure to certain companies.[3838] In the European Communities' view, the second step makes the infrastructure non-general, but does not invalidate the fact that the first step constitutes provision of general infrastructure. The European Communities argues that the second step must be evaluated

[3833] EC, FWS, para. 721. The European Communities first refers to the Note by the Secretariat, listing issues for Negotiators in which the Secretariat had advised negotiators to make a "clear distinction between trade distorting subsidies and subsidies which are designed to enhance efficiency, facilitate the development of infrastructure for industrialization or facilitate structural adjustment". (Note by the Secretariat, Checklist of Issues for Negotiators, 22 October 1987, MTN.GNG/NG10/W/9, Rev. 2, p. 10.) The European Communities also refers to the Statement made by the delegation of Canada at the meeting held on 28-29 June 1988, MTN.GNG/NG10/W/22, 7 July 1988, p.2., which stated that certain subsidy practices should be accepted, specifically mentioning subsidies for infrastructure, research and development and regional development. In addition, the European Communities recalls that at that time, the European Communities felt that measures concerning "for instance, education, culture, health, social welfare and general infrastructure" are normally not subsidies, because they merely contribute to setting the terms and conditions of a country's economic and business environment, but do not alter the competitive position of firms. (Submission by the European Communities, 27 November 1989, MTN.GNG/NG10/W31, p. 6.). The European Communities further notes that Korea emphasized that subsidies should be non-actionable which supply "social overhead capital" such as harbour facilities, electric power, or transportation systems. Measures for establishing such social infrastructure should not be regarded as subsidies to be disciplined. (Submission by the Republic of Korea, 18 January 1990, MTN.GNG/NG10/W34, p. 4.). The European Communities highlights the understanding of several Members that general infrastructure is characterized by its designation for public use. To this end, the European Communities refers to the submission by the United States in which it sought to list certain practices as non-actionable, among them "basic infrastructure where there are no *de jure* or *de facto* limitations on use". (Submission by the United States, Elements of the Framework for negotiations, 22 November 1989, MTN.GNG/NG10/W/29, p. 6.) Similarly, it refers to the submissions by Canada and India who wished to exclude basic infrastructure "for general public use" from the scope of actionable subsidies. (Submission by Canada, 27 June 1989, MTN.GNG/NG10/W/25, p.7; Submission by India, 30 November 1989, MTN.GNG/NG10/W/33, p. 2.).

[3834] EC, FWS, para. 723, citing, Draft Text by the Chairman, 2 November 1990, MTN/GNG/NG10/W/38/Rev. 2, p.1.

[3835] In this connection, the European Communities contrasts interventions by the Members relating to general infrastructure made in the context of the discussions about the list of non-actionable subsidies (what later became Article 8 of the SCM Agreement), with the draft text of the Chairman of 2 November 1990, which put the "general infrastructure" exception into the definition of the subsidy (what today is Article 1.1(a)(1)(iii) of the SCM Agreement). EC, FWS, para. 723, referring to the Draft Text by the Chairman, 2 November 1990, MTN/GNG/NG10/W/38/Rev. 2, p.1.

[3836] EC, SWS, paras. 333 and 339.

[3837] EC, SWS, para. 333.

[3838] EC, SWS, para. 340.

on its own, because the existence of limitations on use or access to the infrastructure provided does not effect the general character of the infrastructure, but only the question of whether there is any benefit to the recipient in a limited or exclusive right of use or access.[3839]

7.1020 The United States contends that the public-policy-focused approach suggested by the European Communities' argument does not comport with the ordinary meaning of the term "general infrastructure", read in context and in light of the object and purpose of the SCM Agreement.[3840] In the United States' view, the European Communities' position would create an extremely broad exception, undercutting the basic rule that a subsidy may consist of government-provided goods or services that confer a benefit.[3841] The United States maintains that if any grant of infrastructure were deemed to be general infrastructure, so long as it was "fulfilling a public policy objective", then virtually every grant of infrastructure would be excluded from the SCM Agreement's definition of "subsidy."[3842] According to the United States, the phrase "general infrastructure" in Article 1.1(a)(1)(iii) cannot be interpreted to include any infrastructure "fulfilling a public policy objective" because that would render redundant the word "general".[3843]

(ii) Arguments of Third Parties

Australia

7.1021 Australia notes that Article 1.1(a)(1)(iii) of the SCM Agreement carves out "general infrastructure" from the definition of a "financial contribution". For Australia "general infrastructure" in this context means the provision, by government, of goods and services that are generally available or multi-user. Notwithstanding the carve-out of "general infrastructure" from sub-paragraph (iii), Australia considers that the Panel should examine whether a benefit has been conferred by government. Australia notes that Article 14(d) of the SCM Agreement provides the standard for determining whether the provision of goods or services confers a benefit, and asserts that if the provision of infrastructure relieves an enterprise of a cost it would otherwise have to pay, then it should be considered that a subsidy exists. The facts and circumstances surrounding the provision of "general infrastructure" need to be examined to determine whether the provision of infrastructure confers a benefit to an enterprise. Australia offers the following example by way of illustration: in establishing an industrial park, a government may provide general infrastructure to the site. However, it is necessary to assess whether there will be more than one enterprise located on the site. If there will only be a single enterprise then, in Australia's view, the industrial park cannot be deemed to be general infrastructure. In addition, Australia does not consider that the mere fact that a government creates infrastructure for public policy reasons in order to "enable members of the public at large"[3844] (e.g., combating unemployment, fostering economic development, raising living standards) necessarily makes it "general infrastructure".[3845]

7.1022 In response to questions from the Panel, Australia asserted that it is not possible to exhaustively list factors that are relevant to the determination as to whether infrastructure is "general" for purposes of Article 1.1(a)(1)(iii), but considered that one relevant factor is whether the infrastructure is for exclusive or dominant use by a particular enterprise or enterprises, and that the question must be addressed on a case-by-case basis, taking into account all the relevant facts and circumstances. Australia further commented that while the Article 2 specificity test is separate and

[3839] EC, SWS, para 340.
[3840] US, SWS, para. 306.
[3841] US, SWS, para 307.
[3842] US, SWS, para 307.
[3843] US, SWS, para 308.
[3844] Australia, Third Party Submission, para. 54, referring to EC, FWS, paras. 716 and 724.
[3845] Australia, Third Party Submission, paras. 53-54.

BCI deleted, as indicated **[***]**

distinct, the concept of specificity may be relevant in determining whether infrastructure is of a general nature.[3846] Australia noted that, in assessing whether limiting the provision of goods or service only to certain persons or entities might still constitute "general infrastructure", one relevant consideration may be the nature of the infrastructure provided, e.g., whether the infrastructure provided allows for its use by a number of entities. In Australia's view, any such limitation would tend to militate against a determination of "general infrastructure". Australia also suggested that the provision of infrastructure, and the terms and conditions attached to use of infrastructure are separate questions, e.g., in the establishment of an industrial park involving the provision of goods and services, the nature of the infrastructure provided may be a separate consideration by government from the terms and conditions by which entities make use of the industrial park.[3847]

Brazil

7.1023 Brazil considers that, to give full effect to the text of the SCM Agreement, if the Panel finds that a government provides a financial contribution under Article 1.1(a)(1)(iii) of the SCM Agreement in the form of non-general infrastructure and determines that such contribution confers a benefit, it must also determine whether such subsidy is specific under Article 2 of the SCM Agreement. In Brazil's view, the Panel should not interpret the relevant provisions to preclude the possibility that there may be infrastructure that is not "general" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement and that is also not specific within the meaning of Article 2 of the SCM Agreement. Such infrastructure may not be "general" because access is limited to certain entities based on *de jure* or *de facto* conditions, such as, for example, requirements in relation to the licensing and qualification of users, quotas on total use, or restrictions intended to protect public health and safety or the environment. However, Brazil considers that a finding that the provision of this non-general infrastructure constitutes a subsidy does not necessarily mean that the subsidy is specific within the meaning of Article 2 of the SCM Agreement. In Brazil's view, the Panel must conduct an objective assessment of the facts to determine whether the provision of this infrastructure is *de jure* or *de facto* specific.[3848]

7.1024 In Brazil's view, infrastructure to which access is *de jure* or *de facto* limited to certain persons or entities would normally not constitute "general infrastructure" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. The fact that particular infrastructure is used predominantly or disproportionately by certain users (and other users do not face any restrictions on access) would normally not preclude a finding that the infrastructure is "general" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. Brazil considered that the Panel should make its determination regarding whether limitations on access indeed exist, however, on a case-by-case basis.[3849]

Canada

7.1025 Canada agrees with the European Communities that the term "infrastructure" denotes "basic goods and services in a society that underpin its economic performance".[3850] Canada notes that the word "general" has a number of ordinary meanings, the most relevant of which, in its view, is "*not specifically limited in application*; relating to a whole class of objects, cases, occasions, etc".[3851] (emphasis added). Canada considers that, for something to be transformed from "general" to non-

[3846] Australia, Answer to Panel Third Party Question 8.
[3847] Australia, Answer to Panel Third Party Question 9.
[3848] Brazil, Answer to Panel Third Party Question 8, paras. 13-14.
[3849] Brazil, Answer to Panel Third Party Question 9, para. 15.
[3850] Canada, Third Party Submission, para. 32, referring to EC, FWS, para. 714.
[3851] Canada, Third Party Submission, para. 32, citing, *Shorter Oxford English Dictionary*, 5th ed. (Oxford: Oxford University Press, 2002), pp. 1081-82, Exhibit CDA-1.

general or restricted application, the limitation must be clearly specified. Canada considers this understanding of "general" is confirmed by the negotiating history of the SCM Agreement. Canada thus considers that, that where a government provides infrastructure and does not specifically limit its availability to the public, there is no financial contribution for the purposes of the SCM Agreement. Moreover, Canada argues that context supports a broad interpretation which presumes that government-provided infrastructure is general unless a government specifically limits its use so that it is not available to the general public. In this regard, Canada notes that, by virtue of its position in Article 1 of the SCM Agreement, this is the only exclusion in that Agreement where the legal analysis regarding the SCM Agreement's application to a government measure can be completed without any consideration of whether the measure confers a benefit. Second, Canada considers that the fact that general infrastructure is excluded indicates that the drafters' primary purpose was to ensure that exclusion, rather than ensuring that certain infrastructure was included. Finally, Canada asserts that the object and purpose of the broader provision supports a presumption that government-provided infrastructure is general unless its availability is specifically limited.[3852]

7.1026 Canada argues that because "subsidy" and "specificity" determinations constitute discrete and sequential findings under the SCM Agreement, it follows that a finding under Article 1.1(a)(1)(iii) that government-provided infrastructure is not general, cannot be equated with a finding under Article 2.1 of the Agreement that a resulting subsidy is specific, as this would introduce an element of redundancy to the analysis. Therefore, Canada considers that the test for *de facto* specificity in Article 2.1(c) of the SCM Agreement is not the relevant test in an analysis under Article 1.1(a)(1)(iii), as the application of the *de facto* specificity test to government-provided infrastructure available to the public would give rise to systemic inequities, disadvantaging Members whose lack of national or regional economic diversification results in predominant use of government-provided infrastructure by certain enterprises.[3853]

7.1027 Canada also argues that improvements to general infrastructure that benefit a limited number of users do not change the status of that infrastructure so long as it remains generally available to the public. Canada asserts that the public reasonably expects that a government will maintain general infrastructure in the public interest, and that improvements to general infrastructure that initially benefit a single or limited number of users frequently end up benefiting new economic actors and activities that may not have been foreseen when the improvements were made. On this basis, Canada asserts that the United States has identified no limitations on the use by the general public of roads related to the Aéroconstellation industrial site as a result of the improvements, suggesting that these are therefore not "the provision of goods or services other than general infrastructure" within the meaning of Article 1.1(a)(1)(iii).[3854] Canada notes that different considerations are raised by the Bremen runway extension, as specific restrictions on the use of a distinguishable element of infrastructure to certain enterprises could, in appropriate circumstances, justify separate consideration of that element, whether or not it is attached or otherwise connected to general infrastructure.[3855] In contrast, Canada considers that temporary limitations on the use of infrastructure to certain users do not necessarily deprive that infrastructure of its general nature if there is a reasonable expectation that general use will resume in the foreseeable future (e.g., an exclusive use agreement for a period before public use is practicable or covering a particular season when public use is not practicable). A temporary right of exclusive use may, however, require independent consideration to determine if that conferral of an exclusive right itself constitutes provision of a good (or service).[3856]

[3852] Canada, Third Party Submission, para. 32.
[3853] Canada, Third Party Submission, paras. 33-34.
[3854] Canada, Third Party Submission, para. 36.
[3855] Canada, Third Party Submission, para. 37.
[3856] Canada, Third Party Submission, para. 38.

BCI deleted, as indicated **[***]**

7.1028 On the basis of this analysis, Canada proposes that government-provided infrastructure should be presumed to be general infrastructure unless the evidence demonstrates that a government has limited its use exclusively to certain users; that Government-provided infrastructure that a government has reserved for exclusive use by certain users is not "general" for the purpose of Article 1.1(a)(1)(iii) of the SCM Agreement; that the fact that certain enterprises are significant or predominant users of government-provided infrastructure does not establish that such infrastructure is not "general" for the purposes of Article 1.1(a)(1)(iii) of the SCM Agreement; and that government-provided infrastructure which is limited to certain enterprises may still qualify as "general" for the purpose of Article 1.1(a)(1)(iii) if the limitations on its use are temporary and where general use is likely to resume in the foreseeable future.[3857]

7.1029 In response to a question from the Panel, Canada emphasized that the focus of the inquiry in Article 1.1(a)(1)(iii) is on what a government actually "provides" to a recipient. In cases where a government has provided something less than complete and exclusive rights to a given item of infrastructure, the focus of the determination whether the government has provided a financial contribution to a recipient should not be on the totality of the infrastructure, but on the part of it that is actually being provided by the government to the recipient. In the case of the Mühlenberger Loch facility, for example, Canada considers that the lease agreements establish what has been provided to Airbus and therefore provide an appropriate basis for determining whether Airbus has received terms consistent with those it would have received from comparable commercial leases in the prevailing market.[3858]

Japan

7.1030 Japan considers that Article 1 of the SCM Agreement does not indicate a presumption that "infrastructure" is "general" unless it is specifically provided for limited persons or its use is specifically limited to such persons. Japan believes that being "specific" as an antonym of being "general" could help inform the determination of whether infrastructure is "general" for the purpose of Article 1.1(a)(1)(iii), in light of the ordinary meaning of the term "general". Japan further notes that the notion of being "specific" does not necessarily exclude the concept of "specificity" prescribed under Article 2 of the SCM Agreement.[3859]

(iii) Evaluation by the Panel

7.1031 We begin our analysis with the text of the treaty. We recall that Article 3.2 of the DSU provides that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31.1 of the Vienna Convention on the Law of Treaties ('Vienna Convention'),[3860] which is generally accepted as such a customary rule, provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.1032 We further recall that, pursuant to Article 32 of the Vienna Convention, if interpretation of the text of a provision in accordance with Article 31 of the Vienna Convention leaves the meaning of that provision "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable",

[3857] Canada, Third Party Submission, para. 39.
[3858] Canada, Answer to Panel Third Party Question 9, para. 9.
[3859] Japan, Answer to Panel Third Party Question 8.
[3860] (1969) 8 International Legal Materials 679.

BCI deleted, as indicated **[***]**

recourse may be had to the supplementary means of treaty interpretation within the meaning of Article 32 of the Vienna Convention. [3861]

7.1033 Article 1 of the SCM Agreement provides, in pertinent part:

> "1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), *i.e.*, where: ...
>
> > (iii) a government provides goods or services other than general infrastructure, or purchases goods; ...
>
> and
>
> (b) a benefit is thereby conferred."

7.1034 In this case, it is not disputed that the alleged financial contributions in question were provided by a "government" within the meaning of Article 1.1(a)(1). In addition, the European Communities does not dispute that the measures in question constitute the "provision" of "goods and services", in the form of "infrastructure", within the meaning of Article 1.1(a)(1)(iii). The disagreement between the parties centers on the meaning of "**general** infrastructure" in the context of Article 1.1(a)(1)(iii), and in particular on the factors or circumstances that distinguish between infrastructure which is "general" and infrastructure which is "other than general". In order to establish a framework for our analysis of the facts in this dispute, we must therefore first consider the meaning of the term "general infrastructure".

7.1035 The meaning of the term "general infrastructure" has not been considered in any detail in any WTO dispute. In *US – Softwood Lumber IV*, the Appellate Body emphasized that it is not the provision of "infrastructure" *per se* that is carved out of the scope of a financial contribution under Article 1(a)(1)(iii), but the provision of "general infrastructure" -- that is, infrastructure of a "general" nature:

> "In Article 1.1(a)(1)(iii), the only explicit exception to the general principle that the provision of "goods" by a government will result in a financial contribution is when those goods are provided in the form of "general infrastructure". In the context of Article 1.1(a)(1)(iii), all goods that might be used by an enterprise to its benefit—including even goods that might be considered *infrastructure*—are to be considered "goods" within the meaning of the provision, unless they are infrastructure of a *general* nature."[3862] (emphasis original)

However, this statement does not directly address the central question at issue here, which is how to determine whether the particular provisions of infrastructure by governments in this case are the provision of infrastructure that is "other than general infrastructure", and thus whether there has been a financial contribution by a government.

7.1036 Dictionaries define the term "infrastructure" as, *inter alia*, "installations and services (power stations, sewers, roads, housing, etc.) regarded as the economic foundation of a country,"[3863] the

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[3861] *Vienna Convention*, Article 32(a) and (b).
[3862] Appellate Body Report, *US – Softwood Lumber IV*, para. 60.
[3863] *New Shorter Oxford English Dictionary*, (1993).

BCI deleted, as indicated **[***]**

"underlying foundation or basic framework (as of a system or organization),"[3864] and the "system of public works of a country, state, or region."[3865] The term "general" is defined as "including, involving, or affecting all or nearly all the parts of a (specified or implied) whole as a territory, community, organization, etc.; completely or nearly universal; not partial, particular, local, or sectional"[3866] and "involving, applicable to, or affecting the whole; involving, relating to, or applicable to every member of a class, kind, or group".[3867] We consider that the term "**general** infrastructure", taken in its ordinary and natural meaning, refers to infrastructure that is not provided to or for the advantage of only a single entity or limited group of entities, but rather is available to all or nearly all entities. In our view, this interpretation is consistent with the ordinary meaning of the term "general" when used to modify the word "infrastructure." However, we consider that it is difficult if not impossible to define the concept of "general infrastructure" in the abstract.[3868]

7.1037 For us, the existence of limitations on access to or use of infrastructure, whether *de jure* or *de facto*, is highly relevant in determining whether that infrastructure is "general infrastructure". However, we are not persuaded by the United States' argument that the existence of *de jure* or *de facto* limitations on access or use is the **only** legally relevant consideration, and one that will always be determinative. We find no support for such a test in the words of Article 1.1(a)(1)(iii), and we see no reason why other considerations concerning the provision of the infrastructure in question should be categorically excluded from the analysis. In our view, such additional factors could include, *inter alia*, the circumstances under which the infrastructure in question was created and the nature and type of infrastructure in question.

7.1038 We do not, however, consider all of the additional factors relied upon by the European Communities in this case to be relevant. The European Communities proposes three factors as relevant to determining whether infrastructure is "general":

> "(i) the substance of government action related to basic installations, facilities and services needed to support social as well as economic development; (ii) their public policy objective and (iii) their designation for public use be either being publicly

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[3864] Merriam-Webster Dictionary online.
[3865] Merriam-Webster Dictionary online.
[3866] *New Shorter Oxford English Dictionary*, (1993).
[3867] Merriam-Webster Dictionary online.
[3868] Other disputes involving questions of interpretation of Article 1.1(a)(1) of the SCM Agreement have similarly not resulted in precise or absolute definitions of terms, in the abstract. Thus, the Panel in *US – FSC*, para. 6.7, addressing the definition of "otherwise due" in Article 1.1(a)(1)(ii) noted that "the application of the concept of "otherwise due" in other disputes would require panels to apply their **best judgement** on a **case-by-case** basis" and at paragraph 7.93 observed "In the foregoing sections, we have concluded that whether revenue foregone is "otherwise due" is to be determined on the basis of an examination of the fiscal treatment that would be applicable "but for" the measures in question. Of course, as in other areas under the WTO Agreement, the application of this test requires panels to apply their **best judgement** on a **case-by-case** basis." Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*"), WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, 1675 (emphasis added). Similarly, in *US – DRAMS*, para. 116, the Appellate Body acknowledged the difficulty in formulating precise, abstract definition of "entrusts or directs" in the context of Article 1.1(a)(1)(iv)("It may be difficult to identify **precisely**, **in the abstract**, the types of government actions that constitute entrustment or direction and those that do not. The particular label used to describe the governmental action is not necessarily dispositive. Indeed, as Korea acknowledges, in some circumstances, "guidance" by a government can constitute direction. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction **will hinge on the particular facts of the case.**" (emphasis added, footnote omitted) Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* ("*US – Countervailing Duty Investigation on DRAMS*"), WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131

> accessible, by enabling access by members of the public at large, or by providing common goods to the public."[3869]

In our view, the first two factors proposed by the European Communities do not provide useful guidance in distinguishing general infrastructure from infrastructure which is not general, and certainly cannot be determinative. The provision of any infrastructure by a government will generally relate to installations, facilities and services needed to support social or economic development of the polity, and will have some public policy objective. Indeed, it would be expected that governments do not, as a rule, undertake to grant specific subsidies, whether in the form of providing infrastructure or otherwise, without such objectives. Thus, to base the exclusion of "general" infrastructure from the scope of the SCM Agreement disciplines on these considerations would result in an exception that swallows the principle to which it pertains: that the provision of goods or services **other** than general infrastructure constitutes a financial contribution by a government. We also agree with the United States, and consider that the phrase "general infrastructure" in Article 1.1(a)(1)(iii) cannot be interpreted to include all infrastructure "fulfilling a public policy objective", because that would render redundant the word "general."

7.1039 Thus, we do not consider that there is any form or type of infrastructure which is inherently "general" *per se*. For instance, in our view, such things as railroads or electrical distribution systems do not necessarily constitute "general infrastructure".[3870] Rather, the determination whether the provision of the good or service in question is "general infrastructure" or not must be made on a case-by-case basis, taking into account the existence or absence of *de jure* or *de facto* limitations on access or use, and any other factors that tend to demonstrate that the infrastructure was or was not provided to or for the use of only a single entity or a limited group of entities. Such factors may relate to the circumstances surrounding the creation of the infrastructure in question, consideration of the type of infrastructure, the conditions and circumstances of the provision of the infrastructure, the recipients or beneficiaries of the infrastructure, and the legal regime applicable to such infrastructure, including the terms and conditions of access to and/or limitations on use of the infrastructure. If an evaluation of relevant facts concerning such factors demonstrates that the infrastructure was provided to a single entity or a limited group of entities, then we believe it cannot properly be considered "general" infrastructure, and consequently falls within the scope of Article 1.1(a)(1) of the SCM Agreement, necessitating further analysis to determine whether a subsidy exists.

7.1040 We recognize that our interpretation may involve consideration of facts that may be relevant to a determination of specificity under Article 2. However, we note that the question being addressed for purposes of Article 1.1(a)(1)(iii) is not whether the government is limiting access to a subsidy to certain enterprises, but whether it is providing a good or service in the form of general infrastructure or not, and thus whether or not there is a financial contribution by a government, such that a subsidy may exist. In our view, the fact that similar considerations are relevant to the separate inquiry required under Article 2 does not preclude their relevance to the question of determining whether infrastructure is "general".

7.1041 Our conclusion that the determination whether the provision of the good or service in question is "general infrastructure" or not must be made on a case-by-case basis, based on all the facts and circumstances concerning relevant factors, flows from the ordinary meaning of the terms of Article 1.1(a)(1)(iii), and is supported by consideration of their immediate context. As the Appellate Body has observed, Article 1.1(a)(1)(iii) concerns the provision of goods by a government that might

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[3869] EC, Answer to Panel Questions 186 and 221, paras. 148 and 555, respectively

[3870] Take as an extreme example a 2 kilometer stretch of railway from a mine to a mineral processing plant, used for transporting raw ore for processing, on land owned by the mining company. It seems clear to us that the provision by a government of such a railway cannot properly be considered "general infrastructure" simply because it is a railway.

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be used by an enterprise to its benefit. In addition, this interpretation is consistent with Articles 1.1(b) and 2, insofar as it does not blur distinct legal elements of "financial contribution", "benefit", or "specificity".[3871] Moreover, Articles 1.1(a)(1)(i) and (ii) of the SCM Agreement each illustrate specific instances of financial contributions by examples. Thus, Article 1.1(a)(1)(i) illustrates the concept of a "direct transfer of funds" by referring to "*e.g.,* grants, loans, and equity infusion", and illustrates the concept of a "potential direct transfer of funds or liabilities" by referring to "*e.g.,* loan guarantees". Article 1.1(a)(1)(ii) illustrates the concept of a "government revenue that is otherwise due ... foregone or not collected" by referring to "*e.g.,* fiscal incentives such as tax credits". The absence of any examples of "general infrastructure" suggests to us that the negotiators of the SCM Agreement did not consider that the concept could be illustrated with concrete examples, otherwise they would have done so, as they did with the other concepts in the preceding two provisions. Moreover, the practical impossibility, in our view, of classifying every type of infrastructure as "general" or "other than general", in the abstract, compels this conclusion. Finally, interpreting the term "general infrastructure" so as to exclude from the scope of Article 1 the provision of infrastructure that is provided to or for the benefit of a single entity or a limited group is consistent with the object and purpose of the SCM Agreement: *inter alia*, to establish disciplines on the use of government intervention in the form of subsidies that distort, or have the potential to distort, international trade.[3872] In our view, the provision of "general infrastructure" is excluded from the disciplines of the SCM Agreement because the general nature of qualifying infrastructure implies a lack of such distortion.

7.1042 The European Communities does acknowledge the relevance of "clearly specified" limitations on use of, or government specified limitations on use of, the infrastructure provided to the determination whether it is "general" infrastructure.[3873] Thus, both parties apparently accept that *de jure* limitations on use is a critical, potentially determinative, factor in establishing whether infrastructure provided by a government is "general infrastructure". However, the European Communities argues that merely because the public does not actually use the infrastructure provided, or because use is in fact limited to a single entity does not suffice to qualify the infrastructure in question as other than "general" infrastructure.[3874] The European Communities considers that two steps must be distinguished: first, a government may build general infrastructure, and second, a government may limit the use of that general infrastructure to certain companies. In the European Communities' view, the second step may make the infrastructure non-general (depending on an assessment of benefit), but does not invalidate the fact that the first step constitutes provision of general infrastructure. The European Communities argues that the second step must be evaluated on

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[3871] As noted, merely because the separate analysis under Article 2 may involve consideration of the same facts or similar factors as the determination whether infrastructure is "general" does not in our view render Article 2 redundant.

[3872] Panel Report, *Canada – Aircraft*, WT/DS70/R, para. 9.119.

We note in this regard that, during the negotiation of the SCM Agreement, the European Communities proposed that such measures as education, culture, health, social welfare and general infrastructure be treated as "non-actionable". The European Communities explained its rationale as follows:

> "Action in these fields may have an effect on the economy of a country, and thus on the international economy, but they are not normally subsidies, because they merely contribute to setting the terms and conditions of a country's economic and business environment. {T}herefore they do not alter the competitive position of firms."

Elements of the Negotiating Framework, Submission by the European Community, MTN.GNG/NG10/W/31 (27 November 1989) p. 8.

We consider that subsidies that "alter the competitive position of firms" do, in fact, distort or have the potential to distort, international trade, and thus properly fall within the scope of the SCM Agreement disciplines.

[3873] EC, SWS, para. 333.

[3874] EC, SWS, para. 333.

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its own,[3875] because the existence of limitations on use or access to the infrastructure provided does not effect the general nature of the infrastructure.[3876] The United States contends that where the government creates infrastructure adapted to the particular needs of one company and then provides the infrastructure to that company for its exclusive or preferential use, it is not general infrastructure, and it is subject to the SCM Agreement rules.[3877]

7.1043 Given our view that there is no infrastructure that is inherently "general" *per se* – a proposition with which both parties appear to agree[3878] – it logically follows for us that it is not possible to determine whether certain infrastructure is "general" or not without assessing whether there exist any *de jure* or *de facto* limitations on access to or use of the infrastructure. That is because, in our view, whether access to or use of infrastructure is actually limited is a highly relevant consideration in determining whether the infrastructure in question is "general". Thus, we are not convinced by the European Communities' argument that a distinction must be drawn between, and a two-step analysis conducted in respect of, the "provision" of infrastructure in the sense, as we understand it, of creating the infrastructure in question, and subsequent limitations on use or access. This would imply that the "general" nature of some infrastructure is inherent and that circumstances surrounding the provision of that infrastructure do not change its general nature. We, however, consider that if an evaluation of the circumstances surrounding the creation of the infrastructure demonstrates that it was provided to a single entity or a limited group of entities, this supports the conclusion that the infrastructure created is not properly considered general. This is, in our view, particularly the case where the infrastructure in question was created for the particular needs of the entity or group which has the right to access or use of that infrastructure.

7.1044 Finally, if it is correct, as we have concluded, that there is no infrastructure that is "general" *per se*, then it also follows logically, in our view, that certain infrastructure may be "general" within the meaning of Article 1.1(a)(1)(iii) at some point in time, but not at another. Thus, for instance, we consider that a government may provide infrastructure that is not general when first provided, because use or access to it is limited, but may subsequently make that same infrastructure available for public use or access, such that it would then become provision of general infrastructure.[3879] The opposite situation may also obtain – a government may provide general infrastructure, and subsequently limit use or access to it, either permanently or for a period of time, during which it would, in our view, cease to be "general" infrastructure. Such situations would have to be carefully evaluated, based on all the relevant facts in each case, in order to determine whether the provision of the infrastructure in question is general or not, and whether that determination changes over time. Thus, we consider that the proper point of reference in determining whether a provision of goods or services is "other than general infrastructure" is the time when the act of provision that is alleged to constitute a subsidy takes place. That may be at the time the infrastructure in question is created, in the sense of being brought into existence, or a subsequent point in time, when the conditions surrounding the provision of that infrastructure are changed by the government providing it. Moreover, the determination of

[3875] EC, SWS, para. 340.
[3876] EC, SWS, para. 340.
[3877] US, SWS, para 311.
[3878] We note in this regard that the European Communities has referred to public roads as "the example *par excellence* of a work of 'general infrastructure' within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement." EC, FWS, para. 940. The European Communities also argues that the question of whether the infrastructure is "basic" to be relevant, but recognizes the relevance of public access. EC, Answer to Panel Question 184 at para 131. However, we do not, overall, understand the European Communities to be arguing that certain types of infrastructure are *per se* general infrastructure. *See,* EC, Answer to Panel Question 186, paras. 148-149.
[3879] Of course, any such changes would have to be evaluated on the basis of the facts – it seems clear that a purely formalistic change cannot be determinative. Returning to our extreme example from footnote 3870 above, merely that the government providing the railway described makes it *de jure* available to everyone would change nothing, if in fact no one else can or does use it.

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whether a provision of goods or services is "other than general infrastructure" may involve a time period of limited or indefinite duration.[3880]

7.1045 We now turn to the alleged subsidies concerning the Mühlenberger Loch industrial site, the Bremen airport runway extension and associated noise reduction measures, and the ZAC Aéroconstellation site. We address first in each case the question of whether the measure in question is one of general infrastructure, in which case we will conclude it does not constitute a financial contribution within the meaning of Article 1.1 of the SCM Agreement. However, if we conclude that any of these three measures is not one of general infrastructure, we will go on to address whether a benefit is conferred upon Airbus by the subsidy in question, and to the extent relevant, specificity.

(c) Mühlenberger Loch

7.1046 According to the United States, when Airbus launched the A380, it decided to establish two assembly facilities, one at Toulouse and one at Hamburg, where Airbus already had existing facilities, so as to utilize synergies with the existing facilities. The United States asserts that the existing Hamburg facilities, located at Finkenwerder, had no real potential for expansion, as the site was on a peninsula in the Elbe river, surrounded by wetlands.[3881] The United States argues that the transformation of a portion of these wetlands, in the "Mühlenberger Loch" and "Rüschkanal", into an industrial site, including building flood protection, erecting a quay with Roll-on/Roll-off installations, and building other facilities and infrastructure required by Airbus on the site, and the provision of that site to Airbus for less than adequate remuneration, is a financial contribution that confers a benefit on Airbus within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.

7.1047 The European Communities argues in its request for preliminary ruling that the United States' request for establishment with regard to the alleged subsidy in connection with the Hamburg facilities lacks the requisite specificity concerning the measure subject to challenge. The European Communities considers that the United States' first written submission continues to fail to reveal exactly what measure is subject to the United States' challenge.[3882] The European Communities contends that it is unclear whether the United States is concerned with the "creation" of the industrial site, *i.e.*, the turning of the wetlands into an industrial site, or the "provision" of the site to Airbus, including its creation and the allegedly inadequate remuneration received.[3883]

7.1048 According to the European Communities, the Mühlenberger Loch project includes three distinct elements: (1) turning wetlands into usable land; (2) building flood protection measures; and (3) building special-purpose facilities on the reclaimed usable land. The European Communities asserts that it is uncertain which of these measures is the subject of the United States' challenge.[3884] Assuming that the United States challenges the turning of the wetlands into usable land and the lease of this land and the special-purpose facilities to Airbus Germany, the European Communities argues that the turning of the wetlands into usable land and the provision of flood protection constituted "general infrastructure" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement, and that these measures do not constitute a subsidy.[3885] The European Communities further argues that Hamburg, the owner of the land, receives a market-based rent from Airbus Germany for the lease of

[3880] The provision of infrastructure the use of or access to which is limited in time may complicate the assessment of the benefit, if any, of the measure in question, but that is a different issue from determining whether the infrastructure is general or not.

[3881] US, FWS, para. 423.

[3882] EC, FWS, para. 746.

[3883] EC, FWS, para. 747. We have previously explained our reasons for rejecting the European Communities' arguments in this regard in our preliminary ruling, *see*. paragraphs 7.153, 7.155 and 7.158 above.

[3884] EC, FWS, para. 749.

[3885] EC, FWS, para 750.

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the land and the special-purpose facilities, which thus does not confer any benefit on Airbus Germany within the meaning of Article 1.1(b) of the SCM Agreement.[3886]

(i) Factual background

7.1049 In 2000, the City of Hamburg undertook to turn 20 percent of the wetlands in the Mühlenberger Loch and Rüschkanal, adjacent to Airbus' existing facilities in Finkenwerder, into usable land. Hamburg also undertook to construct a number of special-purpose facilities on the reclaimed land, and built dykes for the purpose of flood protection.[3887] Hamburg set up a company, the *Realisierungsgesellschaft GmbH* ("ReGe") for the management of the land reclamation project and the special-purpose facilities.[3888] On completion of the project, Hamburg transferred ownership of the land and facilities to a government-owned entity, *Projektierungsgesellschaft Finkenwerder GmbH & Co. KG* ("ProFi").[3889] ProFi, the titleholder of the properties, and Airbus Germany entered into a series of lease agreements for the land and the special-purpose facilities.[3890]

7.1050 As the Mühlenberger Loch was a protected wildlife sanctuary, in order to go ahead with the land reclamation, the German government was obliged to, and did, apply for approval from the European Commission to undertake the reclamation project.[3891] On 19 April 2000, the Commission, conditional upon the undertaking of compensatory measures, approved the project, finding that there were imperative reasons of public interest for the project, including job creation.[3892] As compensation, Hamburg was obliged to provide substitute wetland areas elsewhere in Germany.[3893] It was also required to defend against lawsuits by environmental groups seeking to halt the project.[3894]

7.1051 Work on draining and filling the land began in February 2001, and was carried out in stages.[3895] The city of Hamburg upgraded the height of dykes around the existing Airbus facility, and built new dykes to protect the reclaimed land.[3896] Hamburg also constructed special-purpose facilities on the reclaimed land, consisting of (1) a quay facility, (2) a sluice and pump building, (3) a drainage ditch, (4) a roll-on roll-off ("RoRo") facility, and (5) a *sternfender*.[3897] The European Communities asserts that the aggregate cost of land-filling, flood protection, and special-purpose facilities, was EUR 693.679 million,[3898] asserting that the figure cited by the United States for this work, {EUR 751 million} is an earlier, now-outdated 2003 estimate.

7.1052 As noted above, the City of Hamburg - through ProFi - leases the reclaimed land and special-purpose facilities to Airbus Germany. The Lease agreement for the reclaimed land indicates that the

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[3886] EC, FWS, para. 751.

[3887] EC, FWS, paras. 752-753.

[3888] EC, FWS, para. 753, citing Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 16/4734, Exhibit EC-545, p. 12..

[3889] EC, FWS, para. 753, citing Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 16/4734, Exhibit EC-545, p. 12.

[3890] EC, FWS, para. 753, citing Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 16/4734, Exhibit EC-545, p. 13.

[3891] EC, FWS, para. 754.

[3892] Commission decision of 19 April 2000, Exhibit EC-547 (BCI) p. 3.

[3893] US, FWS, para. 425, citing A REA, A380-Werkserweiterung im Mühlenberger Loch – Eine Bilanz, at 20, 23 (10 August 2004), Exhibit US-182

[3894] US, FWS, para. 425, citing *Injunction Sought in Germany's Highest Court to Stop Airbus' Destruction of Protected Habitat*, PR Newswire, Hamburg (25 April 2001) Exhibit US-185.

[3895] EC, FWS, para. 755.

[3896] EC, FWS, para. 756.

[3897] EC, FWS, para 757. Hamburg also constructed extensions to the existing runway at the Finkenwerder site. *Id.* citing Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 16/4734, Exhibit EC-545, p. 3.

[3898] Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 18/4115, p. 8, Exhibit EC-548.

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lease is for **[***]**.[3899] The Lease Agreement establishes an annual rent of EUR 3,60/m^2, to be adjusted annually on the basis of changes in the German consumer price index. The lease foresees a gradual increase in the total rent, as successive parcels of the reclaimed land are taken over by Airbus Germany, starting with the first parcel of land subject to the lease on 1 October 2002, with possession of the whole area scheduled for the end of 2009.[3900] As the reclaimed land was subject to settling, and thus was not immediately fully usable by Airbus Germany, an initial reduction in the rent was agreed, with the rent to be gradually increased to the full amount as the land fully settled.[3901] The full rent of EUR 5,156,588 per annum will therefore only be achieved gradually.[3902]

7.1053 ProFi and Airbus Germany also concluded four lease agreements for six special-purpose facilities.[3903] The term of each of these agreements is 20 years. According to the European Communities, the amount of rent is set to provide the City of Hamburg with a return of 6.5 % on its investment in each of the facilities, including a return on capital for the portion of each facility's economic life depleted during the 20 year lease term.[3904] The annual rent over the 20 year period for the special purpose facilities is EUR 5,619,200, again, to be adjusted upwards in line with inflation.[3905] The European Communities argues that these rental amounts for the land and the special-purpose facilities are consistent with market conditions in Hamburg.[3906]

(ii) Arguments of the parties

United States

7.1054 The United States notes that Article 1.1(a)(1)(iii) of the SCM Agreement includes the provision of goods or services other than general infrastructure among the types of measures that constitute financial contributions. The United States argues that the provision of the site to Airbus, including the transformation of the Mühlenberger Loch into land fit for production facilities, the putting into place and provision of a flood protection system, a new quay wall, an extension of the runway, other facilities and infrastructure on the site, etc., constitutes the provision of "goods or services other than general infrastructure," and thus constitutes a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement.[3907]

7.1055 The United States also argues that the provision of the Hamburg-Finkenwerder site to Airbus confers a benefit on Airbus within the meaning of Article 1.1(b) of the SCM Agreement, because Hamburg created a site that the market would not have created, and provided that site to Airbus for less than adequate remuneration.[3908] The United States asserts that Hamburg spent approximately EUR 751,000,000 to create the 1.4 square kilometer (or 1,400,000 square meter) site, an investment of approximately EUR 536.43 per square meter. Relying on a report by the German real estate surveyor firm Dr. Keunecke & Stoehr, the United States asserts that the fair market value for land in the

[3899] Exhibit EC-551 (BCI). **[***]**.
[3900] EC, FWS, para. 760.
[3901] EC, FWS, para. 761.
[3902] EC, FWS, para. 761, citing Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 18/33, pp. 6, Annex 1, Exhibit EC-562.
[3903] EC, FWS, para. 762. **[***]** Addendum No. 1, Exhibit EC-552 (BCI); **[***]** Addendum No. 3, Exhibit EC-554 (BCI), **[***]** Addendum No. 7, Exhibit EC-558 (BCI); **[***]** Addendum No.8, Exhibit EC-559 (BCI).
[3904] EC, FWS, para. 762, citing Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 18/33, pp. 6-7, Exhibit EC-562.
[3905] EC, FWS, para. 763, citing Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 18/33, p. 7, Exhibit EC-562.
[3906] EC, FWS, paras. 764-771.
[3907] US, FWS, para 430.
[3908] US, FWS, para 431.

immediate vicinity of the Hamburg site in 2000, the year in which the government decided to create and develop the site, ranged between EUR 51.13 and EUR 61.36 per square meter.[3909] Therefore, according to the United States, the Hamburg government spent EUR 751,000,000 to create a site that was worth between EUR 71,600,000 and EUR 85,900,000.[3910] The United States maintains that a commercial investor in real property in Germany would not have made such an investment, and thus, if Airbus had wanted to expand its facilities at Hamburg-Finkenwerder, it would have had to spend the EUR 751,000,000 to create the site itself, thus significantly increasing the costs of the A380 project.[3911] Consequently, the United States argues, the Hamburg government's decision to create the land and provide it to Airbus confers a benefit on Airbus within the meaning of Article 1.1(b) of the SCM Agreement. The United States notes that a September 2000 report that the Hamburg government provided to the Hamburg Parliament analyzed the project under SCM Agreement rules and concluded that the project was a subsidy:

> "It is true that the improvements to the infrastructure of the area and its subsequent lease to AI is, in principle, a subsidy within the meaning of Article 1 (1) (iii) of the GATT Subsidy Agreement. ..."[3912]

7.1056 The United States asserts that its approach to analyzing the benefit to Airbus from the Hamburg project is virtually identical to the approach the European Commission uses to determine whether the sale of land constitutes state aid under EU state aid rules.[3913] In *Scott Paper SA Kimberly-Clark*, for example, the Commission explained that the sale of land does not confer an "advantage" under EU state aid rules if:

[3909] US, FWS, para. 432, citing Expert Opinion No. 27649/06, Benchmarks for Land Values concerning Hamburg Airbus Site "Mühlenberger Loch," Kreekslag 10, 21129 Hamburg Finkenwerder, 9 October 2006 (hereinafter "Keunecke Report"), Exhibit US-189. The relevant portion of the report is on page 5, Exhibit US-189). The United States notes that the office of Dr. Keunecke & Stoehr is one of the most respected real estate surveyors in Germany, whose two partners, Dr. Klaus-Peter Keunecke and Eberhard Stoehr, have been appointed and sworn in as public surveyors by the Berlin Chamber of Commerce for the appraisal of developed and undeveloped plots of real estate and of leases.

[3910] The United States observes that 1.4 million square meters at EUR 51.13 to EUR 61.36 per square meter equals EUR 71,582,000 to EUR 85,904,000. US, FWS, footnote 516. The United States further notes that the Hamburg government's own reports estimated that the land Hamburg created had a maximum value of EUR 61.35 per square meter, citing Hamburgische Bürgerschaft, Drucksache 16/4734, Mitteilung des Senats an die Bürgerschaft, at 12 (5 September 2000)., Exhibit US-183 (explaining that "all the parcels of land that are later to be leased, including those owned by the City of Hamburg and those that must still be acquired from the German Government, will be transferred to the GmbH & Co. DG as contributions in kind (fair market value of about DM 50 million based on a commercial land value of DM 120/m2)"). The United States converted the amount to Euros using the official Euro/DM conversion rate. Exhibit US-183.

[3911] In this sense, the United States maintains that the creation of the site is akin to a EUR 665-679 million grant to Airbus, since Airbus would have spent EUR 751 million to create a site worth only EUR 71.6-85.9 million. US, FWS, footnote 517.

[3912] US, FWS, para 441, citing Hamburgische Bürgerschaft, Drs. 16/4734, at 3 (in the original German, "Bei der infrastrukturellen Herrichtung der Fläche und der anschliessenden Vermietung an AI handelt es sich {…} grundsätzlich {…} um eine Subvention im Sinne des Artikel 1 Absatz 1 (iii) des GATT-Subventionsübereinkommens"), Exhibit US-183.

[3913] The United States observes that a government measure constitutes state aid under the EC state aid rules when it "confers an economic advantage on a recipient", and asserts that a requirement to show that a measure "confers an economic advantage on the recipient" is virtually identical to the SCM Agreement's requirement to show that a financial contribution confers a "benefit" on the recipient. Therefore, according to the United States, a DG-Competition finding that a particular measure is state aid is tantamount to a finding that the measure is a subsidy within the meaning of the SCM Agreement. US, FWS, footnote 518.

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> "a private investor, on the basis of forecast potential profitability and ignoring any social, regional or sectoral policy considerations, would have invested in the land and then sold the plot at the same price as that asked by the local authorities."[3914]

According to the United States, when the Hamburg authorities committed to spend EUR 751 million to transform a portion of the Mühlenberger Loch site into an industrial site, they knew the project would result in a loss of several hundred million Euro, an action a private investor would not have undertaken. Relying on the *Scott Paper SA Kimberly-Clark* decision, the United States argues that, by enabling Airbus to avoid spending the EUR 751,000,000 itself, the Hamburg authorities granted a subsidy conferring a benefit on Airbus.[3915]

7.1057 The United States asserts that another basis for determining whether the government is providing the infrastructure for less than adequate remuneration is to determine whether the rent Airbus is paying under the lease will allow Hamburg to recoup its investment plus a market-based rate of return. According to the United States, the Keunecke report explains that commercial investors in real estate in Germany expect to receive an annual return on their net investment (including financing costs) of between 9 and 12 percent.[3916] To obtain even a 9 percent return, the United States asserts that Hamburg would need to charge Airbus at least EUR 67.5 million per year in rent; to achieve a 12 percent return, the lease price would need to be set at over EUR 90 million per year.[3917]

7.1058 In its first written submission, the United States noted that European Communities and Germany had refused to provide a copy of the Lease to the Annex V Facilitator, so the United States did not know the precise amount of rent that Airbus is paying, but asserted that it was "highly unlikely" that Hamburg was charging Airbus anywhere near the amount required to constitute adequate remuneration.[3918] In this regard, the United States cited a statement by Hamburg's former minister for economic affairs: "The investment would in fact be unprofitable based on the rent alone. The whole thing must be viewed in terms of the public economy."[3919] The United States also relied on reports by the Hamburg government to the Hamburg Parliament in late 2003 and early 2006 regarding the creation of the site which state that the government expects Airbus to pay a total of EUR 29 million in rent through 2007, only EUR 4.9 - 7.25 million per year, assertedly less than a one percent annual return, before inflation.[3920] The United States also observed, as noted above, that the Hamburg government had considered the project to be a subsidy within the meaning of the SCM Agreement.[3921]

7.1059 The United States argued that the refusal of the European Communities and Germany to provide any of the information requested by the Facilitator during the Annex V process relating to the creation of the site, including the total costs that Hamburg incurred to create the site; the terms and

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[3914] European Commission, Decision of July 12, 2000, Aid to Scott Paper SA Kimberly-Clark, OJ (2002) L 12/1, Exhibit US-190, para. 149.

[3915] US, FWS, para. 436, citing European Commission, Decision of July 12, 2000, Aid to Scott Paper SA Kimberly-Clark, OJ (2002) L 12/1, paras. 165 (emphasis added), Exhibit US-190.

[3916] US, FWS, para. 438, citing Keunecke Report at 9-10, Exhibit US-189; *Immobilienstandort Metropolregion Hamburg: Die Logistikbranche boomt dank dem Hafen*, Frankfurter Allgemeine Zeitung (June 3, 2005) (explaining that German investors expect recovery of their investments, not including financing costs or profits, to take 13 years), Exhibit US-191.

[3917] US, FWS, para. 438.

[3918] US, FWS, para 439.

[3919] US, FWS, para. 439, citing, *Airbus! Hark Bohm, Verlegen Bauer, Senator Uldall streiten beim Abendblatt*, Hamburger Abendblatt (March 2003), Exhibit US-192, at 3.

[3920] US, FWS, para. 440, citing, Hamburgische Bürgerschaft, Drücksache 18/4115, Mitteilung des Senats an die Bürgerschaft (18 April 2006), Exhibit US-184, at 8; Hamburgische Bürgerschaft, Drücksache 17/3641, Mitteilung des Senats an die Bürgerschaft (11 November 2003), Exhibit US-186, at 8.

[3921] US, FWS, para. 441.

BCI deleted, as indicated **[***]**

conditions of any sale or lease of any portion of the site to Airbus; and information regarding any payments by Hamburg to create the facilities that Airbus located on the site gave, rise to a logical inference that the information would have supported the US claim that the measure is a specific subsidy. The United States suggested that the Panel draw such a logical inference. In addition, the United States suggested that, in accordance with paragraph 7 of Annex V, the Panel would be justified in drawing an adverse inference that the withheld information demonstrates that the measure is a specific subsidy and the United States requested that the Panel so infer.[3922]

7.1060 Finally, the United States asserts that the subsidies are specific to Airbus within the meaning of Article 2 of the SCM Agreement (i) because the Hamburg authorities custom-built the Hamburg-Finkenwerder site to Airbus's specifications in order to provide space for Airbus' A380 assembly facility (specificity "in law) and (ii) because Airbus is the only company located on the site, Airbus is the only company that can use the site (the site is surrounded by water on three sides and by Airbus's existing facilities on the land side), and the Hamburg authorities exercised their discretion to create the site especially for Airbus (specificity "in fact").[3923]

European Communities

7.1061 The European Communities considers that the reclamation of land in the Mühlenberger Loch and Rüschkanal does not fall within the scope of the SCM Agreement. The European Communities maintains that conversion of wetlands into usable land is a typical task of public authorities, and constitutes the provision of general infrastructure, and is therefore outside the scope of Article 1 of the SCM Agreement.[3924] The European Communities asserts that, under the constitution of Hamburg, the port is of specific importance to the city of Hamburg,[3925] noting that the "law on the development of the port" (*Hafententwicklungsgesetz*) states that the development of the port is a public task. According to the European Communities, industrial sites are scarce in Hamburg, and the reclaimed land in the Mühlenberger Loch is an economic asset for the city, whether used by Airbus Germany or others.[3926] The European Communities maintains that upon the expiry or termination of the lease agreement between Airbus Germany and Hamburg, Hamburg can open the land for public use or choose to rent it to another industrial investor, who could use it for instance as a container terminal or a car loading facility.[3927]

7.1062 Thus, the European Communities argues that the United States' allegation that an investor in "the market" would not have created the reclaimed land is beside the point, since a private company is neither bound by public law to implement certain tasks, nor charged with expending public resources to achieve public policy goals.[3928] Moreover, the European Communities maintains that in evaluating such projects, cost and the projected return in strict monetary terms is not of paramount importance. Governments may chose to spend more or less public resources on general infrastructure projects, and to frame the expected return in something other than mere monetary terms, for instance, job creation. For the European Communities, under Article 1.1(a)(1)(iii) of the SCM Agreement, the question is whether or not the goods or services provided pertain to general infrastructure goals. Whether or not "the market" would have created a similar site is irrelevant.[3929] In the European Communities' view,

[3922] US, FWS, para. 445.
[3923] US, FWS, para. 444.
[3924] EC, FWS, paras. 775-778.
[3925] EC, FWS, para. 777, citing Preamble of the Constitution of the Freie and Hansestadt Hamburg, Exhibit EC-569.
[3926] EC, FWS, para. 778.
[3927] EC, FWS, para. 778.
[3928] EC, FWS, para. 779.
[3929] EC, FWS, para. 780.

the conversion of wetland into generally usable land by Hamburg did not confer an advantage on Airbus.[3930]

7.1063 The European Communities notes that the statement of the Hamburg Senate that the creation and leasing of the Mühlenberger Loch site constitutes a subsidy reflects the possibility that Hamburg contemplated of renting the reclaimed land to Airbus at a price below the market.[3931] However, the European Communities asserts that the final lease price reflects the full market rent for the land, and the Senate statement is therefore outdated.[3932] The European Communities also argues that WTO subsidy rules and EC State aid rules are not the same, and that therefore, any analogy between EC State aid practice and Article 1 of the SCM Agreement is not accurate.[3933] In particular, the European Communities rejects the United States' assertion that "a DG-Competition finding that a particular measure is State aid is tantamount to finding that a measure is a subsidy within the meaning of the SCM Agreement".[3934] Thus, for the European Communities, the United States' reliance on the decision in the *Scott Paper* case is misleading. In any case, the European Communities notes that there is no Commission decision that the Hamburg project constituted State aid under EC competition rules.[3935] The European Communities also asserts that the situations in *Scott Paper* and Mühlenberger Loch are also substantially different, as *Scott Paper* did not deal with measures of general infrastructure like the pure creation of land, but rather concerned the transformation of existing agricultural land into a tailor-made industrial site for the company.[3936] According to the European Communities, rather than providing general infrastructure, in *Scott* Paper, the French authorities acted in favour of one specific company to whom ownership of the tailor-made industrial site, including specific buildings for the factory, was transferred with a sales price that did not cover the investment costs. No private investor would have acted in such a manner. In the case of Mühlenberger Loch however, the European Communities asserts that Hamburg's land reclamation is a measure of general infrastructure, and that for such measures a market where private investors act does not exist. Furthermore, the European Communities notes that Hamburg has not sold the reclaimed land to Airbus Germany, but rather retains ownership of the property and the possibility to use the reclaimed land for other purposes after termination of the lease agreement with Airbus, and receives a market-based return on its investment in leasing special purpose facilities to Airbus.[3937]

7.1064 The European Communities also argues that the construction of flood protection measures, *i.e.*, the dykes, constitutes general infrastructure which falls outside the scope of Article 1 of the SCM Agreement. According to the European Communities, the flood protection measures serve a basic infrastructure purpose for the citizens of Hamburg, as part of the public task of the City to ensure the safety of its citizens against natural catastrophes according to section 55 of the Water Law of Hamburg (*Hamburger Wassergesetz*).[3938] The European Communities asserts that the flood protection measures implemented around the reclaimed land were part of the federal and regional flood protection programme implemented from 2000 to 2002.[3939] According to the European Communities, all dykes must be seen as a measure for the protection of all inhabitants of Hamburg, and there is no specific benefit to single proprietors.

[3930] EC, FWS, para. 781.
[3931] EC, FWS, para. 782.
[3932] EC, FWS, para. 782.
[3933] EC, FWS, para. 784.
[3934] EC, FWS, para. 786, citing US, FWS, para. 434, note 518.
[3935] EC, FWS, paras. 784-787.
[3936] EC, FWS, paras. 789-790, citing, European Commission, Decision of 12 July 2000, Aid to Scott Paper SA Kimberly-Clark, OJ 2002, L12, 1, Exhibit US-190, para 165.
[3937] EC, FWS, paras. 789-792.
[3938] EC, FWS, para. 794, referring to Hamburger Wassergesetz (Water Law of Hamburg), Exhibit EC-575.
[3939] EC, FWS, para. 795.

BCI deleted, as indicated **[***]**

7.1065 For the European Communities, whether or not Hamburg granted a subsidy to Airbus Germany within the meaning of the SCM Agreement depends solely on the terms under which Hamburg removed the publicly-owned reclaimed land in the Mühlenberger Loch area from public use by renting it to a private company.[3940] The relevant inquiry must therefore, in the European Communities' view, focus on the terms of the lease, and not on the costs of the creation of the site.

7.1066 The European Communities recalls that a benefit is only conferred if the recipient received a financial contribution on terms more advantageous than those that would have been available to the recipient at market.[3941] The European Communities asserts that, under the terms of the land lease agreements with Airbus Germany, no such advantageous terms exist, relying in this regard on the contemporaneous opinion of the Hamburg real estate Experts Committee[3942], as well as the Keunecke report relied on by the United States.[3943]

7.1067 The European Communities points out that at the request of the City of Hamburg, the Experts Committee concluded that the value for industrial land in the vicinity was **[***]**. As the leased land is approximately 1,577,388 m² and thus that the total value of the land was approximately **[***]**.[3944] The Experts Committee then concluded that an acceptable market-based rate of return for the Land Lease Agreement was **[***]**.[3945] The European Communities notes that the United States' expert reached the same conclusion with regard to the value of the land, concluding that the land value is between EUR 1.13/m² and EUR 61.36/m².[3946] Based on these figures, the European Communities asserts that a market rent would be EUR 3.70/m^2 per year, or EUR 0.30/m^2 per month, which it asserts is in accordance with the rent paid by Airbus Germany.[3947]

7.1068 Thus, according to the European Communities, the difference between the conclusions reached by the Experts Committee, and the United States' position, derives from different assumptions concerning the applicable rate of return on real estate, set at 9 to 12% in the Keunecke Report, as opposed to **[***]** set by the Experts Committee. In the European Communities' view these two percentage values do not measure the same thing and cannot be directly compared, as they result from two different definitions of "return." The European Communities asserts that when these values are restated and expressed in the same economic terms, there is very little difference between them. Any remaining difference is the result of assertions by Dr. Keunecke that are unsupported and not relevant to the industrial land and facilities at hand.[3948] Thus, the European Communities argues, the difference between the results of the Keunecke Report and the European Communities' position lies in the United States' view that Hamburg should not only demand a fair price for the current value of the land, but should also recover the full costs for the development of the site.[3949] However, the European Communities considers this to be erroneous, since those costs are related to the creation of general

[3940] EC, FWS, para. 781.
[3941] EC, FWS, para. 798, citing, Appellate Body Report, *Canada – Aircraft*, para. 157.
[3942] Real Estate Experts Committees are established by German federal law. The Hamburg Experts Committee issues appraisals regarding the market value of real property, on request by the City of Hamburg or its courts. EC, FWS, paras 766-767, Exhibit EC-567.
[3943] EC, FWS, para. 798.
[3944] EC, FWS, para. 801, citing, Gutachterausschuss für Grundstückswerte in Hamburg, Gutachten G 03.0058 M 21, 23 October 2003, p. 4-6, Exhibit EC-563 (BCI).
[3945] EC, FWS, para. 804. The European Communities notes that the estimate of **[***]** coincides with the Expert Committee's yearly estimations of property value in Hamburg, referring to Gutachterausschuss für Grundstückswerte in Hamburg, Der Grundstücksmarkt in Hamburg 2002, 2003, 2004, 2005, Exhibit EC-565, which sets an average return on real estate for the relevant area at 6,2 %. EC, FWS, footnote 680.
[3946] EC, FWS, para. 806.
[3947] EC, FWS, para. 807.
[3948] EC, FWS, para. 809.
[3949] EC, FWS, para. 818.

BCI deleted, as indicated **[***]**

infrastructure, and therefore, the European Communities maintains, fall outside the scope of Article 1 of the SCM Agreement.[3950]

7.1069 The European Communities further argues that, even if the Panel does not agree that the land reclamation was a measure of general infrastructure, the difference between Hamburg's costs for the project and the rent paid by Airbus Germany does not constitute a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement, because the relevant standard for determining benefit is the benefit to the recipient, and not the cost to the government.[3951] The European Communities notes that these principles, set out in Part V of the SCM Agreement, are equally valid with respect to the definition of a subsidy in Article 1. The question under Article 1.1(b) of the SCM Agreement is whether a financial contribution confers a "benefit" on a recipient, relative to a market benchmark, and not whether the government covers the costs of delivering that financial contribution.[3952] Thus, the European Communities argues, the market benchmark serves as a floor in determining whether a financial contribution constitutes a benefit, but also serves as a ceiling on the amount of "benefit" that can be found to exist under Article 1.1(b) of the SCM Agreement.[3953] While the government is entitled to a market-based return, the European Communities argues that it can only earn a market-based return on the value of the good leased, which may or may not be lower than its cost. The European Communities argues, however, that the government can earn returns through increased employment and other returns that private investors cannot capture.[3954]

7.1070 The European Communities argues that the United States' approach ignores this fundamental point, and would require that Airbus Germany agree to pay the City rent considerably in excess of what the market would demand, based on the cost to reclaim the land.[3955] That is, the European Communities argues, effectively a resort to a "cost to government" standard. According to the European Communities, the United States considers that, regardless of the rental agreement Airbus Germany could have received at market, it should pay rent sufficient for the government to recover the costs it incurred in creating the reclaimed land, which position the European Communities argues rest on the "cost to government" standard rejected by the Appellate Body. The European Communities urges the Panel to do so as well in this dispute.[3956]

7.1071 Turning to the special purpose facilities, the European Communities notes that Hamburg also requested the Experts Committee to examine the market consistency of the Quay Facility Lease Agreement.[3957] The Experts Committee concluded that the agreed rent for the facilities covered in the Quay Facility Lease Agreement was consistent with market; and second, that the other terms of the Quay Facility Lease Agreement were consistent with market.[3958] The other special purpose facility lease agreements were based on the same pattern, and the European Communities asserts that they are also consistent with the market.[3959]

[3950] EC, FWS, para. 819.

[3951] EC, FWS, para. 821, referring to Article 14(d) of the SCM Agreement and the decision of the Appellate Body in *Canada – Aircraft*.

[3952] Appellate Body Report, *Canada – Aircraft*, para. 155.

[3953] EC, FWS, paras. 823-824.

[3954] EC, SWS, para. 1083, footnote 326, EC Comments on US Answers to Panel Questions 154 and 155, para. 164.

[3955] EC, FWS, para. 826. The European Communities notes that the United States suggests, at paragraph 438 of its first written submission, that Airbus Germany should pay an annual rent of EUR 90 million. EC, FWS, footnote 687.

[3956] EC, FWS, para. 826.

[3957] EC, FWS, para. 828.

[3958] Gutachterausschuss für Grundstückswerte in Hamburg, Gutachten G 03.0059 M 21, 23 October 2003, Exhibit EC-564 (BCI) p. 4.

[3959] EC, FWS, paras. 829-845.

BCI deleted, as indicated **[***]**

(iii) Evaluation by the Panel

7.1072 In order to resolve this aspect of the United States' claims, we will address first the European Communities' contention that the conversion of the Mühlenberger Loch site from wetlands into usable land constitutes a measure of general infrastructure, and thus does not constitute a subsidy under Article 1 of the SCM Agreement. An underlying premise of the European Communities' argument is that the various aspects of the development of the industrial site must be analyzed separately, in contrast to the United States' view, which treats the entire project as an integrated whole for purposes of analysis. Should we conclude that part or all of the provision to Airbus of the site is **not** a measure of general infrastructure, we will then go on to assess whether the financial contribution represented by that measure confers a benefit on Airbus.

General infrastructure

7.1073 As we concluded above,[3960] in our view, the question of whether the provision of a good or service constitutes a provision of "general infrastructure" cannot be answered in the abstract, but rather must take into account the existence or absence of *de jure* or *de facto* limitations on access or use, and any other factors that tend to demonstrate that the infrastructure was or was not provided to or for the use of only a single entity or a limited group of entities, which may include factors relating to the circumstances surrounding the creation of the infrastructure in question, consideration of the type of infrastructure, the conditions and circumstances of the provision of the infrastructure, the recipients or beneficiaries of the infrastructure, and the legal regime applicable to such infrastructure, including the terms and conditions of access to and/or limitations on use of the infrastructure. Consideration of these factors in this instance leads us to conclude that the provision of the Mühlenberger Loch/Rüschkanal site does not constitute a measure of general infrastructure.

7.1074 Before addressing these factors, we consider the issue raised by the European Communities' argument that the Mühlenberger Loch project consisted of three distinct elements, (1) turning of wetlands into usable land, (2) building of flood protection measures, and (3) building of special purpose facilities, and that these three elements must be considered separately in assessing the issue of whether they constitute a provision of general infrastructure.[3961] The United States, on the other hand, contends that the creation of the site, and its provision to Airbus, are not distinct transactions having nothing to do with one another, but are integrally linked.[3962] For the United States, the lease of the land and special purpose facilities to Airbus cannot be separated from the creation of the land, including the flood protection measures and building of the special purpose facilities, because it was necessary to create the land in the first place in order to allow the remainder of the project, including the building of the special purpose facilities, to be undertaken.

7.1075 The European Communities does not, in our understanding, contend that the land reclamation was undertaken for reasons unrelated to the needs of Airbus, and then, afterwards, independently, the land was rented to Airbus. The European Communities has submitted no evidence that would suggest that the Hamburg authorities would have undertaken the reclamation of wetlands in the Mühlenberger Loch and Rüschkanal but for the fact that it was necessary to reclaim the land in order to make possible the expansion of Airbus' existing facilities in Hamburg to enable Airbus to assemble the A380 at that facility. Indeed, in its second written submission, the European Communities

[3960] *See*, discussion at paras. 7.1036 to 7.1044 above.
[3961] EC, FWS, para. 748.
[3962] US, SWS, para. 315.

BCI deleted, as indicated **[***]**

acknowledges that the land reclamation was undertaken to accommodate Airbus' needs in connection with assembly of the A380.[3963]

7.1076 The European Communities argues that the fact that the Hamburg authorities "were aware of the fact that Airbus would be the first user of the newly-created land" is not surprising, and considers that the United States errs in attaching importance to this undisputed fact.[3964] The European Communities refers to the law governing the development of the port of Hamburg, suggesting that the reclamation was part of that development, but acknowledges that the site is not, in fact, within the harbour area as defined by the port law.[3965] The European Communities also suggests that land for industrial use is limited in Hamburg, implying that land reclamation is undertaken in a general effort to provide additional sites for industrial, and residential, use.[3966]

7.1077 In our view, none of these elements supports the basic premise of the European Communities, that we must consider as distinct elements the land reclamation, the building of the dykes, and the lease of the land and special purpose facilities. We agree with the United States that the lease of the land and special purpose facilities to Airbus cannot be separated from the creation of the land, including the flood protection measures and the building of the special purpose facilities, because it was necessary to create the land in the first place in order to allow the remainder of the project, including the building and subsequent lease of the special purpose facilities, to be undertaken. Merely because land reclamation and flood control are "typical task{s} of public authorities, as providers of general infrastructure"[3967] does not constitute a sufficient basis to conclude that they must be considered as distinct elements of the provision of the Mühlenberger Loch site to Airbus. In fact, the European Communities' argument in this respect is somewhat circular: because the land reclamation and flood control aspects are, in the European Communities' view, measures of general infrastructure, they must be considered separately from the lease of the land to Airbus, and considered separately, they constitute measures of general infrastructure. However, as noted above, despite the European Communities' arguments to the contrary,[3968] it is clear to us that the United States' claim is that the entire transaction of creating and providing an industrial site to Airbus constitutes the alleged subsidy, which it asserts is not a provision of general infrastructure.[3969]

7.1078 We consider that there is no legal requirement that we separate the various elements of the project for purposes of our analysis, and indeed, the European Communities has not proposed one. Nor are we persuaded that there is any factual basis that necessitates separating the elements as proposed by the European Communities. It is clear from the evidence before us that the land reclamation in question was undertaken in order to make possible the expansion of Airbus' existing facilities, and not for any independent purpose. Thus, it is part of an integrated project to provide a site adjacent to Airbus' existing Finkenwerder site for expansion of its facilities. We therefore proceed on the basis of an analysis of the entire project as a single measure.

[3963] "Hamburg agreed, ... to fill in wetlands adjacent to the Deutsche Airbus facility (and owned by the City) to accommodate the A380 {final assembly line}". EC, SWS, para. 1083.

[3964] EC, SWS, para. 353.

[3965] EC, Answer to Panel Question 93, para 244. The United States points to evidence that the site was specifically excluded from the Harbor Area through an amendment to the Act in 1999, because the creation of land for the purpose of expanding Airbus' site, according to the Hamburg government, does "not serve any harbor purposes." US, SWS, para. 237, referring to Hamburgische Bürgerschaft, Mitteilung des Senats an die Bürgerschaft, Achtes Gesetz zur Änderung des Hafenentwicklungsgesetzes, hier: Änderung des Hafengebiets im Mündungsbereich des Rüschkanals und vor der Aufhöhungsfläche des Mühlenberger Lochs, Drs. 16/2646, p. 1, Exhibit US-552).

[3966] EC, Answer to Panel Question 91, para 225.

[3967] EC, FWS, para. 775.

[3968] EC, FWS, paras. 747-749.

[3969] *See*, paras. 7.153, 7.155 and 7.158 above.

BCI deleted, as indicated **[***]**

7.1079 We recall our interpretation of the term "general infrastructure", where we concluded that that the term "**general** infrastructure", taken in its ordinary and natural meaning, refers to infrastructure that is not provided to or for the advantage of only a single entity or limited group of entities, and that there is no type or form of infrastructure which is inherently "general" *per se*.[3970]

7.1080 It is clear from the evidence before us that the reclamation of the wetlands adjacent to the existing Airbus facility in Finkenwerder was undertaken not merely in the awareness that Airbus would be the "first user", as argued by the European Communities, but specifically in order to enable Airbus to expand its existing facilities in a way it could not do without the creation of the new land.[3971] The decision of the EC Commission granting approval for the draining of the wetlands notes the **[***]**.[3972] The flood control measures, *i.e.*, the new dyke, for the reclaimed land would not have been undertaken had the land reclamation not taken place. While the European Communities asserts that the existing flood protection system for the existing Airbus facility in Finkenwerder was insufficient, it acknowledges that the land reclamation project provided "a timely opportunity to upgrade" those facilities, in line with the 2002-2012 flood protection programme for the river Elbe.[3973] The special purpose facilities, the quay, the roll-on-roll-off facility, sluice and pump building, drainage ditch, and sternfender, all form part of the creation of an industrial site suitable for the expansion of Airbus' existing facilities. There is simply no evidence to suggest that any of this development would have been undertaken at the time were it not necessary in order to enable Airbus to expand its existing facilities to allow for assembly of the A380 at that site.

7.1081 We do not doubt that the Hamburg authorities were pursuing a public interest or public policy goal in undertaking this large project. Indeed, this is clear from the EC Commission decision, which granted approval for a project which would destroy a protected wildlife sanctuary in part on the basis that it would counterbalance job losses in Hamburg and would have a positive effect on the economic and social situation in the region.[3974] However, merely that the Hamburg authorities were furthering a public interest does not suffice to demonstrate that the project, starting with the reclamation of the land, and including the remaining elements of flood protection and special purpose facilities, constitutes general infrastructure. To the contrary, as we have noted, it is in any event always likely to be the case that public authorities will have reasons of public policy when expending public funds.

7.1082 The European Communities also argues that there is public access to the reclaimed land, and a potential for other uses, allegedly demonstrating that that aspect of the project constitutes provision of general infrastructure.[3975] As discussed above, we do not consider it appropriate to analyse the elements of provision of the Mühlenberger Loch site separately. However, even if we were to do so, we would not find the European Communities' arguments in this regard persuasive. With respect to its assertion of public access, the European Communities relies primarily on photographic evidence to argue that the site is accessible via a publicly owned road, *i.e.*, the dyke lane, which functions as the normal traffic road between the Airbus facilities and the village of Cranz, without crossing the Airbus facilities.[3976] However, at best, the dyke lane provides limited access to the circumference of the site,

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[3970] *See*, discussion at paras. 7.1036 to 7.1044 above.

[3971] *See*, EC, SWS, para. 1083. We note, moreover, that on 9 July 2004, the City of Hamburg and Airbus Deutschland GmbH concluded a contract under which Airbus promised to undertake all investments needed for the production and delivery of the A380 Freighter, including investments in the buildings on the newly created artificial land in the Mühlenberger Loch. In addition, Airbus agreed to rent the land needed for this purpose, and to pay damages to Hamburg for, *inter alia*, investments to provide the site, should Airbus ultimately not locate A380 production there. US, SWS, para. 337, *see* Exhibits US 562, 563, 564 and 565.

[3972] Commission decision of 19 April 2000, Exhibit EC-547 (BCI).

[3973] EC, FWS, para. 756. The European Communities provides no evidence to suggest that such an "upgrade" would have taken place at that time but for the entire project being undertaken.

[3974] EC, FWS, para. 754.

[3975] EC, Answer to Panel Question 91, paras. 227-229, 233 and 242-246.

[3976] Exhibit EC-616.

BCI deleted, as indicated **[***]**

and not to any of the land leased by Airbus.[3977] More pertinently, as the European Communities acknowledges, the dyke lane is open to use only by Airbus employees and city officials responsible for maintenance of the dyke, at least for as long as the land is leased to Airbus.[3978] Moreover, the European Communities has not rebutted the United States' arguments concerning the inadequacy of the dyke lane as a means of access to the site, other than for limited purposes.[3979] The mere possibility that at some future time, if Airbus no longer leases the land, there might be access to the site via an improved dyke lane, does not, in our view, suffice to demonstrate that any part of the Mühlenberger Loch project constitutes a measure of general infrastructure.

7.1083 With respect to the assertion that there are potentially other uses for the site, the European Communities argues that if the lease agreement with Airbus were terminated, the site could be leased to another company, and specifically, could be used as a container terminal.[3980] Our review of the lease for the site leads us to conclude that any potential other use of the site is, at best, a fairly distant future possibility.[3981] Moreover, we are not persuaded by the European Communities' arguments that there are alternative uses for the site. The European Communities relies on the land use plan for Hamburg (*Flächennutzunsplan*) to argue that the site is not restricted to use by aviation industries,[3982] and asserts that due to scarcity of land in Hamburg, the site constitutes a valuable asset.[3983] However, the European Communities' argument relies primarily on the overall land use plan and does not address the subsidiary land construction plan (*Bebauungsplan Finkenwerder 37*), which, as argued by the United States, imposes limitations on the use of the Mühlenberger Loch site for any purpose other than Airbus' aircraft assembly facilities.[3984] While it is true that these plans are subject to revision by the Hamburg authorities, that possibility is not sufficient, in our view, to support the European Communities' position, and does not justify a conclusion that the site is available, in any meaningful sense, for use by any entity other than Airbus or for any use other than by aviation industries.[3985] Moreover, merely that land is a valuable asset adds nothing to the European Communities' argument, particularly in view of the evidence rebutting the European Communities' assertion that there is a shortage of land for industrial use in Hamburg.[3986]

7.1084 The circumstances surrounding the creation of the Mühlenberger Loch site, including all of aspects discussed above, clearly demonstrate to us that the Hamburg authorities were not simply "aware" that Airbus would be the first user of the site, but undertook the entire project specifically in

[3977] We note that the Land Lease Agreement contains two specific provisions relating to access to the site by parties other than Airbus. In particular, Article 11.3 states that "the lessee is obliged to allow agents of the lessor or representatives of the utilities companies after prior agreement with the lessee to enter the leased area and undertake any work he considers necessary (surveys, building inspections, maintenance, repairs etc.)," and Article 11.4 provides that "Contractors of the dyke authority or from other responsible authorities must be given access over the leased area to the flood defences at any time in connection with dyke maintenance and dyke defence functions." *See*, Exhibit EC-551 (BCI).

[3978] EC, Answer to Panel Question 91, para. 229.

[3979] US, SWS, para. 347-348.

[3980] EC, FWS, para. 778, referring to Exhibit EC-571

[3981] The Lease agreement, Exhibit EC-551 (BCI), indicates that the lease is for **[***]**.

[3982] EC, Answer to Panel Question 91, para. 233, Exhibit EC-617.

[3983] EC, Answer to Panel Question 91, para. 225.

[3984] US, SWS, para 343-344 and references therein.

[3985] We also note that the fact that Hamburg required Airbus to agree to pay damages, including for the investment made in the site required by Airbus, should the latter decide not to locate A380 freighter operations in Hamburg supports the conclusion that the city authorities did not consider that there were any other uses for the newly created site than the expansion of Airbus' existing operations. US, SWS, para 337 and footnote 411, referring to Exhibits US-562, US-563, US-564, and US-565.

[3986] Prior to the decision to create the Mühlenberger Loch site, three alternative sites of comparable size in Hamburg were considered. US, SWS, para 320. This supports the US contention that there is no shortage of industrial land, and thus rebuts the implication that creation of the Mühlenberger Loch site was somehow necessary apart from enabling Airbus to expand its existing facilities at that location.

order to enable Airbus to expand its existing facilities. The project, including the special purpose facilities, was tailor-made for Airbus, enabling it to expand its existing facilities so as to be able to benefit from the resulting synergies. No other beneficiary was considered at any time – the project was undertaken exclusively for Airbus. Moreover, the terms of the lease agreements, as well as the then-existing legislation governing use of the land, limit the use of the site for the foreseeable future to Airbus. In light of these facts, we conclude that the creation and provision of the Mühlenberger Loch industrial site is not a provision of general infrastructure, but rather constitutes a financial contribution in the form of the provision of goods or services other than general infrastructure, within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. We therefore go on to consider whether it conferred a benefit on Airbus.

Benefit

7.1085 The United States asserts that the provision of the Mühlenberger Loch site confers a benefit on Airbus (i) because Hamburg authorities created a site that the market would not have created,[3987] and (ii) because the site is provided to Airbus for less than adequate remuneration.[3988]

7.1086 In its first written submission, the United States identified the alleged costs of the Mühlenberger Loch project and addressed the question of benefit based on publicly available information, because, it noted, the European Communities and Germany had refused to provide information, as requested by the Facilitator during the Annex V process, concerning the creation of the site, including total costs incurred by Hamburg to create the site, as well as information on the terms and conditions of any sale or lease of the site to Airbus, and information regarding any payments by Hamburg to create the facilities located on the site by Airbus.[3989] The United States argued that the logical inference to be drawn from this refusal was that the information would have supported the United States' claim that the measure is a specific subsidy, and that the Panel would be justified in drawing an adverse inference pursuant to paragraph 7 of Annex V to that effect.

7.1087 Paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Although the European Communities failed to provide all of the information requested on the Mühlenberger Loch project during the Annex V process, it has, during the course of this panel proceeding, submitted additional information. Thus, we are not here faced with a situation where a party has failed to supply any part of the requested information. As a consequence, we cannot simply accept, as the United States suggests, that the failure to provide the requested information during the Annex V process warrants drawing an adverse inference against the European Communities. Rather, we consider that it is appropriate to address the evidence that has been put before us on the issue of benefit.

7.1088 The United States argues, based on publicly available information, that the Hamburg authorities invested EUR 751,000,000 in the creation and development of the site, including the land reclamation, dykes, and special purpose facilities. The United States asserts that Hamburg estimated that the total cost of the project would be EUR 693,700,000[3990] but that "{t}he Hamburg Accounting Office criticised this estimate and predicted that the total costs to Hamburg would amount to EUR 751,000,000".[3991] The European Communities, on the other hand, argues that this amount represents

[3987] US, FWS, paras. 431-436.
[3988] US, FWS, paras. 437-442.
[3989] US, FWS, para 445.
[3990] US, FWS, para. 428, citing Hamburgische Burgerschaft, Drucksache 18/4115, Mitteilung des Senats and die Bürgerschaft (18 April 2006), Exhibit US-184, at 11-12 (annex 1) and 13 (annex 2).
[3991] US, FWS, para. 428, citing Hamburgische Burgerschaft, DRs. 17/2267, Report from the Audit Office to the Burgerschaft (19 February 2003), Exhibit US-188, at 155, para. 385.

BCI deleted, as indicated **[***]**

an early estimate of the cost of the project, and that the aggregate costs for the project foreseeable in 2006 were EUR 693,679,000.[3992]

7.1089 Although the European Communities has now provided information concerning the total cost of creating the Mühlenberger Loch site that was not presented during the Annex V process, the United States continues to argue that the real costs were approximately EUR 750 million.[3993] The United States argues that the European Communities' contention that its calculation is based on a earlier, outdated estimate is wrong, and asserts that the European Communities fails to include the cost of certain interim financing incurred by ProFi, which it contends should be included, based on the Court of Auditors report on which the United States relies.[3994] We agree with the United States that the European Communities' cost estimates do not include the interim financing costs to ProFi.[3995] We further agree that those costs are appropriately included in the total. Together with the fact that the European Communities did not provide the information requested during the Annex V process, we therefore consider it appropriate to accept the United States' assertion, based on publicly available information, that the cost of the development of the Mühlenberger Loch site, including the land reclamation, flood protection, and special purpose facilities was approximately EUR 751 million. The site is leased to Airbus under a series of leases for the land and the special purpose facilities, for a period of **[***]**. The full rent for the land, which will only be achieved after 2009, after all parcels are suitable for use, and the reductions for settling are eliminated, will be EUR 5,619,588 per annum, while the rent for the special purpose facilities is EUR 5,619,200 per annum, both subject to adjustment for inflation.

7.1090 We recall that Article 1.1(b) of the SCM Agreement does not define the notion of "benefit". However, it is well established that a "financial contribution" will confer a "benefit" upon a recipient when it places that recipient in a more advantageous position compared with the position of that recipient in the absence of the "financial contribution".[3996] In *Canada – Aircraft*, both the panel and the Appellate Body considered that the basis for making this comparison was the market. Thus, the panel observed that:

> "a financial contribution will only confer a 'benefit', *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market".[3997]

Similarly, the Appellate Body explained that:

> "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

[3992] EC, FWS, para. 758, citing Hamburgische Burgerschaft, Drucksache 18/4115, Mitteilung des Senats and die Bürgerschaft (18 April 2006), Exhibit EC-548, at 8.

[3993] US, SWS, footnote 367 and paras. 352, 356.

[3994] US, SWS, footnote 439.

[3995] In its report, the Court of Auditors noted that the Hamburg government had not included in its cost information certain interim financing cost incurred by the government-owned developer ProFi that should be included in the cost. *See,* Hamburgische Bürgerschaft, Jahresbericht 2003 des Rechnungshofs (2003 Annual Report of the Court of Auditors), Drs. 17/2267, para. 385, Exhibit US-188).

[3996] Panel Report, *Canada – Aircraft*, para. 9.112, cited with approval in Appellate Body Report, *Canada – Aircraft*, para. 149.

[3997] Panel Report, *Canada – Aircraft*, para. 9.112; Appellate Body Report, *Canada – Aircraft*, paras. 157-158; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 102.

> received a 'financial contribution' on terms more favourable than those available to the recipient on the market."[3998]

7.1091 Thus, a benefit will be conferred whenever a financial contribution is granted to a recipient on terms more favourable than those available to the recipient in the market. In the context of a financial contribution in the form of provision of goods or services other than general infrastructure, we consider that the appropriate question to be addressed in resolving the question of benefit is whether a market actor would have provided the good or service to the recipient at the time, on the same terms and conditions as the government provision at issue.

7.1092 In this regard, the European Communities argues that it is incorrect to assess benefit to Airbus on the basis of the difference between the cost to the Hamburg government of the project, and the rent paid by Airbus for the site.[3999] The United States does not dispute the basic premise that cost to the government is not an appropriate basis for assessment of benefit. However, the United States does argue that the circumstances of the case require consideration of the total amount invested by Hamburg to create the site in order to determine the existence and amount of any benefit. The United States argues that this is not a case where the government simply rented an existing parcel of land to Airbus. Rather, in this case the Hamburg authorities specifically created the land that was necessary for Airbus' expansion next to its existing site at Finkenwerder, and then rented that land to Airbus. The United States does not, in the first instance, dispute that the rent for the land and special purpose facilities may well be commensurate with a market benchmark for rental of **existing** land in the area,[4000] but considers that the underlying investment in reclaiming the land must be included in the calculation in this case in order to arrive at a realistic approximation of a market benchmark for the value of the **particular land in question, which must reflect the investment in land**. In the United States' view, a calculation of the lease price which does not take into consideration the investment in creating the site effectively turns that amount into a grant to Airbus.

7.1093 The European Communities, on the other hand, argues that Hamburg did not create an industrial site for Airbus, but "conducted mere land reclamation",[4001] and then rented that land to Airbus at a market-based price, and that no benefit was conferred upon Airbus thereby. We have already rejected the argument that "mere land reclamation" is exempt from consideration as a subsidy in this dispute, and are considering the entire Mühlenberger Loch project as a whole. Therefore, we consider that the investment by Hamburg in bringing the site into existence is relevant in our assessment of whether a benefit was conferred on Airbus. This does not constitute, as argued by the European Communities, a determination of the amount of benefit on the basis of cost to the government. Rather, we consider that it is simply a reflection, in the particular circumstances of this measure, of the basis on which a market actor would determine the amount of rent to be charged for that particular parcel of land, and thus the appropriate "market" benchmark.

7.1094 While the parties agree that, in this case, no commercial investor would have undertaken the project, it is clear to us that this is because the investment necessary in reclaiming the land was disproportionately large in comparison to any potential returns. The parties are in general agreement as to the market value of industrial land in Hamburg, and the value of the Mühlenberger Loch land - between EUR 71,600,000 and EUR 85,900,000, according to the United States,[4002] or approximately

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[3998] Appellate Body Report, *Canada – Aircraft*, para. 157.

[3999] EC, FWS, para. 820.

[4000] The United States does, as a second line of argument, assert that the rent is insufficient by comparison to a market benchmark. In light of our conclusion, we do not consider it necessary to address this line of argument.

[4001] EC, SWS, para. 357.

[4002] US, FWS, para. 432, and Exhibit US-183.

BCI deleted, as indicated **[***]**

[***], according to the EC.[4003] It is clear that a market-based rental on land of that value is necessarily far less than would be a market based rental on an investment in land worth EUR 750 million. Indeed, the European Communities does not even suggest that the rental paid by Airbus provides a market return on the investment in reclaiming the land. Yet, in our view, a market actor who invested EUR 750 million in land, whether by purchasing it or by creating it through reclamation, would, in renting the property, seek a return on that investment. In this situation, the "investor" was the Hamburg city authorities, who directed public funds to create an asset that the market would not have created. To argue, as the European Communities effectively does, that in this situation, no benefit can be found, would, in our estimation, result in a wholesale circumvention of the fundamental purpose of the SCM Agreement's discipline on subsidies. Under the European Communities' view, the more a financial contribution by a government distorted the allocation of resources that the market would otherwise produce, the less it could be found to be a subsidy.[4004] This is not an acceptable outcome, as it perverts a fundamental goal of the SCM Agreement.

7.1095 The European Communities argues that for the United States to successfully argue that the cost of the project should be taken into account it must demonstrate that, absent the actions of the Hamburg authorities, Airbus would have reclaimed the land itself, in which case the costs incurred by Hamburg would represent the "cost savings" for Airbus.[4005] While the European Communities argues that Airbus would not have done so, this appears largely to be based on its view that land reclamation is a government task, and that absent the action of Hamburg to reclaim the land, Airbus would simply have sited its new facility elsewhere. While it may be true that land reclamation is most commonly undertaken by governments, there is nothing in principle that would preclude a private party from undertaking such a project, and thus nothing in principle that would have precluded Airbus from reclaiming the Mühlenberger Loch site on its own account.[4006] That the cost of the project might have persuaded Airbus not to undertake it, but rather to site its assembly facility elsewhere, as argued by the European Communities, in our view simply underscores the fact that the reclamation of this land involved, as the European Communities itself suggested, a "cost of reclamation that no rational investor, including Airbus, would incur for land that Airbus did not need."[4007] The fact that Airbus had other options, but chose to expand its existing facilities at Finkenwerder once the necessary land was made available to it thus supports our view that the financial contribution of the Hamburg authorities in reclaiming the land and building special purpose facilities for Airbus' use conferred a benefit on Airbus.[4008]

[4003] EC, FWS, para. 801 and Exhibit EC-563 (BCI) p. 4-6.

[4004] The European Communities agrees that there are instances where cost can serve as a surrogate for a market price. However, it asserts that cost may be used to estimate market prices only in instances where it is apparent that generally prevailing market prices at the time of the investment are sufficient to induce private investors to undertake the project. The European Communities argues that cost does not provide a reliable measure of market value where it is apparent that no private investor would undertake the investment because the rent or price required to provide a market return exceeds the market value of the resulting asset. EC, Comments on US Answer to Panel Questions 154 and 155.

[4005] *See*, EC, SNCOS, paras. 30 & 212.

[4006] Provided, of course, that necessary permission was granted to undertake such a project. In our view, had Airbus sought to undertake the land reclamation on its own account, and been denied permission by the Hamburg authorities, which then undertook the project at government expense and provided the reclaimed land exclusively to Airbus, this would demonstrate that the provision of the land conferred a benefit, as it would be clear that the government had, by its own action, enabled Airbus to save the expense of reclaiming the land.

[4007] EC, SCOS, para. 20.

[4008] Moreover, not only did the Hamburg authorities have incentive to keep Airbus active at its existing facility, which might not have been the case had the expansion for purposes of the A380 project not been possible, but Airbus had incentive to site A380 production operations at the site, in order to ensure that it obtained LA/MSF from the German government. The European Communities acknowledges that **[***]** was one of the reasons Airbus set up two production sites, despite the asserted **[***]** that resulted. EC, SWS, para. 1079.

BCI deleted, as indicated **[***]**

7.1096 Finally, the European Communities argues that Airbus pays rent for the land and special purpose facilities that is commensurate with market rates for like land and facilities in Hamburg, and therefore that there is no benefit conferred on Airbus. However, the European Communities' argument is premised on its view that the land reclamation aspect of the project does not constitute a financial contribution, which we have rejected. It is clear, and the European Communities does not argue otherwise, that the rent paid by Airbus for the reclaimed land and special purpose facilities does not provide a market rate of return on the whole of the investment by the Hamburg authorities to create the Mühlenberger Loch site. Thus, in our view, whether the rent paid by Airbus for the land and special purpose facilities is commensurate with a market rate for rental of existing industrial land and facilities in Hamburg is simply not relevant to our analysis of benefit. We consider that the subsidy granted by Hamburg by creating and leasing the Mühlenberger Loch site conferred a benefit on Airbus in an amount equivalent to the extent of the difference between the actual rent paid by Airbus for the land and facilities in question, and a reasonable rate of return on the investment of the Hamburg authorities in creating that land and those facilities. That investment was many times greater than the value of the site reflected in the actual rental amounts, and thus in our view, the provision of the site conferred a very large benefit to Airbus.

7.1097 Therefore, in our view, the conclusion that the provision of the Mühlenberger Loch site to Airbus confers a benefit on Airbus, for whom the project was undertaken, and thus constitutes a subsidy within the meaning of Article 1 of the SCM Agreement is inescapable. The European Communities does not dispute that the provision of the site was specific to Airbus. As Airbus is the only user of the site, which was developed to fulfil Airbus' needs, we find that the subsidy in question is specific to Airbus within the meaning of Article 2.1(a) of the SCM Agreement.

(d) Bremen Airport Runway

7.1098 The United States argues that the main runway at Bremen airport was extended by German authorities in 1988-89 to accommodate transport flights for Airbus wings manufactured in Bremen. According to the United States, the authorities extended the runway specifically for Airbus' requirements, and use of the extended portions of the runway is restricted by regulation to flights transporting Airbus parts. The United States contends that the provision of the extended runway to Airbus for its exclusive use for less than adequate remuneration is a financial contribution that confers a benefit on Airbus within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement.[4009]

7.1099 According to the European Communities, the United States' claim fails to adequately identify the presumed beneficiary, and falls outside the scope of the SCM Agreement.[4010] The European Communities argues that the extension of the Bremen airport runway, and the associated noise reduction measures, constitute measures of general infrastructure, and therefore do not constitute a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[4011] The European Communities acknowledges that allowing only Airbus to use the full length of the extended runway may constitute the provision of a service within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement, but contends that granting Airbus a right to use the full length of the runway does not confer a benefit on Airbus because Airbus pays for this use in accordance with the general fee schedule applicable at Bremen Airport.[4012]

[4009] US, FWS, para. 451.
[4010] EC, FWS, paras. 860-861.
[4011] EC, FWS, paras. 864, 869.
[4012] EC, FWS, paras. 872-873.

BCI deleted, as indicated **[***]**

(i) Factual Background

7.1100 According to the European Communities, German authorities require a safety margin at either end of commercial runways, consisting of a 300 meter area free of all obstacles. In Bremen, the implementation of this requirement had resulted in the shortening of the usable length of the runway.[4013] In May 1988, an extension of the runway by 300 meters at either end was authorized.[4014] Consequently, in 1989-90, the runway was extended from its existing length of 2,034 meters to 2,634 meters.[4015] At the same time, noise reduction measures were put in place.[4016] It is undisputed that, with the exception of emergencies, only 2,034 meters of the runway's length is available for general aviation use. Regular use of the entire length of the runway, including the 600 meters of extension, is permitted only for flights transporting Airbus wings from Bremen.

7.1101 The cost of the runway extension and noise reduction measures was borne by the City of Bremen. The United States asserts that Bremen paid DM 40 million to extend the runway and a further DM 10 million for noise reduction measures.[4017] The European Communities disputes the amounts in question, asserting that Bremen paid **[***]** for the extension of the runway and **[***]** for noise reduction.[4018]

(ii) Arguments of the Parties

7.1102 The United States argues that the extension of the Bremen airport runway and the provision of the runway to Airbus for its exclusive use, including the implementation of noise reduction measures, constitutes the provision of goods and services other than general infrastructure within Article 1.1(a)(1)(iii) of the SCM Agreement, and confers a benefit on Airbus.[4019]

7.1103 In response, the European Communities asserts first that the United States' challenge is "overly vague", as it fails to adequately identify the presumed beneficiary of the alleged subsidy. In this regard, the European Communities notes that, at the time of the runway extension, neither Airbus SAS nor Airbus Germany existed.[4020] We recall our findings that, for the purpose of this dispute " a financial contribution provided to any Airbus partner or affiliated entity, or to Airbus GIE, in relation to the production of an Airbus LCA, confers a benefit on the Airbus Industrie consortium, as the producer of Airbus LCA" and that the United States is not required to demonstrate "the "pass-through" to Airbus SAS of benefits conferred by financial contributions provided to the Airbus Industrie consortium."[4021] Therefore, we conclude that the United States has sufficiently identified the beneficiary of the alleged subsidy. The European Communities also maintains that this measure falls outside the temporal scope of Article 5 of the SCM Agreement and was grandfathered by Article 2 of the 1992 Agreement. These issues were addressed and the European Communities' arguments in this

[4013] EC, FWS, para. 863.
[4014] EC, FWS, para. 863.Senatsbeschluss of 31 May 1988, Exhibit EC-577) (Non-BCI).
[4015] This involved, *inter alia*, rerouting the river Ochtum, which flowed past the end of the runway. Senatsbeschluss of 31 May 1988, Exhibit EC-577) (Non-BCI).
[4016] EC, FWS, para. 863.
[4017] US, FWS, para 453 referring to Bremische Bürgerschaft, Antrag (Entschließung) der Fraktion der SPD, Drucksache 12/194, para. 13 (16 May 1988), Exhibit US-195). The Bremen Parliament approved the extension and related expenditures on 18 May 1988. *See,* Bremische Bürgerschaft, Plenarprotokoll, 18. Sitzung, 12. Wahlperiode, at 1018, 1028, 1032 (18 May 1988), Exhibit US-196).
[4018] EC, FWS, para. 864.
[4019] US, FWS, para. 451.
[4020] EC, FWS, para. 860.
[4021] *See*, paras. 7.192 - 7.200 above.

regard were rejected in our Preliminary Ruling.[4022] We therefore will not address these arguments further in this section.

7.1104 Substantively, the European Communities argues that the extension of the Bremen airport runway, and the associated noise reduction measures, constitute measures of general infrastructure, and therefore do not constitute a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[4023] The European Communities argues that the runway extensions fall "within the notion of general infrastructure", asserting that Bremen may provide modern transportation facilities, including an airport, whose proper function is subject to questions of capacity, and thus the extension of the runway to match demand constitutes the provision of general infrastructure.[4024] The European Communities acknowledges that allowing only Airbus to use the full length of the extended runway may constitute the provision of a service within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement,[4025] but contends that granting Airbus a right to use the full length of the runway does not confer a benefit on Airbus because Airbus pays for this use in accordance with the general fee schedule applicable at Bremen Airport.[4026]

7.1105 The United States maintains that the extension of the runway and the implementation of noise reduction measures do not constitute the provision of general infrastructure.[4027] The United States argues that the extension of the runway was undertaken by the city of Bremen specifically for Airbus, to accommodate its need to transport large parts, *i.e.*, aircraft wings, by air, to other Airbus facilities elsewhere. In support of its argument, the United States relies, *inter alia*, on statements made in the Bremen Parliament that described the runway as a "company runway" for Airbus.[4028] The United States further argues that the use of the full length of the extended runway is limited to Airbus by regulation.[4029] In this regard, the United States cites, *inter alia*, an order of the Administrative Court of Bremen which limits the use of the full length of the runway to specific aircraft types carrying freight consisting of wings for Airbus A330/A340 and future models.[4030]

[4022] *See*, paras. 7.88 - 7.105 (findings on temporal scope arguments) and paras. 7.138 - 7.158 (findings on adequacy of US request for panel establishment) above.

[4023] EC, FWS, paras. 869-870.

[4024] EC, FWS, para 870.

[4025] EC, FWS, para. 872.

[4026] EC, FWS, para. 873. The European Communities argues that fees for runway usage are based on objective criteria (such as the weight and type of aircraft, number of passengers). According to the European Communities, the fact that the fees are not calculated based on the length of runway used by a plane does not mean that Airbus should pay an additional fee simply because it uses the full length of the runway. The European Communities asserts that aircraft weight is related to the use of the runway extension because heavier aircraft require longer runways. In other words, the European Communities argues that because the fees are levied in part based on the weight of the aircraft, Airbus is paying a higher user fee when it uses the runway extension to land heavier aircraft. EC, Answer to Panel Question 96, para. 257.

[4027] US, SWS, para. 416.

[4028] US, FWS, para. 451, citing Bremische Bürgerschaft, Plenarprotokoll, 18, Sitzung, 12, Wahlperiode (18 May 1988) at 1016 (stating also that the expenditure amounts to a subsidy of DM 250,000 per take-off), Exhibit US-196; Bremische Bürgerschaft, Antrag (Entschließung) der Fraktion der SPD, Drucksache 12/194 (16 May 1998), Exhibit US-195.

[4029] US, Answer to Panel Question 20, para. 153, referring to the ruling of the Bremen Administrative Court concerning the operating restrictions for the use of the extended runway, which provide that it can only be operated for take-offs and solely for transporting airfreight consisting of the wings of Airbus A330 and A340 aircraft, as well as successive versions thereof, and only using Aero Spaceliner 377 Guppy/Super Guppy or aircraft with noise levels not exceeding those of these models. *See*, pp. 9-13 of the judgment, Exhibit EC-578 and pp. 9-12 of the translation submitted by the European Communities, and Verwaltungsgericht Bremen (Administrative Court) (20 December 2001), case no. 2K 2787/00, Exhibit US-199, at 3.

[4030] US, FWS, para 451, referring to the description in Verwaltungsgericht Bremen (Administrative Court) (20 December 2001), case no. 2K 2787/00, Exhibit US-199, at 3; *see also*, the maps published by the

BCI deleted, as indicated **[***]**

7.1106 The European Communities acknowledges that there are limitations on use of the runway, but argues that these limitations are based on environmental concerns about increased air traffic and pollution, as well as noise-related concerns.[4031] The European Communities also acknowledges that in deciding to extend the runway, the Senate intended to allow Airbus to use the extended runway for the transport of parts, so as to ensure the maintenance of an Airbus facility, and 500 associated jobs, in the region.[4032] In light of this, the European Communities acknowledges that allowing only Airbus to use the full length of the extended runway may constitute the provision of a service within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[4033] However, the European Communities contends that this right does not confer a benefit on Airbus, because Airbus pays for this use in accordance with the general fee schedule applicable at Bremen Airport.[4034] The European Communities also asserts that in practice, the runway extensions can be used by any aircraft in emergency situations such as interrupted take-offs and emergency landings, can be used for the transport of parts and components by the aerospace industry and, in particular cases, can be used by any private airline.[4035] Therefore, the European Communities asserts, all users of the Bremen airport may benefit from the extensions.[4036]

7.1107 The United States argues that the use of the extended runway is limited to Airbus for the transport of aircraft parts by law, referring first to the decision of the Bremen government to extend the runway.[4037] In that decision, the United States argues, the Bremen government explicitly rejected the possibility that the extended runway could be used for general, non-Airbus related air transport. Second, the United States refers to the December 2001 judgment by the Bremen Administrative Court, which confirmed that the use of the extended runway was limited to Airbus, and only for the transport of wings for the A330/A340 or future models.[4038] The United States maintains that, contrary

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German air traffic control agency Deutsche Flugsicherung in the German AIP (14 and 28 October 2004), Exhibit US-193; *see also,* http://www.fluglaerm.de/bremen/flughafenvertrag _seite_1.htm for a description of the history of the extension, Exhibit US-194. *See, also*, United States, Answer to Panel Question 20, para. 152.

[4031] The European Communities notes that in January 1989, Bremen concluded a contract with the Bremen airport company with the aim of permanently restricting noise and pollution from the runway, as extended, which governs the use of the runway extensions. Following a complaint about use of the extension contrary to the applicable restrictions, the Bremen Administrative court in December 2001 confirmed the terms of the user restrictions, obliging the city of Bremen not to use the extensions beyond the agreed level. EC, FWS, paras. 865-867, referring to Verwaltungsgericht Bremen, Az.2 K 2787/00, pp. 5-13, Exhibit EC-578) and Oberverwaltungsgericht Bremen Az 1A159/02, p.1, Exhibit EC-579.

[4032] EC, FWS, para. 872.

[4033] EC, FWS, para. 872.

[4034] EC, Answer to Panel question 96, para. 257. *See*, footnote 4026 above.

[4035] EC, FWS, para. 868.

[4036] EC, FWS, para. 868.

[4037] US, Answer to Panel question 20, para.153 referring to Senatsbeschluss of 31 May 1988, Exhibit EC-577, at paras. 1 and 3 (English translation by the European Communities).

"{1.} The Senate hereby endorses its decision of 8 May 1973, that Bremen Airport, after full availability of the existing 2,034m long runway has been restored, duly satisfies the requirements to be placed on it in the interest of ensuring the safety of flight operations and achieving optimum integration with the domestic and European operations network through short and medium haul flights with the exception of minor restrictions on load capacity. The rejection of an extension to the existing runway for general air traffic remains the unchanged foundation of Bremen's airport policy and the subject of Bremen Airport's operating licence in its revised form of 7 February 1985. ... {3.} The Senate resolves, for the purposes of safeguarding Airbus wing assembly operations in Bremen in the long-term and the 500 jobs which are dependent on such operations, to extend the paved runway to the west and east of the airport by 300m in each direction by Summer 1990 for the exclusive use of super guppy take-offs or take-offs by similarly quiet freight aircraft for MBB intra-factory flights."

[4038] US, Answer to Panel Question 20, para. 153:

"The operating restrictions set forth in the following nos. 1 to 4 provide, *inter alia*, that the special runway can only be operated for take-offs and solely for transporting airfreight consisting of the wings of Airbus

to the European Communities' assertions, the complainant in that case was concerned that the use restrictions, *i.e.*, the limitation to use in transporting Airbus wings, had not been, and might in the future not be, strictly enforced.[4039] Third, the United States refers to the adoption by the Bremen Parliament of a motion reaffirming that the runway extension was undertaken exclusively for use by Airbus to transport Airbus wings.[4040]

7.1108 In response to a question from the Panel, the European Communities confirmed that use of the full length of the extended runway is "currently open only to certain freighters from Airbus and not to other companies".[4041] The European Communities noted that the general conditions to use the runway of the Bremen airport, including the extension, are laid down in the January 1989 contract between the City of Bremen and the airport company ("the *Flughafenvertrag*"), and that in the process of extending the runway, Bremen committed to use the extended runway only in accordance with the agreed user restrictions. Departures exceeding those restrictions can only be authorised with the consent of the neighbours concerned, with the exception of emergency situations.[4042]

7.1109 In this context, the European Communities sought to distinguish the provision of a service from limitations on access to a service. The European Communities asserts that the SCM Agreement "is not concerned with questions of access to services provided by governments".[4043] For the European Communities, under Article 1.1(a)(1)(iii) of the SCM Agreement, the provision of a service constitutes a financial contribution, but the Agreement is not concerned with potential government

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models A 330 and 340 as well as successive versions thereof and only using Aero Spaceliner 377 Guppy/Super-Guppy or one with noise levels not exceeding those of such model. The implementation order of the Senator for Building Affairs, which conform with the settlement, was issued on January 14, 1992. Subsequently, the special runways were built, *i.e.*, the main runway was extended by 300m at each end."

Verwaltungsgericht Bremen (Administrative Court) (20 December 2001), case no. 2K 2787/00, at 3, Exhibit US-199).

[4039] US, Answer to Panel Question 20, para.153. The United States argues that the European Communities omits relevant pages from the Court's decision and that its also omits details and modifies the facts to suit its purposes. For instance, the United States observes that at para. 867 of its first written submission, the European Communities asserts that the complainant had "complained that a Boeing 747 (!) had used the extended runway." The United States argues that in fact, the complaint was triggered primarily by the use of the extended runway by Airbus for six test flights with an aircraft of the type VFW614-ATD. The complainant was concerned, and the Court agreed, that this regular use of the runway by Airbus for test flights, rather than the transport of wings as provided for, indicated that the restriction on the use of the extension was no longer being fully enforced. *See,* pp. 9-13 of the judgment, Exhibit EC-578 and pp. 9-12 of the English translation. The one instance in which the extension of the runway was used by a Boeing 747 was, according to the United States, irrelevant to the judgment. It appears that the runway extension was not used in that instance for either take off or landing, but only for a turning manoeuvre after landing was complete, and the Court did not rely on this event in its ruling. *Id.* at pp. 5 & 8-9 (English version).

[4040] US, Answer to Panel Question 20, para. 153. The United States notes that, in a motion submitted by the governing party, the SPD, to the Bremen Parliament on 16 May 1988, the Parliament was asked to approve the runway extension. The motion noted that "{t}he extension of the takeoff and landing runway as a *company runway* at the Bremen Airport is being done *exclusively for use in the industrial transport of MBB* {*i.e.*, the corporate parent of Deutsche Airbus} *Bremen to transport the Airbus wings*." (emphasis added). The motion was adopted on 18 May 1988. US, Answer to Panel 20, para.153, citing Bremische Bürgerschaft, Antrag (Entschließung der Fraktion der SPD), Drs. 12/194, Exhibit US-195 and Bremische Bürgerschaft, 18. Sitzung am Mittwoch, dem 18 Mai 1988, Plenarprotokoll, p. 1032, paras. (B) and (C), Exhibit US-196.

[4041] EC, Answer to Panel Question 269, para 146.

[4042] The European Communities clarified that other airport users could request the airport company to receive slots for using the extended runway as well. In order to respond positively, the contract would have to be modified by mutual agreement between the City of Bremen and the airport company. The City of Bremen can only agree to such modifications, if and to the extent commitments vis-à-vis the neighbours not to exceed a fixed number of allowed departures on the extended runway would be kept. EC, Answer to Panel Question 269, paras. 144-145.

[4043] EC, Answer to Panel Question 269, para. 147.

BCI deleted, as indicated **[***]**

services or with regulating under which conditions governments may or may not grant exclusive rights to companies. Thus, the European Communities maintains, it is immaterial that only a certain company can have access to a government service, whereas other cannot. According to the European Communities, the SCM Agreement establishes disciplines on the granting of subsidies, and the relevant test is whether the actual provision of the service to a certain company is done on favourable terms as compared with market conditions so as to confer a benefit to the company. Thus, the European Communities argues that the relevant analysis requires a comparison of the user fees Bremen collects from Airbus for the service of allowing it the use of the full length of the extended runway, with the fees collected from other companies for the service of allowing the use of the ordinary length of the runway.[4044]

7.1110 The United States asserts that the SCM Agreement does not support the European Communities' position, but rather flatly contradicts it. The United States argues that Article 2 of the SCM Agreement makes clear that "limit{ing} access to a subsidy to certain enterprises" renders that subsidy specific and that Article 14(d) provides that the "availability" of, *i.e.*, access to, a government-provided service is one factor to be considered when examining adequacy of remuneration in the context of a benefit determination. Therefore, the United States maintains that, where the subsidy at issue is, as provided for in Article 1.1(a)(1)(iii), the provision of a service by a government, the extent to which other users may access that service is critical to any inquiry under the SCM Agreement.[4045]

7.1111 With respect to the noise reduction measures, the European Communities argues that these measures are general infrastructure on the grounds that it is a constitutional duty of the city of Bremen to protect the public health of its citizens. The European Communities contends that in performing this task, the city of Bremen may construct noise reduction measures for the benefit of the public at large and may also chose where such measures need to be located to be most effective. More specifically, it asserts that construction of the noise reduction measures in the area surrounding an airport is for the benefit of citizens living in the immediate neighbourhood, and is a legitimate choice that falls outside the ambit of the SCM Agreement.[4046]

7.1112 The United States contends that the noise reduction measures implemented by the Bremen government at the time of the runway extension cannot be seen as general infrastructure measures. The Unites States argues that these noise reduction measures were necessary only because of the runway extension, which itself was undertaken exclusively for Airbus for the transport of aircraft wings.[4047] Thus, rather than protecting the areas adjacent to the airport against noise from the airport generally, these measures were prompted exclusively by the extension of the runway and are, as such, for the exclusive benefit of Airbus. In support of its view, the United States refers to the Bremen government's decision authorizing the extension, which describes the government's motivation in undertaking the noise reduction measures.[4048] In addition, the United States refers to the 16 May 1988 motion of the SPD, which indicates that, while additional noise reduction measures were not formally required, the extension of the runway should be accompanied by an extended noise reduction area. [4049] A Bremen Parliamentarian therefore called the cost of the noise reduction

[4044] EC, Answer to Panel Question 269, paras. 147-148.
[4045] United States, Comments on EC's Answer to Panel Question 269, para. 133.
[4046] EC, FWS, para. 869.
[4047] US, Answer to Panel Question 22, para. 158.
[4048] "With a view to protecting the resident population living within the proximity of the airport from aircraft noise and to improving the general airport environment in its location near to the city, the Senate resolves, as a voluntary measure, to reimburse, on application, future expenditure on structural noise protection within the existing noise protection zone 2."
Senatsbeschluss of 31 May 1988, para. 5, Exhibit EC-577.
[4049] US, Answer to Panel Question 22, para. 159, citing, Bremische Bürgerschaft, Antrag (Entschließung der Fraktion der SPD), Drs. 12/194, Exhibit US-195.

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measures "follow-up costs for noise reduction."[4050] The above evidence, in view of the United States, demonstrates that the additional noise reduction measures were prompted exclusively by the extension of the runway.

(iii) Evaluation by the Panel

General infrastructure

7.1113 We consider first the European Communities' argument that the provision of the runway extension for the exclusive use of Airbus to transport aircraft wings, and the noise reduction measures, constitute measures of general infrastructure. In order to address that question, however, we must first determine whether the noise reduction measures must be considered separately from the extension of the runway *per se*, and if so, whether the former constitute, as the European Communities argues, a measure of general infrastructure. The United States maintains that the noise reduction features were undertaken only as a result of the extension of the runway, and that therefore they constitute a single measure.

7.1114 We agree with the United States. The evidence before us supports the conclusion that the noise reduction measures were considered only as a result of the decision to extend the runway, and even in that context were not considered necessary, but were undertaken as a matter of choice in connection with the runway project.[4051] The European Communities has provided no evidence to suggest that the noise reduction measures in question would have been undertaken but for the decision of the Bremen authorities to extend the runway. While we recognize that measures to reduce noise in the area of an urban airport may well benefit the public at large, this does not, in our view, suffice to demonstrate that the measures at issue here must be considered general infrastructure, independently from the runway extension. It would be putting the cart before the horse, in our view, to consider whether the noise reduction measures constitute general infrastructure and therefore should be considered separately from the runway extension. We will therefore consider whether the runway extension and associated noise reduction measures constitute the provision of general infrastructure together in our analysis.

7.1115 As we concluded above,[4052] in our view, the determination whether the provision of a good or service constitutes a provision of "general infrastructure" cannot be answered in the abstract, but rather must take into account the existence or absence of *de jure* or *de facto* limitations on access or use, and any other factors that tend to demonstrate that the infrastructure was or was not provided to or for the use of only a single entity or a limited group of entities, which may include factors relating to the circumstances surrounding the creation of the infrastructure in question, consideration of the type of infrastructure, the conditions and circumstances of the provision of the infrastructure, the recipients or beneficiaries of the infrastructure, and the legal regime applicable to such infrastructure, including the terms and conditions of access to and/or limitations on use of the infrastructure.

7.1116 It is clear from the evidence before us that the extension of the runway at Bremen airport, and the associated noise reduction measures, were undertaken by the Bremen city authorities specifically for Airbus' needs. The records of the decision to extend the runway by 600 meters make it clear that this was undertaken in order to enable Airbus to use the runway to transport aircraft wings from its Bremen facility to other facilities in the production of LCA. For instance, the January 1989 contract relating to the airport specifies that that the use of the runway extensions should be limited to ensuring the transport of Airbus wings assembled in Bremen. It goes on to provide that should the

[4050] US, Answer to Panel Question 22, para. 159, Bremische Bürgerschaft, 18. Sitzung am Mittwoch, dem 18. Mai 1988, Plenarprotokoll, Exhibit US-196, p. 1016, para. (B).
[4051] *See*, exhibits cited at footnotes 4038, 4040 and 4048 above.
[4052] *See*, discussion at paras. 7.1036 to 7.1044 above.

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transportation of wings cease, transportation of other goods of the Bremen air and space industry is possible to a limited extent, if such transport cannot be carried out without use of the "special" runway, that is, the extensions, and that should such take-offs not be necessary in the future, no other take-offs are to be carried out.[4053] A motion in the Bremen Parliament concerning the extensions cited costs of DM 40 million for the construction of the "company runway" and DM 9 million for the "voluntary additional noise protection measures". The motion referred to the extension of a "company runway at the Bremen Airport ... being done exclusively for use in the industrial transport of MBB Bremen to transport the Airbus wings".[4054] The motion notes that "{a}ll other proposed and examined alternatives for transport of the wings have been ruled out" and goes on to observe that while "{a}dditional noise protection ... is not necessary ... voluntary additional noise protection measures should be completed now".[4055] During discussions in the Bremen Parliament prior to the eventual approval of this motion, it was noted that the planned "restrictions in use" limited the use of the extensions "only for MBB".[4056] The European Communities does not dispute this evidence, and has presented no evidence to suggest that the extension of the runway was not undertaken exclusively for Airbus' use.[4057]

7.1117 We do not doubt that the Bremen authorities were pursuing a public interest in undertaking the project – indeed, it is clear from the evidence before us that one motivation for the runway extension was the desire to ensure that Airbus' Bremen facility, and the associated 500 jobs, would be able to continue operations. However, a public interest in maintaining jobs in the region is simply not sufficient to demonstrate that the project constitutes general infrastructure. As we have noted, it is in any event always likely to be the case that public authorities will have reasons of public policy when expending public funds. Particularly in the face of evidence to the contrary, a public purpose cannot, in our view, be enough to justify a finding that a measure constitutes general infrastructure.

7.1118 Moreover, not only was the extension of the runway undertaken explicitly to enable Airbus to transport wings by air, but it is clear from the evidence before us that the use of the full length of the extended runway is limited to Airbus by regulation.[4058]

[4053] Exhibit US-194.

[4054] Bremische Bürgerschaft, Antrag (Entschließung) der Fraktion der SPD, Drucksache 12/194 (16 May 1998), Exhibit US-195, para. 2.

[4055] Bremische Bürgerschaft, Antrag (Entschließung) der Fraktion der SPD, Drucksache 12/194 (16 May 1998), Exhibit US-195, paras. 6, 11-12.

[4056] Bremische Bürgerschaft, 18. Sitzung am Mittwoch, dem 18 Mai 1988, Plenarprotokoll, p. 1032, paras. (B) and (C), Exhibit US-196. We recall our decision that the United States need not demonstrate a "pass through" to Airbus, *see* paras. 7.192 and 7.200 above.

[4057] Thus, for instance, although the European Communities alludes, para. 870 of its first written submission, to "questions of capacity" and the "extension of the runways to match demand", it has submitted no evidence to suggest that there were any capacity concerns regarding the Bremen airport at the time the decision to extend the runway was undertaken. Certainly, none of the records concerning the decision to extend the runways before us suggest the existence of any capacity concerns, other than Airbus' need for a longer take-off runway to transport wings manufactured in the region to other facilities.

[4058] US, FWS, para 451, referring to the description in Verwaltungsgericht Bremen (Administrative Court) (20 December 2001), case no. 2K 2787/00, at 3, Exhibit US-199; *see also*, the maps published by the German air traffic control agency Deutsche Flugsicherung in the German AIP (14 October and 28 October 2004), Exhibit US-193); *see also*, http://www.fluglaerm.de/bremen/flughafenvertrag _seite_1.htm for a description of the history of the extension, Exhibit US-194. *See, also*, US, Answer to Panel Question 20, paras. 152-153, referring to the ruling of the Bremen Administrative Court concerning the operating restrictions for the use of the extended runway, which provide that it can only be operated for take-offs and solely for transporting airfreight consisting of the wings of Airbus models A330 and A340, as well as successive versions thereof, and only using Aero Spaceliner 377 Guppy/Super Guppy or aircraft with noise levels not exceeding those of these models.

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7.1119 Indeed, the European Communities does not dispute that the limitation on use of the full length of the extended runway may constitute a subsidy, but rather argues that Airbus pays fees for this usage and that therefore no benefit is conferred on Airbus. The European Communities suggests that the right to exclusive use of the full length of the runway, should be considered access to a service, and should be distinguished from the provision of a service by a government.[4059] It goes on to argue that that the exclusive access provided to Airbus does not confer a benefit.[4060]

7.1120 Our understanding of the United States' position is that it challenges the provision of the extended runway as a good, rather than the provision of access to the extended runway as a service, and thus the European Communities' argument is inapposite. In any event, however, we see no basis in the text of the SCM Agreement for the distinction the European Communities seeks to draw between access to a service or provision of a service, in the context of Article 1.1(a)(1)(iii) of the SCM Agreement. We see no reason why the provision of a service by a government to a company should be distinguished from the establishment, by a government, of limitations on access to a service – in our view, these two slightly different government actions have the same consequences, and thus fall within our understanding of a government providing services as set out in Article 1.1(a)(1)(iii).

7.1121 Having found, as a matter of fact, that the runway extension was undertaken to fulfil Airbus' specific needs, and that use of the extended runway is *de jure* limited to Airbus for the purpose of transporting aircraft wings, we do not agree with the European Communities that only the right to exclusive use of the extended runway is at issue here. Rather, the entire project, extending the runway, the associated noise reduction measures, and the right of exclusive use, constitute a financial contribution to Airbus, within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. Thus, in view of the specific limitations on access to, *i.e.*, use of the extended runway, and the clear evidence demonstrating that the runway extension was undertaken for the use of Airbus, we conclude that it does not constitute a measure of general infrastructure but rather constitutes a financial contribution in the form of the provision of goods or services other than general infrastructure, within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. We therefore turn to the question of benefit.

Benefit

7.1122 The United States asserts that the provision of the runway confers a benefit on Airbus, because (i) Airbus did not reimburse the Bremen authorities for the costs of extending the runway and creating the noise reduction measures, and (ii) Airbus does not pay any additional landing fees for use of the extended runway.[4061]

7.1123 We recall that Article 1.1(b) of the SCM Agreement does not define the notion of "benefit". However, it is well established that a "financial contribution" will confer a "benefit" upon a recipient when it places that recipient in a more advantageous position compared with the position of that recipient in the absence of the "financial contribution".[4062] In *Canada – Aircraft*, both the panel and the Appellate Body considered that the basis for making this comparison was the market. Thus, the panel observed that:

[4059] EC, Answer to Panel Question 269, para. 147.
[4060] EC, Answer to Panel Question 270.
[4061] US, FWS, para. 453.
[4062] Panel Report, *Canada – Aircraft*, para. 9.112, cited with approval in Appellate Body Report, *Canada – Aircraft*, para. 149.

BCI deleted, as indicated **[***]**

> "a financial contribution will only confer a 'benefit', *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market".[4063]

Similarly, the Appellate Body explained that:

> "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 on the market."[4064]

7.1124 Thus, a benefit will be conferred whenever a financial contribution is granted to a recipient on terms more favourable than those available to the recipient in the market. In the context of a financial contribution in the form of provision of goods or services other than general infrastructure, we consider that the appropriate question to be addressed in resolving the question of benefit is whether a market actor would have provided the good or service to the recipient at the time, on the same terms and conditions as the government provision at issue.

7.1125 We note that, during the Annex V process, the Facilitator asked the European Communities and the Airbus governments to provide information regarding the cost of the runway extensions and noise reduction measures at the Bremen airport, but that the European Communities refused to provide any of the information that the Facilitator requested. The United States asks the Panel, in accordance with paragraph 7 of Annex V, to draw adverse inferences that the withheld information supports the contentions of the United States.[4065] The United States has supported its contentions concerning benefit with publicly available information. During the proceedings before the Panel, the European Communities also provided some information concerning the costs of the runway extension and associated noise reduction measures.

7.1126 Relying on the records of the Bremen Parliament approving the runway extension and noise reduction measures, the United States asserts that the City of Bremen paid DM 40 million to extend the runway, and DM 10 million for noise reduction measures.[4066] The European Communities does not dispute that these figures represent the planned expenditures, but contends that the actual construction costs were lower than planned.[4067] Thus, the European Communities contends that the City of Bremen actually paid **[***]** for the extension of the runway and **[***]** for noise reduction.[4068] While the European Communities did not originally submit any supporting evidence for these assertions, in response to a question from the Panel, the European Communities submitted a document indicating that the runway extension accounted for 25.9% of the total amount budgeted for the

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[4063] Panel Report, *Canada – Aircraft*, para. 9.112; Appellate Body Report, *Canada – Aircraft*, paras. 157-158; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 102.

[4064] Appellate Body Report, *Canada – Aircraft*, para. 157.

[4065] US, FWS, para 455 referring to Questions 48-55 from the Facilitator to the EC, Exhibit US-4 (BCI), as well as to EC Answers to Questions 38-45 from the Facilitator, Exhibit US-5 (BCI). *See, also,* US Answer to Panel Question 20, para. 157.

[4066] US, FWS, para 453 referring to Bremische Bürgerschaft, Antrag (Entschließung) der Fraktion der SPD, Drucksache 12/194, para. 13 (16 May 1988), Exhibit US-195. The Bremen Parliament approved the extension and related expenditures on 18 May 1988. *See,* Bremische Bürgerschaft, Plenarprotokoll, 18. Sitzung, 12. Wahlperiode, at 1018, 1028, 1032 (18 May 1988), Exhibit US-196. The United States also refers to statements in the Bremen Parliament that the City of Bremen expenditure amounts to a subsidy of DM 250,000 per take-off. US, FWS, para 451 referring to Exhibit US-196, Bremische Bürgerschaft, Plenarprotokoll, 18, Sitzung, 12, Wahlperiode (18 May 1988) at 1016.

[4067] EC, Answer to Panel Question 94, para. 250.

[4068] EC, FWS, para 864.

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Bremen runway project. According to the European Communities, the entire project included the restoration of the full original length of the runway, as well as the extension.[4069] Thus, the European Communities estimated the actual costs of the extension by applying the 25.9% portion of the total estimate accounted for by the extension to the final actual costs for the runway project as a whole, and arrived at the **[***]** figure cited above.[4070] The European Communities argues that "{r}ather than basing itself on early estimates, the Panel should base its findings on actual data submitted by the European Communities in its first written submission...".[4071]

7.1127 While we are perturbed that the European Communities did not substantiate its contentions until specifically asked by the Panel, the United States does not dispute, and we do accept, as a matter of fact, that the actual cost of the noise reduction measures was **[***]** as shown in Exhibit EC-622[4072].

7.1128 On the other hand, while we understand the calculation on which the European Communities has based its contentions regarding the actual cost of the runway extension, we are not satisfied that this calculation is sufficient to substantiate the **[***]** figure cited by the European Communities as the actual cost of the extension. We recall that the "runway project" included the restoration of the full length of the runway and rerouting of the river, as well as the extension. The European Communities asserts that the restoration of the runway and the extension were "financed under the same budget line, which does not specifically distinguish between restoration and extension".[4073] Thus, the European Communities' contention rests on applying the percentage of estimated costs accounted for by the extension, 25.9 %, to the actual costs of the entire runway project, to arrive at the **[***]** figure. The European Communities indicates that actual costs of the construction were less than the originally estimated costs.[4074] In these circumstances, we cannot simply accept that the percentage of the actual costs of the entire runway project attributable to the runway extension is necessarily the same as the portion of the estimated costs. The actual expenditures were less than the estimated expenditures, and we cannot rule out the possibility that the proportion of the actual expenditures represented by the different aspects of the entire project also changed, since we do not know why the costs were lower than estimated. We further note that the failure of the European Communities to respond at all to the Facilitator's questions in this regard, and the European Communities' failure to substantiate its assertions concerning the costs of the runway extension until directly asked to do so by the Panel, warrants our accepting the figure proposed by the United States. We therefore accept the United States' allegation of DM 40 million, which as noted, the European Communities accepts reflects the originally estimated cost of the runway extension, as the cost of the runway extension for purposes of our consideration of benefit.[4075] Thus, we conclude that the investment by the City of Bremen in the

[4069] EC, Answer to Panel Question 94, para. 249 and Exhibit EC-621 (English translation). The exhibit shows budgeted amounts for "Reinstatement of the full use of the runway ... Extension of the runway ... Loan to Bremen Airport ... Grant to Bremen Airport for investments ... and Noise protection for Airport" The reference to "reinstatement of the full use of the runway" is somewhat perplexing, as the European Communities elsewhere stated that the runway was restored to its full length in 1973, EC, FWS, para. 863, citing Senatbeschluss of 8 May 1973, Exhibit EC-576, while, the extension of the runway was only undertaken in 1988-89. In any event, the European Communities does not dispute that the amounts cited by the United States relate only to the extension of the runway and the noise reduction measures.

[4070] EC, Answer to Panel Question 94, paras. 250-252 and Exhibit EC-622. The European Communities relies on this latter exhibit to substantiate its contention regarding the costs of the noise reduction measures.

[4071] EC, Comments on US Answer to Panel Question 245, paras. 247-248.

[4072] Exhibit EC-622.

[4073] EC, Answer to Panel Question 94, para. 247.

[4074] EC, Answer to Panel Question 94, para. 250.

[4075] We note that the European Communities argues that, for the same reasons as in connection with Mühlenberger Loch, cost to the government is irrelevant for determining benefit. EC, FWS, para. 873. For the same reasons as expressed previously in paragraph 7.1093, we consider that whether the provision of the

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extension of the runway, including the associated noise reduction measures, constitutes a financial contribution in the amount of **[***]**.

7.1129 The European Communities does not argue that the Bremen authorities receive a market return on their investment in extending the runway, but only that the exclusive right to use the extended runway given to Airbus is not on more favourable terms than those in the market, and therefore confers no benefit on Airbus. The European Communities argues that since Airbus pays for the runway use, including the use of the extension, in accordance with the general fee schedule applicable at Bremen Airport, there is no benefit to Airbus.[4076] The European Communities maintains that the fact that Airbus is the only company allowed to use the extended runway is irrelevant for determining the benefit.[4077] The United States maintains that, absent an arrangement that ensures that the City of Bremen is compensated for the cost of the runway infrastructure created specifically for Airbus and available for use only by Airbus, Airbus receives a benefit from having been provided with this infrastructure.[4078]

7.1130 The European Communities observes that the user fees are calculated on the basis of a number of factors including weight of the aircraft, but not on the basis of the length of runway used by a plane when taking off or landing. The European Communities asserts that because Airbus is landing heavier aircraft, it is paying the highest user fees under the applicable fee schedule.[4079] The United States acknowledges that the fee is based on the maximum take-off weight of the aircraft, but argues that maximum take-off weight has nothing to do with the actual take-off weight, and it is this latter fact that determines the actual length of runway needed for take-offs.[4080] Therefore, the United States asserts that the maximum take off weight, on which the fees are calculated, it is not dispositive of whether or not a departing or landing aircraft uses the extended runway. Moreover, United States argues that regardless of the maximum take-off weight of Airbus aircraft using the extended runway, users other than Airbus are not allowed to use the extended runway. Finally, the United States asserts that the European Communities mistakenly suggests that the maximum take-off weight of the aircraft used by Airbus to transport wings from Bremen is particularly high.[4081]

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extended runway and noise reduction measures to Airbus confers a benefit is properly evaluated on the basis of the investment by the government in the measure.

[4076] EC, FWS, para 873. Fees for runway usage are based on objective criteria such as the weight and type of aircraft, number of passengers, etc.. According to the European Communities, the fact that the fees are not calculated based on the length of runway used by a plane does not mean that Airbus should pay an additional fee simply because it uses the full length of the runway. The European Communities asserts that aircraft weight is related to the use of the runway extension because heavier aircraft require longer runways. In other words, because the fees are levied in part based on the weight of the aircraft, Airbus is paying a higher user fee when it uses the runway extension to land heavier aircraft; EC, Answer to Panel Question 96, para. 257. *See, also,* EC, Answer to Panel Question 269, para. 146.

[4077] EC, Answer to Panel Question 270, para. 156*; see also,* the European Communities' answer to Panel Question 269, paras. 147-148.

[4078] US, SWS, para 418.

[4079] EC, Answer to Panel Question 96, para. 257.

[4080] US Comment on EC, Answer to Panel Question 270

[4081] US, SWS, para 419. The United States observes that the Boeing Super Guppy has a maximum take-off weight of 77 tonnes; the Airbus Super Transporteur (Beluga) has a maximum take-off weight of 155 tonnes. By way of comparison, the A300-600 Freighter has a maximum take-off weight of 170.5 tonnes; the A330-200 Freighter has a maximum take-off weight of 233 tonnes; and the A340-200 has a maximum take-off weight of 275 tonnes. *See,* Airbus, Product Viewer, 18 May 2007, Exhibit US-590; Flugzeuginfo.net, B-377 SG Super Guppy, 2006, available at www.flugzeuginfo.net, Exhibit US-591. The United States observes that the European Communities' "implicit fee" theory would only make sense if the maximum weight of the Airbus-owned aircraft allowed to use the extended runway - the Beluga and the Super Guppy - were so extraordinarily high that Airbus would have to pay, by definition, a higher fee than any other user of the airport (which is not allowed to use the extension). If so, the difference between the fee charged for the Beluga and the Super Guppy

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7.1131 The United States maintains that Airbus' exclusive use of the extended runway is relevant to the determination of benefit, because if Airbus pays less than adequate remuneration for that exclusive use, it is receiving a benefit, referring to Article 14 (d) of the SCM Agreement. In sum, the United States argues that Airbus continues to enjoy the use of the extended runway to the exclusion of all other users for a nominal fee that in no way compensates Bremen airport for that use.[4082]

7.1132 The European Communities provided no evidence to support the suggestion that the take-off weight of Airbus aircraft transporting wings and using the extended runway is higher than that of other aircraft, which are not allowed to and do not use the extended runway. Thus, there is no factual basis on which we could conclude that Airbus pays a higher fee for use of the extended runway than other users pay for the use of the non-extended runway. Moreover, the European Communities has provided no evidence, or even argued, that heavier Airbus aircraft actually require the use of the extended runway – indeed, evidence submitted by the United States suggests that aircraft heavier than those used by Airbus on the extended runway use the Bremen airport, but these do not, barring emergencies, use the extended runway. Thus, no connection has been established suggesting that Airbus pays fees relating to the use of the extended runway. It is clear to us that the fees paid by Airbus do not relate to the use of the extended runway *per se*, but are based on the weight of the aircraft in question, and thus are indistinguishable from the fees paid by other users of the airport for the use of the non-extended runway.

7.1133 As we have already concluded that the subsidy is not limited to simply the use of the extended runway, but rather encompasses the entire investment by the City of Bremen in extending the runway and the associated noise reduction measures, for the benefit of Airbus, we do not consider that an evaluation of the fees paid by Airbus for runway use at Bremen airport affects our analysis of benefit. It is undisputed that Airbus pays runway fees in accordance with the regular fee schedule, applicable to all users of the airport, with no additional charges for the use of the runway extensions, which only Airbus is permitted to use, and only for certain flights. Airbus pays no other fees or charges in connection with the extended runway. Thus, it is clear that there is no return to the City of Bremen on its investment in the runway extension and noise reduction measures, and a benefit to Airbus conferred by the provision of that extension and noise reduction measures.

7.1134 Therefore, in our view, the conclusion that the provision of the runway extension and associated noise reduction measures confers a benefit on Airbus, for whom the project was undertaken, and which is by regulation the exclusive user, is clear. As Airbus is the only company entitled to regular use of the extended runway, and in view of the fact that the extension was undertaken by the Bremen authorities explicitly to fulfil Airbus' needs in transporting aircraft wings, we find that the subsidy in question is specific to Airbus within the meaning of Article 2.1(a) of the SCM Agreement.

(e) ZAC Aéroconstellation

7.1135 The United States asserts that the provision of the Aéroconstellation site to Airbus, which it asserts includes the sale of a portion of the site and the lease of another portion of the site, and including the provision of certain specialized facilities (the EIG facilities), constitutes a subsidy within meaning of the SCM Agreement because it involves a financial contribution in the form of the provision of goods and services other than general infrastructure within the meaning of

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(which may use the extension) and "usual" aircraft of other users (which may not use the extension) might be seen as an implicit fee for the extension. The comparison submitted by the United States shows, however, that the maximum weights of the Beluga and the Super Guppy are not such as to carry an implicit fee. US Comment on EC, Answer to Panel Question 270, para.137. Thus, it appears that weight of the aircraft is not relevant to the use of the extended runway.

[4082] US Comment on EC, Answer to Panel Question 270, para.139.

BCI deleted, as indicated **[***]**

Article 1.1(a)(1) of the SCM Agreement,[4083] that confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement.[4084] The United States claims that the subsidies provided are specific within the meaning of Article 2.1(a) ("specificity in law") and Article 2.1(c) (specificity "in fact").[4085] The United States also claims that the improvement of roads linking the Aéroconstellation site to the "Itinéraire à Grand Gabarit" ("IGG") (the extra-wide highway) constitutes a subsidy within the meaning of Article 1 of the SCM Agreement, which is specific within the meaning of Article 2.[4086]

7.1136 The European Communities argues that the creation of industrial land such as the Aéroconstellation site is not a financial contribution for purposes of Article 1.1(a) of the SCM Agreement because the provision by the government of any goods or services in the context of the creation of the site, including the improvement of the roads, constitutes the provision of general infrastructure.[4087] As regards the EIG facilities, the European Communities contends that the lease for these facilities does not confer a benefit within Article 1.1(b) because it is at market rates.[4088]

(i) Factual Background

7.1137 In 1999, French government authorities signed a protocol on the development of a site located near Toulouse, adjacent to the Toulouse Blagnac airport, to be known as the Aéroconstellation site, and to be dedicated to aeronautical activities.[4089] The site is designated as a "zone d'aménagement concertée" ("ZAC") under French law, a zone in which a public authority buys, improves, and sells land for economic development.[4090] ZACs of different sorts, *e.g.*, for industrial, housing, and various tertiary services, exist throughout France, created under the same general legal provisions.[4091]

7.1138 The development of the ZAC Aéroconstellation required first that the agricultural land in question be made suitable for industrial use. This included the creation of drainage, sewage, water circulation systems, fencing, fire protection, landscaping and lighting. Second, in order to make the site suitable for the aeronautical activities for which it was intended, certain additional elements, including taxiways and roads on the site, aircraft parking areas, underground technical galleries and service areas, were created. These specialized facilities are collectively known as "équipement d'interet général" ("EIG") facilities.[4092]

7.1139 After the Aéroconstellation site was prepared, the government-established company charged with implementing the project the "*Société d'Equipment Toulouse Midi Pyrénées*" ("SETOMIP") sold all but 11 hectares of the land to different companies involved in the aeronautical industry, including with the development and production of the A380 aircraft that were to be assembled there.[4093] Purchasers of land in the ZAC included Airbus France, Air France Industries, the Société industrial aéronautique du Midi (SIDMI), CUS-Elyo, Exxon Mobil and STTS.[4094] These companies are all

[4083] US, FWS, para. 463.
[4084] US, FWS, para. 464.
[4085] US, FWS, para. 479.
[4086] US, FWS, para. 483. We note that the United Status has not challenged the IGG itself in this dispute.
[4087] EC, FWS, para. 922.
[4088] EC, FWS, para 925.
[4089] US, FWS, para. 456 and footnote 544, citing Exhibits US-201 and US-205.
[4090] EC, FWS, para. 923 and note 747, citing Article L.311-1 of the French urban code ("*Code de l'Urbanisme*"), http://www.legifrance.gouv.fr/WAspad/ListeCodes.
[4091] EC, FWS, para. 923.
[4092] US, FWS, para. 458, EC, FWS, paras. 912-914.
[4093] EC, FWS, para. 915; US, FWS, paras. 459-460; US, Answer to Panel Question 20; US, SNCOS, para. 91; Exhibits US-200, 206-207, 498, 532 and 640.
[4094] EC, FWS, para. 915, footnote 738 and web-site referred to therein, consulted by Secretariat on various dates.

involved, in various ways, with different aspects of the construction, assembly, testing, maintenance, etc. of aircraft. All purchasers of land in the ZAC paid the same price per square meter for the different sized plots purchased.[4095] In addition, an association of users, the "*Association Foncière Urbaine Libre*" ("AFUL") comprising all the companies that bought land in the ZAC, was created.[4096] The EIG facilities were leased by the Toulouse authorities to the AFUL. Only AFUL members have access to the EIG facilities, and each member of the AFUL pays rent for the EIG facilities on a pro-rata, user pays basis, at the same rate per unit of use.[4097]

7.1140 At the same time as the Aéroconstellation site was being developed, the French authorities undertook the improvement of several public roads around the site, specifically, the RD901, the RD902 and the RD963. These roads serve, *inter alia*, as access roads linking the Aéroconstellation site to the IGG, the extra-wide highway that enables Airbus to transport A380 components manufactured elsewhere from the French coast to Toulouse. The improvement of these roads was financed and supervised by the French authorities.[4098]

(ii) Arguments of the Parties

Provision of the ZAC Aéroconstellation site and EIG facilities

United States

General Infrastructure

7.1141 The United States argues that the ZAC Aéroconstellation site, including the EIG facilities, is not "general infrastructure", asserting that it has been tailor-made for Airbus, its suppliers and Air France. The United States claims that the French authorities transformed agricultural land in Toulouse into a site suitable for use by Airbus as a production, testing, and delivery site for the A380, and then sold the site to Airbus at a below-market price, thereby conferring a benefit.[4099] The United States argues that, even accepting the European Communities' allegations regarding the price paid for the land, that price is lower than the French authorities' investment in preparing the site, including the development of the EIG facilities.[4100] In addition, the United States asserts that Airbus appears to be the predominant user of the site and the predominant or exclusive user of the EIG facilities,[4101] noting that Airbus occupies the largest single space on the site, 51 hectares, more than half of the total 95 hectares made available for sale.[4102] Almost all other occupants are suppliers to Airbus.[4103] The

[4095] EC, FWS, para. 916.
[4096] EC, FWS, para. 917.
[4097] EC, FWS, para. 917.
[4098] The improvement of these roads was originally discussed in July 1996. The *Révision du Schéma Directeur de l'Agglomération Toulousaine*, discussing the improvement was finalised on 12 July 1996 and submitted to the *Syndicat Mixte D'Études de l'Agglomération Toulousaine* (SMEAT) for its approval on 11 December 1998. Révision du Schéma directeur, p. 216, Exhibit EC-125. The general council of the *Département de la Haute-Garonne* took the relevant decision on the roads in January 1998 to accommodate traffic and congestion caused by industrial growth in the Toulouse-Blagnac region. *See, e.g.*, Décision du Conseil Général du Département de la Haute-Garonne, 29 January 1998, Exhibit EC-126).
[4099] US, SWS, para. 399.
[4100] US, SWS, para. 401.
[4101] US, Answer to Panel Question 20, para. 144.
[4102] US, Answer to Panel Question 20, para. 144, referring to Atisreal study provided by the European Communities as Exhibit EC-18 (BCI) p. 10.
[4103] In support of its position, the United States refers to maps which can be found at http://www.grandtoulouse.org/admin/upload/fichier/aeroconstellation.htm (Carte interactive), Exhibit US-218, and in particular to the descriptions of the activities of these companies in the maps entitled "La société Capelle", "Le centre technique" and "La station carburant". *See, also,* press releases published by ELYO,

BCI deleted, as indicated **[***]**

United States contends that, as with the Hamburg site, had the French authorities not created the Aéroconstellation site for and provided it to Airbus, the company would have had to make the investment itself.[4104] The United States also argues that the fact that the site is a ZAC, created under the same legal authority as other similar sites elsewhere in France, lends no support to the European Communities' position that provision of the site is a measure of general infrastructure.[4105] The United States asserts that the site was created specifically as a location for Airbus A380 facilities, its use is expressly limited to the aeronautics industry, and it is used almost exclusively by Airbus and its suppliers.[4106] The United States also refers to the European Commission's decision in the *Scott Paper* case, arguing that the Commission's conclusion that purchase and transformation of agricultural land to industrial use, and its sale at a price that did not recoup costs, would not have been undertaken by a private investor, and therefore constituted state aid, supports its view that the provision of the Aéroconstellation site constitutes a subsidy.[4107]

7.1142 The United States alleges that the revenue from the sale of land in the ZAC constituted less than adequate remuneration, thereby conferring a benefit on Airbus, because it does not cover (a) the cost of the land improvements, (b) the value of the unimproved land, and (c) an unspecified return. The United States asserts that a private investor would not have improved the land and sold it at a loss. The United States argues that the European Communities' focus on the market price for improved land in the area as the benchmark ignores that fact that the site was created expressly for Airbus, and that a private investor who prepared land for a particular buyer would not exclude the value of its investment in developing the land from its selling price, which is what the government did in providing the Aéroconstellation site to Airbus.[4108]

7.1143 The United States also contends that most of the taxiways on the site exclusively connect Airbus assembly and testing facilities to the airport.[4109] The only other users of taxiways on the Aéroconstellation site are Air France and STTS, which use the taxiways to access their buildings. The United States, referring to the official map of the site, notes that these buildings are located at the entrance to the site from Toulouse-Blagnac Airport at the very southern end of the site, and argues that these taxiways used by Air France and STTS do not account for even 10 percent of the total length of the taxiways.[4110] Similarly, Airbus is the exclusive user of most of the aircraft parking space on the site. The United States asserts that the large space in front of Airbus's production hall labelled "infrastructure publique" and marked red on the map available from the website of Grand Toulouse is used exclusively by Airbus as a testing site for the A380. Airbus owns the land used for the actual testing facilities, marked blue on the map.[4111] The United States asserts that this evidences that the infrastructure improvements are not "general" in the sense of Article 1.1.(a)(1)(iii).

Exhibit US-221, and ExxonMobil, Exhibit US-222,, describing the role of ELYO, ExxonMobil and Spie Batignolle.

[4104] US, SWS, para. 402.

[4105] US, SNCOS, para 90.

[4106] US, SNCOS, para 91.

[4107] European Commission, Decision of 12 July 2000, Aid to Scott Paper SA Kimberly-Clark, OJ 2002 L 12, Exhibit US-190, (hereinafter "*Scott Paper*"). US, FWS para. 435-436.

[4108] US, SNCOS, para 92.

[4109] US, Answer to Question 20 of the First Panel Questions, para. 145.

[4110] The United States refers in this regard to the previously cited maps which can be found at http://www.grandtoulouse.org/admin/upload/fichier/aeroconstellation.htm (Carte interactive), and which the United States submitted as Exhibit US-218. On the maps, the sites marked in blue are the private facilities (each marked with the name of the occupant; the areas marked in red are the "public" infrastructure: the roads, taxiways and airplane parking spaces on the site. *See, also,* the satellite photographs of the site at http://maps.google.com, Exhibit US-481.

[4111] *See,* map at http://perso.orange.fr/franceaero/plan/planaccueil.htm, Exhibit US-219. *See, also,* the maps at http://www.grandtoulouse.org/admin/upload/fichier/aeroconstellation.htm (Carte interactive), Exhibit

BCI deleted, as indicated **[***]**

Benefit

7.1144 The United States made its assertions concerning the alleged benefit associated with the provision of the Aéroconstellation site and the EIG on the basis of publicly available information, as the European Communities had not provided any of the information requested in this regard during the Annex V process. The United States provides a range of figures for the expenditures to develop the Aéroconstellation site, from EUR 158 million[4112] to EUR 200 million.[4113] The United States also asserts that French authorities spent approximately EUR 77.9 million, that is, EUR 82 per square meter, on internal development measures to turn 950,000 square meters of agricultural land into land fit for industrial use, not including the EIG facilities.[4114] The European Communities does not dispute these figures. The United States contends that a commercial owner of the land either would have sold the land "as is" or would have asked for a commercial return on the owner's investment in turning the land into an industrial site, in addition to a price reflecting the value of the land.[4115] The United States argues that the EUR 158 million in site preparation is akin to a grant, since the French authorities spent funds to create a site that Airbus would otherwise have had to create itself.[4116] The United States originally asserted, based on public information, that the French authorities sold the land in the ZAC to Airbus for between EUR 14 and EUR 27 per square meter,[4117] while they sold the remaining commercial surfaces in the ZAC for EUR 45.73 per square meter.[4118] The United States also points out that at the same time that they created the Aéroconstellation site, the French authorities also created the near-by ZAC Andromède, a mixed residential and commercial area developed primarily to respond to the residential and commercial needs arising from the Aéroconstellation project, and sold land in the ZAC Andromède at EUR 200 per square meter.[4119] Thus, in the United States' view, the sale of the land in the ZAC Aéroconstellation was for less than adequate remuneration, and thus confers a benefit on Airbus.

7.1145 Again relying on publicly available information,[4120] the United States asserts that the lease for the EIG facilities was based on the total cost of the facilities, as originally estimated in 2002, EUR 53.4 million. The lease, with a term of 40 years, was concluded in June 2002. The rental amount was determined by analogy to a loan with a 2.2 percent annual interest rate, with repayment of the principal and interest spread over the 40 year term of the lease. The lease payments were progressive, with lower payments in the early years and higher amounts later.[4121] By 2003, however,

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US-218, in particular the maps entitled "Les aires industrielles" and "Les postes extérieurs". Finally, *see* the **[***]** the Atisreal study provided by the European Communities as Exhibit EC-18 (BCI) p. 11.

[4112] US, FWS para. 467, footnote 568.

[4113] US, FWS para 456.

[4114] EUR 77.9 million is the difference between the total EUR 158 million that French authorities spent to develop the Aéroconstellation site (US, FWS, para. 468) and the 80.1 million of that amount attributable to EIG facilities (US, FWS, para. 475).

[4115] US, SWS, para. 406.

[4116] US, FWS, para.468.

[4117] US, FWS, paras. 467-468.

[4118] US, FWS, para.469 referring to Agence d'Urbanisme et d'Aménagement du Territoire Toulouse Aire Urbaine, Atlas des Parcs d'Activités de la Haute-Garonne, available at http://www.auat-toulouse.org, Exhibit US-223; *see also, Airbus entame la construction de l'usine Star de l'A380 à Blagnac*, Les Echos No. 18555, at 12 (19 December 2001) (reporting that, as of December 2001, 37 hectares were still available at EUR 45.73 per square meter), Exhibit US-212.

[4119] US, FWS, para 470, referring to Atlas des Parcs d'activités de la Haute-Garonne, Blagnac, ZAC Andromède, available at http://www.auat-toulouse.org/cdza_trav/Rcs_swf/loader.php, Exhibit US-224.

[4120] US, FWS, paras. 474, referring to Conseil de Communauté du Grand Toulouse, Délibération no. 2004-05-ADU-01, 28 May 2004, Exhibit US-214; *see also, Les collectivités locales ont investi 172 millions d'euros dans la zone* Aéroconstellation, Les Echos No. 19155, at 20 (10 May 2004), Exhibit US-213.

[4121] The United States clarifies that when the original cost for the EIG facilities was estimated at EUR 53.4 million, the annual rent was expected to be between EUR 1.6 million (in 2007) and EUR 2.8 million (in 2042).

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the total estimated cost of the project had increased to EUR 69.2 million, resulting in a modification of the lease, under which EUR 56 million of the costs were treated like a 40 year loan with a 2.2 percent annual interest rate, while a 4.5 percent interest rate, again over 40 years, was applied to the remaining EUR 13.2 million. In 2004, after costs increased again, to EUR 80.1 million in total, the lease agreement was again modified, to treat EUR 62.6 million like a 40-year loan with a 2.2 percent annual interest rate in accordance with the original lease terms, and applying a 4.5 interest rate to the remaining EUR 17.5 million.[4122]

7.1146 The United States argues that these terms are not commercial. According to the United States, a commercial investor in industrial real estate in the region at the time (2002-2004) would have required an initial net return of between 9 and 11 percent on its investment in building the EIG facilities, EUR 80.1 million, for a lease price of between EUR 7.2 million and EUR 8.8 million.[4123] The United States also contends that other aspects of the lease demonstrate its non-commercial nature: (a) the lease price calculation ignores the value of the 119 hectares of land on which the EIG facilities were built; (b) the lease price increases progressively, further reducing the effective net initial return,[4124] and (c) the lease price is not subject to **[***]**, but remains **[***]** over the 40 years.[4125] According to the United States a commercial investor would not have acted this way, but would have asked for an **[***]** of the lease price to reflect the **[***]** of money.[4126] The absence of an **[***]** clause results in an additional, very large advantage for Airbus.[4127]

7.1147 Finally, the United States asserts that the European Communities' own consultant, Mr. Miller, came to the conclusion that the lease agreement conferred a benefit as compared with a market benchmark. According to the United States, Mr. Miller concluded that a commercial investor would have asked for a lease price of EUR 4.4 million per year for the EIG facilities plus an additional EUR 1.5 million for the land on which these facilities were built, for a total of EUR 5.9 million per year.[4128] However, the United States asserts, on average, Airbus pays an annual lease price of EUR 3.1 million,[4129] therefore, on average, Airbus pays EUR 2.8 million less per year than what a commercial investor would have required it to pay.[4130]

7.1148 Responding to the European Communities' argument that the cost of Airbus debt should be used as a benchmark, the United States asserts that, accepting the European Communities' approach,

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[4122] US, FWS, paras. 474-476, also referring to the Conseil de Communauté de Grand Toulouse, Délibération no. 2004-05-ADU-01 (28 May 2004), Exhibit US-214.

[4123] US, SWS, para. 410.

[4124] US, FWS, para. 473.

[4125] US, SWS, paras. 411-413.

[4126] US, SWS, para. 413, citing INSEE, Informations Rapides, Série "Principaux Indicateurs", Indice du coût de la construction, 12 January 2007, p. 2: "The cost of construction index is used, in particular, to adjust lease prices agreed in lease agreements for commercial property." ("L'Indice du coût de la construction est notamment utilisé pour réviser les loyers des baux commerciaux."), Exhibit US-588.

[4127] US, SWS, para. 413. The United States notes that, from the third quarter of 1997 to the third quarter of 2006, lease prices indexed to the INSEE cost of construction index increased annually by 2.86 percent on average, citing INSEE, L'Indice du Coût de la Construction, Exhibit US-589. Based on the terms of the lease agreement as modified in 2004, the United States contends that Airbus pays, on average, EUR 3.1 million over the course of 40 years. If one ties the annual payment of these EUR 3.1 million to the INSEE cost of construction index, as a private investor would have done, and assumes an average annual increase of cost of construction by 2.86 percent, the United States asserts that the annual lease price would increase to EUR 4.00 million by 2012; EUR 5.30 million by 2022; EUR 7.02 million by 2023; and EUR 9.31 million by 2042. US., SWS, footnote 517.

[4128] US, Comment on EC, Answer to Panel Question 185, para. 123, referring to EC, SCOS, paras. 31-32.

[4129] US, SWS, paras. 408-414.

[4130] US, Comment on EC Answer to Panel Question 185, para. 123.

BCI deleted, as indicated **[***]**

and taking Airbus' cost of debt at 6.83 percent,[4131] a market-based lease price should have been EUR 5.5 million per year[4132] – almost double the amount paid by Airbus. Thus, according to the United States, even using the European Communities' approach to analyzing the lease, including the benchmark proposed by it, the United States contends that Airbus saves at least EUR 2.7 million per year from the beneficial terms of the lease of the EIG facilities.[4133]

7.1149 The United States also defends its benchmark lease price of between EUR 7.2 million and EUR 8.8 million, based on an initial net return of at least between 9 and 11 percent.[4134] The United States asserts that the EIG facilities lease is no different from any other lease, and if anything, its risks are higher than for typical real estate because the ZAC Aéroconstellation site and EIG facilities are tailor-made for Airbus and the aeronautics industry's needs and are thus extremely specialized facilities for which there exists virtually no other market than Airbus and the associated companies that occupy the ZAC.[4135] The United States also asserts that while Airbus France credit rating may have been A1 in 2007, it was rated only A2 in 2001 and was downgraded even further to A3 in early 2002, when the lease terms were negotiated and agreed, and that this rating persisted until about 2 years past the start date of the EIG facilities lease.[4136]

7.1150 The United States considers the European Communities' assertion that Airbus France would not have agreed to an investor return on the lease that exceeded its own borrowing cost to be at odds with economic reality. In particular, the United States maintains that companies regularly prefer leases over purchases because a lease keeps the debt involved off their balance sheets. The United States also recalls that the lease was entered into as part of the same package as the Aéroconstellation site purchase by Airbus and the other aeronautics companies using it.[4137] Thus, it is not clear if Airbus even had a choice whether to construct and/or purchase the EIG facilities itself. Indeed, the United States argues that the European Communities' assertion is difficult to reconcile with actual practice in the market, where lease prices are frequently higher than purchase prices based on a company's cost of borrowing.

7.1151 In respect of indexation, the United States clarifies that: (i) due to the time-value of money, the fact that larger lease payments are not made until later results in a lower rate of return for the investor/lessor; and (ii) the lack of **[***]** exposes the investor to the additional risk of further reducing his return because of **[***]**. A **[***]** lease price would typically demand a premium to compensate for this additional risk (in particular in light of the long term of the lease), but the 3.9% return that is achieved through the EIG lease does not include such a premium. In the United States' view,

[4131] EC, Answer Panel Question 271, para. 160.

[4132] US, Comment on EC, Answer to Panel Question 271, para. 143 and footnote 193, referring to the United States' calculation in Exhibit US-686. The United States observes that it fails to understand how the European Communities arrived at the amount of EUR 4.4 million used in EC Answer Panel Question 271, para. 161, noting that the European Communities has not explained its calculation method, nor has it revealed its calculation.

[4133] US, Comment on EC, Answer to Panel question 271, para. 143. The United States observes that the European Communities suggests that 6.83 percent was Airbus France's average cost of debt throughout the entire period (EC Answer Panel Question 271, para. 160), the United States has used previously 6.83 percent for the EUR 62.6 million share agreed in 2002 and 6.17 percent for the EUR 17.5 million share agreed in 2004 (US, SWS, para. 411, n.512). Even if calculated on this more conservative basis, the United States considers that the lease price would have been EUR 4.3 million for the EUR 62.6 million share and EUR 1.1 million for the EUR 17.5 million share (totaling EUR 4.4 million per year, or EUR 2.2 million per year more than the lease price agreed), referring to the calculation in Exhibit US-686.

[4134] US, SWS, para. 411; US, Comments on EC Answer to Panel Question 271, paras. 141 – 150.

[4135] US, Comment on EC, Answer to Panel Question 271, para. 147.

[4136] US Comment on EC, Answer to Panel Question 271, para. 148, referring to Moody's screen-print, Exhibit US-688.

[4137] US Comment on EC, Answer to Panel Question 271, para. 149, referring to EC, FWS, n.726.

BCI deleted, as indicated **[***]**

characterization of the lease as debt financing does not "obviate" the need for **[***],** it simply means that while **[***]** is usually made explicit in lease contracts, it is usually implicit in debt financing. It also means, that, in the case of a 40-year arrangement like the EIG facilities lease, such "implicit **[***]**" would need to take account of the **[***]** that comes with a longer term loan, *i.e.*, that the premium would be far higher than on the average borrowing of the company.[4138]

7.1152 Thus, the United States maintains that Airbus receives a benefit of at least EUR 4 million to EUR 5.6 million per year from the EIG lease, and, in fact, much more.[4139] In any event, however, the United States notes that the European Communities has admitted that Airbus receives a benefit from the terms and conditions of the EIG lease agreement that is worth at least EUR 2.3 million per year.[4140]

7.1153 The United States claims that the provision of the site is a subsidy specific "in law" because the entire site, including the EIG facilities, was "tailor-made" for A380 production operations, and is explicitly dedicated to the aeronautics industry as a "parc d'activités aéronautiques". It also claims that the provision of the site is a subsidy specific "in fact," because only aeronautics companies and their suppliers are located on the Aéroconstellation site, and Airbus is the primary or predominant user of the site, including the EIG facilities.[4141]

European Communities

General Infrastructure

7.1154 The European Communities assert that industrial parks like the ZAC Aéroconstellation constitute general infrastructure within the meaning of Article 1.1 of the SCM Agreement because creation of such facilities benefits society as a whole and reflects legitimate economic development policies. According to the European Communities, the creation of an industrial site is a legitimate policy choice open to every WTO member.[4142] It argues that the creation of an industrial site is therefore a public investment for the benefit of the population at large. The European Communities states that any member of the public can participate in the tenders for the sale of the land and lease of the EIG facilities, and that such tenders are open and non-discriminatory. In return, the companies who use the ZAC are then expected to invest and produce at it, with a positive spill-over for employment and tax income in the region. Thus, the European Communities asserts that ZAC Aéroconstellation site, like ZACs all over France, is a typical example of public-private partnership for the economic development of the country at large and constitutes general infrastructure.[4143] In addition, the European Communities observes that all of the companies which bought land in the ZAC Aéroconstellation paid the same price for that land, **[***]** per square meter, a price the European Communities argues is commensurate with market prices for improved land in the area.[4144] The European Communities also argues that Airbus did not lack alternatives to the ZAC Aéroconstellation – according to the European Communities, Airbus bought "undifferentiated" industrial land, with basic infrastructure allowing it to be used for industrial purposes, and that similar land is available throughout Europe. Moreover, the European Communities asserts that the return to the government is not limited to the purchase price of the land, but may include "other forms" of remuneration such as higher tax revenues and increased employment, which may make it willing to incur what appears to be a loss in providing the land in question. The European Communities maintains that consideration

[4138] US, Comment on EC, Answer to Panel Question 272.
[4139] *See*, US, Comment on EC, Answer to Panel Question 272.
[4140] US, Comment on EC, Answer to Panel Question 271, paras. 141 – 150.
[4141] US, FWS, para. 479.
[4142] EC, FWS, para 923.
[4143] EC, FWS, para 925.
[4144] EC, FWS, paras. 927-935, citing Attestation de vente, **[***]**, Exhibit EC-123 (BCI).

BCI deleted, as indicated **[***]**

of the cost incurred by the French authorities in preparing the site for industrial use is irrelevant to the question of benefit.[4145]

7.1155 The European Communities does not argue that the EIG facilities constitutes general infrastructure and their provision is therefore not a financial contribution. Rather, the European Communities asserts that the terms of the lease for these facilities is commensurate with a market benchmark, and therefore does not confer a benefit within the meaning of Article 1.1(b).[4146] The European Communities asserts that the EIG facilities enable owners of land in the ZAC Aéroconstellation to exploit the efficiencies of using a single, integrated network of facilities, instead of each company constructing its own redundant and potentially incompatible infrastructure.[4147] It argues that **[***]**, and that the land in the ZAC would have been worthless to Airbus France without facilities such as taxiways and aircraft service areas, because these shared facilities are indispensable to Airbus France's A380 final assembly operations.[4148] The European Communities further contends that **[***]**.[4149] The European Communities also points out that **[***]**.[4150]

Benefit

7.1156 The European Communities asserts that the price paid by Airbus to purchase land in the ZAC Aéroconstellation was at or above prices charged in other similarly-improved ZACs in France. For instance, at the ZAC de Saint Martin du Touch, which is similarly located near the Toulouse-Blagnac airport, the price of comparable industrial land is **[***]**.[4151] The European Communities disputes the appropriateness of the United States' comparison with the ZAC Andromède, because the latter does not have an industrial purpose, but is dedicated to housing and services, and is thus considerably more expensive than land in an industrial ZAC.[4152] The European Communities contends that the findings of Atisreal, an independent commercial appraisal firm, confirm that the price of the land purchased by Airbus France in the ZAC Aéroconstellation was consistent with market terms. Atisreal, employing both comparative and land cost valuation methodologies, allegedly in accordance with industry standards, concluded that the market price of improved land of the sort purchased by Airbus France was between EUR 24/m^2 and EUR 27/m^2 in 2001.[4153]

7.1157 In this context, the European Communities argues that in instances where the government's costs are particularly high relative to the value of the economic resources transferred to the recipient, the "benefit to the recipient," market benchmark standard still applies, and serves as a ceiling on the amount of "benefit" that can be assessed under Article 1.1(b) of the SCM Agreement. This, according to the European Communities, means that the government can only earn a market-based return on the value of the thing, which may or may not be lower than its cost.[4154] The European Communities maintains that the United States erroneously relies on Article 14(a) of the SCM Agreement, which relates to government equity infusions and according to which a benefit is not conferred unless an equity infusion is conferred contrary to the "usual investment practice … of private investors in the territory of that Member." Article 14(d) of the SCM Agreement prescribes a different standard for the provision of goods and services, one that is tied to "prevailing market conditions," such as "price."

[4145] EC, SNCOS, paras. 216-217.
[4146] EC, FWS, para 925.
[4147] EC, FWS, para. 922.
[4148] EC, FWS, para. 919**.**
[4149] EC, FWS, para. 919 referring to **[***]** declaration, paras. 4-6, Exhibit EC-17 (BCI); ZAC Protocole d'Accord, **[***]**, Exhibit EC-130 (BCI) **[***]**.
[4150] EC, FWS, para. 919 referring to **[***]** declaration, paras. 4-6, Exhibit EC-13 (BCI); AFUL: Statuts, **[***]**, Exhibit EC-124 (BCI).
[4151] EC, FWS, para. 928, citing Attestation de **[***]**, Exhibit EC-127 (BCI).
[4152] EC, FWS, para. 928.
[4153] EC, FWS, para. 929, citing **[***]**, Valuation Certificate **[***]**, Exhibit EC-18 (BCI).
[4154] EC, FWS, para. 933.

BCI deleted, as indicated **[***]**

Where "prevailing market conditions" dictate a price for the good or service – as with improved industrial land – that price serves as the appropriate benchmark for determining whether a "benefit" has been conferred. The European Communities rejects the United States' argument that a benefit was conferred because a private investor would not have provided the financial contribution in the first place, or in the exact form that it ultimately took (e.g., as a sale of improved versus unimproved land).[4155] The European Communities disputes the relevance of the EC Commission's decision in *Scott Paper* to the analysis in this case, as it asserts that EC state aids rules impose different disciplines than the SCM Agreement.[4156] According to the European Communities, a government may incur higher costs than a private investor would, and even sell land for a loss, without conferring a subsidy, because a government can realize other forms of remuneration – such as higher tax revenues and increased employment.[4157]

7.1158 The European Communities acknowledges that the EIG facilities are indispensable to the A380 final assembly operations and were central to Airbus France's decision to move to the ZAC Aéroconstellation. The European Communities notes that **[***]**.[4158] Each member pays the same amount per unit of use of a given EIG.[4159] The European Communities argues that the United States has not provided sufficient evidence to show that the terms of the lease of the EIG facilities were not commercial,[4160] although it does not dispute the United States' allegations concerning the calculation of the lease price.

7.1159 In response to the argument of the United States that the lease price calculation ignores the value of the land on which the EIG facilities were built, the European Communities asserts, relying on the expert conclusion of Mr. Miller, that the benchmark initial return employed by the United States (9-11%) is significantly inflated, and is based on an inapposite report analyzing initial net returns for industrial real estate.[4161] According to the European Communities, the EIG facilities are not typical industrial real estate, but are akin to facilities/equipment project financing. Therefore, the European Communities asserts, unlike a typical industrial real estate lease, the EIG lease presents a very low risk to investors, first because the lease financing is effectively secured by the EIG equipment itself, and second because the lease covers the entire economic life of the facilities investment.[4162] The European Communities further asserts that Airbus France and Air France provide investors with very low credit/default risk.[4163] Taken together, the European Communities contends that these factors mean that any risk premium applied to the EIG lease would be low. By contrast, the return on typical industrial real estate must capture occupancy and default risk. Moreover, according to the European Communities, the long-term nature of the EIG lease makes comparison to a benchmark based on initial net returns for industrial real estate particularly inappropriate. The European Communities argues that long-term capital leases for the life of an asset are simply a means of financing what is, in effect, an asset purchase. Thus, in the European Communities' view, Airbus France would not agree to an investor return that exceeded its own borrowing cost (*i.e.*, the cost of financing the purchase of these assets), which it asserts the United States recognizes was only 6.83% during the relevant

[4155] EC, SWS, paras. 386-391.
[4156] EC, SCOS, para. 394.
[4157] EC, SWS, para. 389.
[4158] EC, FWS, para. 918, referring to Association de Foncière Urbaine Libre de la ZAC Aéroconstellation, Statuts **[***]**, Exhibit EC-124 (BCI)
[4159] EC, FWS, para. 918.
[4160] EC, FWS, paras. 936-938.
[4161] EC, SCOS, para. 29.
[4162] EC, Answer to Panel Question 271, para. 159. According to the European Communities, this means that, at the end of the lease term, investors do not incur occupancy risk – *i.e.*, the risk that, if there is residual value at the end of a lease, the investor will not be able to recover this value by finding a new lessee.
[4163] EC, Answer to Panel Question 271, para. 159, citing Moody's Investor Service, EADS, 12 March 2007, Exhibit EC-835.

BCI deleted, as indicated **[***]**

period.[4164] Thus, the European Communities maintains that Airbus France could have simply borrowed the EUR 80.1 million required to construct the EIG facilities, and then sublet a portion of the facilities to the other AFUL members. For a financial lease covering the entire useful life of the assets, the European Communities maintains that the lessor cannot demand a return higher than the cost of funds available to the lessee through readily-available alternative financing mechanisms. On the basis of the above, the European Communities argues that the appropriate benchmark for the EIG lease is Airbus France's borrowing cost, which reflects the most likely alternative source of market financing.

7.1160 The European Communities therefore concludes that under this cost of debt benchmark, the average annual lease payment would be approximately EUR 4.4 million, far less than the amounts asserted by the United States (EUR 7.2 to EUR 8.2 million). The European Communities argues that since debt financing is not indexed (because the borrowing rate captures the total return to the lender), any shortfall between this benchmark and the actual return on the lease would capture the entire amount of any "benefit" received by Airbus France.[4165]

7.1161 The European Communities also disputes the United States' view that the lease confers a benefit because the lease price increases progressively, further reducing the effective net initial return to far below the 3.9 percent nominal rate and is not subject to **[***]**, but remains **[***]** over the course of 40 years, on three grounds. The European Communities maintains that the "benefit" inquiry does not hinge on the structural features of a financing instrument.[4166] The European Communities considers that there is nothing inherently non-commercial about instruments that do or do not possess features such as a progressive repayment structure or indexation. The European Communities argues that these characteristics are only relevant to the extent that they affect the investor's rate of return, while the "benefit" inquiry asks whether the resulting effective return on such instruments is consistent with a market rate. Second, the European Communities argues that the United States' reliance on these two structural features, progressive repayments and the absence of indexation, is incoherent because, on the one hand, the United States criticizes the EIG lease's "progressive" repayment structure, while on the other, it asserts that these repayments should, in fact, increase over time through indexation to account for the decreasing value of money.[4167] Third, the European Communities argues that even if the EIG lease could be viewed as not incorporating indexation, this would not render the lease "non-commercial." In this context the European Communities maintains its position that use of a cost of debt benchmark obviates the need for indexation; debt financing is not indexed.[4168]

7.1162 The European Communities does not argue the question of specificity beyond its assertion that the provision of the site *per se* constitutes general infrastructure, and thus is not a financial contribution and not within the scope of the SCM Agreement. With respect to the EIG facilities, the European Communities does not make any additional arguments regarding specificity.

Provision of roads

United States

7.1163 The United States claims that the improvements to the RD901, RD902 and RD963 do not constitute provision of general infrastructure. The United States asserts that these improvements are

[4164] EC, Answer to Panel Question 271, para. 160.
[4165] EC, Answer to Panel Question 271, para. 161.
[4166] EC, Answer to Panel Question 271, para. 163, referring to EC, FWS, paras. 1640-41; EC, FCOS, paras. 14-18 (Statement of Prof. Whitelaw); EC, Answer to Panel Question 65, para. 71.
[4167] EC, Answer to Panel Question 272, paras. 163-164..
[4168] EC, Answer to Panel Question 272, para. 165..

BCI deleted, as indicated **[***]**

for use only by Airbus and its suppliers.[4169] In support of its assertion, the United States refers to a statement by French authorities describing "the access roads for the site",[4170] as well as to satellite images of the site which, it asserts, demonstrate that Air France, STTS and SIDMI access the site from the south, via the RD901, while improvements created at the site's northern perimeter (at the RD963) and at its eastern perimeter (at the RD902, including the "Diffuseur de Pinot") are for the exclusive use of Airbus and its suppliers. The United States argues that the improvements to the roads became necessary as a result of the preparation of the Aéroconstellation site. Thus, the United States asserts that the road works were not undertaken to create general infrastructure, but are specifically related to the development of the site, undertaken to provide access to the site for Airbus and its suppliers.[4171] The United States disputes the European Communities' assertion that the decision to develop the Aéroconstellation site merely brought forward the schedule for road improvements in the whole region. According to the United States, the construction work on the RD901, RD902 and RD963 was either triggered exclusively by the development of the Aéroconstellation site for A380 assembly, testing and delivery, or the plans were amended significantly for that purpose.[4172]

7.1164 The United States asserts that the publicly available information indicates that the French authorities spent at least EUR 49 million (approximately EUR 17 million to rebuild the RD901 through and beneath the Aéroconstellation site, and EUR 33 million to adapt the RD902 to Airbus' needs), and provided them to Airbus free of charge.[4173] The United States indicates that it was unable to locate any information on the costs of the work on the RD963.[4174] In essence, the United States argues that the provision of the road improvements is a grant to Airbus, and thus confers a benefit, and thus constitutes a subsidy within the meaning of Article 1 of the SCM Agreement.[4175]

7.1165 The United States asserts that the improvements to the RD901, RD902, and RD963 in connection with establishment of the Aéroconstellation site are *de facto* specific to Airbus, within the meaning of Article 2.1(c) of the SCM Agreement. The United States argues that (i) the overpasses for taxiways at the RD901 are, in fact, used exclusively by the users of the Aéroconstellation site and primarily by Airbus, and that (ii) the access infrastructure, in particular the traffic circles created at the RD902 and RD963, is used, in fact, exclusively or primarily for access to the Airbus A380 facilities.[4176]

European Communities

7.1166 The European Communities argues that building of the access roads linking the Aéroconstellation site to the IGG is a classic example of provision of general infrastructure, an example "*par excellence*" of general infrastructure and is, therefore, outside the scope of Article 1.1(a)(1)(iii).[4177] According to the European Communities, the road works were necessary in order to alleviate existing traffic congestion, and the decision to develop the ZAC Aéroconstellation

[4169] US, Answer to Panel Question 153, para. 107. Thus, the United States does not accept the European Communities' view of its position as based on an assertion of predominant use by the companies located in the ZAC.
[4170] US, FWS, para. 482.
[4171] US, SNCOS, paras. 93-95.
[4172] US, Answer to Panel Question 20, para. 150.
[4173] US, FWS, para. 484, citing Flash Aéroconstellation, Bulletin d'information des riverains, No. 11 (November/December 2002), available at http://www.grandtoulouse.org/index.php?pagecode=20, Exhibit US-208.
[4174] US, FWS, para. 481.
[4175] US, FWS, para. 484.
[4176] US, Answer to Panel Question 20, paras. 149-151.
[4177] EC, FWS, para. 940, EC, SNCOS, para. 220.

BCI deleted, as indicated **[***]**

merely brought forward the schedule for road improvements in the whole region.[4178] The European Communities further notes that there is no restriction on the use of the roads in question, and that companies located in the Aéroconstellation site do not have privileged access to the roads.

7.1167 The European Communities also disputes that the users of Aéroconstellation site obtain more benefit from the improvements than any other users of the roads. In this connection, the European Communities argues that, considering the practical effects of building a public road, it cannot be established that the users of the Aéroconstellation site, let alone one specific user, benefit from the improvements more than other users of the roads, because, according to the European Communities, the road improvements were necessary to alleviate existing traffic congestion, with the establishment of several ZACs, noting that access to the ZAC Andromède is from the same roads. The European Communities also contends that the RD901 and RD902 are central transportation arteries for the Département de Haute-Garonne, and their improvement was planned long before the decision to develop the ZAC Aéroconstellation was taken.[4179]

7.1168 The European Communities refers to countervailing duty practice in the United States in support of its position. In particular, it argues that in *Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, the US Department of Commerce ("DOC") concluded that the construction of a public highway in the Kwangyang Bay area was not a countervailable subsidy.[4180] The DOC found that "the reason for the public highway was not to serve **[***]**, but to provide general infrastructure to the area as part of the **[***]** continuing development of the country and to relieve a transportation bottleneck."[4181] The DOC observed that the road "is utilized by both industries in the area to transport goods and by residents living in the Kwangyang Bay area."[4182] The same reasoning, according to the European Communities, applies with respect to the improvements to the RD901, RD902 and RD963.[4183]

7.1169 The European Communities contends that the claim of the United States really only concerns the two traffic circles, *i.e.*, the improvements at the site's northern perimeter (at the RD963) and at its eastern perimeter (at the RD902, in particular the "Diffuseur de Pinot").[4184] The European Communities also argues that the two overpasses (at the RD901 on the southern perimeter) link taxiways on the Aéroconstellation site to the Toulouse airport, and that when a government creates an industrial site for the aerospace industry, an important feature is its interconnection with the airport. It therefore believes that theses two elements are confounded with the general infrastructure of the public roads RD902 and RD963.[4185] In this connection it observes that the traffic circles related to the RD902 and RD963 may be seen as an integral part of the French road network - the fact that these are used more often by companies located in ZAC Aéroconstellation is only normal.[4186]

[4178] EC, FWS, paras. 921 and 944.
[4179] EC, FWS, para. 944.
[4180] EC, FWS, para. 941, citing Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 64 Fed. Reg. 30636, 30648-49 (18 June 1999) ("*Korean Stainless Steel*").
[4181] EC, FWS, para. 941, citing *Korean Stainless Steel* at 30648-49. Contrary to the suggestion of the DOC in *Korean Stainless Steel*, the status of a measure as "general infrastructure" does not hinge on the subjective intent of public authorities (which is notoriously difficult to establish). *See, e.g.*, Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. 5110, H.R. Doc. 316, Vol. 1, 103d Congress, 2d sess. (1994), *reprinted in* 1994 USCCAN 4040, 4242 ("{I}t has long been established that intent to target benefits is not a prerequisite for a countervailable subsidy . . . .").
[4182] Korean Stainless Steel at 30648-49.
[4183] EC, FWS, para. 941.
[4184] EC, SWS, para. 370.
[4185] EC, SWS, para. 372.
[4186] EC, SWS, para. 373.

BCI deleted, as indicated **[***]**

7.1170 The European Communities argues that even if the building of the roads constituted a financial contribution, the United States has failed to establish that this alleged subsidy is specific within the meaning of Article 2.1 of the SCM Agreement, because the improvements are not specific to Airbus France, or even to the entire group of companies in the ZAC Aéroconstellation.[4187] Noting that according to Article 2.1 of the SCM Agreement, a subsidy is specific if "the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises", the European Communities observes that RD901, RD902 and RD963 are public roads accessible to anyone, and that French law requires that departmental roads remain open to public traffic.[4188]

7.1171 The European Communities does not appear to dispute the United States' allegations concerning the amounts spent by the French authorities on road improvements.

(iii) Evaluation by the Panel

7.1172 In order to resolve this aspect of the United States' claims, we will address first the European Communities' contention that the provision of the ZAC Aéroconstellation site constitutes a measure of general infrastructure, and thus does not constitute a subsidy under Article 1 of the SCM Agreement. In this connection we will evaluate whether it is appropriate to consider the provision of the EIG facilities separately, as suggested by the European Communities' argument, or as an integral part of the creation of the site and its provision to Airbus and other companies, as suggested by the United States' argument. We will then address whether the improvements to the access roads around the ZAC Aéroconstellation site, specifically the RD901, RD902, and RD963, and including the Diffuseur de Pinot and the underpasses beneath the taxiways which connect the ZAC Aéroconstellation with the Toulouse-Blagnac airport over the RD901, constitute measures of general infrastructure. Should we conclude that any of these is not a provision of general infrastructure, we will then go on to assess the financial contribution represented by that measure, and whether that measure confers a benefit on Airbus, including consideration of the appropriate benchmark for comparison in assessing the question of benefit.

Provision of the ZAC Aéroconstellation site and EIG facilities

General infrastructure

7.1173 As we concluded above,[4189] in our view, the determination whether the provision of a good constitutes a provision of "general infrastructure" cannot be answered in the abstract, but rather must take into account the existence or absence of *de jure* or de facto limitations on access or use, and any other factors that tend to demonstrate that the infrastructure was or was not provided to or for the use of only a single entity or a limited group of entities, including factors relating to the circumstances surrounding the creation of the infrastructure in question, consideration of the type of infrastructure, the conditions and circumstances of the provision of the infrastructure, the recipients or beneficiaries of the infrastructure, and the legal regime applicable to such infrastructure, including the terms and conditions of access to and/or limitations on use of the infrastructure.

7.1174 Before addressing these factors with respect to the ZAC Aéroconstellation site and the EIG facilities, we consider it appropriate to address whether the EIG facilities should be evaluated as a separate measure, as implied by the European Communities' argument. The European Communities

[4187] EC, SWS, para. 373.
[4188] EC, FWS, para. 946 referring to Loi no 89-413 du 22 juin 1989 relative au code de la voirie routière, Art. L131-2, http://www.legifrance.gouv.fr; Code de la Voirie Routière, Art. L111-1, L131-1, http://www.legifrance.gouv.fr/WAspad/ListeCodes.
[4189] *See*, discussion at paras. 7.1036 to 7.1044 above.

BCI deleted, as indicated **[***]**

does not argue that the provision of the EIG facilities does not constitute a financial contribution, and thus does not argue that the provision of those facilities constitutes general infrastructure. Rather, the European Communities' argument with respect to these facilities is that they are rented at a market price to the owners of the sites in the ZAC, and thus there is no benefit to Airbus. The United States, while it also disputes the European Communities' contention that the rental of the EIG facilities is at a market price, considers the provision of the ZAC Aéroconstellation, including the EIG, is not a measure of general infrastructure, and constitutes a specific subsidy to Airbus.

7.1175 In our view, the EIG facilities constitute an integral part of the Aéroconstellation site. Indeed, the European Communities' own arguments indicate that the EIG facilities were a necessary part of the development of the site, in order to make it suitable for its intended use by the aeronautics industry, including particularly A380 production. Thus, for instance, the European Communities itself asserts that the purchasers of the land in the ZAC **[***],**[4190]** and that the land in the ZAC would have been worthless to Airbus without EIG facilities such as taxiways and aircraft service areas, because these shared facilities are indispensable to Airbus France's A380 final assembly operations. Moreover, the European Communities itself contends that **[***].**[4191]** Thus, we see no basis for an analysis of the EIG facilities separate from our consideration of the provision of the Aéroconstellation site as a whole.[4192]

7.1176 We recall our interpretation of the term "general infrastructure", where we concluded that that the term "**general** infrastructure", taken in its ordinary and natural meaning, refers to infrastructure that is not provided to or for the advantage of only a single entity or limited group of entities, and that there is no infrastructure which is inherently "general" *per se*.[4193] Thus, merely because the development of industrial sites such as the ZAC Aéroconstellation "benefits society as a whole" and "reflects legitimate economic development policies", as argued by the EC,[4194] does not demonstrate that the provision in this case of the site constitutes provision of general infrastructure. Similarly, the fact that the ZAC Aéroconstellation was developed under the same legislation as other ZACs throughout France does not inform our consideration of this issue.[4195] The European Communities does not argue, as it did in connection with the reclamation of land in the case of the Mühlenberger Loch development, that development of industrial land is a "typical task of public authorities, as providers of general infrastructure",[4196] but merely that the creation of an industrial site is a "legitimate policy choice".[4197] We do not disagree. However, this fact provides no basis for a conclusion that the development of the particular site in question, the ZAC Aéroconstellation, is a

[4190] EC, FWS, para. 919, citing **[***]** declaration, paras. 5-6, Exhibit EC-17 (BCI). The European Communities notes that the **[***]**. Exhibit EC-130 (BCI).

[4191] EC, FWS, para. 919 referring to **[***]** declaration, paras. 4-6, Exhibit EC-17 (BCI); ZAC Protocole d'Accord, **[***]**, Exhibit EC-130 (BCI) **[***]**.

[4192] We note that the European Communities asserts, in discussing the question of benefit, that an appropriate market benchmark for the EIG lease is Airbus' cost of debt. This is because, the European Communities appears to recognize, had the French authorities not created the EIG facilities, Airbus could have done so itself, as they are necessary to its activities in the production of A380 aircraft, as well as those of the other companies purchasing land in the ZAC and involved in the production of that aircraft. This supports our view that the provision of the site and the EIG facilities should be considered together, as it is clear that Airbus, as well as the French authorities, considered the EIG facilities an integral part of the site.

[4193] *See*, discussion at paras. 7.1036 to 7.1044 above.

[4194] EC, FWS, para. 909.

[4195] It may be that the provision of other ZACs constitutes the provision of general infrastructure, or the provision of infrastructure which is not general. As we have previously concluded, whether a provision of infrastructure is "general" or not must be assessed in each instance on the basis of the particular facts of the specific measure at issue. Thus, we are not making any ruling concerning the status of any ZAC except the ZAC Aéroconstellation which is before us in this dispute.

[4196] EC, FWS, para. 775.

[4197] EC, FWS, para. 923.

BCI deleted, as indicated **[***]**

measure of general infrastructure. The provision of specific subsidies[4198] is equally a legitimate policy choice of governments – however, it is one that has potential consequences under the SCM Agreement.

7.1177 The European Communities does not, in our understanding, seriously contend that the development of the site was undertaken for reasons unrelated to the needs of Airbus. There is no evidence before us to suggest that the French authorities would have undertaken the development of the site and the construction of the EIG facilities but for the fact that it was desirable in order to provide a suitable site for Airbus' A380 final assembly line, adjacent to the Toulouse-Blagnac airport. Indeed, it is clear to us that the development of the ZAC Aéroconstellation site and the construction of the EIG facilities was undertaken specifically to enable Airbus to situate an A380 final assembly line in an advantageous location, in France.[4199] The ZAC Aéroconstellation is specifically designated as a site for aeronautics-related activities, and the sale of land in the ZAC was limited to companies in the aeronautics industry, and the purchasers are companies concerned specifically with the assembly and testing of the A380.[4200] The EIG facilities are, as the European Communities itself argues, necessary to the efficient and effective operation of the A380 assembly operations for which the site was developed, as well as for other aeronautics related activities undertaken at the site. Moreover, we do not accept the European Communities' view that Airbus purchased "undifferentiated" industrial land, and that similar land is available throughout Europe. It is clear to us that the ZAC Aéroconstellation site was, from the outset, uniquely adapted to Airbus' needs, from its situation next to and connection to the Toulouse-Blagnac airport, to the highly specific EIG facilities.

7.1178 We do not doubt that the French authorities considered that they were pursuing a public interest in undertaking the development of the Aéroconstellation site. However, this interest does not suffice to demonstrate that the project, starting with the development of agricultural land into an industrial site, and including the construction of the EIG facilities, constitutes a provision of general infrastructure. As we have noted previously, it is in any event always likely to be the case that public authorities will have reasons of public policy when expending public funds. However, when the circumstances of such expenditure demonstrate that it was provided to or for the use of only a single entity or a limited group of entities, we do not consider that it can be found to be "general" infrastructure.

7.1179 The European Communities makes no other arguments with respect to the ZAC Aéroconstellation site that might suggest that it was not created and provided specifically for the use

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[4198] With the exception of subsidies prohibited under Article 3.

[4199] Indeed, the European Communities argues that the decision by Airbus to establish two A380 assembly facilities rather than the single site in Toulouse originally contemplated resulted in **[***]**, implying that the ZAC Aéroconstellation site was the most advantageous location. EC, SWS, para. 1079. *See, also*, *Les élus toulousains réservent un site pour la chaîne d'assemblage de l'Airbus géant*, Les Echos, No. 17994, 28 September 1999 ("This project is a credible and attractive alternative to Aérospatiale-Matra's solution for integration of the Airbus A3XX for which Toulouse is a candidate.") Exhibit US-205; Airbus, press release, *Airbus' A380 Final Assembly Facility inaugurated by French President*, 16 July 2000, Exhibit US-200; http://www.aeroconstellation.com, "Le Programme Constellation, Quelques Chiffres, La ZAC AéroConstellation", Exhibit US-201.

[4200] Exhibit US-218 contains excerpts from the interactive map on the Grand Toulouse web-site, http://www.grandtoulouse.org/admin/upload/fichier/aeroconstellation/aeroconstellation.htm describing the companies, installations, and activities planned for the site. That map shows that these include, in addition to the "pôle logistique" where aircraft parts are received on the site and stored, the large Airbus assembly building and outside stations for final testing of A380 aircraft, a building for the Société Capelle, responsible for road transport of A380 fuselage parts, a fuel supply installation (Exxon), a building for Air France Industries, active in aircraft and engine maintenance, a building for STTS, which paints and waterproofs aircraft, underground galleries linking the various sectors and supplying heating, fire suppression, compressed air, communications, etc., and taxiways linking the various parts of the site and linking the site to the Toulouse-Blagnac airport.

of Airbus, its suppliers, and companies associated with the aeronautics industry for, initially, the assembly and testing of A380 aircraft. The circumstances surrounding the development of the site, including the limitation on the use of the site as a "parc d'activités aéronautiques", and the connections between the purchase of land and the required participation in the lease of the EIG facilities, makes it clear that the development of the ZAC Aéroconstellation, including the EIG facilities, was undertaken to suit Airbus' needs, and in particular, its needs in connection with the assembly and testing of A380 aircraft. In light of these facts, we conclude that the creation and provision of the ZAC Aéroconstellation site and EIG facilities is not a measure of general infrastructure within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. We therefore will go on to consider whether the financial contribution of the French authorities in this respect conferred a benefit on Airbus.

Benefit

7.1180 The United States contends that the provision of the ZAC Aéroconstellation site and EIG facilities confers a benefit on Airbus because (i) the French authorities sold the land for less than adequate remuneration, and (ii) because the authorities are leasing the EIG facilities to Airbus for less than adequate remuneration.[4201]

7.1181 We recall that Article 1.1(b) of the SCM Agreement does not define the notion of "benefit". However, it is well established that a "financial contribution" will confer a "benefit" upon a recipient when it places that recipient in a more advantageous position compared with the position of that recipient in the absence of the "financial contribution".[4202] In *Canada – Aircraft*, both the panel and the Appellate Body considered that the basis for making this comparison was the market. Thus, the panel observed that:

> "a financial contribution will only confer a 'benefit', *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market".[4203]

Similarly, the Appellate Body explained that:

> "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 on the market."[4204]

7.1182 Thus, a benefit will be conferred whenever a financial contribution is granted to a recipient on terms more favourable than those available to the recipient in the market. In the context of a financial contribution in the form of provision of goods or services other than general infrastructure, we consider that the appropriate question to be addressed in resolving the question of benefit is whether a market actor would have provided the good or service to the recipient at the time, on the same terms and conditions as the government provision at issue.

7.1183 In its first written submission, the United States identified the alleged costs of the Aéroconstellation site and EIG facilities based on publicly available information, because, it noted,

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[4201] US, FWS, para. 464.

[4202] Panel Report, *Canada – Aircraft*, para. 9.112, cited with approval in Appellate Body Report, *Canada – Aircraft*, para. 149.

[4203] Panel Report, *Canada – Aircraft*, para. 9.112; Appellate Body Report, *Canada – Aircraft*, paras. 157-158; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 102.

[4204] Appellate Body Report, *Canada – Aircraft*, para. 157.

BCI deleted, as indicated **[***]**

the European Communities and France had refused, during the Annex V process, to provide the requested information relating to the site, which included a copy of the agreement in which the French national and regional authorities agreed to develop the site, a detailed description of the site development project, a list of the measures that French authorities undertook and the costs they incurred to develop the site, information regarding the terms and conditions of any purchase by Airbus or any other entities of any portion of the site, and information on Airbus' use of the site.[4205] The United States contends that the logical inference to be drawn from these refusals is that the information would have supported the United States' claim that the measure is a specific subsidy. The United States suggests that the Panel draw such a logical inference.[4206] In addition, the United States asserts that in this situation, the Panel would be justified, in accordance with paragraph 7 of Annex V, in drawing an adverse inference that the withheld information demonstrates that the measure is a specific subsidy, and respectfully requests that the Panel so infer.[4207] The United States contends that since the European Communities and France refused the request for the terms and conditions of the lease and the terms and conditions of equivalent commercial leases, it is not possible to calculate the exact amount of the benefit to Airbus.[4208]

7.1184 Paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Although the European Communities failed to provide any of the information requested concerning the Aéroconstellation site during the Annex V process, it has, during the course of this panel proceeding, submitted some information, in particular concerning the price paid by purchasers for land in the ZAC and a valuation of that land by Atisreal. However, it has not provided any information concerning the costs associated with the development of the site. Nor has it disputed the United States' allegations concerning those costs, and it has not contested the United States' allegations concerning the costs associated with the creation of the EIG facilities and the terms of the lease for those facilities. Thus, while we are not here faced with a situation where a party has failed to supply any part of the requested information, much of the information before us on the question of benefit is factual allegations by the United States based on public information which are unchallenged by the European Communities. To the extent reliance on that information may be adverse to the European Communities' position in this dispute, we consider that such reliance, which is not in itself an adverse inference, is entirely justified. Moreover, to the extent the information publicly available to the United States and submitted in support of its arguments is insufficient, we consider that inferences favourable to the United States' view are warranted to the extent necessary to reach conclusions, in view of the lack of cooperation by the European Communities during the Annex V process.

7.1185 The European Communities contends that the United States' argument concerning benefit conferred by the provision of land in the ZAC effectively is based on a "cost to government" standard, as it is based on the premise that regardless of the market price for industrial land in the area, Airbus France should have paid a price sufficient for the government to recover the costs incurred in developing the ZAC. Because the "cost to government" standard has been rejected by the Appellate Body, the European Communities asks the Panel to do so in this dispute.[4209]

7.1186 The United States does not dispute the basic premise that cost to the government is not an appropriate basis for assessment of benefit, but does argue, as it did with respect to the Mühlenberger Loch project, that consideration of the total amount invested by the French authorities is appropriate in order to determine the amount of any benefit. The United States contends that a commercial owner

[4205] Questions 56-72 from the Facilitator to the EC, Exhibit US-4 (BCI); EC Answers to Questions 56-72 from the Facilitator, Exhibit US-5 (BCI).
[4206] Our understanding is that this position does not extend to the development of the roads.
[4207] US, FWS, para 480.
[4208] US, FWS, para 476.
[4209] EC, FWS, para. 935.

BCI deleted, as indicated **[***]**

of the land on which the ZAC Aéroconstellation was developed either would have sold the land "as is", *i.e.*, in its raw agricultural state, or would have asked for a commercial return on the owner's investment in turning the land into an industrial site, in addition to a price reflecting the value of the land. Thus, the United States' argument is that the amount of the investment should be considered in determining the appropriate market-based benchmark for assessing the existence of benefit. Moreover, the United States argues that the EUR 158 million invested in site preparation is akin to a grant, since the French authorities spent funds to create a site that Airbus would otherwise have had to create itself.[4210]

7.1187 We have already rejected the European Communities' view that the provision of the Aéroconstellation site constituted a measure of general infrastructure. The European Communities' arguments concerning the price of the land in the ZAC Aéroconstellation do not address the question of the amount invested in developing raw agricultural land into land suitable for industrial use, but focus on the market price for industrial land in the region, and the fact that all purchasers paid the same price per hectare for land in the ZAC. However, neither of these arguments directly addresses the question before us here. As we concluded with respect to the Mühlenberger Loch project,[4211] we consider that the investment by the French authorities in developing the site to make the land suitable for industrial use is the relevant basis for assessing whether a benefit was conferred on Airbus.

7.1188 As previously discussed, this does not constitute, as argued by the European Communities, a determination of the amount of benefit on the basis of cost to the government. Rather, it is simply a reflection, in the particular circumstances of this case, of the basis on which a market actor would determine the price to be charged for the land to be sold, and thus the appropriate "market" benchmark. In our view, based on the evidence provided by the European Communities, the "prevailing market conditions" in the region would have led to a sales price for land in the ZAC Aéroconstellation that would have been insufficient to provide an adequate return to cover the investment in developing the land for industrial use. Thus, in our view, a commercial land developer would not have undertaken the project. In these circumstances, to argue, as the European Communities does, that the market price for improved industrial land is the appropriate benchmark for determining whether a benefit has been conferred would, in our estimation, result in a wholesale circumvention of the fundamental purpose of the SCM Agreement's discipline on subsidies. Under the European Communities' view, the more a financial contribution by a government distorts the allocation of resources that the market would otherwise produce, the less it could be found to be a subsidy. This is not an acceptable outcome, as it perverts a fundamental goal of the SCM Agreement.

7.1189 The European Communities asserts that the return to the government is not limited to the purchase price of the land, but may include "other forms" of remuneration such as higher tax revenues and increased employment, which may make it willing to incur what appears to be a loss in providing the land in question.[4212] We do not agree. In the first place, the European Communities has provided no evidence to substantiate the possibility of such other forms of remuneration in this case, or that any such other forms of remuneration would make up the difference between the amount invested by French authorities in developing the land to be suitable for use by the aeronautics industry, including the investment in the EIG facilities, and the sales price for the land and lease price for the EIG facilities. More importantly, we do not consider that the possibility of higher tax revenues or increased employment has any relevance in assessing whether a financial contribution by a government confers a benefit on the recipient. As we have previously noted, government authorities would be expected to have a public policy purpose in making a financial contribution – higher tax revenues and increased employment might be among the factors considered in deciding whether a particular financial contribution by the government is in the public interest. But the fact that such a

[4210] US, FWS, para. 468.
[4211] *See*, paragraph 7.1093 above.
[4212] EC, SWS, para. 389.

BCI deleted, as indicated **[***]**

contribution is in the public interest, for instance because the government, or the locality, or the public at large may benefit from it, simply does not affect whether the recipient of that financial contribution benefits from it, which is the question before us here. If a financial contribution confers a benefit on the recipient, then it constitutes a subsidy under Article 1 of the SCM Agreement. That others, including the public at large, may also benefit does not alter that conclusion.

7.1190 Finally, as discussed above, we consider that the provision of the Aéroconstellation site is appropriately considered together with the provision of the EIG facilities. It is clear, and the European Communities does not argue otherwise, that the price paid by Airbus for land in the ZAC Aéroconstellation, and the lease for the EIG facilities, does not provide a market rate of return on the investment by the French authorities to develop the site, including the EIG facilities. Thus, whether the lease for the EIG facilities is commensurate with a market benchmark does not save the provision of the site, including the EIG facilities, from conferring a substantial benefit on Airbus. Therefore, we conclude that the provision of the ZAC Aéroconstellation, including the EIG facilities, constitutes a subsidy within the meaning of Article 1 of the SCM Agreement.

7.1191 The European Communities does not dispute the United States' allegations of specificity, other than arguing that the measure constitutes general infrastructure, a view we have rejected. While it is true that Airbus is not the sole occupant of the ZAC or user of the EIG, it is clear that it is the main beneficiary, as the other purchasers of land in the ZAC are all suppliers or contractors connected to Airbus' activities in producing LCA, in particular the A380. Moreover, the ZAC is specifically designated as a site for aeronautics-related activities, and the sale of land (and consequently use of the EIG facilities) is limited to companies in the aeronautics industry. We therefore consider that the provision of the ZAC, including the EIG facilities, is specific within the meaning of Article 2.1(a) of the SCM Agreement.

Provision of Roads

7.1192 We recall once more our interpretation of the term "general infrastructure", where we concluded that that the term "**general** infrastructure", taken in its ordinary and natural meaning, refers to infrastructure that is not provided to or for the advantage of only a single entity or limited group of entities, and that there is no form or type of infrastructure which is inherently "general" *per se*.[4213] In the context of the road improvements alleged to constitute subsidies in this case, the United States argues that the improvements to the RD901, RD902, and RD963, were triggered exclusively by, or were amended significantly as a result of, the development of the ZAC Aéroconstellation site, and that these improvements were undertaken for the use of Airbus and its suppliers in the ZAC Aéroconstellation. In support of this position, the United States relies on the fact that the improvements provide access to the Aéroconstellation site at two points, on the northern perimeter from the RD963, and on the eastern perimeter, from the RD902, and the that the construction of underpasses on the southern perimeter for the RD901 allows taxiways on the Aéroconstellation site to link to the Toulouse-Blagnac airport.[4214] The United States asserts that the access at the northern and eastern perimeters is exclusively for Airbus and its suppliers, while the taxiways are principally used by Airbus.

[4213] *See*, paragraphs 7.1035 to 7.1044 above.

[4214] While it is not entirely clear from the arguments, we understand the taxiways themselves to constitute part of the development of the ZAC site itself, including the EIG facilities, rather than a part of the road improvements. Of course, the need for taxiways linking a site for the assembly of aircraft to the airport, or in general, to a runway, is obvious, and given the existence of a perimeter road, either level crossings or under- or over-passes will have to be created to allow traffic to flow on the road. Thus, the road aspect, the underpasses, and the taxiway "bridges" are inextricably linked.

BCI deleted, as indicated **[***]**

7.1193 The European Communities has put before us evidence that improvements to the roads in the area, including the RD901, RD902, and RD963, were under consideration by the local authorities in 1998, before the decision to develop the ZAC Aéroconstellation site was made in September 1999.[4215] Thus, while the specific details of the improvements and the timing of the works appears to have been affected as a result of the decision to develop the Aéroconstellation site, we cannot agree with the United States that the road improvements it challenges were "triggered" by that development.

7.1194 Nor do we agree with the United States' view that those improvements are exclusively for Airbus and its suppliers situated on the site. Even assuming the United States is correct that Airbus and the other aerospace companies located at the Aéroconstellation site are the primary or predominant users of the road improvements, it is clear that there are no express or implied restrictions or limitations on the use of the roads, or any part thereof. As a matter of French law, they are open to all traffic. Moreover, their use is not limited as a matter of fact to Airbus or the other companies located on the site. Rather, the improvements to the roads, like the roads themselves, allow for through traffic, and access to other sites in the region and beyond. The European Communities observes, and the United States does not dispute, that the RD901 and RD902 are central transportation arteries for the region. The Diffuseur de Pinot, the roundabout from which the Aéroconstellation site is accessed from the east, also provides access to the ZAC Andromède, located directly across from the entrance to the ZAC Aéroconstellation site.[4216] Similarly, while the underpasses at the southern perimeter permit aircraft assembled on the site to access the Toulouse-Blagnac airport, they also allow traffic on the RD901 to continue to move freely.

7.1195 Unlike the case of an industrial site developed for a particular purpose and for the use of a particular company or industry, in the case of publicly accessible and publicly used roads that form part of the general network of roads in a region, very strong evidence would be necessary to support the conclusion that improvements to such roads do not constitute general infrastructure. Merely that some users may benefit more directly or more immediately from such improvements than others does not, in our view, suffice in this regard. Moreover, it is not clear that companies situated on the Aéroconstellation site use the road improvements more than other traffic, given that the roads and roundabouts in question are part of the general network of roads, allowing and/or improving access to all sites in the region, including the other ZACs and the airport itself. Thus individuals and businesses in the entire region are likely to use the improved roads to a similar degree. We simply do not consider that the United States has submitted sufficient evidence to demonstrate that the road improvements were provided to or for the use of only Airbus and/or companies located on the ZAC Aéroconstellation site.

7.1196 We therefore conclude that the road improvements challenged by the United States in this case constitute the provision by the French authorities of general infrastructure within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. Therefore, there is no financial contribution by a government in connection with these road improvements, and they do not constitute a subsidy within the meaning of Article 1 of the SCM Agreement. We will not consider these measures further in this dispute.

(f) Regional grants

(i) Arguments of the Parties

7.1197 These measures concern grants for the construction of manufacturing and assembly facilities provided by the German Land of Lower Saxony and the German government to Airbus in Nordenham in Germany, grants provided by the Spanish government and regional and local governments in Spain,

[4215] Exhibit EC-126. *See, also,* Exhibit US-201. pg. 2.
[4216] Exhibit US-203. pg. 3.

BCI deleted, as indicated **[***]**

supported in some cases by the European Regional Development Fund, to Airbus in Sevilla, La Rinconada, Illescas (Toledo), Puerto de Santa Maria and Puerto Real in Spain, and grants provided by the Welsh government to Airbus in Broughton, Wales.[4217] The United States asserts that these grants are specific to Airbus under Article 2 of the SCM Agreement[4218] and Article 2.2 of the SCM Agreement[4219] because they were provided to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority".

7.1198 The United States notes that, during the Annex V process, the Facilitator asked the European Communities and the Airbus governments to provide numerous categories of information regarding each of the grants referred to above, including the amount of the grant; the reasons for approval of the grant; the terms and conditions of the grant; how Airbus used the grant money; and all agreements or other documents providing the legal basis for the grant, but that the European Communities refused to provide any of the information that the Facilitator requested. The United States asserts that the logical inference to be drawn from this refusal is that the information would have supported the United States' claim that the measures were specific subsidies, and suggests that the Panel draw such a logical inference. In addition, the United States considers that this would appear to be a situation in which, in accordance with paragraph 7 of Annex V, the Panel would be justified in drawing an adverse inference that the withheld information demonstrates that the measures are specific subsidies and the United States requests that the Panel draw such an inference.[4220]

7.1199 The European Communities argues that under Article 2.2 of the SCM Agreement, a subsidy that is limited to *certain* enterprises within a designated geographical region within the jurisdiction of the granting authority shall be specific (emphasis of the European Communities).[4221] The European Communities asserts that, *a contrario*, a subsidy would appear to be non-specific if it is available to *all* enterprises located within a designated geographical region under the jurisdiction of the granting authority.[4222] Thus, the European Communities argues, the United States is wrong when it alleges that Article 2.2 of the SCM Agreement renders all regional aid schemes *per se* specific without inquiring whether or not access is limited to *certain* enterprises located within the designated regions.[4223]

7.1200 The European Communities relies, in addition to its parsing of the text of Article 2.2, on the negotiating history of Article 2 in support of its view. The European Communities argues that proposed Article 2.1(d) of the Chairman's draft text of 6 November 1990 would have rendered all subsidies granted by sub-federal authorities specific, even if the subsidy was available to all enterprises within the authority's territory:

> "A subsidy which is available to all enterprises located within a designated geographical region shall be specific irrespective of the nature of the granting authority." (emphasis added)[4224]

The European Communities asserts that this provision eventually became Article 2.2, which does away with the idea that designation of a geographical region alone leads to specificity. Rather, the European Communities asserts, there is the additional limitation that such regional aid must be "limited to certain enterprises", which establishes that regional aid programmes that are available to

[4217] US, FWS, para. 486.
[4218] US, FWS, para. 489 (Nordenham); US, FWS, paras. 491-493 (Broughton).
[4219] US, FWS, paras. 495, 497, 499, 501, 503, 505, 507, 509, 511 and 513 (Spanish grants).
[4220] US, FWS, para. 514.
[4221] EC, FWS, para. 733.
[4222] EC, FWS, para. 733.
[4223] EC, FWS, para. 737.
[4224] EC, FWS, para. 735, citing Draft Text by the Chairman, 2 November 1990, MTN/GNG/NG10/W/38/Rev. 2, p.3.

all enterprises located within a designated region within the jurisdiction of the granting authority are non-specific.[4225]

7.1201 As noted, the European Communities asserts that regional aid programmes that are available to all enterprises (as distinct from certain enterprises) in designated regions are non-specific under an *e contrario* reading of Article 2.2. In the European Communities' view, even if regional aid programmes were specific under Article 2.1(a) of the SCM Agreement, such programmes could be non-specific within the meaning of Article 2.1(b).[4226] Thus, the European Communities asserts that even if a regional subsidy were found to be specific under Article 2.2, it could nonetheless be non-specific within the meaning of Article 2.1(b) of the SCM Agreement. That is, the European Communities perceives a hierarchical relationship, whereby a finding of non-specificity under Article 2.1(b) prevails over a finding of specificity under Article 2.2. The European Communities goes on to assert that the decisive test is whether the programme satisfies the "objective criteria" element of Article 2.1(b), and maintains that the regional programmes in questions do satisfy this element, and that therefore none of the challenged grants constitutes a specific subsidy.[4227]

7.1202 The United States disputes the European Communities' proposed interpretation of Article 2 of the SCM Agreement, which the United States considers rests on two mistaken propositions. The United States asserts that the European Communities errs in arguing that, under Article 2.2, a subsidy is only specific if it is limited to a subset of enterprises within a designated geographical region, and in arguing that a subsidy which is specific under Article 2.2 may nevertheless be found to be non-specific under Article 2.1(b).[4228] The United States argues that the European Communities' interpretation is not supported by the text of the provision, understood in context and in light of the object and purpose of the SCM Agreement, by the negotiating history of Article 2.2, or by European Communities' practice under its own countervailing duty law.[4229]

(ii) Arguments of Third Parties

Australia

7.1203 Australia disagrees with the European Communities' view that a subsidy is non-specific if it is available to all enterprises located within a designated geographic region under the jurisdiction of the granting authority.[4230] Referring to the European Communities' argument that Article 2.2 involves a two-step test, requiring assessment first whether the subsidy is limited to a designated geographic region and second whether the subsidy is limited to certain enterprises within that designated geographic region,[4231] Australia notes that if such a two-step test for regional specificity were adopted, it would be difficult to envisage a situation covered by Article 2.2 that would not already be covered by Article 2.1(a).[4232]

Japan

7.1204 In response to a question from the Panel, Japan asserts that the first sentence of Article 2.2 confirms that a subsidy provided by a local government is treated in the same way as a subsidy

[4225] EC, FWS, para. 736.
[4226] EC, FWS, para. 739.
[4227] EC, FWS, para. 740.
[4228] US, SWS, para. 373.
[4229] US, SWS, para. 374.
[4230] Australia, Third Party Submission, para. 55, referring to EC, FWS, para. 733.
[4231] Australia, Third Party Submission, para. 56, referring to EC, FWS, paras. 733-737.
[4232] Australia, Third Party Submission, para. 56.

BCI deleted, as indicated **[***]**

provided by a central government if the subsidy provided by a local government is specific. Thus, in Japan's view, Article 2.1(a) covers situations stipulated in the first sentence of Article 2.2.[4233]

(iii) Evaluation by the Panel

Factual background

7.1205 With respect to the United States' allegations concerning regional grants in Germany, Spain, and Wales, we note that, except as specifically indicated below, the factual allegations of the United States concerning the dates, amounts, and recipients of the challenged grants are not disputed by the European Communities.

Nordenham

7.1206 The European Communities acknowledges that on 14 May 2002, the government of the German Land of Lower Saxony awarded a grant, co-financed from the EU budget and the special federal budget "*Gemeinschaftsaufgabe*", of EUR 6 million to Airbus for the extension of Airbus Germany's existing manufacturing site in Nordenham.[4234] According to the European Communities, the grant was made because it contributed to improving economic infrastructure in a region struggling with structural difficulties and created additional jobs, complied with the requirements of both Objective 2 under the EU Regional Development Funds ("ERDF") and the German Framework Programme No. 31.[4235] The European Communities acknowledges that the eligibility for the grant is restricted to those companies located in specifically designated areas, both under the EU wide regional programme and the German "Gemeinschaftsaufgabe".[4236]

Sevilla, La Rinconada, Illescas (Toledo), Puerto de Santa Maria, Puerto Real

7.1207 The European Communities acknowledges the provision in 2001 of a grant of EUR 2.2 million to the EADS-CASA's facility at Tablada (Sevilla), and the provision of a grant of EUR 814,000 linked to an investment at the EADS CASA facility of San Pablo (Sevilla).[4237] The European Communities also acknowledges that in March 2003, the Spanish Ministry of Economics granted EUR 37.9 million to Airbus Spain for its plant of Illescas (Toledo).[4238]

7.1208 The European Communities also acknowledges that the Spanish Ministry of Economics granted EUR 5.9 million to EADS CASA to invest in a new facility of Puerto Santa Maria and approved a grant of EUR 13.1 million for the Airbus Spain's facility in Puerto Real.[4239] The legal basis for all these grants was the Spanish Law 50/1985 on less favourable geographical zones, and, with respect to the co-financed part in Toledo, the ERDF regulation.[4240]

7.1209 The European Communities further acknowledges that the government of Andalusia in July 2001provided a grant of EUR 8.6 million to the EADS CASA facility in Puerto Santa Maria, and in July 2002 provided another grant of EUR 35.7 million to EADS CASA for its new facility at

[4233] Japan Answer to Panel Third Party Question 5.
[4234] EC, FWS, para. 881.
[4235] EC, FWS, para. 895.
[4236] EC, FWS, para. 897.
[4237] EC, FWS, para. 949. The United States identified this grant as having been made to EADS CASA's facility at La Rinconada. US, FWS, para. 494. We do not consider this to undermine the adequacy of the United States' allegations regarding this grant.
[4238] EC, FWS, para. 950.
[4239] EC, FWS, paras. 952-953.
[4240] EC, FWS, paras. 949-954.

BCI deleted, as indicated **[***]**

Sevilla.[4241] The legal basis for these grants was the Orden of 10 March 2000. The European Communities acknowledges that in July 2003, the Andalusian government provided a EUR 17.5 million grant, co-financed by the ERDF, to Airbus Spain for the Puerto Real facility under a regional Andalusian scheme for most depressed areas in Andalusia and the ERDF.[4242]

7.1210 Finally, the European Communities acknowledges that in March 2004, the government of Castilla-La Mancha, under a regional aid scheme for the entire region of Castilla-La Mancha, provided a grant of EUR 7.6 million, co-financed by the ERDF, with respect to investment in the Airbus, Spain plant in Illescas, Toledo.[4243]

7.1211 The European Communities disputes the provision of a Spanish government grant of EUR 43.1 million to EADS CASA for the facility at La Rinconada in July 2003, asserting that there exists no such EADS CASA facility at La Rinconada.[4244] The European Communities asserts that EADS CASA received the EUR 43.1 million grant in connection with the building of a new facility in the area of Sevilla rather than La Rinconada.[4245] The European Communities acknowledges that the Andalusian Government provided a EUR 61.9 million grant in October 2004 for the purpose of the new EADS CASA facility in Sevilla.[4246] However, the European Communities asserts that EADS used the proceeds from this grant for purposes unconnected with Airbus LCA.[4247]

Broughton, Wales

7.1212 The European Communities acknowledges that, in 2000, the Welsh government provided two grants, of GBP 4.9 million and GBP 14.6 million, to Airbus UK in respect of its facility in Broughton, Wales.[4248]

Evaluation by the Panel

Existence of a subsidy under Article 1 of the SCM Agreement

7.1213 To the extent that the European Communities has not disputed the United States factual allegations, as indicated above, we consider that with respect to each of the measures described in paragraphs 7.1206 to 7.1212 above, the United States has made out a *prima facie* case that a subsidy exists under Article 1 of the SCM Agreement. The European Communities does not dispute that these measures all consisted of cash grants benefiting Airbus, with the exception of the October 2004 grant by the government of Andalusia, which we address below. Nor does the European Communities dispute that these measures constitute subsidies.

7.1214 With respect to the October 2004 grant by the government of Andalusia, we must resolve certain factual issues under Article 1 of the SCM Agreement before addressing the question whether it is specific under Article 2 of the SCM Agreement. The European Communities does not dispute that

[4241] EC, FWS, para. 955. The European Communities asserts that this latter grant amount is erroneously attributed to La Rinconada by the United States. However, the US asserted that this grant was in connection with the EADS CASA facility in Sevilla. US, FWS, para. 506.
[4242] EC, FWS, para. 957.
[4243] EC, FWS, para. 959.
[4244] EC, FWS, para. 951.
[4245] EC, FWS, para. 951.
[4246] EC, FWS, para. 958, and Exhibit EC-140 (BCI). The European Communities asserts that this latter grant amount is erroneously attributed to La Rinconada by the United States. However, the US identified this grant as being made in connection with the EADS CASA "Sevilla/La Rinconada facility". US, FWS, para. 512.
[4247] Specifically, the European Communities asserts that the grant funds were used to **[***]**. EC, FWS, para. 958.
[4248] EC, FWS, para. 986, 989.

BCI deleted, as indicated **[***]**

this measure consists of a direct transfer of funds that confers a benefit, but it does dispute the United States' allegation that the grant conferred a benefit on the subsidized product, large civil aircraft. The European Communities argues that the United States has not established as a matter of fact that this grant benefits Airbus Spain's large civil aircraft activities, asserting that it was provided for the purpose of the EADS CASA facilities in Sevilla/La Rinconada, and used exclusively for non-large civil aircraft-related activities.[4249]

7.1215 With respect to this issue, we observe that these factual allegations were first raised in the European Communities' first written submission, in response to the arguments made by the United States in its first written submission, expanding on its request for establishment. We further note that the United States attempted, during the Annex V information gathering process, to seek more specific and detailed information concerning each of these grants, including the amount of the grant, the reasons for approval of the grant, the terms and conditions of the grant, how the grant money was used, and all agreements or other documents providing the legal basis for the grant. The European Communities refused to respond to the United States' questions. In its first written submission, the United States identified the measures in dispute and the respective amounts of funding at stake, relying on information that was publicly available. Although the European Communities has now provided information that was not presented during the Annex V process, we understand the United States to continue to be of the view that the European Communities has failed to disclose all relevant information and that the Panel should draw adverse inferences when establishing the facts surrounding a number of its claims.

7.1216 Paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Although the European Communities failed to provide information requested during the Annex V process, it has subsequently, during the course of this panel proceeding, provided much of that information, which largely corresponds to the publicly available information relied on by the United States. Thus, we are not here faced with a situation where we cannot draw factual conclusions based on the information before us. We therefore do not consider it necessary to draw adverse inferences.

7.1217 In any event, the evidence that the European Communities provides fails to substantiate its factual assertions concerning the October 2004 grant. Having reviewed the information before us, it is clear to us that the United States has demonstrated that the grant in question benefited the EADS CASA facilities in question. Information provided by European Communities demonstrates that work is done at the Tablada facility on large civil aircraft, specifically, A320 and A380 aircraft.[4250] We note that the European Communities itself asserts that the "overwhelming majority" of activities in Tablada concerns military activities, thus acknowledging that there are LCA activities as well.[4251] Even assuming, as the European Communities asserts, that only a "minor portion" of revenues is derived from sales to Airbus Spain involving the A320 and A380 models, this fails to demonstrate that the grant in question does not benefit Airbus Spain's LCA activities. In addition, the European Communities asserts that the San Pablo facility is "virtually entirely" dedicated to military activities, thus acknowledging that there are some LCA-related activities undertaken as well.[4252] None of the evidence submitted by the European Communities concerning this facility provides any information about the grant money or how it was invested or used, but it does confirm that work at that facility

[4249] Specifically, the European Communities asserts that the grant funds were used to **[***]**. EC, FWS, para. 958.

[4250] Exhibit EC-139 (BCI) consists of a series of slides dated December 2006, showing the layout of the EADS-CASA Tablada plant and summarizing certain projects apparently undertaken at that plant. Two of the slides indicate that work at this plant is done for Airbus's A380 and A320 models.

[4251] EC, FWS, para. 975-976.

[4252] EC, FWS, para. 975-977.

BCI deleted, as indicated **[***]**

includes LCA-related activities.[4253] Thus, we conclude that the European Communities has failed to rebut the United States' *prima facie* case that, as a matter of fact, this grant benefits Airbus.

7.1218 Our review of the information provided by the parties, and particularly the facts set out by the European Communities itself, leads us to conclude that each of the challenged regional grants is a financial contribution in the form of a direct transfer of funds and that each confers a benefit on Airbus in connection with the production of LCA. Therefore, each constitutes a subsidy within the meaning of Article 1 of the SCM Agreement.

Specificity

7.1219 Having concluded that the measures challenged by the United States constitute subsidies within the meaning of Article 1 of the SCM Agreement, we now turn to the question of specificity. The European Communities raises two arguments in this regard. First, the European Communities makes a legal argument with respect to the meaning of Article 2.2 of the SCM Agreement, and the question whether subsidies provided to enterprises in certain geographic regions within the territory of the granting authority are specific. Second, the European Communities makes a factual and legal argument with respect to the grants by the Welsh government, arguing that they are not specific under Article 2. We turn first to the legal question under Article 2.2.

Interpretation of Article 2.2 of the SCM Agreement

7.1220 We recall that Article 3.2 of the DSU provides that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31.1 of the Vienna Convention on the Law of Treaties ('Vienna Convention')",[4254] which is generally accepted as such a customary rule, provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.1221 There is a considerable body of WTO case law dealing with the application of these provisions on treaty interpretation in dispute settlement in the WTO. It is clear that interpretation must be based above all on the text of the treaty,[4255] but that the context of the treaty also plays a role. It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[4256] Thus, all language must have a meaning. Furthermore, panels "must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement."[4257] Finally, the Appellate Body has noted that, if after applying Article 31 of the Vienna Convention, the meaning of a term of the treaty remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable,

[4253] Specifically, the document indicates that work at this plant involves **[***]**. Exhibit EC-138 (BCI). There is no evidentiary basis for apportioning the amount of the grant between LCA and other activities, and the European Communities has not suggested otherwise.

[4254] Done at Vienna, 23 May 1969, 1155 United Nations Treaty Series 331 (1980); 8 *International Legal Materials* 679 (1969).

[4255] Appellate Body Report, *Japan – Alcoholic Beverages II* , p. 11.

[4256] Appellate Body Report, *India – Patents (US)*, para. 45.

[4257] Appellate Body Report, *India – Patents (US)*, para. 46.

BCI deleted, as indicated **[***]**

Article 32 of the Vienna Convention allows a treaty interpreter to have recourse to supplementary means of interpretation, including the preparatory work of the treaty, *i.e.*, its negotiating history.[4258]

7.1222 Article 2.2 of the SCM Agreement provides as follows:

> "2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement."

Thus, Article 2.2 establishes that a subsidy "**shall** be specific" if it is "limited to certain enterprises located within a designated geographical region within the territory of the granting authority." In order to resolve the question before us, we must interpret the latter phrase.

7.1223 Article 2.2 is not particularly clearly drafted. It could be understood, based on the text alone, as establishing specificity on the basis of a geographical limitation on the recipients ("within a designated region"), which is the United States' position. It could also be understood to establish specificity on the double basis posited by the European Communities – "certain", *i.e.*, not all, enterprises, "within a designated region". While the text, standing alone, is not unambiguous in this respect, when the text is considered in its context and in light of its object and purpose, it is clear to us that Article 2.2 is properly understood to provide that a subsidy available in a designated region within the territory of the granting authority is specific, even if it is available to all enterprises in that designated region.

7.1224 We recall that the European Communities argues that under Article 2.2 of the SCM Agreement, only a subsidy that is limited to *certain* enterprises within a designated geographical region within the jurisdiction of the granting authority shall be specific.[4259] The European Communities' proposed interpretation would entail that, in order to be specific, a subsidy granted by a regional authority must not only be limited to a designated region within the territory of the granting authority, but must in addition be limited to only a subset of enterprises within that region. However, if a national authority grants a subsidy to a subset of enterprises within its territory, whether that subset of enterprises is located in a designated region or not, such a subsidy would, by definition, already be specific under Article 2.1, which provides, in pertinent part:

> "2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to.

[4258] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, para. 86.

[4259] EC, FWS, para. 733.

BCI deleted, as indicated **[***]**

> The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
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>
> [2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

Thus, the European Communities' proposed reading of Article 2.2 merely replicates the standard set out in Article 2.1(a), and thereby makes Article 2.2 redundant. As the Appellate Body has stated:

> "A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (ut res magis valeat quam pereat).[21] In *United States - Standards for Reformulated and Conventional Gasoline*, we noted that "{o}ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[22]
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> [21] See also (1966) Yearbook of the International Law Commission, Vol. II, p. 219: "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."
>
> [22] United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/9, adopted 20 May 1996, p. 23."

7.1225 The European Communities appears to recognize that its reading of Article 2.2 has the effect of making it redundant of Article 2.1(a), but dismisses this as a "structural overlap," which it describes as "not uncommon" in treaty-making.[4260] However, in our view, there is a perfectly reasonable reading of Article 2.2 which avoids this problem, and we consider it appropriate to eschew a reading of that provision which raises it. On this basis alone, we consider the European Communities' proposed interpretation of Article 2.2 to be unsatisfactory, as it fails to give full effect to the text of Article 2 as a whole.

7.1226 In addition, as the United States points out,[4261] the European Communities' reading of Article 2.2 also creates a redundancy with Article 8.2(b). Although Article 8.2(b) has expired (pursuant to the provisions of Article 31 of the SCM Agreement), it did form part of the original "traffic light" architecture of the SCM Agreement, and thus provides us with important context for understanding the intended scope of other provisions.[4262] Article 8.2(b) specifically rendered assistance to disadvantaged regions within the territory of a Member non-actionable, as long as that assistance met certain criteria. One of those criteria was that the assistance be "non-specific (within

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[4260] EC, Answer to Panel Question 97, para. 263.

[4261] US, SWS, para 380.

[4262] The Panel in *US – Upland Cotton* noted that provisions of the SCM Agreement that have lapsed may nevertheless be useful in understanding the overall architecture of the SCM Agreement with respect to the different types of subsidies it sought and seeks to address; Panel Report, *US – Upland Cotton*, para. 7.907 (footnote 1086). A similar view was expressed in the Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, footnote 66.

BCI deleted, as indicated **[***]**

the meaning of Article 2) within eligible regions." Under the European Communities' reading of Article 2.2, a regional subsidy that is not "limited to certain enterprises" within the region is not specific. Thus, the European Communities' reading of Article 2.2 would have rendered Article 8.2(b) redundant and unnecessary from the outset. Moreover, Article 8.1(b) provided that subsidies which were specific within the meaning of Article 2, but which met all the conditions of Article 8.2, would be non-actionable. Thus, Article 8.2(b) carved out as non-actionable regional development subsidies which, presumably, would otherwise have been actionable, in part because they were specific. Given that the establishment of particular types of subsidies as non-actionable under Article 8, including assistance to disadvantaged regions, was a significant achievement of the Uruguay Round negotiations, an interpretation of Article 2.2 which would have rendered one of the key provisions of Article 8 in this regard redundant and useless from the outset makes no sense to us, and we reject such an interpretation.

7.1227 Thus, in our view, the ordinary meaning of Article 2.2 of the SCM Agreement, read in context and in light of its object and purpose, is clear. As a consequence, there is no need for consideration of the negotiating history of the SCM Agreement.

7.1228 However, even assuming, *arguendo*, that there were some ambiguity in the interpretation of Article 2.2, in our view, the European Communities' description of the negotiating history is inaccurate and does not lend weight to its position. An important issue during the negotiation of the SCM Agreement was the treatment of subsidies by sub-national authorities – e.g., states or provinces in a federal system. Some delegations considered that all subsidies granted by sub-national authorities should be treated as automatically specific, simply because the subsidies were only available to enterprises within the geographical region in question.[4263] The European Communities was one of the proponents of this view:

> "Indeed, there is no difference, as to their economic effect, between a subsidy granted by a regional or local government to all firms in that region on one hand, and the same subsidy granted to the same firms in the same region but by the central government on the other hand."[4264]

Others delegations argued that subsidies granted by sub-national authorities should be treated as specific only if they were limited to enterprises in a designated geographical region within the jurisdiction of the sub-national authority in question.

7.1229 The 7 November 1990 draft text of the Negotiating Group on Subsidies and Countervailing Measures reflected the first approach, providing, in Article 2.1(d) that a regional subsidy is specific "irrespective of the nature of the granting authority." In other words, regardless of whether the granting authority was national or regional, the fact that a subsidy was limited to a "designated geographical region" would automatically make it specific. The text of Article 2.2 in the Draft Final Act also reflected this approach, providing:

> "A subsidy which is available to all enterprises located within a designated geographical region shall be specific irrespective of the nature of the granting authority. It is understood that the setting or change of generally applicable tax rates

[4263] US, SWS, para. 383

[4264] Elements of the Negotiating Framework, Submission by the European Community, MTN.GNG/NG10/W/31, at 6 (November 27, 1989).

BCI deleted, as indicated **[***]**

> by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement." [4265]

7.1230 However, the adopted text of the SCM Agreement reflects the other approach, that a subsidy meets the regional specificity test only if it is "limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority."

7.1231 The European Communities argues that the adopted text of Article 2.2 eliminates the notion of aid to a designated region as a singular basis of a finding of specificity. However, the European Communities ignores the change from a text which established that any regional assistance, irrespective of the granting authority, would always be specific, to a text which linked specificity to availability within the jurisdiction of a particular granting authority. This change reflects a compromise which accomplished the goal of those delegations who opposed the text of Article 2.2 in the Draft Final Act, and who sought to ensure that, if the granting authority was a regional government, a subsidy available to enterprises throughout the territory over which that regional government had jurisdiction would not be specific. The European Communities argues that the negotiators went even further, and added an additional limitation that regional aid granted by a regional authority would be specific only if it was limited to less than all enterprises within the region. There does not seem to be any basis for this outcome in the negotiating history, and the European Communities has put forward no evidence or arguments suggesting reasons why it would have been sought by or acceptable to the negotiators.

7.1232 The United States also points out that the European Communities' proposed construction of the regional specificity provision in Article 2.2 is contrary to its own practice in countervailing duty investigations.[4266] In response to a question from the Panel, the European Communities asserts that this is not the case.[4267] However, the only evidence it provides is the EC Basic Regulation governing countervailing duty investigations. As the European Communities recognizes, the Basic Regulation transposes the relevant provisions from the SCM Agreement into EC law. It does not, however, elaborate on how they are to be interpreted or applied in practice. The United States has submitted as exhibits decisions of the EC Commission, the investigating authority in the European Communities, and the Council of the European Communities, imposing countervailing duties, finding that aid to designated regions within the territory of a sub-national granting authority is countervailable, based on finding that such a subsidy is specific.[4268] For instance, the European Communities found that certain incentives granted by the regional government in the Indian state of Maharashtra to enterprises in developing and backward regions of that state were specific, even though they were not limited to a subset of enterprises, stating:

> "The scheme is only available to companies having invested within certain designated geographical areas within the State of Maharashtra. It is not available to companies located outside these areas. The level of benefit is different according to the area

[4265] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, at I.3 (20 December 1991)

[4266] US, SWS, para 388.

[4267] EC, Answer to Panel Question 98, paras. 267-269..

[4268] US, SWS, para. 477, referring to Council Regulation (EC) No 1338/2002 of 22 July 2002 imposing a definitive countervailing duty and collecting definitively the provisional countervailing duty imposed on imports of sulphanilic acid originating in India, OJ L196/1, 25.7.2002, recital 32, Exhibit US-581. The United States also points to Council Regulation (EC) No 1891/97of 26 September 1997 imposing a definitive countervailing duty on imports of farmed Atlantic salmon originating in Norway, OJ L267/19, 30.9.1997, recital 26 ("With regard to the business development grants in central regions, investment grants in assisted areas and business development grants in assisted areas, access to the subsidy is limited to enterprises in certain regions and specificity therefore exists."), Exhibit US-582 and recital 28 ("{T}he grants which are restricted to certain regions are by definition specific.").

BCI deleted, as indicated **[***]**

> concerned. The scheme is therefore specific in accordance with Article 3(2)(a) and Article 3(3) of the basic Regulation."[4269]

While it is clear, as the European Communities asserts, that its countervailing duty determinations are not the subject of this Panel,[4270] and we are not here addressing the consistency of those determinations with the SCM Agreement, it is nonetheless clear that the European Communities has not, in its own practice, followed the interpretation it urges on us in this dispute.

7.1233 Finally, with regard to the European Communities' "hierarchy" argument, we note that Article 2.2 provides, "A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority **shall be specific**." There is no indication in the text of the SCM Agreement that a finding of specificity under Article 2.2 is somehow subject to further examination under Article 2.1(b). There is thus no basis for the inference of a hierarchy posited by the European Communities, and a reading of the provisions of Article 2 as potentially conflicting in this manner is to be avoided. Moreover, non-specificity under Article 2.1(b) is based on the existence and application of criteria or conditions governing eligibility for and amount of a subsidy which are neutral, "do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise." The European Communities asserts that "the regional aid programmes themselves satisfy the criteria of Article 2.1(b) of the SCM Agreement".[4271] Essentially, the European Communities appears to be arguing that because the criteria for designation of the region within which challenged subsidies are granted are objective, and the criteria for eligibility for those subsidies within that region are objective, the subsidies granted within that region are non-specific.

7.1234 If this position were accepted, it would mean that Article 8.2(b)(ii) of the SCM Agreement was redundant from the outset. That Article provided that, in order for assistance to a disadvantaged region to be considered non-actionable, *inter alia*, the region in question must be determined "on the basis of neutral and objective criteria", defined in footnote 32 as "criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy." There would have been no need for this provision if the European Communities' "hierarchy" argument were correct. Of course, Article 8 has now expired, and thus there is no longer a category of non-actionable subsidies to disadvantaged regions. The European Communities' position effectively would re-introduce the expired provisions of Article 8.2(b), making regional assistance subsidies non-actionable on the basis of being non-specific under Article 2.1(b), which is not a justifiable outcome.

7.1235 The European Communities does not contest, and the information before us substantiates, that the grants provided by the German Land of Lower Saxony and the German government to Airbus in Nordenham in Germany, and the grants provided by the Spanish government to Airbus in Sevilla, La Rinconada, Illescas (Toledo), Puerto de Santa Maria and Puerto Real in Spain, and grants provided by the government of Andalusia to Airbus in Sevilla and Puerto Real in July 2002, July 2003 and October 2004, and by the government of Castilla-La Mancha to Airbus in Illescas (Toledo) in March 2004, were provided to enterprises in designated geographical regions within the territory of the respective granting authorities.

[4269] *See*, Commission Regulation (EC) No 573/2002 of 3 April 2002 imposing a provisional countervailing duty on imports of sulphanilic acid originating in India, OJ L87/5, 4.4.2002 ("Sulphanilic Acid from India Provisional CVD Regulation"), recital 68, Exhibit US-580. This finding was confirmed in the regulation imposing a definitive countervailing duty. .

[4270] EC, Answer to Panel Question 98, para. 267.

[4271] EC, FWS, para. 897. *See, also*, paras. 948, 981-83.

BCI deleted, as indicated **[***]**

7.1236 In this regard, we note that the grants provided by the government of Andalusia to Airbus in Sevilla and Puerto Real in 2002 and 2003, respectively, and by the government of Castilla-La Mancha to Airbus in Illescas (Toledo) in 2004, were co-financed by the European Regional Development Fund (ERDF).[4272] The United States asserts that "subsidies under the {ERDF} are necessarily limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority," and thus are specific within the meaning of Article 2.2 of the SCM Agreement".[4273] The European Communities does not dispute that these grants were co-financed by the ERDF. However, the European Communities does not address the United States' assertion that grants co-financed by the ERDF are necessarily specific within the meaning of Article 2.2. The European Communities relies entirely on its assertion that the programmes under which these grants were made were generally available throughout Andalusia and Castilla-La Mancha, respectively to dispute the United States' assertion of specificity with respect to these grants.[4274] Even accepting this as fact[4275], it does not undermine the United States' specificity argument. In our view, the United States' argument implies that the ERDF is the granting authoritiy, within the meaning of Article 2.2 of the SCM Agreement, for the portions of these grants which it financed, and that the ERDF-financed portions of these grants were therefore provided to enterprises in designated geographical regions within the territory of the granting authority. Based on the foregoing, we consider that the portions of these grants financed by the ERDF were provided to enterprises in designated geographical regions within the territory of the granting authority, and therefore, we conclude that they are specific under Article 2.2 of the SCM Agreement.[4276]

7.1237 Turning to the grant provided by the government of Andalusia to Airbus in Puerto Santa Maria in July 2001, we reach a different conclusion. Although the United States asserts that the grant to Puerto Santa Maria was made pursuant to an Andalusian government development plan for the Bahía de Cadiz, the evidence cited by the United States does not support this conclusion.[4277] The United States did not assert any other basis for a finding of specificity with respect to this grant. Based on the foregoing, we conclude that the grant provided by the government of Andalusia to Airbus in Puerto Santa Maria in July 2001 was not provided to an enterprise in a designated geographical region within the territory of the granting authority, and is therefore not specific under Article 2.2 of the SCM Agreement.

GBP 19.5 million grant in 2000 by the government of Wales

7.1238 With respect to the alleged 2000 grant by the Welsh government, the European Communities asserts that two grants were actually provided, under two programmes the terms of which make clear that they were not specific within the meaning of Article 2 of the SCM Agreement. The United States asserts that BAE Systems originally applied for a grant under Welsh Assembly's Regional Selective

[4272] US, FWS, paras. 506, 508 and 510.
[4273] US, FWS, paras. 507, 509 and 511.
[4274] EC, FWS, paras. 967, 980.
[4275] The United States does not dispute that the governments of Andalusia and Castilla-La Mancha "authorized" and "approved" those grants, respectively. US, FWS, paras. 506, 508 and 510.
[4276] We note in this regard that the information before us indicates that 75 percent of the grant to Sevilla was financed by the ERDF, but does not indicate what portion of the grants to Puerto Real and Illescas was financed by the ERDF. Thus, the amount of specific subsidy to Puerto Real and Illescas is less than the total amount of those grants, EUR 17.5 and 7.6 million, respectively. Given our conclusions with respect to the magnitude of the subsidies, see paras. 7.1963 - 7.1976, we consider that the lack of precise quantification of the amount of these subsidies does not affect our overall conclusions.
[4277] Page 14,291 of Exhibit US-240, cited by the United States in this regard, states that that the funds were granted "for a plan of action for the Bahía de Càdiz Centre (*Polígono Parque Industrial Bahía*)". Having carefully reviewed the evidence, we cannot conclude that the "Plan" referred to in Exhibit US-240 is an Andalusian government development plan for the Bahia de Càdiz.

BCI deleted, as indicated **[***]**

Assistance ("RSA") scheme, which application was denied.[4278] The United States asserts that the Welsh Assembly, in the face of pressure,[4279] in September 2000 agreed to provide *ad hoc* a total of GBP 19,500,000, in lieu of the assistance initially requested, to BAE Systems in support of A380 wing production work in Broughton, Wales.[4280] The United States argues that Article 2 of the UK A380 Launch Aid contract, **[***]**.[4281] further demonstrates that these measures are specific.[4282]

7.1239 The United States maintains that the circumstances surrounding the GBP 19.5 million grant are important to understanding why it is a specific subsidy.[4283] The United States notes that the original grant application was under the RSA programme, and asserts that grants under that scheme are specific within the meaning of Article 2.2 of the SCM Agreement, as they are limited to certain "assisted areas" in Wales.[4284] The United States asserts that an "uproar" following the Welsh Assembly's rejection of that original application, including, *inter alia*, the threat by BAE Systems to move A380 wing production from Wales to Germany,[4285] led the Welsh Assembly to provide the GBP 19.5 million to BAE Systems, albeit formally under schemes other than the RSA scheme under which the original application had been made.[4286] In the United States' view, the European Communities' approach fails to take into account the totality of the evidence, focusing only on events starting with BAE Systems' application for the grants that ultimately were provided, and further fails to address the **[***]**.[4287]

7.1240 The European Communities argues that the United States' allegation that the grant of GBP 19.5 million to Airbus UK in Broughton, Wales is specific is based on an application for a grant that Airbus UK did not actually receive, and simply assumes, without evidence, that the amount actually received was an *ad hoc* replacement for that denied grant.[4288] According to the European Communities, the United States' allegation of specificity is based entirely on its assumption that the amounts actually received were a direct substitute for the RSA grant that had been originally sought but denied, and argues that the United States has failed to make a *prima facie* case of specificity.[4289] The European Communities denies, in any event, that the RSA programme provides specific subsidies.[4290] The European Communities disputes the implication that the grants actually received by Airbus UK in 2000 replaced the denied RSA grant.[4291] Therefore, the European Communities considers that the A380 contract is not relevant, because that contract refers to an amount for RSA, which Airbus UK did not receive. The European Communities argues that, whether RSA is a programme that provides specific subsidies (which the European Communities contends it is not) is not the point, as Airbus received two grants pursuant to two different programmes, both of which are

[4278] US, FWS, para. 491.
[4279] According to the United States, *inter alia*, BAE Systems threatened to move the A380 wing production work from Wales to Germany. US, FWS, para. 493.
[4280] The package included GBP 15,000,000 from the Welsh Development Agency for the "general infrastructure of a big site" and GBP 4,900,000 for the "development of people." US, FWS para. 492.
[4281] A380 LA/MSF Contract, Art. 2.1.2, DS-316-EC-BCI-0000556, 0000562 (blank space in parentheses in original). The United States indicates that it did not know **[***]** referenced in the contract, because the European Communities redacted the relevant information from the copy of the contract that it provided to the Annex V Facilitator. Exhibit US-79 (BCI).
[4282] US, FWS, para. 492.
[4283] US, SWS, paras. 426-31.
[4284] US, FWS, para. 491 and footnote 589.
[4285] US, FWS, para. 492.
[4286] US, FWS, para. 492.
[4287] US, FWS, para. 493.
[4288] EC, FWS, para. 984.
[4289] EC, FWS, para. 984.
[4290] EC, FWS, footnote 793.
[4291] EC, SWS, para. 408.

generally available in Wales.[4292] Neither of these programmes is RSA, which is limited to assisted areas, whereas the programmes under which grants were actually provided are applicable throughout Wales.[4293] The European Communities considers that these grants must be evaluated on the basis of the terms and conditions of the programmes under which they were actually provided, and not as replacements or surrogates for RSA, which was not granted.[4294]

7.1241 While we agree with the United States that the circumstances surrounding the provision of a subsidy are relevant to our evaluation of the question of specificity, the starting point for that evaluation must, in our view, be the programme(s) pursuant to which the subsidy at issue is granted. Only if, notwithstanding an appearance of non-specificity in the grant of a particular subsidy, there are reasons to believe it may nonetheless be specific, do we consider it appropriate to focus our attention on the factual circumstances surrounding the provision of that subsidy to determine the question of specificity. In this regard, the European Communities has provided us with evidence, which the United States does not dispute, that the GBP 19.5 million was granted pursuant to two programmes that do not meet the test set forth in Article 2.2. There is no indication, and the United States does not argue otherwise, that subsidies granted under these programmes are limited by sector, region or enterprise. It follows that subsidies provided under those programmes are not "limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority", and are therefore not specific under Article 2.2 of the SCM Agreement. The United States has made no other allegations of specificity with respect to the GBP 19.5 million grant.[4295]

7.1242 We therefore conclude that the GBP 19.5 million provided to Airbus UK in respect of its operations in Broughton, Wales, is not a specific subsidy within the meaning of Article 2.2 of the SCM Agreement.

7.1243 Based on the foregoing, we therefore conclude that grants for the construction of manufacturing and assembly facilities in Nordenham, Germany, and Sevilla, La Rinconada, Toledo, and Puerto Real, Spain, are subsidies within the meaning of Article 1 that are specific within the meaning of Article 2.2. The European Communities does not dispute the amounts in question.

(g) Conclusion

7.1244 In summary, we conclude that the provision of the Mühlenberger Loch industrial site, the provision of the extended runway at Bremen Airport, the provision of the ZAC Aéroconstellation and EIG facilities, as well as regional grants by German authorities in Nordenham and Spanish authorities in Sevilla, La Rinconada, Toledo, Puerto Real, constitute specific subsidies to Airbus. We further conclude that the provision of road improvements by French authorities, the grant provided by the government of Andalusia to Airbus in Puerto Santa Maria in July 2001 and the grant of GBP 19.5 million to Airbus UK in respect of its operations in Broughton, Wales, are not specific subsidies to Airbus, and we will not consider them further in this dispute.

[4292] EC, FWS, para 985.
[4293] EC, SWS, para. 410.
[4294] EC, SWS, para. 409-410.
[4295] We therefore do not address the question of specificity under Article 2.1, or the European Communities' arguments concerning *de facto* specificity. EC, FWS, paras. 994, 996.

BCI deleted, as indicated **[***]**

7. Whether the German government's transfer of its ownership share in Deutsche Airbus to the Daimler Group is a specific subsidy to Airbus

(a) Background to the Capital Restructuring of Deutsche Airbus

7.1245 In this section, we address the United States' claims that two specific transactions arising out of the Federal German government's restructuring of Deutsche Airbus in the late 1980s constitute subsidies to Airbus. We begin by describing the events that led to the restructuring of Deutsche Airbus in 1989, and the specific transactions at issue before us, before considering in greater detail the arguments of the United States and the responses of the European Communities.

7.1246 Deutsche Airbus GmbH (Deutsche Airbus), the German partner in the Airbus GIE consortium, was founded in 1967 to assume work for the development of a European wide-body aircraft that had originally begun in 1965 as a joint venture among five German aerospace companies.[4296] By 1989, as a result of the consolidation of various German aerospace firms, Deutsche Airbus had become a wholly owned subsidiary of Messerschmitt-Bölkow-Blohm GmbH (MBB), itself the largest aerospace company in West Germany.[4297] The German share of the Airbus Industrie consortium's development and series production work was performed by MBB and Dornier, with Deutsche Airbus paying MBB and Dornier for services provided.[4298] Deutsche Airbus had been insufficiently capitalized by its parent company, MBB, and was largely dependent on financial aid from the German government, including guarantees of its private debt.[4299]

7.1247 The German government had, for a number of years prior to 1989, been encouraging MBB to obtain additional capital for Deutsche Airbus by finding new investors, although MBB's attempts on this front had been unsuccessful.[4300] By 1989, the German government had committed DM 10.7 billion to Deutsche Airbus in LA/MSF and financial aid for sales and series production.[4301] Deutsche Airbus also anticipated that it would require additional financing for the A320 programme, and the start-up of the A330/A340 programme.[4302] During this time, a significant depreciation of the US dollar relative to the DM, combined with a variety of other factors, had brought Deutsche Airbus to the brink of bankruptcy.[4303] It is against this background that the German government implemented the 1989 plan to restructure Deutsche Airbus. The objective of the restructuring plan was to gradually shift the risks associated with participation in Airbus GIE to the private sector. According to the German Federal Ministry of Economics, the restructuring of Deutsche Airbus was designed to create a

[4296] The original companies in question were: Blohm-Hamburger Flugzegbau GmbH (HFB), Messerschmitt AG, Vereinigte Flugtechnische Werke (VFW), Siebel and Dornier.

[4297] By 1969, Messerschmitt, Bölkow AG and HFB had merged to form Messerschmitt-Bölkow-Blohm GmbH (MBB). MBB originally held 60 percent of the interests in Deutsche Airbus, with Dornier and VFW each holding 20 percent. MBB took over VFW in 1981. Prior to Daimler-Benz AG acquiring control of MBB in 1989, the German federal states of Bavaria, Hamburg and Bremen held 52.3 percent of the capital stock of MBB; Monopolkommission, *Zusammenschlussvorhaben der Daimler Benz AG mit der Messerschmitt-Boilkow-Blohm GmbH*, Sondergutachten 18, 1989 (*Monopolkommission Report*), Exhibit US-30, para. 138.

[4298] *Monopolkommission Report*, Exhibit US-30, para. 116.

[4299] *Monopolkommission Report*, Exhibit US-30, para. 116. According to the German Federal Cartel Office, the German government bore most of the financial risk associated with development and series production of the German share of Airbus GIE, with Deutsche Airbus functioning as "a liability and risk barrier" for MBB.

[4300] *Monopolkommission Report*, Exhibit US-30, para. 123.

[4301] *Monopolkommission Report*, Exhibit US-30, para. 117.

[4302] *Monopolkommission Report*, Exhibit US-30, para. 124.

[4303] EC, FWS, para. 1177.

BCI deleted, as indicated **[***]**

"realistic chance of placing the Airbus program under full private industry responsibility over the longer term and thus reducing the level of state financial assistance for Airbus." [4304]

7.1248 The restructuring plan involved the industrial group Daimler-Benz AG (Daimler-Benz) acquiring control of MBB (and thus Deutsche Airbus) through a newly created aerospace subsidiary, Deutsche Aerospace AG (Dasa).[4305] The restructuring also involved a series of commitments by the German government that significantly limited any risk to Daimler-Benz associated with its acquisition of the German share of the Airbus consortium.[4306] These transactions were set forth in a Framework Agreement among the Federal Republic of Germany, Daimler-Benz, MBB and Deutsche Airbus.[4307] The principal elements of the restructuring transactions were as follows: First, the German government repaid, on behalf of Deutsche Airbus, DM 1.9 billion of Deutsche Airbus outstanding bank debt which had been guaranteed by the German government.[4308] In addition, the German government agreed to pay up to DM 750 million of Deutsche Airbus' guaranteed debt in respect of the A300/A310 programmes that was still outstanding at the end of 1994.[4309] Second, the German government established an exchange rate loss insurance programme under which it agreed to cover future exchange rate losses incurred by Deutsche Airbus.[4310] Third, the German government provided a DM 165 million loan to finance production of the A320.[4311] Fourth, the German government rescheduled repayments of LA/MSF previously granted in connection with its financing of development costs for the A300, A310, A320 and A330/A340 pursuant to a (profit-based) income adjustment bond, or "debtor warrant".[4312] Fifth, the German government, through the government development bank, *Kreditanstalt für Wiederaufbau* (KfW) agreed to make a DM 505 million equity infusion to Deutsche Airbus, representing 20 percent of the equity in Deutsche Airbus. KfW's

[4304] *Handelsblatt* No. 212, November 3, 1988, p. 24 "Daimler-Benz-MBB / Statement of the German Federal Ministry of Economics on the Restructuring of the Aviation Industry," Exhibit US-259.

[4305] In 1989, MBB, Dornier and two other companies, Motorenund Turbinen Union and Telefunken System Technik were merged into a newly created aerospace subsidiary of the German automaker Daimler-Benz AG (Daimler-Benz), called Deutsche Aerospace AG (Dasa), as one part of the restructuring of the German aerospace industry; Exhibit EC-26, p. 2.

[4306] *Monopolkommission Report*, Exhibit US-30, para. 129.

[4307] The Framework Agreement, dated as of 23 March 1989, as amended on 2 September 1989 (the "Framework Agreement"), Exhibit EC-887-HSBI. The Framework Agreement was amended a further three times between 1992 and 1998. The last of those amendments occurred in December 1998, when the parties agreed to settle of all of the German government's outstanding repayment claims under the debtor warrant for a one-off compensatory payment of DM 1.75 billion. The United States claims that the 1998 settlement of Deutsche Airbus debt to the German government was itself a specific subsidy to Airbus. We address this claim in Section VII.E.8

[4308] *Monopolkommission Report*, Exhibit US-30, para. 121.

[4309] *Monopolkommission Report*, Exhibit US-30, para. 131.

[4310] *Monopolkommission Report*, Exhibit US-30, para. 131. This aspect of the restructuring programme was determined to be a subsidy on exports prohibited under the Tokyo Round Subsidies Code, by a GATT panel. GATT Panel Report, *EEC – Airbus*, 4 March 1992, unadopted, *SCM*/142.

[4311] US, FWS, para. 520, footnote 622; EC, FWS, para. 1180.

[4312] The European Communities translates *Besserungsschein* as "debtor warrant"; EC, FWS, para. 1179, and we use the same term to refer to the *Besserungsschein.* We note that in one exhibit, the United States has translated the term *Besserungsschein* as "(profit-based) income-adjustment bond": Exhibit US-31, p. 14. Under the terms of the debtor warrant, the German government's repayment claims against Deutsche Airbus' were to be met from Deutsche Airbus' annual profits (*i.e.*, the repayment obligations were contingent on Deutsche Airbus having earned pre-tax profits in the preceding year); Daimler-Benz Annual Report 1997, Exhibit US-262, p. 96. Moreover, Deutsche Airbus profits were first to be applied to increasing its equity capital to DM 1.755 billion and to providing a special reserve for exchange rate losses and a revenue reserve. According to the Federal Cartel Office, the arrangement for the government's repayment obligations to be made pursuant to the terms of the debtor warrant meant that the repayment claims of the German government were delayed far into the future, leading to a considerable interest rate subsidy; *Monopolkommission Report*, Exhibit US-30, para. 132.

BCI deleted, as indicated **[***]**

acquisition of the 20 percent stake in Deutsche Airbus was originally envisaged to be for a period of 10 years, with MBB agreeing to purchase the 20 percent stake from KfW by the end of 1999 at the latest.

7.1249 The United States' subsidy claims relate to the fifth element of the restructuring of Deutsche Airbus; namely, the acquisition by KfW of the 20 percent equity interest in Deutsche Airbus in 1989, and the subsequent sale of that interest to MBB in 1992.[4313]

(b) Arguments of the parties

(i) United States

The purchase by KfW of 20 percent of the shares of Deutsche Airbus

7.1250 The United States argues that the acquisition by KfW of 20 percent of the shares of Deutsche Airbus constitutes a "financial contribution" by the German government in the form of a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. The United States argues that the acquisition by KfW of 20 percent of the shares of Deutsche Airbus is an equity infusion by the German government in Deutsche Airbus, and that Article 1.1(a)(1)(i) of the SCM Agreement includes equity infusions among the types of "direct transfers of funds" that constitute financial contributions under Article 1.1(a)(1).[4314] The United States also contends that this financial contribution conferred a benefit on Deutsche Airbus within the meaning of Article 1.1(b) of the SCM Agreement. The United States submits that, while Article 1.1(b) of the SCM Agreement does not establish a standard for determining whether an equity infusion confers a benefit on the recipient, Article 14(a) provides relevant context for such a determination. In light of Article 14(a), the United States submits that if a government's decision to provide equity to a company is inconsistent with the usual investment practice of private investors in the Member's territory, the equity infusion confers a benefit within the meaning of Article 1.1(b).[4315]

7.1251 Accordingly, the United States argues that the German government's decision to make the DM 505 million equity infusion in Deutsche Airbus was inconsistent with the usual investment practice of private investors in Germany. The United States contends that Deutsche Airbus' financial position at the time of the investment by KfW was exceedingly poor.[4316] In particular, the United States notes that in Deutsche Airbus' 1990 Annual Report, the company reported significant liabilities on its balance sheet, that it continued to face business risks from the DM/dollar exchange rate, lacked capital to finance the DM 2 billion costs of producing the A320, A321 and A330/A340 and would not be able to borrow the necessary additional funds without first obtaining additional equity.[4317] The United States also points to the fact that the KfW infusion was itself part of a package of financial aid

[4313] Although the parties to the Framework Agreement had originally agreed that MBB would purchase KfW's interest in Deutsche Airbus in 1999, this date was brought forward to 1996 by a September 1989 amendment to the Framework Agreement. In 1992, following the adverse GATT Panel Report in *EEC – Airbus*, and the German government's decision to terminate the exchange rate loss insurance programme at issue in that dispute, the Framework Agreement was further amended, *inter alia*, to require that MBB purchase KfW's 20 percent equity stake in Deutsche Airbus by 30 September 1992 at the latest, for the purchase price of DM **[[**HSBI**]],** the consideration to take the form of a repayment claim pursuant to the terms of the debtor warrant; EC, FWS, para. 1182.

[4314] US, FWS, paras. 543.

[4315] US, FWS, para. 545.

[4316] In this regard, the United States notes that at the end of 1988, Deutsche Airbus' parent, MBB, had reported shareholders' equity of less than DM 900 million, compared to total liabilities in excess of DM 3.6 billion. MBB had also reported a consolidated net loss of DM 83.3 million in 1987; US, FWS, para. 546; MBB Consolidated Annual Report 1989, Exhibit US-267, p. 51.

[4317] US, FWS, para. 546 ; Deutsche Airbus, Annual Report 1990, p. 18, Exhibit US-268.

BCI deleted, as indicated **[***]**

to MBB (that was a precondition to Daimler-Benz's agreement to acquire control of MBB) as an additional relevant fact that confirms the non-commercial nature of the German government's investment.[4318]

7.1252 Finally, the United States argues that the equity infusion is specific to Airbus within the meaning of Article 2 of the SCM Agreement, as an exercise of discretion by the German government to provide equity to a single company, Deutsche Airbus, as part of a broader aid package for that company.[4319]

The 1992 sale of KfW's 20 percent interest in Deutsche Airbus to MBB

7.1253 The United States claims that the 1992 sale by KfW of its 20 percent interest in Deutsche Airbus to MBB also constitutes a subsidy to Airbus. The United States argues that the transfer of shares in Deutsche Airbus to MBB is a "financial contribution" because it involves the "direct transfer of funds" (*i.e.*, share capital), within the meaning of Article 1.1(a)(1) of the SCM Agreement.[4320] The United States asserts that, based on publicly available information, MBB did not appear to have paid any consideration for the Deutsche Airbus shares acquired from KfW, and that the share transfer was, effectively, a DM 505 million grant.[4321]

7.1254 The United States also points to the background of the share transfer to MBB as evidence of its non-commercial nature. In this regard, the United States notes that that when KfW acquired the 20 percent stake in Deutsche Airbus in 1989, it had been agreed that MBB would purchase that stake from KfW by 1999 at the latest. In 1990, this agreed date was changed to 1996. However, the United States alleges that the date for the acquisition by MBB was then brought forward to 1992 directly as a result of the findings of the 1992 GATT panel that the German government's exchange rate guarantee scheme was a prohibited export subsidy to Deutsche Airbus.[4322] According to the United States, the German government agreed to eliminate the exchange rate guarantee scheme, whereupon Daimler-Benz demanded that it be compensated, and the German government agreed to return its 20 percent stake in Deutsche Airbus to MBB (which had been renamed Dasa) in 1992 "apparently free of charge".[4323] The United States argues that KfW's uncompensated return of Deutsche Airbus shares could be considered as converting its original provision of a DM 505 million equity infusion to Deutsche Airbus into an outright grant.[4324] In support of its contention that the share transfer to MBB was non-commercial in nature, the United States also relies on statements by Daimler-Benz and the former head of DG Trade of the European Commission, to the effect that the terms of the 1992 transfer of Deutsche Airbus shares to MBB was intended to "compensate" Daimler-

[4318] United States, FWS, para. 547. The United States also points to a published Answer by the Deputy Secretary of Parliament to a question concerning the "subsidies" granted by the Federal government to Airbus, which specifically lists the equity infusion as one such subsidy. US, FWS, para. 540; BT-Drs. 13/8409, Exhibit US-31, pp. 13-14.

[4319] US, FWS, para. 548.

[4320] US, FWS, para. 553.

[4321] US, FWS, para. 555.

[4322] GATT Panel Report, *EEC – Airbus*, 4 March 1992, unadopted, *SCM*/142.

[4323] US, FWS, para. 550. The United States notes that in a 1992 Report, Daimler-Benz explained that, following the decision of the GATT Panel, the German government and Daimler-Benz entered into negotiations "with a view to achieving an equally satisfactory solution when the present assistance ceases. In the resulting agreement, it was decided that, as one of the compensatory measures, the shares held by the Reconstruction Loan Corporation will be transferred to Deutsche Airbus at an earlier date than scheduled…"; Daimler-Benz Consolidated Interim Report, January 1-June 30, 1992, p. 7, Exhibit US-272.

[4324] US, Answer to Panel Question 161, para. 160. This is why, if the Panel accepts that the 1992 KfW transfer of its 20 percent stake in Deutsche Airbus to MBB was made "free of charge", the United States considers it unnecessary for the Panel to make a separate finding regarding the original DM 505 million equity infusion*; see also*, US, FWS, para. 552, footnote 668.

BCI deleted, as indicated **[***]**

Benz for the German government's withdrawal of the exchange rate guarantee scheme following the adverse GATT Panel decision.[4325]

7.1255 The United States also argues that, if the Panel were to find that KfW's transfer of its 20 percent equity interest in Deutsche Airbus to MBB was not free of charge, we should find (i) that the original equity infusion constitutes a subsidy (inasmuch as providing that infusion was inconsistent with the usual investment practice of private investors and thus confers a benefit); and (ii) "that, even assuming *arguendo*, the payment the European Communities says KfW received when it sold its Deutsche Airbus shares to MBB in 1992, that equity infusion also constitutes a subsidy (inasmuch as providing that infusion was inconsistent with the usual investment practice of private investors and thus confers a benefit)."[4326]

7.1256 The United States argues that in other disputes concerning restructuring of financially distressed companies, panels have considered the absence of independent assessments or going-concern analyses of the company to be relevant to the commercial reasonableness of government provision of equity to such companies. The United States notes that the European Communities has not offered any evidence that the German government based its decision to provide additional capital to Deutsche Airbus on independent assessment studies, such as studies comparing the going-concern value of Deutsche Airbus with its liquidation value.[4327] The United States also notes that the European Communities had refused to respond to questions about the terms and conditions of the 1992 transfer by KfW of its 20 percent equity interest in Deutsche Airbus posed by the Facilitator during the Annex V process.[4328] According to the United States, the logical inference to be drawn from such a refusal is that the information would have supported the United States' claim that the measure is a specific subsidy. The United States requests the Panel to draw such an inference, and in addition, requests the Panel to draw an adverse inference that the withheld information demonstrates that the measure is a specific subsidy.[4329]

7.1257 Finally, the United States argues that the 1992 share transfer is specific to Airbus within the meaning of Article 2 of the SCM Agreement because it resulted from a negotiation between the German government and a single company to compensate the company from the effects of withdrawing the exchange rate guarantee scheme that was found to be inconsistent with the Tokyo Round Subsidies Code.[4330]

(ii) European Communities

The purchase by KfW of 20 percent of the shares of Deutsche Airbus

7.1258 The European Communities argues that the United States "fails to distinguish between the recipient of the alleged subsidy in 1989 and today's LCA manufacturer - Airbus SAS."[4331] According

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[4325] US, FWS, paras. 550-552, 554. The United States refers to an excerpt from an interview with the then head of DG Trade, Peter Carl, in which Carl is quoted as saying:

"We lost the export subsidy case…But it was settled immediately afterwards. We agreed with the Germans that they had to change their system. But what happened in reality was the way the German government simply changed the way in which it handed out very substantial amounts of money to Deutsche Airbus. Instead of going by route A, it went by route B"; Stephen Aris, *Close to the Sun*, at 166-167 (2004), Exhibit US-23.

US, Answer to Panel Question 32, paras. 209-212.

[4326] US, Answer to Panel Question 161, para. 162.

[4327] US, Answer to Panel Question 224, para. 313-317.

[4328] US, Answer to Panel Question 32, para. 206; Exhibit US-5 (BCI).

[4329] US, Answer to Panel Question 32, para. 212.

[4330] US, FWS, para. 556.

[4331] EC, FWS, para. 1212.

BCI deleted, as indicated **[***]**

to the European Communities, the United States has attempted to demonstrate that the 1989 investment by KfW is a subsidy, "without showing how that alleged subsidy passed on to Airbus SAS to benefit the production of LCA alleged by the United States to be causing present adverse effects."[4332] The European Communities submits that the Panel should reject the United States' claim on this basis.

7.1259 The European Communities argues that KfW's equity investment in Deutsche Airbus did not confer a benefit on Deutsche Airbus. The European Communities agrees with the United States that Article 14(a) of the SCM Agreement offers contextual guidance for determining whether a benefit is conferred in the context of an equity infusion.[4333] Contrary to the assertions of the United States however, the European Communities argues that the KfW investment was not inconsistent with the usual investment practice of private investors in Germany because Daimler-Benz, "through MBB" also acquired shares in Deutsche Airbus at that time and for the same nominal price per share. The European Communities also contends that the evidence adduced by the United States of MBB's financial position at the time of the investment is irrelevant to an assessment of Deutsche Airbus' equityworthiness. According to the European Communities, Deutsche Airbus was equityworthy at the relevant time, as is confirmed by Daimler-Benz's simultaneous purchase of Deutsche Airbus' shares *following* Deutsche Airbus' restructuring.[4334]

The 1992 transfer of KfW's 20 percent interest in Deutsche Airbus to MBB

7.1260 The European Communities contends that the sale by KfW of its 20 percent interest in Deutsche Airbus to MBB did not confer a benefit on Deutsche Airbus, because the transfer of a company's shares from one shareholder to another is of no economic consequence to the company itself.[4335] In addition, the European Communities argues that MBB, as the purchaser of KfW's 20 percent interest in Deutsche Airbus (and therefore as the recipient of any alleged financial contribution), did not develop, manufacture or sell any Airbus LCA in 1992 or subsequently.[4336] According to the European Communities, the United States has failed to demonstrate how the acquisition of shares in Deutsche Airbus could have conferred a benefit on Deutsche Airbus, let alone "how the alleged subsidy (benefit) passed from MBB to "Deutsche Airbus" (which was manufacturing LCA in the past) or, more pertinently, to Airbus SAS, which today develops, manufactures and sells LCA that is alleged to impose present adverse effects on United States' interests."[4337]

7.1261 Moreover, the European Communities contends that the share transfer to MBB was not in fact "free of charge" as alleged by the United States. The European Communities points to independent valuations of KfW's 20 percent interest in Deutsche Airbus by **[***]** and contends that the fact that the value of KfW's 20 percent stake in Deutsche Airbus in 1992 was less than its initial value at the time KfW subscribed the shares does not indicate that there was a subsidy.

7.1262 The European Communities notes that one of the terms of the 1989 restructuring was that, should the value of KfW's 20 percent interest in Deutsche Airbus **[***]**.[4338] Since the 1992 valuation

[4332] EC, FWS, para. 1212.
[4333] The European Communities argues that Appellate Body case law on the relevance of Article 14 to the interpretation of Article 1.1(b) of the SCM Agreement "neither calls for nor suggests a mechanistic, automatic and literal application of tests in Article 14 to the issue of determination of existence of benefit in the sense of Article 1.1(b)." However, the European Communities also indicates that in the context of an equity contribution by a government, it is implicit in the notion of "benefit" in Article 1.1(b) to inquire into the usual investment practice of private investors; EC, Answer to Panel Question 101, paras. 277, 280.
[4334] EC, FWS,para. 1217.
[4335] EC, FWS, para. 1203; EC, SWS, para. 600.
[4336] EC, FWS, para. 1203.
[4337] EC, FWS, para. 1203.
[4338] EC, FWS, para. 1209.

BCI deleted, as indicated **[***]**

of the 20 percent stake by **[***]** was less than DM 505 million, the German government thereby became entitled, above and beyond the **[[**HSBI**]]** value ascribed to the 20 percent stake by **[***]**, to an additional amount of **[[**HSBI**]]**. According to the European Communities, the German government, Daimler-Benz, MBB and Deutsche Airbus agreed that an amount of **[[**HSBI**]]**, corresponding to the value of the shares by **[***]**, plus an additional amount of **[[**HSBI**]]**, be paid by Deutsche Airbus under the terms of the debtor warrant.[4339] The transfer by KfW of its 20 percent interest in Deutsche Airbus to MBB was therefore not "free of charge" and, according to the European Communities, did not confer a benefit on Deutsche Airbus.

7.1263 The European Communities also contends that the United States has agreed that the 1992 amendment to the 1989 Framework Agreement did not affect the economic position of Deutsche Airbus and that, since the 1992 sale of KfW's 20 percent equity interest in Deutsche Airbus to MBB was an element of the 1989 Framework Agreement and the 1992 amendment, it likewise cannot be held to confer a benefit on Deutsche Airbus.[4340] In addition, the European Communities argues that, if the Panel were to find that the KfW acquisition of a 20 percent equity interest in Deutsche Airbus in 1989 were tantamount to a grant to Deutsche Airbus, it could not then conclude that the 1992 transfer of that equity interest to MBB constitutes a second subsidy, because to do so would amount to double counting.[4341]

(c) Evaluation by the Panel

(i) Additional factual background to KfW's acquisition and subsequent sale of the 20 percent equity interest in Deutsche Airbus

7.1264 Before proceeding to evaluate the arguments of the parties, we consider it helpful to set forth additional information concerning the terms on which KfW initially acquired the 20 percent interest in Deutsche Airbus in 1989, and the terms on which it ultimately transferred that interest to MBB in 1992. As previously indicated, these transactions were elements of the 1989 restructuring of Deutsche Airbus which involved Daimler-Benz acquiring a majority shareholding in MBB and thus, indirectly, Deutsche Airbus' 37.9 percent interest in Airbus Industrie.

7.1265 In conjunction with the Daimler-Benz acquisition of a majority interest in MBB, MBB agreed to contribute additional capital of approximately DM 1 billion to Deutsche Airbus.[4342] Also in conjunction with the Daimler-Benz acquisition of a majority interest in MBB, KfW agreed to make a capital contribution of DM 505 million to Deutsche Airbus, representing 20 percent of the outstanding equity capital of Deutsche Airbus. In addition, the German government agreed that, during the 10 year period in which KfW was originally expected to hold its equity interest in Deutsche Airbus, any profits generated by Deutsche Airbus would, for at least the first eight years, be used first to build up Deutsche Airbus' capital base and to form a special reserve to compensate Deutsche Airbus for exchange rate losses.[4343]

[4339] EC, FWS, para. 1209.

[4340] EC, Comments on US Answer to Panel Question 225, para. 208; referring to US, Answer to Question 32, paras. 209-211.

[4341] EC, Comments on US Answer to Panel Question 225, para. 209.

[4342] Of this amount, DM 800 million was to be provided in cash, DM 5 million was to be provided in the form of an in-kind contribution of MBB's transport and commercial aircraft division, and DM 195 million was to consist of a special payment to be allocated to a special capital reserve in order to compensate Deutsche Airbus for US dollar exchange rate losses. According to the German Federal Cartel Office, DM 800 million of the DM 1 billion additional capital provided by MBB was attributable to Daimler-Benz's DM 993 million capital injection to MBB as part of its acquisition of a majority interest in MBB; *Monopolkommission Report*, Exhibit US-30, paras. 125, 126, 128.

[4343] *Monopolkommission Report*, Exhibit US-30, para. 132.

BCI deleted, as indicated **[*******]**

7.1266 It was originally agreed among the parties to the Framework Agreement that KfW's investment in Deutsche Airbus was to be of 10 years' duration, with MBB agreeing to acquire the 20 percent equity interest in Deutsche Airbus from KfW by the end of 1999.[4344] The parties to the Framework Agreement had agreed that, **[*******]**.[4345]

7.1267 In 1992, the Framework Agreement was amended to, among other things, bring forward to 1992 the date of MBB's purchase of KfW's 20 percent equity interest in Deutsche Airbus, and to provide that the purchase price for that stake **[*******]** DM **[[**HSBI**]]** million. The European Communities has provided evidence suggesting that the amount of DM **[[**HSBI**]]** million was negotiated between the German government and MBB based on advice from two independent accounting firms, **[*******]**, and that the value of KfW's 20 percent equity interest in Deutsche Airbus in 1992 was DM **[[**HSBI**]]** million.[4346] This means that the sale price of DM **[[**HSBI**]]** million negotiated in 1992 represents **[***** **[[**HSBI**]]** *****]**.

(ii) Was the 1992 transfer of KfW's 20 percent equity interest in Deutsche Airbus to MBB "free of charge"?

7.1268 The United States argues that both the acquisition by KfW of the 20 percent interest in Deutsche Airbus and the subsequent sale of that interest to Deutsche Airbus' parent MBB, are specific subsidies. In its first written submission, the United States indicated that if the Panel were to find that the 1992 sale by KfW of its 20 percent interest in Deutsche Airbus to MBB amounted to a grant in the amount of DM 505 million, it would not be necessary for the Panel to determine whether the original acquisition of the 20 percent stake by KfW in 1989 was also a subsidy.[4347] In response to a question from the Panel, the United States subsequently explained that the argument which it had formulated in its first written submission was based on publicly available information regarding the purchase and subsequent sale by KfW of its equity interest in Deutsche Airbus, because the European Communities had not provided any information concerning the 1992 transfer by KfW in the Annex V process.[4348] According to the United States, the logical inference to be drawn from the publicly available information was that KfW's shares in Deutsche Airbus had been acquired in 1989 for DM 505 million and had then effectively been returned to MBB without payment. As a result, according to the United States, the uncompensated return of shares could be considered to have converted the original provision of a DM 505 million equity infusion to Deutsche Airbus into an outright grant.[4349] On this basis, the United States considered that it would be unnecessary for the Panel to make a separate finding as to whether the 1989 KfW acquisition of shares in Deutsche Airbus amounted to a subsidy.

7.1269 According to the United States, if the Panel were to accept the European Communities' subsequent contention that the 1992 transfer by KfW of its 20 percent interest in Deutsche Airbus to MBB was made for consideration (a contention which the United States regards as unsubstantiated), then the Panel should make findings regarding both the original DM 505 million acquisition by KfW of a 20 percent equity interest in Deutsche Airbus and the subsequent transfer of that interest to MBB in 1992.[4350]

[4344] As previously noted, the Framework Agreement was amended in September 1989 to bring forward the date at which MBB was required to purchase KfW's 20 percent interest in Deutsche Airbus to 1996, before that date was once again brought forward to 1992.

[4345] EC, FWS, para 1209; Framework Agreement; Exhibit EC-887 HSBI.

[4346] The evidence in question is a letter, dated 1 July 1992, from the accounting firm **[***]** which corroborates the European Communities' contention that **[***]** had agreed on a **[***[[**HSBI**]]]**; EC, FWS, paras. 1208-1209; SWS, para. 601; Exhibit EC-752 HSBI.

[4347] US, FWS, para. 552, at footnote 668.

[4348] US, Answer to Panel Question 161, para. 159.

[4349] US, Answer to Panel Question 161, para. 159.

[4350] US, Answer to Panel Question 161, para. 160.

BCI deleted, as indicated **[***]**

7.1270 We are not persuaded that the 1992 transfer of KfW's equity interest in Deutsche Airbus to MBB was "free of charge" as alleged by the United States. We base this factual finding on the terms of the Framework Agreement, as amended in 1992, which provided that the consideration to be provided for the transfer of the shares was DM **[[**HSBI**]] [***].**[4351] As we explain further below, we are not in a position to calculate with precision what would have been the present value, in 1992, **[*** **[[**HSBI**]]*****]**. However, we are satisfied that the value would have been greater than zero. We are therefore unable to conclude that the 1992 transfer by KfW of its 20 percent equity interest in Deutsche Airbus was made "free of charge", or that it could be considered to have converted the whole of KfW's original provision of a DM 505 million equity infusion to Deutsche Airbus into a grant.[4352] This being so, it is necessary for us to consider whether the 1989 acquisition by KfW of a 20 percent stake in Deutsche Airbus *and* the 1992 sale of that stake to MBB, *each* constitutes a specific subsidy to Airbus.

7.1271 Although we will examine both the 1989 and the 1992 transactions in order to establish whether either can be said to amount to a subsidy, we note that the two transactions are related to one another and that this circumstance should be taken into account in our assessment of each of them. For example, in assessing whether the 1989 acquisition by KfW of a 20 percent equity interest in Deutsche Airbus constitutes a subsidy, we consider not only the purchase price paid by KfW (DM 505 million) but the fact that one of the terms on which that stake was acquired was that MBB, the only other shareholder of Deutsche Airbus, was obligated to purchase that stake from KfW by 1999 according to a particular pricing formula designed to **[***]**.[4353] Similarly, in assessing whether the 1992 transfer by KfW of its 20 percent interest in Deutsche Airbus to MBB constitutes a subsidy, we consider the 1992 amendments to the terms of the debtor warrant **[***]**.

(iii) KfW's acquisition of a 20 percent equity interest in Deutsche Airbus in 1989

7.1272 We consider that the 1989 acquisition by KfW of a 20 percent equity interest in Deutsche Airbus constitutes a direct transfer of funds in the form of an equity infusion and is therefore a financial contribution pursuant to Article 1.1(a)(1)(i) of the SCM Agreement.

7.1273 In relation to the existence of a benefit conferred by that financial contribution, we note the European Communities' contention that the United States has failed to demonstrate how any "alleged subsidy passed on to Airbus SAS to benefit the production of LCA alleged by the United States to be causing present adverse effects."[4354] By this, we understand the European Communities to argue that the United States has failed to demonstrate how any benefit conferred on Deutsche Airbus by the financial contribution "passed through" to Airbus SAS. For reasons which we fully explain elsewhere in this report, we reject the European Communities' arguments that it is necessary for the United States to affirmatively demonstrate the "pass-through" to Airbus SAS of the benefit conferred by a financial contribution which is provided to Airbus GIE or one of the Airbus partners (such as Deutsche Airbus).[4355] In short, if we find that KfW's acquisition of 20 percent of the shares of Deutsche Airbus conferred a benefit on Deutsche Airbus, we consider that it will have conferred a benefit on the Airbus Industrie consortium and thus, Airbus SAS, without requiring the United States to affirmatively establish the "pass-through" of any benefit to the Airbus Industrie consortium, or to Airbus SAS.

[4351] Second amendment to the Framework Agreement; Exhibit EC-889 HSBI.

[4352] Moreover, we note that this claim to repayment was settled by the German government in 1998, along with the other debt outstanding under the debtor warrant, as part of the 1998 debt settlement. *See*, paras. 7.1315 - 7.1322.

[4353] As originally negotiated, the latest date for the purchase of KfW's stake by MBB was 1999. The first amendment to the Framework Agreement amended that date to 1996, and the third amendment to the Framework Agreement amended the date once again, to 1992.

[4354] EC, FWS, para. 1212.

[4355] *See*, paras. 7.190 - 7.200 above.

BCI deleted, as indicated **[***]**

7.1274 As to whether KfW's acquisition of a 20 percent equity interest in Deutsche Airbus conferred a "benefit" on Deutsche Airbus, we note that the SCM Agreement does not set forth when a financial contribution in the form of an equity infusion will be considered to confer a "benefit" for purposes of Article 1.1(b). However, it is well established that a financial contribution confers a benefit within the meaning of Article 1.1(b) where the terms on which the financial contribution was provided to the recipient are more favourable than the terms available to the recipient in the market.[4356] Although Article 14 of the SCM Agreement sets forth guidelines for investigating authorities in countervailing duty investigations to follow when calculating the amount of benefit to the recipient for purposes of Part V of the SCM Agreement, the Appellate Body has held that Article 14 also constitutes relevant context for the interpretation of "benefit" in Article 1.1(b).[4357] Article 14(a) of the SCM Agreement provides:

> "{G}overnment provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the *usual investment practice* (including for the provision of risk capital) *of private investors* in the territory of that Member."[4358]

7.1275 Both the United States and the European Communities agree that, in assessing whether the KfW equity infusion conferred a benefit on Deutsche Airbus, it is appropriate for us to consider whether providing the equity infusion was consistent with the usual investment practice of private investors in Germany.[4359] Our approach to the issue of benefit in the context of KfW's acquisition of a 20 percent equity interest in Deutsche Airbus is to ask whether the United States has demonstrated that a reasonable private investor would not have made this investment on the same terms and conditions based on the information available at that time.

7.1276 We note that the financial position of Deutsche Airbus at the time of the KfW investment was exceedingly poor. For the financial year ended 31 December 1988, Deutsche Airbus reported a loss of DM 270.1 million.[4360] Deutsche Airbus had also accumulated losses from previous years that, together with the 1988 loss, comprised an aggregate loss of DM 3.37 billion. The European Communities itself acknowledges that in the late 1980s, "despite Deutsche Airbus' favourable commercial prospects (especially as regards the number of orders received for the A320), a variety of external and internal factors, and especially the extreme collapse in the value of the US dollar, brought Deutsche Airbus to the verge of bankruptcy."[4361] In order to avoid insolvency, Deutsche Airbus was availing itself of a provision of German law that permitted creditors to waive claims in

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[4356] *See, e.g.,* Appellate Body Report, *Canada – Aircraft*, paras. 157-158; Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea ("US – Countervailing Duty Investigation on DRAMS"*), WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report, WT/DS296/AB/R, DSR 2005:XVII, 8243, para. 7.179; Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea ("EC – Countervailing Measures on DRAM Chips")*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671, paras. 7.173-7.175; Panel Report, *Japan – DRAMs (Korea)*, para. 7.256.

[4357] Appellate Body Report, *Canada – Aircraft*, para. 155.

[4358] Emphasis added.

[4359] US, FWS, paras. 554-555, 561-564; EC, FWS, para. 1215; EC, Answer to Panel Question 101, para. 280.

[4360] *Jahresabschluss 1988 Daimler-Benz Aerospace Airbus* (Deutsche Airbus Situation Report for the 1988 Financial Year), Exhibit EC-886. Management noted that this result (an improvement on the DM 778.6 million loss report in 1987) as due to the pro-rata assumption of responsibility for the losses of Airbus GIE (amounting to DM 336.6 million). However, management also noted that the 1988 figure was improved by DM 160.7 million due to the German government's remission of LA/MSF repayments.

[4361] EC, FWS, para. 1177.

BCI deleted, as indicated **[***]**

respect of government-guaranteed debt to the extent necessary to limit the company's losses to the amount of subscribed capital.[4362]

7.1277 We note in addition evidence that the German government had, by its own account, been seeking to obtain private capital for Deutsche Airbus for a number of years prior to 1989.[4363] According to the German government, Daimler-Benz was the only private investor that could be secured for long-term industrial management of Deutsche Airbus while accepting a simultaneous reduction in state financial aid.[4364] In a statement in 1988 announcing the planned restructuring of Deutsche Airbus, the German Ministry of Economics noted that the German government currently bore all of Deutsche Airbus' risk through its provision of guarantees for the costs of the A300/A310 programmes, and indicated that its overall policy objective was to transfer the management and risk associated with Deutsche Airbus' operations to the private sector over the long term.[4365] In response to a Parliamentary question asking why MBB's own negotiations with prospective private investors had not resulted in a private investor acquiring an equity interest in MBB/Deutsche Airbus, the German government explained that, while Deutsche Airbus' sales prospects had "improved considerably" over the 20 years since its establishment, the production of civil aircraft presented substantial risks (since invested capital can generally only be amortized over project terms of up to 20 years), along with factors such as exchange rate risks.[4366] In addition, statements of the German Ministry of Economics indicate that it considered that the relatively small market share that Airbus Industrie enjoyed at that time, coupled with the currency risks, would continue to present difficulties for the future profitability of Deutsche Airbus.[4367]

7.1278 The European Communities rejects the United States' arguments that KfW's 1989 acquisition of a 20 percent equity interest in Deutsche Airbus was inconsistent with the usual investment practice of private investors in Germany. According to the European Communities, the commercial nature of KfW's equity infusion is evident from the fact that Daimler-Benz also purchased an interest in Deutsche Airbus "on the same terms and conditions as KfW".[4368] In other words, the European Communities argues that Daimler-Benz is an appropriate "private investor" whose acquisition "through MBB" of an interest in Deutsche Airbus on the same terms and conditions as KfW's investment demonstrates that the KfW investment was consistent with the usual investment practice of private investors in Germany and thus did not confer a benefit on Deutsche Airbus.

7.1279 The European Communities appears to base its argument that Daimler-Benz invested in Deutsche Airbus "through MBB" on the same terms and conditions as KfW on the fact that, pursuant to the Framework Agreement, MBB had agreed that, of the DM 993 million it received from Daimler-Benz (as the subscription price for 258 million newly issued shares of MBB), it would use DM 800 million to purchase 294 million newly issued shares in Deutsche Airbus.[4369] We recall that the Framework Agreement provided that (i) MBB would contribute DM 800 million in capital to Deutsche Airbus to purchase 294 million newly issued Deutsche Airbus shares (representing a

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[4362] Creditor banks had waived claims against Deutsche Airbus worth DM 2.92 billion; *Jahresabschluss 1988 Daimler-Benz Aerospace Airbus*, Exhibit EC-886, notes 9 and 13.

[4363] BT-Drs 11/4375 (German government Answer to a Parliamentary Question), Exhibit US-14.

[4364] BT-Drs 11/4375 (German government Answer to a Parliamentary Question), Exhibit US-14.

[4365] *Handelsblatt* No. 212, 3 November 1988, p. 24 "Daimler-Benz-MBB / Statement of the German Federal Ministry of Economics on the Restructuring of the Aviation Industry," Exhibit US-259.

[4366] BT-Drs 11/4375 (German government Answer to a Parliamentary Question), Exhibit US-14.

[4367] *Handelsblatt* No. 212, 3 November 1988, p. 24 "Daimler-Benz-MBB / Statement of the German Federal Ministry of Economics on the Restructuring of the Aviation Industry," Exhibit US-259.

[4368] EC, FWS, para. 276.

[4369] *Monopolkommission Report*, Exhibit US-30, para. 128; MBB Consolidated Annual Report, Exhibit US-267, p. 51. MBB also agreed to contribute another DM 5,000,000 to Deutsche Airbus through a contribution in kind of one of its operating subsidiaries at a book value of DM 5,000,000; *Monopolkommission ReportMonopolkommission ReportMonopolkommission Report*, Exhibit US-30, para. 126.

BCI deleted, as indicated **[***]**

nominal value of DM 2.72 per share) and (ii) KfW would contribute DM 505 million in capital to Deutsche Airbus to purchase 186 million newly issued Deutsche Airbus shares (representing a nominal value of DM 2.72 per share). We understand that it is on the basis of the above analysis that the European Communities contends that KfW and Daimler-Benz "through MBB" invested in Deutsche Airbus on the same terms and conditions. We are not persuaded by this analysis.

7.1280 The fact that Daimler-Benz paid DM 993 million to acquire 258 million newly issued MBB shares suggests that it paid DM 3.849 per share of MBB. As previously mentioned, MBB owned Deutsche Airbus, in addition to significant defence technology operations conducted through other MBB subsidiaries. Although MBB was required to make the DM 800 million capital contribution to Deutsche Airbus, in return for the issuance by Deutsche Airbus of 294 million shares to MBB, there is no evidence to suggest that Daimler-Benz, in paying DM 3.489 per newly-issued MBB share, could be deemed (based on the relative valuations of the operations of Deutsche Airbus and those of the other subsidiaries of MBB) to have thereby indirectly paid the equivalent of DM 2.72 per share for the newly issued shares in Deutsche Airbus. The terms of MBB's capital contribution to Deutsche Airbus under the Framework Agreement represent a negotiated allocation of MBB's funds for purposes of building Deutsche Airbus' capital base as part of the restructuring arrangement. They are not indicative of the value of MBB's Deutsche Airbus subsidiary relative to the other MBB subsidiaries, or of the price that an arm's length private investor would have been prepared to pay to directly acquire shares in Deutsche Airbus.

7.1281 We reject the European Communities' argument that the 1989 acquisition by KfW of a 20 percent equity interest in Deutsche Airbus was consistent with the usual investment practice of a private investor in Germany because Daimler-Benz invested in Deutsche Airbus on the same terms and conditions as KfW. First, we cannot equate KfW's direct investment in Deutsche Airbus with Daimler-Benz's indirect investment in Deutsche Airbus through its acquisition of a majority interest in MBB. The transaction that the European Communities describes as an investment by Daimler-Benz in Deutsche Airbus "through MBB" was, in fact, a transaction in which Daimler-Benz acquired a majority interest in MBB, the parent company of Deutsche Airbus, not shares in Deutsche Airbus. We note in this regard that MBB was not a mere holding company for Deutsche Airbus. MBB was at that time West Germany's largest aerospace and defence contractor, active in *both* the aerospace and defence technology sectors. MBB's defence technology operations were profitable, its aerospace operations (*i.e.*, Deutsche Airbus) were not.[4370] Daimler-Benz's acquisition of shares of MBB was not the same, in legal or economic terms, as KfW's acquisition of shares of Deutsche Airbus.

7.1282 We also consider that, for purposes of assessing whether the government's investment decision can be regarded as inconsistent with the usual practice of private investors, any comparison of the terms and conditions on which a government and a private investor each invest in a company should take account of the different obligations undertaken by the respective parties in connection with those investments. When the specific terms of the KfW investment are considered, it is clear to us that Daimler-Benz can in no sense be considered to have invested in Deutsche Airbus on the same terms and conditions as KfW. The Framework Agreement provided that the German government would instruct KfW to acquire the 20 percent equity interest in Deutsche Airbus and that MBB would then acquire that shareholding from KfW by a specific date.[4371] In other words, it was contemplated from the outset that the KfW equity infusion would be of a temporary duration. At the time at which KfW acquired the 20 percent interest in Deutsche Airbus, which we consider to be the relevant time for purposes of assessing whether the investment decision was consistent with the usual investment practice of private investors, KfW's shareholding in Deutsche Airbus was to be purchased by MBB in

[4370] The United States contends that at the time of Daimler-Benz's investment in MBB, approximately 75 percent of MBB's total turnover and 100 percent of its profits were generated by its non-Airbus-related activities; US, Answer to Panel Question 156, para. 138.

[4371] Framework Agreement, Exhibit EC- 887 HSBI.

BCI deleted, as indicated **[***]**

ten years (*i.e.*, with effect from the end of 1999 at the latest) at an agreed market-based valuation of the 20 percent equity interest at that time, **[***]**. In addition, the German government had agreed that during the time that KfW was originally expected to hold its interest in Deutsche Airbus, any profits generated by Deutsche Airbus would, for at least the first eight of the 10 years of the investment, be used first to build up Deutsche Airbus' capital base and to form a special reserve to compensate Deutsche Airbus for exchange rate losses. In light of all of the above, it is inconceivable to us that Daimler-Benz can be considered to have invested in Deutsche Airbus on the same terms and conditions as KfW, or that KfW's investment decision can be considered to have been consistent with the usual investment practice of private investors in Germany on the basis of Daimler-Benz's investment in Deutsche Airbus "through MBB".

7.1283 The European Communities has also presented various arguments throughout its submissions suggesting that the KfW and Daimler-Benz investments "took place *following* the financial restructuring of Deutsche Airbus".[4372] According to the European Communities, provided that, *following* a financial restructuring, a government injects capital on equal terms with a private investor, the capital injection does not confer a benefit on the recipient company, within the meaning of Article 1.1(b).[4373] Therefore, the European Communities argues that (i) the terms on which Daimler-Benz, via its subsidiary MBB, invested in Deutsche Airbus reflect the terms on which a commercial investor was willing to put fresh equity capital into the financially restructured Deutsche Airbus, and (ii) the fact that KfW paid the same price as Daimler-Benz for the newly issued shares in a financially restructured Deutsche Airbus, confirm the consistency of that equity infusion with the ordinary investment practice of private investors.

7.1284 In our view, it is not appropriate to approach the question whether the KfW equity investment conferred a benefit on Deutsche Airbus by treating that transaction as an equity investment in a *restructured* Deutsche Airbus (*i.e.*, as a transaction that occurred *subsequent* to the restructuring of Deutsche Airbus). The KfW investment was an integral element of the restructuring of Deutsche Airbus as set forth in the Framework Agreement and as described by the German government.[4374] It is clear to us that Daimler-Benz would not have made the investment in Deutsche Airbus at all absent the restructuring arrangement (one component of which was the KfW investment, with significant other components being the foreign exchange risk loss insurance programme and the rescheduling of Deutsche Airbus debt).[4375] Daimler-Benz agreed to invest in Deutsche Airbus *provided that* the German government (i) restructured Deutsche Airbus' existing debt obligations, delaying the German government's repayment claims far into the future, (ii) agreed to assume a portion of Deutsche Airbus' exchange rate risk through an insurance program, and (iii) provided additional equity capital to Deutsche Airbus for (an initially contemplated period of) 10 years, while agreeing to forego rights to

[4372] EC, SWS, para. 608 (emphasis added)*; see also,* EC, Answer to Panel Question 188, paras. 170-171.

[4373] EC, Answer to Panel Question 100, para. 273.

[4374] *Handelsblatt* No. 212, 3 November 1988, p. 24 "Daimler-Benz-MBB / Statement of the German Federal Ministry of Economics on the Restructuring of the Aviation Industry," Exhibit US-259. We note that the European Communities acknowledges elsewhere in its submissions that the 20 percent equity infusion by KfW in Deutsche Airbus *is part of* the 1989 restructuring arrangement; EC, Answer to Question 187, paras. 152 and 158.

[4375] The Report of the Federal Cartel Office states: "Daimler-Benz linked its stake in MBB to a series of commitments by the federal government, and they *significantly limit any risk to Daimler-Benz which is associated with the acquisition of the German share of Airbus*", Exhibit US 30, para. 129 (emphasis added). In a German government Answer to a Parliamentary question concerning alternative options for raising additional capital for Deutsche Airbus, the government responded that "Daimler-Benz is the only company that could be secured for a long-term industrial management in the Airbus program whilst accepting a simultaneous reduction in state financial aid."; BT-Drs 11/4375 (German government Answer to a Parliamentary Question), Exhibit US-14.

payment of dividends from profits for the first eight years of that investment, in order for Deutsche Airbus to rebuild its capital base.[4376]

7.1285 The European Communities itself acknowledges that, had the German government required Daimler-Benz to assume fully Deutsche Airbus' repayment obligations and government-guaranteed debt, neither Daimler-Benz nor any other buyer would have purchased Deutsche Airbus.[4377] However, the European Communities also contends that the German government's behaviour was consistent with that of a rational investor in similar circumstances; *i.e.*, it acted to minimize its losses "while providing certain contributions to rebalance the value of Deutsche Airbus' assets and liabilities."[4378] The European Communities therefore argues that the United States has not established that the 1989 restructuring was inconsistent with the practice of a similarly-situated private creditor of Deutsche Airbus, faced with the imminent insolvency of a debtor company.

7.1286 We make the following observations regarding this argument. First, we note that the European Communities has provided no evidence to support it; for example, contemporaneous, objective evaluations of the German government's prospects of minimizing its losses and/or maximizing its recovery if Deutsche Airbus were to be restructured in the manner described rather than liquidated. Second, we fail to understand, on the basis of the evidence before us, how the terms of the restructuring could have minimized the German government's losses and/or maximized its returns as the major creditor of a financially distressed Deutsche Airbus. Under the restructuring arrangement, the German government paid Deutsche Airbus' outstanding bank debt, rescheduled Deutsche Airbus' government debt pursuant to the **[***]** "debtor warrant", provided Deutsche Airbus with an additional DM 165 million loan to finance production of the A320, established an exchange rate loss insurance programme (for which the German government had either appropriated in the federal budget, or included in its planning estimates, approximately DM 4.1 billion to cover its anticipated obligations over the period 1989 to 2000)[4379] and provided additional equity capital to Deutsche Airbus for an (initially contemplated) period of 10 years. In a 1998 statement announcing the planned restructuring of Deutsche Airbus, the German Ministry of Economics noted that the German government currently bore all of Deutsche Airbus' risk through its provision of guarantees for the costs of the A300/A310 programmes, and indicated that its overall policy objective was to transfer the management and risk associated with Deutsche Airbus' operations to the private sector over the long term.[4380] The Ministry also stated that the pursuit of this overall aim, to gradually move Deutsche Airbus into private sector management and responsibility, "now justifies an additional substantial financial effort" in order to bring it about.[4381] The terms of the 1989 restructuring arrangement and the German government's comments appear to us to be far more consistent with a government providing a final round of assistance in order to reduce a company's dependence on subsidization over the long term than with a major creditor of a financially distressed company seeking to minimize its losses and/or maximize its returns.

7.1287 Finally, we regard the European Communities' argument, that the United States has failed to demonstrate that the 1989 restructuring is inconsistent with the practice of a similarly-situated private creditor of Deutsche Airbus, faced with the imminent insolvency of a debtor company, as irrelevant to the United States' arguments as to "benefit". The United States does not argue that the KfW equity infusion is a subsidy because it is part of the 1989 restructuring arrangement. Nor do we understand it

[4376] *Monopolkommission Report*, Exhibit US-30, para. 132.
[4377] EC, Answer to Panel Question 187, para. 163.
[4378] EC, Answer to Panel Question 187, para. 164.
[4379] *Monopolkommission Report*, Exhibit US-30, para. 131.
[4380] *Handelsblatt* No. 212, 3 November 1988, p. 24 "Daimler-Benz-MBB / Statement of the German Federal Ministry of Economics on the Restructuring of the Aviation Industry," Exhibit US-259.
[4381] *Handelsblatt* No. 212, 3 November 1988, p. 24 "Daimler-Benz-MBB / Statement of the German Federal Ministry of Economics on the Restructuring of the Aviation Industry," Exhibit US-259.

BCI deleted, as indicated **[***]**

to argue that the 1989 restructuring arrangement as a whole constitutes a subsidy.[4382] The United States argues that no private investor would have invested in Deutsche Airbus at the relevant time, and that KfW's investment was therefore inconsistent with the usual investment practice of private investors and conferred a benefit on Deutsche Airbus within the meaning of Article 1.1(b) of the SCM Agreement. The European Communities attempted to rebut the United States' argument by demonstrating that the KfW investment was not inconsistent with the usual investment practice of private investors because a private investor, namely, Daimler-Benz, invested in Deutsche Airbus at the same time and on the same terms and conditions as KfW. It was in response to the European Communities' rebuttal argument that the United States asserted that the Daimler-Benz investment was linked to the restructuring in a way that significantly limited the risk to Daimler-Benz of the investment, and thus that the Daimler-Benz investment cannot be considered a market benchmark for the purpose of assessing the existence of benefit.[4383] In the context of a response to the European Communities' rebuttal argument, it is not necessary for the United States to establish that the German government's conduct in regard to the 1989 restructuring arrangement as a whole was inconsistent with the conduct of a similarly-situated private creditor of Deutsche Airbus.

7.1288 We therefore reject the European Communities' argument the KfW investment in Deutsche Airbus was consistent with the usual investment practice of private investors because Daimler-Benz had invested in Deutsche Airbus, "through MBB", on the same terms and conditions as KfW. In light of the evidence of Deutsche Airbus' perilous financial condition at the time of the KfW investment, its serious exposure to adverse movements in the US dollar/DM exchange rate in the absence of a government exchange rate insurance programme, its substantial dependence on government aid for at least the short to medium term, evidence that, while Airbus Industrie's sales prospects were improving, its future profitability would remain "difficult" due to its relatively small market share of 20 percent, and its inability to attract private investment in the absence of government investment and rescheduling of government-related debt, we are satisfied that KfW's investment decision was inconsistent with the usual investment practice of private investors in Germany, because no private investor seeking a reasonable rate of return on its investment would have made the equity investment in Deutsche Airbus which KfW made. We accordingly find that KfW's acquisition of 20 percent of the shares of Deutsche Airbus conferred a "benefit" on Deutsche Airbus within the meaning of Article 1.1(b) and thus constitutes a subsidy to Deutsche Airbus.[4384]

7.1289 For the reasons set forth above, we conclude that KfW's 1989 acquisition of a 20 percent equity interest in Deutsche Airbus was a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, which conferred a benefit on Deutsche Airbus within the meaning of Article 1.1(b), and thus constitutes a subsidy to the Airbus Industrie consortium and to Airbus SAS.

7.1290 The United States argues that KfW's acquisition of a 20 percent equity interest in Deutsche Airbus is a specific subsidy to Airbus within the meaning of Article 2 of the SCM Agreement because it was an exercise of discretion by the German government to provide equity to a single company,

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[4382] US, Comments on EC Answer to Panel Question 187, para. 133.

[4383] The United States has pointed out clearly, "the relevance of the fact that the KfW equity infusion was part of the broader aid package to Deutsche Airbus is that it undermines the European Communities' attempt to use Daimler's investment in MBB (the parent company of Deutsche Airbus) as a market benchmark. Daimler would not have made its investment without the aid package that included the equity infusion at issue". US, Comments on EC's Answer to Question 187, para. 129. *See, also*, US, Answer to Panel Question 157, para. 141.

[4384] We have reached our factual conclusions without drawing inferences, logical or adverse, from the European Communities' failure to provide information requested by Questions 46, 73-76, 77 and 85-90 of the Annex V Facilitator, Exhibit US-4 BCI. We consider it unnecessary to decide whether the Panel would have been entitled to draw such inferences.

BCI deleted, as indicated **[***]**

Deutsche Airbus, as part of a broader aid package for that company.[4385] Although the United States has not identified a particular sub-paragraph of Article 2 as the basis of its claim, we understand from the nature of the argument it advances that its claim is grounded in Article 2.1(a) of the SCM Agreement. Evidence submitted by the United States as to the terms of the KfW investment in Deutsche Airbus and of the 1989 restructuring arrangements more generally confirms the United States' assertion that the KfW investment in Deutsche Airbus was explicitly limited to Deutsche Airbus and was thereby "specific" within the meaning of Article 2.1(a) of the SCM Agreement. The European Communities does not contest the United States' allegation. We therefore find that KfW's 1989 acquisition of a 20 percent equity interest in Deutsche Airbus constitutes a specific subsidy to Airbus SAS.

(iv) KfW's transfer of its 20 percent equity interest in Deutsche Airbus to MBB in 1992

7.1291 We now turn to the United States' claim that the 1992 acquisition by MBB of KfW's 20 percent equity interest in Deutsche Airbus was also a subsidy. We first consider whether the transfer by KfW of its shares in Deutsche Airbus to MBB is a "financial contribution" in the sense of Article 1.1(a)(1)(i) of the SCM Agreement. The Appellate Body has indicated that the term "funds" in Article 1.1(a)(1)(i) encompasses not only "money" but also financial resources and other financial claims more generally.[4386] We regard shares in a company as financial claims to a stream of income (in the form of dividends paid out of a company's profits) and to a share in the capital of the company on its liquidation. Therefore, we consider that shares in a company fall within the scope of the term "funds" in Article 1.1(a)(1)(i), and that a transfer of shares falls within the scope of the term "direct transfer of funds". We thus conclude that the transfer by KfW of its 20 percent equity interest in Deutsche Airbus to MBB was a "financial contribution" within the meaning of Article 1.1(a)(1)(i).

7.1292 Our approach to the issue of benefit in the context of KfW's transfer of its 20 percent equity interest in Deutsche Airbus to MBB is to ask whether the terms of that transfer are more favourable to MBB than those that would have been available in the market? To the extent that they are, then the financial contribution in question (*i.e.*, the transfer by KfW of its 20 percent equity interest in Deutsche Airbus) will have conferred a benefit on MBB within the meaning of Article 1.1(b) of the SCM Agreement.

7.1293 The European Communities argues that the United States has failed to make a *prima facie* case that the KfW transfer of its 20 percent equity interest in Deutsche Airbus conferred a benefit on Deutsche Airbus or on Airbus. According to the European Communities, the United States has failed to demonstrate whether and how any alleged subsidy benefit passed from MBB to Deutsche Airbus, as the former manufacturer of LCA, or for that matter, to Airbus SAS, as the present day manufacturer of LCA. The European Communities argues that neither in 1992 nor subsequently did MBB develop, produce or sell LCA.[4387] Moreover, the European Communities contends that, from Deutsche Airbus' perspective, the transfer of its shares from one shareholder (*i.e.*, KfW) to another (*i.e.*, MBB) is of no economic consequence.[4388]

7.1294 We note that prior to 1989, development and series production of the German share of the Airbus consortium *was* performed by MBB on behalf of Deutsche Airbus.[4389] Even accepting the European Communities' assertion that the corporate entity MBB did not itself develop, produce or sell

[4385] US, FWS, para. 548.
[4386] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 250.
[4387] EC, FWS, para. 1203.
[4388] EC, FWS, para. 1203.
[4389] *Monopolkommission Report*, Exhibit US-30, para. 116. The German Federal Cartel Office notes that German federal government subsidies to Deutsche Airbus were *passed on* to MBB and Dornier; *Monopolkommission Report*, Exhibit EC-30, para. 118.

BCI deleted, as indicated **[*****]**

LCA from 1992 onwards, we are not persuaded by the proposition that the United States must demonstrate that any benefit conferred on MBB by the transfer to MBB of KfW's 20 percent equity interest in Deutsche Airbus passed through to Deutsche Airbus and ultimately, to Airbus SAS. We recall that, prior to KfW's 1989 investment in Deutsche Airbus, Deutsche Airbus was a wholly-owned subsidiary of MBB. MBB thereafter continued to own an 80 percent interest in Deutsche Airbus until 1992, when MBB re-acquired KfW's 20 percent stake in Deutsche Airbus and Deutsche Airbus once again became a wholly-owned subsidiary of MBB. As we have previously explained, MBB's re-acquisition of a 20 percent stake in Deutsche Airbus was undertaken for the sole purpose of facilitating the restructuring of Deutsche Airbus. There is therefore no doubt that it was inherently linked with Deutsche Airbus' ability to continue to operate in LCA business. When Daimler Benz merged MBB into Daimler-Benz's aerospace subsidiary, Dasa, later in 1992, Deutsche Airbus became a wholly-owned subsidiary of Dasa. Dasa has since been the parent company of Deutsche Airbus, and following the reorganization of the Airbus consortium in 2000, a controlling shareholder of EADS. Thus, in the light of these facts, we are of the view that absent a demonstration by the European Communities that the financial contribution which allegedly conferred a benefit on MBB was unrelated to the production of Airbus LCA, MBB along with Deutsche Airbus should be considered to be a producer of Airbus LCA for purposes of our analysis of the existence of a subsidy under the SCM Agreement.[4390]

7.1295 As regards our determination of a benefit conferred by the 1992 transfer of KfW's 20 percent equity interest in Deutsche Airbus to MBB, we have already indicated that we are satisfied that the transfer was not "free of charge". However, the fact that consideration was provided to KfW in respect of the transfer does not necessarily mean that the transfer did not confer a benefit: whether it did or did not depends on whether the terms of the transfer were consistent with what could have been obtained in the market.

7.1296 We note that the price at which KfW sold its 20 percent equity interest in Deutsche Airbus consisted of two components. The first was the agreed value of the shares as of 1 January 1992, as evaluated by two independent accounting firms according to a market-based methodology. The second was the **[*****]**. This price was to be paid, **[*****[[**HSBI]] ***]**.[4391] We recall the **[*****]** nature of the Deutsche Airbus debt payable pursuant to the debtor warrant; namely, such debt was repayable **[*****]**. In addition, **[*****]**.[4392]

7.1297 Given the **[*****]**, it is necessary for us to evaluate whether the principal amount of DM **[[**HSBI]]** of Deutsche Airbus **[*****]** was equivalent to the market value of KfW's 20 percent interest in Deutsche Airbus. Although we are unable to arrive at a precise estimate, we have no doubt that the present value in 1992 of the principal amount of DM **[[**HSBI]]** of Deutsche Airbus **[*****]** would have been heavily discounted from its face amount in light of the fact that repayments would not become due before 2001 and in any case, would be contingent on, and paid from 40 percent of, Deutsche Airbus' annual pre-tax profits. Indeed, we are of the view that the principal amount of DM **[[**HSBI]]** of Deutsche Airbus **[*****]** would have been less than the appraised cash value of the 20 percent stake

[4390] *See*, further on the question of pass-through our general discussion and conclusions set out at paras. 7.190 - 7.200 above.

[4391] In response to a question from the Panel asking why or how Deutsche Airbus assumed obligations which appear to have been MBB's as purchaser of the Deutsche Airbus shares from KfW, the European Communities replied that, following the German government's cancellation of the exchange rate insurance mechanism in 1992, the parties agreed to amend certain repayment provisions, including the terms of the debtor warrant, and to transfer KfW's 20 percent stake in Deutsche Airbus in exchange for Deutsche Airbus' commitment to pay the agreed purchase price under the amended debtor warrant, in order to "maintain the balance of rights and obligations negotiated in the 1989 restructuring agreement"; EC, Answer to Panel Question 192, para. 190.

[4392] Second Amendment to the Framework Agreement dated 23 March 1989, dated as of 14 July 1992; Exhibit EC-888 HSBI.

BCI deleted, as indicated **[*******]**

in Deutsche Airbus of DM **[[**HSBI**]]**. We therefore consider that the transfer by KfW of its 20 percent interest in Deutsche Airbus to MBB was made on terms considerably more favourable to MBB than the market and thus conferred a benefit on MBB. Our conclusion in this regard is confirmed by evidence relating to the context in which the 1992 transfer occurred.

7.1298 As noted in our discussion of the background to the capital restructuring of Deutsche Airbus, KfW's time-limited equity investment in Deutsche Airbus was one element of a comprehensive restructuring plan for Deutsche Airbus that was designed to gradually shift the risks associated with participation in the Airbus GIE to the private sector. Another element of the restructuring arrangement as it had originally been envisaged was the establishment of an exchange rate loss insurance programme under which the German government agreed to guarantee against exchange rate losses incurred by Deutsche Airbus. The German government had either appropriated in the federal budget, or included in its planning estimates, approximately DM 4.1 billion to cover its anticipated obligations under the exchange rate loss insurance programme over the period 1989 to 2000.[4393] When the German government subsequently cancelled the exchange rate loss insurance programme in 1992, it had already made payments under the programme of approximately DM 1.48 billion.[4394] We consider it reasonable to infer that the cancellation of the exchange rate loss guarantee programme resulted in Deutsche Airbus potentially losing approximately DM 2.6 billion in assistance that it had anticipated in 1989 that it would receive through to 2000. The European Communities acknowledges that the 1992 amendments to the Framework Agreement, including the amendments to the terms of the debtor warrant and the transfer of KfW's 20 percent equity interest in Deutsche Airbus to MBB in exchange for Deutsche Airbus' commitment to pay the agreed purchase price **[*******]** were agreed between the parties in order to "maintain the rights and obligations negotiated in the 1989 restructuring agreement".[4395] In addition, the United States points to statements by Daimler-Benz to the effect that the early transfer of KfW's 20 percent equity interest in Deutsche Airbus to MBB was one of the measures designed to compensate Deutsche Airbus/Daimler-Benz for the loss of assistance which had been anticipated under the exchange rate loss insurance scheme.[4396]

7.1299 As we have previously noted, we are unable, on the basis of the evidence before us, to find that the sale of the KfW stake in Deutsche Airbus to MBB was "essentially for free". However, on the basis of the **[*******]**, we conclude that KfW transferred its 20 percent equity interest in Deutsche Airbus to MBB for considerably less than its market value, which we consider to be **[[**HSBI**]]** in accordance with the appraisal performed by **[*******]**. We therefore find that the 1992 transfer by KfW of its 20 percent equity interest in Deutsche Airbus to MBB conferred a benefit on MBB within the meaning of Article 1.1(b) of the SCM Agreement.[4397]

7.1300 We therefore conclude that KfW's 1992 transfer of a 20 percent equity interest in Deutsche Airbus to MBB was a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, which conferred a benefit on MBB within the meaning of Article 1.1(b) and thus constitutes a subsidy to the Airbus Industrie consortium and to Airbus SAS.

7.1301 The United States argues that KfW's transfer of its 20 percent equity interest in Deutsche Airbus to MBB is a specific subsidy to Airbus within the meaning of Article 2 of the SCM Agreement

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[4393] *Monopolkommission Report*, Exhibit US-30, para. 131.

[4394] BT-Frs. 13/8409, Exhibit US-31, para. 21.

[4395] EC, Answer to Panel Question 192, para. 190.

[4396] US, FWS, para. 550; Daimler-Benz, Consolidated Interim Report, January 1-June 30, 1992, Exhibit US-272, at 7. The United States refers to similar statements attributed to Peter Carl, then head of the European Communities' DG-Trade; Stephen Aris, *Close to the Sun*, Exhibit US-23, at 166-167.

[4397] We have reached our factual conclusions without drawing inferences, logical or adverse, from the European Communities' failure to provide information requested by Questions 46, 73-76, 77 and 85-90 of the Annex V Facilitator, Exhibit US-4 (BCI). We consider it unnecessary to decide whether the Panel would have been entitled to draw such inferences.

BCI deleted, as indicated **[***]**

because it resulted from a negotiation between the German government and a single company to compensate the company for the effects of withdrawing the exchange rate guarantee scheme that was found to be inconsistent with the Tokyo Round Subsidy Code.[4398] Although the United States has not identified a particular sub-paragraph of Article 2 as the basis of its claim, we understand from the nature of the argument it advances that its claim is grounded in Article 2.1(a) of the SCM Agreement. Evidence before us as to the terms of the 1992 share transfer confirms the United States' assertion that share transfer to MBB was explicitly limited to MBB and was thereby "specific" within the meaning of Article 2.1(a) of the SCM Agreement. The European Communities does not contest the United States' allegation. We therefore find that KfW's 1992 transfer of its 20 percent equity interest in Deutsche Airbus to MBB constitutes a specific subsidy to Airbus SAS.

(d) Conclusion

7.1302 In conclusion, we find that the 1989 acquisition by KfW of a 20 percent equity interest in Deutsche Airbus constitutes a subsidy to Airbus because it involves a financial contribution, in the form of a direct transfer of funds, pursuant to Article 1.1(a)(1)(i) of the SCM Agreement, which conferred a benefit on Deutsche Airbus because the investment decision was inconsistent with the usual investment practice of private investors in Germany. We further find that this subsidy is specific within the meaning of Article 2 of the SCM Agreement. We also find that the 1992 transfer by KfW of its 20 percent equity interest in Deutsche Airbus to MBB constitutes a subsidy to Airbus because it involves a financial contribution, in the form of a direct transfer of funds, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement which conferred a benefit on MBB because the consideration provided in respect of the transfer was less than the market value of the shares. We further find that this subsidy is specific within the meaning of Article 2 of the SCM Agreement.

7.1303 We now consider the parties' arguments concerning the 1998 settlement of the German government's outstanding claims against Deutsche Airbus.

8. Whether the German government has subsidized Airbus by forgiving at least DM 7.7 billion of Deutsche Airbus' government debt

(a) Background to the 1998 debt settlement

7.1304 We recall our previous discussion of the key elements of the 1989 restructuring of Deutsche Airbus.[4399] In particular, we note that, pursuant to the 1989 Framework Agreement, the German government (i) paid DM 1.9 billion in Deutsche Airbus' guaranteed bank debts and agreed to pay up to DM 750 million of LA/MSF debt in respect of the A300/A310;[4400] (ii) made a loan of DM 165 million to finance production of the A320; (iii) agreed to reschedule repayments of government financing of development costs for the A300, A310, A320, A330/A340; and (iv) made a time-limited equity investment in Deutsche Airbus through KfW.[4401] The payments made by the German government in items (i) through (iii), as well as amounts owed to the German government as a result of the exchange rate insurance mechanism between 1989 and 1992, were to be conditionally repayable by Deutsche Airbus, in that they would give rise to claims to repayment to the German government pursuant to the terms of the debtor warrant. Under the debtor warrant, Deutsche Airbus' repayment obligations were to be contingent on Deutsche Airbus recognizing pre-tax profits, were to be payable only from such profits, and were to be payable from such profits only after any profits had

[4398] US, FWS, para. 556.
[4399] *See*, paras. 7.1264 - 7.1302 above.
[4400] Exhibit US-30, paras. 121 and 131. Of the DM 750 million, only DM 426 million was actually paid, bringing the total of Deutsche Airbus bank debt which was paid by the German government to approximately DM 2.33 billion; Exhibit US-31, para. 21; EC, FWS, para. 1184.
[4401] Exhibit US-31, p. 14.

BCI deleted, as indicated **[*******]**

first been applied to rebuilding Deutsche Airbus' capital base and to funding a reserve to cover future exchange rate losses.[4402]

7.1305 In 1992, following the GATT Panel report in *EEC- Airbus*, KfW transferred its 20 percent equity interest in Deutsche Airbus to MBB, in return for the German government holding a claim to repayment against Deutsche Airbus, in the amount of **[[**HSBI**]]**, **[*******]**. In addition, the repayment terms of the debtor warrant were themselves amended to provide that Deutsche Airbus would only be required to begin making repayments from 2001, and then only from 40 percent of its pre-tax profits, with the annual repayment obligation being contingent on Deutsche Airbus having earned pre-tax profits in the previous year, and such pre-tax profits being subject to reduction by the application of prior years' cumulative loss carryforwards.[4403]

7.1306 In 1997, pursuant to the third amendment to the 1989 Framework Agreement, the German government agreed to accept a payment of DM 1.4 billion from Deutsche Airbus to fully discharge all of the German government's repayment claims in respect of development financing for the A320.[4404]

7.1307 Finally, pursuant to the fourth amendment to the Framework Agreement, the German government agreed, on 30 December 1998, to treat as satisfied the remainder of the German government's existing and/or projected payment and other claims against Deutsche Airbus pursuant to the Framework Agreement, and in respect of development financing for the A300 and A310 from 2001 onwards, and for the A330/A340 from July 2004 onwards, in return for a one-off compensation payment of DM 1.75 billion, representing the present value of those claims on 1 January 1999.[4405]

7.1308 The United States argues that the total accumulated principal amount of debt which Deutsche Airbus owed the German government by the time of the 1998 transaction was at least DM 9.4 billion.[4406] According to the United States, settlement of DM 9.4 billion in debt for a payment of DM 1.735 billion equates to debt forgiveness in the amount of DM 7.7 billion.[4407] The United States therefore argues that the 1998 transaction should be characterized as "debt forgiveness" and therefore, a financial contribution within Article 1.1(a)(1)(i) of the SCM Agreement.[4408]

[4402] Exhibit US-30, para. 132.

[4403] Daimler-Benz Annual Report 1997, Exhibit US-262, p. 96.

[4404] EC, FWS, para. 1183; Third Amendment to the Framework Agreement of 23 March 1989, dated 22 December 1997, Exhibit EC-889 HSBI. The United States does not challenge the 1997 settlement effected by the Third Amendment to the Framework Agreement in this dispute; US, Answer to Panel Question 30, para. 195.

[4405] Fourth Amendment to the Framework Agreement of 23 March 1989, dated as of 30 December 1998, Exhibit EC-890 HSBI; EC, FWS, para. 1187.

[4406] US, FWS, para. 516. The United States alleges that this debt consisted of DM 5.4 billion principal amount of debt in respect of LA/MSF for the A300/A310 and A330/A340 programs; a DM 165 million loan provided by the German government in 1988 to underwrite the costs of producing the A320, which was repayable pursuant to the debtor warrant; and DM 3.8 billion in additional loans arising out of the 1989 restructuring; US, FWS, paras. 518-521.

[4407] US, FWS, para. 531.

[4408] US, FWS, paras. 532-533. The United States refers to the Panel Report in *Korea – Commercial Vessels*, where the Panel stated that debt forgiveness is comparable to a cash grant, as funds that were previously provided as a loan, against interest, are now provided for free, given the removal of the repayment obligation; Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels ("Korea – Commercial Vessels*"), WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749, para. 7.413.

BCI deleted, as indicated **[***]**

(b) Arguments of the parties

(i) United States

7.1309 The United States alleges that in 1998, the German government agreed to accept a payment of DM 1.735 billion from Deutsche Airbus in full settlement of DM 9.4 billion outstanding debt owed by Deutsche Airbus to the German government. The United States contends that in 1997, Deutsche Airbus and the German government entered into an agreement pursuant to which the German government agreed to accept a payment of DM 1.4 billion to settle the outstanding amount of DM 1.5 billion outstanding debt of Deutsche Airbus in respect of LA/MSF for the A320. Then in 1998, Deutsche Airbus and the German government entered into another agreement in which the German government agreed to accept a further payment of DM 1.735 billion to settle the remainder of Deutsche Airbus' DM 9.4 billion outstanding debt. According to the United States, both the 1997 and 1998 debt settlements were designed to strengthen Deutsche Airbus' balance sheet in anticipation of a merger of the Airbus partners to form an Airbus single corporate entity.[4409] The United States argues that the 1998 settlement thus constitutes debt forgiveness in the amount of DM 7.7 billion (excluding interest), and is a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[4410]

7.1310 The United States argues that the 1998 settlement also confers a benefit on Deutsche Airbus within the meaning of Article 1.1(b) of the SCM Agreement. According to the United States, because debt forgiveness is comparable to a cash grant, it likewise places the recipient in a better position than it otherwise would have been in the marketplace.[4411] The United States further argues that Article 6.1(d) of the SCM Agreement confirms that debt forgiveness confers a benefit, and thus constitutes a subsidy, as debt forgiveness is one of only four types of transactions that are explicitly defined as subsidies which are deemed to cause serious prejudice.[4412] According to the United States, Deutsche Airbus received an additional "intangible" benefit from the 1998 settlement, in the sense that the 1998 settlement removed the commercial uncertainty as to the period of time over which Deutsche Airbus was to be able to enjoy the benefit of DM 9.4 billion of debt interest free, as Deutsche Airbus' repayment obligations were subject to Deutsche Airbus' post-2001 profitability.[4413]

7.1311 Finally, the United States argues that the 1998 settlement is specific within the meaning of Article 2 of the SCM Agreement. The United States contends that the 1998 settlement was effectuated through an *ad hoc* agreement between the German government and Deutsche Airbus to settle all of the company's outstanding repayment obligations for all of the support it had previously received from the government. The United States notes that this debt forgiveness was specifically limited to Deutsche Airbus and no other company participated in the transaction.[4414]

(ii) European Communities

7.1312 The European Communities argues that there was no forgiveness of debt arising out of the 1998 settlement; rather, the settlement amount represents the present value in 1998 of the obligation to repay outstanding debt negotiated as part of the 1989 restructuring, as modified in 1992. According to the European Communities, even if a "benefit" had been conferred on Airbus as a result

[4409] US, FWS, paras. 530-531.
[4410] US, FWS, para. 515. The United States refers to the Panel's determination in *Korea – Commercial Vessels*, that debt forgiveness is "comparable to a cash grant, as funds that were previously provided as a loan, against interest, are now provided for free, given the removal of the repayment obligation"; Panel Report, *Korea – Commercial Vessels*, para. 7.413.
[4411] US, FWS, para. 534.
[4412] US, FWS, para. 535.
[4413] US, Answer to Panel Question 30, para. 200.
[4414] US, FWS, para. 536.

BCI deleted, as indicated **[***]**

of the 1989 restructuring (which it denies), all that Deutsche Airbus received in 1998 was the present value (in 1998) of the benefits that had been conferred pursuant to the 1989 restructuring.[4415] According to the European Communities, the 1998 settlement did not constitute the "forgiveness" of outstanding debt owed by Deutsche Airbus to the German government; rather, the 1998 settlement simply fixed the present fair value (in 1998) of the debt that would become due under the repayment obligations that had been negotiated in 1989.[4416] The European Communities contends that in purporting to challenge the 1998 settlement as debt forgiveness of DM 7.7 billion, the United States is in reality seeking to challenge the terms of the 1989 restructuring arrangement, which constitutes a new claim that is outside the terms of reference of this Panel.[4417] In addition, the European Communities argues that it would be seriously prejudiced and injured in its rights, as a defendant, if it were required to defend itself against such a legally and factually complex claim that was being raised for the first time after the first written submissions had been filed and the first substantive meeting of the Panel had been held.[4418]

7.1313 The European Communities also disputes that in 1998 Deutsche Airbus owed DM 9.4 billion to the German government.[4419] The European Communities asserts that in 1989, the German government negotiated a restructuring arrangement that involved, among other things, the *deferral* of outstanding debt of Deutsche Airbus, through a profit-sharing arrangement (as amended in 1992) known as the *Besserungsschein* (the "debtor warrant").[4420] According to the European Communities, the terms of this debt instrument were such that Deutsche Airbus' repayment obligations were not triggered before 2001 (and on reaching certain financial milestones). In other words, in 1998, Deutsche Airbus' repayment obligations under the debt instrument had not yet been triggered, and the European Communities contends that it is therefore not correct to say that in 1998, the German government was entitled to repayment of DM 9.4 billion.[4421]

7.1314 The European Communities further disputes the United States' assertion that there was an additional "intangible" benefit conferred by the 1998 settlement, in the sense that the high level of uncertainty about the claims that would accrue to the German government was removed. The European Communities argues that, although the import of such an argument is unclear, it is theoretically possible that such a conversion might result in a "benefit" if undertaken for an amount that does not reflect the fair market value of the converted cash flow stream in light of the risk associated therewith. However, the European Communities contends, to avoid such a possibility in the present case, an independent international auditing firm, **[***]**, valued the German government's claims against Deutsche Airbus through the application of the most commonly used corporate evaluation method – a discounted cash flow analysis.[4422] The European Communities argues that the report prepared **[***][***]**in 1998 at the request of the German government in order to **[***]**, used discount rates and assessed delivery forecasts and exchange rates in order to neutralize the uncertainties to which the United States refers, in order to determine the likely value of future

[4415] EC, SWS, para. 574.
[4416] EC, SWS, para. 579.
[4417] EC, SWS, paras. 571, 584, 585-591.
[4418] EC, Answer to Panel Question 103, paras. 297-298. In this regard, the European Communities submits that it has never understood the United States to be challenging the terms of the 1989 restructuring. According to the European Communities, the terms of reference of a panel "are not a moving target that can be adjusted as the complainant likes, and at the expense of the defending party". EC, RPQ 103, para. 297 and footnote 179.
[4419] EC, SWS, para. 567.
[4420] As previously indicated, the European Communities translates the term *Besserungsschein* as "debtor warrant". The European Communities notes that the 1989 package involved the *deferral* rather than a write-off of debts of Deutsche Airbus to the German government; EC, FWS, para. 1179.
[4421] EC, SWS, paras. 568-570.
[4422] EC, SNCOS, para. 245.

BCI deleted, as indicated **[***]**

repayments under the 1989 restructuring, discounted to their present value in 1998.[4423] The European Communities asserts that the settlement amount agreed by the parties ultimately exceeded the value placed on the German government's claims by **[***]**.[4424]

(c) Evaluation by the Panel

7.1315 The United States has clarified the claim pertaining to the 1998 debt settlement, which it explains in the following terms:

> "{T}he U.S. "claim" is that the European Communities has violated Article 5 of the SCM Agreement through the 1998 settlement agreement, which amounted to a financial contribution that provided a benefit to Deutsche Airbus within the meaning of Article 1, that is specific within the meaning of Article 2, and that causes adverse effects to U.S. interests."[4425]

7.1316 The United States argues that the 1998 settlement agreement amounts to a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement; namely, debt forgiveness of DM 7.7 billion. The European Communities argues that in 1998, there was no debt due to the German government that could be forgiven: Deutsche Airbus did not "owe" anything to the German government, because the obligation to begin repaying financing provided by the German government did not arise until 2001.[4426] The European Communities' argument suggests that debt can only be "forgiven" when it is otherwise due and payable. We are unable to accept such a proposition. We accept the factual evidence submitted by the United States, and not specifically rebutted by the European Communities, that as of 1998, the German government had advanced at least DM 9.4 billion to Deutsche Airbus which Deutsche Airbus was obliged to repay to the German government pursuant to the terms of the debtor warrant and of LA/MSF arrangements.[4427] As of 1998, this amount was owed by Deutsche Airbus to the German government and was therefore a debt, notwithstanding that the parties had agreed to defer repayments on this debt so that the first repayment would not be due until 2001, assuming the prerequisite financial conditions were satisfied.

7.1317 The United States characterizes the financial contribution arising out of the 1998 debt settlement as "debt forgiveness". Our approach is, rather, to determine first, whether the 1998 debt settlement involves a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement, and second, whether that financial contribution confers a benefit on Deutsche

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[4423] EC, SWS, para. 576. The European Communities notes that the United States does not offer any basis on which to question whether **[***]** independent assessment of the value in 1998 of these future repayment was properly undertaken; nor does the United States argue that the amount arrived at by **[***]** underestimated the present value of those future claims.

[4424] EC, SNCOS para. 246. According to the European Communities, the discount rate implied in the actual settlement amount implies that the future cash flow stream was converted at the risk free German government borrowing rate, meaning that Deutsche Airbus had effectively agreed, in its negotiations with the German government, to settle the repayment claims as if there were virtually no risk that repayments would be delayed compared with current projections, or would not be made at all. The European Communities contends that the parties effectively assumed, in other words, that the amount and timing of Deutsche Airbus' future payments on the claims held by the German government was as certain as the payment on a German government bond; EC, SNCOS, para. 246.

[4425] US, Answer to Panel Question 31, para. 204, footnote 241; FWS, paras. 515-536;.

[4426] EC, SWS, para. 567.

[4427] *Frankfurter Allgemeine Zeitung*, 16 June 1997, reporting a statement by the CEO of Dasa that Deutsche Airbus owed DM 10.5 billion under the profit-sharing arrangement (*i.e.*, the debtor warrant, and DM 1 billion through LA/MSF delivery-based repayments), Exhibit US-263; *Frankfurter Allgemeine Zeitung*, 24 May 1997, reporting a statement by the Federal Minister of Finance that the German government had repayment claims under debtor warrants in respect of DM 10.4 billion in German federal government subsidies to Airbus; Exhibit US-264.

BCI deleted, as indicated **[***]**

Airbus within the meaning of Article 1.1(b) of the SCM Agreement. If we conclude that the financial contribution confers a "benefit" on Deutsche Airbus, then it may be that the subsidy in question could be described as "debt forgiveness" in an amount equal to the amount of benefit found to have been conferred. However, the first issue for us to determine is whether the 1998 debt settlement constitutes one of the forms of financial contribution set forth in Article 1.1(a)(1). We conclude that the 1998 debt settlement constitutes a financial contribution in the form of a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. We note that, in *Japan – DRAMS*, the Appellate Body interpreted the term "funds" in Article 1.1(a)(1)(i) broadly, as encompassing not only "money" but also "financial resources and other *financial claims* more generally."[4428] Debt owed to the government is an asset held by the government consisting of certain *financial claims* (*i.e.*, rights to payment of money or equivalents) that the government has against a debtor. A settlement of government-held debt essentially involves the transfer to the debtor of the government's financial claims against that debtor, resulting in the cancellation of the debt. We therefore regard a settlement of debt as a "direct transfer of funds" by a government, and thus a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.1318 We now consider whether the 1998 debt settlement conferred a benefit on Deutsche Airbus within the meaning of Article 1.1(b) of the SCM Agreement. The United States alleges that by the end of 1998, Deutsche Airbus had accumulated DM 9.4 billion in debt to the German government, consisting of (i) DM 5.4 billion in LA/MSF that the German government had provided to Deutsche Airbus in respect of the A300/A310 and A330/A340 programs;[4429] (ii) a DM 165 million loan that the German government had provided to Deutsche Airbus in 1988 to underwrite costs of producing the A320;[4430] and (iii) approximately DM 3.8 billion in additional loans that the German government had provided to Deutsche Airbus in the 1980s and early 1990s, which had their genesis in the 1989 restructuring of Deutsche Airbus.[4431] The German government and Daimler-Benz negotiated to settle Deutsche Airbus' outstanding repayment obligations under the debtor warrant and LA/MSF on the basis of a report prepared by the accounting firm **[***]**. In the **[***]** Report, **[***]** attempted to calculate a present value for two categories of conditional repayment obligations of Deutsche Airbus. The first category comprised claims that were based on future deliveries of LCA, such as German government development financing for the A300 and A310 (from 2001 onwards) and for the A330/A340 from July 2004 onwards. The second category comprised amounts repayable under the debtor warrant (which were repayable from 40 percent of Deutsche Airbus' annual pre-tax profits from 2001 onwards). The **[***]** Report used a discounted cash flow methodology to calculate **[***]**.[4432] The settlement amount ultimately negotiated between the German government and Daimler-Benz was higher than the upper end of the range of the values **[***]**.

7.1319 The United States argues that, even if one assumes *arguendo* that DM 1.7 billion represented the present fair value of the German government's claims at the time of the settlement, the effect of

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[4428] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 250.

[4429] The United States notes that figure of DM 5.4 billion represents principal only; US, FWS, para. 519.

[4430] US, FWS, para. 520. The United States refers to German budget documents as indicating that the DM 165 million loan was originally part of a total loan of DM 670 million which the German government had decided to provide to Deutsche Airbus for the production of the A320. According to the United States, the German government converted DM 505 million of the loan into a DM 505 million capital investment in Deutsche Airbus in 1989. As previously indicated, the United States challenges the DM 505 million capital investment by the German government as a specific subsidy. *See*, paras. 7.1264 - 7.1302 and paras. 7.1315 - 7.1322 above.

[4431] US, FWS, para. 521.

[4432] **[***]** also provided the German government with a document confirming its view that the settlement amount did not amount to alteration of existing contractual obligations to advantage the beneficiary, but represented an adequate amortization of those obligations on the basis of the various assumptions on which the settlement amount was based; **[***]** Letter, dated 26 July 1999, Exhibit EC-HSBI-0000205.

BCI deleted, as indicated **[***]**

settling the debt for a payment of DM 1.7 billion was to confer on Airbus a one time benefit of DM 7.7 billion, as opposed to receiving the benefit of the below-market interest rate embedded in the debtor warrant over a period of decades from 1989. According to the United States, in ascertaining whether Deutsche Airbus received an advantage relative to what would have been accorded by a market-based creditor, it is necessary to consider also the "non-market based terms of the underlying claims". Thus, in the United States' view, the fair market value of a market-based creditor's claims against Deutsche Airbus would have been higher than the fair market value of the non-market based claims that the German government had against Deutsche Airbus. The United States argues that, by discounting the preferential repayment obligations inherent in LA/MSF and the other outstanding debt effective as of 1 January 1999, the German government converted the loans and repayable grants, and the future benefit associated with them, to a net present repayment obligation of DM 1.7 billion and therefore a net present benefit of DM 7.7 billion.[4433]

7.1320 Consideration of this issue involves two levels of transactions that could potentially constitute subsidies to Deutsche Airbus; namely, (i) the original transactions between the German government and Deutsche Airbus that resulted in Deutsche Airbus being obligated to repay, as of December 1998, DM 9.4 billion to the German government; and (ii) the settlement by the German government of those repayment claims in return for a payment of DM 1.75 billion. The United States has challenged the latter as a specific subsidy to Deutsche Airbus.[4434] We do not agree with the United States that it is appropriate to consider the terms of the original transactions that resulted in the repayment claims totalling DM 9.4 billion in determining whether the terms of the settlement of those repayment claims are consistent with the terms on which a market-based creditor would have settled such claims. We are aware of the possibility that the underlying transactions were themselves subsidies, and indeed, certain of them have been challenged as, and in some cases found to be, subsidies in this dispute.[4435] However, in light of the specific circumstances of the 1998 debt settlement, we do not consider the fact that the underlying transactions may be subsidies to be relevant to the question whether the "financial contribution" at issue before us here; *i.e.*, the transfer of the German government's financial claims against Deutsche Airbus to Deutsche Airbus for a specified amount, conferred a "benefit" on Deutsche Airbus, within the meaning of Article 1.1(b).[4436] For purposes of assessing any benefit conferred as a result of the 1998 debt settlement, the relevant question is whether the terms of the transfer of the financial claims were consistent with those that Deutsche Airbus would have obtained from a market-based creditor.

7.1321 The European Communities has presented evidence that the DM 1.75 billion settlement amount negotiated between the German government and Daimler-Benz was based on the present value of the financial claims, and was consistent with the terms that Deutsche Airbus could have

[4433] US, Answer to Panel Question 30, para. 199.

[4434] Although the United States has challenged certain of the underlying transactions as specific subsidies in this dispute, including elements of the 1989 restructuring arrangement, namely KfW's acquisition of a 20 percent equity interest in Deutsche Airbus in 1989 and subsequent transfer of that interest to MBB in 1992, we note that the United States does not challenge the 1989 restructuring arrangement as a whole. The United States has made clear that its challenge is confined to "the 1998 transaction that led to the elimination of DM 9.4 billion in debt that Deutsche Airbus owed to the German government in exchange for a one-time payment of DM 1.7 billion"; US, Comments on EC Answer to Panel Question 187, para. 133.

[4435] The United States has challenged certain of the underlying transactions that gave rise to the repayment claims as themselves involving subsidies; *e.g.*, LA/MSF in respect of the A300/A310, A320 and A330/A340 and the 1992 sale of KfW's 20 percent equity interest in Deutsche Airbus to MBB. We have found that these are specific subsidies in this dispute. *See*, paras. 7.497 and 7.1302 above. If, having found that these underlying transactions constituted subsidies, we were to then find that settlement of financial claims created by those underlying transactions constituted subsidies *because the underlying transactions constitute subsidies*, we would be double-counting the same subsidies.

[4436] We express no view as to whether, in other factual circumstances, it may be relevant to the question whether a settlement of debt conferred a benefit that the debt in question related to previously granted subsidies.

obtained in the market for the settlement of those claims. The United States has not challenged the assumptions employed or range of estimates arrived at in the **[***]** Report, nor has it argued that the settlement amount of DM 1.75 billion was less than the fair value, in 1998, of the German government's outstanding claims. On the basis of the unrefuted evidence presented by the European Communities that the amount of DM 1.75 billion is consistent with the present value in 1998 of Deutsche Airbus' outstanding indebtedness to the German government, we consider that the United States has not established that the German government's 1998 settlement of outstanding debt of Deutsche Airbus for DM 1.75 billion conferred a benefit on Deutsche Airbus within the meaning of Article 1.1(b) of the SCM Agreement.

(d) Conclusion

7.1322 We conclude that the 1998 settlement by the German government of all of Deutsche Airbus' outstanding repayment obligations to the German government in exchange for a payment of DM 1.75 billion is a financial contribution in the form of a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. We are not satisfied, however, that the financial contribution conferred a "benefit" on Deutsche Airbus within the meaning of Article 1.1(b) of the SCM Agreement. We therefore reject the United States' claim that the 1998 debt settlement constitutes a specific subsidy to Airbus.

9. Whether the equity infusions that the French government provided to Aérospatiale are specific subsidies

(a) The French government's capital investments in Aérospatiale between 1987 and 1994

(i) Factual background

7.1323 In this section, we address the United States' claims that four capital contributions made by the French government to Aérospatiale between the years 1987 and 1994, constitute specific subsidies to Airbus. We briefly recount the facts concerning those capital contributions, before addressing the parties' arguments and setting forth our evaluation of the relevant legal issues and our findings.

7.1324 We recall that, from its inception in 1970 until 1999, Aérospatiale was wholly-owned, either directly or indirectly, by the French government.[4437] In 1987, the French government made a capital contribution in the amount of FF 1.25 billion to Aérospatiale. This amount was integrated into Aérospatiale's financial statements for the year ended 31 December 1987, although it was not paid in until the beginning of 1988.[4438] The French government made a further capital contribution of FF 1.25 billion to Aérospatiale in 1988.[4439] Then, in 1992, Crédit Lyonnais, which was at that time

[4437] The French government's indirect interests in Aérospatiale were held through SOGEPA and (following its equity investment in 1992), Crédit Lyonnais. In 1999, Aérospatiale merged with Matra Hautes Technologies to form Aérospatiale-Matra; *see*, footnote 2054.

[4438] Aérospatiale Results 1987, p. 2, Exhibit US-32, p. 2; French Senate Report No. 88, Project de loi des finances pour 1989, Tome III, Annexe 34 due 21/11/1988, Transports et mer II/Aviation civile III/Météorologie, Exhibit US-279, p. 33.

[4439] French Senate Report No. 85, *Project de loi des finances pour 1991, Tome III, Annexe 19 Equipement, logement, transport et mer*, Exhibit US-281, p. 46, which records a contribution of FF 1,250 million being made by the French government to Aérospatiale in 1987 and an additional capital contribution of FF 1,250 million being made by the French government to Aérospatiale in 1988; Aérospatiale 1988 Annual Report, Exhibit US-282, pp. 5, 25; Aérospatiale, Comptes de l'Exercise 1988, at 5, referring to a "second tranche" of FF 1.25 billion being received by Aérospatiale in 1988.

BCI deleted, as indicated **[***]**

controlled by the French government, acquired a 20 percent equity interest in Aérospatiale.[4440] This transaction involved Crédit Lyonnais subscribing for FF 1.4 billion in newly-issued Aérospatiale shares, as well acquiring existing Aérospatiale shares from the French government, in exchange for the issuance to the French government of approximately two percent of Crédit Lyonnais' share capital.[4441] On 1 February 1994, the French government made a further capital transfer of FF 2 billion to Aérospatiale.[4442]

7.1325 We note that in its first written submission, the European Communities indicates that the relevant amounts and dates of the capital contributions made by the French government are: FF 1.48 billion in 1988; FF 1.25 billion in 1989;1.439 billion in 1992 and FF 2 billion in 1994.[4443] Thus, although the parties agree generally as to the amounts and timing of the 1992 and 1994 capital contributions, the United States alleges that the French government made a capital contribution of FF 1.25 billion in 1987, whereas the European Communities considers this capital contribution to have been in the amount of FF 1.48 billion in 1988. Similarly, the "second" FF 1.25 billion capital contribution, which the United States alleges was made in 1988, the European Communities considers to have been made in 1989. The exhibits to which the European Communities refers in support of its assertions that the relevant dates of the two capital contributions are 1988 and 1989, rather than 1987 and 1988 as alleged by the United States, actually record the capital contributions as having been made in 1987 and 1988. As for the apparent discrepancy over the amount of the 1987 capital contribution, the United States notes that, although Aérospatiale's 1987 Annual Report records a FF 1.48 billion "capital stock increase in process", it can be assumed that this larger amount includes a FF 230 million capitalized advance which was provided in 1986. We are satisfied that the French government made a capital contribution of FF 1.25 billion to Aérospatiale in 1987 and a further capital contribution in the same amount in 1988 and we shall proceed to examine the United States' claims on that basis.

7.1326 The United States argues that each of the capital contributions made by the French government to Aérospatiale in 1987, 1988, 1992 (made by Crédit Lyonnais), and 1994, are financial contributions within the meaning of 1.1(a)(1) of the SCM Agreement, which conferred a benefit on Aérospatiale within the meaning of Article 1.1(b). The United States further alleges that each of the above-referenced transactions constitutes a specific subsidy within the meaning of Article 2 of the SCM Agreement. As will be apparent from our discussion of the respective arguments of the United States and the European Communities, the parties' disagreement over whether the transactions in question are specific subsidies centres on the issue of whether they can be said to have conferred a "benefit" on Aérospatiale, within the meaning of Article 1.1(b) of the SCM Agreement. This in turn, involves a consideration of the appropriate standard for determining the existence of a benefit conferred by a financial contribution in the form of an equity infusion, and the nature of evidence sufficient to establish (and rebut) the existence of benefit.

[4440] Immediately preceding the 1992 capital investment by Crédit Lyonnais, the French government held a 54.3 percent interest in Crédit Lyonnais. Following the capital investment, its stake increased to 56.1 percent.

[4441] The transaction occurred in two stages: (i) Crédit Lyonnais, acting through its subsidiary Crédit Lyonnais Industrie-Clindus, acquired 3,570,884 newly issued shares in Aérospatiale (representing a FF 1,439 million increase in Aérospatiale's equity capital); and (ii) the French government contributed 4,637,931 of its shares in Aérospatiale to Crédit Lyonnais, in exchange for an increase in Crédit Lyonnais' capital reserved for the state; Aérospatiale Group Annual Report 1992, Exhibit EC-174, p. 74.

[4442] Aérospatiale 1993 Annual Report, Exhibit EC-186, p. 42.

[4443] EC, FWS, para. 1132.

BCI deleted, as indicated **[***]**

(ii) Arguments of the parties

United States

The appropriate standard for determining the existence of "benefit" under Article 1.1(b)

7.1327 The United States notes that Article 1.1(b) of the SCM Agreement does not establish a standard for determining whether an equity infusion confers a benefit on its recipient.[4444] The United States contends that Article 14(a) provides relevant context for determining how to make such a determination, however, as it provides a standard for purposes of Part V of the SCM Agreement.[4445] In light of Article 14(a), the United States argues that, "if a government's decision to provide equity to a company is inconsistent with the usual investment practice of private investors in that Member's territory, the infusion confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement."[4446] Thus, according to the United States, if under the usual investment practice of private investors in the territory of the subsidizing Member, the equity infusion would not have been provided, or if the government equity infusion is made on better than commercial terms, the equity infusion confers a benefit and constitutes a subsidy.[4447]

7.1328 According to the United States, where a recipient company's shares are not publicly traded, the question whether an equity infusion is consistent with the usual investment practice of private investors in the territory of the Member involves an analysis of the company's financial state and performance to determine whether the government had a realistic expectation of a reasonable return on the investment, or if private investors would have undertaken such an investment at all.[4448] The United States contends that the usual practice of private investors considering whether to invest in a company is to analyze indicators of the company's financial and commercial health and performance, as reflected in the company's financial statements, and to conduct an objective analysis and in-depth "due diligence" on the company. The United States contends that a market investor, with virtually limitless options for investing its capital, is interested in maximizing its returns, regardless of whether that interest coincides with the interest of a particular company in meeting ongoing capital requirements.[4449]

The 1987 and 1988 capital contributions

7.1329 The United States argues that the capital contributions made by the French government to Aérospatiale in 1987 and 1988 are direct transfers of funds in the form of equity infusions and therefore constitute financial contributions within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[4450] The United States argues that each of these financial contributions conferred a benefit on Aérospatiale and thus constitutes a subsidy to Aérospatiale.[4451] Finally, the United States argues that these subsidies are specific to Aérospatiale within the meaning of Article 2 of the

[4444] US, FWS, para. 544.
[4445] US, FWS, para. 544.
[4446] US, FWS, para. 545.
[4447] US, FWS, para. 562.
[4448] US, FWS, para. 563.
[4449] For this reason, the United States contends that it is beside the point that the French government may have considered the capital contributions to be necessary to meet Aérospatiale's ongoing capital requirements; US, Answer to Panel Question 224, para. 322.
[4450] US, FWS, para. 567.
[4451] US, FWS, para. 561.

BCI deleted, as indicated **[***]**

SCM Agreement, as they are *ad hoc* infusions into the company by the French government and are explicitly limited to Aérospatiale.[4452]

7.1330 In support of its argument that the 1987 and 1988 equity infusions were inconsistent with the usual investment practice of private investors in France, and therefore conferred a benefit on Aérospatiale, the United States contends that Aérospatiale was "in serious financial trouble", at the relevant times at which the French government would have been considering whether or not to make the investments. The United States points to Aérospatiale's total shareholders' equity in 1986 (which was slightly more than FF 3.3 billion) compared to its long-term borrowings of FF 8.7 billion and total liabilities of approximately FF 36.7 billion.[4453] The United States also presents evidence of certain key financial ratios of Aérospatiale compared with those of an alleged peer group of French aerospace and defence companies.[4454] The United States notes that Aérospatiale's debt-to-equity ratio in 1986 was 10.9, compared with an average of 6.2 for the peer group companies. Aérospatiale's debt coverage ratio was 0.1 in 1986 and zero in 1987, compared with a peer group average of 1.1 and 1.6, respectively.[4455] Finally, the United States notes that Aérospatiale's return on equity in 1986 and 1987 was 9.8 percent and 4 percent, respectively, compared with peer group averages of 45.2 percent and 17.2 percent. In sum, the United States argues that "in 1987 and 1988, Aérospatiale had a liquidity crisis; the investments were insufficient to resolve the crisis; it had been a poor investment in the years preceding the equity infusions."[4456]

7.1331 In addition, the United States notes that the Annex V Facilitator had requested the European Communities to indicate whether any prior evaluation had been made of the equity infusions or Aérospatiale shares during this period and to provide any contemporaneous reports or analyses of the financial situation or prospects of Aérospatiale.[4457] The United States contends that the European Communities neither provided such information nor indicated whether such information exists. Accordingly, the United States argues that the European Communities' failure to respond gives rise to a logical inference that there are no such contemporaneous analyses (indicating behaviour at variance with that of the usual investment practice of a private investor), or that such contemporaneous analyses contain information adverse to the European Communities' case.[4458]

The 1992 capital contribution

7.1332 The United States asserts that Crédit Lyonnais, as an entity that was controlled by the French government at the relevant time, is a "public body" within the meaning of Article 1.1(a)(1) and thus that the FF 1.4 billion investment in Aérospatiale by Crédit Lyonnais constitutes a direct transfer of funds (in the form of an equity infusion) by a public body within the meaning of Article 1.1(a)(1)(i) of

[4452] US, FWS, para. 574.
[4453] US, FWS, para. 569.
[4454] Exhibit US-274. The alleged key financial ratios are return on equity, debt-to-equity ratio and debt coverage ratio. The alleged peer group companies are Aviation Latécoère, Dassault Aviation S.A., SAFRAN S.A., Thales S.A. and Zodiac S.A.
[4455] The United States notes that, as a ratio of one or above is necessary in order for a company to be able to cover its outstanding short-term debt, Aérospatiale's debt coverage ratios indicate that it was "in serious financial trouble" at the time.
[4456] US, FWS, para. 573. The United States notes that the European Communities' evidence concerning an expected recovery in the LCA market dates only from 1994 and that the European Communities did not provide any evidence of contemporaneous studies or analyses undertaken by the French government on the investment prospects of Aérospatiale in 1988, 1989, 1992 or 1994; United States, Answer to Question 27 of the First Questions of the Panel, para. 174.
[4457] Question 94(h)-(i) from the Facilitator to the EC, Exhibit US-4 BCI.
[4458] US, FWS, para. 572.

BCI deleted, as indicated **[***]**

the SCM Agreement.[4459] The United States argues that this financial contribution conferred a benefit on Aérospatiale because Crédit Lyonnais' decision to invest in Aérospatiale in 1992 was inconsistent with the usual investment practice of private investors. Finally, the United States argues that the 1992 equity infusion is specific to Aérospatiale within the meaning of Article 2 of the SCM Agreement because it is an *ad hoc* infusion by a public body and is explicitly limited to Aérospatiale.[4460]

7.1333 In support of its argument that the 1992 equity infusion by Crédit Lyonnais was inconsistent with the usual investment practice of private investors in France and therefore conferred a benefit on Aérospatiale, the United States points to certain evidence of Aérospatiale's financial health and performance, as reflected in its financial statements, and its commercial outlook at the time of the 1992 equity infusion. In this regard, the United States notes that Aérospatiale's total liabilities had increased from FF 33.2 billion in 1989 to FF 60.2 billion in 1991, of which debt maturing within one year had increased from FF 3.6 billion to FF 8.4 billion.[4461] Aérospatiale's debt coverage ratio was 0.1, -0.5 and 0.2 for the years 1989, 1990 and 1991, respectively, compared to corresponding peer group averages of 2.4, 1.5 and 1.3, respectively.[4462] Aérospatiale's debt-to-equity ratio was 6.5 in 1989, 10.5 in 1990 and 12.3 in 1991, compared to peer group averages of 4.0, 4.3 and 3.7, respectively, over the same periods.[4463] The United States considers these results to be evidence that, "prior to the 1992 decision to provide yet another equity infusion, Aérospatiale was sinking deeper into debt, with less ability to pay its short-term liabilities and with its capital under constant pressure from sustained losses."[4464]

7.1334 In addition, the United States notes that Aérospatiale had sustained a net operating loss in 1990 and had reported a positive result in 1991 only because of the effect of two extraordinary income items not related to its Airbus operations.[4465] According to the United States, Aérospatiale's return on equity was "dismal" in the years preceding the 1992 equity infusion.[4466] Moreover, the United States notes that contemporaneous press reports had questioned how the investment in Aérospatiale made sense for Crédit Lyonnais.[4467] In sum, the United States argues that Aérospatiale's financial results at the time of the 1992 equity infusion would have deterred private investors from injecting further equity into the company. According to the United States, Aérospatiale was undergoing a liquidity crisis, it had been a poor investment in the years preceding the infusion and the situation in the aeronautics industry did not indicate that its prospects would soon improve.[4468]

7.1335 Finally, the United States notes that, in response to requests from the Annex V Facilitator to provide contemporaneous reports, studies or analyses of Aérospatiale's financial situation or expectations with respect to the investment, the European Communities had replied that the transactions in question were carried out consistently with the French government's practice and in

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[4459] US, FWS, para. 580. The United States notes that in the Annex V process, the European Communities confirmed that Crédit Lyonnais was controlled by the French government at the time of the 1992 equity infusion; EC, Answer to Q99 from the Facilitator, Exhibit US-5 BCI.

[4460] US, FWS, para. 590.

[4461] US, FWS, para. 583, referring to Aérospatiale, Annual Report 1989, Exhibit US-287 and Aérospatiale, Annual Report 1991, Exhibit US-273.

[4462] US FWS; para. 583; Ratio Comparison Chart, Exhibit US-274.

[4463] US, FWS, para. 583; Ratio Comparison Chart, Exhibit US-274.

[4464] US, FWS, para. 583.

[4465] US, FWS, para. 583; Aérospatiale, Annual Report 1991, Exhibit US-273; Aérospatiale, Annual Report 1990, Exhibit US-289.

[4466] US, FWS, para. 585. The United States notes that Aérospatiale's return on equity was 2.2 percent in 1989, negative 7.7 percent in 1990, and 4.5 percent in 1991, compared with peer group averages of 15.8 percent, 14.5 percent and 15.2 percent over the corresponding periods.

[4467] US, FWS, para. 586.

[4468] US, FWS, para. 589.

BCI deleted, as indicated **[***]**

full accordance with French law.[4469] The United States contends that the European Communities' response suggests that the equity infusion was consistent with French government practices, not the usual investment practice of private investors, and that the European Communities' refusal to provide the information sought by the Annex V facilitator further supports this conclusion.

The 1994 capital contribution

7.1336 The United States alleges that in February 1994, the French government transferred a further FF 2 billion to Aérospatiale as an advance on a capital increase which took place in April 1994.[4470] According to the United States, this capital contribution constitutes a financial contribution as it is a direct transfer of funds in the form of an equity infusion within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[4471] The United States argues that the 1994 equity infusion conferred a benefit on Aérospatiale because, based on an analysis of Aérospatiale's financial condition and performance prior to the capital contribution, such an investment was inconsistent with the usual investment practice of private investors in France. Finally, the United States argues that the 1994 equity infusion is specific within the meaning of Article 2 of the SCM Agreement because it was an *ad hoc* infusion which was explicitly limited to Aérospatiale.

7.1337 In support of its argument that the 1994 equity infusion was inconsistent with the usual investment practice of private investors in France, and therefore conferred a benefit on Aérospatiale, the United States points to Aérospatiale's reported financial results and financial ratios in the periods preceding the 1994 equity infusion. In that regard, the United States notes that Aérospatiale reported consolidated net losses of FF 2.38 billion and FF 1.4 billion in 1992 and 1993, respectively.[4472] In addition, the United States notes that Aérospatiale's financial ratios "remained dire".[4473] The United States also refers to various media reports suggesting that Aérospatiale's serious financial condition was common knowledge at the time of the 1994 equity infusion, including a statement by Aérospatiale's then-Chairman, Louis Gallois in February 1994, that from an investor's point of view, Aérospatiale was probably still "repellent" and suggesting that privatization of Aérospatiale was unlikely to occur in 1994 or even in 1995.[4474] Moreover, the United States argues that Aérospatiale's prospects at the time of the 1994 equity infusion were also unpromising, noting management's prediction in Aérospatiale's 1993 Annual Report that economic conditions would remain very difficult in 1994.[4475]

7.1338 The United States further notes that the European Commission examined the 1994 equity infusion under the EC state aid rules and that, despite the Facilitator's request during the Annex V process that the European Communities provide information with respect to the European

[4469] US, FWS, para. 588; citing to EC, Answer to Panel Question 100(g) from the Facilitator, Exhibit US-5 BCI.

[4470] US, FWS, para. 594.

[4471] We understand that the United States challenges the capital investment made by the French government and that this transaction took the form of an advance contribution of cash to Aérospatiale in February 1994 against the issuance of new shares in Aérospatiale which occurred in April 1994.

[4472] US, FWS, para. 598.

[4473] US, FWS, para. 599. Aérospatiale's debt-to-equity ratios were 16.6 and 25.5 in 1992 and 1993, respectively, which the United States contrasts to peer group averages for the corresponding periods of 3.2 and 3.1. The United States also notes that Aérospatiale had a debt coverage ratio of -1.3 and – 0.7 in 1992 and 1993, respectively, which it contrasts with peer group averages for the corresponding periods of 1.1 and 0.7. According to the United States, the negative debt coverage ratios indicate that Aérsospatiale's assets were "grossly insufficient" to cover its current borrowings. In addition, Aérospatiale's return on equity was -48.5 percent in 1992 and -37 percent in 1993, which the United States contrasts with peer group averages for the corresponding periods of 13.2 percent and 8.3 percent, respectively.

[4474] US, FWS, para. 603; Exhibit US-275.

[4475] US, FWS, para. 603.

BCI deleted, as indicated **[***]**

Commission's review (including the Commission's conclusion and reasons as to whether the infusion constituted state aid), the European Communities refused to provide the information. The United States requested the Panel to use its authority under Article 13 of the DSU to request the information on the European Commission's state aid review of the 1994 equity infusion that the European Communities had failed to provide to the Facilitator in the Annex V process.[4476]

European Communities

7.1339 The European Communities argues that the United States has failed to make out a *prima facie* case that any of the four capital contributions made by the French government to Aérospatiale between 1987 and 1994, which the United States alleges are subsidies to Aérospatiale, "have benefited Airbus SAS, which is the only company that produces Airbus LCA in the European Communities".[4477]

7.1340 The European Communities contends that the provisions of Article 14 of the SCM Agreement are simply guidelines for investigating authorities to follow in calculating the benefit to the recipient conferred pursuant to Article 1.1 in the context of countervailing duty investigations and, as such, serve as "guidelines" providing "relevant context" for Article 1.1(b) of the SCM Agreement.[4478] According to the European Communities, Article 14 is not supposed to provide a "cut and paste" legal test for the purposes of Article 1.1(b).[4479] However, the European Communities considers that, in the context of an equity contribution by a government, it is implicit in the notion of "benefit" in Article 1.1(b) of the SCM Agreement to inquire into the usual investment practice of private investors. The European Communities argues that in determining what the usual investment practice of private investors would have been, it is necessary to take account of the factual circumstances surrounding the making of the financial contribution.[4480] According to the European Communities, private investor "practice" will differ depending on such factors as whether the investment target is solvent and the private investor is an existing creditor, whether "countercyclical investment" is considered important or unwise in the sector in which the investment target operates, and whether the investment target is a candidate for sale, merger or other consolidation.[4481]

7.1341 The European Communities argues that determining the benchmark of the usual investment practice of private investors requires an assessment of an investment target's prospects for the future, rather than an undue focus on its past performance. Private investors decide whether or not to commit capital based on an assessment of prospects, rather than past performance because, according to the European Communities, "fundamentally the value of a business today is the present value of its anticipated future free cash flow available for distribution or reinvestment."[4482] The European Communities contends that the United States' conclusion that the French government acted inconsistently with the usual investment practice of private investors in France in making the capital contributions between 1987 and 1994 is, in each instance, based solely on data concerning Aérospatiale's *past* financial performance. The European Communities contends that the United States' arguments concerning the existence of benefit allegedly conferred by the various capital

[4476] US, FWS, para. 593.
[4477] EC, FWS, para. 1109; EC, FNCOS, para. 101.
[4478] EC, Answer to Panel Question 101, para. 277.
[4479] EC, Answer to Panel Question 101, para. 277.
[4480] EC, Answer to Panel Question 224, para. 567.
[4481] EC, Answer to Panel Question 224, para. 568.
[4482] EC, FWS, para. 1140. The European Communities notes, for example, that during the early 1990s, when the commercial airline industry was depressed and Boeing's commercial aircraft revenue and operating profit were in decline, Boeing increased its investment in total assets and assumed significant additional risk. According to the European Communities, Boeing's management understood that in the LCA industry, with its long and costly development cycle, increased investment is imperative even during depressed periods in order to position the company to be competitive when the market recovers. EC, FWS, para. 1115.

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contributions are flawed because of this undue focus on Aérospatiale's past financial performance rather than its prospects, and moreover, because the United States exaggerates Aérospatiale's past financial difficulties.

7.1342 The European Communities argues that, at the time of the capital contributions made by the French government between 1987 and 1994, Aérospatiale needed additional equity capital to fund product development. According to the European Communities, the French government's decision to provide that equity capital was "informed by its knowledge that countercyclical investment is critical in the LCA sector."[4483] The European Communities contends that a similarly knowledgeable private investor would have considered data related to Aérospatiale's past financial performance in light of the need to invest countercyclically in LCA development.[4484] The European Communities argues, moreover, that a private investor considering whether to make the capital contributions under consideration would evaluate Aérospatiale's future prospects.[4485]

The capital contributions made between 1987 and 1994

7.1343 The European Communities does not dispute the United States' position that the capital contributions made by the French government to Aérospatiale between 1987 and 1994 (including the 1992 capital contribution made by Crédit Lyonnais) are direct transfers of funds in the form of equity infusions and thus constitute financial contributions within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. However, the European Communities does dispute the United States' contention that the various equity infusions conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the SCM Agreement.

7.1344 The European Communities argues that, although Aérospatiale posted losses from 1992 through 1995 when the industry was in recession, it had been consistently profitable for the fiscal years 1987 through 1991 (covering the years leading up to the 1987, 1988 and 1992 capital increases), returned to profitability in 1996, and remained profitable through the merger with Matra Hautes Technologies in 1999 and the creation of EADS in 2000.[4486]

7.1345 More specifically, the European Communities disputes as a factual matter the United States' assertion that the 1987, 1988 and 1992 capital contributions were made when Aérospatiale was not "equityworthy". The European Communities argues that at the relevant times at which the French government was assessing whether to make the 1987, 1988 and 1992 capital contributions, Aérospatiale was profitable, even though its financial performance "may not have been as robust as the company would have liked".[4487] The European Communities argues that in producing the A320 (which entered commercial service in March 1988) Aérospatiale had made significant investments in specialized capital and facilities, in addition to investing in increasing levels of work-in-process

[4483] EC, Comments on US Answer to Panel Question 224, para. 415. The European Communities argues that both parties agree that, given the long and costly development cycle in the LCA industry, increased investment in aircraft development is imperative, "particularly during a period of trying financial performance driven by weak sales" so that an LCA manufacturer is poised to be competitive when the market recovers. EC, Comments on US Answer to Panel Question 224, para. 415.

[4484] EC, Comments on US Answer to Panel Question 224, para. 415.

[4485] The European Communities argues that it has provided "reams of contemporaneous documents" establishing that at the time that the French government made the capital contributions in question, Boeing, Airbus GIE and the US government itself had forecast commercial airline traffic growth and "robust, untapped demand for LCA well into the future"; EC, Comments on US Answer to Panel Question 224, para. 416; EC, SWS, paras. 534-535; see also the evidence discussed in paragraphs 7.1344 through 7.1350, 7.1365, 7.1369, and 7.1373.

[4486] EC, FWS, para. 1136; Aérospatiale Annual Report 1990, Exhibit EC-177, at p. 60; Aérospatiale Annual Report 1991, Exhibit EC-179, at p. 85; Aérospatiale 1998 Financial Statements, Exhibit EC-180, at p. 6.

[4487] EC, FWS, para. 1137.

inventory as production ramped up.[4488] According to the European Communities, these investments put considerable strain on the financial resources of the company, in response to which it incurred additional debt and discussed with its sole shareholder, the French government, the need for additional equity capital.[4489] As regards the period between 1992 and 1995, the European Communities argues that Aérospatiale's financial performance was driven by the depressed state of the commercial airline industry, which had also adversely affected Boeing's financial performance during this period.[4490]

7.1346 According to the European Communities, the fact that Aérospatiale's financial performance "was not robust in certain of the years in which capital contributions were made by the French government" does not suggest that the French government could not or did not have a realistic expectation of a reasonable return on the investment, or that it had no basis on which to conclude that its return on equity would improve significantly in the coming years.[4491] The European Communities contends that, at the time of the challenged capital contributions in 1987, 1988, 1992 and 1994, an informed investor with an understanding of the LCA development cycle would have considered Aérospatiale to be equityworthy, on the basis of "objectively measurable positive prospects for the firm".[4492] The European Communities argues that, just as Boeing dramatically increased its investment in commercial aircraft assets and assumed additional debt, notwithstanding its own "abysmal financial performance in the early 1990s", so too Aérospatiale and the French government, based on their assessment of positive future prospects driven by dramatic growth in LCA passenger demand, decided to look beyond Aérospatiale's recent performance and increase investment in the future.[4493] According to the European Communities "a strong order book in the late 1980s, and robust forecasts for the new A320 and for the A330/A340 programme then under development, meant that management and the company's shareholder had ample evidence that the company's performance would improve significantly."[4494]

[4488] EC, FWS, paras. 1134; SWS, para. 524; Aérospatiale Annual Report 1990, Exhibit EC-177, at p. 4. The European Communities argues that a further factor that caused Aérospatiale's debt-to-equity ratio to deteriorate in 1986 and 1987 was its accounting practice of expensing losses incurred in production of LCA at the beginning of the learning curve when production costs are significantly higher than revenue from sales. The European Communities notes that, in contrast, Boeing employs an accounting method known as "program accounting" in which early production losses are classified as an asset; EC, SWS, paras. 525-526.

[4489] EC, SWS, para. 524.

[4490] EC, FWS, para. 1138; Trends and Challenges in Aerospace Offsets, Proceedings and Papers, Charles W. Wessner, Editor, Board on Science, Technology, and Economic Policy, National Research Council, National Academy Press, Washington, D.C., 1999, Exhibit EC-181, p. 134; Five-Year Summary, 1994 Boeing 10-K, Exhibit EC-169, at p. 56.

[4491] EC, FWS, para. 1116.

[4492] EC, SWS, para. 531.

[4493] EC, SWS, paras. 532-533. The European Communities submits that, in the early 1990s, Boeing's commercial aircraft revenue and operating profit declined precipitously, by 30 percent, and 49 percent, respectively, between 1992 and 1994, reflecting the depressed state of the commercial aircraft industry; however, despite such less than robust financial performance, Boeing dramatically increased its investment in commercial aircraft assets (by 82 percent between 1991 through 1995) and assumed additional debt. Indeed, the European Communities notes, Boeing launched the 777 programme in October 1990 and continued its development during a very depressed period of demand, with the first commercial flight in 1995, while in 1993, it launched the 737 Next Generation programme. EC, FWS, paras. 1114 – 1115, 1142; 1993 Boeing 10-K, Exhibit EC-184, at p. 57; 1994 Boeing 10-K, Exhibit EC-169, at p. 56; 1995 Boeing 10-K, Exhibit EC-185, at pp. 41, 61.

[4494] EC, FWS, para. 1117. The European Communities refers to management's discussions of Airbus LCA deliveries, orders and options in its Annual Reports for 1987, 1988 and 1989 as reinforcing the company's prospects and underscoring the legitimate basis on which the French government acted in deciding to make the capital contributions in 1988, 1989 and 1992; paras. 1145-1149

BCI deleted, as indicated **[***]**

7.1347 The European Communities argues that Aérospatiale's financial results for 1990 and 1991 were adversely affected by three major events unrelated to Aérospatiale's business.[4495] According to the European Communities, Aérospatiale's "underlying trends were robust for Airbus", notwithstanding these events.[4496] Although airline deregulation, a global recession and reduced military spending had combined to result in losses at Aérospatiale in 1992 and 1993, the European Communities notes that the company was predicting that most of its markets would grow in the longer term. The European Communities argues that the decision by Crédit Lyonnais to provide the 1994 equity infusion was based on the rationale that the additional equity capital was necessary in order to ensure that Aérospatiale would continue to enhance its product line and increase its competitiveness for the future, in anticipation of the future recovery of the LCA market.[4497]

7.1348 The European Communities argues that the French government was, at all relevant times, closely informed about the business plans and prospects of Aérospatiale. In this regard, the European Communities notes that French law required that the French government, as shareholder, be provided with certain information in order to enable it decide on how to vote on the proposed capital contributions.[4498] Moreover, the European Communities submits that the French government's assessment of Aérospatiale's prospects at the times of the various capital contributions "proved to be prescient" given that, through the privatization of Aérospatiale in 1999 and formation of EADS in 2000, the French government earned an annual rate of return of **[***]** percent on the capital investments it made between 1988 and 1994.[4499]

7.1349 The European Communities also contends that, even if past financial performance were determinative of investor behaviour, the United States "distorts the significance of the debt-to-equity relationship." The European Communities argues that the significant indebtedness of Aérospatiale during the late 1980s can be explained by reference to the financial demands of developing and manufacturing the A320 and its decision to expense as losses recurring costs in excess of revenues (in contrast to way in which Boeing accounts for these costs) which exaggerated the negative effect on the firm's debt-to-equity ratio in 1986 and 1987.[4500]

7.1350 In sum, the European Communities contends that it has demonstrated that the challenged capital contributions are WTO-consistent, even on the basis of the legal test proposed by the United States. For this reason, the European Communities submits that there is no need for the Panel or the United States to request the information related to the European Commission's review of the 1994 capital contribution under the European Communities' state aid rules. According to the European

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[4495] EC, FWS, para. 1151. These events were the significant drop in the US dollar, the Gulf War and consequent write off of Iraqi receivables and a strike at BAE Systems which delayed Airbus deliveries; Aérospatiale Annual Report 1990, Exhibit EC-177, at p. 3; Aérospatiale Comptes de l'Exercise 1988, Exhibit EC-172, at p. 3.

[4496] EC, FWS, para. 1152. The European Communities notes, for example, that adjusted for the decrease in the value of the US dollar, Aérospatiale's sales volume increased 10 percent in 1990 (from 1989) and again in 1991 (from 1990). Aérospatiale Annual Report 1990, Exhibit EC-177, at p. 18; Aérospatiale Annual Report 1991, Exhibit EC-179, at p. 4.

[4497] EC, FWS, para. 1159; "France Pledges Subsidy to Aerospace Group", New York Times, 3 February, 1994, Exhibit US-298.

[4498] EC, SWS, paras. 546-550; Aérospatiale, Procès Verbal de l'Assemblé Générale Exraordinaire du 27 avril 1988, Exhibit EC-746, at p. 2; Décret 67-236 du 23 mars 1967, sur les sociétés commerciales, §§133, 135, Exhibit EC-751; Aérospatiale, Rapport du conseil d'administration à l'assemblé générale extraordinaire du 10 février 1989, Exhibit EC-747, pp. 4,3; Aérospatiale, Rapport du Conseil d'Administration à l'assemblée générale extraordinaire relative à l'augmentation du capital, Exhibit EC-748, p. 5; Aérospatiale, Procès-Verbal de l'Assemblée Générale Extraordinaire du 27 avril 1994, Exhibit EC-749, p. 2.

[4499] EC, FWS,para. 1122; Return from Equity Infusions – French Government, Exhibit EC-171 (BCI).

[4500] EC, SWS, para. 525.

BCI deleted, as indicated **[***]**

Communities, the EC state aid regime is based on distinct concepts that are different from WTO law and have no bearing on the WTO-consistency of a particular commercial operation.[4501]

(iii) Evaluation by the Panel

7.1351 The parties have advanced general horizontal arguments as to the existence of a requirement to demonstrate the pass-through to Airbus SAS of any benefit conferred on Aérospatiale by a financial contribution and the standard against which the presence of absence of a "benefit" within the meaning of Article 1.1(b) is assessed. We consider these general, horizontal questions first followed by the specific arguments and evidence pertaining to each of the challenged capital investments.

Pass-through

7.1352 We reject the European Communities' argument that the United States has failed to make out a *prima facie* case that any of the four capital contributions made by the French government to Aérospatiale between 1987 and 1994 are subsidies to Airbus SAS because the United States has not demonstrated how the benefit conferred by the respective financial contributions provided to Aérospatiale passed through to Airbus SAS. Our reasons for rejecting the European Communities' "pass-through" arguments are set forth in detail elsewhere in this report.[4502] In short, *if* we find that any of the capital contributions is a "financial contribution" which conferred a "benefit" on Aérospatiale within the meaning of Article 1.1(b), we consider that such financial contribution also conferred a benefit on the Airbus Industrie consortium (and therefore Airbus SAS), without requiring the United States to affirmatively establish the "pass-through" of any such benefit from Aérospatiale to Airbus Industrie or to Airbus SAS.

Determining the existence of a benefit conferred by a financial contribution in the form of an equity infusion

7.1353 A "financial contribution" provided by a government only constitutes a subsidy if it confers a "benefit" on a recipient. As we have already noted in the context of our evaluation of the United States' claims concerning the capital restructuring of Deutsche Airbus by the German government, the SCM Agreement does not contain a definition of the term "benefit" as it is used in Article 1.1(b). However, it is well established that a financial contribution confers a benefit within the meaning of Article 1.1(b) where the terms of the financial contribution are more favourable than the terms available to the recipient in the market.[4503]

7.1354 Accordingly, in order to determine whether the capital contributions made by the French government (including Crédit Lyonnais) to Aérospatiale conferred a benefit on Aérospatiale, we must evaluate whether the terms on which those capital contributions were provided to Aérospatiale were more favourable than those that would have been available to Aérospatiale on the market at the relevant times.

7.1355 The SCM Agreement does not set forth methodologies that panels may use in assessing whether the terms on which an equity infusion was made by a government were more favourable than those that would have been available on the market. Nor does it indicate the nature of evidence that is necessary or sufficient to establish those market-based terms. Article 14 of the SCM Agreement, entitled "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient", sets forth

[4501] EC, FWS, para. 1163.
[4502] *See*, paras. 7.193 - 7.200 above.
[4503] *See, e.g.,* Appellate Body Report, *Canada – Aircraft*, paras. 157-158; Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.179; Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.173-7.175; Panel Report, *Japan – DRAMs (Korea*), para. 7.256.

BCI deleted, as indicated **[***]**

guidelines for methods used by investigating authorities in countervailing duty investigations to calculate the benefit to a recipient for the purposes of Part V of the SCM Agreement.

7.1356 As we have previously noted, panels and the Appellate Body have acknowledged that, although the introductory words of Article 14 state that the guidelines it establishes apply for purposes of Part V of the SCM Agreement, Article 14 nonetheless constitutes relevant context for the interpretation of "benefit" in Article 1.1(b).[4504]

7.1357 The parties agree generally that Article 14(a), although not directly applicable to Part III of the SCM Agreement, nevertheless provides guidance for the interpretation of Article 1 of the SCM Agreement as regards claims not involving Part V.[4505] Accordingly, the United States argues that the capital contributions in question conferred a benefit on Aérospatiale because they were inconsistent with the usual investment practice of private investors in France. We understand the United States to argue that Aérospatiale was not equityworthy at the times of the equity infusions by the French government, in the sense that Aérospatiale was, or would have been, unable to attract investment capital from a private investor. The French government's decision to provide such investment capital was, therefore, inconsistent with the usual investment practice of private investors. Conversely, the European Communities has sought to rebut the United States' allegations that the financial contributions conferred a benefit on Aérospatiale on the basis that Aérospatiale's positive future prospects at the times of the various equity infusions justified the commitment of additional capital, and that in providing that capital, the French government anticipated a reasonable return on its investment and was thus was acting consistently with the usual investment practice of private investors.

7.1358 Our approach to the issue of benefit in the context of the French government's capital investments in Aérospatiale is to ask whether the United States has demonstrated that a private investor would not have made the capital investments in question based on the information available at that time. In this regard, we note that a private investor evaluating an equity investment in an enterprise will be seeking to achieve a reasonable rate of return on its investment. Information relevant to such an evaluation would include current and past indicators of an enterprise's financial performance (including rates of return on equity) calculated from the enterprise's financial statements and accounts, information as to the future financial prospects of the enterprise, including market studies, economic forecasts and project appraisals, equity investment in the enterprise by other private investors, and marketplace prospects for the products produced by the enterprise.

The capital contributions to Aérospatiale made between 1987 and 1994

Financial contribution

7.1359 We consider that the capital contributions made by the French government to Aérospatiale in 1987, 1988 and 1994 are direct transfers of funds in the form of equity infusions and therefore constitute "financial contributions" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. The European Communities does not dispute that, at the relevant time, Crédit Lyonnais was a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement. We consider that, at the time of its 1992 investment in Aérospatiale, Crédit Lyonnais was controlled by the French government and

[4504] *See*, e.g., Appellate Body Report, *Canada – Aircraft*, para. 155; Appellate Body Report, *Japan – DRAMs (Korea)*, para. 173.

[4505] US, FWS, paras. 544-545, 561-564; EC, FWS, para. 1215; EC, SNCOS, para. 267; EC, Answer to Question 101, para. 280; EC, SWS, para. 520. In its Answer to Question 101, the European Communities states that WTO case law does not suggest a "mechanistic, automatic, literal application of tests in Article 14 to the issue of determination of the existence of benefit in the sense of Article 1.1(b)". According to the European Communities, the Panel should apply this test taking due account of the sector and type of operations; para. 277.

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was a "public body" for purposes of Article 1.1(a)(1) of the SCM Agreement. As a result, the FF 1.4 billion capital contribution which Crédit Lyonnais made to Aérospatiale in 1992 also constitutes a financial contribution (*i.e.*, a direct transfer of funds in the form of an equity infusion) by a public body within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

Benefit

7.1360 The United States has submitted evidence of Aérospatiale's financial performance (expressed in terms of certain key financial ratios) during the relevant periods compared to the financial performance of certain alleged peer group companies over the same periods.[4506] This evidence indicates that between 1985 and 1994, Aérospatiale's financial ratios were uniformly and, in many cases, significantly inferior to the corresponding average ratios of its peer group of companies. We are aware that investors employ a variety of methodologies to estimate the expected rate of return from a potential investment and that measures of a firm's past financial performance are often relevant, at least as a starting point, to making such estimates. Moreover, there are many different ways of measuring a firm's financial performance. The United States has submitted evidence of Aérospatiale's financial performance measured against the performance of alleged peer group companies in terms their respective return on equity, debt-to-equity and debt coverage ratios. The European Communities has not disputed that the so-called "peer" companies identified by the United States are appropriate comparators for evaluating Aérospatiale's financial performance in the context of the industries in which it operates. While we would be reluctant to place undue reliance on a single measure of financial performance in isolation, recognizing that any particular financial ratio may be affected by accounting or other factors unrelated to a firm's underlying financial condition and performance, we note that the European Communities has not challenged the relevance, accuracy or appropriateness of evaluating Aérospatiale's financial performance on the basis of the financial ratios selected by the United States, nor has it suggested any alternative bases for evaluating Aérospatiale's financial performance in comparison to its peer group of companies. Owing to the cyclical nature of the markets in which Aérospatiale operates, we regard indicators of Aérospatiale's financial performance in relation to the performance of other firms operating in the same industries, presumably subject to similar business risks and cycles as Aérospatiale, as particularly probative of the question whether a private investor would have chosen to make the capital investments in Aérospatiale at issue in this dispute.

7.1361 The European Communities has submitted evidence purporting to demonstrate that at the times at which the French government made the various equity infusions, Aérospatiale had positive future prospects which, when coupled with the company's commitment to invest in product development, justified the commitment of expansion capital.[4507] This evidence covers the period between 1985 and 1994 and consists of (i) statements in various Aérospatiale Annual Reports as to the status of aircraft deliveries, orders and backlog, revenue, profits and turnover; (ii) market and business forecast reports prepared by Airbus GIE predicting increases in demand for LCA and increases in Airbus GIE's market share; and (iii) Boeing market forecasts and a US government publication predicting increased long-term growth for the LCA industry. For reasons which we discuss in paragraphs 7.1366, 7.1370 and 7.1374, in assessing whether a private investor would have made the capital investments in question, we are inclined to accord the evidence in the latter two of these categories relatively less weight than evidence of Aérospatiale's past financial performance in comparison to that of its peers, coupled with management's statements as to expectations and prospects for the company contained in Aérospatiale's annual reports.

7.1362 We have considered the evidence carefully, and in its totality, and set forth below our factual findings with respect to the financial condition and prospects of Aérospatiale on the basis of

[4506] Exhibit US-274.
[4507] EC, SWS, para. 534.

BCI deleted, as indicated **[***]**

information that existed at the time at which the French government made the various capital investments in Aérospatiale.

7.1363 First, in relation to the **1987 and 1988 capital contributions**, we note that Aérospatiale reported a profit of FF 50 million for 1987 and FF 93 million in 1988. Noting that sales for 1987 had continued to be affected by the crisis that hit the aeronautics sector in 1982-1983, Aérospatiale described 1987 as marking a turning point for the company.[4508] However, Aérospatiale also noted that with over one quarter of its production billed in US dollars, the continued drop of the US dollar since 1985 weighed considerably against sales in French francs. Aérospatiale noted positive factors affecting its outlook, such as strong growth in commercial air traffic, military budgets that allowed scope for modernization of military equipment, the commencement of strategic new programmes by Airbus GIE such as the launch of the A330/340 programmes, and the launch of the Arian 5 and Hermès satellites.[4509] On the other hand, Aérospatiale warned that it was vulnerable to declines in the US dollar, to market volatility as a result of economic instability and an economic situation approaching stagnation, and to increased competition. Aérospatiale also indicated that in 1987 its working capital had declined due to a reduction in in-house funding and an increase in investments, while its working capital requirements had increased as a result of higher business levels and the need to make increased deliveries in future years. According to Aérospatiale, this "need to re-establish a balanced financial position" led to the French government making the FF 1.25 billion capital contribution in 1987.[4510] In sum, Aérospatiale predicted that the future would not be any less difficult than the previous year had been. Finally, we note that during the period leading up to the French government's capital investments, Aérospatiale's return on equity, debt to equity and debt coverage ratios were consistently inferior to the corresponding average ratios for its peer group of companies.[4511]

7.1364 The European Communities explains that Aérospatiale required additional equity capital in 1987 and 1988 in order to fund new investments, such as the ramp-up for manufacture of the A320 (with first delivery due in 1988) and the launch of the A330/A340 in 1987 (with first delivery due in 1993).[4512] In our view, the fact that additional capital may have been necessary from the perspective of the recipient enterprise does not mean that the provision of such additional capital made sense from the perspective of an investor seeking to achieve a reasonable rate of return on its investment. On the other hand, we do not regard the fact that Aérospatiale was undercapitalised by the French government, its sole shareholder, to necessarily mean that a private investor would not have provided capital to the company.

7.1365 Aside from excerpts from Aérospatiale's 1987 and 1988 Annual Reports (detailing increases in revenue, net income and orders between 1987 and 1988, and providing details as to Aérospatiale's backlog and levels of orders and options for the A320 and A330/340), the European Communities has provided two types of evidence which it claims to be objective evidence demonstrating positive future prospects for Aérospatiale that would have provided a basis for a private investor to anticipate a reasonable return on an equity investment in Aérospatiale at the relevant times. This evidence consists of (i) Airbus GIE market and business outlook forecasts;[4513] and (ii) Boeing market outlook forecasts.[4514]

[4508] Aérospatiale Annual Report 1987, Exhibit US-32, at 2.
[4509] Aérospatiale SNI *Compte de L'Exercise* 1987, Exhibit EC-176, at 12.
[4510] Aérospatiale Annual Report 1987, Exhibit US-32, at 2.
[4511] Exhibit US-274.
[4512] EC, FWS, paras. 1134-1135.
[4513] Airbus GIE, *A View of the Future*, April 1985, part C and Chart C2, Exhibit EC-727; Airbus GIE, *Market and Business Forecasts* 1986-2005, Exhibit EC-728; Airbus GIE, Global Market Forecast 1987-2006, Exhibit EC-729. The Airbus GIE documents predict that, by 2004/2005, Airbus will achieve its long term strategic objective of securing a 30 percent share of the world's major commercial airline supply business, while

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7.1366 However, this evidence generally relates to overall market conditions and contains very little explanation of the basis for the assumptions and forecasts. In addition, the forecasts do not relate specifically to Aérospatiale's business operations, but to those of Airbus GIE, whose business comprises only one component of Aérospatiale's operational activities. In this regard, the evidence is potentially relevant to prospects for Aérospatiale's Aircraft Division, but is not indicative of prospects for Aérospatiale's Missiles, Space and Defence and Helicopters divisions, which would also be relevant to an investor contemplating an investment in the company as a whole. We attribute relatively less weight to the evidence contained in market and business outlook forecasts for Airbus GIE and market outlook forecasts for Boeing as we do not regard this evidence to be particularly probative of the question whether a private investor contemplating a capital investment in Aérospatiale at the relevant time could have expected to achieve a reasonable rate of return on its investment. We note also that the European Communities has not submitted information as to Aérospatiale's actual projected earnings figures for 1988 and subsequently, or any other Aérospatiale financial projections or budgets which presumably were made available to the French government prior to its decision to provide the additional equity capital to Aérospatiale in 1987 and 1988. Such evidence might potentially have supported a rebuttal by the European Communities of the United States' case by demonstrating that a private investor contemplating a capital investment in Aérospatiale at the relevant time could have expected to achieve a reasonable rate of return on such an investment.[4515]

7.1367 We conclude that a private investor would not have made capital investments of FF 1.25 billion in Aérospatiale in 1987 and 1988. We reach this conclusion after considering all of the evidence in its totality in respect of the French government's 1987 and 1988 capital contributions to Aérospatiale.[4516] Accordingly, we consider that the United States has established that the French government's investment decisions with respect to the FF 1.25 billion equity infusions in 1987 and 1988 were inconsistent with the usual investment practice of private investors in France and conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the SCM Agreement.

7.1368 As regards the **1992 capital contribution by Crédit Lyonnais**, we note that in 1991, Aérospatiale had reported net income of FF 1,829 million, compared with FF 38 million in 1990 and FF 204 million in 1989. However, allowing for the effect of extraordinary items, the company had actually posted a net loss in 1991.[4517] Moreover, in late 1992 Aérospatiale had announced a loss of FF 477 million for the first half of 1992, plus a provision of FF 300 million for an employment adaptation plan which was expected to affect 1,150 employees.[4518] Aérospatiale had noted in its 1991 Annual Report that its order books were deeply affected by a year-long atmosphere of crisis resulting from the drop-off in air traffic and heavy losses incurred by airlines, the general economic slowdown and budgetary restrictions which affected buyers. Although orders for commercial aircraft were then

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also forecasting traffic growth of an average of 5.6 percent per annum over the period 1985-2004 and significant increases in demand over the 1987-2006 period.

[4514] Airbus GIE, *A View of the Future*, April 1985, part C and Chart C2, Exhibit EC-727.

[4515] We note, however, that the weight that we would accord to any such evidence would depend on the evidence itself.

[4516] We recall that the United States requested the Panel to draw certain logical inferences from the European Communities' failure to respond to requests from the Annex V Facilitator related to whether there had been any prior evaluation of the equity infusions or Aérospatiale shares during this period and to provide any contemporaneous reports or analyses of the financial situation or prospects of Aérospatiale. Given our conclusions with regard to the evidence presented in this dispute, we do not find it necessary to draw the logical inferences requested by the United States.

[4517] Aérospatiale Annual Report 1991, Exhibit EC-179, at 13. The extraordinary items were a capital gain of FF 3,316 million from the spinoff of the company's helicopter business and a FF -815 provision for retirement indemnities.

[4518] Les Echos, *Accord annonce en juillet dernier – Le Crédit Lyonnais finalise son entrée dans Aérospatiale*, Exhibit US-283, at 1.

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at three to four years' production, the backlog situation for both helicopters and missiles was described as a cause for concern. In addition, the cancellation of the S-45 strategic missile programme was described as profoundly changing the outlook for the Space and Defence Division, while the company's position in the regional aircraft market was described as "vulnerable" due to the European Commission's refusal to approve Aérospatiale's acquisition of de Havilland.[4519] Finally, we note that during the period leading up to Crédit Lyonnais' capital investment, Aérospatiale's return on equity, debt to equity and debt coverage ratios were consistently inferior to the corresponding average ratios for its peer group of companies.[4520]

7.1369 The evidence provided by the European Communities consists of information from Aérospatiale's Annual Reports relating to reported net income, turnover, backlog and orders and credit ratings, Airbus GIE's planning and market and delivery forecasts,[4521] and Boeing market outlook documents. The European Communities also pointed to statements by a Crédit Lyonnais executive following the announcement of the capital investment in August 1992 to the effect that the investment was justified by the good prospects for the A330/A340 programme, which would start generating substantial revenue in 1994 and that Crédit Lyonnais considered the Aérospatiale investment to be a long term investment.[4522]

7.1370 However, aside from the evidence concerning Aérospatiale's reported financial results, this evidence generally relates to overall market conditions and contains very little explanation of the basis for the assumptions and forecasts. In addition, the market and delivery forecasts do not relate specifically to Aérospatiale's business operations, but relate to those of Airbus GIE, whose business comprises one component of Aérospatiale's operational activities. In this regard, the evidence is potentially relevant to prospects for Aérospatiale's Aircraft Division, but is not indicative of prospects in Aérospatiale's Missiles, Space and Defence and Helicopters divisions, which would also be relevant to an investor contemplating an investment in the company as a whole. We attribute relatively less weight to the evidence contained in market and delivery forecasts for Airbus GIE and market outlook forecasts for Boeing as we do not regard this evidence to be particularly probative of the question whether a private investor contemplating a capital investment in Aérospatiale at the relevant time could have expected to achieve a reasonable rate of return on its investment. We note also that the European Communities has not submitted information as to Aérospatiale's actual projected earnings figures for 1992 and subsequently, or any other Aérospatiale financial projections or budgets which presumably were made available to Crédit Lyonnais and to the French government prior to the decision to provide the capital contribution to Aérospatiale in 1992. Such evidence may potentially have supported a rebuttal by the European Communities of the United States' case by demonstrating that a private investor contemplating a capital investment in Aérospatiale at the relevant time could have expected to achieve a reasonable rate of return on such an investment.[4523]

7.1371 We conclude that a private investor would not have made a capital investment of FF 1.4 billion in Aérospatiale in 1992. We reach this conclusion after considering all of the evidence in its totality in respect of Crédit Lyonnais' 1992 capital investment in Aérospatiale.[4524] Accordingly,

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[4519] Aérospatiale, Annual Report 1991, Exhibit EC-179, at 3.

[4520] Ratio Comparison Chart, Exhibit US-274.

[4521] Airbus GIE Operational Plan & Budget 1989-1991, Exhibit EC-724; Airbus GIE Market and Delivery Forecasts 1990-2009, Exhibit EC-730; Airbus GIE Global Market Forecast 1990-2009, Exhibit EC-731; Airbus GIE Forecast, Exhibit EC-725; Airbus GIE Market Perspectives for Civil Jet Aircraft, Exhibit EC-732; Airbus GIE Market Perspectives for Civil Jet Aircraft June 1991, Exhibit EC-733.

[4522] Aviation Week & Space Technology, Crédit Lyonnais to Buy 20% Stake in Aérospatiale from French Government, 3 August 1992, Exhibit US-284.

[4523] We note, however, that the weight that we would accord to any such evidence would depend on the evidence itself.

[4524] We recall that the United States requested the Panel to draw certain logical inferences from the European Communities' failure to respond to requests from the Annex V Facilitator related to whether there had

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we consider that the United States has established that Crédit Lyonnais' investment decision with respect to the FF 1.4 billion equity infusion in 1994 was inconsistent with the usual investment practice of private investors in France and conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the SCM Agreement.

7.1372 Finally, regarding the **French government's FF 2 billion capital investment in 1994**, we note that, in the period leading up to that investment, Aérospatiale had posted a consolidated loss of FF 1.42 billion in 1993, which it considered to be an improvement over the FF 2.38 billion loss in 1992.[4525] In its 1993 Annual Report, Aérospatiale indicated that in general, market conditions in 1993 were worse than in 1992, with markets shrinking significantly under the impact of a dual crisis in civil and military demand, which had created surplus production capacity and augmented pressure on prices. Aérospatiale said that it was continuing to suffer from the crisis which had reigned in the world's aerospace industry for several years. Uncontrolled airline deregulation and the global recession had led to cancellations of aircraft orders during 1993, military orders from Western countries experienced a sharp drop and the civil helicopter market had collapsed.[4526] Aérospatiale reported that "{t}he crisis in the aerospace industry is global, and our markets have never been as seriously affected as they are today."[4527] Aérospatiale described the outlook for its Aircraft division as "very pessimistic", and predicted that there would be "no significant recovery" in aircraft orders until 1996 or 1997.[4528] Aérospatiale predicted that its missile division business for the next three years would be comparable to 1993 levels. The civil helicopter market had experienced its worst year for helicopter sales since 1967, with Aérospatiale indicating that no significant recovery could be expected in the short term.[4529] As a result of what Aérospatiale described as its "poor medium-term outlook", Aérospatiale decided to adopt a new employment adaptation plan involving the elimination of 2,240 jobs in 1994, in addition to the 1,800 jobs which had been eliminated in 1993. Its expressed goal was to return to profitability by 1995 at the latest.[4530] We note also that during the period leading up to the French governments' capital investment, Aérospatiale's return on equity, debt to equity and debt coverage ratios were consistently inferior to the corresponding average ratios for its peer group of companies.[4531] By March 1994, the media was reporting that Aérospatiale's 1993 results, along with a poor outlook for military and civil sales until 1996, had prompted the French Prime Minister to rule out the possibility of privatizing Aérospatiale in the near future.[4532]

7.1373 The European Communities refers to Aérospatiale's 1992 Annual Report which reported sales increases of 10 percent over the previous year and a year-end backlog of four years' of production. The European Communities also provided evidence of Airbus GIE forecasts of significant increases in civil aircraft demand over the 1992-2011 period (with Airbus orders announced by 1992 amounting to 20 percent of that demand),[4533] evidence that the French government considered that there would be a

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been any prior evaluation of the equity infusions or Aérospatiale shares during this period and to provide any contemporaneous reports or analyses of the financial situation or prospects of Aérospatiale. Given our conclusions with regard to the evidence presented in this dispute, we do not find it necessary to draw the logical inferences requested by the United States.

[4525] Aérospatiale Annual Report 1993, at 5. Although Aérospatiale had succeeded in reducing its net debt to FF 3.7 billion, it also noted that the undervalued US dollar, changes in the repayment terms of government loans for financing aircraft development and a charge of FF 724 million to cover the employment adaptation plan to be executed in 1994, all had a negative impact on operating results.

[4526] Aérospatiale Annual Report 1993, Exhibit EC-186, at 42.

[4527] Aérospatiale Annual Report 1993, Exhibit EC-186, at 3.

[4528] Aérospatiale Annual Report 1993, Exhibit EC-186, at 12.

[4529] Aérospatiale Annual Report 1993, Exhibit EC-186, at 30.

[4530] Aérospatiale Annual Report 1993, Exhibit EC-186, at 7.

[4531] Exhibit US-274.

[4532] Flight International, *France rules out Aérospatiale sell-off*, Exhibit US-299.

[4533] Airbus GIE Forecast 1986-2006, Exhibit EC-723.

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gradual recovery in aerospace markets from which Aérospatiale could be expected to benefit,[4534] evidence that Aérospatiale had predicted in 1993 that most of its markets would grow in the longer term, notwithstanding their weakness in the short term,[4535] and Boeing market outlook forecasts as well as a US National Research Council publication predicting substantial increases in traffic growth and deliveries in the longer term.[4536]

7.1374 Although the European Communities has pointed to general statements about expectations for a recovery in the market in the longer term, this evidence must be considered against the evidence of Aérospatiale's poor results in the years leading up to the 1994 capital contribution (both absolute and relative to its peer group of companies) and the very pessimistic statements made by management in its annual reports about prospects for recovery in the short to medium term. For the reasons we have previously explained, we attribute relatively less weight to the evidence contained in market and business outlook forecasts for Airbus GIE and market outlook forecasts for Boeing as we do not regard this evidence to be particularly probative of the question whether a private investor contemplating a capital investment in Aérospatiale at the relevant time could have expected to achieve a reasonable rate of return on its investment. We note also that the European Communities has not submitted information as to Aérospatiale's actual projected earnings figures for 1994 and subsequently, or any other Aérospatiale financial projections or budgets which presumably were made available to the French government prior to its decision to provide the additional equity capital to Aérospatiale in 1994. Such evidence might potentially have supported a rebuttal by the European Communities of the United States' case by demonstrating that a private investor contemplating a capital investment in Aérospatiale at the relevant time could have expected to achieve a reasonable rate of return on such an investment.[4537]

7.1375 We conclude that a private investor would not have made capital investment of FF 2 billion in Aérospatiale in 1994. We reach this conclusion after considering all of the evidence in its totality in respect of the French government's 1994 capital contribution to Aérospatiale.[4538] Accordingly, we consider that the United States has established that the French government's investment decision to make the FF 2 billion equity infusion in 1994 was inconsistent with the usual investment practice of private investors in France and conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the SCM Agreement.

The relevance of the absence of contemporaneous, objective assessments of an enterprise's financial condition and prospects

7.1376 We note that the United States also argues that contemporaneous independent analyses of the finances and prospects of an investment target are among the "key types of evidence" available to show whether an equity infusion was consistent with the usual investment practice of private

[4534] New York Times, *France Pledges Subsidy to Aerospace Group*, 3 February 1994, Exhibit US-298.
[4535] Financial Times, *Aérospatiale Posts FFr 2.3 bn loss*, 26 March 1993, Exhibit US-295.
[4536] Boeing 1991 Current Market Outlook, Exhibit EC-742; Boeing 1992 Current Market Outlook, Exhibit EC-743; Boeing 1993 Current Market Outlook, Exhibit EC-744; Boeing 1994 Current Market Outlook, Exhibit EC-745;High-Stakes Aviation: US-Japan Technology Linkages in Transport Aircraft, Committee on Japan, Office of Japan Affairs, Office of International Affairs, National Research Council, National Academy Press, Washington, D.C. 1994, Exhibit EC-170.
[4537] We note, however, that the weight that we would accord to any such evidence would depend on the evidence itself.
[4538] We recall that the United States requested the Panel to draw certain logical inferences from the European Communities' failure to respond to requests from the Annex V Facilitator related to whether there had been any prior evaluation of the equity infusions or Aérospatiale shares during this period and to provide any contemporaneous reports or analyses of the financial situation or prospects of Aérospatiale. Given our conclusions with regard to the evidence presented in this dispute, we do not find it necessary to draw the logical inferences requested by the United States.

investors.[4539] According to the United States, conversely, the *absence* of contemporaneous independent analyses "tends to show that an investment decision is not consistent with the usual investment practice of private investors; that is, it is not based on commercial considerations[4540] and suggests that the government made an investment decision without the "analytical foundation private investors would ordinarily require".[4541]

7.1377 The European Communities argues that basing a finding of "benefit" within the meaning of Article 1.1(b) on the *absence* of contemporaneous, independent financial analyses is tantamount to reversing the burden of proof, requiring a defending Member (or a respondent in domestic countervailing duty proceedings) to affirmatively demonstrate that the financial contribution did not confer a benefit.[4542] In this regard, the European Communities distinguishes between the standard against which the presence or absence of a "benefit" is to be assessed, on the one hand, and evidence relevant to that assessment, on the other.[4543] As to the former, the European Communities contends that the standard for assessing the presence or absence of a benefit is the market, and that nothing in Article 1.1(b) or Article 14 makes a government's "considerations" the lodestone of that standard.[4544] The European Communities argues that contemporaneous, independent financial analyses of an investment target's financial condition and prospects are but one (and by no means the only or necessary) example of evidence that a defending Member may offer in order to establish that the Member's investment decision was consistent with the usual investment practice of private investors.[4545]

7.1378 We do not preclude the possibility that the absence of any evidence that a government evaluated an equity investment in a manner consistent with the manner in which a private investor would evaluate the same investment may, in particular circumstances, be probative of the question whether the government's investment decision was consistent with the usual investment practice of a private investor. However, as is clear from our discussion of the evidence in paragraphs 7.1353 - 7.1358 above, the evidence as to Aérospatiale's financial condition and prospects at the relevant times has persuaded us that each of the French government's equity investments in 1987, 1988, 1992 and 1994 was inconsistent with the usual investment practice of private investors without attributing weight to the fact that the European Communities has not submitted evidence of contemporaneous, objective assessments of a Aérospatiale's financial condition and prospects undertaken by or provided to the French government at the times of the contemplated investments.

[4539] US, FWS, para. 564.

[4540] US, Answer to Panel Question 280, para. 110.

[4541] US Comment on EC, Answer to Panel Question 260, para. 44*; see also,* US, Answer to Panel Question 280, para. 110. The United States refers to various disputes in which it contends that other panels have found a financial contribution was not provided on the basis of commercial considerations, as evidenced by the absence of contemporaneous, independent financial analysis: Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.208; Panel Report, *Japan – DRAMs (Korea)*, para. 7.276; Panel Report, *Korea – Commercial Vessels*, para. 7.437.

[4542] EC, Answer to Panel Question 280, para. 182. The European Communities asserts that the United States has erroneously converted a finding by the Panel in *Korea – Commercial Vessels* regarding the *relevance* of contemporaneous government studies or analyses into a requirement that such studies or analyses be provided in order for the European Communities to successfully defend the French government's capital contributions to Aérospatiale; EC, SWS, para. 543.

[4543] EC, Answer to Panel Question 280, para. 183.

[4544] EC, Answer to Panel Question 280, para. 184. The European Communities argues that if the terms on which a financial contribution is provided are consistent with market, no "benefit" is conferred, regardless of the government's "considerations" in providing the financial contribution.

[4545] EC, Answer to Panel Question 280, para. 186. According to the European Communities, contemporaneous, objective evidence demonstrating the consistency of a transaction with market is sufficient; EC, Answer to Panel Question 260, para. 39.

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Specificity

7.1379 The United States argues that the 1987, 1988, 1992 and 1994 capital contributions are subsidies which are specific to Aérospatiale within the meaning of Article 2 of the SCM Agreement as they are *ad hoc* infusions into the company by the French government (and as regards the 1992 contribution by Credit Lyonnais, a public body) and are explicitly limited to Aérospatiale.[4546] Although the United States has not identified a particular sub-paragraph of Article 2 as the basis of its claims, we understand from the nature of the argument it advances that its claims are grounded in Article 2.1(a) of the SCM Agreement. Evidence submitted by the United States as to each of the challenged capital contributions to Aérospatiale between 1987 and 1994 more generally confirms the United States' assertion that these capital contributions were explicitly limited to Aérospatiale and were thereby "specific" within the meaning of Article 2.1(a) of the SCM Agreement. The European Communities does not contest the United States' allegations. We therefore find that each of the challenged capital contributions to Aérospatiale made between 1987 and 1994 constitutes a specific subsidy to Aérospatiale and thus to Airbus SAS.

Conclusion

7.1380 In conclusion, we find that each of the capital contributions to Aérospatiale made by the French government in 1987, 1988 and 1994, and the capital contribution to Aérospatiale made by Crédit Lyonnais in 1992, constitutes a subsidy to Aérospatiale. Each involves a "direct transfer of funds" in the form of an equity infusion, and therefore a financial contribution pursuant to Article 1.1(a)(1)(i), which conferred a benefit on Aérospatiale because the investment decision was inconsistent with the usual investment practice of private investors in France. We further find that each of these subsidies is specific within the meaning of Article 2 of the SCM Agreement.

(b) The 1998 transfer of the French government's 45.76 percent interest in Dassault Aviation to Aérospatiale

(i) Background to the French government's transfer of its 45.76 percent equity interest in Dassault Aviation to Aérospatiale

7.1381 In this section, we address the United States' claims that the 1998 transfer by the French government of its 45.76 percent equity interest in Dassault Aviation to Aérospatiale is a specific subsidy to Aérospatiale within the meaning of Article 1 and 2 of the SCM Agreement. We begin by describing the transaction and the context in which it occurred, before addressing the arguments of the parties and setting forth our evaluation of the relevant legal issues and our findings.

7.1382 Dassault Aviation is a French aircraft manufacturer of military, regional and business jets. Until 1978, almost all of its capital was privately held by the Dassault family through the entity Dassault Industries. In 1978, the French government acquired a 45.76 percent equity interest in the company.[4547] Although the French government held less than a majority interest in Dassault Aviation, it was able to exercise 55 percent of the voting rights of the company owing to double voting rights attached to certain of its shares. On 30 December 1998, the French government transferred its 45.76 percent interest in Dassault Aviation to Aérospatiale, in exchange for new shares of Aérospatiale to be issued at a later date following the fixing of an exchange ratio by a panel of independent experts.[4548] The panel of independent experts delivered its report on 19 March, 1999, approving the contribution of the Dassault Aviation shares to Aérospatiale at an amount equal to their

[4546] US, FWS, paras. 574, 590, 605.
[4547] Dassault Industries held 49.9 percent of the shares in Dassault Aviation, with the remaining 4.34 percent being held by the public.
[4548] Aérospatiale Matra Offering Memorandum, dated 25 May 1999, Exhibit EC-53, p. 24.

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net book value of FF 2,658 million. On the basis of this report, on 6 May, 1999, Aérospatiale issued 9,267,094 new shares to the French government (based on an exchange ratio of two Aérospatiale shares for each Dassault Aviation share).[4549]

7.1383 The French government's transfer of its 45.76 percent interest in Dassault Aviation to Aérospatiale in late 1998 was a preliminary step in the planned consolidation of the French aeronautical, defence and space industries through the combination of Aérospatiale and Matra Hautes Technologies (MHT) to create Aérospatiale-Matra, and the public offering of shares in Aérospatiale-Matra.[4550] In 1999, Aérospatiale and MHT were combined to create Aérospatiale-Matra, and the French government thereupon sold a portion of its shareholding in Aérospatiale-Matra in a public offering. Following the public offering in 1999, the French government held approximately 48 percent of the shares in Aérospatiale-Matra.[4551]

7.1384 When the French government acquired its interest in Dassault Aviation in 1978, it had agreed with the Dassault family that the special control rights (double voting rights) attaching to certain of the French government's shares would not be transferred to private entities.[4552] When the French government transferred its 45.76 percent interest in Dassault Aviation to Aérospatiale, in anticipation of Aérospatiale's combination with MHT and the privatization of Aérospatiale-Matra, the French government agreed to the cancellation of the double voting rights which had attached to certain of the its shares in Dassault Aviation, and the Dassault family thus regained effective control of Dassault Aviation.[4553]

(ii) Arguments of the parties

United States

7.1385 The United States argues that the 1998 transfer by the French government of its 45.76 percent interest in Dassault Aviation to Aérospatiale is a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, and constitutes a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement.[4554] The United States further argues that the share transfer conferred a "benefit" on Aérospatiale, within the meaning of Article 1.1(b) of the SCM Agreement, because it was inconsistent with the usual investment practice of private investors.[4555] In addition, the United States argues that the 1998 share transfer is specific within the

[4549] Aérospatiale recorded the difference between the net book value of the Dassault Aviation shares and the nominal value of the Aérospatiale shares (FF 100 nominal value per share) as additional paid-in capital of approximately FF 1,731 million; Aérospatiale Matra Offering Memorandum, dated 25 May 1999, Exhibit EC-53, p. 24.

[4550] The consolidation of the French aeronautical, defence and space industries was itself undertaken in preparation for the creation of EADS; EC, FWS, para. 1165*; see*, paras. 7.183 and 7.199 and Section VII.E.1 Attachment, following para. 7.289 above.

[4551] A private company, Lagardère, held 33 percent of Aérospatiale-Matra and exercised control over Aérospatiale-Matra jointly with the French government. The remaining shares were held by the public and Aérospatiale-Matra employees.

[4552] EC, SNCOS, paras. 274-277; *Avis du Conseil d'Etat, no. 362-610*, Exhibit EC-846. Although French law would theoretically have allowed the French government to transfer its double voting rights to a third person following a two-year waiting period, the French government agreed that the double voting rights would not be exercised, even after the expiration of the two year period required by French law; EC, SNCOS, para. 275; *Loi no. 66-537 du 24 juillet 1966 sur les sociétés commerciales*, Article 175, Exhibit EC-845.

[4553] EC, SNCOS, paras. 274-277; The current share ownership of Dassault Aviation is as follows: Groupe Industriel Marcel Dassault, 50.21 percent; EADS, 46.30 percent; public, 3.49 percent; EC, FWS, para. 1169, footnote 942; Exhibit EC-845; Exhibit EC-846.

[4554] US, FWS, para. 608.

[4555] US, FWS, para. 609.

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meaning of Article 2 of the SCM Agreement because it is an *ad hoc* transfer from the French government which is explicitly limited to Aérospatiale.[4556]

7.1386 The United States argues that, if under the usual investment practice of private investors in the territory of the subsidizing Member, an equity infusion would not have been provided, or if the government equity infusion is provided on better than commercial terms, it confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement and constitutes a subsidy.[4557] The United States argues that the French government's transfer of its 45.76 percent interest in Dassault Aviation to Aérospatiale conferred a benefit on Aérospatiale because Aérospatiale received what amounts to a FF 5.28 billion equity infusion (which increased Aérospatiale's consolidated capital by approximately 20 percent) through a transaction that was inconsistent with the usual investment practice of private investors in France.[4558] According to the United States, a private investor would not have engaged in the transaction that resulted in Aérospatiale's receipt of the Dassault Aviation shares, given Aérospatiale's "dire financial circumstances" at the time, the uncompensated loss of control over Dassault Aviation which the transaction entailed, and the absence of any contemporaneous studies suggesting that such loss would be outweighed by gains that could be expected from the eventual public offering of Aérospatiale-Matra.[4559]

7.1387 The United States argues that Aérospatiale's financial condition and commercial outlook "remained serious" in the late 1990s.[4560] In 1997, Aérospatiale reported total liabilities of more than FF 56 billion, compared with shareholders' equity of FF 5.3 billion.[4561] In addition, the United States alleges that Aérospatiale's financial ratios were very poor in comparison with those of its peer group of companies.[4562] The United States alleges that, following a negative market reaction to the news that the French government was considering the privatization of Aérospatiale, the French government decided instead to pursue a partial merger between Dassault Aviation and Aérospatiale through the transfer of its 45.76 percent interest in Dassault Aviation.[4563] According to the United States, the transfer of the 45.76 percent equity interest in Dassault Aviation to Aérospatiale "led to a considerable benefit to Aérospatiale".[4564] The United States refers to a report of the French *Sénat* indicating that the transaction would benefit Aérospatiale by reinforcing its financial position through an equity participation in Dassault Aviation (a company with superior operating margins), as well as amounting to a 20 percent increase in Aérospatiale's equity.[4565]

7.1388 The United States also notes that in transferring its stake in Dassault Aviation to Aérospatiale, the French government relinquished double voting rights attaching to certain of its shares, which had enabled it to exercise control of Dassault Aviation despite holding less than a majority interest. The

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[4556] US, FWS, para. 620.
[4557] US, FWS, para. 562.
[4558] US, SWS, para. 480; Answer to Question 159, para. 153.
[4559] US, Answer to Panel Question 159, para. 153.
[4560] US, FWS, para. 610.
[4561] US, FWS, paras. 610-614. The United States also refers to a 1987 report of the French *Sénat* that states that Aérospatiale did not have sufficient equity for its development; 1987 Senate Report, Exhibit US-18, p. 78.
[4562] US, FWS, para. 611. Aérospatiale's debt-to-equity ratios were 13.5, 10.7 and 7.3 percent in 1996, 1997 and 1998, respectively, compared with averages for its peer group of 2.6, 2.1 and 2.2 percent, respectively over the corresponding periods. Aérospatiale's debt coverage ratios were 0.6, 1.5 and 1.1 percent in 1996, 1997 and 1998, respectively, compared with peer group averages of 4.3, 7.7 and 6.5, respectively over the same periods; Ratio Comparison Chart, Exhibit US-274.
[4563] US, FWS, para. 613; *Aérospatiale on Credit Watch negative – S&P*, AFX News, 29 May 1998, Exhibit US-307.
[4564] US, FWS, para. 613.
[4565] US, FWS, para. 614; *Senate Report No. 89*, Exhibit US-302, p. 55; US, Answer to Panel Question 29, para. 189.

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United States contends that the French government's ceding control over Dassault Aviation as a result of the transfer of its stake in that company to Aérospatiale was not compensated by the Dassault family, owners of the rest of the shares in the company who thus regained control, and resulted in the French government incurring a substantial financial loss.[4566] The United States acknowledges that a private investor might knowingly incur such a loss where it has a "reasonable expectation of an offsetting financial gain". However, the United States argues that such an expectation should be based on prior studies undertaken in order to determine the financial benefit that could be expected.[4567] The United States notes that the French government failed to undertake any such studies and that the European Communities has not identified any basis for the French government to have expected that its profit from the formation of Aérospatiale-Matra would outweigh its loss from ceding control of Dassault Aviation without compensation.[4568]

7.1389 The United States argues that two further considerations help to reinforce the conclusion that the 1998 share transfer to Aérospatiale was not consistent with the usual investment practice of private investors. First, in addition to ceding control of Dassault Aviation to the Dassault family as a consequence of the transfer of its equity stake in Dassault Aviation to Aérospatiale, the French government also agreed to grant Dassault a significant participation in the merged entity Aérospatiale-Matra in the hope of persuading the Dassault family to consent to a full merger between Aérospatiale and Dassault Aviation.[4569] According to the United States, this additional cost to the French government should increase the offsetting gain that it would have been reasonable for the French government to expect from the formation of Aérospatiale-Matra and its subsequent privatization, in order for the 1998 share transfer to be considered consistent with the usual investment practice of private investors.[4570] Second, the United States argues that the French government's transfer of its 45.76 percent interest in Dassault Aviation to Aérospatiale was motivated by political and industrial policy concerns, rather than an interest in receiving a commercial return on its investment.[4571] According to the United States, evidence of the French government's political and industrial policy motivations explains the absence of cost-benefit analyses that would have been undertaken by a private investor and further demonstrates that the 1998 share transfer to Aérospatiale was not consistent with the usual investment practice of private investors.[4572]

European Communities

7.1390 The European Communities contends that, unlike the capital investments which the French government made in Aérospatiale between 1987 and 1994, the contribution to Aérospatiale of the French government's 45.76 percent interest in Dassault Aviation was made, not to fund the expansion

[4566] US, Answer to Panel Question 158, para. 146. The United States has furnished an expert report that calculates that the French government's relinquishment of control of Dassault Aviation without compensation translated into a loss of **[[**HSBI**]]** to the French government. Lauren D. Fox, 1998 Dassault Share Transfer Valuation Report, Exhibit US-595 HSBI.

[4567] US, Answer to Panel Question 158, para. 147.

[4568] US, Answer to Panel Question 158, para. 148. The United States notes that by the end of the 13-month period following the formation of Aérospatiale-Matra (during which Aérospatiale-Matra shares were publicly traded) the value of the French government's interest in Aérospatiale-Matra substantially declined, compounding the loss which the French government had already incurred in ceding control of Dassault Aviation without compensation.

[4569] US, FWS, para. 616.

[4570] US, Answer to Panel Question 158, para. 150.

[4571] US, FWS, para. 615; US, Answer to Panel Question 158, para. 151. The United States alleges that, at the time of the 1998 share transfer, the French government had foreseen the consolidation of the European aerospace industry through the creation of Airbus SAS and wanted to strengthen Aérospatiale's balance sheet (and thus its relative position in negotiations with the other members of the Airbus consortium) and protect French interests in the anticipated consolidation of the European aerospace industry.

[4572] US, Answer to Panel Question 158, para. 151.

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of Aérospatiale's product lines, but to facilitate the consolidation and privatization of the French aerospace industry (*i.e.*, the combination of Aérospatiale with MHT to form Aérospatiale-Matra and the public offering of shares in Aérospatiale-Matra).[4573]

7.1391 The European Communities notes that, prior to its contribution to Aérospatiale of its shares in Dassault Aviation, the French government owned 100 percent of Aérospatiale and independently owned a 45.76 percent interest in Dassault Aviation. According to the European Communities, the French government's transfer of its stake in Dassault Aviation to Aérospatiale in exchange for newly issued shares of Aérospatiale amounted to "changing the form but not the substance" of the French government's ownership of both Aérospatiale and its stake in Dassault Aviation. In other words, the French government continued to own its 45.76 percent equity interest in Dassault Aviation, only now through its 100 percent ownership of Aérospatiale.[4574] The European Communities asserts that, to the extent that the French government transferred anything "the transfer was to itself."[4575] Accordingly, the European Communities considers that the transaction was purely mechanical and practical, in that it enabled the French government to sell a significant interest in both Aérospatiale and Dassault Aviation in a single sale transaction through the public offering of Aérospatiale-Matra in June 1999.[4576]

7.1392 The European Communities argues that if Aérospatiale-Matra had sold the Dassault Aviation shares at the time at which they were transferred to Aérospatiale or shortly thereafter, the French government's contribution of the 45.76 percent interest in Dassault Aviation to Aérospatiale "could be considered equivalent to a cash equity contribution by the French government."[4577] However, because Aérospatiale, then Aérospatiale-Matra, and subsequently, EADS, retained the 45.76 percent interest in Dassault Aviation, the French government's transfer of the 45.76 percent interest in Dassault Aviation should not be characterized as a "new investment" in Aérospatiale, but simply as the combination of two of its existing investments (*i.e.*, the French government's equity stakes in Aérospatiale and Dassault Aviation, respectively) under the corporate entity Aérospatiale, in anticipation of the sale of a majority interest in the combined entity, Aérospatiale-Matra, to private investors.[4578]

7.1393 According to the European Communities, for the United States to sustain its argument that this pooling of assets by the French government in anticipation of the privatization of those assets is inconsistent with the usual investment practice of a private investor, it would need to present evidence as to what a private investor would have done in the context of the specific investment.[4579] In other words, the United States would need to demonstrate that it is inconsistent with the usual investment practice of an owner to pool wholly-owned assets together in anticipation of a combined sale of those assets, for which the owner is compensated on market terms.[4580] The European Communities argues that a market-based parent entity would consolidate holdings in order to realize synergies and create wealth, and that the United States has failed to demonstrate that it is inconsistent with the usual

[4573] EC, FWS, para. 1165.
[4574] EC, FWS, para. 1166.
[4575] EC, Answer to Panel Question 102, para. 282 ; SWS, para. 553 ; SNCOS, para. 264.
[4576] EC, FWS, para. 1167.
[4577] EC, FWS, para. 1170.
[4578] EC, FWS, para. 1170. According to the European Communities, the French government's interests in both "assets" remained the same: It owned 100 percent of its 45.76 percent stake in Dassault Aviation before the transfer to Aérospatiale and 100 percent of that stake after the transfer to Aérospatiale. Similarly, it owned 100 percent of Aérospatiale before the contribution of its interest in Dassault Aviation, and 100 percent of Aérospatiale after the contribution of its interest in Dassault Aviation; EC, Answer to Panel Question 102, para. 281.
[4579] EC, Answer to Panel Question 102, para. 282; EC, SWS, para. 554.
[4580] EC, Answer to Panel Question 102, para. 282; EC, SWS, paras. 513, 554.

investment practice of a private investor to pool wholly-owned assets together where doing so would realize synergies and create wealth.[4581]

7.1394 The European Communities contends that the United States' argument that the French government knowingly incurred financial losses in transferring its 45.76 percent interest in Dassault Aviation to Aérospatiale is irrelevant to the question whether, for purposes of Article 1.1(b) of the SCM Agreement, Aérospatiale received the Dassault Aviation shares on better terms than would have been conferred by a market-based owner of those shares.[4582] According to the European Communities, the United States has acknowledged that the beneficiary of any allegedly uncompensated sacrifice by the French government of voting control over Dassault Aviation was the Dassault family, rather than Aérospatiale. The European Communities argues that, if anything, ceding the double voting rights reduced, rather than enhanced, the value of the Dassault Aviation shares received by Aérospatiale.[4583] The European Communities also rejects the United States' argument that, in ceding its double voting rights to the Dassault family, the French government incurred a loss because it was not compensated for the value of the double voting rights. According to the European Communities, the double voting rights could not be acquired by private entities (due to the contractual arrangements between the French government and Dassault Industries) and therefore had no "market" value.[4584]

7.1395 Moreover, the European Communities contends that the French government was adequately compensated for the value of its 45.76 percent interest in Dassault Aviation in the subsequent privatization of Aérospatiale-Matra.[4585] The European Communities points to the separate valuations of Aérospatiale's 45.76 percent interest in Dassault Aviation carried out by several investment banks in conjunction with the combination of Aérospatiale and MHT in 1999. These valuations were undertaken in order to estimate a value for the combined Aérospatiale-Matra entity, and thus a public offering price for shares in Aérospatiale-Matra.[4586] The European Communities acknowledges that the valuations were not "fairness opinions" on the transfer of the 45.76 percent equity interest in Dassault Aviation to Aérospatiale; rather, they related to the valuation of Aérospatiale-Matra for purposes of establishing a public offering price for the shares of that entity.[4587] However, the European Communities contends that they demonstrate that the French government did not leave Aérospatiale-Matra, the successor to Aérospatiale, with any residual value from the 45.76 percent stake in Dassault Aviation for which the French government was not compensated through the public offering of shares in Aérospatiale-Matra.[4588]

7.1396 The European Communities also argues that the United States has distorted the facts concerning Aérospatiale's financial condition at the time of the Dassault Aviation transfer. The European Communities notes that Aérospatiale's annual orders had grown from EUR 9.6 billion in 1996, to EUR 12.2 billion in 1997 and EUR 13.3 billion in 1998 and that its backlog had also increased substantially, from EUR 19.8 billion in 1996, to EUR 24.5 billion in 1997 and EUR 27.2 billion in 1998.[4589] The European Communities further notes that Aérospatiale had reported profits of EUR 93 million, EUR 217 million and EUR 175 million in 1996, 1997 and 1998, respectively, while at the same time incurring almost EUR 5 billion in research and development expenses.[4590] According to the European Communities, the financial ratios referred to by the United States as

[4581] EC, SWS, para. 555.
[4582] EC, Comments on US Answer to Panel Question 158, para. 186.
[4583] EC, Comments on US Answer to Panel Question 158, para. 186.
[4584] EC, Comments on US Answer to Panel Question 158, para. 188.
[4585] EC, Answer to Panel Question 102, para. 283.
[4586] EC, SWS, para. 558.
[4587] EC, SNCOS, para. 266.
[4588] EC, SNCOS, para. 266; Answer to Question 102, paras. 283-284; SWS, para. 558.
[4589] EC, Comments on US Answer to Panel Question 158, para. 190.
[4590] EC, Comments on US Answer to Panel Question 158, para. 190.

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evidence of Aérospatiale's "dire" financial condition relate to Aérospatiale's need for additional capital, and the implication of the United States' arguments is that, if a company needs capital, it is by definition not equityworthy. However, the European Communities contends that the fact that a company may require additional capital says nothing about whether or not it is equityworthy. Rather, the relevant question is whether, from the perspective of a private investor, an investment holds out the prospect of good returns.[4591]

7.1397 In this regard, the European Communities refers to a number of studies of the potential costs and benefits of the anticipated combination of Aérospatiale and MHT and public offering of Aérospatiale-Matra conducted by investment banks on behalf of the French government, Aérospatiale and Lagardère.[4592] The European Communities notes that certain of the reports of these investment banks "confirm" that Aérospatiale undertook an "extensive due diligence exercise" including the September 1998 exchange of Aérospatiale's and MHT's respective sector-by-sector business plans for the period 1998 to 2003. According to the European Communities, these business plans contained financial projections as well as past and projected data which were the subject of intensive review and assessment by the investment banks.[4593] The European Communities contends that the investment banks had valued synergies expected to result from the combination of Aérospatiale and MHT at an amount that significantly exceeded any loss of value that the United States has attributed to the French government's loss of the double voting rights attached to its Dassault Aviation stake, and that this evidence shows that the French government expected synergies from the Aérospatiale-MHT combination that would offset any such loss.[4594]

7.1398 The European Communities also refers to the detailed information concerning Aérospatiale in the 1999 offering memorandum prepared for the public offering of Aérospatiale-Matra, "setting out positive future prospects" for Aérospatiale and Aérospatiale-Matra, as well as the terms of Lagardère's association with Aérospatiale-Matra and the response of retail and institutional investors to the Aérospatiale-Matra public offering, as evidence that private investors held reasonable expectations of financial gains in the anticipated combination of Aérospatiale and MHT and public offering of Aérospatiale-Matra.[4595]

7.1399 The European Communities thus requests that the Panel reject the United States' claim that the contribution to Aérospatiale of the French government's shareholding in Dassault Aviation conferred a "benefit" on Aérospatiale and thus constitutes a subsidy.[4596]

(iii) Evaluation by the Panel

Financial contribution

7.1400 The United States argues that the 1998 transfer by the French government of its 45.76 percent shareholding in Dassault Aviation to Aérospatiale is a "direct transfer of funds" and therefore constitutes a financial contribution for purposes of Article 1.1(a)(1)(i) of the SCM Agreement.

[4591] EC, Comments on US Answer to Panel Question 158, para. 192.
[4592] EC, FWS, paras. 233-236; Comments on US, Answer to Panel Question 158, para. 194; **[***]** assessment (HSBI Annex V, EC-HSBI-0001531); **[***]** assessment (HSBI Annex V, EC-HSBI-0001652); **[***]** assessment (HSBI Annex V, EC-HSBI-0000903); **[***]** assessment (HSBI Annex V, EC-HSBI-0000727); **[***]** assessment (HSBI Annex V, EC-HSBI-0000235); **[***]** assessment (HSBI Annex V, EC-HSBI-0000543); **[***]** assessment, Exhibit EC-544 HSBI.
[4593] EC, Comments on US Answer to Panel Question 158, para. 195.
[4594] EC, Comments on US Answers to Question 158, para. 196.
[4595] EC, Comments on US Answers to Question 158, paras. 199-203.
[4596] EC, FWS, para. 1171.

BCI deleted, as indicated **[***]**

7.1401 The European Communities argues that the transfer should not be characterized as a "new investment" by the French government, but simply as the combination of two of its existing investments under the corporate entity, Aérospatiale, in anticipation of the sale of a majority interest in Aérospatiale's successor entity, Aérospatiale-Matra.[4597] It may be *possible* to understand the European Communities to argue that the French government's transfer of its 45.76 percent interest in Dassault Aviation to Aérospatiale is not a *financial contribution* within the meaning of Article 1.1(a)(1), because it is simply a change in the form in which the French government held its investment in Dassault Aviation, and not a "new investment". Such an argument would, we believe require us to accept the proposition that a government cannot provide a financial contribution to an entity of which it is already the owner; *i.e.*, one cannot make a "financial contribution" to oneself. We are unable to accept such a proposition. We note that a similar argument in relation to transactions involving debt-for-equity swaps was rejected by the Panel in *Korea – Commercial Vessels*.[4598]

7.1402 The European Communities does not expressly argue that the contribution by the French government of its 45.76 percent interest in Dassault Aviation to Aérospatiale is not a "financial contribution". On the contrary, the European Communities argues that, had Aérospatiale-Matra sold the Dassault Aviation stake at the time at which it was transferred by the French government, or shortly thereafter, the contribution of the Dassault Aviation shares to Aérospatiale "could be considered equivalent to a cash equity infusion by the French State", which suggest that the European Communities considers that the transaction could, in certain circumstances, constitute a financial contribution.[4599] However, we do not consider that the ordinary meaning of Article 1.1(a)(1) permits us to characterize a transaction as a "financial contribution" according to the behaviour of the recipient subsequent to the transaction. If the transfer of the 45.76 percent interest in Dassault Aviation to Aérospatiale constitutes an equity infusion and falls within the meaning of Article 1.1(a)(1)(i), it will do so regardless of whether or not Aérospatiale or Aérospatiale-Matra as the recipient retained the transferred Dassault Aviation shares or subsequently sold them to a third party.[4600]

7.1403 Article 1.1(a)(1)(i) of the SCM Agreement provides that a "financial contribution" exists where there is a "direct transfer of funds (*e.g.*, grants, loans, and equity infusion), potential direct transfers of funds or liabilities (*e.g.*, loan guarantees)." The first issue we consider is whether a contribution of shares in a company (rather than a cash contribution) in exchange for newly-issued shares in the recipient company is a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. We agree with the Appellate Body that the term "funds" in Article 1.1(a)(1)(i) encompasses not only "money" but also financial resources and other financial claims more generally.[4601] Moreover, as the Appellate Body has noted, the words "grants, loans, and

[4597] EC, FWS, para. 1170; EC, Answer to Panel Question 102, para. 281.

[4598] *See*, Panel Report, *Korea – Commercial Vessels*, paras. 7.419-7.423, where the panel noted that the fact that equity infusions are explicitly designated as "financial contributions" suggests that the SCM Agreement does not preclude the owner of a company from making a "financial contribution" to that company (at para. 7.420).

[4599] EC, FWS, para. 1170.

[4600] During the Second Meeting of the Panel, while the European Communities stated that, to the extent that the French government transferred anything in connection with the Dassault Aviation transaction, the transfer was to itself, this statement, along with the European Communities' arguments concerning the proper characterization of the transaction as a combination of existing investments rather than as a "new investment", were made in the context of rebutting the United States' allegations that the transfer conferred a benefit on Aérospatiale, and thus appear to be directed to the issue of benefit within the meaning of Article 1.1(b)*; see* EC, SNCOS, paras. 264-279. *See, also,* EC, SWS, paras. 552-553, where the European Communities makes the same statement as part of its argument that the transaction could not have conferred a "benefit" within the meaning of Article 1.1(b).

[4601] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 250.

BCI deleted, as indicated **[***]**

equity infusion" in Article 1.1(a)(1)(i) are preceded by the abbreviation "e.g." which indicates that grants, loans and equity infusion are cited examples of transactions falling within Article 1.1(a)(1)(i), and transactions which are similar to those expressly listed are also covered by the provision. As we have indicated previously, we regard shares in a company as financial claims to a stream of income (in the form of dividends paid out of a company's profits) and to a share in the capital of a company on its winding up.[4602] Therefore, we consider shares in a company to fall within the scope of the term "funds" in Article 1.1(a)(1)(i), and a transfer of shares to fall within the scope of the term "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[4603] We conclude that the French government's transfer of its 45.76 percent stake in Dassault Aviation to Aérospatiale constitutes a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.1404 We next consider whether that financial contribution conferred a "benefit" on Aérospatiale within the meaning of Article 1.1(b) of the SCM Agreement.

Benefit

7.1405 We have previously indicated that it is well established that a financial contribution confers a benefit within the meaning of Article 1.1(b) where the terms of the financial contribution are more favourable than the terms available to the recipient in the market.[4604] We have also noted that the Appellate Body has held that Article 14 constitutes relevant context for the interpretation of "benefit" in Article 1.1(b).[4605] Moreover, the United States and European Communities both agree generally that Article 14(a), although not directly applicable to Part III of the SCM Agreement, provides guidance for the interpretation of Article 1 of the SCM Agreement as regards claims not involving Part V.[4606]

7.1406 The United States does not argue that the transfer by the French government of its 45.76 percent interest in Dassault Aviations to Aérospatiale, in exchange for the issuance by Aérospatiale to the French government of an additional 9,267,094 shares in Aérospatiale, conferred a benefit on Aérospatiale because the value of the newly issued shares in Aérospatiale was less than the value of the 45.76 percent interest in Dassault Aviation.[4607] The United States argues that the transaction conferred a benefit on Aérospatiale because it constituted an equity infusion that was inconsistent with the usual investment practice of private investors in France.

7.1407 Our approach to the issue of benefit in the context of the French government's 1998 equity infusion to Aérospatiale (through the transfer of its 45.76 percent interest in Dassault Aviation to Aérospatiale in exchange for newly-issued shares in Aérospatiale) is to ask whether the United States has demonstrated that a private investor would not have made the equity investment in question based on the information available at the time. In this regard, we consider that a private investor contemplating such an investment would be seeking to achieve a reasonable rate of return on its investment. The United States has not presented evidence as to the rates of return which the French

[4602] *See*, para. 7.1291 above.
[4603] *See*, para. 7.1291 above.
[4604] *See, e.g.,* Appellate Body Report, *Canada – Aircraft*, paras. 157-158; Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.179; Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.173-7.175; Panel Report, *Japan – DRAMs (Korea)*, para. 7.256.
[4605] Appellate Body Report, *Canada – Aircraft*, para. 155.
[4606] US, FWS, paras. 544-545, 561-564; EC, FWS, para. 1215; SNCOS, para. 267; Answer to Panel Question 101, para. 280; SWS, para. 520.
[4607] US, Answer to Panel Question 159, para. 152. The United States agrees with the European Communities that the ratio at which the French government exchanged its Dassault Aviation shares for newly-issued shares in Aérospatiale is of "no economic significance" due to the French government's ownership of Aérospatiale and the Dassault Aviation shares.

government could reasonably have expected to achieve from what the United States contends is effectively a FF 5.28 billion equity infusion to Aérospatiale. Instead, the United States argues that a private investor would not have made such an equity infusion because Aérospatiale was, at the time, in "dire financial circumstances", the transaction involved considerable costs associated with ceding control of Dassault Aviation, and there is nothing to suggest that, at the time of the transaction, those costs appeared to be outweighed by gains that could be expected from the subsequent sale of shares of Aérospatiale-Matra.[4608]

7.1408 In this regard, the United States refers to Aérospatiale's reported total liabilities of more than FF 56 billion in 1997, compared with shareholders' equity of FF 5.3 billion, along with its poor financial ratios as compared with those of its peer group companies.[4609] The United States also refers to evidence indicating that Aérospatiale was seriously undercapitalized at the relevant time.[4610] We do not regard the fact that Aérospatiale was undercapitalized by the French government, as its sole shareholder, to necessarily mean that a private investor would not have provided capital to the company.[4611] Although the United States refers to a 1997 report of the French *Sénat* which stated that Aérospatiale had insufficient capital for its development, we note that the report also explained that, despite its undercapitalization, Aérospatiale had reasonable levels of indebtedness and cost management.[4612] Indeed, while Aérospatiale's debt to equity ratios and debt coverage ratios in 1995 and 1996 continued to be inferior to the average ratios of its peer group of companies,[4613] unlike the period between 1987 and 1995, Aérospatiale's return on equity in 1996 and 1997 exceeded the average return on equity for its peer group of companies.[4614] However, we are unable, on the basis of the arguments and evidence before us, to determine whether the relative improvement in Aérospatiale's return on equity ratios is primarily due to increased revenues, or is at least partially the result of other factors that are not necessarily indicative of an improvement in financial performance. In any case, we note that Aérospatiale reported profits of EUR 93 million in 1996, and EUR 217 in 1997, along with growth in annual orders from EUR 9.6 billion in 1996 to EUR 12.2 billion in 1997 and consider that this evidence demonstrates that Aérospatiale's financial condition and prospects in 1996 and 1997 had improved over prior periods.[4615]

7.1409 Despite this improvement over prior periods, however, it is clear to us that the increase in Aérospatiale's capitalization brought about by the transfer of the French government's 45.76 percent interest in Dassault Aviation (representing a 20 percent increase in Aérospatiale's total consolidated capital) was necessary in order to increase the chances that the planned privatization of Aérospatiale could occur as soon as possible.[4616] Moreover, we are satisfied that the planned privatization of Aérospatiale was regarded as necessary to improve the French government's position in its negotiations with other Airbus governments over the terms of the consolidation of the European

[4608] US, Answer to Panel Question 159, para. 153.
[4609] *See*, para. 7.1387 above.
[4610] US, FWS, paras. 610-611.
[4611] Aérospatiale's undercapitalization by the French government can therefore be contrasted with the undercapitalization of Deutsche Airbus by MBB, a private shareholder; *see*, paras. 7.1291 - 7.1302 above.
[4612] Exhibit US-18, p. 77.
[4613] In 1996 and 1997, Aérospatiale's debt to equity ratios were 13.5 and 10.7, respectively, compared with average peer group ratios of 2.6 and 2.1, respectively. Over the same periods, Aérospatiale's debt coverage ratios were 0.6 and 1.5, respectively, compared with average peer group ratios of 4.3 and 7.7, respectively.
[4614] In 1996, Aérospatiale's return on equity was 27.7 percent compared with an average of 15.0 percent for its peer group of companies, and in 1997, its return on equity was 37.4 percent compared with a peer group average of 17.8 percent.
[4615] EC, Comments on US Answer to Panel Question 158, para. 190. In addition, the European Communities notes that Aérospatiale's backlog increased from EUR 19.8 billion in 1996 to EUR 24.5 billion in 1997.
[4616] Exhibit US-276.

BCI deleted, as indicated **[***]**

aerospace industry.[4617] This being so, we consider that Aérospatiale's financial position and prospects immediately prior to the French government's transfer of its 45.76 percent interest in Dassault Aviation, while improved, were not improved to a degree that would have enabled Aérospatiale, absent the addition of the 45.76 percent interest in Dassault Aviation (representing a 20 percent increase in its total consolidated capital), to attract private capital.

7.1410 The European Communities argues that the appropriate focus of inquiry in evaluating the consistency or otherwise of the Dassault Aviation transfer with the usual investment practice of private investors is to ask whether a private *owner* would consolidate its wholly-owned investments in advance of the sale of those assets.[4618] In the context of the French government's transfer of its 45.76 percent interest in Dassault Aviation to Aérospatiale, the European Communities argues that this standard requires that the United States demonstrate that it is inconsistent with the usual investment practice of private owners to pool wholly-owned assets together in anticipation of a combined sale of those assets, for which the owner is compensated on market terms.[4619]

7.1411 We do not reject the possibility that a party may successfully rebut a claim that an equity infusion conferred a benefit because it was inconsistent with the usual investment practice of private investors by showing that the transaction in question was a preliminary step in, or otherwise part of, a restructuring or consolidation project and that, considered in the context of the overall returns expected to be generated from that restructuring or consolidation project, the equity investment was consistent with the usual investment practice of a private investor. As we have indicated, we are satisfied as a factual matter that the French government's transfer of its 45.76 percent interest in Dassault Aviation to Aérospatiale was envisaged as a preliminary step in the consolidation of the French aeronautics industry, in preparation for the eventual consolidation of the European aeronautics industry. However, the European Communities has presented no evidence to persuade us that, at the time at which the French government was contemplating transferring its 45.76 percent interest in Dassault Aviation to Aérospatiale, it had a rational basis for believing that the overall returns it could expect from a public offering of shares in an entity that combined the French government's interests in Dassault Aviation with Aérospatiale, exceeded the rate of return it could expect from retaining its 46.75 percent equity interest in Dassault Aviation (including the double voting rights attached to certain of those shares) separately from its ownership of Aérospatiale.

7.1412 The European Communities has provided evidence to the effect that the Dassault Aviation stake received by Aérospatiale had been valued separately from Aérospatiale in the context of calculating a public offering price for Aérospatiale-Matra. We note, however, that the transfer by the French government of its 45.76 percent interest in Dassault Aviation occurred in December 1998.[4620] The assessments to which the European Communities refers concern the relative valuations of Aérospatiale, Aérospatiale's 45.76 percent interest in Dassault Aviation, and MHT for the purpose of establishing a public offering price for the Aérospatiale-Matra shares, which occurred in 1999. These valuations are all dated either February, March or April 1999; in other words, they were all made *after* the French government had decided to transfer its 45.76 percent interest in Dassault Aviation to Aérospatiale. Moreover, the assessments do not analyze the relative merits of the French government retaining its separate holdings of Dassault Aviation (including the French government's double voting rights) and Aérospatiale, on the one hand, as opposed to combining those holdings (and cancelling the

[4617] In announcing the French government's decision to transfer its interest in Dassault Aviation to Aérospatiale, the French Finance Ministry said that the agreement between Aérospatiale and Dassault Aviation was designed to promote a concerted strategy for the French aeronautics industry in the broader context of alliances that need to be concluded in the near-term between the principal European actors; French Finance Ministry, *Communiqué de presse*, 15 May 1998, Exhibit US-304. Similar views are expressed in media reports: Exhibit US-307; Exhibit US-309; Exhibit US-310; Exhibit US-312; Exhibit US-596.

[4618] EC, Comments on US Answer to Panel Question 224, para. 421. Emphasis added.

[4619] EC, SWS, paras. 554-555.

[4620] Aérospatiale-Matra Offering Memorandum, dated 25 May 1999, Exhibit EC-53, p. 24.

double voting rights attached to the Dassault Aviation shares) and merging them with MHT with a view to a subsequent public offering of the merged entity. Rather, the assessments are valuations of Aérospatiale and MHT and estimates of the synergies that could be expected from their combination.[4621] We therefore do not consider any of the assessments submitted by the European Communities to support the proposition that the French government had a rational basis for believing that the overall returns it could expect from a public offering of shares in an entity which combined the French government's interests in Dassault Aviation (minus the double voting rights) with Aérospatiale exceeded the rate of return it could expect from holding its 45.76 percent equity interest in Dassault Aviation (including the double voting rights attached to certain of those shares) separately from Aérospatiale. We are satisfied that the French government's transfer of its 45.76 percent equity interest in Dassault Aviation in exchange for newly issued shares in Aérospatiale was inconsistent with the usual investment practice of a private investor in France, because a private investor would not have made the investment, and that the transaction therefore conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the SCM Agreement. We reach this conclusion after considering all of the evidence in its totality in respect of the French government's 1998 transfer of its 45.76 percent interest in Dassault Aviation to Aérospatiale.

Specificity

7.1413 The United States argues that the 1998 transfer by the French government of its 45.76 percent interest in Dassault Aviation to Aérospatiale is a subsidy which is specific to Aérospatiale within the meaning of Article 2 of the SCM Agreement as is an *ad hoc* transfer from the French government which is explicitly limited to Aérospatiale.[4622] Although the United States has not identified a particular sub-paragraph of Article 2 as the basis of its argument, we understand from the nature of the argument it advances that it is grounded in Article 2.1(a) of the SCM Agreement. Evidence submitted by the United States as to the 1998 transfer of a 45.76 percent interest in Dassault Aviation to Aérospatiale more generally confirms the United States' assertion that this transfer was explicitly limited to Aérospatiale and was thereby "specific" within the meaning of Article 2.1(a) of the SCM Agreement. The European Communities does not contest the United States' allegations. We therefore find that the 1998 transfer by the French government of its 45.76 percent interest in Dassault Aviation to Aérospatiale constitutes a specific subsidy to Aérospatiale.

(iv) Conclusion

7.1414 In conclusion, we find that the French government's 1998 transfer of its 45.76 percent equity interest in Dassault Aviation to Aérospatiale in exchange for the issuance by Aérospatiale of shares to the French government constitutes a subsidy to Aérospatiale because it involves a "direct transfer of funds" comparable to an equity infusion and is therefore a financial contribution within the meaning of Article 1.1(a)(1)(i), which conferred a benefit on Aérospatiale because the investment decision was inconsistent with the usual investment practice of private investors in France. We further find that this subsidy is specific within the meaning of Article 2 of the SCM Agreement.

[4621] We also note that certain of the assessments were performed by investment banks that had been retained to advise parties other than the French government in connection with the Aérospatiale-MHT offering, and therefore cannot necessarily be presumed to be information known to, or advice received by, the French government in the context of its decision to effect the transfer of its interest in Dassault Aviation to Aérospatiale. For example, **[***]** advised Aérospatiale, Exhibit EC-HSBI0000543; Exhibit EC-HSBI0000235, while **[***]** advised Lagardère, Exhibit EC-HSBI0000727; Exhibit EC-HSBI0000905.

[4622] US, FWS, para. 620; Aérospatiale Annual Report 1998, Exhibit US-301, p. 28.

BCI deleted, as indicated **[***]**

10. Whether research and technological development funding that the European Commission and the member States provide to Airbus are specific subsidies

(a) Introduction

7.1415 The United States challenges multiple instances of research and technological development ("R&TD") funding provided or committed to Airbus by the European Communities, the French, German, Spanish and UK governments and three German sub-federal public entities between 1986 and 2007. In the vast majority of cases, the challenged funding measures take the form of grants. However, in two instances, the United States' complaint focuses on loans. The United States claims that each of the challenged measures amounts to a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement. The R&TD measures that are subject to the United States' claims are:

(i) EC grants for LCA-related R&TD projects in which Airbus participated pursuant to the:

- Second Framework Programme for Community Activities in the Field of Research and Technological Development (1987-1991) ("Second Framework Programme" or "2nd FP"),[4623]
- Third Framework Programme for Community Activities in the Field of Research and Technological Development (1990-1994) ("Third Framework Programme" or "3rd FP"),[4624]
- Fourth Framework Programme of the European Community Activities in the Field of Research and Technological Development and Demonstration (1994-1998) ("Fourth Framework Programme" or "4th FP"),[4625]
- Fifth Framework Programme of the European Community for Research, Technological Development and Demonstration Activities (1998-2002) ("Fifth Framework Programme" or "5th FP");[4626] and
- Sixth Framework Programme of the European Community for Research, Technological Development and Demonstration Activities, Contributing to the Creation of the European Research Area and to Innovation (2002-2006) ("Sixth Framework Programme" or "6th FP");[4627]

(ii) French government grants for LCA-related R&TD projects in which Airbus participated, between 1986 and 2005.[4628]

(iii) German federal government grants for LCA-related R&TD projects in which Airbus participated under the:

- Luftfahrtforschungsprogramm I ("LUFO I") (1995-1998),[4629] Luftfahrtforschungsprogramm II ("LUFO II") (1998-2002)[4630] and Luftfahrtforschungsprogramm III ("LUFO III") (2003-2007);[4631]

[4623] US, FWS, para. 628. Exhibit EC-200.
[4624] US, FWS, para. 631. Exhibit EC-201.
[4625] US, FWS, para. 636. Exhibit EC-202.
[4626] US, FWS, para. 641. Exhibit EC-203.
[4627] US, FWS, para. 646. Exhibit EC-204.
[4628] US, FWS, para. 680. Exhibits US-337, EC-205, EC-206, EC-207-BCI-, EC-208-BCI and EC-209-BCI.

BCI deleted, as indicated **[***]**

(iv) Grants from three German sub-federal public entities for LCA-related R&TD projects in which Airbus participated under the:

- Offensive Zukunft Bayern (1995),[4632]
- Offensive Zukunft Bayern II (1996),[4633]
- Bayerisches Luftfahrtforschungsprogram (2000),[4634]
- Hightechoffensive Bayern (1999-2003),[4635]
- Airbus Materials & System Technology Centre Bremen ("AMST I") (2000-2002),[4636]
- Airbus Materials & System Technology Centre Bremen II ("AMST II") (2002-2006),[4637] and
- Luftfahrtforschungsprogramm (2000-2005) Hamburg;[4638]

(v) Spanish government loans for LCA-related R&TD projects in which Airbus participated, in particular loans made under :

- the Plan Tecnológico Aeronáutico ("PTA") (1993-2003),[4639] and
- the Programa de Fomento de la Investigación Técnica ("PROFIT") (2000-2007);[4640] in particular the Programa Nacional de Aeronáutica of PROFIT (2000-2003)[4641] and the Subprograma Nacional de Transporte Aéro of PROFIT (2004-2007);[4642]

(vi) UK government grants for LCA-related R&TD projects in which Airbus participated under the

- Civil Aircraft Research and Development Programme ("CARAD") (subsequently renamed the Aeronautics Research Programme ("ARP") (1992-2004),[4643] and Technology Program ("TP") (2004-2005).[4644]

7.1416 In responding to the United States' claims, the European Communities has presented multiple arguments, two of which have already been set out and addressed in our Preliminary Ruling.[4645] A

[4629] US, FWS, para. 659. Exhibit US-327.
[4630] US, FWS, para. 659. Exhibit US-327.
[4631] US, FWS, para. 659. Exhibit US-327.
[4632] US, FWS, para. 668. Exhibits US-330, US-331.
[4633] US, FWS, para. 668. Exhibits US-330, US-331.
[4634] US, FWS, para. 668. Exhibits US-330, US-331.
[4635] US, FWS, para. 668. Exhibits US-330, US-331.
[4636] US, FWS, para. 674. Exhibit US-334.
[4637] US, FWS, para. 674. Exhibit US-334.
[4638] US, FWS, para. 671. Exhibit US-333.
[4639] US, FWS, para. 693. Exhibit US-344-BCI.
[4640] US, FWS, para. 697. Exhibits US-349; Exhibit US-355.
[4641] US, FWS, para. 697. Exhibit US-349.
[4642] US, FWS, para. 697. Exhibit US-355.
[4643] US, FWS, para. 686. Exhibit US-341 (BCI).
[4644] US, FWS, para. 687. Exhibit US-495.

BCI deleted, as indicated **[***]**

third argument relates to the extent to which R&TD measures involving the participation of companies other than Airbus SAS and its subsidiaries are within the scope of this dispute. As we have noted elsewhere,[4646] the European Communities argues that the only companies that can be the subject of the United States' adverse effects complaint are those that produce Airbus LCA, *i.e.*, the product which in the United States' view causes adverse effects to United States interests. Thus, according to the European Communities, to the extent that the United States has sought to contest R&TD measures that did not involve the participation of Airbus SAS or any of its subsidiaries, it has overstated the amount of R&TD support that can be rightfully challenged under the SCM Agreement.[4647]

7.1417 We recall our findings on the "relevant companies" for the purpose of this dispute: we do not consider that the changes to the corporate structure of the producer of Airbus LCA are such as to require the United States to demonstrate, as part of its *prima facie* case, the "pass-through" to the entity Airbus SAS of benefits conferred by financial contributions that had been provided to the Airbus Industrie consortium. If we find that any of the alleged financial contributions provided to the Airbus Industrie consortium conferred a benefit within the meaning of Article 1.1(b), and thus constitute subsidies, we would be satisfied that those subsidies do, in fact, subsidize Airbus LCA for purposes of our adverse effects analysis under Articles 5 and 6.[4648] Thus, we will proceed to examine the United States' claims with this understanding of Airbus in mind.

(b) Terms of Reference

7.1418 Another issue raised by the European Communities (for the first time in its first written submission) relates to our terms of reference. According to the European Communities, the United States' complaint against the Spanish government loans provided to Airbus under the PROFIT is outside our terms of reference because the measures at issue were not adequately identified in the United States' panel request, in accordance with Article 6.2 of the DSU.[4649] The United States rejects the European Communities' contention, arguing that its panel request clearly identifies the measures at issue in conformity with Article 6.2 of the DSU.[4650]

7.1419 The relevant section of the United States' panel request reads:

> "The measures of the EC and the member States that are the subject of this panel request include:
>
> ...
>
> (6) The provision by the EC and the member States of financial contributions for aeronautics-related research, development, and demonstration ("R&D"), undertaken by Airbus, whether alone or with others, or in any other way to the benefit of Airbus, including:
>
> ...
>
> (d) Funding from the Spanish government, including regional and local authorities, since 1993 for civil aeronautics-related R&D projects in which Airbus

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[4645] *See*, paras. 7.65 and 7.105 (findings on temporal scope arguments) and paras. 7.117, 7.137 and 7.158 (findings on adequacy of US request for panel establishment) above.
[4646] *See*, paras. 7.185 - 7.186 above.
[4647] EC, FWS, para. 1219.
[4648] *See*, para. 7.200 above.
[4649] EC, FWS, para. 1315.
[4650] US, SWS, paras. 516-517.

BCI deleted, as indicated **[***]**

> participated, including loans and other financial support provided under the Plan Tecnológico Aeronáutico I and the Plan Tecnológico Aeronáutico II."

7.1420 The language in Section (6)(d) of the panel request identifies the measures subject to the United States' complaint as "funding from the Spanish government, including regional and local authorities since 1993 for civil aeronautics-related R&D projects in which Airbus participated". This description indicates: the provider ("the Spanish government, including regional and local authorities"); the timing ("since 1993"); the purpose ("for civil aeronautics-related R&D projects"); and the subject ("in which Airbus participated"), of the funding at issue. Thus, the focus of the United States' complaint is not all Spanish government funding to Airbus for LCA-related activities; rather only funding provided "since 1993" "for civil aeronautics-related R&D projects". Section (6)(d) explains that such funding *includes* "loans and other financial support provided under the" PTA I and PTA II. It is clear to us from the use of the word "including" that the United States' challenge is not limited to loans under the PTA I and PTA II.

7.1421 The United States' request for the establishment of the present Panel was made on 31 May 2005. On 23 September 2005, the Dispute Settlement Body initiated Annex V procedures. On the same day, the parties exchanged draft questions requesting a range of information each party considered relevant to the dispute. These included a series of detailed questions from the United States to the European Communities on loans made under the PROFIT. The United States' questions on the PROFIT followed, in numerical order, from a similar set of questions asked in respect of loans granted under the PTA I and PTA II. Final versions of these questions were provided to the European Communities on 7 October 2005.

7.1422 On 25 October 2005, the European Communities requested the Panel (which had been composed on 17 October 2005) to make a number of preliminary rulings on a series of matters, including whether certain aspects of the United States' panel request satisfied the standards of clarity required by Article 6.2 of the DSU. Although, at the time, the European Communities was aware that the PROFIT was one of the two Spanish government R&TD loan programmes about which the United States was interested in collecting information, the European Communities' request for a preliminary ruling did not raise any issue about the adequacy of the United States' identification of those measures in the panel request. Likewise, despite asserting in its answer of 18 November 2005 to question 279 of the Facilitator during the Annex V process that "the PROFIT scheme" fell outside the Panels terms of reference, the European Communities did not object to the United States' claims in the updated request for a preliminary ruling it presented on 7 November 2006. By that stage, the European Communities could have had no doubt that the PROFIT loans formed part of the United States' complaint, given that they had been explicitly identified in the addendum to the United States' consultations request, filed nine months prior to the European Communities' updated request for a preliminary ruling.[4651] Thus, when considered as a whole and in light of the attendant circumstances,[4652] we find that Section (6)(d) of the United States panel request presents the United States' claim against the PROFIT loans in a manner that is sufficiently clear to meet the standards of Article 6.2 of the DSU.

[4651] The addendum to the United States' request for consultations was communicated on 31 January 2006, in WT/DS316/1/Add.1. In this communication, the United States expressed the view that its updated request for consultations might "help to clarify, and if possible, resolve, the issues in the EC's preliminary ruling request". Subsequently, and with reference to *inter alia*, this communication, the United States requested the establishment of a new panel, in WT/DS316/6. Both of these documents were later renumbered, respectively, WT/DS347/1 and WT/DS347/3, and the words "Second Complaint" added to the titles.

[4652] Other attendant circumstances are referred to in our Preliminary Ruling, where we addressed and dismissed the European Communities' allegation that the United States' complaint against French government R&TD measures was outside the Panel's terms of reference because it failed to identify those measures with sufficient precision in its panel request. *See*, para. 7.149 above. *See, also*, US, SWS, paras. 18-24.

BCI deleted, as indicated **[***]**

(c) The Measures At Issue

7.1423 A final matter that we believe must be addressed before evaluating the merits of the United States' claims is the not insignificant issue of the precise identity of the R&TD measures being challenged and, in particular, the amount of funding provided to Airbus.

(i) Background

7.1424 During the Annex V process, the United States, through the Facilitator, posed over 300 questions, including at least as many detailed sub-questions, to the European Communities on a range of issues relating to alleged instances of European Communities and EC member State funding of Airbus LCA-related research and development activities. These questions included requests for information on the precise identity of the alleged measures and the related amounts of funding. The European Communities refused to provide any of the requested information in respect of the Second EC Framework Programme and French government R&TD funding from 1986 to 1994 because it considered that some of the United States' requests in respect of these measures related to funding activities that were outside the temporal scope of the dispute.[4653] It also refused to provide any of the requested information with respect to the Spanish government PROFIT programme, because it considered this programme to be outside of the Panel's terms of reference.[4654] Where the European Communities did provide information, it was limited to projects involving the Airbus corporate entities that it considered were relevant to the dispute.[4655]

7.1425 In its first written submission, the United States identified the measures in dispute and the respective amounts of funding at stake, relying in part on information submitted by the European Communities during the Annex V process and in part on information that was publicly available. In elaborating its claims, the United States has, in a number of instances, asked the Panel to draw adverse inferences, in accordance with paragraph 7 of Annex V, from the fact that the European Communities did not provide all of the data that was requested during the Annex V process.[4656] Although the European Communities has now provided information that was not presented during the Annex V process, we understand the United States to continue to be of the view that the European Communities has failed to disclose all relevant information and that the Panel should draw adverse inferences when establishing the facts surrounding a number of its claims.[4657]

7.1426 With this background in mind, we now review the facts that have been presented in respect of each category of R&TD measures that is the subject of the United States complaint with a view to identifying the precise R&TD measures and funding amounts that are in dispute.

(ii) Grants under the Second Framework Programme

7.1427 The United States asserts that publicly available information shows that the European Communities funded 28 LCA-related projects under the Second Framework Programme, providing a total of EUR 35 million to all participating entities.[4658] The United States submits that Airbus was

[4653] E.g., EC, Answers to Questions by the Facilitator under Annex V, para. 9, Question 132, Sections VI.A.2, VI.A.3, VI.D and VI.D.2.
[4654] EC, Answers to Questions by the Facilitator under Annex V, Questions 279-281.
[4655] E.g., EC, Answers to Questions by the Facilitator under Annex V, Question 132.
[4656] US, FWS, paras. 630, 635, 640, 645, 650, 676, 684, 690 and 702.
[4657] US, Answer to Panel Question 34; US, Comments to EC, Answer to Panel Questions 277 and 278.
[4658] US, FWS, paras. 628 referring to Commission of the European Communities, Directorate-General for Science, Research and Development, *BRITE/EURAM Area 5 – Specific Activities Relating to Aeronautics – Synopses of Projects Supported under the Call for Proposals 1989*, October 1990, Exhibit US-317.

BCI deleted, as indicated **[***]**

involved in 15 of these projects, and that it received EUR 18.75 million.[4659] The European Communities rejects the United States' assertions. According to the European Communities, 53 aeronautic sector projects were funded under the Second Framework Programme, with the "relevant" Airbus entities participating in **[***]**. In total, the data submitted by the European Communities indicates that the "relevant" Airbus entities received just over ECU **[***]**.[4660] The European Communities asserts that it derived the relevant information from "original source documents, notably contracts and payment records".[4661]

7.1428 The United States argues that the information submitted by the European Communities cannot be relied upon as an accurate reflection of the full amount of funding Airbus received because the European Communities has failed to disclose the data from which it was derived. In other words, the United States considers the EC' information to be unreliable because it does not identify all of the LCA-related projects or the full list of participants funded under the Second Framework Programme.[4662] The United States recalls that during the Annex V procedure, the European Communities refused to provide any information on the projects and participants funded under the Second Framework Programme in response to the Facilitator's questions. In the light of this refusal, the United States asks the Panel to draw the adverse inference, pursuant to paragraph 7 of Annex V, that Airbus obtained funding in the amount of EUR 18.75 million under the Second Framework Programme.[4663]

7.1429 Our review of the information submitted by the parties leads us to conclude that there are a number of discrepancies in the data presented by the European Communities suggesting that the total value of the LCA-related funding received by Airbus under the Second Framework Programme has not been disclosed. The European Communities asserts that the list of projects it has identified "coincide with publicly available data".[4664] However, the publicly available information submitted by the United States, which the European Communities has not contested, identifies one project involving Airbus' participation which was not included in the list of projects that was submitted by the European Communities – the "Advanced Study for Active Noise Control in Aircraft (ASANCA)" project.[4665] Furthermore, in respect of two of the projects identified in the European Communities' list, funding provided to British Aerospace and CASA was not disclosed, even though publicly available information indicates that these companies participated in the two projects.[4666] The

[4659] US, FWS, paras. 628-630. The United States arrived at this figure by apportioning 15/28^{ths} of the total amount of funding made available to all entities under the Programme to Airbus, reflecting its alleged participation in 15 of the 28 funded projects. US, FWS, para. 630, footnote 774.

[4660] EC, FWS, paras. 1231 and 1234; EC, Answer to Panel Question 277 citing Exhibits EC-189 (BCI) and EC-968 (BCI). The precise amount disclosed in the information submitted by the European Communities is ECU **[***]**. We note that in Panel Question 277, we specifically asked the European Communities to provide "a break-down of all LCA-related projects in which the entities identified in Answer to Questions 273 to 275 participated" (emphasis added). Although the European Communities appears to suggest in its answer to Panel Question 277 and elsewhere (e.g., EC, FWS, para. 1228) that the list of projects it has submitted is over-inclusive in the sense that it contains funding for non-LCA-related activities, it has not specifically identified which projects must not be taken into account. Neither has it explained exactly why any such projects do not relate to LCA. In the absence of any such identification or explanation, and given the very specific nature of our question, we have treated all of the projects identified by the European Communities as LCA-related.

[4661] EC, FWS, para. 1221.

[4662] US, Answer to Panel Question 34; US, Comments to EC, Answer to Panel Questions 277 and 278.

[4663] US, FWS, para. 630.

[4664] EC, FWS, para. 1231.

[4665] Exhibit US-317 lists the German company "MBB" as one of the project's "partners". As noted above, MBB was part of the Airbus Industrie Consortium and was involved in the development, production and sale of LCA up until at least 1992. *See*, para. 7.1294 above.

[4666] Exhibit US-317 indicates that CASA was one of the "EUROMESH" project "partners" and that British Aerospace as was one of the "All Electric Aircraft" project "partners". The information provided by the European Communities indicates that these two Airbus companies received no funding under these projects.

BCI deleted, as indicated **[***]**

European Communities has provided no valid explanation for these apparent discrepancies. Moreover, in the light of Panel Question 277, we are particularly puzzled as to why the European Communities omitted to provide any details about the ASANCA project, when it had previously, in its first written submission, identified this project and noted that MBB, a company we have found forms part of the Airbus consortium, was a recipient of funding.[4667] Finally, we note that the total amount of Airbus funding disclosed in Exhibit EC-968 (BCI) is miscalculated, because it does not include one contribution (amounting to ECU **[***]**) identified in the same Exhibit as having been provided to a relevant Airbus entity. Thus, the total amount of funding to Airbus actually disclosed by the European Communities must be increased by this same amount.[4668] For all of these reasons, we cannot accept that the information the European Communities has submitted on funding amounts covers all of the relevant monies granted to Airbus under the Second Framework Programme.

7.1430 We recall that the European Communities has not contested the publicly available information submitted by the United States in Exhibit US-317. This information indicates that Airbus participated in **[***]** projects for which the European Communities has provided either no information or incomplete details on the payments to all relevant Airbus entities.[4669] The missing information relates to **[***]** contributions that were apparently made to three Airbus entities.[4670] In our view, these contributions should be added to the funding the European Communities has confirmed Airbus obtained through its participation in the **[***]** projects it has already identified.[4671]

7.1431 Paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Although the European Communities failed to provide information on the funding amounts received and projects undertaken by Airbus under the Second Framework Programme during the Annex V process, it has subsequently, during the course of this panel proceeding, both on its own initiative and in response to Panel Question 277, submitted information that it considers discloses all of the relevant data. Thus, we are not here faced with a situation where a party has failed to supply any part of the requested information. Moreover, we observe that to draw the adverse inference that Airbus received EUR 18.75 million in funding under the Second Framework Programme would, in effect, be to accept that Airbus received **[***]** as much of the funding obtained from **[***]** projects (that is, over EUR **[***]**) from one individual project and contributions to two Airbus companies under two other projects. In our view, there is enough factual evidence before us to indicate that such an outcome would be overly speculative and unreasonable.[4672]

[4667] Exhibit EC-194 (BCI). We recognize that the European Communities explained in this Exhibit that it had not provided any details in respect of this project because it considered MBB was not a "relevant" company. However, in Panel Question 277, we asked the European Communities to provide "a break-down of all LCA-related projects in which the entities identified in Answer to Questions 273 to 275 participated". As MBB was one of the companies identified in the Answers to those questions, information on funding it received under the Second Framework Programme should have been provided. Indeed, this is exactly what the European Communities did for eight other projects funded under the Second Framework Programme which involved MBB. Therefore, we do not understand why the European Communities did not also provide the amounts received by MBB under the ASANCA project.

[4668] Therefore, the precise amount of funding the European Communities disclosed went to Airbus is ECU **[***]**.

[4669] These projects are (by acronym): "EUROMESH"; "All Electric Aircraft"; and "ASANCA".

[4670] These entities were: CASA ("EUROMESH" project); British Aerospace ("All Electric Aircraft" project); and MBB ("ASANCA" project).

[4671] *See*, para. 7.1427 above.

[4672] The European Communities disclosed that the monies made available to Airbus for the ASANCA II project under the Third Framework Programme amounted to EUR **[***]**. Information on the "EUROMESH" and "All Electric Aircraft" projects indicates that Airbus entities other than British Aerospace and CASA received individual grants that ranged from ECU **[***]** to ECU **[***]**. In our view, this evidence strongly suggests that for Airbus to have received over EUR **[***]** from its participation in the ASANCA project and the

BCI deleted, as indicated **[***]**

7.1432 We note that the average amount of funding obtained by Airbus for each contribution received pursuant to **[***]** projects under the Second Framework Programme was ECU **[***]**.[4673] On this basis, the sum total of the **[***]** contributions to Airbus under the **[***]** projects that we believe must be accounted for in the total amount of funding at issue is ECU **[***]**. In our view, it would therefore be reasonable, in the light of the parties' positions and the factual information that is before us, to find that the total amount of funding granted to Airbus under the Second Framework Programme amounted to approximately ECU **[***]**, covering **[***]** separate projects. A list setting out our findings in respect of the **[***]** individual projects that are the subject of the United States' complaint is contained in Annex I.1 to this Section, following para. 7.1609.

(iii) Grants under the Third Framework Programme

7.1433 The United States asserts that publicly available information shows that the European Communities funded 27 aeronautics-related research projects under the Third Framework Programme, providing a total of EUR 56 million to all participating entities.[4674] The United States asks the Panel to find that Airbus participated in 18 of these projects, receiving a total of EUR **[***]**.[4675] The European Communities rejects the United States' assertions. According to the European Communities, 61 aeronautics-related projects were funded under the Third Framework Programme, with the "relevant" Airbus entities participating in **[***]** of those projects.[4676] The European Communities contends that total funding allocated to the aeronautics research sector amounted to EUR 130 million of which the "relevant" Airbus entities received EUR **[***]**.[4677] Again, the European Communities explains that the funding data it submitted was derived from "original source documents, notably contracts and payment records".[4678]

7.1434 The United States argues that the information submitted by the European Communities cannot be relied upon as an accurate reflection of the full amount of funding Airbus received because

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two distributions made to British Aerospace and CASA under the "EUROMESH" and "All Electric Aircraft" projects, would be extraordinary.

[4673] Derived from information contained in Exhibit EC-968 (BCI) (EUR **[***]** / **[***]** contributions).

[4674] US, FWS, paras. 631-634 referring to European Commission, Industrial and Materials Technologies Programme: Area 3, Aeronautics: Synopses of Current Aeronautics Projects (1993), Exhibit US-319.

[4675] The United States arrives at the EUR **[***]** figure by adding (i) the amount of funding it alleges the European Communities disclosed, during the Annex V process, was provided to "Airbus research consortia" participating in 16 aeronautics-related projects (EUR **[***]**) to (ii) an amount representing Airbus' participation in the two additional projects (EUR **[***]**), constructed on the basis of the average funding received by "Airbus research consortia" under the 16 projects confirmed by the European Communities (*i.e.*, EUR **[***]** / 16 projects = EUR **[***]**). US, FWS, paras. 631-632, 635 and footnote 780. During the Annex V process, the European Communities disclosed that EUR **[***]** was provided for 16 projects in which Airbus entities participated, with those entities directly receiving EUR **[***]**.

[4676] EC, FWS, paras. 1231 and 1236, Exhibits EC-190 (BCI) and EC-194 (BCI).

[4677] EC, Answer to Panel Question 277 citing Exhibit EC-969 (BCI); EC, Letter to Panel of 19 February 2008, referring to revisions made in Exhibit EC-993 (BCI). The precise amount disclosed in the information submitted by the European Communities is EUR **[***]**. Again, we note that in Panel Question 277, we specifically asked the European Communities to provide "a break-down of all LCA-related projects in which the entities identified in Answer to Questions 273 to 275 participated" (emphasis added). Although the European Communities appears to suggest in its answer to Panel Question 277 and elsewhere (e.g., EC, FWS, para. 1228) that the list of projects it has submitted is over-inclusive in the sense that it contains funding for non-LCA-related activities, it has not specifically identified which projects must not be taken into account. Neither has it explained exactly why any such projects do not relate to LCA. In the absence of any such identification or explanation, and given the very specific nature of our question, we have treated all of the projects identified by the European Communities as LCA-related.

[4678] EC, FWS, para. 1221.

BCI deleted, as indicated **[***]**

the European Communities has failed to disclose the data from which it was derived.[4679] In addition, the United States argues that the European Communities made no attempt to reconcile the discrepancies between publicly available information and the information it submitted during the Annex V process.[4680] According to the United States, these discrepancies suggest that the European Communities has not reported all of the funding that Airbus entities received under the Third Framework Programme. For instance, the United States asserts that publicly available information establishes that monies under the Third Framework Programme were provided to CASA for participating in two projects – the "Basic Research in Aircraft Interior Noise" and "Crashworthiness for Commercial Aircraft" projects.[4681] However, the information presented by the European Communities indicates that CASA **[***]**, without explaining why the publicly available information submitted by the United States indicates otherwise. Thus, the United States concludes that the information it submitted, showing that Airbus participated in **[***]** projects under the Third Framework Programme, provides the most reliable basis for the Panel to conduct its inquiry into the relevant subsidies.[4682] As we understand it, the United States therefore asks the Panel to find, pursuant to paragraph 7 of Annex V, that Airbus participated in **[***]** projects under the Third Framework Programme, receiving funds in the amount of EUR **[***]**.

7.1435 Our review of the United States' and EC' submissions has revealed shortcomings in the information presented by both parties. For instance, the list of beneficiaries the United States asserts were funded under the Third Framework Programme includes Airbus entities that allegedly received contributions under four projects which cannot be found in the information in the publicly available document submitted as Exhibit US-319.[4683] Although the European Communities acknowledges the existence of all four projects, it does not accept that it has failed to disclose payments made to all Airbus entities that participated in those initiatives.[4684] Thus, we are unable to confirm the United States' contention in respect of the alleged beneficiaries under these four projects. Similarly, the information submitted by the European Communities indicates that Airbus did not receive any funding pursuant to four projects, which the publicly available information presented by the United States indicates did involve Airbus participation.[4685] Moreover, when compared to the same publicly available information, the funding data submitted by the European Communities is incomplete in respect of three other projects because it omits funding that Exhibit US-319 indicates was allocated to CASA.[4686] Again, the European Communities has provided no valid explanation for these apparent discrepancies.

[4679] US, Answer to Panel Question 34; US, Comments to EC, Answer to Panel Questions 277 and 278.

[4680] US, FWS, para. 633.

[4681] US, Comments on EC Answer to Panel Question 277, referring *inter alia*, to European Commission, Industrial and Materials Technologies Programme: Area 3, Aeronautics: Synopses of Current Aeronautics Projects (1993), Exhibit US-319.

[4682] US, Comments on EC Answer to Panel Question 277.

[4683] The United States identifies these projects (by acronym) as: "ASANCA II"; "BREZ-0313"; "BREZ-0151"; and "BREZ-0169 DICANT". Exhibits US-485 and US-689. In respect of the latter three projects, we understand the United States to be referring to the projects the European Communities has identified as "BRE2-0313"; "BRE2-0151"; and "BRE2-0169 PICANT". We have assumed that the reference to "ECARD" in Exhibit US-689 is intended to mean what is identified in Exhibit US-319 and by the European Communities as "ECARP".

[4684] *See*, e.g., Exhibit EC-194 (BCI).

[4685] These projects are (by acronym): "SNAAP"; "NS Solvers"; "FANPAC"; and "AERONOX". We note that the European Communities did identify a project described as "Aeroacoustic Methods for Fan Noise Prediction and Control (FANPAC)" in its submissions. However, the associated contract number, proposal number and acronym provided by the European Communities for this project did not match the publicly available information. Compare Exhibit EC-969 (BCI) (line 6) with Exhibit US-319 (p.15).

[4686] The projects are (by acronym): "BRAIN"; "CRASHWORTHINESS"; and "IMAGES 2000".

BCI deleted, as indicated **[***]**

7.1436 We recall that the European Communities has not contested the publicly available information submitted by the United States in Exhibit US-319. This information indicates that Airbus participated in **[***]** projects for which the European Communities has provided either no information or incomplete details on the payments to all relevant Airbus entities.[4687] The missing information relates to **[***]** contributions that were apparently made to five Airbus entities.[4688] In our view, these contributions should be added to the funding the European Communities has confirmed Airbus obtained through its participation in the **[***]** projects it has already identified.[4689]

7.1437 Paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Although the European Communities failed to provide all of the information requested on the funding amounts received and projects undertaken by Airbus under the Third Framework Programme during the Annex V process, it has subsequently, during the course of this panel proceeding, both on its own initiative and in response to Panel Question 277, submitted additional information that it considers discloses all of the relevant data. Thus, we are not here faced with a situation where a party has failed to supply any part of the requested information. Moreover, we observe that, as with the Second Framework Programme, publicly available information shows that Airbus participated in the Third Framework Programme research initiatives as one of several entities (the number of parties involved in each of the relevant projects ranged from eight to 35). Thus, we cannot simply accept, as the United States suggests, that the full amount of funding provided to all participants under each of the projects must be allocated to Airbus.

7.1438 We note that the average amount of funding obtained by Airbus for each contribution received pursuant to **[***]** projects under the Third Framework Programme was EUR **[***]**.[4690] On this basis, the sum total of the **[***]** contributions to Airbus under the **[***]** projects that we believe must be accounted for in the total amount of funding at issue is EUR **[***]**. In our view, it would therefore be reasonable, in the light of the parties' positions and the factual information that is before us, to find that the total amount of funding granted to Airbus under the Third Framework Programme amounted to approximately EUR **[***]**, covering **[***]** separate projects. A list setting out our finding in respect of the **[***]** individual projects that are the subject of the United States' complaint is contained in Annex I.2 to this Section, following para. 7.1609.

(iv) Grants under the Fourth Framework Programme

7.1439 The United States asserts that publicly available information shows that the European Communities funded 139 aeronautics-related research projects under the Fourth Framework Programme, providing a total of EUR 245 million to all participating entities.[4691] The United States asks the Panel to find that Airbus participated in 71 of these projects, receiving a total of

[4687] These projects are: (by acronym): "SNAAP"; "NS Solvers"; "FANPAC"; and "AERONOX" (no information); "BRAIN"; "CRASHWORTHINESS"; and "IMAGES 2000" (information on contributions to CASA missing).

[4688] These entities were: Aérospatiale ("SNAAP", "NS Solvers", "FANPAC", "EUROSHOCK" projects); Bae Airbus ("AERONOX", "EUROSHOCK" projects); Bae Sowerby Research Center ("NS Solvers" project); Deutsche Aerospace Airbus GmbH ("FANPAC", "EUROSHOCK" projects); and CASA ("BRAIN", "CRASHWORTHINESS", "IMAGES 2000", "EUROSHOCK" projects).

[4689] *See*, para. 7.1433 above.

[4690] Derived from information contained in Exhibits EC-969 (BCI) and EC-993 (BCI) (EUR **[***]** / **[***]** contributions).

[4691] US, FWS, para. 636 referring to European Commission, Fourth Framework Programme, Aeronautics Related Research, Synopses of Current Projects Selected Under the 1995 Call for Proposals, at xix, xxi (Area 3A Aeronautics Technologies) (1996), Exhibit US-314, and European Communities online project synopses at *www.cordis.europa.eu*.

BCI deleted, as indicated **[*******]**

EUR **[*******]**.[4692] The European Communities rejects the United States' assertions. According to the European Communities, 126 aeronautics-related projects were funded under the Fourth Framework Programme with the "relevant" Airbus entities participating in **[*******]** of those projects.[4693] Of the EUR 245 million in funding allocated to the aeronautics research sector, the European Communities asserts that the "relevant" Airbus entities received EUR **[*******]**.[4694] Again, the European Communities explains that the funding data it submitted was derived from "original source documents, notably contracts and payment records".[4695]

7.1440 The United States argues that the information submitted by the European Communities cannot be relied upon as an accurate reflection of the full amount of funding Airbus received under the Fourth Framework Programme because it does not identify all of the LCA-related projects or the full list of participants funded.[4696] Moreover, the United States argues that the European Communities made no attempt to reconcile the discrepancies between publicly available information and the information it submitted during the Annex V process.[4697] According to the United States, these discrepancies suggest that the European Communities has not reported all of the funding that Airbus entities received under the Fourth Framework Programme. Thus, the United States argues that the publicly available information it submitted, showing that Airbus participated in 71 projects under the Fourth Framework Programme, provides the most reliable basis for the Panel to conduct its inquiry into the relevant subsidies.[4698] As we understand it, the United States therefore asks the Panel to find, pursuant to paragraph 7 of Annex V, that Airbus participated in 71 projects under the Fourth Framework Programme, receiving funds in the amount of EUR **[*******]**.

7.1441 Our review of the United States' and EC' submissions has revealed shortcomings in the information presented by both parties. For instance, the United States identifies one project and three beneficiaries of other projects under the Fourth Framework Programme that cannot be verified in the publicly available information.[4699] In addition, the United States' latest submission incorrectly

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[4692] The United States arrives at the EUR **[***]** figure by adding (i) the amount of funding it alleges the European Communities disclosed, during the Annex V process, was provided to "Airbus research consortia" participating in **[***]** aeronautics-related projects (EUR **[***]**) to (ii) an amount representing Airbus' participation in the 39 additional projects (EUR **[***]**), constructed on the basis of the average funding received by "Airbus research consortia" under the **[***]** projects confirmed by the European Communities (*i.e.*, EUR **[***]** / **[***]** projects = EUR **[***]** / project). US, FWS, paras. 636-637, 640 and footnote 786. During the Annex V process, the European Communities disclosed that EUR **[***]** was provided for **[***]** projects in which Airbus entities participated, with those entities directly receiving EUR **[***]**.

[4693] EC, FWS, paras. 1231 and 1238.

[4694] EC, Answer to Panel Question 277 citing Exhibit EC-970 (BCI). The precise amount disclosed in the information submitted by the European Communities is EUR **[***]**. Again, we note that in Panel Question 277, we specifically asked the European Communities to provide "a break-down of all LCA-related projects in which the entities identified in Answer to Questions 273 to 275 participated" (emphasis added). Although the European Communities appears to suggest in its answer to Panel Question 277 and elsewhere (e.g., EC, FWS, para. 1228) that the list of projects it has submitted is over-inclusive in the sense that it contains funding for non-LCA-related activities, it has not specifically identified which projects must not be taken into account. Neither has it explained exactly why any such projects do not relate to LCA. In the absence of any such identification or explanation, and given the very specific nature of our question, we have treated all of the projects identified by the European Communities as LCA-related.

[4695] EC, FWS, para. 1221.

[4696] US, Answer to Panel Question 34; US, Comments to EC, Answer to Panel Questions 277 and 278.

[4697] US, FWS, para. 638.

[4698] US, Comments on EC Answer to Panel Question 277.

[4699] These discrepancies relate to: (i) the "AEROJET" project, the existence of which cannot be verified in the publicly available information submitted by the parties; and (ii) the "AERONET", "AFMS" "GASCA", "INGENET", "ADSTREFF" projects, where the alleged beneficiaries under the project, EADS, GIE and EADS-CASA, cannot be found in the publicly available information submitted by the parties. (We have assumed that the United States reference to the "ADSTREFFEX" project is intended to be a reference to what is

BCI deleted, as indicated **[***]**

asserts that the European Communities failed to disclose funding amounts provided to six Airbus entities, which the European Communities has in fact disclosed.[4700] Similarly, the information submitted by the European Communities fails to disclose the funding received by Airbus under 11 projects, which the publicly available information presented by the United States indicates involved Airbus participation.[4701] Moreover, when compared to the same publicly available information, the funding data submitted by the European Communities is incomplete in respect of six additional projects because it fails to identify the funding that went to BAE Systems Aviones Ltd., EADS GIE, CASA and DASA Airbus, whose participation in the "ENHANCE", "EDAVCOS", "ELGAR", "EUROSUP", "ISAWARE" and "PROFOCE" projects was confirmed in the publicly available information. Again, the European Communities has provided no valid explanation for these apparent discrepancies between the data it has provided and the publicly available information.

7.1442 We recall that the European Communities has not contested the publicly available information relied upon by the United States. This information indicates that Airbus participated in **[***]** projects for which the European Communities has provided either no information or incomplete details on the payments to all relevant Airbus entities.[4702] The missing information relates to **[***]** contributions that publicly available information suggests were made to eight Airbus entities.[4703] In our view, these contributions should be added to the funding the European Communities has confirmed Airbus obtained through its participation in the **[***]** projects it has already identified.[4704]

7.1443 Paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Although the European Communities failed to provide all of the information requested on the funding amounts

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identified in the publicly available information as the "ADSTREFF" project). Compare Exhibit US-689 with information contained in Exhibits US-314 and EC-970 (BCI) and the relevant Programme synopses of projects at *http://www.cordis.europa.eu.*

[4700] The six beneficiaries are: CASA, under the "ENIFAIR" "ENHANCE" and "HYLDA" projects; Aérospatiale-Matra SA, under the "ADSTREFF" project; BAE Systems (Operations) Ltd., under the "ADSTREFF", "HYLTEC" and "BRPR-97-0551" projects; Airbus UK, under the "ENHANCE" project; Daimler Benz Aerospace AG, under the "ENHANCE" and CEDIX projects; and Airbus Industrie, under the "HYLDA" projects. (We note that for the "ENHANCE", "HYLDA" and CEDIX projects, the United States and publicly available information identifies Daimler Benz Aerospace AG and Airbus Industrie as the beneficiaries, whereas the European Communities identifies Airbus Deutschland, Airbus France and EADS Deutschland. We have assumed that the European Communities' disclosure includes the amounts of funding obtained by the beneficiaries identified in the publicly available information.) Compare Exhibits US-689 and EC-970 (BCI).

[4701] These projects are (by acronym): "AIRDATA"; "AERONET"; "AEROJET II"; "AEROPROFILE"; "AFMS"; "VINTHEC"; Investigation of the Viability of MEMS Technology for Boundary Layer Control on Aircraft (this project has no acronym, we have assumed that it is the project the US refers to with the acronym "MEMS"); "DAMASCOS"; "HICAS"; "WAVENC" and Non-Intrusive Measurements of Aircraft Engine Emissions (this project has no acronym). Compare Exhibit EC-970 (BCI) with Exhibit US-314 and the relevant Programme synopses of projects at *www.cordis.europa.eu*

[4702] These projects are (by acronym): "AIRDATA"; "AERONET"; "AEROJET II"; "AEROPROFILE"; "AFMS"; "GASCA"; "INGENET"; "VINTHEC"; "DAMASCOS"; "HICAS"; "WAVENC"; Investigation of the Viability of MEMS Technology for Boundary Layer Control on Aircraft (this project has no acronym); Non-Intrusive Measurements of Aircraft Engine Emissions (this project has no acronym); and "ENHANCE"; "EDAVCOS"; "ELGAR"; "EUROSUP"; ISAWARE" and "PROFOCE" (information on contributions to BAE Sytems Aviones Ltd., EADS GIE, CASA and DASA Airbus missing).

[4703] These entities were: BAE Systems (Operations) Ltd ("AIRDATA", "AERONET", "AEROJET II", "AEROPROFILE", "VINTHEC", Investigation of the Viability of MEMS Technology for Boundary Layer Control on Aircraft, "HICAS" and Non-Intrusive Measurements of Aircraft Engine Emissions (this project has no acronym)); BAE Sowerby Research Centre ("AIRDATA"); DASA ("AFMS"); Daimler Benz Aerospace AG ("DAMASCOS"); BAE Sytems Aviones Ltd ("ENHANCE" and "ISAWARE"); EADS GIE ("EDAVCOS" and "PROFOCE"); CASA ("ELGAR"); DASA Airbus ("EUROSUP"); Aérospatiale-Matra ("WAVENC").

[4704] *See*, para. 7.1439 above.

BCI deleted, as indicated **[***]**

received and projects undertaken by Airbus under the Fourth Framework Programme during the Annex V process, it has subsequently, during the course of this panel proceeding, both on its own initiative and in response to Panel Question 277, submitted additional information that it considers discloses all of the relevant data. Thus, we are not here faced with a situation where a party has failed to supply any part of the requested information. Moreover, we observe that, as with the previous Framework Programmes, publicly available information shows that Airbus participated in the Fourth Framework Programme research initiatives as one of several entities (the number of parties involved in each of the relevant projects ranged from five to 24). Thus, we cannot simply accept, as the United States suggests, that the full amount of funding provided to all participants under each of the projects must be allocated to Airbus.

7.1444 We note that the average amount of funding obtained by Airbus for each contribution received pursuant to **[***]** projects under the Fourth Framework Programme was EUR **[***]**.[4705] On this basis, the sum total of the **[***]** contributions to Airbus under the **[***]** projects that we believe must be accounted for in the total amount of funding at issue is EUR **[***]**. In our view, it would therefore be reasonable, in the light of the parties' positions and the factual information that is before us, to find that the total amount of funding granted to Airbus under the Fourth Framework Programme amounted to approximately EUR **[***]**, covering **[***]** separate projects. A list setting out our finding in respect of the **[***]** individual projects that are the subject of the United States' complaint is contained in Annex I.3 to this Section, following para. 7.1609.

(v) Grants under the Fifth Framework Programme

7.1445 The United States asserts that publicly available information shows that during the Fifth Framework Programme, the European Communities allocated EUR 700 million to aeronautics-related research projects.[4706] According to the United States, the same publicly available information indicates that "Airbus research consortia" participated in 72 of these projects, receiving EUR 509 million. In the absence of more detailed and precise information on Airbus' participation in these projects, the United States asks the Panel to attribute the full amount of EUR 509 million to Airbus.[4707] The European Communities rejects the United States' assertions. According to the European Communities, 152 aeronautics-related projects were funded under the Fifth Framework Programme, with the "relevant" Airbus entities participating in **[***]** of those projects.[4708] Of the EUR 700 million in funding allocated to the aeronautics research sector, the European Communities asserts that the "relevant" Airbus entities received EUR **[***]**.[4709] Again, the European Communities

[4705] Derived from information contained in Exhibit EC-970 (BCI) (EUR **[***]** / **[***]** contributions).

[4706] US, FWS, para. 641 referring to European Commission, The Competitive and Sustainable Growth Programme, 1998-2002 Project Synopses: New Perspectives in Aeronautics (2003), at xi, Exhibit US-322, and European Communities online project synopses at *www.cordis.europa.eu*.

[4707] US, FWS, para. 645.

[4708] EC, FWS, paras. 1231 and 1240.

[4709] EC, Answer to Panel Question 277 citing Exhibit EC-971 (BCI). The precise amount disclosed by the European Communities is EUR **[***]**. Again, we note that in Panel Question 277, we specifically asked the European Communities to provide "a break-down of all LCA-related projects in which the entities identified in Answer to Questions 273 to 275 participated" (emphasis added). Although the European Communities appears to suggest in its answer to Panel Question 277 and elsewhere (e.g., EC, FWS, para. 1228) that the list of projects it has submitted is over-inclusive in the sense that it contains funding for non-LCA-related activities, it has not specifically identified which projects must not be taken into account. Neither has it explained exactly why any such projects do not relate to LCA. In the absence of any such identification or explanation, and given the very specific nature of our question, we have treated all of the projects identified by the European Communities as LCA-related.

explains that the funding data it submitted was derived from "original source documents, notably contracts and payment records".[4710]

7.1446 The United States argues that the information submitted by the European Communities cannot be relied upon as an accurate reflection of the full amount of funding Airbus received under the Fifth Framework Programme because it does not identify all of the LCA-related projects or the full list of participants funded.[4711] Moreover, the United States argues that the European Communities made no attempt to reconcile the discrepancies between publicly available information and the information it submitted during the Annex V process.[4712] According to the United States, these discrepancies suggest that the European Communities has not reported all of the funding that Airbus entities received under the Fifth Framework Programme. Thus, the United States argues that the publicly available information it submitted, showing that Airbus participated in **[***]** projects under the Fifth Framework Programme, provides the most reliable basis for the Panel to conduct its inquiry into the relevant subsidies.[4713] As we understand it, the United States therefore asks the Panel to find, pursuant to paragraph 7 of Annex V, that Airbus participated in **[***]** projects under the Fifth Framework Programme, receiving funds in the amount of EUR 509 million.

7.1447 Our review of the United States' and EC' submissions has revealed shortcomings in the information presented by both parties. For instance, the United States identifies one project and four beneficiaries of other projects under the Fifth Framework Programme that cannot be verified in the publicly available information.[4714] In addition, the United States' latest submission incorrectly asserts that the European Communities has failed to disclose funding amounts provided to two Airbus entities, which the European Communities has in fact disclosed.[4715] Similarly, the information submitted by the European Communities fails to disclose the funding received by Airbus under seven projects, which the publicly available information presented by the United States indicates involved Airbus participation.[4716] ""The European Communities has provided no valid explanation for these apparent discrepancies between the data it has provided and the publicly available information. Finally, we note that the total amount of Airbus funding disclosed in Exhibit EC-971 (BCI) is miscalculated, because it does not include various sums of monies (amounting to EUR **[***]**) identified in the same Exhibit as having been provided to individual Airbus entities. Thus, the total amount of funding to Airbus actually disclosed by the European Communities is approximately EUR **[***]**[4717] not EUR **[***]**.

7.1448 The European Communities has not contested the publicly available information submitted by the United States in Exhibit US-322. This information indicates that Airbus participated in **[***]**

[4710] EC, FWS, para. 1221.

[4711] US, Answer to Panel Question 34; US, Comments to EC, Answer to Panel Questions 277 and 278.

[4712] US, FWS, para. 643.

[4713] US, Comments on EC Answer to Panel Question 277.

[4714] These discrepancies relate to: (i) the "COMPOSIT" project, the existence of which cannot be verified in the publicly available information submitted by the parties; (ii) the "ADAMS2" project, where the United States identifies BAE Systems (Operations) Ltd. as a beneficiary, but publicly available information and the European Communities identify the beneficiary as Airbus UK; and (iii) the "ENABLE", "FUBACOMP" and "MA-AFAS" projects, where the alleged beneficiaries under the respective projects, EADS Deutschland GmbH, GIE EADS and BAE Systems (Operations) Ltd., cannot be found in the publicly available information submitted by the parties. Compare Exhibit US-689 with information contained in Exhibits US-322 and EC-972 (BCI) and the relevant Programme synopses of projects at *www.cordis.europa.eu*.

[4715] The two beneficiaries are GIE Airbus Industrie under the "AERONET II" project and EADS GIE under the "EECS" project. Compare Exhibits US-689 with EC-972 (BCI).

[4716] These projects are (by acronym): "AEROFIL"; "FUBACOMP"; "HEACE"; "HiAER"; "MA-AFAS"; "MOB" and "VINTHEC II". Compare Exhibit EC-971 (BCI) with Exhibit US-322 and the European Communities online project synopses at *www.cordis.europa.eu*.

[4717] The precise amount is EUR **[***]**.

BCI deleted, as indicated **[***]**

projects for which the European Communities has provided either no information or incomplete details on the payments to all relevant Airbus entities.[4718] The missing information relates to **[***]** contributions that publicly available information suggests were made to five Airbus entities.[4719] In our view, these contributions should be added to the funding the European Communities has confirmed Airbus obtained through its participation in the **[***]** projects it has already identified.[4720]

7.1449 We recall that paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Although the European Communities failed to provide all of the information requested on the funding amounts received and projects undertaken by Airbus under the Fifth Framework Programme during the Annex V process, it has subsequently, during the course of this panel proceeding, both on its own initiative and in response to Panel Question 277, submitted additional information that it considers discloses all of the relevant data. Thus, we are not here faced with a situation where a party has failed to supply any part of the requested information. Moreover, we observe that, as with all previous Framework Programmes, publicly available information shows that Airbus participated in the Fifth Framework Programme research initiatives as one of several entities (the number of parties involved in each of the relevant projects ranged from six to 48). Thus, we cannot simply accept, as the United States suggests, that the full amount of funding provided to all participants under each of the projects must be allocated to Airbus.

7.1450 We note that the average amount of funding obtained by Airbus for each contribution received pursuant to **[***]** projects under the Fifth Framework Programme was EUR **[***]**.[4721] On this basis, the sum total of the **[***]** contributions to Airbus under the **[***]** projects that we believe must be accounted for in the total amount of funding at issue is EUR **[***]**. This compares with a total European Communities contribution to all 98 participants in the same **[***]** projects of EUR 30.5 million.[4722] In our view, it would therefore be reasonable, in the light of the parties' positions and the factual information that is before us, to find that the total amount of funding granted to Airbus under the Fifth Framework Programme amounted to approximately EUR **[***]**, covering **[***]** separate projects. A list setting out our finding in respect of the **[***]** individual projects that are the subject of the United States' complaint is contained in Annex I.4 to this Section, following para. 7.1609.

(vi) Grants under the Sixth Framework Programme

7.1451 The United States asserts that publicly available information shows that during the Sixth Framework Programme, EUR 840 million was used by the European Communities to fund aeronautics-related research projects.[4723] According to the United States, the same publicly available information indicates that "Airbus research consortia" participated in 61 of these projects, receiving EUR 450 million. In the absence of more detailed and precise information on Airbus' participation in these projects, the United States asks the Panel to attribute the full amount of EUR 450 million to Airbus.[4724] The European Communities rejects the United States' assertions. According to the

[4718] These projects are (by acronym): "AEROFIL"; "FUBACOMP"; "HEACE"; "HiAER"; "MA-AFAS"; "MOB"; and "VINTHEC II".

[4719] These entities were: GIE EADS ("AEROFIL"); EADS Deutschland GmbH ("HEACE" and "HiAER"); BAE Systems (Operations) Ltd ("VINTHEC", "MOB" and "FUBACOMP"); BAE Systems Avionics Ltd. ("MA-AFAS") and Daimler-Chrysler Aerospace ("MOB").

[4720] *See*, para. 7.1445 above.

[4721] Derived from information contained in Exhibit EC-971 (BCI) (EUR **[***]** / **[***]** contributions).

[4722] Exhibit US-322.

[4723] US, FWS, paras. 646, referring to European Commission, Aeronautics Research 2003-2006 Projects, Project Synopses – Volume 1, Research Projects from the First and Second Calls (2006), Exhibit US-324, and European Communities' online project synopses at *www.cordis.europa.eu.*

[4724] US, FWS, paras. 646 and 650.

BCI deleted, as indicated **[***]**

European Communities, 93 aeronautics-related projects were funded under the Sixth Framework Programme, with the "relevant" Airbus entities participating in **[***]** of those projects.[4725] The European Communities contends that total funding allocated to the aeronautics research sector amounted to EUR 840 million, of which the "relevant" Airbus entities received EUR **[***]**.[4726] Again, the European Communities explains that the funding data it submitted was derived from "original source documents, notably contracts and payment records".[4727]

7.1452 The United States argues that the information submitted by the European Communities cannot be relied upon as an accurate reflection of the full amount of funding Airbus received because the European Communities has failed to disclose the data from which it was derived.[4728] In addition, the United States argues that the European Communities made no attempt to reconcile the discrepancies between publicly available information and the information it submitted during the Annex V process.[4729] According to the United States, these discrepancies suggest that the European Communities has not reported all of the funding that Airbus entities received under the Sixth Framework Programme. Thus, the United States concludes that the information it submitted, showing that Airbus participated in 61 projects under the Sixth Framework Programme, provides the most reliable basis for the Panel to conduct its inquiry into the relevant subsidies.[4730] As we understand it, the United States therefore asks the Panel to find, pursuant to paragraph 7 of Annex V, that Airbus participated in 61 projects under the Sixth Framework Programme, receiving funds in the amount of EUR 450 million.

7.1453 Our review of the United States' and EC' submissions has revealed shortcomings in the information presented by both parties. For instance, the United States identifies two alleged beneficiaries of four separate projects under the Sixth Framework Programme that cannot be verified in the publicly available information.[4731] In addition, the United States' latest submission incorrectly asserts that the European Communities failed to disclose the funding amount provided to one other Airbus entity, which the European Communities has in fact disclosed.[4732] Similarly, the information submitted by the European Communities indicates that Airbus did not receive any funding pursuant to twenty projects, which the publicly available information presented by the United States shows did involve Airbus participation.[4733] Moreover, when compared to the same publicly available

[4725] EC, FWS, paras. 1231 and 1236, Exhibits EC-193 (BCI) and EC-194 (BCI).

[4726] EC, Answer to Panel Question 277 citing Exhibit EC-972 (BCI). The precise amount disclosed in the information submitted by the European Communities is EUR **[***]**. Again, we note that in Panel Question 277, we specifically asked the European Communities to provide "a break-down of all LCA-related projects in which the entities identified in Answer to Questions 273 to 275 participated" (emphasis added). Although the European Communities appears to suggest in its answer to Panel Question 277 and elsewhere (e.g., EC, FWS, para. 1228) that the list of projects it has submitted is over-inclusive in the sense that it contains funding for non-LCA-related activities, it has not specifically identified which projects must not be taken into account. Neither has it explained exactly why any such projects do not relate to LCA. In the absence of any such identification or explanation, and given the very specific nature of our question, we have treated all of the projects identified by the European Communities as LCA-related.

[4727] EC, FWS, para. 1221.

[4728] US, Answer to Panel Question 34; US, Comments to EC, Answer to Panel Questions 277 and 278.

[4729] US, FWS, para. 648.

[4730] US, Comments on EC Answer to Panel Question 277.

[4731] These alleged beneficiaries are: EADS Deutschland GmbH under the "DINAMIT" project; and GIE EADS under the "DEEPWELD", "ITOOL" and "IFATS" projects.

[4732] This entity is: GIE EADS CCR under the "DIALFAST" project. Compare Exhibits US-689 and EC-972 (BCI).

[4733] These projects are (by acronym): "ADLAND"; "ARTIMA"; "ATENAA"; "B-VHF"; "DEEPWELD"; "DESIDER"; "EMMA"; "HILAS"; "HISAC"; "IFATS"; "IPAS"; "iTOOL"; "MESEMA"; "MOWGLY"; "RETINA"; "UFAST"; "SEFA"; "WISE"; "ASAS-TN2"; and "C-ATM (PHASE 1)". For the purpose of this list, we have assumed that the United States' reference to a project identified as "ATEENA" was

BCI deleted, as indicated **[***]**

information, the funding data submitted by the European Communities is incomplete in respect of two other projects because it omits funding that the publicly available information shows was allocated to Airbus Spain and Airbus France.[4734] Again, the European Communities has provided no valid explanation for these apparent discrepancies.

7.1454 We recall that the European Communities has not contested the publicly available information relied upon by the United States. This information indicates that Airbus participated in **[***]** projects for which the European Communities has provided either no information or incomplete details on the payments to all relevant Airbus entities.[4735] The missing information relates to **[***]** contributions that were apparently made to eight Airbus entities.[4736] In our view, these contributions should be added to the funding the European Communities has confirmed Airbus obtained through its participation in the **[***]** projects it has already identified.[4737]

7.1455 Paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Although the European Communities failed to provide all of the information requested on the funding amounts received and projects undertaken by Airbus under the Sixth Framework Programme during the Annex V process, it has subsequently, during the course of this panel proceeding, both on its own initiative and in response to Panel Question 277, submitted additional information that it considers discloses all of the relevant data. Thus, we are not here faced with a situation where a party has failed to supply any part of the requested information. Moreover, we observe that, as with all the Framework Programmes, publicly available information shows that Airbus participated in the Sixth Framework Programme research initiatives as one of several entities (the number of parties involved in each of the relevant projects ranged from seven to 62). Thus, we cannot simply accept, as the United States suggests, that the full amount of funding provided to all participants under each of the projects must be allocated to Airbus.

7.1456 We note that the average amount of funding obtained by Airbus for each contribution received pursuant to **[***]** projects under the Sixth Framework Programme was EUR **[***]**.[4738] On this basis, the sum total of the **[***]** contributions to Airbus under the **[***]** projects that we believe must be accounted for in the total amount of funding at issue is EUR **[***]**. This compares with a total EC contribution to all **[***]** participants in the same **[***]** projects of EUR **[***]**. In our view, it would be reasonable, in the light of the parties' positions and the factual information that is before us, to find that the total amount of funding granted to Airbus under the Sixth Framework Programme amounted to approximately EUR **[***]**, covering **[***]** separate projects. A list setting out our

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intended to be the "ATENAA" project. Compare Exhibit EC-972 (BCI) with Exhibit US-324 and the relevant Programme synopses of projects at *www.cordis.europa.eu*.

[4734] The projects are (by acronym): "TATEM" and "SMIST".

[4735] These projects are: (by acronym): "ADLAND"; "ARTIMA"; "ATENAA"; "B-VHF"; "DEEPWELD"; "DESIDER"; "EMMA"; "HILAS"; "HISAC"; "IFATS"; "IPAS"; "iTOOL"; "MESEMA"; "MOWGLY"; "RETINA"; "UFAST"; "SEFA"; "WISE"; "ASAS-TN2"; and "C-ATM (PHASE 1)" (no information); "TATEM" and "SMIST" (information on contributions to Airbus Spain and Airbus France missing).

[4736] These entities were: EADS Deutschland ("ADLAND", "ARTIMA", "ATENAA", "DESIDER", "HISAC", "iTOOL", "MESEMA", "RETINA", "UFAST", "SEFA" and "WISE" projects); BAE Systems (Operations) Ltd. ("B-VHF", "HILAS", "IPAS" and "ASAS-TN2" projects); Airbus France ("EMMA", "SMIST" and "C-ATM (PHASE 1)" projects); Airbus Deutschland ("MOWGLY" project); EADS CCR ("IPAS" and "DEEPWELD" projects); Airbus Spain ("TATEM" project); BAE Systems Avionics Ltd. ("EMMA" and "C-ATM (PHASE 1)" projects); EADS Systems and Defence Electronics SA ("IFATS" project); EADS Astrium ("IPAS" project).

[4737] *See*, para. 7.1451 above.

[4738] Derived from information contained in Exhibit EC-972 (BCI) (EUR **[***]** / **[***]** contributions).

BCI deleted, as indicated **[***]**

finding in respect of the **[***]** individual projects that are the subject of the United States' complaint is contained in Annex I.5 to this Section, following para. 7.1609.

(vii) German Federal government grants

7.1457 The United States challenges the German Federal government's alleged provision of EUR 217 million to Airbus for civil aeronautics research under the LuFo I, LuFo II and LuFo III programmes.[4739] The European Communities argues the amount of alleged German Federal government subsidization under the LuFo programmes that may be properly challenged is limited to EUR **[***]**.[4740] According to the European Communities, this amount is the maximum level of funding that may be challenged because it represents the monies actually *disbursed* by the German Federal government to Airbus under the LuFo programmes as of 1 July 2005 (the alleged cut-off date used by the United States in its first written submission)[4741]. While the European Communities acknowledges that as of 1 July 2005, the German Federal government had *committed* to provide Airbus with approximately an additional EUR **[***]** (bringing the total amount of funding to EUR **[***]**),[4742] the European Communities does not accept that this additional EUR **[***]** can be properly challenged in this dispute.[4743]

7.1458 As we understand it, the European Communities' position is premised on the view that a government practice involving the *commitment* of funds, without any actual disbursement of those funds, cannot amount to a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. We will address the merits of this position in the substance of our evaluation of the United States' claims against the LuFo programmes.[4744]

(viii) German sub-federal government grants

Bavaria

7.1459 The United States asserts that the government of Bavaria has, since 1990, provided Airbus with at least EUR **[***]** in R&TD grants under various civil aeronautics programmes including the Offensive Zukunft Bayern (established in 1995), the Offensive Zukunft Bayern II (established in 1996) and the Bayerisches Luftfahrtforschungsprogramm (established in 2000).[4745] The European Communities acknowledges that the Bavarian government awarded nine project grants, totalling EUR **[***]**, to Daimler Benz Aerospace ("Dasa") and EADS Deutschland in the period 1997 to 2006.[4746] However, it argues that these grants cannot be properly challenged in this dispute because Daimler Benz Aerospace and EADS Deutschland are not relevant Airbus companies and the United States has failed to show how they have benefited Airbus Germany.[4747]

7.1460 We recall that in Section VII.E.1 of this Report, we rejected the European Communities' contentions, finding that a financial contribution provided to any Airbus partner or affiliated entity, or to Airbus GIE, in relation to the development and/or production of an Airbus LCA, potentially confers a benefit on the Airbus Industrie consortium, as the "producer" of Airbus LCA, and Airbus SAS as the

[4739] US, FWS, para. 664; US, SWS, para. 513. Full titles of the Programmes are set out at para. 7.1415 above.
[4740] EC, FWS, para. 1258; EC; SWS, para. 630; EC, Answer to Panel Question 108.
[4741] EC, FWS, para. 1256.
[4742] EC, FWS, paras. 1255-1258; EC, SWS, para. 630.
[4743] EC, FWS, para. 1258; EC; SWS, para. 630; EC, Answer to Panel Question 108.
[4744] *See*, paras. 7.1493-7.1494 below.
[4745] US, FWS, paras. 668-669, referring to grants listed in Exhibit US-329 (BCI).
[4746] EC, FWS, para. 1261 and Exhibit EC-210 (BCI).
[4747] EC, FWS, para. 1262.

BCI deleted, as indicated **[***]**

successor corporate entity.[4748] As we have previously explained, Dasa was a member of the Airbus Industrie consortium. Likewise, EADS Deutschland was a subsidiary of Dasa, later contributed to EADS.[4749] Moreover, we note that the European Communities does not assert that the R&TD grants at issue were not intended to support LCA development. Accordingly, we will proceed to examine the merits of the United States' claims against all nine Bavarian government R&TD grants of EUR **[***]** identified in the parties' first written submissions.

Bremen

7.1461 The United States asserts that publicly available information confirms that, between 1999 and 2006, the government of Bremen provided a total of EUR 11 million in grants to Airbus for aeronautics-specific research under the Airbus Materials and System Technology I and II programmes ("AMST I" and "AMST II").[4750] According to the United States, the European Communities has failed to explain the discrepancy between the amount of funding it conceded, during the Annex V process, was received by Airbus (EUR **[***]**), and the EUR 11 million that publicly available information shows was provided by the government of Bremen. In this light, the United States asks the Panel to find, in accordance with paragraph 7 of Annex V, that the government of Bremen provided Airbus with EUR 11 million in subsidies under the AMST I and AMST II programmes.[4751]

7.1462 The European Communities submits that Airbus Germany received EUR **[***]** for participating in nine projects under the AMST I programme and a further EUR **[***]** for five projects under the AMST II programme, bringing the total amount of R&TD funding obtained by Airbus Germany under both programmes to EUR **[***]**.[4752] According to the European Communities, the alleged level of funding set out in the United States' submissions overstates the amount of funding actually provided to Airbus Germany because it includes payments to recipients other than Airbus. In particular, the European Communities asserts that under the AMST I programme, monies were made available to three research institutes, namely the Fraunhofer Institute for Manufacturing Technology and Applied Materials Research, the Bremen Institute for Applied Jet-Propulsion Technology, and the Institute for Materials Technology.[4753] The European Communities discloses the precise amounts it alleges were received by these institutes (approximately EUR **[***]**) in a table set out in its first written submission. Thus, the European Communities asks the Panel to find that the R&TD support to Airbus Germany under AMST I and AMST II was limited to EUR **[***]**.[4754]

7.1463 As we understand it, the publicly available information that the United States relies upon to establish that Airbus received EUR 11 million under the AMST programmes is a press release issued by a Senator of Economics of the City of Bremen, Dr Peter Gloystein. This press release appears to repeat a speech made by Senator Gloystein at the "'Richtfest' (topping-out ceremony) of the new Halls

[4748] *See*, paras. 7.192 - 7.200 above.

[4749] We recall that prior to the EADS combination, the LCA-related assets and activities of Dasa were reorganized into various subsidiaries, including (i) a subsidiary called DaimlerChrysler Aerospace Beteiligungs GmbH, which held 99.99 percent of the shares in DaimlerChrysler Aerospace Airbus GmbH, which in turn held 37.9 percent of the membership rights in Airbus GIE; and (ii) a subsidiary called EADS Deutschland GmbH, to which various other assets and liabilities of Dasa were contributed. These Dasa subsidiaries were then contributed to EADS. *See*, footnote 2187 above.

[4750] US, FWS, para. 674, referring to Exhibits US-334 (Bremische Bürgerschaft, Drucksache 15/1115, April 16, 2002, Mitteilung des Senats vom 16. April 2002 - Technologieoffensive für das Land Bremen, Annex, InnoVision 2010 - Bremer Innivationsoffensive, April 2002, p. 20) and US-335 (Freie Hansestadt Bremen, Wirtschaftssenator Dr. Peter Gloystein: "Luftfahrzeugbau eine der Schlüsselindustrien in Bremen," press release of October 8, 2004).

[4751] US, FWS; para. 676; US, SWS, paras. 508-509.

[4752] EC, FWS, para. 1272, referring to Exhibit EC-212 (BCI).

[4753] EC, FWS, paras. 1269 and 1272; EC, SWS, para. 637.

[4754] EC, FWS, para. 1272; EC, SWS, paras. 637-638.

BCI deleted, as indicated **[***]**

400 and 57 at Airbus Bremen". Its title is "Aircraft construction one of the key industries in Bremen". The particular passage that indicates the amount of funding allegedly provided to Airbus reads: "The Senate is making a palpable contribution to improving the performance and competitiveness of the Bremen Airport plant and therefore to safeguarding and creating permanent jobs – which involves considerable financing. For example, the Senator of Economics has provided some EUR 26 million for the AMST ('Airbus Material & System Technology-Center Bremen'), of which around EUR 11 million will go to Airbus Bremen."[4755] We note that this extract does not categorically state that EUR 11 million has been provided to Airbus Bremen, but that "around" this amount "will go" to Airbus.

7.1464 The publicly available information also confirms that the three research institutes identified by the European Communities did in fact participate in the AMST programmes.[4756] There is, however, no indication in the publicly available information of how much funding these institutes actually obtained. Although the European Communities provided a breakdown of the alleged amounts in a table in its first written submission, it has provided no evidence to substantiate the information contained therein. In the light of the United States' insistence on the European Communities' failure to disclose all relevant information and appropriately explain the discrepancy between the publicly available information and its factual assertions, we are surprised that the European Communities has provided no evidence in support of the funding disclosures made in respect of the three research institutes. In the absence of any such evidence, we cannot accept the European Communities' tabulation of the amounts of monies received by Airbus Germany and other participants under the AMST programmes. In these circumstances, we consider it appropriate to base our factual finding on the publicly available information submitted by the United States, and accordingly find that Airbus received EUR 11 million from the government of Bremen under the AMST programmes.

Hamburg

7.1465 The United States asserts that, between 2001 and 2005, the government of Hamburg provided Airbus with at least EUR **[***]** in aeronautics-specific R&TD grants under the Hamburger Luftfahrtforschungsprogramm.[4757] The European Communities argues that the funding amounts referred to by the United States include EUR **[***]** provided to EADS Airbus GmbH. The European Communities submits that this amount should be excluded from the total amount of funding at stake because the United States has not explained how the monies to EADS Airbus GmbH have benefited Airbus Germany. Thus, according to the European Communities, the total amount of funds that may be properly challenged in this dispute is EUR **[***]**.[4758]

7.1466 We recall that in Section VII.E.1 of this Report, we rejected the European Communities' contentions, finding that a financial contribution provided to any Airbus partner or affiliated entity, or to Airbus GIE, in relation to the development and/or production of an Airbus LCA, potentially confers a benefit on the Airbus Industrie consortium, as the "producer" of Airbus LCA, and Airbus SAS as the successor corporate entity. The European Communities has at no stage argued that EADS Airbus GmbH is not a company involved in the Airbus LCA business. Moreover, the European Communities has not asserted that the R&TD grant at issue was not intended to support Airbus LCA development activities. Accordingly, we will proceed to examine the merits of the United States' claims against all of the Hamburg government R&TD grants of EUR **[***]** identified in the parties' first written submissions.

[4755] Exhibit US-335.
[4756] Exhibit US-334.
[4757] US, FWS, paras. 671-672, referring to Exhibit US-332 (BCI).
[4758] EC, FWS, para. 1266 and Exhibit EC-211 (BCI); EC, SWS, paras. 634-636.

BCI deleted, as indicated **[***]**

(ix) French government grants

7.1467 The United States asserts, on the basis of publicly available information, that between 1986 and 2005, the French government budgeted over EUR 1.2 billion in grants to the aeronautics industry for civil aeronautics research and development activities. In particular, the United States contends that French authorities budgeted EUR 391 million for the period 1986 to 1993; and EUR 809 million for the period 1994 to 2005.[4759]

7.1468 The United States recalls that the European Communities refused, during the Annex V process, to provide any information on the funding received by Airbus between 1986 and 1993. Consequently, in its first written submission, the United States asks the Panel to either request this information from the European Communities, or else find, in accordance with paragraph 7 of Annex V, that Airbus received EUR 391 million in LCA-related research and development grants from the French government for the period 1986 to 1993.[4760] In respect of the grants made between 1994 and 2005, the United States recalls that the European Communities acknowledged, during the Annex V process, that Airbus was a beneficiary of EUR **[***]**. However, the United States doubts the accuracy of the European Communities' disclosure, citing the European Communities' alleged consistent under-valuation of Airbus funding under the EC Framework Programmes.[4761] In the absence of more reliable information from the European Communities on the amount of funding actually obtained by Airbus, the United States asks the Panel to attribute the full amount of EUR 809 million to Airbus, in accordance with paragraph 7 of Annex V. Thus, according to the United States, the logical inference to be drawn from the European Communities' continued refusal to provide all of the information needed to confirm the precise amount of French government Airbus LCA-related research and development expenditure, is that the entire amount of EUR 1.2 billion for the period 1986 to 2005 must be allocated to Airbus.[4762]

7.1469 The European Communities rejects the United States' assertions. In respect of the alleged subsidies granted between 1986 and 1994, the European Communities initially argued that these fell outside of the temporal scope of this dispute.[4763] However, following our preliminary ruling on this issue, we asked the European Communities to provide a break-down of all Airbus LCA-related projects funded by the French government between 1986 and 1993.[4764] In response, the European Communities stated that it was unable to provide the requested information as neither the French government nor Airbus were able to locate any of the research contracts for this period.[4765] However, the European Communities explained that:

> "the amount of EUR 391 million to which the United States refers in its First Written Submission ... constitutes a budgeted figure for the entire aeronautics sector (comprising LCA and non-LCA activities, such as helicopters and engines). Therefore, the amount that Airbus would have received for LCA-related R&T during this period would inevitably have been far below this figure. This is illustrated by the fact that out of the EUR 809 million budgeted by the French Senate for R&T programmes in the aeronautics field for the period 1994 to 2005, only EUR **[***]** went to Airbus."[4766]

[4759] US, FWS, para. 678 referring to French Government Funding for Civil Aeronautics Research and Development (yearly budgets), Exhibit US-337.
[4760] US, FWS, para. 684.
[4761] US, FWS, paras. 682-683.
[4762] US, SWS, para. 511; US, Comments on EC Answer to Panel Question 278.
[4763] EC, FWS, para. 1275; EC, SWS, para. 639.
[4764] Panel Question 278.
[4765] EC, Answer to Panel Question 278.
[4766] EC, Answer to Panel Question 278.

BCI deleted, as indicated **[***]**

7.1470 For the years 1994 to 2005, the European Communities maintains that the information provided during the Annex V process accurately reflects the funding obtained by Airbus over this period.[4767] According to the European Communities, the EUR 809 million figure advanced by the United States includes the entire French government R&TD budget for all projects undertaken in the civil aeronautics sector (comprising LCA and non-LCA activities) between 1994 and 2005.[4768] Therefore, the European Communities maintains, it is not all relevant to this dispute and cannot be allocated in its entirety to Airbus. In the European Communities' view, the correct amount of funding provided to Airbus by French authorities is disclosed in the project-by-project breakdown submitted during the Annex V process showing that Airbus received EUR **[***]** in LCA-related R&TD grants from 1994 to 2005.[4769]

7.1471 The publicly available information relied upon by the United States takes the form of a compilation of extracts of seven French Senate reports that reveal the amounts of R&TD funding provided to the French civil aeronautics sector. It is clear from these reports that the funding amounts disclosed pertain to monies distributed to the French civil aeronautics sector as a whole, including but not limited to Airbus and, in some cases for non-LCA activities.[4770] For the period 1986 to 1993, the information indicates that FF 2,565 million, or EUR 391 million, was disbursed for civil aeronautics research undertaken by the participating French entities. The European Communities does not contest that the French government disbursed this amount of funding to the civil aeronautics sector between 1986 and 1993. However, it has provided no information on the share of this funding going to Airbus. Moreover, in response to a specific question from the Panel asking it to disclose the projects and amount of French government R&TD funding going to Airbus during this period,[4771] the European Communities provided no information, citing the inability of both the French government and Airbus to find the relevant research contracts.

7.1472 We appreciate that obtaining information from up to 22 years ago may not always be a simple task. However, where a party that is the obvious originator of requested information is faced with such difficulties, we believe it is incumbent upon that party to not only explain why it cannot submit the requested information, but also to do its best to provide an appropriate proxy for the missing information. In our view, the explanation the European Communities has provided for its failure to submit the requested information and the approach it suggests might be adopted by the Panel in order to arrive at an appropriate R&TD figure are less than satisfactory. In particular, we are not convinced that, even in the absence of the actual contracts, there was no public (or confidential) information available to the French government and Airbus that might have usefully guided us in our deliberations on the amount, or approximate amount, of actual R&TD funding received by Airbus. Simply stating that Airbus "inevitably" received an amount "far below" the total funding provided to the aeronautics sector as a whole (*i.e.*, "far below" EUR 391 million) because the evidence from a subsequent period of funding (1994 to 2005) shows that this was the case in that subsequent period, is guidance of a kind that is so general that in practice it provides very little assistance at all. In the absence of a more acceptable suggestion on the part of the European Communities for how to fill the evidentiary gap, the only information we have available to us on the French government R&TD contributions to Airbus between 1986 to 1993 is that contained in Exhibit US-337. Although we are fully aware of its limitations, we believe that in these particular circumstances, we are left with no alternative but to use

[4767] EC, SWS, para. 640; EC, Answer to Panel Question 279.
[4768] EC, FWS, para. 1278.
[4769] EC, FWS, para. 1279; EC, SWS, para. 640, both referring to Direction des Programmes Aéronautiques et de la Coopération ("DPAC"), Soutiens Versés au Titre des Etudes et Recherches portant sur les Avions de 10 place et plus de 1992 à 2005, 2 novembre 2005, Exhibit EC-209 (BCI).
[4770] For instance, *see* Budget 1997: Sénat, No. 89 (session ordinaire de 1999-2000), Rapport Général, Commission des Finances du Contrôle Budgétaire et des Comptes Economiques de la Nation sur le projet de loi de finances pour 2000, Tome III, Annexe No. 25, Equipment, Transports et Logement; III. – Transports; Transport Aérien et Météorolgie et Aviation Civile, p. 88, in Exhibit US-337.
[4771] Panel Question 278.

BCI deleted, as indicated **[***]**

it as the basis of our factual finding. In this regard, we recall that where a party refuses to supply information requested by a panel, it is open to that panel to draw inferences from the full configuration of facts that are before it.[4772] Accordingly, on the basis of the full configuration of the facts that are before us, we find that Airbus received a maximum of EUR 391 million in French government R&TD grants between 1986 and 1993.

7.1473 We come to a different conclusion in respect of the funding provided to Airbus between 1994 and 2005. The information submitted by the European Communities showing that Airbus was the recipient of EUR **[***]** is derived from a document authored by the DPAC, the authority that administered the French government funding programmes.[4773] This document provides a project-by-project break-down of French government R&TD funding to all recipients from 1994 to 2005.[4774] We are satisfied that this document provides a suitable basis for our factual finding in respect of the monies Airbus received from the French government for R&TD activities over this period. Although the United States has expressed doubt about whether this document captures all such funding provided to Airbus, it has pointed to no inconsistency between the data contained in this document and, for example, publicly available information to suggest that it is unreliable. Thus, we find the total amount of French government R&TD funding to Airbus between 1994 and 2005 to be EUR **[***]**.

(x) Spanish government loans

Plan Tecnológico Aeronáutico

7.1474 The United States asserts that, between 1993 and 2003, the Spanish government provided Airbus with below-market research and development loans in the amount of EUR **[***]** under two phases of the Plan Tecnológico Aeronáutico ("PTA"). Under the first phase, PTA I, which ran from 1993 to 1998, the United States contends that Airbus received loans in the amount of EUR **[***]**. In the second phase, PTA II, which ran from 1999-2003, the United States submits that Airbus obtained EUR **[***]** in loans.[4775] The European Communities does not contest that Airbus received loans of EUR **[***]** under the PTA. However, according to the European Communities, the disbursements under PTA I and II which took place from 1993 to 1994 fall outside the temporal scope of Article 5 of the SCM Agreement. According to the European Communities, these payments must be disregarded by the Panel, bringing the total amount of relevant funding under the PTA to EUR **[***]**.[4776]

7.1475 We recall that in Section VII.C.2 of this Report, we rejected the European Communities' arguments on the temporal scope of this dispute.[4777] Accordingly, we will proceed to examine the merits of the United States' claims against the Spanish government's provision of EUR **[***]** in R&TD loans under the PTA.

Programa de Fomento de Innovación Técnica

7.1476 The United States asserts that the Spanish government provided Airbus with below-market research and development loans under two phases of the Programa de Fomento de Innovación Técnica ("PROFIT"), first established in 2000. According to the United States, publicly available information demonstrates that Airbus received loans under the first phase of the PROFIT in the

[4772] Appellate Body Report, *Canada – Aircraft*, para. 203.
[4773] US, FWS, para. 678; EC, FWS, para. 1277.
[4774] *See*, footnote 4770 above.
[4775] US, FWS, para. 693 referring to Exhibit US-344 (BCI), setting out information on the amounts of Airbus funding under the PTA disclosed by the European Communities during the Annex V process.
[4776] EC, FWS, para. 1312.
[4777] *See*, paras. 7.65 and 7.105 above.

amount of EUR 1.5 million.[4778] In addition to this amount that allegedly went directly to Airbus, the United States asserts that the Spanish aeronautics industry received an additional EUR 62 million in loans under both phases of the programme.[4779] The United States recalls that the European Communities did not respond to the Facilitator's request for recipient-specific funding information under the PROFIT. In this light, the United States asks the Panel to request the European Communities to provide the information the Facilitator requested, or else find, in accordance with paragraph 7 of Annex V, that the Spanish government provided Airbus with loans in the amount of EUR 63.5 million.[4780]

7.1477 As we have noted above, the European Communities has consistently argued that the PROFIT loans challenged by the United States fall outside the terms of reference of the present dispute.[4781] Because of this, the European Communities initially refused to provide any information on payments under the PROFIT. However, following the first substantive meeting with the parties, the Panel asked the European Communities to provide information on the loan payments made under the PROFIT.[4782] This request was made in the context of the statement of the European Communities in its first written submission, that it would provide the Panel with "information regarding loans and grants" under the PROFIT were the Panel to determine that the United States' claims fell within the Terms of Reference.[4783] In response, the European Communities submitted information on what appears to be a selection of payments made under a series of PROFIT sub-programmes in the years 2004 and 2005 "in the spirit of good cooperation and without prejudice to its" position that the United States' claims fell outside of the Panel's terms of reference.[4784] The European Communities subsequently characterized this information as "relevant information on payments made under the PROFIT programme".[4785] However, it is less than apparent to us how the figures supplied by the European Communities are in fact "relevant" to our request for information. First, it is unclear whether the information provided by the European Communities relates to all sub-programmes funded under the PROFIT or just a selection, because the European Communities has not specified exactly how much payment data it has supplied. Second, the information does not identify the recipients of the funding amounts, making it impossible to determine how much of the disclosed monies involved loans to Airbus.

7.1478 The European Communities noted that "{i}n view of the immense scope of the programme, the European Communities respectfully requests the Panel, should it decide that PROFIT falls within the terms of reference, *quod non*, and desire additional information concerning the programme, to specify the information it would like to obtain so that such information could be prepared in the most

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[4778] US, FWS, para. 698, referring to *PROFIT 2003, Comites de Evaluación de 21 y 22/4/03, Proyectos y entidades con propuesta favorable de ayuda, P.N. Aeronáutico*, Exhibit US-351.

[4779] US, FWS, para. 698, referring to *Javier Alfonso Gil, Antonia Sáez Cala and Maricruz Lacalle Calderón, EADS y las Estrategias Territoriales del Sudoeste Europeo: Informe de la Región de Madrid, Universidad Autonoma de Madrid (undated)*, at 70, Exhibit US-352; and *Ramon Herrero, Ministerio de Industria, Turismo y Comercio, Aeronautics Research and Development in Spain, ACARE AeroDays*, March 31, 2005, at 25, Exhibit US-353.

[4780] US, FWS, para. 702.

[4781] *See*, para. 7.1418 above; EC, FWS, para. 1315; EC, Answer to Panel Question 109; EC, SWS, para. 647.

[4782] Panel Question 109.

[4783] EC, FWS, para. 1318. We note that the European Communities made this statement under the "Payments" sub-heading within its discussion of the PROFIT. Elsewhere, where the European Communities used the same "Payments" sub-heading it revealed what it considered to be the amount of alleged subsidization received by Airbus, for instance, at paras. 1312 (grants under the PTA I and II); 1289-1290 (grants and loans under the CARAD and ARP Programmes); 1278-1279 (French government R&TD grants); and 1271-1272 (Bremen authorities' R&TD grants).

[4784] EC, Answer to Panel Question 109, submitting Exhibit EC-624 (BCI).

[4785] EC, SWS, para. 648.

BCI deleted, as indicated **[***]**

efficient way possible."[4786] We are puzzled by the European Communities' response. Although we recognize that the question posed to the European Communities was not as specific as it could have been, it is our view that, in the context of the European Communities' statement at paragraph 1318 of its first written submission,[4787] the United States' claims and factual assertions, as well as the Facilitator's previous Annex V information requests, it was reasonably clear that the information we requested was information pertaining to loan payments to Airbus under the PROFIT. The fact that we had not yet ruled on whether the United States' claims fell within our terms of reference at the time of our request is, in our view, not a valid reason for failing to provide the requested information. In this regard we observe that the European Communities did not consider the absence of any terms of reference ruling problematic when it voluntarily, on a without prejudice basis, provided information on the amount of French government R&TD funding granted to Airbus in its first written submission, even though it had also consistently argued that such funding fell outside of our terms of reference.[4788]

7.1479 The publicly available information submitted by the United States takes the form of: (i) two Spanish government decrees establishing the PROFIT;[4789] (ii) a table of unknown origin setting out various items of information on loans provided under the PROFIT (Programa Nacional de Aeronautica) in 2003; (iii) one page from a Report prepared by the Universidad Autonoma de Madrid; and (iv) one page from what appears to be a Powerpoint presentation prepared by an official of the Spanish Ministerio de Industria, Turismo y Comercio. The Spanish government decrees confirm that the PROFIT was established with a view to running under two phases from 2000 to 2007.[4790] The next above-cited document submitted by the United States indicates that Airbus obtained two loans in 2003 of approximately EUR 1.5 million.[4791] We note that the European Communities has acknowledged that Airbus received this amount of funding.[4792] However, the European Communities does not accept that Airbus received the remainder of the funding the United States asserts was provided to Airbus. In this regard, the information supplied by the United States indicates that EUR 2.58 million and EUR 2.76 million in "anticipos reembolsables", and EUR 0.5 million and EUR 0.7 million in "subvenciones", was provided to all participants under the "Programa Nacional de Aeronautica" of the PROFIT in 2001 and 2002.[4793] In addition, the last of the above-cited documents submitted by the United States indicates that EUR 55.5 million in loans was provided to the Spanish aeronautics sector in 2004.[4794] The United States contends that, in the light of the European Communities' refusal to provide more specific information on the funding obtained by Airbus, the full value of these amounts (EUR 62 million, *i.e.*, EUR 6.54 million in 2001 and 2002 plus EUR 55.5 million in 2004) must be added to the EUR 1.5 million accepted by the European Communities and allocated to Airbus for the year 2003.

[4786] EC, Answer to Panel Question 109.

[4787] Including the context described in footnote 4783.

[4788] EC, FWS, paras. 1274 and 1276.

[4789] *Orden de 7 de marzo de 2000 por la que se regulan las bases, el régimen de ayudas y la gestión del Programma de Fomento de la Investigación Técnica (PROFIT), incluido en el Plan Nacional de Investigación Cientfíca, Desarrollo e Innovación Tecnologíca (2000-2003)*, BOE núm. 59 (9 March 2000), at 9855-62, Exhibit US-349, ("Order of 7 March 2000"); *Orden PRE/690/2005, de 18 marzo, par la que se regulan las bases, el régimen de ayudas y la gestión del Plan Nacional de Investigación Cientifíca, Desarrollo e Innovación Tecnológica (2004-2007) en la parte dedicada al fomento de la investigación técnica*, BOE núm. 67 (19 March 2005), at 9670, Exhibit US-350, ("Order of 18 March 2005").

[4790] Exhibits US-349 and 350.

[4791] The actual loan amount is EUR 1,554,622.60. *PROFIT 2003. Comites de Evaluación de 21 y 22/4/03, Proyectos y entidades con propuesta favorable de ayuda, P.N. Aeronáutico*, Exhibit US-351.

[4792] EC, SCOS, HSBI-Redacted Version, Table at para. 36.

[4793] *Javier Alfonso Gil, Antonia Sáez Cala and Maricruz Lacalle Calderón, EADS y las Estrategias Territoriales del Sudoeste Europeo: Informe de la Región de Madrid, Universidad Autonoma de Madrid (undated)*, at 70, Exhibit US-352.

[4794] *Ramon Herrero, Ministerio de Industria, Turismo y Comercio, Aeronautics Research and Development in Spain, ACARE AeroDays*, March 31, 2005, at 25, Exhibit US-353.

BCI deleted, as indicated **[***]**

7.1480 We recognize that the bulk of the information the United States is asking us to rely upon discloses industry-wide funding and not individual loans granted to Airbus. However, due to the European Communities' failure to provide any specific information on the value of the loans obtained by Airbus under the PROFIT in response to the Facilitator's and our own requests, the publicly available information submitted by the United States is the only data we have to consider. In this regard, we note that the European Communities has at no stage challenged the credibility of the information contained in these publicly available documents. Thus, we have no reason to doubt that the Spanish aeronautics industry received EUR 62 million in funding under the PROFIT. In this light, and in accordance with paragraph 7 of Annex V, we believe it is appropriate to base our findings on the amount of loans obtained by Airbus under the PROFIT on the publicly available information, submitted by the United States. In doing so, we observe that given the focus of the United States complaint on "anticipos reembolsables", we believe that it would be inappropriate to consider allocating the amounts (EUR 1.2 million) described as "subvenciones" in Exhibit US-352 to Airbus.[4795] Therefore, in accordance with paragraph 7 of Annex V, we find that Airbus was the recipient of approximately EUR 62.2 million in loans under the PROFIT.

(xi) UK government grants

Civil Aircraft Research and Demonstration Programme / Aeronautics Research Programme

7.1481 The United States asserts that, between 1992 and 2005, the UK Department of Trade and Industry ("DTI") agreed to provide Airbus with GBP **[***]** in LCA-related research grants under the Civil Aircraft Research and Demonstration Programme ("CARAD"), which it alleges was later renamed the Aeronautics Research Programme ("ARP"). In particular, the United States asserts that, over this period, the UK DTI disbursed approximately GBP **[***]** and committed to disburse a further GBP **[***]**.[4796] According to the European Communities, the total amount of LCA-related research grants that Airbus received between 1992 and 2005 under the CARAD programme and ARP was approximately GBP **[***]**. However, the European Communities argues that not all of this amount is properly within the scope of this dispute because it includes payments of GBP **[***]** that were granted prior to 1995, and therefore outside of the temporal scope of this dispute.[4797] Thus, the European Communities submits that the amount of funding that is properly within the scope of the United States complaint is limited to GBP **[***]**.[4798]

7.1482 We recall that in Section VII.C.2 of this Report, we rejected the European Communities' arguments on the temporal scope of this dispute.[4799] Therefore, we will include payments made under the CARAD programme between 1992 and 1995 in our analysis.

7.1483 In reviewing the parties' submissions on the actual amount of funding received by Airbus under the CARAD programme, we have identified a number of discrepancies. In the first instance, we note that the factual basis of the United States assertion that Airbus received GBP **[***]** is information submitted by the European Communities during the Annex V process. However, the European Communities relies upon the same data to conclude that Airbus received only GBP **[***]**.

7.1484 Payments made to Airbus under the CARAD programme between April 1997 and October 2005 are specified in one table, submitted by the United States as Exhibit US-339 (BCI)

[4795] *See*, e.g., US, FWS, para. 697 and footnote 859, which refers to Article 7.4 paras. a) to c) of the Spanish government decree establishing the PROFIT (2000 to 2003), Exhibit US-349.
[4796] US, FWS, para. 686, citing Exhibit US-339, which reproduces information supplied by the European Communities during the Annex V process.
[4797] EC, FWS, paras. 1281 and 1289.
[4798] EC, FWS, para. 1289.
[4799] *See*, paras. 7.65 and 7.105 above.

BCI deleted, as indicated **[***]**

and the European Communities as Exhibit EC-233 (BCI). This table sets out the relevant payments on a project-by-project basis, in each financial year (1 April to 31 March) starting from 1997/1998 to October 2005. These individual payments are also summed and presented in a separate column as the total amount of funds received per-project as well as the total overall amount obtained by Airbus under the entire programme. The difference in how the parties have interpreted the data contained in this table may be explained by a calculation error. In arriving at an amount of funding of GBP **[***]**, the United States used a figure of GBP **[***]**, which was identified in the table as the total value of all payments made to Airbus under the CARAD programme. This figure was calculated by adding all of the per-project payment amounts listed in the same column. However, we have found that for eleven of the projects, the total amount of payments made to Airbus listed in the "Payments to Airbus to Date" column overstates what the same table shows was actually paid in each of the relevant financial years. When these errors are taken into account, the correct figure should be GBP **[***]**.

7.1485 In addition, the United States' assertion that the UK DTI made a commitment to provide Airbus with an additional GBP **[***]** in grants under the CARAD programme appears to involve double-counting. As we understand its submission, the United States relies on the table contained on the last page of Exhibit US-339 (BCI) to justify its assertion. However, it appears to us that the contributions that the United States relies upon, which added together come to approximately GBP **[***]**,[4800] are already accounted for as payments in the financial years listed in the table the United States uses to justify that Airbus received GBP **[***]**. Therefore, we cannot accept the United States' assertion in respect of the alleged commitment of GBP **[***]**.

7.1486 Finally, in arguing that Airbus received GBP **[***]** in grants under the CARAD programme, the European Communities relied upon a series of tables setting out payments made to Airbus between 1992 and 1996 presented in Exhibits EC-232 (BCI) and US-339 (BCI). However, in doing so, the European Communities incorrectly transposed two of the values shown in the tables (**[***]** and **[***]**).

7.1487 Thus, in the light of the information before us, we find that Airbus received GBP **[***]** in grants under the CARAD programme and ARP between January 1992 and October 2005.

Technology Programme

7.1488 The United States initially asserted that Airbus research consortia received GBP **[***]** in grants under the Technology Programme ("TP"), which ran from 2004.[4801] The European Communities indicated in its first written submission that, as of November 2005, Airbus had participated in 18 projects under the Technology Programme, receiving a total of GBP **[***]**.[4802] The United States appears to be satisfied that this amount of funding is an accurate reflection of the monies Airbus received under the TP. Thus, we find that there is no dispute between the parties as to the amount of funding Airbus received under the TP.

[4800] The actual amount is GBP **[***]**.

[4801] US, FWS, para. 687, citing Exhibit US-340, which reproduces information supplied by the European Communities during the Annex V process.

[4802] EC, FWS, para. 1292, citing Exhibit EC-235 (BCI), showing that Airbus received GBP **[***]** in grants under the programme.

BCI deleted, as indicated **[*******]**

(d) Whether each of the challenged R&TD measures individually constitutes a subsidy within the meaning of Article 1 of the SCM Agreement

(i) Arguments of the Parties

United States

7.1489 The United States alleges that each of the challenged R&TD measures constitutes a "financial contribution" that confers a "benefit" on Airbus, and therefore amounts to a subsidy, within the meaning of Article 1.1 of the SCM Agreement.

7.1490 To the extent that the measures at issue take the form of grants or loans, the United States contends that they fall explicitly within the definition of a "financial contribution" set out in Article 1.1(a)(1)(i) of the SCM Agreement.[4803] According to the United States, it is well established that a grant confers a benefit because, as the panel stated in *United States – Cotton*, it "place{s} the recipient in a better position than the recipient otherwise would have been in the marketplace".[4804] Thus, the United States argues that the R&TD grants at issue in this dispute necessarily confer a benefit on Airbus and, consequently, constitute subsidies within the meaning of Article 1.1 of the SCM Agreement.[4805]

7.1491 As far as the Spanish government loans are concerned, the United States argues that when a loan is provided to a recipient on terms that are better than those available in the commercial marketplace, a benefit is conferred.[4806] Thus, according to the United States, because the loans at issue are provided to Airbus **[*******]**, they confer a benefit upon Airbus. The United States submits that it is not necessary to quantify the amount of this benefit because the **[*******]** terms are alone sufficient to establish the existence of a benefit.[4807] Furthermore, the United States argues that the deferred repayment terms provided for under the challenged loans further evidence the existence of a benefit to Airbus.[4808]

European Communities

7.1492 The European Communities explicitly acknowledges that Airbus received subsidies under the LuFo I, LuFo II, LuFo III, the AMST I, AMST II and the CARAD/ARP programmes.[4809] However, it disputes whether funds *committed* but *not disbursed* to Airbus under the LuFo III programme as of 1 July 2005 should be taken into account in establishing the *amount* of subsidy provided to Airbus under this programme.[4810] For all of the remaining R&TD measures at issue, the European Communities does not contest that they constitute financial contributions within the meaning of

[4803] US, FWS, paras. 626 (grants under the EC Framework Programmes); 680 (French government grants); 655 (German Federal government and Sub-Federal government grants); 694, 700 (Spanish government loans); and 688 (UK government grants).

[4804] Panel Report, *US – Upland Cotton*, para. 7.1116.

[4805] US, FWS, paras. 627 (grants under the EC Framework Programmes); 681 (French government grants); 656 (German Federal government and Sub-Federal government grants); and 689 (UK government grants).

[4806] US, FWS, paras. 695 (PTA loans) and 701 (PROFIT loans), relying upon Appellate Body Report, *Canada - Aircraft*, para.157.

[4807] US, Answer to Panel Question 38.

[4808] US, FWS, paras. 693 and 695 (**[***]** for PTA loans) and 697 and 701 (up to 15 years for PROFIT loans); US, SWS, para. 514.

[4809] EC, Answer to Panel Question 108.

[4810] EC, FWS, para. 1256-1257; EC, SWS, para. 630; EC, Answer to Panel Question 104.

BCI deleted, as indicated **[***]**

Article 1.1(a)(1)(i) of the SCM Agreement.[4811] Moreover, the only United States allegation of benefit that the European Communities explicitly contests relates to Spanish government loans under the PTA. According to the European Communities, the United States has failed to establish that these loans confer a benefit on Airbus because it failed to undertake an appropriate comparison between the terms of the PTA loans and loans available on the marketplace.[4812]

(ii) Evaluation by the Panel

Do the Challenged Measures involve a "Financial contribution"?

7.1493 The European Communities argues that funds *committed* to Airbus, but *not disbursed*, under the LuFo III programme as of 1 July 2005 (*i.e.*, the cut-off date used by the United States in its first written submission) should be excluded from our consideration. According to the European Communities, this would reduce the amount of funding at issue under the three LuFo programmes from EUR **[***]** to EUR **[***]** (a difference of approximately EUR **[***]**).[4813] The United States argues that the amount of funding at stake under the three LuFo programmes is EUR 217 million. The United States appears to derive this amount from the *Förderkatalog*.[4814] According to the United States, the *Förderkatalog* is an electronic R&D subsidy catalogue maintained by the German Federal government which records R&D funding provided by the German Federal Ministry for Research and Technology and the German Federal Economics Ministry.[4815] The United States argues that the *Förderkatalog* demonstrates that a firm commitment had been made as of 1 July 2005 to disburse the EUR **[***]**, which the European Communities contends should not be considered, and that there is no indication that such money has not been and will not be disbursed. The United States notes that a subsidy within the meaning of Article 1 of the SCM Agreement includes "potential direct transfers of funds" as well as actual direct transfers of funds. Thus, even if the European Communities were correct in characterising certain amounts as "commitments" rather than "disbursements" that would not be a basis for excluding those amounts from the Panel's consideration.[4816]

7.1494 The European Communities does not contest the United States' allegation that funding granted to Airbus under the LuFo programmes up to 1 July 2005 constitutes a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. In our view, there is no doubt that such amounts represent a "direct transfer of funds" and therefore fall squarely within the definition of a "financial contribution" that is set out in Article 1.1(a)(1)(i) of the SCM Agreement. Thus, we are satisfied that the evidence submitted by the United States, to the extent corroborated by the European Communities on the basis of information obtained from the German Federal Ministry of Economics and Industry, establishes that as of 1 July 2005, the German Federal government provided a "financial contribution" to Airbus under the LuFo programmes in the amount of EUR **[***]**.[4817]

[4811] EC, FWS, paras. 1218-1319; EC, SWS, paras. 610-649; EC, Answer to Panel Question 104, where the European Communities recognizes that to the extent that they are shown to confer a benefit on Airbus, the challenged measures would constitute subsidies within the meaning of Article 1 of the SCM Agreement.

[4812] EC, FWS, para. 1313. The European Communities makes no similar argument on the question of the existence of benefit in respect of the United States complaint against the PROFIT loans. EC, FWS, paras. 1314-1319; EC, SWS, paras. 646-649.

[4813] EC, FWS, para. 1258.

[4814] US, FWS, para. 663.

[4815] US, FWS, footnote 806 and Exhibit US-326. The European Communities describes the *Förderkatalog* as a public database which lists all the recipients of research grants in all areas where funding is provided by the German government. EC, FWS, para. 1255.

[4816] US, SWS, para. 514.

[4817] EC, FWS, para. 1257. The BCI table presented following para. 1257 of the European Communities' first written submission identifies amounts of funding under each of the three LuFo programmes,

BCI deleted, as indicated **[***]**

7.1495 In respect of the funding that was committed, but not disbursed under LuFo III as of 1 July 2005, the European Communities' principal argument in response to the United States' claims amounts to the submission that a government commitment of funds, without any actual disbursement of those funds, cannot amount to a "financial contribution". However, as we have noted elsewhere in this Report, a commitment to provide funds may well be a "financial contribution" if in the form of a "potential direct transfer of funds".[4818] As we understand it, the United States argues that the funds that were committed but not disbursed to Airbus under the LuFo III programme represent precisely this form of "financial contribution". We agree. Just as the disbursement of funds is a "direct transfer of funds", a commitment – or a promise – to disburse funds may be properly characterized as a "potential direct transfer of funds" falling within the definition of a "financial contribution" set out in Article 1.1(a)(1)(i) of the SCM Agreement. Thus, on the basis of the parties' submissions and the evidence that has been presented, we find that as of 1 July 2005, the German Federal government provided Airbus with a "potential direct transfer of funds" in the form of a commitment to transfer approximately EUR **[***]** to Airbus under the LuFo III programme. [4819]

7.1496 As regards the remaining R&TD measures at issue,[4820] we agree with the United States that to the extent they are grants involving direct transfers of funds or loans, they explicitly fall within the definition of a "financial contribution" under Article 1.1(a)(1)(i) of the SCM Agreement.

Do the challenged Measures confer a "Benefit" on Airbus?

7.1497 The European Communities has not contested the United States' allegation that the R&TD grants confer a benefit upon Airbus. However, it has disputed whether the United States has established that Airbus received any benefit from the Spanish government loans provided under the PTA. The basis of the European Communities' view is that, consistent with the Appellate Body's views in *Canada – Aircraft*, the United States must demonstrate the existence of a benefit to Airbus by undertaking "some kind of comparison" between the loans obtained by Airbus and comparable loans available on the marketplace. The United States argues that the very fact that the loans in question were made at a **[***]** interest rate is enough to establish that they were made on preferential terms compared with the marketplace and, therefore, that they confer a benefit on Airbus.[4821]

7.1498 The Spanish government loans that are the subject of this part of the United States' complaint were provided to Airbus between 1993 and 2003 under two phases of the PTA (PTA I and PTA II). PTA I ran from 1993 to 1998 and PTA II ran from 1999 to 2003. The evidence submitted by the

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distinguishing between "project grants to Airbus Germany" and "amount{s} received by Airbus Germany as of 1 July 2005", listing the latter as an amount of EUR **[***]**.

[4818] *See*, paras. 7.301 - 7.304 and 7.733 - 7.735 above.

[4819] EC, FWS, para. 1257. The BCI table presented following para. 1257 of the European Communities' first written submission identifies amounts of funding under each of the three LuFo programmes, distinguishing between "project grants to Airbus Germany" and "amount{s} received by Airbus Germany as of 1 July 2005". The table shows that the "project grants to Airbus" under LuFo I and LuFo II were paid out to Airbus in full; whereas under LuFo III, there was an approximately EUR **[***]** difference between "project grants to Airbus Germany" (EUR **[***]**) and "amount received by Airbus Germany as of 1 July 2005" (EUR **[***]**). The funding "grants" under the LuFo III programme were intended to be made over a period ending 2007. *See, also*, EC, SWS, para. 630.

[4820] *I.e.*, all of the measures granted under the 2nd Framework Programme, 3rd Framework Programme, 4th Framework Programme, 5th Framework Programme and 6th Framework Programme (*see*, paras. 7.1427, 7.1433, 7.1439, 7.1445 and 7.1451 above) as well as the German federal and sub-federal government grants, French government grants, Spanish government loans and UK government grants (see, paras. 7.1457, 7.1459, 7.1461, 7.1465, 7.1467, 7.1474 and 7.1481 above).

[4821] US, FWS, para. 695; US, SWS, para. 514.

BCI deleted, as indicated **[***]**

United States suggests that all of the PTA loans were **[***]**.[4822] The European Communities has not contested this evidence. In addition, we note that the loans granted under PTA I between 1993 and 1998 carried a **[***]** repayment term, with the first repayment expected only in the year 2000.[4823] The PTA II loans granted between 1999 and 2003 carried a **[***]** repayment term, with the first repayment required in 2007.[4824] The monies loaned under the two phases of the PTA amounted to approximately EUR **[***]**.[4825]

7.1499 We recall that it is well established that whether a financial contribution confers a benefit upon its recipient is a question that must be resolved by reference to the market. Thus, in the particular context of a financial contribution in the form of a loan, a benefit will be conferred whenever it is granted to a recipient on terms more favourable than those available to the recipient in the market.[4826] As already noted elsewhere in this Report, we believe that it would be extraordinary and highly unlikely for a market-based lender acting pursuant to commercial considerations to provide financing at a **[***]** rate of return.[4827] It would be even more exceptional to find a market lender agreeing to finance EUR **[***]** worth of R&TD activities in the LCA sector at a **[***]** rate of return with full repayment not expected before as much as 21 to 30 years. In this light, we consider that it was not necessary for the United States to present evidence of the terms and conditions of specific market-based financing comparable to the loans at issue in order to establish, at least on a *prima facie* basis, that the PTA loans conferred a benefit upon Airbus.

7.1500 Although the European Communities has questioned whether the United States has demonstrated that the PTA loans conferred a benefit, it has provided no evidence of its own to counter the United States' *prima facie* case. Thus, on the basis of the evidence and arguments before us, we are satisfied that Airbus obtained the PTA loans from the Spanish government on terms more favourable than would otherwise have been possible on the market. We therefore find that the PTA loans at issue conferred a benefit upon Airbus, and consequently, amount to subsidies within the meaning of Article 1.1 of the SCM Agreement.

7.1501 In respect of the remainder of the challenged R&TD measures, we agree with the United States that to the extent that Airbus received a funding grant in the form of an actual "direct transfer of funds" from the various entities involved, it was automatically placed in a better position than it would otherwise have been in without the grant.[4828] The European Communities has not contested this aspect of the United States' submission. Consequently, we find that all of the R&TD funding grants obtained by Airbus that we have identified as the subject of the United States' complaint conferred a benefit upon Airbus, and are therefore subsidies within the meaning of Article 1.1 of the SCM Agreement.

7.1502 However, we are not convinced that the United States has established that the approximately EUR **[***]** "financial contribution" granted to Airbus under the LuFo III programme in the form of a "potential direct transfer of funds" conferred a benefit. As we have previously explained, a benefit may arise from a "potential direct transfer of funds" when the commitment or promise to provide funds *in and of itself* places the recipient of that commitment or promise in a better position

[4822] The information submitted by the United States in Exhibits US-344 (BCI) and US-345 (BCI) indicates that **[***]**.
[4823] Exhibit US-344 (BCI).
[4824] Exhibits US-344 (BCI) and US-345 (BCI).
[4825] Exhibits US-344 (BCI) and US-345 (BCI).
[4826] *See*, para. 7.401 above.
[4827] *See*, footnote 2728 above.
[4828] US, FWS, paras. 627 (grants under the EC Framework Programmes); 681 (French government grants); 656 (German Federal government and Sub-Federal government grants); and 689 (UK government grants).

than it would otherwise have been in without that commitment or promise.[4829] The United States has advanced no argument and submitted no evidence explaining why the LuFo III funding commitment at issue *in and of itself* conferred a benefit that is separate and independent from the benefit that might be conferred by any future transfer of the promised funds. On the contrary, the entire focus of the United States' arguments appears to have been the benefits associated with the amount of funds that were promised, as opposed to the promise itself. Thus, we find that the United States has failed to establish that the EUR **[***]** funding commitment made by the German Federal government under the LuFo III programme conferred a benefit upon Airbus. We therefore dismiss the United States' claims with respect to this particular measure.

7.1503 Finally, we note that the European Communities has not challenged the United States' contention that the loans under the PROFIT confer a benefit because they were provided to Airbus at a **[***]** rate of interest, with deferred repayment schedules extending up to 15 years. The publicly available information the United States has submitted to support its claims confirms that the PROFIT loans were provided to Airbus on **[***]** terms with a maximum repayment period of 15 years.[4830] Once again, we note that it would, in our view, be exceptional to find a market lender acting pursuant to commercial considerations willing to finance EUR **[***]** worth of R&TD activities in the LCA sector at a **[***]** rate of interest. We therefore find that the evidence and arguments presented by the United States are sufficient to establish, at least on a *prima facie* basis, that the PROFIT loans conferred a benefit upon Airbus. The European Communities has provided no evidence to counter the United States' contentions. Thus, on the basis of the evidence and arguments before us, we are satisfied that Airbus obtained the PROFIT loans from the Spanish government on terms more favourable than would have been possible on the marketplace. We therefore find that the PROFIT loans at issue conferred a benefit upon Airbus, and consequently, amount to subsidies within the meaning of Article 1.1 of the SCM Agreement.

(e) Whether the R&TD subsidies are specific within the meaning of Article 2 of the SCM Agreement

(i) Introduction

7.1504 The United States argues that all of the R&TD subsidies it challenges are specific to Airbus and/or the aeronautics industry, within the meaning of Article 2.1 of the SCM Agreement.[4831] The European Communities disputes the United States' allegations **only** in respect of the subsidies granted under each of the EC Framework Programmes, the Spanish government PROFIT programme and the UK Technology Programme.[4832] In the sections that follow, we start our evaluation of the merits of the United States' claims by focusing on the allegations of specificity contested by the EC.

(ii) Grants under the EC Framework Programmes

Arguments of the United States

7.1505 The United States argues that the subsidies granted to Airbus under the Framework Programmes are specific, "in law", within the meaning of Article 2.1(a) of the SCM Agreement, because they were granted pursuant to "specific programmes" with their own implementation rules and separate budgets dedicated to aeronautics industry research activities. In particular, the

[4829] *See*, paras. 7.301 - 7.304 and 7.733 - 7.735 above.

[4830] Exhibit US-349, Articolo 7.4(c), confirming that loans ("anticipos reembolsable") under the PROFIT I were provided with an "applied interest rate of zero per cent per year". Exhibit US-350, Capitolo I, paragrafo noveno, regarding loans ("préstamos"), "applied interest rate of zero per cent per year".

[4831] US, FWS, paras. 651-653, 665-666, 670, 677, 685, 691, 696 and 703.

[4832] EC, FWS, paras. 1219, 1243-1252, 1294-1307 and 1319.

BCI deleted, as indicated **[***]**

United States asserts that, under the Second Framework Programme, the European Communities established a programme called "Industrial manufacturing technologies and advanced materials applications" ("BRITE/EURAM"), within which it allocated a "ring-fenced" amount of funding to aeronautics research under the heading "Area 5 - Specific Activities Relating to Aeronautics". Similarly, the United States submits that the European Communities allocated "ring-fenced" funding amounts for aeronautics research within the scope of the "Area 3, Aeronautics" and "Area 3A, Aeronautics" headings of the BRITE/EURAM programmes, respectively established under the Third and Fourth Framework Programmes. Moreover, the United States contends that a separate aeronautics-specific sub-budget was also created within each of the Fifth and Sixth Framework Programmes. In respect of the Fifth Framework Programme, the United States asserts that eight specific programmes were established, including one known as "competitive and sustainable growth". The United States argues that this programme included a dedicated sub-budget for research falling within the "New perspectives for aeronautics" heading. Finally, the United States asserts that the European Communities designated aeronautics research as a "priority" area under the Sixth Framework Programme, with its own separate and dedicated budget.[4833]

7.1506 The United States submits that for areas under each of the Framework Programmes where a dedicated sub-budget was made available, the European Commission adopted a "work programme" setting out the technical content of the areas of civil aeronautics research to be funded. According to the United States, the budgeted funds were accessed through calls for project proposals issued by the European Commission in accordance with the aeronautics work programme of each Framework Programme. These calls for projects established specific criteria for the proposals to be submitted, including the type of project, criteria for the evaluation of proposals, the number of project participants, and, most notably in the United States' view, the area and specific topic of research as well as the budget for the call. The United States argues that only project proposals satisfying the requirements of the respective call were eligible for the relevant research grants.[4834]

7.1507 Finally, the United States also argues that the subsidies that Airbus received under the EC Framework Programmes are specific "in fact", within the meaning of Article 2.1(c) of the SCM Agreement, because Airbus and other aeronautics companies were the predominant users of the grants.[4835] According to the United States, Airbus received EUR **[***]** under the Second Framework Programme, constituting **[***]** of the sub-budget reserved for aeronautics research; EUR **[***]** under the Third Framework Programme, which is **[***]** of the relevant aeronautics sub-budget; EUR **[***]** under the Fourth Framework Programme, accounting for approximately **[***]** of the relevant aeronautics sub-budget; EUR **[***]** under the Fifth Framework Programme**,** which is **[***]** of the sub-budget reserved for aeronautics; and **[***]** of the aeronautics sub-budget of the Sixth Framework Programme.[4836]

Arguments of the European Communities

7.1508 The European Communities disputes the United States' contentions. In its view, subsidies granted under the relevant Framework Programmes are not specific within the meaning of Article 2.1(a) of the SCM Agreement because they are not limited, "in law", to any particular enterprise, industry or group of enterprises or industries.[4837] The European Communities explains that the Framework Programmes at issue are funding instruments that provide grants for collaborative research activities falling within a broad array of thematic areas to which funds are specifically allocated. The European Communities argues that the thematic areas established under each of the

[4833] US, FWS, paras. 651-653; US, Answer to Panel Question 36; US, SWS, paras. 499-505.
[4834] US, Answer to Panel Question 36; US, SWS, para. 502.
[4835] US, FWS, para. 653.
[4836] US, Answer to Panel Question 35.
[4837] EC, FWS, para. 1244.

BCI deleted, as indicated **[***]**

Framework Programmes do not coincide with any particular enterprise, industry or group of enterprises or industries. Moreover, according to the European Communities, the purpose of the allocation of funds to the thematic areas is not to favour any particular enterprise or industry or group of enterprises or industries, but rather to ensure that funds under each of the Framework Programmes are spread across several important fields of research.[4838]

7.1509 The European Communities asserts that the Second to Fifth Framework Programmes did not establish sub-budgets specific to the aeronautics industry. However, the European Communities acknowledges that these programmes did make an "indicative internal allocation of funds" at a "level" below the "sub-sub-budget" "level". Thus, for instance, the European Communities asserts that the Fourth Framework Programme breaks down its overall budget into seven sub-budgets for research activities within the "information and communication technologies", "industrial technologies", "environment", "life sciences and technologies", "non-nuclear energy", "transport" and "targeted socio-economic research" headings. According to the European Communities, none of these are specific to aeronautics. The European Communities explains that the "industrial technologies" research area is broken down further establishing "sub-sub"-budgets for research areas identified as "industrial and material technologies" and "measurements and testing". It is only at the next level that an "aeronautics" research activity appears with an "indicative internal allocation of funds".[4839] Similarly, the European Communities argues that the Sixth Framework Programme does not establish any dedicated subsidy programme for aeronautics. Rather, the European Communities submits that the Sixth Framework Programme establishes "aeronautics and space" as one of seven "priority thematic areas" under the sub-programme "Focussing and Integrating Community Research" to which certain portions of the budget are allocated.[4840]

7.1510 The European Communities argues that to the extent that the Framework Programmes allocate, at some level well below the programme level, portions of their budget to "aeronautics and space" and "aeronautics", this does not render the funding grants specific. In the European Communities' view, such allocations simply serve the purpose of ensuring that a disproportionate amount of funds is not allocated to one sector (which could give rise to *de facto* specificity). Thus, according to the European Communities, specificity "in law" within the meaning of Article 2.1(a) of the SCM Agreement must be determined at the programme level. If this were not the case, the European Communities contends that support provided under broad research programmes, which necessarily allocate their budget to a variety of research areas in order to spread funds to several important technological fields, would always constitute a specific subsidy pursuant to Article 2.1(a) of the SCM Agreement.[4841]

7.1511 The European Communities also disputes the United States' allegation that the subsidies granted to Airbus under the Framework Programmes are "in fact" specific, within the meaning of Article 2.1(c). The European Communities submits that specificity "in fact" must be determined by looking to the amount of funding made available at the overall programme level. When assessed at this level, the European Communities argues that aeronautics companies cannot be found to be the predominant users of research funding afforded under the Framework Programmes. Thus, according to the European Communities, of the total budget for the Third Framework Programme (EUR 5.7 billion), only EUR 130 million (2.3%) was spent on aeronautics. For the Fourth Framework Programme, only EUR 400 million (3.3%) of the total budget of EUR 12.3 billion went to aeronautics. As regards Fifth and Sixth Framework Programmes, the aeronautics budget allegedly represented 5.1% and 6.6%, respectively, of the total budgets. The European Communities submits that these amounts demonstrate that aeronautics expenditure under each of the Framework

[4838] EC, FWS, paras. 1243-1251.
[4839] EC, Answer to Panel Question 106; EC, SWS, para. 625.
[4840] EC, SWS, para. 624 and footnote 647.
[4841] EC, Answer to Panel Question 106; EC, SWS, para. 626.

BCI deleted, as indicated **[***]**

Programmes was not disproportionate and that therefore aeronautics companies were not the predominant users of the grants. Finally, the European Communities stresses that the above-mentioned figures cover the total funding for aeronautics-related research activities and, thus, include payments to research institutes and universities, so that the actual portion of funding that went to aeronautics companies is even lower. With regard to Airbus SAS, the European Communities argues that the absence of any in fact specificity is even more evident. In particular, the European Communities asserts that the relevant companies (*i.e.*, Airbus Germany, Airbus France, Airbus Spain and Airbus UK) received only **[***]** of the total budget of the Third Framework Programme and **[***]** of the grants provided to aeronautics-related R&TD. Under the Fourth Framework Programme, the relevant companies received **[***]** of the total budget and **[***]** of the grants provided to aeronautics-related R&TD. For the Fifth Framework Programme, the figures were **[***]** and **[***]**, and for the Sixth Framework Programme, **[***]** and **[***]** respectively. The European Communities submits that it can hardly be argued that a pro-mille portion of a total budget or a portion of less than **[***]** in case of aeronautics-related R&TD rises to the level of "predominant use" and, thus, "in fact" specificity.[4842]

Evaluation by the Panel

7.1512 We begin our evaluation of the United States' claims by focusing on the question whether the challenged Framework Programmes are specific within the meaning of Article 2.1(a) of the SCM Agreement. As previously noted in the context of our discussion of the EIB loans, a finding of specificity under Article 2.1(a) requires the establishment of the existence of a limitation that expressly and unambiguously restricts the availability of a subsidy to "certain enterprises", and thereby does not make the subsidy "sufficiently broadly available throughout an economy".[4843]

7.1513 The subsidies provided to Airbus under the challenged Framework Programmes were granted by the European Commission pursuant to a series of similar, but not identical, legal instruments. Before turning to assess the extent to which each of these subsidies was specific within the meaning of Article 2.1(a), we first describe our understanding of how the grants at issue flowed from the operation of the legal instruments forming part of each of the relevant Framework Programmes.

- Second Framework Programme

7.1514 The Second Framework Programme was established by Council Decision 87/516/Euratom, EEC of 28 September 1987,[4844] giving effect to the strategic research and technological development mandate and objectives set out in Title VI of the Treaty establishing the European Economic Community.[4845] As reflected in the recitals of the Decision, the Programme's objectives included advancing EC R&TD activities in order to strengthen the scientific and technological basis of EC industry; encouraging undertakings of all sizes in their R&TD efforts; and promoting the overall harmonious development of the European Communities with a view to strengthening its economic and social cohesion. To this end, the Decision was intended to establish:

> "a multiannual {1987 to 1991} framework programme laying down the scientific and technical objectives of its activities, defining their respective priorities, setting out the main lines of the activities envisaged, estimating the necessary amount and drawing

[4842] EC, SWS, paras. 627-629.
[4843] *See*, para. 7.919 above.
[4844] *Council Decision 87/516/Euratom, EEC of 28 September 1987 concerning the framework programme for Community activities in the field of research and technological development (1987 to 1991)*, OJ L 302/1, 24.10.1987 (hereinafter "Council Decision 87/516"), Exhibit EC-200.
[4845] Treaty establishing the European Economic Community, as amended by the Single European Act, 1 July 1987.

BCI deleted, as indicated **[***]**

> up detailed rules for financial participation by the Community in the programme as a whole and the breakdown of this amount between the various activities envisaged"[4846]

7.1515 Annex I of the Decision contains a breakdown of the activities targeted for funding, together with the amount of funds allocated to each. In total, 22 activities are identified under eight headings: two activities under the "Exploitation of the sea bed and use of marine resources" heading; three activities under each of the "Quality of life", "Towards a large market and an information and communications society", "Exploitation and optimum use of biological resources" and "Energy" headings; and four activities under each of the "Modernization of industrial sectors" and "Improvement of European S/T cooperation" headings.[4847] Most of these activities appear to be of a general horizontal nature, potentially cutting across a variety of business segments.[4848] Others seem to be more focussed, concentrating on particular economic sectors.[4849] The funding levels "deemed necessary" for each of the 22 activities are also disclosed, with the total amount for all activities combined amounting to ECU 5,396 million.

7.1516 Annex II of the Decision sets out a more detailed description of each of eight research headings and 22 envisaged activities and their scientific and technical objectives; while Annex III outlines the selection criteria that should generally be applied when selecting the R&TD initiatives to fund. The Decision does not, however, provide for the disbursement of any funds to individual applicants. In this respect, Article 2.1 of the Decision explains in clear terms that the Second Framework Programme was to be implemented through "specific programmes developed within each of" the eight prescribed research headings. According to Article 2.2, each "specific programme shall":

> "- define the detailed rules for implementing it, fix its duration and provide for the means deemed necessary,
>
> - state its precise objectives and provide for an evaluation of results achieved in relation to these objectives,
>
> - be evaluated in the light of all the selection criteria set out in Annex III, which include that of contributing to the strengthening of the economic and social cohesion of the Community,
>
> - define the rate or rates of the Community's financial participation"

[4846] Council Decision 87/516, recital 7.

[4847] No activities are specifically identified under the "Science and technology for development" heading, to which ECU 80 million is allocated.

[4848] These activities are: (i) under the "Quality of life" heading – "Health" and "Environment"; (ii) "Towards a large market and an information and communication society" heading – "Information technologies" and "New services of common interest (including transport)"; (iii) under the "Modernization of industrial sectors" heading – "Science and technology for manufacturing industry", "Science and technology of advanced materials", "Raw materials and recycling" and "Technical standards, measurement methods and reference materials"; (iv) under the "Science and technology for development" heading"; and (v) under the "Improvement of European S/T cooperation" heading – "Stimulation, enhancement and use of human resources", "Use of major installations", "Forecasting and assessment and other back-up measures (including statistics)" and "Dissemination and utilization of S/T research results".

[4849] These activities are: (i) under the "Quality of life" heading – "Radiation protection"; (ii) under the "Towards a large market and an information and communication society" heading – "Telecommunications"; (iii) under the "Exploitation and optimum use of biological research" heading – "Biotechnology", "Agro-industrial technologies" and "Competitiveness of agriculture and management of agricultural resources"; (iv) under the "Energy" heading – "Fission: nuclear safety", "Controlled thermonuclear fusion" and "Non-nuclear energies and rational use of energy"; and (v) under the "Exploitation of the sea bed and use of marine resources" heading – "Marine science and technology" and "Fisheries".

BCI deleted, as indicated **[***]**

7.1517 Thus, the Decision setting up the Second Framework Programme established an EC-wide R&TD support initiative targeting a variety of economic activities at both horizontal and sector-specific levels. The Decision identified and allocated funds to 22 areas of research under eight headings and described, in broad terms, their scientific and technical objectives. However, in laying down these overall guidelines, the Decision establishing the Second Framework Programme did not actually indicate how these funds could be accessed by individual applicants. Neither did it prescribe any specific modalities for the distribution of funds. The detailed rules and methodologies for the distribution of funds was left to the "specific programmes" that were to be adopted for the purpose of implementation.

7.1518 As we understand it, the Decision establishing the Second Framework Programme was implemented through numerous "specific programmes". For the purpose of the present dispute, the focus of our analysis is on what is referred to as the BRITE/EURAM programme.

7.1519 The BRITE/EURAM programme was established through Council Decision 89/237/EEC of 14 March 1989 with the aim of contributing to the achievement of the objectives of the Second Framework Programme by implementing a specific R&TD programme in two of the fields identified under that Programme, namely, the industrial manufacturing technologies and advanced materials applications activities.[4850] Annex IV of the Council Decision 89/237/EEC made an "indicative internal allocation" of a total of ECU 499.5 million across five "Areas" of research: "Advanced materials technologies" (28%); "Design methodologies and assurance for products and processes" (19%); "Application of manufacturing technologies" (19%); "Technologies for manufacturing processes" (20%); and "Specific activities relating to aeronautics" (7%).[4851] A summary of the scope and objectives of each of the five research areas was provided in Annex I. As regards the "Specific activities relating to aeronautics" area, Annex I stipulated the type of research that would fall under this heading as "pre-competitive research in technological areas which are of primary relevance to aeronautics (in particular aeroplanes and helicopters) and are not yet covered in other programme areas". It also identified four fields of focus: "Aerodynamics"; "Acoustics"; "Airborne systems and equipment" and "Propulsion systems".

7.1520 Rules for the implementation of the "specific programme" are set out in Annex II. These indicate that the funding initiatives would be principally executed by "means of shared-cost research contracts to be awarded following a selection procedure based on calls for proposals" published by the Commission in the Official Journal of the European Communities. They also describe four types of research projects that would be funded ("Industrial applied research", "Focused fundamental research", "Feasibility awards for SMEs" and "Coordinated activities"), spelling out *inter alia*, the level of support expected from participants and the funding that would be committed by the European Communities for each type of project. The rules for "Research relating to aeronautics" are set out separately in Annex II. Again, these require the Commission to initiate the process by publishing calls for proposals. However, unlike the other types of research projects, the rules implementing the aeronautics research area activities specify that the Commission's calls for proposals must be based on a "work programme" "established to define precise objectives and determine priority themes for research". Moreover, the rules relating to financing of "Industrial applied research" and "Focused fundamental research" projects apply equally to aeronautics research only when "appropriate".

7.1521 Finally, we note that the BRITE/EURAM programme established two different decision-making procedures and programme review guidelines: one for projects funded under the aeronautics

[4850] *Council Decision 89/237/EEC of 14 March 1989 on a specific research and technological development programme in the field of industrial manufacturing technologies and advanced materials applications (Brite/Euram) (1989 to 1992)*, OJ L 98/18, 11.4.1989 (hereinafter "Council Decision 89/237"), recital 7 and Article 1, Exhibit EC-195.

[4851] The allocation makes 7% of the funds available to cover staff and administrative costs.

research area, and another for all other areas of research. In particular, Article 6.1 specifies that decisions relating to funding activities other than in the aeronautics research area must be taken by the European Commission after consultation with a Committee composed of representatives of EC member States. On the other hand, Article 6.2 stipulates that decisions in respect of measures to be undertaken in the aeronautics research area were to be made on the basis of a qualified majority vote of the EC member State representatives in the Committee or the Council. Likewise, different approaches were envisaged for the programme reviews mandated under Article 4. While a review of the BRITE/EURAM programme was required during the third year of implementation, a review in respect of research relating to aeronautics was called for during the second year. Moreover, Annex III described the programme objectives and criteria that were required to be taken into account when undertaking such reviews, setting out additional objectives and criteria for aeronautics research area projects.

7.1522 Thus, the BRITE/EURAM programme implemented the objectives of the Second Framework Programme by further elaborating five areas of research that would be funded, providing for an indicative allocation of funds to these areas, establishing implementation rules and decision-making procedures, and a review process. However, it is apparent that the BRITE/EURAM programme treated the area of aeronautics research somewhat differently than the other research areas. First, we note that, unlike the other four research areas identified under BRITE/EURAM, the aeronautics research area specifically targets a particular sector of economic activity. The other four research areas are much more horizontal in nature. Projects falling within their scope do not appear to be limited to any particular sector of the economy and, as envisaged in Annex I, might even include areas of research relating to aeronautics. Second, the aeronautics research area is implemented through different rules and decision-making procedures, with the latter involving a much stronger degree of control by the EC member States on, *inter alia*, the research work programme and projects to be funded. Finally, the BRITE/EURAM programme mandates a shorter time-frame for reviewing the results of the financing provided to projects in the aeronautics research area, and requires that such reviews take into account objectives that do not have to be considered when reviewing projects funded under the other four areas.

- Third Framework Programme

7.1523 The Third Framework Programme was established by Council Decision 90/221/Euratom, EEC of 23 April 1990,[4852] giving effect to the strategic research and technological development mandate and objectives set out in Title VI of the Treaty establishing the European Economic Community.[4853] As reflected in the recitals of the Decision, the Programme's objectives included advancing EC R&TD activities in order to strengthen the scientific and technological basis of EC industry; encouraging undertakings of all sizes in their R&TD efforts; and promoting the overall harmonious development of the European Communities with a view to strengthening its economic and social cohesion. To this end, the Decision was intended to set up a multiannual framework programme covering the period 1990 to 1994 to continue and develop the research and technological development activities identified and supported under the Second Framework Programme.

7.1524 Annex I of the Decision contains a breakdown of the activities targeted for funding, together with the amount of funds allocated to each. In total, 15 activities are identified under six headings: three activities under the "Information and communications technologies" heading; two activities under each of the "Industrial and material technologies" and "Environment" headings; four activities

[4852] *Council Decision 90/221/Euratom, EEC of 23 April 1990 concerning the framework programme for Community activities in the field of research and technological development (1990 to 1994)*, OJ L 117/28, 8.05.1990 (hereinafter "Council Decision 90/221"), Exhibit EC-201.

[4853] Treaty establishing the European Economic Community, as amended by the Single European Act, 1 July 1987.

BCI deleted, as indicated **[***]**

under the "Life sciences and technologies for developing countries" headings; three activities under the "Energy" heading; and one activity under the "Human capital and mobility" heading. Most of these activities appear to be of a general horizontal nature, potentially cutting across a variety of business segments.[4854] Others seem to be more focussed, concentrating on particular economic sectors.[4855] The funding levels "deemed necessary" for each of the 15 activities are also disclosed, with the total amount for all activities combined amounting to ECU 5,700 million.

7.1525 Annex II of the Decision sets out a more detailed description of each of the six research headings and 15 envisaged activities and their scientific and technical objectives; while Annex III outlines the selection criteria that should generally be applied when selecting the R&TD initiatives to fund. The Decision does not, however, provide for the disbursement of any funds to individual applicants. In this respect, Article 2.1 of the Decision explains that the Third Framework Programme was to be implemented through "specific programmes developed within each of" the six prescribed research headings. According to Article 2.4, each "specific programme shall: "determine its precise objectives and make provision for an evaluation of the results achieved as compared with those objectives and with the criteria in Annex III".

7.1526 Thus, the Decision setting up the Third Framework Programme established an EC-wide R&TD support initiative targeting a variety of economic activities at both horizontal and sector-specific levels. The Decision identified and allocated funds to 15 areas of research activity under six headings and described, in broad terms, their scientific and technical objectives. However, in laying down these overall guidelines, the Decision establishing the Third Framework Programme did not actually indicate how these funds could be accessed by individual applicants. The detailed rules and methodologies for the distribution of funds were left to the "specific programmes" that were to be adopted for the purpose of implementation.

7.1527 As we understand it, the Decision establishing the Third Framework Programme was implemented through numerous "specific programmes". For the purpose of the present dispute, the focus of our analysis is on the "Specific Programme for Research and Technological Development in the Field of Industrial and Materials Technologies" (the "IMT 1991 programme").[4856]

7.1528 The IMT 1991 programme was established through Council Decision 91/506/EEC of 9 September 1991 with the aim of contributing to the achievement of the objectives of the Third Framework Programme by implementing a specific R&TD programme in the field of industrial and materials technologies.[4857] Annex II of the Decision sets out an "indicative allocation" of a total of ECU 663,3 million across three "Areas" of research: "Materials - raw materials" (ECU 308.8 million); "Design and manufacture" (ECU 301.5 million); and "Aeronautics research" (ECU 53 million).[4858]

[4854] These activities are: (i) under the "Information and communications technologies" heading – "Information technologies", "Communication technologies" and "Development of telematics systems of general interest"; (ii) under the "Industrial and material technologies" heading – "Industrial and material technologies" and "Measurement and testing"; (iii) under the "Environment" heading – "Environment"; and (iv) under the "Human capital and mobility" heading – "Human capital and mobility".

[4855] These activities are: (i) under the "Environment" heading - "Marine sciences and technologies"; (ii) under the "Life sciences and technologies for developing countries" heading" – "Biotechnology", "Agricultural and agro-industrial research", "Biomedical and health research", and "Life sciences and technologies for developing countries"; and (iii) under the "Energy" heading – "Non nuclear energies", "Nuclear fission safety" and "Controlled nuclear fusion".

[4856] *Council Decision 91/506/EEC of 9 September 1991 on a specific research and technological development programme in the field of industrial and materials technologies (1990 to 1994)*, OJ L 269/30, 25.9.1991 (hereinafter "Council Decision 91/506"), Exhibit EC-196.

[4857] Council Decision 91/506, Article 1, Exhibit EC-196.

[4858] The amount intended for aeronautics research is provided for a period of three years. The allocation makes 8% of the funds available to cover staff and administrative costs.

BCI deleted, as indicated **[***]**

The Annex stipulates that the funding amount allocated to "Aeronautics research" is provided for a period of three years.[4859]

7.1529 A summary of the scope and objectives of each of the three research Areas is set out in Annex I of the Decision. For the "Aeronautics research" Area, six fields of focus are identified: "Environment related technologies"; "Technologies of aircraft operation"; "Aerodynamics and aerothermodynamics"; "Aeronautical structures and manufacturing technologies"; "Avionic system technologies"; and "Mechanical, utility and actuation technologies". Annex I of the Decision explains that "the aeronautical technologies research that began with the BRITE/EURAM programme will be continued taking account of harmonization, standardization, safety and environmental aspects". Moreover, it provides that the "Aeronautics research" Area is intended to support only "specific aeronautical research and applications". Generic aeronautics research is to be dealt with under the other two research Areas.[4860]

7.1530 Article 5 provides that a work programme would be prepared in accordance with the objectives identified in Annex I of the Decision, and that the Commission would draw up calls for proposals for projects on the basis of the work programme. Other implementation rules are set out in Annex III of the Decision, which *inter alia*, describes the four types of actions through which the European Communities intended to provide funding ("Research Projects", "Cooperative research projects", "Concerted actions" and "Accompanying measures, including feasibility premiums"). The rules set out in Annex III of the Decision also indicate the level of support expected from participants and the proportion of funding that would be committed by the European Communities for each type of action.

7.1531 Finally, unlike the decision-making procedure found in the Second Framework Programme, the IMT 1991 programme envisages one and the same decision-making process, irrespective of the Area of research. In particular, decisions must be taken by the Commission after consultation with a Committee composed of representatives of EC member States, and on the basis of a qualified majority vote of the EC member State representatives in the Committee or the Council.[4861]

7.1532 Thus, the IMT 1991 programme implemented the objectives of the Third Framework Programme by further elaborating three areas of research that would be funded, providing for an indicative allocation of funds to these areas, establishing implementation rules and a decision-making procedure. Of the three research "Areas" the aeronautics research area is the only one that specifically targets a particular sector of economic activity. The other two research areas cover projects that are more horizontal in nature. Moreover, as already noted, Annex I of the decision explicitly provides that only "specific aeronautical research" will be supported under the "Aeronautics research" Area, with aeronautics research of a generic nature to be dealt with under the other two Areas.

- Fourth Framework Programme

7.1533 The Fourth Framework Programme was established by Decision 1110/94/EC *European Parliament and of the Council of 26 April 1994*[4862], giving effect to the strategic research and technological development mandate and objectives set out in Title VI of the Treaty establishing the

[4859] Council Decision 91/506, Annex II, Footnote 1.
[4860] Council Decision 91/506, Annex I, Paragraph 6.
[4861] Council Decision 91/506, Article 6.
[4862] *Decision 1110/94/EC European Parliament and of the Council of 26 April 1994 concerning the framework programme for Community activities in the field of research and technological development and demonstration (1994 to 1998)*, OJ I. 126/1, 18.05.1994 (hereinafter "Council Decision 1110/94/EC"), Exhibit EC-202.

BCI deleted, as indicated **[***]**

European Economic Community.[4863] As reflected in the recitals of the Decision, the Programme's objectives included advancing EC R&TD activities in order to strengthen the scientific and technological basis of EC industry; encouraging undertakings of all sizes in their R&TD efforts; and promoting the overall harmonious development of the European Communities with a view to strengthening its economic and social cohesion. To this end, the Decision was intended to set up a multiannual framework programme covering the period 1994 to 1998 to continue and develop the research and technological development activities identified and supported under the Third Framework Programme.

7.1534 Annex I of the Decision contains a breakdown of the activities targeted for funding, together with the amount of funds allocated to each. In total, four activities are identified: (i)"Research, technological development and demonstration programmes"; (ii)"Cooperation with third countries and international organizations"; (iii)"Dissemination and optimization of results"; and (iv)"Stimulation of the training and mobility of researches". The funding levels for each of the four activities are also disclosed, with the total amount coming to ECU 11,046 million. The Decision contains an indicative breakdown of the themes and subjects only of the first activity ("Research, technological development and demonstration programmes"). In total, 13 research themes are identified under seven main headings: three research themes under the "Information and communication technologies" heading; two research themes under each of the "Industrial technologies" and "Environment" headings; and three research themes under the "Life sciences and technologies" heading. The following three headings do not specify any particular research themes: "Non-nuclear energy", "Transport" and "Targeted socio-economic research". The funding levels for each of the 13 research themes are also disclosed, with the total amount coming to ECU 9,432 million. Most of these research themes appear to be of a general horizontal nature, potentially cutting across a variety of business segments.[4864] Others seem to be more focussed, concentrating on particular economic sectors.[4865]

7.1535 Annex III of the Decision sets out a more detailed description of each of the four activities and their scientific and technical objectives; while Annex II of the Decision outlines the selection criteria that should be generally applied when selecting the R&TD initiatives to fund. As we understand it, the Decision does not provide for the disbursement of any funds to individual applicants. In this respect, Article 2.1 of the Decision explains that the Fourth Framework Programme was to be implemented through "specific programmes developed within each" of the four prescribed activities. According to Article 2.1, each specific programme "shall specify its precise objectives on the lines of the scientific and technological objectives in Annex III".

7.1536 Thus, the Decision setting up the Fourth Framework Programme established an EC-wide R&TD support initiative targeting a variety of economic activities at both horizontal and sector-specific levels. The Decision identified and allocated funds to four activities and described, in broad terms, their scientific and technical objectives. However, in laying down these overall guidelines, the Decision establishing the Fourth Framework Programme did not actually indicate how these funds could be accessed by individual applicants. The detailed rules and methodologies for the distribution

[4863] Treaty establishing the European Economic Community, as amended by the Single European Act, 1 July 1987.

[4864] These activities are: (i) under the "Information and communications technologies" heading – "Telematics", "Communication technologies" and "Information technologies"; (ii) under the "Industrial technologies" heading – "Industrial and material technologies" and "Measurement and testing"; (iii) under the "Environment" heading" – "Environment and climate"; (iv) the "Transport" heading and (v) the "Targeted socio-economic research" heading".

[4865] These activities are: (i) under the "Environment" heading "Marine sciences and technologies"; (ii) under the "Life sciences and technologies" heading – "Biotechnology", "Biomedicine and health" and "Agriculture and fisheries (including agro-industries, food technologies, forestry, aquaculture and rural development)" and (iii) the "Non-nuclear energy" heading.

BCI deleted, as indicated **[***]**

of funds were left to the "specific programmes" that were to be adopted for the purpose of implementation.

7.1537 As we understand it, the Decision establishing the Fourth Framework Programme was implemented through numerous "specific programmes". For the purpose of the present dispute, the focus of our analysis is on the "Specific Programme for Research and Technological Development, including Demonstration, in the Field of Industrial and Materials Technologies" (the "IMT 1994 programme").

7.1538 The IMT 1994 programme was established through Council Decision 94/571/EC of 27 July 1994 with the intention of contributing to the achievement of the objectives of the Fourth Framework Programme by implementing a specific R&TD programme in the field of the industrial and material technologies.[4866] Annex II of the Decision sets out an "indicative breakdown" of a total of ECU 1,617 million across three "Areas" of research: "Production Technologies" (ECU 590 million); "Materials and technologies for product innovation" (ECU 566 million); and "Technologies for transport means" (ECU 461 million). The Annex stipulates that 50% of the amount allocated to the "Technologies for transport means", ECU 230.5 million, is for the aeronautics sector.[4867] The aeronautics sector is the only sector to have been allocated a specific amount.

7.1539 A summary of the objectives and content of each of the three research Areas is described in Annex I of the Decision. Annex I of the Decision indicates that in the development of the different technologies for transport means, due account shall be taken of the requirements of the various transport industries. The Annex explains that "where the aircraft industry is concerned, research will concern advanced technologies, in particular for environmental protection, to reduce both noise and polluting emissions, and as regards design, to reduce overall energy consumption". It also stipulates that the activities will aim to improve safety, increase the capacity and cost-effectiveness of the air transport system, and facilitate the production, operation, reliability and maintenance of future generations of aircraft and equipment.[4868]

7.1540 Article 5 provides that a work programme would be prepared in accordance with the objectives identified in Annex I of the decision, and that the Commission would draw up calls for proposals for projects on the basis of the work programme. Other implementation rules set out in Annex III of the decision indicate that the funding initiatives would be executed by different means of shared-cost research actions, preparatory, accompanying and support measures and concerted actions. The rules set out in Annex III also indicate the level of support expected from participants and the proportion of funding that would be committed by the European Communities for each type of action.

7.1541 Finally, unlike the decision-making procedure in the Second Framework Programme, the IMT 1994 programme envisages one and the same decision-making process, irrespective of Area of research. In particular, decisions must be taken by the Commission after consultation with a Committee composed of representatives of EC member States, and on the basis of a qualified majority vote of the EC member State representatives in the Committee or the Council.[4869]

7.1542 Thus, the IMT 1994 programme implemented the objectives of the Fourth Framework Programme by further elaborating three areas of research that would be funded, providing for an indicative allocation of funds to these areas, establishing implementation rules and a decision-making

[4866] *Decision 94/571/EC of 27 July 1994 on a specific research and technological development programme in the field of industrial and material technologies (1994 to 1998)*, OJ L 222/19, 26.8.1994 (hereinafter "Council Decision 94/571"), Article 1, Exhibit EC-197.
[4867] Council Decision 94/571, Annex II, Footnote I.
[4868] Council Decision 94/571, Annex I, Area 3.6.
[4869] Council Decision 94/571, Article 6.

BCI deleted, as indicated **[***]**

procedure. The aeronautic sector is the only sector to have been allocated a specific amount, with ECU 230.5 million being exclusively directed for projects in the aeronautics sector.[4870]

- Fifth Framework Programme

7.1543 The Fifth Framework Programme was established by Council Decision 182/1999/EC of 22 December 1998[4871], giving effect to the strategic research and technological development mandate and objectives set out in Title VI of the Treaty establishing the European Economic Community.[4872] As reflected in the recitals of the Decision, the Programme's objectives included advancing EC R&TD activities in order to strengthen the scientific and technological basis of EC industry; encouraging undertakings of all sizes in their R&TD efforts; and promoting the overall harmonious development of the European Communities with a view to strengthening its economic and social cohesion. To this end, the Decision was intended to set up a multiannual framework programme covering the period 1998 to 2002 to continue and develop the research and technological development activities identified and supported under the Fourth Framework Programme.

7.1544 The Decision setting up the Fifth Framework Programme established an EC-wide R&TD support initiative targeting a variety of economic activities at both horizontal and sector-specific levels. Annex III of the Decision contains a breakdown of the activities targeted for funding, together with the amount of funds allocated to each. In total, eight activities are identified under four headings: four activities under the "Implementation of research, technological development and demonstration programmes" heading; and one activity under each of the "Promotion of cooperation in the field of community research, technological development and demonstration with third countries and international organizations", "Dissemination and optimization of the results of activities in Community research, technological development and demonstration" and "Stimulation of the training and mobility of researches in the Community" headings. The eighth activity is identified as the Joint Research Centre. These eight activities appear to be of a general horizontal nature, potentially cutting across a variety of business segments.[4873] The funding levels for each of the four headings are also disclosed, with the total amount for all activities combined coming to ECU 13,700 million. Annex III of the Decision contains a breakdown only of the activities targeted for funding under the first heading, and indicates the amount of funds allocated to each of them. In total, ECU 10,843 million is allocated to the first heading.

7.1545 Annex I of the Decision outlines the selection criteria for selecting the themes of the activities; while Annex II of the Decision sets out a more detailed description of each of the activities, their scientific and technical objectives and related priorities. This Decision does not, however, provide for the disbursement of any funds to individual applicants. In this respect, Article 3.1 of the

[4870] Council Decision 94/571, Annex II, Footnote I.

[4871] *Decision 182/1999/EC of 22 December 1998 concerning the framework programme for Community activities in the field of research, technological development and demonstration (1998 to 2002)*, OJ I 26/1, 1.2.1999 (hereinafter "Council Decision 182/1999"), Exhibit EC-203.

[4872] Treaty establishing the European Economic Community, as amended by the Single European Act, 1 July 1987.

[4873] These activities are: (i) under the "Implementation of research, technological development and demonstration programmes" heading – "Quality of life and management of living resources", "User-friendly information society", "Competitive and sustainable growth", and "Energy, environment and sustainable development"; (ii) under the "Promotion of cooperation in the field of community research, technological development and demonstration with third countries and international organizations" heading – "Confirming the international role of Community research"; (iii) under the "Dissemination and optimization of the results of activities in Community research, technological development and demonstration" heading -"Promotion of innovation and encouragement of participation of Small and Medium-size Enterprises (SMEs); and (iv) under the "Stimulation of the training and mobility of researches in the Community" heading – "Improving human research potential and the socioeconomic knowledge base."

BCI deleted, as indicated **[***]**

Decision explains that the Fifth Framework Programme was to be implemented through "specific programmes" developed within each of the four prescribed research headings. According to Article 3.1, each "specific programme shall specify its precise objectives, and define the detailed rules for implementing it, fix its duration and provide for the means deemed necessary."

7.1546 Thus, the Decision setting up the Fifth Framework Programme established an EC-wide R&TD support initiative targeting a variety of economic activities at both horizontal and sector-specific levels. The Decision identified and allocated funds to eight areas of research activity under four headings and described, in broad terms, their scientific and technical objectives. However, in laying down these overall guidelines, the Decision establishing the Fifth Framework Programme did not actually indicate how these monies could be accessed by individual applicants.

7.1547 As we understand it, the Decision establishing the Fifth Framework Programme was implemented through numerous "specific programmes". For the purpose of the present dispute, the focus of our analysis is on the "Specific Programme for Research, Technological Development and Demonstration on Competitive and Sustainable Growth" ("the CSG programme").

7.1548 The CSG programme was established through Council Decision 1999/169/EC of 25 January 1999 with the intention of contributing to the achievement of the objectives of the Fifth Framework Programme by implementing a specific programme in one field identified under that Programme, namely, the competitive and sustainable growth activity.[4874] Annex I of the Decision set out an "indicative internal allocation" of a total of ECU 2,705 million across three "Areas" of research: "Key Actions"; "Research and technological development activities of a generic nature" and "Support for research infrastructures". A summary of the objectives and priorities of each of the three research areas is set out in Annex II of the Decision.

7.1549 For the "Key actions" Area, four types of activities and associated budgets are identified: "Innovative products, processes and organisation" (ECU 731 million); "Sustainable mobility and intermodality" (ECU 371 million); "Land transport and marine technologies" (ECU 320 million), and "New perspectives for aeronautics" (ECU 700 million).[4875] For the "New perspectives for aeronautics" Area, three fields of focus are identified: "Acquisition of critical technologies"; "Technology integration for new-generation aircraft"; and "Operational efficiency and safety". Annex II of the Decision explains that the overall goal of the "New perspectives for aeronautics" is to facilitate the development of aircraft and their subsystems and components in order to foster the competitiveness of the European industry, including SMEs, while assuring the sustainable growth of air transportation.[4876]

7.1550 Article 5 provides that a work programme would be prepared by the Commission specifying in greater detail the objectives and priorities identified in Annex II. Implementation rules are set out in Annex III of the decision, which indicate that the programme will be implemented through indirect R&TD actions provided for in the Fifth Framework Programme. These indirect R&TD actions comprise shared-cost research actions, training fellowships, support for networks, concerted actions and accompanying measures.[4877]

7.1551 Finally, unlike the decision-making procedure in the Second Framework Programme, the CSG programme foresees one and the same decision-making process, irrespective of Area of research.

[4874] *Decision 1999/169/EC of 25 January 1999 adopting a specific programme of research, technological development and demonstration on competitive and sustainable growth (1998 to 2002)*, OJ L 64/40, 12.3.1999 (hereinafter "Council Decision 1999/169/EC"), Article 1,Exhibit EC-198.

[4875] Council Decision 1999/169/EC, Annex I.

[4876] Council Decision 1999/169/EC, Annex II.

[4877] Council Decision 1999/169/EC, Annex III and Council Decision 182/1999 Annex IV.

BCI deleted, as indicated **[***]**

In particular, decisions must be taken by the Commission after consultation with a Committee composed of representatives of EC member States, and on the basis of a qualified majority vote of the EC member State representatives in the Committee or the Council.[4878]

7.1552 Thus, the CSG programme implemented the objectives of the Fifth Framework Programme by further elaborating three areas of research that would be funded, providing for an indicative allocation of funds to these areas and establishing implementation rules and a decision-making procedure. Only the activities under the "Key actions" area were identified in the Decision, and the only one of these activities that appears to be sector specific was "New perspectives for aeronautics", to which a budget of ECU 700 million was allocated.

- Sixth Framework Programme

7.1553 The Sixth Framework Programme was established by Decision No. 1513/2002/EC of the European Parliament and the Council of 27 June 2002,[4879] giving effect to the strategic R&TD mandate and objectives set out in Title XVIII of the Treaty establishing the European Community.[4880] As reflected in the recitals of the Decision, the Programme's objectives included advancing EC R&TD activities in order to strengthen the scientific and technological basis of EC industry; contributing to the creation of a European Research Area and innovation; and promoting the development of scientific and technical excellence and the coordination of European research. To this end, and in accordance with Article 166(1) of the EC Treaty, the Decision was adopted to:

> "establish the scientific and technical objectives {of the sixth multiannual (2002 to 2006) framework programme} and fix the relevant priorities for the activities envisaged, the maximum overall amount, the detailed rules for Community financial participation in the ... programme, as well as the respective shares in each of the activities envisaged, and to indicate the broad lines of the activities in question"[4881]

7.1554 Annex I of the Decision contains a breakdown of the activities targeted for funding, and provides a description of the related scientific and technological objectives and priorities. In total, 17 activities are identified under three headings: 11 activities under the "Focussing and integrating Community research" heading; four activities under the "Structuring the European Research Area" heading; and two activities under the "Strengthening the foundation of the European Research Area" heading. Most of these activities appear to be of a general horizontal nature, potentially cutting across a variety of business segments.[4882] Others seem to be more focussed, concentrating on particular

[4878] Council Decision 1999/169/EC, Article 7.

[4879] *Decision No 1513/2002/EC of the European Parliament and of the Council of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006)*, OJ L 232/1, 29.8.2002 (hereinafter "Decision 1513/2002/EC"), Exhibit EC-204.

[4880] Treaty establishing the European Community; Treaty of Rome 1957 amended through the Treaty of Amsterdam 1997.

[4881] Decision 1513/2002/EC, recital 10, read together with Article 1.

[4882] These activities are: (i) under the "focussing and integrating Community research" heading – the "nanotechnologies and nanosciences, knowledge-based multifunctional materials, and new production processes and devices", "sustainable development, global change and ecosystems", "citizens and governance in a knowledge-based society", "supporting policies and anticipating scientific and technological needs", "horizontal research activities involving SMEs", "specific measures in support of international cooperation", and "non-nuclear activities of the Joint Research Centre" activities; (ii) under the "structuring the European Research Area" heading – the "research and innovation", "human resources" and "science and society" activities; and (iii) under the "strengthening the foundation of the European Research Area" heading – the "coordination activities ... in the whole field of science and technology" and "support {for} the coherent development of research and innovation policies" activities.

BCI deleted, as indicated **[***]**

economic sectors.[4883] The "indicative" funding levels for each of the 17 activities are set out in Annex II, with the total amount of funding made available for all activities coming to EUR 16,270 million. The funding made available for the "aeronautics and space" activity was EUR 1,075 million.

7.1555 Annex III of the Decision describes ten different types of "instruments" that it is envisaged will be used to execute the various funded activities, outlining the expected level of the European Communities' financial participation in each one. As we read them, the "instruments" described in Annex III of the Decision represent different forms or types of research projects, including "networks of excellence", "integrated projects", "coordination action" and "integrated infrastructure activities". Some of these "instruments" are expressly limited to particular research activities, while others are intended to be used more broadly in respect of multiple activities.

7.1556 Like all of the prior Decisions establishing framework programmes, Decision 1513/2002/EC does not provide for the disbursement of any funds to individual applicants. In this respect, Article 5 explains that the Sixth Framework Programme was to be implemented through "specific programmes" which "shall establish precise objectives and the detailed rules for implementation".

7.1557 Thus, the Decision setting up the Sixth Framework Programme established an EC-wide R&TD support initiative targeting a variety of economic activities at both horizontal and sector-specific levels. The Decision identified and allocated funds to 17 preferred areas of research activity and described the forms or types of research projects that would be supported. However, in laying down these overall guidelines, the Decision did not explain how any financial support could be practically accessed by individual applicants. As with all other Framework Programmes, the detailed rules and methodologies for the distribution of funds were left to the "specific programmes" adopted for the purpose of implementation.

7.1558 As we understand it, the Decision establishing the Sixth Framework Programme was implemented through more than one "specific programme". For the purpose of the present dispute, the focus of our analysis is on the "Specific Programme for Integrating and Strengthening the European Research Area" (the "ISERA programme").

7.1559 The ISERA programme was established through Council Decision 2002/834/EC of 30 September 2002 for the purpose of implementing the research initiatives described in two of the three headings set out in Decision 1513/2002/EC, namely, the "Focussing and Integrating Community research" and "Strengthening the Foundation of the European Research Area" headings.[4884] Annex I of the Decision provides a detailed description of 12 of the 13 activities listed in Annex I of Decision 1513/2002/EC under the same two headings.[4885] This includes an explanation of four research priorities that may qualify for funding through the "Aeronautics" element of the "Aeronautics and Space" activity. These priorities are described as: "Strengthening Competitiveness"; "Improving Environmental Impact with regard to Emissions"; "Improving Aircraft Safety"; and "Increasing Operational Capacity and Safety of the Air Transport System". Similarly, Annex II of the ISERA programme contains the same "indicative breakdown" of funding amounts per activity that were set

[4883] These activities are all found under the "focussing and integrating Community research" heading – namely, the "life sciences, genomics and biotechnology for health", "information society technologies", "food quality and safety" and "aeronautics and space" activities.

[4884] *Council Decision 2002/834/EC of 30 September 2002 adopting a specific programme for research, technological development and demonstration: "Integrating and strengthening the European Research Area" (2002-2006)*, OJ L 294/1, 29.10.2002 (hereinafter "Decision 2002/834/EC"), recital 2 and Article 1, Exhibit EC-199.

[4885] The one research activity falling within the "focussing and integrating Community research" heading that is not covered by the ISERA programme is the "non-nuclear activities of the Joint Research Centre" activity.

BCI deleted, as indicated **[***]**

out in Annex II of Decision 1513/2002/EC. The same figure of EUR 1,075 million is disclosed as the indicative amount of funding for projects falling within the scope of the "Aeronautics and Space" activity.

7.1560 A description of the "means" for implementing the ISERA programme is set out in Annex III. These include seven of the ten "instruments" referred to Annex III of Decision 1513/2002/EC, which are further elaborated and explained. In addition, Annex III of the programme stipulates that the programme will be implemented in accordance with "Regulation (EC) No .../2002 on rules for the participation of undertakings, research centres and universities and for the dissemination of research results" (which neither of the parties to this dispute has submitted). As with other Framework Programmes, the Commission is called upon to initiate the process by establishing work programmes associated with each thematic area of research and publishing calls for proposals.[4886] Finally, two decision-making procedures are envisaged, one applying specifically for the purpose of adopting measures in respect of research involving or using human embryos and human embryonic stem cells, and another for measures adopted in respect of all other research activities falling within the scope of the ISERA programme.[4887]

7.1561 Thus, the ISERA programme implemented the objectives of the Sixth Framework Programme by providing a more detailed exposition of 12 of the 13 research activities identified in Decision 1513/2002/EC, identifying the same indicative levels of funding that would be made available to support these activities, and explaining how funding decisions would be taken and implemented. In respect of "Aeronautics and Space" activities, the ISERA programme confirmed that the EUR 1,075 million funding allocation would be used to finance research that advanced, *inter alia*, the competitiveness of the aeronautics industry, one of the objectives being to "enable the 3 sectors of the manufacturing industry: airframe, engines and equipment, to increase their competitiveness, by reducing in the short and long term, respectively, aircraft development costs by 20% and 50%, and aircraft direct operating cost by 20% and 50%, and improving passenger comfort".[4888]

- Whether the Framework Programme grants are specific within the meaning of Article 2.1(a) of the SCM Agreement

7.1562 A common feature of all of the Framework Programmes is that their establishment and implementation was provided for under separate legal instruments. Nevertheless, it is apparent that for each Framework Programme, these legal instruments constituted one single legal regime pursuant to which the European Commission granted the subsidies at issue to Airbus. In our view, it follows that for the purpose of Article 2.1(a) of the SCM Agreement, it is appropriate to regard the legal regime established through the constituent instruments of each Framework Programme as the "legislation pursuant to which the granting authority operates". Thus, in order to determine whether the subsidies granted to Airbus are specific within the meaning of Article 2.1(a), the question we must answer is whether the "granting authority" or each of the relevant legal regimes explicitly limited access to the subsidies at issue to "certain enterprises".

7.1563 Although the overall aims of each of the Framework Programmes were expressed in terms of advancing EC R&TD activities in general, the legal regimes giving effect to these objectives did so, at least partly, by channelling dedicated amounts of funding to sector-specific research areas that were

[4886] Decision 2002/834/EC, Article 5 and Annex I (work programmes) and Article 6.2(a) (calls for proposals).
[4887] Decision 2002/834/EC, Articles 6 and 7.
[4888] Decision 2002/834/EC, Annex III.

BCI deleted, as indicated **[***]**

implemented in accordance with specific work programmes.[4889] We note, in particular, that an amount of funding dedicated to "aeronautics" or "aeronautics and space" research was made available under each of the relevant Framework Programmes.[4890] These funding amounts were disbursed in line with the objectives and priorities identified in the aeronautics research related work programmes.[4891] The effect of creating such allocations is, in our view, equivalent to setting aside a portion of a budget that is ostensibly intended to fund research activities in all sectors of the economy for the sole purpose of the research efforts of enterprises or industries active in the aeronautics sector. In doing so, the legal regimes under which the European Commission operated, explicitly limited access to a dedicated portion of the subsidy grants made available under the Framework Programmes to only those enterprises or industries undertaking research in the field of aeronautics. To this extent, the research grants at issue could be viewed as emanating from a closed system of subsidization that focused on "aeronautics" or "aeronautics and space".

7.1564 The European Communities argues that to the extent that the Framework Programmes allocated portions of their budgets to research activities in the field of "aeronautics", this did not render the subsidies granted to Airbus specific within the meaning of Article 2.1(a). According to the European Communities, specificity within the meaning of Article 2.1(a) must be determined at the overarching Framework Programme level where budgets are allocated to a wide array of different thematic research areas. If this were not the case, the European Communities contends that support provided under broad research programmes, which necessarily allocate their budgets to a variety of research areas in order to spread funds to several important fields of technology, would always constitute a specific subsidy pursuant to Article 2.1(a).[4892]

7.1565 We are not persuaded by the European Communities' arguments. While it is true that each of the Framework Programmes was intended to provide R&TD funding opportunities for projects across a wide array of economic sectors, such opportunities were circumscribed by the fact that the funding amounts were explicitly allocated to particular sectors of research, including "aeronautics" or "aeronautics and space". Funds made available for aeronautics research were reserved for entities active in this research segment; and funding amounts so allocated could not be accessed by entities seeking support for other types of R&TD projects. Moreover, the fact that entities not active in the field of aeronautics research were eligible to obtain R&TD grants under other research headings does not mean that the subsidies received by Airbus under the aeronautics research headings were equally accessible to these other entities. It is clear to us that the legal regimes of each of the challenged Framework Programmes did not allow for this outcome, creating, what was in effect, a separate programme of subsidization for the benefit of "certain enterprises".

[4889] *See*, para. 7.1518 above, Second Framework Programme; para. 7.1527 above, Third Framework Programme; para. 7.1537 above, Fourth Framework Programme; para. 7.1547 above, Fifth Framework Programme; and para. 7.1558 above, Sixth Framework Programme.

[4890] *See*, para. 7.1519 above, Second Framework Programme; para. 7.1528 above, Third Framework Programme; para. 7.1538 above, Fourth Framework Programme; para. 7.1548 above, Fifth Framework Programme; and para. 7.1559 above, Sixth Framework Programme.

[4891] For example, *see* for Fifth Framework Programme – *New Perspectives in Aeronautics* in European Commission, *Growth Work programme for RTD actions in support of "competitive and sustainable growth" 1998-2002*, Exhibit US-488; and Sixth Framework Programme – *Thematic Priority 1.4 Aeronautics and Space Work Programme 2002-2006*, Exhibit US-489. Although the parties have not submitted a copy of similar work programmes established under the Second to Fourth Framework Programmes, we are satisfied that work programmes of the same kind associated with the respective "aeronautics" research areas were required under the legal regimes of each of these programmes. For the Second Framework Programme, we note that the dedicated funding was also disbursed pursuant to a distinct "aeronautics" area decision-making procedure. *See*, para. 7.1521 above.

[4892] EC, Answer to Panel Question 106; EC, SWS, para. 626.

BCI deleted, as indicated **[***]**

7.1566 This, however, does not mean that we believe any subsidy granted pursuant to an allocated sub-budget of a general subsidy programme will necessarily be specific within the meaning of Article 2.1(a) of the SCM Agreement. In our view, the allocation of funds to certain exclusive research activities under an umbrella subsidy programme is not incompatible with Article 2.1(a), **provided that** the availability of those funds is not explicitly limited to certain enterprises. However, in the present case, the evidence before us indicates that amounts of subsidization were explicitly set aside under each of the relevant Framework Programmes for the research efforts of "certain enterprises". Thus, we conclude that the R&TD subsidies granted to Airbus under each of the Framework Programmes are specific within the meaning of Article 2.1(a) of the SCM Agreement.

7.1567 In the light of the above finding, we believe it is unnecessary for the resolution of this dispute to also determine whether the subsidies at issue were de facto specific within the meaning of Article 2.1(c) of the SCM Agreement. We therefore exercise judicial economy and decline to rule on the United States' allegation that the challenged subsidy measures were also specific under Article 2.1(c) of the SCM Agreement.

(iii) Loans under the Spanish PROFIT programme

Arguments of the United States

7.1568 The United States argues that the loans received by Airbus under the Programa de Fomento de la Investigación Técnica ("PROFIT") are specific within the meaning of Article 2 of the SCM Agreement, because it considers they were explicitly limited to aeronautics companies.[4893] To support its position, the United States first notes that the two phases of PROFIT pursuant to which Airbus received the subsidies at issue established sector-specific research programmes for aeronautics – the Programa Nacional de Aeronautica (PROFIT I, 2000-2003) and the Subprograma Nacional de Transporte Aero (PROFIT II, 2004-2007).[4894] Second, the United States observes that the research objectives and priorities under each of these programmes singled out the aeronautics industry; with eligibility for the available support measures limited to aeronautics-related research proposals.[4895]

7.1569 The United States also claims that the subsidies at issue were de facto specific within the meaning of Article 2.1(c). The United States maintains that the European Communities' failure to provide information on PROFIT loans during the Annex V process has made it impossible for it to present a detailed analysis of de facto specificity under the terms of Article 2.1(c) of the SCM Agreement. Therefore, in the light of the European Communities' alleged lack of cooperation, the United States asks the Panel to draw the logical inference that, had the European Communities provided the information requested, it would have supported a finding of de facto specificity.[4896]

[4893] US, FWS, para. 703; US, SNCOS, paras. 74 and 77.
[4894] US, SWS, para. 519.
[4895] US, FWS, para 703; US, SWS, para. 519, citing for PROFIT 2000-2003, *RESOLUCIÓN de 10 de mayo de 2001, de la Secretaría de Estado de Política Científica y Tecnológica, por la que se efectúa la convocatoria del año 2001 para la concesión de las ayudas del Programa Nacional de Aeronáutica del Programa de Fomento de la Investigación Técnica (PROFIT), incluido en el Plan Nacional de Investigación Científica, Desarrollo e Innovación Tecnológica (2000-2003)*, BOE núm. 128 (29 May 2001), Exhibit US-354; and for PROFIT 2004-2007, *Orden ITC/1038/2005, de 14 de abril, por la que se efectúa la convocatoria del año 2005, para la concesión de las ayudas del Programa de Fomento de la Investigación Tecnológica dentro del Plan Nacional de Investigación Científica, Desarrollo e Innovación Tecnológica (2004-2007), en la parte dedicada al fomento de la investigación técnica*, BOE núm. 95 (21 April 2005), p. 13756, at Sección 14. Programa Nacional de Medios de Transporte, Apartado cuarto – Subprograma Nacional de Transporte Aéreo, Exhibit US-355.
[4896] US, FWS, paras. 699, 702; US, SWS, para 519, footnote 660.

BCI deleted, as indicated **[***]**

Arguments of the European Communities

7.1570 The European Communities rejects the United States' allegations that the research support provided under the PROFIT is specific within the meaning of Article 2 of the SCM Agreement. The European Communities explains that the PROFIT implements the Plan Nacional de Investigación Científica, Desarrollo e Innovación Tecnológica (the "PLAN"), the objective of which is to encourage companies and other organisations to carry out R&TD activities across a wide array of economic sectors in accordance with a defined set of objectives. According to the European Communities, the PROFIT concerns the part of the PLAN dedicated to technological research, and neither explicitly nor implicitly restricts participation of any enterprise or industry or group thereof wanting to participate. In the European Communities' view, the PROFIT is a framework programme providing R&TD support in the form of mainly loans and grants across a wide variety of research areas.[4897] Thus, the European Communities contends that loans received by Airbus under the PROFIT cannot be specific.[4898]

Evaluation by the Panel

- Specificity under Article 2.1(a)

7.1571 We begin our analysis of the United States' claim by considering whether the subsidies at issue are specific within the meaning of Article 2.1(a) of the SCM Agreement. We recall that Article 2.1(a) of the SCM Agreement stipulates that a subsidy is specific to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority, if the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises.[4899] Thus, in examining whether the subsidies at issue are specific within the meaning of this provision, the focus of our analysis will be on understanding whether the Spanish "granting authority" or the "legislation pursuant to which the granting authority operates" explicitly limits access to the subsidies at issue to "certain enterprises".

7.1572 The subsidies challenged by the United States were granted to Airbus under two phases of the PROFIT – PROFIT I (2000-2003) and PROFIT II (2004-2007). Both phases of the PROFIT implemented the R&TD objectives identified by the Spanish government in the PLAN for the respective four year periods. First established in 1986,[4900] the PLAN defines the general framework of the Spanish government multi-year scientific research, development and technological innovation support initiatives across a broad spectrum of economic sectors.[4901] The two phases of the PROFIT that are the subject of the United States' complaint implemented the R&TD activities identified in the

[4897] EC, FWS, para. 1319; EC, SWS, para 649; EC, Answer to Panel Question 109.
[4898] EC, FWS, para. 1319; EC, SWS, para 649; EC, FNCOS, para. 119.
[4899] *See*, para. 7.919 above.
[4900] Law 13/1986 of Promotion and General Co-ordination of Scientific and Technical Research.
[4901] The sectors covered by the PLAN 2000-2003 were: Biomedicine; Biotechnology; Information and Communication Technologies; Materials; Chemical Processes and Products; Industrial Design and Production; Natural Resources; Agro-Food Resources and Technologies; Socio economy; Aeronautics; Food sector; Automotive; Civil construction and conservation of cultural heritage; Defence; Energy; Space; Environment; Sociosanitary; Information Society; Transport and Land Planning, and Tourism, leisure and sports., Exhibit US-690-A, p. 13 -14. The sectors covered by the PLAN 2004-2007 were: Biomedicine; Technologies for the Health and the Well-being; Biotechnology; Basic Biology; Resources and Agro-Food Technologies; Sciences and Environmental Technologies; Earth sciences and Biodiversity; Space; Astronomy and Astrophysics; PArticle Physics; Math; Physics; Energy; Sciences and Chemical Technologies; Materials; Design and Industrial Production; Security; Defence; Electronic and Communications Technologies; Informatics Technologies; Information Society Technologies; Transport; Construction; Humanities, and Social, Economic and Legal Sciences, Exhibit US- 691-A, p. 16-22.

BCI deleted, as indicated **[***]**

PLAN that were managed by the Ministry of Industry and Energy for the period 2000-2003 and the Ministries of Education and Science, and Industry, Trade and Tourism between 2004-2007.[4902]

7.1573 PROFIT I was enacted by Ministerial Order of 7 March 2000[4903] in order to give effect to the following research areas identified in the PLAN 2000-2003: the "National Biotechnology Programme"; the "National Industrial Design and Production Programme", the "National Materials Programme"; the "National Programme of Chemical Processes and Products"; the "National Natural Resources Programme"; the "National Programme of Agro-Food Resources and Technologies"; the "National Programme of Information and Communication Technologies"; the "National Socio-Economic Research Programme", the "National Biomedicine Programme"; the "**National Aeronautics Programme"**; the "National Automotive Programme", the "National Energy Programme", the "National Space Programme"; the "National Environment Programme"; the "National Information Society Programme"; and the "National Transport and Land Planning Programme".[4904]

7.1574 Likewise, PROFIT II was established by Ministerial Order of 18 March 2005[4905] in order to give effect to the following research areas identified in the PLAN 2004-2007: the "National Programme of Biomedicine"; the "National Programme of Technologies for the Health and the Well-being"; the "National Biotechnology Programme"; the "National Programme of Resources and Agro-Food Technologies"; the "National Programme of Sciences and Environmental Technologies"; the "National Programme of Energy"; the "National Programme of Sciences and Chemical Technologies"; the "National Materials Programme"; the "National Programme of Design and Industrial Production"; the "National Programme of Electronic and Communications Technologies"; the "National Programme of Informatics Technologies"; the "National Programme of Information Society Technologies"; the "National Transport Programme", including the "Air Transport Sub-Programme"; the "National Construction Programme"; the "National Security Programme"; and the "National Programme of Social, Economic and Legal Sciences".[4906]

7.1575 The loans challenged by the United States were provided to Airbus under the National Aeronautics Programme (PROFIT I) and the Air Transport Sub-Programme (PROFIT II). In summary, the objectives of both of these Programmes were to advance the research activities and capacity of the Spanish aeronautics industry, and thereby enhance its competitive position.[4907] Essentially the same objectives are described for each of the other research Programmes established under the PROFIT I and II. With regard to the beneficiaries, PROFIT I and II identify the same group of generic potential recipients of funding for all research areas, including the National Aeronautics Programme and the Air Transport Sub-programme, namely: enterprises; groups or associations of enterprises; public research institutes; private non-profit research and development centers; and for certain specified projects and actions, public statutory bodies.[4908]

7.1576 Although it is apparent that only businesses active in the field of aeronautics research may qualify for loans under the National Aeronautics Programme and the Air Transport Sub-Programme,

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[4902] The Ministry of Industry and Energy managed PROFIT I. Exhibit US-349, p. 1, recital 5. PROFIT II was managed by the Ministry of Education and Science and the Ministry of Industry, Trade and Tourism. As we understand it, the latter Ministries assumed competencies from the Ministry of Industry and Energy which was re-organized after PROFIT I. EC, FWS, para. 1317.

[4903] Exhibit US-349.

[4904] Exhibit US-349, Chapter I, Article 2.

[4905] Exhibit US-350.

[4906] Exhibit US-350, Chapter I, Article 2.

[4907] PROFIT I: Exhibit US-349, Chapter III, Article 38.1(b). PROFIT II: Exhibit US-355, Section 14, "Apartado tercero".

[4908] PROFIT I: Exhibit US-349, Chapter III, Article 39. PROFIT II: Exhibit US-350, Chapter I, Article Sexto.

it does not automatically follow that, for this reason alone, the subsidies granted thereunder are specific within the meaning of Article 2.1(a) of the SCM Agreement. In our view, when assessing whether an umbrella subsidy programme that channels support through one or more industry-focussed sub-programmes is specific under the terms of Article 2.1(a) of the SCM Agreement, all relevant facts and circumstances must be taken into account. One of these may involve examining whether any dedicated sub-budgets exist for one or more of the industry-focussed sub-programmes.[4909] As in the case of the EC Framework Programmes, where a subsidy is granted pursuant to a sub-budget allocated for research activities falling within the scope of a particular industry-focussed sub-programme, that subsidy will be explicitly limited to "certain enterprises".[4910] However, where there is no such ring-fencing of funds for particular sub-programmes, it follows that the entirety of the funding available under the umbrella programme will, in principle,[4911] be accessible for eligible projects under any particular sub-programme. In this event, all projects eligible for support under any particular sub-programme will have access to the same pool of resources available to subsidize all research endeavours that are the focus of the umbrella programme.

7.1577 We note that the United States does not argue, as it did with respect to the EC Framework Programmes, that a dedicated sub-budget was allocated exclusively to research activities falling within the scope of the National Aeronautics Programme or the Air Transport Sub-Programme.[4912] Rather, the United States' claim of specificity within the terms of Article 2.1(a) rests solely on the fact that the two aeronautics support programmes under PROFIT I and II were entirely focused on and open to research activities carried out for the purpose of aeronautics. The United States has pointed to no other particular fact or circumstance in support of its claim. However, as we have articulated above, we are not convinced that the aeronautics-focus of the two programmes is, in the light of the evidence and arguments, alone enough to demonstrate that the subsidies granted to Airbus under the PROFIT I and PROFIT II were explicitly limited to "certain enterprises". We therefore dismiss the United States' claim of specificity under Article 2.1(a) of the SCM Agreement.

[4909] Other factors that may also be relevant might include eligibility criteria and decision-making procedures.

[4910] *See*, paras. 7.1563-7.1566 above.

[4911] In our view, funds that are, in form available for all projects equally under an umbrella subsidy programme might in substance be ring-fenced for a particular purpose or industry sector if, for instance, different decision-making procedures or eligibility criteria apply without justification to limit the availability of funds to "certain enterprises".

[4912] Our own review of the evidence advanced by the United States does not lead us to conclude that any funding amounts were in fact actually reserved for this purpose. The evidence indicates that funds were to be distributed after review of applications in Answer to Calls for Proposals and that projects and activities under the different programmes were to be financed in accordance with the budgetary lines determined in the corresponding Calls for Proposals in each of the years of the Programmes, Exhibit US- 349, Chapter I, Article 7, and Exhibit US-350, Chapter I, Article 11. The one Call for Proposals under the National Aeronautics Programme submitted by the United States, Exhibit US-354, *Segundo*, reveals that eligible projects would be financed from a series of numbered "aplicaciones presupuestarias" ("budgetary lines") - "20.08.542E.747", "20.08.542E.777","20.08.542E.787","20.08.542E.821" and "20.08.542E.831". However, there is no evidence (or argument) before us that explains exactly what these numbered "aplicaciones presupuestarias" mean. In respect of the Air Transport Sub-Programme the United States submitted a document pertaining to a Call for Proposal for the year 2005 for most of the programmes established under the PROFIT II, including the Air Transport Sub-Programme, Exhibit US-355, *Tercero*. This Call for proposal also reveals that eligible projects would be financed from a series of numbered "aplicaciones presupuestarias" ("budgetary lines") "20.16.467C.747","20.16.467C.757","20.16.467C.767","20.16.467C.777","20.16.467C.787","20.16.467C.821.10", and "20.16.467C.831.10". Although there is no evidence (or argument) before us that explains exactly what these numbered "aplicaciones presupuestarias" mean, it is clear to us that not only eligible projects for the Air Transport Sub-Programme would be financed from these "aplicaciones presupuestarias", but that almost all eligible projects under all the Programmes that the Call for Proposal refers to, would be financed from these "aplicaciones presupuestarias". In our view, this evidence strongly suggests that there was no sub-budget allocated exclusively to research activities falling within the scope of the Air Transport Sub-Programme.

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- Specificity under Article 2.1(c)

7.1578 The United States asserts that during the Annex V process the Facilitator asked the European Communities a series of detailed questions on the amounts of funding received by Airbus and other participants for all projects carried out under the PROFIT programmes.[4913] The United States recalls that the European Communities provided no information in response to the Facilitator's request.[4914] In this light, the United States asked the Panel to request the European Communities to provide the information the Facilitator requested, or else find, in accordance with paragraph 7 of Annex V, that the loans received by Airbus under the PROFIT are specific within the meaning of Article 2.1(c) of the SCM Agreement.[4915] The United States argues that had the European Communities provided the information requested, it would have supported a finding of de facto specificity, within the meaning of this provision.[4916]

7.1579 The European Communities has consistently argued that the PROFIT loans challenged by the United States are outside the terms of reference of the present dispute.[4917] Because of this, the European Communities initially refused to provide any information at all about the projects carried out under the PROFIT.[4918] However, in response to Panel Question 109, the European Communities submitted certain information on loan payments made under the PROFIT II in the years 2004 and 2005.[4919] For reasons we have previously explained, we believe the European Communities' response to Panel Question 109 to be less than satisfactory.[4920] In our view, had the European Communities provided clear and accurate information on, at least, the loan payments made to Airbus under the two separate PROFIT programmes at issue, (as we had expected it would in response to Panel Question 109), the United States would have at least had a credible starting point from which it could have assessed whether the subsidies at issue were specific within the meaning of Article 2.1(c), and if necessary construct its case. Obviously, had the European Communities disclosed some or all of the information requested during the Annex V process, the United States would have had more data to inform its analysis.[4921] However, in the light of the EC' responses to the Facilitator's information requests and Panel Question 109, the United States was left with publicly available data estimating the global loan amounts received by Airbus over an unknown period of time under both phases of the PROFIT.[4922] As is apparent from our previous discussion of the factors that may be considered in order to establish specificity under Article 2.1(c) of the SCM Agreement,[4923] the publicly available information before us is not enough to conduct a proper assessment of whether the subsidies at issue were de facto specific.[4924]

[4913] Questions 279(a)-(k) and 280(a)-(l) from the Facilitator to the EC, Exhibit US-4 (BCI).
[4914] EC Reply to Questions 279 and 280 from the Facilitator, Exhibit US-5 (BCI).
[4915] US, FWS, paras. 699, 702; US, SWS, para 518, footnote 660.
[4916] US, FWS, paras. 699, 702; US, SWS, para 518, footnote 660.
[4917] EC, FWS, para. 1315; EC, Answer to Panel Question 109; EC, SWS, para. 647.
[4918] EC Reply to Questions 279 and 280 from the Facilitator, Exhibit US-5 (BCI).
[4919] Exhibit EC-624 (BCI).
[4920] *See*, paras. 7.1477-7.1478 above.
[4921] We note that the information requested during the Annex V process was much broader and more detailed than the "payment information" requested in Panel Question 109, and included information on the total budgets for PROFIT I and II as well as the National Aeronautics Programme and Air Transport Sub-Programme, lists of all funded projects and recipients under the Programme and Sub-Programme, relevant legal instruments and legislation, projects evaluation reports, and the terms of the loans granted to Airbus. *See*, Questions 279(a)-(k) and 280(a)-(l) from the Facilitator to the EC, Exhibit US-4 (BCI).
[4922] *See*, paras. 7.1476-7.1480 above.
[4923] *See*, paras. 7.959 and 7.976 above addressing the United States' claims against the challenged EIB loans.
[4924] We recall that the language of Article 2.1(c) suggests that it is intended to address the situation where a challenged subsidy does not appear to be specific within the meaning of the principles set out in Articles 2.1(a) and 2.1(b), but "there are reasons to believe that the subsidy may in fact be specific". When such

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7.1580 We recall that paragraph 7 of Annex V provides that a panel "should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". In the light of the foregoing, and consistent with our previous finding on the amount of the loan payments made to Airbus under the challenged PROFIT programmes,[4925] we conclude pursuant to paragraph 7 of Annex V, that the challenged subsidies under the PROFIT I and II are specific within the meaning of Article 2.1(c) of the SCM Agreement.

(iv) Grants under the UK Technology Programme

Arguments of the United States

7.1581 The United States argues that the grants provided to Airbus under the UK Technology Programme ("TP") are specific within the meaning of Article 2 of the SCM Agreement because they were awarded through calls for proposals that are limited to aeronautics-related technologies, which have a scope determined by a narrow set of industry-specific criteria.[4926] According to the United States, the European Communities has acknowledged that the TP is divided into 43 "research themes" targeting a limited set of industries. The United States asserts that each of these research themes has its own budget and tends to be highly industry-specific. For example, the United States argues that the "Advanced Materials" research theme targets composite materials development in the aeronautics industry, with calls under this research theme singling out the aeronautics industry. Finally, the United States also submits that the European Communities has admitted that the TP is a continuation of the CARAD/ARP, a programme for which the European Communities has not contested its claims of specificity.[4927] Thus, for all of these reasons, the United States argues that the R&TD funding provided to Airbus and the aeronautics industry under the TP is specific within the meaning of Article 2.1 of the SCM Agreement.[4928]

Arguments of the European Communities

7.1582 The European Communities rejects the United States' allegations. The European Communities asserts that the TP is a broad research programme open to all industrial and service sectors, including the aeronautics sector.[4929] The European Communities explains that the TP is devoted largely to collaborative R&TD, with a budget of GBP 370 million for the period 2005-2008.[4930] Funding grants are limited to 50% of eligible costs and provided on a bi-annual basis in response to competitions calling for research falling within the scope of seven key technology areas: Advanced Materials; Bioscience and Healthcare Technologies; Design Engineering and Advanced Manufacturing; Electronics and Photonics; Emerging Energy Technologies; Information and Communication Technologies; and Sustainable Production and Consumption.[4931] The European

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a situation arises, the first sentence of Article 2.1(c) stipulates that "other factors may be considered". The second sentence of Article 2.1(c) elaborates four "{s}uch factors" – "use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy."

[4925] *See*, paras. 7.1476-7.1480 above.

[4926] US, FWS, para, 691, referring to *DTI, Second Call of the Technology Program (April 2004), Advanced Composite Materials and Structures*, at 2; and *DTI, The Technology Program, November 2004 Competition for Funding, Smart Materials and Related Structures*, at 2; and *DTI, The Technology Programme: Spring 2006 Competition for Funding, Design Engineering & Advanced Manufacturing: Management of complex fluid flow conditions*, at 2, Exhibits US-495a, US-495b and US-495c.

[4927] US, FWS, Para 691.

[4928] US, SWS, para 520. Exhibit US-343.

[4929] EC, FWS, paras. 1286 and 1305; EC, SWS, para. 643.

[4930] EC, FWS, para. 1287. Exhibit EC-229.

[4931] EC, FWS, paras. 1288, 1296-1304. Exhibit EC-230.

BCI deleted, as indicated **[***]**

Communities denies that the calls for proposals are determined by narrow industry-specific criteria, or that there has been any "earmarking" of a certain amount of support for the aerospace sector in general, for Airbus UK, or for any other aerospace-sector organisation.[4932] Thus, the European Communities argues that the R&TD grants available under the TP are not explicitly limited to "certain enterprises" and therefore not specific within the meaning of Article 2.1(a) of the SCM Agreement.[4933]

7.1583 The European Communities criticizes the United States for relying upon information brochures relating to three of 43 technology priority areas so far identified in the competitions undertaken under the TP, namely, the "Advanced Composite Materials and Structures" (April 2004 competition); "Smart Materials" (November 2004 competition) and "Design Engineering and Advanced Manufacturing" (Spring 2006 competition) brochures. The European Communities argues that although the areas will be relevant to the aeronautics industry, none of them is "limited to aeronautics-related technologies" and each of the brochures explicitly refers to other sectors to which the technology in question is relevant.[4934]

Evaluation by the Panel

7.1584 The United States argues that the grants provided to Airbus under the TP are specific within the meaning of Article 2 of the SCM Agreement. In particular, we understand the United States to argue that the grants provided to Airbus under the TP are specific within the meaning of Article 2.1(a) of the SCM Agreement. We do not understand the United States to argue that they are also specific within the meaning of Article 2.1(c) of the SCM Agreement.

7.1585 As already noted elsewhere in this Report, Article 2.1(a) of the SCM Agreement stipulates that a subsidy is specific to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority, if the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises.

7.1586 The main argument advanced by the United States to substantiate its claim that the grants provided to Airbus under the TP are specific within the meaning of Article 2.1(a) of the SCM Agreement is based on the assertion that they were awarded through competitions that were limited to R&TD activities in the field of aeronautics-related technologies. In this regard, the United States refers to information brochures publicising three competitions held in April and November 2004 and Spring 2006, respectively involving R&TD in the fields of "Advanced Composite Materials and Structures", "Smart Materials" and "Design Engineering and Advanced Manufacturing".[4935]

7.1587 However, our review of the evidence before us suggests that the subsidies provided under the TP are not limited, in the way the United States asserts, to entities active in the field of aeronautics research. We agree with the European Communities that the TP is a research programme intended to fund R&TD activities across a broad array of economic sectors. The TP operates on the basis of an overall budget for all supported activities set at GBP 370 million for the years 2005-2008.[4936] Funding is provided for the purpose of "collaborative research and development" and "knowledge transfer networks"[4937] through competitions held twice per year. The precise subject matter of the research themes addressed in each competition is shaped by the input of the "Technology Strategy

[4932] EC, FWS, para. 1305.
[4933] EC, FWS, para. 1306.
[4934] EC, SWS, para. 643.
[4935] Exhibits US-495a, US-495b and US-495c.
[4936] Exhibit EC-230.
[4937] Exhibit EC-229.

BCI deleted, as indicated **[***]**

Board", an advisory board comprised "mainly of experienced business leaders".[4938] The Technology Strategy Board is tasked with ensuring "that the technology priorities within the Technology Programme are market-focussed, and" advising "on the broad allocation of resources to them."[4939] The research themes it identifies for open competitions vary from year-to-year, but broadly fall within the seven key technology areas identified by the European Communities, namely: Advanced Materials; Bioscience and Healthcare Technologies; Design Engineering and Advanced Manufacturing; Electronics and Photonics; Emerging Energy Technologies; Information and Communication Technologies; and Sustainable Production and Consumption.[4940] In the vast majority of cases, the research themes do not appear to focus on particular economic sectors.[4941]

7.1588 Turning to the three competitions that are the focus of the United States' complaint, we note that the competition relating to "Advanced Composite Materials and Structures" does not limit the availability of grants under the TP to the aeronautics-related research. Under the "scope of the call" heading, there is no limitation at all with respect to the types of industries which might be eligible for grants thereunder. Indeed, the brochure explicitly identifies the aerospace, automotive, construction, consumer product, engineering, marine, rail and space sectors as being potential beneficiaries of research falling within the scope of this call for proposals.[4942] Similarly, multiple potential industry beneficiaries are identified in the competitions relating to "Smart Materials and Related Structures"[4943] and "Design Engineering and Advanced Manufacturing".[4944] Far from singling out the aerospace sector as the beneficiary of the relevant R&TD grants, it is clear that the three competitions at the centre of the United States' complaint are open to all industry sectors interested in the particular technology at issue; and in fact, numerous industries are identified as potential beneficiaries.

7.1589 As regards the United States' argument that each of the technology priority areas funded under the competitions had its own budget, we note that it is less then clear that this is in fact the case in respect of all 43 thematic areas addressed in the competitions. Nevertheless, indicative funding amounts were set for the three competitions at issue: GBP 10 million for "Advanced Composite Materials and Structures"; GBP 7 million for "Smart Materials and Related Structures" and GBP 12 million for "Design Engineering and Advanced Manufacturing".[4945] However, as we have already explained, the availability of the allocated funds was not explicitly limited to entities active only in the field of aeronautics research. Unlike the situation in respect of EC Framework Programmes, the TP (and each of the three competitions at issue) did not set aside any portion of budgeted funding amounts for the sole purpose of the research efforts of enterprises or industries active in the aeronautics sector.

7.1590 Finally, the United States considers that the European Communities has admitted that the TP is a continuation of the CARAD/ARP, and that this is further confirmation that TP is specific.[4946] We do not understand the European Communities to have made any such admission. In its first written

[4938] Exhibit EC-229.
[4939] Exhibit US-342.
[4940] Exhibit EC-230.
[4941] The thematic research areas covered in the competitions held from 2004 to 2006 are identified in the European Communities' first written submission, at paras. 1298-1304. They are also set out in the information referred to in Exhibit EC-230.
[4942] Exhibit US-495a.
[4943] Exhibit US-495b, stating in particular, "Smart Materials represent an enabling technology that has applications across a wide range of sectors including construction, transportation, agriculture, food and packaging, healthcare, sport and leisure, white goods, energy and environment, space and defence."
[4944] Exhibit US-495c, stating in particular, "In addition to applications within the Chemicals and Oil and Gas sectors, some illustrative examples include: Food and Drink, ... Built Environment, ... Automotive, ... Aerospace, ...".
[4945] Exhibits US-495a, US-495b and US-495c.
[4946] US, FWS, para. 691.

BCI deleted, as indicated **[***]**

submission, the European Communities clearly states that the TP did not "replace" CARAD. The European Communities explains that the TP brought together all UK R&TD sectoral collaborative funding under one umbrella.[4947] In addition, in its answer to a question posed by the Facilitator during the Annex V procedure, the European Communities stated that the TP *"replaced* all industrial collaborative programmes, including CARAD".[4948] Thus, it is clear to us that the TP is a R&TD support programme that is of an entirely different nature to the CARAD/ARP, which as we explain further below, the European Communities does not contest amounts to a specific programme for civil aircraft research. In contrast, the TP may be characterized as a framework R&TD support programme that identifies and funds research into new and emerging technologies across a broad array of economic sectors that are considered to be critical to the growth of the UK economy.

7.1591 Having found that the grants at issue were not provided pursuant to competitions explicitly limited to entities active in aeronautics-related research; that the availability of the allocated funds under the relevant competitions was not explicitly limited to aeronautics-related research projects; and that the TP is not a continuation of CARAD/ARP, we conclude that the subsidies provided to Airbus under the TP that are the subject of the United States' complaint were not explicitly limited to "certain enterprises" and are therefore not specific within the meaning of Article 2.1(a) of the SCM Agreement.

(v) Other R&TD measures

French government grants

7.1592 The United States claims that the civil aeronautics R&TD grants that the French Government provided to Airbus are specific within the meaning of Article 2 of the SCM Agreement because they were provided pursuant to a budget that is dedicated to "aeronautic construction" and limited to aeronautics manufacturing companies.[4949] Although the United States has not identified a particular sub-paragraph of Article 2 as the basis of its claim, we understand from the nature of the arguments it has advanced that its claim is grounded in Article 2.1(a) of the SCM Agreement. The European Communities does not contest the Unites States' allegation.

7.1593 Having carefully reviewed the evidence submitted by the United States,[4950] it is apparent that the funding amounts at issue pertain to monies distributed to the French civil aeronautics sector as a whole, including but not limited to Airbus.[4951] The evidence indicates that the funding at issue was directed at research endeavours in the area of civil aeronautics construction, and granted pursuant to a dedicated budget.[4952] The Reports submitted by the United States indicate that the funding was essentially provided to the following aeronautics companies: "Aérospatiale-Matra", "Dassault Aviation" and "L'Onera".[4953] In addition, a note from the "Direction des programmes aéronautiques et

[4947] EC, FWS, Para 1286.
[4948] *See*, EC Reply to Question 219 (b) from the Facilitator, Exhibit US-5 (BCI).
[4949] US, FWS, para 685.
[4950] *See*, at paras. 7.1467-7.1473 above.
[4951] For instance, *see* Budget 1997: Sénat, No. 89 (session ordinaire de 1999-2000), Rapport Général, Commission des Finances du Contrôle Budgétaire et des Comptes Economiques de la Nation sur le projet de loi de finances pour 2000, Tome III, Annexe No. 25, Equipment, Transport et Logement; III. – Transport; Transport Aérien et Météorolgie et Aviation Civile, p. 88, in Exhibit US-337.
[4952] Sénat, No. 73 (session ordinaire de 2003-2004), Rapport Général, Commission des Finances, du Contrôle Budgétaire et des Comptes Économiques de la Nation sur le projet de loi de finances pour 2004, Tome III, Annexe No. 18 Équipement, Transport et Logement. III. - Transports et Sécurité Routière: Aviation et Aéronautique Civiles, p. 37, Exhibit US-337F. *See, also,* Exhibit EC-208 (BCI).
[4953] Sénat, No. 73 (session ordinaire de 2003-2004), Rapport Général, Commission des Finances, du Contrôle Budgétaire et des Comptes Économiques de la Nation sur le projet de loi de finances pour 2004,

de la coopération" submitted by the European Communities indicates that more than half of the support provided for research and studies for 100-seat-and-above range of aircraft between 1994 and 2005 was provided to Airbus.[4954]

7.1594 Given that the available funding was explicitly limited to the French civil aeronautics sector, we find the French government R&TD grants challenged by the United States to be specific to Airbus and/or the aeronautics industry, within the meaning of Article 2.1(a) of the SCM Agreement.

German Federal government grants

7.1595 The United States claims that German federal government grants for LCA-related R&TD projects in which Airbus participated under the LuFo I, LuFo II and LuFo III programmes are specific, within the meaning of Article 2 of the SCM Agreement, because disbursed from budgets that are dedicated to the civil aeronautics industry, with access explicitly limited to the civil aeronautics industry.[4955] Although the United States has not identified a particular sub-paragraph of Article 2 as the basis of its claim, we understand from the nature of the arguments it has advanced that its claim is grounded in Article 2.1(a) of the SCM Agreement. The European Communities does not contest the Unites States' allegation. [4956]

7.1596 Having carefully reviewed the evidence submitted by the United States,[4957] it is clear to us that the LuFo programmes are limited to the aeronautics sector. Indeed, in its responses to Questions from the Facilitator, the European Communities concedes that federal funding through the LuFo Programmes was exclusively provided to the aeronautics sector.[4958] The budget plans submitted by the United States indicate, in addition, that the objective of these programmes is to support the competitiveness of the aviation industry in Germany.

7.1597 Thus, we have no doubt that the R&TD grants at issue were explicitly limited to the German aeronautics sector. We therefore agree with the United States that they are specific within the meaning of Article 2.1(a) of the SCM Agreement.

German sub-Federal government R&TD grants

7.1598 The United States claims that the R&TD grants received by Airbus from the German sub-federal governments of Bavaria, Bremen and Hamburg, are specific within the meaning of Article 2 of the SCM Agreement because they are explicitly limited to Airbus and/or the aeronautics industry.[4959] Again, the United States has not identified a particular sub-paragraph of Article 2 as the basis of its claim. However, we understand from the nature of the arguments it has advanced, that its claim is grounded in Article 2.1(a) of the SCM Agreement. The European Communities does not contest the Unites States' allegations. [4960]

Tome III, Annexe No. 18 Équipement, Transport et Logement. III. - Transports et Sécurité Routière: Aviation et Aéronautique Civiles, p. 37, Exhibit US-337F. *See, also,* Exhibit EC-208 (BCI).

[4954] Exhibit EC-209 (BCI). The Note, at page 2, indicates that the term "Airbus" includes Aérospatiale, Aérospatiale-Matra, EADS Airbus and Airbus France.

[4955] US, FWS, paras. 665-666.

[4956] EC, Answer to Panel Question 108.

[4957] *See*, paras. 7.1457-7.1458 and 7.1493-7.1495 above.

[4958] EC, Answer to Panel Question 173 from the Facilitator, Exhibit US-5 (BCI).

[4959] US, FWS, paras. 670; 673; and 677.

[4960] EC, FWS, paras. 1259-1272; EC, Answer to Panel Question 108.

BCI deleted, as indicated **[***]**

- Government of Bavaria R&TD grants

7.1599 In support of its claim of specificity, the United States has submitted various documents, including an extract from the website of the German Aerospace Center ("DLR") and a document from the Bavarian Parliament.[4961] The extract from the DLR website describes the goals and content of the grants at issue and identifies the eligible candidates. It indicates that the government of Bavaria made DM 15 million available at the end of 1999 for civil aviation research in Bavaria, in close coordination with the federal government's aeronautical research programme. The funding was made available for "companies from Bavaria's aviation industry", including Bavarian universities and non-university-affiliated research establishments located in Bavaria. Similarly, the document from the Bavarian Parliament indicates that the R&TD grants were made for the purpose of the development of aeronautics and aerospace technologies. In our view, it is clear from the evidence before us that the R&TD grants at issue were only provided in order to fund research activities undertaken in Bavaria for the purpose of the aeronautics sector. We therefore agree with the United States that the R&TD grants were explicitly limited to "certain enterprises", and are therefore specific within the meaning of Article 2.1(a) of the SCM Agreement.

- Government of Bremen R&TD grants

7.1600 In support of its claim of specificity, the United States has submitted various documents, including an extract from a Memorandum of the Bremen City Parliament and State Parliament;[4962] an extract from the "Fraunhofer Institute for Manufacturing Technology and Applied Materials Research in Bremen" online site;[4963] and a press release issued by a Senator of Economics of the City of Bremen.[4964]

7.1601 The extract of the Memorandum of the Bremen City Parliament and State Parliament indicates that funds have been allocated to the AMST site project to pursue research and development with the aim of strengthening Bremen as an aircraft construction site.[4965] Another document submitted by the United States consists of an extract from the website of the "Fraunhofer Institute for Manufacturing Technology and Applied Materials Research in Bremen". This extract indicates that within the framework of the reorganization of European aircraft builders, the purpose of the AMST was, in particular, to tap the scientific know-how of public institutions in matters of materials and processes available in Bremen for the Airbus plant and develop this further, in a targeted manner, for the needs of aircraft construction.[4966] Finally, the press release issued by the Senator of Economics of the City of Bremen indicates that aircraft construction is traditionally one of the key industries in Bremen and that through provision of funds to implement the AMST project, the Senate expected to contribute significantly to improve the performance and competitiveness of the Bremen Airbus Plant. In our view, it is apparent that the R&TD grants at issue were aimed at supporting the aircraft construction sector in Bremen, referred to as "one of the key industries in Bremen", and in particular to Bremen Airbus' plant. [4967] We therefore agree with the United States that the R&TD grants were explicitly limited to "certain enterprises", and are therefore specific within the meaning of Article 2.1(a) of the SCM Agreement.

[4961] Exhibits US-330 and US-331.
[4962] Exhibit US-334.
[4963] Exhibit US-336.
[4964] Exhibit US-335.
[4965] Exhibit US-334 indicates that a total of EUR 24.2 million in R&D funds
[4966] Exhibit, US-336.
[4967] Exhibit US-335.

BCI deleted, as indicated **[***]**

- Government of Hamburg R&TD grants

7.1602 In support of its claim, the United States has submitted various documents, including an extract from the website of the German Aerospace Center ("DLR")[4968] and a document that indicates the projects in which Airbus has participated, the dates in which those projects began and ended, and contains details on the payments to relevant Airbus entities.[4969] The extract from the DLR website describes the goals and content of the grants at issue and identifies the eligible candidates. It explicitly states that the targeted funding projects are aimed at encouraging Hamburg's aerospace industry to increase its efforts in developing new technologies; *i.e.*, to strengthen the technological productivity of Hamburg's aerospace and supply industry. Hamburg-based companies operating in the aerospace sector are one of the eligible applicants, together with universities and research institutes. In our view, this evidence confirms that the R&TD grants at issue are explicitly limited to Hamburg's aerospace sector. We therefore agree with the United States that the R&TD grants were explicitly limited to "certain enterprises", and are therefore specific within the meaning of Article 2.1(a) of the SCM Agreement.

Loans under the Spanish PTA programme

7.1603 The United States claims that the loans received by Airbus under the two phases of the PTA programme are specific to Airbus and/or the aeronautics industry within the meaning of Article 2 of the SCM Agreement. With respect to PTA I, the United States argues that the government explicitly limited access to funding to aeronautics companies involved in the manufacturing, design, supply and maintenance of aircraft and aircraft parts, and to engineering services companies and research institutions and universities developing specific technologies with aeronautics use.[4970] The United States argues that similar restrictions were applied with respect to PTA II.[4971] Although the United States has not identified a particular sub-paragraph of Article 2 as the basis of its claim, we understand from the nature of the arguments it has advanced that its claim is grounded in Article 2.1(a) of the SCM Agreement.

7.1604 In support of its claim and with respect to PTA I, the United States has submitted a one page document indicating that the enterprises that are eligible to participate are those involved in the manufacturing, design, supply and maintenance of aircraft and aircraft parts, and engineering services companies and research institutions and universities developing specific technologies with aeronautics use.[4972] In addition, and with respect to PTA II, the United States has submitted a letter from the European Commission to the Spanish Ministry of External Relations indicating that the objective of this programme is essentially to support the competitiveness of the aviation industry in Spain and pointing out that it had no objections to the proposed programme.[4973]

7.1605 Having carefully reviewed the evidence submitted by the United States, it is clear to us that the PTA programme is limited to the aeronautics sector. Indeed, this is explicitly recognized by the European Communities in its first written submission.[4974] We therefore agree with the United States that the R&TD loans at issue are specific within the meaning of Article 2.1(a) of the SCM Agreement.

[4968] Exhibits US-333.
[4969] Exhibit US-332 (BCI).
[4970] US, FWS, para 691 *citing* PTA I, Ministerio de Industria, Turismo y Comercio, Secretary of State for Industry, Plan I+D para el Sector Aeronáutico (undated), p. 13., Exhibit US-348.
[4971] US, FWS, para 691 *citing* European Commission, State Aid N 135/1999, Plan Tecnológico Aeronáutico II, decision of 5 May 1999, SG(99) D/3208, pp. 2,3, Exhibit US-346.
[4972] Exhibit US-348.
[4973] Exhibit US-346.
[4974] EC, FWS, para. 1311.

BCI deleted, as indicated **[*******]**

UK Government grants under CARAD

7.1606 The United States claims that the civil aeronautics R&TD grants that the UK Government provided to Airbus are specific within the meaning of Article 2 of the SCM Agreement because they were limited to entities carrying out research in aeronautics technologies.[4975] Although the United States has not identified a particular sub-paragraph of Article 2 as the basis of its claim, we understand from the nature of the arguments it has advanced that its claim is grounded in Article 2.1(a) of the SCM Agreement. The European Communities does not contest the United States' allegation.[4976]

7.1607 In support of its claim, the United States has submitted an extract of the "Innovation Budget Guidelines" to officials of the CARAD which set out the procedures to be followed on CARAD projects. This extract indicates that **[*******]**.[4977] We are satisfied that this evidence confirms the United States' uncontested assertion that the R&TD grants at issue were limited to entities carrying out research in aeronautics technologies. We therefore agree with the United States that the R&TD grants were explicitly limited to "certain enterprises", and are therefore specific within the meaning of Article 2.1(a) of the SCM Agreement.

(vi) Conclusion

7.1608 On the basis of the foregoing, we find that the United States has established that the following R&TD measures constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement: the grants to Airbus provided under the Second, Third, Fourth, Fifth and Sixth EC Framework Programmes; the loans to Airbus provided under the Spanish PROFIT programme; the grants to Airbus provided by the French government; the grants to Airbus provided by the German Federal government; the grants to Airbus provided by certain German sub-Federal governments; the loans to Airbus provided under the Spanish PTA programme; and the grants to Airbus provided under the UK CARAD programme.

7.1609 On the other hand, we conclude that the United States has failed to establish that the grants to Airbus provided under the UK Technology Programme constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement, and we will not consider them further in this dispute.

[4975] US, FWS, para 691; Exhibit US-341 (BCI).
[4976] EC, Answer to Panel Question 108.
[4977] Exhibit US-341 (BCI).

BCI deleted, as indicated **[***]**

SECTION VII.E.10 ANNEXES

ANNEX I.1 – 2nd Framework Programme

	Project Acronym	Project Title
1	EASN	Contribution to European Aero Supercomputing Network
2	CAPRI	Civil Aircraft Protection Against Ice (CAPRI)
3	SCIA	Helicopter Rotor/Fuselage Interactional Aerodynamics
4	ODT	Optical Data Transmission
5	ELFIN	Investigation of Laminar Flow Technology (ELFIN)
6	EUROVAL	Validation CFD Codes (EURAVAL)
7	IMAGES	Integrated Modular Avionics Software (IMAGES)
8	EUROMESH	Multi - Block Mesh Generation for CFD (EUROMESH)
9	FANSTIC	Future Technologies Impact on Cockpit (FANSTIC)
10	DUPRIN	Ducted Propfan Investigations (DUPRIN)
11	All Electric Aircraft	All Electric Aircraft Flight Control Actuation
12	GEMINI	Airframe / Propulsion Integration (GEMINI)
13	ACOUFAT	Acoustic Fatigue and Related Damage Tolerance
14	ODA	Optimum Design in Aerodynamics
15	Supersonic Flow	Investigation of Supersonic Flow Phenomena
16	*None*	Development of Improved Damage Tolerant Carbon Fibre-Matrix Composites
17	*None*	Development of Advanced Non Contact methods for Non Destructive Detection of Defects and Damage in Aeronautical Structures
18	*none*	Low Cost MMC Made by Spray Deposition
19	*none*	Development of Techniques for Polymeric Diaphragm Forming of Continuous Fibre Reinforced Thermoplastics
20	*none*	New Plating Techniques for Aluminium Alloys
21	*none*	Damage Tolerance and Fatigue Design Methodology for Primary Composite Structures
22	*none*	Post-Buckling Behaviour of CFC Structures
23	*none*	Application of Feature Based Modelling for Complex Product Design and Manufacture
24	ASANCA	Advanced Study for Active Noise Control in Aircraft

BCI deleted, as indicated **[***]**

ANNEX I.2 – 3rd Framework Programme

	Project Acronym	Project Title
1	ELFIN II	"Fibre-Reinforcement of Precision Cast Parts" ("FIBRECAST")
2	FEAST	Investigation of the aerodynamics and cooling of advanced engine turbine components
3	CRASHWORTHINESS	"Efficient Turbulence Models for Aeronautics" ("ETMA")
4	IMAGES 2000	"Development of a High Strength Aluminum-Lithium Alloy"
5	BRE2-0153	"Basic Research in Aircraft Interior Noise" ("BRAIN")
6	DUPRIN II	"Aeroacoustics Methods for Fan Noise Prediction and Control" ("FANPAC")
7	Composite Fuselage	"Electrically Powered Integrated Control (SMART) Actuators" ("EPICA")
8	BRE2-0565	Research on organic primer concepts for aluminium substrates
9	LARA	"New Techniques for Paint Removal"
10	BRE2-0160	Advanced civil core compressor aerodynamics
11	BRE2-0313	"Crashworthiness for Commercial Aircraft" ("CRASHWORTHINESS")
12	EPICA flight tests	Future laser atmospheric measurement equipment
13	EPICA	"Generic Approach for ATM Systems" ("GAAS")
14	LAGER I	"Development of a New Aluminium Alloy for use at 150º C"
15	BRE2-0227	"Simulation of Resin Transfer Moulding Process for Efficient Design and Manufacture of Composite Components 3
16	BRE2-0151	"New Techniques for Paint Removal"
17	PICANT	"Process/Integrated Cost Analysis Tool"
18	PROTAILTHERM	Property tailoring and net shape processing of structures from textile preforms with thermoplastic matrices
19	ECARP	"European Computational Aerodynamics Research Project" ("ECARP")
20	FANSTIC II	"Future ATM New Systems and Technologies Integration in Cockpits" ("FANSTIC II")
21	MOSAIC	Measurement of ozone on Airbus in-service aircraft
22	NOSOST	New optical sensors and optical signal transmissions
23	GEMINI II	"Basic Test Rig for a Generic Model for Wind Tunnel Test on Airframe Propulsion Integration with Emphasis on Advanced Propeller II" ("GEMINI II")
24	ASANCA II	Advanced study for active noise control in aircraft
25	GAAS	"Generic Approach for ATM Systems" ("GAAS")
26	VERSATILE	Vision enhancement for reliable and safe air transport in limiting environment
27	SNAAP	Study of Noise and Aerodynamics of Advanced Propellers
28	NS Solvers	
29	FANPAC	Aeroacoustics Methods for Fan Noise Prediction and Control
30	AERONOX	The Impact Of Nox Emissions from Aircraft Upon the Atmosphere at Flight Altitude 8 – 15 km

BCI deleted, as indicated **[***]**

ANNEX I.3 – 4th Framework Programme

	Project Acronym	Project Title
1	ENHANCE	Enhanced aeronautical concurrent engineering (ENHANCE)
2	RAIN	Reduction of airframe and installation noise (RAIN)
3	HYLDA	Hybrid Laminar Flow Demonstration on Aircraft (HYLDA)
4	APRICOS	Advanced Primary Composites Structures (APRICOS)
5	SPIDERS	Specification Procedures for Industrial Distributed European Realisation of Systems (SPIDERS)
6	ENIFAIR	Engine integration on Future Transport Aircraft (ENIFAIR)
7	MDO	Multi-Disciplinary Design, Analysis and Optimisation of Aerospace Vehicles (MDO)
8	SMAAC	Structural Maintenance of Ageing Aircraft (SMAAC)
9	HYLTEC	Hybrid Laminar Flow Technology (HYLTEC)
10	MONITOR	Monitoring On-line Integrated Technologies for Operational Reliability (MONITOR)
11	CEDIX	To Establish Concurrent Engineering Based "Design for Integrated X-methodologies" for the preliminary and detailed design of aircraft sections (CEDIX)
12	BRPR-97-0551	Design of Human / Machine Interfaces and their Validation in Aeronautics
13	FLEXSHOP	Flexible Workshop for Airframe Assembly (FLEXSHOP)
14	CRASURV	Commercial Aircraft - Design for Crash Survivability (CRASURV)
15	DOCT	Development of Clean technologies for Aircraft Industry (DOCT)
16	CANDIA	Cost Reduction by Advanced non-Destructive Inspection of Aeronautical Structures (CANDIA)
17	MASSPS	Materials system for surface protection and sealing (MaSSPS)
18	3D-PTM	Assessment of Economic and Technical Advantages of 3-D Preform Transfer Moulding (3D-PTM)
19	AVTAC	Advanced Viscous Flow Simulation Tools for Complete Civil Transport Aircraft Design (AVTAC)
20	INDUCE	Advanced integrated NDT concepts for unified life-cycle (INDUCE)
21	EDAVCOS	Efficient Design and Verification of Composite Structures (EDAVCOS)
22	CATE	Composites and Advanced Aircraft Technologies Electromagnetic Protection (CATE)
23	ADPRIMAS	Advanced Concepts for Primary Metallic Aircraft Structures (ADPRIMAS)
24	ELGAR	European Landing Gear Advanced Research (ELGAR)
25	IAPPS	Integrated Automated Process Planning System (IAPPS)
26	EUROWAKE	Wake Vortex Formation of Transport Aircraft (EUROWAKE)
27	EUROSUP	Reduction of Wave & Lift-Dependent Drag for Supersonic Transport Aircraft (EUROSUP)
28	REAL	Robust and Efficient Autopilot Control Laws Design (REAL)

BCI deleted, as indicated **[***]**

	Project Acronym	Project Title
29	EuroShock II	Drag Reduction by Shock and Boundary Layer Control (EuroShock II)
30	EUROTRANS	European Program for Transition Prediction (EUROTRANS)
31	FASTFLO	Fully Automatic System for Three-dimensional Flow Simulations (FASTFLO)
32	3FMS	Free Flight - Flight Management System (3FMS)
33	ADSTREFF	Targeted Research Action in Advanced Structural Efficiency
34	APIAN	Advanced Propulsion Integration Aerodynamics and Noise (APIAN)
35	ASSET	The Development of Advanced Surface Engineering Techniques for Future Aerospace Transmissions (ASSET)
36	AWARD	All Weather Arrival & Departure (AWARD)
37	BRPR-95-0095	Control of Gas Phase and Condensed Matter Temperature in Industrial Processes
38	BRPR-95-0105	Development of Elevated Temperature Aluminium Alloys
39	BRPR-98-5050	Thematic Network Wake Vortex
40	CREEPAL	Long term creep and thermal-mechanical cycling behaviour of aluminium alloys (CREEPAL)
41	DMU-ES	Digital Mock-up Ergonomic Simulation (DMU-ES)
42	DMU-MM	Digital Mock-up Modelling Methodologies and Tools for Product Conception and Downstream Processes (DMU-MM)
43	DMU-VI	Digital Mock-up Visualisation in Product Conception and Downstream Processes (DMU-VI)
44	DRAGNET	European drag reduction network (DRAGNET)
45	DUCAT	Basic research on duct acoustics and radiation (DUCAT)
46	DYNASAFE	Development of Composite Aircraft Passenger Seats with 3-Point Shoulder Harnesses to Provide Enhanced Protection (DYNASAFE)
47	ELISA	Electrical innovative surface actuation (ELISA)
48	ENSPED	European Network of Surface and Prestress Engineering and Design (ENSPED)
49	EUROPIV	Cooperative Action to Apply PArticle Image Velocimetry to Problems of Industrial Interest (EUROPIV)
50	EXT-HAZ	Improved methodological and technical approach to external hazards safety issues in the aerospace industry (EXT-HAZ)
51	FLITE	Forum for large improvement of air traffic in Europe (FLITE)
52	ISAWARE	Increasing Safety through collision Avoidance WARning intEgration (ISAWARE)
53	LABWELD	Laser beam welding in the transportation industries (LABWELD)
54	NAWM	Novel Aluminium Welding Methods (NAWM)
55	NEVADA	Open Integrated Avionics for European Air Transport Aircraft (NEVADA)
56	PERFECT	Process Efficient Regulation for Economical Composites Technologies (PERFECT)

BCI deleted, as indicated **[***]**

	Project Acronym	Project Title
57	PIVNET	PivNet - A European collaboration on development and application of PArticle Image Velocimetry between industry, research organizations and universities
58	PRECIMOULD	High Precision Composites Moulding prediction of Distortion Using Analytical Methods (PRECIMOULD)
59	PROFOCE	Product Focused Concurrent Engineering
60	RANNTAC	Reduction of aircraft noise by nacelle treatment and active control (RANNTAC)
61	RESOUND	Reduction of engine source noise through understanding and novel design (RESOUND)
62	SAMBA	Smart actuator and modular braking applications (SAMBA)
63	TRA3	Targeted research action in aerospace aerodynamics (TRA3)
64	UNSI	Unsteady Viscous Flow in the Context of Fluid Structure Interaction (UNSI)
65	X-NOISE	Aircraft external noise thematic network (X-NOISE)
66	AIRDATA	Aircraft Drag and Thrust Analysis
67	AERONET	The European Aeroemissions Network
68	AEROJET II	Prototyping a Non-Intrusive Exhaust Gas Measurement System for Gas Turbines
69	AEROPROFILE	Profiling spectrometry to simultaneously investigate the spatial distribution of temperature and chemical species in aircraft exhausts
70	AFMS	Advanced Flight Management System
71	VINTHEC	Visual Interactive and Human Effectiveness in the Cockpit
72	*none*	Investigation of the Viability of MEMS Technology for Boundary Layer Control on Aircraft
73	DAMASCOS	Damage Assessment in Smart Composite Materials
74	HICAS	High velocity impact of composite aircraft structures
75	WAVENC	Wake vortex evolution in far-wake region & wake vortex encounter
76	*none*	Non-Intrusive Measurements of Aircraft Engine Emissions

BCI deleted, as indicated **[***]**

ANNEX I.4 – 5th Framework Programme

	Project Acronym	Project Title
1	AWIATOR	Aircraft Wing Advanced Technology Operations
2	TANGO	Technology Application to the Near Term Business Goals and Objectives of the Aerospace Industry
3	FACE	Friendly Aircraft Cabin Environment
4	C-WAKE	Wake Vortex Characterization and Control
5	IARCAS	Improve And Assess Repair Capability Of Aircraft Structures
6	HIRETT	High Reynolds Number Tools And Techniques For Civil Transport Aircraft Design
7	VELA	Very Efficient Large Aircraft
8	WAFS	Welding Of Airframes By Friction Stir
9	LiSA	Light-Weight Low-Cost Surface Protection For Advanced Aircraft Structures
10	NEFA	New Empennage for Aircraft
11	INCA	Improved Nde Concepts For Innovative Aircraft Structures And Efficient Operational Maintenance
12	EUROLIFT	European High Lift Programme
13	ALTTA	Application Of Hybrid Laminar Flow Technology On Transport Aircraft
14	INDeT	Integration of Non Destructive Testing
15	ADFAST	Automation for Drilling, Fastening, Assembly, Systems Integration, and Tooling
16	ROSAS	Research On Silent Aircraft Concepts
17	M-DAW	Modelling and Design of Advanced Wing tip devices
18	EECS	Efficient And Economic Cabling System
19	TAURUS	Technology Development For Aeroelastic Simulations On Unstructured Grids
20	FALCOM	Failure, Performance And Processing Prediction For Enhanced Design With Non-Crimp Fabric Composites
21	AEROSHAPE	Multi Point Aerodynamic Shape Optimisation
22	AGEFORM	Ageformable panels for commercial aircraft
23	HELIX	Innovative Aerodynamic High Lift Concepts
24	BOJCAS	Bolted Joints in Composite Aircraft Structures
25	3AS	Active Aeroelastic Aircraft Structure
26	ADAMS 2	Human Centred Operations In Aircraft Dispatch And Maintenance
27	ADMIRE	Advanced Design concepts and Maintenance by Integrated Risk Evaluation for aerostructures
28	AERO2K	Global aircraft emissions data project for climate impacts evaluation
29	AEROMEMS II	Advanced Aerodynamic Flow Control Using MEMS
30	AERONET II	Aircraft Emissions and Reduction Technologies

BCI deleted, as indicated **[***]**

	Project Acronym	Project Title
31	AFAS	Aircraft In The Future Air Traffic Management System
32	ASICA	Air Management Simulation For Aircraft Cabins
33	ASL	Aircraft Service Logistics
34	Cabinair	Improving Air Quality In Aircraft Cabins Using 'Measurements In The Sky' And Innovative Designs And Technologies
35	COCOPAN	Advanced Digital Network For New Cockpit Overhead Panel
36	CRAHVI	Crashworthiness Of Aircraft For High Velocity Impact
37	CRYOPLANE	Liquid Hydrogen Fuelled Aircraft - System Analysis
38	EEFAE	Efficient And Environmentally Friendly Aircraft Engine
39	EM-HAZ	Methods and Technologies for Aircraft Safety and Protection Electromagnetic Hazards
40	EPISTLE	European Project for Improvement of Supersonic Transport Low Speed Efficiency
41	ESACS	Enhanced Safety Assessment For Complex Systems
42	EUROPIV 2	A Joint Program To Improve Piv Performance For Industry And Research
43	FIREDETEX	New Fire/Smoke Detection And Fire Extinguishing Systems For Aircraft Applications
44	FLOMANIA	Flow Physics Modelling-An Integrated Approach
45	GIFT	Gnss - Inertial Future Landing Techniques
46	HORTIA	Heat And Oxidization Resistant Titanium Alloys Applications
47	IDA	Investigation On Damage Tolerance Behaviour Of Aluminium Alloys
48	IMCAD	Improving The Cockpit Application Development Process
49	INTENT	The Transition towards Global Air and Ground Collaboration in Traffic Separation Assurance
50	ISAWARE II	Increasing safety by enhancing crew situation AWAREness
51	I-WAKE	Instrumentation Systems For On-Board Wake-Vortex And Other Hazards Detection Warning And Avoidance
52	LOADNET	Low Cost Optical Avionics Data Networks
53	NATACHA	Network Architecture And Technologies For Airborne Communication Of Internet High Bandwidth Application
54	NEPAIR	Development Of The Technical Basis For A New Emissions Parameter Covering The Whole Aircraft Operation
55	NEWSCREEN	Three Large Displays Cockpit Approach-New Screen
56	PAMELA	Prospective Analysis For Modular Electronic Integration In Airborne Systems
57	PIVNET2	A European Collaboration On Development, Quality Assessment, And Standardization Of Particle Image Velocimetry For Industrial Applications
58	POA	Power Optimised Aircraft
59	SAFE SOUND	Safety Improvement By Means Of Sound

BCI deleted, as indicated **[***]**

	Project Acronym	Project Title
60	SILENCE(R)	Significantly Lower Community Exposure To Aircraft Noise
61	SOBER	Sonic Boom European Research Programme : Numerical and Laboratory-Scale Experimental Simulation
62	S-Wake	Assessment Of Wake Vortex Safety
63	VICTORIA	Validation Platform For Integration Of Standardised Components, Technologies, And Tools In An Open, Modular And Improved Aircraft Electronic System
64	KATnet	Key Aerodynamic Technologies For Aircraft Performance Improvement
65	SmartFuel	Third Generation Digital Fluid Management System
66	WakeNet2-Europe	A European Thematic Network for Aircraft Wake Turbulence
67	X^2-NOISE	AIRCRAFT EXTERNAL NOISE NETWORK, PHASE II
68	AEROFIL	New Concept of High-Pressure Hydraulic Filter for Aeronautics Preserving Environment
69	FUBACOMP	Full-Barrel Composite Fuselage
70	HEACE	Health Effects in the Aircraft Cabin Environment
71	HiAER	High-Level Modelling of High-Lift Aerodynamics
72	MA-AFAS	More Autonomous Aircraft in the Future Air-Traffic Management System
73	MOB	A Computational Design Engine Incorporating Multi-Disciplinary Design and Optimisation for Blended Wing-Body Configuration
74	VINTHEC II	Visual Interaction and Human Effectiveness in the Cockpit, Part II

BCI deleted, as indicated **[***]**

ANNEX I.5 – 6th Framework Programme

	Project Acronym	Project Title
1	ALCAS	Advanced Low Cost Aircraft Structures
2	CELINA	Fuel Cell Application in a New Configured Aircraft
3	COMPACT	A Concurrent Approach to Manufacturing Induced Part Distortion in Aerospace Components
4	DIALFAST	Development of Innovative and Advanced Laminates for Future Aircraft Structure
5	DINAMIT	Development and innovation for Advanced Manufacturing of Thermoplastics
6	ECOSHAPE	Economic Advanced Shaping Processes for Integral Structures
7	EUROLIFT II	European High Lift Programme II
8	FLIRET	Flight Reynolds Number Testing
9	ISAAC	Improvement of Safety Activities on Aeronautical Complex Systems
10	MUSCA	Non-linear static MUltiSCAle analysis of large aero-structures
11	NACRE	New Aircraft Concepts REsearch
12	REMFI	Rear Fuselage and Empennage Flow Investigation
13	SMIST	Structural Monitoring with Advanced Integrated Sensor Technologies
14	TATEM	Technologies and Techniques for New Maintenance Concepts
15	VIVACE	Value improvement through a Virtual Aeronautical Collaborative Enterprise
16	WEL-AIR	Development of Short Distance WELding Concepts for AIRframes
17	TELFONA	Testing for Laminar Flow on New Aircraft
18	AEROMAG	Aeronautical Application of Wrought Magnesium
19	AERONET III	Aircraft Emissions and Reduction Technologies
20	ANASTASIA	Airborne New and Advanced Satellite techniques & Technologies in A System Integrated Approach
21	FLYSAFE	Airborne Integrated Systems for Safety improvement, Flight Hazard Protection and All Weather Operations
22	MESSIAEN	Methods for the Efficient Simulation of Aircraft Engine Noise
23	OPTIMAL	Optimized Procedures and Techniques for IMprovement of Approach and Landing
24	PIBRAC	PIezo BRake ACtuator
25	SAFEE	Security of Aircraft in the Future European Environment
26	SIRENA	External EMC simulation for radio electric systems, in the close environment of the aircraft
27	SUPERTRAC	SUPERsonic TRAnsition Control
28	VITAL	EnVIronmenTALly Friendly Aero Engine
29	WALLTURB	A European Synergy for the assessment of wall turbulence
30	DATON	Innovative Fatigue and Damage Tolerance Methods for the Application of New Structural Concepts
31	FAR-Wake	Fundamental Research on Aircraft Wake Phenomena

BCI deleted, as indicated **[***]**

	Project Acronym	Project Title
32	ICE	Ideal Cabin Environment
33	LIGHTNING	Lightning protection for structures and systems on aircraft utilising lightweight composites
34	TURNEX	Turbomachinery Noise Radiation through the Engine Exhaust
35	ADLAND	Adaptive Landing Gears for Improved Impact Absorption
36	ARTIMA	Aircraft Reliability Through Intelligent Materials Application
37	ATENAA	Advanced Technologies for Networking in Avionic Applications
38	B-VHF	Broadband VHF Aeronautical Communications System Based On MC-CDMA (B-VHF)
39	DEEPWELD	Detailed multi-physics modelling of friction stir welding
40	DESIDER	Detached Eddy Simulation for Industrial Aerodynamics
41	EMMA	European airport Movement Management by A-smgcs
42	HILAS	Human integration into the life-cycle of aviation systems
43	HISAC	Environmentally friendly high speed aircraft
44	IFATS	Innovative Future Air Transport System
45	IPAS	Installed Performance of Antennas on AeroStructures
46	iTOOL	Integrated tool for simulation of textile composites
47	MESEMA	Magnetoelastic Energy Systems for Even More Electric Aircraft
48	MOWGLY	Mobile Wideband Global Link System
49	RETINA	Reliable, tuneable and inexpensive antennas by collective fabrication processes
50	UFAST	Unsteady effects in shock wave induced separation
51	SEFA	Sound Engineering For Aircraft
52	WISE	Integrated wireless sensing
53	ASAS-TN2	ASAS Thematic Network 2
54	C-ATM (PHASE 1)	Co-operative air traffic Management - Phase 1

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F. ADVERSE EFFECTS

1. General Overview of the Parties' Arguments

7.1610 The United States claims that subsidies to Airbus cause adverse effects to its interests within the meaning of Articles 5(a) and (c) of the SCM Agreement. Specifically, the United States asserts that through the use of these subsidies, the European Communities, France, Germany, Spain and the United Kingdom cause or threaten to cause: (i) "injury" to the United States' industry producing LCA; and (ii) "serious prejudice" to United States' interests in that the effect of the subsidies is (a) to displace or impede imports of United States' LCA into the EC market, (b) to displace or impede exports of United States' LCA from third country markets, and (c) significant price undercutting by EC LCA as compared with the price of United States' LCA in the same market, and significant price suppression, price depression and lost sales in the same market, within the meaning of Articles 6.3(a), (b) and (c) of the SCM Agreement.

7.1611 The United States argues that there is a single subsidized EC product and a single competing United States' like product, which it identifies as large civil aircraft manufactured by Airbus and Boeing respectively, and asserts that data for the period 2001 to 2005 demonstrates that the adverse effects it alleges existed at the time of this Panel's establishment in 2005. The United States acknowledges that the Panel may consider information for a period subsequent to its establishment in 2005, but maintains that the determination of adverse effects should be made as of the date of establishment.

7.1612 The United States alleges that the subsidies to Airbus are large, although it maintains there is no obligation under the SCM Agreement to quantify the magnitude of those subsidies in order to make out its case. The United States contends that LA/MSF was of sufficient magnitude to distort the LCA market by allowing Airbus to launch aircraft at times and at a pace that would have been impossible in its absence, and provided financial flexibility that Airbus could use to price aggressively to gain market share. The United States asserts that the other subsidies in dispute complement the effect of LA/MSF and have a cumulative effect with it, and should therefore be considered together with LA/MSF in the Panel's assessment of adverse effects.

7.1613 The United States contends that subsidies to Airbus resulted in Airbus being able to launch successive models of LCA, which it sold and continues to sell at prices that significantly depress and suppress the prices of competing Boeing aircraft. The United States asserts that Airbus' worldwide market share increased from 2001 to 2005, overtaking that of Boeing. The United States presents evidence concerning Boeing's sales and operating results, as well as the volumes and prices of subsidized LCA imports and US prices of Boeing LCA, which it contends demonstrates that imports of subsidized Airbus LCA into the US market cause and threaten to cause material injury to the United States' industry producing LCA. The United States also presents evidence and arguments concerning changes in the market share of Boeing and Airbus in the EC and third country markets, world price information for Boeing LCA, and information concerning sales to particular customers, in support of its claims of serious prejudice.

7.1614 The European Communities disputes each of the United States' claims of adverse effects, and presents a series of arguments in support of its position. First, the European Communities contends that there are multiple families of allegedly subsidized Airbus LCA, and argues that the Panel should reject the United States' view of a single subsidized product, and instead find four allegedly subsidized products, only three of which compete with three US-produced like products in distinct markets, defined by LCA seating capacity. The European Communities argues that one Airbus LCA, the A380, and one Boeing LCA, the 747, have no competitive counterparts, and therefore that there

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can be no adverse effects caused by subsidies to the A380, and no adverse effects to United States' interests with respect to the Boeing 747.

7.1615 The European Communities argues that the appropriate period for assessing present adverse effects is 2004 to 2006, and that the Panel should disregard data for the period 2001-2003, arguing that this information is too old to be relevant to a determination of present adverse effects. Moreover, the European Communities submits that data for the period 2001 to 2003 is not representative of "normal competitive conditions", and reflects the effects of the events of 11 September 2001, which the European Communities alleges constitute *force majeure* within the meaning of Article 6.7(c) of the SCM Agreement and thereby render the period 2001 to 2003 unreliable as a starting point for consideration of adverse effects.

7.1616 The European Communities asserts that the magnitude of any subsides to any of the Airbus LCA "families" is negligible, and should be considered legally *de minimis*. In support of its position, the European Communities presents a calculation of the *ad valorem* amount of R&TD and LA/MSF subsidies allegedly provided with respect to certain Airbus LCA families. The European Communities asserts that it bases this calculation on United States' regulations governing the methodology for calculating subsidy amounts in countervailing duty investigations. On this basis, the European Communities calculates the amount of alleged R&TD and LA/MSF subsidies tied to the each of the Airbus LCA families, allocates these amounts over time, and over orders of the respective Airbus LCA, and concludes that the total magnitude of these subsidies is small and in some instances *de minimis*. According to the European Communities, it is inconceivable that subsidies of such small magnitude could cause adverse effects. The European Communities recognizes that precise quantification of subsidies is not strictly necessary in a dispute concerning adverse effects, but argues that its calculations demonstrate the *de minimis* magnitude of R&TD and LA/MSF subsidies for the A320, A330, and A340 LCA families, and should therefore be given significant weight, and lead the Panel to reject the United States' claims of adverse effects.

7.1617 The European Communities also contends that the nature of the subsidies in dispute does not support the United States' claims of adverse effects, again focussing on the R&TD funding and LA/MSF. With respect to latter, the European Communities contends that the beneficial effects were largely felt decades ago, and thus are not likely to create present adverse effects. The European Communities maintains that LA/MSF is product-specific project financing which does not finance production costs, but merely transfers a portion of the risk associated with an aircraft development programme. However, according to the European Communities, since Airbus bears most of that risk, such funding does not result in the launch of aircraft that are not otherwise commercially viable. With respect to the former, the European Communities contends that the United States fails to provide evidence or explanation of how the R&TD support measures cause adverse effects, and thus fails to meet its burden of proof in this regard.

7.1618 The European Communities presents evidence and arguments concerning alleged adverse effects specific to each of the allegedly subsidized families of Airbus LCA – the A380 family, the A320 family, the A330 family, and the A340 family, including respective derivative models. With respect to the A380, the European Communities asserts that there is no competition between it and the Boeing 747, that the failure of Boeing to launch a competing aircraft for the over-500 seat market does not constitute present serious prejudice from lost sales, and that the A380 did not cause significant price suppression or depression of Boeing 747 prices. With respect to each of the remaining Airbus LCA families, the European Communities argues that, in light of the conditions of competition in each of the respective markets, and given their nature, age and magnitude, the subsidies at issue do not cause any of the adverse effects alleged by the United States. The European Communities argues that the financial condition and operating performance of Boeing in 2006, including the large backlog of orders for future delivery, demonstrate that there are no present adverse effects. The European Communities also maintains that there is no injury, or threat of injury, to

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Boeing, given its excellent performance in 2006, and that in any event, the United States has failed to demonstrate that the use of the subsidies in dispute has caused any injury to Boeing.

2. Background

7.1619 Before beginning our analysis of the parties' arguments, we consider it useful to briefly describe the development of Airbus, and the LCA industry. We emphasize that this general background is not intended to substitute in any respect for our more detailed consideration of the evidence and findings elsewhere in this Report. It is intended merely as an introduction for the reader.

7.1620 In the mid 1960s, there were three manufacturers of LCA in the United States: Lockheed, McDonnell Douglas, and Boeing. These three accounted for the vast majority of all LCA sold in the global market.[4978] Lockheed exited the LCA industry in 1985, while McDonnell Douglas exited the LCA industry as an independent manufacturer by merging with Boeing in 1997. In the meantime, as described below, Airbus entered the industry, with its first aircraft delivered in 1974. Thus, today, there are two participants in the LCA industry, Airbus and Boeing.

7.1621 Airbus began as a consortium of separate companies in France, Germany and Spain, formally established in 1970 following earlier discussions between France, Germany and the United Kingdom. British Aerospace, a UK company, joined the consortium in 1979. In 2001, there was a fundamental change in Airbus' structure, with the formation of the European Aeronautic Defence and Space Company ("EADS") in 2000 through a merger of the consortium companies in France, Germany and Spain. Between 2001 and 2004, the LCA activities of the four partners in the consortium were placed into subsidiaries under the control of a single, integrated company, Airbus SAS.[4979]

7.1622 Airbus launched its first LCA, the A300, and its modified version, the A310, in 1969 and 1978, and the aircraft entered into service in 1974 and 1985, respectively. Airbus ceased production of these aircraft in July 2007. Airbus' next LCA, the A320, was launched in 1984, and entered into service in 1988. Three variants, the A321, A319, and A318 were subsequently launched in 1989, 1993, and 1999, and entered into service in 1994, 1996, and 2003, respectively. Between the launches of the A320 and its first variant the A321, Airbus launched the A330 and A340, in 1987. Both entered into service in 1993, the A340 first, followed later in the year by the A330. Derivatives of these models, the A330-200 and A340-500 & 600, were launched in 1995 and 1997, and entered into service in 1998 and 2002, respectively. Airbus' next launch was of the A380, in 2000, which entered into service in 2007. Finally, in 2006, Airbus launched the A350XWB, which is expected to enter into service in mid-2013.

7.1623 The LCA industry is characterized by, *inter alia*, significant start-up costs for the development of each new model of LCA, which are invested long before any revenue from the resulting product is generated. Learning effects, both with respect to development, and in production, are significant. The customers for LCA are principally airlines, either directly or through leasing companies, whose operations are sensitive to external events, such that when there is a downturn in the airline industry, the LCA industry also suffers. Long lead times for LCA production mean that the LCA industry cannot respond rapidly to changes in demand from airlines. Thus, LCA manufacturers must engage in long-term planning to attempt to satisfy a market in which changes are expected but unforeseeable. The LCA industry, like the airline industry it serves, is global. LCA are priced in US

[4978] LCA production has continued in Russia but difficulties in obtaining funding for the development of LCA that can meet international airworthiness certification standards have prevented Russian LCA producers from seriously competing with Boeing and Airbus for LCA sales outside the former Soviet bloc. *See*, US International Trade Commission, *The Changing Structure of the Global Large Civil Aircraft Industry and Market*, Inv. No, 332-384 (November 1998) at Ch. 4, Exhibit US-374.

[4979] This background and development is described in more detail in Section VII.E.1 of this Report.

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dollars, and thus exchange rate movements may have an important effect on both manufacturers and customers.

3. Order of Analysis

7.1624 In addressing the United States' claims of adverse effects, there are two fundamental threshold questions that we believe it would be useful to settle before evaluating the substance of the United States' claims. The first question relates to the identification of the relevant "subsidized product" and the relevant "like product" in this dispute. The second question concerns the appropriate time period over which to conduct our examination of the alleged adverse effects, that is, the appropriate "reference period" for the assessment of the elements of injury and serious prejudice. After resolving these two threshold questions, we will turn to evaluate the merits of the United States' adverse effects claims, describing first, by way of background, the general conditions of competition existing in the LCA industry, before examining the arguments and evidence submitted concerning the various forms of alleged adverse effects and causation.

4. Subsidized Product and "Like Product"

(a) Arguments of the Parties

(i) United States

7.1625 The United States asserts that the relevant subsidized product in this dispute is the family of Airbus large civil aircraft, and the corresponding "like product" is the family of Boeing large civil aircraft.

7.1626 The United States argues that, from its inception, Airbus has followed a strategy of developing an LCA family to compete with United States' LCA producers, and used, *inter alia*, the subsidies at issue in this dispute in furtherance of that strategy.[4980] The United States maintains that most customers require a range of aircraft that can operate efficiently over a variety of routes, and most of them see efficiencies and other advantages in operating fleets that contain LCA from a single supplier.[4981] Thus, according to the United States, Airbus has focused on developing an integrated family of aircraft with a high degree of commonality in operational aspects such as flight and cabin crew training and maintenance and spare parts.[4982] Producing a full LCA family also allows Airbus to achieve production efficiencies. Increasing production of one aircraft type reduces the marginal cost of producing related aircraft types, and the development of new aircraft also supports the development of production facilities and technologies across its LCA family.[4983] The United States also argues that Airbus manages its LCA production activities on a family basis, so that the production and sales of one type of LCA supports the development of another LCA type.[4984]

7.1627 Thus, the United States argues, because subsidies are provided to Airbus for the development of an LCA family, and because subsidies for the development of each major Airbus LCA model

[4980] US, FWS, para. 718-19.

[4981] The United States notes that the European Communities pointed to the failure of McDonnell Douglas to continue offering a full family of aircraft as a key factor in its exit from the LCA market. Commission Decision 97/816/EC, O.J. 1997 L336 at 16, (hereafter, *EC Merger Analysis*), para. 59, Exhibit US-375; s*ee also,* Thomas L. Boeder & Gary J. Dorman, *The Boeing/McDonnell Douglas Merger: The Economics, Antitrust Law, and Politics of the Aerospace Industry*, Antitrust Bulletin (Spring 2000), at 119, 137-38 (hereinafter "Boeder & Dorman"), Exhibit US-373

[4982] US, Answer to Panel Question 39, paras. 229-30, Exhibits US-448 & 499.

[4983] US, FWS, para. 722, US, Answer to Panel Question 39, para. 231, Exhibit US-379, *See,* US, Answer to Panel Questions 40 & 41, paras. 241 & 243 respectively.

[4984] US, FWS, para. 723.

benefit the production and marketing of its full LCA family, the "subsidized product" is the Airbus LCA family as a whole.[4985]

7.1628 The United States also contends that, even if it were useful or reasonable to divide the LCA market into a number of submarkets, as the European Communities alleges, the European Communities fails to show why the effects of the subsidies are limited to competition within each of the specific LCA markets identified by the EC.[4986] The United States argues that there are no clear dividing lines between the categories proposed by the European Communities, and considers those categories to be arbitrarily based on a standard seating capacity and class configuration that may or may not reflect the way airlines actually configure their LCA cabins. The United States also asserts that Airbus itself does not follow the market segmentation pattern proposed by the European Communities in this dispute, and that in any event, there are sales competitions between aircraft that are not in the same market segment. Finally, the United States points out that differences in seating capacities and other characteristics among aircraft are routinely "monetized" in comparing the values of different LCA, and that purchasers will make trade-offs between purchase price and seating capacity based on operating efficiencies and per-seat costs of operation, an aspect of competition ignored by the European Communities' analysis.[4987]

7.1629 The United States asserts that, having identified the subsidized product as the entire family of Airbus LCA, the corresponding "like product" is the entire family of Boeing LCA.[4988] The United States notes that the SCM Agreement defines the term "like product" as:

> "a product which is identical, *i.e.*, alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[4989]

The United States asserts that there is no product that is identical to Airbus's LCA family "in all respects," but that the Boeing family of LCA has "characteristics closely resembling" those of the Airbus family. The United States argues that this is a consequence in part of the fact that Airbus developed its LCA family to compete directly with the Boeing LCA family.[4990] The United States describes specific aspects of the physical characteristics, end uses, consumer perceptions, and tariff classification of Boeing and Airbus LCA which it asserts demonstrate this close resemblance.[4991] Moreover, the United States argues that the Airbus family competes with the Boeing family, as demonstrated by the existence of demand substitution among different Airbus and Boeing models for the same routes.[4992]

7.1630 The United States relies on the report of the Panel in *US – Softwood Lumber V* interpreting the like product provision in Article 2.6 of the Anti-Dumping Agreement, which is identical to footnote 46 of the SCM Agreement, in support of its view that the "like product" is defined with reference to the "product under consideration."[4993] The United States notes that the panel in that dispute rejected the argument that the definition of the "like product" requires that each item in the

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[4985] US, FWS, para 724.
[4986] US, SWS, paras. 629-31.
[4987] US, FWS, para. 713.
[4988] US, FWS, para. 725.
[4989] SCM Agreement, footnote 46.
[4990] US, FWS, para. 727.
[4991] US, FWS, para. 727.
[4992] US, FWS, para. 728.
[4993] Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report, WT/DS264/AB/R, DSR 2004:V, 1937, para. 7.153.

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"product under consideration" must be "like" every other item within it.[4994] Thus, the United States argues the "product under consideration" may include a range of specific goods, and the "like product" may also contain a range of specific goods, provided that the "like product" is "identical to" or "closely resembles" the "product under consideration" or subsidized product within the meaning of footnote 46 of the SCM Agreement.[4995]

(ii) European Communities

7.1631 The European Communities disputes the United States position that there is a single "Airbus LCA Family" that constitutes the "subsidized product," a single "like product," and a single "LCA product market."[4996] The European Communities contends that the United States' position defies the reality of the markets for the LCA in question.[4997] The European Communities asserts that there are, in fact, five distinctive product markets of Airbus and Boeing LCA, namely:

> "**the single-aisle 100-200 seat market,** encompassing the Airbus A320 family and the competing Boeing 737NG family;
>
> **the 200-300 seat market,** encompassing the Airbus A330 family and the Airbus A350XWB-800, and the competing Boeing 767 and 787 families;
>
> **the 300-400 seat market,** encompassing the Airbus A340 family and the A350XWB-900/1000, and the competing Boeing 777 family;
>
> **the 400-500 seat market,** encompassing the Boeing 747 family as the only market participant; and
>
> **the 500+ seat market,** with the Airbus A380 family as the only market participant."[4998]

7.1632 The European Communities argues that once a complaining Member has asserted that certain subsidies benefit certain products, it is for the Panel to determine, based on an assessment of the evidence, under Article 11 of the DSU, whether the identified universe of allegedly subsidized products should be treated as a single subsidized product, or multiple subsidized products.[4999] The European Communities asserts that a decision by the Panel on the identification and composition of the subsidized products is a prerequisite for the Panel to then determine the appropriate like product or products that compete in the relevant product market or markets with the subsidized product or products.[5000]

7.1633 In this case, the European Communities notes that the United States claims that a number of different subsidies, including LA/MSF, benefited a single subsidized product, the Airbus "family" of LCA. The European Communities maintains that this combination of subsidized products does not reflect the reality of the LCA industry.[5001] According to the European Communities, the Panel must

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[4994] US Answer to Panel Question 129, paras. 413-414 (citing *US – Softwood Lumber Dumping (Panel)*, para. 7.157).

[4995] Panel Report, *US – Softwood Lumber V*, paras. 7.156-7.157; *see also*, Panel Report, *Indonesia – Autos*, para. 14.164 (definition of like product flows from allegation by the complaining parties that the subsidies in question were conferred only on one type of passenger automobile).

[4996] EC, FWS, para. 1507.

[4997] EC, FWS, para. 1508.

[4998] EC, FWS, para. 1509.

[4999] EC, FWS, para. 1512.

[5000] EC, FWS, para. 1513.

[5001] EC, FWS, para. 1517.

BCI deleted, as indicated **[***]**

consider different models of Airbus LCA, which it asserts benefit from different alleged subsidies, as separate and distinct "subsidized products". The European Communities maintains that an important factor to consider in identifying the subsidized products is the nature and terms of the subsidy measures challenged by the complaining party. In the European Communities' view, where measures relate to the development and production of a particular LCA or family of LCA, this would support the existence of a separate subsidized product.[5002]

7.1634 The European Communities argues that whether it is appropriate to combine multiple subsidized products into a single subsidized product for purposes of Articles 5 and 6 of the SCM Agreement is a question of fact, and that a key factor for the Panel to consider in deciding this question is whether each of the various allegedly subsidized products is properly found to compete in the same product "market." [5003] The European Communities argues that the nature and extent of actual or potential competition between different models of Airbus aircraft is the fundamental prerequisite for determining whether they are in the same market and thus can be considered a single product.[5004] This is, in the European Communities' view, largely a function of their physical and performance characteristics and economic substitutability. For the European Communities, if Airbus aircraft are so dissimilar that they do not compete for the *same* sales or orders, they cannot properly be found to belong in the same market, and cannot be grouped together as a single subsidized product. The European Communities asserts that there is no basis for products which compete in distinct markets to be grouped together as a *single* subsidized product.[5005] The European Communities proposes a number of factors for the Panel to consider in determining which Airbus LCA properly constitute a subsidized product: physical and performance characteristics (from the perspective of market participants); actual or potential competition in the same market; purchaser perceptions; competition between Airbus and Boeing; whether the challenged subsidy measures provide benefits to specific Airbus aircraft; and whether the proposed "like" product includes Boeing aircraft that do not have characteristics that closely resemble each other, based on the perspective of market participants.[5006] The European Communities then argues that the evidence it cites regarding these factors demonstrates that the Panel should find that there are four families of Airbus aircraft, each constituting a separate allegedly subsidized product.[5007]

7.1635 The European Communities argues that the United States' "choice" of a single subsidized product is not driven by the "identical" or "closely resembling" physical characteristics of the allegedly subsidized Airbus and corresponding like Boeing LCA products, and that Articles 5 and 6 of the SCM Agreement, read together with Article 11 of the DSU, require the Panel to conduct an objective assessment of the facts and matter before it, and not to merely rubber-stamp one Member's arguments.[5008] The European Communities maintains that it would be "incoherent" to assess adverse effects by collapsing all LCA into a single subsidized and like product.[5009]

7.1636 With respect to like product, the European Communities argues that different families of Boeing LCA compete in different product markets with Airbus LCA.[5010] The European Communities argues that physical characteristics are key in linking like product to subsidized product, and that the United States has improperly combined Boeing aircraft with enormous physical differences in arguing

[5002] EC, FWS, para. 1551.
[5003] EC, FWS, para. 1518.
[5004] EC, FWS, para. 1519.
[5005] The European Communities also argues that the definition of "like" product as a product *identical* to or having *characteristics closely resembling* a subsidized product is context for interpreting the identity and composition of a subsidized product. EC, FWS, para. 1520.
[5006] EC, FWS, para. 1521.
[5007] EC, FWS, para. 1522 - 1530..
[5008] EC, FWS, para. 1511-1512, 1514.
[5009] EC, SWS, paras. 738, 740-41.
[5010] EC, FWS, para. 1533.

BCI deleted, as indicated **[***]**

that there is one like product.[5011] The European Communities concludes, after presenting evidence on the physical (and other) characteristics of Boeing aircraft, that there are three Boeing "like products" corresponding to three of the Airbus "subsidized" products.[5012]

7.1637 The European Communities maintains that each of the Airbus LCA in these three families has physical characteristics that closely resemble the other Airbus LCA in that particular family, and the Boeing LCA in the assertedly corresponding Boeing family.[5013] The European Communities also argues that these groupings are perceived by Boeing, Airbus, and other market participants as being properly part of separate markets, supported by the existence of physical, price, and perception differences between Boeing/Airbus LCA in these three categories.[5014]

7.1638 Thus, the European Communities requests that the Panel find that the following distinct families of Airbus LCA are separate allegedly "subsidized products": (i) the A320 family; (ii) the A330 family; (iii) the A340 family, and (iv) the A380 family.[5015] The European Communities further asks the Panel to find that the appropriate "like" products for the first three Airbus families are, respectively, (i) the 737NG family, (ii) the 767 and the 787 families, and (iii) the 777 family.[5016] The European Communities also requests the Panel to find that Boeing's 747 family is not a like product to, or a part of the "same {product} market" as, any of the Airbus LCA.[5017] The European Communities further requests the Panel to find that these subsidized and like products compete in the following markets: (i) the Boeing 737NG and Airbus A320 families compete in the 100-200 seat LCA market; (ii) the Boeing 767 and 787 families, Airbus A330 family, and the A350-800 compete in the 200-300 seat LCA market; and (iii) the Boeing 777 family, Airbus A340 family, and the A350-900/1000 compete in the 300-400 seat LCA market.[5018] Finally, the European Communities requests that the Panel find that there is no competition between the Boeing 747 family, which allegedly competes in the 400-500 seat market, and the Airbus A380 family, which allegedly competes in the 500+ seat market.[5019] The competing "subsidized product" and "like product" groups, as well as the markets, identified by the European Communities are set out graphically below:

Allegedly Subsidized Product	Like Product / Market of Competition
A320 family	**Boeing 737NG family, competing in the 100-200 seat LCA market**
A330 family	**Boeing 767 & 787 families, competing in the 200-300 seat LCA market**
A340 family	**Boeing 777 family, competing in the 300-400 seat LCA market**
A380 family	**Alone in the 500+ seat LCA market**
No Airbus LCA	**Boeing 747 family, alone in the 400-500 seat LCA market**

[5011] EC, FWS, para. 1538.
[5012] EC, FWS, para. 1543.
[5013] EC, FWS, para. 1544.
[5014] EC, FWS, para. 1548-49.
[5015] EC, FWS, para. 1556. The European Communities notes that it does not consider a challenge to alleged subsidies benefitting the A350 as within the scope of this dispute and, does not list the A350 here. EC, FWS, footnote 1409. We recall that we dismissed the United States' complaint against the alleged LA/MSF measure for the A350. *See*, para. 7.314 above.
[5016] EC, FWS, para. 1556.
[5017] EC, FWS, para. 1556.
[5018] EC, FWS, para. 1567.
[5019] EC, FWS, para. 1567.

BCI deleted, as indicated **[***]**

(b) Arguments of Third Parties

(i) Australia

7.1639 Australia notes that in order to demonstrate its claim of adverse effects the United States asserts that the "subsidized product" for the purposes of this dispute is the Airbus LCA family, and that the "like product" for the purposes of this dispute is the Boeing LCA family. Australia observes that the European Communities acknowledges the existence of some sort of "family concept" in relation to LCA.[5020] Australia observes that there is little guidance in the SCM Agreement or WTO cases regarding the complaining WTO Member's determination of the "subsidized product". Based on its review of WTO cases addressing the question of like product, Australia posits a series of questions for the Panel's consideration in addressing the issues of "subsidized product" and "like product".[5021]

7.1640 In response to questions from the Panel, Australia stated its view that the SCM Agreement did not require the Panel to make an independent determination regarding the "subsidized product" and therefore there is little guidance concerning the substantive elements of such a determination. In Australia's view, while panels are required by Article 11 of the DSU to make an "objective assessment of the matter" before them, taking into account the views of the respondent, it is for the complainant to determine the basis and nature of its own complaint including the scope of the "subsidized product".[5022] Citing the decisions of panels in *Korea – Commercial Vessels* and *US – Softwood Lumber V*, Australia argues that it is then up to the complainant to demonstrate causation in relation to this "subsidized product".[5023] Australia observes that the Panel's report in *US–Softwood Lumber V* shows the linkage between the "like product" and "product under consideration", and was a case in which the "product under consideration" and the "like product" included a range of specific goods. Australia notes in this regard that the panel's decision also draws the linkage in dealing with injury analysis.[5024] Australia considers that "like product" cases under the Anti-Dumping Agreement are relevant to the SCM Agreement, as long as the different contexts are taken into account, noting that footnote 46 in the SCM Agreement is identical to Article 2.6 of the Anti-Dumping Agreement in defining like product, and that the Panel in *Indonesia – Autos* stated that "useful guidance can nevertheless be derived from prior analysis of "like product" issues under other provisions of the WTO Agreement."[5025]

(ii) Brazil

7.1641 Brazil considers that the Panel should afford the United States substantial discretion as the complaining party to define the subsidized product or products to which its claims apply.[5026] Brazil also agrees with the criteria proposed by the United States for determining the "like product" in this dispute, although Brazil did not take a position regarding whether the entire Boeing family of LCA is the appropriate like product or products.[5027]

7.1642 Brazil notes that the SCM Agreement provides no textual support for the proposition that the "subsidized product" has to conform to a particular configuration, narrow or wide.[5028] In response to

[5020] Australia, Third Party Submission, para. 41.
[5021] Australia, Third Party Submission, paras. 46-51.
[5022] Australia, Answer to Panel Question 10.
[5023] Australia, Answer to Panel Question 10.
[5024] Australia, Answer to Panel Question 10, citing Panel Report, *US – Softwood Lumber V*, paras. 7.152-153 and 7.157.
[5025] Australia, Answer to Panel Question 10, citing Panel Report, *Indonesia – Autos*, para. 14.174.
[5026] Brazil, Third Party Submission, para. 52.
[5027] Brazil, Third Party Submission, para. 53.
[5028] Brazil, Third Party Oral Statement, para. 20.

questions from the Panel, Brazil asserted that complainant should be allowed discretion to define the "subsidized product" in order to ensure that a panel complies with its terms of reference.[5029] Brazil notes that a panel's terms of reference are set out in the request for establishment, which identifies the "matter" subject to dispute, including the specific measures at issue and the applicable claims.[5030] In the present dispute, Brazil considers that, as a consequence of identifying the specific measures at issue (*i.e.*, the subsidies) in its request for establishment, the United States necessarily identified the products to which those measures apply (*i.e.*, the "subsidized product").[5031] In Brazil's view, in analyzing the complainant's claims under Articles 5(a) or 5(c) of the SCM Agreement, a panel may act inconsistently with its terms of reference if it makes an independent determination that expands or narrows the scope of the "subsidized product" to which the subsidies apply.[5032] Moreover, Brazil asserts that there is no provision in the SCM Agreement that authorizes or requires a panel to reformulate a complainant's claims based on multiple rather than a single "subsidized product."[5033]

7.1643 Brazil asserts that, under Article 11 of the DSU, a panel must "make an objective assessment of the matter before it." In doing so, a panel is limited to the "matter" within its terms of reference, which is based on the complainant's request for establishment and includes the measures (*i.e.*, the subsidies) and the products to which the measures apply (*i.e.*, the "subsidized products").[5034] Accordingly, the DSU and the SCM Agreement do not require, nor, arguably, do they permit, the Panel to make an "independent determination" of the "subsidized product" when addressing claims of injury under Article 5(a) of the SCM Agreement and claims of serious prejudice under Article 5(c) of the SCM Agreement.[5035] Brazil considers that the panel's findings in *US - Softwood Lumber V* and *Korea – Certain Paper* support the absence of any requirement for the Panel to find multiple categories of "subsidized product" and multiple categories of "like product" in this dispute.

7.1644 Brazil notes that the Panel may consider it necessary to rely on comparisons of particular "categories" of LCA within the "subsidized product" and the "like product" in order to examine, for example, price undercutting or lost sales, but considers that the Panel should not limit its analysis to categories that are too narrowly defined and should not rely exclusively on a segmented analysis to reach its conclusions, because LA/MSF subsidies to one aircraft model may have "spill-over" effects to a producer's entire family of aircraft and because competing product categories may change from sale to sale based on the particular circumstances involved.[5036] In other words, the Panel may facilitate its analysis by examining certain categories of the "subsidized product," but it should make its conclusions regarding injury and serious prejudice based on the aggregate "subsidized product" as defined by the complainant. Brazil asserts that its views in this regard are consistent with the findings of the panel in *Korea - Commercial Vessels*.[5037]

[5029] Brazil, Answer to Panel Question 10, para. 16.

[5030] Brazil, Answer to Panel Question 10, para. 16, citing Appellate Body Report, *Brazil-Desiccated Coconut*, para. 22; Appellate Body Report, *EC-Export Subsidies on Sugar*, paras. 140-144.

[5031] Brazil, Answer to Panel Question 10, para. 17., citing *Appellate Body Report, EC- Chicken Cuts*, para. 165 ("Article 6.2 contemplates that the identification of the products at issue must flow from the specific measures identified in the panel request. Therefore, the identification of the product at issue … is a consequence of the scope of application of the specific measures at issue. In other words, it is the *measure* at issue that generally will define the *product* at issue.").

[5032] Brazil, Answer to Panel Question 10, para. 17

[5033] Brazil, Answer to Panel Question 10, para. 17

[5034] Brazil, Answer to Panel Question 10, para. 20

[5035] Brazil, Answer to Panel Question 10, para. 21

[5036] Brazil, Third Party Oral Statement, paras. 21-22.

[5037] Brazil, Answer to Panel Question 10, para. 19, citing *Korea - Commercial Vessels*, para. 7.559.

BCI deleted, as indicated **[***]**

(iii) Canada

7.1645 Canada considers it inaccurate to claim, as the United States does, that "because subsidies are provided to Airbus for the development of an LCA family…. the "subsidized product" is the Airbus LCA family as a whole."[5038] In Canada's view, the identification of a "like product" and its corresponding subsidized product in the serious prejudice analysis, is, by virtue of the definition in footnote 46, focused on the characteristics of the products at issue, not the characteristics of the subsidy.[5039]

7.1646 Canada considers that the United States errs in supporting its "like product" claim by arguing that royalty-based financing for individual Airbus models actually benefits the entire Airbus LCA production, because what is relevant is the characteristics of the products being compared, while company-wide benefits of a subsidy have nothing to do with the actual characteristics of the products produced by that company.[5040] Canada states that in light of the differences between the Airbus 380 and the Boeing 737, that A380 could not displace or impede or price undercut a 737, as they are simply not considered by the market to be in competition, and are not "like". Canada notes in this regard that the 737 is a narrow body aircraft with a seating capacity of approximately 120 to 200 seats and a range of approximately 3,000 to 6,000 km, while the A380 is a wide body aircraft of over 500 seats and a range of 15,000 km.[5041] Canada relies on the Panel Report in *Indonesia – Autos*, arguing that the panel in that case dismissed an argument similar to the one made by the United States here on the grounds of the lack of substitutability between the Timor, a small budget car, and passenger cars at the high end of the market, for example a Rolls-Royce.[5042] Recalling that the panel i*n Indonesia – Autos* found that "one reasonable way" to approach the like product issue is to look at the manner in which the industry at issue has analyzed market segmentation, Canada invites the panel in this dispute to follow that approach.

7.1647 In response to questions from the Panel, Canada asserts that there is no basis in the SCM Agreement for deference to either of the disputing parties' views on subsidized product and corresponding like product.[5043] Instead, Canada considers that Article 11 of the DSU requires the Panel, as trier of fact and interpreter of WTO obligations, to make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements", which requires the Panel to make an independent determination given the measures in the light of the relevant provisions of the SCM Agreement at issue in this dispute.[5044] Canada considers the definition of like product in footnote 46 of the SCM Agreement to be highly relevant context for determining whether there are one or more subsidized products at issue. In particular, Canada considers that the requirement in footnote 46 that the subsidized product and like product be identical or closely resemble each other, based on their characteristics, would be rendered meaningless if the complainant could simply assert that a number of discrete products with very different characteristics constituted a single subsidized product.[5045]

7.1648 Canada argues that the panel's report in *US – Softwood Lumber V* is not particularly helpful with respect to a "like product" analysis in the context of Articles 5(a) and 5(c).[5046] Canada states that that case involved a panel review of a domestic agency determination under the AD Agreement, in which a panel is obliged to exercise a degree of deference to agency determinations so that it is not

[5038] Canada, Third Party Submission, para. 50.
[5039] Canada, Third Party Submission, para. 50.
[5040] Canada, Third Party Submission, para. 52.
[5041] Canada, Third Party Submission, para. 53.
[5042] Canada, Third Party Submission, para. 54.
[5043] Canada, Answer to Panel Question 10, para. 10.
[5044] Canada, Answer to Panel Question 10, para. 10.
[5045] Canada, Answer to Panel Question 10, para. 11.
[5046] Canada, Answer to Panel Question 11, para. 12.

BCI deleted, as indicated **[***]**

engaging in *de novo* review, but only ensuring that the determination is reasoned and adequate. Canada considers this approach inappropriate for a panel assessing "likeness" under Articles 5(a) and 5(c), under which a panel is assessing an allegation of subsidy *de novo*. Canada recalls that footnote 46 of the SCM Agreement defines "like product" for purposes of the Agreement. For Canada, the footnote makes it clear that the scope of what is a "like product" is rather narrow, since the like product must be *identical* to the subsidized product, and *only* when there is the absence of an identical product will a product that has characteristics *closely* resembling the subsidized product suffice. Canada also referred to the panel report in *Indonesia – Autos*, which it asserts found that the scope of "likeness" to be quite narrow under the SCM Agreement.[5047]

7.1649 Canada considers that the object and purpose of the likeness analysis under Part III of the SCM Agreement is similar to that under GATT Article III(4), namely preserving the equality of competitive opportunities.[5048] As a result, Canada observes that GATT Article III is likely to be relevant to informing the scope of "likeness" under Articles 5(a) and (c). In this regard, Canada notes that in *Japan – Alcoholic Beverages II*, the Appellate Body found "likeness" to be analogous to an accordion, in that what is considered to be "like" may be narrower or broader depending on the particular provision at issue and on the context and the circumstances that prevail in any given case to which that provision may apply.[5049] It then went on to find that the scope of "likeness" in Article III:2, first sentence was particularly narrow given the content of that provision when compared with Article III:2, second sentence, which incorporates the concept of "directly competitive or substitutable" into a determination of likeness.[5050] Canada asserts that, similarly to Article III, under Article 5 of the SCM Agreement, the United States is required to establish that the products are "like" by reference to, *inter alia*, the physical characteristics, end-uses and tariff classifications of the products.[5051]

(c) Evaluation by the Panel

7.1650 There are two aspects of what may be termed the "product" issue raised in this dispute – the question of identifying the "subsidized product" and the question of identifying the appropriate United States' "like product" for purposes of certain aspects of the adverse effects analysis. The European Communities argues that we must reject the United States' definition of the subsidized product, and focus our adverse effects analysis on separate allegedly subsidized "families" of Airbus LCA, and competition between those allegedly subsidized families and "like" Boeing families in specific market segments. However, in our view, the European Communities' arguments import elements of analysis relevant to the determination of the "like product" into its identification of the "subsidized product". As discussed below, we consider that there is no legal requirement in the SCM Agreement for a panel to make a determination regarding the "subsidized product" independent of the complaining Member's allegations. Moreover, after carefully reviewing the United States' identification of the relevant subsidized product, we find that it is not precluded by the SCM Agreement. In these circumstances, we conclude that we may examine the question of adverse effects on the basis of the subsidized product put forward by the United States – *i.e.*, a single subsidized product, encompassing the entire range of Airbus large civil aircraft. We also conclude that it is appropriate to find that there is a

[5047] Canada, Answer to Panel Question 11, para. 13, citing Panel Report, *Indonesia – Autos*, para. 14.172.

[5048] Canada, Answer to Panel Question 12, para. 14.

[5049] Canada, Answer to Panel Question 12, para. 14, citing *Japan – Alcoholic Beverages II*, para. 114, footnote 58.

[5050] Canada, Answer to Panel Question 12, para. 14, citing *Japan – Alcoholic Beverages II*, para. 114, footnote 58 and Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001;VII, 3243, paras. 94 and 95.

[5051] Canada Answers to Panel Question 12, para. 15, citing Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21.

single "like product", comprising all Boeing LCA, corresponding to the subsidized product, all Airbus LCA.

(i) Subsidized product

7.1651 The United States asserts that the "subsidized product" at issue is the entire family of Airbus LCA. That is, the United States has identified the entire family of Airbus LCA as the product which benefits from the alleged subsidies at issue in this dispute. The European Communities, however, maintains that the United States' assertion is in error, and that we must make an independent assessment of the matter, pursuant to Article 11 of the DSU, and determine that there are multiple subsidized products, corresponding to the model families of Airbus LCA the European Communities identifies. Thus, the question we must resolve is whether we should examine the United States' adverse effects claims on the basis of the subsidized product proposed by the United States, *i.e.*, all Airbus LCA, or whether, as the European Communities asserts, we are required to make an independent assessment as to the appropriate subsidized product, and conclude that, as a matter of fact, there are multiple subsidized products at issue, corresponding to the different model families of Airbus LCA.

7.1652 At the outset, we note that there is no specific guidance in Articles 5 or 6 of the SCM Agreement, or in any other provision of the SCM Agreement, regarding the identification of a "subsidized product" or a panel's role in that process. Indeed, the European Communities has not argued otherwise. Instead, the European Communities relies upon the obligation on the Panel to conduct an objective examination of the evidence under Article 11 of the DSU, and the assertion that the focus of Articles 5 and 6 of the SCM Agreement is on the effects of subsidies on competition between a subsidized product and a like product in the relevant geographic/product markets, to contend that the Panel must undertake its own determination of the subsidized product.[5052] We see nothing in these provisions that requires us to undertake such an analysis.

7.1653 While it is self-evident to us, and the parties do not disagree, that it is necessary to identify the "subsidized product" that is of interest to the complaining Member (and the corresponding "like product"), in order to assess the existence of material injury under Article 5(a), and some of the forms of serious prejudice under Articles 6.3(a), 6.3(b) and 6.3(c)[5053], we are not persuaded that the SCM Agreement requires us to make an independent determination of the "subsidized product", as opposed to relying on the complaining Member's identification of that product. The European Communities focuses on the markets in which different models of aircraft allegedly compete, and differences in their physical characteristics, referring, *inter alia*, to Article 6.3, 6.4 and 6.5 of the SCM Agreement, to argue that a subsidized product must be one that competes in a single market. However, in our view, the fact that displacement or impedance under Articles 6.3(a) and (b), and price effects under Article 6.3(c), must be assessed with respect to particular markets, says nothing about how to identify the scope of the subsidized product. That the effects of a subsidy must be evaluated with respect to market share and prices in particular markets does not entail that a panel must make an independent assessment of the subsidized product that is at issue. Moreover, while Articles 6.3(a) and (b) refer to displacement or impedance of imports or exports of a "like product" from certain markets, and Article 6.3(c) refers to price undercutting by "the subsidized product" in the same market, there is no linkage in the text of these provisions between the terms like product and subsidized product, nor between those terms and "market" in any way that would suggest the definitional import posited by the European Communities.

[5052] EC, FWS, para. 1518.

[5053] It is not clear that a consideration of like product is necessary for consideration of price effects, that is, price undercutting, price suppression, price depression, and of lost sales, although the complaining Member would, logically, have to identify a product or products with respect to which those effects were allegedly manifested. *See*, Panel Report, *Korea – Commercial Vessels*, para. 7.559.

BCI deleted, as indicated **[***]**

7.1654 The European Communities is correct in asserting that we must make an objective examination of the matter before us in determining whether the use of the subsidies in dispute is causing adverse effects to the interests of the United States. But we see nothing that would preclude us from making such an objective assessment on the basis of the case, including the subsidized product allegations, put forward by the United States. It may be that the case is more complicated than it would be if a different subsidized product were at issue. But it is not our role to direct a Member with respect to how it presents its complaint. In this regard, we note the views of the panel in *Korea – Commercial Vessels*, which stated:

> "in any WTO dispute it is always for the complaining party to determine the basis and nature of its own complaint. Thus, a complaining party is free to *claim* that a given subsidy of another Member has caused price suppression or depression to the detriment of the complainant's interests. ...
>
> In this regard, we would observe that the nature of the demonstration that the complainant will need to make to establish causation in any given case, and the difficulty of doing so, will depend on a number of factors and factual circumstances, including but not limited to the breadth of the description of the product on which the complainant brings its case. ... Whatever the factual situation in a given case, the burden will be on the complainant to furnish specific factual evidence affirmatively demonstrating the causal link alleged, and the difficulty and ways of meeting this burden may be very different from one case to another.[296] In all cases, if the complainant fails to meet this evidentiary burden, its serious prejudice claim will fail.
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> [296] For example, in a case involving alleged significant suppression or depression of the price for a given kind of narrowly-defined product due to product-specific subsidization of a physically identical product produced by another Member, product definition issues presumably would figure little if at all in respect of the evidence necessary to demonstrate causation. The situation presumably would be quite different where the alleged subsidy was in respect of an input product, while significant price suppression or depression was alleged in respect of a downstream product of the complainant, or where a subsidy in respect of one product was alleged to cause significant price suppression or depression in respect of a completely unrelated product. Clearly in the latter two cases, product definition issues would create a significant, if not insurmountable, evidentiary hurdle in respect of causation."[5054]

We agree with the view that it is for the complaining Member to structure its own case, which it must then prove with sufficient evidence. Were we to accept the European Communities' argument, conclude that there are multiple subsidized products at issue in this case, and proceed to evaluate the United States' claims on this basis, we would, in effect, be reformulating the United States' complaint. We can find no basis in the text of the SCM Agreement that would allow us, much less require us, to reformulate the United States' claims based on what might be our own view of what should constitute the "subsidized product" as opposed to that of the complaining Member, the United States.[5055]

[5054] Panel Report, *Korea – Commercial Vessels*, paras. 7.559-560.

[5055] We note that in *US – Upland Cotton*, the panel accepted "upland cotton lint" as the relevant "subsidized product," even as it acknowledged that some of the relevant payments were made to persons who did not produce upland cotton and that part of the subsidy benefit was captured by persons other than producers of upland cotton. Panel Report, *US – Upland Cotton*, para. 7.1226.

BCI deleted, as indicated **[***]**

7.1655 Certainly, if a complaining Member were to put forward a proposed "subsidized product" that does not benefit from the alleged subsidies in dispute, a panel would have to address whether that product is, in fact, a relevant subsidized product. However, this is not such a case, as the European Communities' arguments in this context are not based upon the contention that Airbus LCA are not subsidized. Moreover, the United States has presented evidence concerning linkages and spillover effects of the subsidies in question which it argues support the conclusion that subsidies primarily benefiting any one particular Airbus model also benefit other subsequent and previous models, and thus may have adverse effects beyond the model families posited by the European Communities as the appropriate subsidized products. In this regard, the United States argues that the subsidies in dispute are not limited to one model of Airbus LCA, but rather benefit the entire family of Airbus LCA.[5056] In support of its view, the United States asserts, *inter alia*, that:

- subsidies that facilitate the development of one Airbus LCA model improve the marketability of all Airbus LCA models;[5057]
- "spill-over" benefits with regard to technologies or production facilities from one model benefit both subsequently developed and existing models;[5058]
- common elements in design and operation are a central feature in selling the entire Airbus LCA fleet to customers, indicating a significant degree of commonality;[5059]
- aircraft are sold in "package" deals, either simultaneous or consecutive, of different models;[5060]
- LA/MSF in particular reduces the debt burden on Airbus of building each individual LCA model, which in turn allows Airbus to move on to launch the next model much more easily and quickly than would otherwise have been possible;[5061] and
- additional cash flow allows Airbus to reduce prices of any LCA model.[5062]

Were we to accept the European Communities' views concerning the subsidized product, we would be precluding even the possibility of examining whether these linkages and spillover effects exist, and therefore whether the subsidies challenged by the United States are causing the adverse effects alleged.[5063]

7.1656 The European Communities argues that panels in adverse effects disputes must make an independent assessment of whether the subsidized product has been appropriately identified by the complaining Member. While the European Communities has proposed a methodology for making this assessment, there is no basis in the text of the SCM Agreement for that analysis.[5064] Indeed, as

[5056] US, SWS, para. 640.
[5057] US, SWS, para. 633.
[5058] US, SWS, para. 634.
[5059] US, SWS, para. 635.
[5060] US, SWS, para. 636-637.
[5061] US, SWS, para. 638.
[5062] US, SWS, para. 639.
[5063] We note that the European Communities has challenged many of these aspects of the United States' arguments as a substantive matter. In referring to them here we do not mean to suggest that we accept the United States' arguments, merely that we consider it appropriate to consider them on the basis of the evidence, rather than preclude consideration of them on the basis of a finding regarding subsidized product.
[5064] We do not consider, in the abstract, that the European Communities' proposed method of analysis is unreasonable. Simply, we are not persuaded that it is required by the SCM Agreement.

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we have already observed, there is a complete absence of any guidance in the text of the SCM Agreement as to the bases on which a decision as to the appropriate subsidized product might be made. In our view, it is unlikely that the drafters of the SCM Agreement intended panels to make independent, fact-based determinations of the appropriate subsidized product in disputes under Articles 5 and 6, but chose to provide no guidance and establish no criteria for such a determination. In the absence of any guidance in the text of the SCM Agreement, we are reluctant to undertake the task of developing relevant criteria and applying them to the facts of this case. Consequently, we agree with the view that a complaining Member may frame its case as it chooses. It is, of course, then for us to determine whether that case has been demonstrated, on the basis of the evidence and arguments put before us by the parties.

7.1657 The questions surrounding the identification of the appropriate "subsidized product" in this dispute may be analogized to the questions concerning the "product under consideration" in trade remedy cases. Both the SCM and AD Agreements require investigating authorities in countervailing duty and anti-dumping duty investigations to make a determination regarding material injury to the domestic industry, which is defined in terms of domestic producers of a "like product". Both Agreements require a determination of the appropriate "like product", and both define the term "like product" as a product which is "identical, *i.e.*, alike in all respect to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[5065] Thus, the starting point for defining the "like product" in trade remedy investigations is the scope of the "product under consideration". However, the "product under consideration" is not defined in either agreement, just as the term "subsidized product" is not defined in the SCM Agreement.

7.1658 In *EC – Salmon (Norway)*, the panel specifically addressed the question whether the AD Agreement required an investigating authority to make a determination regarding the product under consideration. That panel recognized that, as a practical matter, investigating authorities would have to establish the scope of the allegedly dumped product subject to their investigation in order to carry out the investigation. However, the panel rejected Norway's claim that Article 2.6 of the AD Agreement, defining like product, taken together with the obligation to determine a dumping margin for a "product", established an obligation on investigating authorities to undertake a particular analysis to make and justify a determination regarding the product under consideration. The panel in that dispute concluded that there is no requirement in the AD Agreement that an investigating authority address the question of the scope of the product under consideration at all, and that therefore, there could be no violation of the AD Agreement with respect to the product under consideration identified by the investigating authority in that case.[5066]

7.1659 The panel in *EC – Salmon (Norway)* specifically rejected the argument that considerations of "likeness" in characteristics and uses, required in the context of defining the like product, had any relevance to the issue of product under consideration. In part, this was based on the fact that a determination of the scope of the allegedly dumped product under consideration must precede the determination of like product, as the question of "identical" or "similar in characteristics and uses" for determining like product must be assessed by reference to the product under consideration, which logically must already be defined. Otherwise, the analysis becomes circular.[5067] In the absence of any guidance in the AD and SCM Agreements on identification of a "product under consideration" as the necessary prerequisite to determination of a "like product", the panel concluded that investigating

[5065] AD Agreement Article 2.6, SCM Agreement footnote 46. The question of "like product" also arises in adverse effects cases, and is discussed further below.

[5066] Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway* ("*EC – Salmon (Norway)*"), WT/DS337/R, adopted 15 January 2008, and Corr.1, para. 7.76.

[5067] Panel Report, *EC – Salmon (Norway)*, para. 7.64.

authorities are not precluded from identifying a range of goods as the product under consideration.[5068] In that case, the EC investigating authority had identified the "product under consideration" as "farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen. ... exclud{ing} other similar farmed fish products such as large (salmon) trout, biomass (live salmon) as well as wild salmon and further processed types such as smoked salmon".[5069] The panel concluded that Articles 2.1 and 2.6 of the AD Agreement do not establish an obligation on investigating authorities to ensure that, where the product under consideration is made up of categories of products, all such categories of products must individually be "like" each other, thereby constituting a single homogenous "product under consideration". The panel stated further that "whether the range of goods comprising the product 'farmed salmon' that was investigated by the EC are or are not all 'like' each other within the meaning of Article 2.6 is not a relevant question."[5070]

7.1660 Similarly, in the context of adverse effects claims, the scope of the subsidized product must already be known in order to assess the question of "identical" or "similar in characteristics and uses" in defining the relevant "like product". To argue, as the European Communities does here, that there must be "likeness" within the subsidized product would introduce into adverse effects cases the same untenable circularity identified by the panel in *EC – Salmon (Norway)*. The panel in that dispute observed that, essentially, Norway's arguments raised an issue of policy, suggesting that the absence of limits on the scope of the product under consideration might result in erroneous dumping determinations by investigating authorities. The panel rejected that argument, noting that:

> "Any grouping of products into a single product under consideration will have repercussions throughout the investigation, and the broader such a grouping is, the more serious those repercussions might be, complicating the investigating authority's task of collecting and evaluating relevant information and making determinations consistent with the AD Agreement. Thus, it seems to us that the possibility of an erroneous determination of dumping based on an overly broad product under consideration is remote. That possibility is certainly not enough to persuade us to read obligations into the AD Agreement for which we can find no basis in the text of the Agreement."[5071]

In the present case, proceeding on the basis of a single subsidized product does not raise similar concerns regarding an erroneous determination of whether a subsidy exists. Clearly, however, the United States' position regarding subsidized product has repercussions for the entire case in terms of whether the full range of Airbus LCA have been subsidized, and the evidence and arguments with respect to whether the subsidies in dispute cause the adverse effects alleged. This consequence does not, however, persuade us that, in the absence of any direction to do so, or any guidelines for determination, in the text of the SCM Agreement, we should undertake an independent assessment of the subsidized product.

7.1661 Moreover, we note that differences between the trade remedy context and a dispute concerning adverse effects suggest to us that even if it were appropriate to consider the scope of the "product under consideration" in reviewing a trade remedy determination, it would still be

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[5068] Panel Report, *EC – Salmon (Norway)*, para. 7.68.

[5069] Commission Regulation (EC) No. 628/2005 of 22 April 2005 imposing a provisional anti-dumping duty on imports of farmed salmon originating in Norway (Official Journal, L104/5, published 23 April 2005), para. 10.

[5070] Panel Report, *EC – Salmon (Norway)*, para. 7.68. In addition to *EC – Salmon (Norway)*, other panels have reached the same conclusion in addressing the question of like product and product under consideration in anti-dumping investigations in *United States – Softwood Lumber V*, and *Korea – Certain Paper*, Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* ("*Korea – Certain Paper*"), WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, 10637.

[5071] Panel Report, *EC – Salmon (Norway)*, para. 7.58.

unnecessary and inappropriate for us to address, much less to revise, the scope of the subsidized product identified by a complainant in an adverse effects dispute. First, in the context of anti-dumping and countervailing measures, ensuring that the dumped or subsidized product is appropriately identified is relevant to ensuring that the scope of the remedy is appropriate, as the measure will be imposed in respect of all future imports of the product found to be dumped or subsidized. In addition, the level of the measure is limited to the amount of dumping or subsidization found in respect of the dumped or subsidized product, so an excessively broad product scope could sweep in highly dissimilar goods and subject them all to the same level of duty. However, in the context of adverse effects disputes, neither of these considerations is relevant. The remedy in an adverse effects dispute is either withdrawal of the subsidy, or elimination of the adverse effects caused by the use of that subsidy, not a duty limited by the amount of the subsidy. The ability to implement either of the remedies for findings of adverse effects does not depend on circumscribing the scope of the subsidized product. Thus, even assuming there were a logical reason to review the scope of the dumped or subsidized product in question in a countervailing duty or anti-dumping case, in order to ensure that the scope of application and level of any anti-dumping or countervailing duty imposed is properly determined, that consideration does not arise in the context of an adverse effects dispute.

7.1662 In our view, the United States is entitled to frame its case as it chooses, and so long as the subsidized product it has identified, Airbus large civil aircraft, does in fact benefit from the subsidies in dispute, we will not intervene to alter its identification of the subsidized product. Moreover, there is no basis in the text of the SCM Agreement for the conclusion that it is necessary to group subsidized products according to either corresponding physical characteristics, or competition in particular markets.

7.1663 Even if it were appropriate or necessary for panels in disputes involving claims of adverse effects to consider the question of the subsidized product, it is not clear to us that a panel's role would be to identify the appropriate subsidized product on its own accord based on a review of the facts put in evidence by the parties. While we recognize that, pursuant to Article 11 of the DSU, a panel is required to make an objective assessment of the matter before it, including an objective assessment of the facts, we do not consider that this would require a panel to make a determination of the subsidized product *ab initio*. Rather, in our view, it would at most be appropriate for a panel to start with the complaining Member's allegations, and consider whether, having regard to the totality of the facts, the complaining Member has made a reasonable allegation regarding the product that benefits from the alleged subsidies in dispute. From this perspective, there are strong arguments in support of the United States' view that all Airbus LCA may be properly treated as the relevant subsidized product in the present dispute.

7.1664 All Airbus LCA share particular characteristics, and certainly the same general uses.[5072] In our view, while there are a variety of parameters along which LCA can be categorized, including number of aisles, number of seats, number of engines, range of operations, etc, there are no obvious reasons for choosing one among these as the single dividing line that must be respected, as suggested by the European Communities' argument. The choice of a particular model of aircraft by a customer is not driven purely by the number of seats, but depends on a number of factors related to the airline, the routes, the economics of operation, the existing fleet, as well as other characteristics of the available aircraft, such as range and operating costs.[5073] Moreover, while seating capacity may be a relevant factor if one were trying to group aircraft into categories, we see nothing that suffices to

[5072] In this respect, we note that Airbus has, throughout its history, focused attention on the commonalities of its LCA in terms of technology, design, and operation, as a significant selling point. *See*, e.g., Exhibit US-658. This lends further support to our conclusion that there is no reason to disturb the scope of the subsidized product identified by the United States.

[5073] Statement of Rod P. Muddle, Exhibit EC-19, paras. 46-51.

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establish this as the single determinative factor. Indeed, it is not clear to us that seating capacity *per se* is an appropriate or necessary basis for drawing distinctions among aircraft in terms of market competition.[5074] For instance, the European Commission, in examining the proposed merger of Boeing and McDonnell Douglas in 1997 under EC competition law, examined the questions of dominant position and market impact on the basis of a distinction between narrow body and wide body aircraft, corresponding to 100-200 seating capacity and 200-400+ seating capacity market segments.[5075] In addition, Neven & Seabright in their analysis of the LCA market consider four different market segments: short-range/narrow body; medium-range/medium body; long-range/medium body; and long-range/wide-body.[5076] Thus, based on the available evidence, in our view there are multiple ways in which the market for large civil aircraft could be divided into segments, and there is no obvious or necessary basis for choosing one such way, number of seats, much less a legal requirement that individual Airbus model families be considered separate subsidized products based on the number of seats in each model family.

7.1665 Since its inception, Airbus has recognized the importance to its continued success in the LCA market of developing a full line – a family - of different LCA models:

> "Since Airbus was established for the precise purpose of becoming a viable, profitable, long term enterprise, it was necessary to plan for a family of aircraft. As early as 1973, Airbus Industrie proposed the development over time of five related aircraft types. With the recent launch of the A330 and A340 programs, these five types are now in place."[5077]

More recently, a report to shareholders by the EADS Board of Directors states, with reference to the "long-term strategic goal" of striving for a "leading position in commercial aircraft: A complete product portfolio is seen as necessary to serve the customer base and to maintain overall competitiveness."[5078] Airbus's business strategy focuses on an integrated family of LCA:

> "To achieve its market success, Airbus has pursued a consistent product strategy to offer competitive airliners across the market. The family of aircraft concept has enabled a high degree of commonality to be offered in all aspects of the aircraft operation from flight and cabin crew training to maintenance and spares."[5079]

[5074] In this respect, we note that the European Communities refers to "three overlapping competitive markets (100-200 seat, 200-300 seat, 300-400 seat) and the two markets (400-500 seat and 500+ seat) in which Airbus and Boeing do not compete" in discussing the competitive conditions in which the aircraft industry operates. EC, FWS, para. 1403.

[5075] *EC Merger Analysis*, Exhibit US-375, para. 16.

[5076] Damien Neven & Paul Seabright, *European Industrial Policy: The Airbus Case* (1995) (hereinafter "Neven & Seabright"), *available at* http://www.hec.unil.ch/deep/textes/9509.pdf, Exhibit US-382, pp. 24-25.

[5077] Testimony of Alan Boyd, Chairman of Airbus Industrie of North America, Inc., to US House of Representatives Subcommittee on Commerce, Consumer Protection, and Competitiveness, at 34 (June 23, 1987), Exhibit US-386; *see also,* EC, FWS, para. 1133 (explaining that Airbus needed government equity infusions to enable new LCA model development because it could not have succeeded by producing only the A300 and A310).

[5078] EADS, Report of the Board of Directors, in Documentation for the Annual General Meeting on Friday, 4 May 2007, at 30, *available at* http://www.eads.com/xml/content/OF00000000400004/1/50/41582501.pdf , Exhibit US-503.

[5079] BAE Systems Annual Report 1999 at 15, Exhibit US-388.

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> "{**E**}**very Airbus aircraft belongs to a single family**, sharing the same cockpit, flight deck and spare parts, thus saving time and money for operators in terms of pilot training and maintenance as well as in other areas."[5080]

The European Communities itself acknowledged the importance of offering a full range of LCA:

> "the need to offer separate products whose commonality keep operating costs down for customer airlines across the fleet but which can perform the various missions dictated by an airline's route structure has historically meant that no manufacturer of a single product or family of products, no matter how compelling, has survived in the LCA industry."[5081]

7.1666 Commonality is important not only from the perspective of the purchasers of LCA, but also for the manufacturers. Producing a full family of different models of aircraft allows an LCA manufacturer to achieve production efficiencies. Increasing production of one aircraft type reduces the marginal cost of producing related aircraft types "due to the transferability of some production methods between different models in a manufacturer's range".[5082] Airbus recognizes that the development of new aircraft also supports the development of production facilities and technologies across its LCA family:

> "In the 1980s, we were able to widen our family by launching the A310 that incorporated many systems and power plant improvements that had occurred in the years since the A300 was designed," an Airbus executive said. "Then we turned around and put many of the A310 improvements back into the A300 and came up with an updated aircraft that we designated the A300-600. The same philosophy will be followed with our new aircraft. Additionally, there is a strong possibility that the A320/A330/A340 technology can be used as well to create an advanced A300 and/or A310 in the 1990s."[5083]

> "But the A350 is going to be the sistership of the A380 so it's technology you can already touch and see. It's tangible because the A380 is flying."[5084]

Airbus also manages its LCA production activities on a family basis. For example, recently, in response to an analyst's question as to whether increased production of other models could "offset the pain on the A380 delays," EADS CEO Thomas Enders commented that sustained higher production rates for the A320 would provide "upside" to offset the costs of the A380 delays.[5085] Thus, the production and sales of one model of LCA support the development, production and sales of other

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[5080] EADS Annual Report 2000 at 22, Exhibit US-389 (emphasis added); *see also*, Airbus, *Excellence Runs in the Family*, *available at* http://events.airbus.com/img/media/multimedia/advertising/press/excellence.pdf (visited Sept. 20, 2006), Exhibit US-390, ("Rarely does having a family save you money; the Airbus Family does."); Airbus, *Key Determinants*, at 21-25, Exhibit US-379 (BCI).

[5081] EC, FWS, para. 30.

[5082] Neven & Seabright, Exhibit US-382, 23 n. 11.

[5083] Jeffrey Lenorovitz, *Airbus Industrie Launching Production for New A330/A340 Simultaneously*, Aviation Week & Space Technology (24 February 1986), Exhibit US-391 (emphasis added).

[5084] Jason Neely, *Airbus Top Challenge Is Keeping up with Demand*, Reuters (22 November 2005) (quoting Airbus CEO Gustav Humbert), Exhibit US-392.

[5085] EADS Investor Conference Call, at 1:27:40 (3 October 2006), available on EADS web site, relevant portion transcribed in Exhibit US-393.

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LCA models.[5086] As a consequence, it seems clear to us that subsidies benefiting one particular model of Airbus LCA can have spillover effects for other Airbus models.

7.1667 Thus, while it may be appropriate to consider individual models in some aspects of the adverse effects analysis, for instance when considering price effects, in our view, the identification of the "subsidized product" cannot ignore that Airbus has developed an entire range of LCA family comprising various models, that is marketed to customers as an integrated whole, and that the entire range of models has, at least potentially, been supported by the subsidies in dispute.[5087] To divide the subsidized product along the lines proposed by the European Communities would preclude the panel from taking this into account.

7.1668 We cannot accept the proposition that there is no competition between LCA in the different model groups proposed by the European Communities. That is, while it may well be true that direct head-to-head competition between aircraft models at the ends of the range of models offered by each manufacturer may be limited or non-existent, it seems clear to us that there is at least some degree of competition between adjacent product groups identified by the European Communities, for instance, between a Boeing 747 and an Airbus A380.[5088] Indeed, the European Communities itself states that "{c}ompetition exists *almost* exclusively between the Airbus and Boeing LCA families identified by the European Communities as competing in separate product markets."[5089] Moreover, even by the European Communities' own standards, two different families of Airbus LCA compete in the same alleged product markets, with at least one of these (the A350 family) straddling two of the alleged product markets. In particular, according to the European Communities, the Airbus A330 family of LCA *and* one of the versions of the A350 family (the Airbus A350XWB-800) compete with the Boeing 767 and 787 families in the 200-300 seat market. Similarly, another version of the A350XWB family, the A350XWB-900/1000, *and* the A340 family of LCA allegedly compete with the Boeing 777 family in the 300-400 seat market.[5090] These facts demonstrate that the dividing lines drawn by the European Communities are not sufficiently clear to allow us to conclude, were we required to consider the matter, that separate products **must** be defined on the basis of those lines.[5091]

[5086] Information in the A380 business case supports this conclusion. Exhibit EC-362 (HSBI), pp. 5, 6, 8, 24, 36.

[5087] Indeed, as the European Communities itself has noted, no manufacturer of LCA has been able to survive without a full range of models to offer. EC, FWS, para. 30. From its early days, Airbus contemplated a full range of related LCA models. "Competitiveness of U.S. Commercial Aircraft Industry," Hearing before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce, House of Representatives, 100th Congress, June 23, 1987, Serial No. 100-59, at 34 (statement of Mr. Boyd, Chairman, Airbus Industrie North America) Exhibit US-386. Airbus has, in fact, introduced such a full range to the market since 1970, in competition with the full range of Boeing models.

[5088] Indeed, the business case for the A380 **[***]**. Exhibit EC-362 (HSBI), p. 13. Other HSBI evidence also supports the conclusion that there is some degree of competition among aircraft across the model families identified by the EC. Exhibit EC-98 (HSBI), EC-375 (HSBI) and EC-398 (HSBI).

[5089] EC, Answer to Panel Question 130 (emphasis added). *See, also*, EC, Answer to Panel Question 114, in which the European Communities addresses the "unusual circumstances" of a "cross-market sales campaign" between the A330-200 and the Boeing 777-200. The existence of such campaigns, even if unusual, precludes the conclusion that there is no competition across the model families identified by the EC.

[5090] EC, FWS, para. 1509. The European Communities notes "Each Airbus LCA has distinctive physical and performance characteristics, and these aircraft can be categorized into four distinct markets based on these characteristics. With the exception of the A350 family LCA, which includes LCA intended to compete with two separate Boeing families (*i.e.*, the 777 and 787 families), these product groupings fall along Airbus' own "family" lines." EC, FWS, para. 1523. This suggests that even the European Communities recognizes a degree of ambiguity in the definition of the alleged Airbus families.

[5091] We note that the European Communities' expert, Mr. Scherer, stated that "Aircraft market segments typically are distinct from each other in about 15-20% seat increment." EC, SNCOS, para. 333. We understand from this that to the extent two LCA have seating capacity within 15-20 percent of each other, they compete

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7.1669 Moreover, the European Communities' approach to identifying the relevant subsidized product is premised on the view that the subsidies in dispute, in particular those granted in connection with the launch or development of a particular model of Airbus LCA, benefit only that model.[5092] However, the United States argues that subsidies to one model of Airbus LCA have effects on the development and production of other models, through learning effects and commonalities. Were we to define the subsidized product as suggested by the European Communities, we would preclude consideration of this argument.

7.1670 Thus, overall, the evidence and arguments before us suggest that the single product definition advanced by the United States is not inappropriate. While there may be a variety of parameters along which LCA can be categorized, there are no obvious reasons for choosing one among these as the single dividing line that must be respected, instead of treating LCA as a single subsidized product. Airbus itself recognizes the importance of developing one single "family" of LCA made up of different models of aircraft for its business; a factor that carries equal weight in the minds of LCA customers. Moreover, it is evident that different degrees of competition exist between at least the adjacent markets the European Communities alleges should be used to define the "subsidized product". In this light, we do not believe it would be appropriate to reject the United States' proposed subsidized product, and we will proceed with our analysis on that basis.[5093]

(ii) Like product

7.1671 The parties in this dispute take the position that a determination regarding like product is necessary in order to address the United States' claims of injury under Article 5(a), displacement and impedance under Articles 6.3(a) and (b), and price undercutting under Article 6.3(c).[5094] We note that the Appellate Body in *US – Upland Cotton* raised but did not decide whether, in the case of a claim of significant price suppression under Article 6.3(c), the product identified by the complainant must be "like" the relevant subsidized product, and went on to note, but not address, the question whether, in a case involving alleged price suppression, price depression and lost sales, there is a requirement that the subsidized product and the relevant product of the complainant be "like".[5095] The United States suggests that, even though the identification of a "like product" is not strictly required for claims under Article 6.3(c), the logical structure of Article 6.3(c) similarly requires the identification of a product of the complaining Member, the prices of which have been adversely affected by the subsidies.[5096] In our view, it is not, strictly speaking, necessary to identify a "like product" within the meaning of footnote 46 of the SCM Agreement for purposes of assessing price suppression, price depression, or lost sales under Article 6.3(c).[5097]

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with each other. In this regard, we note that there are overlapping seating capacities within that range between the A330 and A340 families posited by the European Communities, and seating capacities that are beyond that range in the A320 model family. EC, FWS, para. 1524 (tables).

[5092] The European Communities asserts that "many alleged subsidies" relate to specific families of Airbus LCA, but does not present evidence to substantiate its view, except with respect to LA/MSF, which is granted in connection with the launch of specific Airbus LCA models. EC, FWS, paras. 1551-1553 & 1637.

[5093] HSBI evidence also supports the conclusion that there is some degree of competition among aircraft across the model families identified by the EC. Exhibits EC-98 (HSBI), EC-362 (HSBI), EC-375 (HSBI) and EC-398 (HSBI).

[5094] US, FWS, para. 717; EC, FWS, para. 1515.

[5095] Appellate Body Report, *US – Upland Cotton*, footnote 453.

[5096] US, FWS, para. 717.

[5097] *See*, Panel Report, *Korea – Commercial Vessels*, paras. 7.556-557, where the panel came to the same conclusion. However, as that Panel noted, it would seem logical that a complaining Member must identify the product(s) whose prices are allegedly undercut, suppressed, or depressed, or sales of which are allegedly lost. There is no dispute that the United States has done so in this case, and the European Communities makes no arguments in this respect.

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7.1672 The European Communities asserts that there are three Boeing "like products" corresponding to three of the Airbus "subsidized" products it has identified, and that there is no Boeing "like product" corresponding to the A380 "subsidized" product, and no Airbus "subsidized product" corresponding to the Boeing 747. However, in light of our conclusion regarding the subsidized product, we see no legal basis for the European Communities' position.

7.1673 As noted above, footnote 46 of the SCM Agreement defines like product as:

> "a product which is identical, *i.e.*, alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[5098]

The definition of like product in footnote 46 specifically applies to the entire SCM Agreement.[5099] In the context of an adverse effects dispute, the "product under consideration" referred to in footnote 46 must, we believe, be understood to be the subsidized product, which as we determined above, is in this case, all Airbus LCA.[5100] Thus, the like product for purposes of this dispute is a product that is "identical, *i.e.*, alike in all respects to the {subsidized product}, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the {subsidized product}.

7.1674 It seems clear to us that there is no United States' product which is **identical** to the subsidized product identified by the United States, all Airbus LCA. All the aircraft produced by both Airbus and Boeing have differences which preclude a finding of identity. On the other hand, it also seems clear to us that Boeing large civil aircraft, as a whole, is a product which has characteristics closely resembling those of Airbus large civil aircraft, as a whole. Thus, we consider that the relevant like product in this dispute is all Boeing LCA.

7.1675 The European Communities argues that because different Boeing LCA models compete in separate product markets with corresponding Airbus LCA models, and because physical characteristics are key to determining like product, the United States has improperly combined Boeing aircraft with enormous physical differences in arguing that there is one like product. This argument is essentially the same as that made by Canada in *US – Softwood Lumber V* and rejected by the panel in that dispute. As the definition of like product is the same for purposes of this case as for purposes of the AD Agreement, we consider decisions concerning like product under the AD Agreement to be relevant to our analysis in this case.[5101] The report of the Panel in *US – Softwood Lumber V*, goes directly to the questions raised by the European Communities' argument. In that case, the United States had conducted countervailing and anti-dumping duty investigations of softwood lumber from Canada. Softwood lumber, the dumped product under consideration, included a broad range of articles. The United States' investigating authority found one like product, co-extensive with the

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[5098] SCM Agreement, footnote 46.

[5099] "Throughout this Agreement the term "like product" (produit similaire) shall be interpreted..." SCM Agreement, footnote 46.

[5100] While the European Communities disputes the propriety of the subsidized product identified, it does not argue that the "product under consideration" in the context of this dispute is anything other than the subsidized product at issue.

[5101] There is also a Ministerial Declaration on Dispute Settlement Pursuant to the AD and SCM Agreements, in which Ministers recognized the need for "consistent resolution of disputes arising from anti-dumping and countervailing duty measures." Given the focus of the Declaration on trade remedy disputes, it is not directly applicable in the context of an adverse effects dispute. However, since the term like product is defined for purposes of the entire SCM Agreement, we consider it appropriate to ensure that we apply a definition in this case which is consistent with that in applied by panels in the anti-dumping context, to avoid possible conflicts between the SCM and AD Agreements in this respect.

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dumped product under consideration. Before the Panel, Canada argued that "the individual products, constituting collectively the "like product", were not alike to each and every of the products collectively forming the product under consideration as they did not have characteristics closely resembling those of each and every of the individual products constituting collectively the product under consideration."[5102] The Panel found no violation of Article 2.6 of the AD Agreement in the United States' investigating authority's definition of a single like product, coextensive with the product under consideration, rejecting Canada's argument that "{t}he terms 'product under consideration' and 'like product' must be limited to a single group of products sharing characteristics".[5103]

7.1676 Following this same line of reasoning, we conclude that the United States' product that is "like" Airbus LCA is Boeing LCA. We reach this conclusion despite the fact that there are clearly differences between individual Airbus models and even the most closely corresponding Boeing models, and the European Communities' arguments that the Airbus A380 does not compete with any Boeing aircraft, and that the Boeing 747 does not compete with any Airbus aircraft. As noted above, the A380 business case **[***]** this view.[5104] In addition, the United States has presented evidence that indicates that there is competition, specifically between the A380 and the Boeing 747, and that the A340 also competes with the 747 to a significant degree.[5105] That competition is based on similar characteristics of the aircraft which make it suitable for the same use, both generally, and specifically as large seating capacity aircraft. There is nothing in the definition of like product which, on its face, would require analysis of groups of articles within the subsidized product under consideration to determine a "most closely resembling" like product for each group, and we do not consider it appropriate or necessary to undertake such an analysis. Moreover, the definition of like product specifies that, in the absence of a product that is "identical, *i.e.*, alike in all respects to the product under consideration", the like product is defined as "another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." Thus, even assuming we were to accept the European Communities' position that there are multiple subsidized products, and that there is no US-produced product which competes head-to-head with the A380, we would still have to find a United States' "like product" corresponding to a putative A380 subsidized product. In the absence of an identical product, another product with characteristics "closely resembling" those of the A380, which in this case would be the Boeing 747, would seem appropriate.

7.1677 The European Communities also argues, based on the report of the panel in *Indonesia – Autos*, that the determination of like product must be narrowly focused on the question of physical characteristics. However, the question the panel faced in that case was to determine which, of different models of automobiles produced by the complaining Members, could be considered the "like product" to the specific subsidized product, which was the single model, the Timor automobile, manufactured in Indonesia. The analogous circumstance, in the case of LCA, would be if the United States were complaining about subsidies to a single model of allegedly subsidized Airbus LCA, and the panel were seeking to decide which Boeing aircraft could be properly found to be "like" that single allegedly subsidized LCA model. Where, however, as here, the subsidized product under consideration includes the entire range of LCA models produced by Airbus, we see no bar to the conclusion that the corresponding range of aircraft produced in the complaining Member constitutes

[5102] Panel Report, *US – Softwood Lumber V*, para. 7.155.

[5103] Panel Report, *US – Softwood Lumber V*, para. 7.157. In its report in *EC - Salmon (Norway)*, the Panel similarly rejected an argument that the product under investigation must comprise only goods that are all "like" one another, that is, be internally homogeneous.

[5104] Exhibit EC-362 (HSBI), p. 13.

[5105] US, Answer to Panel question 40, paras. 235-242 and references cited therein; US, FCOS, para. 63, US, SWS, paras. 654-56.

an appropriate "like product" – that is, the "product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".[5106]

7.1678 In *Indonesia – Autos*, the panel did state that "the analysis as to which cars have "characteristics closely resembling" those of the Timor logically must include as an important element the physical characteristics of the cars in question."[5107] However, an analysis of which goods produced in the United States are "like" the subsidized product can certainly consider the physical characteristics of the family of Airbus aircraft as a whole, similar to the analysis in *US – Softwood Lumber V*, and assess the correspondence between the range of aircraft on either side of the equation. Moreover, the Panel in *Indonesia – Autos* went on to observe:

> "we do not see that the SCM Agreement precludes us from looking at criteria other than physical characteristics, where relevant to the like product analysis. The term "characteristics closely resembling" in its ordinary meaning includes but is not limited to physical characteristics, and we see nothing in the context or object and purpose of the SCM Agreement that would dictate a different conclusion."[5108]

Thus, other criteria, including such matters as suitability for use, brand loyalty, customer perceptions, to the extent not dictated by physical characteristics, can also be taken into account.

7.1679 Finally, we note that, having concluded that that there is a single subsidized product and a single corresponding like product, does not mean that we must conduct an undifferentiated or monolithic analysis of either injury under Article 5(a), or serious prejudice under Articles 6.3(a), (b), and (c). In the context of injury, which is defined for purposes of Article 5 as being used in the same sense as in countervailing duty cases,[5109] we note that the Appellate Body has stated that investigating authorities may examine injury in the trade remedy context by considering the effects of imports in market segments, so long as they do not ignore any market segments in such analysis, and the overall conclusions address the question of injury to the industry as a whole.[5110] Similarly, we consider that, to the extent relevant, in our analysis of both injury and serious prejudice, we may examine alleged effects in particular market segments, for instance in individual sales campaigns, in which the subsidized and like products compete, or with respect to prices for specific models of LCA. Such a differentiated analysis will likely be relevant in our analysis of significant price undercutting, price suppression, price depression, and lost sales "in the same market".

7.1680 In summary, we conclude that it reasonable and appropriate to conduct the analysis of adverse effects on the basis of one subsidized product, all Airbus LCA, as proposed by the United States, and that there is a single United States' product that is "like" the subsidized product, namely all Boeing LCA.

[5106] We note that the range of aircraft on both sides of the question, subsidized product and like product, covers the full spectrum of existing large civil aircraft. No party has suggested that smaller aircraft should be considered a like product in this dispute, and we do not address that question.

[5107] Panel Report, *Indonesia – Autos*, para. 14.173.

[5108] *Id.*

[5109] Footnote 11, appended to Article 5(a) of the SCM Agreement, specifies: "The term "injury to the domestic industry" is used here in the same sense as it is used in part V {countervailing measures}."

[5110] This view is based on the views of the Appellate Body to this effect in an anti-dumping dispute, Appellate Body Report, *US – Hot-Rolled Steel*, para. 204 ("it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. ... where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry.").

BCI deleted, as indicated **[***]**

5. Reference Period

(a) Arguments of the Parties

(i) United States

7.1681 The United States originally presented data and arguments covering the period 2001 through 2005 to support its claims of adverse effects. Subsequently, in it second written submission and oral statement and in response to questions from the Panel, the United States presented additional data for calendar year 2006.[5111] However, the United States argues that the Panel should not select a particular "reference period" for its examination of adverse effects.[5112] Rather, the United States argues that it is for the complaining Member, *i.e.*, the United States, to define the appropriate period, and then for the Panel to determine whether the complaining Member has set forth a *prima facie* case. In doing so, the United States argues that the Panel will be called upon to examine the evidence and arguments, including considering whether the time periods relied upon by the parties are adequate to meet their respective burdens of proof.[5113]

7.1682 With respect to its argument suggesting an end date for the consideration of adverse effects, *i.e.*, 2005, the United States argues that the "matter" the Panel is to examine is defined in the request for establishment, both in terms of substance, and in terms of temporal scope.[5114] Thus, the United States contends that it is appropriate to consider data for the year in which the Panel was established, but not subsequent years, in deciding whether the subsidies in dispute cause adverse effects. The United States does, however, maintain that the adverse effects it has posited continued after establishment of the Panel, and continue to the present. The United States recognizes that evidence pertaining to any time period that is relevant to the matter before the Panel may be considered, but asserts that the contention that adverse effects ceased sometime after the Panel's establishment is not a defence to the United States' claim.[5115] The United States argues that, as a matter of fact, any improvements in Boeing's situation in 2006 and subsequently do not demonstrate that adverse effects no longer exist.[5116]

7.1683 The United States recognizes the finding of the Panel in *United States – Upland Cotton* that serious prejudice should be found to exist "up to, and including a recent point in time".[5117] However, the United States considers that "up to, and including a recent point in time" is appropriately understood as a period of several years up to and including the year in which the Panel was established, but does not include the period after that year.[5118] The United States argues that a panel's terms of reference are fixed as of the date of its establishment, citing in this respect cases in which measures which expired or were terminated after establishment were nonetheless examined by Panels, and in particular the report in *EC – Biotech*.[5119]

7.1684 The United States submits that Article 6.7(c), relied on by the European Communities to argue that the Panel should exclude information from the period 2001-2003 from its analysis on the basis of *force majeure*, identifies a series of events that limit the ability of the complaining Member to export its product for reasons having nothing to do with subsidies. According to the United States, when such events can be established the causal link between subsidization and the loss of export

[5111] US, SWS, paras. 698, 701, 703, 731, 734, Exhibit US-616, US, Answer to Panel question 238.
[5112] US, Answer to Panel Question 133, para. 440.
[5113] US, Answer to Panel Question 133, paras. 438-39.
[5114] US, SWS, para. 674.
[5115] US, SWS, para. 684.
[5116] US, SWS, para. 672.
[5117] Panel Report, *US –Upland Cotton*, para. 7.1198.
[5118] US, Answer to Panel question 134, para. 451.
[5119] US, SWS, para. 673.

BCI deleted, as indicated **[***]**

market share will be broken. However, the United States argues that the downturn in the LCA market between 2001 and 2003 did not result from any inability of the United States' industry to produce or export LCA. The United States asserts that customers simply chose in increasing proportion to purchase LCA from Airbus rather than Boeing; a choice which meant that the burden of the market downfall fell disproportionately on Boeing.[5120]

7.1685 The United States does acknowledge that data from any period, including the most recent, may be considered by the panel in conducting a long-term analysis of the effects of subsidies on the relevant market, but argues that neither the panel nor the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* endorsed the European Communities' view that only the most recent market trends were relevant. In particular, the United States disputes the view that adverse effects must be shown to exist during the most recent period in order for a panel to find present adverse effects.[5121]

(ii) European Communities

7.1686 The European Communities presents a series of arguments in support of its position that the appropriate reference period for the Panel's consideration should include data from the period 2004-2006, and where available and reliable, 2007, in determining whether subsidies cause adverse effects in 2006 (and 2007). First, the European Communities argues that use of data from the 2001-2003 period would be inconsistent with Article 6.7(c) of the SCM Agreement and with the requirement that the Panel undertake an objective assessment, on the basis that data from that period is distorted because of the effects of 11 September 2001 ("9/11").[5122] The European Communities asserts that the LCA market, particularly in the United States, essentially crashed as result of the collapse in demand for air travel following the events of 9/11. This resulted in air carrier bankruptcies, cancelled orders, delayed orders, and efforts by customers to re-negotiate prices, leaving both Airbus and Boeing with aircraft in production which would not be taken by the original customer. The European Communities considers the events of 9/11 to constitute *force majeure* within the meaning of Article 6.7(c), and thus asserts that the period 2001-2003 must be considered unreliable as a starting point for assessing adverse effects.[5123]

7.1687 Second, the European Communities asserts that the period used to assess trends relating to present material injury and serious prejudice must include a period of time that reflects, as closely as possible, the conditions of competition that exist today. The European Communities argues that the period 2004-2006 more closely reflects normal competition in the LCA markets, and should therefore be the relevant period. The European Communities considers that the data for 2001-2003 do not reflect normal conditions of competition, and therefore asserts that reliance on it is inappropriate, in addition to being inconsistent with Article 6.7(c) of the SCM Agreement.[5124]

7.1688 Third, the European Communities notes that Article 6.4 of the SCM Agreement stipulates that the assessment of displacement or impedance be based on "an appropriately representative period … which, in normal circumstances, shall be at least one year." The European Communities asserts that this is in line with what it describes as an "expressed preference" by the Appellate Body and panels

[5120] US, SWS, paras. 658-659; US, Answer to Panel Question 49(c).

[5121] US, Comments on Panel and Appellate Body Reports in *US - Upland Cotton (Article 21.5 – Brazil)*, para. 7, referring to, Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil (US – Upland Cotton (Article 21.5 – Brazil))*, WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW and Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil (US – Upland Cotton (Article 21.5 – Brazil))*, WT/DS267/AB/RW, adopted 20 June 2008.

[5122] EC, FWS, para. 1494,

[5123] EC, FWS, para. 1495.

[5124] EC, FWS, para. 1497.

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for a shorter period of time in the context of domestic trade remedy investigations, where the Appellate Body and panels emphasize that data and trends relating to the *most recent past* are the most relevant.[5125] In this respect, the European Communities relies on the decisions in disputes involving safeguard measures, *Argentina – Footwear (EC)*[5126] and *US – Lamb*[5127], as well as an anti-dumping dispute, *Mexico – Anti-Dumping Measures on Rice*.[5128] The European Communities argues that the guiding principle for injury investigations by investigating authorities is that the more recent the examined data, the more accurate the analysis of current injury will be. The European Communities notes that Footnote 11 to Article 5 of the SCM Agreement states that the term "injury to the domestic industry" is used in the same sense as in Part V, and argues that this preference should also apply in adverse effects cases.

7.1689 Finally, the European Communities argues that the time period 2004-2006 is consistent with the Panel and Appellate Body decisions in *US – Upland Cotton* and *US – Upland Cotton (Article 21.5 – Brazil)*. The European Communities asserts that the reference periods considered by the original panel and Appellate Body reports in that dispute covered years of high United States' upland cotton production and higher levels of United States' subsidies than previously, but based on arguments of the United States, it did not include marketing year 1998, which the United States asserted was a year of unusually high abandonment of United States' upland cotton acreage due to drought and, therefore, unusually low United States' upland cotton production.[5129] The European Communities argues that the principle to be derived from this report is that data in years with unusual conditions of competition should not be used for assessing trends offering guidance for present adverse effects under present normal conditions of competition. The European Communities asserts that this principle was supported by the United States in the implementation dispute in *US – Upland Cotton*, and was upheld by the panel and Appellate Body.[5130] The European Communities points out that in both the original and implementation disputes, information from after the date of panel establishment was presented and considered in order to assess whether "present" adverse effects existed.[5131]

7.1690 The European Communities submits that the events of 9/11 qualify as *force majeure* within the meaning of Article 6.7(c) of the SCM Agreement, and that as a consequence, data from 2001 to 2003 cannot be used to as a starting point for assessing adverse effects.[5132] The European Communities recognizes that Article 6.7(c) of the SCM Agreement only refers to claims of displacement or impedance resulting in serious prejudice for the purpose of Article 6.3, but argues that it provides "important context" for determining the relevant time period for assessing other adverse effects claims.[5133] The European Communities argues that as a consequence, the three-year period from 2001 to 2003 must be excluded from the appropriate reference period for our evaluation of the United States' claims under Articles 6.3(a) and 6.3(b).[5134] In addition, the European Communities contends that conditions of competition between 2001 to 2003 do not reflect the present conditions of competition in the LCA industry. Thus, more generally, the European Communities questions the relevance of such "historical" data to a determination of whether or not there are *present*

[5125] EC, FWS, para. 1498.
[5126] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear ("Argentina – Footwear (EC)")*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, footnote 130.
[5127] Appellate Body Report, *US – Lamb*, para. 137.
[5128] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165.
[5129] EC, FWS, paras. 1503-04.
[5130] EC, Comments on *US-Upland Cotton* (Article 21.5 – *Brazil*) paras. 10-11.
[5131] EC, Comments on *US-Upland Cotton* (Article 21.5 – *Brazil*) paras. 12-15.
[5132] EC, FWS, para. 1495.
[5133] EC, FWS, para. 1495, footnote 1328.
[5134] EC Answers to Panel Questions 204 and 207.

adverse effects in the form of both injury and serious prejudice within the meaning of Articles 5(a) and (c), and Article 6.3(c), as well as Articles 6(a) and (b).[5135]

(b) Arguments of Third Parties

(i) Brazil

7.1691 Brazil submits that the selection of an appropriate reference period is not a specific requirement of the SCM Agreement but rather is an analytical tool that should help a panel in the assessment of claims of adverse affects.[5136] It refers to the findings of the panel in *US – Upland Cotton* that an evaluation of an effects-based phenomenon cannot be "conducted in the abstract. Rather, discerning adverse effects of subsidies seems to us to require reference to a recent historical period."[5137] Thus, Brazil contends that the selection of the reference period should also take into account the specific nature and circumstances of the market in which the adverse effects are claimed to exist. This, according to Brazil, is consistent with the requirement that panels must conduct an objective assessment of the matter referred to them. [5138]

(ii) Canada

7.1692 Canada submits that the SCM Agreement does not specify a particular reference period that must be used. Whatever period is chosen, it must be representative and allow for a thorough consideration of the issues.[5139]

(c) Evaluation by Panel

7.1693 Articles 5(a) and (c) and 6.3(a), (b) and (c) do not specify any particular time period for a panel to consider in evaluating whether the subsidies in dispute cause adverse effects to the complaining Member's interests, either in the form of injury to the domestic industry of the complaining Member, or in the form of serious prejudice. Article 6.4 does indicate that, for purposes of analysis of impedance or displacement of exports under Article 6.3(b), a panel should examine changes in relative market shares "over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year." However, while this establishes a minimum period of data to be considered in normal circumstances, it does not provide any guidance regarding either a starting date, or an end date, of a relevant period. Nor does it provide any guidance as to the appropriate length of a relevant period, so long as a minimum of one year is generally respected in the context of an analysis under Article 6.4.

7.1694 It is clear that the finding we are required to make is whether there are "present" adverse effects caused by the subsidies in dispute, and the parties do not argue otherwise.[5140] Of course, it is impossible to assess the "present" situation, as immediate data is not available, and thus a review of the past is necessary to draw conclusions about present adverse effects. The issue we must consider here is what evidence we should take into account, what historical period we should refer to, in drawing such conclusions. In our view, in the absence of any specific guidance on this issue, we

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[5135] EC, Answer to Panel Question 204, paras.279-280.

[5136] Brazil, Answer to Panel question 16, para.36.

[5137] Brazil, Answer to Panel question 16, para.36, citing Panel Report, *US – Upland Cotton*, para. 7.1198.

[5138] Brazil, Answer to Panel question 16, para.36.

[5139] Canada, Answer to Third Party Panel Questions, para. 17.

[5140] In this regard, we note that the text of Article 5 indicates a focus on the present, providing "{n}o member should **cause** … adverse effects". The text of Articles 6.3 (a), (b) and (c) are even more plainly drafted with reference to the present, as each begins "the effect of the subsidy **is** …". (emphasis added).

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should avoid making an *a priori* choice of reference period. The legal arguments of the parties do not establish that a panel is either precluded from, or required to, focus on either of the periods proposed by them, in the sense of a limitation on the panel's consideration of information in the abstract. Rather, we consider that it is our responsibility, in making a determination consistent with our obligations under Article 11 of the DSU, to examine the evidence put forward by the United States, and the rebuttal evidence put forward by the European Communities, including recent information where relevant and reliable, in determining whether the United States has demonstrated that subsidies cause present adverse effects within the meaning of Article 5 of the SCM Agreement. While this makes our task of assessment of the evidence more complicated, it serves to ensure that we carry out an objective examination, as required by Article 11 of the DSU, of all the evidence in reaching our conclusions.

7.1695 The European Communities argues that the reference period for our evaluation of the United States' claims under Articles 6.3(a) and 6.3(b) must exclude data from 2001 to 2003 because the events of 9/11 allegedly constitute *force majeure* within the meaning of Article 6.7(c). In our view, the European Communities' reliance on this provision for the purpose of identifying an appropriate reference period is misplaced. Article 6.7(c) provides:

> "6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist[18] during the relevant period:
>
> ...
>
> (c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member; ...
>
> _____
>
> [18] The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant."

7.1696 Article 6.7(c) describes one particular circumstance, *force majeure*, which, if it exists "during the relevant period", precludes a finding of displacement or impediment resulting in serious prejudice under Article 6.3. Thus, Article 6.7(c) does not, by its own terms, concern the identification of the relevant period to be considered in a serious prejudice analysis. Indeed, its application is explicitly limited to the situation where the particular circumstance described occurs during the period relevant for a serious prejudice analysis. This implies that the relevant reference period must be established before consideration can be given to the applicability of Article 6.7(c). There is therefore no basis in Article 6.7(c) to support the European Communities' contention that the relevant reference period must be shortened by the three-year period during which the European Communities asserts that the effects of the alleged *force majeure* event (*i.e.*, 9/11) were felt.

7.1697 Moreover, we are not convinced by the European Communities' argument that the events of 9/11 constitute *force majeure* within the meaning of Article 6.7(c). Article 6.7(c) is one of six sub-paragraphs of Article 6.7 that describe circumstances which, if they exist during the relevant period, have the consequence that displacement or impedance resulting in serious prejudice under Article 6.3 "shall not arise". Thus, as we read it, Article 6.7 identifies six particular circumstances which affect

the complaining Member in such a way as to make it unacceptable to attribute any market displacement or market impedance taking place during the relevant period to the use of subsidies by the defending Member. That is, the negotiators of the SCM Agreement agreed that, in the circumstances identified in Article 6.7(a)-(f), a finding of serious prejudice based on displacement or impedance should be legally precluded, without consideration of whether any such displacement or impedance is the effect of the subsidies in dispute.

7.1698 What amounts to *force majeure* is not defined in Article 6.7(c). However, "natural disasters, strikes {and} transport disruptions ... substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member" are identified as specific events that constitute *force majeure*. Moreover, it is clear that "other *force majeure*" events may fall within the scope of Article 6.7(c), provided they are also "substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member". Footnote 18 also provides that any *force majeure* event must not be "isolated, sporadic or otherwise insignificant". Thus, not all instances of what might, in a more general sense, be considered *force majeure*, will result in Article 6.7(c) being applicable.

7.1699 In our view, the plain meaning of the text of Article 6.7(c) indicates that a finding of displacement or impediment under Article 6.3 cannot be made where the market share effects alleged to constitute such displacement or impedance are the result of extraordinary ("*force majeure*") events which affect the supplies of the product available for export from the complaining Member, in this case the United States. In other words, as we read it, Article 6.7(c) contemplates *force majeure* events that have a substantial effect on supply, thereby limiting the ability of the complaining Member to export its product for reasons having nothing to do with subsidies. Thus, when a *force majeure* event, unrelated to subsidization, substantially affects production, qualities, quantities or prices of the product available for export from the complaining Member, a decrease in that Member's market share in an export market shall not constitute serious prejudice. The European Communities argues that the events of 9/11 and the resulting downturn in demand for LCA products in the market had a greater impact on Boeing's sales and prices, compared with Airbus. Even assuming this to be true, however, this does not demonstrate that the events of 9/11 substantially affected the availability of United States' LCA for export. According to the United States, Boeing's ability to produce, sell or export LCA in the period following 9/11 was unaffected.[5141] Indeed, the European Communities does not present any evidence or argument suggesting that the events of 9/11 affected Boeing's ability to make LCA available for export. Thus, in our view, the downturn in the LCA market that followed the events of 9/11 did not substantially affect the supply of United States' LCA products, but rather affected demand for LCA. Thus, we do not consider that the events of 9/11 qualify as *force majeure* within the meaning of Article 6.7(c).

7.1700 However, even assuming that the types of *force majeure* contemplated under Article 6.7(c) include shocks affecting demand for particular products, we would nevertheless conclude that the events of 9/11 do not constitute *force majeure* within the meaning of that provision. In this regard, we note that each of sub-paragraphs of Article 6.7 describes a particular circumstance that in one way or another limits the volume of exports or imports of the relevant product from the complaining Member. It is significant, in our view, that each sub-paragraph identifies a circumstance that *does not also affect sales of the product of the defending Member in the same or similar way*. Article 6.7(a) refers to a "prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market"; Article 6.7(b) describes a decision by an importing government monopoly or state trading entity, for non-commercial reasons, "to shift ... imports from the complaining Member to another country or countries"; Article 6.7(d) singles out the "existence of arrangements limiting exports from the complaining Member"; Article 6.7(e) focuses on a "voluntary decrease in the availability for export of the product concerned

[5141] *See*, US, SWS, para. 660.

BCI deleted, as indicated **[***]**

from the complaining Member"; and Article 6.7(f) identifies a "failure to conform to standards and other regulatory requirements in the importing country". Thus, even assuming that demand-side shocks could fall within the scope of Article 6.7(c), in order to qualify as *force majeure*, such events would, like the other sub-paragraphs in Article 6.7, have to concern limitations on exports from the complaining Member that do not also affect the product of the defending Member in the same or similar way.

7.1701 In our view, to understand *force majeure* to include demand-side shocks that affect both the complaining and the defending Member's products in the same or similar way would undermine the purpose of Article 6.7, which as we have indicated above, is to identify a series of circumstances in which Members have agreed that the use of subsidies by a defending Member cannot be legally found to be the cause of serious prejudice in the form of market displacement or market impedance that may occur during the relevant reference period.

7.1702 Although the European Communities has submitted evidence showing that Boeing was affected more than Airbus by the events of 9/11,[5142] it has not argued that Airbus' LCA business was not also negatively affected by the downturn following those events. Indeed, the European Communities has explained that:

> "Data from 2001-2003 is heavily distorted because of the effect of the events of 9/11. LCA orders, deliveries, revenue, prices, and demand fell considerably as a result of the short-term collapse of demand for air travel, particularly into, within and from the United States. A number of US carriers and European airlines went bankrupt and cancelled LCA orders. Many other customers sought to delay the delivery of orders. These developments left both Airbus and Boeing with stocks of distressed aircraft, *i.e.*, aircraft under production, but for which the original customer would no longer take delivery."[5143]

Furthermore, the European Communities has explicitly recognized that "as demand for LCA is driven by the demand from the airline industry, both Airbus and Boeing were directly affected by the severe impact" of 9/11.[5144]

7.1703 Thus, the European Communities' own submissions do not pretend that Boeing was the only company affected by 9/11 or that Airbus was not also affected by those events in much the same way, albeit allegedly to a different degree. On the basis of the evidence before us, there is no doubt that the events of 9/11 were a major shock to the LCA market in general, and that demand for LCA from airlines in the United States was particularly hard hit. However, the effects of 9/11 were felt not only by Boeing but, as the European Communities has itself explained, they were also felt by Airbus, although allegedly to a lesser degree. Therefore, even assuming that the types of *force majeure* contemplated under Article 6.7(c) include events affecting market demand for particular products, the events of 9/11 were not of a kind that did not also affect Airbus in the same or similar way as Boeing. Consequently, even under this alternative view of the meaning of Article 6.7(c), we do not consider that they constituted *force majeure* within the meaning of Article 6.7(c) of the SCM Agreement.

7.1704 The second, and more general, argument made by the European Communities in reliance on the events of 9/11 concerns the relevance of data from 2001 to 2003 to a determination of whether or not there are *present* adverse effects in the form of both injury and serious prejudice within the meaning of Articles 5(a) and (c) and Article 6(c), as well as Articles 6(a) and (b). As we understand its argument, the European Communities is of the view that the Panel should either reject data from

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[5142] *See,* e.g., EC, FWS, paras. 1440-1467; EC, Answer to Panel Question 116.
[5143] EC, FWS, para. 1495 (footnotes omitted).
[5144] EC, Answer to Panel Question 204.

BCI deleted, as indicated **[***]**

this period as irrelevant to its analysis,[5145] or give that data very little probative value for the purpose of demonstrating *present* adverse effects. However, there are a number of factors specific to the LCA industry that lead us to consider that it is reasonable and appropriate, in an objective assessment of the United States' adverse effects claims, to review data over a relatively longer period of time. In particular, we note that there are long lead times for development of new LCA, and each model of LCA has a relatively long life once put into service.[5146] Moreover, orders for LCA are placed for future deliveries, sometimes over a period of many years, and sometimes starting well after the date of the order. Taken together with the long periods during which the subsidies have allegedly been supporting Airbus' development and production of LCA, these factors suggest to us that the consideration of data over a relatively longer historical period will better inform our understanding of the industry and market, and assist us in evaluating not only the allegations of adverse effects, but also the question of causation, than would be the case if we were to exclude information from a relatively recent, in the context of this industry, past.

7.1705 The European Communities insists that that we must assess whether subsidies "presently cause adverse effects, taking into account current factual conditions".[5147] We do not disagree. However, we see no contradiction between this proposition and a consideration of information over a longer historical reference period, particularly in this industry.[5148] Thus, we see no reason to exclude data from the years 2001 to 2003 *a priori* from our consideration.[5149] Of course, we will evaluate information concerning the more distant past carefully in assessing the relationship between the effects of subsidies as reflected in older data and the findings of present adverse effects the United States asks us to make in this dispute.

7.1706 The European Communities argues that shorter time periods are to be preferred in assessing the impact of subsidies, relying in part on statements by panels and the Appellate Body to that effect in disputes involving trade remedies (safeguards and anti-dumping measures).[5150] We consider that the European Communities has exaggerated the import of those reports for our analysis in this case. In particular, we consider that the differences between trade remedy disputes, and this dispute involving adverse effects of subsidies, supports the conclusion that there is, as a legal matter, no preference for a shorter period of time for examining adverse effects, whatever the case may be in trade remedy disputes.

[5145] The European Communities does not argue, in this context, that the Panel is precluded, as a matter of law, from considering information from 2001-2003, or any other period. EC, Answer to Panel question 204, para. 280.

[5146] Production of Airbus' first LCA model, the A300, launched in 1969 and first delivered to a customer in 1974 continued until March 2007. Production of the A310, launched in 1978 and first delivered to a customer in 1985, also continued until March 2007. All other LCA models Airbus has brought to market are currently in production, and Airbus LCA of all models remain in service world-wide.

[5147] EC, Comments on *US – Upland Cotton (Article 21.5 – Brazil)*, para. 24.

[5148] In this regard, we note the fundamental difference between the nature of the subsidies and the product in this dispute, and those in *US – Upland Cotton*. Allegations concerning the effects of largely one-off subsidies allegedly enabling the development of LCA, a product with a long life-span, as well as other subsidies benefitting the development and production of LCA over many years and allegations concerning annual production and income support subsidies to cotton farmers producing an annual crop, thus reflecting a more limited time frame, may well result in different time periods being relevant to the assessment of adverse effects under the SCM Agreement. We see nothing in the findings of the panels and Appellate Body in *US – Upland Cotton* which would limit our ability to consider information that is relevant to this dispute, simply because information from a corresponding time period might not have been relevant in that dispute.

[5149] We note that we have before us information and arguments relating to the period prior to 2001 as well, both with respect to the subsidies in dispute, and with respect to their effects. Our conclusions concerning the relevant reference period relate equally to such information, which we have taken into consideration in our analysis as relevant.

[5150] EC, FWS, paras. 1499-1501.

BCI deleted, as indicated **[***]**

7.1707 In trade remedy disputes, a panel is reviewing the decision of a national authority imposing, on a unilateral basis, a limitation on imports or an increase in tariff rates contingent upon a finding that a particular situation exists. In the case of safeguards, the necessary underlying determination is whether a "product **is** being imported ... in such increased quantities ... as to cause or threaten to cause serious injury to the domestic industry."[5151] The focus of the Appellate Body on the importance of the recent past is related to the timing of the increase in imports, which it has found must be recent, in order to sustain imposition of the safeguard measure.[5152] It is clear that if the triggering event is a recent increase in imports, then the injury must also be recent, and therefore, the analysis has focused on the recent past. However, this does not imply a necessary limitation on the time period for which information is gathered or analyzed by the investigating authority, which is undefined.[5153]

7.1708 In anti-dumping cases, the necessary underlying determinations are that imports are dumped, and that "dumped imports are ... causing material injury" to the domestic industry.[5154] Similarly, in countervailing duty cases, the necessary underlying determinations are that imports are subsidized, and that "subsidized imports ... causing material injury" to the domestic industry.[5155] The Appellate Body pointed out in *Mexico – Anti-Dumping Measures on Rice*, that "because the conditions to impose an anti-dumping duty are to be assessed with respect to the current situation, the determination of whether injury exists should be based on data that provide indications of the situation prevailing when the investigation takes place."[5156] However, the Appellate Body went on to note that this did not mean that a past period was not to be examined.[5157] There is nothing in the Appellate Body's views, that imposes any limit on the length of the relevant period. Moreover, the Appellate Body made it clear that relying on evidence from a "remote investigation period" was not *per se* a violation of Article 3.1 of the AD Agreement.

7.1709 In trade remedy cases, investigating authorities routinely analyze information for a pre-determined period of investigation, and may not consider, or even accept information for any time after the end of that period. Indeed, for many investigating authorities, the period of investigation is defined in governing statute or regulation, which may prohibit the consideration of information outside that period.[5158] Thus, the determination ultimately made at the end of the investigation may be based on data that is quite old. In the disputes relied upon by the European Communities to argue that we must focus on the most recent data, complainants argued to the panels and the Appellate Body that the information on which the determinations were based was stale, and therefore could not be relied

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[5151] Agreement on Safeguards, Article 2.1 (emphasis added).

[5152] *See*, Appellate Body Report, *Argentina – Footwear (EC)*, paras. 130-131. *See, also,* Panel Report, *US – Lamb*, paras. 7.129 and 7.132, and Appellate Body Report, *US – Lamb*, paras. 137 – 138, (importance of recent data in context of analysis of threat)..

[5153] In *US – Lamb*, the Appellate Body noted that, in analysing threat, "although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. ... If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading." Appellate Body Report, *US – Lamb*, para. 138. The Appellate Body did not suggest any limitation on the relevant period of investigation.

[5154] AD Agreement, Article 3.5.

[5155] SCM Agreement, Article 15.5.

[5156] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165.

[5157] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 166.

[5158] The Committee on Anti-Dumping Practices has adopted a recommendation on periods of data collection, which while not binding on Members, indicates agreement about practices in the conduct of anti-dumping investigations that Members believe are consistent with the requirements of the Anti-Dumping Agreement. Document G/ADP/6, 16 May 2000. That recommendation provides that the "period of data collection for injury investigations normally should be at least three years", but recognizes that "such guidelines do not preclude investigating authorities from taking account of the particular circumstances of a given investigation in setting the periods of data collection for both dumping and injury, to ensure that they are appropriate in each case." Similarly, we consider that the particular circumstances of this dispute should be taken into account in order to ensure that data for an appropriate period is examined in our analysis.

upon to support the findings made, and panels and the Appellate Body have agreed. Indeed, both the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice* questioned the relevance and pertinence of evidence from a period ending fifteen months before the initiation of the investigation and almost three years before the imposition of anti-dumping duties to the finding of material injury, and indicated that more recent data is likely to provide better indications about injury.[5159] Thus, this case stands for the proposition that when a determination is made with reference to information for a particular period of investigation, if the end of that period is too remote in time, the information may be insufficient to establish, as a matter of fact, the conditions necessary for imposition of the remedy at the time of the decision.[5160] The cases do not, however, establish any principles regarding the appropriate length of the period, or how far back its starting point may be.

7.1710 Moreover, unlike the cases relied upon by the European Communities, in this dispute, the information before us is not "stale". In this regard, we note that although this Panel was established in July 2005, we agreed, at the parties' request, to set aside our timetable until September 2006, with the result that the United States' first submission was not filed until November 2006, and our meetings with parties and third parties were held in March and July 2007. We continued to receive answers to questions, including further information we requested from the parties in January 2008, and further comments as late as July 2008.[5161] Thus, we have before us information as recent as could feasibly be considered, consistent with considerations of due process. Particularly in a dispute involving an industry with long development and production time-frames such as the LCA industry, we see no reason to limit the length of time over which we will consider information to only the most recent period.

[5159] Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice ("Mexico – Anti-Dumping Measures on Rice")*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007, para. 7.58; Appellate Body Report, para. 166.

[5160] How far in the past is too remote in time is a question to be assessed in each case on the particular facts. In *Mexico – Steel Pipes and Tubes*, a determination based on data from an investigation period that terminated about eight months prior to the initiation and about two years prior to the imposition of the definitive measures was found **not** inconsistent with the *AD Agreement*. Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala ("Mexico – Steel Pipes and Tubes"), WT/DS331/R, adopted 24 July 2007*, para. 7.240. The Panel in the latter case distinguished its decision from the decision in *Mexico – Anti-Dumping Measures on Rice*. The Appellate Body stressed that the conclusion of the Panel in *Mexico – Anti-Dumping Measures on Rice* related to the specific circumstances of the case, such that a *prima facie* case was established that the information did not, in fact, provide reliable indications of current injury. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167. Among those circumstances were the fact that the investigation period had been proposed by the petitioner seeking the imposition of anti-dumping duties, there were no practical problems necessitating that period be considered, no attempt was made to update the information during the course of the investigation, it was not established that updating the information was not possible, and there were no reasons, other than general practice of the investigative authority, why more recent information was not sought. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167. Thus, the Appellate Body concluded, "it is not only the remoteness of the period of investigation, but also these other circumstances" that were the basis for the Panel's conclusion that Mexico's selection of the period of investigation was in violation of its obligations under the *AD Agreement*. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167.

[5161] Following the issuance of the Appellate Body report in *US – Upland Cotton (Article 21.5 – Brazil)*, the Panel afforded both parties an opportunity to submit "comments, if any, on the Appellate Body Report in *US - Upland Cotton (Article 21.5 – Brazil)* circulated to the WTO Members on 2 June 2008, and the Panel Report as modified by the Appellate Body Report" noting that it was "interested in the comments of the parties to the extent that the parties deem the Appellate Body Report and the Panel Report as modified by the Appellate Body Report to be pertinent to the present dispute" The Panel further afforded both parties an opportunity to submit comments on each other's comments. In these later submissions, the European Communities continued to submit information relating to even later periods than that which we had requested.

BCI deleted, as indicated **[***]**

7.1711 In a dispute alleging adverse effects, a panel is called upon to decide, for itself, whether a Member is causing, through the use of subsidies, adverse effects to the interests of another Member. As the Appellate Body recognized in *US – Upland Cotton*, there may well be a time lag between the payment of a subsidy and the consequential adverse effects.[5162] Particularly where, as here, the subsidies in dispute have been granted over a long period of time, and the industry and market operate on long time-frames, there seems to us no reason to conclude that consideration of evidence covering a shorter time period would be preferable to consideration of evidence covering a longer period. Indeed, we note that in both *US – Upland Cotton* and *Korea – Commercial Vessels*,[5163] parties submitted, and the panels considered, data covering longer periods of time, from six to ten years, in their analysis, without expressing a particular justification.

7.1712 We find rather curious the notion that we should exclude certain information submitted by a party from our consideration, because it relates to a period more remote in time than other information that has also been submitted. In our view, we might well be viewed as failing to fulfil our obligation to undertake an objective examination of the evidence, were we to decline to consider information which is, on its face, relevant to the issues that are before us.[5164] Thus, we believe that it is more appropriate to consider all the information that has been put before us, and assess it in light of the arguments of the parties, than to make *a priori* judgments as to a defined and limited reference period, beyond which we will not look.

7.1713 This is not to suggest that we would make a finding that adverse effects manifested at some time in the past are sufficient to support a finding of violation of Article 5.[5165] In our view, it is appropriate to take into account the most recent available, relevant and reliable data that we could evaluate in a manner consistent with the requirements of due process, and in light of practical limitations, including in this case data from 2006.[5166] However, we agree with the United States that the question before us is not whether serious prejudice in terms of displacement, impedance, or price effects, or injury to Boeing, has lessened since 2005, but whether, whatever changes there may have been in the most recent period, the subsidies in dispute cause present adverse effects. In this regard, we note that an improvement in the situation in the most recent period does not preclude a finding of present adverse effects. To the contrary, should we conclude that the present situation is worse than it would have been in the absence of the subsidies, and by a sufficient degree, we may find present adverse effects despite improvements in the most recent period.

7.1714 Finally, as implied by the discussion above, we reject the United States' view that we are required to make our determination concerning adverse effects "as of" the date of establishment of this panel in July 2005. While the exigencies of collecting, submitting, and analysing relevant information necessarily means that any decision will be based on a past period, we are nonetheless charged with making a determination of **present** adverse effects, and therefore consider that it behoves us to take into account the most recent information available to us, consistent with due process, that is relevant and reliable. Moreover, in both the original and implementation disputes in *US-Upland Cotton*, the panel took into account information from a period beyond the date of its

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[5162] Appellate Body Report, *US – Upland Cotton*, para. 273.

[5163] Panel Report, *Korea – Commercial Vessels*.

[5164] The probative value and weight to be accorded such evidence is, of course, to be considered through the course of our analysis.

[5165] We recall that the Panel in *US – Upland Cotton* observed that "{s}ubsidies granted under expired measures may have had adverse effects at the time they were in effect, and may still have lasting adverse effects." Panel Report, *US – Upland Cotton* para 7.1201, citing, Panel Report, *Indonesia – Autos*, para. 14.206. Certainly, in our view, subsidies granted with respect to products still being manufactured and sold may be found to still be having adverse effects, despite the fact that the subsidies causing these effects were granted at some time in the past.

[5166] While we have not excluded information relating to periods subsequent to 2006, we will not rely on it specifically in making our findings of fact in the context of adverse effects.

establishment, at least in part based on arguments made by the United States. The United States argues that the "ordinary rules of WTO dispute settlement" indicate that a panel's terms of reference are fixed as of the time of panel establishment, and thus that we should make our ruling as of that date.[5167] The United States suggests that the willingness of the panel to take into account information from a period beyond the date of its establishment in *US – Upland Cotton (Article 21.5 – Brazil)* does not suggest any different understanding of its terms of reference, and that there is a difference between whether evidence is relevant and may be taken into account and whether a panel is to make findings with respect to events that happened after its establishment.[5168]

7.1715 We consider the distinction the United States draws in this regard to be inaccurate. The United States acknowledges that market data regarding a period after establishment may be taken into account in making our determination.[5169] In our view, if evidence about a period after the establishment of the Panel is relevant and may be taken into account in our analysis, then our findings based on that analysis cannot logically be understood as being made "as of" the date of establishment.

6. Conditions of Competition

7.1716 Before proceeding to consider the parties' arguments concerning adverse effects, we consider it important to set out our understanding of the basic structure of the LCA industry overall, and the conditions and nature of competition in the market for LCA, in order to establish the background and context for our analysis of whether the subsidies we have found to exist cause, or threaten to cause, adverse effects within the meaning of Articles 5(a) and (c) of the SCM Agreement.

7.1717 The design, testing, certification, production, marketing and after-delivery support of LCA is an enormously complex and expensive undertaking, which requires huge up-front investments over a period of three to five years before any revenues are obtained from customers.[5170] A rough rule of thumb is that at least 600 airplanes of a new model must be sold before the revenues for a programme exceed the costs. Economies of scale arising from the huge sunk development cost give incumbent firms a considerable competitive advantage. Learning effects induce dynamic economies of scale which reinforce incumbents' advantage. Economies of scope make it difficult to enter one market segment only. Switching costs make it more difficult for new producers to enter, and most airlines prefer fleet commonality. Incumbent firms have a strong incentive to adopt entry deterring price strategies. Historically, according to one commentator, few airplane programmes have been financial successes.[5171] Uncertainty is considerable, making it very difficult to finance the huge development cost on capital markets. Finally, the fact that aircraft are typically sold in USD exposes non-American manufacturers to exchange rate fluctuations which increase uncertainty and are costly to cover against.[5172]

7.1718 Boeing and Airbus are at present the world's only LCA producers. Two other US producers, Lockheed and McDonnell Douglas, exited the LCA market in 1981 and 1997, respectively.[5173]

[5167] US, Comments on EC, Comments on Appellate Body and Panel Reports in *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 3-9.

[5168] US, Comments on EC, Comments on Appellate Body and Panel Reports in – *Upland Cotton (Article 21.5 – Brazil*), para. 9.

[5169] US, Comments on EC, Comments on Appellate Body and Panel Reports in – *Upland Cotton (Article 21.5 – Brazil*), para. 6.

[5170] Boeder & Dorman, Exhibit US-373, at 132-33.

[5171] Gernot Klepper, *Entry Into the Market for Large Transport Aircraft*, 34 European Economic Review 775 (1990) (hereinafter "Klepper"), Exhibit US-377; Boeder & Dorman, Exhibit US-373.

[5172] Klepper, Exhibit US-377.

[5173] Boeder & Dorman, 132-33, Exhibit US-373. Very limited LCA production exists in Russia. According to the United States, difficulties in obtaining the necessary funding for the development of LCA that can meet international airworthiness certification standards have prevented Russian LCA producers from

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Boeing is a long-established manufacturer of LCA, while Airbus launched its first model, the A300, in 1969, and first entered it into service in 1974.[5174] Both Airbus and Boeing now produce a full range of different models of LCA and sell to the full range of customers, primarily airlines and aircraft leasing companies.[5175] In this competitive duopoly, the United States argues that the two producers compete head-to-head for virtually all LCA sales, in a largely "zero sum" competition – a "win" for one producer, in terms of sales, is almost always a loss for the other.[5176] The European Communities agrees that the competitive duopoly between Airbus and Boeing has resulted in vigorous competition between the two companies, but asserts that this competition is welcomed by both companies, as well as by purchasers of aircraft,[5177] and has generated numerous new and innovative LCA products.[5178] The European Communities argues that the competition between the two companies fosters lower prices for LCA purchasers and increased demand for air travel by the flying public which is the ultimate driver of the financial health of both Boeing and Airbus.[5179] According to the United States, however, lower prices for LCA do not significantly increase demand,[5180] because demand for LCA is generally derived from demand for air travel services, and the cost of the aircraft itself is only a small portion of total airline operating costs.[5181]

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seriously competing with Boeing and Airbus for LCA sales outside the former Soviet bloc. *See,* US International Trade Commission, *The Changing Structure of the Global Large Civil Aircraft Industry and Market*, Inv. No, 332-384 (November 1998) at Ch. 4, Exhibit US-374; *EC Merger Analysis*, Exhibit US-375. The European Communities does not consider the evolution of the current competitive situation relevant, but asserts that the United States has made false statements of fact regarding the market exits of McDonnell Douglas and Lockheed. According to the European Communities, Lockheed left the LCA business because of a combination of misjudgements in aircraft design and cost overruns in its military aircraft development operations, while McDonnell Douglas ceased operating because of an unwillingness to invest in the future, an over-reliance on derivative rather than new models of LCA, and a series of crashes. McDonnell Douglas' LCA operations merged with Boeing in 1997. EC, FWS, paras. 1386-88.

[5174] EADS offering memorandum (2000), Exhibit EC-24, pp. 68-70; EADS offering memorandum (2001) Exhibit EC-25, pp. 41-42.

[5175] Aircraft leasing companies essentially are an intermediary between LCA manufacturers and airlines – they purchase LCA, but do not operate them, leasing them to airlines, which thus do not have to themselves finance the purchase of the LCA. *See*, Statement of Christian Scherer, Exhibit EC-14 (BCI) at 30-36.

[5176] US, FWS, para. 711.

[5177] EC, FWS, paras. 1376, 1378, 2272.

[5178] Indeed, the European Communities contends that Boeing acknowledges that it *needs* a strong Airbus competitor, citing remarks by Randy Baseler, Boeing's marketing chief. EC, FWS, para. 1380, citing Boeing, "*Randy's Journal: Staying focused*," 6 October 2006, http://www.boeing.com/randy/archives/2006/10/staying_focused.html (visited 30 January 2007), Exhibit EC-277.

[5179] Paul Wachtel, "*Critique of 'The Effect of Launch Aid on The Economics of Commercial Airplane Programs' by Dr. Gary J. Dorman*," 31 January 2007 (hereinafter "Wachtel Report"), Exhibit EC-12, para. 9. Dr. Wachtel is a professor of economics at New York University's Stern School of Business. His educational credentials include a BA, cum laude, Queens College, CUNY, and an MA and PhD in Economics from the University of Rochester.

[5180] According to the US, "{i}ndustry analysts recognize that lower prices for LCA do not significantly increase LCA demand – or, in economic terms, "the price elasticity of demand for aircraft in general will most likely be rather small.", citing Klepper, Exhibit US-377; *see also*, Dorman Report, Exhibit US-70 (BCI), p. 8. This is because demand for LCA is generally derived from demand for air travel services, and the cost of the aircraft itself is only a small portion of total airline operating costs. *E.g.*, Klepper, Exhibit US-377, at 785-86. The European Communities disputes the US view that "lower prices for LCA do not significantly increase LCA demand," asserting that the evidence regarding individual sales campaigns demonstrate otherwise. Thus, the European Communities asserts that not every order received by one company harms the other, but a lack of balance in market share creates an unhealthy competitive environment. EC, FWS, para. 1400.

[5181] Gernot Klepper, *Entry into the Market for Large Transport Aircraft*, 34 European Econ. Rev., 775, 786 (1990), Exhibit US-377; *see also*, Dorman Report at 8, Exhibit US-70.

BCI deleted, as indicated **[***]**

7.1719 As noted, customers for LCA are primarily airlines and aircraft leasing companies. Sales of LCA tend to be very large, in terms of numbers of aircraft and dollar amounts,[5182] but relatively infrequent. While orders tend to be very large and sporadic, deliveries of ordered LCA tend to be of individual aircraft, spaced over a period of several years subsequent to the order date, depending on the purchaser's anticipated needs and financing.[5183] In general, the terms and conditions of an aircraft purchase are set at the time of order, including aircraft specifications, net price, discounts, non-price concessions and financing arrangements. While the bulk of the purchase price is generally paid upon delivery, deposits are generally required at the time the order is placed, and pre-delivery payments may begin as early as the conclusion of the sales contract.[5184] However, most sales contracts include provisions for price escalation in line with inflation, and in addition, orders may be cancelled, deliveries pushed out over longer periods of time, and sales terms renegotiated.[5185]

7.1720 Customers choose among the various LCA models available those they deem most suitable for their needs at the time of ordering. In making their purchase decisions, customers will consider such matters as the route structure to be served by the aircraft, the structure of the existing fleet, and operating costs, with a view to minimizing costs and maximizing revenues. Some airlines purchase a mix of LCA models to serve a variety of needs, while others may limit themselves to one LCA model because of the efficiencies generated by the operation of a single aircraft type. Once an airline orders any particular LCA model from a given manufacturer, efficiencies in operating a fleet of similar aircraft (including those related to spare parts, maintenance and training) favour follow-on orders of the same models, as well as orders of other aircraft models from the same manufacturer, in order to take advantage of commonalities across an LCA fleet.[5186] Leasing companies both purchase new LCA on a speculative basis for subsequent lease to airline customers, and act as intermediaries between airlines and manufacturers offering LCA financing or operating leases.[5187] Leasing companies account for a significant percentage of all orders for LCA, approximately 17 percent between 2000 and 2006, and accounted for approximately 25 percent of deliveries in that period.[5188]

7.1721 Contrary to the United States' view that Airbus and Boeing compete head-to-head for virtually every LCA sale, the European Communities asserts that a significant number of orders secured by Airbus and Boeing do not involve competition between the two manufacturers. Rather, the European Communities asserts, customers often decide to order a certain aircraft model without considering the competitor's equivalent product, because they prefer, for one reason or another, one manufacturer's aircraft. In addition, the European Communities notes that an LCA manufacturer may decide that it does not want to be involved in a certain sales campaign, or cannot compete for lack of having a product that can fulfil the customer's requirements, citing as an example a customer needing a 555-seat aircraft, which need is only met by the Airbus A380. The European Communities also contends that LCA are sometimes ordered as a result of geopolitical considerations, especially when an airline is state-owned. An airline may also choose to exercise options or purchase rights without initiating a

[5182] As noted above, LCA are priced and sold in US dollars.
[5183] *EC Merger Analysis*, Exhibit US-375, para. 25.
[5184] Statement of Rod P. Muddle, Exhibit EC-19, paras. 58-60.
[5185] US, Answer to Panel Question 132, para. 430.
[5186] US, FWS, para. 712. For example, the United States notes that AirAsia purchased 40 Airbus A320s and took options on 40 more in December 2004 after a vigorous competition between Boeing and Airbus. Air Asia's subsequent orders – an additional 20 A320s in 2005, followed by a firm order for 40 more A320s in July 2006 (plus 30 additional options) – allegedly flowed directly from the choice the airline made in the 2004 campaign, rather than from a new competition between the producers. AirAsia Press Release: *AirAsia Firms Up Option for 40 More Airbus A320s and Signs Another 30 Options* (July 20, 2006), Exhibit US-378. The European Communities also recognizes this tendency to follow a purchase from one manufacturer with further purchases of that manufacturer's LCA. EC, FWS, para. 1421.
[5187] Statement of Rod P. Muddle, Exhibit EC-19, paras. 18-26.
[5188] Statement of Rod P. Muddle, Exhibit EC-19, para. 20.

BCI deleted, as indicated **[***]**

bidding process.[5189] On the other hand, customers may decide to diversify, and follow-on orders can also be the subject of fierce competition.[5190] Moreover, life-time engine maintenance contracts have enabled airlines to operate more diversified fleets.[5191]

7.1722 In asserting that a significant number of orders do not involve competition between Boeing and Airbus, the European Communities relies on the statement of Mr. Christian Scherer, Head of Future Programmes for Airbus. Mr. Scherer states that in Airbus' view, an order results from a "competitive" sales campaign if Airbus has made a "formal binding offer to sell LCA under particular terms and conditions."[5192] Mr. Scherer defines a "competitive {sales} campaign" as one in which Airbus provided the airline with such a formal binding proposal. Thus, in the absence of such a proposal, he considers that the campaign was non-competitive. He also concludes, based on documents and the collective memory of Airbus personnel, that where Boeing was not "involved, in one way or another", an order for Airbus LCA was the result of a non-competitive campaign, and that all orders **[***]**.[5193] We consider this definition to be too narrow, in the circumstances of this industry, to reliably define whether or not there was competition between Boeing and Airbus with respect to any given sale. With only two producers in a highly competitive industry, and knowledgeable customers in both airlines and leasing companies, we consider that sales campaigns involve competition even in the absence of a "formal, binding proposal" by either manufacturer, albeit perhaps not to the same degree as when such a proposal is made. Given the importance of LCA costs to the customers' successful operations, we cannot accept the implication that customers knowledgeable about the market would not consider the competitive products available from the two producers in most cases, even if formal offers are neither requested nor made in a particular instance.

7.1723 The European Communities maintains that the best measure by which to assess the current competitive relationship between Airbus and Boeing is order data; while the United States takes the view that actual deliveries are the best measure of market share. There is generally about three years between order and delivery of aircraft, and the European Communities asserts that order data thus provide the best measure of the current competitive relationship, as well as the future health of both Airbus and Boeing. For the European Communities, delivery and order backlog data indicate what was sold in the past and what is and will be manufactured in the future, but they provide limited insight into the present competitive relationship between Airbus and Boeing.[5194] The European Communities rejects the view that an order won by one producer represents an order lost by the other. In this respect, the European Communities notes that customers can either order new LCA from either producer, purchase used LCA, or lease LCA. The European Communities argues that in a significant number of sales campaigns, competition is with a potential purchase of used LCA or a lease, rather than with the other manufacturer. For the European Communities, to the extent that Boeing is not involved in these sales, an Airbus "win" cannot be considered a "loss" to Boeing.[5195]

[5189] *See*, Statement of Christian Scherer, Exhibit EC-14, (BCI).

[5190] EC, FWS, para. 1421.

[5191] *See*, Statement of Rod P. Muddle, para. 33, Exhibit EC-19.

[5192] Statement of Christian Scherer, Exhibit EC-14 (BCI), para. 45.

[5193] *Id.* at Annex I, paras. 54-56.

[5194] The European Communities cites statements by Airbus and Boeing officials, as well as financial and aerospace analysts to support the view that order market share is the more appropriate benchmark for evaluating the present. Statement of Christian Scherer, paras. 24, 26, Exhibit EC-14, (BCI), *Randy's Journal: Looking ahead*, 23 January 2007, Exhibit EC-286) (Non-BCI), *Boeing Management and Aftermarket Suppliers are Topics in Wall Street Transcript Aerospace/Defence Report*, Yahoo finance, 6 April 2005, Exhibit EC-287, "*Boeing Shares Could Reach $140 By 2009*" Forbes.com, 12 April 2006 http://www.forbes.com/markets/2006/04/12/boeing-0412markets11.html (visited 4 January 2007), Exhibit EC-247

[5195] The European Communities asserts that approximately **[***]** of the A320 family orders, **[***]** of A330 family orders and **[***]** of A340 family orders resulted from competitive campaigns, while approximately

BCI deleted, as indicated **[***]**

7.1724 While it may well be that there is not clear head-to-head competition for each and every sale of LCA, it is apparent to us that, with only two manufacturers in the market, there is overall competition between Boeing and Airbus for all sales of LCA. It is also clear that competition for sales is, in effect, competition for orders, as LCA are generally ordered for future delivery.[5196] Thus, data concerning orders is informative as to the competition for sales between Airbus and Boeing. However, data for deliveries is also important, as there are many factors that can intervene between order and actual delivery. Changes in the terms and conditions of sales between order and delivery will affect the manufacturer involved and the situation in the market in ways which may be important to consideration of the question of adverse effects.[5197] Moreover, deliveries provide a picture of the number of LCA actually entering a given geographical market at a given time. Thus, an exclusive focus on either deliveries or orders would not allow for a complete understanding of the market and changes relevant to our analysis in this dispute.

7.1725 When choosing aircraft, airlines evaluate the economics of the competing aircraft from both Airbus and Boeing, and the impact those factors will have on the revenues that the aircraft can be expected to generate over its economic life of approximately 30 years.[5198] In doing so, customers quantify and weigh numerous factors, including price, net of concessions such as cash discounts, scheduled pre-delivery payments, provisions for price escalation,[5199] and guarantees related to performance, maintenance, or residual value;[5200] financing, including consideration of elements such as direct financing support by the manufacturer; date of delivery; engine manufacturers; the make-up of existing LCA in the purchaser's fleet and cost of change and cost of diversifying,[5201] and direct operating costs, such as fuel efficiency.[5202] Each customer has different cost-related concerns, and so different aspects may be valued differently by different customers or at different times.[5203] Each of

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[***] of 737NG orders, **[***]** of 767 orders, **[***]** of 777 orders, **[***]** of 787 orders and **[***]** of 747 orders resulted from competitive campaigns. Statement of Christian Scherer, Exhibit EC-14 (BCI), paras. 54-56 and Annexes I and II. We do not agree with this categorization of "competitive" vs. "non-competitive" campaigns. *See*, para. 7.1722 above.

[5196] The parties agree that LCA manufacturers rarely have inventories of LCA. US, FWS, para. 746, footnote 934; EC, FWS, para. 2245. *See*, *also*, EC, FWS, footnote 2216.

[5197] As discussed further below, we have considered information concerning both deliveries and orders, albeit the two categories of information are not equally relevant to all aspects of our analysis. *See*, paras. 7.1745 - 7.1750.

[5198] Airbus North America Holdings Inc., Key Determinants of Competitiveness in the Global Large Civil Aircraft Market: An Airbus Assessment (March 2005) at 17-18 ("Airbus, Key Determinants"), Exhibit US-379 (BCI).

[5199] Because LCA are often delivered years after the original order, both Airbus and Boeing generally apply a standard "price escalation" formula that adjusts the order price (in order year dollars) for inflation in aircraft manufacturing costs to determine the price payable for the aircraft on delivery (in delivery year dollars).

[5200] Residual value refers to the value of the aircraft upon resale by the original customer. For example as part of its sale of 120 aircraft to easyJet in 2002, Airbus guaranteed the residual value of Boeing aircraft owned by easyJet by offering to purchase the Boeing aircraft itself, if necessary, at a predetermined minimum price. Airbus also guaranteed that the cost of maintenance would not exceed easyJet's cost of maintaining its existing Boeing aircraft. EasyJet, Proposed Purchase of Airbus Aircraft and Notice of Extraordinary General Meeting at 8-9 (25 February 2003), Exhibit US-380.

[5201] Statement of Rod P. Muddle, Exhibit EC-19.

[5202] Operating costs can be impacted by price concessions. For example, according to the United States, when Airbus determined that its four-engine A340 was losing sales to Boeing's more fuel-efficient two-engine 777 during recent periods of high jet fuel prices, Airbus announced that the additional fuel burn penalty could be "traded off" by financial compensation to A340 operators. Andrea Crisp, *Squaring Up*, Airline Business (1 April 2006), Exhibit US-381.

[5203] The European Communities asserts that subjective factors can also be important in an airline's evaluation and final purchase decision, including the value of product features such as cabin width and aesthetics; the long-term viability of a supplier and product; long-term risks of new technology and materials; risks associated with a single engine choice; and operational risks of two-engined versus four-engined aircraft.

BCI deleted, as indicated **[***]**

the technical, physical and economic characteristics of aircraft under consideration is translated by customers into a revenue or cost element that is included in their assessment of an offer and its net present value. Despite the complexity of the factors involved in a sales campaign, LCA customers, as well as LCA manufacturers, are generally able to account for these factors in assessing the economic value of a sales proposal.[5204] Thus, competition between Boeing and Airbus is driven by the performance characteristics of the aircraft that the two manufacturers have developed and the price (net of all concessions) and sales terms at which they offer their respective LCA. Since both Airbus and Boeing offer a range of competing LCA models suited for various customer needs, price is a significant factor in a customer's purchase determination, but not necessarily determinative.[5205] That this competition may not be manifest in offers from each producer for each potential order does not, in our view, detract from the basic fact of intense competition between Airbus and Boeing for sales of LCA world-wide.[5206]

7.1726 The long-term viability of an LCA producer depends on continued innovation and periodic launches of new aircraft as technological advances and market conditions allow.[5207] Thus, there is a need for both Boeing and Airbus to secure a continuous stream of orders and deliveries to be able to generate the necessary economies of scale and learning curve cost reductions to remain competitive in the long term. In addition, orders are crucial for a newly launched LCA model to be successful, due to the substantial economies of scale in production as well as the steep learning curve cost reductions generated thereby.[5208] The European Communities asserts that both Airbus and Boeing have an incentive to secure high-volume orders, which it contends means that both will offer lower prices to generate new sales and orders, as well as volume discounts in strategic campaigns to capture volume sales that enable the manufacturer to recover sunk development costs. The launch of a new model with improved performance characteristics can give an LCA manufacturer a competitive advantage, but requires enormous up-front designing, engineering, and testing costs over a period of years before a single aircraft can be delivered to a customer.[5209] As noted, common estimates are that many hundreds of aircraft must be sold in order for the manufacturer to recoup these costs.

7.1727 Thus, decisions with respect to product launches drive subsequent pricing and production decisions, and LCA manufacturers try to produce and sell aircraft in sufficient volume, and at a sufficient pace and price, to recover their development costs as quickly as possible. Economies of

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See, Statement of Rod P. Muddle, Exhibit EC-19, para. 99. In our view, these subjective elements are encompassed by the general consideration of the characteristics of the various aircraft models for sale, and are not distinct elements.

[5204] *See,* Statement of Rod P. Muddle, Exhibit EC-19, paras. 48-50. *See, also,* Statement of Christian Scherer, Exhibit EC-14 (BCI), paras. 69-77.

[5205] Statement of Christian Scherer, Exhibit EC-14 (BCI), para. 60

[5206] *See*, para. 7.1722 above.

[5207] In some cases, the United States points out, LCA producers can reduce costs (and thus risks) to a certain extent by developing "derivative" aircraft that incorporate new technology or meet specific customer needs by adapting existing designs rather than creating an all-new model. For example, as the European Communities has observed, a significant reason for the ultimate demise of McDonnell Douglas was its limited product line, all "derivatives of earlier Douglas models, rather than entirely new designs" (in contrast to the "broader and more modern families of aircraft offered by Boeing and Airbus"), and "the perception of airlines that {McDonnell Douglas} is no longer committed to the commercial aircraft business and may leave the market over time." *EC Merger Analysis*, Exhibit US-375, para. 59; *see also,* Boeder & Dorman, at 137-38, Exhibit US-373.

[5208] The learning curve effect is described in Neven & Seabright, Exhibit US-382, p. 15, (explaining that LCA production "involves the coordination of thousands of tasks{,} and this process can be improved as experience accumulates") Neven & Seabright report that the "basic rule of thumb used in the industry is that production costs decrease by 20% when output doubles". Exhibit US-382, p. 15.

[5209] The United States asserts these costs can approach the entire market capitalization of the LCA producer itself. The United States noted that, in 2006, EADS had a market value of 16.6 billion Euro, not much greater than the anticipated projected development cost for either the A380 or the A350. US, FWS, para. 314.

scale are an important part of the economics of LCA production; additional sales of a given aircraft model not only give the LCA producer additional units over which to recover its fixed costs, but also advance the producer further down the learning curve, reducing its marginal costs on future production. Lost sales represent not only lost revenues and profits, but also lost scale and learning efficiencies and, therefore, increased production costs.

7.1728 Finally, as we have already noted, the European Communities maintains that the events of 9/11 had a profound effect on the LCA industry, which must be taken into account as a relevant condition of competition. The European Communities notes that in the context of the global economic recession, demand for new LCA dropped during the entire 2001 to 2003 period.[5210] Airlines cut capacity in response to declining air passenger traffic, which in turn severely hit LCA manufacturers. According to the European Communities, the events of 9/11 had a particularly devastating effect on Boeing.[5211] The United States notes, however, that the downturn in the LCA market in 2001 to 2003 did not result from any inability of the United States' industry to produce or export LCA, but simply from the purchase decisions and choices of customers. Moreover, the United States argues, the downturn in demand reflects conditions in the passenger airline industry, not the LCA industry.[5212] While clearly there was a significant decline in the market for LCA after 9/11, in our view, this did not result from any changes in the fundamental nature of competition between Airbus and Boeing, but rather was driven by the general global economic downturn and decline in air travel, resulting in a decline in demand for new LCA. And while this decline in demand did not affect both producers to the same degree, the basic considerations described above continue to define the conditions of competition between Airbus and Boeing. The events of 9/11 certainly had a profound impact on the airline industry, and therefore on the LCA industry. As the European Communities states, "the LCA industry has an exaggerated business cycle which is particularly sensitive to external events."[5213] Thus, both negative events, such as the collapse of demand following 9/11, and positive events, will have a substantial impact on LCA sales and the operations of the producers. While we must take such impacts into account in our analysis of the evidence concerning adverse effects allegedly caused by subsidies, the fundamental determinants of competition in the LCA industry outlined above are the critical context for our assessment of adverse effects.

7. Whether the Subsidies Have Caused Serious Prejudice to the Interests of the United States

(a) Introduction

7.1729 The United States claims that subsidies to Airbus cause serious prejudice to its interests within the meaning of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement. In particular, the United States alleges that the European Communities, France, Germany, Spain and the United Kingdom have, through the use of the challenged subsidies, caused: (a) imports of United States' (Boeing) LCA into the European Communities market to be displaced or impeded by sales of Airbus LCA; (b) exports of United States' (Boeing) LCA to various third country markets to be displaced or impeded by sales of Airbus LCA; (c) significant price undercutting by Airbus LCA compared with the

[5210] Boeing Commercial Airplanes, "Boeing Current Market Outlook," June 2003, p. 6, Exhibit EC-295. Throttle-Up – Interview with Boeing CEO Scott Carson, Exhibit EC-280.

[5211] The European Communities contends that Boeing's order book was dominated by US airlines, who were hit hardest by the events of 9/11; Boeing's role in financing LCA by setting up an in-house "leasing company" proved very harmful to Boeing as it added risk to Boeing's LCA business and resulted in an order book generally dominated by airlines that were more prone to cancelling and deferring orders than leasing companies; and the events of 9/11 caused Boeing to lose customer focus and ignore customer relations. The European Communities contends that that leasing companies are generally not affected by the cyclical nature of the LCA market. *See*, EC, FWS, para. 1369; EC, Answer Panel Question 116, paras. 356-367.

[5212] US, Answer to Panel Question 49(c).

[5213] EC, FWS, para. 29.

price of United States' (Boeing) LCA in the same market; and (d) significant price suppression, price depression and lost sales in the same market. The European Communities contests the United States' allegations, arguing that no such serious prejudice is caused by the use of any subsidies provided to Airbus. In essence, the European Communities submits that when the United States' claims are properly assessed on the basis of LCA families competing in the same market, it is impossible to find that the subsidies cause serious prejudice in respect of at least one of the alleged families of LCA, the A380 family. This is because, in the European Communities' view, Boeing LCA do not compete with this aircraft. Moreover, in the markets in which Airbus and Boeing do sell competing families of LCA, the European Communities asserts that the subsidies at issue are too old and in any case not of a magnitude that could cause serious prejudice to the United States' interests in the appropriate reference period, which according to the European Communities, is 2004 to 2006.

7.1730 The United States advances its serious prejudice claims by first focusing on showing that the phenomena described in Articles 6.3(a), (b) and (c) of the SCM Agreement are present over the time period it proposed as the relevant reference period. The United States then explains how the subsidies provided to Airbus have, in its view, caused the phenomena it argues can be observed over that period. The European Communities responds to the United States' claims adopting essentially the same methodology, albeit through the submission of data and arguments relating to different subsidized products and LCA market segments over different periods of time.

7.1731 Article 6.3 of the SCM Agreement is silent as to the sequence of steps to be followed for the purpose of assessing claims of serious prejudice. Thus, we see nothing in the language of Article 6.3 to preclude the path followed by the parties in the present case. In our view, the two-step approach followed by the parties is perfectly valid for the purpose of evaluating the claims that are before us, and we will therefore apply the same methodology in our own assessment of the United States' claims. We recall that in *US – Upland Cotton*, the Appellate Body appeared to entertain the possibility of applying a two-step approach when evaluating claims under Articles 6.3(a), (b) and (c), although it cautioned that it might be difficult to observe the relevant phenomena without also taking into account the effect of the challenged subsidies.[5214] As will be explained in the sections that follow, the arguments and evidence advanced by the United States (including in respect of price suppression) renders a two-step approach entirely appropriate to assessing its claims under Articles 6.3(a), (b) and (c) in the present controversy. Thus, in evaluating the United States' claims, we will first consider whether the particular phenomena identified in Article 6.3(a), (b) and (c) of the SCM Agreement can be observed as a matter of fact. In other words, we will begin our analysis of the merits of the United States' allegations by first examining the parties' arguments and the evidence submitted with a view to determining whether, over the period for which we have information, it can be established, as a matter of fact, that:

(i) imports of Boeing LCA into the European Communities market were displaced or impeded by sales of Airbus LCA;

(ii) exports of Boeing LCA to various third country markets identified by the United States were displaced or impeded by sales of Airbus LCA;

(iii) there was significant price undercutting by Airbus LCA compared with the price of Boeing LCA, or lost sales, in the same market; and

(iv) there was significant price suppression or price depression.

7.1732 We emphasize that in undertaking this first step of the analysis, we will not be addressing the question whether any particular phenomenon that can be observed is actually caused by the subsidies

[5214] Appellate Body Report, *US – Upland Cotton*, paras. 432-433 and footnote 521.

we have found were provided to Airbus. This question of causation will be examined in the final section of our serious prejudice findings, where we will review the parties' theories of causation and related arguments and evidence.

7.1733 Before embarking upon the first part of our assessment of the United States' claims, we wish to address one argument raised by European Communities that we believe has horizontal implications for the entirety of the United States' serious prejudice claims. This argument concerns what can be understood as amounting to "serious prejudice" under the terms of the SCM Agreement.

7.1734 In arguing that the United States is not suffering serious prejudice caused by the subsidies to Airbus LCA in this dispute, the European Communities repeatedly refers to the alleged improvements in and excellent condition of Boeing over the period 2006 to 2007. Thus, for instance, the European Communities states that "today, Boeing stands as *the* dominant player in the competitive Boeing-Airbus duopoly".[5215] The European Communities contends that "{h}aving asserted adverse effect claims, the United States must prove that the United States – and its participant in the LCA markets: Boeing – suffers present *serious prejudice* and *adverse* effects by reason of the effects of the alleged subsidies."[5216] The United States argues that the SCM Agreement does not require any inquiry into the specific impact of the subsidies on the various economic indices of the "state of the industry" of the complaining Member in the context of a serious prejudice analysis.[5217] Thus, in the United States' view, the European Communities' argument that the financial condition of Boeing's LCA division in 2006 precludes a finding of serious prejudice is misplaced, as is its assertion that that there is no serious prejudice because Boeing is currently not "in trouble".[5218] In our view, the European Communities' argument that the financial condition of Boeing's LCA division in 2006 and 2007 precludes a finding of serious prejudice[5219] is inapposite, and based on a flawed understanding of the concept of serious prejudice to the interests of the complaining Member.

7.1735 We recall that the United States alleges that subsidized imports of Airbus LCA cause and threaten to cause material injury to the United States' domestic industry, that is, Boeing, thereby causing adverse effects under Article 5(a). In that context, consideration of Boeing's condition over the relevant reference period is, of course, relevant. Specifically, Article 15.4 of the SCM Agreement, which sets forth guidance on the determination of injury, requires an inquiry into "the impact of the subsidized imports on the domestic industry", including all economic factors relating to the "state of the industry".[5220] However, there is no counterpart to Article 15.4 with respect to claims of serious

[5215] EC, FWS, para. 1325. *See*, EC, SWS, para. 651: "While the United States claims to suffer greatly from decades-old alleged subsidies benefiting Airbus, the past three years have seen a record-setting commercial for Boeing, the United States participant in the LCA markets...This ...demonstrates that Boeing is not presently commercially prejudiced and the United States is not suffering adverse effects to its interests from alleged, often decades-old, subsidies to Airbus"; EC, FWS, para. 1671: to demonstrate serious prejudice from lost sales of 747 LCA, "the United States must demonstrate that, but for the effects of the alleged EC subsidies benefiting the A380, Boeing (a) would have launched the 747X; and (b) the United States and Boeing would have been in a better financial state compared to the state Boeing was in after the launch of the 747-8 in 2005."

[5216] EC, FWS, para. 1329.

[5217] US, SWS, para. 695.

[5218] US, SWS, para. 696. Brazil also disagrees with the European Communities' position that Boeing's healthy financial and market position at the peak of the business cycle precludes the possibility that the United States is suffering serious prejudice caused by the subsidy. The relevant issue, according to Brazil, is whether Boeing's market share would be greater absent the subsidized Airbus product. Brazil, Third Party Submission, para. 58.

[5219] EC, FWS, para. 1360: "If the Panel concludes that Boeing's LCA Division is not presently showing concrete signs of being commercially "injured" or not suffering significant competitive prejudice *vis-à-vis* Airbus, then there is no basis for the United States to prevail on its adverse effects claims under Articles 5 and 6 of the SCM Agreement." We recall that Article 6 of the SCM Agreement relates exclusively to claims of serious prejudice. *See, also*, EC, SNCOS, paras. 424-31.

[5220] We consider the United States' claims of material injury in section VII.F.8(b)(ii) of this Report.

prejudice under Articles 5(c) and 6. There is nothing in the text of Article 6, or any other provision of the SCM Agreement, that would even suggest, much less require, consideration of the "state of the industry" of the complaining Member in the context of a serious prejudice analysis. Moreover, no WTO panel considering a case involving allegations of serious prejudice has in the past taken the state of the domestic industry in the complaining Member into account in its determination of whether serious prejudice has been demonstrated to exist. Nor, to our knowledge, has any party argued in any of those cases that the condition of the domestic industry in the complaining Member precludes a finding of serious prejudice to the complaining Member's interests. Rather, those panels examined, as required under Article 6.3, whether the effect of the subsidies in question was significant price suppression or displacement or impedance of imports or exports.

7.1736 Indeed, we see nothing in the text of Article 6 that would preclude the possibility that serious prejudice could be found in a case in which the industry in the complaining Member is in good condition. We note, in this regard, that serious prejudice under Article 6.3(d) may arise where "the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity." This provision does not suggest that a consideration of the condition of the industry in the complaining Member is relevant to the question whether there is serious prejudice to that Member's interests. The term "serious prejudice" certainly implies some notion of "harm", but Article 5(c) makes it clear that the "serious prejudice" to be considered is to the interests of the complaining Member, and thus the relevant "harm" is defined by the provisions of Article 6.3 – that is, the interests of the Member in trade in a given product through access to markets in volumes and at prices that are unaffected by another Member's use of subsidies,[5221] and not with reference to the interests of an industry in the complaining Member. We note, in this context, the finding of the panel in *US – Upland Cotton*, with which we agree:

> "We therefore do not believe that, once we have concluded that the conditions in Article 6.3(c) are fulfilled, and thus that serious prejudice "in the sense of paragraph (c) of Article 5""may" arise, a separate examination of the existence of "serious prejudice" under the chapeau of Article 6.3 or Article 5(c) is necessary. Our examination of the text, in its context, indicates to us that the Article 6.3(c) examination is determinative also for a finding of serious prejudice under Article 5(c). That is, an affirmative conclusion that the effects-based situation in Article 6.3(c) exists is a sufficient basis for an affirmative conclusion that "serious prejudice" exists for the purposes of Article 5(c) of the SCM Agreement."[5222]

7.1737 While it seems to us self-evident that the trade effects set forth in Article 6.3 as demonstrating serious prejudice are likely to have an effect on the industry in the complaining Member, this is not the focus of our inquiry under Article 6 of the SCM Agreement. Thus, we see no basis on which improvements in the condition of Boeing, or consideration of whether it is more or less profitable, should be taken into account in our analysis of serious prejudice under Article 6.3. And, while a complaining Member's balance of trade, balance of payments or overall financial situation might seem more directly relevant to that Member's interests, we consider these to be immaterial, for purposes of a finding of serious prejudice, in the same way as whether the industry in the complaining Member is in bad condition has no relevance to a panel's consideration of whether there is serious prejudice to that Member's interests. In summary, we consider that it will be sufficient for the United States to

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[5221] As noted by the panel in *US – Upland Cotton*, this view is consistent with the approach of three earlier GATT dispute settlement reports, which "indicate that serious prejudice involved the effects of subsidies on a Member's trade in a given product as such, *i.e.*, the volumes and prices and flows of such trade, rather any further effects on a Member's domestic industry, or other issues such as the significance of the particular industry producing the product in question to the overall "interests" of the complaining Member." Panel Report, *US –Upland Cotton*, footnote 1492.

[5222] Panel Report, *US – Upland Cotton*, para. 7.1390.

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prevail on its claims of serious prejudice in this case if it demonstrates that the use of the specific subsidies we have found to have been granted to Airbus caused the market effects described in Article 6.3(a)-(c), without any further examination.[5223] Therefore, in our evaluation of serious prejudice under Article 6.3 of the SCM Agreement, we will not, as the European Communities does, take into account improvements in the condition of Boeing.

(b) Alleged displacement or impedance of imports into the EC market

7.1738 Article 6.3(a) of the SCM Agreement provides:

> "Serious prejudice in the sense of paragraph (c) of the Article 5 may arise in any case where one or several of the following apply:
>
> (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;"

The meaning of "displace" and "impede" was considered by the panel in *Indonesia – Autos*, which stated that "displacement relates to a situation where sales volume has declined, while impedance relates to a situation where sales which otherwise would have occurred were impeded".[5224] We generally agree that this distinction between displacement and impedance is inherent in the ordinary meaning of the terms.

7.1739 In *Indonesia - Autos*, the panel evaluated the European Communities' claims of displacement and impedance by reviewing sales and market share data, finding that "market share data may be highly relevant evidence for the analysis of {a claim under Article 6.3(a)}".[5225] The parties in the present controversy have equally focussed their submissions on market share information. We intend to proceed along the same lines. However, in doing so, we note that while data showing that Boeing's market share in the EC market decreased over the relevant reference period would, in our view, be sufficient to evidence a "displacement" phenomenon,[5226] the same data could not also, on its own, demonstrate "impedance". As noted by the panel in *Indonesia – Autos*, the notion of "impedance" involves understanding whether sales which would otherwise have taken place were impeded – in other words, whether sales that would have otherwise actually occurred were obstructed or hindered. Thus, in order to conclude that imports of the United States' LCA were impeded over the relevant reference period, we would, *inter alia*, have to be satisfied that those sales would have actually taken place.

7.1740 The United States presents market share information comparing the relative positions of Airbus and Boeing in the EC LCA market for the period 2001 to 2006, in terms of annual deliveries of LCA as well as LCA value measured by list prices. Consistent with its position that there is one single subsidized product, Airbus LCA, and one single corresponding United States' like product, Boeing LCA, the information submitted by the United States discloses the alleged market shares on

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[5223] *See, also*, Panel Report, *Indonesia – Autos*, where the panel did not conduct any additional examination.

[5224] Panel Report, *Indonesia – Autos*, para. 14.218.

[5225] Panel Report, *Indonesia – Autos*, para. 14.211. Similarly, in examining the significance of the absence of any reference to the "like product" in the specific context of price suppression and price depression claims under Article 6.3(c) of the SCM Agreement, the panel in *Korea – Commercial Vessels* observed that "{d}etermining displacement or impedance {under Articles 6.3(a) and 6.3(b)} in turn involves an analysis and comparison of relative levels and trends in volume and market share of the subsidized product and the complaining Member's like product". Panel Report, *Korea – Commercial Vessels*, para. 7.555.

[5226] Of course, it would have to be demonstrated that the phenomenon was the effect of the subsidies in dispute in order for the United States claim of serious prejudice to succeed.

BCI deleted, as indicated **[***]**

an aggregate basis. The United States does not break out the data on the basis of aircraft models or any other parameter.[5227]

7.1741 The European Communities does not dispute the accuracy of the data presented by the United States. However, it argues that the United States' claims are "improperly organized" for essentially three reasons.[5228] First, the European Communities contends that the United States has failed to identify the proper subsidized products and corresponding like products and product markets. Consistent with its own view that there is not a single Airbus LCA product but rather multiple LCA products and thus multiple Boeing like products and markets, the European Communities submits that the market share analysis necessary for the purpose of evaluating the United States' claims of displacement and impedance must be undertaken in each separate product market in which the separate families of Boeing and Airbus LCA allegedly compete. Reflecting this position, the European Communities presents an alternative set of market share data measured in terms of both orders and deliveries.

7.1742 We have already rejected the fundamental premises underlying the European Communities' arguments, having concluded that it is appropriate to analyze adverse effects on the basis that all Airbus LCA constitute the subsidized product at issue in this dispute and all Boeing LCA are the relevant like product.[5229] The clear dividing lines the European Communities argues exist between models and families of Boeing and Airbus LCA are not supported by the facts that are before us. This is not a case where the complainant's definition of the subsidized product and like product, and the data submitted corresponding to that definition, risks distorting the market displacement and impedance analysis that must be performed under Article 6.3(a). Thus, in the light of our findings on the subsidized product and like product, we will conduct our evaluation of whether the United States has demonstrated displacement or impedance of imports of United States' LCA into the EC market by looking at market share data for the subsidized product and like product defined by the United States, that is, Airbus LCA and Boeing LCA.

7.1743 The second EC objection to the United States' "organization" of its claims concerns the relevant reference period. As we have previously discussed, the European Communities argues that information from the period between 2001 and 2003 must be disregarded, as it alleges that disruptions to the LCA markets following the events of 9/11 constitute *force majeure* within the meaning of Article 6.7(c) of the SCM Agreement, and therefore displacement or impedance within the terms of Article 6.3(a) cannot arise over this period. Although the European Communities presents and examines data for the period 2001 to 2006,[5230] it argues that the focus of the Panel's attention should be on the 2004 to 2006 period.[5231]

7.1744 We recall that we have previously dismissed the European Communities' reliance on Article 6.7(c) of the SCM Agreement, and concluded that in assessing whether the subsidies to Airbus cause *present* serious prejudice, we will consider all information put before us, without making any *a priori* conclusions as to which time interval must be used.[5232] This does not mean that we consider the events of 9/11 to have had no impact on the LCA industry. In our view, it is clear that 9/11 did result in a severe collapse in demand for LCA, with adverse consequences for the LCA businesses of both

[5227] US, FWS, paras. 766-770, US, SWS, para. 698, Table 1.
[5228] *See*, e.g., EC, FWS, paras. 1933-1937.
[5229] *See*, para. 7.1680 above.
[5230] And in some cases, later, for instance, with reference to order data for the Airbus A340 and Boeing 777, "expected deliveries in the EC market" from 2007 to 2010. EC, FWS, para. 2132.
[5231] The European Communities further asserts that even later information, concerning 2007 and 2008, must be taken into account where available.
[5232] *See*, paras. 7.1694 and 7.1712 above.

BCI deleted, as indicated **[***]**

Boeing and Airbus. However, as we have explained elsewhere, in our view the events of 9/11 do not constitute *force majeure* within the meaning of Article 6.7(c). [5233]

7.1745 The third reason for the European Communities' opposition to how the United States has framed its claims centers on the United States' reliance on delivery data, as opposed to information about orders, in support of its claims of displacement or impedance. [5234] According to the European Communities, the proper focus of an evaluation of market displacement or impedance must be order data. The European Communities argues that a focus on deliveries does not allow for a full assessment of present serious prejudice caused by subsidies but, at best, highlights the historical impact of subsidies. According to the European Communities, order data provides the most up-to-date picture of competition in the LCA market, and so must be considered in any objective assessment of the facts. Moreover, in the particular circumstances of "large capital goods such as LCA, with deliveries that take place years after orders are placed", the European Communities argues that the terms "import" and "export" found in Article 6.3(a) and (b) should be construed to include future imports and exports.[5235]

7.1746 The United States argues that claims of displacement or impedance under Articles 6.3(a) and (b) of the SCM Agreement involve the displacement or impedance of "imports" or "exports", terms which, according to the United States, refer to deliveries rather than orders.[5236] In addition, the United States raises factual concerns with respect to the use of market share data based on orders which, it asserts, makes order information inappropriate as a basis for consideration of displacement or impedance. These include the fact that while the date of delivery is easy to determine, there is a certain flexibility concerning the date on which an order is reported. In addition, the Airclaims Database (on which both parties rely for information concerning sales of LCA) records orders made by leasing companies, which account for a not-insignificant percentage of LCA sales, on the basis of the location of the leasing company, while deliveries are recorded on the basis of the location of the operator to which the aircraft is leased and actually delivered.[5237] Thus, an order by a leasing company in the United States for delivery to an airline in, for example, the United Kingdom, will be reported as a United States' order, and a UK delivery. Finally, the United States contends that an exclusive focus on order data distorts the reality of the market, as an increase in market share based on orders does not reflect current and future loss of market share caused by past orders for which deliveries are being made or which are yet to be made.[5238]

7.1747 Article 6.3 uses the terms "imports" and "exports" in the context of claims of displacement or impedance. Thus, Article 6.3(a) refers to displacement or impedance of the **imports** of a like product into the territory of the subsidizing Member, and Article 6.3(b) refers to the displacement or impedance of the **exports** of a like product from a third country market. "Import" is defined as "something imported or brought in, the amount or value of what is imported; an imported article or commodity" while "export" is defined as "an article that is exported...(the amount or value of) exported goods." [5239] The European Communities argues that the terms "could be interpreted to include orders that will result in future imports and exports – *i.e.,* future deliveries based on *present* orders."[5240] We do not agree that the ordinary meaning of these terms can be understood in this way. The European Communities bases its argument in this regard on the particular product at issue in this

[5233] *See*, paras. 7.1695 -7.1703 above.
[5234] EC, FWS, para. 1403.
[5235] EC, Answer to Panel Question 132; EC, SWS, para. 1140.
[5236] US, Answer to Panel Question 132, para, 432; US, SWS, paras. 687-693.
[5237] *See*, Exhibit EC-21.
[5238] US, Answer to Panel Question 132, para. 430. Australia considers that the Panel should consider both orders and deliveries, as both may indicate the effect of the subsidies on the industry and the market through future projected sales and market share. Australia, Answer to Panel Question 17.
[5239] *New Shorter Oxford English Dictionary*.
[5240] EC, Answer to Panel Question 132, para. 464.

BCI deleted, as indicated **[***]**

case, suggesting that the terms "import" and "export" can include orders that will result in future deliveries in the case of large capital goods with deliveries years after orders are placed.

7.1748 We are not persuaded by the European Communities' argument on this point. In our view, there is nothing in the text of the relevant provisions to indicate that the terms "import" and "export" should be understood differently in the context of different types of products. Thus, we agree with the United States that the ordinary meaning of the terms "imports" and "exports" suggests a focus on deliveries rather than orders. The European Communities argues that our duty under Article 11 of the DSU to conduct an objective assessment of the matter means that we must also consider order data when evaluating the United States' claims under Articles 6.3(a) and 6.3(b), effectively treating order data as information pertaining to future "imports" and "exports".[5241] However, our duty to conduct an objective assessment of the matter includes interpretation of the relevant provisions of the WTO covered agreements, in this case, Articles 6.3(a) and 6.3(b). The European Communities has pointed to nothing in the text of these provisions, their context or object and purpose, to convince us that they should be interpreted in accordance with its contention. Thus, for the purpose of considering a claim of displacement or impedance under Article 6.3 of the SCM Agreement, we consider that it follows from the ordinary meaning of the words "imports" and "exports" that a focus on deliveries is appropriate.

7.1749 Having said that, we recognize that order data reflect competition between Airbus and Boeing for LCA sales, that is, orders for future deliveries. Moreover, both orders and deliveries are important to the condition and continuing operations of aircraft manufacturers. But while Boeing and Airbus undoubtedly make future plans taking into account their current order book, and while market actors will take the future flows from those orders into account in evaluating each company, we do not agree with the European Communities' view that deliveries are a matter of historical interest only. It is at the time of delivery that a manufacturer receives the majority of proceeds from the sale of an aircraft.[5242] Thus, we do not accept the EC' assessment of deliveries as representing only the historical impact of subsidies. If Boeing does not receive an order (or receives an order at a lower price) as a result of the effect of subsidies, it will lose market share and revenue at the time of delivery. Thus, although the effect of subsidies may be manifested at the time an order is not obtained, it may also be manifested when deliveries are not made, or fewer deliveries are made, or deliveries are made at lower prices, in the form of lost market share and price effects. Accordingly, while we agree that present serious prejudice must be found for the United States to substantiate its claims, we do not consider that this requires a focus on order data in assessing impedance or displacement under Articles 6.3(a) and 6.3(b).

7.1750 Nonetheless, we do not mean to suggest that data concerning orders for LCA is irrelevant to our analysis in this dispute. It is apparent from the information before us that, from the perspective of production and financial performance, both orders and deliveries are important to an aircraft manufacturer. Boeing and Airbus primarily compete with each other to secure orders for new aircraft, to be delivered at some time in the future. At the moment an order is placed, the terms and conditions of the delivery of aircraft pursuant to that order will in large part be set. Aircraft specification, net price, discounts, non-price concessions and financing arrangements will be determined at the time of order.[5243] Both Boeing and Airbus require a deposit at the time an order is placed, and further pre-delivery payments in accordance with a prepayment schedule prior to delivery. The total amount of payments prior to delivery is subject to negotiation with the purchaser. However, payments made at the time of order are generally nominal as a percentage of the total price of the aircraft involved, and

[5241] EC, Answer to Panel Question 132.
[5242] Statement of Christian Scherer, Exhibit EC-14 (BCI), para. 28.
[5243] Statement of Christian Scherer, Exhibit EC-14 (BCI), para. 27.

BCI deleted, as indicated **[***]**

payments prior to delivery would not be expected to exceed 30 to 35 percent of the total price.[5244] In general, LCA are not purchased one at a time for immediate delivery, but rather tend to be ordered in large numbers with deliveries spread over a subsequent period of sometimes several years. Thus, orders are to some extent a proxy for future deliveries. Moreover, the competition between manufacturers for a sale to a particular customer is a competition for the order, and the delivery dates are negotiated as part of that competition. Thus, information concerning orders will be relevant to considering the question of lost sales, as well as assessing the United States' claims of price effects, given that the pricing of LCA is largely, albeit not entirely, determined at the time of ordering. Therefore, we will consider order information in certain aspects of our analysis of the United States claims under Article 6.3(c).

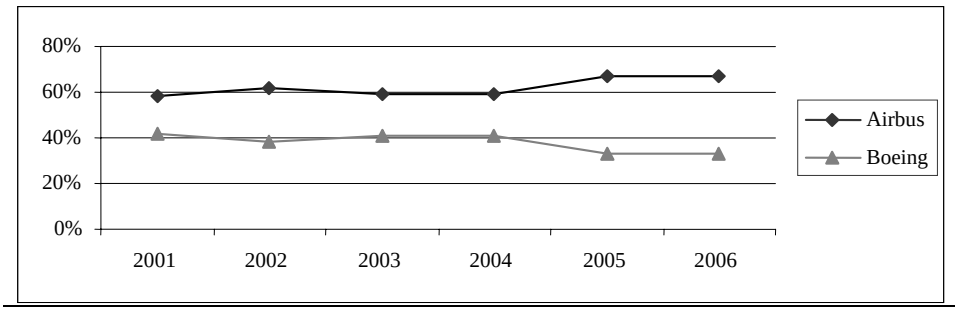
7.1751 Finally, the European Communities' arguments suggest that in order to make out its case under Article 6.3(a) and (b) of the SCM Agreement, the United States must demonstrate displacement or impedance on a sale by sale basis.[5245] We disagree. While such an approach might be one way to present evidence of displacement or impedance, we see nothing in the language of Article 6.3(a) or (b) requiring such an approach. A complaining Member must demonstrate that the effect of the subsidies is to displace or impede imports or exports. However, nothing in the text of these provisions dictates the form of evidence which is to be used to demonstrate such an effect. A market share approach is consistent with previous dispute settlement reports.[5246]

7.1752 The data on LCA deliveries to the EC market submitted by the United States is reproduced in the following tables:

Table 18 – Market Share (Quantity of LCA delivered in the European Communities)[5247]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	**58%**	62%	59%	59%	67%	**67%**
Boeing	**42%**	38%	41%	41%	33%	**33%**

Chart 1 Market Share (Quantity of LCA delivered in the European Communities)



[5244] Statement of Rod P. Muddle, Exhibit EC-19. Mr. Muddle provides information indicating that the standard payment at order for Airbus is 5% of the list price and 1% of list price for Boeing. Total payments prior to delivery are 30% of list price of Airbus and 30-35% of list price for Boeing depending upon the aircraft order. As Mr. Muddles notes in his statement, these payments are the subject of negotiations between the carrier and the manufacturer.

[5245] EC, FWS, paras. 1984 and footnote 1994, paras. 1990-1994, 2045.

[5246] *See*, Panel Report, *Indonesia – Autos*, para. 14.211, Panel Report, *Korea – Vessels*, para. 7.555.

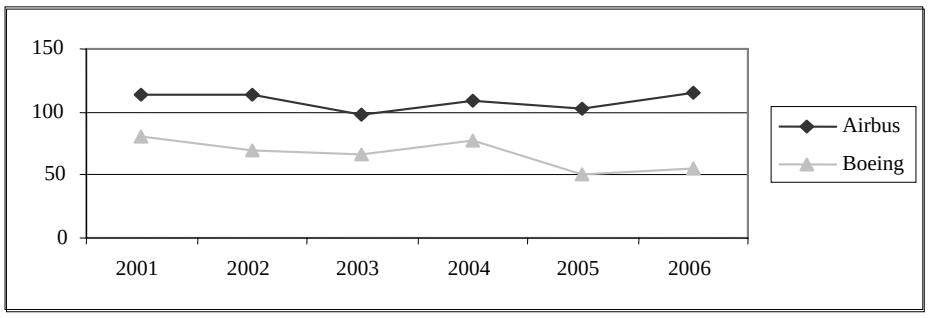
[5247] US, FWS, para. 767.

BCI deleted, as indicated **[***]**

Table 19 – Quantity of LCA delivered in the EC[5248]

	2001	2002	2003	2004	2005	2006
Airbus	114	114	98	109	103	116
Boeing	81	69	67	77	50	56
Total	195	183	165	186	153	172

Chart 2 Quantity of LCA delivered in the EC



7.1753 It is clear from Table 18 that Airbus' share of the EC market increased by 9 percentage points over the period 2001 to 2006. In 2001, Boeing's share of the EC LCA market, measured by quantity of LCA delivered, was 42%; it dropped to 38% in 2002, increased in to 41% in 2003 and 2004, and dropped to 33% in 2005 and 2006. Airbus' share of the EC market for LCA was 58% in 2001, increased to 62% in 2002 before declining to 59% in 2003 and 2004, then increasing again in 2005 and 2006, to 67%.

7.1754 The market share figures reflect the numbers of LCA delivered shown in Table 19. This information shows that Boeing delivered 81 LCA to the EC market in 2001. Its deliveries then declined to 69 LCA in 2002, and again to 67 in 2003, before increasing in 2004 to 77 LCA, and then dropping sharply to 50 in 2005, and increasing to 56 in 2006. Airbus, on the other hand, delivered 114 LCA to the EC market in 2001 and 2002, and although its deliveries declined 2003, 2004, and 2005, they were in each year higher than Boeing's deliveries, and increased to 116 LCA in 2006. Thus, in terms of the quantity of LCA delivered to the EC market, Boeing's sales volume in the European Communities has declined. Table 19 also shows that there was a overall decline in the total number of LCA deliveries to the European Communities from 2001 to 2003, and increase in 2004, and a further decline in 2005. Although deliveries increased again in 2006, they were 12 percent fewer than in 2001. Boeing LCA deliveries over this period declined more than did Airbus LCA deliveries, and the decline in Boeing deliveries is disproportionate to the decline in overall deliveries.

7.1755 The European Communities does not dispute the data presented by the United States. Rather, and reflecting its view that there are multiple Airbus subsidized products and Boeing like products, the European Communities presented different data on LCA deliveries (and orders) to the EC market for three alleged product markets – the single-aisle LCA market (comprising the Boeing 737NG and Airbus A320 families);[5249] the 200-300 seat LCA market (comprising the Boeing 767, 787 and Airbus A330 families);[5250] and the 300-400 seat LCA market (comprising the Boeing 777 and Airbus A340 families).[5251] Having rejected the premise underlying the European Communities' submission of data

[5248] US, FWS, para. 767.
[5249] EC, FWS, paras. 1985-1989.
[5250] EC, FWS, paras. 2043-2046.
[5251] EC, FWS, paras. 2128-2134.

in this form, and proceeding on basis that the United States is entitled to make out its case with respect to Airbus LCA as a single subsidized product, the delivery information provided by the European Communities has little if any probative value for the purpose of answering the question of displacement that is before us.

7.1756 Moreover, having reviewed the European Communities' data, we believe that it provides an inaccurate and incomplete picture of LCA deliveries to the EC market between 2001 and 2006. There are several reasons for this. First, the European Communities does not count deliveries of the Boeing 747, which we have concluded is within the product like the subsidized Airbus LCA. The Airclaims database information relied on by the European Communities shows that there were 23 Boeing 747s owned by and delivered to EC airlines over the relevant period.[5252] Second, the European Communities has not included deliveries of the Boeing 757 model into the EC market, even though it apparently does include these LCA in presenting information on deliveries in the "single-aisle" market in third countries.[5253] The European Communities has not explained why it chose to include Boeing sales of these aircraft in the data presented in respect of third country deliveries but not in respect of deliveries to the EC market. Again, the Airclaims information relied on by the European Communities indicates that six Boeing 757s were owned by and delivered to EC airlines between 2001 and 2006.[5254] Third, in presenting the delivery information, the European Communities treats instances where a leasing company outside of the European Communities owns an LCA that was delivered to an airline operating in the European Communities as a delivery to the country of the leasing company and not a delivery to the country of the operating airline, *i.e.*, such deliveries were not counted as deliveries to the EC market.[5255] We do not accept this as an appropriate approach to the counting of LCA deliveries to specific national markets. New LCA owned by a leasing company are, we understand, delivered directly to the operating airline which leases that LCA, not to the leasing company itself, and thus are, in our view, properly considered as a delivery to the country in which that airline operates.[5256] According to the Airclaims database information, which identifies the "operator country" with respect to deliveries of LCA purchased by leasing companies, six Boeing 747 and four Boeing 757 were owned by leasing companies and delivered to airlines operating in the European Communities between 2001 and 2006.[5257] A spot-check of the information in Exhibit EC-21 indicates that there were similarly deliveries of Boeing 737NG, 767, and 777 aircraft owned by leasing companies and delivered to airlines operating in the European Communities during this period. For all of these reasons, we do not consider the data presented by the European Communities on LCA deliveries to the EC market to be accurate or reliable for the purpose of evaluating the United States' claims of displacement and impedance under Article 6.3(a) of the SCM Agreement.

[5252] Exhibit EC-21, pp. 304-307.

[5253] *See*, EC, FWS, footnote 1962, where, with respect to third country markets, the European Communities states: "For purposes of computing market share, the single-aisle market includes the Boeing 737 Classic, 737NG, 717, MD-90, 757 and Airbus A320 families". The data submitted by the European Communities in respect of third country markets is discussed in the following sub-section of this Report. It appears that there were no deliveries of 717 and MD-90 LCA to the EC market during this period, although this is based on our review of Exhibit EC-21, and is not explained by the European Communities itself.

[5254] Exhibit EC-21, pp. 321-323.

[5255] EC, FWS, footnotes 2056 (200-300 seat market) and 2168 (300-400 seat market). The European Communities does not explain its treatment of lease company deliveries in the 100-200 seat market.

[5256] *See*, para. 7.1747 above. We note that the European Communities asserts, in another context, that Airbus does not know where an LCA purchased by a leasing company on a speculative basis will be delivered. EC, SCOS, para 165. However, as intent is not an element to be considered in assessing displacement or impedance, we do not see how whether or not Airbus knows at the time of ordering where the LCA it sells will be delivered affects our analysis.

[5257] Exhibit EC-21, pp. 304-307 and 321-323.

BCI deleted, as indicated **[***]**

7.1757 Nevertheless, and notwithstanding the deficiencies we have identified, we note that, when aggregated, the information on LCA deliveries provided by the European Communities tells a story similar to that shown in the data submitted by the United States. We have aggregated the EC data in the following tables and charts.

Table 20 – Market Share (Quantity of LCA delivered in the European Communities) (EC data)[5258]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	64%	63%	63%	62%	69%	66%
Boeing	36%	37%	37%	38%	31%	34%

Chart 3 Market Share (Quantity of LCA delivered in the European Communities) (EC data)

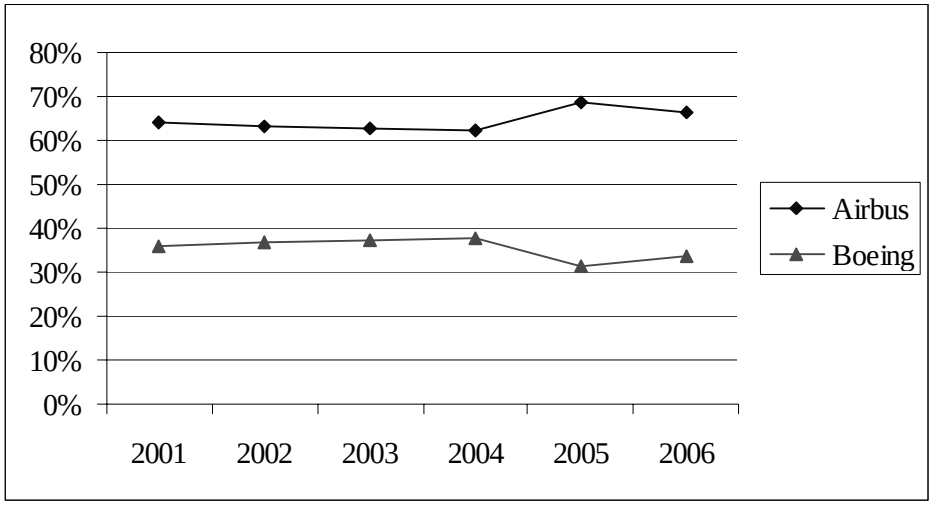


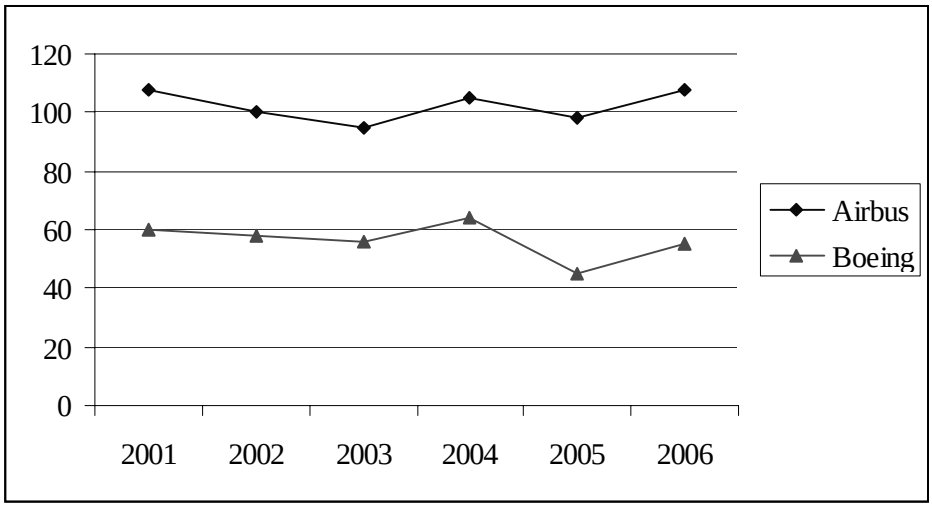
Table 21 – Quantity of LCA delivered in the EC (EC data)[5259]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	108	100	95	105	98	108
Boeing	60	58	56	64	45	55
Total	168	158	151	169	143	163

[5258] EC, FWS, paras. 1985-1989, 2043-2046 and 2128-2134.
[5259] EC, FWS, paras. 1985-1989, 2043-2046 and 2128-2134.

BCI deleted, as indicated **[***]**

Chart 4 Market Share (Quantity of LCA delivered in the European Communities) (EC data)



7.1758 Thus, on the basis of the data presented by the United States, it is clear that Boeing's share of LCA deliveries to the EC market declined over the period, while Airbus' share of that market increased. Despite the different values reflected, the data presented by the European Communities, when aggregated, supports the same conclusion, although, as we have explained, the EC data is not a reliable basis for our evaluation. As the only other competitor in the market was Airbus, it follows that the evidence we have reviewed demonstrates that imports of United States' LCA into the EC market were displaced by Airbus LCA over the relevant period. We address whether the displacement we have observed is an effect of the specific subsidies we have found were granted to Airbus with respect to LCA in Section (e) below.

(c) Alleged displacement or impedance of exports from a third country market

7.1759 Article 6.3(b) of the SCM Agreement provides:

> "Serious prejudice in the sense of paragraph (c) of the Article 5 may arise in any case where one or several of the following apply:
>
> ***
>
> (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;"

7.1760 While Article 6.3(a) of the SCM Agreement concerns displacement or impedance of the complaining Member's imports into the market of the subsidizing Member, Article 6.3(b) concerns displacement or impedance of the complaining Member's exports from a third country market or markets. The phrasing of the two provisions, requiring consideration of an effect on imports in Article 6.3(a), and on exports in Article 6.3(b), is in our view of no consequence – imports of a like product of another Member are, by definition also exports of a like product of another Member. Thus, we consider that the two provisions address the same phenomenon, only in different markets. Therefore, the conclusions we have set out above concerning the meaning of displacement and impedance, and the analysis thereof on the basis of market share in terms of deliveries of LCA, in the context of a claim under Article 6.3(a), apply equally to our consideration of the United States' claim under Article 6.3(b).

BCI deleted, as indicated **[***]**

7.1761 There is, however, an additional element to be considered in the context of a claim under Article 6.3(b). Article 6.4 of the SCM Agreement provides:

> "For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; *(b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; *(c)* the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy."

7.1762 The European Communities argues that the term "non-subsidized like product" as used in Article 6.4 should be understood as "a like product of the complaining Member asserting a serious prejudice claim under Articles 5 and 6.3 of the SCM Agreement that is not subsidized".[5260] The European Communities maintains, accordingly, that displacement or impedance of exports from a third country market for purposes of Article 6.3(b) can be demonstrated **only** if the complaining Member does not provide a subsidy within the meaning of Article 1 of the SCM Agreement in respect of the like product exported. The European Communities argues that the burden is on the complaining Member to demonstrate that its like product(s) do(es) not benefit from subsidies, and that the United States has not done so in this case.[5261] Indeed, the European Communities alleges that LCA manufactured by Boeing do, in fact, benefit from subsidies, and submits information which it asserts demonstrates that fact.[5262]

[5260] EC, SWS, para. 1104. The European Communities makes the same argument with respect to Article 6.5, which is discussed further at paras. 7.1798 - 7.1800 below.

[5261] In answer to a question from the Panel, the European Communities responded:

"the European Communities considers that the competing like product of the complaining Member can be considered "non-subsidized" if the complaining Member demonstrated that the like product does not benefit firm specific subsidies. Conversely, if the like product benefits from specific subsidies, a complaining Member can not meet its burden of establishing that its like product is "non-subsidized"."

EC, Answer to Panel Question 202, para. 262.

[5262] EC, SWS, paras. 1110-1136. The European Communities notes that the alleged subsidization of Boeing LCA is the subject of a separate dispute brought by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft*, DS353. In addition to subsidies challenged for the first time in that dispute, the European Communities asserts that prior to the end of 2006, Boeing had received tens of millions of dollars through the application to LCA of the US foreign sales corporation ("FSC") and extraterritorial income ("ETI") tax exemptions and exclusions. Both of these programmes have been found to be prohibited export subsidies in WTO dispute settlement. Panel Report, *United States – FSC*, para. 8.1(a); Appellate Body Report, *United States – FSC*, at paras. 177(a), 178; Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities ("US – FSC (Article 21.5 – EC)")*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, 119, at paras. 9.1(a), 9.1(b), 9.1(e); Appellate Body Report, *US – FSC (Article 21.5 – EC)*, at paras. 256(a), 256(b), 256(f), 257; Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities ("US – FSC (Article 21.5 – EC II)")*, WT/DS108/RW2, adopted 14 March 2006, as upheld by Appellate Body Report WT/DS108/AB/RW2, DSR 2006:XI, 4761, para. 8.1; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities ("US – FSC(Article 21.5 – EC II)")*, WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, 4721, para. 100(b). The United States has since repealed both measures. EC, SWS, para. 1116.

BCI deleted, as indicated **[***]**

7.1763 The United States maintains that the term "non-subsidized like product" is to be understood as calling for the comparison of the market share of the product which benefits from the subsidies in question (that is, the product of the subsidizing Member) with the market share of the like product which does not benefit from ***that/those*** subsidy(ies).[5263] The United States argues that such a reading is consistent with the text of Article 6.3, which does not suggest any concern with subsidies other than those which are being challenged, and which refers to like product without any qualification as to whether or not the like product is subsidized or not. Moreover, the United States asserts that as the European Communities appears to read the term "non-subsidized," if the product of the complaining Member benefited from "indirect, non-specific, de minimis subsidies, such as public education or public health measures," such a Member would be precluded from asserting a claim under Article 6.3(b) or Article 6.3(c), "no matter how direct, targeted, and massive a subsidy causing adverse effects might be" because it does not have a non-subsidized like product.[5264] According to the United States, this would eviscerate the entirety of Part III of the SCM Agreement, and cannot be the correct interpretation of the text.[5265]

7.1764 The European Communities contends that the United States' reading of Article 6.4 conflates the terms "non-subsidized like product" and "like product of the complaining Member", and thus fails to give meaning to the term "non-subsidized".[5266] Moreover, the European Communities argues that its interpretation requires only that the complaining Member demonstrate that its competing like product does not benefit from specific subsidies.[5267] However, the European Communities does agree that its view would preclude a finding of price undercutting and impedance and displacement in third country markets if the like product benefits from "any specific subsidy, however small."[5268] In the European Communities' view, the object and purpose of Article 6.4 can only be achieved through an "untainted" assessment, and not through a comparison involving a subsidized product and a subsidized like product.[5269]

7.1765 We are not entirely persuaded by the United States' arguments concerning the meaning of the term "non-subsidized" as used in Article 6.4. While it is true that the term "like product" is used in Article 6.3, including Article 6.(3)(b), without the qualifier "non-subsidized," this does not suggest to us that the use of the term "non-subsidized" in Article 6.4 refers simply to a like product which does not benefit from the subsidy which is the subject of the dispute. In fact the use of different terms suggests to us that the term "non-subsidized like product" may well have a specific meaning in Article 6.4. If the intention of Article 6.4 were only to differentiate the like product from the product which benefits from the challenged subsidy we see no reason to have included the term "non-subsidized" in Article 6.4 – it seems self-evident that the like product of the complaining Member would not benefit from the challenged subsidy. Thus, we consider that Article 6.4 may well require that a complaining Member demonstrate, in the circumstances of that provision, that its like product, exports of which are allegedly displaced or impeded from third country markets, is not subsidized.

7.1766 However, an additional question thus arises: whether Article 6.4 is the necessary or exclusive mechanism for demonstrating displacement or impedance of exports to a third country market under Article 6.3(b), or whether, to the contrary, displacement and impedance under Article 6.3(b) can be demonstrated without reference to Article 6.4. The United States argues that while Article 6.4 provides that displacement or impedance "shall include" market conditions discussed therein, thus providing "further guidance" for the application of Article 6.3(b), it does not set out the exclusive

[5263] US, SNCOS, para. 191; US, Comments on EC Answer to Panel Question 202.
[5264] US, SNCOS, para. 192.
[5265] US, SNCOS, para. 192
[5266] EC, Answer to Panel Question 202, para. 257.
[5267] EC, Answer to Panel Question 202, paras. 259-65.
[5268] EC, Answer to Panel Question 202, para. 263.
[5269] EC, Answer to Panel Question 202, paras. 267-268.

BCI deleted, as indicated **[***]**

ways in which serious prejudice in the form of displacements or impedance from a third country market may be demonstrated.[5270] According to the European Communities, however, Article 6.4 describes the exclusive basis on which a claim of third-country market displacement or impedance under Article 6.3(b) may be demonstrated.[5271] For the European Communities, the meaning of like product in Article 6.3(b), as well as in Article 6.3(c), cannot be understood without reference to Articles 6.4 and 6.5, which in the European Communities' view make it clear that the "like product" must not benefit from any specific subsidies.

7.1767 The meaning of Article 6.4 was considered by the panel in *Indonesia – Autos*. That panel dealt with claims under Article 6.3(a) and considered whether the analysis contemplated by Article 6.4 applied to a claim under Article 6.3(a). The panel found that the Article 6.4 analysis did not apply to such a claim, concluding:

> "We agree with Indonesia that Article 6.4 is not relevant in this case. The drafting of the provision is unambiguous, and the specific reference to Article 6.3(b) creates a strong inference that an Article 6.4 type of analysis is not appropriate in the case of Article 6.3(a) claims. The complainants have identified nothing in the context of the provision or the object and purpose of the SCM Agreement that would suggest a different conclusion."[5272]

The panel also noted that the issue was significant for the parties and the disposition of the claims in that case, because Article 6.4 provided, in certain circumstances, a lower threshold for demonstrating displacement and impedance than established in Article 6.3(a), stating:

> "If the type of analysis set forth in Article 6.4 is appropriate in this case, then the complainants arguably could make a prima facie case of displacement and impedance by demonstrating that the market share of a subsidized product has increased over an appropriately representative period. If, on the other hand, the type of analysis set forth in Article 6.4 is not appropriate in this case, then the complainants must demonstrate that "the effect of the subsidy" is to displace or impede imports into Indonesia, that is, that they have lost export sales to Indonesia that they would have otherwise have made and that those export sales were lost as a result of the subsidies provided pursuant to the National Car programme."[5273]

The panel in *Indonesia – Autos* thus concluded that, while not relevant to a claim under Article 6.3(a), Article 6.4 established that, in certain circumstances, a consideration of comparative market share alone will suffice to demonstrate that "*the effect of the subsidy*" is to displace or impede exports. We agree with this reading of Article 6.4. In our view, Article 6.4 describes a particular situation, where the like product of the complaining Member is not subsidized, in which situation a demonstration that market share of the subsidized product complained of increased suffices to make a prima facie case of displacement or impedance under Article 6.3(b).

7.1768 In this case, unlike *Indonesia – Autos*, there is no question that Article 6.4 is relevant. However, while the United States has made a claim under Article 6.3(b), to which Article 6.4 refers, it

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[5270] US, Comments on EC Answer to Panel Question 202, para. 224.

[5271] EC, SWS, paras. 1102: "Article 6.4 then qualifies Article 6.3(b) by setting out the manner and means by which claims of displacement or impedance in third country markets can be asserted." As discussed further below, the European Communities takes a similar position with respect to claims of price undercutting under Article 6.3(c) and the provisions of Article 6.5. *Id.*, para. 1107: "As with Article 6.4 and third-country market displacement or impedance claims, Article 6.5 describes the complete universe in which a price undercutting analysis must be demonstrated."

[5272] Panel Report, *Indonesia – Autos*, para. 14.210.

[5273] Panel Report, *Indonesia – Autos*, para. 14.209.

does not purport to rely on the special rule set out in Article 6.4, but rather, asserts that it has demonstrated that displacement or impedance of its exports from third country markets is the effect of the subsidies in dispute.

7.1769 Our reading of Article 6.4 leads us to the conclusion that if the circumstances set out in Article 6.4 are satisfied, a further assessment of whether the changes in market share are "the effect of the subsidy" is not necessary. Those circumstances include that the exports allegedly displaced or impeded are not themselves subsidized. We see nothing in the text of Article 6.4, or in its context or object and purpose, however, which would suggest that the analysis set out therein is the exclusive means of demonstrating displacement or impedance of exports for purposes of Article 6.3(b). As the United States observes, Article 6.4 provides that, for the purpose of Article 6(3)(b), displacement or impedance "shall include" the specific circumstances set out therein.[5274] The use of the phrase "shall include" in our view indicates that there may be other circumstances, not set out in Article 6.4, in which a Member could demonstrate displacement or impedance for purposes of Article 6.3(b). Rather than limiting the circumstances in which Article 6.3(b) may be satisfied, we read Article 6.4 as simply setting out additional guidance for the application of Article 6.3(b) in certain particular circumstances. Thus, in our view, Article 6.4 establishes a particular set of circumstances in which displacement or impedance of exports shall be found – where the product of the complaining Member is not subsidized, and there has been a change in relative market shares to the disadvantage of that product – without additional consideration of whether that change is the effect of the subsidies.

7.1770 We consider that the contrary interpretation suggested by the EC – that Article 6.4 is the exclusive basis for a finding of displacement or impedance for purposes of Article 6.3(b) – would lead to the absurd result that the SCM Agreement establishes a remedy for displacement or impedance of exports in third country markets **only** in situations where the complaining Member's product is demonstrated to be unsubsidized – effectively, a sort of "clean hands" requirement for complaining Members as a prerequisite to a claim under Article 6.3(b). Not only is there no basis in the text for such a requirement, but, as a practical matter, such a requirement would enormously complicate the task of panels considering claims under Article 6.3(b). Not only would they have to consider whether the challenged measures at issue in the dispute constitute subsidies, but they would have to consider whether the Member challenging those measures itself provides any subsidy with respect to the exported like product. Moreover, while the European Communities states that it asserts only that the complaining Member's like product must not benefit from **specific** subsidies,[5275] there is nothing in the term "non-subsidized like product" which suggests such a limitation. Thus, to accept the European Communities' interpretation would leave open the possibility that a complaining Member would be precluded from pursuing a claim under Article 6.3(b) (and 6.3(c)), because its like product benefits from subsidies that do not fall within the definition of Article 1 of the SCM Agreement. We cannot imagine on what basis a panel might undertake to examine this question. We simply cannot accept that so much can be derived from the mere use of the term "non-subsidized like product" in Article 6.4. We therefore reject the European Communities' view that Article 6.4 is the exclusive basis for a finding of displacement or impedance under Article 6.3(b) of the SCM Agreement.

7.1771 We note that, while our interpretation of the text of Articles 6.3(b) and 6.4 does not result in any ambiguity, and thus does not require resort to supplementary means of interpretation, our view is supported by consideration of the drafting history of the provisions. Article 6.3(b) of the SCM Agreement is derived from Article 6.2 of the Cartland Draft of 18 May 1990 (Cartland I). Article 6.2 of Cartland I set out four situations in which serious prejudice "may arise" in subsections (a) through (d), which correspond to subsections (a) through (d) of Article 6.3 of the SCM Agreement:

[5274] US Comment on EC, Answer to Panel Question 202.
[5275] EC, Answer to Panel Question 202, para. 262,

BCI deleted, as indicated **[***]**

> "Serious prejudice may arise in any case where one or several of the following apply:
>
> (a) the effect of the subsidy is to displace or impede the imports of like product into the market of the subsidizing country;
>
> (b) the effect of the subsidy is to displace the exports like product of another signatory from a third country market;
>
> (c) there is a significant price undercutting by the subsidized products as compared with the price of a like product of another signatory in the same market resulting in price suppression, price depression or lost sales;
>
> (d) the world market share of the subsidizing country in a specific product has increase compared to the share it had during the previous period of {X years} and this increase results from a consistent trend over a period when subsidies have been granted."

Cartland I then went on to set out three Articles giving additional guidance with respect to subsections (a) through (c). Article 6.4 of Cartland I provided:

> "For the purposes of paragraph 2(a), displacing or impeding imports shall include any case in which a subsidy has been granted or significantly increased on a product which directly competes with the product on which a GATT concession or another GATT benefit has been granted."

Article 6.5 of Cartland I provided:

> "For the purpose of paragraph 2(b), displacing exports shall include any case in which, in the absence of circumstances enumerated in paragraph 8 below, there has been a change in relative shares of the market to the disadvantage of the non-subsidized product (over a period of one year or more)."[5276]

Finally, Article 6.6 of Cartland I provided:

> "For the purpose of paragraph 2(c), price undercutting or price suppression should be demonstrated through comparing prices of the subsidized product with prices of like non-subsidized products supplied to the same market. However, if such direct comparison is not possible, the existence of price undercutting or price suppression may be demonstrated on the basis of export unit values."

These provisions remained in subsequent drafts of the SCM Agreement, with the exception of Article 6.4 of Cartland I. Articles 6.5 and 6.6 of Cartland I are substantially the same as Articles 6.4 and 6.5 of the SCM Agreement; Article 6.4 of Cartland I has no corollary in the SCM Agreement as adopted. In our view, both Articles 6.4 and 6.5 of Cartland I delineated particular factual situations in which serious prejudice would be found to exist without requiring the establishment of a causal link between the observed phenomena and the subsidies. Thus, where the product of the complaining Member is not subsidized, Article 6.4 of the SCM Agreement provides for a lesser burden to demonstrate serious prejudice. We consider that this interpretation fits with the overall architecture of Article 6 as originally negotiated and adopted, with different burdens for establishing serious prejudice, ranging from "deemed" serious prejudice in the case of certain subsidies under Article 6.1,

[5276] Paragraph 8 of Article 6 of Cartland I set out "circumstances necessary to rebut the existence of displacement in the sense of" Article 6.5, which are largely reflected in Article 6.7 of the SCM Agreement.

to a lesser burden for complaining Members with "clean hands", *i.e.*, an unsubsidized competing product, to the requirement to prove that the market effects of displacement or impedance are the effect of the subsidies.

7.1772 We now turn to consider the data and arguments the parties have submitted on the question whether United States' exports have been displaced or impeded from third country markets.

(i) Market Share Information in Individual Third Country Markets

7.1773 In support of its claim that Airbus LCA displaced or impeded exports of Boeing LCA from third country markets, the United States has submitted evidence similar to that submitted in support of its claim of displacement or impedance in the EC market under Article 6.3(a). The United States thus presents information concerning the number of LCA deliveries to customers in Australia from 2001 to 2005,[5277] in China from 2001 to 2006,[5278] as well as aggregate information on the number of deliveries to all customers outside the United States and the European Communities from 2001 to 2006.[5279] The United States also provides information on allegedly increased Airbus market share between 2001 and 2005 in Singapore, Korea, Brazil, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"), Mexico and India, without providing specific quantity data.[5280] The United States also asserts that information for 2006 shows that Boeing had increased market share in that year in some of these countries, and decreased market share in others; the United States asserts that in no case did Boeing's market share return to 2001 levels.[5281] The United States argues that Airbus made very large gains in third country market share in 2003 and 2004 and has maintained most of its gains in those growing markets.[5282] The United States also presents information on the number of orders for LCA by Indian customers during 2001-2005.[5283]

7.1774 The European Communities does not contest the accuracy of the information presented by the United States. Rather, it defends against the United States' claim under Article 6.3(b) by relying on the same arguments concerning the subsidized and like product, the appropriate reference period, and the use of order data rather than deliveries, as it did with respect to the United States claim under Article 6.3(a). Again, the European Communities presents its own data showing deliveries (and orders) for separate categories of LCA in individual third country markets. Thus, the European Communities submits data with respect to the "single aisle" LCA deliveries (comprising the A320 family and Boeing 737 Classic and NG and Boeing 717 and 757 families, and the MD-90) to customers in Australia, Brazil, China, Chinese Taipei, India, Korea, Mexico and Singapore;[5284] deliveries of 200-300 seat LCA (comprising the Airbus A300, A310, A330, and A350 families, and the Boeing 767 and 787 LCA families) to customers in Australia, Brazil, China, Chinese Taipei, India, Korea and Mexico,[5285] and deliveries of 300-400 seat LCA (comprising the Airbus A340 and

[5277] US, FWS, para. 773, table 12.
[5278] US, SWS, para. 703, table 3.
[5279] US, FWS, para. 772, tables 9 & 10, US, SWS, para. 701, table 2.
[5280] US, FWS, para. 773.
[5281] US, SWS, para. 703. The United States provided no details concerning quantities involved, or which countries showed increases and which showed decreases.
[5282] US, SWS, para. 705.
[5283] US, FWS, para. 774, table 13.
[5284] EC, FWS, paras. 1951-52, 1954-55, 1957-58, 1961-62, 1963,1965-66, 1968-69, 1971-72. *See*, footnote 1962 for the list of the models the European Communities has included in the "single-aisle" market in the context of third country markets, which differs from the list it included in the "single-aisle" market in the context of the EC market. *See*, paragraph 7.1756 above.
[5285] EC, FWS, para. 2028.

BCI deleted, as indicated **[***]**

Boeing 777 and MD-11 LCA families) to customers in China, Chinese Taipei, India, Korea, and Singapore.[5286]

7.1775 Having presented data by aircraft type and individual country, the European Communities argues that, even where Airbus' market share of orders or deliveries increased during the period 2001 to 2006, for example with respect to the A320 in some third country markets, there is no basis to make a finding of impedance or displacement because the very limited number of orders and deliveries or the very sporadic nature of such orders or deliveries make it very difficult to draw any conclusions regarding trends in market share.[5287] The European Communities suggests that the Panel cannot draw conclusions about trends in market share, and therefore it should make no findings under Article 6.3(b).[5288] Moreover, the European Communities asserts, in some of these third country markets, Boeing's share of deliveries of single-aisle LCA has increased.[5289] Based on the data it presents, the European Communities argues that a clear change in market share in Airbus' favour in individual third country markets cannot be discerned in the period 2001 to 2006.[5290]

7.1776 The United States argues that, if the Panel were to agree with the European Communities that there is insufficient data to examine any of the individual third country markets identified by the United States, the solution is not, as the European Communities suggests, to make no finding. Rather, the United States notes that both parties recognize that the LCA market is a world market, and therefore suggests that the Panel examine whether the effect of the subsidy is to displace or impede the exports of Boeing LCA to the world market or to the markets of all third countries taken as a whole.[5291] In support of this position, the United States points to the chapeau of Article 6.3, which provides that serious prejudice "may arise in any case where" one or more of the specific enumerated market effects applies, but it does not prevent a finding of serious prejudice in other situations as well.[5292] The European Communities argues that even if the Panel were to consider delivery data for all third country markets aggregated on the basis of aircraft type, it would be unable to ascertain any clear trends for the 2004 to 2007 period as many of these markets have only a few customers and demand is idiosyncratic.[5293]

7.1777 We recall that we have previously examined and rejected the European Communities' arguments in respect of the appropriate subsidized and like product, the reference period, and the use of order data rather than deliveries in evaluating claims of displacement or impedance.[5294] We therefore begin our evaluation of the United States' claim under Article 6.3(c) by focussing on the information the United States has presented in respect of individual third country markets.

7.1778 The United States initially presented annual data for Airbus and Boeing LCA deliveries to Australia and China for the period 2001 to 2005, and updated the information for China to include data for 2006. In addition, the United States submitted information showing increases in Airbus' market share from 2001 to 2005 in Singapore, Korea, Brazil, Chinese Taipei, Mexico and India, without specifying the quantities involved.[5295] Reflecting, as we understand it, its claim of threat of

[5286] EC, FWS, paras. 2118-2119.
[5287] EC, FWS, para. 1975.
[5288] EC, FWS, para. 1975, 2029, 2033.
[5289] EC, FWS, paras. 1974 - 1975.
[5290] EC, FWS, paras. 1933-1998, 2024-2053, 2113-2135.
[5291] US, FNCOS, paras. 174-75, US, SWS, para. 704.
[5292] US, FNCOS, para. 175. The United States emphasizes that it makes argument only in the alternative, if the Panel accepts the European Communities' position.
[5293] EC, SWS, para. 1146.
[5294] *See*, paras. 7.1680 and 7.1748 above.
[5295] US, FWS, para. 773.

BCI deleted, as indicated **[***]**

serious prejudice in the form of likely future displacement in the Indian market, the United States also submitted *order* data for the Indian market for the period 2001 to 2005.[5296]

7.1779 The European Communities submitted information on deliveries of LCA to the same markets over the period 2001 to 2006, but in disaggregated form, reflecting its view that there are multiple Airbus subsidized products and Boeing like products. The data presented by the European Communities in respect of deliveries to third country markets presents the same concerns as the information it presented on deliveries to the EC market, with respect to the failure to include deliveries of the Boeing 747 and the treatment of aircraft owned by leasing companies and delivered to operating airlines in individual third country markets, an approach we have rejected above.[5297] Thus, for the reasons previously expressed we do not consider the data presented by the European Communities on LCA deliveries to third country markets to be accurate or reliable for the purpose of evaluating the United States' claims of displacement and impedance under Article 6.3(b) of the SCM Agreement. Nonetheless, in the analysis that follows, we consider the data submitted by the European Communities for the third country markets for which the United States provided quantity data.

Australia

7.1780 A review of the data presented by the United States for the period 2001 to 2005 shows that Boeing's share of the Australian LCA market decreased during that period, while Airbus nearly doubled its share. In 2001, Boeing's share of Australia's market by volume was 78%; it increased to 88% in 2002, then dropped to 63% in 2003, and to 50% in 2004 before increasing to 60% in 2005. Airbus' share of the Australian market for LCA, on the other hand, was 22% in 2001, dropped to 12% in 2002, increased to 37% in 2003 and 50% in 2004 before dropping to 40% in 2005. Overall, Airbus' share of Australia's market for LCA increased 18 percentage points from 2001 to 2005, while Boeing's market share declined by the same amount.

Table 22 – Australia – Number of LCA delivered[5298]

	2001	**2002**	**2003**	**2004**	**2005**
Airbus	2	4	11	12	6
Boeing	7	30	19	12	9
Total	9	34	30	24	15

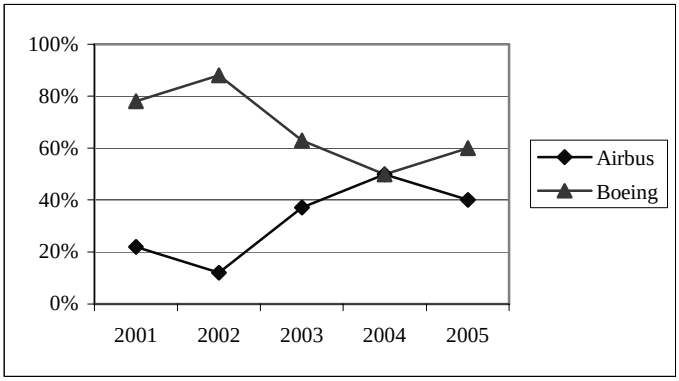
[5296] US, FWS, paras. 773-774, US, SWS, para. 704.

[5297] *See*, para. 7.1756 above. *See*, EC, FWS, footnotes 1962 (the European Communities counted Boeing 757 and MD-90 in computing market share in the single aisle market for third countries); 1964, 1974, 1980, 2048, and 2155, (explaining EC treatment of deliveries of LCA owned by leasing companies) .

[5298] US, FWS, Table 12, para. 773.

BCI deleted, as indicated **[***]**

Chart 5 Australia - Market Share (Quantity of LCA delivered)[5299]



US	Airbus	Boeing
2001	**22%**	**78%**
2002	12%	88%
2003	37%	63%
2004	50%	50%
2005	**40%**	**60%**

A similar pattern appears when we aggregate and examine the data presented by the European Communities, which, we recall, we do not consider to be accurate or reliable.

Table 23 – Australia – Number of LCA delivered (EC data)[5300]

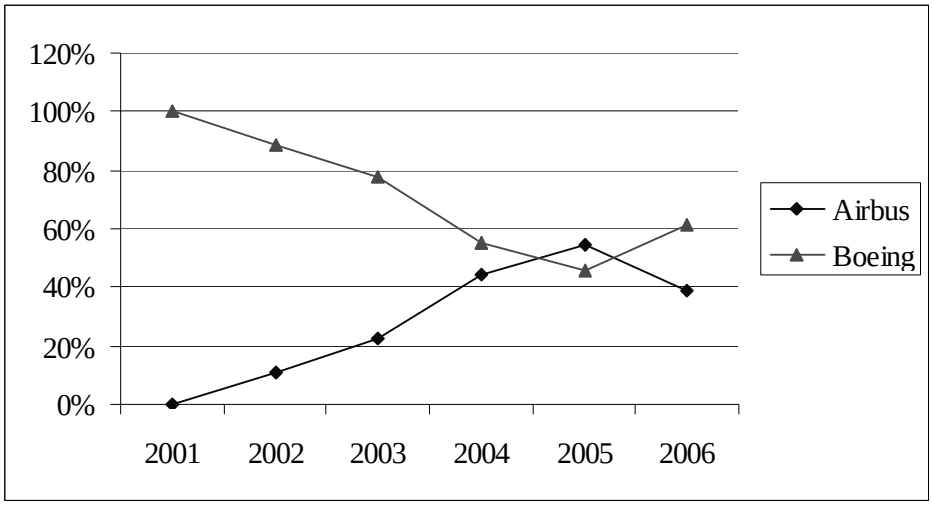
	2001	2002	2003	2004	2005	2006
Airbus	0	2	4	8	12	7
Boeing	1	16	14	10	10	11
Total	1	18	18	18	22	18

[5299] US, FWS, Table 12, para. 773.
[5300] EC, FWS, paras. 1952, 2032 and 2119-2120.

BCI deleted, as indicated **[***]**

Chart 6 Australia - Market Share (Quantity of LCA delivered) (EC data)

	2001	2002	2003	2004	2005	2006
Airbus	0%	11%	22%	44%	55%	39%
Boeing	100%	89%	78%	56%	45%	61%



China

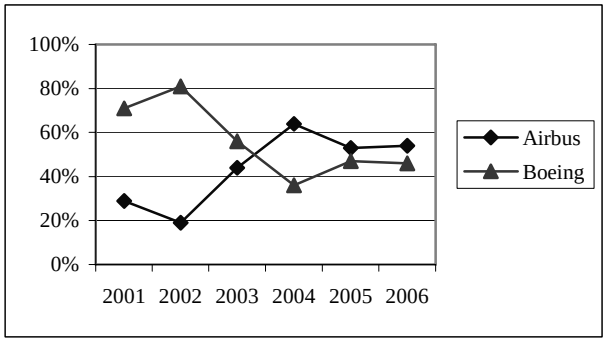
7.1781 A review of the data presented by the United States for the period 2001 to 2006 shows that Airbus gained a substantial share of the Chinese market during that period. In 2001, Boeing's share of the Chinese market by volume was 71%; it increased to 81% in 2002, dropped to 56% in 2003, and again to 36% in 2004, before increasing to 47% in 2005, and then dropping to 46% in 2006. Airbus' share of the Chinese market for LCA was 29% in 2001, dropped to 19% in 2002, increased to 44% in 2003 and 64% in 2004, dropped to 53% in 2005 and increased to 54% in 2006. Thus, Airbus' share of the Chinese market for LCA increased 25 percentage points from 2001 to 2006, while Boeing's market share declined by the same amount.

BCI deleted, as indicated **[***]**

Table 24 – China – Quantity of LCA delivered[5301]

	2001	2002	2003	2004	2005	2006
Airbus	9	7	22	35	56	76
Boeing	22	31	28	20	50	66
Total	31	38	50	55	106	142

Chart 7 China – Market share (quantity of LCA delivered) [5302]



US	Airbus	Boeing
2001	**29%**	**71%**
2002	19%	81%
2003	44%	56%
2004	64%	36%
2005	53%	47%
2006	**54%**	**46%**

Again, essentially the same trends are visible when we examine, in aggregate, the data submitted by the European Communities in aggregated form, which, we recall, we do not consider to be accurate or reliable.

Table 25 – China – Quantity of LCA delivered (EC data)[5303]

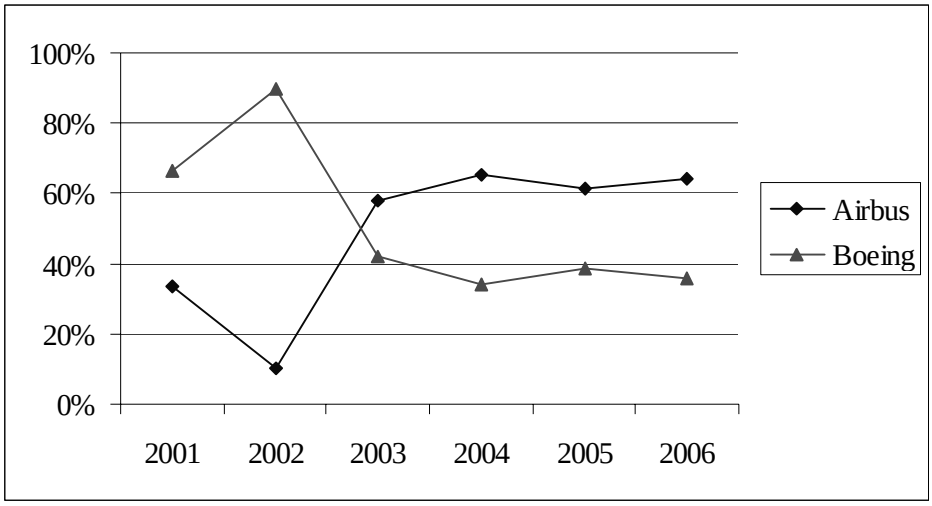
	2001	2002	2003	2004	2005	2006
Airbus	5	2	18	21	45	43
Boeing	10	18	13	11	28	24
Total	15	20	31	33	73	64

[5301] US, SWS, Table 3, para. 703.
[5302] US, SWS, Table 3, para. 703.
[5303] EC, FWS, paras. 1958, 2032 and 2119-2120.

BCI deleted, as indicated **[***]**

Chart 8 China - Market share (quantity of LCA delivered) (EC data)

	2001	2002	2003	2004	2005	2006
Airbus	33%	10%	58%	66%	62%	64%
Boeing	67%	90%	42%	34%	38%	36%



India

7.1782 The United States does not present data on the number of LCA delivered to the Indian market, but does assert that Airbus' share of the Indian market, in terms of deliveries, increased from 0 in 2001 to 76 percent in 2005. The European Communities did present data on deliveries to the Indian market which similarly shows an increase in Airbus' market share, which we set out below, although, we recall that we do not consider this data to be accurate or reliable.

Table 26 – India – Quantity of LCA delivered (EC data)[5304]

	2001	2002	2003	2004	2005	2006
Airbus	0	0	0	0	4	17
Boeing	4	4	2	0	0	12
Total	4	4	2	0	4	29

[5304] EC, FWS, para. 1962.

BCI deleted, as indicated **[***]**

Table 27 – India – Market share (quantity of LCA delivered)(EC data)

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	0%	0%	0%	no deliveries	100%	59%
Boeing	100%	100%	100%	no deliveries	0%	41%

7.1783 The United States also presented information concerning orders by Indian customers, arguing that large new orders threaten additional displacement of Boeing exports for years to come.[5305] As discussed above, we do not consider data on orders to be persuasive evidence of current displacement or impedance, which in our view more appropriately involves a consideration of actual deliveries reflecting actual imports and exports. Nonetheless, orders are an indicator of likely future deliveries, albeit imperfect,[5306] and thus we review the information presented as an indicator of threat of future displacement or impedance of exports from the Indian market. In this regard, although the United States did not extensively argue the issue, we recall that it did present a claim of threat of serious prejudice under Article 6.3(b) of the SCM Agreement, and requested findings in that regard.[5307]

7.1784 The data on orders for the period 2001 to 2005 presented by the United States demonstrates that Airbus gained most of the orders for LCA in the Indian market during that period. In 2000 and 2001 there were no orders for LCA by Indian customers. While Boeing obtained 100 per cent of orders in the Indian market in 2003, Airbus obtained 100 per cent in 2004. In 2005, Airbus' share of orders in the Indian market dropped to 70 per cent while Boeing's share increased to 30 per cent. However, the actual number of LCA represented by these orders paints a very different picture than the percentages. Boeing's 100 percent of orders in 2003 represents one LCA, while Airbus' 100 percent in 2004 represents two LCA. However, in 2005, there were 225 orders for Airbus LCA, compared with 98 orders for Boeing LCA, representing a massive increase in the Indian market. This indicates that, as these LCA are delivered over the ensuing years, it is likely that Airbus will have a significantly greater share of the Indian market than Boeing. While Boeing may obtain additional orders, and may even obtain orders for more LCA than Airbus, in the future, those LCA would likely be delivered at an even later date than the already-ordered LCA, and thus the more immediate future is likely to be an Indian market with more deliveries of Airbus LCA than of Boeing LCA.

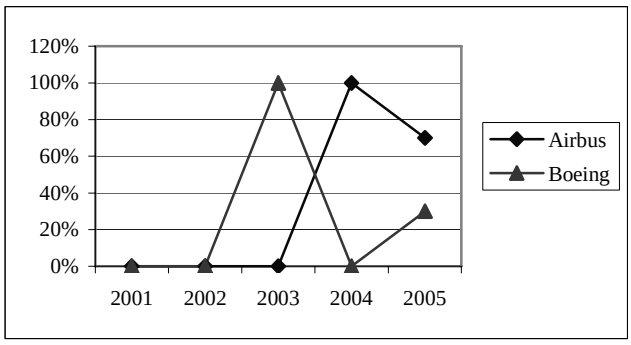
Table 28 – India – Quantity of LCA ordered[5308]

	2001	**2002**	**2003**	**2004**	**2005**
Airbus	0	0	0	2	225
Boeing	0	0	1	0	98
Total	0	0	1	2	323

[5305] US, FWS, para. 774.
[5306] *See*, para. 7.1724 above .
[5307] WT/DS316/2, p. 4 (request for establishment), US, FWS, para. 842(2) (request for findings).
[5308] US, FWS, Table 13, para. 774.

BCI deleted, as indicated **[***]**

Chart 9 India - Market Share Information on the basis of orders[5309]



US	Airbus	Boeing
2001	**0%**	**0%**
2002	0%	0%
2003	0%	100%
2004	100%	0%
2005	**70%**	**30%**

A similar pattern is apparent when we examine the data on orders submitted by the European Communities in aggregated form, which, we recall, we do not consider to be accurate or reliable.

Table 29 – India – Quantity of LCA ordered (EC data)[5310]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	0	0	0	2	216	52
Boeing	0	0	1	0	66	30
Total	0	0	1	2	282	82

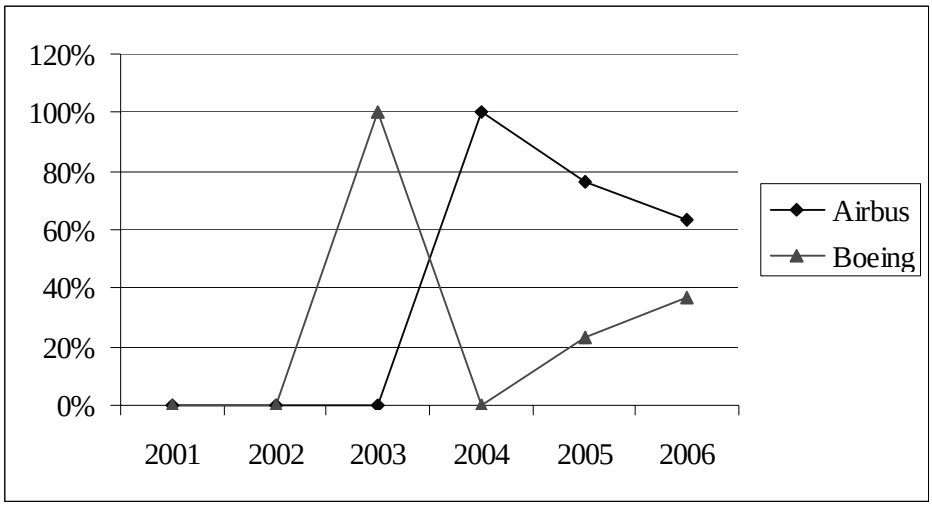
Table 30 – India – Market share (quantity of LCA ordered) (EC data)

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	No orders	No orders	0%	100%	77%	63%
Boeing	No orders	No orders	100%	0%	23%	37%

[5309] US, FWS, Table 13, para. 774.
[5310] EC, FWS, paras. 1962, 2028 and 2118.

BCI deleted, as indicated **[***]**

Chart 10 India - Market Share Information on the basis of orders (EC data)



Other Individual Third Country Markets

7.1785 The United States also asserted that Airbus' market share of delivered LCA increased from 2001 to 2005 from 11% to 73% in Singapore, from 17% to 44% in Korea, from 50% to 86% in Brazil, from 38% to 56% in Chinese Taipei, and from 29% to 50% in Mexico.[5311] In its second written submission, the United States noted, without providing further specifics, that "while Boeing's market share increased from 2005-2006 in some of {the countries listed} and decreased in others, in no case did Boeing's market share recover to 2001 levels".[5312]

7.1786 The European Communities did submit data on the number of LCA delivered to these other third country markets. We recall that we have concluded that the EC data on deliveries to Australia, China and India is neither accurate nor reliable.[5313] Particularly in the case of these other third country markets, in view of the small number of deliveries involved, the effects of the European Communities' counting methodology may well be significant. As a result, the European Communities' information on deliveries to these markets is, in our view, even less accurate or reliable than the information presented by the European Communities on deliveries to Australia, China, and India. As a consequence, we are hesitant to even review the information, and we consider it impossible to draw any conclusions concerning trends in deliveries. Nonetheless, we have aggregated the information presented by the European Communities, with the results shown below.

[5311] US, FWS, para. 773, following Table 12(B).
[5312] US, SWS, para. 703.
[5313] *See*, paragraph 7.1756 above. The European Communities applied the same counting principles that led to our conclusion when counting deliveries to other third country markets. We recall that the European Communities does not count deliveries of the Boeing 747, but it has included deliveries of the Boeing 757 model into the "single-aisle" market in third countries. EC, FWS, footnote 1962, ("For purposes of computing market share, the single-aisle market includes the Boeing 737 Classic, 737NG, 717, MD-90, 757 and Airbus A320 families"). We also recall that we rejected the European Communities' approach treating deliveries of LCA owned by leasing companies as deliveries to the country of the leasing company, and not the country of the airline operating that LCA, *see*, para. 7.1756 above, which the European Communities applied in counting deliveries to third country markets. EC, FWS, fns. 2047 and 2155. In this particular instance, we have not undertaken to exhaustively review the data to determine the extent to which the European Communities' counting principles affect the data it has submitted, considering it apparent that the European Communities' methodology skews the number of deliveries to support our view that the information is neither accurate nor reliable.

BCI deleted, as indicated **[***]**

Table 31 – Brazil – Quantity of LCA delivered (EC data)[5314]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	9	14	0	0	2	5
Boeing	0	0	0	0	1	11
Total	9	14	0	0	3	16

Table 32 – Brazil – Market share (quantity of LCA delivered) (EC data)

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	100%	100%	no deliveries	no deliveries	67%	31%
Boeing	0	0	no deliveries	no deliveries	33%	69%

Table 33 – Chinese Taipei – Quantity of LCA delivered (EC data)[5315]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	5	0	1	3	7	4
Boeing	0	0	0	0	2	2
Total	5	0	1	3	9	6

[5314] EC, FWS, paras. 1954, 2028. The European Communities reported no deliveries in the 300-400 seat market.

[5315] EC, FWS, paras. 1961, 2028, 2119.

BCI deleted, as indicated **[***]**

Table 34 – Chinese Taipei – Market share (quantity of LCA delivered) (EC data)

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	100%	no deliveries	100%	100%	78%	67%
Boeing	0	no deliveries	0	0	22%	33%

Table 35 – Korea – Quantity of LCA delivered (EC data)[5316]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	3	3	3	3	4	4
Boeing	6	9	5	5	4	3
Total	9	12	8	8	8	7

Table 36 – Korea – Market share (quantity of LCA delivered) (EC data)

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	33%	25%	38%	38%	50%	57%
Boeing	67%	75%	62%	62%	50%	43%

Table 37 – Mexico – Quantity of LCA delivered (EC data)[5317]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	0	0	0	0	0	2
Boeing	3	0	5	6	6	9
Total	3	0	5	6	6	11

[5316] EC, FWS, paras. 1965, 2028. The European Communities reported no deliveries in the 300-400 seat market.

[5317] EC, FWS, paras. 1968, 2028. The European Communities reported no deliveries in the 300-400 seat market.

BCI deleted, as indicated **[***]**

Table 38 – Mexico – Market share (quantity of LCA delivered) (EC data)

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	0	No deliveries	0	0	0	18%
Boeing	100%	No deliveries	100%	100%	100%	82%

Table 39 – Singapore – Quantity of LCA delivered (EC data)[5318]

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	2	1	5	4	2	6
Boeing	12	12	9	4	3	6
Total	14	13	14	8	5	12

Table 40 – Singapore – Market share (quantity of LCA delivered) (EC data)

	2001	**2002**	**2003**	**2004**	**2005**	**2006**
Airbus	14%	8%	36%	50%	40%	50%
Boeing	86%	92%	64%	50%	60%	50%

7.1787 We note that the European Communities argues that the United States' allegation of displacement or impedance of exports from the 300-400 seat LCA market in China, Chinese Taipei, Korea, and Singapore "borders on the surreal", asserting that the deliveries of such LCA to those markets are based on orders for which Airbus did not compete, or orders by leasing companies which subsequently decided to lease the aircraft to airlines operating in these markets. According to the European Communities, "Airbus therefore cannot be accused of displacing or impeding Boeing from these third country markets."[5319] It is not clear to what extent, if any, the European Communities considers this argument applies with respect to other categories of LCA or other third country markets. We note, however, that we have elsewhere rejected the European Communities' view of whether a manufacturer "competes" for a given sale.[5320] In addition, we do not agree that Airbus aircraft leased to an airline operating in a given market cannot be considered as displacing or impeding Boeing exports to that market simply because the lease post-dates the leasing company's order to Airbus. Whether Airbus knew or intended that a particular aircraft sold to a leasing company would be leased to a particular company operating in a particular country is simply irrelevant – the question, for purposes of assessing displacement or impedance, in our view, is the country to which Airbus actually delivered the aircraft, which is the country of the operating airline.

[5318] EC, FWS, paras. 1971, 2119. The European Communities reported no deliveries in the 200-300 seat market.

[5319] EC, FWS, para. 2120 and footnote 2157.

[5320] *See*, para. 7.1722 above.

BCI deleted, as indicated **[***]**

(ii) Market Share information in Third Country Markets Considered as a Whole

7.1788 While the United States argued that the Panel could, and if necessary should, consider information on all third country markets, that is, assess displacement of United States' exports from all markets other than the United States and EC,[5321] we do not consider it necessary in this case to do so, as we consider that the information before us is sufficient to draw conclusions concerning displacement or impedance from a third country market with respect to certain individual third country markets.

7.1789 In any event, we have serious doubts whether an analysis of all third country markets as a whole would be permissible under Article 6.3(b) in any case. Article 6.3(b) refers to whether the effect of the subsidy is to displace or impede exports from "a third country market", not "all third country markets" or "the global market outside the complaining and subsidizing Members". However, in this case, we are not required to resolve that question, and we do not address the United States' contentions and evidence concerning third country markets as a whole.

(iii) Conclusion

7.1790 On the basis of the information presented by the United States, the accuracy of which the European Communities does not dispute, it is clear that in certain individual third country markets, Airbus' market share increased significantly over the period 2001 to 2005, and even in 2006 remained higher than Boeing's market share, and that Airbus obtained a significantly larger number of orders in the Indian market than did Boeing. As the only other competitor in the relevant markets over the period we are considering was Airbus, it follows that the evidence demonstrates that Boeing's exports of LCA were displaced from the markets of Australia and China by sales of Airbus LCA over the period we examined, and that there is a likelihood of future displacement of Boeing LCA from the Indian market.

7.1791 The situation is less compelling with respect to the markets of Brazil, Chinese Taipei, Korea, Mexico and Singapore, where sales were sporadic and volumes were relatively small, making identification of any trends more difficult.[5322] Nonetheless, as Airbus was the only other competitor in these markets over the period we are considering, it follows that any market share achieved by Airbus was at the expense of Boeing. Thus, we consider that the evidence demonstrates that United States' exports of LCA were displaced from these markets by sales of Airbus LCA over the period we examined as well.

7.1792 We address whether the displacement we have observed in the third country markets at issue is an effect of the specific subsidies we have found were granted to Airbus with respect to LCA in Section (e) below.

(d) Alleged price effects

7.1793 Article 6.3(c) provides that

> "Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

[5321] US, FWS, para. 772, US, SWS, para. 705. Brazil agrees with the United States that if data on exports to certain third country markets is insufficient, the Panel may conduct an analysis of displacement or impedance under Article 6.3(b) of the SCM Agreement based on the aggregate of all third country markets. Brazil, Third Party Submission, para. 60 referring to Appellate Body Report, *US – Upland Cotton*, para. 427.

[5322] We note in this regard that Article 6.3(b) does not contain any requirement that the displacement or impedance of exports from a third country market rise to any particular level or degree.

BCI deleted, as indicated **[***]**

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> (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;"

The United States argues that each of these phenomena, namely, price undercutting, price suppression, price depression and lost sales, can be demonstrated as separate and individual claims on the basis of the facts that are before the Panel.

7.1794 Before addressing the parties' arguments and evidence on these allegations individually below, we note that in *US – Upland Cotton* the Appellate Body concluded, based on a plain reading of Article 6.3(c) and the phrase "in the same market" "that this phrase applies to all four situations covered in that provision, namely, "significant price undercutting", "significant price suppression, price depression {and} lost sales"." We agree.

7.1795 In *US-Upland* Cotton, the panel considered the meaning of the term "significant" in the context of price suppression and depression, observing that "{t}he ordinary meaning of the term "significant" is "important; notable ... consequential". The term "significant" therefore connotes something that can be characterized as important, notable or consequential.[5323] The panel went on to observe that

> "Such significance may be manifest in a number of ways. The "significance" of any degree of price suppression may vary from case to case, depending upon the factual circumstances, and may not solely depend upon a given level of numeric significance.[1441] Other considerations, including the nature of the "same market" and the product under consideration may also enter into such an assessment, as appropriate in a given case. … We cannot believe that what may be significant in a market for upland cotton would necessarily also be applicable or relevant to a market for a very different product.
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> [1441]In any event, we note that no such numeric standard is provided in Part III of the Agreement. This contrasts, to a certain extent, with the provisions of Part V of the agreement, which contain, for example, indications of "amount" of the subsidy which are *de minimis* (less than 1 per cent *ad valorem*) and volumes of the "subsidized product" which are negligible. See *e.g.*, Article 11.9 of the SCM Agreement."[5324]

The Appellate Body agreed with the Panel's understanding of the term "significant" in the context of "significant price suppression" in Article 6.3(c), and noted in addition that:

> "Article 6.3(c) does not set forth any specific methodology for determining whether the effect of a subsidy is significant price suppression. There may well be different ways to make this determination."[5325]

[5323] Panel Report, *US – Upland Cotton*, para. 7.1325, quoting *New Shorter Oxford English Dictionary*, (1993).

[5324] Panel Report, *US – Upland Cotton*, para. 7.1329.

[5325] Appellate Body Report, *US – Upland Cotton*, paras. 426-427.

BCI deleted, as indicated **[***]**

7.1796 We agree with this understanding of the term "significant" as used in Article 6.3, and consider that, as with the term "in the same market", based on a plain reading of the text of Article 6.3(c), the term "significant" applies to each of the situations addressed in the provision, that is "price undercutting", "price suppression", "price depression" and "lost sales". With these fundamental principles in mind, we turn to consideration of the evidence and arguments with respect to price effects.

(i) Significant Price Undercutting and Lost Sales

7.1797 In support of its allegations of significant price undercutting and lost sales, the United States relies principally on evidence concerning a series of sales campaigns in which the customers ultimately ordered Airbus LCA. The United States asserts that in general, a ""lost" sale is any sale that is captured by the subsidized product instead of the product of the complaining Member."[5326]

7.1798 In examining the United States' allegations of significant price undercutting, we must also consider Article 6.5 of the SCM Agreement, which provides:

> "For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values."

Mirroring its argument in respect of the relationship between Articles 6.3(b) and Article 6.4 of the SCM Agreement, the European Communities asserts that the use of the term "non-subsidized like product" in Article 6.5 means that a claim of price undercutting may only be made out if the complaining Member can demonstrate that its like products do not benefit from any subsidy. The European Communities argues that Boeing benefits from subsidies provided to the United States LCA industry and, consequently, that the United States cannot demonstrate price undercutting as a matter of law. The United States raises the same objections to the European Communities' view as it did in connection with the interpretation of Article 6.4.[5327]

7.1799 The argument advanced by the European Communities raises essentially the same question we addressed above with respect to the relationship between Articles 6.3(b) and 6.4, and in our view, the same result should be reached.[5328] Thus, and for the same reasons as discussed above, we do not consider that Article 6.5 sets forth the exclusive means by which serious prejudice in the form of significant price undercutting can be demonstrated. Rather, in our view, Article 6.5 sets out a particular set of circumstances in which price undercutting can be found without further consideration of whether the price difference is the effect of the subsidy. That case is the one in which the like product of the complaining Member is not subsidized, and a comparison of prices (at the same level and at comparable times, taking due account of any other factor affecting price comparability) shows the subsidized product price to be lower than the price of the non-subsidized like product.

7.1800 In this dispute, the United States' claim of significant price undercutting is based on anecdotal evidence concerning particular sales campaigns, which it asserts demonstrates that the prices of Airbus LCA sold in those campaigns were below the prices offered by Boeing. However, the United States does not stop there, but goes on to assert that the lower prices offered by Airbus are an effect of

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[5326] US, FWS, para. 776.
[5327] *See*, discussion of the parties' arguments in this regard at paragraphs 7.1762 through 7.1764 above.
[5328] *See*, paragraphs 7.1765 through 7.1771 above.

BCI deleted, as indicated **[***]**

the subsidies. Thus, in our view, the United States has not sought to rely on the special circumstances set out in Article 6.5. Therefore, if the evidence demonstrates that the price of Airbus LCA was lower than the price of Boeing LCA, we will go on to consider whether this demonstrates significant price undercutting, and if so, whether such price undercutting is the effect of the subsidies in dispute.

7.1801 The United States supports its claims of significant price undercutting and lost sales principally by reference to various sales campaigns. In particular, the United States asserts that in sales campaigns involving purchases of LCA by easyJet, Air Berlin, Air Asia, Iberia, Czech Airlines, South Africa Airways, Thai Airways, Singapore, Emirates and Qantas, customers evaluated competing bids from Airbus and Boeing, and chose the Airbus LCA offered over the equally qualified LCA offered by Boeing. According to the United States, these sales were captured by Airbus "primarily by significantly undercutting the price offered by Boeing."[5329] However, the United States also argues that Airbus won the sales because it was able to present a particular model of Airbus LCA with particular features at the time of the sales campaign.[5330] The United States argues that any non-price factors which may have been relevant to those sales were monetized by both the manufacturers and the customers, such that when the customer made its decision, all such factors were incorporated into the price offered by the manufacturer for the particular model in question. In other words, the United States considers that a customer's monetization of non-price factors means the customer is able to determine which LCA model offers the lowest price, taking into due account all relevant factors affecting comparability. To this extent, the United States argues that non-price factors do not break the causal link between prices and lost sales.

7.1802 The European Communities does not dispute that in the sales campaigns identified by the United States, Boeing "lost" the sales in question, in the sense that it did not succeed in selling its LCA to the customer in question. However, it considers that the sales were lost for reasons other than price. In the European Communities' view, Boeing's failure to make certain sales was not the result of significant price undercutting on the part of Airbus but, rather, was due to Boeing's customer mismanagement and the perceived benefits of the particular Airbus product offered. According to the European Communities, Airbus sales campaigns were successful because Airbus LCA offered operating advantages to the carriers at issue and, especially during the period 2001-2004, because Boeing allegedly failed to focus on customer relations.[5331] In respect of campaigns where there is evidence of aggressive price competition, the European Communities argues that this is the result of competition which was often aggressive for strategic or economic reasons (especially following the collapse of aircraft demand during the 2001 to 2003 period). According to the European Communities, these factors not only demonstrate that there was no price undercutting, but further, that the lost sales cannot be considered to be an effect of the subsidies.

The Sales Campaigns

easyJet

7.1803 The United States asserts this was the largest single lost sale for Boeing during the period 2001 to 2005. According to the United States, easyJet was an exclusively Boeing customer until it

[5329] US, FWS, para. 776.

[5330] US, SWS, paras. 708-09, US, Answer to Panel Question 54, paras. 307-09.

[5331] The European Communities relies, *inter alia*, on the following statement in support of this argument, EC, FWS, para. 1465:

> "As I mentioned, last year there were two large orders that Airbus may have won on pricing alone. In both instances Boeing was the incumbent and lost out to Airbus. I'm not sure pricing was the whole issue."

The European Communities attributes this statement to Henry Stonecipher, former CEO of Boeing. However, the source of the statement, Exhibit EC-287, clearly attributes it to a J.B. Groh, a market analyst with D.A. Davison & Co.

BCI deleted, as indicated **[***]**

announced, on 14 October 2002, an order for 120 Airbus A319s with options for 120 more.[5332] Following the announcement, a number of reports in the media, quoting senior officials, suggested that the company's decision was attributable to the lower price offered by Airbus. A report in the Financial Times stated that Stelios Haji-Ioannou, the founder of easyJet:

> "said the price difference between the bids left the company with no choice: "The difference was so substantial we would have been in breach of our fiduciary duty; it would have been an offence to buy Boeing."" [5333]

The same article quoted easyJet CEO Ray Webster as saying that "it surprised all of us to see just how aggressive Airbus was in the final round of sealed bids".[5334] Similarly, another article reported that easyJet CEO Ray Webster stated that speculation that Airbus won the sale by offering a 60 percent discount off list prices "is 'a bit ambitious, but not far off. . . . I've been buying aircraft for 20 years and I've never seen anything like it.'"[5335]

7.1804 The United States also refers to public disclosures by the company which, it asserts, demonstrate a substantial discount off the list price for the A319 of 56 percent as of January 2001. For instance, easyJet's 2005 annual report states that the only aircraft delivered to it in 2005 were 12 A319s, for which it paid GBP 167.7 million, a per-aircraft price of GBP 13.98 million. The United States asserts that, according to easyJet, this is the actual price, net of concessions, paid to Airbus in 2005, based on an order placed in 2001 US dollars. The delivery price of GBP 13.98 million in 2005 British pounds sterling thus corresponds to an estimated order price of $19.36 million in 2001 US dollars – a discount of 56 percent off the $44 million list price for the A319 as of January 2001.[5336] In addition, the United States asserts that not only did Airbus discount the price of each aircraft sold to easyJet by more than 50 percent, it also granted additional concessions to offset the cost to easyJet of switching its fleet from Boeing to Airbus. The letter from easyJet to its shareholders seeking approval of the transaction spells out some of these concessions.[5337] Finally, the United States asserts that easyJet estimated that the per-seat cost of the Airbus A319 to be about one-third lower than the per-seat cost of the Boeing 737 it had purchased just two years earlier, a price that easyJet calculated meant that the deal would reduce its overall operating costs by 10 percent.[5338] The United States asserts that this evidence demonstrates that Airbus won the easyJet sale by undercutting the price offered by Boeing.[5339]

7.1805 The European Communities does not deny that Boeing lost this sale to Airbus, but argues, based on HSBI, that the reason was not the price of the Airbus LCA involved. The European Communities asserts that the easyJet sale was profitable to Airbus, and "cash positive".[5340] The European Communities asserts that there is no evidence to support the United States' contention

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[5332] US, FWS, para. 779. EasyJet exercised 20 options in 2005, 91 of the LCA ordered had been delivered by 31 December 2006, and delivery of the remaining LCA had been scheduled.

[5333] Colin Baker, *Easy Does It*, Airline Business (1 December 2002), Exhibit US-408.

[5334] Kevin Done, *Airbus Beats Boeing in Warover Big Order*, Financial Times (15 October 2002) Exhibit US-407.

[5335] Colin Baker, *Easy Does It*, Airline Business (1 December 2002), Exhibit US-408.

[5336] US, FWS, paras. 780-781, citing easyJet plc, Annual Report and Accounts 2005, Exhibit US-409 at 19 and 67, and easyJet, *Proposed Purchase of Airbus Aircraft and Notice of Extraordinary General Meeting* (25 February 2003) at 7, http://www.easyjet.com/EN/News/20030225_01.html, Exhibits US-380 and US-402.

[5337] US, FWS, para. 782, citing easyJet, *Proposed Purchase of Airbus Aircraft and Notice of Extraordinary General Meeting* (25 February 2003), Exhibit US-380 at 4.

[5338] US, FWS, para. 783, citing easyJet, *Proposed Purchase of Airbus Aircraft and Notice of Extraordinary General Meeting* (25 February 2003), Exhibit US-380, at 2, 4 and 8.

[5339] *See*, US, Answer to Panel Question 236, para. 66 and evidence cited therein.

[5340] EC, FWS, para. 1877. Merely that a sale was profitable does not demonstrate that there was not, in our view, demonstrate that there was no price undercutting.

except the reported statement of Ray Webster referring to a 60 percent discount and other concessions to offset the cost of switching from Boeing to Airbus. The European Communities argues that the reported 60 percent discount is false, and contends that the Airbus price was competitive, but not discounted to that level.[5341] Moreover, the European Communities asserts that Airbus was unwilling to offer final concessions sought by easyJet that would have "deteriorate{d} the deal to unacceptable level",[5342] despite its importance to Airbus. According to the European Communities, "even if low prices caused Boeing to lose {the} sale, this was not caused by subsidies, given their asserted low magnitude".[5343] Moreover, the European Communities notes that this sale took place at a time when demand for LCA had collapsed, and asserts that both Airbus and Boeing offered "more competitive pricing" at this time in an attempt to stimulate demand.[5344] The European Communities also argues that the earlier Boeing sale to Ryanair, which Boeing secured some 10 months earlier, allegedly by making an "exceptionally competitive offer",[5345] must be taken into account as well. The European Communities asserts that Airbus competed strongly for that sale, and believed it had won it, but the sale actually went to Boeing.[5346] In this circumstance, the easyJet sale became even more important for Airbus to establish its presence with the expanding low-cost carriers. The European Communities argues that the Ryanair price influenced Airbus' offer to easyJet.[5347]

7.1806 Having reviewed the information regarding this sales campaign, much of which is HSBI and thus cannot be disclosed in this report, we conclude that it is broadly consistent with the published statement of easyJet's founder concerning the sale.[5348] The European Communities refers to other, "non-price" factors which allegedly supported Airbus' offer.[5349] It is clear that Airbus sought to compete on the grounds that its product offering was superior,[5350] but Airbus itself recognized the importance of price to its offer.[5351] While the HSBI suggests that levels of discounting did not approach the 60 percent discount referred to, it is apparent that price discounts were provided.[5352] Evidence before us, including HSBI, indicates that the Airbus' price advantage was, ultimately, the determining factor in its securing this sale.[5353] However, that price advantage does include a number of elements, such as maintenance cost guarantees, technical dispatch reliability and residual value guarantees, and training support, which may be what the European Communities refers to as "non-price" factors.[5354]

Air Berlin

7.1807 On 4 November 2004 Air Berlin announced an order for 60 A320s. The United States alleges that, after the easyJet sale, Airbus again undercut Boeing's price in the campaign at Air Berlin and its Austrian affiliate, NIKI, which led Boeing to lose that sale for 70 firm orders. The United States

[5341] EC, FWS, para. 1875, citing Exhibit EC-431 (HSBI).
[5342] EC, FWS, para. 1877, citing Exhibit EC-432 (HSBI).
[5343] EC, FWS, para. 1878.
[5344] EC, FWS, para. 1880.
[5345] EC, FWS, para. 1881.
[5346] EC, FWS, para. 1882.
[5347] EC, FWS, para. 1883-1884.
[5348] The European Communities also disputes the implication that the loss of the 2002 easyJet sale precluded Boeing from obtaining later sales, including one in which Airbus sold 52 A319s to the company in 2006. EC, FWS, para. 1899. As the United States has not specifically argued this latter as a lost sale, we do not consider it further.
[5349] EC, FWS, paras. 1890-91, Exhibits EC-438, EC-436 (HSBI).
[5350] Exhibit EC-436 (HSBI).
[5351] Exhibit EC-436 (HSBI).
[5352] Exhibit EC-431 (HSBI).
[5353] US, FWS, paras. 780-783, citing Exhibits US-408, US-409, US-380, US-410, and US, SWS, Final Redacted Version Appendix, paras. 14 and 16; Exhibit US-619 (HSBI); Exhibit US-620 (HSBI).
[5354] US, FWS, para. 782.

BCI deleted, as indicated **[***]**

notes that during the sales campaign, Air Berlin executives were quoted as saying that "the total package offered by Boeing and Airbus, including the price of the planes and how to finance them, would determine who won the competition".[5355] In addition, Air Berlin managing director Joachin Hunold stated that "{p}rice is always an issue, but we also looked at the delivery schedule that was possible and at financing."[5356] Air Berlin, like easyJet, had operated only Boeing LCA until this campaign, and the United States alleges that, as in the case of easyJet: "{a}ccording to people familiar with the deals, Airbus trumped Boeing by offering steep discounts and other financial guarantees that {Boeing} was unwilling to match." [5357]

7.1808 The European Communities argues that Boeing, rather than Airbus, pushed down prices in this campaign and that Boeing did not lose this customer because Airbus lowered prices but because Boeing mismanaged customer relations, and implies that Airbus merely made a good offer.[5358] The European Communities argues that Airbus securing the Air Berlin order was a surprise, in view of the fact that it had been a Boeing launch customer in 1994 for the 737-800. However, according to the European Communities, Air Berlin officials were unhappy with Boeing's insistence on maintaining price levels for the final aircraft delivered from the 1994 order, and had complained about production delays and errors, damaged aircraft, and eroding customer support.[5359] Relying on HSBI evidence, the European Communities argues that the United States' argument that Boeing was "unwilling to match" Airbus' final offer is untrue.[5360] Rather, the European Communities argues, it was Boeing that pushed prices down, a view that is contradicted by the United States, also relying on HSBI evidence submitted by the EC.[5361]

7.1809 While the European Communities asserts that Air Berlin were unhappy with Boeing's business and production practices,[5362] the evidence before us, including HSBI evidence, clearly indicates that pricing was a crucial element in this sales campaign, with Airbus seeking to sell to a customer that seemed unhappy with Boeing, and making a very competitive offer in order to do so.[5363] The evidence indicates that there were a number of proposals from both Airbus and Boeing[5364] including a **[***]** from Boeing,[5365] but the sale was ultimately won by Airbus.

Czech Airlines

7.1810 On 6 April 2005 Czech Airlines signed a purchase agreement with Airbus for the delivery of six A319 and six A320 aircraft. In support of its proposition that Airbus won this sale due to significant price undercutting, the United States cites the following:

> "CSA strategic director Jan Vana explained: "Both offers met all of our technical specifications without exception. But Airbus offered the better price"".[5366]

The United States also points to a public statement in which the president of CSA, Jaroslav Tvrdik, gave more details about CSA's decision, stating that Boeing's offer was "truly super and lucrative

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[5355] James Wallace, *Boeing Loses Huge Air Berlin Jet Order to Airbus*, Seattle Post-Intelligencer (5 November 2004), Exhibit US-411.
[5356] *Id.*
[5357] US, FWS, para. 785, citing Exhibit US-412.
[5358] EC, FWS, para. 1910.
[5359] EC, FWS, para. 1903.
[5360] EC, FWS, para. 1908, Exhibit EC-449 (HSBI).
[5361] US Full Version Appendix, paras. 21-22, citing Exhibit EC-447 (HSBI).
[5362] EC, FWS, para, 1903.
[5363] Exhibit EC-443 (HSBI).
[5364] Exhibit EC-447 HSB1.
[5365] Exhibit EC-253 (HSBI), EC-449 (HSBI).
[5366] Dow Jones Newswire (15 October 2004), Exhibit US-424.

BCI deleted, as indicated **[***]**

{and} hard to refuse," but explaining that the Airbus bid, evaluated for the net present value of the various cash flows involved, was more than 100 million Czech crowns ($4 million) less than Boeing's offer.[5367] According to the United States, that "better" Airbus price included a number of additional bonuses by which, Mr. Tvrdik explained, "Airbus is going to cover our transition costs." These included a free training simulator worth 250-300 million Czech crowns ($10-12 million) to be used to train CSA pilots and pilots of other airlines on Airbus equipment, extensive customer service, spare parts at favourable prices and additional services, such as air crew training.[5368]

7.1811 The European Communities argues that this sale was won by Airbus largely based on political considerations, referring to a dispute between the Czech government and Boeing with respect to a state-owned company, Aero Vodochody. In 1997, Boeing had acquired 35 percent of Aero Vodochody, with effective management control. The expectation was that Boeing would help the company improve technology and make sales abroad. According to the European Communities, the company struggled, and in January 2004, the Czech Republic had "threatened to renew the fleet at state-held carrier CSA with rival Airbus".[5369] It appears, on the basis of HSBI, that CSA was willing to make a decision regarding its fleet on the basis of considerations other than fleet structure.[5370] The European Communities contends that the situation was exacerbated after Czech entry into the EU, when it was suggested it would be more advantageous to cooperate with European aerospace manufacturers than with Boeing.[5371] The European Communities argues that Airbus benefited from these political obstacles to Boeing's efforts to secure this sale, and that price was not the basis for Airbus' success in securing the sale.[5372] The European Communities also points to considerations with respect to the engines for the aircraft as a relevant factor in Airbus' securing this sale.[5373]

7.1812 The United States notes that, despite the European Communities' focus on political and other considerations, it does not dispute the veracity of the statement that Airbus offered a better price, and asserts that the European Communities' arguments on price are of little import.[5374]

7.1813 It appears, on the basis of the evidence before us, including HSBI evidence, that CSA was willing to make a purchase decision on the basis of elements other than the existing fleet structure, which might have argued for the purchase of Boeing LCA.[5375] While there is evidence which suggests that CSA was not well inclined towards Boeing, and HSBI evidence regarding other factors relevant to this sale[5376], we note that there is evidence that Airbus did offer the better price.[5377]

Air Asia

7.1814 On 25 March 2005 Air Asia announced that it had signed a purchase agreement for 60 A320 aircraft, and taken options for an additional 40 LCA.[5378] In support of its price undercutting claim, the

[5367] US, FWS, para. 795, citing Jan Cizner, *Tvrdik: Airbus Gave Us a More Attractive Offer*, Mlada Fronta Dnes (21 October 2004) (translated), Exhibit US-425.
[5368] US, FWS, para. 795, citing Jan Cizner, *Tvrdik: Airbus Gave Us a More Attractive Offer*, Mlada Fronta Dnes (21 October, 2004) (translated), Exhibit US-425.
[5369] EC, FWS, para. 1915, citing "Czech CSA Warns may Drop Boeing Over Aero Unit Woes," Reuters, 19 January 2004, Exhibit EC-456.
[5370] Exhibit EC-458 ((HSBI))
[5371] EC, FWS, para. 1916.
[5372] EC, FWS, para. 1918, citing Exhibit EC-425 (HSBI).
[5373] EC, FWS, para. 1919.
[5374] US Full Version Appendix to SWS, para. 27.
[5375] Exhibit EC-458 (HSBI).
[5376] EC, SWS, para, 1919 (HSBI).
[5377] Exhibit US-424.
[5378] EC, FWS, para. 1901.

BCI deleted, as indicated **[***]**

United States quotes a media report indicating that Boeing was not prepared to match the price offered by Airbus:

> "People familiar with the Air Asia negotiations said Boeing hadn't stopped trying to sway the airline but one person said 'Boeing isn't willing to do a deal at any price' indicating Airbus is charging far less than Boeing is willing to accept."[5379]

7.1815 The European Communities argues, in the first instance, that Boeing's failure to win this sale was due to its allegedly "arrogant" and "inflexible" negotiating positions,[5380] which it says was acknowledged by Lewis Platt, former Boeing co-chairman in an interview:

> "We got into a mode where words like arrogant were used, or inflexible. I went around and visited a lot of customers and I had two or three of them – and one especially larger order (AirAsia) that went to Airbus. And I sat down with the CEO and he described the process and I always figured that we lost it on price. He said you guys just did not pay attention to us. He said they wanted to get a couple of airplanes quickly and (Boeing) said it would not happen."[5381]

The European Communities also argues that while it was losing the campaign because of its attitude to customers, Boeing was also offering aggressive pricing, and that Boeing, not Airbus, was the driving force in terms of pricing. Moreover, the European Communities alleges that Boeing repeatedly undercut Airbus' price, and disputes the United States' argument regarding price escalation caps offered by Boeing.[5382] The European Communities acknowledges **[***]**.[5383] The European Communities refers to the statement of Christian Scherer that **[***]**, apparently considering that an offer that **[***]** somehow cannot be found to undercut a competitor's price. Of course, this is not the case, and there is no basis in either law or fact for such an implication.

7.1816 The United States disputes the European Communities' contentions regarding the alleged concern cause by Boeing's attitude[5384] and presents evidence indicating that price was a critical consideration for AirAsia.[5385]

7.1817 We have reviewed the HSBI evidence, which suggests that at various times in the sales campaign, both Boeing and Airbus were perceived as making the most aggressive offer. The evidence also indicates, however, that price was a critical consideration and that at the end of the day, AirAsia chose Airbus because its offer was perceived to be better than Boeing's.[5386]

Iberia

7.1818 On 31 January 2003, Iberia announced the purchase of five Airbus A340-600s over competing Boeing 777-300ERs.[5387] The United States supports its claim of price undercutting in this sale with reference to an Iberia press release, announcing that the company was "taking advantage of exceptional terms" offered by Airbus."[5388] The United States alleges that these "extraordinary

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[5379] *Airbus to Beat Boeing Again*, Wall St. Journal (8 November 2004), Exhibit US-412.
[5380] EC, FWS, para. 1925.
[5381] *Boeing Will Do What It Takes*, Seattle Post Intelligencer, (15 June 2005), Exhibit EC-464.
[5382] EC, FWS, para. 1926, citing Exhibits EC-468 and 469 (HSBI).
[5383] EC, FWS, para. 1929.
[5384] US Full Version Appendix to SWS, para. 24, citing Exhibit US-623 (HSBI).
[5385] US Full Version Appendix to SWS, para. 23, citing Exhibit US-622 (HSBI).
[5386] Exhibit US-622 (HSBI).
[5387] EC, FWS, para. 2094.
[5388] Iberia Press Release, *Iberia opta por Airbus para. la renovación de su flota B-747* (30 January 2003), Exhibit US-415, ("aprovechar unas condiciones excepcionales"). In addition to the Press

BCI deleted, as indicated **[***]**

conditions" were the decisive factor in the sale.[5389] The United States also asserts that Airbus used residual value guarantees to undercut Boeing's price offer.[5390]

7.1819 The European Communities disputes the United States' contentions, and in particular asserts that the B777 and A340 aircraft in contention for this order were not equally qualified for Iberia's needs. According to the European Communities, the A340 had a significant performance advantage in this campaign with respect to operations at hot, high altitude airports served by Iberia.[5391] The European Communities also cites fleet commonality as an important factor.[5392] In addition, the European Communities indicates that Iberia sought price discounts to purchase the "white tail" aircraft being offered by Airbus, which were LCA originally ordered by Swissair and left without a purchaser when the latter went bankrupt and on which **[***]**.[5393] Iberia ultimately agreed to take delivery of three such aircraft, which had been built to Swissair's specifications.

7.1820 The United States disputes the European Communities' argument concerning the alleged performance advantage of the A340 in this campaign, relying on HSBI.[5394] In addition, the United States maintains that price did play an important role in the Iberia sale.[5395]

7.1821 The information before us does suggest that Iberia considered that Airbus aircraft were better suited to operations at the hot, high altitude airports which were prime Iberia markets, and that this meant that the company favoured those aircraft.[5396] However, the relevance and extent of any A340 overall stand-alone operational advantage is brought into question by other HSBI.[5397] While it appears that Iberia did consider that there were advantages to purchasing Airbus LCA, stemming from commonality with its existing Airbus fleet,[5398] HSBI evidence also indicates that price was an important element in this sale.[5399] It also seems clear that having the white-tail aircraft which had been ordered by the bankrupt Swissair (**[***]**) available to offer to Iberia was important to Airbus' price offer.[5400]

South African Airways

7.1822 On 19 June 2002 South African Airways ("SAA") announced the purchase of 12 A340, 11 A319 and 15 A320 aircraft.[5401] The United States notes that, despite having recently ordered

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Release the United States points to a Wall Street Journal Article which also suggests that Airbus won the sale, at least in part due to pricing:

"Airbus nosed ahead thanks to its planes' lower prices and common design with the rest of Iberia's fleet. By offering guarantees on the planes' future value and maintenance costs, plus attractive financing terms, Airbus edged out Boeing's aggressive package. The deal's final financial terms remain secret.

At Airbus, Mr. Leahy {head of sales} was relieved, but he faced one last slap. Iberia's news release crowed about Airbus's {residual} price guarantees on the planes – a detail that Mr. Leahy considered confidential. Iberia's Mr. Dupuy said he wasn't rubbing it in. But he had, he boasted, won "extraordinary conditions."

Wall St Journal (10 March 2003), Exhibit US-416.

[5389] US, FWS, para. 788.
[5390] US, FWS, para. 789.
[5391] EC, FWS, para. 2095.
[5392] EC, FWS, para. 2096.
[5393] EC, FWS, para. 2097-98, statement of Christian Scherer, Exhibit EC-14 (BCI) at para. 28
[5394] US Full Version Appendix to SWS, paras. 31-33, citing Exhibits US-628-629 (HSBI).
[5395] US Full Version Appendix to SWS, para. 30, citing Exhibit US-626 (HSBI).
[5396] Aircraft Economics, March 2001 (Exhibit EC-493).
[5397] Exhibit EC-494 (HSBI); Exhibit US-628 (HSBI).
[5398] Exhibit EC-494 (HSBI).
[5399] Exhibit US-626 (HSBI).
[5400] EC, FWS, para. 2098.
[5401] EC, FWS, para. 2100.

BCI deleted, as indicated **[***]**

21 Boeing 737s in order to operate an all-Boeing fleet,[5402] SAA decided to switch to Airbus with this order.[5403] The United States contends that Airbus was eager to offer a "heavy discount" on its A340s.[5404] The United States also cites a SAA report in which the company described the LCA it bought from Airbus as "aggressively priced."[5405] As in the Iberia sale, certain of the planes purchased by SAA were white-tail aircraft originally destined for Swissair.[5406]

7.1823 The European Communities asserts that, as in the sale to Iberia, a key reason Airbus won the SAA order was the superior operating performance of the A340 in hot, high altitudes, and that the failure of the Boeing 777 in performance tests in 2002 damaged its credibility. HSBI suggests that the A340 did present certain performance advantages, but also indicates the need for aggressive pricing.[5407] The European Communities also argues that Boeing had lost SAA's trust by its mishandling of an earlier sale of 737NG aircraft, which led the company to decide to replace its 737 aircraft with A320s.[5408] The European Communities alleges that the "heavy discounts" referred to are attributable to the fact that some of the LCA were white-tail aircraft, **[***]**.[5409]

7.1824 The United States asserts that the price differential was clearly an important aspect of this sale[5410] and relies on general information about aircraft performance to rebut the European Communities' arguments concerning performance advantages of the A340.[5411] While we do not discount the importance of performance advantages, which the United States does not specifically rebut in this instance, unlike in the case of the Iberia sale, HSBI also indicates the significant role of pricing, including **[***]**, in the sale.[5412]

Thai Airways International

7.1825 In 2003 Thai Airways ordered three A340-500s and five A340-600s.[5413] In support of its significant price undercutting claim the United States cites media reports noting "special price concessions" of USD 7 million each, "extra credits" of USD 9.75 million for each A340-500 and USD 10.25 million for each A340-600 as well as an existing aircraft subsidy phase out.[5414]

7.1826 The European Communities argues that Airbus' pricing was not a competitive factor in this campaign, and asserts that the sales campaign evidence demonstrates that Airbus was not competing against Boeing in this sales campaign.[5415] In addition, the European Communities argues that Thai

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[5402] South African Airways, Group Audited Results, Year Ending 31 March 2002, available at http://ww4.flysaa.com/results/march2001/results_02.html (describing SAA's fleet as consisting of 62 in-service Boeing LCA, with five on order, after the airline "completed the disposal of its Airbus fleet as a result of the upgrade to new Boeing 737-800's.") Exhibit US-417 at 2.

[5403] US, FWS, para. 791.

[5404] *Boeing, Airbus Projections for 2003 May Be Too Rosy*, Airline Financial News (Sept. 9, 2002), Exhibit US-418.

[5405] South African Airways, Group Audited Results, Year Ending 31 March, 2002, at 2, Exhibit US-417 at 2.

[5406] *See*, EC, FWS, para. 2106, (HSBI).

[5407] EC, FWS, paras. 2101-02, citing Exhibits EC-498, 499, 501 (HSBI).

[5408] EC, FWS, paras. 2104-05.

[5409] EC, FWS, para. 2106

[5410] Exhibit US-627 (HSBI).

[5411] US Full Version Appendix to SWS, para. 33.

[5412] Exhibit US-627 (HSBI).

[5413] EC, FWS, para. 2108.

[5414] US, FWS, para, 792.

[5415] EC, FWS, para. 2109, citing, Statement of Christian Scherer, Annex I, Exhibit EC-14, (BCI). We have rejected the definition of "competitive" sales campaign on which this assertion relies, *see* para. 7.1722 above, and thus, we do not accept the view that Airbus did not compete for this sale on the basis of Mr. Scherer's statement.

BCI deleted, as indicated **[***]**

Airways was looking for LCA to operate on ultra-long-range flights to the United States, and that the A340-500/600 was the only ultra-long-range aircraft in production at the time of the Thai Airways sales campaign, and thus could be delivered before the newly launched Boeing 777-200LR. This is not contested by the United States, which responds by arguing that the availability of the A340-500/600 prior to the Boeing aircraft is, itself, an effect of the subsidy.[5416]

7.1827 While we do not agree that there was no competition between Boeing and Airbus for this sale[5417], it does appear, given the timing of this campaign, that the only LCA that met Thai Airways' operational needs in production at the time the sale was concluded was the A340-500/600. Thai Airways would have had to wait some period of time for the Boeing LCA, the 777-200LR, that would meet those needs, to become available.

Singapore Airlines, Emirates Airlines, Qantas

7.1828 Each of these airlines placed orders for the new Airbus A380 in 2000 and 2001 as initial launch customers. The United States alleges that the orders were made despite Boeing's offer of the 747-X, a proposed redesign of the 747. The United States alleges that the 747-X was not launched because it could not find sufficient initial customers in competition with the A380.[5418] The United States argues that the prices offered on these A380 orders were so low that the impact of subsequent delays in delivering the A380 turned them into loss-making contracts.[5419] Indeed, according to the United States, Airbus offered the A380 at low prices compared to those being offered by Boeing on the original versions of the 747.[5420] Thus, the United States argues that the competition from low-priced A380 LCA was the reason the 747-X was not launched.

7.1829 According to the European Communities, Singapore Airlines, Emirates Airlines and Qantas each ordered the A380 not because of its price, but because it offered unique advantages in seating capacity, range, and operating economics not available from any competing LCA Boeing could then offer.[5421] The European Communities argues that the terms of sale were consistent with the **[***]** and normal practice for orders by initial launch customers.[5422] The European Communities dismisses the United States' allegations regarding the offer by Boeing of a competing redesign of the 747, the 747-X, that would have offered similar capabilities. The European Communities asserts that the 747-X was not a serious competitive effort, alleging that Boeing's proposal of several different variants of the 747 over the period 1996 to 2006 damaged its credibility in claiming that it intended to launch an LCA directly competitive with the A380.[5423] According to the European Communities, Boeing never seriously considered launching such an aircraft,[5424] but rather proposed it only to dissuade Airbus from proceeding with the A380 project.[5425]

7.1830 Turning to the specific orders, the European Communities contends that Emirates never considered the Boeing re-design of the 747 in competition with the A380,[5426] asserting that Emirates sought information on the 747X only after it made its commitment to Airbus regarding the A380.[5427]

[5416] US, SWS, HSBI Appendix, para. 29
[5417] *See*, footnote 5415 above.
[5418] US, FWS, para. 793.
[5419] US, FWS, para. 794.
[5420] US, SWS, para. 718.
[5421] EC, FWS, para. 1701.
[5422] EC, FWS, para. 1703, citing Exhibit EC-362 (HSBI).
[5423] EC, FWS, para. 1680.
[5424] EC, FWS, para. 1678.
[5425] EC, FWS, 1681-82.
[5426] EC, FWS, para. 1707-09, Exhibits EC-363-64.
[5427] EC, FWS, para. 1708, citing "*Boeing and Emirates Correspond About 747X, 400X*," Reuters, 2 July 2000, Exhibit EC-368.

BCI deleted, as indicated **[***]**

Thus, according to the European Communities, product characteristics explain this order, and price was not a deciding factor.[5428] With respect to Singapore Airlines, the European Communities argues, based on HSBI, that the proposed 747-X was not a serious competitive offer by Boeing, and was never considered as such by the airline.[5429] Regarding Qantas, the European Communities alleges that it ordered the A380 because it offered the airline unique growth capabilities that could not be matched by the 747-X.[5430] The European Communities cites factors other than price as key, relying on HSBI.[5431]

7.1831 In response, the United States asserts that the contention that Boeing could not offer an aircraft that could compete with the A380 has already been disproven by events, referring to the delays in A380 deliveries as demonstrating that Boeing would have sold more LCA if the European Communities and the Airbus governments had not provided subsidies to bring the A380 to market.[5432] In this regard, the United States cites a recent statement by the CEO of Singapore Airlines, stating "Boeing 777-300ERs, in our experience, would be a useful alternative to A380s. ... We could upsize the order if there are further delays with the A380."[5433] The same article noted that other carriers, including Emirates and FedEx, have also turned to the 777 to replace the delayed A380. The United States points out that the European Communities acknowledges that factors such as seating capacity are routinely "monetized" in sales campaigns and, to the extent practicable, can be offset by price concessions, with the result that even if the A380 may be better suited to a particular airline's business plan than a smaller plane like the 777, the two aircraft can – and do – fly the same routes.[5434] Thus, the United States maintains, it is simply not the case that airlines like Emirates Airlines, Singapore Airlines, or Qantas were indifferent to the price of the A380 compared to the price of other aircraft that could fly the same routes, and reiterates that Airbus was offering the A380 at very low prices compared with the 747.[5435]

7.1832 While it is clear that the A380 offered unique characteristics to these airlines, we do not agree that it did not compete with the 747. Information in the A380 business case contradicts the European Communities' position in this regard.[5436] That evidence also supports the United States' view with respect to the competitive pricing of the A380: **[***]**.[5437] Thus, while we do not discount the importance of the specific characteristics of the A380, the evidence also indicates the significant role of pricing in these sales.

Overall Assessment of the sales campaigns evidence

Significant Price Undercutting

7.1833 A principal difficulty in assessing the United States' claim of significant price undercutting in this dispute is that it is not at all clear to us that the anecdotal evidence discussed above constitutes an appropriate or reliable evidentiary basis for drawing conclusions about price comparison, which are the basis for a finding of significant price undercutting under article 6.3(c) of the SCM Agreement. For the most part, the transaction prices of LCA sold in these campaigns are not available for

[5428] EC, FWS, para. 1717.
[5429] EC, FWS, paras. 1710-19, citing Exhibits EC-370, 373 - 376 (HSBI),
[5430] EC, FWS, para. 1720.
[5431] EC, FWS, para. 1721, citing Exhibit EC-379 (HSBI).
[5432] US, SWS, para. 717.
[5433] *Singapore Airlines may buy more Boeing 777s*, Int'l Herald Tribune (10 December 2006), Exhibit US-611.
[5434] US, SWS, para. 719, referring to Statement of Christian Scherer, para. 69, Exhibit EC-14.
[5435] Referring to US, FWS, paras. 793-794 (citing and quoting sources), US, FCOS, para. 63 (citing Exhibit EC-362 at 18 (HSBI)).
[5436] Exhibit EC-362 (HSBI), pp. 5, 6, 13, 17, 19.
[5437] Exhibit EC-362 (HSBI) p. 19. *See, Id.* at pp. 5 & 17 (**[***]**).

BCI deleted, as indicated **[***]**

comparison, and the sporadic evidence of actual LCA prices available to us is insufficient for purposes of assessing price undercutting. The parties are in agreement that list prices are not a relevant basis for comparison.[5438]

7.1834 In the usual case, we would expect evidence of price undercutting to be of the type that would allow a "comparison of prices" of the two products in question, as suggested by Article 6.5, made "at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability." Article 6.5 goes on to provide "However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values." We recall that we have concluded that Article 6.5 does not establish the exclusive means by which serious prejudice in the form of significant price undercutting can be demonstrated, and that the United States' claim in this case is not premised on the special circumstances for a complaining Member with a non-subsidized like product provided for in Article 6.5. However, we do consider that Article 6.5 provides useful guidance for the nature of the analysis of price undercutting in general, when it describes the type of price comparison that should be undertaken. In this case, we do not have evidence that would allow us to undertake a direct comparison of the price of the subsidized and like products, adjusted to ensure the comparison is at the same level of trade and for other factors affecting price comparability. Indeed, neither party appears to consider that the Panel could or should undertake an effort to calculate "comparable" prices for LCA for purposes of a price undercutting analysis. The United States notes that "it would be impracticable, if not virtually impossible, for the Panel to try to undertake the vast number of adjustments that would be necessary to perform an accurate, apples-to-apples price comparison between Airbus and Boeing LCA prices in a given market".[5439] While the European Communities asserts that the Panel must compare the prices of the Airbus and Boeing offers, taking account of factors affecting price comparability, it does not suggest how the Panel might undertake such a comparison. The European Communities asserts that the United States has not provided evidence demonstrating that the Airbus price in any campaign was lower than the Boeing price, but it has not itself relied on or submitted evidence that would allow a comparison of prices by the Panel.[5440] Instead, both parties have relied upon anecdotal and other evidence concerning the sales campaigns in the context of price undercutting.

7.1835 The United States considers that it has provided evidence concerning the "actual prices" in a number of transactions in the information concerning the several sales campaigns on which it relies. In the United States' view, the customer in a given sale of LCA is the only "party that has access to all of the data necessary to compare the prices offered by Boeing and Airbus" and will "perform the analysis required by Article 6.5 – a comparison of the subsidized product and the like product, in the same market, at the same level of trade, at comparable times, taking "due account" of all relevant factors affecting comparability."[5441] The United States asserts that nothing in Article 6.5 prescribes how these factors are to be taken into account, and given the impracticability if not impossibility of either Boeing, Airbus or the Panel, undertaking such an analysis, the Panel should rely on the statements of customers indicating that Airbus LCA were purchased in a given transaction on the basis of price as probative on the question of price undercutting.[5442]

7.1836 The European Communities agrees with the United States that the customer generally monetizes the differences between competing aircraft offered by Boeing and Airbus in a particular

[5438] US, Answer to Panel Question 281, para. 124: "list prices alone are not generally meaningful for conducting an analysis of LCA pricing under Article 6.3(c)"; EC, Answer to Panel Question 281, para. 190: "list prices are largely irrelevant to the Panel's assessment of injury under Article 5(a) or serious prejudice under Articles 5(c) and 6.3(c)".

[5439] US, Answer to Panel Question 235, para. 61.

[5440] EC, Comments on US Answer to Panel Question 235, paras. 110-119.

[5441] US, Answer to Panel Question 235, para. 62.

[5442] US, Answer to panel Question 235, para. 64, US, Answer to Panel question 281, paras. 122, 127-28.

BCI deleted, as indicated **[***]**

sales campaign,[5443] but it considers that the end result of this process is not a comparison by the customer of the prices of the competing aircraft, but of the net present value (NPV) of the competing offers. In the European Communities' view, the United States "conflates the concepts of price and NPV {implying} that price undercutting is demonstrated simply by evidence that the customer decided to order from Airbus due to the better value of the Airbus offer."[5444] The European Communities considers that the NPV will be determined not only on the basis of price, but also based on consideration of non-price factors, and in such cases, a sale by Airbus does not necessarily indicate that Airbus' price was lower, but rather than the NPV of the Airbus offer was higher, which may be attributable to any of the non-price factors taken into account by the customer.[5445] For the European Communities, it is important that the Panel consider actual prices, and not NPV, in its analysis of price undercutting,[5446] although it does not provide any suggestions as to how such an actual price comparison could or should be undertaken. However, according to the European Communities, in order for the United States to establish significant price undercutting, it must prove, on a sale-by-sale basis, that Airbus offered a significantly lower price than Boeing, taking due account of factors affecting price comparability, and that such significantly lower price was caused by the alleged subsidies.[5447] The European Communities asserts that the United States has failed to demonstrate this in respect of any of the sales campaigns it has relied upon to establish significant price undercutting.

7.1837 We do not agree that the evidence before us reflects the actual prices of LCA in the sales campaigns. Rather, in our view, that evidence relates to the value of the offers of competing manufacturers for a particular customer's order. It is clear to us this evidence demonstrates that the customer's evaluation of the competing offers for sale of LCA involves consideration of a range of elements, from the price of the airframe itself, to various discounts, guarantees, concessions, financing, support, engine choice, and other aspects.[5448] It may well be true that the evaluation by a customer of competing offers or proposals involves a comparison similar to that described in Article 6.5. However, the NPV calculation as described by both the parties[5449] involves a number of subjective and customer specific elements which, because we have no basis on which to evaluate them or consider their importance, makes it impossible for us to conclude that the customer's ultimate decision reflects a choice based on lower price. Moreover, the customer is not the Panel in this dispute, and we do not consider that we can abdicate our responsibility by simply accepting that the customer's ultimate choice of Airbus' offer to sell LCA on certain specific terms demonstrates that the price of the subsidized product involved in that sale was lower than the price of the competing United States' like product.

7.1838 Although we have concluded that the like product in this dispute is all Boeing LCA, it is clear that the LCA models offered by Boeing and Airbus each have their own particular features, and that

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[5443] EC, FWS, para. 1832 ("customers conduct a complex technical and economic of each LCA manufacturer's fleet proposal, translating each technical, physical and economical characteristic of each LCA into a "value" element...This process is highly subjective ... The significance of each factor will depend on where that airline's particular priorities lie. Seemingly small differences in the physical or economics {sic} characteristics of Boeing and Airbus competing LCA can thus be decisive in the purchasing decision of an airline.") (footnotes omitted).

[5444] EC, Comments on US Answer to Panel Question 235, paras. 114-15.

[5445] EC, Comments on US Answer to Panel Question 235, para. 115.

[5446] And also in its analysis of price suppression, price depression, and lost sales. EC, Comments on US Answer to Panel Question 235, para. 119.

[5447] EC, Comments on US Answer to Panel Question 236, para. 120.

[5448] *See,* Statement of Rod P. Muddle, Exhibit EC-19, at paras. 52-93 describing various elements that may be taken into consideration in assessing an offer of LCA. The United States appears to accept that the elements identified by Mr. Muddle form part of the "price" of any LCA transaction, or otherwise affect the value of an LCA offer. US, Answer to Panel question 281, paras. 125-26.

[5449] US, FWS, paras. 799-800, US, Answer to Panel question 235, para. 62, EC, FWS, 1429-1439, EC, Answer to Panel Questions 281 and 282.

each model group, and each specific model within a group, is differentiated in order to offer specific characteristics to individual customers to meet their particular needs. HSBI concerning the sales campaigns indicates that the specific characteristics of the LCA in question are in all cases important elements of a customer's choice of LCA, but that these are not considered in a vacuum but in a complex negotiating process with the manufacturers. Airline customers consider the characteristics of individual LCA in relation to their existing fleets, their route structure and forecasts for changes in routes and traffic patterns, operating costs, maintenance costs, training costs, etc. The number and variety of factors considered is in all cases large, and varies for each individual customer. In each campaign, one or another of the LCA being considered will be the best fit for the particular needs of the customer at that time. Moreover, personal and political factors appear to have played a role in at least some of these sales. In addition, it is clear that competition between Boeing and Airbus for customers is fierce, and that both companies are willing to negotiate on price to secure an important sale.

7.1839 Even where there are other factors such as performance, fleet considerations, or personal factors relevant to a sale, price, in the sense of the overall value of the offer to the customer's business, remains one of the, if not the only, determinative factors in the customer's decision. It seems clear that an LCA manufacturer obtains a particular sale because its offer of a particular LCA (or group of LCA models) has a higher value, from the customer's perspective, than the competing offer of LCA from the other manufacturer. However, we cannot conclude that public statements reflecting this consideration of the value of competing offers constitute sufficient evidence for us to conclude that there was "price undercutting" in a given sale. Given that this calculus takes place in the purchaser's consideration of the offers, and is not apparent in the actual price of the aircraft, it seems difficult if not impossible for us to make conclusions about price undercutting, let alone significant price undercutting, within the meaning of Article 6.3(c) of the SCM Agreement, on the basis of customers' public statements which reflect calculation of the relative value of competing offers to sell LCA, but give us no basis on which to establish an actual comparison of prices. Such an approach in this case would seem to us to be far from what is contemplated by Article 6.5 when it describes how price comparisons might be undertaken.[5450] While a statement such as that of CSA strategic director Jan Vana indicating that "{b}oth offers met all of our technical specifications without exception. But Airbus offered the better price",[5451] suggests some degree of price undercutting, even in this instance, we cannot conclude that such undercutting was significant, or that price was the deciding factor in which manufacturer won the order, given the other factors at play, such as political and fleet considerations.[5452]

7.1840 Thus, overall, while we accept that price was an important factor in each of these sales, and may in some instances have been decisive, in the sense that the overall value of Airbus' offer to the customer was higher than the value of Boeing's offer, we cannot, on the basis of the evidence before us, make any conclusions regarding significant price undercutting within the meaning of Article 6.3(c) of the SCM Agreement.

Significant Lost Sales

7.1841 The European Communities' arguments with respect to lost sales are premised on the notion that unless price was the determining factor in a particular sale, that sale cannot be considered a lost

[5450] We do not preclude the possibility that, in a different case, a conclusion concerning price undercutting might be established based on evidence that does not suffice to establish a direct comparison of prices within the sense of Article 6.5. However, in this case, the anecdotal evidence, in the context of this product and this industry, and the way in which sales decisions are made, is simply insufficient to persuade us with respect to the allegations of significant price undercutting.

[5451] Dow Jones Newswire (15 October 2004), Exhibit US-424.

[5452] *See*, EC, Comments on US Answer to Panel Question 236, para. 158.

BCI deleted, as indicated **[***]**

sale.[5453] However, the United States made clear that it is not relying exclusively on price in support of its claims of lost sales. Rather, the United States makes separate claims with respect to significant price undercutting, and significant lost sales, as separate and distinct effects of the subsidies within the meaning of Article 6.3(c) of the SCM Agreement. The United States acknowledges that some of the evidence it presents is relevant to both claims, but maintains that the claims are legally and factually distinct.[5454] Specifically with respect to lost sales, the United States argues that a sale may be "lost" either because Airbus offered a particular LCA at a lower price, or because it was able to offer a specific model of LCA that it would not have had available but for the subsidies.[5455]

7.1842 The text of Article 6.3 gives no guidance to panels as to the methodology for evaluating allegations of lost sales, other than to specify that such lost sales must be "in the same market". Nor is there any further guidance in any other provision of the SCM Agreement. As this is the first dispute in which allegations of lost sales have been made in order to demonstrate serious prejudice under Article 6.3, there is no dispute settlement guidance on this point.[5456]

7.1843 Looking at the text of Article 6.3(c), it seems clear to us that it describes four different effects which, if found to apply, can support a finding of serious prejudice: significant price undercutting, significant price suppression, price depression or lost sales in the same market. There is nothing in the text of the provision that establishes or requires any connections or linkages between these four types of effect as a legal matter. We can certainly envisage that, as a matter of fact in a particular case, there may be linkages between, for instance, price undercutting and lost sales, or price undercutting and price depression or price suppression. However, we see nothing in the text that would require that a sale must be lost by reason of price in order for it to be considered a lost sale for purposes of Article 6.3(c).

7.1844 While the European Communities maintains that the United States relies on price undercutting to establish the existence of lost sales, considering the United States' arguments as a whole, this is clearly not the case. The European Communities asserts that "only if Airbus' winning lower price is significantly lower *and* that significantly lower price is caused by subsidies" can the United States prevail on its claim of significant lost sales.[5457] In our view, there is no legal basis in the text of the SCM Agreement for the view that lost sales must be demonstrated on the basis of price undercutting, and the European Communities has not demonstrated otherwise.

7.1845 The European Communities does not dispute that Boeing lost sales to Airbus, in the sense that the customer purchased Airbus rather than Boeing LCA. While we have concluded that significant price undercutting cannot be found on the basis of the evidence before us, this does not mean that there were not significant lost sales. In our view, it is clear that Boeing lost sales to Airbus involving purchases by easyJet, Air Berlin, Czech Airlines, Air Asia, Iberia, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines, and Qantas.[5458] Moreover, it is

[5453] EC, FWS, para. 1821.

[5454] US, Answer to Panel Question 54, para. 307.

[5455] US, Answer to Panel Question 54, paras. 309-310. Brazil considers that price need not be the only reason for lost sales, provided it is one of the material factors causing the lost sales. Brazil, Third Party Submission, para. 55.

[5456] Although allegations of lost sales are not uncommon in the context of allegations of material injury in countervailing duty and anti-dumping investigations, neither Article 15 of the SCM Agreement nor Article 3 of the AD Agreement refer to lost sales, and we are not aware of any dispute in which consideration of lost sales allegations have been addressed in the trade remedy context.

[5457] EC, FWS, para. 1821.

[5458] We note that the European Communities argues extensively concerning other sales to different airlines, contending that these were not sales lost by Boeing for reasons of price. However, the United States did not rely on those sales in support of its claim of serious prejudice in the form of lost sales, and thus we do not consider them in this context.

apparent to us that if winning a particular sale is of "strategic importance" to Airbus, as the European Communities asserts with respect to the easyJet campaign discussed above,[5459] the loss of that sale to Boeing is similarly important, and can justifiably be considered a significant lost sale. In addition, lost sales are important to the extent that they delay a manufacturer's ability to benefit from the important learning effects and economies of scale in this industry, and thus have a significance beyond their direct revenue effects.[5460] Moreover, both parties recognize the advantages to being the incumbent supplier with a given customer with respect to subsequent purchases, which also adds to the significance of lost sales. While it is true that a manufacturer may be able to recoup some of these disadvantages by finding another customer to take advantage of delivery slots, this does not, in our view, detract from the significance of a lost sale.[5461] Given the number of aircraft and the dollar amounts involved in those sales, as well as the considerations just described, we conclude that these lost sales are significant. We address whether these significant lost sales are an effect of the specific subsidies we have found were granted to Airbus with respect to LCA in Section (e) below.

(ii) Significant price suppression and price depression

7.1846 In *US – Upland Cotton*, the panel considered the meaning of the terms price suppression and price depression and concluded:

> "Thus, 'price suppression' refers to the situation where 'prices' ... either are prevented or inhibited from rising (*i.e.*, they do not increase when they otherwise would have) or they do actually increase, but the increase is less than it otherwise would have been. Price depression refers to the situation where 'prices' are pressed down, or reduced."[5462]

This definition of price suppression was approved by the Appellate Body in its review of the panel report.[5463] In *US – Upland Cotton (Article 21.5)*, the Appellate Body further elaborated on the notions of price suppression and price depression:

> "At a conceptual level, we see some differences between the concepts of 'price depression' and 'price suppression' as defined in the original proceedings. While price depression is a directly observable phenomenon, price suppression is not. Falling prices can be observed; by contrast, price suppression concerns whether prices are less than they would otherwise have been in consequence of various factors, in this case, the subsidies. The identification of price suppression, therefore, presupposes a comparison of an observable factual situation (prices) with a counterfactual situation (what prices would have been) where one has to determine whether, in the absence of the subsidies (or some other controlling phenomenon), prices would have increased or would have increased more than they actually did".[5464]

[5459] EC, FWS, paras. 1881-1883,

[5460] *See*, paras. 7.1717 and 7.1726 - 7.1727 above, concerning learning effects and economies of scale.

[5461] The European Communities states that "even assuming, *arguendo*, that the effect of any alleged subsidies to Airbus caused Boeing to lose certain sales between 1999-2005, those "lost sales" are not today *significant* given the huge order backlog and the fact that Boeing sold all the early "lost" order slots to other customers at what were "likely higher prices." EC, SCCS, para. 21. As discussed further below, we do not consider that improvements in Boeing's condition, as evidenced by its order backlog, or any efforts by it to mitigate the adverse effects it has suffered, are relevant to our consideration of serious prejudice. We certainly do not consider that whether lost sales are "significant" must be assessed with respect to a period several years after the fact. Lost sales that are significant at the time may well support a finding of present serious prejudice.

[5462] Panel Report, *US – Upland Cotton*, para. 7.1277.

[5463] Appellate Body Report, *US – Upland Cotton*, para. 424.

[5464] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351.

BCI deleted, as indicated **[***]**

7.1847 In the present case, the United States alleges that both significant price depression and significant price suppression can be observed over the period 2001 through 2006 in the world market prices for four models of Boeing LCA: the Boeing 737NG, Boeing 767, Boeing 747, and Boeing 777.[5465] The United States contends, and the European Communities does not disagree, that the world market is the appropriate market for measuring the price effects of subsidies to Airbus.[5466] For each of the four models of Boeing LCA, the United States presents a line chart mapping the movements of annual indexed Boeing LCA order prices and the United States Aircraft Manufacturers Producer Price Index ("PPI"). The United States argues that the charts it has presented show that indexed prices on the world market for each of the four models of Boeing LCA have declined over this period, demonstrating price depression.[5467] Moreover, the United States contends that the fact that prices have not followed the PPI demonstrates price suppression. The United States describes the PPI as the producer price index for aerospace manufacturing in the United States – a measure of general industry costs, which the United States submits represents a "reasonable proxy for the amount by which LCA prices could be expected to rise in the absence of suppression by some external factor".[5468] Thus, the United States alleges that in fact, the PPI is an objective benchmark for what changes in prices would have been expected over the period, and the fact that prices did not increase as would have been expected shows price suppression that can be directly observed in this case. According to the United States, the fact that the indexed prices of Boeing's LCA over the 2001 to 2006 period have not followed the PPI demonstrates significant price suppression.[5469] Finally, the United States asserts that the observed price depression and price suppression is significant. The four charts presented by the United States are reproduced below. We examine each in turn before setting out our views in respect of the parties' arguments.

Chart 11: Boeing 737NG, Average Indexed Order Prices compared with PPI (2001-2006)

[***]

7.1848 The United States asserts that the indexed annual prices for the Boeing 737NG in the world market **[***]** between 2001 and 2005,[5470] before **[***]**.[5471] The United States notes that **[***]**.[5472]

[5465] US, FWS, para. 804. The United States originally presented data for the period 2001 through 2005, and submitted updated tables containing data for 2006 with its second written submission. US, SWS, para. 726, Exhibit US-612 (BCI). Although we are proceeding on the basis of consideration of all Boeing LCA as the product "like" all Airbus LCA, the subsidized product, we nonetheless consider it appropriate to examine the price trends for the individual models, as being the most accurate basis for our assessment. Neither party has suggested that an alternative, for instance some form of aggregation or averaging, would be possible or appropriate. However, while examination of the trends for individual models is appropriate, our conclusion as to whether the United States has demonstrated significant price depression or suppression must be made with respect to the like product, LCA. *See*, Appellate Body Report, *US – Hot-Rolled Steel*, paras. 195, 204 (Appellate Body concluded that, in assessing injury to a domestic industry "as a whole", an investigating authority could properly undertake an evaluation of particular parts, sectors or segments within that domestic industry, so long as the examination was done in an objective manner, either by examining all other parts as well, or explaining why it is not necessary to do so).

[5466] US, FWS, para. 803, where, citing the geographic market definition used by the European Commission in its 1997 clearance Decision regarding the merger between McDonald Douglas and Boeing, *i.e.*, the world market, Exhibit US-375, para. 20, the United States asserts that "{i}n the context of this case, the world market is the appropriate market for measuring the price effects of the Airbus subsidies"; EC, FWS, paras. 1726-1758, 1798-1819, 1999-2023 and 2077-2086

[5467] US, FWS, paras. 804-809.

[5468] US Comment on EC, Answer to Panel Question 213.

[5469] US Comment on EC, Answer to Panel Question 213; US, Answer to Panel Question 237; US, Comments on Appellate Body Report in *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 14-16.

[5470] US, FWS, para. 805, Exhibit US-612 (BCI) (Figure 4, reproduced above).

[5471] US, FWS, para. 805; US, SWS, para. 726, Exhibit US-612 (BCI) (Figure 4).

[5472] US, FWS, para. 805.

BCI deleted, as indicated **[***]**

According to the United States, these adjustments to order prices demonstrate the price depressing effects of Airbus pricing practices, showing significant decreases over three years. The United States explains that the PPI increased by 21.19% from 2001 to 2006, reflecting, in its view, a **[***]**% price decline for the 737NG and therefore both significant price suppression and price depression.[5473]

Chart 12: Boeing 767, Average Indexed Order Prices compared with PPI (2001-2006)

[***]

7.1849 With respect to Boeing 767 prices, the United States alleges a similar trend, with order prices **[***]** by 2002. However, prices **[***]**. Again, the United States asserts that the increase in the PPI shows an inflation-adjusted decline of **[***]**% over the period 2001-2006, demonstrating the significant price suppression and price depression experienced by Boeing over the relevant period.[5474]

Chart 13: Boeing 747, Average Indexed Order Prices compared with PPI (2001-2006)

[***]

7.1850 The United States submits that the above chart shows that the price for the Boeing 747 declined over the relevant period, **[***]**.[5475] Again, the United States notes that these prices did not keep up with inflation as represented by the PPI, declining by more than **[***]**% by the end of the period, thereby demonstrating both significant price suppression and price depression.[5476]

Chart 14: Boeing 777, Average Indexed Order Prices compared with PPI (2001-2006)

[***]

7.1851 Finally, with respect to the 777, the United States argues that a different pattern emerges, with **[***]**.[5477] The United States attributes the increase in prices for the 777 in 2005 and 2006 to the effect of rising fuel prices on the competitiveness of the Airbus A340, which has four engines compared with twin-engine 777.[5478]

7.1852 The United States contends that, overall, the data concerning world market prices shows that Boeing LCA prices have declined, or at best have failed to keep pace with increased costs as represented by increases in the PPI. In the United States' view, this is evidence of significant price depression and price suppression within the meaning of Article 6.3(c) of the SCM Agreement.

7.1853 The European Communities does not dispute the pricing information presented by the United States. Instead, the European Communities argues, *inter alia*, on the basis of its calculation of per-aircraft subsidy amounts for each family of Airbus LCA, that the subsidies were too old, too small, and not of a nature which would make it possible for them to have caused the price effects

[5473] US, SWS, para. 726; US, Answer to Panel Questions 55 and 237; US Comment on EC, Answer to Panel Question 213.
[5474] US, FWS, para. 807; US, SWS, para. 726, Exhibit US-612(BCI) (Figure 5, reproduced above); US, Answer to Panel Questions 55 and 237; US Comment on EC, Answer to Panel Question 213.
[5475] US, FWS, para. 807, US, SWS, para. 726, Exhibit US-612 (BCI) (Figure 6, reproduced above); US, Answer to Panel Questions 55 and 237; US Comment on EC, Answer to Panel Question 213.
[5476] US, SWS, para. 726, (Figure 6); US, Answer to Panel Questions 55 and 237; US Comment on EC, Answer to Panel Question 213.
[5477] US, FWS, para. 808, US, SWS, para. 727, Exhibit US-612(BCI) (figure 7, reproduced above).
[5478] US, SWS, paras. 727-729.

BCI deleted, as indicated **[***]**

observed.[5479] We will address the European Communities' arguments with respect to causation later in this Report.

7.1854 Turning first to the question whether the United States has established that there was significant price depression over the relevant period, we recall that price depression is the situation where prices are observed to fall. As the Appellate Body noted in *US – Upland Cotton (Article 21.5)*, price depression is a phenomenon that may be directly observed. Moreover, we recall that significant price depression must be price depression that is "important, notable ... consequential".[5480] On the basis of the data contained in the above charts, we consider that the United States has demonstrated the existence of significant price depression in the world price of three of the four Boeing LCA models over the period 2001 to 2006. However, we are not convinced that significant price depression is demonstrated in the case of world prices for the Boeing 777 over the same period. In only one of five years did prices for this model of LCA decline. In all other years, prices increased roughly in line with the changes in the PPI, with the exception of 2006 when prices rose by significantly more, leaving them at approximately the same level as the PPI.

7.1855 We note that sales of the Boeing 777 represented only a small proportion of Boeing's overall LCA sales over the reference period.[5481] Thus, the data in the pricing charts demonstrate that Boeing experienced significant price depression with respect to the vast majority of its sales of LCA. We therefore conclude that, overall, the United States has demonstrated significant price depression in the world price of Boeing LCA over the years 2001 to 2006.

7.1856 As regards significant price suppression, the European Communities asserts that the United States' Aircraft Manufacturers' PPI is not a reliable measure of the cost increases faced by Boeing, and that the failure of prices of certain aircraft to increase commensurate with that index is completely irrelevant to the question whether there was significant price suppression in the relevant period.[5482] According to the European Communities, the PPI is a theoretical construct that takes only United States' labour and materials costs into account, and thus provides little information about Boeing's actual manufacturing costs.[5483] Moreover, the European Communities alleges that Boeing has introduced a number of cost-cutting and restructuring measures over the past decade, including increased reliance on suppliers to assume a greater role in LCA production and outsourcing, resulting in reduced costs of manufacturing. The European Communities also contends that Boeing has been able to take advantage of learning curve effects that have likewise reduced Boeing's manufacturing costs.[5484]

7.1857 The European Communities suggests that the appropriate measure for assessing inflation in Boeing's costs is Boeing's operating margin, which is a function of actual costs and revenue, such that an increased operating margin means costs are decreasing, or revenues are increasing (reflecting price increases) or both.[5485] The European Communities points to evidence it argues shows that Boeing's operating margins increased in 2006 and were expected to increase in 2007 and 2008, including a statement made by Boeing's Chief Financial Officer in April 2007, noting that Boeing's operating margins resulted from "a combination of both better pricing as it stabilizes today and … also our

[5479] EC, FWS, paras. 1726-1758, 1798-1819, 1999-2023 and 2077-2086; EC, SWS, paras. 1148-1161, 1166-1174.

[5480] *See*, discussion of the term "significant" at paragraphs 7.1795 and 7.1796 above.

[5481] On the basis of the data presented in Exhibit EC-21, orders of the Boeing 777 accounted for less than 15% of Boeing's total LCA orders between 2001 and 2006. We understand that the 777 prices are higher than 737 prices, but there is no information before us that would suggest that this difference is of a magnitude that would undermine our overall conclusion.

[5482] EC, Answer to Panel Question 213.

[5483] EC, Answer to Panel Question 213.

[5484] EC, Answer to Panel Question 213.

[5485] EC, Answer to Panel Question 213.

productivity efforts".[5486] Thus, the European Communities does not consider that, as a matter of fact, prices for Boeing's LCA have not increased in line with inflation, stating that "not only are Boeing's prices increasing, but its costs are also decreasing".[5487]

7.1858 The United States argues that the ratio of operating profits to costs can be expected to vary with the volume of units sold, entirely apart from any underlying changes to price levels. Thus, according to the United States, trends in actual operating margins, considered without reference to changes in the volume of deliveries over the relevant period, say nothing about price levels that might be expected in the absence of external price-suppressing factors.[5488] Moreover, referring to various passages of a June 2005 press report submitted by the European Communities as Exhibit EC-926, the United States explains that "price escalation" clauses – by which order prices in LCA sales contracts are indexed to inflation to derive the actual price to be paid for LCA at delivery – are driven by the same factors that constitute the PPI, namely, changes in United States' aerospace industry labour and materials costs. Indeed, the United States notes that the same press report indicates that the typical price escalation clause applied by Airbus in its contracts is based on "U.S. labor costs in the aerospace industry, energy costs and costs of materials".[5489] Similarly, the United States points to the following passage in a statement by Mr. Rod P. Muddle, an "expert in the acquisition of large civil aircraft", which the European Communities introduced as Exhibit EC-19:

> "LCA prices are often negotiated several years prior to delivery. Manufacturers make allowance for this with a price adjustment according to date of delivery. The price to be paid at delivery depends on annual increases, or 'escalation', of the list price of the LCA, to which all additions and subtractions are applied. Airbus and Boeing have different escalation formulae. The formula are derived from changes in aerospace industry costs of material and labor".[5490]

Finally, the United States argues that the press report submitted by the European Communities in Exhibit EC-926 provides further support for the significant price suppression and price depression it alleges can be observed during the relevant period because it explains how customers ordering LCA between 1995 and 2000 were, as a result of escalation clauses, paying more for their LCA delivered subsequently than were customers who placed orders after this period, due to the fact that order prices had not risen or even decreased in the years covered by the relevant reference period.[5491]

7.1859 We agree with the United States that, as a general matter, one would expect that in any manufacturing industry, all else being equal, prices would tend to increase when production costs increase. The evidence before us suggests that this is also expected in the LCA industry. In particular, both Boeing and Airbus typically try to ensure that the final price paid by a customer for an LCA delivered some years after the date it was ordered keeps pace with any increases in the costs of manufacturing over the intervening period by including a "price escalation" clause in their sales contracts. However, rather than tracking their own *actual* costs of manufacturing as the basis for calculating final delivery prices, the price escalation formulae used by the two companies appear to be derived from data that approximates those costs on a more general basis. This is evident from the press report the European Communities has submitted as well as the description of how LCA are priced provided by the European Communities' expert, Mr. Rod P. Muddle. Indeed, both sources indicate that the price escalation formulae of Boeing and Airbus are closely related to changes in

[5486] EC, Answer to Panel Question 213, citing Exhibit EC-793.
[5487] EC, Answer to Panel Question 213.
[5488] US Comment on EC, Answer to Panel Question 213.
[5489] US Comment on EC, Answer to Panel Question 213, referring to information contained in Exhibit EC-926.
[5490] Exhibit EC-19, para. 55, quoted in US, Answer to Panel Question 237.
[5491] US, Answer to Panel Question 237, referring to Exhibit EC-926.

BCI deleted, as indicated **[***]**

United States' "aerospace industry costs of material and labor". In other words, the evidence before us shows that the "price escalation" clauses used by both Boeing and Airbus typically index LCA prices to a proxy for cost inflation that is based, in major part, on the same factors that go into calculating the PPI.[5492] Thus, we are satisfied that the PPI represents a reasonable proxy for cost inflation that both Boeing and Airbus would normally try to take into account in the pricing of their LCA.[5493] It follows that the PPI may be used as a reasonable benchmark for the price trends and levels that would have been expected over the reference period. Therefore, the existence of price suppression in world market prices for Boeing LCA may be directly observed on the basis of a comparison of trends in actual indexed prices with the PPI.

7.1860 Comparing the PPI in each chart with the prices of Boeing LCA, there was clearly a degree of price suppression in respect of world market prices for each of the four Boeing LCA models. However, we consider the evidence to show **significant** price suppression in respect of prices for only the 737, 767 and 747. With respect to 777, the price suppression seen reflects a price decline that occurred in only one year (2004). In three of the four other years (2002, 2003 and 2006), the increase in indexed price levels experienced by the Boeing 777 was greater, in proportionate terms, than the PPI increases. Prices of the Boeing 777 also increased in 2005 at almost the same rate as the PPI. Thus, we do not consider the United States to have demonstrated significant price suppression over the relevant period for this model of Boeing LCA.

7.1861 Again, we recall that sales of the Boeing 777 represented only a small proportion of Boeing's overall LCA sales over the reference period.[5494] Thus, we conclude that the evidence before us demonstrates that Boeing experienced significant price suppression with respect to the vast majority of its sales of LCA. We therefore conclude that, overall, the United States has demonstrated significant suppression in the world price for Boeing LCA over the years 2001 to 2006.

7.1862 Having concluded that the United States has demonstrated that, overall, Boeing experienced significant price depression and price suppression over the relevant period, we note that in respect of both phenomena, a large proportion of the absolute and relative price declines took place in 2002, coinciding with the deep industry downturn that followed the events of 9/11. We see this as an issue relevant to the question of causation, that is, whether the significant price depression and suppression we have observed was caused by the subsidies. It is to the question of causation, that is, whether the market effects alleged to demonstrate serious prejudice that have been demonstrated to have occurred during the period we examined are the effect of the specific subsidies to Airbus that we have found, that we now turn our attention.

[5492] US, FWS, para. 742, US comment on EC, Answer to Panel question 213, para. 303.

[5493] One of the reasons why the European Communities considers the PPI to be irrelevant to the question of price suppression is the fact that Boeing allegedly outsources much of its LCA production to suppliers outside of the United States. EC, Answer to Panel question 213. However, we note that in making this point, the European Communities refers only to the manufacture of components for the Boeing 787, which was not yet in commercial production during the relevant period. *Id.* Moreover, even granting that a significant portion of current 787 component manufacture takes place outside of the United States, in our view, the European Communities' argument does not undermine the relevance of the PPI to the question of cost inflation in the LCA industry overall during the period we are considering.

[5494] *See*, footnote 5481 above.

BCI deleted, as indicated **[***]**

(e) Whether Subsidies Are the Cause of the Observed Market Effects

(i) Arguments of the United States

7.1863 The United States argues that LA/MSF distorts competition in the market for LCA in at least two ways.[5495] First, the United States argues that LA/MSF shifts some of the commercial risk of LCA launch decisions from Airbus to the Airbus governments, France, Germany, Spain and the United Kingdom, allowing Airbus to launch aircraft models that, in the absence of LA/MSF, it would not have launched. Second, the United States asserts that LA/MSF provides Airbus with significant additional cash flow and other financial resources on non-market terms which allows Airbus to price its aircraft more aggressively than it would otherwise be able to without LA/MSF. According to the United States, the other subsidies it has challenged in this dispute have essentially the same effects, because like LA/MSF, they also shift costs of LCA development from Airbus to the Airbus governments.[5496] Thus, the United States argues that the effect of the subsidies granted to Airbus has been to enable Airbus to launch new LCA, and thereby to increase its market share, especially during the period 2001 to 2006, to the detriment of the United States LCA industry, causing serious prejudice to the United States' interests within the meaning of Articles 6.3(a), (b) and (c).

7.1864 The United States submits that in the absence of LA/MSF, and all of the other subsidies at issue in this dispute, Airbus would have, at best, fewer and different LCA models available to sell in the global LCA market. The United States argues that even if it is assumed that Airbus would exist in the absence of LA/MSF, its entry into the various segments of the LCA market would have occurred at a later date, and with different aircraft. In this respect the United States asserts:

> "even if Airbus would have entered a particular LCA market segment at some other time with a different aircraft (in terms of technical capabilities, specifications, and other characteristics), the effect on the U.S. LCA industry would have been different. That Airbus enters a market segment at a time and in a way that it can only do because of subsidies cannot but have a distorting impact on the market."[5497]

7.1865 In support of its claim that subsidies have "facilitated and accelerated the introduction of every major Airbus model"[5498] the United States relies principally on two types of evidence. The first is public statements made by both Airbus and Airbus government officials. The United States asserts that these statements demonstrate not only that Airbus has depended on subsidies in order to be able to bring its aircraft to market, but also that those subsidies were designed to target United States' products and producers and thereby gain market share for Airbus.[5499] The second is a report prepared by Dr. Gary J. Dorman of NERA Economic Consulting.[5500] The Dorman Report presents a simulation of a business case for a "typical" wide body aircraft, and purports to demonstrate, on the basis of the simulation, the impact of LA/MSF type measures on the economics of an LCA launch decision. According to the United States, the Dorman Report demonstrates how LA/MSF shifts risk to the Airbus governments, thereby making the "very fact of launch more likely".[5501]

[5495] The United States suggests that there may be other forms of market distortion. However, as the United States did not provide any evidence or arguments with respect to such "other" forms of alleged market distortion, our analysis is limited to the two aspects of market distortion that are the subject of the evidence and arguments presented by the United States.

[5496] US, FWS, para. 819.

[5497] US, SWS, para. 572.

[5498] US, FWS, para. 830.

[5499] US, FWS, paras. 829-838.

[5500] Dorman Report, Exhibit US-70 (BCI).

[5501] US, FCOS, para. 141.

BCI deleted, as indicated **[***]**

7.1866 The United States also asserts that LA/MSF, together with the other subsidies at issue in this dispute, have directly and indirectly lowered Airbus' marginal cost of capital, which allows Airbus to meet profitability targets while reducing prices. The United States argues that LA/MSF, by reducing the cost of capital in the initial years of an aircraft project, allows Airbus to be more flexible in the pricing of all of its LCA during that period while, at the same time, maintaining a rapid pace of development.[5502] In support of its arguments concerning the pricing effect of LA/MSF, the United States relies upon, *inter alia*, statements in the 2005 Airbus Annual Review, which it alleges indicate that market share was more important to Airbus than profitability.[5503] It also refers to certain documents produced by Moody's credit rating agency, which allegedly demonstrate that LA/MSF results in Airbus' parent company EADS having a more favourable credit rating than would otherwise be the case, as well as a 2007 Deutsche Bank report, which indicates that LA/MSF accounted for nearly half of EADS' net "free cash flow".[5504] The United States also relies upon the explanation of the **[***]** mechanism provided by the Executive Vice President of Airbus, Christian Scherer, in a statement prepared for the purposes of this dispute settlement proceeding.[5505]

7.1867 While the United States maintains that there is no obligation on it to quantify the benefit of the subsidies at issue, it presents as evidence of the magnitude of the subsidies a report prepared by NERA Economic Consulting, which calculates the total benefit of LA/MSF in terms of its impact on the present financial condition of Airbus as of year end 2006 at between USD 92.5 billion and USD 178.2 billion.[5506] It also argues that irrespective of the methodology used to calculate benefit, the costs associated with equivalent financing on commercial terms would have been impossible for Airbus to meet.[5507]

7.1868 Thus, in essence, the United States argues that in the absence of the challenged subsidies, Airbus would have fewer and different LCA models and could not price the ones it has so aggressively. According to the United States, this is the market distorting impact of the subsidies that are at issue in this dispute. Drawing on this view, the United States posits a counterfactual in which the "U.S. LCA Industry would produce and sell more aircraft at higher prices than it does in the face of subsidized competition".[5508] While the United States provides evidence and arguments in respect of each of the forms of serious prejudice set out in Article 6.3(a)-(c), these alleged market distortions and their alleged impact on LCA development and prices are at the heart of the United States' serious prejudice claims. As such, the United States argues that each form of serious prejudice alleged flows directly from the market distorting impact of the subsidies.[5509]

(ii) Arguments of the European Communities

7.1869 The European Communities submits that the United States cannot demonstrate that the various Airbus LCA programmes would not have been launched without LA/MSF. In respect of the A380, A340-500/600 and the A330-200 the European Communities has provided internal documents, the Airbus business cases**,** as evidence in support of its position. The European Communities asserts that the Airbus business cases demonstrate that all post-1992 launches of Airbus LCA would have occurred without LA/MSF.[5510] The European Communities also notes that neither the German nor UK governments provided any LA/MSF to Dasa or British Aerospace in respect of the A340-500/600,

[5502] US, SWS, para. 595.
[5503] Airbus Annual Review 2005, Exhibit US-441
[5504] Deutsche Bank, EADS: Risks Mispriced – Downgrade to Sell. Jan 9, 2007, at 7, Exhibit US-459.
[5505] Statement of Christian Scherer, Exhibit EC-14, paras. 105-106.
[5506] NERA Economic Consulting, *Quantification of Benefit of Launch Aid* (24 May 2007), Exhibit US-606.
[5507] US, SWS, para. 612.
[5508] US, FCOS, para.131.
[5509] US, FCOS, para. 170.
[5510] EC, SWS, paras. 763-795.

yet both of these entities participated in the project. According to the European Communities, in the absence of LA/MSF in the case of each of these aircraft launches, Airbus would have availed itself of higher levels of supplier risk financing.

7.1870 Concerning LA/MSF and the launch of the A300, A310, A320, A330 and A340 aircraft, the European Communities stresses that these measures were provided between 20 and 37 years ago, and argues that it is "wholly speculative" to assume "what Boeing's present prices, sales and market share would be, but for MSF loans tied to these products."[5511]

7.1871 The European Communities submitted a critique of the Dorman Report prepared by Professor Paul Wachtel of New York University's Stern School of Business.[5512] Relying on that report, as well as on an internal Airbus analysis of the Dorman simulation,[5513] the European Communities argues that the Dorman simulation uses unrealistic parameters in order to manufacture the conclusion that no Airbus LCA would have been launched without LA/MSF. The European Communities also asserts that the Dorman Report is based on an incorrect premise, *i.e.*, that the LCA market is a natural monopoly, such that if Airbus did not exist Boeing would face no competition from any other LCA manufacturer. The European Communities argues that absent Airbus there would be "very active" competition in higher volume LCA markets, *i.e.*, single-aisle, 200-300 seat, and 300-400 seat.[5514]

7.1872 The European Communities further argues that, even assuming that the alleged subsidies provided a competitive advantage to Airbus at the time of the launch of the A300, A310, A320, A330 and A340, that competitive advantage was short-lived and intervening events have "attenuated the causal link between the subsidies themselves and the adverse effects that the United States alleges resulted from the competitive harm."[5515] According to the European Communities, a key causation question in assessing the existence of present adverse effects is how long the competitive advantage flowing from subsidies lasts.[5516] The European Communities asserts that any generalized competitive and subsidized advantage secured by the launch of any Airbus LCA was relatively short-lived. Thus, the European Communities argues that even if the United States could prove that LA/MSF enabled Airbus to achieve a technological advantage with any given models of LCA, any such advantage would be fleeting. The European Communities argues that a rival manufacturer is normally capable of launching a competing aircraft with comparable or improved technology and bring it to market within approximately five years, thus eliminating any advantage enabled by the subsidy, or even turning it into a disadvantage.[5517] Further, the European Communities contends that if subsidies are used to create a product that creates its own demand and does *not* compete with any other product, then the effect of such subsidies may never become strong enough to cause adverse effects.[5518] Finally, according to the European Communities, since the subsidy element of LA/MSF does not

[5511] EC, SWS, para. 762.

[5512] Wachtel Report, Exhibit EC-12. A supplemental report prepared by Professor Wachtel was also submitted by the European Communities, *Clarification of Critique of "The Effect of Launch Aid on the Economics of Commercial Airline Programs" by Gary J. Dorman*, 20 May 2007 ("Wachtel Report (Clarification)"), Exhibit EC-659.

[5513] Declaration by Francisco-Javier Riaza Carballo, Vice President A380 Business, Attachment 1, Exhibit EC-665 (HSBI)(hereinafter "Carballo Declaration").

[5514] EC, SWS, para. 867. The European Communities' arguments in this regard are premised on its view that there are multiple subsidized products at issue in this dispute, which compete in separate markets with United States' like products. We recall that we have rejected the European Communities' position in this regard, and are considering adverse effects on the basis of a single subsidized product, all Airbus LCA, and a single corresponding like product, Boeing LCA. *See*, para. 7.1680 above.

[5515] EC, SWS, para. 879.

[5516] EC, FWS, para. 2291.

[5517] EC, FWS, para. 1652, referring to Declaration of Andrew Gordon, 31 January 2001, para. 19, Exhibit EC-16 (BCI), para. 2272, EC, SWS, para. 873.

[5518] EC, FWS, para. 2291.

BCI deleted, as indicated **[***]**

reduce recurring costs, any competitive advantage in the marketplace, and hence any potential adverse effects, are extinguished. In addition, the European Communities argues that other factors – such as rising fuel prices – may further reduce the effect of a subsidy over time.

7.1873 In keeping with its assertion of separate and distinct subsidized and like products, the European Communities argues that any serious prejudice caused by subsidies to the A320 family LCA has been diminished by (a) the intervening launches of the Boeing 737NG family LCA and (b) Boeing's abandonment of LCA offered at the time of the A320 series launches, as well as present unmet demand for Boeing 737NG LCA.[5519] With respect to alleged serious prejudice caused by subsidies to the A300/A310, the A330-300, and the A330-200 LCA, the European Communities asserts that the causal link between the launch of those Airbus LCA and the alleged competitive harms is eliminated by (a) the subsequent launches of 767 and especially 787 family LCA, (b) Airbus' abandonment of the A300 and A310 families, and (c) the competitive effect of the 787 on the older 767.[5520] With respect to the A340-200/300 and A340-500/600, the European Communities argues that the causal link between the launch of those Airbus LCA and the alleged competitive harms to the Boeing 777 is attenuated or broken by (a) the later launches of highly successful variants of the Boeing 777, (b) the displacement of the A340 "basic" models which could no longer compete with the technologically superior 777, (c) **[***]**, and (d) the enormous unmet demand and delivery backlog for the 777 series.[5521] Finally, the European Communities argues that the 1997 merger between Boeing and McDonnell Douglas increased Boeing's resources and market power, diminishing any competitive advantage enjoyed by Airbus due to pre-1997 LCA launches.[5522]

7.1874 The European Communities asserts that a consideration of the magnitude of the benefit of the alleged subsidies is necessary in order to consider the United States' claims of adverse effects, and argues that in order to assess the United States' serious prejudice claims the present per-aircraft amount of the alleged subsidies must be determined.[5523] The European Communities, relying in principal part on its understanding of United States' law and regulations governing the calculation and allocation of subsidy amounts in countervailing duty investigations, calculates a per-aircraft amount of subsidization with respect to LA/MSF and R&TD support for fulfilled orders of different models of Airbus LCA in any given year.[5524] According to the European Communities, the results show that the magnitude of the subsidy is very small on a per-aircraft basis, and simply too small to have caused the adverse effects alleged by the United States.

7.1875 The European Communities also argues that the benefit of LA/MSF is limited to the amount of the difference between the LA/MSF interest rates and the respective market interest rate benchmarks. Accordingly, the European Communities argues that any enhanced credit rating resulting from LA/MSF is captured by this difference as "the market benchmark rates derived from the Airbus risk-sharing suppliers presumptively capture all benefits following from this financing, including the reduction in project risk that enhances the credit rating".[5525] Regarding the alleged "free cash flow" effect of LA/MSF the European Communities argues that in the period between 1996 and 2006 LA/MSF had a slight negative effect on Airbus cash flows, and that even if cash flow were an appropriate measure or determining factor in considering aircraft pricing, which the European

[5519] EC, SWS, para. 881.
[5520] EC, SWS, para. 888.
[5521] EC, SWS, para. 895.
[5522] EC, SWS, paras. 908-911.
[5523] EC, FWS, paras. 1569-71.
[5524] EC, FWS, paras. 1586-1634, ITR Report, Exhibit EC-13 (BCI/HSBI). The United States did not endorse the benefit calculation and allocation methodologies relied on by the European Communities, considering them to contain errors at direct variance with the CVD methodologies used by the United States and the European Communities itself. US, Answer to Panel Question 42, para. 250, footnote 313.
[5525] EC, SWS, para. 1039.

BCI deleted, as indicated **[***]**

Communities claims it is not, the cash flow benefits associated with the LA/MSF would be *de minimis*.[5526]

(iii) Evaluation by the Panel

7.1876 We recall that in the previous section of this Report, we concluded that the evidence before us demonstrates that, during the period 2001 to 2006, United States' LCA were displaced by Airbus LCA from the EC LCA market and from certain third country LCA markets.[5527] In addition, we found that the United States had shown that Boeing lost a number of LCA sales to Airbus, and that, overall, there was significant depression and suppression in LCA world market prices between 2001 and 2006.[5528] Consistent with the two-step approach we have decided to adopt for the purpose of evaluating the United States' claims of serious prejudice,[5529] we next turn to examine whether the United States has demonstrated that the particular market phenomena observed over the period 2001 to 2006 were caused by the specific subsidies we have found were provided to Airbus.

7.1877 The United States has advanced two lines of argument in respect of causation focussed on the alleged impact of LA/MSF and the other subsidies on: (i) Airbus' ability to launch and bring to the market models of LCA that the United States submits would not otherwise have been possible at the time and in the way that it did without the support of those subsidies; and (ii) the level of Airbus' cash-flow and other financial resources during the period between launch investment and the recovery of that investment, which the United States submits enabled Airbus to price aggressively and build long-term market share.[5530] For convenience, we refer to the United States' respective arguments as the "product" and "pricing" theories of causation.[5531] Below we examine the merits of each of the two theories in turn, starting with the United States' "product" theory.

7.1878 Before doing so, however, we recall and describe briefly the five types of measures we have found constitute specific subsidies to Airbus with respect to LCA in this dispute:

(a) LA/MSF: LA/MSF consists of loans provided on non-commercial terms to Airbus from 1969 to 2000 by the governments of France, Germany, Spain and the United Kingdom for the purpose of financing differing proportions of the development costs of Airbus' family of large civil aircraft;

(b) Infrastructure measures: the governments of France, Germany and Spain funded some or all of the costs of development, expansion, and upgrading of infrastructure and Airbus facilities in connection with LCA production, including the development and provision of the Mühlenberger Loch site by German authorities on non-commercial terms, the extension and use on non-commercial terms of the runway at Bremen Airport by German authorities, the development and provision by French authorities of the ZAC Aéroconstellation site and associated EIG facilities on non-commercial terms, and regional grants by German authorities in Nordenham, and by Spanish authorities in Sevilla, La Rinconada, Toledo, Puerto de Santa Maria and Puerto Real, for Airbus LCA facilities;

[5526] EC, SWS, 1058-1063; International Trade Resources LLC, *"Cash Flow Effect of member State Financing"*, 20 May 2007, Exhibit EC-661, (BCI/HSBI), Tables 1-2.
[5527] *See*, paras. 7.1758 and 7.1790 - 7.1791 above.
[5528] *See*, paras. 7.1855 and 7.1861 above.
[5529] *See*, para. 7.1731 above.
[5530] US, SWS, paras. 556, 560.
[5531] We emphasize, however, that these are our short-hand references, and we note that there is not always a clear distinction between the two types of argument.

BCI deleted, as indicated **[***]**

(c) German government share transfers: the German government, through KfW, provided capital on non-commercial terms to Deutsche Airbus by acquiring, in 1989, a 20 percent equity interest in Deutsche Airbus, and subsequently transferring that interest to MBB in 1992;

(d) French government equity infusions: the French government provided equity infusions in 1987, 1988, 1992 and 1994, and in 1998, transferred a share of its capital investment in Dassault Aviation to Aérospatiale on non-commercial terms; and

(e) R&TD funding: the European Communities, the governments of France, Germany, Spain, the United Kingdom, and certain sub-federal German government authorities provided grants, and some loans on non-commercial terms, to Airbus to fund research and technological development efforts in connection with the development of Airbus LCA.

The United States' "Product" Theory of Causation

LA/MSF

7.1879 The United States argues that LA/MSF "shifts much of the commercial risk of LCA launch decisions from Airbus to the Airbus governments, thereby causing Airbus to launch aircraft models that in the absence of the subsidy would not have been launched".[5532] The United States argues that LA/MSF has been fundamental to the development of Airbus as a producer of aircraft, as it was a necessary component of the launch of every Airbus model since the initial launch, in 1969, of the A300. The United States does not consider that its arguments depend on finding that, in the absence of LA/MSF, Airbus would not exist. Rather, the United States argues that in the absence of LA/MSF Airbus would not have been in a position to develop the aircraft it did when it did. For the United States, market distortion and adverse effects flow directly from Airbus' entry at a particular time with a particular aircraft, which in the United States' view would not have been possible but for the subsidies.[5533]

7.1880 The United States relies upon essentially two types of evidence to demonstrate that the impact of the LA/MSF provided to Airbus since 1969 was to enable Airbus to launch and develop the aircraft it did when it did and thereby cause present serious prejudice to the United States' interests. In particular, the United States relies upon: (i) a series of public statements and one State Aid Decision of the European Commission revealing the views held by various officials from Airbus and other relevant public bodies on the impact of LA/MSF on the ability of Airbus to launch LCA; and (ii) the Dorman Report, which purports to demonstrate the impact of LA/MSF-type measures on the decision to launch an LCA. In the following sections, we describe and examine each of the two types of evidence the United States relies upon, in light of the parties' arguments, making certain initial conclusions on the extent to which they support the United States' position. However, before doing so, we believe it is useful to briefly recall the salient features of LA/MSF and how it operates.

7.1881 We recall that the type of financing we have denominated LA/MSF in this dispute, and found constitutes specific subsidies to Airbus, consists of loans on non-commercial terms provided to Airbus from 1969 to 2000 by the governments of France, Germany, Spain and the United Kingdom. Each LA/MSF loan we have found to constitute a specific subsidy takes the form of a long-term, unsecured loan at a below-market rate of interest with success-dependent and generally graduated repayment terms. The success-dependent nature of the loans means that Airbus' repayment obligations arise only

[5532] US, SWS, para. 560.

[5533] The United States makes this central argument in a variety of ways throughout its submissions. E.g., US, FWS, paras. 78, 810, US, FNCOS, para. 131 and US, SWS, para. 571.

BCI deleted, as indicated **[***]**

after it has successfully developed and begins selling the financed aircraft. Once repayment begins, it occurs through a levy on each delivery of financed aircraft and is generally graduated on an ascending scale, meaning that repayments on the first aircraft deliveries are lower than repayments on later deliveries. Should Airbus fail to sell enough of the financed aircraft to repay the entire loan, the government lenders have no contractual right to the outstanding balances. The nature of this financing shifts a portion of the commercial and financial risks of developing new models of LCA to the governments providing the LA/MSF. 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. Other features of LA/MSF that affect the degree of risk-shifting include the degree to which repayment is back-loaded and/or graduated and the assumptions concerning sales forecasts used as a basis for the repayment schedule. The questions addressed in the Dorman Report, and the parties' arguments, focus on the mechanics of the risk-shifting element of LA/MSF-type financing, and whether and the extent to which the provision of LA/MSF affects the behaviour of the recipient with respect to the decision whether to launch a particular LCA programme.

The Dorman Report

7.1882 The Dorman Report simulates the impact of LA/MSF-type financing measures on a decision to launch an LCA – that is, the decision to undertake the development of a particular model of aircraft. The Dorman Report simulates cash-flows generated by a hypothetical wide-body airplane programme under a variety of LA/MSF contribution, price, production and cost scenarios. Cash flows are forecast over a 20 year period and discounted in order to derive an overall programme net present value ("NPV"). The Dorman simulation is based on certain key assumptions, principally:

(a) 850 deliveries of LCA over a 20 year period, with the first delivery taking place at the end of year five (the end of the development phase);

(b) an annual discount rate of 10%; and

(c) development costs of $10 billion and forecast recurring costs that decline over time.[5534]

Six different LA/MSF programme examples are considered, patterned after: (i) the UK A320 LA/MSF "package"; (ii) the Spanish A380 LA/MSF "package"; (iii) an interest-free version of the Spanish A380 LA/MSF "package"; (iv) the French A380 LA/MSF "package"; (v) the French A340-500/600 LA/MSF "package"; and (vi) and the French A330-200 LA/MSF "package".[5535] Each of

[5534] Exhibit US-70 (BCI), pp. 3 and 4.

[5535] The Dorman Report explains the six packages in the following terms: the UK A320 "package" and the Spanish A380 "package", "are patterned after actual development funding by the British government for the A320 ... and by the Spanish government for the A380. In both cases, the model's disbursement pattern and the imputed interest rate mirror actual experience." "In the model, the share of total launch aid received in each year mirrors the actual disbursement streams in the real-world examples". The "interest-free version of the Spanish A380 package was included as a third alternative" in order to "examine the financial effects of an interest-free loan package". The "three launch aid packages provided by the French government were" "derived from documents examined as BCI". The Dorman Report notes that "{a}ll examples were selected primarily on the basis of availability of information. In general, the details of actual launch aid packages are difficult to obtain, despite the fact that these are publicly funded programs. These programs were modelled as accurately as possible given the available data, but small discrepancies may result from their lack of transparency." Dorman Report, Exhibit US-70 (BCI) pp. 4-5, footnotes 11-13.

BCI deleted, as indicated **[***]**

these programmes is examined under three alternative repayment schedules.[5536] A total of 54 different scenarios are modelled, with each grant of LA/MSF considered to provide funding of either 33.33%, 66.66% or 100% of development costs, which are to be repaid as aircraft are delivered.

7.1883 In order to demonstrate the alleged impact of LA/MSF, the net present value ("NPV") of a base case scenario is calculated (*i.e.*, the NPV of the modelled programme without LA/MSF). The Dorman simulation generates positive returns in the base case (*i.e.*, a NPV of USD 1.35 billion). The base case assumes that production, cost and pricing levels will be as forecast. However, relatively small variations to the forecasts give rise to uneconomic results. Thus, the Dorman Report predicts that if actual production in the base case is only 90% of forecast production, there will be negative returns (negative USD 3 million) in the absence of LA/MSF. Similarly, a decrease in forecast prices of 5% also results in negative returns (negative USD 191 million). Combining a 5 percent decrease in forecast prices with a 5% increase in recurring costs, the model predicts that negative returns will be even larger (negative USD 1.342 billion).

7.1884 The predicted impact of LA/MSF varies depending upon the particular repayment schedule applied, and the percentage of development cost funded by the particular LA/MSF programme. The NPV effect of LA/MSF is, not surprisingly, higher where such funding accounts for 100 percent of development costs than when such funding accounts for 33 percent of development costs. However, as shown in the Table reproduced below, the results of the Dorman simulation predict that the provision of LA/MSF will have a significant impact on the NPV of the modelled programme in each and every case. Thus, where base case forecasts for prices and costs are met, NPV increases if LA/MSF is provided. Similarly, where production levels and prices are lower than the base case, either a positive NPV is generated with LA/MSF as compared to the result without LA/MSF, or, where a negative NPV results with or without LA/MSF, the resulting losses are lower with LA/MSF than without LA/MSF. These results are set forth in Table 3 of the Dorman Report, which we reproduce below as Table 41.[5537]

[5536] The three scenarios are: level repayment (equal per-aircraft payments set on the basis of forecast deliveries); graduated repayment (increasing per-aircraft payments); and delayed level repayment (equal per-aircraft payments starting with the 60th airplane delivery). Dorman Report, Exhibit US-70 (BCI), p. 5.

[5537] Dorman Report, Exhibit US-70 (BCI).

TABLE 41

Launch Aid Impact on Programme Risk
Example of Launch Aid's Increased Incremental Value at Lower Production Levels

		No Launch Aid			With Launch Aid*			Incremental Value of Launch Aid		
	Recurring cost levels:	Expected	5% higher	10% higher	Expected	5% higher	10% higher	Expected	5% higher	10% higher
					($ millions)					
		(a)	(b)	(c)	(d)	(e)	(f)	{(d)-(a)} (g)	{(e)-(b)} (h)	{(f)-(c)} (i)
	Actual production levels:									
(1)	@100 % of expected production levels	$1,350	$199	($952)	2,386	1,235	84	$1,036	$1,036	$1,036
(2)	@ 95% of expected production levels	616	(490)	(1,596)	1,782	676	(429)	1,166	1,166	1,167
(3)	@ 90% of expected production levels	(3)	(1,068)	(2,134)	1,273	208	(858)	1,276	1,276	1,276
(4)	@ 85% of expected production levels	(744)	(1,761)	(2,778)	662	(355)	(1,372)	1,406	1,406	1,406
(5)	@ 80% of expected production levels	(1,438)	(2,408)	(3,378)	53	(917)	(1,887)	1,491	1,491	1,491

5% Price Decrease

		No Launch Aid			With Launch Aid*			Incremental Value of Launch Aid		
	Recurring cost levels:	Expected	5% higher	10% higher	Expected	5% higher	10% higher	Expected	5% higher	10% higher
							($ millions)			
		(a)	(b)	(c)	(d)	(e)	(f)	{(d)-(a)} (g)	{(e)-(b)} (h)	{(f)-(c)} (i)
	Actual production levels:									
(6)	@100 % of expected production levels	($191)	($1,342)	($2,493)	$845	($306)	($1,457)	$1,036	$1,036	$1,036
(7)	@ 95% of expected production levels	(846)	(1,951)	(3,057)	321	(785)	(1,891)	1,167	1,166	1,166
(8)	@ 90% of expected production levels	(1,396)	(2,461)	(3,527)	(120)	(1,185)	(2,251)	1,276	1,276	1,276
(9)	@ 85% of expected production levels	(2,054)	(3,071)	(4,088)	(649)	(1,666)	(2,683)	1,405	1,405	1,405
(10)	@ 80% of expected production levels	(2,669)	(3,639)	(4,609)	(1,178)	(2,148)	(3,119)	1,491	1,491	1,490

* Launch aid based on the 33$^{1/3}$ percent Spanish A380 launch aid structure with graduated pro-rata repayment {see text of report}.

BCI deleted, as indicated [***]

BCI deleted, as indicated **[***]**

7.1885 Referring to these results, the Dorman Report concludes that LA/MSF distorts competition by subsidizing non-recurring costs and by transferring risk from the manufacturer to the government provider of the funding. In particular, the Dorman Report concludes that LA/MSF:

> "allows the recipient to undertake airplane development projects at a pace and scale that would be more difficult – perhaps impossible – for a competitor that does not have access to launch aid. It can even allow airplanes that are not commercially viable to be built anyway."[5538]

7.1886 To the extent that LA/MSF accelerates the introduction of new aircraft, or causes the introduction of new aircraft, the Dorman Report concludes that this will have negative consequences for other competing producers:

> "An airplane program that is enabled by launch aid is likely to cause prices to decline in the market segment that it targets. Competing airplanes will need to lower their prices and will likely sell fewer units, since some customers will purchase the new airplane and most customers will leverage one seller against another to obtain larger discounts. If launch aid accelerates the pace of airplane development or if the program would only be undertaken with government-provided launch aid, normal competitive decisions become distorted due to resulting subsidy and transfer of risk. This distortion of the competitive process subjects the competing manufacturer to reduced prices, volumes and profitability for its airplane programs."[5539]

The Dorman Report acknowledges that reduced profitability for a competing producer following the introduction of a new competitive plane may be "the natural outcome of the competitive process in the commercial airplane business, *but only when a new airplane is launched on commercially viable terms* ."[5540]

7.1887 We note that the Dorman Report does not explicitly conclude that each Airbus LCA model, or indeed any particular Airbus LCA model, would not have been launched in the absence of LA/MSF. Nevertheless, we consider this to be a clear implication of the conclusions it advances on the basis of the results it predicts. As the Dorman Report notes, commercial airplane programmes are expensive and contain a large inherent amount of risk. Given the long-term nature of an aircraft programme, it is difficult to predict costs, revenues and demand for any particular aircraft and, consequently, a prudent planner might well expect that all cost and revenue variables will not come to pass as forecast. The Dorman simulation generates a positive NPV in the base case scenario (*i.e.*, without LA/MSF and with costs, revenue and production levels as forecast). However, relatively small changes in forecast cost, revenue and production levels result in significantly poorer results, generating either lower or negative NPV in all cases. The Dorman Report implies, and we agree, that such variations in the forecast parameters constitute realistic scenarios which would need to be considered by a manufacturer when making a launch decision. Given that a realistic scenario includes a negative NPV in the absence of LA/MSF, it follows that an affirmative decision to launch is less likely upon consideration of the possible outcomes without LA/MSF. Accordingly, it is clear to us that the Dorman Report, and the simulation reported therein, supports the United States' position that Airbus product launches would not have occurred in the absence of LA/MSF.

[5538] Dorman Report, p. 8, Exhibit US-70 (BCI).
[5539] *Ibid*, p. 9.
[5540] *Ibid*, p. 8. (emphasis in original).

BCI deleted, as indicated **[***]**

7.1888 The European Communities has submitted a critique of the Dorman Report in the Wachtel Report.[5541] The Wachtel Report makes three fundamental criticisms of the Dorman Report: (i) that it is based on an underlying premise that the LCA market is a natural monopoly, and hence it incorrectly assumes that if Airbus did not exist, there would be no other competitor; (ii) that it derives its conclusions about the effects of LA/MSF from sensitivity tests performed on a simulation that is constructed with unrealistic parameter values and assumptions of costs and demand, and (iii) that it fails to take into account the full economic implications of the structure of LA/MSF repayments.[5542]

7.1889 As we understand it, the principal focus of the first point made in the Wachtel Report is the conclusion reached in the Dorman Report that LA/MSF may cause an otherwise unprofitable LCA programme to be undertaken, allegedly implying that in the absence of LA/MSF granted to Airbus, Boeing would enjoy a monopoly position in the market for LCA, including monopoly profits.[5543] According to Wachtel, most LCA markets (defined by the number of passenger seats) [5544] are natural duopolies, *i.e.*, markets in which "the threshold of entry for a second firm is below the market size".[5545] As such, Wachtel submits that it is incorrect to suggest that in the absence of a LA/MSF-supported entrant, an incumbent LCA manufacturer would enjoy a monopoly position.

7.1890 Drawing from publicly available sources, which suggest that the break-even point for the Airbus A380 and Boeing 747 is less than 500 units, the Wachtel Report posits a break-even or entry threshold of 500 production units for each alleged LCA market. The Wachtel Report notes that data from other publicly available sources suggests that LCA markets almost always exceed 1,000 units. Given that this demand is more than twice the break-even or entry threshold, the Wachtel Report asserts, on the basis of an approach adopted in an economic study conducted by Breshnahan and Reiss,[5546] that there is room for two competitors in each of the identified markets, and by extension therefore that "if Airbus had not entered the market, it is more than likely that Boeing would have faced another competitor".[5547]

7.1891 It is true that among the effects the Dorman Report identifies as flowing from the entry into the LCA industry of a new competitor funded through LA/MSF is a reduction in the incumbent competitor's profits.[5548] This implies that, according to the Dorman Report, profits of the incumbent competitor in the LCA industry would be greater in the absence of competition from an entrant provided with LA/MSF subsidies compared to the situation with that subsidized entrant. However, in our view, it does not automatically follow that the "situation" the Dorman Report envisaged in a world without a subsidized entrant is a Boeing monopoly. Indeed, the Dorman Report makes no explicit claim that if LA/MSF measures were not provided, Boeing would be a monopoly provider of LCA.

7.1892 The United States criticizes the Wachtel response to the Dorman Report, submitting that Dr. Wachtel has advanced no support for the proposition that "if Airbus had not entered the market, it is more than likely that Boeing would have faced another competitor". The United States asserts that Dr. Wachtel "does not, and cannot, say when that 'other competitor' would have entered the market, or

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[5541] Wachtel Report, Exhibit EC-12.

[5542] Wachtel Report, Exhibit EC-12; and Wachtel Report (Clarification), Exhibit EC-659.

[5543] Wachtel Report, para. 3, Exhibit EC-12.

[5544] We note, in this respect, that Professor Wachtel's critique reflects the European Communities' view that there are multiple subsidized and like products, which we have rejected. *See*, para. 7.1668 above.

[5545] Wachtel Report, para. 3, Exhibit EC-12; Wachtel Report (Clarification), para. 2, Exhibit EC-659.

[5546] Breshnahan, T, and Reiss, P., "Entry and Competition in Concentrated Markets", (1991) *Journal of Political Economy*, Vol. 95 (5), pp. 977-1009; referred to in Wachtel Report, footnote 2, Exhibit EC-12.

[5547] Wachtel Report, paras. 7-8, Exhibit EC-12. Professor Wachtel provided a more specific, but similar, assessment of the entry threshold in respect of "middle-market aircraft" in the Wachtel Report (Clarification), para. 6, Exhibit EC-659.

[5548] Dorman Report, pp. 8 and 9, Exhibit US-70 (BCI).

BCI deleted, as indicated **[***]**

what the technical capabilities and prices of the LCA produced by that 'other competitor' would be".[5549] Moreover, the United States notes that to the extent that the Wachtel Report criticism may be correct, various facts suggest that the "other competitor" would have most likely been McDonnell Douglas, another United States company. Thus, the United States accepts that in the world without the provision of LA/MSF to Airbus "surely there would nonetheless have been competition". However, it considers that such competition would have been different from the actual competition from a subsidized Airbus.[5550]

7.1893 Reading the United States' response to the Wachtel Report together with the Dorman Report, we do not consider it accurate to characterise the Dorman Report as being premised on the view that Boeing would hold a monopoly position in the absence of a competitor subsidized through LA/MSF. Apart from the fact that the Dorman Report never actually claims that Boeing would hold a monopoly in the absence of a LA/MSF-supported competitor, it is clear that the Dorman Report does not conclude that it would be impossible for a company to enter the LCA business without access to LA/MSF. Thus, the Dorman Report concludes that LA/MSF "allows the recipient to undertake airplane development projects at a pace and scale that would be much more difficult – perhaps impossible – for a competitor that does not have access to launch aid".[5551] While a Boeing monopoly may be one way of understanding what the Dorman Report states about the implications of LA/MSF on the operations of the incumbent LCA manufacturer, it is also possible to understand those implications in the context of a world where the incumbent manufacturer would face competition from another player; a weaker entrant that entered without the assistance of LA/MSF. Finally, as we will explain further below, the real significance for us of the simulation presented in the Dorman Report is not so much what it says about the impact of LA/MSF on the operations of the incumbent manufacturer, but rather what it tells us about whether a potential new entrant, or an existing manufacturer, will decide to launch a new model of LCA.

7.1894 The conclusion in the Wachtel Report that individual LCA markets are a "natural duopoly" also informs Dr. Wachtel's criticism of the parameters used in the Dorman simulation. We understand Dr. Wachtel to be of the view that, assuming LCA markets are duopoly markets, a model which suggests that entry would not occur absent LA/MSF is suspect. The Wachtel Report therefore questions the reliability of the Dorman simulation, in which small changes to forecasts turn a positive NPV into a negative NPV which, in turn, suggests that a decision to launch would not be made. In this respect the Wachtel Report argues that the Dorman simulation implies that not only would Airbus not introduce a new aircraft because of the associated risks, but also that Boeing, itself, would not introduce a new aircraft. The Wachtel Report remarks:

> "The base case makes aircraft production very unattractive. Since the model would apply to all producers, one wonders why Boeing launched all of the aircraft that it did? Clearly, the model and the assumed numerical values are chosen in a way that exaggerates the impact of launch aid."[5552]

We note, however, that Dr. Wachtel subsequently acknowledged that he assessed Dorman "on its face...{and} did not attempt to assess whether the specific parameter values and assumptions defined by Dorman were realistic."[5553]

[5549] US, FNCOS, para. 146.
[5550] US, FNCOS, para. 151; US, SWS, para. 571.
[5551] Dorman Report, p. 8, Exhibit US-70 (BCI).
[5552] Wachtel Report, para. 10, Exhibit EC-12.
[5553] Wachtel Report (Clarification), Exhibit EC-659, para. 8.

BCI deleted, as indicated **[***]**

7.1895 The parameters relied upon in the Dorman simulation are also questioned in the declaration of Francisco-Javier Riaza Carballo, former Vice President A380 Business ("Carballo Declaration") submitted by the EC.[5554] The Carballo Declaration asserts that the Dorman Report incorrectly assumes that non-recurring costs ("NRCs") will be expended within five years of launch and, more importantly, underestimates the number of deliveries over the life of a programme. According to Mr. Carballo, an estimated delivery stream of 850 units may have been reasonable in planning a launch twenty years ago but under current market conditions, Airbus or Boeing could expect 1,400 deliveries within a 15 year period.[5555]

7.1896 In support of the view that the Dorman simulation underestimates the number of expected deliveries, the Carballo Declaration cites public information in respect of Boeing's production plans for the 787, which estimate delivery of 1735 aircraft over 15 years. The Carballo Declaration also notes Airline Monitor's January 2005 estimate of 1375 aircraft deliveries in the first 15 years of commercial service.[5556] Airbus reverse-engineered a simulation of the base case in the Dorman simulation, using the lower estimate of 1375 Boeing 787 aircraft, and the Carballo Declaration reports the result. Whereas the Dorman simulation reported a NPV of USD 1.35 billion in the absence of LA/MSF, the Carballo Declaration reports a NPV of between USD 6 and 7 billion, and an internal rate of return ("IRR") of between 17% and 18%[5557], assuming the delivery of 1375 aircraft.[5558] The European Communities claims that these figures are significant as they are **[***]**.[5559]

7.1897 The United States finds the European Communities' assertion that the Dorman simulation underestimates the number of deliveries that could be achieved for a wide-body LCA programme to be surprising. Drawing from information available on Airbus' website on the number of deliveries for its wide-body LCA models, the United States asserts that "Airbus has never had a widebody program that has produced more than 600 aircraft in its history".[5560] Indeed, according to the United States, no LCA manufacturer, including Boeing, has ever achieved 850 deliveries in the first 15 years of a wide-body programme. Moreover, drawing on an economic study undertaken by Neven and Seabright,[5561] the United States notes that Dr. Wachtel's approach ignores that LCA manufacturers will generally seek economies of scope across different LCA segments because of the importance of having a full LCA family to the development of each individual model. By ignoring such considerations, the United States submits that Dr. Wachtel's analysis implies that there should be 12 LCA manufacturers in the 100-200 seat LCA market segment (*i.e.*, the single-aisle, narrow-body segment), because the number of sales in this segment between 1991 and 2005 is 12 times a break-even point of 500 units.[5562] In any case, the United States argues that even if the European Communities' critique were valid, this would take nothing away from the conclusion established in the Dorman Report that LA/MSF significantly affects the probability that a launch will be profitable and therefore that

[5554] Exhibit EC-665 (HSBI).

[5555] We note that the Carballo Declaration considers the Dorman simulation assumptions about recurring costs and income to be reasonable and makes the same conclusion in respect of the $10 billion NRC estimate if the business case assumes at least two variants of the base model. Exhibit EC-665 (HSBI), para. 9.

[5556] Exhibit EC-665 (HSBI), para. 18, citing "The Airline Monitor" January/February 2005, *ESG Aviation Services*, Edmund S. Greenslet, Editor and Publisher.

[5557] The Dorman Report does not set out an internal rate of return. The Carballo Declaration calculates an IRR of 11.92% for the Dorman simulation base case, as reverse engineered by Airbus. EC, SWS, para. 816.

[5558] EC, SWS, para. 816; Exhibit EC-665 (HSBI), para. 20.

[5559] EC, SWS, at 816

[5560] US, SNCOS, para. 171; Exhibits US-645 and US-647.

[5561] Neven & Seabright, Exhibit US-382.

[5562] US, SWS, paras. 567-568.

BCI deleted, as indicated **[***]**

LA/MSF significantly influences the recipient's decision on whether to launch a new LCA model at all.[5563]

7.1898 We agree with the United States. In our view, the Dorman simulation demonstrates that LA/MSF will have a significant impact on the NPV of any given aircraft project, irrespective of the specific parameters used to model costs and income streams. In all cases, the Dorman simulation shows that LA/MSF will increase potential profits and limit potential losses. By limiting potential losses, LA/MSF transfers risk from Airbus to the governments supplying LA/MSF, thereby rendering it more likely, in any given case, that an LCA programme will be undertaken.[5564] The conclusions of the Dorman simulation are, in this respect, consistent with other evidence before us, including the **[***]** discussed further below.[5565]

7.1899 The third criticism of the Dorman Report raised in the Wachtel Report is that it fails to take into account the economic impact of the structure of LA/MSF repayments. This criticism has two elements. First, the Wachtel Report argues that the Dorman Report fails to note that any subsidy associated with LA/MSF "is limited to the interest rate reduction in the loan, not the size of the principal".[5566] According to Dr. Watchel, this alleged deficiency means that the Dorman Report "overstates the impact of launch aid".[5567] Second, the Wachtel Report argues that repayments of LA/MSF, which occur on delivery of the aircraft involved, could lead to higher prices.[5568] In his Clarification, Dr. Wachtel expands on this point stating:

> "The launch aid repayments are generally made with the delivery of aircraft, thus they are variable costs and as such tend to increase the price at which Airbus sells the aircraft. Were the repayments on the loans independent of the sales of the aircraft, they would be fixed costs with a much less direct and much less upward effect on aircraft prices."[5569]

7.1900 The United States considers that the Dorman Report takes repayments of LA/MSF fully into account in modelling the impact of LA/MSF. According to the United States, this is confirmed by the fact that the Dorman simulation shows that the impact of LA/MSF increases as fewer LCA are sold and fewer repayments made.[5570]

7.1901 Turning first to the proposition in the Wachtel Report that LA/MSF repayments will tend to increase the price at which Airbus sells its LCA because they are tied to LCA deliveries, we do not understand Dr. Wachtel to consider this alleged price effect to be an impact of LA/MSF that is *certain* to result from LA/MSF's sales-dependent repayment terms. Rather, it is clear from Dr. Wachtel's choice of words that the fact that LA/MSF is repaid with revenues generated from LCA deliveries may have an upward effect on the prices of those LCA.[5571] The fact that Dr. Wachtel does

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[5563] US, SNCOS, para. 172.

[5564] The United States refers to the views of British economist Kim Kaivanto in this regard: "Launch Aid commits European governments to absorbing much of any possible losses, so even if Airbus is risk averse, it has little incentive not to adopt a risky, aggressive strategy." US, SWS, para. 563, citing *Premise and Practice of UK Launch Aid*, 40 Journal of World Trade 495, 498 (2006), Exhibit US-2.

[5565] *See*, paras. 7.1922 - 7.1927.

[5566] Wachtel Report, para, 13, Exhibit EC-12; Wachtel Report (Clarification), para. 9, Exhibit EC-659.

[5567] Wachtel Report, para, 17, Exhibit EC-12.

[5568] Wachtel Report, para, 14, Exhibit EC-12.

[5569] Wachtel Report (Clarification), para. 10, Exhibit EC-659.

[5570] US, SWS, para. 572.

[5571] Initially, Professor Wachtel explained that LA/MSF repayments "*could* actually lead to higher prices". Wachtel Report, para. 14 (emphasis added), Exhibit EC-12. As noted above, Professor Wachtel

BCI deleted, as indicated **[*****]**

not conclusively state that LA/MSF repayments will, as a matter of fact, result in higher prices reflects our own understanding of how prices are set for LCA products. There are a variety of often very different and sometimes transaction-specific factors that can affect the final price of an LCA.[5572] In our view, this suggests that the relationship between LA/MSF repayments that are tied to aircraft deliveries and the price at which those aircraft are ultimately sold is more complicated than what is implied by Dr. Wachtel's proposition. Thus, while we recognize that a repayment obligation explicitly tied to delivery of LCA is an expense accruing at the same time as that delivery, it does not necessarily follow that prices for that LCA will be greater than they otherwise would have been in the absence of that LA/MSF repayment. We examine the impact of LA/MSF (and the other subsidies) on LCA prices in the next section of this Report where we address the United States "price" theory of causation. For present purposes, however, we simply note that we are not persuaded that the proposition advanced by Dr. Wachtel discredits the conclusions reached in the Dorman Report. In any case, we recall that for the purpose of the present analysis, the importance for us of the Dorman Report is not what it says about prices after the launch of an LCA programme, but rather what it tells us about whether or not that particular LCA programme would have been undertaken in the first place.

7.1902 As to the allegation that the Dorman simulation does not take into account the amount of the subsidy associated with LA/MSF, as opposed to the principal amount actually loaned, we are equally not persuaded by Dr. Wachtel's submissions. We recall that the simulation in the Dorman Report involved the calculation of the NPV for particular LCA programmes funded with LA/MSF on the basis of projected cash-flows and a discount rate of 10%.[5573] The projected cash-flows (inflows when LA/MSF disbursements, and outflows when LA/MSF repayments) are in two examples (the UK A320 "package" and the Spanish A380 "package") based on "the disbursement pattern and the imputed interest rate" from "actual experience". For the other examples, cash-flows were derived from information designated BCI.[5574] The European Communities has not specifically contested the disbursement patterns or imputed interest rates used in the Dorman simulation. Indeed, comparing the imputed interest rates used in the Dorman simulation with our own findings in respect of the relevant LA/MSF contract interest rates[5575] the only notable difference is in respect of the French A330-200 "package", where the imputed interest rate used in the Dorman simulation is approximately half of what we found it to be.[5576] However, we do not consider these differences to detract from the credibility of the Dorman simulation's general results.

7.1903 The European Communities presented its own calculation of the amount of subsidization associated with each of the challenged LA/MSF contracts, apart from the A300 and A310, in three reports prepared by International Trade Resources LLC.[5577] The first of these reports, the ITR Report, defines the amount of the subsidization conferred by each LA/MSF contract in the following terms:

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subsequently suggested that LA/MSF repayments would "*tend* to increase price". Wachtel Report (Clarification), para. 10, (emphasis added), Exhibit EC-659.

[5572] *See*, discussion at paragraphs 7.1837 - 7.1839 above.

[5573] We understand Dr. Dorman to have used a 10% discount rate throughout the simulation. *See*, paragraph 7.1882 above; US, Comments on EC, SNCOS, para.31.

[5574] Dorman Report, p. 5 and footnote 13, Exhibit US-70 (BCI).

[5575] *See*, Table 7 at para. 7.488 above.

[5576] In particular, the imputed interest rate used for the Spanish A380 "package" is the same as our findings; the imputed interest rate used for the UK A320 "package" and the French A340-500/600 "package" are, respectively, **[***]** and **[*****]** basis points above our findings; and the imputed interest rate used for the French A380 "package" is **[***]** basis points below our findings. Dorman Report, Table 2, Exhibit US-70 (BCI).

[5577] ITR Report, Exhibit EC-13 (BCI/HSBI), ITR Report (Answer) Exhibit EC-660 (BCI/HSBI) and ITR Report (Update) Exhibit EC-839 (BCI).

BCI deleted, as indicated **[***]**

> "The amount of subsidy conferred by each MSF loan is the difference, in the year of launch, between the present value of tax adjusted loan receipts and anticipated loan repayments discounted at the applicable project-specific benchmark rate".[5578]

The ITR Report (Answer) described the methodology applied to calculate the amount of subsidization associated with LA/MSF in the following terms:

> "We calculate the difference between the return that the government anticipated when the MSF loan was agreed with the return that the US Ellis MSF benchmark rates would have required. Because the repayment schedules of the MSF loans are not standard annual repayments and instead are linked to delivery of aircraft, we calculated the present value ("PV") as of the date of the launch of the difference between the return that was anticipated by the MSF agreement and the return that would have been required by a commercial entity".[5579]

7.1904 Thus, as we understand it, the methodology applied in the ITR Report to identify the subsidy amount is not unlike that applied in the Dorman simulation to arrive at the NPV of the various LA/MSF "packages", with one major difference – instead of using a 10% discount rate used in the Dorman simulation, the ITR Report used the interest rate benchmark identified in the Ellis Report (which the European Communities did not accept) in its calculations. It follows that, by the European Communities' own proposed approach for calculating the amount of subsidization associated with LA/MSF, it cannot be concluded that the Dorman simulation is focussed on only the amounts of principal disbursed under the LA/MSF contracts and not the levels of subsidization. As we understand it, the Dorman simulation does, in effect, take into account the amount of subsidization, as defined by the European Communities. However, because Dorman uses a 10% discount rate, this amount is different from that determined by the European Communities, which uses the Ellis Report interest rate benchmarks.

7.1905 Compared with our findings on the appropriate market interest rate benchmarks for the LA/MSF "packages" modelled in the Dorman simulation, the 10% discount rate that is used is below the range of market interest rate benchmarks that we have determined for the LA/MSF contracts in respect of the UK A320 "package". To this extent, by the European Communities' own standards, the amount of the subsidy taken into account in the Dorman simulation simulations involving this LA/MSF "package" will typically underestimate its NPV.[5580] It would therefore not be incorrect to describe the Dorman simulation results for this particular "package" to be overall conservative. For the other "packages", the 10% discount rate used in the Dorman simulation lies within the range of market interest rates we have concluded would be appropriate benchmarks for those relevant contracts. Thus, we are not convinced by Dr Wachtel's contention that the Dorman Report fails to note that any subsidy associated with LA/MSF "is limited to the interest rate reduction in the loan, not the size of the principal".[5581]

7.1906 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. This does not, however, conclusively establish that, but for the grant of LA/MSF, any particular Airbus model would not have been launched when it actually was. The launch of a new model of LCA is an expensive proposition involving significant expenditures. In

[5578] ITR Report, para. 19, Exhibit EC-13 (BCI).
[5579] ITR Report (Answer), para. 6, Exhibit EC-660 (BCI).
[5580] We note that for financing involving a pattern of profits (cash in-flows) early and costs (cash out-flows) later (such as LA/MSF), a lower discount rate makes the NPV smaller.
[5581] Wachtel Report, para. 13, Exhibit EC-12; Wachtel Report (Clarification), para. 9, Exhibit EC-659.

BCI deleted, as indicated **[***]**

considering a launch decision, not only will short-to-medium term development costs need to be estimated, but other recurring costs and revenue streams over the entire 15-20 year production cycle of an aircraft must also be estimated. An element of uncertainty is inherent in such estimates. Given such uncertainties, a prudent manufacturer will likely require there to be some scope for costs and revenues to deviate from forecast estimates without the project as a result becoming unprofitable. The sensitivity testing in the A380 business case (discussed below) in which the **[***]**.

7.1907 The results of the Dorman simulation suggest that, in the absence of LA/MSF, relatively small changes in cost and revenue estimates would make the launch of any particular aircraft model unprofitable. We agree with the suggestion in the Wachtel Report that, in this situation, it seems that it would be unlikely that a hypothetical aircraft manufacturer, considering the results of the Dorman simulation alone, would decide to launch the aircraft programme contemplated. As noted above, the Wachtel Report seeks to counter this implication of the Dorman simulation by arguing that the LCA market is a natural duopoly.

7.1908 The United States criticizes this aspect of the Wachtel Report by arguing that the approach adopted in the Breshnahan and Reiss study, which Wachtel cites in support of his conclusion, is not applicable to the LCA market and that the Wachtel Report has failed to consider the implications of the economies of scope and scale in the LCA market.[5582] Ultimately, however, we consider the United States' arguments concerning this aspect of the Wachtel Report to be inapposite, as the United States is not arguing that Boeing, or indeed the United States, is entitled to a monopoly of the global LCA industry.[5583] Indeed, as we have already explained, the United States goes further, indicating that not only does it not consider that Boeing is entitled to a monopoly but that, in fact, it considers that Boeing would face competition from at least some entity in the absence of LA/MSF.[5584]

7.1909 The implications of this apparent acceptance that Boeing would face competition in a world without LA/MSF (and the other subsidies at issue in this dispute) (the "counterfactual" world) are discussed below. At this stage, however, we note the United States' basic contention that, even if Airbus had entered the market in the absence of LA/MSF, it would have done so at different times and with different planes.[5585] In this respect we understand the United States to be arguing that whether the United States faced competition in the counterfactual world from an Airbus that launched LCA without LA/MSF, or from some other entity, that competition would be different, and that one way in which that difference would be manifest would be that the product line of the competitor would not be the equivalent of the actual Airbus product line.

7.1910 If the United States concedes that Boeing would, in the absence of LA/MSF, face some competition it must, presumably, concede that at least some competing planes would have been launched (by Airbus or some other entity) over the period since Airbus launched its first LCA. The Dorman simulation does not provide a basis for assessing the circumstances of any competitive launches in the absence of LA/MSF. Insofar as its results suggest that there would be no entry, and insofar as it does not distinguish between the type of entry which is modelled and other forms of entry which might otherwise occur, we consider that it is not possible to conclude on the basis of the Dorman Report alone that, but for LA/MSF, any particular Airbus aircraft model would not have been launched.

[5582] US, SWS, paras. 564-570.
[5583] US, SWS, para. 572.
[5584] US, FNCOS, para. 151.
[5585] In this respect the United States asserts "even if Airbus would have entered a particular LCA market segment at some other time with a different aircraft (in terms of technical capabilities, specifications, and other characteristics), the effect on the US LCA industry would have been different." US, SWS, para. 572.

BCI deleted, as indicated **[***]**

7.1911 This does not mean, however, that we do not consider that the Dorman Report supports the United States' argument regarding the impact of LA/MSF on Airbus launch decisions. As we have already observed, the Dorman Report **does** in our view demonstrate that LA/MSF will have a significant impact on the NPV of any particular project, and that irrespective of the specific parameters used to model costs and income streams, LA/MSF will increase potential profits and act to limit potential downside losses. It also demonstrates that in some circumstances, the availability of LA/MSF makes the difference between a positive or negative NPV, or alters the risk profile of a project sufficiently to make an affirmative decision to launch a particular aircraft more likely.

7.1912 In addition to relying on Airbus business cases, which we discuss below, to counter these conclusions, the European Communities also relies on a putative "Boeing 787 business case" it constructed based on public information and **[***]**.[5586] The cash flow analysis prepared for the European Communities for this exercise shows a NPV and IRR higher that those the European Communities asserts were generated by the Dorman simulation.[5587] We do not consider that the results of an *ex post facto* business case for a Boeing LCA constructed on the basis of public information for purposes of this dispute has any relevance to our assessment of the effect of LA/MSF subsidies on Airbus. Even assuming the correctness of the exercise, which is unclear, we do not see how the conclusion that the NPV and IRR of this Boeing 787 business case are higher than those of the Dorman simulation informs our assessment of the effect of LA/MSF on Airbus. Thus, we conclude that the Dorman Report demonstrates that the provision of LA/MSF is likely to change the behaviour of the recipient with respect to a decision to launch a LCA by increasing the likelihood of an affirmative decision to go forward with the launch.

Public Statements and the EC State Aid Decision

7.1913 The second category of evidence presented by the United States consists of a series of public statements, and a decision by the European Commission concerning state aid to Aérospatiale, which the United States argues demonstrate that the subsidies in this dispute "facilitated and accelerated the introduction of every major Airbus model, precisely as the European Communities and the Airbus governments designed them to do."[5588] The European Communities argues that such statements are hearsay and should not be given weight, and at best reflect the intent of Airbus to secure a viable market share, and do not constitute evidence of present adverse effects.[5589] We consider this evidence below.

A300

7.1914 The first Airbus LCA model, the A300, was launched in 1969 and first delivered to a customer in 1974. In 1991 Jean Pierson, then Airbus Managing Director, spoke generally about the role of government support during the early 1970's during a speech at Cranfield University in the UK. He is quoted in a 1998 book:

> "Let us go back to 1970 for one minute. Imagine if I had gone then to a bank and said, 'I have just started a management team from various European countries. I intend to make a large aircraft to compete with Boeing. Will you lend me $1 billion?

[5586] EC, SWS, paras. 804-808.
[5587] International Trade Resources, 787 Business Case, Exhibit EC-662 (HSBI). We note that the Dorman Report does not, in fact calculate an IRR for its hypothetical launch programme; the estimate of 11.92 per cent referred to by the European Communities as generated by the Dorman simulation was actually inferred by Mr. Carballo, as described in the Carballo Report, Exhibit EC-665 (HSBI).
[5588] US, FWS, para. 829.
[5589] EC, FWS, paras. 2318-20, 2322.

BCI deleted, as indicated **[***]**

> You may lose all of it. Or you may start to make some money twenty years from now! I leave it to your imagination the welcome I would have had. No financial institution would have taken such a risk, or if it had the interest rates would have been simply prohibitive. It was therefore up to the governments of each of the countries participating in Airbus Industrie to substitute themselves for the bankers and assume such risks".[5590]

A320

7.1915 In March 1984 Bernard Lathiere, then President and CEO of Airbus, announcing the launch of the A320, referred to the commitments of the governments of France, Germany, Spain and the United Kingdom to take measures enabling investments for this programme as fulfilling "the third and final prerequisite, the financial one".[5591] Earlier, in May 1983, the Chairman of British Aerospace, Sir Austin Pearce, commenting on the development of the A320 and the involvement of British Aerospace in that project, noted that income from the A300 and A310 was just beginning to be received and that, in such circumstances, the proposed A320 was "likely to be pushed further into the future".[5592] The article indicates that the British government had told British Aerospace that it expected it to finance its A320 development costs on the commercial market. The Article also states that British Aerospace had said in 1981 that, in the absence of LA/MSF, it would not be in a position to participate significantly in the A320 programme until 1987 or 1988.[5593] The British Government agreed to provide British Aerospace with financing in March 1985.

A330/A340 and A340-500/600

7.1916 The United States has provided similar evidence with respect to the launch of the A330/A340 and the A340-500/600. Sir Austin Pearce is quoted in March 1987 as saying, with reference to the A330/A340, that "{f}inancing the project through commercial banks is not feasible ... because of the risks associated with the program".[5594] Moreover, the United States notes that the French government notified the LA/MSF it intended to provide to Aérospatiale for the A340-500/600 to the European Commission, in accordance with Article 93(c) of the EC Treaty. In its Decision letter dated 26 July 1999, the European Commission determined that the French LA/MSF was not an "aid" within the meaning of the EC Treaty and did not require notification. In its Decision, the Commission made the following findings concerning the role of the proposed LA/MSF:

> "Aérospatiale could not finance the costs connected with the development of the Airbus A340-500/600 by itself or with the help of bank loans. Accordingly, if it were to finance the development costs of the A3400500/600 solely from its own capital (or through bank loans), it would seriously weaken the financial structure of the company. The fact that aeronautical projects extend over very long periods of time and that any investment made in the A340-500/600 could be paid back, should the program be successful, only in the very long term, make the risk that much more unacceptable.
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> .....

[5590] Quoted in Matthew Lynn, *Birds of Prey* (1998), Exhibit US-42, p. 150.

[5591] *Airbus-Industrie: A320 Is a Reality*, Business Wire (March 2 1984), Exhibit US-15.

[5592] *Costs Push British Towards Joint Efforts*, Aviation Week & Space Technology (30 May 1983), Exhibit US-439.

[5593] *Costs Push British Towards Joint Efforts*, Aviation Week & Space Technology (30 May 1983), Exhibit US-439.

[5594] *British Aerospace rejects A330/A340 aid proposal*, Aviation Week & Space Technology, 30 March 1987, Exhibit US-24.

BCI deleted, as indicated **[***]**

> Through Aérospatiale, the entire A340-500/600 program has been made possible thanks to the measures reported by the French authorities. Indeed, in view of the industrial structure of *Airbus Industrie* and the configuration of the European aeronautics sector, this program cannot be contemplated without the participation of Aérospatiale. Consequently, the reimbursable advance from the French Authorities is helping to promote the A340-500/600 program, which could not be implemented without this government support".[5595]

While we have not been provided with a copy of the submissions of the French government to the European Commission, we consider, based on the decision letter itself, that these findings were consistent with those submissions.

A380

7.1917 Similar evidence is presented by the United States with respect to the A380. Responding to a question in the UK House of Commons on 3 March 2005, Patricia Hewitt, then Secretary of State for Trade and Industry, is quoted as saying "{w}e have recently seen, of course, the launch of the A380, which would not have been possible if it had not been for the commitment of the British Government to launch an extremely successful programme ...".[5596] The provision of LA/MSF in circumstances where it was necessary to the launch of an LCA programme appears to have been the operating policy of the UK Department of Trade and Industry ("DTI"). The DTI described its rationale for providing LA/MSF on its website in October 2006 in the following terms:

> "The fundamental rationale of launch aid is to address the apparent unwillingness of capital markets to fund projects with such high product development costs, high technological and market risks and such long pay back periods. ... An applicant must demonstrate: that the project is technically and commercially viable; that Government investment is essential for the project to proceed on the scale and in the time-scale specified in the application, and that the government will recoup the investment at a real rate of return".[5597]

7.1918 Similarly, a French Senate Report considering public support of the civil aircraft sector concluded that Aérospatiale would not be able to obtain outside financing to meet its requirements in respect of the A380, and even if such financing were available, "such external financing would apparently add excessively to the financial expenses incurred by the firms and would throw their balance sheets out of equilibrium because of the low level of their equity capital".[5598]

7.1919 In considering the above evidence, we recognize that the public statements of Airbus or participant company executives and public officials as to the need for LA/MSF in order to launch a given aircraft may involve a degree of self-interest. For example, comments attributed to Sir Austin Pearce appear to have been made in the midst of efforts by British Aerospace to lobby the government of the United Kingdom for additional support.[5599] In these circumstances, it may well have been in the interest of the company to suggest that its participation in the A320 project would come to a halt without further commitment from the UK government. Having committed public monies, it is also

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[5595] Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Exhibit US-3.

[5596] House of Commons Hansard Debates for 3 March 2005, col. 1088, Exhibit US-436.

[5597] DTI web-site, *"Aerospace and Defence Industries Launch Investment"*, Exhibit US-106.

[5598] Mission de contrôle effectuée sur le soutien public a la construction aéronautique civile, Sénat Report 1997, 72, Exhibit US-18.

[5599] Exhibit US-24.

possible that public officials would be inclined to describe government participation in Airbus projects as essential. However, we note that the Decision letter of the European Commission seems to us to be in the nature of a quasi-judicial evaluation and finding, rather than mere statements by public officials, and therefore the same concerns do not arise in evaluating that decision. In any event, we consider it appropriate to take this evidence into account, making our own judgements as to its weight and probative value, together with other evidence in our evaluation of the United States claims.[5600]

7.1920 The European Communities has not disputed the truth of the public statements or of the facts stated, nor does it respond directly to the United States' allegations based on these statements, which the United States considers demonstrate that LA/MSF was necessary to the launch of the Airbus LCA models in question.[5601] In these circumstances, we conclude that the above evidence supports the United States' position. Although we do not draw specific conclusions as to the intent of the entities on behalf of which the statements were made, and while we recognize that there may have been a variety of motivations at play, taken together, we consider these statements and the European Commission's State Aid decision generally support the inference that, but for the provision of LA/MSF, Airbus would not have been able to launch any of its existing range of LCA, that is, the A300, A320, A330/A340, A340-500/600 and A380, as and when it did.

The business cases

7.1921 The European Communities argues, on the basis of the Airbus business cases for the A380, A340-500/600 and A330-200, that LA/MSF has not, at least since 1992, had any impact on the decision to launch any particular aircraft.[5602] In particular, the European Communities argues that these business cases demonstrate that the programmes provided robust returns in the absence of LA/MSF, such that Airbus could have launched each of these aircraft without LA/MSF. The European Communities also asserts that the business cases demonstrate that the Dorman simulation is

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[5600] In *Australia – Automotive Leather II*, the panel reached a similar conclusion in respect of public statements of Australian government officials reported in the press, noting:
"A commentator on the International Court of Justice's consideration of evidence and proof of facts has stated:

> "It appears to be the case that press reports, when significant but not denied by the responsible state, or when reporting other events such as official statements by responsible officials and agencies of that state, are accepted; {footnote omitted} but when they are uncorroborated or do not otherwise contain material with an independent title of credibility and persuasiveness, the tendency of the Court is to discount them almost entirely".

Highet, Evidence and Proof of Facts, in Damrosch, The International Court of Justice at a Crossroads, 1987. Similarly, we take into account the circumstances in which the reported remarks were made, the source, and whether the information is corroborated elsewhere or contrary evidence is offered, in assessing the value of these Exhibits as evidence."
Panel Report, Australia – Automotive Leather II, footnote 210.

[5601] The European Communities does argue that other statements by EC officials and Airbus officers regarding the use of subsidies to "attack," "destroy" and "kill" Boeing aircraft and cited by the United States as demonstrating that LA/MSF has been granted to enable Airbus to develop LCA models designed specifically to capture market share from the US industry are neither credible nor relevant. EC, FWS, para. 2317, referring to US, FWS, paras. 836-838. The European Communities considers that such statements, even if correct, simply show the intent of company officials to secure a viable market share to compete against Boeing, and say nothing about present adverse effects. EC, FWS, para. 2319.

[5602] In addition the European Communities provided us with the business case for the A320, Exhibit EC-82 (HSBI) and the business case for the A330/A340, Exhibit EC-775. It does not however argue that these documents evidence that these aircraft would have been launched in the absence of LA/MSF. The European Communities submitted no such evidence in connection with the A300 or A310, and makes no argument that these LCA models would have been launched in the absence of LA/MSF.

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based on a fundamentally flawed set of assumptions and parameters.[5603] We examine the European Communities' contentions in respect of these business cases below.

The A380 business case

7.1922 The A380 business case is dated December 2000.[5604] It includes a NPV analysis of a contemplated A380 family of aircraft, which includes a core aircraft and a freighter version, as well as extended range and stretch versions of the core aircraft. An NPV is calculated assuming **[***]**. Like the Dorman Report, the A380 business case makes certain assumptions in respect of non-recurring costs, recurring costs, number of deliveries and pricing. The NPV for two baseline scenarios is calculated. One assumes that no LA/MSF is available and the other assumes the provision of LA/MSF amounting to 33 percent of development costs. In the no-LA/MSF scenario the A380 business case anticipates a positive NPV using **[***]**. However, the NPV using the **[***]** in the no-LA/MSF scenario is less than one-third of the NPV calculated using the **[***]**, suggesting that the choice of **[***]** will make a significant difference to the NPV of the project.[5605] Like the Dorman simulation, the A380 business case indicates that the NPV of the project will increase with LA/MSF, compared to the situation without LA/MSF. Depending upon which of the **[***]** is used, the difference in NPV is approximately **[***]** and **[***]**.[5606]

7.1923 The A380 business case also contains five different sensitivity assessments in respect of the results obtained in the baseline case, one of which is the "Realistic Worst Case" scenario. Under this scenario, the NPV of the project is determined **[***]**.[5607] The results show that **[***]**. When the **[***]** is applied, the NPV falls by approximately **[***]**; when the **[***]** is used, the NPV drops by approximately **[***]**. Both results are deemed in the document to be **[***]**.[5608] The sensitivity testing in the A380 business case assumes that Airbus receives LA/MSF. Thus, the Realistic Worst Case scenario is not tested against a base case in which Airbus does not receive LA/MSF. In our view, the inference that can be drawn from this is that Airbus did not contemplate or provide for the possibility of launching the A380 in the absence of LA/MSF.

7.1924 The European Communities submitted an *ex-post facto* sensitivity analysis which, using the information in the A380 business case, applies the Realistic Worst Case scenario assuming that LA/MSF is not provided. The results of this analysis, provided in the Carballo Declaration,[5609] indicate that, although NPV **[***]**, there would be **[***]** in the NPV of the project in the absence of LA/MSF in the Realistic Worst Case scenario. However, while the A380 business case calculated the baseline NPV at **[***]** the Carballo Declaration only considers the impact of the absence of LA/MSF in the Realistic Worst Case scenario using the **[***]**.

7.1925 The fact that the Carballo Declaration did not undertake the same sensitivity analysis with the **[***]** used in the original A380 business case means that we do not know whether the use of **[***]** would have resulted in a negative NPV in the Realistic Worse Case scenario. In general, for projects involving a pattern of costs (cash out-flows) early and profits (cash in-flows) later (such as the A380 project), **[***]** makes the NPV smaller. In this regard, we recall that the NPV calculated for the A380 project in the Airbus baseline business case using the **[***]** and assuming no LA/MSF scenario was **[***]** of the NPV calculated using the **[***]**. In other words, in a scenario without LA/MSF in the

[5603] EC, SWS, paras. 799-809.
[5604] Exhibit EC-362 (HSBI).
[5605] We note that both of the **[***]** than the 10% discount rate used in the Dorman Report.
[5606] A380 Business Case, p. 29, Exhibit EC-362 (HSBI) .
[5607] A380 Business Case, p. 36, Exhibit EC-362 (HSBI).
[5608] A380 Business Case, p. 36, Exhibit EC-362 (HSBI).
[5609] Carballo Declaration, Exhibit EC-665 (HSBI).

BCI deleted, as indicated **[***]**

baseline business case, a **[***]** had a significant impact on the project's NPV. We have no reason to believe that this would not also be the case for the NPV that would result from sensitivity testing the Realistic Worst Case scenario without LA/MSF using **[***]**.

7.1926 Finally, as we mention in another context elsewhere in this Report, an important factor to consider is the credibility of the business case itself.[5610] While the business case may serve as the basis for Airbus' decision whether the launch of a new LCA programme is a worthwhile investment, it also serves as at least one of the bases for the government lenders to decide whether to support a programme and how that support will be structured. Because of the graduated levy-based and success-dependent nature of LA/MSF repayments, Airbus has an economic incentive to be optimistic in its forecasts of, *inter alia*, the number of aircraft likely to be sold and the pace of those sales, when preparing a business case in support of a programme for which LA/MSF is sought.[5611] The greater the number of sales over which principal repayments and royalties must be paid, the less likely it is that Airbus will have to make those payments if the business plan estimates prove to be optimistic. The European Communities argues that the Airbus business case is the product of "an exhaustive internal analysis of the programme's technical and commercial prospects" and "relies on a host of conservative assumptions and methodologies".[5612] Moreover, the European Communities submits that Airbus' business case delivery forecasts have been, by definition, "realistic and sober".[5613] It does not, however, suggest that those business case delivery forecasts are infallible. Indeed, the European Communities recognizes that forecasts are, by their very nature, "informed judgements about how events that have not yet occurred will unfold in the future", and therefore are not always reliable.[5614] While the European Communities contends that the business case delivery forecasts have been "often met, and indeed exceeded,"[5615] experience to date suggests that this may not be the case in respect of the A380.[5616]

7.1927 A critical element of the credibility of the business case is the reasonableness of the demand predictions on which the sales and delivery projections are based. The A380 programme was launched in the face of basic disagreement between Airbus and Boeing about the size of the potential market for the aircraft.[5617] As the United States observes, "the main risk of non-repayment of {LA/MSF} is not a risk associated with development or manufacturing; it is a risk associated with sales".[5618] While we are in no position to judge at this time whether the sales estimates in the A380 business case were, in fact, reasonable, we note that the A380 business case reflects consideration of a rather limited range of possibilities in terms of failure to achieve sales targets, particularly in view of

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[5610] *See*, paragraphs 7.412 - 7.414.

[5611] We recognize that LA/MSF for the A380 accounted for only 33% of the development costs of the project, and that the A380 business case (in part or in full) may also have been used by Airbus to attract other investors. However, given the project's scope, the development costs covered by LA/MSF, approaching **[***]**, was significant. Moreover, it seems clear to us that securing LA/MSF from the four governments had a positive impact on Airbus' ability to finance the remainder of the large amount of investment needed for the A380 programme.

[5612] EC, FWS, para. 466.

[5613] EC, FWS, paras. 465 and 467.

[5614] EC, FWS, para. 467.

[5615] EC, FWS, para. 467. The European Communities notes, in this regard, that as of 31 December 2006 Airbus had sold approximately 3000 A320 aircraft, well above the original business case projections, which are not in the evidence before us. EC, FWS, para. 331. It makes no similar statement with respect to any of the other LCA programmes.

[5616] The difficulties Airbus experienced with the A380, resulting in substantial delays in production and customer concerns, are generally well known, and have had had a significant effect on its parent company, EADS. EADS, *EADS 2006 Results Dominated by Airbus Loss*, 9 March 2007, Exhibit US-463,

[5617] US, FWS, 262, 263

[5618] US, SNCOS, para 57.

BCI deleted, as indicated **[***]**

the uncertainty of demand forecasts for the aircraft.[5619] Moreover, it appears that the Realistic Worst Case Scenario is not the worst with respect to all parameters considered in the sensitivity testing.[5620] The A380 may yet succeed in reaching the sales levels predicted in the business case. However, the actual delays in ramping up production, and relatively limited sales and deliveries to date, make it clear that such success will, if it occurs, likely take a good deal longer than originally projected, thus delaying achievement of the break-even point of the programme.[5621] The financial consequences of the A380 production problems and resulting programme delays have been significant, with EADS reporting a consequent reduction in Airbus' earnings before interest and taxes of EUR 2.5 billion as of 2006.[5622] Thus, it is by no means apparent that the Realistic Worst Case Scenario actually captured what could reasonably have been envisioned to be the worst case scenario at the time the business case was developed. These concerns inform our consideration of the European Communities' contention that the A380 business case demonstrates that Airbus would have gone forward with the launch even in the absence of LA/MSF.

The A340-500/600 business case

7.1928 The A340-500/600 business case is dated October 1997.[5623] It compares the effect of the launch of the A340-500/600 (a derivative aircraft) on the economics of the **[***]**. The results predict that the IRR and the NPV of the overall A330/A340 programme will **[***]** if a decision to launch were made. The business case includes a **[***]** analysis in respect of both the overall programme and the incremental effect of the A340-500/600 launch assuming **[***]**. The modelled results predict a **[***]** contribution to the overall programme and a **[***]** incremental NPV in circumstances where the **[***]**.[5624]

7.1929 It is unclear, on its face, whether the A340-500/600 business case takes into consideration the grant of LA/MSF. The European Communities asserts that it does not, but provides no supporting evidence.[5625] It also asserts that, assuming *arguendo*, that the business case did take into account the effect of LA/MSF, the **[***]** IRR, relative to the discount rate, indicates that the project would be commercially viable in the absence of LA/MSF. Its arguments in this respect are based on a comparison of the IRR in the A380 business case, **[***]**.[5626]

[5619] Exhibit EC-362 (HSBI), pp. 33, 36. The demand forecasts reflected in the A380 business case include demand for LCA with over 400 seats, a category that includes not only the A380, but also the A340-600 and the Boeing 747 and 777-300. Thus, it is not at all clear that the A380 business case is based on a "realistic and sober" forecast for deliveries of the A380 *per se*, which is an aircraft with more than 500 seats.

[5620] Exhibit EC-362 (HSBI); compare information at pp. 34 and 36.

[5621] Exhibit EC-362 (HSBI), pp. 6.

[5622] EADS, *EADS 2006 Results Dominated by Airbus Loss*, 9 March 2007, Exhibit US-463, at 8.

[5623] Exhibit EC-958 (HSBI)

[5624] But see US, Comments on EC Answer to Panel Question 262 (HSBI Appendix), paras. 10-12.

[5625] EC, SWS, para. 785.

[5626] EC, SWS, para. 816. In the A380 business case the IRR **[***]** in the absence of LA/MSF, but remained **[***]** the discount rate. The European Communities argues that if the IRR in the A340-500/600 business case is reduced by the same amount it will result in a hypothetical IRR for the A340-500/600 which is commercially viable; that is, an IRR which exceeds the discount rate. The European Communities argues that applying a similar reduction to the IRR in respect of the A340-500/600 would, in fact, exaggerate the impact of LA/MSF, as while the **[***]** only France and Spain provided LA/MSF in respect of the A340-500/600. EC. SWS, para. 787. On the same basis the European Communities also argues that if the sensitivity testing undertaken in the Carballo Declaration were implemented in respect of the A340-500/600 "it is reasonable to assume that similar results would be obtained". EC, SWS, para. 788.

BCI deleted, as indicated **[***]**

The A330-200 business case

7.1930 The A330-200 business case[5627] considers the introduction of two aircraft derived from the A340-300B, referred to in the document as the **[***]**. As with the A340-500/600 business case, the document considers the **[***]** are added to the Airbus range. The results predict that the IRR and the NPV of the overall A330/A340 programme would **[***]** if a launch decision were made. Sensitivity testing predicts that the NPV of the overall programme will **[***]** and be an improvement over the **[***]**.[5628] The European Communities asserts that the **[***]** implied incremental IRR for the A330-200 project **[***]** the expected IRR of the A380 and A340-500/600 programmes. On the basis of the same logic used in respect of the A340-500/600, the European Communities concludes that the **[***]** IRR demonstrates that LA/MSF had no role in respect of the launch of the A330-200.

7.1931 According to the European Communities, the lack of impact of the grant of LA/MSF on the launch of the A330-200 is further demonstrated by the fact that only Aérospatiale received LA/MSF amounting to only EUR 49.9 million. The European Communities asserts that this amount could have been financed in other ways, including through risk-sharing suppliers.[5629]

Conclusions Regarding the impact of LA/MSF on the Launch of Airbus LCA

7.1932 The European Communities argues that the A380, A340-500/600 and A330-200 business cases conclusively demonstrate that LA/MSF was inconsequential to the launch of these aircraft models, and that, as a consequence, the United States causation theory in respect of these three models "fails as a matter of fact".[5630] The European Communities presents no equivalent evidence or arguments in respect of the earlier models of Airbus LCA (*i.e.*, the A300, A310, A320 and A330/A340 model families). The European Communities has submitted no internal documents or other evidence suggesting that Airbus would have proceeded with pre-1992 projects in the absence of government LA/MSF support. It has simply suggested that the United States has not done enough to demonstrate the link between LA/MSF and the launch of Airbus aircraft.[5631] However, in our view, the United States has met its evidentiary burden in this respect.

7.1933 The A300 was the first Airbus model of LCA, launched in 1969 with close to 100 percent of its development costs financed through LA/MSF at zero interest.[5632] We recall that the 1969 inter-governmental agreement set out the intention of the governments of France and Germany to cooperate in the field of aeronautics, and in particular to support the development by national manufacturers of a single LCA, and specifically envisaged that those governments would provide funding for the development of that LCA, the A300.[5633] Prior to the 1969 Agreement, the companies that would eventually form part of Airbus Industrie GIE, which we recall was constituted in 1971, had not yet worked together on any endeavour of similar scope or ambition. Both parties have recognized the complexities and the risks involved in launching such a project. Indeed, as we have previously noted, the parties have described the development of LCA as an endeavour that requires "huge up-front investments"[5634] and a commitment of "tremendous resources"[5635] in the face of a business

[5627] Exhibit EC-956 (HSBI).
[5628] But see US, Comments on EC Answer to Panel Question 262 (HSBI Appendix), paras. 7-9.
[5629] EC, SWS, para. 793.
[5630] EC, SWS, para. 795.
[5631] EC, SWS, paras. 758, 837-839, 854-857.
[5632] *See*, footnote 2431 above.
[5633] *See*, para. 7.534 above. The 1969 Agreement was extended to the governments of the Netherlands and Spain in 1970 and 1971, respectively. *See*, para. 7.537 above. *See*, Exhibits US-16, EC-992 (BCI).
[5634] US, FWS, para. 112.
[5635] EC, FWS, para. 31.

BCI deleted, as indicated **[***]**

environment that is shaped by factors "whose very foreseeability is impossible by definition".[5636] In our view, the degree of risk associated with Airbus' first venture into LCA manufacturing was probably the greatest among all of its LCA projects. This level of uncertainty appears to be clearly reflected in the statement attributed to Airbus' Managing Director Jean Pierson:

> "Let us go back to 1970 for one minute. Imagine if I had gone then to a bank and said, 'I have just started a management team from various European countries. I intend to make a large aircraft to compete with Boeing. Will you lend me $1 billion? You may lose all of it. Or you may start to make some money twenty years from now! I leave it to your imagination the welcome I would have had. No financial institution would have taken such a risk, or if it had the interest rates would have been simply prohibitive. It was therefore up to the governments of each of the countries participating in Airbus Industrie to substitute themselves for the bankers and assume such risks".[5637]

7.1934 In our view, the United States has demonstrated that LA/MSF functions as a risk transferring device which significantly alters the economics of a decision to launch any given LCA programme. This we believe is adequately demonstrated by the Dorman Report which, in this respect, is supported by the sensitivity testing included in the A380 business case. According to both pieces of evidence, the provision of LA/MSF improves the predicted results of the aircraft programme in question, indicating that an affirmative launch decision is more likely than it would be in the absence of such financing. As noted above, we do not consider that the Dorman Report proves that any particular Airbus model would not have had a positive NPV in the absence of LA/MSF. It does, however, demonstrate how LA/MSF, by transferring risk to the government lenders, reduces the manufacturer's risk, and improves the potential profitability of any particular aircraft programme, making a decision to go ahead with LCA programme launch more likely. This dual impact of risk reduction and profit enhancement would have been particularly pronounced for the A300, given that LA/MSF covered close to 100 percent of its development costs at zero interest, when the interest rate that would have been offered by a market lender for a comparable loan would have, at a minimum, fallen within the range of 15.18 percent and 16.60 percent.[5638] In our view, having to borrow the necessary funds for the A300 launch at those interest rates would have been a significant disincentive to a decision to go ahead with the programme. Irrespective of its limitations in demonstrating whether any particular aircraft would have been launched without LA/MSF, the Dorman Report persuasively illustrates how LA/MSF transfers risk and improves the NPV of any particular aircraft project. Together with the above-quoted statements and our own understanding of the history and risks associated with development of LCA in general, and of the A300 in particular, we consider that the United States has demonstrated that LA/MSF was necessary for Airbus to have launched the A300 as originally designed and at the time that it did. We come to the same conclusion with respect of the remaining models of Airbus LCA, as we explain below.

7.1935 LA/MSF was used to finance between 90 percent and 100 percent of the development costs of the A310, which was launched in 1978.[5639] The United States has not adduced any evidence of direct statements of any Airbus or government officials suggesting that LA/MSF for the A310 was necessary for its development. However, it has argued that the development of one Airbus LCA model supports the development of production facilities and technologies that are used across all other

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[5636] EC, FWS, para. 30.
[5637] Quoted in Matthew Lynn, *Birds of Prey*150 (1998), Exhibit US-42.
[5638] *See*, para. 7.488 above.
[5639] *See*, footnote 2431 above.

BCI deleted, as indicated **[***]**

LCA models.[5640] According to the United States, such a relationship between Airbus LCA models was recognized by Airbus:

> "'In the 1980s, we were able to widen our family by launching the A310 that incorporated many systems and power plant improvements that had occurred in the years since the A300 was designed', an Airbus executive said. 'Then we turned around and put many of the A310 improvements back into the A300 and came up with an updated aircraft that we designated the A300-600. The same philosophy will be followed with our new aircraft. Additionally, there is a strong possibility that the A320/A330/A340 technology can be used as well to create an advanced A300 and/or A310 in the 1990s'."[5641]

> "'But the A350 is going to be the sistership of the A380 so it's technology you can already touch and see. It's tangible because the A380 is flying'."[5642]

7.1936 That static and dynamic ("learning curve") economies of scope and scale achieved in the context of one model of LCA are an important part of the development and production of other LCA models has also been recognized by economists.[5643] It is undisputed that LCA projects involve complex development and production technology. Therefore, knowledge and experience gained in the development and production of one model of aircraft will tend to lower the costs of development and production of subsequent aircraft. We are satisfied from the evidence before us that the A310 benefited from Airbus' earlier successful development of the A300. To this extent, had Airbus not obtained LA/MSF for the A300, and therefore not launched, developed, and starting in 1974, sold the A300 as designed, we have little doubt that it would not have been able to launch the A310 as originally designed in 1978. Even if Airbus had successfully launched the same A300 in 1969 without LA/MSF, relying upon market-based financing to do so, we consider that the costs of that financing would have made it extremely difficult, if not impossible for Airbus to have subsequently launched the A310 in 1978, without LA/MSF.[5644] We recall that LA/MSF was provided for close to 100 percent of the development costs of the A300 at zero interest, whereas we have found that the interest rate that would have been offered by a market lender for a comparable loan would have, at a minimum, fallen within the range of 15.18 percent and 16.60 percent.[5645] Similarly, LA/MSF for the A310 covered between 90 percent and 100 percent of its development costs, and it too was provided at zero interest, compared with what we found would have been a minimum of between 13.99 percent and 18.88 percent demanded by a market lender for comparable financing.[5646] The Dorman simulation demonstrates that LA/MSF will make it more likely that an LCA project will be launched. In the particular context of the launch of the A310, the Dorman simulation provides persuasive support for our conclusion that had Airbus not obtained LA/MSF for the A310, it would not have been able to launch it as originally designed and at the time that it did.

[5640] US, FWS, para. 722.

[5641] Jeffrey Lenorovitz, *Airbus Industrie Launching Production for New A330/A340 Simultaneously*, Aviation Week & Space Technology, 24 February 1986, Exhibit US-391.

[5642] Jason Neely, *Airbus Top Challenge Is Keeping up with Demand*, Reuters, 22 November 2005, (quoting Airbus CEO Gustav Humbert), Exhibit US-392.

[5643] Neven & Seabright, Exhibit US-382. *See, also*, A-380 business case, Exhibit EC-362 (HSBI) p. 36.

[5644] We note, in this regard, that while the A300 was launched in 1969, it was first delivered to a customer in 1974. Thus, revenues were only just beginning to flow from deliveries to customers at the time the decision to launch the A310 was being contemplated, and repayments of LA/MSF were limited at most.

[5645] *See*, para. 7.488 above.

[5646] *See*, para. 7.488 above.

BCI deleted, as indicated **[***]**

7.1937 The A320 was the next model of LCA launched by Airbus, in 1984. It too was financed with LA/MSF, covering up to 90 percent of its development costs.[5647] The United States has submitted two reported statements made by officials of Airbus and British Aerospace which support the conclusion that LA/MSF was in fact necessary for the launch of the A320. While the statement made by Sir Austin Pearce may have been directed towards the role of LA/MSF in allowing British Aerospace to participate in the project, we do not consider this to be a deficiency in the United States' arguments. There is no suggestion in the evidence before us, and the European Communities does not argue, that if British Aerospace (or any other Airbus company) could not participate in the project unless LA/MSF were provided, the project would nonetheless have continued without its participation.[5648] Given the nature of the Airbus enterprise from the first inter-governmental agreements onward, it seems clear to us that the participation of all four national enterprises was and remained an important element of every launch of Airbus LCA.[5649]

7.1938 There is also little doubt in our minds that the launch of the A320 in 1984, as originally designed, was to a very large degree made possible by Airbus' successful launches of the A300 and A310 over the previous decade with the assistance of LA/MSF. Therefore, it is clear that the LA/MSF for these earlier models of LCA also benefited the launch of the A320. Moreover, as we have already noted, the cost of obtaining market financing for the A300 and A310, compared with LA/MSF, was significant. However, even assuming Airbus had been able to launch both LCA models as originally designed in 1969 and 1978, relying only on market-based financing (something we consider would have been highly unlikely), it would have been extremely difficult, if not impossible, to launch the A320 in 1984 as originally designed, without access to LA/MSF.[5650] In this regard, we recall that the interest rate benefit associated with LA/MSF provided for the A320 ranged, at a minimum, between **[***]** and **[***]**.[5651] Taking the above evidence and considerations together

[5647] The 1990 German Federal Budget introduced a standard development aid ceiling for Airbus of 90 percent. *See*, Budget Plan 09 (Ministry of Economics), Part 02, Chapter 09, comments to line item 892 91-634, Exhibit US-17X. For France (75%): Collin (Yvon), Rapport d'Information No 367 (96/97), Mission de contrôle effectuée sur le soutien public à la construction aéronautique (hereinafter "1997 Senate Report"), at 63, 67, Exhibit US-18. For Spain (70%): Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Cuenta General del Estado de 1992, Serie A, Núm. 34, at 122 (13 January 1997), Exhibit US-19

[5648] Indeed, there is evidence to the contrary. "Through Aérospatiale, the entire A340-500/600 program has been made possible thanks to the measures reported by the French authorities. Indeed, in view of the industrial structure of *Airbus Industrie* and the configuration of the European aeronautics sector, this program cannot be contemplated without the participation of Aérospatiale." Letter from Karel Van Miert to Hubert Vedrine, Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program, Exhibit US-3.

[5649] The development and production of Airbus LCA was divided among the national companies participating in the in the Airbus consortium. Thus, as of 1999, the French company, Aérospatiale, was responsible for flight control systems, cockpits, power plant integration, ground and flight testing, complex structural sections, equipped subassemblies and technical publications. The German company, DASA, produced the major fuselage sections containing hydraulic equipment, secondary flight control systems, wing assemblies and commercial furnishing, as well as equipping the wings furnished by BAE Systems. DASA also carried out final assembly of A321 and A319 aircraft, as well as some cabin outfitting and customization of the cabins of the A300/A310 and the A320 family. The British and Spanish companies, BAE Systems and CASA, were in charge of other distinct areas. *See*, Aérospatiale-Matra Offering Memorandum, 25 May 1999, pp. 90-91, Exhibit EC-053. It is clear from the evidence before us that this division of labour continued with subsequent models of Airbus LCA.

[5650] We note, in this regard, that while the A310 was launched in 1978, it was first put in service and delivered to a customer in 1985. Thus, the LA/MSF for the A310 project was still outstanding, and significant revenues were not yet being generated by that LCA at the time the decision to launch the A320 was being made and implemented. The A300 had only been in service since 1974, and we understand most of the LA/MSF for this project was also still outstanding at the time the decision to launch the A320 was made in 1984.

[5651] *See*, para. 7.488 above.

BCI deleted, as indicated **[***]**

with the results of the Dorman simulation,[5652] we conclude that the United States has demonstrated that LA/MSF for the A320 was necessary for Airbus to have launched the A320 at the time it did and as originally designed.

7.1939 Likewise, on the basis of a similar set of considerations, we find that the United States has also established that 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.[5653] First, we note the statement made by a British Aerospace official indicating that commercial financing for the A330/A340 project was not a feasible option at the time. As we have already observed, the participation of all four national Airbus companies was and remains an important element of every launch of Airbus LCA. Thus, without the participation of British Aerospace in the A330/A340 project, it seems highly unlikely that Airbus would have gone ahead with that launch in 1987. Again, we consider that LA/MSF provided for the previous LCA models, the A300, A310 and A320, played a significant role in placing Airbus in a position to be able to launch the A330/A340 project in 1987.[5654] However, even assuming Airbus had been able to launch these earlier models without access to LA/MSF, (which we consider would have been even less likely than the launch of the A320, but for the earlier provision of LA/MSF for that model, as well as for the A300 and A310), it would have been extremely difficult, if not impossible, to launch the A330/A340 project in 1987 as originally designed, without access to LA/MSF. In this regard, we recall that the interest rate benefit associated with LA/MSF provided for the A330/A340 ranged, at a minimum, between **[***]** and **[***]**.[5655] When considered together with the results of the Dorman simulation,[5656] we conclude the United States has demonstrated that LA/MSF for the A330/A340 was necessary for Airbus to have launched this project at the time when it did and as originally designed.

7.1940 We now consider the impact of LA/MSF on the launch of the A330-200 and the A340-500/600. The business case for the A330-200 indicates that the expected development costs for this model were comparatively small. The expected NRC constitute a small fraction of the "typical" wide-body NRC used in the Dorman simulation. Furthermore, as the European Communities notes, only Aérospatiale was provided with LA/MSF, amounting to EUR 49.9 million. Given this relatively small amount, it seems less unlikely that Aérospatiale would not have been able to finance this amount for this LCA in some other manner. Further, given that the aircraft at issue was a derivative of an existing aircraft, its potential success or failure involved a smaller risk for Airbus' overall operations. In this light, it seems more likely that the A330-200 could have been launched even in the absence of the specific LA/MSF granted in respect of that programme than the other programmes we have examined. However, as previously discussed, LCA have a complex production technology which results in strong learning effects. Knowledge and experience gained in the development and production of one model of aircraft will lower the costs of development and production of subsequent aircraft launches. This is particularly true for derivative aircraft, where the subsequently launched model is a variant of an existing model, as is the case with these LCA models.[5657] Consequently we

[5652] See also, US, Comments on EC Answer to Panel Question 262 (HSBI Appendix), para. 3.

[5653] BT-Drs. 12/1080, at 46, Exhibit US-26; 1997 Senate Report, at 63, 68, Exhibit US-18; Boletin Oficial de las Cortes Generales, Congreso de los Diputados, Contestaciones del Gobierno, Serie D, Núm. 547, (June 5, 2003), at 153, Exhibit US-27.

[5654] Again, we note that while the A320 was launched in 1984, it was first delivered to a customer in 1988, after the launch of the A330/A340 in 1987. Thus, revenues were not yet being generated by this model LCA at the time the decision to launch the A330/A340 in 1987 was made, and repayment of LA/MSF received for the A320 had not yet begun.

[5655] *See*, para. 7.488 above.

[5656] See also, US, Comments on EC Answer to Panel Question 262 (HSBI Appendix), paras. 4-6.

[5657] "{S}ome production stages are not specific to a particular type of aircraft, such that learning effects which are realized in the production of a generic aircraft can influence marginal cost of producing another generic aircraft." Klepper, Exhibit US-377. The fact that such cross effects are strong for updated versions of

BCI deleted, as indicated **[***]**

consider that the economic viability and, indeed the very existence of the A330-200, is dependent on the aircraft which preceded it, including in particular the original A330 aircraft from which it is derived. The relatively small development costs of the A330-200 in our view are a function of the fact that it is a derivative of the A330/A340, the launch of which, as we concluded above, would not have occurred as and when it did but for the LA/MSF granted in respect of that aircraft.[5658] Thus, while the particular grant of LA/MSF specific to the A330-200 may not have been necessary to its launch, on the whole, we conclude that LA/MSF was necessary to the launch of the A330-200, as without the grant of LA/MSF for the development of the original model (and all models preceding that model), the A330-200 could not have been launched when it was without significantly higher costs.

7.1941 Like the A330-200, the A340-500 and 600 are derivative aircraft whose development was dependent upon the prior development and production of the original A340 model from which they are derived. For the reasons discussed above, in considering the impact of LA/MSF on the launch of such a derivative aircraft, we consider it appropriate not only to consider the LA/MSF directly linked to the particular aircraft model but also to consider the role that LA/MSF played in the launch of the aircraft on which it is based, as well as all other Airbus LCA launched before it. The A340-500/600 was derived from the A340, whose launch, as we have found above, depended upon the provision of LA/MSF. In these circumstances, we consider that LA/MSF was also essential to the development of the A340-500/600.

7.1942 Even considered on a stand-alone basis, the evidence suggests that the A340-500 and 600 were dependent upon the provision of LA/MSF. As noted above, the European Commission found, in response to the French government State Aid notification in respect of the A340-500/600 measures: "Aérospatiale could not finance the costs connected with the development of the Airbus A340-500/600 by itself or with the help of bank loans."[5659] This statement suggests that, even assuming a business case which predicts **[***]**, Aérospatiale, at the very least, could not have participated in the programme in the absence of LA/MSF. As we noted above, there is no indication that any of the aircraft launches would have proceeded without the participation of all the Airbus companies, and thus, the participation of Aérospatiale was required if the project was to proceed.[5660] In this respect we do not consider the fact that the UK government did not provide LA/MSF to British Aerospace, or that British Aerospace was able to secure outside funding to develop this model of LCA, is sufficient to substantiate the European Communities' position that the A340-500 and 600 would have been launched even in the absence of LA/MSF. While British Aerospace's ability to secure outside funding suggests a confidence in the project on the part of those entities supplying the financing, that decision presumably rests on those entities' overall assessment of British Aerospace's financial position, and also the terms of the financing agreement. We doubt that the same would have been true for Aérospatiale. The European Communities itself states that the launch of the A320, A330, and A340, even with LA/MSF, had left Aérospatiale in a position in which "{i}nternally generated cash flow was not sufficient" to fund its investments, given that "a prudent debt/equity ratio placed limits on the amount of new debt that could be borne."[5661] **[***]**.[5662] Funding even just a portion of its LCA launches without subsidies had left Aérospatiale in a position that was "repellent" to private

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an aircraft, the so-called derivatives, is illustrated for the Airbus A300 and its derivative the A310 in Klepper, Exhibit US-377, p. 778.

[5658] *See*, para. 7.1939 above.

[5659] Letter from Karel Van Miert to Hubert Vedrine, *Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program*, Exhibit US-3

[5660] *See*, para. 7.1939 above.

[5661] EC, FWS, para. 1135.

[5662] Aérospatiale report to Credit Lyonnais (1994), DS316-EC-BCI-0000756, at 1 (**[***]**), Exhibit US-296, (BCI).

BCI deleted, as indicated **[***]**

investors.[5663] There is no basis to conclude that Aérospatiale could have obtained outside financing simply because British Aerospace did, as the state aid finding of the European Commission demonstrates.

7.1943 Turning to the A380, the evidence before us indicates that, as compared with both the A330-200 and the A340-500/600, the A380 was a massive project with respect to both the technical aspects of development of the aircraft, and its associated costs. Thus, in our view, the A380 programme has more in common with the project contemplated by the Dorman simulation than either of the immediately preceding derivative programmes. The A380 business case clearly demonstrates that LA/MSF has a significant impact on the economics of the programme. That said, the A380 business case predicts a positive NPV for the programme even assuming no LA/MSF is provided, as well as a positive NPV in circumstances where a Realistic Worst Case scenario is contemplated in situations where the project is supported by LA/MSF. Likewise the Carballo Declaration indicates that in a no-LA/MSF Realistic Worst Case scenario a smaller but still positive NPV would be predicted on the basis of the **[***]** used in the Airbus business case. Assuming that the business case, or rather the numbers underlying the business case as applied in the Carballo Declaration, demonstrate a positive NPV in a no-LA/MSF and a Realistic Worst Case scenario,[5664] the relevant question for us is whether the United States has demonstrated that the A380 would not have been launched in the absence of LA/MSF. The United States makes two principal arguments in this respect.

7.1944 First, the United States suggests that given the high risk involved in a programme such as the A380, LA/MSF increases confidence in the business model, including confidence that the Realistic Worst Case scenario is, in fact, the realistic worse case. If market conditions are more adverse to Airbus than those considered in the realistic worse case scenario, LA/MSF ensures that the project may nevertheless result in a positive NPV, or at a minimum, as the Dorman simulation predicts, will limit losses. In this way the launch decision remains dependent upon the provision of LA/MSF. The United States also argues that the sensitivity analysis provided by Airbus overstates likely sales volumes and understates the risk of a shortfall.[5665] For similar reasons, we have concerns about the A380 business case, as discussed above,[5666] and we are thus not persuaded that the A380 business case alone demonstrates that Airbus would have launched the A380 even in the absence of LA/MSF.

7.1945 Second, the United States argues that even if Airbus were confident that the A380 project would be viable without LA/MSF, it does not follow that Airbus would have been able to fund the project from its own resources and outside financing. In this respect the United States points to the comments of the French Senate Report considering the provision of LA/MSF to Aérospatiale, which suggests that even if Aérospatiale could find outside funding in respect of the A380 programme (which it considered it could not) the impact of such funding on the balance sheet of Aérospatiale would be such that it would have difficulties following this strategy. As noted above, the Report concluded that "such external financing would apparently add excessively to the financial expenses incurred by the firms and would throw their balance sheets out of equilibrium because of the low level

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[5663] *EC to Review France's Aérospatiale Capital Injection*, Aerospace Daily (9 February 1994), Exhibit US-275.

[5664] We recall that because the Carballo Declaration did not undertake the sensitivity analysis with the **[***]** would have resulted in a negative NPV in the Realistic Worst Case scenario without LA/MSF. Given what we know about the effects of the **[***]** rate on the NPV of the project without LA/MSF in the baseline business case, we suspect that a **[***]** would have also had a significant impact on the project's NPV in the Realistic Worst Case scenario without LA/MSF. *See*, para. 7.1925 above.

[5665] In this respect the United States notes that the impact of unanticipated delivery delays and higher than expected development costs actually experienced in connection with the A380 were reported by EADS in 2006 to be EUR 2.5 billion. US, SWS, para. 582, citing EADS press release, *EADS 2006 results dominated by Airbus loss*, 9 March 2007, Exhibit US-463.

[5666] *See*, para. 7.1927 above.

BCI deleted, as indicated **[***]**

of their equity capital".[5667] Moreover, the United States has submitted a record of a statement made by the then UK Secretary of State for Trade and Industry, who in response to a question in Parliament answered: "We have recently seen, of course, the launch of the A380, which would not have been possible if it had not been for the commitment of the British government to launch an extremely successful programme ... ".[5668]

7.1946 The European Communities contests the United States' reliance on the French Senate Report, noting that this report addresses the role of Aérospatiale only and that it was prepared in 1996-1997, prior to the creation of EADS in 2000 which, according to the European Communities, increased Airbus' financial flexibility. In addition, it asserts that the Senate Report only considers "on balance sheet debt financing" and does not consider "off balance sheet financing" such as risk-sharing arrangements with suppliers. Noting that the A380 business plan already included off-balance sheet financing through suppliers, that Boeing has reportedly financed 60 percent of the non-recurring costs of the 787 through such methods and the supply by Alenia of such financing to the German Airbus partner Dasa when the German government did not provide LA/MSF in respect of the A340-500/600, the European Communities argues that absent LA/MSF, Airbus could have increased its use of risk-sharing suppliers to secure the necessary financing.[5669]

7.1947 While the financial situation of Airbus France in 2000 would have clearly been different from the position of Aérospatiale in 1997 (when the French Senate Report was released) the European Communities has submitted no persuasive evidence to suggest that Airbus France was in a better position than Aérospatiale to fund its part of the A380 project without LA/MSF. Although it is evident from the EADS offering memorandum that the corporate restructuring of Airbus Industrie GIE, Aérospatiale, CASA and Deutsche Airbus was intended to improve the companies' operations by rationalizing resources, eliminating duplication and consolidating overall management under a more integrated corporate structure, it is not so clear precisely how, or indeed if or to what degree, this move affected the ability of Airbus France (or Airbus SAS) to raise the very large amounts of capital needed for the A380 project. Likewise, the European Communities has submitted no evidence to support the contention that merely because, reportedly, Boeing was able to finance a significant portion of the non-recurring costs of development of the 787 through risk-sharing supplier arrangements, Airbus would necessarily have been able to do the same with respect to the A380. Airbus does use risk-sharing supplier arrangements, but there is no indication that it could have increased its use of such arrangements so as to replace the entire amount of financing provided by LA/MSF, which, we recall, was up to 33 percent of the development costs of the A380. We do not consider the availability of risk-sharing supplier arrangements in respect of the A340-500/600 to be persuasive in this regard. Those were derivative aircraft which entailed much smaller development costs and a much lower level of risk to Airbus' overall operations. The willingness of suppliers to take on some of the risk of that much smaller programme does not demonstrate that any supplier or suppliers would be prepared to do so in respect of up to 33 percent of the much greater costs of the A380. Moreover, as we have previously noted, information in the Airbus A380 business case suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants.[5670]

7.1948 Finally, but for LA/MSF provided with respect to Airbus' launches of earlier models of LCA, we do not consider that it would have been possible for Airbus to be in a position to launch the A380 in 2000. We have found that the cost for Airbus of obtaining market financing for the A300, A310,

[5667] *Mission de contrôle effectuée sur le soutien public a la construction aéronautique civile*, Sénat Report 1997, 72, Exhibit US-18.
[5668] Exhibit US-436.
[5669] EC, Answer to Panel Question 265.
[5670] Exhibit EC-362 (HSBI), p. 29.

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A320 and A330/A340 would have been many percentage points greater than what it actually was because of LA/MSF in each instance. Given the amount of funding transferred to Airbus under the individual LA/MSF contracts, and in the light of the formidable risks associated with the LCA business and the learning curve effects that are necessary to successfully participate in this sector, we have found that it would not have been possible for Airbus to have launched all of these models, as originally designed and at the times it did, without LA/MSF. Even assuming this were a possibility, and that Airbus had actually been able to launch these aircraft relying on only market financing, the increase in the level of debt Airbus would have accumulated over the years would have been massive.[5671] Thus, while the A380 business case suggests, but by no means demonstrates, that as a stand-alone proposition the project might have been economically viable even without LA/MSF, in our view, that conclusion rests in part on the assumption that at the time of the launch, Airbus would have been in a position to not only design and manufacture the A380, *i.e.*, had the necessary development and production technologies available to it, but also would have been able to obtain all the necessary financing on market terms. However, Airbus' technical capabilities derived in part from its experience in the development of its earlier model LCA funded in significant part by LA/MSF. Moreover, because of the significant amount of debt that developing its previous models of LCA would have generated, we consider Airbus would not have been in a position to obtain market financing for the A380, had it not financed the development of its earlier model LCA in significant part through LA/MSF. It follows that the view that Airbus could have launched the A380 as a stand-alone proposition is dependent upon Airbus having received LA/MSF to develop all of its previous models of LCA. Thus, either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380.

7.1949 In summary, we conclude that the United States has demonstrated that LA/MSF shifts a significant portion of the risk of launching an aircraft from the manufacturer to the governments supplying the funding, which we recall is on non-commercial terms. Based on our review of the development of successive models of Airbus LCA, we conclude that Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF.

The alleged "product" effect of the other subsidies in dispute

7.1950 The United States argues that while LA/MSF is the primary subsidy benefiting Airbus LCA, the other challenged subsidies have similar effects.[5672] Thus, the United States contends that the other subsidies also shift costs of LCA development from Airbus to the governments, giving Airbus an edge, and allowing it to enter the LCA market with new LCA models at a pace that would otherwise not have been possible.

7.1951 The United States asserts that infrastructure subsidies relieve Airbus of the need to fund infrastructure necessary for the development and production of LCA, shifting the costs of aircraft development from Airbus to the Airbus governments.[5673] The United States argues that infrastructure grants for the A380 assembly sites at Hamburg and Toulouse relieved Airbus of development costs, in

[5671] The United States asserts that if Airbus had funded all of its LCA launches by obtaining LA/MSF at market rates rather than the subsidized rates provided by the Airbus governments, the resulting impact on its balance sheet would have been an additional US$ 178.2 billion in debt, far greater than anything Airbus could have sustained. US, SWS, para. 612-613, US, Answer to Panel Question 228, para. 14, citing NERA Economic Consulting, *Quantification of Benefit of Launch Aid* (24 May 2007), Exhibit US-606; US, SWS, paras. 610-612. While we do not necessarily accept the United States' calculation, it is clear to us that the additional debt burden for Airbus of commercial financing of all its LCA launches would have been massive, and potentially prohibitive. Indeed, the European Communities itself states that this cumulative impact is several times greater than the entire market capitalization of EADS. EC, SWS, para. 960.

[5672] US, FWS, para. 819.

[5673] US, FWS, para. 821.

this case for the A380, and when provided together with LA/MSF, shifted commercial risk away from Airbus and to the governments involved, limiting the risk of A380 failure to Airbus and making it more likely that Airbus would launch the A380 in the first place.[5674]

7.1952 Similarly, the United States contends that R&TD funding for particular LCA models or aspects thereof also relieves Airbus of costs it would have otherwise had to incur itself in launching those LCA models.[5675] In addition the United States asserts that HSBI evidence demonstrates that Airbus needed R&TD subsidies in order to launch particular models.[5676] The United States asserts that at least some of the R&TD subsidies provided to Airbus are clearly related to LCA development, citing as an example EUR 3,000,000 for a study of the A380 wake vortex, which it asserts was an important issue related to the development of the A380 and its placement into commercial service.[5677] The United States maintains that where research subsidies are provided to fund projects that would clearly otherwise be part of the launch of a given LCA model, the effects of such subsidies are also properly considered together with LA/MSF.[5678]

7.1953 The United States argues that debt forgiveness[5679] and equity infusions increased the capital available to Airbus, enabling Airbus to maintain a level and pace of product development that could not have been sustained without subsidies, thus complementing the effect of LA/MSF by offsetting the build-up of debt on Airbus' balance sheet associated with the pace of its product development.[5680] The United States maintains that debt forgiveness and equity infusions have played a significant role in improving Airbus's balance sheet and enabling it to attract additional private investment and maintain its product development and pricing strategies.[5681]

7.1954 The United States maintains that each of the above-mentioned types of subsidies, together with LA/MSF, support Airbus' long-term plan to develop and maintain a competitive LCA family, and each of them has economic effects similar to that of LA/MSF, *i.e.*, reducing the costs and shifting the risk of LCA development (thus making launch more likely) and alleviating the financial strain of product launches (thus affording pricing flexibility with respect to all models).[5682] The United States therefore considers that the measures should be considered together with LA/MSF.[5683]

7.1955 The European Communities argues that the nature of the challenged measures, in terms of their structure, operation and design, precludes considering them in the aggregate.[5684] The European

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[5674] US, SWS, para. 625.

[5675] US, FWS, para. 822.

[5676] HSBI Redacted version appendix to US, FWS, paras. 60-61, citing, French A340-500/600 project appraisal, DS316-EC-(HSBI)-0001143, at 17.

[5677] *See,* Competitive and Sustainable Growth Programme, 1998-2002 Project Synopsis: New Perspectives in Aeronautics, 2003, at 261, Exhibit US-322.

[5678] US, SWS, para. 626.

[5679] We recall that we have not found the debt forgiveness by the German government to constitute a specific subsidy, but did conclude that the capital transfer through KfW to Deutsche Airbus is a specific subsidy.

[5680] US, FWS, para. 824-825, citing Aérospatiale report to Credit Lyonnais (1994), DS316-EC-BCI-0000756, at 1

[5681] US, SWS, para. 628.

[5682] US, FWS, para. 826. We address the United States' contentions regarding pricing further below.

[5683] Brazil agrees that the challenged subsidies should be cumulated in examining whether they are causing adverse effects to US interests if such subsidies "manifest themselves collectively," but does not take a position regarding whether that standard is satisfied in this case. Brazil, Third Party Submission, para. 56

[5684] Canada considers that the United States errs by aggregating the subsidies without consideration of their nature and effect, citing *US – Upland Cotton* for the proposition that aggregation should be undertaken with caution, as otherwise parties may be left with inadequate guidance as to what actions are required by a subsidizing Member to comply with a recommendation from the DSB to withdraw the adverse effects caused by subsidies in the aggregate. Canada, Third Party Submission, paras. 61-63. According to Canada, the

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Communities argues that, unlike the subsidies in *US – Upland Cotton*, which were found to be appropriately aggregated, not all of the subsidies in this case have a nexus to a particular subsidized product, they are not contemporaneous, and some are recurring while others are not.[5685] The European Communities argues that the United States causation theory focuses on the impact of subsidies on launch decisions, and contends that aggregation is inconsistent with this argument.[5686] With respect to the different types of measures, the European Communities contends that each grant of LA/MSF is tied to a specific LCA, and thus to a specific subsidized product, and each was granted at a different time. The European Communities asserts that some of the infrastructure measures are tied to a specific LCA model, and notes that they were provided at different times, and that some are recurring while others are not. In addition, the European Communities contends that none of the equity infusions is tied to a particular LCA model, and that these non-recurring measures were granted at different times. Finally, with respect to the non-recurring R&TD grants, the European Communities points out that they were granted at different times.[5687] In its first written submission, the European Communities asserted that the United States failed to explain how R&TD subsidies caused adverse effects, arguing that the United States failed to provide evidence showing how the nature of these grants caused specific lost sales, price depression, or other material injury or serious prejudice.[5688] The European Communities also argues specifically that infrastructure measures provided by Hamburg are not of a nature that causes adverse effects to United States' interests.[5689] The European Communities asserts that the structure and operation of the measures at Mühlenberger Loch are such that they are incapable of causing adverse effects. Indeed, according to the European Communities, these measures led to an **[***]**.[5690] The European Communities maintains that **[***]** and the availability of the reclaimed land in Hamburg led Airbus to split the A380 Final Assembly Line ("FAL") between Toulouse and Hamburg, as opposed to creating a single site FAL in Toulouse, as initially contemplated, which decision, the European Communities asserts, **[***]** cost of locating and operating the A380 FAL, resulting in a **[***]** in the **[***]**.[5691]

7.1956 We do not agree with the European Communities' view that differences in the structure, operation, and design of the different subsidies at issue in this dispute preclude their being considered in the aggregate in examining whether their effect is serious prejudice. We have concluded that LA/MSF was necessary to the launch of each successive model of Airbus LCA, and that the individual and cumulative effect of those measures was fundamental to Airbus' ability to launch the particular LCA models it launched at the time that it did. That is, but for LA/MSF, Airbus would not have been able to accomplish these successive launches.[5692] This "product" effect of LA/MSF is, we

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United States fails to establish a nexus between alleged subsidies and the adverse effects claimed. Canada, Third Party Submission, paras. 64-71.

[5685] EC, Comments on US Answer to Panel Question 162, para 247.

[5686] EC, Comments on US Answer to Panel Question 162, para 248.

[5687] EC, Comments on US Answer to Panel Question 162, para 249.

[5688] EC, FWS, paras. 1658-1659.

[5689] EC, SWS, para. 1077.

[5690] *See,* Airbus Industrie Supervisory Board Meeting Re: A3XX Programme Status (following Pre-ATO Campaigns), 8 June 2000, Exhibit EC-794, (HSBI).

[5691] EC, SWS, para. 1079. *See,* Airbus Industrie Supervisory Board Meeting Re: A3XX Programme Status (following Pre-ATO Campaigns), 8 June 2000, Exhibit EC-794, (HSBI). The European Communities notes that the assessment of the **[***]** assumed that all deliveries would take place from Toulouse. Ultimately, deliveries were split between Toulouse and Hamburg. If anything, two delivery centers marginally increased costs **[***]**.

[5692] *See,* footnote 5671 and associated text above. Having rejected the European Communities' view that different models of Airbus LCA are distinct subsidized products, we do not consider the fact that the grants of LA/MSF were provided with respect to the development of specific models of LCA to undermine the conclusion that each of these measures benefited the subsidized product, Airbus LCA. Moreover, we note that, with the exception of the A300 and A310, with respect to which the United States alleged only LA/MSF

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consider, complemented and supplemented by the other specific subsidies we have found to exist in this dispute.[5693] The fact that the LA/MSF subsidies were granted over a long period of time, and the first and last grants were decades apart does not, in our view, demonstrate that it is not appropriate to consider them all together, as we have concluded that they were all provided in connection with the subsidized product, Airbus LCA, and they all had the same effect on Airbus' ability to launch the LCA it launched at the time that it did.[5694]

7.1957 The equity investments and share transfer measures of the French and German governments ensured the continued existence and financial stability of the respective national entities engaged in the Airbus enterprise. Those entities were a necessary element of the overall Airbus effort, as it is clear to us that without their participation in the overall effort, Airbus would not have been able to continue to develop, launch and produce LCA in fulfilment of the goal of developing a full range of LCA for the market.[5695] Moreover, as noted above, Aérospatiale required the additional equity to fund investments in fixed assets and inventory, and advances to suppliers, in connection with the development of new aircraft. As the European Communities acknowledges that Aérospatiale could not have undertaken these investments without the government's assistance through equity infusions,[5696] it seems clear to us that these equity investments directly supported the development of LCA in a manner that was as direct as LA/MSF.

7.1958 The infrastructure subsidies similarly provided essential support to the development and production of Airbus LCA, relieving Airbus of significant expenses in connection with the development of facilities for the production of, most particularly, the A380, and thus enabling it to continue with the launch of successive models of LCA. Even assuming, as the European Communities contends, that the establishment of an A380 final assembly line in Hamburg **[***]**, the establishment of that line was necessary in order to ensure **[***]**,[5697] which we consider to have been necessary to the ability of Airbus to launch the A380.

7.1959 Finally, 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. Even in the case of those R&TD subsidies directed to pre-competitive research, the ability to fund such efforts at a time when it would likely have been unable to do so in light of other demands on its resources was, in our view, significant in ensuring the launch of successive models of Airbus LCA. While we recognize that the

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subsidies, we have found subsidies to Airbus that were granted during the period each succeeding model of Airbus LCA was being developed and brought to market. For instance, since 2000, when LA/MSF was first provided in respect of the A380, Airbus has received infrastructure and R&TD subsidies. During the period the A340 was being developed with financing provided by LA/MSF, Airbus was also benefiting from infrastructure, RT&D and equity infusion subsidies. Similarly, when the A320 was being developed with LA/MSF financing, Airbus also received infrastructure, RT&D and equity infusion subsidies. Moreover, Airbus was receiving LA/MSF with respect to more than one model of LCA at a time during much of the period from 1978 on. Thus, with the exception of the A300 and A310, Airbus has received a range of subsidies with respect to each model of LCA it has developed, and subsidies have overlapped with one another.

[5693] We recall that we have concluded that while the EIB loans in dispute are subsidies, they are not specific. *See*, Section VII.E.5(c) above.

[5694] Moreover, we recall that the Appellate Body has recognized that "there could be a time-lag between the payment of a subsidy and any consequential adverse effects." Appellate Body Report, *US – Upland Cotton*, para. 273. In our view, that subsidies were granted at different times does not determine when their effects were manifested and felt, and thus does not determine whether it is appropriate for a panel to consider them together.

[5695] *See*, footnote 5649 above.

[5696] EC, FWS, para. 1135.

[5697] EC, Answer to Panel Question 219, para. 546; US, Comments on EC Answer to Panel Question 219, para. 22; EC, Comments on US Answer to Panel Question 219, para. 381; US, SCOS, paras. 51-53.

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impact of pre-competitive R&TD subsidies on Airbus' market presence was perhaps more attenuated, compared with the other subsidies at issue, or with R&TD subsidies that funded research and technology actually used on LCA that were launched, we believe that combined with the others, the RT&D subsidies complemented and supplemented the impact of LA/MSF.

7.1960 In *US – Upland Cotton*, the panel concluded that the reference to the effect of the "subsidy" in the singular in Article 6.3(c), did not mean that a serious prejudice analysis of price suppression must clinically isolate each individual subsidy and its effects.[5698] Thus, in that panel's view, "textual references to "any subsidy", "the subsidy" and the "subsidized product" in Articles 5(c) and 6.3(c) suggest that while due attention must be paid to each subsidy at issue as it relates to the subsidized product, a serious prejudice analysis may be integrated to the extent appropriate in light of the facts and circumstances of a given case."[5699] The panel concluded that:

> "textual references to "any subsidy" and "the effect of the subsidy" permit an integrated examination of effects of any subsidies with a sufficient nexus with the subsidized product and the particular effects-related variable under examination. Thus, in our price suppression analysis under Article 6.3(c), we examine one effects-related variable – prices – and one subsidized product – upland cotton. To the extent a sufficient nexus with these exists among the subsidies at issue so that their effects manifest themselves collectively, we believe that we may legitimately treat them as a "subsidy" and group them and their effects together."[5700]

We agree with the panel's views in this regard, and consider that the ability to consider the effects of subsidies together extends to all aspects of a claim of adverse effects under Articles 5(a) and (b), and Articles a6a.3(a), (b), and (c).

7.1961 In our view, based on the facts and circumstances outlined above, the subsidies at issue in this dispute all have a "sufficient nexus with the subsidized product". Moreover, inasmuch as those subsidies enabled Airbus to launch successive models of LCA when it did, they also have a sufficient nexus with "the particular effects-related variable{s} under examination", since the United States claims of serious prejudice that we are examining are based, at least in part, on the presence of a given Airbus LCA available on the market at a particular time. Therefore, we conclude that it is appropriate to undertake our analysis of the effects of the subsidies on an aggregated basis in this dispute.

Additional considerations with respect to the "product" theory of causation

7.1962 In addition to arguing that LA/MSF and the other subsidies in dispute do not have the effect of increasing the likelihood that any given LCA programme will be launched, and thus resulting in the presence of each succeeding model of Airbus LCA on the market, the European Communities makes several overarching arguments seeking to demonstrate that the market effects we have observed are not an effect of the subsidies. We address these arguments below.

[5698] Panel Report, *US – Upland Cotton*, para. 7.1192. The panel noted in this regard that:
"Taken to an extreme, this could mean that separate dispute settlement proceedings, or at least separate claims, would need to be brought with respect to the serious prejudice caused by each and every individual subsidy, even where these subsidies exist contemporaneously and interact in concert in respect of a single subsidized product to produce a single result in the form of a price phenomenon."
Panel Report, *US – Upland Cotton*, para. 7.1192, footnote 1307.

[5699] Panel Report, *US – Upland Cotton*, para. 7.1192

[5700] Panel Report, *US – Upland Cotton*, para. 7.1192

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Magnitude of the Subsidies

7.1963 The European Communities argues that the amount of the subsidies in this dispute is simply too small to have the effects asserted by the United States. Relying in principal part on its understanding of United States' law and regulations governing the calculation and allocation of subsidy amounts in countervailing duty investigations[5701], the European Communities calculated what it alleges is the per-aircraft magnitude of the LA/MSF and R&TD subsidy amounts that can be allocated to fulfilled orders of different models of Airbus LCA in any given year.[5702] The European Communities first determined what it defines to be the amount of subsidy provided under each LA/MSF contract (for all but the A300 and A310 LA/MSF contracts), by identifying the difference between the "present value of tax adjusted loan receipts and anticipated loan repayments discounted at the applicable project-specific benchmark rate".[5703] The European Communities then allocated these amounts over orders for the LCA for which the LA/MSF was provided, from the year of launch and extending over its anticipated marketing life.[5704] The European Communities applied a similar methodology to allocate the R&TD subsidies. First, the European Communities identified the amount of the subsidies (the entire amount of each grant), and then it allocated these amounts over all Airbus LCA orders during an 18 year period, beginning with the date of receipt of the R&TD subsidy.[5705] According to the European Communities, the results of its calculations show that, on a per-aircraft basis, the magnitude of the subsidies allocated to each relevant model of Airbus LCA is "*de minimis*" and simply too small to have caused any of the adverse effects alleged by the United States.[5706] In response to the United States' assertion that the "cash flow effect" of the alleged subsidies currently exceeds $100 billion, the European Communities, on the basis of an alternative cash flow methodology, asserted that the present per-aircraft cash flow effects are *de minimis*.[5707]

7.1964 The United States did not originally present any calculation with respect to the magnitude of the subsidy, which it characterized as "massive".[5708] In response to the European Communities' arguments and calculation of the alleged per aircraft subsidy amount, the United States argued that it was not obliged to provide a detailed quantification and allocation of the subsidy benefit. The United States also disputed the European Communities calculation of the per-aircraft magnitude of the subsidy, considering it "riddled with significant errors".[5709] In this regard, the United States asserts that the European Communities erroneously: (1) calculates the LA/MSF subsidies as grants based on the projected impact on net present value at the time the LA/MSF was committed, rather than as a

[5701] The details of the methodology, and its application in this case, are set out in the ITR Report, Exhibit EC-13. The European Communities describes the methodology as entailing the following steps:

calculation of the amount of subsidy conferred;:
tying the amount of subsidy to the aircraft programme;
allocation of the subsidy over the aircraft's anticipated marketing life;
allocation of the assigned subsidy over orders fulfilled for that programme; and
reducing the subsidy magnitude to account for alleged subsidies that were extinguished or extracted.

EC, FWS, para. 1589. The European Communities notes that it does not agree with or adopt this methodology for its own. EC, FWS, para. 1574. However, the European Communities, while reserving the right to do so, does not present any alternative methodology. The United States did not endorse the benefit calculation and allocation methodologies relied on by the European Communities, considering them to contain errors at direct variance with the CVD methodologies used by the United States and the European Communities itself. US, Answer to Panel Question 42, para. 250, footnote 313.

[5702] EC, FWS, para. 1573; ITR Report, Exhibit EC-13 (BCI), EC-13 (HSBI).
[5703] ITR Report, para. 19, Exhibit EC-13 (BCI).
[5704] ITR Report, para. 22, Exhibit EC-13 (BCI).
[5705] ITR Report, para. 23, Exhibit EC-13 (BCI).
[5706] EC, FWS, paras. 1569-70.
[5707] EC, SWS, paras. 1010-1024.
[5708] US, FWS, paras. 3, 80, 85, 421.
[5709] US, SWS, para. 599.

loan at below-market interest rates providing current benefits from interest savings; (2) calculates the subsidy based on the projected schedule of LCA deliveries and repayments rather than on actual repayments made, while using actual rather than projected disbursements; and (3) calculates the subsidy net of the (theoretical) impact of taxation, and fails to implement its own stated methodology correctly by **[***]**.[5710]

7.1965 Nonetheless, the United States asserted that any reasonable calculation of the magnitude of the subsidy in this dispute demonstrates that it was very large. In this respect, the United States presented its own calculation of the magnitude of the LA/MSF subsidy, based on an entirely different methodology from that used by the European Communities, which indicates that the total benefit to Airbus from LA/MSF is between USD 92.5 and USD 178.2 billion.[5711] The United States' calculation assumed a 17-year loan period for each set of LA/MSF disbursements and, using the commercial benchmarks it had previously developed (which ITR also used in its calculation for the European Communities), considered how much of the actual or projected loan disbursements plus accumulated interest at the benchmark commercial rate still remained or would remain unpaid at the end of the 17 year loan period. Any repayments made after the 17-year loan period were used to reduce the outstanding balance. When calculated in this way, the total outstanding balance of all of the particular provisions of LA/MSF as of December 2006, based on the "stated rate" – that is, projected disbursements and repayments – was $92.5 billion. The United States also undertook the calculation on the "realized rate" – that is, actual disbursements and repayments, yielding a total of $129.9 billion.[5712] These figures include loan balances assumed to have been left unpaid in the past. To ensure an apples-to-apples comparison, the United States brought forward such balances using the government risk-free borrowing rate so as to express the total uniformly in 2006 dollars, resulting in a total of $122.1 billion using projected disbursements and repayments, and $178.2 billion using actual disbursements and repayments. The United States suggests that Airbus's general, non-project-specific corporate borrowing rates would be a more accurate way to measure the impact of LA/MSF on the present financial condition of Airbus, which would yield an even larger accumulated benefit.[5713] It also argues that irrespective of the methodology used to calculate benefit, the costs associated with equivalent financing on commercial terms would have been impossible for Airbus to support while at the same time developing and launching all the aircraft it did.[5714]

7.1966 We agree with the United States that there is no obligation in a dispute under Part III of the SCM Agreement for the complaining party to precisely calculate or allocate the benefit of the subsidies in dispute. Looking at the text of Article 6.3(c), the Appellate Body in *US – Upland Cotton* observed that the provision does not state explicitly that a panel needs to quantify the amount of the challenged subsidy.[5715] The Appellate Body concluded that while a panel must determine that the challenged payments constitute a specific subsidy in order to "find that a subsidy has the effect of significant price suppression, or some other effect mentioned in Article 6.3(c) ... the definitions of a specific subsidy in Articles 1 and 2 do not expressly require the quantification of the "benefit"

[5710] US, SWS, para. 605, referring to US, Answer to Panel Question 42, para. 252.

[5711] US, SWS, para. 610-612; NERA Economic Consulting, *Quantification of Benefit of Launch Aid* (24 May 2007), Exhibit US-606.

[5712] NERA Quantification Report at 4, Exhibit US-606.

[5713] NERA Quantification Report at 4, Exhibit US-606.

[5714] US, SWS, para. 612. In this regard, we note that the United States calculated the amount by which it considered per-aircraft repayments for subsidized Airbus LCA would have been greater in order to repay LA/MSF at the commercial rates determined in the Ellis Report, concluding that Airbus would have been required to repay an additional **[***]** to France, Germany, and Spain, plus an additional **[***]** to the United Kingdom. US, Comments on EC Answer to Panel Question 289, paras. 221-225. See also, US, SNCOS, paras. 184-186.

[5715] Appellate Body Report, *US – Upland Cotton*, para. 461.

BCI deleted, as indicated **[***]**

conferred by the subsidy on any particular product."[5716] Turning to the context of Article 6.3(c), the Appellate Body noted that the only provision concerning quantification was in the now expired Article 6.1(a), and concluded that the lack of provisions concerning quantification in Article 6.3(c) suggested that no precise quantification is envisaged in that provision.[5717] The Appellate Body also rejected consideration of the methodologies set out in Part V of the SCM Agreement as providing relevant context for the interpretation of Articles 5(c) and 6.3(c) of the SCM Agreement, noting that the apparent rationale for Part III differs from that for Part V of the SCM Agreement.[5718] The Appellate Body also noted the absence of any indication in Article 6.3(c) as to what method of quantification might be appropriate as indicating that precise quantification was not necessary for a panel's analysis under Article 6.3(c), and that Annex V did not mandate precise quantification of subsidies in order to determine their effect under Article 6.3(c).[5719] Thus, the Appellate Body concluded that while in many cases it may be difficult to decide whether the effect of a subsidy is significant price suppression in the absence of some assessment of the magnitude of the challenged subsidy, "this does not mean that Article 6.3(c) imposes an obligation on panels to quantify precisely the amount of a subsidy benefiting the product at issue in every case. A precise, definitive quantification of the subsidy is not required."[5720]

7.1967 While the Appellate Body in *US – Upland Cotton* was considering a claim of price suppression under Article 6.3(c), we see no reason why the same conclusion should not apply equally to other claims of serious prejudice under the remainder of Article 6, and indeed, to the entire universe of claims of adverse effects. This does not mean that the magnitude of the subsidy is irrelevant to the consideration of adverse effects. It is clear that the subsidy or subsidies in dispute must cause the adverse effect(s) alleged. However, whether a particular subsidy or subsidies cause particular alleged adverse effects is clearly not a function simply of their magnitude, however measured, but must also take into account the nature and effects of the particular subsidies in question, and the nature of the subsidized product and market, in order to assess whether the necessary causal link exists. Thus, there is no necessary correlation between the magnitude of a subsidy and the determination whether it causes certain alleged adverse effects. While logic may indicate that a larger subsidy is likely to have more significant effects, in some circumstances, even a relatively small subsidy may have significant effects, for instance, where it enables market participation that would otherwise not occur. Certainly a case such as this one, where the subsidies have, as we concluded, enabled Airbus to launch LCA that it otherwise would not have been unable to launch when it did, and where the subsidies are, by any realistic measure, extremely large, a causal link can be found between the use of the subsidies and the effects.

7.1968 In addition, we are not persuaded by the European Communities' premise that an allocation of the benefit of the subsidies on a per-aircraft basis is required in order for the United States to sustain its claims of serious prejudice in this dispute. The European Communities' submission assumes that a per-aircraft allocation of the subsidy benefit over time in order to determine a "current" per-plane subsidy amount is necessary, but the European Communities nowhere explains why such a calculation is necessarily the way to determine the magnitude of the subsidy.[5721] The notion of allocation of benefit applied by the European Communities in its calculation is derived from the practice of investigating authorities in the context of countervailing duty investigations. In the countervailing duty context, the remedy for any violation of the SCM Agreement is the imposition of a countervailing duty on future imports of the exported product benefiting from the subsidies found to

[5716] Appellate Body Report, *US – Upland Cotton*, para. 462.
[5717] Appellate Body Report, *US – Upland Cotton*, para. 463.
[5718] Appellate Body Report, *US – Upland Cotton*, para. 464.
[5719] Appellate Body Report, *US – Upland Cotton*, para. 465-466.
[5720] Appellate Body Report, *US – Upland Cotton*, para. 467.
[5721] EC, FWS, para. 1569.

exist. The SCM Agreement specifically limits the amount of any countervailing duty applied to any imports to the amount of subsidy per unit of product.[5722] Thus, in the countervailing duty context, it is critical, in order to act consistently with the SCM Agreement, for the investigating authority to determine the amount of benefit from the subsidy per unit of product, in order to ensure that the remedy, countervailing duties on imports, is collected in the correct amounts. There is no corresponding reason to undertake a similar calculation in the context of a dispute under Part III of the SCM Agreement.[5723] In this context, the relevant question is not the precise amount of subsidy attached to each unit of the subsidized product, but rather whether the subsidies in question are of sufficient magnitude, in light of their nature and effect, to have caused the serious prejudice alleged. We therefore conclude that allocation of the benefit of the specific subsidies we have found, on a per Airbus LCA basis, is not necessary in this dispute.

7.1969 In any case, we believe there are a number of deficiencies with the European Communities' calculation, which renders it unreliable for the purpose of identifying the magnitude of the subsidies at issue, even without allocation on a per-plane basis. First, we note that in identifying the magnitude of the LA/MSF subsidies, the European Communities has focussed its analysis on the amount of the subsidy benefit (*i.e.*, the interest rate differentials), without also taking into account the nature of the financial contributions at issue. In our view, in order to properly consider the magnitude of a subsidy provided under a loan for the purpose of informing a panel's consideration of a serious prejudice claim, it is important to examine the interest rate differential in the context of the amount of funding borrowed under the loan. Such an approach is not only consistent with Article 1 of the SCM Agreement, which we recall defines a subsidy as a financial contribution that confers a benefit upon a recipient,[5724] but it also makes sense in the particular context of a serious prejudice analysis, where it is important to focus on the effects of the challenged subsidies. In this respect, we note that, all things being equal, the effects of a loan involving a financial contribution covering 1 percent of the costs of a particular project at an interest rate that is 100 basis points below the market rate for a comparable loan, are likely to be less pronounced than a loan providing the same interest rate benefit but covering 100 percent of the costs of a project.

7.1970 A second flaw we believe is manifest in the European Communities' calculation of the alleged subsidy benefits associated with LA/MSF lies in its discounting of taxes allegedly paid on the principal loaned under the LA/MSF contracts. Elsewhere in this Report, we have concluded that consideration of such a tax effect in the context of the present dispute is inappropriate.[5725] Moreover, the European Communities relies upon repayment amounts for the purpose of its present value calculations concerning the Spanish A340-500/600 contract and the French A330/A340 contract that we have found to be erroneous or non-verifiable on the basis of the evidence before us.[5726] Thus, even following its own methodology for identifying the amount of the subsidy benefit provided under each LA/MSF contract, the European Communities' calculations underestimate the total benefit we consider could be reasonably associated with the provision of LA/MSF. Finally, we note that, the European Communities has included in its calculations the alleged amount of LA/MSF subsidy associated with only *five* of the seven Airbus LCA programmes and only *some* of the R&TD subsidies we have determined to exist.

[5722] Article 19.4 of the SCM Agreement provides that "no countervailing duty shall be levied on an imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." (footnote omitted).

[5723] *See*, Appellate Body Report, *US – Upland Cotton*, para. 464.

[5724] We note that, in the context of a grant, the magnitude of the subsidy is properly determined on the basis of the amount of funding actually transferred by means of the grant. In other words, where a subsidy takes the form of a grant, the amount of the financial contribution and the amount of the benefit are the same.

[5725] *See*, para. 7.430 above.

[5726] *See*, para 7.415 above.

BCI deleted, as indicated **[***]**

7.1971 Following the European Communities' methodology corrected for the technical errors noted above, we sought to arrive at our own estimates of the amounts of subsidy benefit associated with the LA/MSF contracts counted by the European Communities. These estimates indicate that the European Communities' totals of LA/MSF benefit of EUR **[***]** and **[***]** understate the actual amount of LA/MSF subsidy benefit on the A320, A330/340, A330-200, A34-500/6000, and A380, by approximately **[***]** with respect to the Euro amount, and approximately **[***]** with respect to the pound amount. Our estimate of the amounts of R&TD subsidies are approximately twice the amount, EUR 381 million, calculated by the European Communities for subsidies conferred by the European Communities, France, and Germany, not even counting the Spanish loans we determined constitute specific subsidies. In addition, the European Communities did not include LA/MSF for the A300 and A310 in its calculations. We recall our findings that LA/MSF was provided at a zero rate of interest for the A300 and A310, while the market benchmarks we determined were at least 16.52 percent for the A300 contract and at least 18.88 percent for the A310, on 100 percent of the development costs of those planes, indicating a significant additional amount of subsidy. Thus, with respect to even the limited portion of the specific subsidies we have found to exist in this dispute that it counted, the European Communities' calculations vastly underestimate their magnitude.

7.1972 In addition, and significantly, the European Communities' calculations fail entirely to take into account the other specific subsidies we have found to exist, namely, the subsidies with respect to the infrastructure grants, equity infusions and share transfers. While we have not precisely calculated the amounts of the subsidies conferred, we note that with respect to the Mühlengberger Loch and ZAC Aéroconstellation infrastructure subsidies, the hundreds of millions of Euro expended by government authorities in developing the sites are not included in the basis on which the rent or the purchase prices paid by Airbus were calculated, making the amount of the difference akin to grants to Airbus. The **[***]** for the Bremen airport runway extension and noise reduction measures, and the more than EUR 200 million in regional grants for Airbus production facilities by German and Spanish authorities between 2001 and 2004, are not included in the European Communities calculations. Nor does the European Communities count the value of the transfer of KfW's 20 percent equity interest in Deutsche Airbus to MBB in 1992 on non-market terms, or the FF 3.54 billion in equity investments in Aérospatiale by the French government and Crédit Lyonnais in 1987, 1988, 1992, and 1994, or the transfer by the French government of its interest in Dassault Aviation to Aérospatiale in 1998. Thus, taking into account all of the specific subsidies we have found to have been provided to Airbus, it is apparent that the European Communities' calculation greatly understates the amount of the benefit associated with the specific subsidies we have found were provided in respect of Airbus LCA, which in our estimation is substantial and significant. Moreover, considering that the proportion of development costs covered by LA/MSF for the early models of Airbus LCA was close to 100 percent and that even 33 percent of development costs of the post 1992 models is a significant amount of subsidized funding, we conclude that the magnitude of the specific subsidies is certainly sufficient to have had the effect of enabling Airbus to launch successive models of LCA at a pace it could not otherwise have achieved.

The Age of the LA/MSF Subsidies

7.1973 The European Communities submits that several of the LA/MSF subsidies in this dispute are "decades old" and cannot, for that reason, be causing present serious prejudice to the United States' interests.[5727] It is true that the first grant of LA/MSF, for the A300, was agreed by the governments of Germany and France in 1969 and by Spain in 1970. However, this was but the first of a series of grants of LA/MSF provided in respect of each subsequent model of Airbus LCA. Thus, LA/MSF was

[5727] "The notion that subsidies conferred decades ago could significantly affect current pricing decisions or otherwise cause serious prejudice is fanciful, at best." EC, FWS, para. 1656. *See, also*, EC, FWS, paras. 7, 1323, 1335, 1606, 1643, 1645, 1656, 1794, 2261, 2270, 2272.

provided by those same governments with respect to the A310 in 1978. The governments of France, Germany, Spain and the United Kingdom provided LA/MSF with respect to the A320 in 1984,[5728] and with respect to the A330/A340 in 1987. LA/MSF was again provided by the government of France for the A330-200 in 1995, and by the governments of France and Spain for the A340-500/600 in 1997. The most recent grant of LA/MSF was in 2000, by the governments of France, Germany, Spain and the United Kingdom, with respect to the A380.

7.1974 The LCA supported by those grants of LA/MSF entered into service in each case several years after the grant of LA/MSF, and with the exception of the A300 and A310, production of which ceased in July 2007 (after the period we examined in this dispute), each of these aircraft is still in production and being sold by Airbus. Although the European Communities notes that **[***]**,[5729] this does not detract from the fact that LA/MSF enabled Airbus to launch that model at the time it did, and thus ensure its presence on the market and consequent effects. Moreover, LA/MSF is not the only specific subsidy we have found to benefit Airbus LCA in this dispute, and each of these other specific subsidies has also been repeatedly granted over a number of years with respect to the same product, Airbus LCA. Thus, we have found specific subsidies in the form of R&TD funding, granted from 1986 onward, with the most recent grants in 2003, as well as in the form of infrastructure grants, involving the Bremen runway extension in 1989-90, the Aéroconstellation site in 1999, the Mühlenberger Loch site in 2000, and various Spanish and German sites from 2001 to 2004. These subsidies, together with LA/MSF, as well as the share transfers and equity infusions we have found constituted specific subsidies to Airbus between 1988 and 1998, have conferred benefits on Airbus at intervals over its entire existence, supporting its ability to launch successive models of LCA, and thus its participation in the LCA market.

7.1975 Thus, we are not concerned here with a one-off grant of a single subsidy, or even a number of subsidies, "decades" ago, but with repeated grants of subsidies benefiting the same product[5730] over a period of decades, which product has been produced and sold throughout that period and continues to be produced and sold now and into the future. We have concluded that LA/MSF and the other subsidies played a vital role in permitting Airbus to not only launch and develop the model of LCA actually funded by each grant of LA/MSF, but also each of the subsequent models.[5731] Moreover, advantages in technology and production flowed from the development of each succeeding model of LCA supported by LA/MSF and other subsidies to production of earlier models, and the development of derivative and improved versions of earlier models.

7.1976 While the effect of a single subsidy may well dissipate over time, in our view, the fact that the subsidies at issue in this dispute were repeatedly granted over the entire history of Airbus' LCA development with respect to that same product has had rather the opposite effect, through the learning and spillover effects, and production synergies that are inherent in this industry, which spread the effect of LA/MSF for the development of one model of LCA, and of other subsidies, to both

[5728] Airbus began the A320 Development programme in 1980, which ultimately resulted in the launch of four models in the A320 group, the A320 basic, A321, A319, and A318.

[5729] EC, FWS, para. 1655, referring to Comparison of Actual Deliveries **[***],** Exhibit EC-327 (HSBI). We understand that with the exception of loans provided in respect of the A300 and A320, substantial amounts of LA/MSF loans remain outstanding, including the entirety of the amount loaned with respect to the A380. The European Communities does not make specific allegations with respect to **[***]**, but even if this were the case, it would not affect our conclusions.

[5730] We recall our conclusion that there is a single subsidized product at issue, Airbus LCA.

[5731] While we have found that the United States has not demonstrated the existence of a "LA/MSF programme" *per se*, based on the evidence before us, we consider that the governments of France, Germany, Spain, and the United Kingdom, and the European Communities, have pursued a policy of providing support for LCA development and production since 1969.

BCI deleted, as indicated **[***]**

subsequent and earlier models.[5732] We recall the observation of the panel in *US – Upland* Cotton that "{s}ubsidies granted under expired measures may have had adverse effects at the time they were in effect, and may still have lasting adverse effects."[5733] Indeed, the nature of the product at issue in this case, LCA, with its long lead times for development and long-term presence in the market, suggests that the subsidies granted at different periods in the life of the product may well continue to have effects long after the original grant. This is particularly so, in our view, in light of the fact that the product, LCA, benefiting from those subsidies continues to be manufactured and sold. We therefore do not consider that that age of the LA/MSF subsidies (or any of the other subsidies at issue) undermines our conclusion that, but for those subsidies, Airbus would not have been able to launch and develop each model of LCA as originally designed and at the time that it did.

Competition in the Absence of the Subsidies

7.1977 As noted above, a key critique of the Dorman Report advanced by the European Communities in the Wachtel Report is that it is allegedly premised on the assumption that Boeing would face no competition in the absence of an Airbus which received LA/MSF. The Wachtel Report asserts that LCA "markets" are natural duopolies and, accordingly, if Airbus did not exist, some competitor other than Boeing would have arisen to take its place in those markets. Thus, in the counterfactual in which Airbus did not exist or did not launch the aircraft it did when it did, some other competitor would have launched aircraft to compete with Boeing.[5734] In circumstances where Boeing would face competition in the counterfactual there is not, according to the European Communities, sufficient evidence to conclude that in the absence of LA/MSF, the United States' LCA industry would enjoy a higher market share and/or receive higher prices for its products.[5735]

7.1978 The European Communities asserts that the United States itself admits that Boeing would face active competition in the absence of LA/MSF and that their proposed counterfactual is inherently speculative. The European Communities notes, *inter alia*, the following statement:

> "To be clear, the United States does not contend that the LCA industry should be a Boeing or even a U.S. monopoly. No one can say with certainty how the LCA industry would have developed over the last 40 years without the EC and Airbus government subsidies designed to ensure that Europe would be the home of one producer in a competitive duopoly. But for the EC provision of Launch Aid, surely there would nonetheless have been competition. But the nature and type of that competition would surely have been different. The United States seeks only what the SCM Agreement seeks – that the competition not be subsidized competition."[5736]

Insofar as "there would nonetheless have been competition" in the absence of LA/MSF the United States cannot, according to the logic of the European Communities, demonstrate how LCA competition has been affected by LA/MSF and that those competitive effects have caused serious prejudice to the United States.[5737]

[5732] *See*, US, FCOS, paras. 62-67, citing Exhibits EC-98 (HSBI), EC-362 (HSBI), EC375 (HSBI), and EC-498 (HSBI), US, SNCOS, paras. 151-154, citing *inter alia*, Exhibits US-182 (efficiency of combining production facilities for A380 with existing facilities for A319/A321 facilities at Mühlenberger Loch), EC-776 (HSBI)(commonality as part of rationale for launching new derivative models).

[5733] Panel Report, *US – Upland Cotton*, para. 7.1201.

[5734] EC, FWS, para. 2279, citing Wachtel report, Exhibit EC-12, paras. 7-8.

[5735] EC, SWS, para. 847.

[5736] US, FCOS, para, 151.

[5737] EC, SWS, paras. 846-848.

BCI deleted, as indicated **[***]**

7.1979 We note, as a factual matter, that the LCA market has been a duopoly market since the merger of McDonnell Douglas with Boeing in 1997. The fact that competition in the market is currently limited to Boeing and Airbus is, not surprisingly, reflected in the evidence presented by the United States in support of its serious prejudice claims. For example, the United States uses the phrase ""zero sum" competition" in the sense that "a win for one producer is almost always a loss for the other" to describe the competition between the two producers.[5738] This 'zero sum' assumption does, at times, colour the United States description of the causal link between the subsidies and the effect on the United States interests. Thus, for instance, after reiterating its position that absent the subsidies Airbus would have fewer and different LCA products, the United States asserts that "{i}n this duopoly market, that means that the U.S. LCA Industry would produce and sell more aircraft at higher prices than it does in the face of subsidized competition".[5739] We do consider that in certain instances the United States may proceed too hastily from a conclusion that certain Airbus products would not exist but for the subsidies to the conclusion that Boeing would sell more aircraft and prices would be higher. If there were competition from some other producer, that competitor might have been in a position to introduce competitive aircraft to the market that Airbus could not have introduced but for LA/MSF, with a similar effect on Boeing sales and prices. Nonetheless, we do not agree with the premise of the European Communities' argument, that the possibility, or even the likelihood, of competition in the absence of subsidies to Airbus, requires us to conclude that the United States has failed to demonstrate a causal link between the Article 6.3 phenomena and the use of subsidies by the European Communities and certain of its member States.

7.1980 As both parties acknowledge, any consideration of a counterfactual in the context of this particular dispute is inherently speculative. However, to differing degrees both the United States and the European Communities appear to accept that had Airbus not entered the LCA market when it did, there would have been some other market participant than Boeing, albeit perhaps not a new entrant.[5740] The United States also posits a situation where Airbus would have entered at a much later stage with a different quality LCA offering.[5741] A review of the economic literature, much of which has been introduced as evidence in this dispute, can help narrow down the range of possibilities.

7.1981 To begin with, certain fundamental characteristics of the LCA market are well described in the literature,[5742] and are not disputed by the parties. First, entry barriers into the LCA market are formidable. The design, testing certification, production, marketing and after-delivery support of LCA is an enormously complex and expensive undertaking, which requires huge up-front investments over a period of three to five years before any revenues are obtained from customers.[5743] A rough rule of thumb is that at least 600 airplanes of a new model must be sold before the revenues for a programme exceed the costs. Economies of scale arising from the huge sunk development cost give incumbent firms a considerable competitive advantage. Learning effects induce dynamic economies of scale which reinforce incumbents' advantage. Economies of scope make it difficult to enter one market segment only. Thus, producers of a full range of LCA are at an advantage. Switching costs, *i.e.*, the costs of customers moving from one aircraft manufacturer's LCA to another's, make it more difficult for new producers to enter. Most airlines prefer fleet commonality. Incumbent firms have a strong incentive to adopt entry deterring price strategies. Uncertainty is considerable. This makes it

[5738] US, FWS, para, 198.
[5739] US, FCOS, para. 131.
[5740] EC, FWS, para. 2287, EC, SWS, paras. 859-861. US, FNCOS, paras. 147-148, 151; US, SWS, paras. 587-89.
[5741] US, SWS, para. 590.
[5742] *See, also*, Section VII.F.6 of this Report, where we set forth our understanding of the relevant conditions of competition in this industry, which are consistent with the views of economists described here.
[5743] Boeder & Dorman, Exhibit US-373.

very difficult to finance the huge development costs on capital markets.[5744] Finally, the fact that aircraft are typically sold in US dollars exposes non-American manufacturers with a production base outside of the United States to exchange rate fluctuations which increase uncertainty and are costly to cover against.[5745]

7.1982 Economists generally consider that with such high entry barriers, entry into the manufacture of LCA without government support is difficult if not impossible. Consideration of alternative scenarios that have been analyzed in the literature provides a sense for what economists consider to be the most likely counterfactuals. For instance, Klepper posits two scenarios that could have become reality since 1970, had Airbus not entered the market.[5746] The first is a Boeing monopoly, and the second is a duopoly with two established producers, Boeing, and either McDonnell Douglas or Lockheed.[5747] The difference between this and the actual situation is that there would be two established US producers, rather than one incumbent US producer and a new non-US entrant. Neven and Seabright consider three alternative scenarios to their base case, which attempts to reproduce the actual development of the aircraft market from the early 1960s.[5748] The first is a Boeing-McDonnell Douglas duopoly, the second is an Airbus, Boeing duopoly (without McDonnell Douglas), while in the third, Boeing remains a monopoly throughout the period. Baldwin and Krugman, which is quoted in the Dorman Report, notes that "{i}n the world market there are only three significant manufacturers of airframes for jets that seat more than one hundred passengers. It is arguable that in the absence of government support there would be only one."[5749]

7.1983 We are not convinced by the view expressed in the Wachtel Report that, because of the alleged size of the segments in the LCA market, the LCA industry is a "natural duopoly". The fundamental reasoning behind the Wachtel Report in this regard is clear. Relying upon the methodology applied in a study undertaken by Bresnahan and Reiss, Wachtel segments the LCA market and compares an estimate of the average break-even point for sales of any given model of LCA with the size of individual market segments. Where the segment market size is larger than twice the break-even point, he concludes that there is room for two producers and thus the segment is a natural duopoly. A major weakness of this reasoning is that it ignores the linkages between market segments. Because of scope economies and switching costs, entry into one of the segments alone is almost impossible. This problem is acknowledged by Bresnahan and Reiss, who note in their conclusion that "{w}hen markets overlap, it becomes less clear how one should compute entry thresholds".[5750] There are further reasons to question the applicability of the Bresnahan and Reiss approach to the LCA market. Bresnahan and Reiss assume that firms have U-shaped average total costs, while learning effects in the LCA industry tend to reduce marginal costs, at least up to a certain, rather significant, production level. The theoretical industrial organization literature suggests that learning curves can provide strong strategic incentives to firms.[5751] For instance, Cabral and Riordan

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[5744] Klepper, Exhibit US-377; Boeder & Dorman, Exhibit US-373.

[5745] Klepper, Exhibit US-377.

[5746] Klepper, Exhibit US-377.

[5747] The second scenario assumes the market is large enough for two or more producers, and that Lockheed and McDonnell Douglas were efficient producers. Klepper, Exhibit US-377, p. 789. The author notes that in reality, a complete monopoly might not materialize, and another American producer might not be an equal competitor to Boeing.

[5748] Neven & Seabright, Exhibit US-382.

[5749] R. Baldwin & P. Krugman, *Industrial Policy and International Competition in Wide-Bodied Jet Aircraft*, in *Trade Policy Issues and Empirical Analysis*, R. Baldwin, ed., National Bureau of Economic Research, 1988, p. 45.

[5750] T.F. Bresnahan & P.C. Reiss, *Entry and competition in concentrated markets.* 99(5) Journal of Political Economy, 977 (1991)

[5751] *See*, overview in C. Lanier Benkard, *A Dynamic Analysis of the Market for Wide-Bodied Commercial Aircraft*, 71 Review of Economic Studies 581 (2004).

show that in a duopoly with strong learning curve efficiencies there is a tendency for the firm with lower costs to increase its lead;[5752] while Dasgupta and Stiglitz show that when learning is strong, an oligopoly may tend toward monopoly.[5753]

7.1984 Thus, our evaluation of the arguments and evidence the parties have submitted leads us to conclude that there are multiple possibilities for the LCA industry in the counterfactual world that would exist in the absence of subsidies to Airbus. In one scenario, Airbus would not have entered the LCA market at all and Boeing would be in a monopoly position, holding 100 percent of the market. In this scenario, the link between the subsidies that enabled Airbus to enter the LCA market and Boeing's loss of market share and sales is self-evident. Any market displacement and lost sales actually suffered by Boeing would be directly attributable to the subsidies granted to Airbus, which enabled it to launch and develop its own family of LCA. In a second plausible scenario, Airbus would not have entered the market, but there would nevertheless have been two players, which on the basis of the evidence before us, would most likely have been Boeing and McDonnell Douglas, the latter having merged with Boeing in 1997.[5754] As both Boeing and McDonnell Douglas are (or were) US LCA manufacturers, there would once again be no question about the nexus between the subsidies which enabled the non-US company, Airbus to enter the LCA market and serious prejudice to the United States' interests (displacement of Boeing and/or McDonnell Douglas LCA from the LCA markets and lost sales). Finally, in a third and a fourth scenario, Airbus might have entered the LCA market without subsidies, either in competition with Boeing alone, or in competition with a United States' industry comprising Boeing and another US producer. In either case, Airbus could not conceivably have been present in the LCA market with the same aircraft and at the same times as it actually was, given our conclusions concerning the cumulative effect of LA/MSF and the other subsidies in dispute on Airbus' ability to launch successive models of LCA as and when it did. In our view, it is simply not feasible that, without LA/MSF and the other subsidies, relying entirely on non-subsidized financing, Airbus could have undertaken the pace of aircraft development that would have enabled it to launch the range of LCA that it has successfully launched to date, which has resulted in its present position in the market for LCA. It follows that even in the unlikely event that Airbus would have been able to enter the LCA market as a non-subsidized competitor, we are confident that it would not have achieved the market presence it did over the period 2001 to 2006 and that we have described in the previous sections of this Report.[5755]

Factors other than competition with subsidized Airbus LCA

7.1985 The European Communities asserts that the United States' claim that subsidies to Airbus LCA cause present adverse effects cannot be sustained because the United States fails to take account of various "non-attribution" factors, which the European Communities contends are responsible, distinct from competition with Airbus LCA, for a "significant portion of any present lower Boeing prices, sales, deliveries, and market share."[5756] In this context, the European Communities raises alleged mismanagement of customer relations, geopolitical considerations, and the role of engine manufacturers in sales campaigns as contributing to lost sales, rather than Airbus pricing. We have

[5752] L. Cabral & M.H. Riordan, *The learning curve, market dominance, and predatory pricing*, 62(5) Econometrica 1115, (1994).

[5753] P. Dasgupta & J. Stiglitz, *Learning-by-doing, market structure and industrial and trade policies*. 40 Oxford Economic Papers 246, (1988).

[5754] We note in this regard the United States' assertion that competition from Airbus was a factor in McDonnell Douglas' exit from the LCA industry. US, FCOS, para. 68. In addition, we note that Lockheed, the other competitor in the market at an earlier date, had already exited the market in 1981, and neither party has suggested that any other pre-existing entity was or would have been in a position to enter the LCA industry, or that any entity other than Boeing sought to purchase McDonnell Douglas.

[5755] *See*, paras. 7.1752, 7.1757, 7.1780, 7.1781, 7.1782, 7.1784 and 7.1786 above.

[5756] EC, SWS, para 1090.

BCI deleted, as indicated **[***]**

rejected above the view that lost sales must be by reason of lower price in order to constitute adverse effects.[5757] As discussed above, there is no dispute that Airbus succeeded in the sales campaigns we have considered, and we have therefore concluded that the United States has demonstrated that Boeing suffered substantial lost sales during the period 2001-2006. We noted that there are numerous factors involved in a customer's decision as to which LCA to purchase. However, one factor which is essential is the availability of a particular model or models of LCA suitable for a particular customer's needs at the time of the sale. We have concluded that, but for LA/MSF and the other subsidies in dispute, Airbus would not have been able to launch the particular LCA it did at the time it did. Thus, the presence of these subsidized LCA in the market is a fundamental cause of the lost sales observed. But for the subsidies, Airbus would not have been competing for these sales with the LCA it actually sold.[5758] Similarly, Airbus' market share is directly attributable to its ability to sell and deliver to the European Communities and relevant third country markets, LCA which it would not have had available but for the subsidies which supported the launch of every model of Airbus LCA.

7.1986 We note the European Communities' general view that subsidies in a previous period cannot be the cause of changes in market share during the period we are considering. We do not agree with this view, given that, as we have discussed, in the LCA industry, the effect of subsidies which support the development of new models of LCA is felt long after the subsidies have been granted, in the years in which LCA supported by those subsidies are sold and delivered to customers which otherwise would not have had the option of purchasing such LCA.[5759] In any event, however, we do not consider that it is necessary in the circumstances of this dispute to link the particular changes in market share we have observed to the timing of the grant of the subsidies in order to make a finding of displacement in either the EC or third country markets. We have found that the effect of LA/MSF, complemented by the other subsidies in dispute, is to enable Airbus to launch and bring to market LCA that it otherwise would have been unable to – that is, the subsidies support the presence of Airbus in each segment of the LCA market with each of its LCA models. Since we have concluded that, but for the subsidies, Airbus would not have had the market presence it did have during the period we examined, it is clear that those LCA have displaced Boeing LCA from the relevant markets and caused lost sales in the same market.

7.1987 The European Communities also points to the severe downturn in the market in 2001-2003 following the events of 9/11 (exacerbated by the start of the war in Iraq and the outbreak of SARS in Asia). The European Communities argues that the severity of this downturn, and its allegedly greater impact on Boeing than on Airbus, compel the conclusion that it was responsible, at least in part, for declining demand and declining prices of Boeing LCA.[5760] We certainly recognize that there was a severe downturn in the market for LCA following the events of 9/11. However, as we have previously discussed, this downturn affected both Boeing and Airbus. Even if we accept the European Communities' view that the downturn had a greater impact on Boeing's sales than it did on Airbus, this does not, in our view, detract from our conclusions concerning the effect of the subsidies in this dispute, which enabled Airbus to have available the particular models of LCA that it sold and delivered in the distressed market.

7.1988 The European Communities contends that, even if the effect of the subsidies is to allow Airbus to launch an LCA model it would not otherwise have launched, any adverse effects caused by such subsidies are eliminated when Boeing launches an aircraft that competes with the subsidized

[5757] *See*, paras. 7.1841 - 7.1845 above.

[5758] Whether it might have been competing at all for those sales, for instance with a different LCA developed without subsidies, is questionable, as the lost sales all involved aircraft we have concluded would not have been developed by Airbus at the relevant times had earlier models not benefited from subsidies.

[5759] *See*, discussion at para. 7.1976 above.

[5760] EC, SWS, para. 1093-94.

BCI deleted, as indicated **[***]**

Airbus model.[5761] The United States argues that this is both logically and factually incorrect.[5762] We agree.

7.1989 As the United States points out, if Airbus launched a subsidized LCA, either Boeing would have launched its own subsequent, competing aircraft even if Airbus had not launched, based on Boeing's own evaluation of the demands of customers and the market and its capabilities, or Boeing would not have done so. If Boeing would have launched the aircraft anyway, then it would not have had to compete with the subsidized Airbus model, but for the subsidies, as without the subsidies, the Airbus model would not have been launched at that time and with those characteristics. On the other hand, if Boeing only launched the competing aircraft to respond to the subsidized Airbus model, then Boeing had to expend capital and resources to do so, which it might otherwise not have done. Thus, but for the subsidies, Boeing might have used those resources in some other fashion. In either case, displacement of imports from the EC market, displacement of exports from certain third country markets, and lost sales that resulted from the competition with the subsidized Airbus LCA would all be effects of the subsidies, without which the Airbus LCA would not exist at that time. Thus, whether Boeing launched an LCA in response to Airbus or not, adverse effects would ensue.

7.1990 The European Communities' argument in this respect seems to suggest that the subsidies granted to Airbus are somehow beneficial in that they enable Airbus to compete with Boeing, which competition is good for the consumers of LCA, airlines and leasing companies, and the travelling public, and that this militates against a finding that those subsidies cause adverse effects to the United States' interests. Indeed, the European Communities asserts that Boeing welcomes the competition with Airbus, which it asserts has "generated numerous new and innovative LCA products" and fosters lower prices for LCA purchasers and increased demand, which ultimately is the basis of the financial health of both Boeing and Airbus. The European Communities maintains that airlines and other purchasers of new LCA insist that such competition is vital for their economic success and for their financial health and survival.[5763] It may well be true that Boeing welcomes competition, and that competition between Boeing and Airbus benefits purchasers of LCA. But that does not mean that the United States is not entitled to relief under the SCM Agreement if that competition is fuelled by subsidies used by another Member that cause adverse effects to the United States' interests.

7.1991 Moreover, we see no basis in the SCM Agreement for the notion that an increase in "consumer welfare" constitutes a defence to a claim of adverse effects caused by subsidies. Nothing in the text of the Agreement, or in its object and purpose, supports the proposition that the panel can or should take into account possible "positive" effects on competition of subsidies in evaluating claims of serious prejudice. It may often be the case that subsidies in fact contribute positively to consumer welfare – for instance, in *US – Upland Cotton*, the panel found price suppression caused by subsidies, and concluded that the United States' use of subsidies caused adverse effects to Brazil's interests. However, that price suppression presumably also resulted in prices for textiles and clothing that were lower than they otherwise would have been, which is a "positive", while it also reduced revenues to cotton farmers, which is a negative. There is no mention of this in either the panel's or the Appellate Body's decision, and absolutely no basis to think that panels should somehow engage in a consideration that might "balance" these competing effects.

[5761] EC, FWS, paras. 2288-2304.

[5762] US, SWS, para. 585. Brazil disagrees with the European Communities' assertion that adverse effects are extinguished by the launch within two or three years of a technologically equal or superior competing aircraft by Boeing. According to it, the continuing distortive effect of subsidies in the market does not disappear with the launch of a competing aircraft. Brazil, Third Party Submission, para. 57.

[5763] EC, FWS, paras. 1378-1381.

BCI deleted, as indicated **[***]**

7.1992 In our view, that Boeing chooses to meet subsidized competition from Airbus to the best of its ability cannot be considered to eliminate the adverse effects caused by the subsidies in dispute. To conclude otherwise would in our view eviscerate the SCM Agreement's remedies for subsidies that cause adverse effects, as it would imply that a Member must not seek to respond to or mitigate adverse effects caused by subsidies for fear of being unable to demonstrate their existence in a dispute. We cannot believe that such an outcome is warranted.

7.1993 It is in our view clear that Airbus would have been unable to bring to the market the LCA that it launched but for the specific subsidies it received from the European Communities and the governments of France, Germany, Spain and the United Kingdom. We reiterate that we do not conclude that Airbus necessarily would not exist at all but for the subsidies, but merely that it would, at a minimum, not have been able to launch and develop the LCA models it has actually succeeded in bringing to the market. Had Airbus successfully entered the LCA industry without subsidies, it would be a much different, and we believe, a much weaker LCA manufacturer during the period we examined, with at best a more limited offering of LCA models. Thus, under either scenario, Airbus would not have had the market presence and ability to win orders for LCA that it did have during the period 2001-2006, and the United States' LCA industry, at a minimum, would not have lost sales to Airbus and would have had a larger market share in the EC and certain third country markets than it actually did over that period. 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.

The alleged "product" effect of the subsidies on prices

7.1994 Finally, the United States also asserts that because the subsidies at issue have been necessary to Airbus' ability to develop and successfully bring to market its full range of LCA models, they have also created supply side pressure which must perforce have had an impact on prices in the LCA market.[5764] This supply-side pricing argument is advanced in the Dorman Report[5765] and in the statement of Professors Joseph Stiglitz and Bruce Greenwald, submitted by the United States in response to a question from the Panel ("Stiglitz/Greenwald statement").[5766] The Stiglitz/Greenwald statement, in particular, argues that a pricing impact is a direct and inevitable result of the introduction of a new model aircraft, observing:

> "The new model introduction inevitably represents an increase in supply which just as inevitably has a negative impact on prices. The most extreme example of such an impact is that in which, but for the subsidy, the new model could not have been

[5764] US, SWS, para. 594.
[5765] In this respect the Dorman Report states:
"An airplane program that is enabled by launch aid is likely to cause prices to decline in the market segment that it targets. Competing airplanes will need to lower their prices and will likely sell fewer units, since some customers will purchase the new airplane and most customers will leverage one seller against another to obtain larger discounts."
Dorman Report, Exhibit US-70 (BCI), p. 9.
[5766] Statement of Professors Joseph E. Stiglitz and Bruce C. Greenwald, *On the Question of the Impact of Subsidies on Supply and Prices in the LCA Market* (Jan 21, 2008), Exhibit US-676 (hereinafter "Stiglitz/Greenwald statement").

BCI deleted, as indicated **[***]**

> economically introduced, since the potential returns would not have justified the unsubsidized investment involved."[5767]

The European Communities argues that both the arguments of the United States and the Stiglitz/Greenwald statement are premised on the assumption that, in the absence of Airbus, Boeing would face no competition, whereas the United States has acknowledged that in the absence of Airbus or LA/MSF, Boeing would face competition.[5768] We understand the thrust of the European Communities' argument to be that, because there would be active competition among two or more LCA manufacturers even in the absence of Airbus, any price effects resulting from increases in supply in the LCA market cannot be attributed to subsidies to Airbus.

7.1995 As we understand it, the argument that Stiglitz and Greenwald make is that in a duopoly situation, like the one characterizing the LCA industry at present, a subsidy that makes possible the launch of a new model aircraft is likely to increase supply and thereby to reduce the price of LCA on the market. The Stiglitz/Greenwald statement seems to raise two possible scenarios. In the first, one of the duopolists is already producing a specific aircraft and the subsidy allows the other duopolist to launch a directly competing plane. In this case, the subsidy increases supply and lowers the price in this specific segment of the market. In the second, the subsidy allows one of the duopolists to launch an aircraft in a segment of the market that is not yet occupied. In this case, the subsidy will push down the price of aircraft in adjacent segments of the market. Overall, the Stiglitz/Greenwald statement supports the view that prices in the aircraft market are lower than they would be in the Boeing monopoly counterfactual. The subsidized entry of Airbus and the subsequent launches of Airbus aircraft clearly increased the supply of aircraft and reduced the prices of Boeing aircraft.[5769] However, in our view, the Stiglitz/Greenwald statement does not help us assess whether the prices that prevailed in 2001 to 2006 were higher or lower than those that would have resulted in the second and the fourth of the counterfactual scenarios we posited in paragraph 7.1984 above, *i.e.*, if the market had evolved towards either (i) a duopoly with two relatively equal unsubsidized United States producers of LCA, or (ii) a situation with two relatively equal unsubsidized United States producers in competition with each other and with a third unsubsidized, but relatively weaker, producer, Airbus. Competition between the producers in either of these circumstances could very well have been even more fierce than competition between a subsidized new entrant, with presumably a corresponding initial cost disadvantage, and an incumbent producer. The resulting price levels in the two former scenarios could then have been lower than the one in the latter, which corresponds more closely to the actual Boeing-Airbus duopoly.

7.1996 Based on the foregoing, we are of the view that we cannot draw any firm conclusions on the price effect of the presence of subsidized Airbus LCA in the market, and thus cannot conclude that the United States has demonstrated, in this context, that the effect of the subsidies is the significant price suppression and price depression we observed over the period 2001-2006.

The United States' "Price" Theory of Causation

7.1997 The principal focus of the United States "price" causation theory is the argument that the challenged subsidies, and in particular LA/MSF, provided Airbus with the financial means to be flexible with its pricing of LCA in competitions against Boeing, thereby enabling it to win sales, capture market share and significantly depress and suppress the prices of LCA between the years 2001

[5767] Stiglitz/Greenwald statement, p. 2.
[5768] US, FCOS, para, 151; US, SWS, 571
[5769] We note in this regard the conclusion of Baldwin & Krugman, quoted in Neven & Seabright, Exhibit US-382 p. 22, that, with respect to the market segment encompassing the A300 and Boeing 767, "the entry of Airbus resulted in ... large losses of profits to Boeing ... . {t}he United States suffered as a whole...".

BCI deleted, as indicated **[***]**

and 2006. The United States explains that there are essentially two reasons for this alleged price effect of LA/MSF. First, the United States submits that the nature and magnitude of the cumulative provision of LA/MSF to Airbus had a direct and significant impact on EADS' free cash flow, allowing Airbus to be more aggressive in its approach to investments, including price concessions aimed at building market share over the long-run. Second, the United States asserts that LA/MSF decreased Airbus' marginal production cost by indirectly lowering its marginal cost of capital, which in turn, the United Sates argues, could be expected to lower the price of Airbus LCA.[5770]

7.1998 The European Communities disputes the United States' assertions, arguing that the United States fails to calculate the alleged cash flow effect, which the European Communities contends is zero or *de minimis*.[5771] In any event, the European Communities contends that the United States failed to demonstrate that Airbus has actually used any additional cash flow to reduce its prices. The European Communities argues that Airbus lacks the incentive and commercial opportunity to use the benefit of subsidies to price down its LCA.[5772] The European Communities also argues that any impact of LA/MSF on EADS' credit rating or a lower cost of production is not a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement, because the same benefit would accrue from alternative market financing. Thus, for the European Communities, the difference between LA/MSF interest rates and market benchmarks fully captures this effect.[5773]

Alleged Effect on EADS' Free Cash Flow

7.1999 The United States argues that in the absence of LA/MSF, the financial condition of Airbus would have been significantly worse than it has actually been. Assuming, *arguendo*, that Airbus had launched each of its LCA programmes without subsidies by obtaining funds from market lenders, the United States argues that "{a}t some point, the cumulative risk of the projects and the cumulative exposure of Airbus to high levels of debt at full market rates would have made it impossible to obtain additional investment funds".[5774] Indeed, the United States considers that even with LA/MSF, Airbus faced significant difficulties in funding its LCA projects. For instance, the United States refers to evidence which it submits reveals that **[***]**.[5775] The United States contends that the European Communities has recognized this fact by stating in its first written submission that "{i}t is not surprising that Aérospatiale required additional equity capital to fund the new investments. Internally generated cash flow was not sufficient, and a prudent debt-to-equity ratio placed limits on the amount of new debt that could be borne".[5776] Furthermore, to substantiate the same point, the United States recalls the comment made in the 1997 French Senate Report concerning the provision of LA/MSF for the A380, expressing the view that market financing for the project "would apparently add excessively to the financial expenses incurred by the firms, and would throw their balance sheets out of equilibrium because of the low level of their equity capital".[5777] Thus, the United States argues that in addition to evidence of the direct impact of LA/MSF on individual Airbus launch decisions, the cumulative impact of LA/MSF on the overall financial condition of Airbus must also be considered.

[5770] US, FWS, para. 819; US, FNCOS, paras. 154-160; US, FCOS, paras. 58-60; US, SWS, paras. 595-598; US, SNCOS, paras. 173-176; US, Answer to Panel Questions 228, 229 and 230.

[5771] EC, Comments on US Answer to Panel Question 230, paras. 59-60.

[5772] EC, SWS, para. 671.

[5773] EC, SWS, para. 1037, EC, Answer to Panel Question 230, para. 55..

[5774] US, Answer to Panel Question 229.

[5775] US, Answer to Panel Question 228, referring to *Aérospatiale Report to Credit Lyonnais* (1994), Exhibit US-296 (BCI).

[5776] US, Answer to Panel Question 228, referring to EC, FWS, para. 1135.

[5777] 1997 French Senate Report, at 72, Exhibit US-18, referred to by the United States in its Answer to Panel Question 229.

BCI deleted, as indicated **[***]**

7.2000 According to the United States a relevant measure of the impact of LA/MSF on the overall financial condition of Airbus is its impact on EADS' net free cash flow. Citing a January 2007 Deutsche Bank Company Research Report,[5778] the United States notes that over the period 2001 to 2005, nearly half of the net free cash flow of EADS was accounted for by changes in net LA/MSF. The United States asserts that the Deutsche Bank Report demonstrates that EADS' net free cash flow in 2001 and 2002 would have been negative without the provision of LA/MSF. Yet, according to the United States:

> "... it was precisely in this period, when the market was at its low, that Airbus intensified its effort to win sales and gain market share by aggressively underpricing Boeing and winning several major long-term sales. If during this period Airbus had been relying on its own resources to fund the ongoing development of the A340-500/600 and the A380 and preparing to fund the A350 – if it in fact could have done those things without government subsidies – its financial flexibility to pursue its pricing strategy would have been quite different."[5779]

7.2001 The United States also notes that the Deutsche Bank Report concludes that without the cash inflows obtained from net LA/MSF disbursements and customer advances received from LCA orders, "EADS must materially improve its underlying free cash generative performance in the future", or else it will probably be unable to "avoid future refinancing of the group through either additional debt, equity or hybrid bond issues".[5780] Thus, the United States argues that the Deutsche Bank analysis of EADS' free net cash flow confirms that LA/MSF had a material impact on the financial constraints facing Airbus, showing that LA/MSF was decisive in giving Airbus positive free cash flow, and therefore also the "ability to make the very pricing decisions at the heart of the serious prejudice about which the United States complains".[5781]

7.2002 The European Communities argues that nothing in the Deutsche Bank Report suggests that LA/MSF provided Airbus with pricing flexibility. It asserts that the United States, in relying on the Deutsche Bank Report, exhibits a conceptual flaw in that, instead of considering the benefit of the subsidy, its arguments rely on the total amount of the financial contribution provided by LA/MSF.[5782] Moreover, the European Communities submits that during the 2001 and 2002 period, LA/MSF did not represent a source of cash that would permit Airbus to price down LCA. According to the European Communities, the loan principal from the A380 LA/MSF contracts was used for the purpose for which it was borrowed – that is, the development of the A380.[5783] In any case, the European Communities submits that because, in its view, Airbus could have replaced the LA/MSF loans received for LCA launched after 1992 with risk-sharing supplier financing, the same amount of financial contribution, and thus the same level of cash flow, would have accrued to EADS even in the absence of LA/MSF. Consequently, the European Communities argues that any "material impact on the financial structure of EADS" resulting from these inflows would have occurred with or without LA/MSF loans. In this light, the European Communities submits that the principal disbursed through LA/MSF cannot, in and of itself, confer an advantage on Airbus relative to the market.[5784] Finally, the European Communities argues that when the period 1999 to 2007 is considered, Airbus repaid the

[5778] Deutsche Bank, *EADS: Risks Mispriced – Downgrade to Sell*, 9 January 2007, p. 7, (hereinafter "Deutsche Bank Report"), Exhibit US-459.
[5779] US, FNCOS, para. 160.
[5780] US, Answer to Panel Question 229, quoting from Deutsche Bank Report, p. 7, Exhibit US-459.
[5781] US, Answer to Panel Question 229.
[5782] EC, Comments on US Answer to Panel Question 229.
[5783] EC, Comments on US Answer to Panel Question 229, footnote 29.
[5784] EC, Comments on US Answer to Panel Question 229.

BCI deleted, as indicated **[***]**

relevant member States more cash than it received in LA/MSF financing, such that over this longer period of time LA/MSF did not add to its free cash flow, but actually consumed it.[5785]

7.2003 The Deutsche Bank Report is an eighteen page document which analyses a number of "key issues" affecting EADS' business activities for the purpose of arriving at a recommendation on how to trade shares in EADS. Among these are the financial and technical risks associated with the aircraft development projects underway or in the pipeline as of January 2007, namely, the A380, A350XWB and the A400M. In this context, the Deutsche Bank Report identifies what is "arguably the key issue for EADS", as the maintenance of a level of free cash flow sufficient to cover the demands of its business activities.[5786] This amount is assumed to be EUR 1 billion per year until 2013. The Report observes that this level of free cash flow "may not see{m} demanding at first", going on to note that a large part of EADS free cash flow between the years 2001 to 2005 has come from LA/MSF and "strong inflows" of advance order payments.

7.2004 When the data on EADS' free cash flow that is presented in the Deutsche Bank Report is reviewed, it is evident that in the absence of the inflows from net LA/MSF disbursements, EADS' free cash flow would have been negative in 2001 and 2002. However, it is also apparent that net inflows from LA/MSF represented a much smaller proportion of total overall free cash flow in subsequent years, declining steadily to 2005. Moreover, in 2001, 2004 and 2005, the cash inflows generated from advance order payments were significantly greater than those from net LA/MSF inflows.[5787] Thus, while it is true that net LA/MSF inflows amounted to approximately half of the free cash flow that accrued to EADS between 2001 and 2005, inflows from advance order payments were more than double LA/MSF inflows over the same period. The Deutsche Bank Report goes on to reason that LA/MSF will no longer be available for future projects and that inflows from advance order payments are likely to "reverse". In this light, it concludes that in the absence of LA/MSF disbursements and the expected decline in advance order payments, it would be difficult for EADS to "avoid refinancing of the group through either additional debt, equity or hybrid bond issues".[5788]

7.2005 In our view, the Deutsche Bank Report demonstrates that net LA/MSF inflows were an important component of EADS' free cash flow over the years 2001 to 2005, but less so than advance order payments. Moreover, apart from 2001 and 2002, we do not consider the impact of net LA/MSF inflows to be as significant to Airbus' free cash flow as the United States' argument intimates. Nevertheless, it is clear that without the net LA/MSF inflows reported in the Deutsche Bank analysis, EADS would have been in a worse position in terms of free cash-flow, and particularly so in 2002, when advance order payments were negative.

7.2006 The European Communities argues that the Deutsche Bank Report is focussed on the effect of LA/MSF principal on EADS' free cash flow position, and not on the effect of any LA/MSF subsidies. According to the European Communities, this means that the Report cannot be used to substantiate the United States' claim of serious prejudice. We agree with the European Communities that for the purpose of determining whether the United States has established that LA/MSF has caused serious prejudice to its interests, it not sufficient to focus on the effects of only the principal amounts disbursed under the LA/MSF contracts. As the European Communities points out, had Airbus obtained comparable loans from the market place, its cash inflows from those loans would have been

[5785] EC, Comments on US Answer to Panel Question 229; EC, SWS, para, 1057.
[5786] Deutsche Bank Report, p. 6, Exhibit US-459.
[5787] Cash inflows from advance order payments were more than double inflows from LA/MSF in 2001, more than six times greater than inflows from LA/MSF in 2004, and almost 24 times greater in 2005. Deutsche Bank Report, figure 6, p. 7, Exhibit US-459.
[5788] Deutsche Bank Report, p. 7, Exhibit US-459.

BCI deleted, as indicated **[***]**

the same as those obtained via LA/MSF.[5789] Therefore, a focus on how LA/MSF principal effects EADS' free cash flow would not be relevant to the question that concerns us here – whether the effect of the LA/MSF (and other) subsidies was the serious prejudice alleged by the United States.

7.2007 However, in our view, it is not accurate to say that the Deutsche Bank Report's analysis is concerned with only LA/MSF principal. As we understand it, the cash flow analysis examines **net** LA/MSF inflows, taking into account both LA/MSF receipts (*i.e.*, loaned principal) and repayments.[5790] Thus, while the Deutsche Bank Report does not directly analyze the effect of the amount of the subsidy associated with LA/MSF, the fact that it takes into account both LA/MSF receipts and repayments means that it is possible to indirectly draw some general conclusions about how the amount of LA/MSF subsidies affected EADS' cash flow.

7.2008 We recall that had Airbus funded its LCA development programmes with loans from the market, its repayments would have been greater than those actually required under the LA/MSF contracts. It follows that without LA/MSF, the contribution of net inflows from market-based loans to EADS' overall free cash flow position would have been smaller. Thus, it is possible to conclude from the Deutsche Bank Report, when considered in the light of our findings on the appropriate market interest rate benchmarks for LA/MSF, that the LA/MSF subsidies had a positive impact on EADS' free cash flow. However, the precise magnitude of this impact cannot be determined from the Deutsche Bank analysis. Therefore, we do not know whether the effect of the LA/MSF subsidies on EADS' free cash flow was, as the United States argues, to significantly alleviate financial constraints on Airbus ability to price its LCA.[5791]

7.2009 In any case, even assuming *arguendo* that it could be understood from the Deutsche Bank Report that the LA/MSF subsidies did have a significant impact on EADS' free cash flow in the years between 2001 and 2005, the United States would still have to show that it actually had the effect of lowering the price of Airbus LCA in order to make out its case of serious prejudice. While we accept that a greater free cash flow could translate into more pricing flexibility, this does not demonstrate that Airbus actually used that pricing flexibility in respect of the alleged lost sales and with the effect of depressing and suppressing prices in the LCA market. Given what we know about how prices are set in the LCA industry,[5792] it is, in our view, too simplistic to conclude that merely because LA/MSF improved Airbus' financial condition (perhaps even significantly so in 2001 and 2002), it also led to Airbus winning the sales we have found Boeing lost, by enabling Airbus to offer a lower price than it otherwise would have in the particular sales campaigns relied on by the United States. Indeed, we recall that on the basis of the evidence before us, we determined that the United States has failed to demonstrate that Airbus actually undercut the price offered by Boeing in the competitions the United States relied upon to demonstrate price undercutting as serious prejudice to its interests.[5793] Moreover, on the basis of the same considerations, we conclude that the United States has not shown that the effect of the subsidies on Airbus' cash flow caused the price depression and suppression we observed over the relevant period.

7.2010 Based on the foregoing, we consider that the United States has failed to demonstrate the effect of LA/MSF on EADS free cash flow caused Airbus to lower prices on LCA during the period 2001-

[5789] EC, Comments on US Answer to Panel Question 229.
[5790] Deutsche Bank Report, p. 7, Exhibit US-459.
[5791] US, SNCOS, para. 173.
[5792] *See*, discussion at paragraphs 7.1837 - 7.1839 above.
[5793] Of course, this does not affect our conclusion that those same sales were lost to Boeing due to the ability of Airbus to offer the particular LCA at issue at that time as a result of the subsidies in dispute.

BCI deleted, as indicated **[***]**

2006 with the effect of causing significant price suppression, price depression or lost sales[5794] in the LCA market.

Alleged Effect on Airbus Cost of Capital

7.2011 In addition to the alleged direct financial benefits flowing from the provision of LA/MSF, the United States argues that LA/MSF, by transferring much of the commercial risk of LCA development away from Airbus to the Airbus governments, also indirectly benefits Airbus by improving its credit rating and thereby reducing its marginal cost of capital in respect of those portions of its LCA development projects and other activities that are not funded with LA/MSF.[5795] The United States submits that a lower marginal cost of capital will reduce Airbus' marginal cost of production, which in turn could be expected to lower Airbus' pricing.[5796]

7.2012 Relying on parts of the evidence submitted and arguments made in support of its free cash flow theory,[5797] the United States asserts that had Airbus funded all of its LCA projects by obtaining financing at market rates rather than at the subsidized rates provided by the Airbus governments, the resulting impact on its balance sheet would have been far greater than anything that Airbus could have sustained. The United States submits that this evidence alone is sufficient to demonstrate that LA/MSF has a significant impact on the creditworthiness of Airbus, and thereby, also its marginal cost of capital.[5798] However, the United States also submitted other evidence it considers substantiates its position.

7.2013 First, the United States points to an assessment made in the Deutsche Bank Report of the financial risks associated with the development of the A350XWB in the light of Airbus' perceived "inability to use government launch finance" for this project.[5799] According to the United States, the Deutsche Bank analysis expresses the view that in the absence of LA/MSF for the A350XWB, "'far more' of the exposure of EADS 'equity and debt holders' will be 'risk' rather than 'risk free', than has been the case with prior Airbus LCA launches".[5800] Thus, the United States submits that the Deutsche Bank Report shows that the impact of LA/MSF on EADS' private investors is significant.

7.2014 Second, the United States relies upon a series of statements made by Moody's Rating Agency and Credit Suisse.[5801] In particular, the United States refers to a press release issued by Moody's in 2003, where, it argues, Moody's stated publicly that its debt rating for EADS "considers the expectation for continuing government support, which is primarily in the form of refundable advances

[5794] We note that our rejection of the United States' position that the effect of subsidies to Airbus was lost sales **by reason of price** does not affect our determination that the United States has demonstrated that those same lost sales were an effect of the subsidies through their effect on Airbus' ability to launch LCA as and when it did, thereby making available LCA for those sales that it otherwise would not have had.

[5795] US, SWS, para. 580; US, Answer to Panel Question 228.

[5796] US, FNCOS, para. 58; US, Answer to Panel Question 228.

[5797] *See*, para. 7.1999 above.

[5798] US, Answer to Panel Question 229.

[5799] Deutsche Bank Report, pp. 2-3, Exhibit US-459.

[5800] US, Answer to Panel Question 229.

[5801] US, SWS, para. 580, referring to Moody's Investor Service, *Moody's confirmation of EADS highlights government's role as odd rescuers*, 12 March 2007, Exhibit US-450; Moody's Investor Service, *Moody's Assigns A3 Rating to New Euro Mtn Program of European Aeronautic Defence and Space Company EADS N.V.*, 6 February 2003, Exhibit US-56; Moody's Global Credit Research, *Moody's confirms EADS A1 rating*, 9 March 2007, Exhibit US-464; CreditSuisse, *Value versus Risk*, EADS upgrade rating, at 14, 15 June 2006, Exhibit US-465.

for up to 1/3 of the development cost of each new aircraft programme on the Airbus level."[5802] Moreover, the United States asserts that Moody's stated in the same communication that it was "comforted" notwithstanding the large $12 billion investment in the A380 programme, by, *inter alia*, "continuing government support in the form of refundable advances of up to 1/3 of the required development expenses for Airbus' commercial aircraft". The United States has also pointed to an announcement by Moody's in March 2007 that it would maintain its high credit rating of EADS, notwithstanding losses related to the delay in A380 deliveries and other pressures. According to the United States, the announcement noted that government support to Airbus provides a "helping hand in times of financial difficulties" and "reflects an entrenched inclination for state protection and a low appetite for exposing private bond holders to losses".[5803]

7.2015 The United States submits that this evidence confirms that EADS' credit rating would be lower – and its cost of capital higher – in the absence of LA/MSF. Consequently, the United States concludes that by reducing the cost of capital, LA/MSF also reduces the price that Airbus can accept while sustaining its profitability targets.

7.2016 In responding to the United States' arguments, the European Communities rejects the notion that an improved baseline credit rating could be viewed as an "additional benefit" of LA/MSF, and it contests the United States' reliance on the announcements concerning EADS' credit ratings.

7.2017 The European Communities recalls that in order to identify a benefit flowing from LA/MSF, a comparison must be made between the terms provided under the government financing instrument and those available on the market. The European Communities asserts that LA/MSF impacts EADS' credit rating to the extent that it transfers project risk for Airbus LCA programmes to governments. According to the European Communities, precisely the same benefits would flow directly from market financing alternatives such as risk-sharing arrangements and delivery-based financing through private banks. Thus, the European Communities submits that any impact of LA/MSF on EADS' credit rating due to a reduction of risk is equivalent to what the company would enjoy if it employed risk-sharing supplier financing, instead of LA/MSF.[5804] In other words, the European Communities argues that the United States cannot establish that but for the provision of LA/MSF, Airbus would not have obtained a similarly enhanced baseline credit rating through market-based risk-sharing financing.[5805] Therefore, in the European Communities' view, the amount of any and all benefits associated with LA/MSF are captured by the difference between interest paid on LA/MSF and the benchmark, not any impact on the recipient's credit rating.[5806]

7.2018 The European Communities rejects the contention that the 2003 Moody's credit rating statements support the United States position. The European Communities argues that Moody's did not raise EADS' credit rating because of the "indirect effect" of the interest subsidy associated with these loans. According to the European Communities, Moody's had no way of knowing the terms of the LA/MSF loans, which remain confidential. Thus, the European Communities asserts that the 2003

[5802] US, Answer to Panel Question 229, referring to Moody's Investor Service Press Release, 6 February 2003, Exhibit US-56.

[5803] US, Answer to Panel Question 229, referring to Moody's Investor Service Press Release, 12 March 2007, Exhibit US-450.

[5804] EC, SWS, para. 1037.

[5805] The European Communities asserts that because both Airbus and Boeing have relied upon risk-sharing supplier funding for the A380 and the 787, "even in the total absence of MSF loans for the A350XWB, it is reasonable to assume that Airbus SAS will transfer all or most of the risk formally transferred to the member States for, e.g., the A380, to risk-sharing suppliers, with no additional programme risk to the equity holders". EC, Comments on US Answer to Panel Question 228.

[5806] EC, SWS, paras. 1036-1039; SNCOS, paras. 479-485; EC, Comments on US Answer to Panel Question 228.

BCI deleted, as indicated **[***]**

Moody's report confirms only that EADS' improved baseline credit rating flows from the risk-sharing aspect of LA/MSF, which the European Communities emphasizes, is equally present under market alternatives such as risk-sharing supplier financing.[5807] Similarly, the European Communities argues that the United States' reliance on the Moody's press release from March 2007 is misplaced because, in its view, the change in Moody's credit rating of EADS announced in this communication was linked to Moody's conferral of "Government Related Issuer" status on EADS, not LA/MSF. Moreover, according to the European Communities, Moody's decision to confer GRI status also itself had nothing to do with LA/MSF, but rather with the fact that governments are shareholders in EADS.[5808] In any event, the European Communities considers that the effect of EADS' "classification as a GRI" on its cost of capital is negligible, referring to two reports prepared by two banks that examined its impact on EADS' bond yields, in support of its position.[5809]

7.2019 The United States asserts that according to its stated methodology, the aspect of Moody's GRI analysis that relates to "government support" takes into account only extraordinary subsidies in the event of catastrophic failure of the business. According to the United States, Moody's explains that all other "aspects of the entity's existing (or anticipated) business model, including benefits (such as regular subsidies or credit extension)" are included within the "baseline risk assessment" as they would be for any company.[5810] Thus, the United States contends that the ongoing impact of LA/MSF is included in the baseline assessment of EADS, not the GRI-specific support factor on which the European Communities focuses its argument. The United States recalls that Moody's 2003 statement clearly shows that its baseline credit assessment of EADS is affected by LA/MSF.[5811]

7.2020 In our view, there is some logic to the European Communities' argument that the credit-rating implications of the transfer of risk associated with LA/MSF could well be mirrored by those that would flow from comparable market financing. As the European Communities notes, LA/MSF involves the same transfer of risk from Airbus to the member State governments that would be transferred through a comparable loan from a market based lender. However, we can see at least two reasons why the European Communities' line of argument cannot apply to the circumstances before us in this case. First, we have found that the interest rates associated with market financing that is comparable to LA/MSF would require Airbus to increase its loan repayments in respect of all developed models of LCA, in some cases by significant margins.[5812] As we have noted above, increased loan repayments would reduce Airbus' free cash flow, increase its debt, and therefore, naturally, also adversely affect its credit rating. Second, the strength of the European Communities' argument depends upon accepting that in the absence of LA/MSF, Airbus would have been able to call upon risk-sharing suppliers to fund that portion of development costs of its LCA projects. However, we have seen little evidence to suggest that this could have been a possibility, even for the one-third of A380 development costs funded by LA/MSF, let alone for the earlier models of Airbus LCA for which LA/MSF funded an even larger portion of the development costs. Moreover, as we have previously noted, information in the Airbus A380 business case undermines the contention that the risk-sharing supplier contracts are an appropriate benchmark for market-based financing.[5813]

[5807] EC, Comments on US Answer to Panel Question 228.

[5808] EC, SWS, paras. 1040-1042, citing Moody's Investor Service, *EADS*, 12 March 2007, Exhibit EC-835.

[5809] EC, SWS, para. 1043, referring to Exhibit EC-657 (BCI).

[5810] US, Answer to Panel Question 228, referring to Moody's Investor Service, *The Application of Joint Default Analysis to Government Related Issuers*, at 2, April 2005, Exhibit EC-836.

[5811] US, Answer to Panel Question 228.

[5812] *See*, para. 7.488 above.

[5813] *See*, para. 7.480 and footnote 2713 above.

BCI deleted, as indicated **[***]**

7.2021 Turning to the parties' arguments on the probative value of the various credit rating statements relied upon by the United States, we agree with the European Communities that in the absence of any evidence of the rating agencies' awareness that LA/MSF is not granted on market terms, it is difficult to conclude that they demonstrate that LA/MSF has in fact had any impact on EADS' credit rating that could not also have been achieved from market financing. The United States has not even asserted that Moody's or Credit Suisse were aware of LA/MSF's non-commercial terms and conditions. Thus, we are not convinced that the statements concerning EADS' credit rating support the case the United States is seeking to make.

7.2022 Nevertheless, as we have indicated above, on the basis of the other evidence and argument the United States has advanced, it is clear to us that LA/MSF subsidies do have a positive impact on Airbus' creditworthiness. In our view, this is most apparent from the evidence the United States has submitted (and our own findings) on the effect that market-based financing for all of Airbus LCA projects would have had on its level of cash flow and debt compared with its situation having received LA/MSF.[5814]

7.2023 To the extent that LA/MSF improves EADS' creditworthiness, the United States argues that it also reduces its cost of capital and marginal cost of production, thereby enabling Airbus to be more flexible on price. We do not understand there to be any dispute about whether better creditworthiness results in a lower cost of capital. However, we are not convinced that this will necessarily translate into a reduction in the marginal cost of production. The United States has provided very little, if any, explanation for why it considers this relationship would hold. In any case, even assuming the United States were correct, we note that it has itself argued that Airbus **[***]**.[5815] In this respect, the United States considers that the A380 business case demonstrates that Airbus' **[***]**. However, nothing in the A380 business case **[***]**.[5816] Thus, even assuming that LA/MSF improves EADS' creditworthiness, and thereby reduced its cost of capital and marginal cost of production, the United States has failed to demonstrate that it necessarily also led to Airbus winning the sales we have found Boeing lost by enabling Airbus to offer a lower price than it otherwise would have in those particular sales campaigns. In this regard, we recall again that the United States has failed to demonstrate that Airbus actually undercut the price offered by Boeing in the competitions the United States relied upon to demonstrate significant price undercutting as serious prejudice to its interests.[5817]

7.2024 Based on the foregoing, we consider that the United States has failed to demonstrate the effect of LA/MSF on cost of capital was such that it led Airbus to lower prices on LCA during the period 2001-2006. Therefore, we conclude that the United States has failed to demonstrate that an effect of the subsidies is the significant price depression, price suppression and lost sales[5818] observed during that period.

[5814] *See*, paras. 7.2012 and 7.2020 above.

[5815] US, FCOS, para. 59.

[5816] A380 Business Case, pp. 21-27, Exhibit EC-362 (HSBI).

[5817] Of course, this does not affect our conclusion that those same sales were lost to Boeing due to the ability of Airbus to offer the particular LCA at issue at that time as a result of the subsidies in dispute.

[5818] As above, *see* footnote 5794, our rejection of the United States' position that the effect of subsidies to Airbus was lost sales **by reason of price** does not affect our determination that the United States has demonstrated that those same lost sales were an effect of the subsidies through their effect on Airbus' ability to launch LCA as and when it did, thereby making available LCA for those sales that it otherwise would not have had.

BCI deleted, as indicated **[***]**

(iv) Conclusion

7.2025 For all of the foregoing reasons, and recalling our findings in respect of the Article 6.3 phenomena observed during the 2001 to 2006 period,[5819] we are satisfied that the specific subsidies the United States has shown to exist enabled Airbus to bring to the market LCA that it would not otherwise have been able to develop and launch as and when it did, and thus caused displacement of United States' imports of LCA from the EC market and of United States' exports from the markets of certain third countries, as demonstrated in the data concerning market share before us. Furthermore, we conclude that those subsidies caused lost sales of United States' LCA because, but for the subsidies, Airbus would not have had available the LCA that it was able to sell to the customers at issue in the sales we have found were lost by Boeing between the years 2001 and 2006. Thus, we conclude that the United States has established that the European Communities and the governments of France, Germany, Spain, and the United Kingdom have, through the use of specific subsidies, caused serious prejudice to the United States' interests over the period 2001 to 2006 in the form of:

(i) displacement of United States' imports of LCA into the EC market, within the meaning of Article 6.3(a) of the SCM Agreement;

(ii) displacement of United States' exports of LCA from the markets in Australia, China, Brazil, Chinese Taipei, Korea, Mexico, and Singapore, within the meaning of Article 6.3(b) of the SCM Agreement, and threat of displacement of United States' exports of LCA from the market in India; and

(iii) lost sales of United States' LCA in the same market, within the meaning of Article 6.3(c) of the SCM Agreement.

7.2026 However, we find that the United States has not demonstrated that the specific subsidies at issue, by allowing Airbus to launch and develop its family of LCA and thereby achieve a notable presence in the LCA market, were also the cause of the significant price depression and price suppression we have observed in the period 2001 to 2006. In addition, we conclude that the United States has failed to demonstrate that the financial effect of the subsidies in dispute on Airbus has enabled it to lower its prices so as to cause the significant price depression, price suppression and lost sales we have observed in the period 2001 to 2006.

7.2027 We recall that, in addition to its claims of displacement of United States' imports into the EC market, and of United States' exports from the markets of certain third countries, on which our conclusions are set out above, the United States asserted claims of impedance of United States' imports into the EC market, and of United States' exports from the markets of certain third countries. However, the United States did not assert specific evidence or make specific arguments in support of these claims in addition to its arguments concerning displacement. In the absence of a sufficiently elaborated presentation of its claims in this respect, we find that United States has failed to demonstrate that the effect of the subsidies in dispute was to impede United States' imports into the EC market, and United States' exports from the markets of certain third countries, during the period 2001-2006.

7.2028 Finally, we recall that the United States asserted a claim of threat of serious prejudice with respect to all the forms of serious prejudice it alleged in this dispute. However, with the exception of evidence concerning threatened displacement of United States' exports from the Indian market, the United States did not assert specific evidence or make specific arguments in support of such a claim in addition to its arguments concerning present serious prejudice. In the absence of a sufficiently

[5819] *See*, paras. 7.1758, 7.1791, 7.1840, 7.1845 and 7.1861.

BCI deleted, as indicated **[***]**

elaborated presentation of its claim in this respect, we find that United States has failed to demonstrate that the effect of the subsidies in dispute was a threat of serious prejudice, except as set forth above concerning threatened displacement of United States' exports from the Indian market.

8. Alleged injury to the United States' industry producing LCA

(a) Overview of Parties' Arguments

(i) United States

7.2029 The United States argues that the provision of the challenged subsidies to Airbus by the European Communities and the Airbus governments is inconsistent with Article 5 of the SCM Agreement because the European Communities has, through the use of those subsidies, caused adverse effects to the United States' interests within the meaning of Article 5(a), that is, injury to the United States' domestic industry.[5820] The United States further contends that the demonstrated intent of the European Communities and the Airbus governments is to continue to provide subsidies to Airbus that will perpetuate the adverse effects to the interests of the United States.[5821]

7.2030 The United States notes that the SCM Agreement clarifies that the "term 'injury to the domestic industry' is used in Article 5(a) in the same sense as it is used in Part V of the Agreement."[5822] The United States also notes that Article 16.1 of the SCM Agreement, which is in Part V, defines the "domestic industry" as "the domestic producers as a whole of the like products" to the imported subsidized product. The United States asserts that the subsidized product in this dispute is all Airbus LCA,[5823] that the like product is all Boeing LCA,[5824] and that the only LCA producer in the United States at the present time is Boeing, which therefore constitutes the United States' domestic industry.[5825] Therefore, the United States considers that the question for the Panel under Article 5(a) is whether subsidized imports of Airbus LCA into the United States have caused injury to Boeing's LCA production in the United States, as defined in Article 15 of the SCM Agreement, including both material injury to a domestic industry and threat of material injury to a domestic industry.[5826]

7.2031 The United States contends that the Panel must examine the factors set out in Article 15.1 of the SCM Agreement, and determine whether subsidized imports of Airbus LCA into the United States have caused injury to the United States' LCA industry. In this regard, the United States refers to the *Thailand – H-Beams* case, where the Appellate Body explained that Article 3.1 of the Anti-Dumping Agreement – which parallels Article 15.1 of the SCM Agreement – "is an overarching provision that sets forth" the fundamental aspects of an injury analysis and "informs the more detailed obligations in succeeding paragraphs."[5827] In particular, Article 15.1 provides that a determination of injury:

> "shall be based on positive evidence and involve an objective examination of both (*a*) the volume of the subsidized imports and the effect of the subsidized imports on

[5820] US, FWS, para 707.
[5821] US, FWS, para 708.
[5822] US, FWS, para. 730.
[5823] US, FWS, paras. 718-724.
[5824] US, FWS, paras. 725-729.
[5825] US, FWS, para. 731.
[5826] US, FWS, para. 731.
[5827] US, FWS, para. 732, citing, Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland ("Thailand – H-Beams")*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701, para. 106.

BCI deleted, as indicated **[***]**

> prices in the domestic market for like products and (*b*) the consequent impact of these imports on the domestic producers of such products."[5828]

The United States further contends that the Panel should examine the additional factors set forth in Article 15.7, which the United States submits demonstrate that subsidized imports threaten additional injury to the domestic industry.[5829]

7.2032 The United States originally presented data and arguments concerning the factors set out in Articles 15.1 and 15.7 of the SCM Agreement for the period 2001 – 2005. Subsequently, in its second written submission and in response to questions from the Panel, the United States presented additional information for 2006, while maintaining its view that the Panel should make its determination of injury as of the time establishment of this Panel was requested, *i.e.*, June 2005.[5830] The United States argued that improvement in Boeing's financial condition in 2006 did not demonstrate a lack of current injury to the United States' LCA industry, but rather, demonstrated how "relief from subsidized competition improves the fortunes" of that industry.[5831]

7.2033 The United States contends that the European Communities is legally incorrect in arguing that the "effect of the subsidy" standard under Article 6.3 also applies in the context of a material injury inquiry under Article 5(a).[5832] In any event, however, the United States asserts that the effect of the subsidies, as measured by changes in market share, lost sales, price undercutting, and price suppression or depression in other markets or the world market is not dissimilar to the effect of the subsidy as measured by changes in market share, lost sales, price undercutting, and price suppression or depression in the US market. Thus, even if it were necessary to show, in a claim under Article 5(a), that the material injury is not only, as required by Article 15.5, the effect of the subsidized imports, but also the effect of the subsidies, the United States considers that, on the facts of this case, the showing that the serious prejudice it has suffered is the effect of the subsidies applies, *mutatis mutandis*, to the effects of the subsidies in the US market.[5833]

(ii) European Communities

7.2034 The European Communities disputes the United States' claim of injury to its domestic LCA industry. The European Communities recalls its view that there are multiple allegedly subsidized products and corresponding like products for three of those allegedly subsidized products, and argues that an injury claim must be made out with respect to individual domestic industries producing each like product.[5834] The European Communities contends that the United States' failure to do so constitutes a fatal flaw in its claim of material injury under Article 5(a) of the SCM Agreement.[5835] Assuming *arguendo* that an assessment of the United States' claim of material injury could be properly based on data pertaining to a single domestic industry, comprising all of Boeing's LCA business, the European Communities maintains that Boeing is not presently suffering any injury, let alone "material" injury.[5836] Nor is there any evidence that the effects of any subsidies to Airbus are

[5828] SCM Agreement, Art. 15.1 (footnote omitted).
[5829] US, FWS, para. 732.
[5830] US, SWS, para. 736.
[5831] US, SWS, para. 738.
[5832] US, SWS, para. 741.
[5833] US, SWS, paras. 739-41.
[5834] EC, FWS, para 2159, footnote 2180.
[5835] EC, FWS, para. 2137.
[5836] EC, FWS, para. 2138. The European Communities also asserts, however, that "Boeing is performing so well in all four of the LCA markets where Boeing LCA products are marketed, that it is irrelevant whether the Panel examines a single or four different US domestic industries." *Id.*, footnote 2180.

causing Boeing material injury. Thus, the European Communities argues, there is no basis for the United States' claims under Article 5(a) of the SCM Agreement.

7.2035 The European Communities disagrees with the United States' description of the legal standard for establishing a material injury claim under Article 5(a) of the SCM Agreement. The European Communities recognizes that Article 15 of the SCM Agreement defines the term "injury" to mean, *inter alia*, "material injury to a domestic industry" or "threat of material injury to the domestic industry," and that pursuant to footnote 11, the term "injury" in Article 5(a) is used in the same sense as in Part V, where the definition of injury is located in footnote 45.[5837] For the European Communities, this confirms that the degree and nature of the "injury" covered by an Article 5(a) claim must be "material."[5838] The European Communities asserts that a claim under Article 5(a) involves two cumulative steps: First, an assessment of whether the domestic industry of another Member is suffering from "material injury;" and, second, an assessment of whether any material injury is caused by reason of the "use of any subsidy."[5839] The European Communities asserts that Article 15.4 of the SCM Agreement provides contextual guidance for assessing whether there is "material injury" to the domestic industry, by requiring an "evaluation of all relevant economic factors and indices having a bearing on the state of the industry," and setting out a non-exhaustive series of factors to be in determining the state of the domestic industry.[5840]

7.2036 The European Communities submits that Article 5(a) of the SCM Agreement requires a determination whether adverse effects in the form of material injury are caused by reason of the use of any subsidy.[5841] The European Communities bases this position on the view that the causal link in an adverse effects case under Part III of the SCM Agreement must be between the "effects", in this context, alleged material injury, and the "use of any subsidy". The European Communities argues this is necessary in order to give meaning to the text of Article 5(a), including the terms "cause," "use of any subsidy" and "adverse effects", in the context of a material injury claim under Article 5(a).[5842] Thus, the European Communities disagrees with the United States' view that the question before the Panel is whether the subsidized imports of Airbus LCA into the United States have caused injury to Boeing's LCA production in the United States, arguing that it must be the "use" of any subsidies that "causes" the "effects."

7.2037 The European Communities asserts that, as it must in considering serious prejudice claims under Article 5(c), in making an objective assessment of an injury claim under Article 5(a) a Panel must consider the magnitude and nature of the challenged subsidies and how their use causes effects, in this context material injury, in light of the conditions of competition in the market or markets at issue.[5843] The European Communities contends that the United States does not examine the magnitude, age or nature of the subsidies in its Article 5(a) claims, but rather labels as subsidized all Airbus LCA imported into the United States, and then examines the effects of those imports in asserting causation.

7.2038 The European Communities argues that contextual guidance for interpreting the terms "effects," "caused" by the "use" of subsidies in a claim of "material injury to a domestic industry of another Member" is found in Article 15.5 of the SCM Agreement, which provides that "{i}t must be demonstrated that the subsidized imports are, *through the effects of subsidies,* causing injury within

[5837] EC, FWS, para. 2144.
[5838] EC, FWS, para. 2145.
[5839] EC, FWS, para. 2146.
[5840] EC, FWS, para. 2147.
[5841] EC, FWS, para. 2148.
[5842] EC, FWS, para. 2148.
[5843] EC, FWS, para. 2149.

BCI deleted, as indicated **[***]**

the meaning of this Agreement."[5844] The European Communities notes that footnote 47, appended to the word "effects" in Article 15.5 in the SCM Agreement, states "{a}s set forth in paragraphs 2 and 4," and that Articles 15.2 and 15.4 refer to a variety of different forms of "effects" that are related to "subsidized imports." Article 15.2 concludes by cautioning that "{n}o one or several of these factors can necessarily give decisive guidance." Further, Article 15.4 concludes with the statement that "{t}his list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." Article 15.5 states that "{t}he demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." The European Communities then asserts that "all relevant evidence" that must be considered in a dispute involving Article 5(a) includes the magnitude, nature and age of the alleged subsidies.[5845] The European Communities argues that the United States' approach is flawed because it assumes that the effects of all the disputed subsidies are the same, regardless of their magnitude, age or nature, as long as they subsidize the imports analyzed. However, for the European Communities the causation question in a claim under Article 15(a) is not solely whether subsidized imports cause material injury, but rather whether the *effects* of subsidies (which may be manifest in subsidized imports) cause material injury.[5846]

7.2039 The European Communities also considers that the provisions of Article 11.9 of the SCM Agreement, which it asserts requires immediate termination in countervailing duty cases "where the amount of a subsidy is *de minimis* …" and Article 15.3 of the SCM Agreement, which requires that subsidized imports be excluded from an assessment of the effects on the domestic industry in a countervailing duty case if the level of subsidization is *de minimis*, are important context for a Panel in considering a claim under Article 5(a) of the SCM Agreement.[5847] The European Communities considers that the United States' arguments on injury and causation under Article 5(a) fail to address the "use" of any subsidies allegedly causing the effect of material injury. According to the European Communities, Airbus imports, which at most benefit from subsidies of less than 1 percent *ad valorem*, which are in the European Communities' view legally *de minimis*, cannot be presumed to cause lost sales, price suppression or depression or displace market share simply because they are minimally subsidized.[5848]

7.2040 The European Communities considers that this interpretation of the causation requirement under Article 5(a) is consistent with the causation requirement for other type of adverse effects claims under Articles 5(c) and 6.3 of the SCM Agreement.[5849] Thus, the European Communities argues, while Articles 6.3(c), 6.3(d), 6.4 and 6.5 refer to a "subsidized product," demonstration of serious prejudice requires proof that the "effect of the subsidy" is the cause of the various forms of serious prejudice. The European Communities asserts that it would be anomalous for there to be two completely different causation standards for a finding of adverse effects by the use of subsidies under Article 5 of the SCM Agreement. The European Communities considers that in assessing the question of causation under Article 5(a), the Panel must distinguish the effects of the challenged subsidies from the effects of imports that are subsidized to any degree. The European Communities points to evidence it maintains demonstrates that, even assuming, *arguendo*, that Boeing is materially injured, such injury is not caused by the effects of subsidies – *i.e.*, their magnitude, nature and age in the context of the competitive conditions in the various LCA markets.[5850]

[5844] EC, FWS, para. 2151 (emphasis added by European Communities).
[5845] EC, FWS, para. 2151.
[5846] EC, FWS, para. 2153.
[5847] EC, FWS, para. 2154.
[5848] EC, FWS, para. 2156.
[5849] EC, FWS, para. 2157.
[5850] EC, FWS, para. 2157-58.

BCI deleted, as indicated **[***]**

7.2041 The European Communities argues, based on evidence relating to financial and market indicators, that Boeing's LCA division was performing remarkably well as of 2006, relying principally on data for the period 2004 to 2006, but also referring to the period 2001 to 2006. In its second written submission and in its answer to a Panel question, the European Communities provided further information for 2007.[5851] The European Communities asserts that not only was Boeing in excellent financial condition as of 2006 and into 2007, but that it had achieved a dominant competitive position *vis-à-vis* Airbus. On the basis of this evidence, the European Communities asserts that the Panel should dismiss the United States' claims by finding that Boeing is not "materially injured" and that there is no threat of material injury.[5852] The European Communities concludes that, even assuming, *arguendo*, that Boeing is experiencing material injury, such material injury or threat of material injury is not caused by the effects of any subsidies to the various Airbus LCA families.[5853]

(b) Evaluation by the Panel

7.2042 In addressing the United States' claims of injury and threat of injury to the United States' LCA industry, we will first address several overarching issues, the resolution of which affects the entirety of our analysis. We will then consider the evidence and arguments presented by the parties on the questions of material injury, threat of material injury, and causation.

(i) Preliminary issues

Domestic industry

7.2043 The parties' arguments raise several preliminary questions that must be considered and addressed before we can consider their evidence and arguments on the question of injury, including threat thereof. The first point of disagreement between the parties concerns the subsidized and like products relevant to the Panel's analysis. As previously discussed,[5854] we have rejected the European Communities' position that there are multiple allegedly subsidized Airbus products and three corresponding Boeing like products, and are considering adverse effects, including the question of injury to the United States' domestic LCA industry, on the basis of the allegations of the United States, *i.e.*, that there is one subsidized product, all Airbus LCA, and one corresponding like product, all Boeing LCA. We turn next to the identification of the relevant domestic industry.

7.2044 Article 16.1 of the SCM Agreement defines the domestic industry. It provides

[5851] EC, SWS, paras. 1177- 1182; EC, Answer to Panel Question 261. We note that our question did not, in fact, request additional or updated information from the European Communities in this regard. The United States noted, in its comment on the EC Answer, that this information was "not responsive to the Panel's question, which was limited to a clarification of the data through 2006 previously provided by the EC." US, Comments on EC Answer to Panel Question 261, para. 86. We agree. While we could, in accordance with paragraph 15 of our Working Procedures, exclude that information from the record of this dispute, as it was in our view not "necessary for purposes of rebuttals or answers to questions" we have chosen not to do so, as we had not yet expressed a view as to the relevant reference period and data to be considered when the European Communities submitted the information. However, in light of our views set out in this report concerning the appropriate reference period and data, we have not relied on data for 2007 in reaching our conclusions on the United States' claim of injury. We take the same view with respect to data for 2007 (and 2008) submitted and discussed by the European Communities in its Comments on the Panel and Appellate Body Reports in *US – Upland Cotton (Article 21.5 – Brazil*) and its Comments on the US Comments on those Reports.

[5852] EC, FWS, para. 2230, 2246; EC, SWS, para. 1182, 1193.

[5853] EC, FWS, para. 2259

[5854] *See*, paras. 7.1651 - 7.1668 and paras. 7.1671 - 7.1680 above.

BCI deleted, as indicated **[***]**

> "For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related[48] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers."
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>
> [48] text of original footnote omitted."[5855]

The text of Article 16.1 is explicit: the definition of domestic industry it sets forth applies "for purposes of" the SCM Agreement. Thus, it is clear to us, from the plain meaning of the text, that the definition of "domestic industry" should be the same in the context of assessing "injury to the domestic industry" of a Member in an adverse effects analysis under Article 5(a) as it would be in a case under Part V of the SCM Agreement to determine material injury to a domestic industry in a countervailing duty investigation. As the only producer in the United States of the like product LCA during the relevant period, Boeing constitutes the whole of the domestic industry in this dispute. Thus, in this dispute, we shall be examining the question of material injury to Boeing.[5856]

Reference period

7.2045 Another point of disagreement between the parties concerns the appropriate period to be considered by the Panel in making its determination. As previously discussed,[5857] it is clear that the finding we are required to make is whether there are "present" adverse effects - in this context, present material injury or present threat of material injury to the United States' LCA industry. It is, as a practical matter, of course impossible to assess the "present" situation, as immediately current data is not, and can never be, available as of the date of a panel's decision, and thus a review of the past is necessary to draw conclusions concerning the present. Indeed, this is how investigating authorities in the context of countervailing duty investigations under Part V of the SCM Agreement typically proceed, and that practice has been approved in dispute settlement.[5858] However, there is no specific guidance in the SCM Agreement concerning the period for which data should be collected and examined, either in the context of countervailing duty investigations, or specifically in the context of Article 5(a). As previously discussed,[5859] we have determined not to make an *a priori* choice of reference period in the context of our assessment of serious prejudice, but rather to examine the evidence and arguments put forward by the United States, and the rebuttal evidence and arguments presented by the European Communities, including recent information where relevant and reliable, in determining whether adverse effects have been demonstrated by the United States. We consider that the same approach is appropriate in the context of our assessment of the question of injury.

[5855] Paragraph 2 of Article 16, which provides for the examination of regional industries is not relevant here, and there are no allegations concerning related producers.

[5856] In this respect, both parties agree that the domestic industry refers to the LCA Division of Boeing Commercial Aircraft, which comprises the LCA operations of Boeing Corporation, and it is evidence concerning that industry we will consider. *See*, US, Answer to Panel Question 239; EC, FWS, footnote 2173.

[5857] *See*, paras. 7.1693 - 7.1694 above.

[5858] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para 166: "In order to determine whether injury caused by dumping exists when the investigation takes place, "historical data" may be used."

[5859] *See*, paras. 7.1694 above.

BCI deleted, as indicated **[***]**

7.2046 In the context of its injury arguments, the United States originally provided evidence concerning the volume and market share of imports of Airbus LCA into the United States, pricing in the United States' market for three models of Boeing LCA, the 737NG, 747, and 777, and the condition of the United States' industry, for the period 2001 through 2005, [5860] arguing that the Panel should make its determination of injury as of the date of the Panel's establishment. The European Communities provided information on various indicators of Boeing's performance for the period for the period 2001 through 2006,[5861] which the United States did not specifically accept, but the accuracy of which it largely did not dispute, and upon which it did comment, and information relating to Airbus orders and market share in the United States for that same period.[5862] The United States subsequently provided updated information concerning imports and market share for 2006, and pricing information for the Boeing 737 in the United States' market updated to include data for 2006 in its second written submission.[5863]

7.2047 In order to enable the Panel to make its decision on the basis of more recent data concerning the United States' LCA industry, on 12 December 2007, we requested the United States to update the information it had provided concerning Boeing operations to include information for calendar year 2006, which the United States submitted on 22 January 2008.[5864] Thus, we continued to collect relevant updated information even after the meetings with the parties, and provided the parties an opportunity to comment on such information.[5865]

7.2048 We did not request any more recent information beyond calendar year 2006, and have not considered any such evidence submitted as relevant to our decision concerning material injury, however, as we consider that it would be inappropriate, and impractical, to continue gathering and considering information concerning the operations of the United States' domestic industry, and concerning the volume and market share of imports into the United States and prices in the United States' market, without an opportunity for comment and arguments concerning such information by the parties. The process of gathering information and comment and argument by the parties cannot continue indefinitely, even if that means that by the time our decision is issued, the information on which we base our conclusions is not completely current. This is, however, a result of the size and complexity of the case before us, and therefore in our view, does not undermine our conclusions as to present adverse effects. We note that the first submission in this dispute was filed in November 2006, and second submissions were filed in May 2007, and the second meeting of the Panel with the parties was held in July 2007. Thus, both parties had an opportunity to gather, present, and comment on, information concerning calendar year 2006, including in their answers to questions and comments thereon in January and February 2008. Our Working Procedures only allowed for the submission of factual information after the first written submissions "except with respect to evidence necessary for purposes of rebuttals or answers to questions ... upon a showing of good cause." We do not consider this to constitute a license to the parties to continue to present new factual information well after the second meeting of the panel with the parties. Nor do we consider it imposes any obligation on us to consider such information where it is not necessary to respond to our questions. In our view, the end of 2006 is a reasonable cut-off date for information concerning the question of injury to the domestic industry.

[5860] US, FWS, paras. 733-734, Tables 2 and 3; paras. 741-744, Figures 1-3; para. 746, Table 4.
[5861] EC, FWS, paras. 2162-2229 and tables therein.
[5862] EC, FWS, paras. 2252-2255 and tables therein.
[5863] US, SWS, para. 731, Table 3; para. 734 and exhibit US-616 (BCI).
[5864] US, Answer to Panel question 238.
[5865] Answers to the Panel's third set of questions were submitted on 22 January 2008, and comments on those answers were submitted on 8 February 2008, by both parties, and included additional evidence as necessary to respond to those questions.

BCI deleted, as indicated **[***]**

7.2049 The European Communities, however, considers that the United States must demonstrate present material injury "in 2008, on the basis of the most recent complete and reliable data."[5866] The European Communities asserts that, while in a countervailing duty case, it is justified to make a determination on the basis of a fixed period of investigation ending just prior to the initiation of the investigation, the situation is different in a dispute under Part III of the SCM Agreement, implying that we must consider data more recent than that concerning 2006. We do not agree. While we recognize that the passage of time while this complex dispute has been *sub judice* means that there is a degree of historicity to a decision based on data no more recent than 2006, we consider that the interests of due process, in allowing the parties an opportunity to comment on the information on which we base our decision, justifies putting a period to the data we will consider as of the end of 2006.

7.2050 Moreover, unlike the situations in *Mexico – Rice*, a dispute concerning an anti-dumping investigation relied on by the European Communities in this regard, the information we have concluded it is appropriate to consider in this dispute is not from a period "remote" from the time of our analysis and determination. In *Mexico – Rice*, the Panel and Appellate Body questioned the relevance and pertinence of evidence from a period ending fifteen months before the initiation of an investigation and almost three years before the imposition of anti-dumping duties based on the finding of material injury.[5867] The Appellate Body stressed that in that case, a *prima facie* case was established that the information did not, in fact, provide reliable indications of current injury.[5868] Among the reasons for this conclusion were that the investigation period had been proposed by the petitioner seeking the imposition of anti-dumping duties, there were no practical problems necessitating that period be considered, no attempt was made to update the information during the course of the investigation, it was not established that updating the information was not possible, and there were no reasons, other than general practice of the investigative authority, why more recent information was not sought.[5869] Thus, the Appellate Body concluded, "it is not only the remoteness of the period of investigation, but also these other circumstances" that were the basis for the Panel's conclusion that Mexico's selection of the period of investigation was in violation of its obligations under the AD Agreement.[5870]

7.2051 The situation is very different here. As indicated above, we did seek, and the parties did provide, updated information during the period the dispute was pending. Indeed, we did not, *ab initio*, establish a particular time period for information to be considered in our determination. Although the European Communities submitted information relating to even later periods than that which we sought, we have concluded that it is not appropriate to consider such information which is not complete, and which was not subject to the opportunity for comment and argument in written submissions and oral proceedings by both parties, except to the extent we requested such information ourselves.

7.2052 In addition, we note that in a countervailing (or anti-dumping) case at the national level, the remedy is the imposition of additional duties on all future imports of the product in question after the final determination.[5871] Thus, the immediate and continuing effect of the remedy on imports of the

[5866] EC, Comments on US Answer to Panel Question 240.

[5867] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.58; Appellate Body Report, para. 166.

[5868] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167. However, the Appellate Body made it clear that relying on evidence from a "remote investigation period" was not *per se* a violation of Article 3.1 of the *AD Agreement*. *Id.*

[5869] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167.

[5870] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167.

[5871] Collection of such duties continues until such time as the duty is removed as a result of changed circumstances, or is not continued following a sunset review and consequently expires.

product into the affected Member supports a concern that the remedy be necessary in light of the current situation. By contrast, in an adverse effects dispute, the remedy under Article 7.8 of the SCM Agreement is either the withdrawal of the subsidy, or the removal of the adverse effects. With either of these remedies, there is no necessary or immediate effect on imports of the product concerned, and thus, in our view, less concern for a close conjunction between the data on which a finding of injury is based and the date of imposition of the remedy.

7.2053 The United States argues that we are to make our determination concerning adverse effects "as of" the date of establishment of this Panel, in September 2005, as in the United States' view, that is the matter that is within our terms of reference. Thus, the United States argues that the question before us is not whether the condition of Boeing, in terms of the factors to be considered in assessing injury, has worsened since 2005, but whether the information before us demonstrates material injury to the United States' domestic industry. We agree that whether the condition of Boeing worsened after 2005 is not determinative on the issue of material injury. Nonetheless, as previously discussed,[5872] we do not agree with the United States' view that we must make our determination of injury as of the date of establishment of the Panel. We will therefore take into account information for the period after the date of establishment, in order to make a determination of present adverse effects in the form of injury that reflects (but is not necessarily determined by) the available information through 2006.

Method of analysis

7.2054 Turning to the method of analysis the Panel should apply in assessing the question of injury, the European Communities has posited that we must undertake a two-step inquiry, pursuant to which we should examine the question of "material injury" first, and only if we find such injury, should we go on to assess the question of causation of such injury. The United States has not directly addressed the European Communities' arguments about the appropriateness of a two-step analysis of material injury and causation, but it has presented its claim by asserting that Boeing is materially injured, and that subsidized imports are causing that material injury, indicating that the United States accepts that a two-step analysis is appropriate. In order to address the European Communities' argument concerning the nature of the analysis to be undertaken in considering the United States' claims of injury and threat of injury, we will first review the relevant provisions of the SCM Agreement, to determine if that, or indeed, any particular analytical approach, is required.

7.2055 This case is the first in which a Panel has been asked to consider adverse effects under Article 5(a) of the SCM Agreement, which provides:

> "No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, *i.e.*:
>
> (a) injury to the domestic industry of another Member[11];
>
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>
> [11] The term "injury to the domestic industry" is used here in the same sense as it is used in Part V."

We recall that Part V relates to the imposition of countervailing duties, which is only permitted if, *inter alia*, the investigating authorities determine that subsidized imports are causing injury to the domestic industry in the importing country producing the like product. Thus, in evaluating the United

[5872] *See*, paras. 7.1714 - 7.1715 above.

BCI deleted, as indicated **[***]**

States' claim of injury to the domestic industry in the sense of Article 5 of the SCM Agreement, we are directed to Part V of that Agreement for guidance.

7.2056 Article 15 of the SCM Agreement, which is in Part V of the SCM Agreement, is entitled "Determination of Injury", and includes a definition of the term "injury" in footnote 45, which states:

> "Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provision of this Article."

Article 15.1 is a general provision, which provides that a determination of injury shall be based on "positive evidence" and involve an "objective examination" of the volume of subsidized imports, their effect on prices in the domestic product for like products[5873] and the consequent impact of these imports on the domestic producers of such products. Article 15.2 gives further guidance with regard to the volume of subsidized imports, specifying that that the investigating authorities "shall consider" whether there has been a significant increase in subsidized imports, either absolutely, or relative to domestic production or consumption. With regard to price effects, Article 15.2 specifies that the authorities shall consider whether there has been significant price undercutting, a significant degree of price depression, or significant price suppression. With regard to the consequent impact of subsidized imports, Article 15.4 sets out a series of factors regarding the "state of the industry", which shall be evaluated by the investigating authorities. The list is not exhaustive, and the provision makes clear that no one or several of the factors listed can give decisive guidance. Article 15.7 sets forth several additional factors which should be considered in making a determination of threat of material injury, which determination shall be based on facts, and not allegation, conjecture, or remote possibility. Finally, Article 15.5 provides:

> "It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement.
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>
> [47] As set forth in paragraphs 2 and 4 {Articles 15.2 and 15.4}."

7.2057 These provisions of the SCM Agreement have been considered by several panels in the context of disputes concerning the decisions of domestic investigating authorities in countervailing duty investigations.[5874] In addition, the parallel, and largely identical, provisions in the AD Agreement, Articles 3.1, 3.2, 3.4, 3.5, and 3.7, have been the subject of a number of disputes concerning the decisions of domestic investigating authorities in anti-dumping investigations.[5875]

[5873] As previously discussed, the term "like product" is defined in footnote 46, which definition applies throughout the SCM Agreement.

[5874] Panel and Appellate Body Reports, *United States – Countervailing Duty Investigation on DRAMS*; Panel Report, *Mexico –Olive Oil*; Panel Report, *EC – Countervailing Measures on DRAM Chips* .

[5875] Panel and Appellate Body Reports, *Mexico - Anti-Dumping Measures on Rice* ; Panel and Appellate Body Reports, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada ("US – Softwood Lumber V (Article 21.5 – Canada)")*, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, 5087, WT/DS264/RW, adopted 1 September 2006, reversed by Appellate Body Report WT/DS264/AB/RW, DSR 2006:XII, 5147; Panel and Appellate Body Reports, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil ("EC – Tube or Pipe Fittings")*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, 2701; Panel and Appellate Body Reports, *European Communities – Anti-Dumping Duties on*

BCI deleted, as indicated **[***]**

Given that the text of the relevant provisions of the SCM and AD Agreements regarding determination of injury is almost identical, we consider WTO dispute settlement reports concerning the corresponding provisions of the AD Agreement to be equally relevant to our consideration of the issues before us as reports concerning the SCM Agreement. Of course, the decisions of investigating authorities in trade remedy cases are highly specific and dependent on the facts of the particular investigation. Thus, the outcomes of disputes regarding those decisions with respect to issues of fact provide little guidance to us in our review of the evidence presented in this case. However, dispute settlement reports with respect to interpretation of the SCM and AD Agreements, and concerning the methods of analysis of injury and causation, are relevant and we will look to them for guidance in considering the parties' arguments and our own analysis in this case.[5876]

7.2058 Not all the questions raised by the parties' arguments in this case have been addressed in dispute settlement in trade remedy cases. For instance, no panel has directly addressed the question whether a two-step analysis, as suggested by the European Communities and used by the United States in presenting its case, is appropriate (or required) in a countervailing or anti-dumping duty investigation.[5877] Therefore, we do not consider it clearly established that a Panel considering injury under Article 5(a), fulfilling essentially the same role in that context as an investigating authority in a

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Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India ("EC – Bed Linen (Article 21.5 – India) "), WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, 1269; Panel and Appellate Body Reports, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steel")*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, WT/DS184/R, adopted 23 August 2001 as modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769; Panel and Appellate Body Reports, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland ("Thailand – H-Beams")*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R; Panel and Appellate Body Reports, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States ("Mexico – Corn Syrup (Article 21.5 – US)")*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, WT/DS132/RW, adopted 21 November 2001, as upheld by Appellate Body Report WT/DS132/AB/RW, DSR 2001:XIII, 6717; Panel and Appellate Body Reports, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen")*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077; Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey ("Egypt – Steel Rebar")*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667; Panel Report, *Korea –Certain Paper* ; Panel Report, *E C – Salmon (Norway)*.

[5876] We note in this regard the "Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures" adopted by Ministers at Marrakech, which provides that

> "Ministers,
>
> Recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."

Since the term "injury" is used in Article 5(a) in the same sense as in Part V of the SCM Agreement, we consider that this injunction suggests that a similarly consistent resolution in dispute settlement under Article 5(a) is appropriate where possible.

[5877] Indeed, this topic has been the subject of proposals in the current round of negotiations on the AD Agreement, which suggests that it is not established that such analysis is a requirement under either the AD or SCM Agreement as presently in force. *See*, Working Document from the Chairman, document TN/RL/232 (28 May 2008), Annex A, setting forth a consolidation of text-based proposals submitted to the Rules Negotiating Group on anti-dumping issues up to November 2007. An earlier compilation of proposals can be found in document TN/RL/W/143 (22 August 2003), with references to the documents containing the proposals submitted by Members.

BCI deleted, as indicated **[***]**

countervailing duty or antidumping investigation, **must** first consider the question of injury, and only if it finds such injury, go on to consider whether the necessary causal link can be established. However, by the same light, in the absence of any clear obligations in this regard, in our view, nothing precludes us from undertaking such an analysis, that is, considering first the question of injury, and only turning subsequently to the question of causation of such injury, if it was found to exist in the first step. As neither party has argued that we should apply a different method of analysis, and as nothing in the SCM Agreement precludes such an analysis, we consider it unnecessary to opine definitively on the question of the nature of the causal analysis to be undertaken in considering material injury to a domestic industry. In addition, we understand that a two-step analysis of injury and causation is commonly employed by investigating authorities in the context of countervailing duty investigations. In light of our view that analysis of injury under Article 5(a) should be consistent with analysis under Part V of the SCM Agreement, we conclude that we may appropriately undertake a two-step analysis of injury and causation in this dispute.

Injury caused by subsidized imports, or injury as the effects of the subsidy

7.2059 A further, and critical, point of disagreement between the parties concerns the issue of what must be found to be causing injury to the United States' LCA industry in order for the United States to prevail on its claim of adverse effects under Article 5(a). The parties have taken sharply different positions regarding the agent of causation. The European Communities argues that the "effect" of injury must be caused by the "use of the subsidies".[5878] The United States contends that the European Communities wrongly seeks to read the "effect of the subsidy" standard of Article 6.3 into a material injury inquiry under Article 5(a),[5879] arguing that Article 15.5 requires that the material injury be the effect of subsidized imports.[5880]

7.2060 This is an issue that has not previously been addressed by any panel or the Appellate Body, since, as we have noted, this is the first dispute under Part III of the SCM Agreement in which a claim of injury under Article 5(a) has been raised. In our view, the European Communities' attempt to read the "effect of the subsidy" standard set out in Article 6.3 into the context of an injury inquiry under Article 5(a) is legally incorrect.

7.2061 Considering the text of the SCM Agreement in this regard, we note that the chapeau of Article 5 provides that "No Member should cause, through the use of any subsidy" adverse effects, including those set out in Article 5(a), *i.e.*, "injury to the domestic industry of another Member". Footnote 11 to Article 5(a) specifies that the term "injury to the domestic industry is used in the same sense as in Part V of the SCM Agreement". Thus, the text of Article 5 specifically references Part V of the SCM Agreement with respect to defining the term "injury" as used in Article 5(a).

7.2062 Part V, of course, governs the imposition of countervailing duties, including various procedural and substantive issues in the investigations that must be undertaken and determinations that must be made by national investigating authorities before such imposition can be justified. Article 15, which is in Part V of the SCM Agreement, sets out the criteria for a "determination of injury", and in doing so, refers repeatedly to consideration of subsidized imports. For instance, Article 15.1 refers to the "volume of the subsidized imports", the "effect of the subsidized imports on prices" and the "consequent impact of **these** imports". Article 15.2 refers to the "volume of the

[5878] EC, FWS, paras. 2144-2158.
[5879] US, SWS, para. 741.
[5880] US, SWS, para 740. The United States goes on to assert that, were it required to make a showing that material injury is the effect of the subsidies in dispute, "on the facts of this case, the showing that the serious prejudice is the effect of the subsidy applies, *mutatis mutandis*, to the effects of the subsidy in the U.S. market." *Id.*

subsidized imports", a "significant increase in subsidized imports", "the effect of the subsidized imports on prices", "significant price undercutting by the subsidized imports" and "the effect of **such** imports". Article 15.4 refers to "The examination of the impact of the subsidized imports on the domestic industry". Article 15.5 refers to the "causal relationship between the subsidized imports and the injury to the domestic industry" and requires that injuries caused by "any known factors other than the subsidized imports ... must not be attributed to the subsidized imports". Article 15.8 refers to "cases where injury is threatened by subsidized imports." In our view, these repeated references strongly imply that the "something" which must cause injury for purposes of Article 15 is the subsidized imports. It seems to us that, if we are to apply the term "injury to the domestic industry" consistently with Article 15 in this dispute under Article 5(a), the same causal factor, *i.e.*, the subsidized imports, should be considered in assessing the question of causation in both contexts. Thus, we conclude that for purposes of determining whether there are adverse effects in the sense of injury under Article 5(a) of the SCM Agreement, we must examine whether subsidized imports, in this case, subsidized Airbus LCA imported into the United States, are causing injury to the United States' domestic LCA industry.

7.2063 The single reference to "effects of subsidies" in Article 15 is in Article 15.5, which provides, in pertinent part:

> "It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement.
>
> _____
>
> [47] As set forth in paragraphs 2 and 4."

7.2064 The European Communities argues that footnote 47 provides contextual support for its view regarding the appropriate assessment of causation in an adverse effects dispute.[5881] Panel and Appellate Body reports in a recent dispute dealt specifically with the meaning of footnote 47 in the context of a countervailing duty investigation under Article 15.5, and addressed and rejected essentially the same argument as that made by the European Communities in this dispute.

7.2065 In that dispute, *Japan – DRAMs*, Korea argued that the Japanese investigating authority acted inconsistently with, *inter alia*, Article 15.5 by failing to demonstrate that subsidized imports were causing injury "through the effects of subsidies", because while it considered the volume and price effects of those imports, it did not demonstrate that the volume and prices of those imports, and their consequent impact on the domestic industry, were affected by the subsidies in a manner sufficient to cause injury. Korea argued that if an investigating authority could not demonstrate that the subsidies altered the volume or price of the imports, there was no basis for a finding that injury caused by those imports occurred "through the effects of the subsidies".[5882]

7.2066 The panel rejected Korea's view. The panel concluded that "the ordinary meaning of the first sentence of Article 15.5 and its accompanying footnote is to define the phrase "through the effects of subsidies" to mean the effects of subsidized imports ("{a}s set forth in Article 15.2 and 15.4")".[5883] The panel found that Article 15.5 could not be read to mean, as Korea contended, that "it must be demonstrated that the *subsidies* are causing injury *through the effects of subsidized imports*", as Articles 15.2 and 15.4, referred to in the footnote, indicate that consideration must be of the effects of

[5881] EC, FWS, para 2151.
[5882] Panel Report, *Japan – DRAMs*, para. 7.399.
[5883] Panel Report, *Japan – DRAMs*, para. 7.411.

BCI deleted, as indicated **[***]**

the subsidized imports, and not the subsidy.[5884] The panel also rejected Korea's argument that the "through the effects of subsidies" language of Article 15.5 should be interpreted as requiring the same type of causation analysis as panels have developed under the "effect of the subsidy" language in Article 6.3 of the SCM Agreement. The panel noted, as the *US – Upland Cotton* Panel had found, that references in Articles 5(c) and 6.3(c) to the "effect of the subsidy" contrast with the language used in the countervailing duty provisions in Part V of the Agreement."[5885]

7.2067 The Appellate Body came to the same conclusion, stating that:

> "Article 15.5 as a whole deals with the causal relationship between subsidized imports and injury to the domestic industry. ... By virtue of footnote 47 to Article 15.5, which forms an integral part of the first sentence, the demonstration of the causal relationship envisaged in the first two sentences of Article 15.5 is to be carried out by following the analysis set forth in Articles 15.2 and 15.4 for examining the 'effects' of the subsidized imports. According to these paragraphs, such an examination will comprise of: (i) whether there has been a significant increase in subsidized imports; (ii) the effect of the subsidized imports on prices; and (iii) the consequent impact of the subsidized imports on the domestic industry."[5886]

Thus, the Appellate Body concluded that it was:

> "clear from the architecture of Articles 15.2, 15.4, and 15.5 that, for determining whether the 'subsidized imports are, through the effects of subsidies, causing injury' to the domestic industry, what is required is the examination of the effects of the subsidized imports as set forth in Articles 15.2 and 15.4. These paragraphs neither envisage nor require the two distinct types of examinations suggested by Korea, namely, an examination of the effects of the subsidized imports as per Articles 15.2 and 15.4; and, a second examination of the effects of the subsidies... . {I}f an investigating authority carries out the examination required under Articles 15.2, 15.4, and 15.5, such examination suffices to demonstrate that 'subsidized imports are, through the effects of subsidies, causing injury' within the meaning of the SCM Agreement."[5887]

7.2068 We agree with this view, and consider that it applies equally to our analysis in this case. In our view, the term "injury to the domestic industry", which we are to apply in the same way under Article 5(a) as an investigating authority would in the context of a countervailing duty investigation, includes the question of causation. Thus, we consider that a consistent interpretation of the concept of "injury to the domestic industry" requires us to examine, in considering causation, the effects of subsidized imports as set forth in Articles 15.2 and 15.4 in our analysis of material injury under Article 5(a). Any other conclusion would, we believe, inappropriately establish a different legal standard and obligations for analysis of injury in the context of Part III from that developed under Part V of the SCM Agreement, which in our view would be contrary to footnote 11.

7.2069 In addition, as the United States notes in response to the European Communities, Article 6.3, by its terms, defines conditions in which "serious prejudice" may arise, not conditions in which

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[5884] Panel Report, *Japan – DRAMs*, para. 7.411 (emphasis in original).

[5885] Panel Report, *Japan – DRAMs*, para. 7.419, citing Panel Report, *US – Upland Cotton*, para. 7.1227 and footnote 1346.

[5886] Appellate Body Report, *Japan – DRAMs*, paras. 262-63.

[5887] Appellate Body Report, *Japan – DRAMs*, paras. 264, 268.

BCI deleted, as indicated **[***]**

"material injury" may arise.[5888] We agree with the United States that if the drafters of the SCM Agreement had intended the causation aspects of Article 6.3 to apply to claims of adverse effects in the form of injury under Article 5(a), they would not have used only the term "serious prejudice" in the chapeau of Article 6.3. The use of the term "serious prejudice" alone suggests that the provisions of Article 6.3 do not apply when considering other forms of adverse effects, which, include injury, in the sense of Part V of the SCM Agreement, under Article 5(a), and nullification and impairment under Article 5(b).

7.2070 With respect to the latter, we note that footnote 12 to Article 5(b) of the SCM Agreement provides:

> "{t}he term 'nullification or impairment' is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions."

Unlike the question of injury under Part V of the SCM Agreement, there is no methodological guidance in the text of GATT 1994 on the determination of nullification or impairment. This explains, in our view, why there is a specific reference to "practice" in the application of nullification and impairment provisions in footnote 12. On the other hand, Part V of the SCM Agreement contains extensive, albeit not complete, methodological guidance on the determination of injury, including the question of causation.

7.2071 In response to a question from the Panel on a related matter, the European Communities reiterated its view that a claim of injury under Article 5(a) can only be made out if the "use of any subsidy" causes that injury, relying in this regard on the chapeau of Article 5.[5889] According to the European Communities, its position is consistent with the views of the Appellate Body in *Japan-DRAMS* referring to the fact that the Appellate Body relied in part on the differences between Part III and Part V of the SCM Agreement in concluding that there was no basis for importing the specific obligations of Part III into the provisions of Part V.[5890] However, in our view, footnote 11 clearly not only provides a basis for, but indeed **obliges** a panel to apply Part V, and all the obligations in Article 15, including with respect to causation, in an analysis of injury under Part III. That footnote specifically incorporates the meaning of the term "injury to the domestic industry" as set out in Part V into Part III (Article 5(a)), and thus in our view incorporates into Part III of the SCM Agreement the obligations with respect to determination of injury, including those relevant to determining causation of injury, set out in Part V of the SCM Agreement. There is no similar provision even suggesting, much less requiring, the application of the obligations of Part III in disputes under Part V of the SCM Agreement, as noted by the Appellate body in *Japan-DRAMS*. Thus, we consider that unlike that case, here there is a sound legal basis in the text of the SCM Agreement itself for our conclusion that the obligations concerning determinations of injury under Part V of the SCM Agreement, including the consideration of subsidized imports as the causal factor, apply in the analysis of claims under Article 5(a) of Part III.

7.2072 On the basis of the foregoing, we reject the European Communities' view that in an examination of injury under Article 5(a), we must determine whether the use of the subsidies in dispute cause the effects asserted to demonstrate the existence of injury. Rather, we consider that an examination of the effects of subsidized imports, as set forth in Articles 15.2 and 15.4, is appropriate. As the Appellate Body has concluded, this is what is required in an assessment under Article 15 of the

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[5888] US, SWS, para. 742.
[5889] EC, Answer to Panel Question 284.
[5890] EC, Answer to Panel Question 284, citing Appellate Body Report, *Japan – DRAMS*, para. 272.

BCI deleted, as indicated **[***]**

SCM Agreement, and therefore, in our view, is also what is required in an assessment under Article 5(a).

7.2073 We recall that we have concluded that the subsidized product at issue in this dispute is all Airbus LCA.[5891] Therefore, in assessing the effects of subsidized imports, we will consider the effects of all Airbus LCA imported into the United States.

7.2074 The European Communities argues that we must consider the nature and effect of the subsidies, and their magnitude, in evaluating the question of injury, in order to ensure that any injury found is an effect of the subsidies. As we have just discussed, we do not agree that our analysis should focus on the effects of the subsidies, but rather should focus on the effects of the subsidized imports on the United States' LCA industry. Thus, for purposes of our injury analysis, it is in our view not necessary to consider whether the nature and effect of the subsidies in dispute is such as to cause material injury. The nature and effects of the subsidies are not, independently, an element to be addressed in our analysis of injury, except as may be relevant in the context of threat of injury, in light of Article 15.7(i) of the SCM Agreement.

7.2075 With respect to the magnitude of the subsidies, we have a similar view. The European Communities asserts that the *ad valorem* level of subsidy for imports of A320 LCA into the United States was *de minimis* in 2006, and similarly low in previous years, and that "{t}hese Airbus imports or sales cannot be presumed to cause lost sales, price suppression, or displaced market share simply because they are marginally "subsidized"."[5892] We note that the European Communities does not make similar assertions with respect to imports of other models of Airbus LCA, although it has undertaken to calculate an *ad valorem* subsidy rate with respect to LA/MSF and R&TD subsidies for Airbus LCA over the period 1999-2006, and argues that these subsidies are *de minimis* in the context of arguing that the subsidies do not cause the serious prejudice alleged by the United States.[5893] Thus, to the extent the European Communities makes arguments concerning causation specific to the question of material injury, as opposed to its arguments with regard to the effect of the subsidies in dispute more generally, it appears to contend that the magnitude of the subsidies benefiting imports of Airbus LCA into the United States is too small to cause or threaten material injury.

7.2076 We do not, however, consider it necessary to consider the *ad valorem* rate of subsidization on a per aircraft basis in evaluating the United States' claim of injury and threat of injury, even assuming we were satisfied with the European Communities' calculations in this regard.[5894] There is nothing in the text of Article 15 linking the magnitude of the subsidy to the question of injury or the assessment of causation. This is in contrast to Article 3.4 of the AD Agreement, which includes "the magnitude of the margin of dumping" as a relevant factor that must be evaluated in examining the question of injury. There is no corresponding provision with respect to the magnitude of the subsidy in the parallel provision, Article 15.4, of the SCM Agreement, suggesting that there is no linkage between the amount of subsidy and the determination of material injury caused by subsidized imports. It is true that Article 11.9 provides that an application shall be rejected and an investigation terminated if

[5891] *See*, para. 7.1668 above.
[5892] EC, FWS, para. 2156
[5893] EC, FWS, para. 1624; ITR report, Exhibit EC-13)(BCI/HSBI). Rates are calculated for A318, A319, A320, A321, A330-200, A330-300, A340-300, A340-500, A340-600, and A380 model LCA. The European Communities refers to the allegedly *de minimis* level of subsidization repeatedly in arguing that the alleged adverse effects are not the effect of the subsidies in dispute, e.g., paras. 1800, 1855, 1913, 1937, 1977, 2010, 2062, 2088, 2100, 2120, 2128, 2134. Although we conclude that the magnitude of subsidization is not a relevant consideration in the context of our injury analysis, we note that we have rejected the European Communities' calculations as an appropriate basis for considering the magnitude of the subsidies in the context of our analysis of serious prejudice. *See*, paras. 7.1969 - 7.1972 above.
[5894] *See*, paras. 7.1969 - 7.1972 above.

BCI deleted, as indicated **[***]**

the level of subsidization is *de minimis*, which is defined as a level of subsidization of 1 percent *ad valorem*.[5895] However, it is clear from previous dispute settlement that there is no basis for the proposition that a *de minimis* subsidy is non-injurious, even in the context of a countervailing duty investigation:

> "there is nothing in Article 11.9 to suggest that its *de minimis* standard was intended to create a special category of "*non-injurious*" subsidization, or that it reflects a concept that subsidization at less than a *de minimis* threshold *can never* cause injury. For us, the *de minimis* standard in Article 11.9 does no more than lay down an agreed rule that if *de minimis* subsidization is found to exist in an original investigation, authorities are obliged to terminate their investigation, with the result that no countervailing duty can be imposed in such cases." [5896]

As the Appellate Body has noted, "injury is not defined in the SCM Agreement in relation to any specific level of subsidization".[5897]

7.2077 Thus, in our view, an evaluation of injury for purposes of Article 5(a) of the SCM Agreement does not require consideration of the magnitude of the subsidy, because the question to be answered is not whether the subsidy(ies) cause injury, but whether the subsidized imports, that is, the imports of the subsidized product, do so. We have determined in this case that the subsidized product is all Airbus LCA, and we will proceed to examine the question of causation by imports of subsidized Airbus LCA into the United States according to the guidance set out in Article 15 of the SCM Agreement, and relevant dispute settlement reports.[5898]

Evidence

7.2078 With respect to the analysis of evidence, we note Article 15.1 of the SCM Agreement, which provides:

> "{a} determination of injury for purposes of Article VI of *GATT 1994* shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and *(b)* the consequent impact of these imports on the domestic producers of such products. (footnote omitted)."

7.2079 In the context of countervailing (and anti-dumping) determinations of investigating authorities, panels have made clear that an investigating authority must ensure that its determination of injury, and specifically its findings under Articles 15.2, 15.4 and 15.5 of the SCM Agreement, are

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[5895] The AD Agreement contains a similar provision in Article 5.9.

[5896] Appellate Body Report, *United States – Carbon Steel*, para. 83.

[5897] Appellate Body Report, *United States – Carbon Steel*, para. 81.

[5898] We note that footnote 35 of the SCM Agreement specifies that

> "{t}he provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the imposing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available."

The availability of the two tracks simultaneously suggests to us that it is not precluded that one track might yield an affirmative result, resulting in relief, while the other does not. Thus, while a level of subsidization that is *de minimis* would, in the case of a countervailing duty investigation, preclude the imposition of countervailing measures on imports of the subsidized product, we see nothing in the SCM Agreement that would preclude, as a matter of law, an affirmative determination of adverse effects, including injury, with respect to subsidies benefiting that product in a dispute under Part III.

BCI deleted, as indicated **[***]**

made on the basis of "positive evidence" and involve an "objective examination."[5899] In this regard, the Appellate Body has interpreted "positive evidence" as follows:

> "{t}he term 'positive evidence' relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word 'positive' means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[5900]

We also note that the Appellate Body has defined an "objective examination":

> "{t}he term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness."[5901] (footnote omitted)

The Appellate Body summed up the requirement to conduct an "objective examination" as follows:

> "an 'objective examination' requires that the domestic industry, and the effects of {subsidized} imports be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process."[5902]

We also note that the Appellate Body in *Thailand – H-Beams* confirmed the fundamental nature of Article 3.1 of the AD Agreement, which is the parallel provision to Article 15.1, as a guiding principle underlying all aspects of an injury determination.

> "Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Articles 3.7 and 3.8). The focus of Article 3 is thus on *substantive* obligations that a Member must fulfil in making an injury determination."[5903] (emphasis in original)

[5899] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.272.
[5900] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[5901] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[5902] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[5903] Appellate Body Report, *Thailand – H-Beams*, para. 106.

BCI deleted, as indicated **[***]**

7.2080 Like previous panels and the Appellate Body in the trade remedies context, we understand Article 15.1 of the SCM Agreement as an overarching provision which informs the more detailed obligations set forth in the remainder of Article 15 of the SCM Agreement. Since in this case we are essentially fulfilling the role that would be taken by the investigating authority in a countervailing or anti-dumping duty investigation, this means that we must base our examination and determination with respect to injury on positive evidence and an objective examination of the various injury elements as required by the more specific provisions of Article 15.

7.2081 With the foregoing in mind, we consider below the evidence and arguments presented by the parties in support of their contentions regarding injury and threat of injury.

(ii) Material injury

7.2082 As discussed above, we have concluded that it is appropriate to undertake a two-step analysis of the question of injury, that is, to determine in the first instance whether the condition of the United States' LCA industry is such as to justify a conclusion that it is materially injured. Only in the event that we find in the affirmative on this question and conclude that the United States' industry producing LCA is materially injured will it be necessary for us to go on to determine whether such material injury is caused by the subsidized imports, in view of the volumes and price effects of such imports and their consequent impact on the domestic industry. Therefore, we consider it appropriate to first analyze the information before us relevant to the condition of the United States' LCA industry, that is, Boeing, before considering developments in the volume and prices of subsidized imports. The latter information is, in our view, more relevant to consideration of the question of causation of injury than to consideration of the question of whether material injury exists.

Condition of the United States' LCA industry

7.2083 Article 15.4 of the SCM Agreement provides that an examination of injury within the meaning of Article 15:

> "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, {and} ability to raise capital or investments . . . . This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

These factors all bear on the performance or condition of the domestic industry, and thus inform our judgment concerning whether the industry is in a condition which can be termed material injury. In this regard, we note that there is no elaboration of the word "material" in the SCM Agreement, and thus no standard for determining whether a particular degree of "injury" is material. In our view, the determination whether a particular degree of injury, as evidenced by the Article 15.4 factors, is "material" is fact-specific in each case, depending on the nature of the product and the industry in question. Developments in various of the relevant factors, such as for instance a particular decline in production, sales, or profit levels, that in one industry may support a finding of material injury, may not in another industry. Thus, our determination must be based on an overall evaluation of the condition of the industry before us, taking into account the particularities brought to our attention concerning its operations and the relative importance of the relevant factors with respect to its performance.

BCI deleted, as indicated **[***]**

7.2084 In our view, it is clear that it is not necessary that all relevant factors, or even most or a majority of them, must show declines in order to make a finding of injury. As the text of the Article 15.4 makes clear, no one or several factors can necessarily give decisive guidance. In our view, this means that an overall evaluation of the information, in context, is necessary, as well as an explanation of how the facts support the determination.[5904] But this does not mean that injury may not be found in the case of an industry whose performance is improved or improving. The outcome of the inquiry will depend on the particular facts and the particular industry.

7.2085 The United States provided the following data on the Article 15.4 factors for Boeing's United States' production operations for LCA.[5905]

[5904] *See*, Panel Report, *Mexico – Olive Oil*, para. 7.372. We note that the factual circumstances in which injury may or may not be found are also the subject of proposals in the Rules Negotiations. *See*, Working Document from the Chairman, document TN/RL/232 (28 May 2008), Annex A, setting forth a consolidation of text-based proposals submitted to the Rules Negotiating Group on anti-dumping issues up to November 2007. An earlier compilation of proposals can be found in document TN/RL/W/143 (22 August 2003), with references to the documents containing the proposals submitted by Members.

[5905] The United States originally presented information on these factors for the period 2001-2005, US, FWS, Table 4, para. 746. The United States subsequently presented the updated information reproduced in the text in answer to a question from the Panel. US, Answer to Panel question 238, para. 81, table 2.

BCI deleted, as indicated **[***]**

Table 42 – Trends in Boeing's LCA Operations (US data)[5906]

	2001	2002	2003	2004	2005	2006
Production (aircraft)	518	377	273	280	284	387
Capacity Utilization[5907]	**[***]**%	**[***]**%	**[***]**%	**[***]**%	**[***]**%	**[***]**%
Sales (US dollars, millions)[5908]	35,056 27,202	28,387 21,380	22,408 19,925	21,037 21,365	22,651 28,465	
Operating income (US dollars, millions)	1,911	2,107	707	753	1,432	2,733
Return on assets	**[***]**%	**[***]**%	**[***]**%	**[***]**%	**[***]**%	**[***]**%
Cash flow (US dollars, millions)[5909]	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
Employees	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
Wages paid (US dollars, millions)[5910]	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
Productivity (US dollars, thousands)[5911]	**[***]**	**[***]** **[***]**	**[***]** **[***]**	**[***]** **[***]**	**[***]** **[***]**	**[***]**

7.2086 The United States did not submit information on inventories, because, with rare exceptions, Boeing produces to order and does not carry inventories of unsold aircraft.[5912] With respect to "ability to raise capital or investments", the United States provided the following chart showing the evolution of Boeing's credit rating.

[5906] US, Answer to Panel Question 238 (table 2).

[5907] Reflects 2006 reduction in total capacity from **[***]** aircraft per month to **[***]** aircraft per month, due to the closure of the Boeing 757 production line in 2005.

[5908] The United States notes that Boeing changed its accounting policy in 2006 with respect to concessions received from vendors. The sales data provided for 2006 reflect this change in accounting methodology. For comparative purposes, the United States provided sales data for prior years (available for 2002, 2003, 2004, and 2005) using the adjusted methodology. US, Answer to Panel Question 238, para. 81, Table 2, footnote 106.

[5909] Corrected figure for 2001. US, Answer to Panel Question 238, para. 81, Table 2, footnote 107.

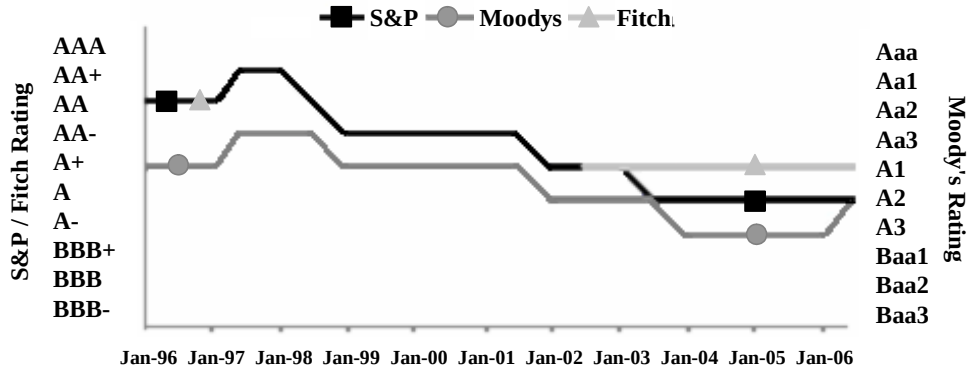
[5910] Corrected calculation. US, Answer to Panel Question 238, para. 81, Table 2, footnote 108.

[5911] Because productivity is calculated as sales per employee, the 2006 change in Boeing's accounting methodology for sales also affects the calculation of productivity. US, Answer to Panel Question 238, para. 81, Table 2, footnote 109.

[5912] US, FWS, para. 746, footnote 934. The European Communities agrees that inventories are generally unimportant. EC, FWS, para. 2245. *See, also*, EC, FWS, footnote 2216. Based on the shared view of the parties, and our own understanding of the operations of the LCA industry based on the evidence before us, we do not consider information concerning inventories to be relevant to our analysis of injury, and the lack of such information before us does not affect our conclusions.

BCI deleted, as indicated **[***]**

Chart 15: Boeing's credit ratings in recent years[5913]



7.2087 With respect to sales and market share, the United States relied on the information it presented with respect to the volume and market share of deliveries of LCA in the United States' market. That information is set out in full at paragraph 7.2113 below. It shows that deliveries of Boeing LCA in the United States' market declined dramatically, from 280 units in 2001, to 126 in 2002, and declined still further to 75 units in 2003, before increasing to 88 units in 2004, dropping again to 78 units in 2005, and increasing to 81 units in 2006.[5914] However, the declines in the early part of this period reflect in significant part a collapse of demand in the United States' market for LCA, as declines in Boeing's market share of deliveries were far less dramatic. Boeing's share of the United States' LCA market was 70 percent in 2001, declined to 58 percent in 2002, and further to 56 percent in 2003, increased to 59 percent in 2004, fell again to 52 percent in 2005, and increased to 57 percent in 2006.

7.2088 The United States argues that this information demonstrates that Boeing is materially injured, in light of the decline in its financial results, despite deep cuts in costs and steady gains in productivity, which could not offset the bottom-line impact of declines in production, capacity utilization, and sales revenue. The United States points out that Boeing's income on LCA operations declined by nearly two-thirds in 2003 and 2004 as compared with 2002, and increased only slightly in 2005. Thus, the United States attributes the increase in income in 2005 almost entirely to improved productivity.

7.2089 The European Communities argues that Boeing is not materially injured. In the European Communities' view, a finding of material injury requires that the condition of the United States' LCA industry, as reflected in the Article 15.4 factors, be poor, and/or reflect declines over the relevant period. Thus, the European Communities focuses on its contention that in 2006, Boeing is in "robust financial health, dominant in global and United States' LCA markets, in improved financial health relative to 2004 and 2001 and on a sharply upward trend."[5915] The European Communities presents information regarding the Article 15.4 factors which it argues demonstrates that there are no actual or potential declines in Boeing's performance, and no negative effects on its financial condition, over the period examined.

[5913] Exhibit US-403.

[5914] *See*, para. 7.2116 above, explaining our decision to consider deliveries, rather than order data, in this context.

[5915] EC, FWS, para. 2159.

BCI deleted, as indicated **[***]**

Table 43 – Trends in Boeing's LCA Operations (EC data)[5916]

	2001	2002	2003	2004	2005	2006
Sales (global LCA orders)	316	251	249	277	1,025	1,052
Share of US market (by LCA)	48%	59%	43%	35%	57%	69%
Share of US market (by seats)	47%	54%	40%	33%	55%	73%
Contractual backlog at year end (US dollars, millions)	75,850	68,159	63,929	70,449	124,132	174,300
Backlog units at year end (LCA)	1,228	1,098	1,066	1,058	1,796	2,455
Production (LCA delivered)	527	381	281	285	288	396
Net earnings (US dollars, millions)	1,911	2,107	707	753	1,432	2,733
Operating margin	5.45%	7.11%	3.2%	3.6%	6.3%	9.6%
Return on assets (LCA Division-only assets)	15.9%	20.2%	8.1%	10.2%	19.9%	28.2% (est.)
Return on assets (United States' method)	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]** (est.)
Cash flow (US dollars, millions)	2,244	2,345	977	839	1,206	2,429
Employment	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	56,310
Wages per employee	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	n/a
Utilization of capacity	n/a	n/a	n/a	~100%	~100%	~100%
Productivity (US dollars)	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	505,505

7.2090 The European Communities notes, based on the above, that Boeing sales of LCA (calculated as orders for LCA world-wide) in 2005 and 2006 exceeded by far sales in any prior year. The European Communities argues that in 2006, Boeing captured more than 50% of United States' sales in each of the single-aisle, 200-300 seat, and 300-400 seat markets, as well as capturing the only United

[5916] EC, FWS, para. 2162 (column labelled "change – 2004-2006", and rows reflecting "global market share" deleted). The European Communities presented additional information on some of these factors for 2007, EC, Comments on US Answer to Panel Question 238, para. 200, and some preliminary data for 2008, during the later stages of the proceedings before the Panel. As we have discussed, we have considered information for the period 2001-2006 to be most pertinent for our analysis, and have not relied on later data in reaching our conclusions regarding injury. *See*, paras. 7.2051 and 7.2053 above. We have not set forth the later submitted information in the body of our report.

BCI deleted, as indicated **[***]**

States' orders for LCA sized 400 seats or greater.[5917] The European Communities contends that Boeing's production increased from 2004 to 2006, and is likely to increase sharply in coming years as a result of Boeing's record-setting backlog of orders as of 2006. The European Communities asserts that net earnings in 2006 exceeded those of any prior year, 2001-2005, while operating margin in 2006 was nearly three times the 2004 level and substantially exceeded the 2001 level. The European Communities asserts that Boeing's 2006 cash flow and return on assets exceeded that of any prior year, 2001-2005, and credit ratings at year end 2006 exceeded its ratings in 2004 and were industry-leading. The European Communities observes that wages per employee increased substantially between 2001 and 2005 and considers that this trend presumably continued in 2006, although relevant data was not available. The European Communities asserts that Boeing has operated at or near full capacity between 2004 and 2006. According to the European Communities, this evidence demonstrates not only that Boeing is not in an economically distressed condition, but that it could not be much farther from such a condition, absent a monopoly position in all LCA markets.[5918]

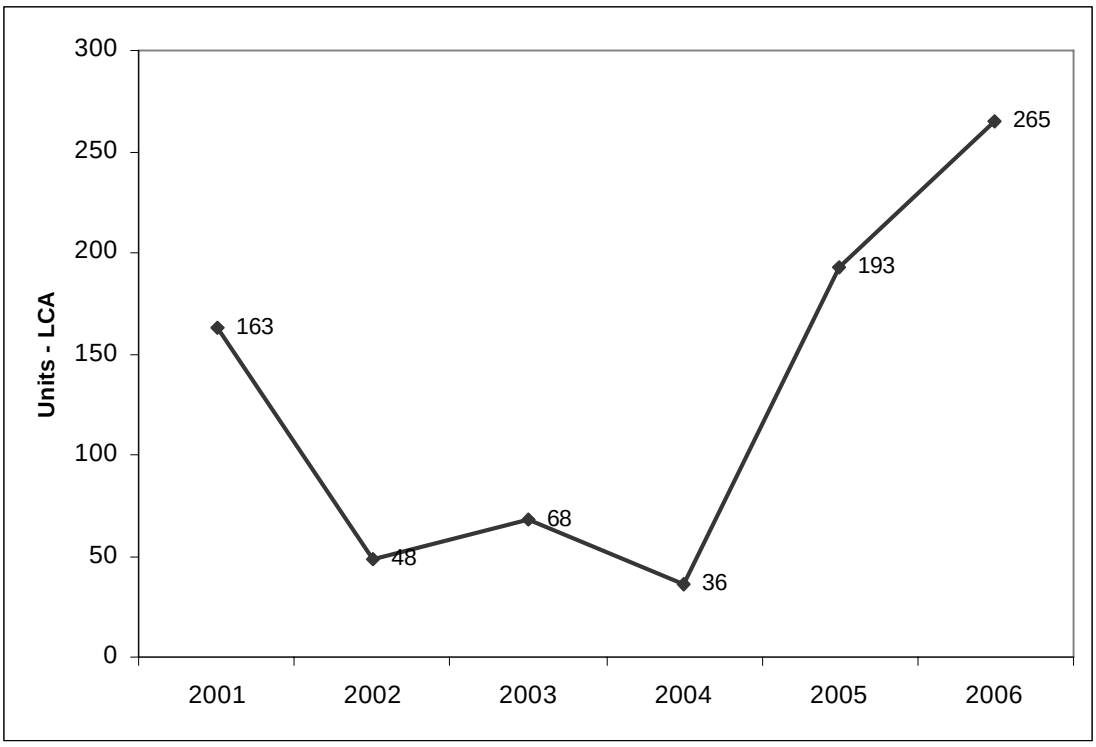
7.2091 With respect to sales, the European Communities asserts, on the basis of orders for Boeing LCA by United States' customers, in addition to the information presented above, that there is no actual or potential decline in sales over the most recent period, relying in part on the following chart:

[5917] As previously discussed, we have rejected the European Communities' position regarding consideration of separate markets for single-aisle LCA, for 200-300 seat LCA market, for 300-400 seat LCA market, for 400-500 seat LCA market and for 500+ seat LCA market. We note here that, despite its contention that LCA in the 400-500 seat and 500+ seat markets do not compete, the European Communities compares Boeing's 747 LCA with Airbus' 500+ seat A380 to demonstrate the relative success of the Boeing 747. EC, FWS, para. 2161, footnote 2182.

[5918] EC, FWS, para. 2161.

BCI deleted, as indicated **[***]**

Chart 16: Boeing LCA Orders By United States' Customers[5919]



According to the European Communities, the United States has presented no credible evidence to suggest that the sharply rising trend evident in the chart will change in the near future.

7.2092 We note that the data in Chart 16 represent orders by United States' customers, while the data in the Table 43 above represent orders by customers world-wide. The LCA market is global in scope, and thus Boeing's LCA operating results in the United States, which reflect the condition of the relevant domestic industry, include sales to customers world-wide. Indeed, in response to a question from the Panel asking the extent to which the data presented by the United States includes results relating to sales for export, the United States stated that it had presented "data on economic factors and indices affecting the entire U.S. domestic industry" and went on to observe that the relevant domestic industry "includes U.S. production 'as a whole' of LCA products, including production for export".[5920] While the United States asserts that it has limited its injury claim to the impact of subsidized imports on the United States' market,[5921] this appears to be reflected in the data only with respect to United States' sales (deliveries), market share and prices. With respect to Boeing's financial results, the information presented by the United States appears to relate to Boeing's world-wide LCA sales. While the United States has calculated sales volume on the basis of deliveries in the United States, the dollar amounts set out above in Table 42 appear to reflect world-wide sales. We see no impediment to conducting our analysis of injury on the basis of the data presented which reflects global sales of LCA, as we agree that we are to consider the United States' domestic industry "as a whole" in our analysis.

[5919] EC, FWS, para. 2164.
[5920] US, Answer to Panel Question 239, para. 83.
[5921] US, Answer to Panel Question 239, para. 83.

BCI deleted, as indicated **[***]**

7.2093 The European Communities argues that Boeing is the dominant player in terms of market share, calculating market share on the basis of orders for LCA. The following charts summarize the European Communities' position with respect to market share:[5922]

Chart 17: Airbus United States' Orders and Market Share, Single-Aisle LCA, 2001 - 2006[5923]

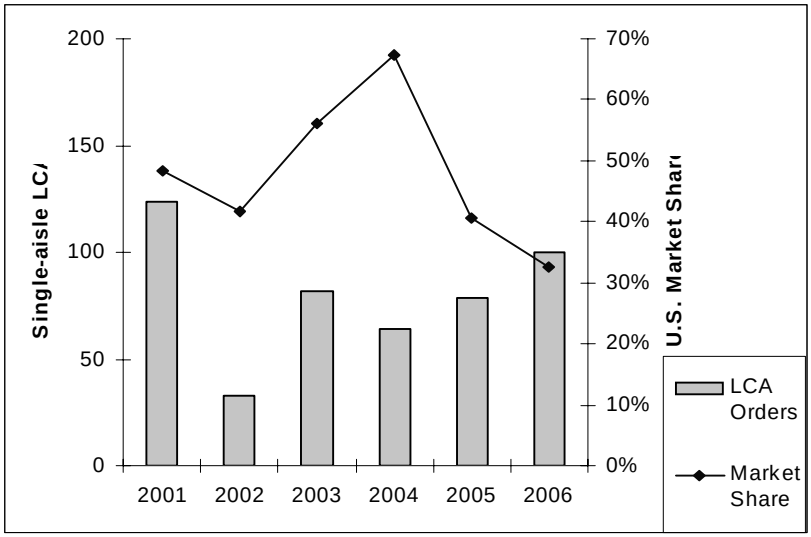
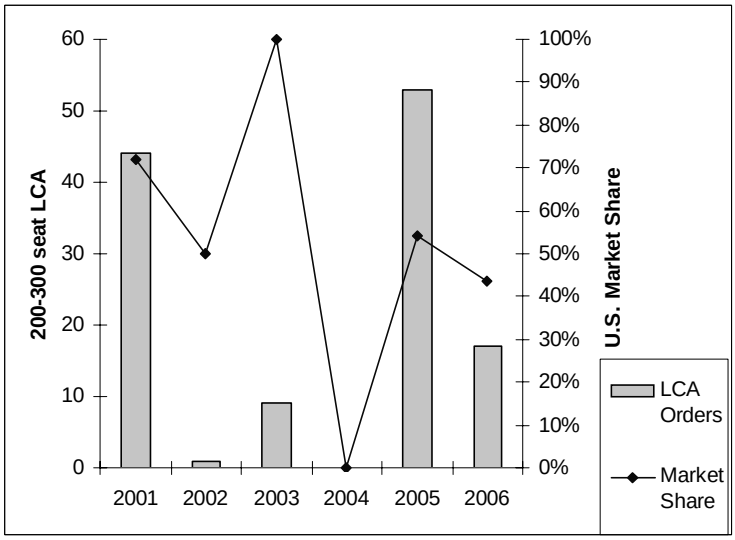


Chart 18: Airbus United States' Orders and Market Share, 200-300 Seat LCA, 2001 - 2006[5924]



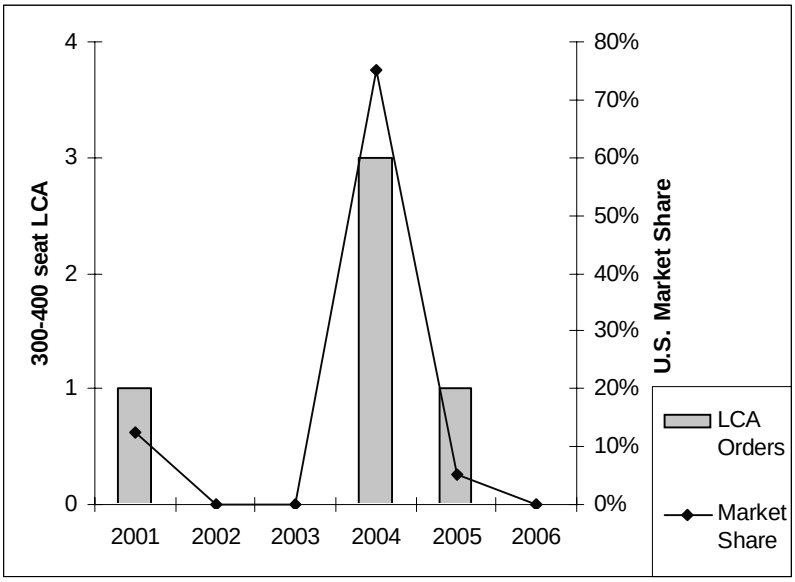
[5922] The European Communities also presented a series of tables setting forth the number of US orders of Boeing and Airbus LCA, counted by seats, and for each of the product markets the European Communities had defined. EC, FWS, paras. 2168-2172. We understand the charts reproduced in the text to be a different presentation of the same data, and thus do not discuss the seat-based information separately.

[5923] EC, FWS, para. 2252.

[5924] EC, FWS, para. 2253.

BCI deleted, as indicated **[***]**

Chart 19: Airbus United States' Orders and Market Share, 300-400 seat LCA, 2001 - 2006[5925]



7.2094 While we have carefully considered the information and arguments of the European Communities in this regard, we conclude that information on orders disaggregated by market segments is not probative on the issue of market share in this case. As we have previously discussed in the context of displacement or impedance, we consider that deliveries are the more appropriate basis for consideration of market share.[5926] In addition, Boeing's financial performance is to a large extent linked to deliveries, when the bulk of revenues are recorded, and which reflect orders during an earlier period. Thus, in our view, information concerning deliveries is more relevant in assessing changes in the share of the United States' market held by Boeing and Airbus during the period in the context of considering current material injury, as Boeing's performance will reflect in large part those deliveries. We consider the information on orders further below, in the context of our assessment of threat of material injury. The European Communities also presents information on global orders for LCA in the product markets it has defined, and on the basis of total seats in charts at paragraphs 2173-2178 of its first written submission. However, we do not find this information to be of relevance to our consideration of market share in the context of injury, which we consider is appropriately limited to share of the United States' market, and not share of the global market.

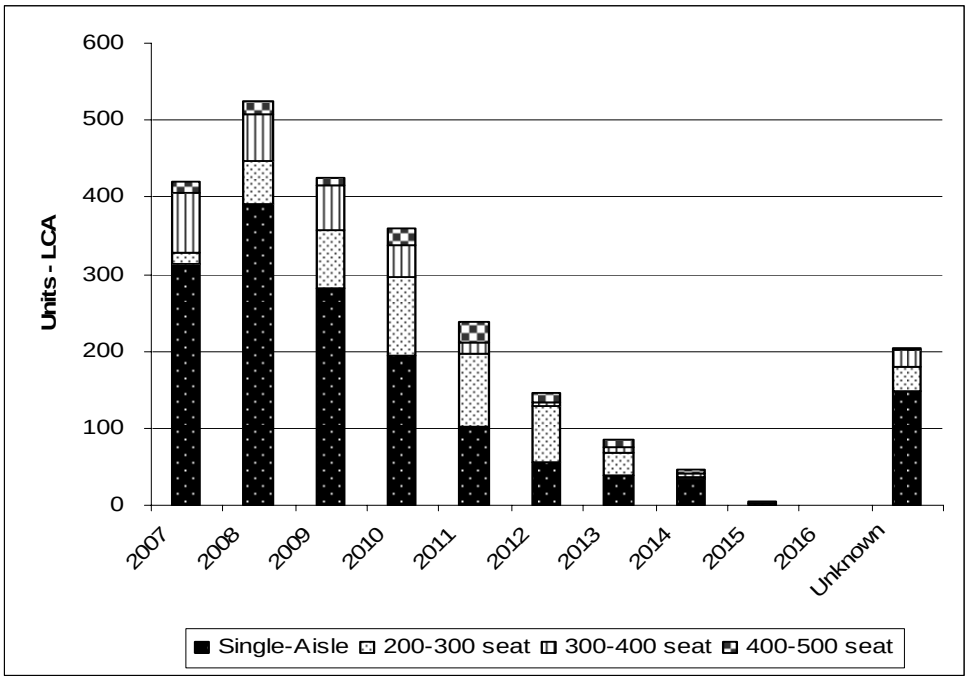
7.2095 With respect to output, the European Communities presents information concerning global deliveries of LCA on the basis of the number of seats, rather than numbers of LCA, as well as the information concerning production volumes set out in the consolidated Table 43.[5927] Measured on the basis of seats, the European Communities asserts that Boeing's production has increased. The European Communities acknowledges that Boeing's LCA production was significantly below 2001 levels in 2006, but asserts that future deliveries will reach and even exceed those levels.[5928] In this regard, the European Communities refers to Boeing's year-end backlog, as well as its delivery schedule for existing LCA orders, as of 31 December 2006. Based on the latter, the European

[5925] EC, FWS, para. 2254.
[5926] *See*, paras. 7.1745 - 7.1750 above.
[5927] The European Communities notes that the production figures it reports are slightly above those reported by the United States, by between 4 and 10 LCA in each period, but acknowledges that this does not significantly affect the trend over the period 2001-2006. EC, FWS, footnote 2216.
[5928] EC, FWS, para. 2182.

BCI deleted, as indicated **[***]**

Communities asserts that Boeing will make 421 or more deliveries in each year 2007-2008, as indicated in the following chart:

Chart 20: Boeing Delivery Schedule for Existing LCA Orders, as of 31 December 2006[5929]



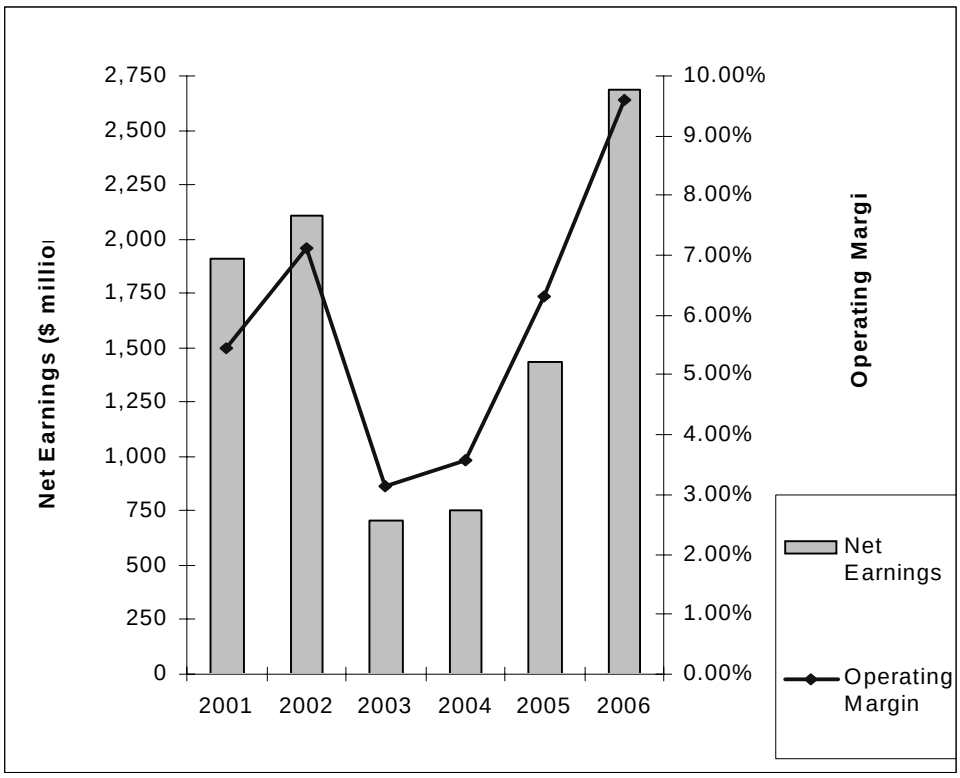
The European Communities considers that this information demonstrates that Boeing's production has increased, and will continue to increase. We note that this information does not address production levels during the period we are considering, which the European Communities acknowledges were lower in 2006 than in 2001. Rather, this information relates to periods after 2006, and we consider that to the extent that it is relevant, it pertains to the question of threat of material injury, which we address below.

7.2096 The European Communities contends that there is no actual or potential decline in Boeing's profits, which it asserts have increased in both absolute terms and as a ratio to sales each year over every prior year, from 2001 to 2005.[5930] However, the European Communities information shows a significant decline in Boeing's net earnings from 2001 to 2003, with a slight improvement in 2004, and significant improvement in 2005 and 2006.[5931]

[5929] EC, FWS, para. 2183.
[5930] EC, FWS, para. 2188.
[5931] EC, FWS, paras. 2162 (table), 2189 (table).

BCI deleted, as indicated **[***]**

Chart 21: Boeing Net Earnings and Operating Margins, 2001 - 2006[5932]

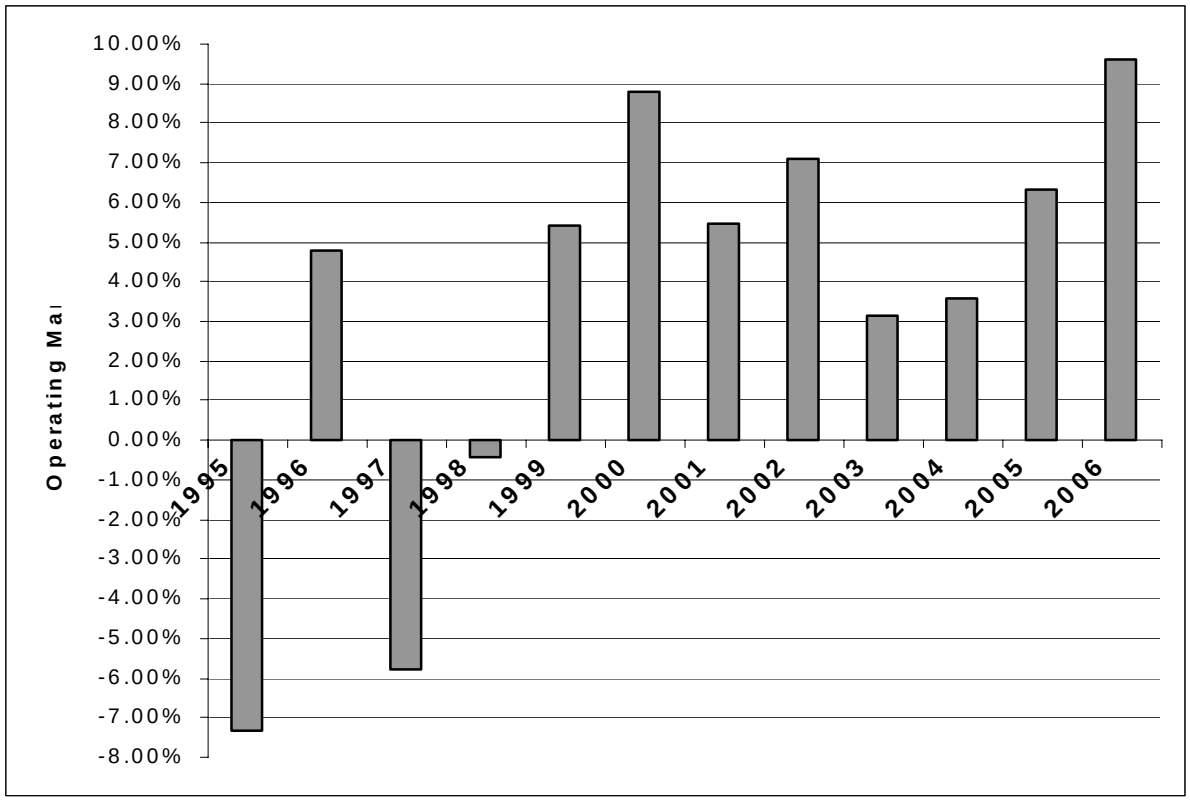


The European Communities contends that increased deliveries have driven the increase in net earnings in 2004-2006, and not, as the United States argues, increased productivity, pointing to Boeing filings with the US Securities and Exchange Commission (SEC) and statements to investors that increased net earnings in 2005 were due in large part to increased deliveries of LCA.[5933] The European Communities also points to substantial increases in Boeing's operating margins (earnings as a ratio to sales) from both 2001 and 2004 to 2006, without commenting on the substantial decline in that margin from 2001 to 2004 (from 5.45 percent to 3.6 percent).[5934] The European Communities presents the following data on historic operating margins:

[5932] Boeing LCA Division Economic Data for 1995 – 2006, Exhibit EC-240. 2006 figures are estimated.
[5933] EC, FWS, para. 2188, Exhibits EC-242, 266.
[5934] EC, FWS, para. 2190.

BCI deleted, as indicated **[***]**

Chart 22: Boeing Operating Historic Operating Margin, 1995 – 3rd Quarter 2006[5935]



The European Communities considers Boeing's performance to be impressive in light of its expenses during this period, notably those related to the launch and development of the 787 LCA in 2004, and the 747-8, the 737-ER, and the 777 freighter version. The European Communities suggests that Boeing had only begun to recoup development costs for earlier LCA in 2005, when it launched the latter two LCA, and contends that is "financial strength " permitted it to undertake these massive expenditures while preserving growing profits.[5936] We note, however, that with the exception of the 787, these are all variants of existing Boeing LCA, and thus do not entail the same level of development expense as an entirely new LCA model.

7.2097 The European Communities asserts that Boeing's return on investments, considered as return on assets,[5937] has more than doubled since 2004 and has increased substantially compared to every prior year since 2001. The European Communities takes issue with the United States' calculation of return on assets, which included a share of Boeing corporate assets allocable to Boeing's LCA Division.[5938] The European Communities asserts that return on assets is commonly measured as net earnings or operating income divided by assets. The European Communities calculated return on assets by dividing the LCA Division's net earnings, as reported in Boeing's 10-k filings with the US

[5935] EC, FWS, para. 2190. The European Communities notes that Boeing merged with McDonnell Douglas in 1997, and the table includes the combined Boeing and McDonnell Douglas revenue and net earnings for 1995 and 1996 as provided in the Boeing 1997 10-K; 2001 and 2002 figures based on 2003 restatement of net earnings for those years. *Id.* footnote 2242.

[5936] EC, FWS, para. 2191.

[5937] The United States agreed that return on assets is the most reasonable measurement of the US LCA industry's return on investments. US, Answer to Panel Question 242, para. 98.

[5938] EC, FWS, para. 2195, referring to US, FWS, footnote 935.

BCI deleted, as indicated **[***]**

SEC, by the value of LCA Division assets, also reported in Boeing's 10-k filings, thus excluding entirely Boeing corporate assets. Based on its methodology, the European Communities estimated Boeing's 2006 estimated return on assets as 28.2 percent, a 175 percent increase over 2004 and a 77 percent increase over 2001.[5939] According to the European Communities, based on predicted increases in deliveries and net earnings, Boeing's return on LCA assets should continue to increase.[5940] To the extent the European Communities relies on this predicted increase, we note that it is more relevant to a consideration of threat of injury, which we discuss further below.

7.2098 In response to a question from the Panel, the United States argued that since Boeing's corporate investments do not represent a separate profit center, but rather support the company's operations in each of the different industries in which it is active, it is appropriate to include a portion of those assets in determining Boeing's return on assets in the context of its LCA operations.[5941] However, the United States concluded that the basic trend was similar whether the United States' or the European Communities' methodology was used, and therefore suggested the Panel need not decide which method was more accurate for purposes of this dispute.[5942] The European Communities agreed that this disagreement over methodology in calculating return on assets is "of no practical consequence."[5943] Under either calculation, Boeing's return on LCA assets increased each year since 2003, and therefore we do not consider it necessary to opine on the choice of methodology.

7.2099 The European Communities suggests that Boeing operated at or near total capacity in the last three years of the period, which the European Communities defines at production at or near its delivery forecast. The European Communities notes the United States' calculation of capacity utilization in 2005 of **[***]** percent, and argues that this is impossible to reconcile with the evidence that Boeing was sold out during 2005 and 2006, turning away orders, had met (or nearly) its delivery forecasts, and had a substantial order backlog.[5944] The European Communities maintains that the United States based its calculation on a historical figure from a period of unusually high production in 1999, with no explanation, and that this is not an appropriate basis for calculating capacity utilization in 2005-2006. The European Communities also considers that the United States' figure inappropriately aggregates production lines for different LCA, while the European Communities contends that these are not fungible. Thus, the European Communities contends that its calculation, based on delivery forecasts adjusted to year to year changes is more meaningful.[5945]

7.2100 With respect to "capacity utilization," the parties do not appear to disagree on the basic fact that in the LCA industry, production capacity is planned and established years in advance based on actual orders and anticipated demand. As the European Communities recognizes, "{c}apacity is a more complex concept in the LCA industry than in many other industries because it cannot be based on machine rated capacity or factory floor bottlenecks."[5946] The United States maintains that Boeing determines its production levels, and consequently capacity over the medium term, based on the level of orders it has received and expects to receive.[5947] The United States contends that because Boeing received fewer orders for deliveries of LCA after 2001, it reduced employment and other factors of production, but did not reduce its "basic capacity to produce LCA at prior levels".[5948] Thus, the

[5939] EC, FWS, para. 2196.
[5940] EC, FWS, para. 2197.
[5941] US, Answer to Panel question 240, para. 89.
[5942] US, Answer to Panel question 240, para. 90.
[5943] EC, Comments on US Answer to Panel Question 242, para. 230.
[5944] EC, FWS, paras. 2207-08.
[5945] EC, FWS, para. 2210.
[5946] EC, FWS, para. 2198.
[5947] US, Answer to Panel Question 210, paras. 226-231; US Comments on EC, Answer to Panel Question 210, paras. 291-296.
[5948] US, Answer to Panel Question 240, para. 92.

BCI deleted, as indicated **[***]**

United States considers it appropriate to assess Boeing's capacity utilization as actual production divided by Boeing's historic actually attained capacity level. The European Communities contends, on the other hand, that because Boeing did not produce aircraft beyond the number of orders and reduced the number of planned delivery slots in anticipation of fewer deliveries, its capacity utilization should be defined as actual production divided by the number of planned delivery slots.[5949]

7.2101 In our view, because LCA manufacturers generally produce only in response to orders received or expected to be received, the European Communities' methodology for determining "capacity utilization" would generally produce a figure approaching 100 percent regardless of what was occurring in the market to which the manufacturer was reacting and the reasons for any decline in production. Thus, on the whole we consider that the United States' methodology is more appropriate for evaluating capacity utilization. It is clear that Boeing reduced both LCA production levels and the number of scheduled LCA delivery slots, compared to historic levels, and thus that its utilization of capacity declined from 2001 to 2003, and increased thereafter, albeit not to the level recorded in 2001.[5950]

7.2102 The European Communities contends that Boeing is not experiencing any negative effects on cash flow, asserting that not only is 2006 cash flow higher than every prior year since 2001, but the rising trend of net earnings suggests that it will continue to grow. Moreover, the European Communities considers that even if large capital expenditures reduced cash flow, it would not necessarily be a sign of economic distress, as it might indicate investment in Boeing's future.[5951] The European Communities also maintains that rising trends in Boeing's performance indicate that its performance will continue to be strong, with growth in output likely, indicating no actual or potential negative effects on growth.[5952] With respect to its ability to raise capital or investment, the European Communities contends that Boeing is strong, improved relative to 2004, and anticipated to strengthen further.[5953] In support, the European Communities points to growth to record levels of Boeing's share price 2004-2006, and its high, albeit not top-of-the-scale, credit ratings, which have improved 2004-2006.[5954]

7.2103 The European Communities maintains that no actual or negative effects on employment have been "conclusively established."[5955] The European Communities notes that Boeing employment – measured as the number of full-time employees of Boeing's LCA division, excluding executives and contract labour – increased from 2004-2006.[5956] The European Communities considers that the United States' reliance on the decline in employment between 2001 and 2005 is of no value in assessing material injury, because employment declines since 2001 are due in large part to Boeing's restructuring, cost cutting, and outsourcing efforts. With respect to wages, the European Communities asserts that it is not possible to determine wages per employee on the basis of available information, and that the total wage information relied on by the United States is uninformative and, at worst, misleading, as a basis for assessment of injury. The European Communities asserts that given the evidence that wages per employee have increased significantly over this period, the

[5949] EC, FWS, paras. 2162, 2198-2210.
[5950] This total capacity was reduced for 2006 to reflect the closure of Boeing's 757 production facilities in 2005. US, Answer to Panel Question 238, para. 81, footnote 105
[5951] EC, FWS, para. 2212.
[5952] EC, FWS, para. 2215.
[5953] EC, FWS, para. 2216.
[5954] EC, FWS, paras. 2216-17 (and tables).
[5955] EC, FWS, heading preceding para. 2221.
[5956] EC, FWS, para. 2221. The European Communities notes that the figures on which it relies, taken from Boeing's website, Exhibit EC-515, do not precisely match the figures provided by the United States in its first written submission, but that this discrepancy varies per year upward or downward by **[***]** and does not substantially affect the trend. *Id.*, footnote 2296.

explanation for a substantial decline in total wages paid must be a decline in employment, which is consistent with Boeing's efficiency initiatives and outsourcing. But in this context, the European Communities contends that neither employment or wage information is of any utility for assessing material injury.

7.2104 As we noted at the outset of our analysis, we are undertaking a two-step analysis of the issue of injury. Turning to our assessment of the condition of the United States' LCA industry, we note that the trends in the data presented by the two parties show largely the same picture, although the parties emphasize different aspects, and draw different inferences and conclusion. For the most part, the European Communities does not dispute the figures presented by the United States, but relies on the data it has presented in making its arguments, which the United States similarly does not dispute for the most part. With respect to the operating performance of Boeing's LCA division, we see no reason not to accept the information presented by both parties as accurate, and address differences where relevant. Although neither party has explicitly referred to the conditions of competition in the United States' market, we consider the discussion set out elsewhere in our report[5957] reflects conditions of competition in the United States' market.

7.2105 In general, the information presented by both parties demonstrates that Boeing's condition deteriorated significantly from 2001 to 2003, and thereafter improved, with significantly better performance in 2006, albeit not at the levels reported for 2001 for all factors. As we have indicated, we have focussed our assessment on Boeing's performance during the period 2001-2006, which we consider to be an appropriate period as a basis for reaching conclusions in the context of our analysis of injury.

7.2106 With respect to sales of LCA, the European Communities reports sales in terms of the number of LCA ordered. For our analysis, the dollar sales figures reported by the United States are more pertinent to a consideration of the condition of the United States' LCA industry. Aircraft manufacturers earn the bulk of the revenue on a sale not at the time the aircraft are sold, *i.e.*, ordered, but at the time of delivery. Thus, the operating performance of the manufacturer at any given time will not reflect the anticipated revenues attributable to LCA already ordered but not yet delivered.[5958] However, the strength of a manufacturer's order book is important in assessing its overall condition, as it provides indications as to the future performance of the company, which is likely to be reflected in such factors as its share price and credit rating. In this respect, while these are not factors set out in Article 15.4, we note and consider relevant the undisputed information presented by the European Communities which reflects significant increases in Boeing's share prices from 2004 to 2006, and industry-leading credit ratings from Moody's, Standard & Poor's and Fitch.[5959]

7.2107 It is clear from the information before us that Boeing suffered significant declines in sales from 2001 to 2004. Sales improved slightly in 2005, and then improved more significantly in 2006, although they remained well below the levels reported for 2001. Capacity utilization followed a similar trend, declining significantly from 2001 to 2003, and increasing annually thereafter. Boeing's operating income showed a slightly different trend, increasing slightly from 2001 to 2002, before dropping precipitously to less than half the 2002 level in 2003, improving slightly in 2004, almost doubling in 2005, and increasing significantly in 2006. Operating margins, presented by the European Communities and not disputed by the United States, showed a similar trend, improving from 2001 to 2002, before dropping by more than half in 2003, improving slightly in 2004, almost doubling in 2005, and improving significantly in 2006. The United States attributes the improvement in 2002 to

[5957] *See*, Section VII.F.6 of this Report above.
[5958] In addition, orders for LCA, if ultimately delivered, represent future production and revenues, although that is a consideration more relevant to the question of threat material injury.
[5959] EC, FWS, paras. 2216-17.

BCI deleted, as indicated **[***]**

cost-cutting efforts and improvements in productivity. However, the data presented by the United States on productivity does not, in fact, show gains until 2004, when productivity (unadjusted for the changes in Boeing's accounting methodology in 2006) was above that reported for 2001, and continued to improve in 2005, and substantially in 2006. While we recognize, as does the European Communities, that Boeing engaged in significant cost-cutting efforts during this period, and particularly during 2001-2004, the United States has not presented data on those efforts, with the exception of information showing continuing and significant declines in wages and employment since 2001. In our view, cost-cutting efforts do not in themselves reflect injury to an industry, and thus the declines in wages and employment undertaken to cut costs and improve production efficiency similarly do not necessarily indicate that the industry is injured.

7.2108 Information on return on assets presented by the parties shows the same trend as operating income, improving slightly from 2001-2002, then declining precipitously in 2003, improving slightly in 2004, more notably in 2005, and almost doubling in 2006.[5960] With respect to cash flow, the parties presented very similar information, with the exception of 2006. That data shows a slight decline from 2001 to 2002, then a collapse to less than half the 2002 level in 2003, a further decline in 2004, and a significant improvement in 2005. For 2006, the United States' data shows in increase of 57 percent, while the European Communities data shows an increase of just over 100 percent. The United States did not comment on this discrepancy when given the opportunity to do so, and we therefore are not in a position to reconcile it.[5961]

7.2109 We recognize that wages and employment declined steadily throughout the period, ending at levels just slightly above half those reported in 2001. However, this decline clearly reflects the significant cost-cutting and efficiency programmes instituted by Boeing, as well as increased outsourcing, which as we noted, do not necessarily indicate that the industry is injured. The United States does not dispute the European Communities' argument that declines in employment and total wages reflect Boeing decisions to increase efficiency and reduce costs by, *inter alia*, significantly decreasing its workforce. Indeed, the United States noted that "Boeing has remained competitive despite its loss of market share in its home market and depressed prices, particularly in the downturn, by cutting costs and improving productivity."[5962] The United States went on to assert that despite the "recovery in the financial health of Boeing", employment did not increase.[5963] In our view, this fact does not support the conclusion that Boeing is injured, but rather, indicates that the cost-cutting efforts of Boeing have had the desired effect of improving Boeing's performance, allowing it to record significant improvements in its financial condition.

7.2110 As noted, the declines in Boeing's performance happened during the early part of the period we are considering, principally in 2002 and 2003, and the condition of the industry improved significantly thereafter. The United States argues that the improvements must be viewed in the context of unusually high demand in 2005 and 2006, and asserts that Boeing has remained competitive despite lost market share in the United States' market and depressed prices, by cutting costs and improving productivity.[5964] While we do not disagree with the United States' assertion, we consider it to be of little weight in terms of determining whether the United States' LCA industry is materially injured. The parties agree that the LCA industry is strongly affected by cyclical demand conditions. Merely because improved performance occurs at a time of increased demand does not

[5960] As discussed above, this trend is the same whether the calculation is that made by the United States, or by the EC. We do not rely on the absolute levels reported, and thus the difference in the absolute values in question is of no consequence to our analysis.

[5961] US, Answer to Panel question 240, para. 85 ("areas of agreement include ... cash flow").

[5962] US, SWS, para. 737.

[5963] US, SWS, para. 737.

[5964] US, SWS, para. 737.

BCI deleted, as indicated **[***]**

mean we cannot conclude that the improved performance reflects a lack of material injury to the industry. The United States argues that any injury resulting from decreased demand is distinguishable from the injury resulting from subsidized imports, asserting that if Boeing's market share had remained at the 2002 level through 2005, Boeing would have delivered significantly more aircraft, and had significantly higher sales.[5965] However, this is an argument relating to other factors which may be causing injury, and does not directly address the question whether the condition of the United States' LCA industry reflects material injury.

7.2111 Having reviewed the evidence and arguments of the parties, we conclude that overall, Boeing's performance in 2006, and in 2005 with respect to a number of factors, reflects significant improvement over the earlier part of the period. While it is true that the levels reported in 2006 for production, capacity utilization, sales, and cash flow were lower in 2006 than in 2001, figures for operating income, and return on assets not only improved after the early declines, but were well above the levels reported in 2001. Productivity also showed significant improvement after the early declines, and was well above the 2001 level in 2006. The data demonstrate that following the collapse of demand in the LCA market after the events of 9/11, Boeing's performance began to recover in 2004, and by the end of the period we examined, it was operating at levels which, in our view, do not warrant a finding that the United States' domestic industry producing LCA is materially injured.

7.2112 Having concluded that the United States' LCA industry is not materially injured, we do not consider it necessary to make findings on the question of whether subsidized imports, in view of their volumes and effects on prices, and consequent impact on the domestic industry, are causing material injury. As previously discussed, and in the absence of any disagreement between the parties on this approach, we have concluded that a two-step analysis is appropriate in this dispute, and are applying that methodology. Nonetheless, we will go on to discuss below the principal evidence and arguments concerning import volume, effects on prices, and causal link, in order to establish a factual basis for further consideration of that issue, should it become necessary in the context of an appeal of our decision.

Volume of subsidized imports

7.2113 With respect to the volume of subsidized imports, Article 15.2 of the SCM Agreement requires consideration of "whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member."

7.2114 The United States provided the following information concerning the volume of subsidized imports:[5966]

Table 44 – Quantity of LCA delivered in the United States' market

	2001	2002	2003	2004	2005	2006
Airbus	122	91	60	60	71	61
Boeing	280	126	75	88	78	81
total	**402**	**217**	**135**	**148**	**149**	**142**

[5965] US, FWS, para. 748.
[5966] US, SWS, para. 731, table 3.

BCI deleted, as indicated **[***]**

Table 45 – Market share (quantity of LCA delivered) in United States' market

	2001	2002	2003	2004	2005	2006
Airbus	30%	42%	44%	41%	48%	43%
Boeing	70%	58%	56%	59%	52%	57%

Table 46 – Market share of United States' market by value (list price)

	2001	2002	2003	2004	2005	2006
Airbus	28%	34%	44%	50%	53%	49%
Boeing	72%	66%	56%	50%	47%	51%

7.2115 The European Communities does not dispute the information presented by the United States. Nor does the European Communities present any information or make any arguments regarding the volume of subsidized imports *per se*. To the extent the European Communities presents information on orders for Boeing and Airbus LCA in the United States' market, and the consequent "market share" represented by those orders, this information does not, in our view, provide any basis for drawing conclusions concerning the volume of imports.

7.2116 We have previously concluded that, in the context of consideration of displacement or impedance under Article 6.3, consideration of deliveries is more relevant than information concerning orders.[5967] We take the same view with respect to consideration of the volume of imports in the context of injury under Article 5(a). Based on the plain meaning of the text of Article 15.1, 15.2, 15.4, and 15.5, those provisions all require consideration of subsidized imports. In view of the ordinary meaning of the term "import", as previously discussed,[5968] we consider that a focus on deliveries is appropriate, and we therefore consider the information provided by the United States concerning deliveries, which the European Communities does not dispute, to be the most directly relevant and probative information for considering the volume of subsidized imports. In our view, data about orders for LCA has limited relevance to the consideration of the volume of subsidized imports required by Article 15.2 of the SCM Agreement. Moreover, while order information gives a good indication of the likelihood of future imports, orders for LCA, even firm orders, do not necessarily result in actual deliveries. In addition, orders may result in deliveries years later, and if placed by a leasing company, may result in deliveries to a country other than the country of that ordering company, and never actually be imported into the country of that company. Thus, we conclude that consideration of whether there "has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member" as required by Article 15.2, should focus on the number of Airbus LCA actually delivered into the United States.

7.2117 Moreover, we have rejected the European Communities' view that we should focus our analysis on separate product categories.[5969] Thus, even were we to consider the information presented

[5967] *See*, para. 7.1748 above.
[5968] *See*, para. 7.1747 above.
[5969] *See*, para. 7.1680 above.

BCI deleted, as indicated **[***]**

by the European Communities with respect to orders to be relevant, we would only consider it to the extent it is related to orders for all LCA. The European Communities does present a table setting forth United States' orders of Boeing and Airbus LCA, by seats.[5970] As we understand it, this information does not count units of LCA, but rather the total number of seats represented by the units of LCA ordered. Again, as this information concerns orders, we do not find it probative on the question of the volume of actual imports of Airbus LCA into the United States. Moreover, while in principle the number of seats might be a relevant basis for aggregating information across different models of LCA, the European Communities has provided no explanation how this information describes the volume of imports of LCA into the United States – at best it describes the volume of LCA seats ordered by United States' customers, including US-based leasing companies, for delivery at some time in the future to unspecified locations. It is less than clear to us, and the European Communities provides no explanation of, how this information informs consideration of the volume of imports into the United States during the period we examined.

7.2118 Finally, the European Communities presents information on the volume of LCA ordered over the period 2001-2006 by seats, and by number of LCA for four product categories, on a global basis.[5971] We do not consider this information to be probative on the question of the volume of imports for the same reasons as set out above. In addition, and more importantly, we do not consider information about global market share to be relevant to the question of imports into the United States, or more generally, to analysis of the United States' market for purposes of analysing injury to the United States' LCA industry. Therefore, we base our consideration of the volume of imports on the data presented by the United States.

7.2119 Measured in terms of number of aircraft delivered, imports of Airbus LCA declined significantly during the period for which we have data. However, the total number of aircraft delivered in the United States' market during this period also declined significantly, from 402 in 2001 to less than half that many in 2006. In the context of this decline, we consider that that the information on market share gives a better understanding of the market, representing the volume of imported Airbus LCA relative to domestic consumption.

7.2120 In terms of market share, imports of Airbus LCA increased over the period we are considering, notably from 2001 to 2003, increasing by 14 percentage points during that period, then declined slightly in 2004, increased in 2005, and declined again in 2006, ending with a 43 percent share of the market, 13 percentage points higher than in 2001. The information on market share by value, calculated by list price, we consider to be of little weight, as the parties are agreed that list prices of LCA are not a realistic indicator of the value of the aircraft actually ordered and delivered.[5972] Given that there are only two producers, every gain in market share in the United States' market by Airbus represents a commensurate loss of market share by Boeing. Thus, although the number of imported Airbus LCA delivered into the United States' market declined, the market share represented by those imports increased significantly, from 30 percent in 2001 to 43 percent in 2006, an increase in market share of more than 40 percent over the period. Most of that increase, however, occurred from 2001 to 2003, during which period Airbus' market share increased from 30 percent to 44 percent, or by 47 percent.

[5970] EC, FWS, paras. 2168, 2169-2172.
[5971] EC, FWS, paras. 2173-2178.
[5972] We note that the market share by value information presented by the United States shows Airbus' market share increased steadily from 2001 to 2005, from 28 percent to 53 percent, and then declined in 2006 to 49 percent, while Boeing's market share declined overall correspondingly. US, SWS, para 732 table (C). This largely tracks the changes in market share by volume, suggesting, as the US argues, that the proportion of higher and lower value LCA sold by the two companies was relatively similar at any given time. US, FWS, para 734.

BCI deleted, as indicated **[***]**

Price Effects of Subsidized Imports

7.2121 Article 15.2 of the SCM Agreement requires that, with respect to "the effect of the subsidized imports on prices," consideration must be given to:

> "whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree."

7.2122 The United States observes that "the record does not contain comparable LCA pricing data for all U.S. sales," and seeks to demonstrate on the basis of public information that Airbus achieved its growth in the United States' market by undercutting Boeing on price, and that the subsidized imports have depressed or suppressed prices.[5973] With respect to its allegations of price undercutting, the United States presents anecdotal evidence regarding the sales of Airbus LCA to JetBlue, Frontier and America West Airlines, accounting for nearly 40 percent of Airbus deliveries during 2001-2005. The United States notes that all three of these airlines placed their first orders for Airbus LCA in 1999, and then made substantial additional follow-on orders with Airbus through 2005, which the United States considers to be losses stemming from the earlier sales campaigns, and which are reflected in lost market share to Boeing.[5974] The United States asserts that in each case, Boeing was a strong competitor for the initial order, and that while the actual price that each airline paid to Airbus, taking into account all concessions on the sale, is not available to the United States, publicly available information indicates that Airbus price undercutting played a key role in its winning these customers.[5975] The United States also contends that Boeing lost the "most significant" sales campaigns in the United States' market during 2001-2005 due to price undercutting by Airbus, citing in this regard a statement by the head of Virgin America following the purchase (including options) of nearly 100 LCA that while there were "very compelling proposals" from both manufacturers, the airline was "pleased with the favourable economic terms" received from Airbus.[5976]

7.2123 The European Communities does not specifically address the United States' contentions of price undercutting in responding to the United States' claim of injury. Instead, the European Communities "incorporates and references all of the evidence and argument refuting the United States' serious prejudice claims".[5977] Thus, the European Communities apparently considers that the Panel should revisit this information and determine for itself in what respect it is relevant and/or probative as a response to the specific allegations of the United States in the context of injury. We consider this method of presenting its case to be less than satisfactory, as it leaves the Panel uncertain as to the specific arguments the European Communities seeks to make and which evidence it would rely upon in response to the specific arguments and information presented by the United States in support of its claims of price undercutting by subsidized imports in the United States' market. Moreover, in the context of injury, as discussed, we are considering the effects of subsidized imports on the United States' LCA industry, rather than considering the effects of the subsidies themselves, as we are in the context of serious prejudice. Thus, it is not entirely clear how the European Communities' arguments in the context of serious prejudice are apposite to the analysis of injury. Nonetheless, we have reviewed the arguments and information referred to by the European Communities, focussing on the specific sales relied upon by the United States in support of its claim of price undercutting, involving Jet Blue, Frontier, America West, and Virgin America.

[5973] US, FWS, para. 737.
[5974] US, FWS, para. 737.
[5975] US, FWS, paras. 738-740.
[5976] US, FWS, para. 740.
[5977] EC, FWS, para. 2250.

BCI deleted, as indicated **[***]**

7.2124 The European Communities addresses the sales to Jet Blue, Frontier, America West, and Virgin America in the context of its argument that subsidies to A320 model LCA did not cause significant lost sales of Boeing 737 aircraft, and did not have significant price undercutting effects.[5978] The European Communities argues that the United States has the burden of proving in each challenged sales campaign that the magnitude, nature, and age of the subsidies at that point in time caused Airbus A320 family prices to be significantly lower than Boeing's price. The European Communities asserts that a lower winning price does not equal "significant price undercutting" or even "undercutting," and that it is not sufficient if Airbus' winning prices were lower than Boeing's last offer. In the European Communities' view, only if Airbus' winning lower price is significantly lower and that significantly lower price is caused by subsidies that the United States can prevail on its significant lost sales claims.[5979]

7.2125 The European Communities argues that "significant price undercutting" involves an objective assessment of whether the subsidies have caused Airbus prices to be significantly lower, and asserts that the United States has not met its burden in this regard.[5980] The European Communities contends that the amount of alleged A320 subsidies in each of these alleged lost sales was *de minimis*, and thus too small to provide Airbus sales personnel with sufficient funds to significantly lower A320 family prices, that in some of these sales, Airbus' winning price was actually higher than Boeing's final offer and that there were other important non-price-related reasons why the company won the particular sale which break the causal link between the effects of subsidies and lower pricing.[5981] The European Communities asserts that while price is a relevant consideration, particularly for low-cost carriers, it is only one of the many factors a customer will consider in determining the value of a particular offer, and the decision of each customer on the value of an offer to sell is subjective, based on its own particular needs at the time.[5982] Finally, the European Communities asserts that by 2001-2006, any initial effects from the 1984 launch of the A320 were dissipated by Boeing's 1993 launch of the 737NG, and thus, the effects of the subsidies are attenuated.[5983]

7.2126 The European Communities' arguments in this context are concerned with demonstrating that the subsidies to A320 LCA did not cause the lost sales in question, principally because those subsidies did not cause price undercutting. The European Communities does not dispute that Airbus made these sales, and Boeing did not. However, the United States does not rely on these "lost sales" as evidence of injury. Rather, the United States relies on these sales as evidence of price undercutting by subsidized Airbus LCA. The European Communities argues, specifically with respect to the JetBlue sale in 1999[5984] and the Frontier Airlines sale in 2000,[5985] that Airbus's price was not lower than Boeing's. In both cases, the European Communities' contention is supported by public statements of airline officials, as is the United States' contention to the contrary.

7.2127 The United States argues that in each case, Boeing was a strong competitor for the initial order, which Airbus eventually won. The United States acknowledges that it has no information regarding the actual price that each airline paid to Airbus, taking into account all concessions on the sale, and thus relies on public statements.[5986] For instance, with respect to Frontier Airlines, the United States alleges that Boeing withdrew from the competition in the face of aggressive Airbus

[5978] EC, FWS, paras. 1820-1873.
[5979] EC, FWS, para. 1821.
[5980] EC, FWS, para. 1824, 1826.
[5981] EC, FWS, para. 1827-29
[5982] EC, FWS, paras. 1831-1833, 2256.
[5983] EC, FWS, para. 1834.
[5984] EC, FWS, para. 1839.
[5985] EC, FWS, para. 1851.
[5986] US, FWS, para. 739.

BCI deleted, as indicated **[***]**

discounting, citing a remark by Boeing's CEO that: "There are places where there is very intense price competition. We've always said we're in business to make money, and if that gets too intense we don't go there – that's what happened at Frontier, for example."[5987] The United States also points to the statement of Frontier Airline's chief financial officer in response to being asked whether Boeing's claims of Airbus's price undercutting were accurate: "We seem to be hearing that from people around us – we're pretty pleased."[5988] The European Communities asserts that Frontier Airlines decided to order the A320 family LCA because of the product advantages of the Airbus aircraft, and not because of price.[5989] It cites in this regard comments of Frontier Airline's chief financial officer concerning improved operating economics and increased customer comfort of the Airbus LCA, and concluding that "both operationally and from a marketing standpoint," the airline was "excited" about the A320.[5990] The European Communities also points to HSBI in support of its contention that Airbus was forced to match Boeing's price in this sales campaign.[5991]

7.2128 With respect to America West, the United States cites W.A. Franke, the chairman of America West Holdings, who stated, concerning his company's October 1999 Airbus order, that the Airbus aircraft were "very competitively priced."[5992] The European Communities argues that the United States incorrectly asserts that this was America West's first Airbus purchase, noting that America West had already ordered nine A320s and 22 A319s in 1997,[5993] and contending that this does not demonstrate that low prices were the ultimate reason for America West to buy the A320.

7.2129 Finally, the United States cites JetBlue's CEO David Neeleman as stating that JetBlue "fully expected to choose the {Boeing} 737" until the low A320 price offered by Airbus got its attention.[5994] The European Communities points to different statements by Mr. Neeleman,[5995] indicating that JetBlue ended up paying more than it would have, had it chosen the Boeing 737-80,[5996] and stating "{w}e bought the airplane for no other reasons than because it was the right product."[5997]

7.2130 As we have previously discussed in the context of our analysis of price undercutting in the serious prejudice analysis, this type of anecdotal public evidence is of limited value in determining which manufacturer's LCA were lower priced, as opposed to determining which offer the customer considered to be of higher value to it overall.[5998] While the evidence clearly indicates that price was an important element of these sales campaigns, the conclusion posited by the United States, that each airline, based on having monetized all elements of an offer, makes a purchase decision that will

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[5987] Chris Kjelgaard, *Boeing's Condit Reveals Frontier Airbus Deal*, Air Transport Intelligence (14 October 1999), Exhibit US-397.

[5988] Chris Kjelgaard, *Frontier Plans to Complete Airbus Transition by 2005*, Air Transport Intelligence (18 October 1999), Exhibit US-398.

[5989] EC, FWS, para. 1850.

[5990] EC, FWS, para. 1850, citing Exhibit US-398.

[5991] EC, FWS, paras. 1851-52, citing Statement of Christian Scherer, paras. 105-106, Exhibit EC-14 (BCI); Airbus **[***]** data, Exhibit EC-425 (HSBI).

[5992] *America West Places Orders for A318s, A320s*, Aerospace Daily (22 October 1999), Exhibit US-399.

[5993] EC, FWS, para. 1859.

[5994] Laurence Zuckerman, *New Low-Fare Airline to Buy Airbus Industrie Jets*, N.Y. Times (21 April 1999), Exhibit US-400.

[5995] EC, FWS, para. 1839.

[5996] "JetBlue CEO Delivers Baruch's Second Annual Burton Kossoff Business Leadership Lecture," Baruch College, 7 March 2006, http://www.baruch.cuny.edu/news/DavidNeeleman-BurtonKossoffBusinessLeadershipLecture-EOC-Zicklin-News-BaruchCollege.htm (visited 29 January 2007, Exhibit EC-276).

[5997] John Newhouse, *Boeing versus Airbus* (1st ed., Alfred A. Knopf, 2007) p. 36, Exhibit EC-253.

[5998] *See*, 7.1833 - 7.1840 above.

BCI deleted, as indicated **[***]**

maximize its profitability in operating the LCA purchased does not, in our view, demonstrate that the price of the LCA of the successful manufacturer undercut the competing manufacturer's price.

7.2131 The European Communities also argues that several of these sales **[***]**.[5999] We do not see, and the European Communities makes no attempt to explain, how this responds to the United States' argument that these imports of Airbus LCA entered the United States' market at prices that enabled them to take sales that Boeing, as the only other manufacturer, would have made, thereby increasing Airbus' market share. The **[***]** were negotiated at the time of the original sales, which we do not understand the European Communities to suggest **[***]**.

7.2132 With regard to its allegations of price depression, the United States asserts that the pricing pressures of the Airbus sales to Jet Blue, Frontier, America West, and Virgin America affected the prices Boeing obtained on other sales in the United States' market. In support of this contention, the United Sates presented indexed average order prices, net of all discounts and concessions, obtained by Boeing from its United States' sales of B737 aircraft, reproduced in Chart 23 below.[6000] The line in Chart 23 with diamonds indicating the data points represents the average actual prices for orders placed in each year of the 2001-2005 period, indexed to the 2001 price. On the basis of the comparison, the United States asserts that the average price for B737s fell by **[***]** through 2005. The United States asserts that US pricing for the 737 **[***]**.[6001]

7.2133 The United States also argues that downward trends in market pricing led to Boeing having to reduce prices on undelivered aircraft for certain major customers. The line in Chart 23 with circles indicating the data points is asserted to show how retroactive price decreases over the period have further lowered Boeing's actual prices. [6002] For example, the United States contends that Boeing was forced to reduce the price of B737s ordered in 2001 by **[***]** percent before those aircraft were actually delivered, and that adjusted prices for B737 aircraft ordered in 2005 were **[***]** percent below their original 2001 levels.[6003] Moreover, to the extent that many of these aircraft have not yet been delivered, they remain subject to possible additional repricing.

7.2134 The line with triangles indicating the data points in Chart 23 shows increases in the US Aircraft Manufacturing Producer Price Index (PPI), which rose by nearly 17 percent from 2001 to 2005.[6004] The United States asserts that, ordinarily, one would expect that producers would over time increase prices generally in line with increases in their costs. The United States asserts that Chart 23 shows, however, that Boeing has been unable to maintain its US pricing for B737s in line with cost increases, demonstrating price suppression. [6005]

[5999] EC, FWS, paras. 1844, 1846 **[***]**, 1855 **[***]**.

[6000] Exhibit US-616 (BCI). The United States presented an earlier version of this information which did not contain data for 2006 in Exhibit US-444.

[6001] US, FWS, para. 741.

[6002] US, FWS, para. 742.

[6003] US, FWS, para. 742.

[6004] U.S. Department of Labor, Bureau of Labor Statistics Producer Price Index Industry Data: Aircraft Manufacturing 2001-2005 (as of 13 October 2006), available at http://data.bls.gov, Exhibit US-402.

[6005] US, FWS, para. 743.

BCI deleted, as indicated **[***]**

Chart 23

737 NG (-600/-700/-800/-900) in the U.S. LCA Market
Indexed Boeing average order prices (based on order-year $s) compared to Aircraft Manufacturers Producer Price Index ("PPI")

[***]

7.2135 Charts 24 and 25[6006] show price trend information for B747 and B777 sales in the United States' market.[6007] Although the number of sales is small, the United States asserts that prices for the B747 **[***]**, while prices for the B777 **[***]**.[6008]

Chart 24

747 in the U.S. LCA MARKET
Indexed Boeing average order prices (based on order-year $s) compared to Aircraft Manufacturers Producer Price Index ("PPI")

[***]

Chart 25

777 in the U.S. LCA MARKET
Indexed Boeing average order prices (based on order-year $s) compared to Aircraft Manufacturers Producer Price Index ("PPI")

[***]

7.2136 The United States asserts that the data in Charts 23 to 25 demonstrate that Boeing has experienced price depression (actual price decreases) and price suppression (price increases lower than would otherwise occurred) for its United States' LCA sales. The United States maintains that, given the evidence of aggressive Airbus pricing in United States' sales campaigns, the price depression and price suppression shown in these figures are plainly attributable to the subsidized imports.[6009]

7.2137 The European Communities does not dispute the information on pricing in the US market presented by the United States. Nor does it present any additional or different information concerning price levels in the US market. Rather, it relies on its arguments that Boeing lost sales in the US market for reasons entirely unrelated to subsidies to Airbus, and that the magnitude and age of any subsidy available to Airbus for use in the relevant sales campaigns would not have resulted in price effects sufficient to make the difference for the customer in choosing between Boeing and Airbus LCA.[6010] The European Communities also asserts that many of the orders from United States' airlines to Boeing during the period 2001-2006 did not involve any competitive presence by Airbus. In the

[6006] Exhibit US-444(BCI).
[6007] The United States did not present pricing information for Boeing 767 aircraft, stating that there were insufficient sales of the 767 in the US market during the period to generate data to show average price trends. US, FWS, footnote 933.
[6008] US, FWS, para. 744.
[6009] US, FWS, para. 745. In this regard, the United States referred to the earlier version of Chart 10, which was identical to the revised version reproduced in the text with respect to the information for 2001-2005.
[6010] EC, FWS, para. 2256-57.

BCI deleted, as indicated **[***]**

European Communities' view, there is little basis to find that subsidies cause adverse effects where there is not direct competition between Airbus and Boeing.[6011] In this latter regard, the European Communities does not specify the sales campaigns in the US market in which there was allegedly no competitive presence by Airbus.[6012] We have considered the European Communities' view that several of these sales **[***]** and found it unpersuasive, as it does not directly respond to the United States' contention of price suppression in the context of its injury arguments.[6013]

7.2138 The European Communities also argues, in the context of its contention that subsidies to A320 Aircraft did not cause suppression of world market prices for Boeing 737NG LCA, that the magnitude of the subsidies is too small to account for the difference between actual Boeing prices and the prices that would reflect increases in the Aircraft Manufacturers Producer Price Index.[6014] Again, assuming this to be the European Communities' argument with respect to price suppression in the US market in the injury context, which is not clear as the European Communities has not specifically asserted it, we do not see that it responds to the question whether the imports of subsidized Airbus LCA caused price suppression, as it focuses exclusively on the effect of the subsidies, which is a different question. As discussed above, we do not consider the magnitude of the subsidies to be a factor which is required to be considered in assessing whether injury is caused by subsidized imports.[6015]

7.2139 With respect to the question of price depression, the undisputed price information submitted by the United States shows that over the period we examined, prices for Boeing 737NG aircraft increased slightly from 2001 to 2002, then declined precipitously in 2003, increased in 2004 but did not reach the 2002 level, and then declined in 2005 and remained essentially the same in 2006. Post-reprice levels show the same trends at slightly different levels. Prices for the 747 model LCA in the US market declined from 2001 to 2002, and were markedly lower in 2005, although there were apparently no sales during the intervening years. The picture is slightly different with respect to the 777 model LCA, whose prices were well above the 2001 levels in 2003, and despite being substantially lower in 2005, were nonetheless above the level reported for 2001. Thus, the evidence before us clearly demonstrates price depression, that is, actual declines in price levels, for the 737NG and 747 model LCA, over the entire period being considered, and price depression from 2003 to 2005 for the 777 model LCA.

7.2140 With respect to price suppression, we note that, all else being equal, one might well expect that producers would increase prices in line with increases in costs. The European Communities asserts that the United States Aircraft Manufacturers Producer Price Index ("PPI") is not a reliable measure of the cost increases faced by Boeing, and that the failure of prices of certain aircraft to increase commensurate with that index is completely irrelevant to the question whether there was significant price suppression in the relevant period.[6016] We have rejected the European Communities' view in this regard, concluding that, as argued by the United States, as a general matter, one would

[6011] EC, FWS, para. 2258.

[6012] We note that the Annexes to the statement of Christian Scherer, Exhibit EC-14(BCI) present information on what the European Communities considers to be "competitive" and "non-competitive" sales campaigns. However, even if we considered it appropriate for us to review that the information in the Annexes to the Statement of Christian Scherer relied on by the European Communities in this regard in an attempt to determine which campaigns the European Communities might be referring to in this regard, which we do not, we recall that we rejected the European Communities' position with regard to which sales may be considered "competitive". *See*, para. 7.1722 above. Moreover, those Annexes do not include all of the lost sales referenced by the United States, as they do not contain information for 1999

[6013] *See*, paragraph 7.2131 above.

[6014] EC, FWS, para. 1803.

[6015] *See*, paragraph 7.2077 above.

[6016] EC, Answer to Panel question 213, paras. 509, 511.

BCI deleted, as indicated **[***]**

expect that in any manufacturing industry, all else being equal, prices should tend to increase with production costs, and that the PPI represents a reasonable proxy for cost inflation, and may be used as a reasonable benchmark for the price trends and levels that would have been expected over the period we examined.[6017] Thus, to the extent Boeing LCA indexed prices in the US market declined relative to the US Aircraft Manufactures PPI, this suggests that there was price suppression.

7.2141 Comparing the PPI in Charts 23 through 25 with the prices of Boeing 737NG, 747, and 777 LCA in the US market, we consider the information demonstrates that there was a degree of price suppression in respect of prices for all three models. This is most apparent in the case of the 737 prices, where the indexed original order price for 737 LCA increased slightly more than the PPI in 2002, then dropped precipitously in 2003 while the PPI continued to rise, increased more rapidly than the PPI in 2004, and then dropped again in 2005 while the PPI continued to rise, and remained virtually unchanged in 2006. Indexed post-reprice averages show generally the same trends, albeit at slightly different rates of change. With respect to the 747, indexed prices declined from 2001 to 2002, while the PPI rose slightly, and indexed prices were lower again in 2006, while the PPI had continued to rise. For the 777, indexed average prices were approximately 17 percentage points lower in 2005 than in 2003, while the PPI increased by just under 11 percentage points. For these latter two categories of aircraft, the lack of price information in the intervening years makes it difficult to draw conclusions, as it is not clear whether the later price points are anomalous, or demonstrate a trend. Nonetheless, it is clear to us that Boeing's average prices did not keep pace with increased costs as represented by the PPI, and by a substantial degree, supporting the conclusion that there was significant price suppression in the US market prices for LCA.

7.2142 The European Communities argues that "for purposes of the US Article 5(a) claim it is essential to examine the collective effects of any subsidies on Boeing's commercial health", which the European Communities maintains requires a "world-wide assessment" of the effects of the subsidies, and, therefore, the European Communities incorporates all of the arguments and evidence presented to rebut the United States' serious prejudice claims by reference.[6018] In the European Communities' view, this evidence is "highly relevant to show the absence of any effects from the largely *de minimis* magnitude and old age of any subsidies {a}nd ... is sufficient to refute any United States' arguments that "subsidized Airbus LCA" cause material injury to Boeing".[6019] The European Communities also refers to its discussion of sales campaigns involving United States' customers in the context of its response to the United States' serious prejudice claims to argue that those sales were lost for reasons "entirely unrelated to alleged Airbus subsidies", and asserts that the *de minimis* magnitude and age of subsidies would not have resulted in price effects sufficient to make a difference for an airline choosing between Airbus or Boeing LCA when ordering.[6020]

7.2143 We are in something of a quandary with respect the European Communities' arguments in this regard, as they focus on whether the effect of subsidies to Airbus LCA is serious prejudice to the United States' interests, while we are here considering whether the subsidized imports of Airbus LCA into the United States cause material injury to the United States' LCA industry. Thus, in our view, arguments concerning the age and magnitude of the subsidies, even if accepted as a matter of fact, have little if any relevance to the question whether subsidized imports caused price suppression or depression in the US market. With respect to the sales campaigns, as indicated above, the information provided by the European Communities makes clear that pricing was an important factor in each of those sales, as indeed would be expected, as the cost of aircraft, both in terms of purchase costs and operating costs, is a major component of an airlines' ability to operate, and to operate profitably, but

[6017] *See*, para. 7.1861 above.
[6018] EC, FWS, para. 2249.
[6019] EC, FWS, para. 2250.
[6020] EC, FWS, para. 2256.

BCI deleted, as indicated **[***]**

that there were a number of elements considered by the customers in choosing between competing offers from Airbus and Boeing in the first instance.

Causal link

7.2144 The United States argues that Airbus' gains in US market share have come at the expense of Boeing, thus linking the subsidized imports to the significant adverse impact on Boeing's LCA production and sales figures. Moreover, the United States contends that the decline in the prices Boeing has been able to command (or failure of those prices to increase commensurate with inflation as indicated by the PPI) for the LCA it has been able to sell in the US market is a function of the pricing of subsidized imports from Airbus. The deterioration in the other relevant indicators of the economic health of Boeing's LCA operations follows, in the United States' view, directly from this loss of market share and loss of revenue. The temporal correlation of this deterioration with Boeing's loss of market share to Airbus, both in the US market and worldwide, is for the United States further evidence of the causal relationship between imports of subsidized Airbus LCA and the injury to the United States' LCA industry. The United States asserts that the Appellate Body has recognized that a temporal correlation between a claimed cause and its effect, while not in itself decisive, is relevant evidence that "one would normally expect" to find in examining the effects of a subsidy.[6021]

7.2145 The United States argues that the decline in the financial results of Boeing's LCA business over the period 2001-2005 occurred despite deep cuts in costs and steady gains in productivity. The cost-cutting effort led to a rise in operating income in 2002 over 2001, even though Boeing's sales and capacity utilization were lower in 2002 than they had been in 2001. The cost cutting and efficiency gains continued in succeeding years, but according to the United States could no longer offset the bottom-line impact of declining production, capacity utilization, and sales revenue. In absolute terms, Boeing's income on its LCA operations fell by nearly two-thirds in 2003 and 2004, as compared with 2002. Further, the partial recovery in Boeing's LCA income in 2005 is, according to the United States, due almost entirely to improved productivity, as revenues increased only slightly from their 2004 levels.[6022]

7.2146 The European Communities relies principally on its argument that the United States' LCA industry, *i.e.*, Boeing, is "in robust financial health, dominant in global and United States' LCA markets, in improved financial health relative to 2004 and 2001 and on a sharply upward trend"[6023] to rebut the United States' arguments concerning the effects of subsidized imports on the United States' LCA industry.[6024] The European Communities asserts that the United States failed to address "non-attribution" factors in its arguments generally and with respect to material injury, and thus improperly attributes negative market effects resulting from the events of 9/11 to subsidized Airbus LCA.[6025] Finally, the European Communities recalls its assertion that many Boeing orders from United States' airlines did not involve competition from Airbus, and that there is "little basis" to find that the effects of subsidies could cause adverse effects where there is not direct competition. [6026]

7.2147 The European Communities argues that Boeing was particularly badly affected by the events of 9/11 because its orders were predominantly from United States' airlines which were themselves particularly hard hit by the collapse of the travel industry, with four major United States' airlines, Northwest, United, US Airways, and Delta, filing for bankruptcy protection in the subsequent

[6021] US, FWS, para. 730 citing Appellate Body Report, *US – Upland Cotton*, para. 451.
[6022] US, FWS, para. 747.
[6023] EC, FWS, para. 2159.
[6024] EC, FWS, paras. 2247, 2252 – 2255.
[6025] EC, FWS, para. 2257.
[6026] EC, FWS, para. 2258.

BCI deleted, as indicated **[***]**

period.[6027] Information presented by the European Communities, not disputed by the United States, shows that from 1998 to 2001, United States' airlines accounted for between 47 and 32 percent of Boeing's orders annually, but in 2002 that percentage dropped to 16 percent.[6028] Orders by United States' airlines fell from 106 in 2001 to 40 in 2002, or by 62 percent.[6029] The United States disputes the European Communities' argument, noting that Airbus also was present in the US market prior to 2001-2003 and itself was a significant supplier to United States' airlines that entered bankruptcy in this period, noting that 82 of Airbus' 122 United States' deliveries in 2001, or 67 percent, were to Northwest Airlines, United Airlines, and US Airways.[6030]

7.2148 The United States argues that injury resulting from the decline in total demand for LCA following 9/11 – a factor that affected both Airbus and Boeing – is clearly distinguishable from injury resulting from Boeing's loss of market share in the United States to Airbus. The United States asserts that while both Airbus and Boeing were affected by the decline in overall LCA demand in the US market, through the downturn, Airbus increased its market share and has since maintained that increased market share, largely through deliveries to new customers such as JetBlue, Frontier Airlines, and Virgin America, which it gained in head-to-head campaigns against Boeing from 1999 onwards.[6031]

7.2149 It is clear that both Airbus and Boeing were badly affected by the collapse of the LCA market following the events of 9/11. However, we agree with the European Communities that the US market was particularly badly affected, and Boeing was particularly hard hit in the US market, resulting in the significant decline in its market share from 2001 to 2003. In this regard, we note that Airbus principally gained market share in the early part of the period we are considering, with its market share increasing by 14 percentage points during this same period, from 30 percent in 2001 to 44 percent in 2003.

7.2150 With respect to pricing, as noted above, the European Communities does not dispute the United States' information showing declines in indexed prices over the period 2001-2006 for Boeing 737NG, 747 and 777 aircraft. Nor does the European Communities dispute that in 2005, and in 2006 for the 737NG aircraft, the Boeing indexed price was substantially below the Aircraft Manufacturers PPI. The European Communities does, however, contend that these declines were not caused by subsidies to A320 LCA, and does not agree that as a matter of fact, prices for certain LCA have not increased in line with inflation.[6032]

7.2151 The United States does not explicitly rely on lost sales in support of its claim of material injury, although it does assert that sales lost to Airbus in 1999 and between 2001 and 2005 demonstrate price undercutting. As noted above, the European Communities seeks to rebut the United States' arguments by incorporating by reference its argument asserting a lack of price suppression caused by subsidies to A320 LCA, an argument which we find difficult to evaluate in the context of an evaluation of whether subsidized imports caused material injury. Nonetheless, for the same reasons as discussed in the context of our analysis of price undercutting for Article 6.3 (c), we do not consider that the anecdotal information relied on by the United States is sufficient to support its assertion of price undercutting, particularly in light of the conflicting anecdotal information submitted by the EC.[6033] The information also indicates that while price is clearly an important factor in LCA

[6027] EC, FWS, para 1443.
[6028] EC, FWS, para. 1444 (table).
[6029] EC, FWS, para. 1444 (table).
[6030] US, SWS, para. 732.
[6031] US, SWS, para. 732.
[6032] EC, Answer to Panel question 213, para. 507.
[6033] *See*, paras. 7.1833 to 7.1840 above.

BCI deleted, as indicated **[***]**

sales, it is not in all cases determinative, which undermines the United States' position with respect to price undercutting, and thus with respect to the price suppressive and depressive effect of subsidized imports.

7.2152 With respect to alleged other causes of injury, the United States recognizes that much of the decline in the condition of Boeing's LCA operations may be attributed to the post-2000 drop in LCA demand, particularly in the United States. Nonetheless, the United States argues that any injury resulting from this decreased demand is clearly distinguishable from the alleged injury caused by subsidized imports of Airbus LCA. According to the United States, the data concerning LCA deliveries and market share show that if Boeing's share by volume of the US market had held constant at its 2001 level during 2002-2005, Boeing would have delivered 23 percent more aircraft than it actually did over the period.[6034] Likewise, the United States contends that if Boeing's share by value of the US market had held constant at its 2001 level, its United States' sales would have been 54 percent greater in 2005. To this, the United States contends, must be added the negative price impact of Airbus' sales on the aircraft that Boeing did deliver during this period. Thus, the United States argues that the direct impact of subsidized Airbus imports in the US market on Boeing's operating performance is "material" by any reasonable standard.[6035]

7.2153 The United States also argues that improvements in Boeing's financial condition in 2006, relied upon by the European Communities to argue that there is no present material injury, are irrelevant, as the relevant question for an adverse effects claim under the DSU and the SCM Agreement is whether the European Communities was in breach of its obligation under Article 5(a) when the Panel was established, and thus that the Panel must make its determination as of 2005. As we have discussed, we do not agree, and consider the period 2001-2006 is appropriate for purposes of determining whether subsidized imports of Airbus LCA cause present material injury to the United States' industry producing LCA. The United States argues that improvement in the financial condition of Boeing must be placed in the context of unusually high demand in 2005 and 2006 in this cyclical industry. According to the United States, Boeing remained competitive despite its loss of market share in its home market and depressed prices, particularly in the downturn, by cutting costs and improving productivity. With respect to employment, the United States contends that despite the recovery in the financial health of Boeing, most of the jobs that were lost in the downturn had not returned to the industry.[6036] Indeed, the United States argues that the events of 2006 demonstrate how significantly relief from subsidized competition improves the fortunes of the United States' LCA industry. The United States points out that in 2006, Airbus could not effectively market either its A380 (because of production problems) or its A350 (which had to be redesigned), and asserts that what 2006 shows is how the absence of a subsidized and aggressively marketed new Airbus aircraft improves the fortunes of the United States' LCA industry – and, by contrast, how significant the adverse effects of LA/MSF and the other Airbus subsidies have been.[6037]

7.2154 In this respect, the United States' argument suggests that, but for the presence of subsidized Airbus imports in the US market, and the prices of those imports, during the period 2001 – 2005, and continuing in 2006, Boeing would have been in a materially better position in terms of its performance, and thus considers that the subsidized imports caused material injury to Boeing. We have serious doubts about the appropriateness of such an analysis in the context of this case. In a duopoly market, with one supplier of subsidized imports and one domestic producer, it could be argued that subsidized imports will always cause material injury, because in the absence of such imports, the domestic industry would capture the entire market.

[6034] US, FWS, para 748.
[6035] US, FWS, para. 748.
[6036] US, SWS, para. 737.
[6037] US, SWS, para. 738.

BCI deleted, as indicated **[***]**

7.2155 In response to a question from the Panel raising this proposition, the United States acknowledged that in such a case, "the legal standard for determining material injury is the same as it would be in any other case". The United States went on to assert that its demonstration on material injury did not depend on the Panel finding that the United States' industry would have supplied the entire market in the absence of subsidized imports.[6038] Rather, the United States argued that relevant indicators such as production, revenues, operating margins, and employment levels demonstrated material injury. The United States further contended that (1) much of Boeing's loss of market share could be traced to sales lost to Airbus during and before the period 2001-2005, and (2) price declines, much of which can be traced to price undercutting by Airbus, were together a not insignificant cause of that injury, such that the Panel need not consider the proposition.[6039]

7.2156 The European Communities agreed that the Panel need not decide whether the proposition in the Panel's question is valid, but for different reasons.[6040] In the European Communities' view, the proposition is neither legally correct, nor appropriate in the factual circumstances of this dispute.[6041] The European Communities asserts that in a two-step analysis, it is possible for a domestic industry to face competition from subsidized imports and still not be in a condition that constitutes "material injury". Moreover, the European Communities asserts that the possibility that Boeing might have more revenue in the absence of subsidized imports does not prove causation.[6042]

7.2157 Having found that the United States' domestic industry is not in a condition that can be considered "material injury", we consider that we need not resolve the question of the validity of the proposition we raised with the parties. We note, however, that, as suggested by our conclusion, we agree with the view that it is possible for a domestic industry to compete with subsidized imports and not be materially injured. That is, in our view, what the facts show in this case – following the collapse of the LCA market after the events of 9/11, Boeing has managed to successfully compete with subsidized imports and better its performance to the extent that we cannot conclude that it is materially injury as of the end of the period we examined.

(iii) Threat of Material Injury

7.2158 Article 15.7 of the SCM Agreement requires that a determination of threat of material injury shall be "based on facts and not merely on allegation, conjecture, or remote possibility." Moreover, it establishes that "the change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent", and sets out the following series of factors which should be considered in making the determination:

> "(i) nature of the subsidy or subsidies in questions and the trade effects likely to arise therefrom;
>
> (ii) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
>
> (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

[6038] US, Answer to Panel question 284, paras. 136-37.
[6039] US, Answer to Panel question 284, para. 137.
[6040] EC, Comments on US Answer to Panel question 284, para. 312.
[6041] EC, Answer to Panel question 284, para. 214.
[6042] EC, Answer to Panel question 284, paras. 216-17.

BCI deleted, as indicated **[***]**

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(v) inventories of the product being investigated."

7.2159 As we have noted, in the context of our assessment of injury, including threat of material injury, we consider our role in this dispute to be essentially similar to that of an investigating authority in a trade remedy investigation. Previous panels have considered the meaning of Article 15.7 in reviewing the determinations of investigating authorities concerning threat of material injury in countervailing duty determinations. We consider those reports to be relevant guidance for our analysis in this dispute. In addition, given that the provisions of Article 3.7 of the AD Agreement parallel those of Article 15.7 of the SCM Agreement, with the exception of Article 15.7(i), and for the same reasons as discussed above,[6043] we also consider reports addressing Article 3.7 of the AD Agreement to be equally instructive.

7.2160 The panel in *Mexico-HFCS* concluded that Article 3.7 of the AD Agreement sets forth a series of factors that must be considered in each case in assessing threat of material injury, but recognizes that factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination.[6044] The panel went on to conclude that "{a} determination that material injury would occur cannot, in our view, be made solely on the basis of consideration of the Article 3.7 factors. Rather, it must include consideration of the likely impact of further dumped imports on the domestic industry."[6045] This, the panel observed, was because:

> " the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters to increase exports, and the availability of other export markets), the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the "consequent impact" of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question – whether the "consequent impact" of continued dumped imports is likely to be material injury to the domestic industry - which must be answered in a threat of material injury analysis."[6046]

The panel concluded that "consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7".[6047]

7.2161 Thus, the panel concluded that Article 3.4 of the AD Agreement, which is mandatory and requires examination of the listed injury factors in every case, also applies in consideration of threat of

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[6043] *See*, para. 7.2057 above.

[6044] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States ("Mexico – Corn Syrup")*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345, para. 7.124.

[6045] Panel Report, *Mexico – Corn Syrup*, para. 7.125.

[6046] Panel Report, *Mexico – Corn Syrup*, para. 7.126.

[6047] Panel Report, *Mexico – Corn Syrup*, para. 7.127.

BCI deleted, as indicated **[***]**

material injury, along with any other relevant factors, in order to make a determination consistent with the requirements of Articles 3.1 and 3.7.[6048] The panel opined that

> "an investigating authority cannot come to a reasoned conclusion, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry. These factors all relate to an evaluation of the general condition and operations of the domestic industry – sales, profits, output, market share, productivity, return on investments, utilization of capacity, factors affecting domestic prices, cash flow, inventories, employment, wages, growth, ability to raise capital. Consideration of these factors is, in our view, necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7. ... Such an analysis would be necessary in order to explain the present, and anticipated future, condition of the domestic industry sufficiently to support the conclusion that 'material injury would occur', as provided in Article 3.7, unless protective action is taken."[6049]

Similarly, in this case, our evaluation of the condition of the United States' industry producing LCA provides a background for our consideration of the Article 15.7 factors, and the likely effect of future subsidized imports on that industry.

7.2162 In *US – Lumber VI*, the panel stated that "consideration" of the factors listed in Article 15.7 must "go beyond a mere recitation of the facts in question, and put them into context. However, the investigating authorities are not required by Articles 3.7 and 15.7 to make an explicit "finding" or "determination" with respect to the factors considered".[6050] The panel went on to note that, unlike in consideration of the injury factors listed in Articles 15.4 of the SCM Agreement and 3.4 of the AD Agreement,

> "consideration of each of the factors listed in Articles 3.7 and 15.7 is not mandatory. Consequently, a failure to consider a factor at all, or a failure to adequately consider, a particular factor would not necessarily demonstrate a violation of the provisions. Whether a violation existed would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given."[6051]

In this case, we have information and arguments concerning all of the Article 15.7 factors, and we address them below.

7.2163 With respect to the nature of threat of injury as opposed to injury, and the possibility of the two existing in the same case, we note that in the context of safeguards, "serious injury" is defined as "a significant overall impairment in the position of a domestic industry", and threat of serious injury is defined as serious injury that is clearly imminent".[6052] In addressing the question whether a discrete determination of either serious injury or threat of serious injury, but not both, must be made by the investigating authorities in a safeguards investigation, the Appellate Body noted:

[6048] Panel Report, *Mexico – Corn Syrup*, paras. 7.127 – 128.

[6049] *Id.*, paras. 7.132 – 133.

[6050] Panel Report, *US – Softwood Lumber VI*, para. 7.67 (footnotes omitted, citing generally Panel Report, *Thailand H-Beams* and paras. 7.170 and 7.161).

[6051] Panel Report, *US – Softwood Lumber VI*, para. 7.68 (footnote omitted).

[6052] Agreement on Safeguards, Article 4.1 (a) and (b).

BCI deleted, as indicated **[***]**

> "these two definitions reflect the reality of how injury occurs to a domestic industry. In the sequence of events facing a domestic industry, it is fair to assume that, often, there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be "serious injury". Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury."[6053]

While the SCM Agreement does not contain a similar definition distinguishing present material injury and threat of material injury, the relationship between the concepts is in our view the same.

7.2164 The European Communities argues that the United States has not demonstrated a "clearly foreseen and imminent" "change in circumstances which would create a situation in which" the alleged subsidies would cause material injury to Boeing. According to the European Communities, the United States faces a "heavy burden" to demonstrate new or changed circumstances that would change the "improving financial strength and increasing market dominance" of Boeing in 2005-2006 to material injury.[6054] This raises a question concerning the consideration of the "the change in circumstances which would create a situation in which the subsidy would cause injury" referred to in the chapeau of Article 15.7, and its import for our analysis.

7.2165 On this issue, the views of the panel in *US-Softwood Lumber VI*, are particularly apposite. In that case, the complaining Member, Canada, argued before the panel that Article 15.7 of the SCM Agreement requires that the "change in circumstances" from the non-injurious period of investigation that will create a situation in which the dumping or subsidy will cause injury must be "clearly foreseen and imminent", calling this the "logical predicate" for an affirmative finding of threat of material injury, and that this change in circumstances must be clearly anticipated and on the brink of happening. Canada asserted that the investigating authority in that case had failed to explain how the evidence provided a basis for a conclusion that the situation would change such that imports that did **not** cause injury to the domestic industry during the period of investigation **would** cause material injury in the imminent future.

7.2166 In its report, the panel considered the meaning of the "change of circumstances" element of Article 15.7, noting that it was "not a model of clarity".[6055] The Panel observed that the provision seemed, on its face, to require that some "'change of circumstances' must be clearly foreseen and imminent, and that it is this change of circumstances that would create a situation in which injury would occur."[6056] The panel referred to footnote 10 to the parallel provision, Article 3.7, in the AD Agreement, which provides an example of what might constitute a change in circumstances: "One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices". That example, however, is effectively repeated in Article 15.7(ii), which sets out "likelihood of increased imports" as a factor to be considered. The panel noted that "both the change of circumstances, and further dumped or subsidized imports, must be imminent, and the likelihood of increased imports is both a relevant change of circumstances and a factor to be considered in determining the existence of threat."[6057] The panel concluded that:

[6053] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea ("US – Line Pipe")*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403, para. 168.

[6054] EC, FWS, para. 2238.

[6055] Panel Report, *US-Softwood Lumber VI*, para. 7.53.

[6056] *Id.*

[6057] Panel Report, *US-Softwood Lumber VI*, para. 7.54.

BCI deleted, as indicated **[***]**

> "the relevant 'change in circumstances' referred to in Articles 3.7 and 15.7 is one element to be considered in making a determination of threat of material injury. However, we can find no support for the conclusion that such a change in circumstances must be identified as a single or specific event. Rather, in our view, the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently."[6058]

7.2167 Overall, based on these reports, we understand that an industry that is not materially injured, and whose performance is robust and improving, is less vulnerable to a deterioration of its performance which might be considered material injury in the near future. Conversely, an industry whose performance, while not reflecting present material injury, is generally weak or declining, would be more vulnerable to such deterioration, and the likelihood of its being materially injured in the near future would be greater. Of course, whether any such future material injury would be caused by subsidized imports must also be considered, and consideration of the Article 15.7 factors is pertinent to this aspect of the analysis.

7.2168 We have concluded, based on our consideration of information concerning relevant Article 15.4 factors, that the United States' industry producing LCA is not presently materially injured. Based on that same information, and in particular considering the trends over the most recent period and information concerning future trends in deliveries of Boeing LCA presented by the European Communities, we see no indication that the condition of the United States' industry is likely to deteriorate in the near future to a degree that would result in it experiencing material injury. The information before us shows improvements in Boeing's performance in 2006 over 2005, and the significant number of orders booked in 2005 and 2006 suggests that Boeing's performance will continue to be strong, if not even further improved. Thus, we do not consider the United States' industry to be vulnerable to injury caused by subsidized imports in the near future.

7.2169 Having established the framework for and context of our analysis, we proceed to review the evidence on the Article 15.7 factors, which, as mentioned, concern primarily the likely volumes and prices of future imports.

Nature and effects of the subsidies

7.2170 The United States argues that the European Communities and the Airbus governments tailored the subsidies at issue so as to give Airbus a structural advantage over Boeing. According to the United States, LA/MSF and the other subsidies in dispute transfer much of the cost and risk of LCA development from Airbus to the European Communities and the Airbus governments, and the continued effects of these subsidies give Airbus flexibility that it would not otherwise have to launch new aircraft and price all models to gain market share.[6059] The United States asserts that subsidies already bestowed, and already committed for the A350, as well as further anticipated subsidies, perpetuate Airbus's structural advantages in the United States' LCA market, and give Airbus the financial flexibility to capture additional orders at aggressively discounted prices, while absorbing loss-making A380 sales and designing the A350.[6060]

[6058] Panel Report, *US - Softwood Lumber VI*, para. 7.57.
[6059] US, FWS, para. 755.
[6060] US, FWS, para. 756.

BCI deleted, as indicated **[***]**

7.2171 We have earlier in this report found that the United States has failed to establish that as of the establishment of this Panel, the Airbus governments had committed to provide Airbus with LA/MSF for the A350 on unsecured, backloaded, success-dependent and below-market interest rate repayment terms. On the other hand, we have also concluded that the subsidies that we have found to exist have had the effect of enabling Airbus to launch new models of LCA that it would otherwise not have been able to, or at least not at the time that it did. Moreover, we have concluded that LA/MSF granted with respect to each successive model of Airbus LCA has effects with respect to both later- and previously-launched models. The most recently launched Airbus LCA, the A380, was just entering the market at the end of the period we examined, and all earlier models were still being manufactured and sold.[6061] Thus, we consider that, apart from subsidized LA/MSF to the A350, for which the United States has not established a commitment that it will be provided, imports of Airbus LCA in the near future will continue to be subsidized. However, there is nothing to suggest that there is likely to be an increase in subsidization in the near future, as almost all of the subsidies with respect to currently-marketed models of Airbus LCA have already been provided.[6062] Nor is there anything in the nature of the subsidies we have found to exist which suggests that there is likely to be an increase in subsidized imports in the near future as a consequence of the subsidies themselves.

7.2172 The European Communities contends that there are no trade effects likely to arise from the measures in dispute that are likely to threaten material injury to Boeing. In this regard, the European Communities refers to its argument that Boeing is not suffering present material injury.[6063] Again, by referencing other portions of its argument, the European Communities leaves the Panel in something of a quandary to determine what aspects of its argument are to be considered. It would appear that the European Communities refers in this respect to its arguments concerning "potential" declines or negative effects on Boeing in its discussion of the Article 15.4 factors. It is not entirely clear how this relates to the nature and effect of the subsidies in dispute, as these portions of the European Communities' arguments relate to its view that improvements in Boeing's performance, as reflected in the Article 15.4 factors, are likely to continue. While this may support the view that Boeing will not be materially injured in the future, it is difficult to see how it relates to the nature and effect of the subsidies.

Rate of increase of subsidized imports

7.2173 The United States argues that Airbus' market share in the United States has significantly increased in recent years, and asserts that the strength of its firm order backlog for new LCA deliveries confirms that the volume of imports will remain high for the foreseeable future.[6064] We have concluded that order data is relevant in assessing threat of injury, as it is a good, albeit not a perfect predictor of future deliveries, and thus can serve as a basis for assessing likely trends in future imports.

7.2174 The European Communities states that imports into the United States' LCA market increased moderately in absolute terms during when the market improved from 2004 to 2005, but declined in 2006 and continue to lose market share to domestic production.[6065] The European Communities

[6061] Production of Airbus' first LCA models, the A300 and A310, ceased in 2007.

[6062] Of course, it is possible that new or additional subsidies will be granted. However, these would presumably benefit existing models of Airbus LCA. If they were with respect to a newly launched model, imports of such a new LCA would not be likely in the near future, given the development time necessary for a new model.

[6063] EC, FWS, para. 2239.

[6064] US, FWS, para. 757.

[6065] EC, FWS, para 2240. The data on imports in terms of deliveries presented by the United States shows that imports of Airbus LCA were the same in 2004 as in 2003, increased in 2005, and decreased in 2006, albeit to a level just above that for 2005. Market share followed the same trend. *See*, paragraph 7.2113 above.

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reiterates that Airbus' share of orders in the US market decreased substantially between 2004 and 2006, and between 2001-2006. The European Communities contends that as United States' LCA markets rebound from the 2002-2004 recession and grow, Airbus is capturing an ever-declining share of those markets.[6066]

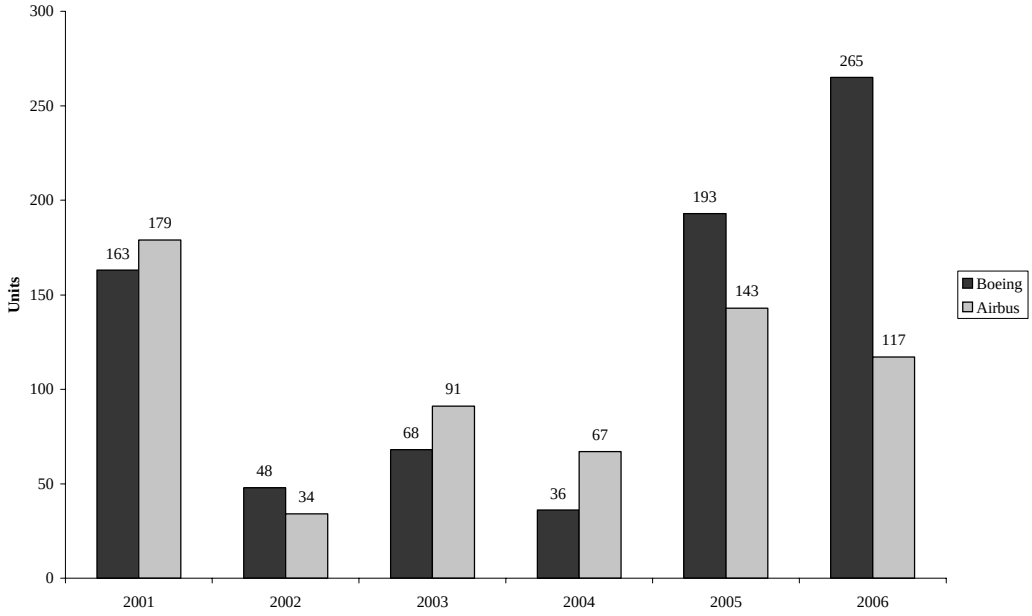
7.2175 The United States presents information concerning orders for LCA, based on sales allegedly lost during the period 2001-2006. That information indicates a total of 198 firm orders for Airbus LCA unfilled as of August 2006, specifically from JetBlue (89), U.S. Airways (49), America West (26), Virgin America (19), and Frontier (15).[6067] The United States argues that these scheduled deliveries are already contracted for and are therefore "clearly foreseen and imminent."[6068] In addition, the United States notes that 20 A380s and 41 A350s had been ordered by United States' customers,[6069] and asserts that more such orders can be anticipated in the near future as these programs advance. In addition, the United States argues that once an airline has chosen one LCA manufacturer over the other, it tends to make additional follow-on orders from that same manufacturer in order to enhance its efficiency and minimize its operating costs, and thus that Airbus' increased share of the US market places it in a stronger position to win additional follow-on sales and capture a higher share of orders and deliveries in future years.

7.2176 The European Communities has also submitted information on United States' orders of Boeing and Airbus LCA for the period 2001 to 2006. The European Communities' data, following the principles on which it has structured its arguments, is presented separately for each of four categories of LCA. We have compiled the information presented by the European Communities in the following chart:

[6066] EC, FWS, para. 2240.
[6067] US, FWS, para. 758, referencing Airclaims CASE database, data query as of August 14, 2006.
[6068] SCM Agreement, Art. 15.7.
[6069] US, FWS, para. 758, referencing Airclaims CASE database, data query as of August 14, 2006, adjusted for cancellation of FedEx A380 order in November 2006.

BCI deleted, as indicated **[***]**

Chart 26: United States' orders of Airbus and Boeing LCA, 2001-2006[6070]



7.2177 We note that there are certain constraints in considering order information with respect to likely trends in future imports. The Airclaims database (on which both parties rely for information concerning orders and deliveries of LCA) records orders made by leasing companies, which account for a significant percentage of LCA sales, on the basis of the location of the leasing company, while deliveries are recorded on the basis of the location of the operating airline to which the aircraft is ultimately delivered.[6071] Thus, an order by a leasing company in the United States for delivery to an airline in, for example, the United Kingdom, will be reported as a US order, and a UK delivery.[6072] Our review of the information from which this chart is derived, Exhibit EC-21, bears out this concern in the context of evaluating likely future imports into the United States. Thus, for example, Exhibit EC-21 indicates that of the 20 total Airbus A380 LCA reported by the European Communities as United States' orders for the period 2001 – 2006, 10 were ordered by a leasing company, ILFC, in 2001.[6073] The first scheduled delivery date for any of those aircraft is May 2010, with further deliveries scheduled through 2015. The "operator country" for two of the aircraft ordered by ILFC is listed as the United Arab Emirates, suggesting that at least those two aircraft will not, in fact, be imported into the United States. The "operator" for the remaining 8 aircraft ordered by ILFC is listed as ILFC. Of course, ILFC is not an airline and does not actually operate aircraft. Thus, this information gives no indication as to the country to which those 8 aircraft will eventually be delivered. Similar concerns arise with respect to the order information for other models of LCA, and thus with respect to the data as a whole.

7.2178 Overall, while the information on orders does demonstrate that there will continue to be imports of subsidized Airbus LCA into the US market, these types of concerns make this information a less than reliable basis on which to draw conclusions concerning an imminent increase in subsidized

[6070] Compilation of information presented in tabular form, EC, FWS, paras. 2169-2172. We note that this information is based on a query to the Airclaims CASE database as of 19 January 2007, submitted as Exhibit EC-21.

[6071] *See*, Exhibit EC-21.

[6072] US, Answer to Panel Question 132, para 430.

[6073] The other 10 were ordered by UPS, a freight/cargo carrier, in 2005.

BCI deleted, as indicated **[***]**

imports. In addition, it is clear that even firm orders do not inevitably result in deliveries, as orders are sometimes cancelled, for instance by an airline that goes bankrupt, and delivery is sometimes subject to unanticipated delays as a result of production problems, or re-negotiation of terms with customers. Moreover, the time frame for the deliveries of these booked orders is often significantly longer than could reasonably be deemed "imminent". While the notion of "imminent" in the context of the LCA industry, with its long lead times for orders and extended delivery schedules, may well be longer than in other industries with a shorter interval between order, production and delivery, we do not consider that orders for deliveries of LCA that will not occur within two or three years can reasonably be considered "imminent", even if those aircraft are eventually delivered to the United States. Lastly, merely because an order is booked as a US order does not mean that the aircraft involved will actually be delivered to a customer in the United States, and thus it remains unclear whether that order actually represents a future import. While the impact of this latter factor is incalculable, given the significant number of LCA purchased by leasing companies, we consider it likely to be significant. Thus, we do not consider that this information demonstrates a likelihood of substantially increased importation in the near future, although it clearly demonstrates that there will continue to be a substantial number of subsidized imports of Airbus LCA.

Additional capacity

7.2179 The United States argues that Airbus is increasing its LCA capacity by adding two entirely new LCA production lines for the A380 and the A350, a substantial number of which aircraft have already been ordered by United States' customers. According to the United States, Airbus has also announced that it is increasing its capacity to produce its other aircraft and is considering even further increases. The United States considers that this makes it clear that Airbus is substantially increasing its LCA production capacity, and argues that at least some of this capacity can be expected to be available to supply additional subsidized LCA to the US market, even taking into account expected growth of Airbus LCA sales in other markets as well. [6074]

7.2180 The European Communities does not dispute the United States' evidence concerning Airbus' capacity, arguing only that any capacity added to Airbus' existing capacity could not threaten material injury to Boeing, given Boeing's dominant and improving position in the LCA market.[6075] The European Communities notes that deliveries of the A380 will begin in 2007, while deliveries of the A350 will not begin before 2013-2014.[6076] For the European Communities, the increase in orders booked by Boeing in 2005 and 2006 "virtually guarantees" that Boeing will dominate deliveries to United States' customers for the ensuing three years, even given the likelihood of eventual increases in Airbus deliveries to the US market as a result of increased production capacity.[6077]

7.2181 It seems clear to us that, with the introduction of new model Airbus LCA, manufactured in part in newly added production lines, the capacity of Airbus to deliver LCA, including the US market, will increase. Of course, whether that increase translates to increases in imports is a different question. The order information does not suggest that recently-added additional capacity to produce A380 aircraft will have a significant imminent effect on imports, and any increases as a result of increased capacity to produce A350 aircraft would seem even more remote in time.[6078] Thus, while

[6074] US, FWS, para. 760.
[6075] EC, FWS, paras. 2241.
[6076] EC, FWS, para. 2242-43.
[6077] EC, FWS, para. 2243.
[6078] Although we have concluded that the United States has failed to demonstrate a commitment to grant subsidized LA/MSF with respect to the A350, we have found that the spillover effects of LA/MSF subsidies to particular models of Airbus LCA benefit other earlier and subsequent models, and, in addition, a number of the subsidies we have found to exist benefit Airbus LCA as a whole.

BCI deleted, as indicated **[***]**

increased capacity does suggest an eventual increase in production of Airbus LCA, we cannot conclude that it supports finding an imminent increase in imports into the United States.

Continued price depression and suppression

7.2182 The United States asserts that available data indicate that Airbus has systematically priced its aircraft below Boeing's prices, particularly in seeking initial customers for new aircraft, trying to capture a Boeing account, or trying to win business at a new airline. According to the United States, recent Airbus sales, both in the US market and elsewhere, have driven global LCA prices to new lows. Each new campaign is conducted in the prevailing price environment, and the United States argues that United States' LCA prices are therefore likely to remain depressed or suppressed for the foreseeable future.[6079]

7.2183 The European Communities considers that the United States has failed to establish that imports are suppressing or depressing prices, and would likely increase demand for further imports. The European Communities argues that the United States has failed to demonstrate price suppression or depression in the global market, and in view of the lack of any link between subsidies and any price effects, there is no basis for a conclusion that there will be future price effects.[6080]

7.2184 It seems clear that prices in the US market showed declines and suppression during the period we are considering. However, given the complexities of pricing in the LCA market, where each sales campaign involves considerable negotiation between customer and manufacturer, we find it difficult to draw any conclusions about likely future pricing, particularly given the evidence of improvements in the market and Boeing's order backlog. Thus, we conclude that the information before us does not demonstrate that subsidized imports are likely to have price depressing or suppressing effects in the near future.

Inventories

7.2185 The parties are agreed that LCA producers rarely keep inventories, and therefore this factor does not suggest any likelihood that imports of subsidized Airbus LCA will increase in the near future.[6081]

(iv) Conclusion

7.2186 We have concluded, based on our assessment of Boeing's operating performance over the period examined, that it is not presently materially injured. Moreover, the improvements in Boeing's performance toward the end of the period we examined appear likely to continue in the near future and result in continued strong and even improved performance, particularly in light of strong demand in the market, and the surge in orders obtained by Boeing in 2005 and 2006. In addition, Boeing's improved efficiency and productivity over the period of 2001-2005, as well as increased out-sourcing of various operations, also supports the view that its strong performance as of 2006 is likely to continue into the near future. Lead times for LCA production and deliveries are long, and while it is clear that Airbus has, and will continue to have, increased capacity to deliver subsidized LCA to the US market, there is nothing in the information before us to suggest that any significant increases in such imports are likely to occur in the near future. Moreover, while indexed price levels declined during the period 2001-2005, and in 2006 for the 737NG, and prices in the US market were suppressed with respect to the US Aircraft Manufacturers' PPI, in view of the many factors that

[6079] US, FWS, para. 762.
[6080] EC, FWS, para. 2244.
[6081] *See* footnote 5912.

BCI deleted, as indicated **[***]**

determine LCA pricing and the increased demand in the market, as well as the significant number of orders Boeing obtained in 2005 and 2006, we cannot conclude that subsidized imports are likely to have price depressing or suppressing effects in the near future. On balance, therefore, and considering all the evidence and arguments before us, we conclude that the United States has not demonstrated a threat of material injury to the United States' LCA industry.

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 In light of the findings set out in the foregoing sections of our Report, we conclude that the United States ***has established*** the following concerning the existence of subsidies:

(a) concerning the provision of LA/MSF;

(i) that each of the challenged LA/MSF measures constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and

(ii) that the German, Spanish and UK A380 LA/MSF measures are subsidies contingent in fact upon anticipated export performance, and therefore prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.

(b) concerning the provision of infrastructure and infrastructure-related grants;

(i) that the provision of the Mühlenberger Loch site constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement,

(ii) that the provision of the lengthened Bremen Airport Runway constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement,

(iii) that the provision of the ZAC Aéroconstellation site and associated EIG facilities constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and

(iv) that challenged grants provided by authorities in Germany and Spain for the construction of manufacturing and assembly facilities in Nordenham, Germany, and Sevilla, La Rinconada, Toledo, Puerto de Santa Maria and Puerto Real, Spain, and by the governments of Andalusia and Castilla-La Mancha to Airbus in Puerto Real, Sevilla, and Illescas (Toledo) are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

(c) concerning the German government's transfer of its ownership share in Deutsche Airbus to the Daimler Group;

(i) that the 1989 acquisition by KfW of a 20 percent equity interest in Deutsche Airbus is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and

BCI deleted, as indicated **[*******]**

(ii) that the 1992 transfer by KfW of its 20 percent equity interest in Deutsche Airbus to MBB is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.

(d) concerning the equity infusions that the French government and Crédit Lyonnais provided to Aérospatiale;

(i) that the 1987, 1988, 1992 and 1994 equity infusions to Aérospatiale are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement, and

(ii) that the 1998 transfer by the French government of its 45.76 percent interest in Dassault Aviation to Aérospatiale is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.

(e) concerning the research and technological development funding provided by the European Communities and certain EC member States;

(i) that grants under the Second, Third, Fourth, Fifth and Sixth EC Framework Programmes identified in Annexes I.1, I.2, I.3, I.4 and I.5 are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,

(ii) that French government grants amounting to a maximum of EUR 391 million between 1986 and 1993 and EUR **[*******]** between 1994 and 2005 are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,

(iii) that German Federal government grants under the LuFo I, LuFo II and LuFo III programmes amounting to EUR **[*******]** are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,

(iv) that German sub-Federal government grants amounting to EUR **[*******]** from the Bavarian authorities under the OZB and Bayerisches Luftfahrtforschungsprogramm, EUR 11 million from the Bremen authorities under the AMST programmes, and EUR **[*******]** from the Hamburg authorities under the Luftfahrtforschungsprogramm are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,

(v) that loans under the Spanish government PROFIT and PTA programmes amounting to, respectively, EUR 62.2 million and EUR **[*******],** are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement, and

(vi) that UK government grants under the CARAD and ARP programmes amounting to GBP **[*******]** are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

8.2 Furthermore, in light of the findings set out in the foregoing sections of our Report, we conclude that the United States ***has established*** the following with respect to adverse effects:

(a) that the effect of the subsidies is to displace the imports of a like product of the United States into the European market within the meaning of Article 6.3(a) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement,

BCI deleted, as indicated **[***]**

(b) that the effect of the subsidies is to displace the exports of a like product of the United States from the markets of Australia, Brazil, China, Chinese Taipei, Korea, Mexico, and Singapore within the meaning of Article 6.3(b) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement,

(c) that the effect of the subsidies is likely displacement of exports of a like product of the United States from the market of India within the meaning of Article 6.3(b) of the SCM Agreement, constituting a threat of serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement, and

(d) that the effect of the subsidies is significant lost sales in the same market within the meaning of Article 6.3(c) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement.

8.3 On the other hand, in light of the findings set out in the foregoing sections of our Report, we conclude that the United States ***has not established*** the following concerning the existence of subsidies:

(a) concerning the provision of LA/MSF;

(i) the existence, as of July 2005, of a LA/MSF commitment measure for the A350 constituting a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement,

(ii) that the French A380, French A340-500/600, Spanish A340-500/600 and French A330-200 LA/MSF measures are subsidies contingent in fact upon anticipated export performance within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement,

(iii) that the French A380, German A380, Spanish A380, UK A380, French A340-500/600, Spanish A340-500/600 and French A330-200 LA/MSF measures are subsidies contingent in law upon anticipated export performance within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement, and

(iv) the existence of an unwritten LA/MSF Programme measure constituting a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.

(b) concerning the challenged EIB Loans;

(i) that each of the challenged loans and the 2002 credit facility for the A380 constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.

(c) concerning the provision of infrastructure and infrastructure-related grants;

(i) that the road improvements by French authorities constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,

BCI deleted, as indicated **[***]**

(ii) that the GBP 19.5 million provided to Airbus UK in respect of its operations in Broughton, Wales, is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and

(iii) that the grant provided by the government of Andalusia to Airbus in Puerto Santa Maria is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.

(d) that the 1998 settlement by the German government of Deutsche Airbus' government debt constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.

(e) concerning the research and technological development funding provided by the European Communities and certain EC member States;

(i) that the German Federal government's commitment to provide Airbus with EUR **[***]** under the LuFo III programme is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and

(ii) that the challenged grants under the UK Technology Programme are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

8.4 Furthermore, in light of the findings set out in the foregoing sections of our Report, we conclude that the United States ***has not established*** the following with respect to adverse effects;

(a) that the effect of the subsidies is significant price undercutting by the subsidized product as compared with the price of a like product of the United States in the same market within the meaning of Article 6.3(c) of the SCM Agreement,

(b) that the effect of the subsidies is significant price suppression within the meaning of Article 6.3(c) of the SCM Agreement,

(c) that the effect of the subsidies is significant price depression within the meaning of Article 6.3(c) of the SCM Agreement, and

(d) that, through the use of the subsidies, the European Communities and certain EC member States cause injury to the United States' domestic industry within the meaning of Article 5(a) of the SCM Agreement.

B. RECOMMENDATIONS

8.5 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the European Communities, France, Germany, Spain and the United Kingdom have acted inconsistently with the SCM Agreement, they have nullified or impaired benefits accruing to the United States under that Agreement.

8.6 Article 4.7 of the SCM Agreement provides that, having found a measure in dispute to be a prohibited subsidy, a panel "**shall** recommend that the subsidizing Member withdraw the subsidy without delay" (emphasis added). Furthermore, that provision provides that a panel "**shall** specify in its recommendation the time-period within which the measure must be withdrawn" (emphasis added). Accordingly, taking into account the nature of the prohibited subsidies we have found in this dispute,

BCI deleted, as indicated **[***]**

we recommend that the subsidizing Member granting each subsidy found to be prohibited withdraw it without delay and specify that this be done within 90 days.

8.7 Article 7.8 of the SCM Agreement provides 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 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". Accordingly, in light of our conclusions with respect to adverse effects set out in paragraph 8.2 above, we recommend that, upon adoption of this report, or of an Appellate Body report in this dispute determining that any subsidy has resulted in adverse effects to the interests of the United States, the Member granting each subsidy found to have resulted in such adverse effects "take appropriate steps to remove the adverse effects or ... withdraw the subsidy".

8.8 Finally, we note that the special and additional rules applicable under Parts II and III of the SCM Agreement do not require a panel to specify how the implementation of recommendations under Articles 4.7 and 7.8 should be effected by the subsidizing Member(s). In this context, we recall that the second sentence of Article 19.1 of the DSU provides that a panel "may" suggest ways in which a recommendation could be implemented. Assuming that this provision also applies to recommendations under Articles 4.7 and 7.8 of the SCM Agreement, we note the observation of the panel in *US – Hot Rolled Steel* that the means of implementation is, pursuant to Article 21.3 of the DSU, for the Member concerned, in the first instance.[6082] Further, the Appellate Body has made clear that the second sentence of Article 19.1 "does not oblige panels to make ... a suggestion".[6083] In this case, it is possible to speculate as to the approaches that might be used to implement our recommendations. However, in the absence of any requirement to do so, and given that the United States has not even requested that we do so, we do not make any suggestions concerning steps that might be taken to implement those recommendations.

[6082] Panel Report, *US – Hot-Rolled Steel*, para. 8.11.
[6083] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 189.

BCI deleted, as indicated **[***]**

ANNEX A

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ANNEX A

EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT, REQUEST FOR CONSULTATIONS BY THE UNITED STATES, WT/DS316/1-G/L/697-G/SCM/D62/1

(12 October 2004)

The following communication, dated 6 October 2004, from the delegation of the United States to the delegations of the European Communities, France, Germany, Spain and the United Kingdom, and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Governments of Germany, France, the United Kingdom, and Spain (the "member States"), and with the European Communities ("EC"), pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Articles 4, 7, and 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") (to the extent that Article 30 incorporates Article XXIII of the GATT 1994) with regard to measures affecting trade in large civil aircraft.

The United States considers that measures of the EC and the member States provide subsidies that are inconsistent with their obligations under the SCM Agreement and the GATT 1994, including:

- The provision by the member States of financing for large civil aircraft design and development to the Airbus[1] companies (hereinafter "launch aid")[2] This financing provides benefits to the recipient companies including financing for projects that would otherwise not be commercially feasible. The non-commercial terms of the financing include no interest or interest at below-market rates and a conditional repayment obligation that is tied to the success of the aircraft model being financed; if a model is not successful, some or all of the financing is forgiven.

[1] The Airbus companies, as referenced throughout this request, include Airbus SAS, its predecessor Airbus GIE and current and predecessor affiliated companies, including each person or entity that directly, or indirectly through one or more intermediaries or relationships, controls or controlled, is or was controlled by, or is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France S.A.S., Airbus UK Limited, European Defence and Space Company ("EADS"), and BAE Systems.

[2] The EC and the member States use different terms to describe the type of financing at issue, such as launch aid, launch investment, avances remboursables, Rueckzahlbare Zuwendungen, Entwicklungsbeihilfen, Zuschuesse zur Entwicklung von zivilien Flugzeugen, anticipo reembolsable, and prestamo reembolsable. Although the United States will hereinafter refer to the financing as "launch aid," the US request for consultations is with respect to all such types of financing, regardless of the specific term or terms that the entity providing the financing uses.

BCI deleted, as indicated **[***]**

- The provision by the EC and the member States of grants and government-provided goods and services to develop, expand, and upgrade Airbus manufacturing sites for the development and production of the Airbus A380. Specific instances include public investments in Airbus manufacturing facilities by German authorities in Hamburg and Nordenham, by French authorities in Toulouse, by UK authorities at Broughton, and at numerous locations in Spain by Spanish authorities (such as Puerto Real, Illescas, Puerto de Santa Maria, and La Rinconada).

- The provision by the EC and the member States, through the European Investment Bank ("EIB"), to the Airbus companies, including Airbus' parent company EADS, of research and development and other loans on preferential terms, including financing for the A320, the A321, the A330/340, and the A380.

- The assumption and forgiveness by the EC and the member States of debt resulting from launch aid and other large civil aircraft production and development financing, including debt accumulated by Deutsche Airbus and forgiven by the German government and debt assumed by the government of Spain on behalf of Construcciones Aeronauticas SA ("CASA").

- The provision by the EC and the member States of equity infusions and grants, including through government-owned and government-controlled banks. Examples include equity investment by the German government through Kreditanstalt für Wiederaufbau ("KFW") in Deutsche Airbus and the return of the shares acquired through this transaction to Deutsche Airbus' parent, the Daimler group, without compensation. The French government between 1987 and 1997 made equity infusions to offset losses of Aérospatiale and increased the company's share value through share transfers into the company in 1998.

- The provision by the EC and the member States of research and development loans and grants in support of large civil aircraft development. These loans and grants directly benefit the Airbus companies.

- Any amendments, revisions, implementing or related measures to the measures described above.

- Any other measures that involve a financial contribution by the EC or any of the member States that benefit the Airbus companies.

The subsidies in question include those relating to Airbus models A300, A310, A320 family, A330/340, A330-200, A340-500/600, and most recently the A380.

The United States is concerned that the launch aid provided by the EC and the member States to Airbus for the development of large civil aircraft, including but not limited to the Airbus A340-500/600 and the A380, and the EIB loan provided to EADS for the A380, appear to be export subsidies in breach of Articles 3.1(a) and 3.2 of the SCM Agreement.

The United States further is concerned that the measures appear to be causing adverse effects to its interests as provided in:

- Article 5(a) of the SCM Agreement because the measures are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement and an evaluation of all relevant economic factors has shown that their effects are causing or threatening to cause injury to the US industry in the US market for large civil aircraft.

BCI deleted, as indicated **[***]**

- Articles 5(c), 6.3(a), 6.3(b), 6.3(c), and 6.4 of the SCM Agreement because the measures are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement that are causing or threatening to cause serious prejudice to the interests of the United States through displacement and impedance of US imports of large civil aircraft into the EC and third country markets, and through significant price undercutting, price suppression, price depression or lost sales in the same market.

The United States also is concerned that the measures appear to be inconsistent with Article XVI:1 of the GATT 1994.

The United States also is concerned that the measures have caused and continue to cause nullification or impairment of benefits accruing directly or indirectly to the United States under the GATT 1994 within the meaning of Article XXIII:1.

Attached please find the statement of available evidence, pursuant to Articles 4 and 7 of the SCM Agreement.

We look forward to receiving your reply to this request and to fixing a mutually acceptable date for consultations.

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ANNEX B

EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT, REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES, WT/DS316/2

(3 June 2005)

The following communication, dated 31 May 2005, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 6 October 2004, the United States requested consultations with the Governments of Germany, France, the United Kingdom, and Spain (the "member States"), and with the European Communities ("EC"), pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Articles 4, 7, and 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") (to the extent that Article 30 incorporates Article XXIII of the GATT 1994) with regard to measures affecting trade in large civil aircraft. The United States held consultations with the European Communities and the member States on 4 November 2004. These consultations provided some helpful clarifications, but unfortunately did not resolve the dispute.

Accordingly, the United States respectfully requests the Dispute Settlement Body to establish a panel pursuant to Article 6 of the DSU, Article XXIII:2 of GATT 1994, and Articles 4, 7, and 30 of the SCM Agreement (to the extent that Article 30 incorporates by reference Article XXIII of GATT 1994).

The measures of the EC and the member States that are the subject of this panel request include:

(1) The provision by the member States of financing for large civil aircraft design and development to the Airbus companies[1] (hereinafter "launch aid").[2] This financing provides

[1] The Airbus companies, as referenced throughout this request, include Airbus SAS, its predecessor Airbus GIE and current and predecessor affiliated companies, including each person or entity that directly, or indirectly through one or more intermediaries or relationships, controls or controlled, is or was controlled by, or is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France S.A.S., Airbus UK Limited, European Defence and Space Company ("EADS"), and BAE Systems.

[2] The EC and the member States use different terms to describe the type of financing at issue, such as launch aid, launch investment, avances remboursables, Rückzahlbare Zuwendungen, Entwicklungsbeihilfen, Zuschüsse zur Entwicklung von zivilen Flugzeugen, anticipo reembolsable, and prestamo reembolsable. Although the United States will hereinafter refer to the financing as "launch aid," the U.S. request is with respect to all such types of financing, regardless of the specific term or terms that the entity providing the financing uses.

benefits to the recipient companies including financing for projects that would otherwise not be commercially feasible. The non-commercial terms of the financing may include no interest or interest at below-market rates and a repayment obligation that is tied to sales. If the aircraft is not successful, some or all of the financing need not be repaid. Specific examples of the financing at issue include:

(a) French financing for the Airbus A300, A310, A320, A330/340, A330-200, A340-500/600, A380, and A350;

(b) German financing for the Airbus A300, A310, A320, A330/340, A380, and A350;

(c) United Kingdom financing for the Airbus A300, A310, A320, A330/340, A340-500/600, A380, and A350; and

(d) Spanish financing for the Airbus A300, A310, A320, A330/340, A340-500/600, A380, and A350.

(2) In addition to launch aid, the provision by the EC and the member States, through the European Investment Bank ("EIB"), to the Airbus companies, of financing for large civil aircraft design, development, and other purposes. Specific examples of the financing at issue include:[3]

(a) Financing to British Aerospace for the A320 and the A330/A340;

(b) Financing to Aérospatiale for the A330/340;

(c) Financing to Construcciones Aeronauticas SA ("CASA") for the A320 and the A330/340;

(d) Financing to Airbus Industrie for the A321;

(e) Financing to Aérospatiale Super Transporteurs; and

(f) Financing to EADS for the A380.

(3) The provision by the EC and the member States of financial contributions to develop, expand, and upgrade facilities and other infrastructure for the Airbus companies. Specific instances include public investments by German authorities in Hamburg, Nordenham, Bremen, and Varel, by French authorities in the Toulouse region, by UK authorities at Broughton, and by Spanish authorities at numerous locations in Spain (such as Puerto Real, Illescas, Puerto de Santa Maria, and La Rinconada).

(4) The assumption and forgiveness by the EC and the member States of debt resulting from launch aid and other financing for large civil aircraft development and production, including debt accumulated by Deutsche Airbus that was forgiven by the German government in 1997 and 1998 and debt assumed by the government of Spain on behalf of CASA and not repaid.

[3] EIB financing to airline customers for the purchase of new aircraft is not within the scope of this panel request.

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(5) The provision by the EC and the member States of equity infusions and grants, including through government-owned and government-controlled banks. Examples include equity investment by the German government through Kreditanstalt für Wiederaufbau ("KFW") in Deutsche Airbus in 1989 and the return of the shares acquired through this transaction to Deutsche Airbus' parent, the Daimler group, without compensation, in 1992; equity infusions by the French Government into Aérospatiale in 1987 and 1988; an equity infusion by French state-owned Crédit Lyonnais into Aérospatiale in 1992; an equity infusion by the French Government into Aérospatiale in 1994; and the grant by the French Government of its 45.76 per cent share of Dassault Aviation's capital to Aérospatiale in 1998.

(6) The provision by the EC and the member States of financial contributions for aeronautics-related research, development, and demonstration ("R&D"), undertaken by Airbus, whether alone or with others, or in any other way to the benefit of Airbus, including:

(a) EC funding for civil aeronautics-related R&D projects under the Second (1987-1991), Third (1990-1994), Fourth (1994-1998), Fifth (1998-2002) and Sixth (2002-2006) EC Framework Programs in which Airbus participated.

(b) Funding from the German federal government and sub-federal entities for civil aeronautics-related R&D projects in which Airbus participated, including:

(i) federal government funding as set forth in the most updated version of the government's Förderkatalog database, including funding under the federal aeronautics research programs Luftfahrtforschungsprogramm 1 (1995-1998), Luftfahrtforschungsprogramm 2 (1998-2002), and Luftfahrtforschungsprogramm 3 (2003-2007);

(ii) the regional Bremen Airbus Materials & System Technology Centre Bremen (AMST) (2000-2002) and the Airbus Materials & System Technology Centre Bremen II (AMST) (2002-2006);

(iii) the regional Bavaria "Hightechoffensive Bayern" program (1999-2003); and

(iv) the regional Hamburg Luftfahrtforschungsprogramm (2001-2005).

(c) Funding from the government of the United Kingdom since 1992 for civil aeronautics-related R&D projects in which Airbus participated, including funding under the Civil Aircraft Research and Development Program (CARAD) and the Technology & Strategy Program.

(d) Funding from the Spanish government, including regional and local authorities, since 1993 for civil aeronautics-related R&D projects in which Airbus participated, including loans and other financial support provided under the Plan Tecnológico Aeronáutico I and the Plan Tecnológico Aeronáutico II.

(e) Funding from the French government, including regional and local authorities, since 1986 for civil aeronautics-related R&D projects in which Airbus participated.

(f) The provision by government-controlled and financed research institutions of civil aeronautics R&D-related goods or services to Airbus and/or funding for civil aeronautics-related R&D projects in which Airbus participated, including by the German Deutsches Zentrum für Luft- und Raumfahrt ("DLR"), by the UK Defence

BCI deleted, as indicated **[***]**

Evaluation and Research Agency ("DERA") and its successor Qinetiq, and by the French Office National des Études et des Recherches Aérospatiales ("ONERA"), the Centre National de la Recherche Scientifique ("CNRS"), and the Centre National de la Recherche Technologique ("CNRT").

(7) Any amendments, revisions, implementing or related measures to the measures described above.

(8) Any other measures that involve a financial contribution by the EC or any of the member States that benefit the Airbus companies.

The United States is concerned that the launch aid provided by the EC and the member States to Airbus for the development of large civil aircraft, including but not limited to the Airbus A340-500/600 and the A380, and the EIB loan provided to EADS for the A380, appear to be export subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

The United States further is concerned that the measures of the EC and the member States that are the subject of this panel request appear to be causing adverse effects to its interests within the meaning of:

- Article 5(a) of the SCM Agreement because the measures are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement that are causing or threatening to cause injury to the US industry.

- Articles 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement because the measures are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement that are causing or threatening to cause serious prejudice to the interests of the United States through displacement and impedance of imports of large civil aircraft of the United States into the EC and third country markets, and through significant price undercutting by large civil aircraft of the EC as compared with the price of large civil aircraft of the United States in the same markets, and significant price suppression, price depression or lost sales in the same markets.

The United States also is concerned that the measures appear to be inconsistent with Article XVI:1 of the GATT 1994.

The United States requests that a Panel be established with standard terms of reference, in accordance with Articles 4.4 and 7.4 of the SCM Agreement and Article 7 of the DSU.

The United States asks that this request for the establishment of a Panel be placed on the agenda for the next meeting of the Dispute Settlement Body.

The United States further requests that, upon establishment of a panel in this matter, the DSB initiate the procedures provided for in Annex V of the SCM Agreement pursuant to paragraph 2 of that Annex, and designate a representative to serve the function of facilitating the information-gathering process pursuant to paragraph 4 of that Annex.

BCI deleted, as indicated **[***]**

ANNEX C

REPORT OF THE DESIGNATED REPRESENTATIVE, INCLUDING ATTACHMENTS 1 AND 2 (WORKING PROCEDURES FOR DEVELOPING INFORMATION UNDER ANNEX V OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES; AND PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION)

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BCI deleted, as indicated **[***]**

ANNEX C

EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT (WT/DS316)

PROCEDURE UNDER ANNEX V OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Report to the Panel from the Facilitator

(24 February 2006)

A. BACKGROUND

1. On 20 July 2005, the Dispute Settlement Body ("DSB") established a Panel at the request of the United States with respect to the above matter. In its request for establishment of a panel, the United States invoked, *inter alia*, paragraph 4 of Article 7 of the *SCM Agreement* and requested that, upon establishment of a panel in this matter, the DSB initiate the procedures provided for in Annex V of the *SCM Agreement*, pursuant to paragraph 2 of that Annex.[1]

2. On 23 September 2005, the DSB initiated the procedures for developing information concerning serious prejudice under Annex V of the *SCM Agreement*, pursuant to paragraph 2 of Annex V of the *SCM Agreement*, and designated Mr. Mateo Diego-Fernández as a representative to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the *SCM Agreement*.[2]

B. WORKING PROCEDURES

3. Annex V does not describe all aspects of the procedures for developing information concerning serious prejudice. On 30 September 2005, Mr. Diego-Fernández (the "Facilitator") adopted Working Procedures for the Annex V procedure[3] (the "Working Procedures") after consulting upon them with the United States and the European Communities.

4. The Working Procedures provided for a round of questions and responses, and then a round of follow-up questions and responses. In each round, the United States and the European Communities would submit draft questions, comment on each other's draft questions and then pose final versions of the draft questions. Upon review of the questions submitted by the parties, the Facilitator would transmit questions that he considered necessary "to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute" as set out in paragraph 4 of Annex V. Questions could be addressed to third-country Members in the initial round of questions. Each party and third-country Member would respond to each question, or specify the reason why it did not respond, by a particular date.

[1] Document WT/DS316/2. See also the minutes of the meetings of the DSB held on 13 June 2005 (WT/DSB/M/191, para. 4) and 20 July 2005 (WT/DSB/M/194, para. 49).

[2] See the minutes of the meeting of the DSB held on 23 September 2005 (WT/DSB/M/197, paras. 6 and 9).

[3] The Working Procedures, as modified, are contained in Attachment 1 to this report.

5. Third-country Members were identified by the parties in their draft questions.[4]

6. The Working Procedures were transmitted to the parties upon adoption and to third-country Members at the time of transmission of questions to such Members.

7. The Working Procedures were modified on various occasions after consultations with the parties, in accordance with paragraph 16. On 4 November 2005, at the request of the parties, the Facilitator modified the date for submission of responses to initial questions in paragraph 6 by postponing it one week. On 15 November 2005, at the request of the parties, the Facilitator modified the method of delivery of responses in paragraph 12 to allow submissions to be made exclusively in electronic form. On 24 November 2005, the Facilitator modified the date for submission of draft follow-up questions in paragraph 7 by postponing it one week, with additional time for those questions which followed up on certain responses submitted after the deadline. At the same time, the Facilitator also eliminated the procedures for submission of comments on follow-up questions and finalized versions in paragraphs 7 and 8, in order to avoid undue delays in the process. Modifications to the Working Procedures were notified to the parties and to third-country Members upon adoption.

C. BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION

8. The Annex V process shall – pursuant to footnote 67 of Annex V – take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process. In this connection, and in light of the particularities of the large civil aircraft ("LCA") industry, the need to establish rules for the enhanced protection of certain information was recognized. Accordingly, paragraph 17 of the Working Procedures provided for the possibility of procedures for the protection of business confidential information. On 10 October 2005, the European Communities requested that the Facilitator adopt additional procedures for the protection of business confidential information and highly sensitive business information, and submitted a set of draft procedures. At the invitation of the Facilitator, the United States submitted comments to this draft on 13 October 2005.

9. The Facilitator responded by suggesting ways to most efficiently solicit necessary information as well as encourage the co-operation of the parties, consistent with paragraph 4 of Annex V of the *SCM Agreement*. Throughout the development of the procedures, the parties underlined that they should be specifically tailored to the particular nature of the market for LCA. As this market has only two producers and a limited number of major purchasers, the parties asserted that certain (e.g. price and cost) data of the LCA producers in these disputes was extraordinarily and uniquely sensitive. It was for this reason that, at the request of the parties, the Facilitator undertook to establish procedures to protect this information that substantially exceeded the protections that prior WTO panels had provided for certain kinds of information. On 19 October 2005, the Facilitator met the United States and the European Communities, and on 21 October 2005, he posed a series of questions to both of them. On 25 October 2005, the United States and the European Communities responded to the Facilitator's questions and, on 28 October 2005, commented on each other's responses. On

[4] The European Communities, in its draft questions (and in document WT/DS317/2), identified the following 49 Members as third country Members: Argentina; Australia; Bahrain; Brazil; Brunei; Cameroon; Canada; Chile; China; Colombia; Egypt; El Salvador; Fiji; Hong Kong, China; Iceland; India; Indonesia; Israel; Japan; Jordan; Kenya; Kuwait; Madagascar; Malaysia; Mauritania; Mexico; Mongolia; Morocco; Namibia; New Zealand; Norway; Oman; Pakistan; Panama; Peru; Philippines; Romania; Senegal; Singapore; South Africa; Republic of Korea; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; Trinidad and Tobago; Tunisia; Turkey; United Arab Emirates and Venezuela. The Facilitator sent the questions to all these 49 Members.

BCI deleted, as indicated **[***]**

1 November 2005, the Facilitator transmitted to the parties a set of draft procedures, on which the parties commented on 3 November 2005.

10. On 4 November 2005, the Facilitator adopted the Procedures for the protection of business confidential information and highly sensitive business information for the Annex V procedure[5] (the "BCI/HSBI Procedures") in accordance with paragraph 17 of the Working Procedures. The Procedures were transmitted to the parties and third-country Members.

11. Briefly, the BCI/HSBI Procedures accord enhanced protection to information designated by a Party or Third Country Member as "Business Confidential Information" ("BCI") or "Highly Sensitive Business Information" ("HSBI"). In respect of BCI, only "Approved Persons", designated under the Procedures, may have access to such information, under specific conditions, and they must use such information only for the purposes of the Annex V process. No Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person. The Procedures also restrict copying, transmission and storage of BCI. In respect of HSBI, the Procedures stipulate, in addition, that HSBI shall be submitted to the WTO in electronic form, using locked CDs or two sealed laptop computers, and stored at the special HSBI location at the WTO Secretariat. No HSBI Approved Person shall disclose HSBI to any person except another HSBI Approved Person, and then only for the purpose of the specific dispute in which it is being used. Except as otherwise provided, HSBI shall not be stored, transmitted or copied either in written or electronic form. HSBI Approved Persons of a Party may view HSBI on the Sealed laptop computer submitted by the other Party or, in the case of HSBI submitted on Locked CDs on a Stand-alone computer, only in a designated room at one of the HSBI locations, subject to certain conditions. All HSBI must be stored in a safe at the relevant HSBI location.

D. PROCEDURAL ISSUES

1. Approved Persons

12. On 11 November 2005, pursuant to paragraph 23 of the BCI/HSBI Procedures, the United States and the European Communities each submitted to the Facilitator a list of Representatives and Outside Advisors who needed access to BCI and HSBI submitted by the other party. On the same day, the designee of the Director-General of the WTO submitted to the Facilitator a list of Secretariat employees who needed access to BCI and HSBI in this dispute. On 18 November 2005 the United States revised its list by reducing the number of Representatives and Outside Advisors who needed access to HSBI.[6]

13. On 18 November 2005, in accordance with paragraph 26 of the BCI/HSBI Procedures, the Facilitator designated as Approved Persons those persons included on the list submitted on 11 November 2005 by the United States, as confirmed on 18 November 2005; those persons included on the list submitted on 11 November 2005 by the European Communities; and those persons included on the relevant list submitted on 11 November 2005 by the designee of the Director-General of the WTO. He indicated that HSBI Approved Persons were those Approved Persons specifically designated as such on the list submitted by the United States on 18 November 2005 (16 Representatives and 12 Outside Advisors), on the list submitted by the European Communities on

[5] The Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information for the Annex V Procedure are contained in Attachment 2 to this report.

[6] The United States reduced its list in reaction to a comment from the European Communities received on 18 November 2005, pointing out that the United States had proposed the maximum number of persons possible under the BCI/HSBI Procedures, and that parties could not, in the future, give access to more persons by withdrawing some of the currently approved persons.

11 November 2005 (14 Representatives and 8 Outside Advisors) or by the designee of the Director-General of the WTO on the list submitted on 11 November 2005, as well as himself.

14. On 5 January 2006, the European Communities notified the designation of two of its existing Approved Persons as HSBI Approved Persons and the addition of three new persons to its list of Approved Persons. On 9 January 2006, the United States expressly indicated that it did not object to the designation of the two existing persons. On 27 January 2006, as no objection was received, one additional person, who had been notified by the Secretariat on 25 January, was added to its list of Approved Persons.

2. Designation of information

15. On 10 January 2006, the United States formally objected to the European Communities' designation of certain information in 17 documents as highly sensitive business information. On 16 January 2006, the European Communities commented on the objections, at the invitation of the Facilitator. On 3 and 13 February 2006, the Facilitator posed questions to the European Communities concerning certain documents, without prejudice to the status of any other documents. On 8 and 14 February 2006, the European Communities responded to the Facilitator's questions.

16. On 15 February 2006 the Facilitator communicated to the parties his view that, while he rejected many of the US objections, he accepted the US objection that four documents or parts thereof designated as HSBI by the European Communities may not be designated as HSBI and that the European Communities should communicate in writing any action taken in light of the Facilitator's views and the BCI/HSBI Procedures by 20 February 2006. On that date, the European Communities requested the Facilitator to reconsider certain of his views, and the United States sent a related communication on 21 February 2006. On 21 and 22 February, the Facilitator took note of the parties' communications, confirmed his 15 February views and recalled his 15 February request that the European Communities submit written confirmation of any actions taken in light of those views. The European Communities was also requested to inform him whether it had decided to redesignate or withdraw the information concerned, so that he could act accordingly. On 22 February 2006, the European Communities indicated, among other things, that, due to the sensitivity of the documents concerned, "...the originators ha[d] indicated that they need a reasonable time to consider and discuss internally how to best proceed. On the basis of this, the EC s[aw] no other immediate solution than to exclude the four documents concerned ... from the batch of translations due [that] day." The European Communities indicated that it was "working closely with the parties concerned to reach a decision before the end of th[e] week", and requested the Facilitator to "hold off" on issuing his final report until the classification issue was settled and all the translations had been submitted. On 23 February, the Facilitator took note of the EC communication and indicated that he intended to issue his report by 24 February 2006, and unless he heard otherwise from the European Communities by a certain time on that day, he intended to deem the European Communities to have withdrawn the information concerned. On 24 February, the European Communities designated two of the documents concerned as BCI and withdrew the other two documents.

3. Other procedural issues

17. On 16 November 2005, pursuant to paragraph 17(d) of the BCI/HSBI Procedures, the European Communities designated the Brussels office of Sidley Austin Brown Wood LLP as an additional Secure site for BCI. On 17 November 2005, pursuant to paragraph 17(d) of the BCI/HSBI Procedures, the United States designated the Washington D.C. and Berlin offices of Wilmer Hale as two additional Secure sites for BCI.

BCI deleted, as indicated **[***]**

18. On 18 November 2005, at the time of delivery of responses, the Facilitator met with the United States and the European Communities to discuss certain practical matters concerning the smooth functioning of the Annex V process, including the parties' proposed modification of the timetable under the Working Procedures, as well as the operation of the HSBI location at the WTO in accordance with the BCI/HSBI Procedures.

19. On 25 November 2005, pursuant to paragraph 14 of the Working Procedures, the United States requested that the European Communities provide English-language translations of all the German language documents that it had provided in its responses to questions and of all the German language documents identified in Section VIII of the questions to the European Communities (Questions Nos. 340-352). On 30 November 2005, the European Communities objected to the request insofar as it related to publicly available official documents or websites to which the United States allegedly already had at its disposal before the Annex V process. After consulting with the United States and the European Communities, on 5 December 2005 the Facilitator fixed a staggered time-limit for the European Communities to provide the requested translations into English of documents provided in response to questions as follows: 6 January 2006 (750 pages); 31 January 2006 (750 pages); and 22 February 2006 (remaining pages).

20. Over the course of the Annex V process, the United States and the European Communities each made a series of comments regarding alleged deficiencies in the responses submitted by the other. The Facilitator took note of these comments.

E. EC MEMBER STATES

21. Four EC member States (France, Germany, Spain and the United Kingdom) are named as respondents in the request for consultations and the request for establishment of a panel in this dispute. Much of the information developed in this procedure under Annex V may concern measures of these four EC member States. However, whilst the European Communities spoke during the DSB meetings which led to the initiation of this procedure under Annex V of the *SCM Agreement* and communicated directly with the Facilitator during this procedure, the EC member States did not.

22. On 5 October 2005, in light of certain comments by the United States and the European Communities on draft questions[7], the Facilitator wrote to the European Communities stating that it was his understanding that in this procedure under Annex V, the European Communities represented all five respondents in this dispute, namely itself, France, Germany, Spain and the United Kingdom. Accordingly, he intended to transmit questions to the European Communities on behalf of all five respondents and expected that the European Communities would respond on behalf of all five respondents.

23. On 6 October 2005, the European Communities replied that it was the proper respondent in this case. It advised that it had never said that it "represent[ed]" its member States but took full responsibility in these proceedings for the actions of its member States and would to the best of its ability provide documents that were properly requested wherever they might be located and trusted that the United States would do the same. It also considered that the term "and certain member States" could be deleted from the title of the dispute.

24. On 5 December 2005, the United States alleged that several responses submitted by the European Communities were ambiguous because they referred to the "European Commission". The

[7] The European Communities and the United States exchanged views about whom the questions should be addressed to. (For example, the European Communities opined on this matter in its 29 September 2005 comments, and the United States, in turn, submitted its views in its 3 October 2005 comments).

United States stated that it was seeking information in the possession of EC institutions as well as the member States, all of which, in its view, were respondents in the dispute in their own right. It asked the Facilitator to send the questions directly to the member States themselves to ensure full and adequate responses.

25. On 7 December 2005, the European Communities reiterated its view that it was the sole respondent. It stated that it had internally closely cooperated with the member States and other bodies concerned to ensure the timely development of information and would continue to do so throughout the case. It recalled that the European Commission represented the European Communities before the WTO but, for clarity, references to the "European Commission" should be read as "European Communities". It asked the Facilitator to dismiss the United States' request.

26. In light of the above statements, the Facilitator did not transmit any questions directly to the EC member States but included several follow-up questions requesting documents and information that could be expected to be in the possession of a particular EC member State but which had not been provided by the European Communities in its responses to the original questions.

27. The Facilitator submits this report without prejudice to the issue whether France, Germany, Spain and the United Kingdom are separate respondents in this dispute represented by the European Communities, or whether they are incorporated within the European Communities as the sole respondent.

F. INFORMATION GATHERED

28. On 7 October 2005, in accordance with paragraph 5 of the Working Procedures, the Facilitator transmitted 352 questions (many including sub-questions) to the European Communities, 115 questions (some including sub-questions) to the United States, and eight questions to 49 third-country Members identified by the parties.

29. The Facilitator did not transmit certain draft questions that he did not consider "necessary to facilitate the expeditious subsequent multilateral review of the dispute" in accordance with paragraph 4 of Annex V of the *SCM Agreement* and paragraph 5 of the Working Procedures. Certain of these draft questions were submitted by the European Communities, in particular 216 draft questions addressed to the United States concerning the existence and amount of subsidization of Boeing by the United States and 54 draft questions addressed to Japan concerning the existence and amount of subsidization of Boeing's component manufacturers by Japan. Certain draft questions submitted by the United States were also excluded. The Facilitator also modified certain draft questions in order to ensure "the timely development of information" in accordance with paragraph 4 of Annex V of the *SCM Agreement* and paragraph 5 of the Working Procedures.

30. On 17 November 2005, the United States and the European Communities jointly informed the Facilitator that they had agreed that neither of them would respond, in the Annex V process, to a number of cost-related questions. As such, they provided a list of 24 questions or sub-questions posed to the European Communities and 27 questions posed to the United States. They indicated that this agreement did not affect the rights and obligations of the parties to request and disclose any information at a later stage in the dispute settlement proceeding.

31. On 18 November 2005, the European Communities and the United States provided responses to questions and specified the reason why they did not respond to certain other questions. The following third-country Members responded to questions posed to them – albeit with widely ranging degrees of comprehensiveness – or specified the reason why they did not respond to some or all of the

BCI deleted, as indicated **[***]**

questions[8]: Argentina; Australia; Brazil; Canada; Chile; China; Colombia; El Salvador; Hong Kong, China; Iceland; India; Indonesia; Israel; Japan; Jordan; Korea; Madagascar; Malaysia; New Zealand; Norway; Panama; Peru; the Philippines; Romania; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Turkey.

32. On 9 December 2005, in accordance with paragraph 9 of the Working Procedures, the Facilitator transmitted 280 follow-up questions (many including sub-questions) to the European Communities and 31 follow-up questions to the United States.

33. The Facilitator did not transmit certain draft follow-up questions that he considered did not ask for clarification or elaboration of responses provided to the original questions, in accordance with paragraph 7 of the Working Procedures.

34. On 22 December 2005, in accordance with paragraph 10 of the Working Procedures, the European Communities and the United States provided responses to follow-up questions and specified the reason why they did not respond to certain other follow-up questions.

35. On 6 and 31 January and 22 February 2006, the European Communities provided translations into English of documents provided in response to questions, in accordance with the staggered time-limits fixed by the Facilitator on 5 December 2005.[9]

36. The questionnaires, replies to questionnaires, follow-up questions and replies to follow-up questions constitute Annexes I – III to this report. However, the annexes omit information designated as Business Confidential Information ("BCI") and Highly Sensitive Business Information ("HSBI"). In accordance with paragraphs 30 and 40 of the Procedures for the protection of business confidential information and highly sensitive business information for the Annex V procedure, the Facilitator will submit BCI and HSBI to the Panel once the Panel has adopted its own BCI and HSBI procedures.

ATTACHMENT 1

[Working Procedures, as modified]

ATTACHMENT 2

[BCI/HSBI Procedures]

ANNEX 1: INFORMATION SUBMITTED BY THE EUROPEAN COMMUNITIES[10]

[Non BCI/HSBI CD-ROMs]

ANNEX 2: INFORMATION SUBMITTED BY THE UNITED STATES

[8] The following 20 Members did not respond: Bahrain; Brunei; Cameroon; Egypt; Fiji; Kenya; Kuwait; Mauritania; Mexico; Mongolia; Morocco; Namibia; Oman; Pakistan; Senegal; South Africa; Trinidad and Tobago; Tunisia; United Arab Emirates and Venezuela.

[9] See *supra*, para. 19.

[10] {Footnote added for the Panel report.} Annexes 1-3 are not reproduced in the Panel report.

BCI deleted, as indicated **[***]**

[Non BCI/HSBI CD-ROMs]

ANNEX 3: INFORMATION SUBMITTED BY THIRD-COUNTRY MEMBERS

[Non BCI/HSBI CD-ROM produced by the Secretariat]

BCI deleted, as indicated **[***]**

ATTACHMENT 1

EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT
(DS316)

and

UNITED STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT
(DS317)

WORKING PROCEDURES FOR DEVELOPING INFORMATION UNDER ANNEX V OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

(24 November 2005)

I. SCOPE OF THE PROCEDURES

1. These procedures apply to the development of information between the parties pursuant to Annex V in disputes DS316 and DS317. These procedures provide for the application of identical rules and schedules for the separate Annex V processes that will develop the factual records in the two disputes. It shall be without prejudice to the rights and obligations of the parties under the *SCM Agreement* and the DSU, unless explicitly otherwise provided herein.

II. STEPS IN THE PROCEDURE

2. On 23 September 2005, each party submitted to the other party and to the facilitator a draft of the questions the party proposes be asked of the other party and of third-country Members. On 29 September 2005, each party submitted to the other party and to the facilitator comments on the draft questions submitted by the other party on 23 September 2005.

3. At the request of a party, the facilitator may direct a question equivalent to one directed to that party in the Annex V process in one dispute to the other party in the Annex V process in the other dispute.

4. At the latest on 3 October 2005, each party will transmit to the other party and to the facilitator a final version of its questions, which may incorporate revisions to reflect the other party's comments and additional questions only in accordance with paragraphs 2 and 3.

5. Upon review of the questions submitted by the parties, and any comments submitted under paragraph 2, the facilitator will transmit to the parties and to third-country Members any questions that he considers necessary to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute, at the latest on 7 October 2005.

6. Each party / third-country Member will respond to each question transmitted to it by the facilitator pursuant to paragraph 5 or specify the reason why it does not respond, at the latest on 18 November 2005.

BCI deleted, as indicated **[***]**

7. The parties may submit draft follow-up questions to each other at the latest on 5 December 2005, except as provided in paragraph 8. "Follow-up questions" are exclusively those questions that ask for clarification or elaboration of responses provided under paragraph 6.

8. The European Communities may submit draft follow-up questions that ask for clarification or elaboration of responses provided by the United States on 23 November 2005 at the latest on 7 December 2005.

9. Upon review of the follow-up questions submitted by the parties, the facilitator will endeavour to transmit to the parties the follow-up questions that he considers necessary to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute at the latest on 9 December 2005.

10. Each party will respond to each follow-up question transmitted to it by the facilitator, or specify the reason why it does not respond, at the latest on 22 December 2005.

11. For ease of reference, when submitting documents annexed to responses to questions and follow-up questions, parties and third-country Members will number exhibits sequentially, with US exhibit numbers prefixed with "US-" and EC exhibit numbers prefixed with "EC-" (and third-country Members using a suitable prefix).

12. Each party / third-country Member will file the submissions envisaged in these procedures with the Secretariat (Mr. Ferdinand Ferranco (Office 3154)), by 5pm on the deadlines established by the facilitator. In addition, each party must serve a single copy of the submissions envisaged in these procedures on the other party, and third-country Members must serve single copies of their responses on both of the parties.

13. The parties and third-country Members may file submissions with the Secretariat in hard copy or electronic format. They will provide electronic copies of any hard copy submissions to the Secretariat at the time they provide any such submissions. Submissions in electronic format should, if possible, be in a format compatible with that used by the Secretariat. If the electronic version is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to guy.evans@wto.org, hiromi.yano@wto.org and matthew.kennedy@wto.org. If a diskette or CD-ROM is provided, it should be delivered to Mr. Ferdinand Ferranco. Each party will also provide electronic copies of their submissions to the other party, and third-country Members will provide electronic copies of their submissions to both parties.

14. A party / third-country Member submitting documents in response to a question or follow-up question will provide a copy in the original language, it being understood that the party / third-country Member will also submit an English version if one is available. Each party may request translations into English of any document or information provided in response to a question that is not submitted in a WTO language as of 25 November 2005. Each party may also request translations into English of any document or information provided in response to a follow-up question that is not submitted in a WTO language as of 9 January 2006. Any such translations will be provided by the party / third-country Member submitting the relevant document or information. The time limit for providing these translations will be fixed by the facilitator.

15. The facilitator will transmit any responses submitted by parties and third-country Members, as well as the requested documents and any translations thereof, taking account of the time that he considers to be necessary for the translation of documents as set out in paragraph 14 above. The facilitator will submit this information to each of the panels separately, but on the same day.

BCI deleted, as indicated **[***]**

III. FINAL CLAUSES

16. The facilitator may at any time modify these working procedures, including the timetable, after consulting with the parties.

17. The parties may propose to the facilitator procedures for the protection of business confidential information during the present Annex V procedure. If the parties do so, the facilitator will adopt procedures for the protection of business confidential information during the course of the present Annex V procedure. The facilitator will be considered a "covered person" for purposes of paragraphs II:1, III:1, III:2, VI:2, VI:5, VII:1, VII:2, VIII:1, VIII:2, and VIII:5 of the Rules of Conduct, and will be subject to the same obligations as a panellist under paragraphs IV:1, VI:1(a); VI:4(a), VIII:5, and VIII:7.

BCI deleted, as indicated **[***]**

ATTACHMENT 2

EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT
(WT/DS316)

and

UNITED STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT
(WT/DS317)

PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION IN THE PROCEDURE UNDER ANNEX V OF THE SCM AGREEMENT

(4 November 2005)

I. GENERAL

These procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of Annex V of the SCM Agreement and Article 13 of the DSU.

II. DEFINITIONS

1. **"Approved Persons"** means:

   (a) Representatives or Outside Advisors of a Party, or Employees of the Secretariat, when designated in accordance with Section IV of these procedures; and

   (b) the Facilitator.

2. **"Business Confidential Information"** or "**BCI"** means any business information that a Party or a Third-country Member has "Designated as BCI" regardless of whether contained in a document provided by a public or private body because it is not otherwise available in the public domain. Each Party and Third-country Member shall act in good faith and exercise restraint in designating information as BCI, and will endeavor to designate information as BCI only if its disclosure would cause harm to the originators of the information.

3. **"Conclusion of the Panel Process"** means the earliest to occur of the following events:

   (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the report;

   (b) pursuant to Articles 16.4 and 17.14 of the DSU, the Appellate Body report is adopted and the Panel report is adopted as modified, if at all, by the Appellate Body report;

   (c) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; and

(d) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB.

4. **"Designated as BCI"** means:

(a) for printed information, text that is set off with bold square brackets in a document clearly marked with the notation 'BUSINESS CONFIDENTIAL INFORMATION' and with the name of the Party or Third-country Member that submitted the information; and

(b) for electronic information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation 'BUSINESS CONFIDENTIAL INFORMATION', has a file name that contains the letters "BCI", and is stored on a storage medium with a label marked 'BUSINESS CONFIDENTIAL INFORMATION' and indicating the name of the Party or Third-country Member that submitted the information.

5. **"Designated as HSBI"** means electronic information in characters that are set off with double bolded square brackets (or a heading with double bolded square brackets on each page) in an electronic file that contains the notation 'HIGHLY SENSITIVE BUSINESS INFORMATION', has a file name that contains the letters "HSBI", and is stored on a storage medium with a label marked 'HIGHLY SENSITIVE BUSINESS INFORMATION' and indicating the name of the Party or Third-country Member that submitted the information.

6. **"Electronic information"** means any information stored in an electronic form (including but not limited to binary-encoded information).

7. **"Employee of the Secretariat"** means a person employed or appointed by the Secretariat who has been authorized by the Secretariat to work on the dispute.

8. **"Facilitator"** means the person designated by the DSB in accordance with paragraph 4 of Annex V of the *SCM Agreement*.

9. **"Highly Sensitive Business Information"** or **"HSBI"** means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third-country Member has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third-country Member's view, cause exceptional harm to its originators. Each Party and Third-country Member shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party and Third-country Member may at any time designate as non-BCI/HSBI or as BCI information designated by that Party or Third-country Member as HSBI.

(a) The following categories of information may be Designated as HSBI:

(i) information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[1], and, except as provided

[1] This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing

BCI deleted, as indicated **[***]**

in subparagraph (d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

(ii) information gathered or produced in the context of LCA sales campaigns;

(iii) information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, investment banks or the European Investment Bank, with regard to LCA products; or

(iv) information concerning an LCA manufacturer's costs of production, including but not limited to data regarding pricing by suppliers.

(b) Each Party may also designate as HSBI other categories of business information that is not otherwise available in the public domain and the disclosure of which could, in the Party's view, cause exceptional harm to its originators. In case the other Party objects to the designation of such information as HSBI, the dispute shall be resolved by the Facilitator. If the Facilitator disagrees with designation of information as HSBI, the submitting Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. The Facilitator shall either destroy such information or return it to the submitting Party. Each Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party as HSBI.

(c) Each Party shall Designate as HSBI any information described in subparagraph (a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of the other Party.

(d) The following categories of information may not be Designated as HSBI:

(i) aggregated pricing data for a particular LCA model or family of LCA within a particular market that is indexed (*i.e.*, does not reflect actual prices but rather movements in prices off a base of 100 for a particular year). Such data shall be treated as BCI;

(ii) general legal conclusions based on HSBI (e.g., that HSBI demonstrates that a producer engaged in price undercutting). Such conclusions shall be treated as neither BCI nor HSBI;

(iii) contracts on the granting of launch aid or reimbursable launch investment and project appraisal documents relating thereto, other than information described in subparagraph (a);

(iv) the terms and conditions of loans, other than information described in subparagraph (a); and

(v) intergovernmental agreements and government decisions, other than information described in subparagraph (a).

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information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

BCI deleted, as indicated **[***]**

(e) Information may not be Designated as HSBI simply because it is subject to bank secrecy or banker-client confidentiality.

10. **"HSBI Approved Person"** means Approved Persons specifically designated by the Parties and the Director-General of the WTO or his designee as having the right to access HSBI (according to the procedures laid down in Section IV), as well as the Facilitator.

11. **"HSBI location"** means a room to be kept locked when not occupied and the access to which shall be possible only for HSBI Approved Persons, located:

(a) for the HSBI submitted by the United States, the European Communities and any Third-country Members, on the premises of the WTO (Centre William Rappard, Rue de Lausanne 154, Geneva, Switzerland);

(b) for HSBI submitted by the United States, on the premises of the United States Mission to the European Union in Brussels;

(c) for HSBI submitted by the European Communities, on the premises of the Delegation of the European Commission to the United States in Washington;

(d) for HSBI submitted by a Third-country Member, on the premises of its Geneva Mission to the WTO, should that Third-country Member so wish.

12. **"Locked CD"** means a CD-ROM that is not rewritable.

13. **"Outside Advisor"** means a legal counsel or other advisor of a Party, who:

(a) advises a Party in the course of the dispute;

(b) is not an employee, officer or agent of an entity or an affiliate of an entity engaged in the manufacture of LCA, the provision of supplies to an entity engaged in the manufacture of LCA, or the supply of air transportation services; and

(c) is subject to an enforceable code of professional conduct that includes an obligation to protect confidential information, or has been retained by another outside advisor who assumes responsibility for compliance with these procedures and is subject to such a code of professional conduct.

For purposes of this paragraph, outside legal counsel representing an LCA producer headquartered in the territory of one of the Parties in connection with these proceedings or outside consultants who have been retained by such counsel to provide advice with regard to these proceedings are not considered agents of an entity listed in subparagraph (b).

14. **"Party"** means the European Communities or the United States.

15. **"Representative"** means an employee of a Party.

16. **"Sealed laptop computer"** means a laptop computer having (software and hardware) characteristics considered necessary by the submitting Party for protection of that HSBI, provided that it has software installed that permits such HSBI to be searched and printed in accordance with paragraph 37. However, HSBI may not be edited on the sealed laptop computer.

BCI deleted, as indicated **[***]**

17. **"Secure site"** means a facility to be kept locked when not occupied and the access to which shall be possible only for Approved Persons, located:

(a) in the case of the Facilitator and the Secretariat, on the premises of the WTO (Centre William Rappard, Rue de Lausanne 154, Geneva, Switzerland);

(b) in the case of the European Communities, the offices of External Relations Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Delegation of the European Communities to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and one additional site specified in accordance with subparagraph (d);

(c) in the case of the United States, the offices of the General Counsel of the Office of the United States Trade Representative (600 17th Street, NW, Washington, DC, USA), the offices of the United States International Trade Commission (500 E Street, S.W., Washington, DC, USA) the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and one additional site specified in accordance with subparagraph (d); and

(d) two sites other than a government office that are designated by each Party for use by its Outside Advisors; provided that the identity of those sites has been submitted to the other Party, the Facilitator, and the other Party has not objected to the designation of that site within ten days of such submission.

Any objections raised under subparagraph (d) may be resolved by the Facilitator.

18. **"Stand-alone computer"** means a computer that is not connected to a network.

19. **"Stand-alone printer"** means a printer that is not connected to a network.

20. **"Third-country Member"** means Members to whom questions have been submitted by the Facilitator in accordance with paragraph 3 of Annex V of the SCM Agreement.

III. SCOPE

21. These procedures apply to all BCI and HSBI received by an Approved Person as a result of the Annex V procedures. Unless this Understanding specifically provides otherwise, these procedures do not apply to a Party's treatment of its own BCI and HSBI.

22. The Facilitator is aware that, in order to respond fully to all questions, the United States may need to submit information pertaining to United States Special Access Programs, and/or information that it internally classifies as "Top Secret", "Secret", or "Confidential". Similarly, the European Communities may need to submit information that it internally classifies as "EU Top Secret", "EU Secret" or "EU Confidential". The Facilitator will to the extent possible implement procedures for the protection of such classified information in the event that either Party informs the Secretariat that it will be submitting such classified information in the context of the present Annex V procedure and has not already designated it as BCI or HSBI. In such cases, the submitting Party shall propose appropriate procedures for the protection of such classified information.

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IV. DESIGNATION OF APPROVED PERSONS

23. At the latest on 11 November 2005, each Party shall submit to the other Party, and to the Facilitator a list of the names and titles of its Representatives and Outside Advisors who need access to BCI and HSBI submitted by the other Party and whom it wishes to have designated as Approved Persons for either DS316 and/or DS317, along with any clerical or support staff that would have access to the BCI and HSBI.

24. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a combined total of 20 Representatives and 15 Outside Advisors as "HSBI Approved Persons" for both disputes.

25. The Facilitator shall have access to BCI and HSBI. The Director-General of the WTO, or his designee, shall submit to the Parties, and the Facilitator, a list of the employees of the Secretariat who need access to BCI and/or HSBI for each dispute.

26. Unless a Party objects to the designation of an Outside Advisor of the other Party or an Employee of the Secretariat, the Facilitator shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraphs 23 or 25 that would suggest that designation of an individual is not appropriate. If a Party objects, the Facilitator shall decide on the objection within ten days.

27. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

28. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to objections for the addition of new Approved Persons in accordance with paragraph 27.

V. BCI

29. To the extent possible, BCI should be submitted in an exhibit or annex to a response to an Annex V question or to a submission. An entire response to an Annex V question or an entire submission, or significant parts thereof, may be designated as BCI only when necessary.

30. Only Approved Persons may have access to BCI submitted in each of these proceedings. Approved Persons shall use BCI only for the purposes of the Annex V process. No Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person. The Facilitator is entitled to disclose BCI information to the members of each Panel, once these have adopted their own procedures on BCI.

31. A Party shall make no more than one copy of any BCI submitted by the other Party and any Third-country Member for each Secure site provided for that Party in paragraph 17.

32. BCI submitted pursuant to these procedures shall not be copied, distributed, or removed from the Secure site, except as necessary for submission to the Panel in accordance with paragraph 5 of Annex V of the SCM Agreement.

33. Parties may incorporate BCI in internal memoranda for the exclusive use of Approved Persons. Any memorandum and the BCI it contains shall be marked in accordance with paragraph 4.

34. Any document or annex referenced in paragraph 33 shall not be copied in excess of the number of copies required by the Approved Persons. All copies of such documents or annexes shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible. Such documents may be transmitted electronically only by using secure e-mail. Unless the submitting Party agrees otherwise, original documents containing the information designated as BCI shall not be transmitted electronically, and shall be viewed only on a Stand-alone computer and printed on a Stand-alone printer. If a Party submits to the Facilitator an original document that cannot be transmitted electronically, it shall on the day of submission deliver a copy of that document to the first secure site listed for the other Party in paragraph 17.

35. Approved Persons shall store BCI only in locked security containers. BCI shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. All work papers (e.g., draft submissions, worksheets, etc.) containing BCI shall, when no longer needed, be shredded or burned consistent with normal government practice for destroying sensitive documents.

VI. HSBI

36. Unless otherwise provided below, HSBI shall be subject to all the restrictions in Section V applicable to BCI.

37. HSBI shall be submitted to the WTO in electronic form, using locked CDs or two Sealed laptop computers connectable to 19" - 21" monitors.[2] HSBI shall be stored at the HSBI location indicated in paragraph 11a) and shall be made available for viewing and use by HSBI Approved Persons pursuant to paragraph 39 below. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO for access by HSBI Approved Persons acting on behalf of the other Party in the HSBI location listed in paragraph 11 located within its territory. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper and marked in accordance with paragraph 5. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

38. Except as otherwise provided in these procedures, HSBI shall not be stored, transmitted or copied either in written or electronic form.

39. HSBI Approved Persons of a Party may view HSBI on the Sealed laptop computer submitted by the other Party or, in the case of HSBI submitted on Locked CDs on a Stand-alone computer, only in a designated room at one of the HSBI locations indicated in paragraph 11, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI location, except at the location indicated in paragraph 11a) where the room will also be available during weekends to the Facilitator and HSBI Approved Persons designated by the Director-General of the WTO or his designee. HSBI Approved Persons may not bring into that room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from that room, except in the form of handwritten notes or aggregated information generated on a Stand-alone computer. In either case, such notes or information shall be used exclusively for the individual dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI location shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI location within its territory referenced in paragraph 11, maintain such log until one year after the Conclusion of the Panel Process. Before

[2] Only Locked CDs may be used for HSBI submitted by a Third-country Member.

entering and when leaving the room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls. Viewing of HSBI at the location indicated in paragraph 11(a) by HSBI Approved Persons designated by the Parties shall be conducted under the observation of a WTO security guard or employee.

40. No Approved Person shall disclose HSBI to any person except another HSBI Approved Person, and then only for the purpose of the specific dispute in which it is being used. The Facilitator is entitled to submit HSBI to each Panel pursuant to paragraph 5 of Annex V of the SCM Agreement, once that Panel has adopted its own HSBI procedures.

41. HSBI may be processed only on Stand-alone computers. Any memorandum or appendix to a submission containing HSBI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

42. All HSBI shall be stored in a safe at the relevant HSBI location.

VII. RESPONSIBILITY FOR COMPLIANCE

43. Each Party is responsible for ensuring that its Approved Persons and designated Representatives comply with these procedures to protect BCI and HSBI submitted by each Party, as well as with enforceable codes of professional conduct to which its approved persons or other outside advisors are subject. The Secretariat is responsible for ensuring that its employees comply with these procedures to protect BCI and HSBI submitted by a Party or Third-country Member and for adhering to the requirements to provide access in the WTO to Approved Persons and to control the use by HSBI Approved Persons when reviewing the material in the WTO premises. The Facilitator shall comply with these procedures to protect BCI and HSBI submitted by a Party or Third-country Member.

VIII. ADDITIONAL PROCEDURES

44. After consulting with the Parties, the Facilitator may apply any other additional procedures that he considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures. In the event that the Facilitator applies additional procedures or modifies these procedures as applied in that dispute, the Parties will endeavour to obtain adoption of the same procedures in the other dispute.

45. The Facilitator may, with the consent of both Parties, waive any part of these procedures. Such "waiver" shall be specifically set forth in writing and signed by a representative of both Parties.

IX. RETURN AND DESTRUCTION

46. After the Conclusion of the Panel Process, within a period fixed by the Facilitator, the Facilitator, the Secretariat and the Parties (along with all Approved Persons) shall return all documents (including electronic material) or other recordings containing BCI to the Party or Third-country Member that submitted such documents or other recordings. The Facilitator, Secretariat, and the Parties shall destroy and/or return any electronic material submitted by a Party or Third-country Member that contains HSBI.

47. The hard drive of all Stand-alone computers and all media used to back up such computers shall be destroyed at the Conclusion of the Panel Process.

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ANNEX D

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ANNEX D

EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT, (WT/DS316), WORKING PROCEDURES OF THE PANEL

(30 March 2007)

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The Panel shall conduct its internal deliberations in closed session. The parties to the dispute, and interested third parties, shall be present at meetings only when invited by the Panel to appear before it. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting with the parties. The Panel may open the third party session of its first substantive meeting to the public, subject to appropriate procedures to be adopted by the Panel after consulting with the parties and third parties.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. The parties may jointly or individually propose special procedures for the protection of certain confidential information. If the Panel receives such a proposal, it may adopt amendments to the present working procedures for the protection of certain confidential information as it considers appropriate. In the event that either of the parties makes such a proposal individually, the other party shall be given the opportunity to comment and/or make an alternative proposal.

5. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case, their arguments and their counter-arguments, respectively. Third parties may transmit to the Panel written submissions after the first written submissions of the parties have been submitted.

6. At its first substantive meeting with the parties, the Panel shall ask the United States to present its case. Subsequently, and at the same meeting, the European Communities will be asked to present its point of view. The parties will then be allowed an opportunity for final statements, with the United States presenting its statement first. Third parties will be asked to present their views thereafter at the separate session of the same meeting set aside for that purpose. Upon request, the parties will be allowed an opportunity to make written comments on the views presented by Third parties at this separate session.

7. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of this session.

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8. Formal rebuttals shall be made at a second substantive meeting of the Panel. The European Communities shall have the right to take the floor first, to be followed by the United States. The parties shall submit, prior to that meeting, written rebuttals to the Panel.

9. The Panel may at any time put questions to the parties and to the third parties and ask them for explanations either in the course of the substantive meeting or in writing. Answers to questions shall be submitted in writing by the date(s) specified by the Panel. Answers to questions after the first meeting shall be submitted in writing at the same time as the written rebuttals, unless the Panel specifies a different deadline.

10. The parties to the dispute and any third party invited to present its views shall make available to the Panel and the other party or parties a written version of their oral statements, preferably at the end of the meeting, and in any event not later than the day following the meeting. Parties and third parties are encouraged to provide the Panel and other participants in the meeting with a provisional written version of their oral statements at the time the oral statement is presented.

11. The parties and third parties shall make all submissions in an official WTO language, namely English, French or Spanish. This does not preclude a party or third party submitting exhibits in the original language, provided that it submits a version in an official WTO language at the same time. The Panel may grant extensions of time for submission of such language versions upon a showing of good cause.

12. In the interest of full transparency, the presentations, rebuttals and statements shall be made in the presence of the parties. Moreover, each party's written submissions, including responses to questions put by the Panel, shall be made available to the other party.

13. The parties should provide the Secretariat with an executive summary of the claims and arguments contained in their written submissions and oral presentations. These executive summaries will be used by the Secretariat only for the purpose of assisting the Secretariat in drafting a concise arguments section of the Panel report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties. The summaries of the first written submission and rebuttal written submission shall be limited to twenty (20) pages each, and the summaries of the oral statements at the meetings will be limited to five (5) pages each. The Panel may vary these page limits. Third parties are requested to provide the Panel with executive summaries of their written submissions and oral presentations, of no more than five (5) pages each. The executive summaries shall be submitted to the Secretariat within ten days of the original submission or presentation concerned. Paragraph 19 shall apply to the service of executive summaries.

14. A party shall submit any request for preliminary ruling not later than its first submission to the Panel. If the complaining party requests such a ruling, the respondent shall submit its response to the request in its first submission. If the respondent requests such a ruling, the complaining party shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure will be granted upon a showing of good cause.

15. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. The other party shall be accorded a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

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16. The parties to the dispute have the right to determine the composition of their own delegations. The parties shall have the responsibility for all members of their delegations and shall ensure that all members of the delegation act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings. The parties as well as third parties shall provide a list of their delegation before each meeting to the Secretary to the Panel, Mr. Hiromi Yano (e-mail: hiromi.yano@wto.org).

17. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by parties, parties should sequentially number their exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of its next submission thus would be numbered US-6. A party may rely on a sequential page numbering system to organize its exhibits, with appropriate references to such numbered pages in its submissions to the Panel.

18. Following issuance of the interim report, the parties shall have the time, as established by the timetable of the Panel, to submit written requests to review precise aspects of the interim report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at that time. Following receipt of any written requests for review, if no further meeting with the Panel is requested, the parties shall have the opportunity, within a time-period specified by the Panel, to submit written comments on the other party's written requests for review. Such comments shall be strictly limited to responding to the other party's written request for review.

19. The following procedures regarding service of documents shall apply:

(a) Each party and third party shall serve all of its written submissions (including any separate requests for preliminary ruling and responses thereto), executive summaries and written versions of oral statements, directly on all other parties, and on third parties as appropriate, and confirm that it has done so at the time it provides those submissions to the Secretariat.

(b) The parties and third parties should provide their submissions to the Secretariat by 5:30 p.m. on the deadlines established by the Panel, unless a different time is set by the Panel.

(c) Unless the Panel indicates otherwise, the parties and third parties shall provide the Secretariat with ten paper copies of each of their written submissions. These copies shall be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (office 2150).

(d) The parties and third parties shall provide electronic copies of all submissions to the Secretariat at the time they provide their submissions, if possible in a format compatible with that used by the Secretariat. If the electronic version is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to judith.czako@wto.org, andrea.mastromatteo@wto.org, graham.cook@wto.org, nadiya.nychay@wto.org, michelle.healy@wto.org and hiromi.yano@wto.org. If the electronic version is provided by diskette or CD, four copies should be delivered to Mr. Ferdinand Ferranco (office 2150).

(e) The Panel will endeavour to provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as

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appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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ANNEX E

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ANNEX E

EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT, (WT/DS316), ADDITIONAL WORKING PROCEDURES FOR DS316 – PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION ("BCI/HSBI PROCEDURES")

(Revised 9 November 2007)

I. GENERAL

The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Panel record, including BCI and HSBI submitted during the information-gathering process under Annex V of the SCM Agreement and transmitted by the Facilitator as part of his report to the Panel. These Procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of the *SCM Agreement* and Article 13 of the *DSU*.

II. DEFINITIONS

For the purposes of these Procedures,

1. **"Approved Persons"** means:

   (a) Representatives or Outside Advisors of a Party, or Employees of the Secretariat, when designated in accordance with these procedures;

   (b) Panel members;

   (c) the Facilitator; and

   (d) PGE members or experts appointed by the Panel who in the opinion of the Panel require access to BCI and/or HSBI.

2. **"Business Confidential Information"** or "**BCI"** means any business information that a Party or Third Party has "Designated as BCI" regardless of whether contained in a document provided by a public or private body because it is not otherwise available in the public domain. Each Party and Third Party shall act in good faith and exercise restraint in designating information as BCI, and will endeavour to designate information as BCI only if its disclosure would cause harm to the originators of the information.

2*bis* **"Designated Reading Room"** means a room, located on the premises of the WTO, where a Third Party BCI Approved Person may use to access Party's submission that contains Party-BCI.

3. **"Conclusion of the Panel Process"** means the earliest to occur of the following events:

(a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the report;

(b) a Party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU;

(c) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; or

(d) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB.

4. **"Designated as BCI"** means:

(a) for printed information, text that is set off with bold square brackets in a document clearly marked with the notation 'BUSINESS CONFIDENTIAL INFORMATION' and with the name of the Party or Third Party that submitted the information;

(b) for electronic information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation 'BUSINESS CONFIDENTIAL INFORMATION', has a file name that contains the letters "BCI", and is stored on a storage medium with a label marked 'BUSINESS CONFIDENTIAL INFORMATION' and indicating the name of the Party or Third Party that submitted the information; and

(c) for uttered information, declared by the speaker to be "Business Confidential Information" prior to utterance.[1]

(d) The above provisions shall apply to all submissions, including exhibits, by a Party or Third Party.

5. **"Designated as HSBI"** means:

(a) for electronic information, in characters that are set off with double bolded square brackets (or a heading with double bolded square brackets on each page) in an electronic file that contains the notation 'HIGHLY SENSITIVE BUSINESS INFORMATION', has a file name that contains the letters "HSBI", and is stored on a storage medium with a label marked 'HIGHLY SENSITIVE BUSINESS INFORMATION' and indicating the name of the Party or Third Party that submitted the information; and

(b) for uttered information, declared by the speaker to be "Highly Sensitive Business Information" prior to utterance.[2]

(c) The above provisions shall apply to all submissions, including exhibits, by a Party or Third Party.

[1] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the BCI in question.

[2] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the HSBI in question.

BCI deleted, as indicated **[***]**

6. **"Electronic information"** means any information stored in an electronic form (including but not limited to binary-encoded information).

7. **"Employee of the Secretariat"** means a person employed or appointed by the Secretariat who has been authorized by the Secretariat to work on the dispute, and includes translators and interpreters as well as any transcribers present at Panel meetings involving BCI and/or HSBI.

8. **"Facilitator"** means the person designated by the DSB for the purpose of the DS316 dispute in accordance with paragraph 4 of Annex V of the SCM Agreement.

9. **"Highly Sensitive Business Information"** or **"HSBI"** means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause exceptional harm to its originators. Each Party and Third Party shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party and Third Party may at any time designate as non-BCI/HSBI or as BCI information designated by that Party or Third Party as HSBI.

(a) The following categories of information may be Designated as HSBI:

(i) information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[3], and, except as provided in subparagraph (d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

(ii) information gathered or produced in the context of LCA sales campaigns;

(iii) information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, investment banks or the European Investment Bank, with regard to LCA products; or

(iv) information concerning an LCA manufacturer's costs of production, including but not limited to data regarding pricing by suppliers.

(b) Each Party and Third Party may also designate as HSBI other categories of business information that is not otherwise available in the public domain and the disclosure of which could, in the Party's view, cause exceptional harm to its originators.

[3] This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

(c) Each Party and Third Party shall Designate as HSBI any information described in subparagraph (a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of either of the Parties.

(d) The following categories of information may not be Designated as HSBI:

(i) aggregated pricing data for a particular LCA model or family of LCA within a particular market that is indexed (i.e., does not reflect actual prices but rather movements in prices off a base of 100 for a particular year). Such data shall be treated as BCI;

(ii) general legal conclusions based on HSBI (e.g., that HSBI demonstrates that a producer engaged in price undercutting). Such conclusions shall be treated as neither BCI nor HSBI;

(iii) contracts on the granting of launch aid or reimbursable launch investment and project appraisal documents relating thereto, other than information described in subparagraph (a);

(iv) the terms and conditions of loans, other than information described in subparagraph (a); and

(v) intergovernmental agreements and government decisions, other than information described in subparagraph (a).

(e) Information may not be Designated as HSBI simply because it is subject to bank secrecy or banker-client confidentiality.

(f) Except for BCI and HSBI submitted during the information-gathering process under Annex V of the SCM Agreement and transmitted by the Facilitator as part of his report to the Panel BCI or HSBI, in case either Party objects to the designation of information as HSBI under paragraphs 9(a)-(e), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as HSBI, the submitting Party or Third Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. The Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party or Third Party as HSBI.

10. **"HSBI Approved Person"** means Approved Persons specifically designated by the Parties, the Panel or the Director-General of the WTO or his designee as having the right to access HSBI (according to the procedures laid down in Section IV), as well as the Panel members.

11. **"HSBI location"** means a room to be kept locked when not occupied and the access to which shall be possible only for HSBI Approved Persons, located:

(a) for the HSBI submitted by the United States, the European Communities, and any Third Parties, on the premises of the WTO (Centre William Rappard, Rue de Lausanne 154, Geneva, Switzerland);

(b) for HSBI submitted by the United States, on the premises of the United States Mission to the European Union in Brussels;

(c) for HSBI submitted by the European Communities, on the premises of the Delegation of the European Commission to the United States in Washington;

(d) for HSBI submitted by a Third Party, on the premises of its Geneva Mission to the WTO, should that Third Party so wish.

12. **"Locked CD"** means a CD-ROM that is not rewritable.

13. **"Outside Advisor"** means a legal counsel or other advisor of a Party or Third Party, who:

(a) advises a Party or Third Party in the course of the dispute;

(b) is not an employee, officer or agent of an entity or an affiliate of an entity engaged in the manufacture of LCA, the provision of supplies to an entity engaged in the manufacture of LCA, or the supply of air transportation services; and

(c) is subject to an enforceable code of professional conduct that includes an obligation to protect confidential information, or has been retained by another outside advisor who assumes responsibility for compliance with these procedures and is subject to such a code of professional conduct.

For purposes of this paragraph, outside legal counsel representing an LCA producer headquartered in the territory of one of the Parties or Third Parties in connection with these proceedings or outside consultants who have been retained by such counsel to provide advice with regard to these proceedings are not considered agents of an entity listed in subparagraph (b).

14. "**Panel**" means the DS316 Panel composed on 17 October 2005.

15. **"Party"** means the European Communities or the United States.

15*bis* "**Party-BCI**" means BCI originally submitted by a Party.

16. **"Representative"** means an employee of a Party or Third Party.

17. **"Sealed laptop computer"** means a laptop computer having (software and hardware) characteristics considered necessary by the submitting Party for protection of that HSBI, provided that it has software installed that permits such HSBI to be searched and printed in accordance with paragraph 44. However, HSBI may not be edited on the sealed laptop computer.

18. **"Secure site"** means a facility to be kept locked when not occupied and the access to which shall be possible only for Approved Persons, located:

(a) in the case of the Panel, the Facilitator, PGE members or experts appointed by the Panel in accordance with paragraph 1(d), and the Secretariat, on the premises of the WTO (Centre William Rappard, Rue de Lausanne 154, Geneva, Switzerland);

(b) in the case of the European Communities, the offices of External Relations Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Delegation of

the European Communities to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and three additional sites specified in accordance with subparagraph (d);

(c) in the case of the United States, the offices of the General Counsel of the Office of the United States Trade Representative (600 17th Street, NW, Washington, DC, USA), the offices of the Import Administration, United States Department of Commerce (600 17th Street, NW, Washington, DC, USA), the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and three additional sites specified in accordance with subparagraph (d); and

(d) three sites other than a government office that are designated by each Party for use by its Outside Advisors; provided that the identity of those sites has been submitted to the other Party and the Panel, and the other Party has not objected to the designation of that site within ten days of such submission.

(e) Any objections raised under subparagraph (d) may be resolved by the Panel.

19. **"Stand-alone computer"** means a computer that is not connected to a network.

20. **"Stand-alone printer"** means a printer that is not connected to a network.

20*bis* "Submission" means any written, electronic, or uttered information transmitted to the Panel, including but not limited to, correspondence, written submissions, exhibits, oral statements, and answers to questions.

21. **"Third party"** means a Member having notified its interest in the dispute to the DSB pursuant to DSU Article 10.

22. **"Third Party BCI Approved Person"** means a representative or Outside Advisor of a third party granted access to BCI pursuant to paragraphs 27, 34, 34*bis* and 39*bis*.

III. SCOPE

23. These procedures apply to all BCI and HSBI received by an Approved Person as a result of the Annex V procedures and/or the Panel process and to all BCI reviewed, in accordance with these procedures, by a Third Party BCI Approved Person. As soon as the Facilitator transfers the BCI and HSBI to the Panel as envisaged in his 24 February transmittal letter accompanying his Annex V report to the Panel and Approved Persons are designated in accordance with paragraph 30, these procedures shall supersede the BCI/HSBI Procedures adopted by the Facilitator.

24. Unless specifically otherwise provided herein, these procedures do not apply to a Party's or Third Party's treatment of its own BCI and HSBI.

25. The Panel is aware that the European Communities may need to submit information that it internally classifies as "EU Top Secret", "EU Secret" or "EU Confidential". The Panel will to the extent possible implement procedures for the protection of such classified information in the event that either Party informs the Secretariat that it will be submitting such classified information and has not already designated it as BCI or HSBI. In such cases, the submitting Party shall propose appropriate procedures for the protection of such classified information.

BCI deleted, as indicated **[***]**

IV. DESIGNATION OF APPROVED PERSONS

26. At the latest on 23 October 2006, each Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and/or Third Parties and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and/or Third Parties and whom it wishes to have designated as HSBI Approved Persons.

27. There shall be no Third Party HSBI Approved Persons. The designation of Third Party BCI Approved Persons shall be governed by paragraphs 34 and 34*bis*.

28. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a total of 30 Representatives and 20 Outside Advisors as "HSBI Approved Persons".

29. The Panel Members, the Facilitator, any PGE members or experts appointed by the Panel in accordance with paragraph 1(d) shall have access to BCI and HSBI. The Director-General of the WTO, or his designee, shall submit to the Parties and Third Parties, and the Panel, a list of the employees of the Secretariat who need access to BCI and/or HSBI.

30. Unless a Party objects to the designation of an Outside Advisor of the other Party or an Employee of the Secretariat, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraphs 26 or 29 that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days.

31. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

32. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 28 and to objections for the addition of new Approved Persons in accordance with paragraph 31.

V. BCI

33. Only Approved Persons and Third Party BCI Approved Persons may have access to BCI submitted in this proceeding. Third Party BCI Approved Persons may not have access to Party-BCI other than that included in the submissions. Approved Persons and Third Party BCI Approved Persons shall use BCI only for the purposes of this dispute. No Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person or Third Party BCI Approved Person. No Third Party BCI Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person or Third Party BCI Approved Person.

34. Each Third Party that wants to access Party-BCI contained in the first submission of a Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors (including clerical or support staff) who need access to such BCI and whom it wishes to have designated as Approved Persons. Each Third Party shall keep the number of Approved Persons as limited as possible. Each Third Party may designate no more than a total of 5 Representatives and Outside Advisors as Approved Persons.

BCI deleted, as indicated **[***]**

34*bis*. Unless a Party objects to the designation of an Outside Advisor of a Third Party, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 34 above that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

35. A Party shall make no more than one copy of any BCI submitted by the other Party or a Third Party for each Secure site provided for that Party in paragraph 18.

36. Parties may incorporate BCI in internal memoranda for the exclusive use of Approved Persons. Any memorandum and the BCI it contains shall be marked in accordance with paragraph 4.

37. BCI submitted pursuant to these procedures shall not be copied, distributed, or removed from the Secure site, except as necessary for submission to the Panel.

38. The treatment in a Party's submissions to the Panel of any BCI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to BCI.

(a) Parties may incorporate BCI in submissions to the Panel, marked as indicated in paragraph 4. In exceptional cases, parties may include BCI in an appendix to a submission.

(b) A Party submitting a submission or appendix containing BCI shall also submit, within a time period to be set by the Panel, a version redacting any BCI. This shall be referred to as the "Non-BCI Version". However, a Party is not required to submit a "Non-BCI Version" of any exhibit containing BCI, unless specifically directed to do so by the Panel;

(c) A Non-BCI Version shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Non-BCI Version:

(i) A Party may request the Party that originally submitted the BCI, as soon as possible, to indicate with precision portions of documents containing BCI that may be included in the non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

(ii) Upon receipt of such a request, the Party that originally submitted the BCI shall, as soon as possible, indicate with precision portions of documents containing BCI that may be included in the Non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

(iii) The Panel shall resolve any disagreement as to whether the Party that originally submitted the BCI failed to indicate with sufficient precision portions of documents containing BCI that may be included in the Non-BCI Version and to produce, if necessary, a Non-BCI summary in sufficient detail

to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

(d) The responding Party may designate the personal offices of up to four of its Approved Persons as additional Secure sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' submissions to the Panel. All of the protections applicable to BCI under these procedures, including the storage rules in Paragraph 41, shall apply to such submissions. BCI exhibits to submissions may not be stored or reviewed at these additional Secure sites. The responding Party shall submit the address (including room number) of each of the additional Secure sites to the Panel and the complaining Party.

39. Any document containing BCI shall not be copied in excess of the number of copies required by the Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible. Such documents may be transmitted electronically only by using secure e-mail. If a Party or Third Party submits to the Panel an original document that cannot be transmitted electronically, it shall on the day of submission deliver a copy of that document to the first secure site listed for the Parties/Third Parties in paragraph 18.

39*bis* Notwithstanding paragraph 19 of the Working Procedures[4], the following procedures apply to the access by Third Parties to a Party's submission that contains Party-BCI.

(a) A Party's Submission containing Party-BCI shall not be serviced to Third Parties unless both Parties agree otherwise.

(b) Third Party Approved Persons may view Party-BCI contained in a Party's first written submission only in a Designated Reading Room. Third Party BCI Approved Person may not bring into that room any electronic recording or transmitting devices. Third Party BCI Approved Person may not remove a Party's Submission containing Party-BCI from that room, but may take handwritten notes of the Party-BCI contained therein. Such notes shall be used exclusively for this dispute (that is, DS316). Each person viewing a Party's Submission containing Party-BCI shall complete and sign a log identifying the submission the person reviewed. The WTO Secretariat shall maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving the room, Outside Advisors who are Third Party BCI Approved Persons may be subject to appropriate controls.

(c) If a Third Party BCI Approved Person removes from the Designated Reading Room a handwritten memo in accordance with subparagraph (b) above, that Third Party BCI Approved Person shall store the memo only in a locked security container. Such memo shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. The content of such memo shall not be incorporated, electronically or in handwritten form, into the Non-BCI Version, as defined in paragraph 38(b).

(d) All Third Parties that have designated Third Party BCI Approved Persons must inform the Panel and both Parties the identity of the specific room (including the

[4] Concerning service of documents.

address and the room number) in which the locked security container, as referred to in subparagraph (c) above, is located.

(e) If a Third Party BCI Approved Person removes from the Designated Reading Room a handwritten memo in accordance with subparagraph (b) above, such memo shall not be copied in excess of the number of copies required by the Third Party BCI Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies of such memo shall be prohibited.

(f) A Third Party may not incorporate into the body of its submission any Party-BCI. If a Third Party wishes to refer to any Party-BCI , the relevant arguments including such BCI should be incorporated into a separate Appendix. Such Appendix shall not be serviced to other Third Parties.

(g) On the date determined by the Panel as the deadline to make the Third Party submission, a Third Party shall service its submission only to the Parties and to the Panel. The submission shall be serviced to the other Third Parties only after the Parties have confirmed that the submission does not contain or disclose Party-BCI. A Party shall make this confirmation or otherwise advise of any necessary change to the relevant Third Party within 2 working days of receiving the submissions of Third Parties.

40. A Party or Third Party that wishes to submit or refer to BCI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not Approved Persons or, as appropriate, Third Party BCI Approved Persons from the meeting for the duration of the submission and discussion of BCI.

41. Approved Persons shall store BCI only in locked security containers. BCI shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. All work papers (*e.g.*, draft submissions, worksheets, etc.) containing BCI shall, when no longer needed, be shredded or burned consistent with normal government practice for destroying sensitive documents.

42. The Panel shall not disclose BCI in its report, but may make statements or draw conclusions that are based on the information drawn from the BCI.

VI. HSBI

43. Unless otherwise provided below, HSBI shall be subject to all the restrictions in Section V applicable to BCI.

44. HSBI shall be submitted to the WTO in electronic form, using locked CDs or two Sealed laptop computers connectable to 19" - 21" monitors. HSBI shall be stored at the HSBI location indicated in paragraph 11(a) and shall be made available for viewing and use by HSBI Approved Persons pursuant to paragraph 47 below. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO for access by HSBI Approved Persons acting on behalf of the other Party in the HSBI location listed in paragraph 11 located within the other Party's territory. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

BCI deleted, as indicated **[***]**

45. If a Third Party submits HSBI, it shall notify the Parties of the fact that such submission has been made.

46. Except as otherwise provided in these procedures, HSBI shall not be stored, transmitted or copied either in written or electronic form.

47. HSBI Approved Persons of a Party may view HSBI on the Sealed laptop computer submitted by the other Party /a Third Party or, in the case of HSBI submitted on Locked CDs on a Stand-alone computer, only in a designated room at one of the HSBI locations indicated in paragraph 11, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI location, except at the location indicated in paragraph 11(a) where the room will be available at any time, including weekends, to the Panel, the Facilitator and the PGE members or experts appointed by the Panel in accordance with paragraph 1(d), and to HSBI Approved Persons designated by the Director-General of the WTO or his designee. HSBI Approved Persons may not bring into that room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from that room, except in the form of handwritten notes or aggregated information generated on a Stand-alone computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI location shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI location within its territory referenced in paragraph 11, maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving the room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls. Viewing of HSBI at the location indicated in paragraph 11(a) by HSBI Approved Persons designated by the Parties shall be conducted under the observation of a WTO security guard or employee.

48. No Approved Person shall disclose HSBI to any person except another HSBI Approved Person, and then only for the purpose of this dispute.

49. HSBI may be processed only on Stand-alone computers. Any memorandum containing HSBI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

50. A Party or Third Party that wishes to submit or refer to HSBI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not HSBI Approved Persons from the meeting for the duration of the submission and discussion of HSBI.

51. All HSBI shall be stored in a safe at the relevant HSBI location.

52. The treatment in a Party's submissions to the Panel of any HSBI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to HSBI.

(a) HSBI may be incorporated into a separate appendix to, but not the body of, a Party's submission, which appendix shall be comprehensible in itself. The document containing the HSBI shall be referred to as the "Full HSBI Version Appendix" ;

(b) A Party submitting an appendix containing HSBI shall also submit, within a time period to be set by the Panel, a version redacting any HSBI. This shall be referred to as the "Redacted Version Appendix";

BCI deleted, as indicated **[***]**

(c) At the request of a Party, information contained in the Redacted Version Appendix may be treated as BCI, in accordance with the provisions of Section V;

(d) A Redacted Version Appendix shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Redacted Version Appendix:

(i) A Party may request that the Party that originally submitted the HSBI, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

(ii) Upon receipt of such a request, the Party that originally submitted the HSBI shall, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

(iii) The Panel shall resolve any disagreement as to whether the Party that originally submitted the HSBI failed to indicate with sufficient precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and to produce, if necessary, a non-HSBI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

(e) The Full HSBI Version Appendix shall be kept in an HSBI Location in the form of a locked CD. If that is not practical, the Party may keep it in a locked security container in a Secure Site in the form of a locked CD.

(f) The locked CD containing the Full HSBI Version Appendix shall bear the label marked 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION' and indicate the name of the Party that submitted the HSBI. In addition, the HSBI Appendix itself shall be marked with heading with double bolded square brackets on each page in an electronic file that contains the notation 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION'. The electronic file containing the HSBI Appendix shall have a file name that contains the letters "HSBI VERSION".

(g) The Party shall submit one copy of the Full HSBI Version Appendix to the Panel (c/o the DS Registry), and two copies to the other Party in the form of two locked CDs. The Full HSBI Version Appendix shall not be transmitted via e-mail. Parties shall agree between themselves beforehand on the name of the Approved Person that is to receive the locked CD.

(h) The Party shall commence transfer of the locked CDs containing the Full HSBI Version Appendix no later than the deadline for the submission concerned, and, at the same time, provide the Panel and the other Party with proof that this has been done.

BCI deleted, as indicated **[***]**

(i) No more than one working day in advance of a Panel meeting with the parties, a Party may, exclusively at that Party's Permanent Mission in Geneva, use the locked CD to produce no more than one hard copy of the Full HSBI Version Appendix for each HSBI Approved Person planning to attend that Panel meeting.

(j) Panelists, the Facilitator and the PGE members or experts appointed by the Panel in accordance with paragraph 1(d) and HSBI Approved Persons designated by the Director-General of the WTO or his designee may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, a Panel meeting with the parties and/or an internal meeting.

(k) Any hard copy of an Full HSBI Version shall be destroyed immediately upon the conclusion of a Panel meeting with the parties and/or an internal meeting.

(k*bis*) Parties are encouraged to submit versions of exhibits containing HSBI from which all HSBI has been deleted. Such exhibits shall be referred to as "HSBI-Redacted Version Exhibits". HSBI-Redacted Version Exhibits may contain BCI.

(i) A Party may submit HSBI-Redacted Version Exhibits prepared by that Party to the Panel, and serve them on the other Party in accordance with the applicable procedures, at the time it serves the submission to which the exhibit relates.

(ii) If a HSBI-Redacted Version Exhibit is not submitted by the Party submitting the exhibit, an HSBI-Approved Person representing the other Party may prepare an HSBI-Redacted Version Exhibit of any such exhibit.

(iii) HSBI-Redacted Version Exhibits may be prepared by an HSBI-Approved person, at an HSBI location, by deleting the HSBI in the exhibit (identified by double brackets) from such exhibit and either printing or photo-copying the resulting document containing no HSBI. The deletion of HSBI from the resulting document shall be verified by a person authorized for this purpose by the Party that submitted the exhibit(s) in question. The resulting document containing no HSBI (but which may contain BCI) will constitute the HSBI-Redacted Version Exhibit of such exhibit, and may be removed from the HSBI location.

(iv) The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI-Approved Person for purposes of the verification provided for in paragraph (iii) above. HSBI-Redacted Version Exhibits may be prepared by HSBI-Approved Persons upon request during the times the designated room at the relevant HSBI location is available, as provided for in paragraph 47 of these Procedures.

(v) The Panel shall resolve any disagreement arising from the operation of this sub-paragraph, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

(l) The Panel reserves the right, after consulting the parties, to amend the provisions of this paragraph at any time in order to accommodate situations arising during Panel meetings, and the preparation of the interim report and the final report.

53. The Panel shall not disclose HSBI in its report, but may make statements or draw conclusions that are based on the information drawn from the HSBI.

VII. RESPONSIBILITY FOR COMPLIANCE

54. Each Party and Third Party is responsible for ensuring that its Approved Persons and Third Party BCI Approved Persons comply with these procedures to protect BCI and HSBI submitted by each Party and Third Party, as well as with enforceable codes of professional conduct to which its approved persons or other outside advisors are subject. The Secretariat is responsible for ensuring that its employees comply with these procedures to protect BCI and HSBI submitted by a Party or Third Party and for adhering to the requirements to provide access in the WTO to Approved Persons and to control the use by HSBI Approved Persons when reviewing the material in the WTO premises. The Panel shall comply with these procedures to protect BCI and HSBI submitted by a Party or Third Party.

VIII. ADDITIONAL PROCEDURES

55. After consulting with the Parties, the Panel may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures.

56. The Panel may, with the consent of both Parties, waive any part of these procedures. Such "waiver" shall be specifically set forth in writing and signed by a representative of both Parties.

IX. RETURN AND DESTRUCTION

57. After the Conclusion of the Panel Process as defined in paragraphs 3(a), 3(c) or 3(d), within a period fixed by the Panel, the Panel, any PGE members or experts appointed by the Panel, the Facilitator, the Secretariat, the Parties and Third Parties (along with all Approved Persons) shall destroy or return all documents (including electronic material) or other recordings containing BCI to the Party or Third Party that submitted such documents or other recordings. The Panel, Secretariat and Parties shall destroy and/or return any electronic material submitted by a Party or Third Party that contains HSBI.

58. After the Conclusion of the Panel Process as defined in paragraph 3(b), the Panel will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible.

59. The hard drive of all Stand-alone computers and all media used to back up such computers shall be destroyed at the Conclusion of the Panel Process.

BCI deleted, as indicated **[***]**

ANNEX F

SELECTED RULINGS OF THE PANEL CONCERNING BCI/HSBI PROCEDURES AND THEIR APPLICATION

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BCI deleted, as indicated **[***]**

ANNEX F-1

COMMUNICATION OF 13 MARCH 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. Having considered the United States' comments on the proposed non-BCI version of the European Communities' first written submission, and the EC's response, the Panel has reached certain decisions on this issue, and on certain other matters concerning the application of the Panel's BCI/HSBI Procedures in this dispute. Because the Panel recognizes the importance of clarifying issues relating to these Procedures as soon as possible, it has decided to issue a ruling on the issue of designation of BCI in the EC's first written submission, and certain other matters, at this time. The Panel is still considering other issues before it, including issues relating to the designation of HSBI in the EC's first written submission, and will address these issues as soon as possible.

2. Before turning to the resolution of the issue of designation of BCI in the EC's first written submission, the Panel observes, as a general matter, that the Panel's BCI/HSBI Procedures are designed to protect specific *information*, not entire submissions or other documents. It is for this reason that paragraph 4 of the BCI/HSBI Procedures requires that the specific information designated as BCI/HSBI be set off within brackets (single or double, as appropriate) within any given printed or electronic document. This general understanding of the meaning of BCI and HSBI has implications with respect to the manner in which the BCI/HSBI Procedures are to be applied.

(a) First, the Panel would like to clarify that the Parties are not to present entire submissions or exhibits categorized as BCI or HSBI, but rather are to specifically identify, through the use of brackets as provided for in paragraph 4, the information *within* those submissions or exhibits they consider should be so designated. We note, for example, that the EC did not, in its letter dated 6 March submitted as "BCI version", specifically identify through the use of brackets *any* specific information as BCI. If a Party considers that a submission or exhibit contains BCI it **must** identify that information through the use of brackets as envisaged by paragraph 4.

(b) Second, the Panel does not consider that "opinions" or "positions" may be designated as BCI or HSBI merely because those opinions or positions were expressed in relation to BCI or HSBI.[1] This is clear from the BCI/HSBI Procedures themselves, which specifically envision that "the Panel may make statements or draw conclusions that are based on the information drawn from" the BCI or HSBI (paras. 42 and 53), and further require that a Party provide on request a non-BCI or non-HSBI summary of BCI or HSBI sufficient to permit a reasonable understanding of the substance of the information (paras. 38(c)(i) and 52(d)(ii)). Of course, the Parties must exercise caution to ensure that the "opinions" or "positions" drawn from the BCI or HSBI do not reveal any specific BCI or HSBI information. This line may be a difficult one to draw in some cases, but this does not justify a blanket approach to designating such "positions or "opinions" as BCI or HSBI in their entirety.

(c) Third, the BCI/HSBI Procedures clearly state that information can be treated as BCI or HSBI only if it is "not otherwise in the public domain" (paras. 2 and 9). The fact

[1] It should be evident from the foregoing that the Panel does not accept the view of the EC that personal opinions may in and of themselves be BCI or HSBI merely because those *opinions* are not in the public domain.

that information is also found in "BCI **[**or HSBI**]** documents" does not mean that such information can be treated as BCI or HSBI if it is demonstrably and unambiguously available in the public domain. The relevant question for designation of information as BCI or HSBI is not the source of the information *per se*. The Panel notes that the decision whether information is demonstrably and unambiguously available in the public domain may be difficult. Thus, the Panel has erred on the side of caution in resolving the specific objections at this point, where it has been unable to satisfy itself on the basis of available information. The Panel may revisit these objections in the future.

(d) Fourth, the Panel notes the EC's concern for the protection of Boeing documents and its designation of such documents as BCI or HSBI. The Panel considers, however, that the standard for determining whether such information is BCI or HSBI relates to the possibility of harm to the "originator" of the information, which in this case is Boeing, in the event of disclosure. In our view, the originator of a document is entitled, through its government, to waive BCI or HSBI status where it believes that disclosure of the information would not cause the requisite harm, or where it is prepared to accept such harm. The Panel doubts that it would be consistent with fundamental fairness for it to rely on documents originated by a stakeholder where that stakeholder was unaware that those documents were even before the Panel because they were designated as BCI or HSBI by the other party.

(e) Fifth, with respect to titles of exhibits, the Panel emphasizes its view that it is not documents themselves, much less the very existence of such documents, which may be designated as BCI or HSBI, but information within those documents. In this light, the Panel does not believe it appropriate, as a general matter, to bracket the titles of exhibits as BCI and HSBI in their entirety. If, as an exceptional matter, the title itself contains specific information that a Party considers to be BCI or HSBI, the Panel requests that the Party identify the document with a non-BCI/HSBI title that permits a reasonable understanding of the nature of the exhibit in question.

(f) Finally, the Panel notes that the EC has indicated, in numerous instances, its willingness to re-designate certain information as non-BCI. The Panel has accepted such re-designations as resolving the US objection with respect to the information in question and appreciates the cooperative spirit shown by the EC in this respect.

The Panel has applied these general principles in resolving the specific objections raised by the US regarding designation of BCI in the EC's first written submission. The Panel's specific decisions are set out in the attached annex, which contains BCI. The annex also indicates those instances where the Panel has accepted the EC's proposed re-designation of information as non-BCI. The Panel directs the EC to prepare a revised version of its first written submission, reflecting the Panel's decisions and the re-designations proposed by the EC and accepted by the Panel, and submit it to the Panel, and serve the United States, no later than close of business **Thursday 15 March 2007**.

3. Turning to other issues, the Panel notes the United States' concern regarding the EC's decision to provide HSBI in the body of its submission rather than as a separate stand-alone Appendix. The EC disputes the US understanding that such a stand-alone document is required[2], but indicates its willingness to provide an Appendix consisting of the full text of the paragraphs and footnotes of the

[2] The Panel notes, however, that the EC itself stated when explaining the proposed language for the provision that corresponds to the current paragraph 52 "the suggested language clarifies that *HSBI must be provided separately from other parts of the written submission which allows the separate treatment of this part of the written submission as required by the rules pertaining to HSBI*." "Note 14" in EC letter of 29 September 2006. (Emphasis added.)

BCI deleted, as indicated **[***]**

EC's first written submission in which information designated as HSBI appears. While the Panel does not consider that such an Appendix fully satisfies the requirement for a "Full HSBI Version Appendix" envisaged in paragraph 52(b) of the BCI/HSBI Procedures, it considers the EC's proposal to be a reasonable effort to address the issue identified by the United States with respect to the first written submission. The Panel therefore requests that the EC prepare such an Appendix in respect of its first submission by close of business **Thursday 15 March 2007**, in order to facilitate the first meeting of the Panel.[3]

4. The Panel further requests that the Parties prepare an appropriate "Full HSBI Version Appendix" in respect of all future submissions to the Panel that contain HSBI, as envisaged by the BCI/HSBI Procedures. In the view of the Panel, such an Appendix must be a readable document in its own, and not simply a compilation of paragraphs containing HSBI.[4]

5. With regard to the treatment of the HSBI exhibits that accompanied the EC's first written submission[5], the Panel realizes that there is certain ambiguity in the BCI/HSBI Procedures.[6] However, given the fact that the US has provided an electronic copy of its HSBI Exhibit in CD form,[7] the Panel considers it fair to request the EC to submit the HSBI exhibits in locked CD form, by close of business on **Thursday 15 March 2007**. The Panel draws the attention of the EC to the fact that it must serve this CD in accordance with paragraph 52(g) of the BCI/HSBI Procedures.

6. The Panel notes the US request that the Panel "permit the United States to produce one paper copy of the 'HSBI version' of the EC's written submission for each of its three secure sites".[8] As this would be a major deviation from the carefully negotiated provisions of the BCI/HSBI Procedures, the Panel declines to grant this request.

7. The Panel recognizes that the application of the BCI/HSBI Procedures implies a significant burden on the Parties (and on the Panel), but the Parties were well aware that this would be the case when they sought such procedures. The Panel considers it essential that these Procedures be implemented in a manner that protects the legitimate rights of defence of both Parties, and that allows the Panel to perform its work and to explain its ultimate decision in a comprehensible manner. If these Procedures prove inadequate as implemented, the Panel could be forced to re-examine them. The Panel further notes that the efficiency of these Procedures at the panel level may influence the views of the Appellate Body with respect to how to treat information in the event of an appeal. It is therefore important that the Parties work together in a cooperative spirit to maintain the credibility of these Procedures.

[3] Given that the issue of the designation of HSBI is unlikely to be resolved in advance of the Panel's first meeting, the Panel requests that the EC prepare an interim version of this Appendix on the basis of existing designations.

[4] Parties have already confirmed this understanding. See letters from the US and from EC dated 17 October 2006.

[5] As requested by the US in section C of its 28 February letter.

[6] For example, the Panel notes that BCI exhibits are not part of the record to which Third Parties BCI Approved Persons are granted access.

[7] The Panel notes that the EC did not object to such treatment of an HSBI exhibit.

[8] Cover letter of the US dated 28 February.

BCI deleted, as indicated **[***]**

ANNEX

SPECIFIC ISSUES RAISED BY THE US REGARDING DESIGNATION OF BCI IN THE EC'S FIRST WRITTEN SUBMISSION

No. of paragraph	CONTENT	DECISION OF THE PANEL
120	A summary of the European Communities' perception on the United States' compliance with Article 5 was communicated by Sir Leon Brittan, the then Commissioner for Trade, to his counterpart in 1997: **[***.[9]]**	The Panel accepts the EC re-designation.
121	In her response, Mrs. Barshevsky put forward the following view: **[***[10]]**	The Panel accepts the EC re-designation.
321	The amount of the levy **[***]**. This **[***]** reflects the fact that the effect of a manufacturer's learning curve for an aircraft reduces production costs and, thereby, increases cash on hand.[11]	The Panel sustains the US objection.
322	After MSF debt and interest are repaid in full, AMs/NatCos may be required to **[***]** for subsequent aircraft deliveries. The **[***]** is calculated either as **[***[12]] [***]** may significantly enhance an MSF creditor's return on its investment.	With respect to information in the first and fourth sets of brackets, the Panel accepts the EC re-designation. With respect to information in the second set of brackets, the Panel sustains the US objection.
336	The French government also provided **[***]** in MSF loans to support the development of the A340-500/600.[13]	The Panel is not prepared to rule on this objection at this time.
337	Likewise, the Spanish government provided **[***]** in loans for the A340-500/600 variant.	The Panel is not prepared to rule on this objection at this time.
339	To protect governments from unfavourable changes in interest rates, repayment obligations for the A380 are generally tied to variable, as opposed to fixed, rates of return. The loan amounts were **[***]**	The Panel is not prepared to rule on this objection at this time.
364	-	The Panel accepts the EC re-designation.
365	-	The Panel accepts the EC re-designation.

[9] **[***]**.
[10] **[***]**.
[11] **[***]**.
[12] **[***]**.
[13] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
366	-	The Panel accepts the EC re-designation.
369 and notes 280-284	-	The Panel accepts the EC re-designation.
370	-	The Panel accepts the EC re-designation.
371	-	The Panel accepts the EC re-designation.
372	-	The Panel accepts the EC re-designation.
note 284	Sondergutachten der Monopolkommission, at p. 71, Table 11, table entry "davon bis Ende 1988 ausbezahlt" for the A320 (Exhibit US-30). The US itself notes the fact that disbursement had reached the level of **[***]** already in 1988 (US first written submission, p. 51, note 194).	The Panel accepts the EC re-designation.
377	The Spanish commitments for the A330/A340 reached the level of **[***]**.	The Panel accepts the EC re-designation. The Panel understands that the US is not objecting to other BCI in this paragraph.
378	-	The Panel accepts the EC re-designation.
note 356	**(to para. 483, which reads:** *By way of background, the US approach correctly conceives of MSF as a form of debt financing. The Ellis report repeatedly refers to MSF as "launch aid debt" and "launch aid loans."*[14] *Consistent with this conception of MSF as debt, the first two steps of the Ellis model (*i.e.*, the risk-free rate and the premium for general corporate risk) rely entirely on bond yields.*[356]**)** **[***]**	The Panel sustains the US objection. The Panel requests that the EC re-designate all citations of the "Ellis Report" in all of the footnotes in its first submission as non-BCI.
508	Professor Whitelaw explains that Ellis overstates the cost of equity by employing incorrect assumptions. Professor Whitelaw **[***[15]]** Drawing on recent scholarship, Professor Whitelaw concludes that the risk premium would be no more than **[***[16]. ***[17]]**	The Panel sustains the US objection.

[14] **[[***]]**.
[15] **[[***]]**.
[16] **[[***]]**.
[17] **[[***]]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
509	In sum, the European Communities calculates the alternative benchmark rates by **[***]**. The European Communities notes that the Ellis report applies a fixed project-specific risk premium for all Airbus aircraft models.[18] The European Communities adopts the same approach.	The Panel sustains the US objection.
515	*Second*, recent scholarship confirms that the Ibbotson methodology substantially overstates the equity risk premium. Professor Whitelaw explains that many scholars have *rejected* the Ibbotson approach, which is based on historical (*ex post*) results that fail to reflect investor expectations *ex ante*. Instead, more recent studies show that the actual equity-based risk premium is between **[***]**. [19]	The Panel sustains the US objection.
595	The European Communities has provided the Panel with the measure. The United States alleges that there is an export contingent subsidy in the provisions of Article 7 of the measure that refer to payments on the **[***]** aircraft, and which provide as follows[20]: The repayment instalment per aircraft is defined as follows on the basis of the overall loan in the amount of **[***]**. It is for {...}:	The Panel is not prepared to rule on this objection at this time.
878	-	The Panel accepts the EC re-designation.
881	-	The Panel accepts the EC re-designation.
907	-	The Panel accepts the EC re-designation.
912	**[***[21]. ***]**. The development of the ZAC involved two types of works:	The Panel is not prepared to rule on this objection at this time.
917	Furthermore, **[***]**.	The Panel is not prepared to rule on this objection at this time.
929	*Second*, the findings of a commercial appraiser confirm that the price of the land purchased by Airbus France in the ZAC Aéroconstellation was consistent with market terms.[22] **[***]**.	The Panel sustains the US objection.
949	-	The Panel accepts the EC re-designation.

[18] **[***]**.
[19] **[[***]]**.
[20] **[***]**; US first written submission, paras. 321, 328, 347, 353 second bullet and footnote 415, 354, 357 and footnote 419, and 360.
[21] **[***]**.
[22] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
950	-	The Panel accepts the EC re-designation.
951	-	The Panel accepts the EC re-designation.
952	-	The Panel accepts the EC re-designation.
953	-	The Panel accepts the EC re-designation.
955	-	The Panel accepts the EC re-designation.
957	-	The Panel accepts the EC re-designation.
958	-	The Panel accepts the EC re-designation.
959	-	The Panel accepts the EC re-designation.
984 and 985	*{Footnotes omitted}* 984 The United States alleges that the Welsh Assembly Government (WAG) provided an *ad hoc* grant of **[***]** to Airbus UK in Broughton and seems to argue that for this reason the grant is specific. It bases its claim on an application for a grant that it admits Airbus UK did not receive. Airbus UK's request for a **[***]** grant under the "Regional Selective Assistance" (RSA) programme was rejected by the WAG in March 2000. The United States assumes, without any evidence, that the **[***]** granted in September 2000 was an *ad hoc* replacement for the failed RSA claim. 985 This claim is without foundation. In fact, the **[***]** was neither *ad hoc*, nor an RSA grant. Rather, it was made up of two grants of **[***]**, each made under other generally-available programmes and therefore non-specific within the meaning of Article 2 of the *SCM Agreement*. Indeed, the US allegation of specificity of the two grants is based entirely on its assumption that they were a direct substitute for the RSA grant. Since there was no RSA grant, the United States has not made a *prima facie* case of specificity. However, for the sake of completeness, the European Communities will demonstrate that the grants are non-specific.	(Para 984) The Panel accepts the EC re-designation. (Para 985) With respect to the first set of brackets, the Panel accepts the EC re-designation. With respect to the second set of brackets, the Panel sustains the US objection.
986	In 2000, the Welsh Assembly Government, through the North Wales Training and Enterprise Council (CELTEC), awarded **[***]** grant {...}.	The Panel sustains the US objection.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
994	Although the United States did not allege the contrary, the European Communities would like to (pre-emptively) add, that there was neither a *de facto* specificity under Article 2.1(c) of the *SCM Agreement.* During the period when the grant of **[***]** to Airbus UK was disbursed (FY 2000/2001 – FY 2005/2006), {...}.	The Panel sustains the US objection.
1036	The European Communities notes, first, that while the EIB established in 2002 a "credit" or "commitment" in favour of EADS in the amount of EUR 700 million, only EUR **[***]** was ever actually drawn by EADS and this took place in **[***]**. The other **[***]** commitment **[***]**.[23]	The Panel accepts the EC re-designation. The Panel understands that the US is not objecting to other BCI in this paragraph.
1041	-	The Panel accepts the EC re-designation.
1057	The United States ignores completely the fact that none of the 1988-1993 loans (outstanding or not[24]) was provided to the company that markets and produces LCA today (Airbus SAS). With regard to the outstanding loans, the **[***]** was granted to **[***]**, and the **[***]**[25]. The United States has not explained how any benefit allegedly conferred by these loans has passed through to Airbus SAS in such a manner as to cause the types of present adverse effects to US LCA-related interests alleged by the United States in these proceedings.	The Panel sustains the US objection with respect to the phrase "**[***]**" and denies the remainder of the US objection.
1092	EADS **[***]**.	The Panel sustains the US objection except with respect to the phrase "**[***]**", with respect to which the Panel denies the US objection.
1098	**[***]**.[26]	The Panel sustains the US objection.
1099	**[***.[27]]**	The Panel sustains the US objection, except with respect to the phrase "**[***]**", with respect to which the Panel denies the US objection.

[23] **[***]**.

[24] See also the discussion above where the EC explains that except for the **[***]**, none of the 1988-1993 loans is still outstanding.

[25] **[***]**.

[26] Daily Treasury Yield Curve Rates from http://www.ustreas.gov/offices/domestic-finance/debt-management/interest-rate/yield_historical_2004.shtml

[27] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
1103	Finally, the European Communities notes that with regard to the **[***]** loan, {...}.	The Panel sustains the US objection.
1184	These claims consisted of: **[***;[28] ***]**.	The Panel is not prepared to rule on this objection at this time.
1399	-	The Panel accepts the EC re-designation.
1404	Both Boeing and Airbus, along with market analysts, use the respective manufacturer's current year order book to evaluate the competitive position of Airbus and Boeing. Christian Scherer, Airbus Executive Vice President Head of Future Programs and former Deputy Head of Airbus' commercial department, notes that **[***[29]]** Also, Boeing uses order data to demonstrate the success and "market share" of, *inter alia*, its 787, 777 and 747 families. This is reflected in the Boeing marketing slide below[30]:	The Panel sustains the US objection.
1406	Orders are important for the manufacturer because the terms and conditions of the purchase are set at the time of order. Aircraft specification, net price, discounts, non-price concessions and financing arrangements involving the manufacturer are all agreed upon when an airline or leasing company signs a purchase agreement. **[***[31]] [***[32]]**. Finally, the order intake determines the amount of future deliveries.[33]	The Panel sustains the US objection.
1416	Airlines and leasing companies often decide to order a certain aircraft model without considering the competitor's equivalent product. An airline may choose not to initiate a bidding process between the two manufacturers **[***.[34] ***:]** **[***. ***]**[35].	The Panel sustains the US objection.
1418	There are also situations in which one manufacturer cannot compete for lack of having a product that can fulfil the customer's requirements. For example, if a customer needs a 555-seat aircraft, Airbus can offer its A380, yet Boeing cannot offer any equivalent product. Similarly, if a customer needs a 450-seat LCA, Boeing	The Panel sustains the US objection.

[28] See also section X.C.2 of this submission.
[29] **[***]**.
[30] Randy's Journal: Looking ahead, 23 January 2007 (Exhibit EC-286) (Non-BCI). Mr. Baseler's comparison of orders for the 747 compared to the Airbus A380 is for comparison purposes only. His numerous statements regarding competition between the A380 and the Boeing 747 confirm his view that the 747 and the A380 are in different markets. *See* Section XII.G.
[31] **[***]**.
[32] **[***]**.
[33] *See* Expert Statement of Rod Muddle, para. 17 (Exhibit EC-19) (Non-BCI); **[***]**.
[34] **[***]**.
[35] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
	can offer its 747-8, yet Airbus cannot offer an equivalent product. As a result, Airbus will not even submit a proposal. **[***[36]]**.	
1419	**[***.[37] ***.[38]]** Randy Baseler, vice president of Marketing for BCA, has acknowledged this as well. Mr. Baseler stated that "{a}bout 150 of the {A320} orders {in 2005} were from China, and {Airbus} did it on the government's decision, not on the airlines' orders. But China took 150 from each of us."[39]	The Panel sustains the US objection.
1420	An airline may also choose to exercise options or purchase rights without initiating a bidding process. Options and purchase rights are secured at the same time of a purchase contract. **[***]**. **[***[40]]**.	The Panel sustains the US objection.
1421	Although scale efficiencies favour follow-on orders from the same manufacturer, follow-on orders can also be the subject of fierce competition.[41] Customers are sometimes concerned about having a "sole-supplier" of airframes. **[***[42]]** Customers therefore sometimes decide to diversify their fleet.	The Panel sustains the US objection.
1426	**[*** [43]]**.	The Panel sustains the US objection, except with respect to the specific figures in the fifth and sixth sentences, *i.e.*, **[***]**, with respect to which the Panel denies the US objection.
1432	**[***[44]]**. Seemingly small differences in the physical or economics characteristics of competing Boeing and Airbus LCA can, thus, be decisive in the purchasing decision of an airline. EC LCA market expert Rod Muddle notes that "{f}or a model to win a competition its manufacturer has to do better on the criteria to which the airline attaches greatest priority according to its strategic plans."[45]	The Panel sustains the US objection.

[36] **[***]**.
[37] **[***]**.
[38] **[***]**.
[39] "What's Next for Boeing?," US News.com, 19 October 2006, http://www.usnews.com/usnews/biztech/articles/061019/19boeing.htm) (visited 4 January 2007, Exhibit EC-278) (Non-BCI).
[40] **[***]**.
[41] Compare the first written submission of the United States, para 712: "Once an airline orders a particular LCA type, however, the scale efficiencies favor follow-on orders of the same type, as well as orders of other aircraft from the same manufacturer in order to take advantage of commonalities across an LCA fleet."
[42] **[***]**
[43] **[***]**
[44] **[***]**.
[45] *See* Expert Statement of Rod Muddle, para. 101.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
1433	Differences in seating and cargo capacity are amongst the most important product-related elements of competition in LCA sales campaigns. Capacity has a direct impact on the future costs and revenues an airline will incur and generate over the life of the LCA.[46] **[***[47]]** Furthermore, at times, a particular LCA can be viewed by an airline as being the more technologically-advanced aircraft amongst competing Airbus and Boeing LCA.[48]	The Panel sustains the US objection.
1434	Direct operating costs are crucial in an airline's evaluation of competing offers, in particular since the cost of operating a LCA over its life far outweighs its purchase price.[49] **[***[50]]**	The Panel sustains the US objection.
1435	Engine manufacturers can also play a significant role in determining the outcome of a sales campaign.[51] Engines are the single most expensive item on an LCA.[52] **[***[53]]**.	The Panel sustains the US objection.
1436	The net "fly-away" price a customer pays is the combination of the airframe price and the engine price. While Airbus may offer modest discounts, the engine manufacturer may offer the customer very large discounts. As a result, the final fly-away price secured by a customer may be low, even though Airbus secured a relatively high price. **[***[54]]**.	The Panel sustains the US objection.
1437	An airline may also attach great value to a certain delivery date of its newly-acquired aircraft.[55] Airlines might require additional aircraft to expand their route network. A late delivery schedule by one LCA manufacturer would thus mean revenue foregone for that	The Panel sustains the US objection.

[46] *See* first written submission of the United States, para. 712. **[***]**; and Expert Statement of Rod Muddle, para. 66 (Exhibit EC-19) (Non-BCI).

[47] **[***]**.

[48] *See* Expert Statement of Rod Muddle, para. 35 (Exhibit EC-19) (Non-BCI).

[49] Cash Airplane Related Operating Costs (including crew, fuel, maintenance and landing costs) constitute 60% of a LCA's related operating costs, compared to 40% capital costs (including financing, insurance and depreciation). Karen Willcox, "Cost Analysis," Massachusetts Institute of Technology Aerospace Computational Design Laboratory, 19 September 2004, http://ocw.mit.edu/NR/rdonlyres/Aeronautics-and-Astronautics/16-885JFall-2004/9DFE0985-C9C2-486B-BD37-42060E082AB2/0/pres_willcox.pdf, slide 6 (visited on 10 December 2006, Exhibit EC-292) (Non-BCI).

[50] **[***]**.

[51] **[***]** *See also* Expert Statement of Rod Muddle, paras. 27-34 and 63-64 (Exhibit EC-19) (Non-BCI).

[52] *See* **[***]**; *See also* Expert Statement of Rod Muddle, para. 27 (Exhibit EC-19) (Non-BCI).

[53] **[***]** *See also* Expert Statement of Rod Muddle, para. 27 (Exhibit EC-19) (Non-BCI).

[54] **[***]**.

[55] *See* Expert Statement of Rod Muddle, paras. 70-71 (Exhibit EC-19) (Non-BCI).

[56] *See* Expert Statement of Rod Muddle, para. 70 (Exhibit EC-19) (Non-BCI).

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
	airline while it awaits delivery of its aircraft. [56] Alternatively, an airline might want to downsize its fleet to reduce costs in times of an economic downturn. Again, a late delivery schedule would mean additional costs incurred by the airline pending delivery of the smaller aircraft. Under those circumstances, an earlier delivery slot offered by a manufacturer might be decisive in an airline's decision to buy Airbus over Boeing. Alternatively, a manufacturer can facilitate the "transfer" of a delivery slot from a leasing company or other customer to the customer involved. **[***] **[***]**[57]	
1449	Not only did Boeing neglect leasing companies as potential customers, but Boeing decided to compete with them by providing LCA financing support to airlines itself.[58] **[***[59]]** It created "Aircraft Financial Services" ("AFS"), a group under Boeing Capital Corporation ("BCC"), a wholly-owned subsidiary of The Boeing Company. AFS was intended to provide financing for Boeing commercial aircraft. Instead of transferring the risks and benefits associated with aircraft financing to the leasing companies – as Airbus did – Boeing kept, to a certain extent, the financing of aircraft in-house in an attempt to make further profits. Thereby, Boeing added a further risk to its LCA business. In other words, a crisis like the one caused by 9/11 would hit Boeing twice – first, its LCA manufacturing business, and at the same time also its financing business.	The Panel sustains the US objection.
1451	Airbus's strategy of securing orders with leasing companies proved to be very valuable following the events of 9/11, the resulting global economic downturn, and the Asian SARS crisis. **[***.[60] ***.[61] ***.[62] ***.[63]]**	The Panel sustains the US objection.
1536	These slides identify the same "markets" that the European Communities has identified above: **[***[64]]**.	The Panel sustains the US objection.

[57] **[***]**.
[58] **[***]**.
See further GE Commercial Aviation Services, Loans and Structured Finance, http://www.gecas.com/financing.asp (visited 20 December 2006, Exhibit EC-303) (Non-BCI). Leasing companies regularly sell and buy LCA to maintain a sound portfolio of both Airbus and Boeing LCA. Although leasing companies primarily offer LCA on operating leases to airlines, leasing companies also provide financing support to airlines "to help **[**airlines**]** renew their fleets, increase liquidity, lower debt, and move asset risk off their books."
[59] **[***]**.
[60] **[***]**.
[61] **[***]**.
[62] **[***]**.
[63] **[***]**.
[64] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
1539	The table below reflects Airbus' as well as Boeing's categorization of where their respective aircraft fall within these various LCA markets[65]: {*Table omitted}*	The Panel sustains the US objection.
note 1579	***(refers to para. 1712, which reads: [[***]] This is confirmed by the fact that, [[***]]***[1579]***)*** [1579] **[[***]]**	The Panel cannot rule on this objection, as it cannot determine to what BCI-designation the US is objecting in paragraph 1579.
1542	The United States alleges that the Boeing 747 family was in competition with the Airbus A380 family. However, as discussed in more detail below, **[***.[66]]** Section XII.J below sets forth further detailed evidence of the separate nature of the markets for the A380 family and the 747 family.	The Panel sustains the US objection.
1543	-	The Panel accepts the EC re-designation.
1546	-	The Panel accepts the EC re-designation.
1547	**[***]**	The Panel sustains the US objection. The Panel understands that the US is not objecting to other BCI in this paragraph.
1548	**[***]**	The Panel sustains the US objection. The Panel understands that the US is not objecting to other BCI in this paragraph.
1560	Finally, the United States provides a handful of examples where certain airlines fly Boeing or Airbus LCA from different LCA families to or from the same location to support its finding of a single like product.[67] However, this evidence of "demand substitution" ignores **[***.[68] ***]**.	The Panel sustains the US objection except with respect to the sentence "**[***]**", with respect to which the Panel denies the US objection.

[65] **[***]**

Boeing markets the 787-3 as a 290-330 seat aircraft in a 2-class seating configuration. As the 787-3 has the same fuselage as the 787-8, the 787-3 is assumed to have the same 3-class seating capacity as the 787-8. Boeing markets the 787-8 as a 210-250 seat aircraft in a 3-class configuration.

[66] *See* Section XII.J, *below*.

[67] *See* First Written Submission of the United States, para. 728.

[68] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
1618	The US/Boeing methodology therefore reflects these established principles. It allocates alleged subsidies associated with MSF loans tied to a specific LCA programme over the marketing life of that programme, beginning in the year of launch.[69] **[***.[70]]** Because R&T grants support basic research that is not tied to a specific aircraft programme, these subsidies are allocated over **[***[71]]**	The Panel sustains the US objection except with respect to the figures "**[***]**", with respect to which the Panel denies the US objection.
1619	**[***]**. The European Communities recalls that the "base case" simulation for the model described in the Dorman report assumes only a 15-year period of deliveries.[72] **[***]**.	The Panel sustains the US objection except with respect to the figures "**[***]**", with respect to which the Panel denies the US objection.
1623	As described above, the amount of the subsidy conferred by R&T support (which is not tied to a specific programme) is allocated across all Airbus LCA programmes.[73] Beginning in the year of grant, it is allocated across all programmes and **[***]** As more fully explained in Section V, above, the European Communities reduces these subsidy magnitudes to account for subsidies that were extinguished or extracted when new owners acquired portions of the Associated Manufacturers or Airbus S.A.S.[74]	The Panel sustains the US objection except with respect to the figure "**[***]**", with respect to which the Panel denies the US objection.
1629	*Third*, the amount of subsidy associated with the four MSF loans is allocated across all orders in the A320 programme **[***]** This period is based on **[***]**. Further, beginning in the year of grant, the amount of subsidy associated with R&T support is allocated across all programmes (including the A320 programme) **[***]**. This approach provides a magnitude of the subsidy for each order in the A320 programme for a given year.[75]	The Panel sustains the US objection except with respect to the figures "**[**17", "four", "16", "three" and "18**]**", with respect to which the Panel denies the US objection.
1640	**[***]**. In other words, MSF loans do not inherently confer a benefit.	The Panel accepts the EC re-designation.
1650	**[***]**. Because of these repayment provisions, market risk has become less relevant and less costly for creditors to bear over time.	The Panel sustains the US objection except with respect to the figure "**[***]**", with respect to which the Panel denies the US objection.

[69] **[***]**.
[70] **[***]**.
[71] **[***]**.
[72] Dr. Gary J. Dorman, "The Effect of Launch Aid on the Economics of Commercial Airplane Programs," October 2006 (hereinafter "Dorman report"), exhibit US-70, p. 3.
[73] **[***]**.
[74] *See* Section V, above; **[***]**.
[75] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
1668	Finally, to the extent that the US arguments can be construed to assert that Airbus' A380 programme **[***]**, the European Communities demonstrates that this is not the case.	The Panel sustains the US objection.
Title before 1728	-	The Panel accepts the EC re-designation.
1734	Like Boeing, **[***]**[76] In developing the A380, Airbus "deliberately planned the capacity of the A380 away from the A340-600 and 747."[77]	The Panel sustains the US objection.
1735	... **[***]**[78] EC LCA market expert Rod Muddle confirms Mr. Scherer's assessment.[79]	The Panel sustains the US objection.
1738	-	The Panel accepts the EC re-designation.
1739	-	The Panel accepts the EC re-designation.
1742	...**[***]**[80] As a result, large airlines decided to "park the big airplanes"[81] – a development that had dramatic effects on Boeing 747-400 market values.	The Panel sustains the US objection.
1759	Finally, as part of its "general" causation arguments, the United States suggests that Airbus would not have launched the A380 programme but for MSF loans.[82] This argument has no merit, because Airbus' decision to invest in the A380 programme was based on a sound assessment of the business case for the programme. **[***]**	The Panel sustains the US objection.
1767	**[***]**[83]	The Panel sustains the US objection.
1809	**[***.**[84] ***]**.[85]	With respect to the first sentence, the Panel accepts the EC re-designation. With respect to the second sentence, the Panel sustains the US objection.

[76] **[***]**.
[77] "On a Roll," *Airline Business*, April 2005, p. 45 (Exhibit EC-351).
[78] **[***]**.
[79] *See* Expert Statement of Rod Muddle, paras. 38 and 44 (Exhibit EC-19).
[80] **[***]**.
[81] "Is This Old Bird About to Get its Wings Clipped?," *USA Today*, 12 August 2004 (Exhibit EC-401).
[82] *See* First Written Submission of the United States, para. 813.
[83] **[***]**.
[84] Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).
[85] Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
1810	**[***.[86] ***.[87] ***]**.	With respect to the second and third sentences, the Panel accepts the EC re-designation. With respect to the first and fourth sentences, the Panel sustains the US objection.
1814	-	The Panel accepts the EC re-designation.
1829/1830	Third, the causal link between any effects of *de minimis* alleged A320 subsidies and lower Airbus pricing is broken if there are other important non-price-related reasons why the company won the particular sale. The airlines in the challenged sales campaigns noted that the following reasons were amongst the determining factors for choosing the A320 family LCA over the Boeing 737NG: • advantages in a variety of A320 attributes, including wider aisles[1725] and cockpit technology[1726]; • advantages in the economics of the A320 family, including savings in maintenance cost and lower fuel burn[1727]; • higher passenger capacity of the A320 family LCA[1728]; • savings resulting from commonality with the airline's existing Airbus fleet[1729], • **[***][1730]	The Panel sustains the US objection.
1880	The easyJet sales campaign took place in 2002, when the airline industry was "in the midst of the most serious short-term downturn in modern aviation history."[88] LCA demand collapsed during the 2001-2003 period, due to the collapse of the "dot.com" economy, the events of 9/11 and the global economic recession that resulted.[89] Furthermore, many LCA that were previously ordered but not yet delivered were cancelled or deferred. **[***]**	The Panel sustains the US objection.
1959	***Causal Link:*** Most important in assessing the causal link is the fact that **[***.[90] ***.[91] ***.[92] ***]**. Boeing has acknowledged this fact publicly.[93]	The Panel denies the US objection.

[86] Ryanair ordered 100 737-800 from Boeing on 24 January 2002. *See* Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

[87] EasyJet ordered 120 A319s on 31 December 2002. *See* Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

[88] Boeing 2003 Current Market Outlook, p. 4 (Exhibit EC-295).

[89] Boeing 2003 Current Market Outlook, p. 6 (Exhibit EC-295).

[90] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
Title before 2011	-	The Panel accepts the EC re-designation.
2012	-	The Panel accepts the EC re-designation.
2015	The **[***]** between the A330 and 767 families during 2004-2006, and the **[***]** between 2001-2003 are key facts for the Panel's assessment of the US serious prejudice claims with respect to alleged subsidies benefiting Airbus A330 family LCA. Effects of such subsidies will generally only be experienced where there is actual competition. The lack of competition is consistent with the absence of a genuine and substantial relationship of cause and effect between any A330 subsidies and lower 767 prices.	The Panel sustains the US objection.
2033	***Causal Link:*** The small number of orders and deliveries in every one of the eight third country markets makes it impossible to discern any clear trends in the development of orders or deliveries. Further, the small amounts of alleged subsidies for Airbus A330 LCA have not been shown by the United States to cause any displaced or impeded US market share in 200-300 seat product markets in any of these seven countries. As discussed in Section XII.L.1.(b) above, there was **[***]**	The Panel sustains the US objection.
2048	Second, as discussed in Section XII.L.1.(b) above, the Airbus **[***]**.	The Panel sustains the US objection.
2071	As the Airbus A340 and the Boeing 777 are the only LCA in the 300-400 seat market currently in production, they compete directly in certain sales campaigns. **[***]**.[94]	The Panel accepts the EC re-designation. The Panel understands that the US is not objecting to BCI in the remainder of this paragraph.

[91] **[***]**.
[92] **[***]**.
[93] For example, Randy Baseler, vice president of Marketing for Boeing Commercial Airplanes, noted in a recent interview that

> {o}**]**rders for the A320 aren't as robust as they have been, but of course they put on a surge late last year {2005} to beat us. About 150 of the orders were from China, and they did it on government's decision, not on the airlines' orders. But China took 150 from each of us.

Interview with Randy Baseler, What's Next for Boeing? (Exhibit EC-278) (underlining added).
[94] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
2074	The European Communities has discussed in detail, in Section XII.I above, the nature of the MSF and other measures challenged by the United States. A significant aspect of the nature of these alleged subsidies that are tied or allocated to A340 LCA is their age. MSF loans for the A340 were granted **[***.**[95]]** Likewise, Member States entered into MSF loans for the A340-500/600 **[***]**.[96] Thus, the age of these subsidies strongly militates against the existence of present adverse effects.	The Panel sustains the US objection.
2097	Having chosen the Airbus A340 over the 777 based on performance considerations, Iberia also requested price discounts from Airbus. This was because the A340s being offered by Airbus were "white-tail" aircraft rendered homeless by the bankruptcy of Swissair.[97] **[***.**[98]** ***]**.[99]	With respect to the first bracketed sentence, the Panel sustains the US objection. With respect to the second bracketed sentence, the Panel accepts the EC re-designation.

[95] **[***]**.
[96] **[***]**.
[97] "The long hello," *Flight International*, 3 May 2005, http://www.flightglobal.com/articles/2005/05/03/197483/the-long-hello.html, p. 36 (Exhibit EC-496).
[98] **[***]**
[99] *See* Expert Statement of Rod Muddle, paras. 58-60. (Exhibit EC-19).

BCI deleted, as indicated **[***]**

ANNEX F-2

COMMUNICATION OF 15 MARCH 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel is in receipt of the EC's revised version of its First Written Submission, submitted in response to the Panel's ruling of 13 March 2007 on the United States' objections to certain of the designations in the proposed non-BCI version of the European Communities' first written submission.

2. At the outset, the Panel notes that it is surprised and disappointed that the EC chose to make this submission only in the form of an HSBI submission. Given that the revised version does not change anything with respect to HSBI information, and that it is important that the parties and the Panel have a clear understanding of which information is to be treated as BCI in preparing for next week's meeting, it would have been far preferable for the EC to simply revise the BCI version of its First Written Submission in order to implement the Panel's ruling. Indeed, while we did not so specify, this is what we had anticipated would occur.

3. Under the circumstances, given the limited time remaining to prepare for next week's meeting, the EC is directed to prepare a revised BCI version of its First Written Submission, reflecting the Panel's ruling of 13 March, as modified below, and submit it to the Panel and the United States at the earliest possible moment, and in any event no later than 17.30 on Friday 16 March 2007.

4. The Panel notes that, should the EC conclude, in light of this decision that it would have to consider withdrawing any information, the Panel would expect it to withdraw only the minimum specific information necessary to satisfy itself. Any withdrawal of information should be notified to the Panel and the United States at the earliest possible moment, and in any event no later than 17.30 on Friday 16 March 2007.

No. of paragraph	CONTENT	DECISION OF THE PANEL
1036	The European Communities notes, first, that while the EIB established in 2002 a "credit" or "commitment" in favour of EADS in the amount of EUR 700 million, only EUR **[***]** was ever actually drawn by EADS and this took place in **[***]**. The other **[***]** commitment **[***]**.[1]	The Panel accepts the EC re-designation of 15 March 2007.
1092	EADS **[***]**	The Panel accepts the EC re-designation of 15 March 2007.
1098	**[***]**[2]	The Panel accepts the EC re-designation of 15 March 2007.
1099	**[***.[3]]**	The Panel accepts the EC re-designation of 15 March 2007.

[1] **[***]**.

[2] Daily Treasury Yield Curve Rates from http://www.ustreas.gov/offices/domestic-finance/debt-management/interest-rate/yield_historical_2004.shtml

[3] **[***]**.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
1419	**[***.[4] ***[5]]** Randy Baseler, vice president of Marketing for BCA, has acknowledged this as well. Mr. Baseler stated that "{a}bout 150 of the {A320} orders {in 2005} were from China, and {Airbus} did it on the government's decision, not on the airlines' orders. But China took 150 from each of us."[6]	The Panel confirms and maintains its original decision. The Panel notes its views, expressed in its communication of 13 March, that it does not consider that "opinions" or "positions" may be designated as BCI or HSBI merely because those opinions or positions were expressed in relation to BCI or HSBI.
1451	Airbus's strategy of securing orders with leasing companies proved to be very valuable following the events of 9/11, the resulting global economic downturn, and the Asian SARS crisis. **[***.[7] ***.[8] ***.[9] ***.[10]]**	The Panel confirms and maintains its original decision.
1759	Finally, as part of its "general" causation arguments, the United States suggests that Airbus would not have launched the A380 programme but for MSF loans.[11] This argument has no merit, because Airbus' decision to invest in the A380 programme was based on a sound assessment of the business case for the programme. **[***.]**	The Panel confirms and maintains its original decision. The Panel notes that there is nothing in the bracketed text that suggests that this is a statement of information, as opposed to a statement of opinion or position, which as noted, it does not consider may be designated as BCI or HSBI merely because such opinion or position is expressed in relation to BCI or HSBI.
1810	**[***.[12] ***.[13] ***.]**	The Panel accepts the EC re-designation of 15 March 2007.
1829/1830	Third, the causal link between any effects of *de minimis* alleged A320 subsidies and lower Airbus pricing is broken if there are other important non-price-related reasons why the company won the particular sale. The airlines in the challenged sales campaigns noted that the following reasons were amongst the determining factors for choosing the A320 family LCA over the Boeing 737NG:	The Panel accepts the EC re-designation of 15 March 2007.

[4] **[***]**.
[5] **[***]**.
[6] "What's Next for Boeing?," US News.com, 19 October 2006, http://www.usnews.com/usnews/biztech/articles/061019/19boeing.htm) (visited 4 January 2007, Exhibit EC-278) (Non-BCI).
[7] **[***]**.
[8] **[***]**.
[9] **[***]**.
[10] **[***]**.
[11] *See* first written submission of the United States, para. 813.
[12] Ryanair ordered 100 737-800 from Boeing on 24 January 2002. *See* Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).
[13] easyJet ordered 120 A319s on 31 December 2002. *See* Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
	• advantages in a variety of A320 attributes, including wider aisles[1725] and cockpit technology[1726]; • advantages in the economics of the A320 family, including savings in maintenance cost and lower fuel burn[1727]; • higher passenger capacity of the A320 family LCA[1728]; • savings resulting from commonality with the airline's existing Airbus fleet[1729], • **[***]**[1730]	
2015	The **[***]** between the A330 and 767 families during 2004-2006, and the **[***]** between 2001-2003 are key facts for the Panel's assessment of the US serious prejudice claims with respect to alleged subsidies benefiting Airbus A330 family LCA. Effects of such subsidies will generally only be experienced where there is actual competition. The lack of competition is consistent with the absence of a genuine and substantial relationship of cause and effect between any A330 subsidies and lower 767 prices.	The Panel accepts the text as modified by the EC on 15 March 2007.
2033	***Causal Link:*** The small number of orders and deliveries in every one of the eight third country markets makes it impossible to discern any clear trends in the development of orders or deliveries. Further, the small amounts of alleged subsidies for Airbus A330 LCA have not been shown by the United States to cause any displaced or impeded US market share in 200-300 seat product markets in any of these seven countries. As discussed in Section XII.L.1.(b) above, there was **[***]**.	The Panel accepts the text as modified by the EC on 15 March 2007.
2048	Second, as discussed in Section XII.L.1.(b) above, the Airbus **[***]**.	The Panel accepts the text as modified by the EC on 15 March 2007.

BCI deleted, as indicated **[***]**

No. of paragraph	CONTENT	DECISION OF THE PANEL
2097	Having chosen the Airbus A340 over the 777 based on performance considerations, Iberia also requested price discounts from Airbus. This was because the A340s being offered by Airbus were "white-tail" aircraft rendered homeless by the bankruptcy of Swissair.[14] **[***.[15] ***.]**[16]	The Panel accepts the EC re-designation of 15 March 2007.

[14] "The long hello," *Flight International*, 3 May 2005, http://www.flightglobal.com/articles/2005/05/03/197483/the-long-hello.html, p. 36 (Exhibit EC-496).

[15] **[***]**.

[16] *See* Expert Statement of Rod Muddle, paras. 58-60. (Exhibit EC-19).

BCI deleted, as indicated **[***]**

ANNEX F-3

COMMUNICATION OF 30 MARCH 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel has considered a number of outstanding issues concerning designation of information as BCI or HSBI in this dispute, including issues raised in the United States' objections dated 28 February 2007 to the EC's designation of certain information in its first written submission as "highly sensitive business information", the United States' letter of 27 March 2007 commenting on whether the version of the EC first written submission submitted on 16 March 2007 may be considered the basis of a version redacting any BCI, the United States letter of 8 February 2007, and the United States' answers, dated 12 February 2007, to certain questions posed by the Panel.

2. Before turning to the resolution of the specific issues raised by the United States, the Panel wishes to remind the Parties of the general principles set forth in our 13 March 2007 decision concerning the designation of "business confidential information" in the EC's first written submission. As the Panel indicated at that time, those same general principles apply with equal force in the context of the designation of "highly sensitive business information" in this dispute.

3. As we noted in our 13 March 2007 decision, the Panel's BCI/HSBI Procedures are designed to protect specific information, not entire submissions or other documents. It is for this reason that paragraphs 4 and 5 of the BCI/HSBI Procedures requires that the specific information designated as BCI/HSBI be set off within brackets (single or double, as appropriate) within any given printed or electronic document. We set out in our previous decision a number of implications of this principle for the manner in which the BCI/HSBI Procedures are to be applied in this dispute, including our view that the Parties are not to present entire submissions or exhibits categorized as BCI or HSBI, but rather are to specifically identify, through the use of brackets as provided for in paragraphs 4 and 5, the information within those submissions or exhibits they consider should be so designated.

4. The Panel has applied the general principles set out in our 13 March 2007 decision in resolving pending issues concerning the designation of BCI and HSBI. The Panel's specific decisions regarding the designation of HSBI in the EC's first written submission are set out in the attached annex, which contains BCI. The annex also indicates those instances where the Panel has accepted the EC's proposed re-designation of certain information as BCI, or non-BCI, as the case may be.

5. The Panel also notes the continuing designation of titles of exhibits as BCI in the version of the EC's first written submission submitted on 16 March 2007. As the Panel instructed in its 13 March 2007 decision, it "does not believe it appropriate, as a general matter, to bracket the titles of exhibits as BCI and HSBI in their entirety. If, as an exceptional matter, the title itself contains specific information that a Party considers to be BCI or HSBI, the Panel requests that the Party identify the document with a non-BCI/HSBI title that permits a reasonable understanding of the nature of the exhibit in question".

6. The EC is directed to prepare a revised version of its first written submission, fully implementing the Panel's decisions of 13 March 2007 and today, and the re-designations proposed by the EC and accepted by the Panel, and submit it to the Panel, and serve the United States, no later than close of business **Thursday 5 April 2007**. The EC shall, at the same time, serve a draft non-BCI version on the third parties. The Panel notes that it has made no decisions, in the abstract, as to

whether information which it is ruling is not properly designated as HSBI may be re-designated as BCI.[1]

7. In addition, we direct that the EC specify precisely the information which it considers to be BCI or HSBI in the following documents, by enclosing it within brackets (single or double, as appropriate), as provided for in paragraphs 4(a) and 5(a) of the BCI/HSBI procedures, and resubmitting the relevant documents:

- statements of Messrs Scherer and Gordon (Exhibits EC-14 (BCI) and EC-16 (BCI))
- document DS316-EC-HSBI-0001143 (the French project appraisal for the A340-500/600)
- document DS316-EC-HSBI-0001174 (the French project appraisal for the A380)
- document DS316-EC-HSBI-0001199 (the French project appraisal for the A330-200)
- document DS316-EC-HSBI-0001211 (the UK project appraisal for the A380)
- document DS316-EC-BCI-0006130 (Exhibit US-49)
- document DS316-EC-BCI-0000532 (Exhibit US-125)
- document DS316-EC-HSBI-000088 (Further Calculations of Present Value of Outstanding Airbus Debt to German Government (1999))
- document DS316-EC-HSBI-000146 (Calculations of Present Value of Outstanding Airbus Debt to German Government (1998))
- document DS316-EC-HSBI-000199 (Comments to Present Value Calculations of Outstanding Airbus Debt to German Government of 23 June 1997 (Present Value 1998))
- document DS316-EC-HSBI-000205 (C&L German Auditing Agency's Letter to the German Ministry of Economics of 26 July 1999)

8. While the Panel recognizes the point raised by the United States in its request that the EC resubmit all of its BCI exhibits with proper bracketing, the Panel considers that it would be unrealistic to expect that this could be accomplished at this late stage without causing unacceptable delays in the proceedings. Nonetheless, the Panel considers it imperative, in order for this dispute to go forward based on a clear understanding of the status of information submitted to the Panel, that BCI and HSBI submitted to the Panel be clearly identified. Therefore, the Panel considers that additional steps are necessary to properly identify such information in exhibits already submitted.

9. Therefore, with respect to exhibits already submitted to the Panel in connection with the parties' first submissions and the meeting with the Panel, the Panel directs each party to designate, by close of business **Tuesday, 3 April 2007** specific exhibits which it considers contain information originating with the other party, which require bracketing in order to enable a party to defend its interests. Such designation is without prejudice to either party making further requests with respect to

[1] The Panel recognizes the possibility that the non-BCI version served on third parties on 5 April 2007 may require further revision in light of subsequent events. However, the Panel considers it important to avoid additional delays in providing the third parties with a non-BCI version of the EC's first written submission from which they can begin to prepare their own submissions.

designation of information in previously submitted exhibits at a later date, should this become necessary.[2] The Panel expects that the parties will cooperate in this task by limiting, to the maximum extent possible, their requests to re-bracket previously submitted exhibits. The parties will then have until **Monday, 16 April 2007** to resubmit the designated exhibits with bracketing of information considered by the originating party to be BCI or HSBI. The parties should be guided in this regard by the general principles enunciated in our decision of 13 March 2007, as well as be informed by the specific rulings we have made with respect to contested designations to date.

10. The Panel expects that any exhibits to be submitted in the future will comply with paragraphs 4 and 5 of the BCI/HSBI Procedures. To be clear, parties shall set off, within brackets (single or double, as appropriate), the specific information designated as BCI/HSBI in all submissions to the Panel, **including all exhibits**.

11. As we noted in our 13 March 2007 decision, we "recognize{} that the application of the BCI/HSBI Procedures implies a significant burden on the Parties (and on the Panel), but the Parties were well aware that this would be the case when they sought such procedures. The Panel considers it essential that these Procedures be implemented in a manner that protects the legitimate rights of defence of both Parties, and that allows the Panel to perform its work and to explain its ultimate decision in a comprehensible manner. If these Procedures prove inadequate as implemented, the Panel could be forced to re-examine them. The Panel further notes that the efficiency of these Procedures at the panel level may influence the views of the Appellate Body with respect to how to treat information in the event of an appeal. It is therefore important that the Parties work together in a cooperative spirit to maintain the credibility of these Procedures."

[2] This is also without prejudice to a party requesting that the party that originally submitted the information indicate with precision the portions of a document containing BCI and HSBI, as provided for in paragraphs 38(c)(i) and 52(d)(i) of the BCI/HSBI Procedures. We note that we have decided **not** to amend those procedures as we had proposed in our communication dated 20 February 2007.

BCI deleted, as indicated **[***]**

ANNEX

SPECIFIC ISSUES RAISED BY THE US REGARDING DESIGNATION OF HSBI IN THE EC'S FIRST WRITTEN SUBMISSION

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
footnote 153	**footnote to paragraph 230 [[***]]**	The Panel sustains the US objection.
233	Both Lagardère and the French State, as is standard practice for large merger transactions, commissioned highly respected investment banks to determine the market value of their respective contributions to the new company, ASM. The French State retained **[[***]]**, and Lagardère retained **[[***]]** These firms valued MHT, Aérospatiale, and the combined firm, ASM. The experts applied a combination of a discounted cash flow ("DCF") method and the comparables method to determine the absolute and relative values of Aérospatiale and MHT.[3]	The Panel sustains the US objection.
234 and footnote 156	Based on MHT's pre-merger business plans, **[[***]]** found the relative value of MHT to the combined company to be **[[***]]** percent. It derived this ratio by calculating a high and low estimated value for each entity. Based on these values, it found the relative value of MHT to the combined company to be in the range of **[[***]]** percent to **[[***]]** percent, with an average ratio of **[[***]]** percent.[4] Footnote blanked: **[[***]]**	The Panel sustains the US objection.

[3] In market transactions, such as sales, spin-offs, mergers, or share offerings, it is standard practice to involve professional investment bankers to prepare valuations of the company or production subject to the transaction. The valuation methods used by investment bankers are widely recognized and, although methods may vary, they all aim at valuing a company's net present value at the time of the transaction. One of the most commonly applied methods is "Discounted Cash Flow", which determines the value based on the projected future cash flows while taking into consideration a discount rate that reflects the probability that the cash flow will be realized (the risk factor).

[4] **[[***]]**.

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
235 and notes 157 and 158	**[[***]]** using a DCF method, found that MHT had a value relative to ASM falling between **[[***]]** percent and **[[***]]** percent, the mid-range of which is **[[***[5]]]**. Thus, **[[***]]** found the synergies of the companies were such that MHT had more value relative to the new company than simply the sum of its parts. **[[***]]** used the comparables valuation method and obtained a relative value for MHT of **[[***]]** percent.[6] Blanked Footnotes 157 and 158: **[[***]]**	The Panel sustains the US objection.
248	The parties to the EADS transaction retained reputed investment banks to assess the proposed deal and establish the relative values of each of the merging entities. To perform this due diligence, Chrysler engaged **[[***]]**; Lagardère engaged **[[***]]**; ASM engaged **[[***]]**; the Spanish State engaged **[[***]]**, and the French State engaged **[[***]]**. These six investment banks were supported by an army of accountants and lawyers. Each investment bank conducted extensive assessments of the value of the assets of its client, the value of assets of potential partners, and the value of the proposed combined entity.	The Panel sustains the US objection.
252 and footnotes 166 and 167	For example, **[[***]]**, on behalf of ASM, employed two income approaches to business valuations – segment DCF and EBITDA. Applying these methods, Lazard obtained valuation ratios of **[[***]]** percent to **[[***]]** percent for ASM; **[[***]]** percent to **[[***]]** percent for DASA; and **[[***]]** percent to **[[***]]** percent for CASA.[7] Similarly, **[[***]]**, on behalf of the Spanish State, applied the DCF method, including a sensitivity analysis for valuating ASM, DASA and CASA, and arrived at a valuation of CASA that fell within the exchange ratios finally agreed upon.[8] Blanked Footnotes 166 and 167: **[[***]]**	The Panel accepts the EC re-designation with respect to paragraph 252 and note 167. The Panel sustains the US objection with respect to note 166.
Paragraph 310 and footnote 214	The Associated Manufacturers and NatCos also enter into industrial agreements with Airbus GIE or Airbus SAS. By signing these agreements, the AMs and NatCos commit	The Panel sustains the US objection.

[5] **[[***]]** (HSBI Annex V, EC-HSBI-0000903).
[6] **[[***]]**.
[7] **[[***]]**.
[8] **[[***]]** is described in the report of the Consejo Consultivo de Privatizaciones, Informe de Actividades – 2000, at pp. 49-53 (Exhibit EC-58) (Non-BCI).

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
	themselves to the terms of the framework agreements.[9] In addition, the AMs and NatCos agree to abide by the provisions of the **[[***]]** which distributes work share among the AMs and NatCos, and the **[[***]]**, which identifies the development costs that each entity will incur based on its work share.[10] Blanked Footnote 214: **[[***]]**	
419	The United States finally alleges[11] that France "based its repayment schedule on Airbus's own optimistic sales forecasts". This statement is misleading. The Airbus forecast for the A380, which was in no sense "optimistic", was **[[***]]** sales in the first **[[***]]**. In compliance with Article 4.1 of the *1992 Agreement*, France carried out its own project appraisal for the A380[12] and conservatively sought accelerated repayment of the MSF in **[***]** after disbursement over the much lower number of **[***]**.	The Panel accepts the EC re-designation with respect to the sales projections. The Panel understands that the US is not objecting to designation of other information as HSBI.
425	With regard to Article 4.1 of the *1992 Agreement*, the European Communities addresses the misleading statement by the United States mistakenly states[13] that Germany "joined France in basing its repayment schedule on Airbus's own optimistic forecasts". The Airbus forecast for the A380 was **[[***]]** sales in the first **[[***]]**. Germany conservatively sought accelerated repayment on **[***]**, the same as that used by France and the UK on the basis of their own project appraisals.	The Panel accepts the EC re-designation with respect to the sales projections. The Panel understands that the US is not objecting to designation of other information as HSBI.
431	Finally, with regard to Article 4.1 of the *1992 Agreement*, the United States misleadingly states that the Spanish Government's return is based on "Airbus's own optimistic sales forecasts".[14] Like other Member States, Spain conservatively required accelerated repayment on a lower number of sales, in its case **[***]** as compared with the Airbus forecast of **[[***]]**	The Panel accepts the EC re-designation with respect to the sales projections. The Panel understands that the US is not objecting to designation of other information as HSBI.

[9] **[***]**.
[10] **[***]**; **[[***]]**.
[11] US first written submission, para. 269.
[12] **[[***]]**.
[13] US first written submission, para. 277.
[14] US first written submission, para. 286.

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
475	The Member States also structured MSF contracts for the A380 on the basis of conservative forecasts and methodologies. The "base case" estimate for the A380 business case predicted that Airbus SAS would deliver a total of **[[***]]**[15] Indeed, the longer term forecasts foresaw a demand of up to **[[***]]**[16]	The Panel accepts the EC re-designation with respect to the sales projections. The Panel understands that the US is not objecting to designation of other information as HSBI.
501	Professor Whitelaw calculates the average expected returns for **[[***]]**[17] These returns provide an ideal benchmark for evaluating the market-consistency of MSF loans. Financing through risk-sharing suppliers is an important funding source for the development of Airbus and Boeing aircraft. Indeed, risk-sharing suppliers financed an estimated 60% of the development costs for the Boeing 787.[18]	The Panel sustains the US objection.
504	Professor Whitelaw demonstrates that the average anticipated return for **[[***]]**. Subtracting the applicable risk-free rate and premium for general corporate risk, the project-specific risk premium derived from this data is **[[***]]**.[19] **[***]**. Thus, in calculating a market benchmark, the European Communities applies a fixed project-specific risk premium of **[[***]]**.	The Panel sustains the US objection.
511	The methodologies offered by the United States to supposedly "cross-check" its results do not support the US benchmark. The United States invokes four disparate sources: i) A study of equity market risk conducted by Ibbotson Associates; ii) **[[***]]** iii) An appraisal of the A380 conducted by UK analysts; and iv) A European Commission decision on the legal status of a loan to a regional aircraft manufacturer.	The Panel sustains the US objection.
516 heading (b)	**[[***]]**	The Panel sustains the US objection.

[15] **[[***]]**.
[16] **[[***]]**.
[17] **[[***]]**.
[18] **[***]**.
[19] **[[***]]**.

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
516	The second "cross-check" proposed by the United States fares no better. The Ellis report relies on the negotiating posture adopted (and later abandoned) **[[***[20]]]** The Ellis report latches onto an inflated discount rate proposed by **[[***]]** to reduce the net present value of, *inter alia*, **[[***[21]]]** Contrary to the US suggestion, this so-called **[[***]]** is inappropriate as the basis of a benchmark for MSF loans and, in any event, does not support the benchmark rates adopted in the Ellis report.	The Panel sustains the US objection.
517	*First*, **[[***]]**. As the Ellis report concedes, **[[***]]**"[22] In his report, Professor Whitelaw explains that an equity measure is not appropriate for MSF loans and overstates the risk premium required by market investors.[23]	The Panel sustains the US objection.
518	*Second*, even if an equity measure were appropriate, **[[***[24]]]** This is not surprising. **[[***[25]]]** As discussed, scholars have rejected the Ibbotson data, which substantially overstates the equity risk premium. Accordingly, the **[[***]]** – cannot support the risk premium derived in the Ellis report.	The Panel sustains the US objection.
519	*Third*, the context in which **[[***]]** proposed its discount rate confirms that this measure is inflated. **[[***]]**	The Panel sustains the US objection.
520	**[[***]]**	The Panel sustains the US objection.
521	Significantly, **[[***]]**, which was engaged as the outside auditor for this transaction, **[[***]]**, concluding that it was excessive given the risks involved.[26] Moreover, **[[***]]**. Not surprisingly, the Ellis report neglects to mention these facts.	The Panel sustains the US objection.

[20] **[[***]]**.
[21] **[[***]]**.
[22] **[[***]]**.
[23] **[[***]]**.
[24] **[[***]]**.
[25] **[[***]]**.
[26] For details *see* Section X. B.

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
522	In sum, it is inappropriate for the United States to rely on a discount rate based on a flawed equity measure. And it is particularly inappropriate for the United States to rely on a rate **[[***]]**. For the reasons set out above, as an equity measure, this methodology does not call into question the validity of the benchmark rates calculated by the European Communities.	The Panel sustains the US objection.
528	*Fourth*, governments based the repayment schedule for MSF loans on the Airbus GIE A380 business case – not on predictions suggesting a **[[***]]**. The United States, itself, notes that the UK government ultimately "disregarded" EID's advice regarding how to structure the repayment schedule.[27] The Airbus GIE "baseline" business case for the A380 predicts **[[***]]**.[28] Echoing these projections, the UK A380 contract calls for per-aircraft levies **[***]**. As previously discussed, levies paid on deliveries **[***]**; other Member States adopted **[***.[29]]** The UK return would then be enhanced through levies paid on deliveries **[***]**.[30] Likewise, private commercial actors **[[***[31]]]**	The Panel accepts the EC re-designation with respect to the sales projections. The Panel understands that the US is not objecting to designation of other information as HSBI.
540	The UK A380 contract provides further evidence of the linkage between the company's business case and the repayment terms for MSF loans. This contract is structured to ensure an overall return that is well in excess of the minimum return required by the *1992 Agreement*. Repayment is structured in two phases. As previously discussed, the first phase calls for per-aircraft levies **[***.[32]]** When the contract levy is applied to the **[[***]]**, principal and interest will be repaid within 17 years of the first receipt of MSF – as required by the *1992 Agreement*.	The Panel sustains the US objection.

[27] **[[***]]**.

[28] **[[***]]** The delivery forecasts contained in the business case were presented to MSF lenders such as the UK government before the execution of MSF agreements. *See* **[***]**.

[29] **[***]**.

[30] **[***]**.

[31] **[[***]]**.

[32] **[***]**.

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
762	ProFi and Airbus Germany also concluded four lease agreements for six special-purpose facilities, including one for the Northern runway extension[33]. The term for each of these agreements is 20 years. The amount of rent is set to provide the City of Hamburg with a market return of **[[***]]** on its investment in each of the facilities, including a return on capital for the portion of each facility's economic life depleted during the 20 year lease term.[34]	The Panel sustains the US objection.
765 and footnote 637	In two separate opinions issued on 23 October 2003[35], the Experts Committee concluded that the terms of all of the leases were consistent with the terms Airbus Germany could have secured from a private, non-governmental lessor. Before discussing the Experts Committee's findings in detail, the European Communities first addresses the Committee's function as an independent appraiser. Blanked Footnote 637: **[[***]]**	The Panel sustains the US objection.
801	**[[***[36]]]**	The Panel sustains the US objection.
804	**[[***[37]]]**	The Panel sustains the US objection.
806	The European Communities notes that the US expert comes to the same conclusion with regard to the value of the land. Also drawing from the *Bodenrichtwert*, he concludes that the land value is between €51.13/m² and €61.36/m².[38] **[[***]]**	The Panel sustains the US objection.

[33] **[***]**.
[34] Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 18/33, pp. 6-7. (Exhibit EC-562) (Non-BCI).
[35] **[[***]]**.
[36] **[[***]]**.
[37] **[[***]]**. The estimate of **[[***]]** coincides with the Expert Committee's yearly estimations of property value in Hamburg. Compare Gutachterausschuss für Grundstückswerte in Hamburg, Der Grundstücksmarkt in Hamburg 2002, 2003, 2004, 2005, setting an average return on real estate for the relevant area at 6,2%. (Exhibit EC-565) (Non-BCI).
[38] Expert Opinion No. 27649/06, Benchmarks for Land Values concerning Hamburg Airbus Site, "Mühlenberger Loch," Kreetslag 10, 21129 Hamburg Finkenwerder, 9 October 2006 ("Keunecke Report"), p. 5 of the English translation (Exhibit US-189).

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
807	Drawing from a median value of €56,25/m^2 and applying a return on real estate of **[[***]]**, a market rent would amount to €3,70/m^2 per year, or €0,30/m^2 per month. This is in accordance with the rent paid by Airbus Germany.	The Panel sustains the US objection.
808	The difference between the assumptions of the Hamburg real estate Experts Committee and that of the expert commissioned by the United States lies in the applicable return on real estate, set at 9 to 12 % in the Keunecke Report as opposed to **[[***]]** of the Expert Committee.	The Panel sustains the US objection.
816	Assuming, conservatively, that the properties represented in the report cited by Dr. Keunecke have an average economic life of 40 years, a ratio of rent revenue to value of between 6.0 percent to 8.5 percent represents an actual return of between 5.2 percent and 8.0 percent, respectively. The median ROI of rent revenue to value included in the report's data (*i.e.*, 7.2 percent) represents an actual return of 6.2 percent, **[[***[39]]**	The Panel sustains the US objection.
830	Before discussing the Committee's appraisal, the European Communities offers a general note about the Committee's approach. **[[***]]**	The Panel sustains the US objection.
831	**[[***]]**	The Panel sustains the US objection.
833	The Experts Committee assessed the market consistency of the Agreement separately with respect to each facility. Each of these agreements follows the method of the Experts Committee in determining the market rent. The actual figures for each agreement are laid down in a report to the Hamburg Parliament of January 2007.[40] As a basis for its assessment, **[[***]]**. The Experts Committee – and the report to the Hamburg Parliament referred to directly above – also expressed the required rent to achieve a **[[***]]** actual return on investment (ROI) as a percentage of the amount invested to determine the amount of the total annual rent payment. The annual rent for each facility, including the actual ROI and the amount of	The Panel sustains the US objection.

[39] Gutachterausschuss für Grundstückswerte in Hamburg, Der Grundstücksmarkt in Hamburg 2002, 2003, 2004, 2005, (Exhibit EC-565) (Non-BCI).

[40] Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 18/33 (Exhibit EC-562) (Non-BCI).

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
	the investment repaid to compensate the investor for the consumed value of each facility (*i.e.*, depreciation), varies from **[[***]]** depending on the useful life of the relevant facility (from 20 to 50 years).	
834	**[[***[41]]]**[42]	The Panel sustains the US objection.
835	**[[***]]**.	The Panel sustains the US objection.
836	**[[***]]**[43]	The Panel sustains the US objection.
837	**[[**[44]**]]**.[45]	The Panel sustains the US objection.
838	**[[***]]**	The Panel sustains the US objection.
839	**[[***]]**. The City of Hamburg has not, therefore, conferred a "benefit," or a "subsidy," on Airbus Germany, within the meaning of Article 1.1 of the *SCM Agreement*.	The Panel sustains the US objection.
850	In contrast, the actual rate of return of **[[***]]** expressed by the Experts Committee includes only the first component, actual return on investment. The second component, refund of the investment consumed during the lease, is separately accounted for by the Experts Committee in the actual rental payment for the special-purpose facilities leases.	The Panel sustains the US objection.
851	When both components of the Hamburg Special Facilities leases are combined (*i.e.*, actual return on investment and the refund of the portion of the investment consumed during the lease), the returns – now stated in the same manner as Dr. Keunecke (rent/investment value) – range from a low of **[[***]]**.	The Panel sustains the US objection.
852	The distinction between real return required of **[[***]]** required by the Hamburg Experts Committee and Dr. Keunecke's ROI expressed as rent revenue over the value of the property is comparable to the difference between the return earned by a bank on a home mortgage and annual mortgage payment as percent of the loan. A 20 year home mortgage for	The Panel sustains the US objection.

[41] **[[***]]**.
[42] **[[***]]**.
[43] **[[***]]**.
[44] **[[***]]**.
[45] **[[***]]**.

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
	€ 100,000 with an interest rate of **[[***]]** would required a annual payment of **[[***]]**. The values **[[***]]** are therefore equivalent and simply stated on a different basis. The Experts Committee specified the former, actual return, and Dr Keunecke measures the latter, total payment.	
853	Therefore, to make a fair comparison of the Experts Committee's required **[[***]]** to Dr. Keunecke's measure, it is necessary to put them on the same economic basis. The European Communities first restates Dr. Keunecke's measure of return to that of the Hamburg Experts Committee.	The Panel sustains the US objection.
1176 and footnote 948	This is not surprising, as the 1998 settlement reflected the fair market value of the repayment claims of the German government against Deutsche Airbus. The amount of the settlement was based on **[[***[46]]]** Moreover, **[[***]]** The terms of the 1998 settlement therefore did not confer on Deutsche Airbus any benefit within the meaning of Article 1.1 of the *SCM Agreement*.	The Panel sustains the US objection.
1185	To begin the negotiations, **[[***]]** To avoid undervaluing its claims, however, the German government **[[***]]**	The Panel accepts the EC re-designation with respect to first set of brackets. With respect to remainder of the paragraph, the Panel sustains the US objection.
1186	**[[***[47]***]]**	The Panel sustains the US objection.
1187	**[[***[48]]]**	The Panel sustains the US objection.
1188	**[[***]]**	The Panel sustains the US objection.
1189	**[[***]]**	The Panel sustains the US objection.
1190	**[[***]]**	The Panel sustains the US objection.
1191	**[[***[49]]]**	The Panel sustains the US objection.

[46] **[[ ]]**.
[47] **[[.]]**
[48] **[[.]]**
[49] **[[***]]**

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
1192	**[[***]]**[50]	The Panel sustains the US objection.
1193	Using the **[[***]]** as a basis, the government entered into negotiations with to determine the settlement amount. Ultimately, the German government secured from Deutsche Airbus agreement to a settlement amount ***higher*** than the upper **[[***]]** the German government and Deutsche Airbus agreed on a settlement of DM 1.75 billion – **[[***]]**	The Panel sustains the US objection.
1196	On the request of the German government, **[[***]]**	The Panel sustains the US objection.
1197	**[[***[51]]]** The European Communities fails to understand why the United States has not addressed **[[***]]** in its first written submission and thereby disclosed only a portion of the pertinent facts known to it. The United States was obliged, under paragraphs 5 and 15 of the Working Procedures, to provide all its factual evidence with its first written submission.	The Panel sustains the US objection.
1199	As explained by the Appellate Body, a "benefit" under Article 1.1(b) of the *SCM Agreement* is conferred if a recipient secures a financial contribution on terms more advantageous than those that would have been available on the market.[52] Like any market participants operating at arm's length, the German government and Deutsche Airbus used **[[***]]** report as an indication of value around which to negotiate the terms of settlement.	The Panel sustains the US objection.
1201	**[[***[53]]]**	The Panel sustains the US objection.

[50] **[[***]]**.
[51] **[[***]]**.
[52] Appellate Body Report, *Canada – Aircraft*, para. 157.
[53] **[[***]]**.

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
1202	Based on additional negotiations, the German government and Deutsche Airbus agreed on values above **[[***]]**. Deutsche Airbus paid the German government fair value of its claims, and thus did not receive any advantage relative to that it would have been accorded by a market-based creditor. No "benefit" was conferred on Deutsche Airbus, within the meaning of Article 1.1(b) of the *SCM Agreement*.	The Panel sustains the US objection.
footnote 963	***(footnote to paragraph 1187)*** **[[***]]**	The Panel sustains the US objection.
1208	Upon the advice of two independent accounting firms, **[[***]]**, requested jointly by the German government and DASA/MBB, it was determined that the value of KfW's 20 percent stake in Deutsche Airbus, as of 1 January 1992, **[[***]]**.	The Panel sustains the US objection.
1209	**[***]** Since the valuation fell below DM 505 million, the German government was entitled above and beyond the **[[***]]** value ascribed by **[[***]]**, to an additional **[[***]]** in return for KfW's 20% stake. The German Government, MBB and Deutsche Airbus negotiated that a transfer price of **[[***]]** to be paid by Deutsche Airbus under the terms of the debtor warrant, along with the **[[***]]** million specified in the 1989 restructuring agreement. Like all other claims, this claim was settled in its entirety for fair market value as a part of the 1998 settlement (see above).[54] Therefore, contrary to the United States' assertions, the transfer was not free of charge[55], and did not provide any benefit to Deutsche Airbus.[56]	The Panel sustains the US objection.
Exhibit EC-98	**[[***]]**	The Panel sustains the US objection.
Exhibit EC-563	**[[***]]**	The Panel sustains the US objection.
Exhibit EC-564	**[[***]]**	The Panel sustains the US objection.
Exhibit EC-20	**[[***]]**	The Panel sustains the US objection.

[54] The European Communities notes that the terms of the debtor warrant itself were amended in 1992 (see also above section X.B.2(a)).

[55] US First Written Submission, para. 550.

[56] Cf. US First Written Submission, para. 555.

BCI deleted, as indicated **[***]**

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
Exhibit EC-327	**[[***]]**	The Panel sustains the US objection.
Exhibit EC-336	**[[***]]**	The Panel sustains the US objection.
Exhibit EC-478	**[[***]]**	The Panel sustains the US objection.

BCI deleted, as indicated **[***]**

ANNEX F-4

COMMUNICATION OF 24 APRIL 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel is in receipt of the EC's letter dated 16 April 2007, submitted in response to the direction contained in paragraph 7 of the Panel's communication of 30 March 2007.

2. The Panel notes that in its letter dated 16 April 2007, the EC indicates that it has complied with the Panel's direction contained in paragraph 7 of the communication of 30 March 2007 to specify precisely the BCI and HSBI information contained in four documents (DS316-EC-HSBI-000088; DS316-EC-HSBI-000146; DS316-EC-HSBI-000199; and DS316-EC-HSBI-000205) on the understanding that, *despite* the designation of some information in these documents as BCI, the documents as a whole, and the remainder of the HSBI documents which contain BCI designations, "will retain their HSBI status and remain accessible only in the Secure Room and only to HSBI approved persons."

3. The Panel notes that the Panel's BCI/HSBI Procedures provide that information designated as BCI shall be subject to the restrictions set forth in Section V of the Procedures, while information designated as HSBI shall be subject to the restrictions set forth in Section VI. The Panel's BCI/HSBI Procedures do not make provision for information to be designated as BCI yet be subject to the restrictions applicable to information designated as HSBI. In other words, the Panel's BCI/HSBI Procedures contemplate only two distinct restrictions for the protection of information which apply according to whether information is designated as BCI or as HSBI.

4. The Panel therefore considers that the EC's "understanding" that, despite the designation of certain information in the afore-mentioned documents as BCI, the documents as a whole will retain their "HSBI status" is not in accordance with the Panel's BCI/HSBI Procedures or the general principles set forth in the Panel's communication of 13 March 2007. Neither is it consistent with the provisions of the BCI/HSBI Procedures concerning the submission of Redacted Version Appendices.

5. Thus, the Panel directs the EC to submit to the Panel, and serve upon the United States, BCI versions of these documents, with information designated as HSBI redacted from them, no later than close of business on **Tuesday, 1 May 2007**. Should the EC be unwilling to comply with this ruling, it may withdraw these documents from these proceedings. However, the Panel notes that, in cases where a party fails to provide necessary information, a panel may draw appropriate inferences from this fact. *See* Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, paras. 197-206.

6. The Panel has taken no view as to the propriety of the designations of information in the afore-mentioned documents as BCI or HSBI.

7. The United States is invited to submit, by close of business on **Friday, 27 April 2007**, any comments it may have on the propriety of the EC's re-designations of information as BCI or HSBI in response to the Panel's rulings of 30 March and 4 April 2007.

BCI deleted, as indicated **[***]**

ANNEX F-5

COMMUNICATION OF 30 APRIL 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel is in receipt of the EC's letter dated 25 April 2007. The Panel acknowledges the EC's undertaking to submit to the Panel and serve upon the United States by 1 May 2007, BCI versions (from which designated HSBI information has been redacted) of the documents referred to in the Panel's communication of 24 April 2007.

2. In response to the EC's request for an explanation of the Panel's understanding of the BCI/HSBI procedures concerning redacted versions of exhibits, the Panel observes that the issue addressed in the Panel's communication of 24 April 2007 was not whether the BCI/HSBI Procedures require a Party to produce redacted versions of exhibits *per se*. To the extent that the BCI/HSBI Procedures are understood not to require redacted versions of exhibits, the EC's letter has identified a serious problem with those Procedures. If the EC's view that, under those Procedures, BCI contained in "HSBI documents" should effectively be treated as HSBI were correct, the right of BCI-Approved Persons to have access to BCI would be nullified to the extent that BCI is contained in exhibits also containing HSBI.

3. A rule requiring the submission of BCI versions of all exhibits with HSBI redacted from them would appear to be a practical means of ensuring that Approved Persons are able to view the categories of confidential information to which they are entitled to have access.[1] The Panel therefore proposes to amend the BCI/HSBI Procedures to clarify that there is such a rule. The alternative would seem to be, as the EC observes, to allow HSBI-Approved Persons to redact HSBI from exhibits which also contain BCI, and remove the resulting "redacted version" from the HSBI secure room and treat it according to the rules governing BCI. The Panel is reluctant to impose the responsibility to redact the exhibits of the other party on the HSBI-Approved Persons of either party.

4. The Parties are directed to submit any comments on its proposal, or any other suggestions they may have for ensuring that BCI-Approved Persons have access to BCI in exhibits which also contain HSBI, by close of business on **Friday, 4 May 2007**.

[1] The Panel notes that BCI versions of exhibits with HSBI redacted from them have been submitted by the United States in connection with its first submission.

BCI deleted, as indicated **[***]**

ANNEX F-6

COMMUNICATION OF 23 MAY 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel is in receipt of the European Communities' letter dated 18 May 2007, and the United States' comments thereon dated 22 May 2007. The Panel acknowledges the EC's undertaking regarding preparation of a appropriate Full HSBI Version Appendix, in compliance with paragraph 52 of the BCI/HSBI Procedures and with the Panel's communications of 13 March 2007 and 14 May 2007, in respect of its answers to questions and second written submission.

2. The Panel has considered the EC's proposed change to the procedure for verifying HSBI-Redacted Version Exhibits contained in clause (iii) of paragraph 52(k*bis*) of the revised version of 14 May 2007, to enable such verification to be carried out by a representative authorized for this purpose. In light of paragraph 24 of the BCI/HSBI Procedures, which provides that, unless otherwise specifically provided otherwise, the BCI/HSBI Procedures do not apply to a Party's or Third Party's treatment of its own BCI or HSBI, and the lack of any objection, the Panel accepts the EC's proposed amendment. The relevant amendment to paragraph 52 is incorporated in the attached revised version of the BCI/HSBI Procedures.

3. With respect to the EC's suggested amendment to paragraph 52(a) of the BCI/HSBI Procedures, the Panel notes that it has previously stated its view that an HSBI Appendix must be a readable document on its own, and not simply a compilation of paragraphs containing HSBI. The EC's proposal appears to reflect that view, and therefore, with a slight clarifying modification, the Panel accepts that change, which is reflected in the attached revised version of the BCI/HSBI Procedures.

4. With regard to the EC's comments on bracketing of exhibits, the Panel notes that the amendments to the BCI/HSBI Procedures it transmitted to the Parties on 14 May 2007, incorporating new paragraphs 4(d) and 5(b), are intended to incorporate in the BCI/HSBI Procedures themselves the requirement, identified by the Panel in various rulings in this dispute, to identify specifically, through the use of brackets, single or double as appropriate, BCI or HSBI contained in, *inter alia*, exhibits. Although this requirement was not explicit in the BCI/HSBI Procedures as originally adopted, the Panel has concluded that bracketing of BCI contained in exhibits is required by the those Procedures. In paragraph 2(a) of its communication of 13 March 2007, the Panel clarified that:

> "Parties are not to present entire submissions or exhibits categorized as BCI or HSBI, but rather are to specifically identify, through the use of brackets as provided for in paragraph 4, the information *within* those submissions or exhibits they consider should be so designated.... If a Party considers that a submission or exhibit contains BCI it **must** identify that information through the use of brackets as envisaged by paragraph 4." (Underlining added - other emphasis in original)

The Panel reiterated its view in this regard in paragraph 3 of its communication of 30 March 2007, stating again that "the Parties are not to present entire submissions or exhibits categorized as BCI or HSBI, but rather are to specifically identify, through the use of brackets as provided for in paragraphs 4 and 5, the information within those submissions or exhibits they consider should be so designated." Thus, the addition of paragraphs 4(d) and 5(d) to the BCI/HSBI Procedures does not represent a new requirement. Rather, these paragraphs incorporate in the text of the BCI/HSBI Procedures the substance of the Panel's previous rulings. Therefore, the Panel declines to delete them.

BCI deleted, as indicated **[***]**

5. In order to be clear, the Panel confirms that these amendments take effect as of 14 May 2007. That is, the Parties (and Third Parties) are required to bracket the specific information designated as BCI (or HSBI) contained in any exhibit submitted subsequent to 14 May 2007. Parties are **not**, however, required to retroactively re-bracket BCI or HSBI contained in exhibits filed prior to 14 May 2007, except to the extent that the Panel has already directed them to do so. This does not preclude the possibility that the Panel may direct a Party to re-bracket BCI or HSBI in an exhibit submitted prior to that date, on a case-by-case basis.

6. The Panel notes the concern expressed by the EC regarding the production of non-BCI versions of exhibits. The Panel clarifies that the BCI/HSBI Procedures, as amended, are not intended to require Parties to produce and submit non-BCI versions of exhibits (*i.e.* versions of exhibits from which BCI has been redacted), although such versions are, of course, welcome. The Panel has reflected this view in a clarifying modification to paragraph 38(b).

7. Concerning exhibits EC-167, EC-551 through EC-561 and EC-077, the Panel notes the EC's request that the Panel ask the United States "to specify what information it wants to be unbracketed and to substantiate in what way the alleged over-bracketing is prejudicing its possibility to prepare its second written submission before the burden is put on the European Communities and the stakeholders to re-bracket these exhibits." The EC makes this request despite having failed to submit any responses to the United States' objections to the alleged over-designation of information as BCI in the aforementioned exhibits by the applicable deadline. The Panel further notes that, in its communication of 14 May 2007, the Panel sustained the United States' objections to the EC's designation of information as BCI in the aforementioned exhibits, and directed the EC to re-submit these exhibits, bracketing only the specific BCI contained therein, by 18 May 2007.

8. The Panel recalls that paragraph 2 of the BCI/HSBI Procedures makes it clear that a Party submitting information which it seeks to have treated as BCI is obligated to act in good faith and exercise restraint in designating information as BCI, and endeavour to designate information as BCI only if its disclosure *would cause harm to the originators* of the information. Similarly, paragraph 9 of the BCI/HSBI Procedures makes it clear that a Party submitting information which it seeks to have treated as HSBI is obligated to act in good faith and exercise restraint in designating information as HSBI, and endeavour to designate information as HSBI only if its disclosure *would cause* ***exceptional harm to the originators*** of the information, and sets forth categories of information that may, and may not, be designated as HSBI. It is the Panel's view that the Procedures place the burden on a Party designating information as BCI or HSBI to demonstrate, if challenged, that the information in question satisfies the criteria for such treatment. The EC's proposed modifications to paragraph 38(d) and 52(k*bis*) would shift this burden, imposing obligations on the non-submitting Party, and the Panel. The Panel considers that a Party receiving information designated as BCI is not required to identify specific information it seeks to have 'debracketed' and justify its request on the basis that the designation of such information as BCI is prejudicial to its ability to prepare its submissions to the Panel. Nor is it the Panel's obligation to identify to a Party the portions of exhibits it may wish to discuss in its report in order to ascertain whether specific information is considered by the submitting Party to be BCI.[1]

9. The Panel considers that it is incumbent upon the EC to comply with the Panel's direction of 14 May 2007, and declines to direct the United States to justify its objections as requested by the EC. The EC having failed to respond to the US objections to the designation of almost the entirety of the afore-mentioned exhibits as BCI, the Panel is not in a position to rule on the question of whether specific information in those exhibits may properly be designated as BCI.[2] The Panel notes that,

[1] The Panel will, of course, work with the Parties to ensure that any public documents in this dispute do not contain BCI or HSBI.

[2] The Panel notes, however, that based on the principles it has articulated in its rulings on the issue of designation of information as BCI or HSBI, the Panel has difficulty accepting that, for example, portions of the

BCI deleted, as indicated **[*******]**

pursuant to paragraph 2 of the BCI/HSBI Procedures, the fact that information is not in the public domain is only one element to be considered in designating information as BCI. The EC is directed to comply with the Panel's earlier ruling, and to submit re-bracketed versions of the afore-mentioned exhibits no later than **close of business on Wednesday 30 May 2007.**

10. Finally, the Panel notes that it does not consider it necessary to meet with the parties at this time to discuss these matters.

11. Based on the foregoing, the Panel declines to incorporate the EC's proposed paragraphs 38(d) and 52(k*bis*) in, and declines to delete paragraphs 4(d), 5(d), and 20*bis* from, the BCI/HSBI Procedures (revised version of 14 May 2007). The Panel does, however, incorporate the changes proposed to paragraph 52(a) and paragraph 52(k*bis*) concerning persons authorized to verify the redaction of HSBI from exhibits. A revised version of the BCI/HSBI Procedures reflecting the Panel's rulings is attached.

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table of contents and the section numbers and headings of specific contractual provisions, or apparently standard contractual provisions (*e.g.* provisions to the effect that amendments to the agreement shall be in writing) may be designated as BCI.