

5.775. Accordingly, we modify the Panel's conclusion in paragraph 6.1817 of the Panel Report, and find instead that the United States has established that the "product effects" of the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of impedance of US LCA in the markets for VLA in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

6.1 Article 21.5 of the DSU – the Mühlenberger Loch and Bremen Airport measures

6.2. In its Compliance Communication, the European Union took the view that the Mühlenberger Loch aircraft assembly site measure and the Bremen Airport runway extension measure are consistent with the WTO agreements and in full compliance with the relevant recommendations and rulings of the DSB. Based on our review of the Panel Report and the Panel record, we do not understand the United States to have contested this view. The Panel, therefore, did not err in its interpretation and application of Article 21.5 of the DSU in finding, in paragraph 5.77 of the Panel Report, that there was no "disagreement" for it to resolve within the meaning of that provision. Based on our review of the Panel's analysis, we further disagree with the European Union to the extent that it argues that the Panel acted inconsistently with its duties under Article 11 of the DSU in reaching this conclusion. For these reasons, we find that the Panel did not err by declining to make a finding as to whether the European Union had achieved compliance with respect to the Mühlenberger Loch aircraft assembly site measure and the Bremen Airport runway extension measure, and see no need to make further findings in respect of those measures.

6.2 Article 3.1(b) of the SCM Agreement

6.3. With respect to the admissibility of the United States' appeal under Article 3.1(b) of the SCM Agreement, we find that the United States' appeal falls within the scope of appellate review. As we see it, the United States' appeal adequately identifies "issues of law covered in the panel report and legal interpretations developed by the panel" pursuant to Article 17.6 of the DSU, as well as "specific allegations of errors" within the meaning of the Working Procedures for Appellate Review, with regard to the Panel's interpretation and application of Article 3.1(b) of the SCM Agreement.

- a. Regarding the merits of the United States' appeal, we uphold the Panel's interpretation of Article 3.1(b) of the SCM Agreement and agree with the Panel that *the fact that a subsidy results in the use of domestic over imported goods* cannot by itself demonstrate that that subsidy *is contingent on the use of domestic over imported goods, whether in law or in fact*. While we have expressed concerns with certain aspects of the Panel's reasoning, the focus of the Panel's legal standard on the need to establish a condition requiring the use of domestic over imported goods comports with our reading of this provision.

6.4. Having upheld the Panel's interpretation of Article 3.1(b) of the SCM Agreement, we are not required to make findings regarding the application of this provision to the facts of the present case, or to address the United States' arguments concerning completion of the legal analysis. The Panel's finding under Articles 3.1(b) and 3.2 of the SCM Agreement therefore stands.

6.3 Benefit

6.3.1 The calculation of general corporate borrowing rate

6.5. We agree with the European Union that, in conducting the benefit analysis, the comparison focuses on the moment in time when the lender and borrower commit to the transaction. We disagree, however, with the European Union to the extent that it suggests that the Panel was required to limit its analysis to data from "the day of conclusion" of each A350XWB LA/MSF contract regardless of the time period over which the parties may have committed to the terms

and conditions of that financing instrument. Rather, the Panel was required to take into account the specific financing instrument at issue, including the relevant circumstances surrounding the conclusion of that instrument, to determine the period over which the terms and conditions of the relevant contract were agreed. The Panel provided two reasons in support of its decision to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of the A350XWB LA/MSF contracts, in the form of a *range*. First, the Panel considered that "the yield on the day of the signature of contract may reflect atypical fluctuations."²¹⁰⁹ The Panel's second reason was that "{p}arties agreeing to a complex loan contract may rather set the rates in the lead-up to the conclusion of the contract, and prior to the actual day on which the contract is signed."²¹¹⁰ We have found this understanding to be in line with our observation that, in some cases, parties may have committed to a transaction – or to key aspects thereof – during a finalization period of the negotiations preceding the moment of formal conclusion of *all* aspects of that transaction. In the present case, the financial contribution at issue consists of complex financing, the terms and conditions of which have been negotiated and agreed over a certain contracting period. In these circumstances, we find that the Panel did not err in its application of Article 1.1(b) of the SCM Agreement in finding that the corporate borrowing rate component of the market benchmark could be based on the average yields of the EADS bond "one-month prior and six-months prior to the conclusion" of the French, German, Spanish, and UK A350XWB LA/MSF contracts, "in the form of a range", attributing more weight to the former average yields than it did to the latter.²¹¹¹

6.6. Moreover, we reject the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it *lacked a sufficient evidentiary basis* for rejecting the EADS bond yield on the day of conclusion of each A350XWB LA/MSF contract. In addition, the European Union has not established that the Panel's decision to set the corporate borrowing rate in the form of a range of average yields, or the fact that such decision was done against the background of a downward trend in the yield of the EADS bond, reflects a lack of objectivity and even-handedness contrary to the requirements of Article 11 of the DSU. Consequently, we find that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

6.7. We also reject the European Union's alternative claims that the Panel erred in its application of Article 1.1(b) of the SCM Agreement and acted inconsistently with Article 11 of the DSU by accepting the average yield of the EADS bond over the *six months* prior to the conclusion of the French, German, Spanish, and UK A350XWB LA/MSF contracts as part of the range of average yields that was used to determine the corporate borrowing rate. Although the corporate borrowing rate was determined in the form of a range of average yields, the Panel rightly gave more prominence to the one-month average yield of the EADS bond than to the six-month average yield, which was considered only to be a "helpful indication of market expectations".²¹¹² In these circumstances, we find that the European Union has failed to establish that the Panel erred in its application of Article 1.1(b) of the SCM Agreement or acted inconsistently with Article 11 of the DSU by deciding to observe the EADS bond yield on the basis of the average yields one month prior and six months prior to the conclusion of each of the four A350XWB LA/MSF contracts, in the form of a range, attributing more weight to the former average yields than it did to the latter.

- a. For these reasons, we uphold the Panel's finding, in paragraph 6.389 of the Panel Report, that the corporate borrowing rate component of the market benchmark be based on "the average yields one-month prior and six-months prior to the conclusion of the {French, German, Spanish, and UK A350XWB LA/MSF contracts}, in the form of a range". We also uphold the Panel's findings related to the corporate borrowing rate in Table 7 at paragraph 6.430 and in Table 10 at paragraph 6.632 of the Panel Report.²¹¹³

²¹⁰⁹ Panel Report, para. 6.389.

²¹¹⁰ Panel Report, para. 6.389.

²¹¹¹ Panel Report, para. 6.389.

²¹¹² Panel Report, para. 6.389.

²¹¹³ See *supra* fns 330 and 514.

6.3.2 The calculation of project-specific risk premium

6.8. We disagree with the European Union's claim that "the Panel failed to adopt the most appropriate benchmark, tailored to the risks associated with the A350XWB, based on a 'progressive search' for the benchmark that shared 'as many elements as possible in common with' the A350XWB LA/MSF loans."²¹¹⁴ We also disagree that the Panel erred under Article 1.1(b) of the SCM Agreement merely because it applied a single, undifferentiated project risk premium derived from the A380 project to the A350XWB project. Moreover, given that we addressed and rejected the European Union's claim that the Panel erred under Article 1.1(b) by failing to undertake a "progressive search" for a market benchmark²¹¹⁵, we consider it unnecessary to address further the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to consider alternative, and more appropriate, benchmarks than those proposed by the United States. In addition, we disagree with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it allegedly deviated from the original panel's findings by adopting a "constant, undifferentiated project risk premium" for the A350XWB.²¹¹⁶ Consequently, we find that the European Union has not established that the Panel erred in its application of Article 1.1(b) of the SCM Agreement. We also find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU.

6.9. We also disagree with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in its examination of the risk profiles of the A380 and A350XWB projects, including in its assessment of: (i) programme risk; (ii) contract risk; and (iii) the price of risk. Contrary to the European Union's view, the Panel did not simply assume that the WRP would serve as an appropriate project-specific risk premium for the A350XWB. Instead, the Panel assessed the relative project-specific risks associated with the A380 and A350XWB projects. The purpose of this comparative analysis was, in the Panel's view, to determine "whether the United States ha{d} demonstrated that the project-specific risks of the A350XWB programme {were} sufficiently similar to those of the A380 programme such that it would be reasonable to conclude that the WRP could be used as the project-specific risk premium for the A350XWB".²¹¹⁷ Thus, the Panel sought to engage carefully with the arguments and evidence presented by the parties regarding the possible risk premia that should be used in constructing the market benchmark. Regarding the Panel's analysis of programme risk, we find that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU in its analysis of development risk, market risk, or in its comparison of the development and market risks. With regard to contract risk, we find that the European Union has failed to establish that the Panel's comparison of the A350XWB and A380 LA/MSF contracts lacks a sufficient evidentiary basis in a manner inconsistent with the requirements of Article 11 of the DSU. We also find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU by failing to compare the terms of the A350XWB LA/MSF contracts to the terms of the A380 risk-sharing supplier contracts. Finally, we find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in its analysis of the price of risk.

6.10. We also reject the European Union's claims that, in adopting a single, undifferentiated project-specific risk premium for each of the four A350XWB LA/MSF contracts, the Panel erred in its application of Article 1.1(b) of the SCM Agreement, and also failed to make an objective assessment of the matter as required by Article 11 of the DSU.²¹¹⁸ The Panel recognized that there were some differences among the risk profiles of the four A350XWB LA/MSF contracts.²¹¹⁹ However, based on its analysis, the Panel was not persuaded that the terms of those contracts rendered them significantly different so as to require the application of two or more different project-specific risk premia in these proceedings. Given the Panel's analysis and the arguments that were put before it, we find that the European Union has not established that the Panel erred under Article 1.1(b) of the SCM Agreement by applying a "single, undifferentiated project risk

²¹¹⁴ European Union's appellant's submission, para. 405 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 476 and 486; referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345).

²¹¹⁵ See section 5.3.2.2.1 of this Report.

²¹¹⁶ European Union's appellant's submission, para. 423.

²¹¹⁷ Panel Report, para. 6.459.

²¹¹⁸ European Union's appellant's submission, paras. 517-518.

²¹¹⁹ Panel Report, para. 6.604.

premium" without making adjustments for differences among the risk profiles of the A350XWB LA/MSF contracts.²¹²⁰ Moreover, contrary to the European Union's claim under Article 11 of the DSU, we see no error in the Panel's decision to adopt, on the one hand, an undifferentiated project-specific risk premium for the four A350XWB LA/MSF contracts and, on the other hand, a contract-specific approach to the corporate borrowing rate. Thus, we find that the European Union has failed to establish that, by applying a single, undifferentiated project risk premium to all four of the A350XWB LA/MSF contracts, the Panel acted inconsistently with Article 11 of the DSU.

- a. For these reasons, we uphold the Panel's finding, in paragraphs 6.487 and 6.542 of the Panel Report, that the development risks associated with the A350XWB were *at least as high as, or sufficiently similar to*, those associated with the A380; the Panel's findings, in paragraphs 6.579 and 6.608 of the Panel Report, that the market risks experienced by the A380 and A350XWB were overall comparable in importance and that the A350XWB market risks would not have been much lower than the A380 market risks; the Panel's finding, in paragraphs 6.595 and 6.609 of the Panel Report, that the A350XWB LA/MSF contracts containing such "risk-reducing" terms are no less risky than at least **[BCI]** for A380 LA/MSF that also contained similar terms in the original proceedings; the Panel's findings, in paragraphs 6.607 and 6.609 of the Panel Report, that it was not persuaded that the differences in certain terms affecting the risk profiles of the individual A350XWB LA/MSF contracts would require the application of two or more different project-specific risk premia; and, consequently, the Panel's finding, in paragraphs 6.608 and 6.610 of the Panel Report, that the overall project-specific risks of the A380 and A350XWB projects were sufficiently similar to allow the risk premium applied to the A380 LA/MSF in the original proceedings to be applied to the A350XWB LA/MSF.
- b. Accordingly, we uphold the Panel's findings, in paragraphs 6.632 (including Table 10)²¹²¹ and 6.633 of the Panel Report, that Airbus paid a lower interest rate for the A350XWB LA/MSF than would have been available to it on the market and, consequently, a benefit has thereby been conferred within the meaning of Article 1.1(b) of the SCM Agreement. Consequently, we also uphold the Panel's findings, in paragraphs 6.656 and 7.1.c.i of the Panel Report, that the French, German, Spanish, and UK A350XWB LA/MSF contracts each constitute a subsidy within the meaning of Article 1.1 of the SCM Agreement and, thus, that the United States has demonstrated that the French, German, Spanish, and UK A350XWB LA/MSF contracts are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

6.4 Article 7.8 of the SCM Agreement

6.11. We find that the obligation to "take appropriate steps to remove the adverse effects or ... withdraw the subsidy" concerns the subsidies that are "grant{ed} or maintain{ed}" by the implementing Member at the end of the implementation period. An implementing Member cannot be required to withdraw a subsidy that has ceased to exist. Nor do we see a basis, under Article 7.8 of the SCM Agreement, to require that an implementing Member "take appropriate steps to remove the adverse effects" of subsidies that no longer exist.

- a. Accordingly, we reverse the Panel's interpretation of Article 7.8 of the SCM Agreement, in paragraph 6.822 of the Panel Report, whereby an implementing Member would be required to "withdraw" or "take appropriate steps to remove the adverse effects" of past subsidies *irrespective* of whether such subsidies have expired prior to the end of the relevant implementation period. It follows from our finding that, in the present dispute, the European Union has no compliance obligation with respect to subsidies that had expired before 1 December 2011.

6.5 Conditional appeals under Article 7.8 of the SCM Agreement

6.12. We find that an *ex ante* analysis regarding the benefit of a subsidy serves as *the starting point* of the analysis to determine whether a subsidy continues to exist at the end of the

²¹²⁰ European Union's appellant's submission, para. 522.

²¹²¹ See Table 4 at para. 5.350 above.

implementation period. For such a determination, it is also necessary to conduct an analysis regarding "whether there are 'intervening events' that occurred after the grant of the subsidy that may affect the projected value of the subsidy as determined under the *ex ante* analysis."²¹²² We further find that the Panel's ultimate conclusion regarding the *actual* duration of relevant pre-A380 LA/MSF subsidies was based on a proper analysis of both the expiry of the *ex ante* "lives" of the subsidies and the alleged intervening events after the granting of the subsidies. We consider this to be consistent with the Appellate Body's approach in the original proceedings, whereby the assessment of the "life" of a subsidy should encompass both an *ex ante* analysis and an evaluation of intervening events.

- a. For these reasons, we uphold the Panel's finding, in paragraphs 6.879, 6.1076, and 7.1.d.ii of the Panel Report, that the European Union had demonstrated that the *ex ante* "lives" of the French, German, and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, and A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340, "expired" before 1 June 2011.

6.13. We see no reason to make additional findings on whether the French LA/MSF for the A310-300, the French and Spanish LA/MSF for the A300B/B2/B4 and A300-600, and the French, Spanish, and UK LA/MSF for the A320 and A330/A340 *also* came to an end due to the actual repayment of the loans with interests. We do not consider such findings to be necessary to resolve this dispute.

6.6 European Union's consequential appeal under Article 7.8 of the SCM Agreement

6.14. We disagree with the European Union that it *necessarily* follows from the manner in which the Panel characterized the scope of the compliance obligation under Article 7.8 of the SCM Agreement that the Panel's findings of adverse effects must be reversed for each of the specific country and product markets with respect to which the United States brought its claims. We note that the Panel's adverse effects analysis led to its final conclusion, in paragraph 7.2 of the Panel Report, that "the European Union and certain member States have failed to comply with the DSB recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement 'to take appropriate steps to remove the adverse effects or ... withdraw the subsidy'." In our view, whether the Panel had a sufficient basis for this ultimate conclusion is a question that can only be answered following a careful review of the Panel's reasoning and analysis, in particular its analysis relating to the adverse effects of the *existing* LA/MSF subsidies that are maintained or granted in the post-implementation period.

6.15. Thus, we do not dismiss the totality of the Panel's adverse effects analysis solely on the basis of its interpretation of Article 7.8 of the SCM Agreement. Rather, we do not preclude that the pertinent question in these compliance proceedings – i.e. whether the subsidies existing in the post-implementation period cause adverse effects – may still be answered on the basis of the Panel's analysis of the existing subsidies. A consideration of expired subsidies is relevant for this purpose insofar as it sheds light on whether LA/MSF subsidies granted or maintained by the European Union in the post-implementation period cause adverse effects.

6.7 Articles 5, 6, and 7.8 of the SCM Agreement – adverse effects

6.7.1 Non-subsidized like product

6.16. Regarding the European Union's arguments concerning the relevance of Article 6.4 of the SCM Agreement to the United States' claims under Article 6.3(b) of the SCM Agreement, the Panel was required to examine the meaning of Article 6.3(b), including the relationship between this provision and Article 6.4, as clarified by the Appellate Body in the original proceedings in this dispute and in *US – Large Civil Aircraft (2nd complaint)*. It was also appropriate for the Panel to take into account the findings and reasoning by the original panel regarding the meaning of Article 6.4. The Panel could not simply refuse to address the arguments and evidence before it in dealing with the United States' claims under Article 6.3(b). Rather, the Panel was required to

²¹²² Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709.

adjudicate the United States' claims under Article 6.3(b) in light of the arguments raised and evidence submitted by both parties to the dispute, and it erred by declining to do so.

- a. Accordingly, we declare moot and of no legal effect the Panel's finding, in paragraph 6.1154 of the Panel Report, concerning the European Union's reliance on Article 6.4 to reject the United States' claims under Article 6.3(b) of the SCM Agreement. Based on our interpretation of Article 6.3(b), read together with Article 6.4, we disagree, however, with the European Union that a complainant is required to demonstrate, in each case, that its like product is non-subsidized in order to show that the effect of the subsidy is displacement and/or impedance of its like product in a third country market.

6.7.2 The relevant product markets

6.17. Regarding the term "market" in Article 6.3 of the SCM Agreement, for the purposes of conducting an adverse effects analysis, two products are in the same market if they are sufficiently substitutable and they exercise "meaningful" competitive constraints on each other. A consideration of *quantitative* tools and evidence may assist a panel in defining the relevant product markets and in answering the question of whether products exercise meaningful competitive constraints on each other and are sufficiently substitutable to fall in the same product market. However, like the Panel, we do not see a reason to preclude that a careful scrutiny of *qualitative* evidence may also be sufficient provided that it permits an informative and meaningful analysis of the relevant product markets. Depending on the particularities of a given case, it may be sufficient for a panel to examine *qualitative* evidence regarding demand-side and supply-side substitutability, product characteristics, end-uses, and customer preferences in order to reach a conclusion as to the nature and degree of competition between two products.

6.18. Having reviewed the Panel's analysis of competition in the single-aisle LCA, twin-aisle LCA, and VLA product markets, we are satisfied that the Panel's identification of the product markets in the present dispute was based on a proper analysis of the competition among the relevant products, which the Panel found to demonstrate sufficient substitutability, in accordance with the standard articulated by the Appellate Body in the original proceedings. We are also satisfied that the Panel's analyses identifying the single-aisle LCA, twin-aisle LCA, and VLA product markets reflect a proper reading of the term "market" and we do not agree with the European Union to the extent that it argues that the Panel erred in its interpretation of the term "market" in Article 6.3 of the SCM Agreement.

- a. Accordingly, we uphold the Panel's finding, in paragraph 6.1416 of the Panel Report, that the United States had brought its adverse effects claims with respect to appropriately defined product markets for LCA, namely, the global markets for single-aisle LCA, twin-aisle LCA, and VLA.

6.7.3 "Product effects" of LA/MSF subsidies on Airbus LCA

6.19. The errors alleged by the European Union regarding the Panel's findings on the "product effects" of the pre-A350XWB LA/MSF subsidies on the market presence of the A320 and A330 families of Airbus LCA concern primarily the LA/MSF subsidies that were found by the Panel to have expired before the end of the implementation period – namely, the subsidies for the A300, A310, A320, A330, and A340. We recall that, under our interpretation of Article 7.8 of the SCM Agreement, the European Union does not bear a compliance obligation with respect to the subsidies that were found by the Panel to have expired by the end of the implementation period. Thus, to the extent that some subsidies have expired, a further examination of the removal of the effects of those subsidies would not be necessary. In other words, it is not pertinent to examine whether the Panel's findings on the "product effects" of the *expired* subsidies can support its ultimate conclusion of non-compliance under Article 7.8 of the SCM Agreement. In line with this view, we do not consider it necessary to make separate findings on the European Union's claims on appeal insofar as they concern the Panel's alleged failure to assess properly the passage of time and the events during that time in reaching its findings on the "product effects" of the expired

subsidies. In addition, we disagree with the Panel insofar as its reference to the aggregated LA/MSF subsidies in the above findings includes the expired subsidies.²¹²³

6.20. Rather, as we have explained above, the pertinent question for purposes of these compliance proceedings is whether the subsidies existing in the post-implementation period (i.e. after 1 December 2011) cause adverse effects. The Panel found, and the European Union does not disagree, that the French, German, Spanish, and UK A380 LA/MSF subsidies had not expired by the end of the implementation period. Furthermore, the Panel found that, subsequent to the original reference period (2001-2006), the European Union granted new LA/MSF subsidies to Airbus for developing its A350XWB family of LCA, and that these subsidies were "closely connected" with the adopted recommendations and rulings of the DSB and the European Union's alleged compliance "actions". Given the scope of these compliance proceedings, we have therefore focused our review on the Panel's analysis and findings regarding the effects of subsidies existing in the post-implementation period – namely, the A380 LA/MSF and the A350XWB LA/MSF subsidies – and the European Union's appeal thereof, to determine whether those findings support the Panel's ultimate conclusion regarding serious prejudice.

6.21. As part of our analysis above, we have disagreed with the European Union's claim under Article 11 of the DSU that the Panel's understanding of the "direct effects" of A380 LA/MSF on Airbus' ability to launch, bring to market, and continue developing the A380 *as and when it did* lacks sufficient evidentiary basis. Furthermore, we have found that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in reaching its conclusion that, "without A350XWB LA/MSF, the Airbus company that *actually existed* {in 2006-2010} could have pursued such a programme only by a narrow margin, with a high likelihood that it would, to some degree, have had to make certain compromises with respect to the pace of the programme and/or the features of the aircraft."²¹²⁴ We have also rejected the European Union's claim that the Panel erred in finding that the A380 LA/MSF subsidies had "indirect effects" on the A350XWB.

6.22. The findings by the Panel on the issues surrounding the Original A350 and the launch of the A350XWB, together with its findings on the severe implications of the extensive delays with the A380 programme, establish that Airbus was faced with considerable overall uncertainty in the years following the original reference period. Moreover, the original panel's findings, together with the Panel's analysis, indicate that A380 LA/MSF had "direct effects" on Airbus' ability to launch, bring to market, and continue developing the A380 *as and when it did*, given that the A380 LA/MSF subsidies had not expired, as well as the fact that Airbus continued to receive disbursements under the French, German, and Spanish LA/MSF contracts at a time when it was experiencing severe financial difficulties resulting from the extensive production delays in the A380 programme. The Panel's findings regarding the "direct effects" of the A350XWB LA/MSF, read together with its findings concerning the "indirect effects" of the A380 LA/MSF, also indicate that, without the aggregated "product effects" of the existing LA/MSF subsidies for the A380 and A350XWB programmes, Airbus would not have been able to launch the A350XWB *as and when it did*. In other words, the existing LA/MSF subsidies that Airbus continued to receive made it possible to proceed with the timely launch of the A350XWB – a high-risk and expensive programme of considerable strategic importance to Airbus – and to bring to market the A380, which had suffered extensive delays.

6.23. In sum, our discussion of the Panel's findings reveals that the LA/MSF subsidies existing in the post-implementation period – i.e. the A380 and the A350XWB LA/MSF subsidies – enabled Airbus to proceed with the timely launch and development of the A350XWB, and to bring to market and to continue developing the A380. Both these events were crucial to renew and sustain Airbus' competitiveness in the post-implementation period.

²¹²³ Having said that, we recall that the expired subsidies remain relevant as part of a matrix of analysis that seeks to identify the effects of the subsidies existing in the post-implementation period, in respect of which the European Union continues to have a compliance obligation. Findings from the original proceedings concerning the design, structure, and operation of the expired subsidies, as well as how those subsidies affected Airbus' operations until the end of 2006, can help in understanding the extent to which the existing subsidies may cause adverse effects in the post-implementation period.

²¹²⁴ Panel Report, para. 6.1717. (emphasis original)

6.7.4 Lost sales, displacement, and impedance

6.24. We recall that "displacement or impedance" would arise where the counterfactual analysis shows that the sales of the complaining Member would have declined less or would have been higher in the absence of the challenged subsidy. We understand the Panel to have sought to apply this framework when it turned to assess whether the volume of deliveries and market shares that "would have been achieved by the United States' LCA industry between 1 December 2011 and the end of 2013 would have been higher than *its actual level* in all relevant product markets"²¹²⁵ in the absence of the "product effects" of the LA/MSF subsidies. We further consider that the Panel's finding that "the United States has established that the 'product' effects of the challenged LA/MSF subsidies are a 'genuine and substantial' cause of *displacement and/or impedance* of United States LCA"²¹²⁶ in the relevant geographic markets for single-aisle LCA, twin-aisle LCA, and VLA is informed by the manner in which the United States framed its claims. We do not read the Panel's use of the term "displacement and/or impedance" when summing up its serious prejudice findings regarding the relevant markets at issue as suggesting that the Panel found the existence of these serious prejudice phenomena in an undifferentiated manner with respect to one and the same product and country market. Therefore, contrary to what the European Union appears to suggest, it does not necessarily follow from the Panel's use of the term "displacement and/or impedance" that the Panel treated "displacement" and "impedance" as interchangeable and indistinguishable concepts for purposes of its adverse effects analysis.

6.25. We recall our finding that the Panel's assessment of the relevant product markets in these compliance proceedings was based on a proper analysis of the nature and degree of competition between products that the Panel found to demonstrate sufficient substitutability. However, an assessment of the nature and degree of competition in the relevant product market(s) does not, in and of itself, answer the question of whether the subsidies existing in the post-implementation period are a genuine and substantial cause of adverse effects in the relevant market(s).

6.7.4.1 The single-aisle LCA market

6.26. With regard to the single-aisle LCA market, the Panel's findings regarding the "product effects" of LA/MSF subsidies on the market presence of *the A320* concerned primarily the effects of those subsidies that had expired prior to the end of the implementation period. We have found, however, that the European Union has no compliance obligation in respect of those expired subsidies. Rather, the pertinent question is whether the subsidies existing in the post-implementation period (i.e. after 1 December 2011) cause adverse effects, such that the European Union has failed to comply with its obligation under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". We do not find any analysis by the Panel as to whether, and to what extent, Airbus' competitiveness in the single-aisle LCA market, gained through the pre-A380 LA/MSF subsidies, was renewed and sustained beyond the original reference period as a result of the subsidies that the European Union maintained or granted in the post-implementation period.

6.27. Thus, we are not convinced that, insofar as the single-aisle LCA market is concerned, the Panel's analysis provides a sufficient basis to sustain its conclusion, in paragraph 6.1798 of the Panel Report, that "the orders identified in Table 19 {in the single-aisle LCA market} represent 'significant' 'lost sales' to the United States LCA industry and, therefore, that the challenged LA/MSF subsidies continue to be a 'genuine and substantial' cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement". Similarly, we are not convinced that, with regard to the various country markets for single-aisle LCA, the Panel's analysis is sufficient to sustain its conclusion, in paragraph 6.1817 of the Panel Report, that "the challenged LA/MSF subsidies are a 'genuine and substantial' cause of displacement and/or impedance of United States LCA in the markets for single-aisle LCA in the European Union, Australia, China and India".

²¹²⁵ Panel Report, para. 6.1817. (emphasis added)

²¹²⁶ Panel Report, para. 6.1817. (emphasis added)

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- a. We therefore reverse the above conclusions of the Panel under Articles 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement insofar as they relate to the single-aisle LCA market.

6.28. Having so found, we do not consider it necessary for us to address the European Union's additional arguments described in paragraph 5.703 of this Report.

6.29. We further find that we are unable to complete the legal analysis of the United States' claims of "displacement and/or impedance" in the single-aisle LCA markets in Australia, China, and India, and impedance in the single-aisle LCA market in the European Union, or, in the alternative, threat of displacement and impedance in that market.

6.7.4.2 The twin-aisle LCA market

6.30. With regard to lost sales in the twin-aisle LCA market, our review of the Panel's finding on the product effects of LA/MSF subsidies on the A350XWB indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period (i.e. after 1 December 2011), Airbus would not have been able to offer the A350XWB at the time it did and with the features it had. The Panel's finding that the sales of the A350XWB in the post-implementation period constituted "lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement is also supported by relevant Panel findings regarding the competitive dynamics between Boeing's and Airbus' respective product offerings in the twin-aisle LCA market. Furthermore, we are not convinced by the European Union's argument that the Panel failed to take into account market-specific and sale-specific non-attribution factors.

6.31. Therefore, the Panel's findings support the conclusion that the sales of the A350XWB identified in Table 19 of the Panel Report represent "significant lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' timely launch of the A350XWB, and the existence of sufficient substitutability between Boeing's and Airbus' twin-aisle product offerings. In light of our interpretation of Article 7.8 of the SCM Agreement, however, we disagree with the Panel's conclusion on "significant lost sales" in the twin-aisle LCA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired.

- a. Accordingly, we modify the Panel's conclusion in paragraph 6.1798 of the Panel Report, and find instead that the orders identified in Table 19 of the Panel Report in the twin-aisle LCA market represent "significant lost sales" to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement.

6.32. With regard to displacement and impedance in the twin-aisle LCA market, we note that, according to the Panel, the LA/MSF subsidy for the A330-200 expired no later than **[BCI]**, i.e. in the post-implementation period. We note, however, that the original panel found that it was likely that the A330-200 could have been launched even in the absence of the specific LA/MSF granted in respect of that programme because it was a derivative of the A330 and, therefore, required a comparatively small amount of funding to develop. Moreover, unlike for the A380 and A350XWB LA/MSF subsidies, there are no specific findings by the Panel relating to the issue of whether and how the "product effects" of the A330-200 LA/MSF subsidy continued beyond 2006 and into the post-implementation period. Our review of the Panel's finding on the "product effects" of LA/MSF subsidies on the A350XWB indicates that, in the absence of the LA/MSF subsidies for the A380 and A350XWB existing in the post-implementation period, Airbus would not have been able to offer the A350XWB at the time it did and with the features it had. We further recall the Panel's finding that Airbus' A350XWB product offering was in direct competition with Boeing's twin-aisle LCA.

6.33. We note, however, that the United States framed its claim of displacement and/or impedance in the twin-aisle LCA market on the basis of data concerning market shares and

deliveries of Airbus and Boeing LCA during the period 2001-2013. There were no deliveries of the A350XWB during that period. Thus, for purposes of the claim of displacement and/or impedance in the twin-aisle LCA market, the Panel relied on market shares and delivery data relating to the A330, rather than orders of the A350XWB, in making its finding. We recall, in this regard, that the Panel's findings regarding the "product effects" of LA/MSF subsidies on the A330 concerned primarily the effects of those subsidies that had expired. We have found, however, that the European Union has no compliance obligation in respect of those expired subsidies. Rather, the pertinent question is whether the subsidies existing in the post-implementation period cause adverse effects, such that the European Union has failed to comply with its obligations under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". However, given the way the claims of displacement and/or impedance were raised before the Panel and its approach to assessing these claims, the Panel did not explore, and made no findings on, the issue of whether and, if so, how the A380 and A350XWB subsidies existing in the post-implementation period may have contributed to the deliveries of the A330 occurring during that period. In these circumstances, we are not convinced that the Panel's analysis and findings provide a sufficient basis to sustain the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period was to displace or impede US LCA in the twin-aisle LCA market in the European Union and relevant third country markets.

- a. Accordingly, we reverse the Panel's conclusion, in paragraph 6.1817 of the Panel Report, that "the United States ha{d} established that the 'product' effects of the challenged LA/MSF subsidies are a 'genuine and substantial' cause of displacement and/or impedance of United States LCA in the markets for ... twin-aisle LCA in the European Union, China, Korea and Singapore".

6.34. Having done so, we see no further reason to address the European Union's additional arguments regarding the Panel's conclusion, as set out in paragraph 5.703 of this Report.

6.35. We further find that we are unable to complete the legal analysis of the United States' claims of displacement in the twin-aisle LCA markets in China, Korea, and Singapore, and impedance in the twin-aisle LCA markets in the European Union, China, Korea, and Singapore.

6.7.4.3 The VLA market

6.36. With regard to lost sales in the VLA market, our review of the Panel's findings, as well as the relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period (i.e. after 1 December 2011), Airbus would not have been able to offer the A380 at the time it did. Moreover, the Panel's analysis regarding the conditions of competition in the VLA market confirms that Airbus' and Boeing's respective VLA products – the A380 and 747 – are sufficiently substitutable with each other. Such competitive dynamics, in our view, provide further support to the proposition that the sales won by Airbus in the VLA market were at the expense of the US LCA producer. Finally, like the Panel, we have doubts as to whether Airbus' pre-existing commonality advantages and other product-related advantages over Boeing could be characterized as non-attribution factors that could be said to "dilute" the causal link between the LA/MSF subsidies existing in the post-implementation period and the relevant market phenomena.

6.37. Therefore, the Panel's findings support the conclusion that the sales of the A380 identified in Table 19 of the Panel Report represent "significant lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings. In light of our interpretation of Article 7.8 of the SCM Agreement, however, we disagree with the Panel's conclusion on "significant lost sales" in the VLA market to the extent that its conclusion was based on effects of challenged LA/MSF subsidies that the Panel found to have expired.

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- a. Accordingly, we modify the Panel's conclusion in paragraph 6.1798 of the Panel Report, and find instead that the orders identified in Table 19 of the Panel Report in the VLA market represent "significant lost sales" to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period continue to be a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement.

6.38. With regard to displacement and impedance in the VLA market, our review of the Panel's findings, as well as the relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. We also recall that, as the Panel's analysis of the competitive dynamics in the VLA market shows, Boeing's and Airbus' respective product offerings – the 747 and the A380 – are sufficiently substitutable. With respect to the non-attribution factor alleged by the European Union concerning the development and production delays affecting the 747-8, we note the Panel's observation that the larger versions of the 777 may also at times challenge for sales in the VLA market. Therefore, we see no reason to disturb the Panel's finding that this non-attribution factor would not be capable of diluting the genuine and substantial relationship of cause and effect between the LA/MSF subsidies and the alleged market phenomena.

6.39. We recall that a trend analysis may be relevant and indicative, although not necessarily determinative, for purposes of a finding of displacement. In reaching its finding of displacement, however, the Panel did not examine whether there existed any discernible trends in volumes and market shares in the VLA markets at issue, including whether or not there existed declining trends that could have supported the Panel's findings. In these circumstances, we consider that the Panel should have engaged with the evidence before it in order to explain sufficiently the basis for its finding that the LA/MSF subsidies had the effect of displacing US LCA in these VLA markets in the post-implementation period.

- a. Accordingly, *insofar as displacement in the VLA market is concerned*, we disagree with the Panel to the extent that it found, in paragraph 6.1817 of the Panel Report, that "the United States ha{d} established that the 'product' effects of the challenged LA/MSF subsidies are a 'genuine and substantial' cause of displacement ... of United States LCA in the markets for ... {VLA} in the European Union, Australia, ... Korea, {and} Singapore".

6.40. We further find that we are unable to complete the legal analysis of the United States' claim of displacement in the VLA markets in the European Union, Australia, Korea, and Singapore.

6.41. As for the finding of impedance, we recall that the phenomenon of impedance refers to situations where the exports or imports of the like product of the complaining Member would have expanded had they not been "obstructed" or "hindered" by the subsidized product. Given the particular nature of the LCA industry, especially for VLA like the Boeing 747-8 and the Airbus A380, where instances of sales and volumes of deliveries are generally much lower than in the case of consumer goods, we do not consider that the volumes of deliveries that the Panel considered could not have supported a finding of impedance. We further recall that our review of the Panel's findings with respect to the A380 and A350XWB programmes, as well as relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. Moreover, as the Panel's analysis of the competitive dynamics in the VLA market shows, Boeing's and Airbus' respective product offerings – the 747-8 and the A380 – are sufficiently substitutable. Thus, contrary to the situation regarding alleged impedance in the twin-aisle LCA market, the "product effects" of the LA/MSF subsidies existing in the post-implementation period, including the A380 LA/MSF subsidies, and the VLA delivery data underlying the United States' claim, concern the same aircraft model, and, as explained above, the Panel made necessary findings on both "product effects" and delivery data. On the basis of these considerations, and in light of the deliveries of the A380 in the post-implementation period, we see no error in the Panel's conclusion that, absent the LA/MSF subsidies, the US LCA industry would have achieved a higher volume of deliveries and market share than its actual level in the post-implementation period.

6.42. Therefore, the Panel's findings reviewed above support the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period is impedance of US VLA in the VLA markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings. In light of our interpretation of Article 7.8 of the SCM Agreement, however, we disagree with the Panel's conclusion on impedance in the VLA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired.

- a. Accordingly, we modify the Panel's conclusion in paragraph 6.1817 of the Panel Report, and find instead that the United States has established that the "product effects" of the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of impedance of US LCA in the VLA markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates.

6.43. On the basis of the above, in respect of subsidies existing in the post-implementation period, we uphold, *albeit for different reasons*, the Panel's conclusions:

- a. in paragraph 7.2 of the Panel Report, that "{b}y continuing to be in violation of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement" insofar as the twin-aisle LCA and VLA markets are concerned, "the European Union and certain member States have failed to comply with the DSB recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement 'to take appropriate steps to remove the adverse effects or ... withdraw the subsidy'"; and
- b. in paragraph 7.4 of the Panel Report, that "the European Union and certain member States have failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the SCM Agreement" and that, "{t}o the extent that the European Union and certain member States have failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative."

6.44. The Appellate Body recommends that the DSB request the European Union to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the SCM Agreement into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 8th day of May 2018 by:

Ricardo Ramírez-Hernández
Presiding Member

Ujal Singh Bhatia
Member

Peter Van den Bossche
Member
