

*Check against delivery*

Before the Appellate Body of the World Trade Organization

*European Communities – Measures Affecting Trade  
in Large Civil Aircraft*

Recourse to Article 21.5 of the DSU by the United States

(AB-2016-6 / DS316)

**Opening Statement of the European Union**

*Contains no BCI or HSBI*

Geneva, 2 May 2017

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## LIST OF ABBREVIATIONS

Abbreviation	Description
DSB	Dispute Settlement Body
<i>DSU</i>	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
EADS	European Aeronautic Defence and Space Company
EU	European Union
FWS	First Written Submission
GATT 1994	General Agreement on Tariffs and Trade 1994
LA/MSF	Launch Aid / Member State Financing
LCA	Large Civil Aircraft
PSRP	Project-Specific Risk Premium
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
SWS	Second Written Submission
<i>TBT Agreement</i>	<i>Agreement on Technical Barriers to Trade</i>
US	United States
WTO	World Trade Organization

## I. INTRODUCTION

1. Mr. Chairman, distinguished members of the Division, in this oral statement we would like to focus on some key issues – we hope this will facilitate the question and answer sessions we have scheduled together over the next four days.

## II. THE MÜHLENBERGER LOCH MEASURE AND THE BREMEN RUNWAY MEASURE

2. On appeal, despite offering no substantive arguments,<sup>1</sup> the US continues to oppose a **finding** that the EU **demonstrated** full compliance with respect to the Mühlenberger Loch and Bremen runway measures.
3. **This begs the question why.** The answer is that a finding that the EU has fully complied with respect to these two measures would force a reckoning with the house of cards that is the Panel’s interpretation of Article 7.8 of the *SCM Agreement*. In this respect, it is evident that aligning the terms of a subsidy with a market benchmark achieves full compliance by securing withdrawal of the subsidy, within the meaning of Article 7.8.
4. Making such a finding, however, would render unsustainable the Panel’s view that, for full compliance to be achieved under Article 7.8, withdrawal of a subsidy must result in removal of the adverse effects of that subsidy.
5. Making such a finding would also have forced the Panel to explain whether, and why, it matters, under Article 7.8, that a respondent procures compliance by virtue of action<sup>2</sup> or as a result of expiry.<sup>3</sup>
6. Additionally, making such a finding would have forced the Panel to consider the consequence *all* the *withdrawn* subsidies have on its assessment of any adverse effects from the *remaining, non-withdrawn* subsidies. The Panel would have been forced to consider the impact of the reduced basket of subsidies on its assessment of adverse effects, instead of pretending that it need not do so because “the European Union has failed to demonstrate that *any* of the subsidies challenged by the United States in this compliance dispute have been ‘withdrawn’ for the purpose of Article 7.8”.<sup>4</sup>

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<sup>1</sup> US Appellee’s Submission, paras. 179-180, 183-184.

<sup>2</sup> Panel Report, para. 6.1102 (footnote 1847).

<sup>3</sup> Panel Report, para. 6.1102.

<sup>4</sup> Panel Report, para. 6.1104 (footnote 1848).

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7. Finally, making such a finding would have forced the Panel to consider the impact of *all* the withdrawn subsidies on the counterfactual informing its assessment of the adverse effects flowing from the remaining, non-withdrawn subsidies.
  8. Evidently, each of these points would have **undermined, and indeed rendered untenable**, the rest of the Panel’s analysis and findings under Article 7.8.
  9. We begin with a **threshold point**. Contrary to the US assertion, the Bremen runway measure was identified in the panel request.<sup>5</sup> Like the US consultations request,<sup>6</sup> paragraph 6(a) of the US panel request states that the measures include those listed in steps 1-36 of the EU Compliance Communication.<sup>7</sup> Step 28 refers to the Bremen runway measure, and step 29 to the Mühlenberger Loch measure.<sup>8</sup> Therefore, it is clear that the US had “**recourse to**” compliance proceedings under Article 21.5 with respect to both.
  10. Next, we turn to **three independent reasons** why the US arguments should be rejected. *First*, they are grounded in an erroneous interpretation of Article 21.5 of the DSU. *Second*, in any event, the mutual disagreement that grounded the recourse to Article 21.5 remains extant. *Third*, in any event, the various US statements made during the proceedings do not bring the disagreement to an end.
  11. The *first* reason is that the US arguments are grounded in an **erroneous interpretation of Article 21.5**. The US argument is that the “disagreement” must be “present”, such that once it is no longer present, the matter is not “before” the Panel.<sup>9</sup> We disagree. The first sentence of Article 21.5 does not contain the term “present”. Rather, that sentence provides that, if there is a disagreement, either party may have “**recourse to**” the DSU. Thus, it is clear that where, as in this case, the disagreement is present at the time of recourse, the terms of Article 21.5 are satisfied, and one then moves on to consider the “dispute settlement procedures” set out in the DSU, and specifically, in this case, the special and additional rule in Article 7.8 of the *SCM Agreement*. However, nothing in those provisions supports the US proposition that the

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<sup>5</sup> Cf. US Appellee’s Submission, para. 177.

<sup>6</sup> US Request for Consultations, 14 December 2011, WT/DS316/19, p. 3.

<sup>7</sup> EU Compliance Communication, 1 December 2011, WT/DS316/17.

<sup>8</sup> Communication from the European Union to the DSB, 1 December 2011, WT/DS316/17, items 28, 29, p. 4.

<sup>9</sup> Panel Report, para. 5.78, footnote 1847 to para. 6.1102; US Appellee’s Submission, para. 174.



disagreement that grounded recourse can be retroactively and unilaterally terminated by either party.

12. On the US view, Article 21.5 requires not only that a “disagreement” be “present” when one of the parties has “recourse to” Article 21.5, but also when the dispute is “**decided**”. The term “decided”, in Article 21.5 as elsewhere in the DSU, refers to the adoption of a panel or Appellate Body report by the DSB. Therefore, on the US view, at any time until a report is adopted, either party can withdraw “disagreement” about a matter from consideration.
13. We disagree with this assertion. The meaning of the first sentence of Article 21.5 is not that, if there is a disagreement, such disagreement must be decided; but rather that any resolution of any such disagreement must occur *through “recourse to” the DSU* (as opposed to any other forum).<sup>10</sup> The condition is, therefore, the “disagreement”; if resolution of the disagreement is sought, the obligation that must consequently be complied with is to have “recourse to” the DSU. The obligation is not to actually achieve a decision, because neither party is obliged to have recourse, and in any event the parties can at any time reach a mutually agreed solution. Thus, if the condition (the disagreement) is present, and the required consequence (recourse) is achieved, the provision is exhausted, and no longer operative. Consequently, it cannot ground a subsequent retroactive and unilateral change in the terms of reference by one of the parties.
14. Our position is well supported and confirmed by *Continued Suspension*.<sup>11</sup> The essential point is that, once the issue of compliance is before a compliance panel, the parties **each** have their own **vested interest** in the outcome. Each party can waive its own interest, but one party cannot waive the interest of the other. This distinguishes compliance proceedings from original proceedings. Only complainants can initiate original proceedings. However, either party can have recourse to compliance proceedings. And if one party does have recourse to compliance proceedings, the other party is entitled to rely on their due completion. Furthermore, the party that had recourse cannot subsequently retroactively and unilaterally negate the other party’s vested interest in having an adjudication.

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<sup>10</sup> DSU, Article 23.

<sup>11</sup> See EU Appellant’s Submission, paras. 266-268.

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15. The US asserts that the EU should have commenced duplicative reverse compliance panel proceedings.<sup>12</sup> We disagree. *First*, it is clear that *either* party can have “recourse to” the dispute settlement procedures.<sup>13</sup> It is not necessary that *both* parties must do so. Indeed, the whole point of *Continued Suspension* is that the respondent can place the matter before a compliance panel even if the complainant does not. Thus, if the second party does not wish to add anything to the scope established by the first party, it is not required to file its own request. *Second*, since it is clear that each party has a (shared) “responsibility”<sup>14</sup> or “obligation”,<sup>15</sup> it is equally clear that they each have a corresponding (shared) interest or right in the outcome of the adjudication. *Third*, the Appellate Body expressly observed that **if a complainant considers a reverse compliance panel request too narrow, it may file its own (broader) request.**<sup>16</sup> It follows that if it does *not* consider the reverse compliance request too narrow, it need *not* file its own (duplicative) request. The same applies to a respondent: if it does not consider the compliance panel request too narrow, **it need not file its own duplicative panel request.**
16. A mutual disagreement within the meaning of Article 21.5, grounding recourse to the DSU, is just **one example** of a situation in which a particular parameter of the proceedings is mutually fixed by the parties at the outset, such that one party cannot subsequently unilaterally and retroactively change it. There are **many others**, such as: agreed terms of reference; agreement with respect to the panellists; agreement to allow a citizen of a party or third party to serve as a panellist; agreement to a panel of five; agreement to a panellist from a developing country; and agreed procedures under Article 25 of the DSU. In none of these instances could one party subsequently unilaterally and retroactively change the relevant parameter, as the US argues it was entitled to do in this case.
17. This conclusion is especially compelling on the specific facts of this case because **the relevant terms of reference were agreed.** Thus, the process began with the EU

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<sup>12</sup> US Appellee’s Submission, paras. 190-191.

<sup>13</sup> Appellate Body Report, *US – Continued Suspension*, para. 347; Appellate Body Report, *Canada – Continued Suspension*, para. 347.

<sup>14</sup> Appellate Body Report, *US – Continued Suspension*, para. 348; Appellate Body Report, *Canada – Continued Suspension*, para. 348.

<sup>15</sup> Appellate Body Report, *US – Continued Suspension*, para. 360; Appellate Body Report, *Canada – Continued Suspension*, para. 360.

<sup>16</sup> Appellate Body Report, *US – Continued Suspension*, para. 354; Appellate Body Report, *Canada – Continued Suspension*, para. 354.

Compliance Communication, which (1) was submitted in writing, (2) identified the specific declared measures taken to comply, and (3) included a brief summary of the legal basis of the EU's representations that, with respect to each measure, it had achieved compliance. The consultations request **fully integrated** the Compliance Communication.<sup>17</sup> In other words, the US agreed that every declared measure taken to comply was to be within the scope of the consultations. The EU then **replied** to the consultations request pursuant to Article 4.3 of the DSU, **confirming** its agreement to enter into consultations with the US on that basis. The panel request itself also **fully integrated** the Compliance Communication.<sup>18</sup> Finally, the DSB minutes expressly record that it was “**agreed**” at the **first** DSB meeting (pursuant to the **sequencing agreement**) that the panel be established with the terms of reference specified in the panel request, which fully integrated the Compliance Communication.<sup>19</sup>

18. Finally, the preceding analysis is confirmed by several other principles and provisions, including security and predictability,<sup>20</sup> prompt settlement,<sup>21</sup> the objective of strengthening and improving the effectiveness of consultation procedures<sup>22</sup> and the need to assist the DSB in making the rulings provided for in Article 21.5.<sup>23</sup>
19. Assuming that the Appellate Body agrees with the EU on this interpretative question, that would be **sufficient basis to reverse** the Panel Report on this point.
20. **Second**, in any event, the US assertion that that the mutual “disagreement” that grounded the “recourse to” Article 21.5 does not presently exist is incorrect. The written documents that together formally establish the mutual disagreement are the Compliance Communication and the consultations (and panel) request, which were all formally notified to the DSB, circulated to all WTO Members, and published. **These notifications and communications have never been the subject of any subsequent communication or notification bringing the mutual disagreement to an end, and they remain extant today.** Notably, the Parties have never notified any mutually agreed solution, pursuant to Article 3.6 of the DSU, such that any other Member

<sup>17</sup> Consultations Request, page 2, second paragraph and Statement of Available Evidence, Item 7.

<sup>18</sup> Panel Request, paras. 2-6.

<sup>19</sup> WT/DSB/M/314, 5 June 2012, para. 10.

<sup>20</sup> DSU, Article 3.2.

<sup>21</sup> DSU, Article 3.3; Appellate Body Report, *US – Continued Suspension*, para. 343; Appellate Body Report, *Canada – Continued Suspension*, para. 343.

<sup>22</sup> DSU, Article 4.1.

<sup>23</sup> DSU, Article 7.1.

might raise any point relating thereto. Thus, the problem is not that the EU is trying to “create”<sup>24</sup> a mutual disagreement – the mutual disagreement was “created”, in the sense of being brought into existence, pursuant to the documents and procedures described above. Rather, the problem is that the mutual disagreement has been neither terminated nor adjudicated. Absent an appropriate notification in the correct form and according to the correct procedures, US attempts to refer to various ambiguous statements in the parties’ submissions to the Panel or in these appeal proceedings are unavailing. **This observation would, in itself, also be sufficient basis for reversal.**

21. *Third*, in any event, even if one examines such statements, **they do not purport to clearly and definitively terminate the disagreement.**<sup>25</sup> In this respect, the US’ final and most recent statements are particularly instructive.<sup>26</sup> *First*, silence by the US is not sufficient to terminate the disagreement.<sup>27</sup> *Second*, stating that one does not intend to pursue a claim is not the same as stating that the disagreement is terminated.<sup>28</sup> *Third*, stating that one does not intend to pursue a claim *at this time* clearly implies that one is reserving the right to pursue it in the future.<sup>29</sup> *Fourth*, making contradictory statements is not sufficient.<sup>30</sup> *Fifth*, attempting to re-phrase and embellish what was said during the panel proceedings in the context of appeal proceedings<sup>31</sup> is of no assistance to the US, because what we are examining are the determinations in the Panel Report. **This would also be, in itself, a sufficient basis for reversal.**

### III. ARTICLE 7.8 OF THE SCM AGREEMENT

22. We turn now to the next issue, which concerns the proper interpretation of Article 7.8 of the *SCM Agreement*. You have before you extensive written submissions on this point. That is not at all surprising, since Article 7.8 is the central provision in these proceedings. It is a “special or additional rule” identified in Appendix 2 of the DSU. Moreover, as the Panel noted, in compliance proceedings concerning actionable

<sup>24</sup> US Appellee’s Submission, para. 175.

<sup>25</sup> Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II/Article 21.5 – US)*, para. 217.

<sup>26</sup> US comments on the EU comments on Interim Panel Report, para. 48.

<sup>27</sup> US Appellee’s Submission, para. 180 and 184.

<sup>28</sup> US FWS, footnote 13; US SWS, para. 265.

<sup>29</sup> US comments on the EU comments on Interim Panel Report, para. 48.

<sup>30</sup> For example: US SWS, para. 277, third and fourth sentences; US comments on the EU comments on Interim Panel Report, para. 52, second sentence.

<sup>31</sup> US Appellee’s Submission, paras. 182 and 185.

- subsidies, “Article 7.8 **specifies** what an implementing Member must do” to achieve compliance.<sup>32</sup>
23. We would like to begin with two things on which the **Participants agree**. The Participants agree with the basic proposition that a **subsidy** has a **life**, which may come to an **end**, through the **removal of the financial contribution** or the **expiration of the benefit**.<sup>33</sup> The Participants also agree that, pursuant to the **definition of a subsidy** in Article 1.1 of the *SCM Agreement*, a “**benefit analysis**” properly addresses both the **amount** of the subsidy and the **period of time** over which the benefit is expected to **flow**.<sup>34</sup>
24. *Second*, we would like to correct a misapprehension the US appears to have about our arguments.<sup>35</sup>
25. The EU is arguing that, pursuant to Article 7.8 of the *SCM Agreement*, (i) it is no longer granting or maintaining each of the relevant subsidies, **and**<sup>36</sup> (ii) in any event, each relevant subsidy has been withdrawn through expiry of the benefit or removal of the financial contribution.
26. *Third*, we would like to comment on the Panel’s reliance on the term “**declaratory**”.<sup>37</sup> We recall the context in which the Panel relied on this term. The Panel began its analysis by acknowledging that, under the express terms of Article 7.8, a WTO Member has **no** remaining compliance obligation with respect to an expired subsidy, either because it is not granting or maintaining such subsidy, or because such subsidy has been withdrawn.<sup>38</sup> Nonetheless, the Panel considered this interpretation, which simply reflects what Article 7.8 says, to be “problematic”.<sup>39</sup> The Panel was concerned that an interpretation faithful to the terms of the treaty would render adverse effects findings “purely declaratory” with respect to a subsidy that ceased to exist before the

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<sup>32</sup> Panel Report, para. 6.2.

<sup>33</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 709; Panel Report, para. 6.865; US Other Appellant’s Submission, para. 9; US Appellee’s Submission, para. 169.

<sup>34</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 707; Panel Report, para. 6.865; US Other Appellant’s Submission, para. 4 (and footnote 6), para. 9 (and footnote 16) and para. 16 (and footnote 33).

<sup>35</sup> US Appellee’s Submission, para. 37.

<sup>36</sup> Panel Report, paras. 6.792-6.793 and 6.847-6.849; EU Appellant’s Submission, paras. 32-53.

<sup>37</sup> Panel Report, paras. 6.818, 6.831-32, 6.840 and 6.1094.

<sup>38</sup> Panel Report, para. 6.802; EU Other Appellant’s Submission, para. 20.

<sup>39</sup> Panel Report, para. 6.803.

- end of the implementation period, but that caused an adverse effect that allegedly lingers temporarily after the end of the implementation period.<sup>40</sup>
27. The word “declaratory” is **not treaty language**. The Panel erred in using it as the keystone of its analysis, and this appeal must not be decided on such basis.<sup>41</sup>
28. We understand that a finding or report is “declaratory” when it has **no recommendation** associated with it. We also understand that the legal character of a finding or a report as “declaratory” or non-declaratory is permanently fixed when it is adopted, according to whether or not there is a recommendation.
29. We further understand that the idea of a finding or report that is non-declaratory being **rendered “essentially declaratory in nature”**<sup>42</sup> refers to the recommendation having **no value in practice**, in the sense that it might as well not be there, it being **impossible** for a complainant to proceed to enforcement by retaliation.
30. In the compliance proceedings in *US – Upland Cotton*, where the Appellate Body referred to this phrase, there was: a subsidy **programme** continuing unchanged throughout the original reference period and the post-implementation period, pursuant to which payments were being made; a dispute about the **scope** of Article 21.5 proceedings; and a **timely** complainant (Brazil) faced with being trapped in an **endless cycle** of original proceedings.<sup>43</sup> None of these elements is present in the dispute before you today: there is no subsidy programme; there is no dispute about the scope of these Article 21.5 proceedings; and the US is not a timely complainant, but has freely decided, in pursuit of its own interests, not to seek review of the relevant measures until decades after they came into existence.
31. The Panel was wrong to extrapolate, from the **specific facts** of *US – Upland Cotton* (*Article 21.5 – Brazil*), a **general** proposition that, in WTO law, there is a prohibition on findings or reports (i) that are “declaratory” when made, or (ii) that are

<sup>40</sup> Panel Report, paras. 6.819, 6.840, 6.1094.

<sup>41</sup> Appellate Body Report, *India – Quantitative Restrictions*, para. 94; Appellate Body Report, *India – Patents*, para. 45; Appellate Body Report, *EC – Computer Equipment*, para. 83; Appellate Body Report, *US – Shrimp*, para. 114; Appellate Body Report, *Canada – Aircraft*, para. 171 and footnote 102; Appellate Body Report, *EC – Bed Linen*, para. 83; Appellate Body Report, *US – Line Pipe*, para. 250; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98; Appellate Body Report, *US – Steel Safeguards*, para. 471.

<sup>42</sup> Panel Report, paras. 6.103 and 6.818, citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – US)*, para. 245.

<sup>43</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – US)*, paras. 233-249.

subsequently rendered “essentially declaratory”, or as the Panel erroneously put it, “**purely**<sup>44</sup> declaratory”.

32. There are many examples of the **former**: an original report where the respondent wins; a compliance report where the respondent wins; a reverse compliance report where the respondent wins (the very objective of such a proceeding being to obtain a “declaratory” finding); an Article 22.6 arbitration award; an arbitration under Article 21.3 of the DSU; and any other report that, for whatever reason, contains no recommendation.
33. There are also many examples of the **latter**: non-violation cases; situation complaints; a case in which subsequent factual changes remove the violation; an Article 22.6 arbitration award quantifying nullification or impairment as zero; an original report in a “typical” WTO case concerning an expired but inconsistent measure (as we will shortly recall, the US agrees with this proposition); and an original report in a case concerning an expired but inconsistent prohibited subsidy (as we will shortly recall, the US also agrees with this proposition).
34. There are many reasons why such reports have value, such as: facilitating negotiations about voluntary compensation; providing security and predictability to economic operators in Members that, unlike the US, give direct effect to WTO law or have a functioning “interpretation in conformity” rule; and, providing a legal basis for subsequent Article 21.5 proceedings to review “measures taken to comply”.
35. Therefore, the Panel’s proposition that such “declaratory” findings or reports are prohibited in WTO law – the proposition on which the Panel’s entire analysis rests – is erroneous.
36. Referring to the Panel’s concerns about “declaratory” findings or reports, the US asserts, on the basis of two Appellate Body reports, that panels and the Appellate Body “frequently note when interpretations would weaken the discipline or remedies available under the covered agreements”, and “take such considerations into account in their decision making”.<sup>45</sup>
37. That is a remarkable proposition from the US, not only as a general matter, but also with respect to the matter at hand. The US appears to recognise that special

<sup>44</sup> Panel Report, paras. 6.840 and 6.1094.

<sup>45</sup> US Appellee’s Submission, para. 143.

“considerations” would have to be “take{n} ... into account” by the Appellate Body in order to sustain the Panel’s so-called “interpretation” of Article 7.8 (which is in fact just a re-writing of that provision). Indeed, we recall the Panel’s acknowledgement that, under the express terms of Article 7.8, a WTO Member has **no** remaining compliance obligation with respect to an expired and withdrawn subsidy.<sup>46</sup> Because this correct interpretation would allegedly render adverse effects findings “purely declaratory”, the Panel considered the words on the page to be “problematic”, and took it upon itself to re-write the provision, departing from the terms actually used in the treaty.<sup>47</sup> This is indeed an example, in the US’ words, of a panel taking special “considerations into account in {its} decision making”. However, it is not an approach that WTO adjudicators “frequently” take, because it is not consistent with the rules of treaty interpretation. Unsurprisingly, the US cites no case law for the proposition that the Appellate Body abandons the terms of the treaty when it considers the words on the page to be, in the Panel’s words, “problematic”.

38. *Fourth*, we would like to comment on the Panel’s analysis of the **two compliance options** in Article 7.8.
39. It is important to recall that the meaning and application of Article 7.8 and the two compliance options it provides was **expressly deferred**, without substantive consideration, from the original proceedings to the compliance proceedings.<sup>48</sup> We reject the proposition – so central to the Panel’s approach – that the original proceedings **pre-judge** or “necessarily imply”<sup>49</sup> a particular outcome in these compliance proceedings.
40. The US had the burden of proof in these compliance proceedings, including the burden to demonstrate that each subsidy had not been withdrawn or that steps had not been taken to remove adverse effects. In any event, the EU **demonstrated** that, pursuant to its declared measures taken to comply, the benefit from each expired subsidy has ceased to flow, and that each subsidy was therefore withdrawn.

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<sup>46</sup> Panel Report, para. 6.802; EU Other Appellant’s Submission, para. 20.

<sup>47</sup> Panel Report, para. 6.803.

<sup>48</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 758.

<sup>49</sup> Panel Report, paras. 6.792 and 6.822.



41. **This having been demonstrated**,<sup>50</sup> we reject the proposition that it was permissible for the Panel to somehow **re-evaluate** the life of the withdrawn subsidy in a **distinct**<sup>51</sup> adverse effects analysis under Article 5.<sup>52</sup> In particular, we reject the reading of Article 7.8 the Panel is forced to adopt in order to advance this proposition, namely that the respondent must: take steps “in relation to the subsidy”<sup>53</sup> such that it is **not causing present adverse effects** at the end of the implementation period<sup>54</sup> **“or”** take appropriate steps (that are “more effects-based”)<sup>55</sup> to **remove the adverse effects**. This obviously just amounts to saying that the respondent must remove the adverse effects – by whatever means – but it must remove the adverse effects. **The two options provided for in the treaty are thus collapsed into one.**
42. We are not contesting that the **non-withdrawn** subsidies are to be assessed against the second option in Article 7.8 (steps to remove the adverse effects) contextually informed by Articles 5 and 6 of the *SCM Agreement*, although we fiercely contest that the US demonstrated that they cause adverse effects. Nor are we contesting that LA/MSF loans for the A350XWB are also to be assessed against the second option in Article 7.8, contextually informed by Articles 1, 5 and 6. However, we fiercely contest that the US demonstrated that the A350XWB loans involve any benefit and cause adverse effects to the US, in the form of any significant price or volume effects on Boeing.
43. **This does not justify the Panel’s complete negation of the two-option design and architecture of Article 7.8.** Articles 1 and 2 provide relevant context for the interpretation of the phrase “withdraw the subsidy” in Article 7.8; and Articles 5 and 6 provide relevant context for the interpretation of the phrase “remove the adverse effects”. That is all. That the existence of a **subsidy** causing **adverse effects** entails the **remedy** “withdraw the subsidy” **or** “remove the adverse effects” does not mean that the phrase “withdraw the subsidy” can be re-written as “withdraw the subsidy *such that any adverse effects are removed*”. And this result cannot be achieved on

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<sup>50</sup> Appellate Body Report, *EC – Large Civil Aircraft*, footnote 1643, citing Appellate Body Report, *US – Lead and Bismuth II*, para. 62; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 84; Panel Report, para. 6.865.

<sup>51</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 709.

<sup>52</sup> Panel Report, paras. 6.804-6.813 and 6.1095-6.1100.

<sup>53</sup> Panel Report, paras. 6.1098 and 6.1099.

<sup>54</sup> Panel Report, paras. 6.1095 and 6.1098.

<sup>55</sup> Panel Report, para. 6.1099.

the back of the general proposition that “the remedies provided for under Article 7.8 are intended to bring an implementing Member into conformity with its obligations under Article 5”,<sup>56</sup> insofar as that statement obscures and in fact destroys the two-option design and architecture of Article 7.8. When the treaty tells you plainly what the remedy is, it is neither necessary nor appropriate to re-imagine it. And certainly not on the basis of non-existent treaty language (“declaratory”) that is advanced as a general rule of WTO law that does not in fact exist.

44. *Fifth*, we would like to comment on the **overall design and architecture of the WTO Agreement** and the dispute settlement system, and the place of Article 7.8 within that overall scheme.
45. In a “**typical**” nullification or impairment case, the violation consists of (i) the measure and (ii) the presumed adverse impact; in a **prohibited** subsidies case, the violation is (i) the contingent subsidy and (ii) the presumed adverse impact; and in an **actionable** subsidies case, the violation is (i) the subsidy and (ii) the demonstrated adverse effects. All three instances always involve these **two** elements. The only difference is that in the first two cases (that is, “normally”), the adverse impact is **presumed**, whilst in the third case (that is, exceptionally) the **effects-based disciplines** of Article 5 require adverse effects to be **demonstrated** by the **complainant**.<sup>57</sup>
46. It would be wrong to suggest that, in a “typical” case, the violation consists **only of the infringing measure**.<sup>58</sup> The second sentence of Article 3.8 of the DSU explains what the first sentence means; and together, the two sentences confirm that the violation consists of the infringing measure **together with** the presumed adverse impact.<sup>59</sup>

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<sup>56</sup> Panel Report, para. 6.822.

<sup>57</sup> EU Appellant’s Submission, paras. 78-96.

<sup>58</sup> US Appellee’s Submission, para. 99.

<sup>59</sup> 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. **This means that** there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.”) (bold emphasis added).

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47. It is equally wrong to say that, in an actionable subsidies case, the “**adverse effects are the WTO inconsistency**”.<sup>60</sup> The violation consists of the subsidy causing the adverse effects.
48. With respect to each of these three instances, the compliance obligations are the **same**. The respondent has the option to withdraw the measure/subsidy **or** to rebut the adverse impact/remove the adverse effects. The US considers that the compliance obligation in the third instance is **different**. Specifically, the US considers that the respondent must withdraw each relevant subsidy such that *any adverse effects are removed* “or”, with respect to each relevant subsidy, *remove the adverse effects*.<sup>61</sup> Apart from negating the two-option design and architecture of Article 7.8, this would place an additional compliance obligation on the **respondent**. In so doing, the US position would single out actionable subsidies as the sole and unique measures, amongst all measures disciplined under the covered agreements, the withdrawal of which does not result in full compliance.
49. For all of these reasons, the US position is inconsistent with the design and architecture of the WTO single undertaking, including the dispute settlement mechanism,<sup>62</sup> and the need to search for and prefer a harmonious interpretation where one is available.<sup>63</sup>
50. *Sixth*, we would like to say a few words about **prohibited subsidies**.
51. The **only reason** for considering prohibited subsidies in this context is to make the point that, also in the case of a prohibited subsidy, the remedy of “withdrawing the subsidy” is delivered when it is demonstrated that the benefit has expired. That is, this same consequence follows for both a prohibited subsidy and an actionable subsidy. The US position is that “withdrawing the subsidy” is only a remedy in the case of a prohibited subsidy, but not in the case of an actionable subsidy.
52. Removal of the contingency from a prohibited subsidy should in principle convert it into a subsidy, at least prospectively, and particularly in the case of a programme.

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<sup>60</sup> US Appellee’s Submission, para. 99.

<sup>61</sup> US Appellee’s Submission, Section II.

<sup>62</sup> Appellate Body Report, *US – Large Civil Aircraft*, para. 530; Appellate Body Report, *Korea – Dairy*, para. 74; Appellate Body Report, *Brazil – Desiccated Coconut*, pages 12, 13 and 18.

<sup>63</sup> Appellate Body Report, *Korea – Dairy*, para. 81; Appellate Body Report, *US – Continued Zeroing*, para. 268; Appellate Body Report, *Argentina – Footwear*, para. 81; Appellate Body Report, *US – Upland Cotton*, para. 549.

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- However, the Appellate Body does not need to decide, for the purposes of this case, whether or not that would withdraw the subsidy, because that issue is not before you.
53. *Seventh*, we would like to comment on the US assertions regarding the term “**withdraw**”.
54. The US argues that “withdrawal” requires “affirmative action”.<sup>64</sup> We note, at the outset, that the supposed distinction between “affirmative action” and other means of compliance is not something that is ultimately considered determinative by the Panel. Such reasoning would, in any event, be erroneous.<sup>65</sup> In WTO law, any **act or omission** may be a measure for the purposes of dispute settlement, and the same is true of subsidies. Government revenue can, for example, be simply “foregone or not collected”.<sup>66</sup> Act and omission are just two sides of the same coin. Article 1.1 of the *SCM Agreement*, which defines the term “subsidy” for the purposes of the *Agreement*, including Article 7.8, **deems** a subsidy to exist if certain elements are present. It is *indifferent* as to the mechanism by which the required elements are present or not present – that is, whether or not the elements arise because of “affirmative action” by the government.<sup>67</sup>
55. Just as a breach can be engendered by action or omission, compliance can also be achieved either through action or “otherwise”,<sup>68</sup> including by omission. The recipient itself, for example, can reverse the financial contribution or stop the flow of benefit. And another Member can freely decide, in pursuit of its own interests, not to seek review of the relevant measures until years after they came into existence. In this context, unless “withdraw the subsidy” includes expiry of the benefit, it has little or no meaning as a tool for examining and achieving prospective compliance.
56. The Panel actually agreed with this analysis because, with respect to the “affirmative action” taken by the EU to remove the financial contribution, the Panel stated that its conclusion under Article 7.8 would be the same as its analysis of the expiry of the benefit.<sup>69</sup> The Panel thus agreed that its overall conclusion was not grounded on a

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<sup>64</sup> US Appellee’s Submission, para. 33.

<sup>65</sup> EU FWS, para. 34 and footnote 30 (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236; Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbados)*, para. 6.22).

<sup>66</sup> SCM Agreement, Article 1.1(a)(1)(ii).

<sup>67</sup> SCM Agreement, footnote 1 (... “exemption” ... “remission” ...).

<sup>68</sup> EU FWS, para. 34 and footnote 33; DSU, Article 22.2.

<sup>69</sup> Panel Report, para. 6.1084 (“... not unlike ...”).

(false) distinction between act and omission. This conclusion is further confirmed by the fact that adverse effects may dissipate, and eventually end,<sup>70</sup> irrespective of the actions of any of the relevant actors, the same thus being true with respect to the expiry of benefit.

57. In WTO law, as in general public international law, it is possible for a State to violate its obligations with no action on its part. It is equally possible for a State to cease such violation and come into compliance, even absent any action on its part. For instance, a violation of the general international law obligation not to cause transboundary harm may arise with a change in climatic conditions, such as an abnormal burst of rain temporarily washing contaminants into a river. The same violation may cease with the subsidence of the waters. Neither the violation, nor the subsequent compliance, is attributable to any action on the part of the State.
58. To take examples from WTO law, a Member may find itself to be in violation of Article 2.2 of the *TBT Agreement*, when technological progress makes available a less trade restrictive alternative for the attainment of its legitimate objective.<sup>71</sup> This violation arises without any action on the part of the Member. Conversely, a Member may adopt a technical regulation which, at the time of adoption, is more trade restrictive than necessary to fulfil its legitimate objective, but may subsequently come into compliance because what was thought of as less trade restrictive alternatives become impractical or dangerous, or otherwise unavailable. Here, the Member comes into compliance with Article 2.2 of the *TBT Agreement* without taking any action. Similarly, a change in the relevant international standards may bring a Member into violation of, or compliance with, Article 2.4 of the *TBT Agreement* or Article 3.2 of the *SPS Agreement*, without requiring any action on its part. And under the GATT 1994, changes in product characteristics and/or consumer preferences may make products “like” or non-”like”, triggering the obligations in, for example, Articles I and III of the GATT 1994.
59. The compliance Panel itself acknowledges the possibility that a Member may come into compliance absent action by the complying Member, in the context of removal of adverse effects within the meaning of Article 7.8. Among the circumstances that the

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<sup>70</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 713.

<sup>71</sup> *TBT Agreement*, Article 2.3.

compliance Panel identified as capable of bringing the EU into compliance through that mechanism were the indirect effects of LA/MSF being supplanted by more recent technology and three non-subsidised launches. Neither of these options requires any EU action. The former is a function of technological development. The latter involves actions by Airbus, not the EU.

60. *Eighth*, we would like to comment on the US' assertions concerning **aggregation**.
61. Throughout this dispute, the adjudicators and the Parties have consistently analysed financial contribution and benefit on a **subsidy-by-subsidy** basis. This was the approach adopted in the original proceedings by both the panel<sup>72</sup> and the Appellate Body,<sup>73</sup> as well as by the Panel in these Article 21.5 proceedings.<sup>74</sup> It is also the approach followed by the US in this appeal.<sup>75</sup> The way the measure is defined **determines** whether or not the required elements of the definition set out in Article 1.1 are present (that being a provision that, by its own terms, applies for the purpose of the *SCM Agreement*, including Article 7.8), and thus whether a subsidy is deemed to exist (or not).
62. In this respect, a respondent seeking to withdraw the subsidy is **required** to heed and rely on the relevant findings in the original proceedings.<sup>76</sup> Aggregation, which is done **after** the Panel has found that each subsidy is deemed to exist, has no bearing on whether or not each subsidy is deemed to exist nor on how withdrawal of each subsidy is to be achieved. Just as partial withdrawal of one subsidy entails consideration only of what remains, so withdrawal of one subsidy also entails consideration only of any other subsidies that remain.<sup>77</sup>
63. *Ninth*, we wish to observe that the EU position on this point aligns with the position under Part V of the *SCM Agreement* with respect to **countervailing duties**.<sup>78</sup> Under Part V, once it is determined that the benefit of a subsidy has expired such that the

<sup>72</sup> Panel Report, *EC – Large Civil Aircraft*, Section VII.E.

<sup>73</sup> Appellate Body Report, *EC – Large Civil Aircraft*, Sections IV and VII.

<sup>74</sup> Panel Report, Section 6.6.

<sup>75</sup> US Appellee's Submission, para. 28 ("... the Member's compliance obligation **with respect to that subsidy** under Article 7.8.") (bold emphasis added).

<sup>76</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, footnote 309.

<sup>77</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 47.

<sup>78</sup> Appellate Body Report, *EC – Large Civil Aircraft*, footnote 1643.

subsidy no longer exists, the remedy has been delivered, and it is no longer appropriate or possible to impose countervailing duties.<sup>79</sup>

#### IV. SUBSIDIES WITH RESPECT TO WHICH THE BENEFIT HAS EXPIRED

64. We recall the Panel’s findings that many of the subsidies covered by the recommendations and rulings in the original proceedings have come to the end of their lives, because the benefit from each of those subsidies has expired. Nonetheless, the Panel found that expiry is not sufficient to “withdraw the subsidy”, under Article 7.8. To the Panel, to avoid rendering the recommendations and rulings in the original proceedings “declaratory”, Article 7.8 must be interpreted to require that, where a respondent pursues compliance through withdrawal of the subsidy, it does so in a manner that *also* removes the adverse effects.
65. We have asked the Appellate Body to reverse the Panel’s erroneous interpretation of Article 7.8. To the extent it does so, we have also requested the Appellate Body to complete the analysis on the basis of a proper interpretation of Article 7.8. Specifically, we have asked the Appellate Body to find that, by virtue of the Panel’s findings of fact concerning expiry, the EU has indeed withdrawn each of the relevant subsidies and therefore achieved compliance with respect to those subsidies. (We have also conditionally appealed the Panel Report on the issue of the removal of the financial contribution, in the event that the Appellate Body reaches a point at which it needs to consider that matter. In that circumstance, we have asked the Appellate Body, on the basis of the undisputed facts of record regarding the removal of the financial contribution, to find that the EU has withdrawn each of the relevant subsidies and, for that reason also, achieved compliance with respect to those subsidies.<sup>80</sup>)
66. If the Appellate Body reverses the Panel’s interpretation of Article 7.8, the US has asked the Appellate Body to reverse the Panel’s findings that each of the relevant subsidies has expired.<sup>81</sup> We find the US’ conditional appeal on this point particularly misconceived.<sup>82</sup> The US is again arguing that LA/MSF loans involve risk, that is, future unknowns regarding the occurrence and timing of aircraft deliveries, and that

<sup>79</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 207-210.

<sup>80</sup> EU Appellant’s Submission, Section II.F.2.

<sup>81</sup> US Other Appellant’s Submission, para. 8.

<sup>82</sup> EU Other Appellee’s Submission, paras. 4-78.

such risk cannot be priced *ex ante*, when such loans are concluded. This means that, in the context of a “benefit analysis”, it is impossible to state, at the time such a loan is concluded, whether or not there is a benefit, what the amount of the benefit might be, and how the benefit might be expected to flow over the life of the subsidy. Relatedly, and at least by implication, the US position is that it is impossible to establish, at the time such a loan is concluded, a market benchmark, because the market is not able to price the risk implicated by the loan at that point in time.<sup>83</sup>

67. This issue **has already been resolved**, and specifically with respect to LA/MSF. The “benefit analysis” is an *ex ante*, forward looking analysis that considers whether or not there is a benefit, what the amount of the benefit might be, and how the benefit might be expected to flow over the life of the subsidy.<sup>84</sup> This was the approach used to assess the internal rate of return for each LA/MSF loan.<sup>85</sup> It was endorsed by the original panel and by the Appellate Body in the original proceedings in this dispute, and elsewhere.<sup>86</sup>
68. It is, therefore, incorrect to assert that the market cannot price risk at the time an LA/MSF loan is concluded, and the US conditional appeal should fail for that reason alone.
69. In any event, we find the US appeal particularly perplexing because it implies that it was impossible, as a matter of law, for the Panel to determine whether or not the LA/MSF loans for the A350XWB involve a benefit, and what the amount and flow of that benefit might be. Instead, we must all wait to see what happens in the future before answering that question. If that proposition would be correct, then the Appellate Body would have to reverse the Panel’s findings with respect to the A350XWB loans, together with the rest of the Panel Report,<sup>87</sup> and we could all go home.
70. We also find the US appeal on this point perplexing because, even using the methods suggested by the US (that is, the life of the programme or the final delivery), the

<sup>83</sup> US Other Appellant’s Submission, Section II, particularly paras. 10, 12 and 14-15.

<sup>84</sup> Appellate Body Report, *EC – Large Civil Aircraft*, particularly paras. 706-707; EU Other Appellee Submission, paras. 38-42.

<sup>85</sup> EU Appellee’s Submission, para. 52.

<sup>86</sup> EU Appellee’s Submission, particularly paras. 38-42.

<sup>87</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 837.



benefit of many of the measures expired before the end of the implementation period or shorter thereafter.<sup>88</sup>

71. Consequently, we believe that it should be a straightforward matter for the Appellate Body to reject the US appeal on this point, uphold the Panel’s findings that the EU **demonstrated** that the life of each of the relevant subsidies has come to an end through expiry, complete the analysis by finding that the EU has withdrawn these subsidies, and move on to the next issue.

**V. THE US FAILURE TO DEMONSTRATE THAT ANY OF THE A350XWB LA/MSF LOANS CONFERRED A BENEFIT**

72. We turn next to the Panel’s findings of benefit for each of the LA/MSF loans for the A350XWB.

73. The Participants and the Panel agreed that the benchmark rate of return for each of these loans should be comprised of two components: a corporate borrowing rate, and a project risk premium. In assessing each of these components, however, the Panel made several errors in the application of Article 1.1(b) of the *SCM Agreement*, and failed to make an objective assessment of the matter, under Article 11 of the DSU.

**A. Corporate borrowing rate for each of the A350XWB loans**

74. With respect to the corporate borrowing rate, the Panel ignored the principle that a benefit assessment must focus “on the moment in time when the lender and borrower commit to the transaction”.<sup>89</sup> Specifically, the Panel disregarded the yield on the relevant EADS bond at the time when the parties committed to each transaction, namely the day of conclusion of each LA/MSF contract.

75. Instead, the Panel erroneously selected a *range of average* yields, one month and six months prior to the conclusion of each contract. As support, the Panel *speculated* that the yield on the day each contract was concluded may have been biased as a result of “atypical fluctuations”.<sup>90</sup> However, its own factual findings *demonstrate* that no such

<sup>88</sup> EU Appellee’s Submission, Table 2.

<sup>89</sup> Appellate Body Report, *EC – Large Civil Aircraft*, paras. 706, 835-836.

<sup>90</sup> Panel Report, para. 6.389 (emphasis added).

- fluctuations occurred.<sup>91</sup> Its speculation was, therefore, unfounded, and indeed contradicted by the evidence before it.<sup>92</sup>
76. The US maintains that the Panel correctly rejected the yield on the relevant EADS bond on the day of conclusion of each contract. The US argues that the yield must include all information available to the parties while they were negotiating the terms of the contract, and not “just information reflecting that day itself, as the EU advocates”.<sup>93</sup>
77. The US argument shows a fundamental misunderstanding of what the yield on the day of conclusion reflects. The yield on any given day does not only capture “information reflecting that day itself”, as the US asserts. Rather, the yield on any given day reflects *accumulated* information *up to that date*, and expectations about the future based on that information. In other words, the Panel’s assumption that the use of more data points (through the use of a range of averages) improves accuracy is wrong, because these data points are **not independent**.
78. We have also demonstrated that, in any event, the Panel should not have included the six-month average yield in the range.<sup>94</sup> Indeed, the Panel itself understood that the averaging approach underlying the six-month yield may lead to false positive subsidy findings, particularly where, as here, the market reflected a downward trend in yields during the period leading up to the conclusion of the contracts. The inclusion of the six-month yield in the range appears to have been designed to take advantage of this trend.
79. The US accepts that the Panel found the six-month average yield to be *inferior* to the one-month average yield.<sup>95</sup> Thus, both participants agree that there is no valid reason to include the inferior six-month average yield in a range with the one-month yield.

#### **B. Risk premium for each of the A350XWB loans**

80. The Panel also erred with respect to the second component of the benchmark rates of return – the project-specific risk premia. To recall, for all four A350XWB LA/MSF contracts, the Panel applied a single, undifferentiated risk premium, which was

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<sup>91</sup> EU Appellant’s Submission, para. 291.

<sup>92</sup> Panel Report, para. 6.382 (Table 6).

<sup>93</sup> US Appellee’s Submission, para. 203.

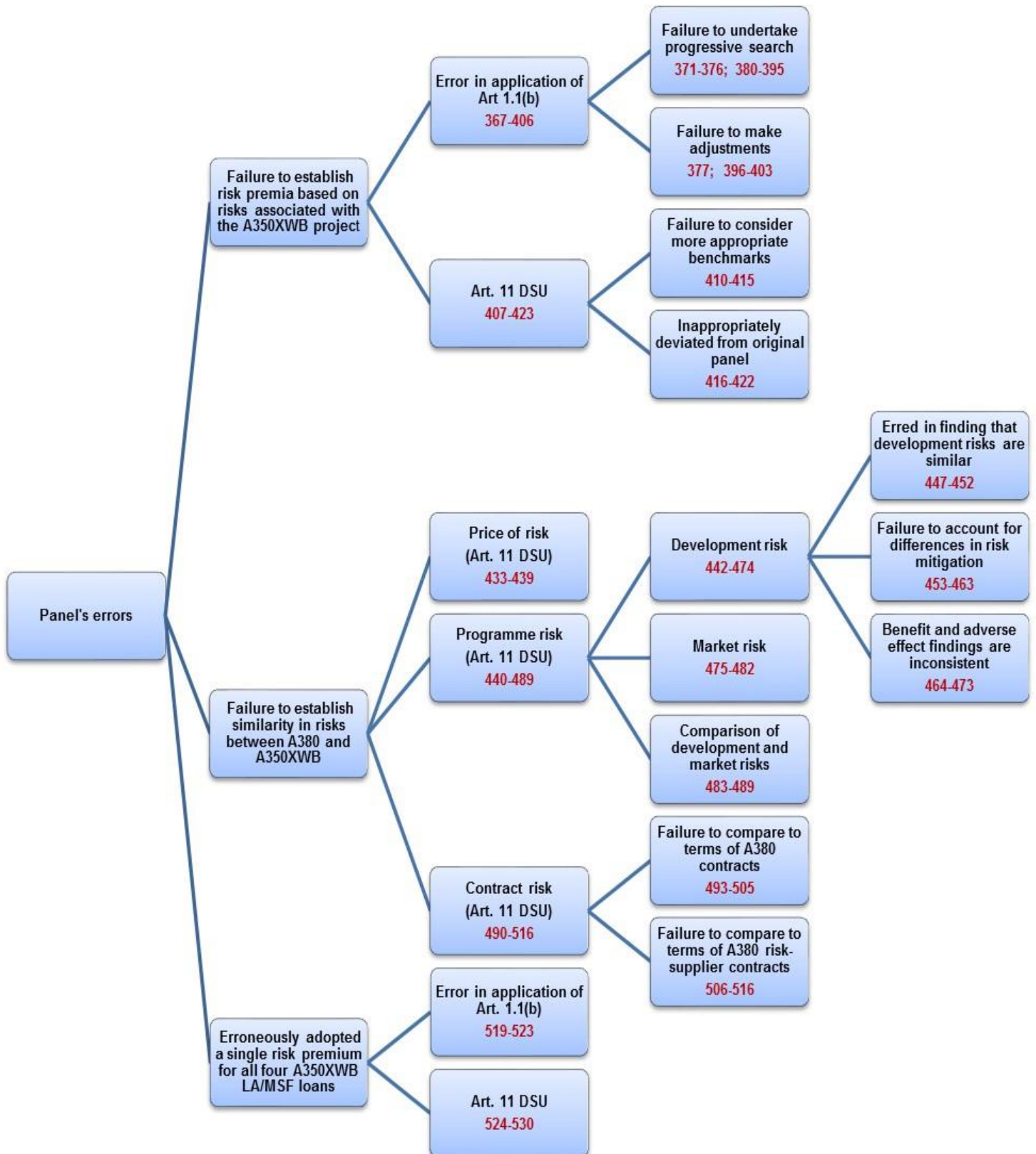
<sup>94</sup> EU Appellant’s Submission, paras. 300-317.

<sup>95</sup> US Appellee’s Submission, para. 204.

developed in the original proceeding for a *different* project, namely the A380, which implicated *different* risks.

81. Figure 1 includes an overview of the EU arguments on this point. We hope you may find this helpful, as we address your questions on the issue of the risk premia.

Figure 1: Overview of Panel errors regarding the risk premia<sup>96</sup>



<sup>96</sup> The numbers in the figure refer to paragraph numbers in the EU Appellant's Submission.



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82. The Participants’ arguments concerning the risk premia must be understood against the background of the original proceedings. The original panel expressed strong concerns about the use of a single, undifferentiated risk premium. It did so because such an approach *ignores differences* in the risks implicated by different LCA projects, and in the risks assumed by the lender under different LA/MSF contracts. The original panel identified four dimensions of risk – development risk, market risk, the price of risk and contract risk – on which the risk profiles of LA/MSF funding for different LCA development projects might differ.<sup>97</sup>
83. Nonetheless, in the compliance proceedings, the US proposed to use, for each of the LA/MSF loans for the A350XWB, the risk premium developed in the original proceedings for the LA/MSF loans for the A380, which was the risk premium paid by Airbus to commercial risk-sharing suppliers for the A380 programme. The US proposed the A380-related risk premium to assess the issue of benefit with respect to the A350XWB LA/MSF loans, without any adjustments to account for differences along the four dimensions of risk identified by the original panel.
84. That is, the US proposed a risk premium that was not remotely tailored to the risks associated with the A350XWB programme and the A350XWB LA/MSF contracts.
85. The US proposition is that, no matter the shortcomings of its proposal, the very fact that it *proposed* a risk premium used in the original proceedings was somehow sufficient to shift the burden to the EU to prove the *absence* of a benefit.<sup>98</sup> To the US, the A380-related risk premium from the original proceedings enjoys *presumptive status* as the risk premium for the A350XWB LA/MSF loans, unless there is “{}sufficient evidence to find that the different financial environment at the time of the conclusion of the A350 XWB and A380 LA/MSF contracts should result in a relative increase or decrease for the PSRP for the A350XWB”.<sup>99</sup>
86. The US proposition turns the normal rules concerning the burden of proof on their head. The A380-related risk premium cannot be presumed to be suitable with respect to LA/MSF loans extended a decade later, for a different LCA programme, launched six years after the A380. The Panel was not permitted, let alone compelled, to

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<sup>97</sup> Panel Report, *EC – Large Civil Aircraft*, para. 7.468.

<sup>98</sup> US Appellee’s Submission, paras. 226, 233.

<sup>99</sup> US Appellee’s Submission, para. 249.

- presumptively use the A380-related risk premium to assess the issue of benefit with respect to the A350XWB loans.
87. Instead, the US bore the burden of identifying risk premia that were fit for purpose – that is, risk premia that were *suitable* to assess whether or not there was any benefit conferred by each of the A350XWB LA/MSF loans. The US was not at liberty simply to ignore the requirement to propose risk premia *tailored to the risks of the project at issue* – a requirement made eminently clear in the original proceedings – and nonetheless pretend that it had met its burden, thereby effectively *reversing* the burden and placing it on the EU.
88. Yet, that is precisely the gamble the US made, and the Panel played along, ignoring the legal standard it had itself described. Like the US, the Panel was evidently aware of its own statements, in the original proceedings, that a risk premium must be tailored to the risks associated with the particular LCA project at hand. Like the US, the Panel also knew that, for a benchmark loan to be “comparable”, as required by Article 1.1(b) in the context of Article 14(b) of the *SCM Agreement*, it “should have as many elements as possible in common with the investigated loan”.<sup>100</sup> To the extent a panel is called upon to use a less proximate loan to undertake its analysis, such loan must be adjusted “to ensure comparability with the investigated loan”.<sup>101</sup> The EU was relentless in reminding the Panel of these points.<sup>102</sup> Reacting to the US suggestion of an A380-based risk premium, and reflecting its role as the respondent, the EU demonstrated that the proposed A380 risk premium was not at all suited to benchmark each of the A350XWB LA/MSF loans. Simply put, it was not tailored to the A350XWB project, or to the distinct terms of each of the A350XWB LA/MSF contracts.
89. Moreover, the Panel was well aware that risk premia could be based on a source of information that was more proximate to the A350XWB programme, and that therefore held out promise as more closely tailored to the risks associated with that programme

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<sup>100</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345.

<sup>101</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345.

<sup>102</sup> See, e.g., EU SWS, paras. 318-342 ; EU 22 May 2013 response to Question 1, paras. 1-5; EU 22 May 2013 response to Question 100, paras. 401-404; EU 25 June 2013 comment on US response to Question 90, para. 678 (citing Appellate Body Report, *EC – Large Civil Aircraft*, paras. 883, 867 (summarising panel finding), 888-895 (reversing the panel’s application of the constant US project-specific risk premium).

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– specifically, the risk premia paid by Airbus to its risk-sharing suppliers *for the A350XWB programme*, rather than for the A380 programme. Elsewhere in its report, the Panel returned frequently to the relevance of the A350XWB risk-sharing suppliers to its analysis.<sup>103</sup>

90. Nonetheless, the Panel did not even bother to explore whether the A380-related risk premium, drawn from the returns enjoyed by A380 risk-sharing suppliers, shared as many elements *as possible* with the A350XWB LA/MSF loans. At the very least, the acknowledged existence of A350XWB risk-sharing supplier financing begged the question whether a risk premium drawn from the A380 risk-sharing supplier contracts was the best fit (or suitable at all), or whether another benchmark was available that shared more elements in common with the A350XWB loans. The Panel did not even pose, let alone answer, this question. In failing even to explore a potential benchmark the existence of which the Panel explicitly confirmed it was well aware, the Panel passed up the opportunity to explore a benchmark that shares “as many elements as possible in common with the investigated loan”. Thus, the Panel disregarded its duty to conduct a “progressive search” for the most suitable benchmark. And since the Panel failed to look beyond the “benchmark” proposed by the US, there was no basis to conclude either that it was based on the most proximate information, or that was suitable – that is, that it was even *capable* of constituting a “benchmark”. Therefore, the Panel erred in the application of Article 1.1(b) of the *SCM Agreement*.
91. The US asserts that the A380 risk premium was the appropriate “starting point” for the Panel’s enquiry with respect to the risk premia for the A350XWB.<sup>104</sup> This is unsurprising, because the hypothesis offered by the party carrying the burden of proof would naturally serve as the “starting point” for an assessment by the trier of facts. The Panel’s errors lie in its failure to determine that the “starting point” proffered by the US did not constitute a suitable benchmark; its failure to engage in a “progressive search” for a benchmark that shares “as many elements as possible in common with the investigated loan”; and thus, in effect, its assumption that the invalid starting point proffered by the US was capable of constituting the valid end point of its assessment.

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<sup>103</sup> Panel Report, paras. 6.501, 6.502, 6.505, 6.511, 6.1555, 6.1555 (footnote 2699), 6.1585, 6.1743.

<sup>104</sup> US Appellee’s Submission, paras. 216, 226, 260.



92. On appeal, the US now asserts that, because the A380-based risk premium was used in the original proceedings, it became the *default* benchmark in these compliance proceedings, and must be used for the A350XWB loans unless “the facts had changed” since the original proceedings.<sup>105</sup> However, the identification of a suitable benchmark for the A350XWB loans is not about whether original facts have changed. The compliance Panel was not asked to re-assess the original benefit determination for the A380 loans. Instead, the compliance Panel was charged with benchmarking an *entirely different set of loans*, concluded *nearly a decade after* the A380 loans, for an *entirely different LCA programme*, launched six years after the A380. Thus, *different* facts must be assessed, because the benchmarking exercise involves a *different* project, which is precisely the point the EU made to the Panel, in emphasising that the US had not advanced suitable risk premia tailored to the A350XWB project, or to the distinct terms of each of the A350XWB LA/MSF contracts.
93. The US also failed to propose, and the Panel failed to make, adjustments to the A380-based risk premium “to ensure comparability with the investigated loan”.<sup>106</sup> The Panel failed to do so, despite having affirmatively found differences between the A380 and the A350XWB programmes in three of the four relevant dimensions of risk: development, market and contract risks.
94. The US offers no meaningful justification for its failure to propose adjustments, or of the Panel’s failure to make any such adjustments to account for these differences in risk. Most importantly, the Panel found the A380 risk premium to be suitable for the A350XWB project, on the basis that the risks posed by the A380 and the A350XWB projects were somehow purportedly similar. However, for several reasons, the Panel enjoyed no basis in the record for its finding of similarity.
95. To begin, the Panel explicitly found that the US had *failed to demonstrate* similarity between the A380 and the A350XWB programmes on one of the types of project risk, namely the *price of risk*. On that basis alone, the record simply could not support a

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<sup>105</sup> US Appellee’s Submission, paras. 216 (“In establishing the PSRP component of the commercial benchmark, the Panel’s starting point was the PSRP used for the A380 in the original dispute”), 221 (“The starting point for the Panel’s assessment of the PSRP for the A350 XWB program was a finding in the original dispute: the PSRP for the A380 LA/MSF”), 226 (“ By using the A380 PSRP as the starting point and evaluating the extent to which the facts had changed, the Panel hewed closely to the Appellate Body’s guidance regarding DSU Article 11, as it applies to compliance panels in particular”), 260 (“the starting point for the Panel’s analysis was the A380 PSRP, which was the basis for DSB-adopted findings in the original dispute”).

<sup>106</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.

finding that the programmes bore similar risks. The US suggests that similarity was nonetheless found on the basis of the two other types of project risk, namely *development* and *market risk*.<sup>107</sup> The US argument finds no support in the Panel’s findings. The Panel nowhere stated, much less explained, that similarities in the development and market risk posed by the two programmes somehow compensated for the US failure to demonstrate similarity in the price of risk, or for the Panel’s failure to assess the impact of the price of risk.

96. Moreover, although the Panel found that the A380 and the A350XWB programmes manifested *different* development and market risks, it somehow concluded that those risks were nonetheless *similar in magnitude* for the two programmes. In so doing, however, the Panel failed to *reduce the differences in development and market risk to common terms* that are relevant under Article 1.1(b), and that would *enable the comparison necessary to determine similarity*. The Panel could have, for example, undertaken that comparison by expressing the differences in risks between the A380 and the A350XWB projects in terms of the *impact* each project’s development and market risks had *on the market price* that would be demanded by a market lender as a risk premium to bear those risks. This was, after all, how the Panel itself chose to frame the benefit assessment: whether the A380-related risk premium, expressed *as a price*, could be applied to the A350XWB.
97. Moreover, the Panel found that the four A350XWB loans were “sufficiently similar” to one another and to the A380 loans for a single risk premium to apply to all of them. The Panel did so despite recognising, for instance, the different timing of the four A350XWB loans, and despite finding that the price of risk,<sup>108</sup> as well as development and market risk,<sup>109</sup> are different at different points in the development of an aircraft.
98. In response, the US mischaracterises our position as mandating a comparison that is quantitative in nature.<sup>110</sup> However, that is not what we are saying. As an *example* of common terms enabling comparison of distinct risks *in a manner relevant to the*

<sup>107</sup> US Appellee’s Submission, para. 249.

<sup>108</sup> Panel Report, paras. 6.384, (*quoting* Appellate Body Report, *EC – Large Civil Aircraft*, paras. 835-836) (“The comparison is to be performed as though the {actual and benchmark} loans were obtained at the same time ... the assessment focuses on the moment in time when the lender and borrower commit to the transaction”), 6.385 (“Mindful of this guidance, we consider that borrowing costs should be observed at the time that each particular contract was concluded”), Table 7 (estimating separate corporate borrowing rates for each of the LA/MSF contracts). *See also, Id.*, paras. 6.580-6.588 (recognizing that the price of risk changes over time).

<sup>109</sup> Panel Report, paras. 6.385-6.388.

<sup>110</sup> US Appellee’s Submission, para. 250.

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*enquiry under Article 1.1(b)*, the EU has suggested *price*. Price is indeed a relevant comparator for an assessment under Article 1.1(b) and Article 14(b), because it speaks to the ultimate question at issue, namely whether a commercial lender would have charged a similar amount for the development risk associated with each project. While it has declined to do so, the US was certainly free to suggest other ways to make a meaningful comparison.

99. The main point – left unaddressed by the US – is that, without some way of reducing the different risks to common terms susceptible to comparison, it is *impossible* to conclude that those different risks are, nonetheless, similar in magnitude.
100. For example, without reducing to common terms the development risk associated with the “unprecedented size” of the A380, and the *different* development risk associated with the extensive use of “*new materials*” on the A350XWB,<sup>111</sup> how could the Panel possibly have concluded that the two risks were so similar in magnitude that a market lender would have charged the *exact same risk premium* as compensation for bearing those risks?
101. Indeed, in assessing the corporate borrowing rate component of the benchmark, the Panel accepted that differences must be reduced to terms susceptible to comparison before making findings that are premised on a comparison between different things. Specifically, the Panel endorsed and applied the so-called “Macaulay” duration, as a tool to reduce to comparable terms two debt instruments of differing term structures and term durations.<sup>112</sup>
102. Yet, when assessing the issue of risk premia, the US failed to propose, and the Panel failed to adopt, any tool whatsoever that would enable a comparison of what it acknowledged to be *different risks* as between the A380 and the A350XWB programmes, on *common terms susceptible to comparison*. Having failed to adopt any such tool, how can the Panel so confidently profess to have identified the amount of any alleged benefit down to one one-hundredth of a percent, as it did in Table 10 of its report?<sup>113</sup> There is a glaring disconnect between the conceit of precision underlying the figures in Table 10, on the one hand, and the imprecise analysis undertaken by the Panel to generate those figures, on the other.

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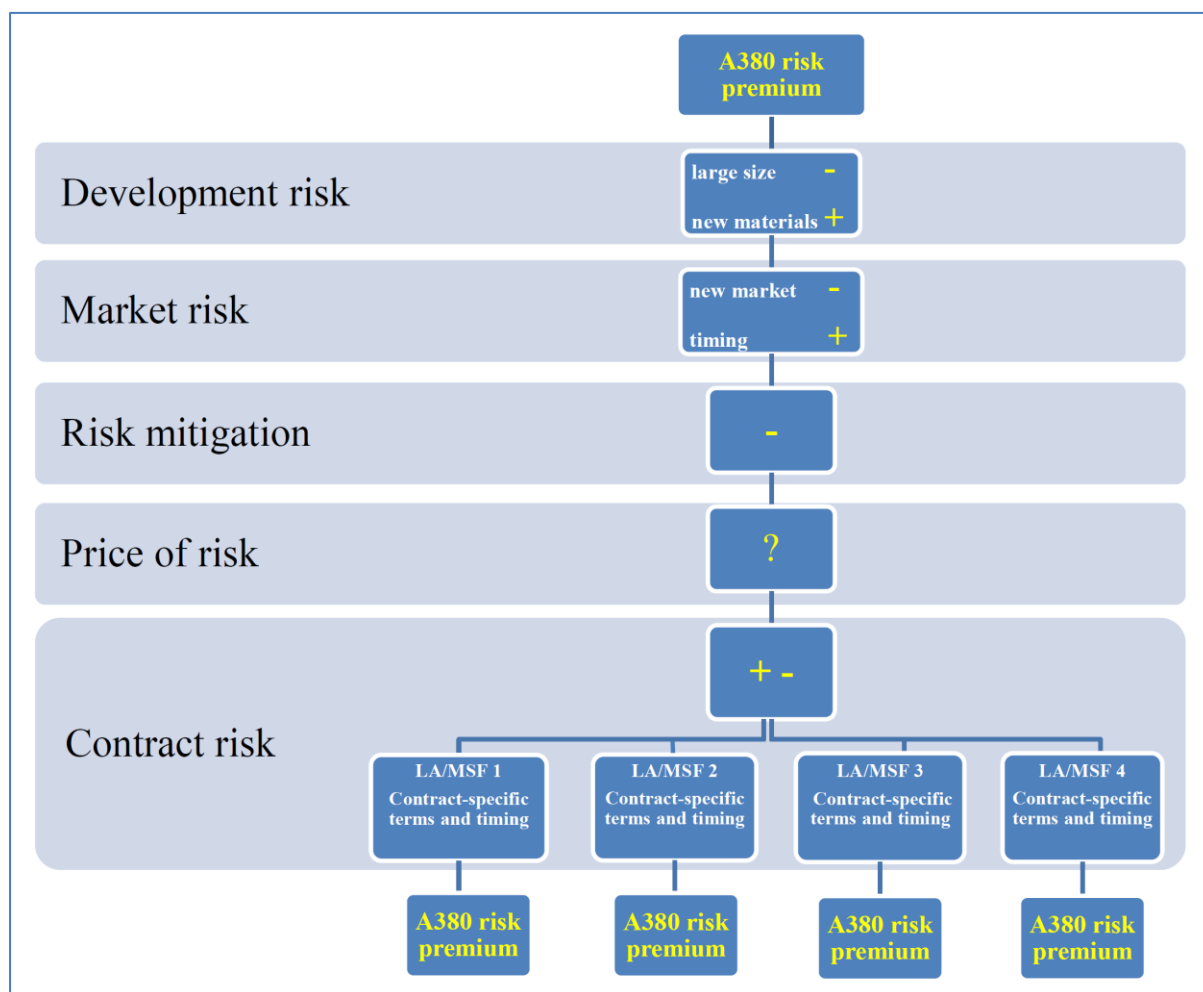
<sup>111</sup> Panel Report, paras. 6.466 (emphasis in original), 6.482.

<sup>112</sup> Panel Report, para. 6.416.

<sup>113</sup> Panel Report, Table 10 and para. 6.633; EU Appellant’s Submission, Section V.A., paras. 401, 515.

103. To summarize, figure 2 shows a graphical representation of the Panel’s findings on this point. It identifies the Panel’s starting point, a number representing the A380 risk premium, identified with the precision of one hundredth of a percentage point. It shows how the Panel then enquired into differences among various aspects of the risks involved in the A350XWB loans, relative to those of the A380 loans. Although the Panel found differences, it concluded that no adjustment was warranted, such that the very same, precise A380 risk premium could be pressed into service as the risk premium for each of the A350XWB loans. In other words, the Panel considered that the net effect of the numerous differences was precisely zero, leading to a risk premium for the A350XWB that was not even one hundredth of a percentage point different from that for the A380.

**Figure 2: Panel findings on the risk premia for A350XWB LA/MSF loans<sup>114</sup>**



<sup>114</sup> Panel Report, paras. 6.457, 6.466, 6.482 (development risk), 6.579 (market risk), 6.522, 6.541, 6.527 (risk mitigation), 6.588, 6.608 (price of risk), 6.593-6.595, 6.602-6.607 (contract risk), 6.632-6.633 (benefit findings).

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104. Figure 2 also identifies some of the differences that the Panel found in the risks involved in the A350XWB loans, relative to the A380 loans. Specifically, the Panel found: (i) *lower* development risks given that the A350XWB does not have the A380's very large size, and *increased* development risks given the A350XWB's technological novelty; (ii) *lower* market risks given that the A350XWB was not, like the A380, launched into a new market, and *increased* market risks given the A350XWB's timing disadvantage relative to its competitor; (iii) *reduced* A350XWB risks given enhanced risk mitigation; (iv) an *unknown* impact from changes in the price of risk; and, (v) risk-increasing or -decreasing effects resulting from differences in timing of the loans and other contract-specific terms. Recognising these differences as **capable** of affecting the A380 risk premium, and thus generating different A350XWB risk premia, the Panel nevertheless concludes that the end points or outputs of its analysis (that is, the four risk premia for the A350XWB loans) are all the same and **coincide** with the input, the A380 risk premium. The Panel could only have done this if it would have reduced these differences to a common term, compared them, and found their net effect on the risk premium to be zero. Given that the Panel found differences in the risk profiles of the four contracts, the Panel would also have had to repeat the exercise for each contract, and find that the net effect of these differences, in each case, was zero. The fact that the Panel did not even attempt to do so undermines its conclusion and suggests a lack of objectivity.
105. In sum, the above equation can be reduced to the following terms: unsuitable **input** (falling short of a *prima facie* case), **plus/minus** a lack of objective assessment or even silence with respect to at least seven independent variables, miraculously **equals** four **identical** suitable benchmarks (without the complainant being required to demonstrate anything and without the need for any adjustments) – the whole exercise being accurate to two decimal places. Really, the thing speaks for itself.
106. Turning to the US arguments regarding the Panel's failure to make an objective assessment, we begin by noting that the US effectively argues that the Appellate Body was wrong to conclude that a panel commits error under Article 11 when it fails to provide a reasoned and adequate explanation.<sup>115</sup> To the US, such a failure would only be problematic for findings by domestic investigating authorities, but not findings by

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<sup>115</sup> US Appellee's Submission, paras. 200, 248 (footnote 341).

a panel. The US argument seems to be with the Appellate Body, which has explicitly stated that a panel is “expected to provide reasoned and adequate explanations and coherent reasoning”.<sup>116</sup> The Panel’s failure to do so in these proceedings constitutes error.

107. Next, we turn to the US argument that our Article 11 appeals regarding the Panel’s benchmarking exercise concern nothing more than a complaint about the “outcome” – that is, the Panel’s findings that each of the A350XWB loans confers a benefit.<sup>117</sup> This is simply wrong. Article 11 requires that a panel’s *assessment* bear the hallmarks of *objectivity*. If it does not, then the outcome of that assessment – whether favouring the complainant or the respondent – should, in principle, be reversed; again, however, it is the *assessment itself* that must be objective.
108. Multiple aspects of the Panel’s assessment were not objective. The EU has identified, with precision, why the Panel’s assessment lacked objectivity. That assessment lacked a sufficient evidentiary basis in the record;<sup>118</sup> it was based on inconsistent and incoherent reasoning;<sup>119</sup> it lacked a reasoned and adequate explanation;<sup>120</sup> it applied inappropriate approaches and failed to consider alternative approaches;<sup>121</sup> or, inappropriately deviated from the original panel’s approach.<sup>122</sup> In each instance, the EU connected these errors in the Panel’s *assessment*, to the *consequence* for the sustainability of the Panel’s benefit and subsidy *findings* under Article 1.1 of the *SCM Agreement*.<sup>123</sup> As we have explained, the errors in the Panel’s assessment are particularly consequential, given the degree to which the Panel’s benefit findings are *highly dependent on precision and accuracy* in the benchmarking exercise. A small change in the benchmark holds the potential to change the results, from a finding that a particular LA/MSF loan constitutes a subsidy, to a finding it does not. The sheer number of instances in which the Panel failed to make an objective assessment greatly enhances the *imprecision and inaccuracy* of the *outcome*. The outcome of the

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<sup>116</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 618. See US Appellee’s Submission, paras. 200, 248 (footnote 341).

<sup>117</sup> US Appellee’s Submission, para. 208.

<sup>118</sup> EU Appellant’s Submission, paras. 296-299, 437-438, 447-452, 476-482, 483-488, 493-504, 506-516.

<sup>119</sup> EU Appellant’s Submission, paras. 312-316, 436, 453-463, 464-473, 524-529.

<sup>120</sup> EU Appellant’s Submission, paras. 310-311, 447-452, 458, 476-482.

<sup>121</sup> EU Appellant’s Submission, paras. 410-415.

<sup>122</sup> EU Appellant’s Submission, paras. 416-422.

<sup>123</sup> EU Appellant’s Submission, paras. 299, 318-327 (and Tables 2, 3 and 3bis), 328-336 (and Table 3), 423, 438-439, 451-452 (citing para. 401), 474, 481-482, 489, 505, 515-516, 530, 531-532 (and Table 4).

assessment – that is, the findings that each of the A350XWB loans involves a subsidy – are therefore also in error and must be reversed.

**VI. ARTICLE 3.1(B)**

109. We turn next to the US “appeal” of the Panel’s findings under Article 3.1(b) of the *SCM Agreement*.

110. In its Notice of Appeal, the US “agrees with the Panel’s interpretation of Article 3.1(b)”.<sup>124</sup> In its Other Appellant’s Submission, the US confirms this position.<sup>125</sup> Nor does the US challenge the Panel’s application of Article 3.1(b). Finally, the US does not assert that the Panel erred in its assessment of the matter, under Article 11.

111. Article 17.13 of the DSU clarifies that the consequence of a successful appeal is a modification or reversal of the panel’s findings and conclusions. In the absence of an allegation of error, there is simply nothing to modify or reverse. There is no “appeal” for the Appellate Body to adjudicate. The matter should end here and now.

112. The US argues that the Appellate Body should nonetheless consider its “appeal” because of the existence of an allegedly “competing interpretation” of Article 3.1(b) in DS487, or because the interpretation of Article 3.1(b) by the DS316 Panel could have “potential applicability to the different facts at issue in DS487”.<sup>126</sup> These are both matters properly reserved for the appeal in DS487. We will be sitting in this configuration again in a month’s time, for the oral hearing in that dispute. In the meantime, in the absence of any allegation of error by the Panel in DS316, there is no appeal for the Appellate Body to adjudicate.

113. In any event, the panel in DS487 did not develop an interpretation of Article 3.1(b) that “competes” with the interpretation developed by the Panel in DS316. The DS316 Panel found that “the act of granting subsidies to firms so long as they engage in domestic production activities, without more, should not be equated to making those subsidies contingent on the use of domestic over imported goods and hence prohibited”.<sup>127</sup> The panel in DS487 interpreted Article 3.1(b) such that “the provision of subsidies exclusively to domestic producers, without more, is not in itself a breach

<sup>124</sup> US Notice of Other Appeal, para. 1.

<sup>125</sup> US Other Appellant’s Submission, paras. 21-22.

<sup>126</sup> US Letter to the Appellate Body, 9 December 2016, para. 14.

<sup>127</sup> Panel Report, para. 6.785.

of the obligations under the covered agreements”.<sup>128</sup> That is, the two panels gave the terms of Article 3.1(b) the same meaning. In our submission, that common interpretation is correct.

114. There is, indeed, a different *outcome* in the two disputes, which is not surprising, given – to borrow the US’ words – “the different facts at issue in DS487”.<sup>129</sup> That differences in the facts underlying two disputes trigger different outcomes under a common interpretation of the provision at issue is a common feature of adjudication, in the WTO as elsewhere.
115. The US appeal must also be rejected because it involves a case that is fundamentally different from the one the US litigated before the Panel. The US made strategic choices about the case it wanted to make to the Panel. Those choices were informed, and are consequential. Under Article 17.6 of the DSU, the US is not entitled to litigate a fundamentally new case on appeal.
116. Finally, even were the Appellate Body to reverse the Panel’s interpretation, it cannot complete the analysis, because there is nothing in the Panel’s factual findings or undisputed facts of record that would permit it to do so without engaging in extensive fact finding. Indeed, the US request for completion is premised entirely on a series of factual assertions that were never made before the compliance Panel.<sup>130</sup> As such, those assertions are not undisputed facts of record. Neither the Panel nor the EU were given the opportunity to test or dispute the US assertions across the many submissions, questions and oral exchanges made in the course of the panel proceedings. While the EU indeed disputes the US assertions made for the first time in this appeal, it is constrained in its ability to do so, since it cannot, in these appellate proceedings, bring to bear new evidence to substantiate its view of the facts. For all of these reasons, the Appellate Body should reject the US “appeal”.

## VII. CONCLUSION

117. Mr. Chairman, members of the Division, this concludes our oral statement. We look forward to answering your questions.

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<sup>128</sup> Panel Report, *US – Conditional Tax Incentives*, para. 7.357.

<sup>129</sup> US Letter to the Appellate Body, 9 December 2016, para. 14.

<sup>130</sup> EU Other Appellee’s Submission, paras. 208-261.