

*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, 26 September 2017

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<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>EC – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC – Large Civil Aircraft (Article 21.5 – US)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/RW and Add.1, circulated to WTO Members 22 September 2016 [appealed by European Union 13 October 2016]
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>US – Large Civil Aircraft</i>	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
<i>US – Large Civil Aircraft (Article 21.5 – EU)</i>	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union</i> , WT/DS353/RW and Add.1, circulated to WTO Members 9 June 2017 [appealed by the European Union on 29 June 2017]

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## LIST OF ABBREVIATIONS

Abbreviation	Description
EU	European Union
LA/MSF	Launch Aid / Member State Financing
LCA	Large Civil Aircraft
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
UAE	United Arab Emirates
US	United States
VLA	Very Large Aircraft
WTO	World Trade Organization

## **I. INTRODUCTION**

1. Mr. Chairman, distinguished members of the Division, among the multiple errors in the Panel’s analysis that we brought to your attention during our last meeting was the Panel’s interpretation of Article 7.8 of the *SCM Agreement*. To recall, the Panel found that even withdrawn subsidies can be WTO-inconsistent in perpetuity. Today, we will discuss some of the Panel’s further errors, including its flawed approach to causation, and its WTO-inconsistent standard for finding displacement and/or impedance.
2. A common theme runs through all of these errors. Having taken a view on what the outcome of the dispute should be, the Panel required the US to demonstrate no more than the market presence of Airbus’ aircraft, in order to sustain a finding of adverse effects. That is, to the Panel, historical subsidies found to have accelerated a product launch will always remain the cause of adverse effects, no matter how much time passes, no matter what events occur during that time, and no matter what the market data says about claims of displacement and impedance.
3. Before we turn to the Panel’s specific errors on causation, and the assessment of displacement and impedance, we will first discuss the Panel’s errors relating to two threshold issues, identifying a non-subsidised like product under Article 6.4 of the *SCM Agreement*, and delineating product markets.

## **II. “NON-SUBSIDIZED LIKE PRODUCT”**

4. The reference in Article 6.4 to “non-subsidized like product” raises a central issue – namely how displacement and impedance should be assessed under Article 6.3(b) when the like product is subsidized, as is the case in the present dispute.
5. The Panel decided not to engage with this important issue. The Panel, simply asserted that it was precluded from “reopening” the original panel’s findings.<sup>1</sup> This allowed the Panel to sidestep inconvenient and legally untenable aspects of the original panel’s interpretation of Article 6.4 – in particular the conflict between that panel’s interpretation and subsequent Appellate Body rulings. Avoiding the issue allowed the Panel to ignore not only the multilateral determination that the like product was

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<sup>1</sup> Panel Report, paras. 6.1153-6.1154.

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subsidized, but also the EU’s additional interpretative proposition that such subsidization should be taken into account in the assessment of *causation*.

6. At the same time, when it assessed and accepted the US’ claims under Article 6.3(b), the Panel expressly referred to prior guidance from the Appellate Body, which had relied on Article 6.4 as context for the interpretation and application of Article 6.3(b).<sup>2</sup> However, the Panel omitted any reference to or discussion of the treaty terms “non-subsidized like product” in Article 6.4. Thus, the Panel took the erroneous position that, even if everything else in Article 6.4 is context for the interpretation and application of Article 6.3(b), the treaty terms “non-subsidized” are not.<sup>3</sup>
7. The Panel’s refusal to engage on the issue of “non-subsidized like product” is grounded, *first*, on its finding that there was no new matter.<sup>4</sup> Framing the question before it in this (inappropriate) manner allowed the Panel to avoid the relevant question. That question is the following: was the US correct in asserting that the reasoning in *EC – Bed Linen* “precluded” the EU from referring to all of Article 6.4 (including the treaty terms “non-subsidized like product”) as context for the US claims under Article 6.3(b)? Obviously, that is not the case. *EC – Bed Linen* concerns the concept of *res judicata* as it applies to a complainant bringing compliance proceedings with respect to a particular matter. It has got nothing to do with the proposition that a litigant might subsequently be “precluded” from making particular kinds of *interpretative* legal arguments. Since “the court knows the law”, it must consider all the relevant law, and cannot exclude relevant provisions from consideration.
8. In any event, as we have explained in our appeal, the Panel was wrong in concluding that there was no new matter. The US response is that a “matter” consists of a legal claim and a measure at issue, but not the facts.<sup>5</sup> This is incorrect. A measure at issue *constitutes* one factual aspect of a matter. In a case under Part III of the *SCM Agreement*, the measure at issue is an alleged subsidy allegedly causing adverse effects. This involves consideration of facts in addition to the measure at issue,

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<sup>2</sup> Panel Report, paras. 6.1799-6.1818.

<sup>3</sup> EU Appellant’s Submission, paras. 675-685.

<sup>4</sup> Panel Report, para. 6.1154(i).

<sup>5</sup> US Appellee’s Submission, para. 370.

namely new facts relating to the markets at issue. In these compliance proceedings, the US has referred to new alleged subsidies, new adverse effects in a new reference period and new arguments regarding causation; whilst the EU has referred to the multilateral determination in DS353 that Boeing LCA are subsidized. In these circumstances, even if this was a relevant issue, there is a new matter.

9. The Panel’s refusal to engage on the issue of “non-subsidized like product” is also grounded, *second*, on its finding that there were no cogent reasons.<sup>6</sup> Yet, whether or not the “cogent reasons” rule governs the relationship between the original panel and the compliance panel, it certainly does not govern the relationship between this compliance Panel and the Appellate Body. The Panel erred because it disregarded its obligation to follow the intervening guidance of the Appellate Body. The Panel’s reasoning is based on the wrong premise, namely that the original panel’s legal interpretation of Article 6.4 was not affected by the subsequent Appellate Body report.<sup>7</sup>
10. The US asserts that the Appellate Body statements “do not relate, directly or tangentially, to the legal interpretation developed by the original panel”.<sup>8</sup> Specifically, the US argues that, contrary to an alleged EU premise, “the Appellate Body never found that claims under Article 6.3(b) must in *all cases* also satisfy *every provision* in Article 6.4”.<sup>9</sup> The EU’s argument is, however, not based on this premise.
11. We recall that the original panel agreed with the EU on the meaning of the term “non-subsidized like product”, but disagreed with the EU when finding that Article 6.4 contains a “special rule” on which a complainant could, if it wished, rely under “certain particular circumstances”.<sup>10</sup> The original panel’s interpretation that Article 6.4 contains a special rule that applies “if the circumstances set out in Article 6.4 are satisfied”<sup>11</sup> was subsequently discredited by the guidance of the Appellate Body, explaining that Article 6.4 provides contextual support for the interpretation and

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<sup>6</sup> Panel Report, para. 6.1154(ii).

<sup>7</sup> Panel Report, paras. 6.1130-6.1131.

<sup>8</sup> US Appellee’s Submission, para. 379.

<sup>9</sup> US Appellee’s Submission, paras. 379, 395.

<sup>10</sup> Panel Report, *EC – Large Civil Aircraft*, paras. 7.1767-7.1769.

<sup>11</sup> Panel Report, *EC – Large Civil Aircraft*, paras. 7.1767-7.1769

application of Article 6.3(b).<sup>12</sup> The US therefore errs when it states that this Appellate Body jurisprudence is not related, “directly or tangentially”, to the original panel’s interpretation of Article 6.4.

12. In any event, however, the US itself claims, for example, displacement by asserting that the subsidy has caused the respondent’s market share to increase at the expense of the complainant’s. These are precisely the circumstances expressly identified in Article 6.4. **In such a scenario, Article 6.4 necessarily provides essential context that an adjudicator must take into account.** We believe that, given the express terms of Article 6.4, including as they have now repeatedly been clarified by the Appellate Body, it is impossible to deny the truth of this proposition. This being so, we are at a loss to understand why it might be the case that, out of 156 treaty terms in Article 6.4, only one term (“non-subsidized”) should, according to the Panel, not be relevant context.

### III. PRODUCT MARKETS

13. The Appellate Body has identified the delineation of product markets as a “prerequisite” for assessing claims of adverse effects.<sup>13</sup> The EU’s appeal in this regard is based on two simple premises. The first is that placing two products into the same product market requires a careful consideration of the “nature and degree”, and not merely the existence, of competition between them. As such, the Panel erred in the interpretation of Article 6.3 in finding that products could be grouped into product markets, based solely on the *existence* of competition, without regard to the nature and degree of that competition.
14. The second premise is that, irrespective of the standard that is applied for defining product markets, in assessing the scope of product markets in a given case, a panel must ensure that products *within* a product market compete more closely with one another than with products *outside* that product market. In the present case, the Panel did nothing to ensure that this minimum logical requirement was met.

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<sup>12</sup> Appellate Body Report, *EC – Large Civil Aircraft*, paras. 681, 1166.

<sup>13</sup> AB Report, *EC – Large Civil Aircraft*, paras. 1119, 1128.

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15. The US spends much of its Appellee’s Submission debating the adjective “significant”.<sup>14</sup> Yet, what matters is not the adjective chosen to describe the requirement. The EU would welcome any formulation of the balance between the extremes of complete absence of competition, and perfect substitutability, as long as it properly takes into account the required “nature and degree of competition”<sup>15</sup> between products. The EU notes that the compliance panel in *US – Large Civil Aircraft* used the formulation “meaningful competitive constraints”.<sup>16</sup>
  16. The Panel failed to adhere to these two basic requirements – (i) consideration of the nature and degree of competition, and (ii) ensuring that products within a product market compete more closely with each other than with products outside that market – either as an interpretative matter, or as a matter of application.
  17. Indeed, the Panel adopted an undemanding standard for its product market delineation, based on the mere existence of competition; in addition, it asked only whether competition exists between products that the US grouped *within* the same product market. The Panel never enquired into the competitive relationship between those products, on the one hand, and products falling *outside* the asserted product market, on the other.
  18. The Panel excuses its failure to conduct a proper assessment of the nature and degree of competition between product pairings on the grounds that a rigorous application of the product market requirement would result in Members being “left without a remedy” against a subsidy that has eliminated or attenuated competition between a subsidised product and an allegedly adversely affected product.<sup>17</sup> The Panel and the US refer to this as the cellophane or reverse cellophane fallacy.<sup>18</sup>
  19. There are several problems with the Panel’s logic.
  20. First and foremost, the Panel’s disagreement is not with the EU, but with the Appellate Body. The Panel paid lip-service to the Appellate Body’s guidance that a

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<sup>14</sup> US Appellee Submission, paras. 271, 310.

<sup>15</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 1123.

<sup>16</sup> Panel Report, *US – Large Civil Aircraft*, para. 9.34.

<sup>17</sup> Panel Report, para. 6.1211. *See also* US Appellee Submission, para. 310.

<sup>18</sup> Panel Report, para. 6.1211. *See also* Panel Report, paras. 6.1192, 6.1199, 6.1202; US Appellee Submission, paras. 281, 283, 295.

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product market analysis that takes into consideration the nature and degree of competition is a threshold and “a critical, and potentially decisive, part of the analysis”.<sup>19</sup> Essentially, however, the Panel – and, before you in this appeal, the US – argues that you were wrong to impose this threshold requirement, because of their views on the perceived consequences of doing so.<sup>20</sup>

21. Second, the risk of the fallacy arising (and the ability of the adjudicator to control for it) are matters that are logically entirely disconnected from the legal standard used by the authority in order to determine what degree of competition is relevant for the purposes of identifying product markets.
22. Third, the central point that this “red-herring” discussion is obscuring is that there is a critical relationship between product market definition and causation analysis: the tighter the market definition the easier it may be to demonstrate causation; the looser the market definition the more difficult it may be to demonstrate causation. Against this background, one simply cannot have the loosest possible market definition coupled with the lowest conceivable “but for” causation threshold that remains valid forever, and still posit that one has demonstrated a genuine and substantial relationship of cause and effect.
23. Fourth, our submissions on this issue do not exclude the possibility that a complainant can develop a claim of price suppression or depression, or of lost sales, under the latter part of Article 6.3(c) (which does not use the term “like product”), in the same geographic market, spanning different product markets, if this is supported by the evidence. However, no such claim was developed or demonstrated by the United States in this case.
24. Finally, the US argues that, were the Appellate Body to reverse the Panel’s findings on product markets, it could complete the analysis either (i) under the product market delineation proposed by the EU to the Panel, or (ii) on the basis of the single product market finding that the EU speculates might have been the outcome of a correct application of the Panel’s *erroneous* interpretation.<sup>21</sup> However, the Panel made no

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<sup>19</sup> Panel Report, para. 6.1161. *See also* Panel Report, para. 6.1158, *citing* Appellate Body Report, *EC – Large Civil Aircraft*, para. 1129.

<sup>20</sup> Panel Report, para. 6.1211; US Appellee Submission, para. 317.

<sup>21</sup> US Appellee Submission, para. 614.

factual findings regarding the nature and degree of competitive constraints *for any product pairing other than those proposed by the US for grouping in the same product market*. Nor are there undisputed facts of record that would permit the redrawing of product market boundaries. Indeed, the EU arguments before the Panel were the subject of intense disagreement between the Parties. On appeal, the EU’s discussion of a single product market reflected the evident truth that loyal application of the Panel’s *erroneous* interpretation could lead to nothing other than a single product market. The EU evidently does not propose or endorse a single product market.

25. In support of its request for completion of the analysis on product markets, the US refers to the Appellate Body’s treatment of the matter in the original proceedings.<sup>22</sup> It is difficult to understand the US proposition. In the original proceedings, the Appellate Body concluded, and I quote, “that we are unable to complete the legal analysis to find that there are one or more LCA product markets”.<sup>23</sup>

#### IV. CAUSATION ANALYSIS

26. The Panel’s errors in product market delineation had important consequences for its subsequent causation analysis. After all, the nature of the competitive relationship between two products is a key factor in the ability of a subsidy to one product, to cause competitive harm to another product.
27. This can be best illustrated in the context of a subsidy that causes adverse effects by lowering the prices of the subsidised product. Where two products compete closely, in the sense that they are closely substitutable, small differences in price can tip the balance.<sup>24</sup> In that situation, a subsidy that enables lower prices is more readily able to skew the competitive dynamic between the two products, and cause harm cognizable under the *SCM Agreement*. On the other hand, where competition between two products is attenuated, attributing harm suffered by one product to the effects of a subsidy for the other product, requires a particularly rigorous assessment of all factors affecting the causal relationship.

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<sup>22</sup> US Appellee Submission, para. 614.

<sup>23</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 1137.

<sup>24</sup> See Appellate Body Report, *Thailand – Cigarettes*, para. 137 (footnote 199), quoting Panel Report, *Thailand – Cigarettes*, para. 7.735.

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28. These considerations apply not only for subsidies operating through a price causal mechanism, but also for subsidies operating through any other causal mechanism, and indeed, for all forms of government intervention. In markets where competition is intense, a small degree of intervention can easily change the competitive outcome; in markets with attenuated competition, the potential for competitive harm is lower.
29. Having adopted an undemanding approach to product market delineation, and having expressly acknowledged that the competition between some of the products that it placed in the same market was attenuated,<sup>25</sup> it was incumbent on the Panel to adopt a rigorous approach to the causation analysis. This was necessary, so as to avoid erroneously attributing to the subsidies present adverse effects that were instead caused by other factors. Yet, the Panel ignored this relationship. It proceeded as though the approach it took to product market delineation bore no relationship to – and *need* not bear any relationship to – the approach it took to assessing causation.
30. To be sure, the Panel paid lip service to the relationship between the product market and causation assessments, recalling the Appellate Body’s explanation “that where the evidence shows that the competitive relationship is not direct and ‘at most, indirect or remote’, this must be properly taken into account in the analysis”.<sup>26</sup> Nonetheless, the Panel adopted an approach to assessing causation that was as undemanding as its approach to product market delineation. The result was a series of evidentiary shortcuts that led the Panel to find present adverse effects without meaningfully testing whether the subsidies were *capable* of causing present harm (in light of the competitive relationship between the products), much less whether that harm was *actually presently caused* by the subsidies, instead of by non-attribution factors.
31. The EU recalls that, to find present serious prejudice under Article 6.3, there must be a genuine and substantial relationship of cause and effect between the *subsidy* and the

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<sup>25</sup> Panel Report, para. 6.1416 (“We wish to emphasize, however, that in making this finding, it is *not* our view that the degree of competition existing within each of these markets will be identical between all pairings or combinations of aircraft. There will be weaker and stronger competitive relationships within each market depending upon the particular circumstances of a sale. Moreover, important competitive relationships may also exist between pairings or combinations of aircraft *across* two, or even all three, of the product markets”). Panel Report, para. 6.1169 (“Moreover, the Appellate Body also explained that where the evidence shows that the competitive relationship is not direct and ‘at most, indirect or remote’, this must be properly taken into account in the analysis”).

<sup>26</sup> Panel Report, para. 6.1169.

*market phenomena* listed in Article 6.3. In fact, the US appears to be in agreement. In the appeal in *US – Large Civil Aircraft (Article 21.5 – EU)*, the US argues that:

Critically, the genuine and substantial relationship of cause and effect must be between the subsidy and the relevant Article 6.3 market phenomenon. It is therefore important to distinguish between “price effects” – which describe how the subsidy in question allows Boeing to lower its prices – and significant lost sales. The latter is the relevant Article 6.3 market phenomenon.<sup>27</sup>

32. Unlike Article 15 of the *SCM Agreement*, which requires a causal relationship between “subsidized imports” and injury, Article 6.3 requires a direct assessment of “the effect of the subsidy”. The existence of Airbus’ products is neither a subsidy, nor one of the market phenomena listed in Article 6.3. As such, a causation analysis that begins and ends with questions relating to the existence of Airbus and its products is flawed.

**A. Indirect effects of pre-A380 LA/MSF subsidies**

33. Turning to the Panel’s specific errors in assessing causation, the EU first recalls the Appellate Body’s guidance that the effects of any subsidy will diminish and eventually come to an end.<sup>28</sup> Once again, the Panel disagrees with the Appellate Body. To the Panel, the historical, and now withdrawn, LA/MSF subsidies will continue to be a genuine and substantial cause of adverse effects in perpetuity, for as long as Airbus and its products exist on the market. This would be true no matter how much time has passed since the grant of the subsidies, what events have occurred during that time, and what non-attribution factors are driving the market outcomes.
34. The US defends the Panel’s error by arguing that “Airbus would not have offered and sold the LCA it did during the post-implementation period if it had not received the pre-A350XWB subsidies”.<sup>29</sup> The US assertion is irrelevant, however. The question properly before the Panel was not whether the LA/MSF subsidies were a necessary historical cause of the market presence of Airbus aircraft. The relevant question is whether those subsidies remain, *today*, a genuine and substantial cause of adverse

<sup>27</sup> See US Other Appellant’s Submission, *US – Large Civil Aircraft (Article 21.5 – EU)*, [https://ustr.gov/sites/default/files/files/Issue\\_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf](https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf), para. 121.

<sup>28</sup> Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1236–1238.

<sup>29</sup> US Appellee Submission, para. 415.

effects, having accounted for the dissipation of effects over the considerable time that has passed since their grant, and in light of events that have occurred during that time.

35. The US also argues that “{j}ust because a phenomenon will at some point end, that does not signify that the end had occurred by a given point in time, such as the end of the implementation period”.<sup>30</sup> This is a statement of the obvious. The problem is, however, that the Panel’s analytical framework was not designed to detect whether a sufficient period of time had passed since the grant of the historical, now withdrawn, subsidies. Instead, the Panel focused solely, and erroneously, on whether those subsidies were, historically speaking, a necessary cause of the market presence of Airbus’ aircraft. Under that analytical framework, the outcome would have been no different, had centuries rather than decades passed since the grant of the subsidies.

1. Treatment of post-launch, non-subsidised investments

36. The extent to which the Panel, and the US, disregard the necessary rigour of a causation analysis is perhaps most evidently revealed by the Panel’s treatment of Airbus’ massive post-launch, non-subsidised investments into the A320 and A330 family aircraft, and the US defence of those findings. The Panel found that Airbus’ post-launch investments “were significant and instrumental to Airbus’ ability to upgrade the technologies and production processes associated with the original A320 and A330 programmes in a way that enabled Airbus to sustain their competitiveness”.<sup>31</sup> Nonetheless, the Panel held that it “cannot see a basis for concluding” that such investments had attenuated or severed the causal link between the historical, now withdrawn, subsidies and the market presence of these aircraft.<sup>32</sup> The Panel based this finding on the notion that the aircraft families into which the non-subsidised investments were made would not have existed but for the historical subsidies. Even were Airbus to have been able to launch the aircraft without the historical subsidies in the intervening years, the Panel further reasoned that, without the historical subsidies, Airbus “would not have had the same accumulated experience and financial strength that enabled it to undertake all of the[se] post-launch

<sup>30</sup> US Appellee Submission, paras. 457.

<sup>31</sup> Panel Report, para. 6.1524.

<sup>32</sup> Panel Report, para. 6.1525.

investments”.<sup>33</sup> The US simply re-iterates the Panel’s reasoning that the “non-subsidized investments could not have occurred in the counterfactual situation”,<sup>34</sup> because the aircraft into which the investments were made would not exist.

37. In this analytical framework, in which one “cannot see a basis” to find that non-subsidised investments can attenuate the causal link between the historical subsidies and the market presence of that aircraft, the outcome would be the same (i) even if the non-subsidised investments were a thousand times higher than the magnitude of historical subsidisation, and (ii) even if the “technological improvement and managerial know-how, marketing knowledge, experience with {the relevant} technologies, and infrastructure and engineering skills” gained from the non-subsidised investments have now “supplanted” the effects from the historical subsidies.<sup>35</sup> In the Panel’s analytical framework, non-subsidised investments, irrespective of their magnitude and contribution, are *a priori* incapable of severing the causal link.

## 2. Treatment of sale-specific and market-specific non-attribution factors

38. Equally telling is the US defence of the Panel’s failure to engage with a number of sale-specific and market-specific non-attribution factors. According to the US, “{n}othing in Articles 5, 6.3, or 7.8 requires a Panel to engage in a non-attribution analysis of factors that *cannot have had* any effect”.<sup>36</sup> That is, to the US, non-attribution factors, which included Boeing’s outright refusal to sell aircraft to Indigo,<sup>37</sup> are *a priori* incapable of altering the outcome of the Panel’s analysis. This indeed is the natural outcome that flows from the analytical framework that the Panel adopted.
39. As the EU already highlighted, in the Panel’s framework, a finding that the historical subsidies were a necessary cause of the market presence of Airbus’ aircraft is a sufficient basis to find, in perpetuity, that those subsidies are a genuine and substantial cause of adverse effects. In that analytical framework, (i) the passage of a large

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<sup>33</sup> Panel Report, para. 6.1526.

<sup>34</sup> Panel Report, para. 6.1811; US Appellee Submission, para. 445.

<sup>35</sup> See Panel Report, footnote 3222.

<sup>36</sup> US Appellee Submission, para. 535 (emphasis added).

<sup>37</sup> EU Appellant’s Submission, paras. 951-952.

amount of time since the grant of the now expired subsidies, (ii) the massive non-subsidised post-launch investments in the relevant aircraft, and (iii) sale-specific and market-specific non-attribution factors, are all *a priori* incapable of breaking or attenuating the causal link between the historical subsidies and the adverse effects. Rather than defending the Panel’s findings, the US in fact highlights the fundamental error in the Panel’s approach to causation.

**B. Effects of A380 LA/MSF and A350XWB LA/MSF**

40. The EU now turns to the Panel’s findings, and alleged findings, relating to A380 LA/MSF and A350XWB LA/MSF. To recall, to the extent that the Panel made findings of “direct effects” for A380 LA/MSF or A350XWB LA/MSF, those findings lack a sufficient evidentiary basis. Nowhere in its report did the Panel find that the A380 or the A350XWB would not have been launched, or would have been launched later, or would have been launched with inferior technology, absent the relevant LA/MSF. The Panel’s finding of “indirect effects” for A380 LA/MSF is in error, because a subsidy that does not have “direct effects” cannot, by definition, give rise to “indirect effects”.
41. Much of the US defence of the Panel’s findings is premised on an attempt to obscure the definitions, attached by the Panel, to the terms “direct effects” and “indirect effects”. To recall, the Panel defined “direct effects” to mean “the effects of any given LA/MSF loan on Airbus’ ability to launch and bring to market the particular model of Airbus LCA specifically funded by that LA/MSF loan”.<sup>38</sup> The Panel defined the terms “indirect effects” to mean “the ‘learning’, scope and financial effects that any given LA/MSF loan provided for the specific purpose of one model of LCA may have on the ability of Airbus to launch and bring to market another model of LCA”.<sup>39</sup> While these are not treaty terms, the Panel used them as tools to characterise the *causal pathway* from the subsidies to the particular adverse effects alleged by the US, such that the definition attached by the Panel to each term is of consequence. In finding “direct effects” or “indirect effects”, the Panel was required to ensure that the evidence before it supported a finding meeting the definitional parameters assigned by the Panel to those terms.

<sup>38</sup> Panel Report, para. 6.1492; footnote 2470.

<sup>39</sup> Panel Report, para. 6.1492; footnote 2470.

1. A380 LA/MSF – “Direct effects” and “Indirect effects”

42. According to the US, the original panel found direct effects for A380 LA/MSF, and the compliance Panel confirmed it.<sup>40</sup> Yet, the US bases this claim on the assertion that the original panel found “*all LA/MSF, including A380 LA/MSF, enable[d] Airbus to launch and bring the A380 to market*”.<sup>41</sup> That finding relates to the indirect effects of prior LA/MSF on the A380, not the direct effects of A380 LA/MSF.
43. According to the US, “it would not matter if A380 LA/MSF were found, in isolation, not to be a necessary cause of the A380 launch and bringing to market”.<sup>42</sup> Here, the US obscures the meaning assigned to the term “direct effects” both in the original proceedings, and by the compliance Panel. If the A380 would have been launched at the same time and with the same technology even absent A380 LA/MSF, it would be a breach of these definitional parameters to find that A380 LA/MSF had direct effects. The original panel, in fact, made no such finding of direct effects for A380 LA/MSF.
44. Like the original panel, the compliance Panel found that A380 LA/MSF was not necessary for the very existence of that aircraft. And neither panel made any findings indicating that the aircraft would have been delayed or would have been launched with inferior technology absent the LA/MSF. As such, any finding of direct effects for A380 LA/MSF by the compliance Panel, to the extent it exists, is in error.
45. Turning to the Panel’s finding of “indirect effects” of A380 LA/MSF on the A350XWB, we recall that the existence of the A380 itself is not a subsidy. As such, even if proven, any present effects that the A380 has on the A350XWB, or on the LCA market, is not sufficient to prove the specific forms of adverse effect enumerated in the *SCM Agreement*. As the US correctly states in DS353, “{c}ritically, the genuine and substantial relationship of cause and effect must be between the *subsidy* and the relevant Article 6.3 market phenomenon”.<sup>43</sup> What is relevant is the effects of A380 LA/MSF, which is the relevant subsidy at issue. In other words, if the A380 would have existed at the same time, with the same technology, absent A380

<sup>40</sup> US Appellee Submission, para. 483.

<sup>41</sup> US Appellee Submission, para. 477.

<sup>42</sup> US Appellee Submission, para. 478.

<sup>43</sup> US Other Appellant’s Submission, *US – Large Civil Aircraft (Article 21.5 – EU)*, [https://ustr.gov/sites/default/files/files/Issue\\_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf](https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf), para. 121.

LA/MSF, so would any learning, scope or financial effects of the A380 on the A350XWB. That is, in the absence of “direct effects” from A380 LA/MSF, it was, by definition, impermissible for the Panel to find that A380 LA/MSF had indirect effects on the A350XWB.

46. The US defends the Panel’s finding of indirect effects from A380 LA/MSF on the A350XWB, referring to the original panel’s findings regarding A330-200 LA/MSF. The US recalls the original panel’s finding that “LA/MSF specific to the A330-200 may not have been necessary to its launch”. According to the US, despite this finding, the original panel found that “due to the role of prior LA/MSF in putting Airbus in a position to develop and launch the A330-200 at a relatively low cost, LA/MSF in aggregate was necessary for the launch”.<sup>44</sup>
47. The US grossly mischaracterises the original panel’s finding, in an attempt to obscure the definitional parameters attached to the term “indirect effects”. Having found that A330-200 LA/MSF may not have been necessary for the launch of that aircraft, the original panel did not make a finding of direct effects for A330-200 LA/MSF. More importantly in this context, when identifying the LA/MSF subsidies that had “indirect effects” on the aircraft launched subsequent to the A330-200 – *i.e.*, the A380 – the original panel did not include A330-200 LA/MSF in that list.<sup>45</sup> Thus, the original panel’s finding, to which the US refers, means that LA/MSF for the prior models, especially the A330/A340, had indirect effects on the A330-200. Those findings do not mean that A330-200 LA/MSF, which the Panel found was *not* necessary for the launch of the A330-200, either (i) had direct effects on the A330-200, or (ii) had indirect effects on subsequent aircraft. As such, this finding provides no support for the US argument that a subsidy without “direct effects” is capable of giving rise to “indirect effects”.

## 2. A350XWB LA/MSF – “Direct effects”

48. Finally, turning to the “direct effects” of A350XWB LA/MSF, the Panel’s finding is based solely on a single-sentence speculation on the likelihood of compromises on the timing and technology of the A350XWB.<sup>46</sup> The US defends the Panel’s finding on

<sup>44</sup> US Appellee Submission, para. 484.

<sup>45</sup> Panel Report, *EC – Large Aircraft*, para. 7.1948.

<sup>46</sup> Panel Report, para. 6.1717.

the basis that “{t}he Panel performed an exhaustive analysis of the effects of A350 XWB LA/MSF, which ran to 182 paragraphs”.<sup>47</sup> Indeed, the Panel Report is not lacking in length. Instead, the problem is that nothing in the Panel’s analysis supports a finding that Airbus would have made compromises on the timing or technology of the A350XWB.

49. The US highlights various *challenges* that Airbus would have faced in launching the A350XWB as and when it did, absent A350XWB LA/MSF, suggesting that those challenges would have forced Airbus to make a compromise of the kind the Panel speculated.<sup>48</sup> Yet, nothing in the Panel’s analysis supports this speculation. Following its examination of whether “the subsidized Airbus that actually existed could have launched the A350 XWB ‘as and when it did’ absent A350 XWB LA/MSF”, the Panel simply did not, as the US argues, “conclude{ } that the answer was ‘no’”.<sup>49</sup> The US characterisation has no basis in the Panel Report.
50. The Panel did identify a number of *challenges* that Airbus would have faced in launching the A350XWSB as and when it did, without A350XWB LA/MSF. However, challenges can be overcome, and do *not* indicate that the A350XWB project was impossible for Airbus to undertake. In fact, overcoming challenges is a routine part of *any* business in general, and the aviation industry in particular.<sup>50</sup> Indeed, the Panel found that, “in the absence of A350XWB LA/MSF ..., the Airbus company that *actually existed* in the 2006 to 2010 period would have been able to launch and bring to market the A350XWB or an A350XWB-type aircraft”.<sup>51</sup> Only after having very clearly, carefully and expressly made that finding, did the Panel speculate, in one sentence, that there was “a high likelihood that {Airbus} 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”, absent A350XWB LA/MSF.<sup>52</sup>

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<sup>47</sup> US Appellee Submission, para. 486.

<sup>48</sup> US Appellee Submission, paras. 496-499.

<sup>49</sup> US Appellee Submission, para. 503.

<sup>50</sup> Panel Report, para. 6.1220 (“As in the original proceeding, technological innovation remains a key element of competition between Airbus and Boeing”). Panel Report, *US – Large Civil Aircraft*, paras. 7.1765-7.1773.

<sup>51</sup> Panel Report, paras. 6.1539, 6.1717.

<sup>52</sup> Panel Report, para. 6.1717.

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51. In offering this speculation, the Panel ignored other of its findings confirming the unlikelihood of any such compromise. In fact, the evidence indicated that any such compromises would have made the project unattractive and risky, not only for Airbus, but also for Airbus' risk sharing partners on the A350XWB.<sup>53</sup> In other words, launching the A350XWB with compromises would have been more of a challenge for Airbus to pursue in the absence of A350XWB LA/MSF, than launching the A350XWB as and when Airbus actually did.
52. The US also defends the Panel's finding of direct effects for A350XWB LA/MSF, falling back on its refrain that Airbus and its aircraft would not exist in the counterfactual.<sup>54</sup> However, that counterfactual reflects the effects of the pre-A380 LA/MSF, not the "direct effects" of A350XWB LA/MSF. Further, the question that the Panel set for itself was whether, "in the absence of A350XWB LA/MSF ..., the Airbus company that *actually existed* ... would have been able to launch and bring to market the A350XWB or an A350XWB-type aircraft".<sup>55</sup> The Panel's counterfactual findings on non-existence of Airbus and its aircraft do not justify the Panel's speculation about the ability of the company that *actually existed* to launch the aircraft as and when it did. There is nothing in the Panel Report, apart from this one sentence of speculation, to support the Panel's finding of "direct effects" for A350XWB LA/MSF.

## V. DISPLACEMENT AND/OR IMPEDANCE

53. We now turn to the Panel's findings of "displacement and/or impedance".
54. In response to the EU appeal that the Panel erred in treating displacement and impedance as interchangeable concepts, the US mischaracterises the exercise undertaken by the Panel as a "simultaneous assessment" of displacement and impedance, based on a unitary counterfactual approach.<sup>56</sup>
55. The EU objects neither to a "simultaneous assessment" of these two phenomena, nor to the use of the unitary counterfactual approach. Neither of these factors justifies a finding of "displacement and/or impedance" covering all the markets at issue. In

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<sup>53</sup> Panel Report, paras. 6.579, 6.1542-6.1544, 6.1546, 6.1555, 6.1569, 6.1572.

<sup>54</sup> US Appellee Submission, paras. 493, 494, 500, 501.

<sup>55</sup> Panel Report, para. 6.1717 (emphasis in original).

<sup>56</sup> US Appellee Submission, paras. 563-565.

making that finding, the Panel communicates that it found evidence of both displacement and impedance in some markets, and found evidence of either displacement or impedance in other markets. Yet, the Panel does not identify the markets that are subject to each of these findings, and no market-specific findings shed light on this conclusion.

56. In an attempt to defend the Panel’s conflation of the separate concepts of displacement and impedance, the US asserts that the original panel in *US – Large Civil Aircraft*, “when making findings, ... always referred to both displacement and impedance”.<sup>57</sup> The US also asserts that the Appellate Body “proceed{ed} on the basis that the Panel meant that, in each of the countries it considered, there was a threat of both displacement and impedance”.<sup>58</sup> All of the findings made by the panel in that dispute were of “displacement and impedance”.<sup>59</sup> On its own terms, such a finding suggests that *both* phenomena have been found in the markets covered by the finding. Even then, the Appellate Body was “troubled by the Panel’s failure to distinguish in its analysis between the phenomena of displacement and impedance”.<sup>60</sup> On the other hand, a finding of “displacement and/or impedance” indicates, on its own terms, that there are markets covered by that finding, for which only one or the other, but not both, of the two phenomena has been found. If not, there would have been no need for the “or” in the Panel’s formulation of its finding. Reading this finding of “displacement and/or impedance” as a finding of “displacement and impedance”, the US seeks an impermissible expansion of the Panels’ findings in its favour.
57. The EU considers that it would be impermissible for a panel to make findings of, for example, (i) “displacement and/or significant price suppression” covering a number of markets; (ii) “displacement in geographic market X and/or displacement in geographic market Y”; (iii) “displacement and/or threat of displacement”. In each of these hypothetical findings, a panel would fail to disclose to the responding Member the nature of the adverse effect found for a specific market. For the same reason, a

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<sup>57</sup> US Appellee Submission, para. 565.

<sup>58</sup> US Appellee Submission, para. 565.

<sup>59</sup> See, e.g., Panel Report, *US – Large Civil Aircraft*, paras. 7.1833, 7.1854(b)-(c), 8.3(ii).

<sup>60</sup> Appellate Body Report, *US – Large Civil Aircraft*, para. 1241.

finding of “displacement and/or impedance” covering several markets is impermissible.

58. The US also defends the Panel’s lack of engagement with the market share data, on the basis that Airbus would have made no deliveries, and Boeing would have made more deliveries in the counterfactual.<sup>61</sup> To the US, this alone relieves the Panel of any requirement to engage further with the data. Had this been true, the Appellate Body in the original proceedings should have found displacement in every market in which Airbus made a delivery. Yet, tellingly, the Appellate Body found that a proper assessment of the data permitted it to make displacement findings only with respect to three markets out of the fifteen examined.<sup>62</sup> Moreover, the EU recalls that the counterfactual that the US relies on is the subject of a separate EU appeal.
59. Finally, the US asks the Appellate Body to complete the legal analysis on the basis of a trend analysis that the US attempts to undertake in its Appellee’s Submission.<sup>63</sup> Even assuming that the data underlying this purported trend analysis are undisputed, it is impermissible, in the procedural context of an appeal, for the Appellate Body to adjudicate the intensely factual question of trends. In *EC – Sugar*, the Appellate Body ruled that it was impermissible for the EC to base an argument on a table derived from certain data on the panel record.<sup>64</sup> The Appellate Body’s reasoning was that, while the data itself was before the panel, and was undisputed, the table was not on the panel record, and was disputed.<sup>65</sup>
60. Moreover, the construction of a trend line is sensitive to the start and end points of the analysis. There are no factual findings or undisputed facts of record indicating the proper start and end points for the analysis. Even the US Appellee’s Submission fails to maintain a consistent position on the start point or the end point for its trend analyses. Different trend lines plotted by the US have different starting points: 2001, 2010, 2007 and 2006. As for the end points, the US generally uses 2013 as the end point, but uses 2012 as the end point for the Singapore twin-aisle market, Singapore

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<sup>61</sup> US Appellee Submission, para. 571.

<sup>62</sup> Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1414(m)-(n).

<sup>63</sup> US Appellee Submission, paras. 575-605.

<sup>64</sup> Appellate Body Report, *EC – Sugar*, paras. 240-242.

<sup>65</sup> Appellate Body Report, *EC – Sugar*, paras. 240-242.

VLA market, and the UAE VLA market. The US offers no explanation for these arbitrary choices, and nothing in the Panel’s findings and undisputed facts of record support these choices.

## VI. COMPLETION OF THE LEGAL ANALYSIS

61. We have already addressed the US’ arguments on completion of the analysis regarding product markets, and displacement and impedance. The US makes a number of assertions regarding completion of the legal analysis on other issues. All of them appear to be nothing more than restatements of arguments made by the US, *defending the Panel’s findings*. Were the Appellate Body to agree with the US assertions defending the Panel’s findings, there would simply be no occasion for a reversal of the Panel’s findings, let alone completion of the analysis. Were the Appellate Body to reject those assertions and reverse the Panel’s findings, a repetition of those same assertions in the context of completion of the analysis would be unavailing.
62. To take one example, the US disagrees with the EU’s position that a finding that even one subsidy was withdrawn would require a re-constitution of the basket of subsidies subject to the adverse effects analysis, and that there are no factual findings or undisputed facts of record that would enable completion of the adverse effects analysis for a re-constituted basket. The US argues that “{i}f a Member withdraws only a subset of a group of subsidies that is aggregated in the original dispute, it would still have an obligation under Article 7.8 to take appropriate steps to remove the adverse effects of the remaining (i.e., unwithdrawn) subsidies in the group”.<sup>66</sup> The EU fully agrees. However, in the sentence immediately following that assertion, the US claims that the adverse effects analysis should be undertaken for an aggregated basket consisting of *both* withdrawn *and* non-withdrawn subsidies.
63. Of course, the US’ assertion suffers from an internal contradiction. On the one hand, the US concedes that where some of the subsidies have been withdrawn, only the “remaining subsidies” are subject to an adverse effects analysis. Yet, the US demands that the withdrawn subsidies be included in an aggregated basket for adverse effects analysis, meaning they continue to be subject to an adverse effects analysis.

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<sup>66</sup> US Appellee Submission, para. 610.

64. More importantly, a key issue arising under the EU appeal under Article 7.8 is that withdrawn subsidies may not be subject to an adverse effects analysis. If the Appellate Body agrees, and reverses the Panel’s erroneous findings, there would be no room to revisit that proposition in the completion of the analysis.

## VII. CONCLUSION

65. To conclude, the EU returns to the common theme running through all of these errors. To the Panel, the alleged finding from the original proceedings, that the historical, now withdrawn, subsidies were a necessary cause of the market presence of Airbus and its aircraft is sufficient basis to find that the EU had failed to comply.

66. Having taken a view on what the outcome of this dispute should be, the Panel freed the US from all required rigours of an adverse effects analysis, and permitted itself shortcuts at every stage of the analysis. The Panel’s product market analysis involved nothing but verifying that some competition exists between products that the US proposed to place in the same product market. An equal lack of rigour is seen in the Panel’s adoption of a causation standard under which nothing could conceivably break the causal chain between the historical, now withdrawn, subsidies and present adverse effects. Finally, with the same lack of rigour, the Panel made findings of (i) “lost sales” for each sale chosen by the US, without looking into any non-attribution factors, and (ii) “displacement and/or impedance” for every market chosen by the US, refusing entirely to engage with the data, or even to specify which form of adverse effects had been found for each market at issue.

67. Should the Panel’s analytical approach survive, the US will be entitled, in perpetuity, to obtain findings of *present* adverse effects – of a description of its choosing – demonstrating nothing but the existence of Airbus and its aircraft.

68. We conclude our oral statement by recalling, once again, the US’ reminder, in asserting its own defence, that, “{c}ritically, the genuine and substantial relationship of cause and effect must be between the subsidy and the relevant Article 6.3 market phenomenon”.<sup>67</sup> The existence of Airbus or its aircraft is not a subsidy. The existence of Airbus or its aircraft is not a relevant Article 6.3 market phenomenon.

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<sup>67</sup> See US Other Appellant’s Submission, *US – Large Civil Aircraft (Article 21.5 – EU)*, [https://ustr.gov/sites/default/files/files/Issue\\_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf](https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf), para. 121.

An adverse effects analysis cannot begin and end with considerations relating to the existence of Airbus and its aircraft. Yet, this is precisely what the Panel did.

69. The Panel’s findings were not born in a vacuum. Indeed, it was the US that incorporated a series of shortcuts into its litigation strategy, as well as into the argumentation and evidence it presented in support of the findings it sought from the Panel. It was the US that ignored its own clear statement of the applicable legal standard – so clearly articulated in defence of its own conduct – that “the genuine and substantial relationship of cause and effect must be between the subsidy and the relevant Article 6.3 market phenomenon”.<sup>68</sup> That is a gamble the US was at liberty to make in these proceedings. It is not, however, a gamble that the Panel was at liberty to repeat, much less to reward. Yet, in relying entirely on a series of shortcuts to test whether the “relationship of cause and effect” asserted by the US was indeed genuine, substantial, and “between the subsidy and the relevant Article 6.3 market phenomenon”,<sup>69</sup> the Panel acquiesced in the US’ approach, and committed legal error. The Panel’s findings simply cannot be sustained on appeal.
70. Mr. Chairman, members of the Division, this concludes our oral statement. We look forward to answering your questions.

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<sup>68</sup> See US Other Appellant’s Submission, *US – Large Civil Aircraft (Article 21.5 – EU)*, [https://ustr.gov/sites/default/files/files/Issue\\_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf](https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf), para. 121.

<sup>69</sup> See US Other Appellant’s Submission, *US – Large Civil Aircraft (Article 21.5 – EU)*, [https://ustr.gov/sites/default/files/files/Issue\\_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf](https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Other.Appellant.Sub.%28Non-BCI%29.Fin.%28public%29.pdf), para. 121.