

components of, especially, the A380, but also other non-specified Airbus LCA in the post-implementation period. To this extent, we believe that, as in the original proceeding, the aggregated effects of the regional development grants continue to "complement and supplement" the "product" effects of the LA/MSF subsidies in two ways. First, the grants "complement and supplement" the *direct* effects of LA/MSF insofar as they meaningfully contribute to Airbus' ability to produce the LCA connected to the LCA programmes that would not have existed as and when they did in the absence of LA/MSF. Second, the grants "complement and supplement" the *indirect* effects arising from LA/MSF because they meaningfully contribute to Airbus' ability to produce its relevant LCA, the development *and production* of which both give rise to the accumulation of the beneficial "learning", scale and scope, and financial effects described earlier in this Report.

6.1846. While we believe that, ultimately, the effects of the regional development grant subsidies operate via a "product"-creating causal pathway similar to the LA/MSF subsidies and the capital contribution subsidies, it is apparent that the regional development grants are not "product" creating or existence subsidies themselves. We detect no evidence before us indicating that Airbus or any of its range of LCA would not have existed in the absence of the regional development grant subsidies. Nevertheless, by meaningfully contributing to Airbus' ongoing LCA development and production efforts in the ways described above, we believe that the regional development grants continue to be a "genuine" cause of the "product" effects of the challenged LA/MSF subsidies and, consequently, also the relevant instances of serious prejudice to the United States' interests caused by those subsidies in the relevant product markets.<sup>3376</sup>

## Conclusion

6.1847. For all of the above reasons, we find that the aggregated effects of the capital contribution subsidies and the aggregated effects of the seven regional development grant subsidies that are before us continue to "complement and supplement" the "product" effects of the LA/MSF subsidies. In our view, the effects of the non-LA/MSF subsidies continue to be a "genuine" cause of serious prejudice to the United States' interests and can, therefore, be "cumulated" with the effects of the challenged LA/MSF subsidies.

## 7 CONCLUSIONS AND RECOMMENDATIONS

7.1. In the light of the reasoning and findings set out in this Report, we reach the following conclusions:

- a. In relation to **the 36 alleged compliance "steps"** notified by the European Union in its Compliance Communication of 1 December 2011 –
  - i. two can be characterized as "actions" concerning the degree of *ongoing subsidization* of Airbus LCA in response to the recommendations and rulings adopted in the original proceeding – namely, "step" 28, the imposition of additional fees for the use of the Bremen Airport runway extension, and "step" 29, revision of the terms of the Mühlenberger Loch lease agreement<sup>3377</sup>;
  - ii. the remaining 34 alleged compliance "steps" are not "actions" relating to the ongoing (or even past) subsidization of Airbus LCA, but rather the *assertion of facts* or the *presentation of arguments* for the purpose of supporting the European Union's theory of compliance. Thus, apart from the "actions" identified in "steps" 28 and 29, the European Union's affirmation of compliance is not grounded in any specific conduct on the part of the European Union and certain member States with respect to the subsidies provided to Airbus or the adverse effects those subsidies were found to have caused in the original proceeding. Rather, fundamentally, the European Union's assertion of full compliance is based on its understanding of the scope and nature of its obligations arising out of the adopted recommendations and rulings as well as its own interpretation of the applicable law and legal provisions, including Article 7.8 of the SCM Agreement.

<sup>3376</sup> See above paras. 6.1797-6.1817.

<sup>3377</sup> As already noted, the United States ultimately included neither of these two measures in its claims of non-compliance against the European Union and certain member States in this dispute.

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- b. In relation to the European Union's requests for preliminary rulings concerning ***the scope of this compliance proceeding*** –
- i. the French, German, Spanish and UK A350XWB LA/MSF measures are within the scope of this compliance proceeding;
  - ii. the United States' prohibited subsidy claims against the French, German, Spanish and UK A380 LA/MSF measures under Article 3.1(a) of the SCM Agreement are within the scope of this compliance proceeding;
  - iii. the United States' prohibited subsidy claims against the French, German, Spanish and UK A380 LA/MSF measures under Article 3.1(b) of the SCM Agreement are outside the scope of this compliance proceeding; and
  - iv. the United States' claims of threat of displacement and impedance under Article 6.3(a) are within the scope of this compliance proceeding.
- c. In relation to the United States' ***prohibited subsidy claims*** against the A380 and A350XWB LA/MSF measures –
- i. The United States has demonstrated that the French, German, Spanish and UK A350XWB LA/MSF measures are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement;
  - ii. The United States has failed to demonstrate that the French, German, Spanish and UK A350XWB LA/MSF subsidies are prohibited export and/or prohibited import substitution subsidies within the meaning of Articles 3.1 and 3.2 of the SCM Agreement; and
  - iii. The United States has failed to demonstrate that the French, German, Spanish and UK A380 LA/MSF subsidies are prohibited export subsidies within the meaning of Articles 3.1(a) and 3.2 of the SCM Agreement.
- d. In relation to *the United States' claim that the European Union and certain member States have failed to comply with Article 7.8 of the SCM Agreement* –
- i. the fact that one or more of the subsidies challenged in this proceeding may have ceased to exist prior to 1 June 2011 does not *ipso facto* mean that the European Union and certain member States do not have a compliance obligation under the terms of Article 7.8 of the SCM Agreement in relation to those subsidies;
    - As regards the "lives" of the pre-A350XWB LA/MSF subsidies
  - ii. the European Union has demonstrated that the *ex ante* "lives" of the French, German and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, A330/A340, the UK LA/MSF subsidies for the A320 and A330/A340, and the capital contribution subsidies, "expired" before 1 June 2011;
  - iii. the European Union has demonstrated that the *ex ante* "lives" of the French LA/MSF subsidies for the A330-200 and the French and Spanish LA/MSF subsidies for the A340-500/600 "expired", respectively, in [\*\*\*] and [\*\*\*];
  - iv. even accepting the entirety of the European Union's assertions, the *ex ante* "lives" of five of the regional development grant subsidies will not "expire" until sometime between 2054 and 2058, with the other two having "expired" around 2014;
  - v. the European Union's submissions concerning the alleged "extraction" of subsidies were already considered and rejected by both the panel and the Appellate Body in the original proceeding and, for this reason, the European Union is not entitled to have the Panel evaluate the merits of the same arguments, for a second time, in this compliance dispute;

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- vi. the European Union has failed to demonstrate that the alleged partial privatization of Aérospatiale in 1999, the transactions leading to the creation of EADS in 2000, and BAE Systems' 2006 sale of its 20% ownership stake in Airbus SAS to EADS, were "intervening events" that resulted in the "extinction" of the benefit of all of the subsidies at issue in this proceeding that were granted prior to those transactions, in the light of each of the three separate opinions expressed by the Appellate Body Division serving in the original proceeding on the question whether "partial privatizations and private-to-private sales" transactions can "extinguish" prior subsidies; and
- vii. the *ex ante* "lives" of the subsidies identified in subparagraphs ii, iii, and iv have "expired" *not* because they were somehow brought to a *premature* end by, for example, having been repaid or because of the alignment of their terms with a market benchmark, but rather simply because the total period of time over which their "projected value" was expected to "materialize" has transpired in the absence of any "intervening event". In other words, the *ex ante* "lives" of the relevant subsidies have "expired" simply because they have been fully provided to Airbus as originally planned and expected.
- As regards whether the European Union and certain member States have complied with the obligation to "withdraw the subsidy"
- viii. the fact that the *ex ante* "lives" of the subsidies identified in subparagraphs ii, iii, and iv *passively* "expired" before the end of the implementation period does not amount to the "withdrawal" of those subsidies by the European Union and certain member States for the purpose of Article 7.8 of the SCM Agreement;
- ix. the European Union and certain member States have, therefore, failed to comply with the obligation to "withdraw the subsidy" for the purpose of Article 7.8 of the SCM Agreement;
- As regards whether the European Union and certain member States have complied with the obligation to "take appropriate steps to remove the adverse effects"
- x. the European Union has failed to establish that the United States' claims under Article 6.3(b) and (c) of the SCM Agreement should be rejected on the grounds that the United States' like product is not "unsubsidized" within the meaning of Articles 6.4 and 6.5 of the SCM Agreement;
- xi. the United States has brought its continued adverse effects claims with respect to appropriately defined product markets for LCA, namely, the global markets for single-aisle LCA, twin-aisle LCA and VLA;
- xii. the *direct* and *indirect* effects of the aggregated pre-A350XWB LA/MSF subsidies continue to be a "genuine and substantial" cause of the current market presence of the A320, A330 and A380 families of Airbus LCA using either the "plausible" or "unlikely" counterfactual scenarios adopted in the original proceeding in relation to the effects of the same subsidies in the 2001 to 2006 period as the starting point of the analysis;
- xiii. the *direct* and *indirect* effects of the aggregated LA/MSF subsidies, with the exception of the LA/MSF subsidies provided for the A300 and A310, are a "genuine and substantial" cause of the current market presence of the A350XWB family of Airbus LCA using either the "plausible" or "unlikely" counterfactual scenarios adopted in the original proceeding in relation to the effects of the pre-A350XWB LA/MSF subsidies in the 2001 to 2006 period as the starting point of the analysis;
- xiv. the "product" effects of the LA/MSF subsidies identified in subparagraphs xii and xiii are a "genuine and substantial" cause of the displacement and/or impedance of the imports of a like product of the United States into the markets for single-aisle, twin-

aisle and very large LCA in the European Union, within the meaning of Article 6.3(a) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;

- xv. the "product" effects of the LA/MSF subsidies identified in subparagraphs xii and xiii are a "genuine and substantial" cause of the displacement and/or impedance of exports from the market for single-aisle LCA in Australia, China and India, the market for twin-aisle LCA in China, Korea and Singapore and the market for very large LCA in Australia, China, Korea, Singapore and the United Arab Emirates, within the meaning of Article 6.3(b) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;
- xvi. the "product" effects of the LA/MSF subsidies identified in subparagraphs xii and xiii are a "genuine and substantial" cause of significant lost sales in the global markets for single-aisle, twin-aisle and very large LCA, within the meaning of Article 6.3(c) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;
- xvii. the effects of the aggregated capital contribution subsidies and certain regional development grants "complement and supplement" the "product" effects of the aggregated LA/MSF subsidies and, therefore, are a "genuine" cause of serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;
- xviii. the United States has failed to demonstrate that the regional development grants provided for the San Pablo facility in Spain that is used for Airbus' military aircraft activities benefit Airbus' LCA activities, thereby failing to establish that those subsidies "complement and supplement" the "product" effects of the LA/MSF subsidies; and
- xix. having found that the United States has established that the challenged subsidies cause *present* serious prejudice to its interests within the meaning of Article 5(c) of the SCM Agreement, we make no findings with respect to the United States' conditional claim that the challenged subsidies *threaten to cause* serious prejudice to its interests.

7.2. By continuing to be in violation of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement, the European Union and certain member States have failed to comply with the DSB recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement "to take appropriate steps to remove the adverse effects or ... withdraw the subsidy".

7.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the SCM Agreement, they have nullified or impaired benefits accruing to the United States under that Agreement.

7.4. We therefore conclude that the European Union and certain member States have failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the SCM Agreement. To the extent that the European Union and certain member States have failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative.