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

## 6 FINDINGS AND CONCLUSIONS

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

and conditions of that financing instrument. Rather, the Panel was required to take into account the specific financing instrument at issue, including the relevant circumstances surrounding the conclusion of that instrument, to determine the period over which the terms and conditions of the relevant contract were agreed. The Panel provided two reasons in support of its decision to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of the A350XWB LA/MSF contracts, in the form of a *range*. First, the Panel considered that "the yield on the day of the signature of contract may reflect atypical fluctuations."[2109] The Panel's second reason was that "{p}arties agreeing to a complex loan contract may rather set the rates in the lead-up to the conclusion of the contract, and prior to the actual day on which the contract is signed."[2110]

### 6.3.2 The calculation of project-specific risk premium

6.8. We disagree with the European Union's claim that "the Panel failed to adopt the most appropriate benchmark, tailored to the risks associated with the A350XWB, based on a 'progressive search' for the benchmark that shared 'as many elements as possible in common with' the A350XWB LA/MSF loans."[2114] We also disagree that the Panel erred under Article 1.1(b) of the SCM Agreement merely because it applied a single, undifferentiated project risk premium derived from the A380 project to the A350XWB project. Moreover, given that we addressed and rejected the European Union's claim that the Panel erred under Article 1.1(b) by failing to undertake a "progressive search" for a market benchmark[2115], we consider it unnecessary to address further the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to consider alternative, and more appropriate, benchmarks than those proposed by the United States. In addition, we disagree with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it allegedly deviated from the original panel's findings by adopting a "constant, undifferentiated project risk premium" for the A350XWB.[2116] Consequently, we find that the European Union has not established that the Panel erred in its application of Article 1.1(b) of the SCM Agreement. We also find that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU.

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

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

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

a. For these reasons, we uphold the Panel's finding, in paragraphs 6.487 and 6.542 of the Panel Report, that the development risks associated with the A350XWB were *at least as high as, or sufficiently similar to*, those associated with the A380; the Panel's findings, in paragraphs 6.579 and 6.608 of the Panel Report, that the market risks experienced by the A380 and A350XWB were overall comparable in importance and that the A350XWB market risks would not have been much lower than the A380 market risks; the Panel's finding, in paragraphs 6.595 and 6.609 of the Panel Report, that the A350XWB LA/MSF contracts containing such "risk-reducing" terms are no less risky than at least

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

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

### 6.7.2 The relevant product markets

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

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

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

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

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

6.22. The findings by the Panel on the issues surrounding the Original A350 and the launch of the A350XWB, together with its findings on the severe implications of the extensive delays with the A380 programme, establish that Airbus was faced with considerable overall uncertainty in the years2124

### 6.7.4 Lost sales, displacement, and impedance

6.24. We recall that "displacement or impedance" would arise where the counterfactual analysis shows that the sales of the complaining Member would have declined less or would have been higher in the absence of the challenged subsidy. We understand the Panel to have sought to apply

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

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

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

#### 6.7.4.2 The twin-aisle LCA market

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

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

a. Accordingly, we modify the Panel's conclusion in paragraph 6.1798 of the Panel Report, and find instead that the orders identified in Table 19 of the Panel Report in the twin-aisle LCA market represent "significant lost sales"

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

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

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

a. in paragraph 7.2 of the Panel Report, that "{b}y continuing to be in violation of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement" insofar as the twin-aisle LCA and VLA markets are concerned, "the European Union and certain member States have failed to comply with the DSB recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement 'to take appropriate steps to remove the adverse effects or … withdraw the subsidy'"; and

b. in paragraph 7.4 of the Panel Report, that "the European Union and certain member States have failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the SCM Agreement" and that, "{t}o the extent that the European Union and certain member States have failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative."

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

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

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Ricardo Ramírez-Hernández
Presiding Member

_____ _____
Ujal Singh Bhatia
Member

Peter Van den Bossche
Member

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