

won. This is so because Airbus' new LCA programme would very likely have won appreciable sales in the present period. Moreover, we lack evidence relating to the specific circumstances of the sales campaigns reflected in Table 10, which gives us limited insight into the customers' decision-making or Boeing's and Airbus' respective positions in those campaigns.

7.444. Notwithstanding these doubts, we take specific note of the Virgin Atlantic sales campaign. In 2016, Virgin Atlantic Airways ordered 12 A350XWB-1000s.⁷⁷⁵ Three things about this order are particularly instructive for our assessment. First, all twelve A350XWB-1000s were ordered together in 2016 and according to the Ascend database are scheduled to be delivered in separate years before 2022.⁷⁷⁶ This is significant in our view because we earlier concluded that Airbus could not have offered in 2014 the A350XWB for delivery in the counterfactual post-2013 period until 2022, at the earliest. This, of course, implies that any counterfactual A350XWBs ordered in subsequent years would likely have been offered on the basis of delivery positions after 2022, at the earliest.⁷⁷⁷ Thus, all twelve delivery positions to which Virgin Atlantic agreed would have been unavailable in the counterfactual. We have difficulty believing that such a consideration would not have weighed on the decision of Virgin Atlantic in this sales campaign.⁷⁷⁸ This is particularly so as five scheduled deliveries were set to occur in 2019, and thus would have had to be postponed by multiple years in the counterfactual if Virgin Atlantic had ordered the A350XWB. Second, Virgin Atlantic ordered A350XWB-1000s, which primarily competes against the Boeing 777.⁷⁷⁹ We note that the A330neo – Airbus' newest and most advanced A330 variant – is not intended to compete against the 777⁷⁸⁰, and thus Airbus would likely have had to compete in this sales campaign against modern Boeing 777 LCA with older models of its A330 family. Finally, Virgin Atlantic had previously ordered 787s from Boeing (15 787s ordered in 2007, one in 2009, and one in 2014⁷⁸¹). Thus, because Virgin Atlantic already would have had twin-aisle Boeing LCA in its fleet, Virgin Atlantic could have realized fleet commonality advantages from purchases of additional Boeing LCA. These considerations, taken together, convince us that Airbus would not have won this Virgin Atlantic sale.

7.445. We therefore find that the aggregated "indirect" effects of A380 LA/MSF subsidies and "direct" effects of A350XWB LA/MSF subsidies are a "genuine and substantial" cause of present lost sales to the US LCA industry in the global twin-aisle product market.⁷⁸²

7.5.7 Conclusions

7.446. Based on the foregoing analysis and findings, we conclude that the European Union has not "take{n} appropriate steps to remove the adverse effects" within the meaning of Article 7.8 of the SCM Agreement. More specifically, we conclude that the A380 and A350XWB LA/MSF subsidies are a genuine and substantial cause of present impedance in the VLA product market and present impedance and lost sales in the twin-aisle LCA product market.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. In the light of the reasoning and findings set out in this Report, the Panel reaches the following conclusions:

⁷⁷⁵ Airbus press release, "Virgin Atlantic Selects the A350 XWB as its Future Flagship", (11 July 2016), (Exhibit USA-143); and Airways, "First Virgin Atlantic A350-1000 Spotted in Toulouse (+photo)", (25 October 2018), (Exhibit USA-144).

⁷⁷⁶ Updated Ascend Data, (Exhibit USA-158).

⁷⁷⁷ We note that the rate of deliveries of the subsidized A350XWB have gradually increased over time, following delivery of the first subsidized A350XWB eight years after originally ordered. Based on the available data, it appears that Airbus achieved a thus-far peak number of deliveries per calendar year in 2018, 12 years after actual launch. Actual deliveries were as follows: 2014 - one delivery; 2015 - 14 deliveries; 2016 - 49 deliveries; 2017 - 77 deliveries; 2018 - 93 deliveries. (Updated Ascend data, (Exhibit USA-158)).

⁷⁷⁸ We earlier noted the importance of delivery positions to LCA customers. (See fn 726 above).

⁷⁷⁹ Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1307-6.1309, and 6.1365. See also Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, Table 5 (indicating that the closest competing Boeing model *vis-à-vis* the A350XWB-1000 is the 777-300ER).

⁷⁸⁰ Airbus A330neo Presentation, (Exhibit USA-51).

⁷⁸¹ Ascend Data, (Exhibit USA-138).

⁷⁸² Insofar as Boeing would have won any additional sales, we further find that such sales are "significant", for the same reasons that the original and first compliance panel found identified lost sales to be significant. (Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1798 (explaining factors underlying the "significance" of lost sales in the LCA industry)).

- a. In relation to the European Union's request for a preliminary ruling and arguments concerning the scope of this compliance proceeding, we find that:
- i. the R&TD measures that the United States challenges are not identified, as a matter of fact, in the European Union's panel request; and
 - ii. even assuming, *arguendo*, that the absence of any reference to the challenged R&TD measures in the European Union's panel request does not prevent the United States from raising claims against those measures in this proceeding, the United States is nevertheless precluded from raising its claims because: (1) as regards the United States' claims against the R&TD measures that were the subject of findings in the original proceeding, as well as the Seventh Framework Programme, the United States is precluded from raising those claims because it could have brought them in the first compliance proceeding but failed to do so; and (2) as regards the United States' claims against the Eighth Framework Programme, the United States has failed to establish that the Eighth Framework Programme has "sufficiently close links" with the relevant measures taken to comply and the DSB's recommendations and rulings such that it would be appropriate to characterize the Eighth Framework Programme as a "measure taken to comply".
- b. In relation to whether the European Union and certain member States have complied with the obligation to "withdraw the subsidy", we find that the European Union *has failed to demonstrate* that:
- i. the [***] amendment to the German A350XWB LA/MSF loan agreement has withdrawn the German A350XWB LA/MSF subsidy;
 - ii. the full repayment of outstanding principal and interest accrued under the UK A350XWB LA/MSF agreement has withdrawn the UK A350XWB LA/MSF subsidy;
 - iii. the [***] amendments to the French, German, Spanish and UK A380 LA/MSF loan agreements have withdrawn the French, German, Spanish and UK A380 LA/MSF subsidies;
 - iv. the alleged amortization of the *ex ante* benefit of the Spanish A380 LA/MSF loan has withdrawn the subsidy;
 - v. Airbus' announcement on 14 February 2019 to wind-down the A380 programme provides "further confirmation" and "an independent basis", on its own, to find that the French, German, Spanish and UK A380 LA/MSF subsidies have been withdrawn; and
 - vi. Airbus' [***] agreement with [***] to repay the principal and interest accrued under the [***] A380 LA/MSF agreement achieves withdrawal of the [***] A380 LA/MSF subsidy.
- c. In relation to whether the European Union and certain member States have complied with the obligation to "take appropriate steps to remove the adverse effects", we find that:
- i. With respect to the "product" effects of the A380 and A350XWB LA/MSF subsidies:
 - (1) the A380 LA/MSF subsidies continue to be a "genuine and substantial" cause of the current market presence of the A380 family of Airbus LCA;
 - (2) the A380 and A350XWB LA/MSF subsidies continue to be a "genuine and substantial" cause of Airbus' ability to *deliver* the A350XWB family of Airbus LCA, and Airbus' ability to offer the A350XWB family of LCA on the same terms as it actually did (particularly with respect to delivery positions);
 - (3) the A380 and A350XWB LA/MSF subsidies are not a "genuine and substantial" cause of the current market presence of the A330neo;

- ii. Airbus' 14 February 2019 wind-down announcement does not, on its own, achieve the removal of the *present* adverse effects of the A380 LA/MSF subsidies as they relate to the market presence of the A380. In our view, those effects will persist while Airbus continues to produce and deliver the A380. It follows, correspondingly, that the wind-down announcement cannot also achieve the removal of any *present* adverse effects of the A380 and A350XWB LA/MSF subsidies as they relate to the market presence of the A350XWB;
- iii. With respect to the impact of the "product" effects of the A380 and A350XWB LA/MSF subsidies in the relevant product markets:
 - (1) in the VLA product market, the "product" effects of the LA/MSF subsidies identified in subparagraph (c)(i)(1), above, are a "genuine and substantial" cause of the impedance of the exports of a like product of the United States from 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;
 - (2) in the twin-aisle product market, the "product" effects of the LA/MSF subsidies identified in subparagraph (c)(i)(2), above, are a "genuine and substantial" cause of impedance of the imports of a like product of the United States into the European Union within the meaning of Article 6.3(a) of the SCM Agreement, and are a "genuine and substantial" cause of the impedance of the exports of a like product of the United States from China, Korea, and Singapore 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; and
 - (3) in the twin-aisle product market, the "product" effects of the LA/MSF subsidies identified in subparagraph (c)(i)(2), above, are a "genuine and substantial" cause of significant lost sales to the US LCA industry in the global market for twin-aisle 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.

8.2. 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".

8.3. 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.

8.4. 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 and the first compliance proceeding, those recommendations and rulings remain operative.
