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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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to G to the Report of the Panel to be found in document WT/DS316/RW.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The Panel shall conduct its internal deliberations in closed session. The parties to the dispute, and interested third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. At the request of either party, the Panel will consider adopting additional procedures for the protection of confidential information. The Panel will consider proposals from the parties as to the content of any such procedures, and will consult with the parties in this regard.

5. Before the substantive meeting of the Panel with the parties to the dispute, the parties shall transmit to the Panel written submissions, and subsequently written rebuttals, in which they present the facts of the case and their arguments, and their counter-arguments, respectively. Third parties may transmit to the Panel written submissions after the first written submissions of the parties have been submitted but before the rebuttals of the parties are submitted.

6. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of that session.

7. At its substantive meeting with the parties, the Panel will ask the United States to present its case. Subsequently, and still at the same meeting, the Panel will ask the European Union to present its point of view. The Panel thereafter will ask third parties to present their views at the separate session of the same meeting set aside for that purpose. The parties will then be allowed an opportunity for final statements, with the United States presenting its statement first.

8. The Panel may at any time put questions to the parties and to the third parties, and ask them for explanations either in the course of the substantive meeting with the parties and/or third parties, or in writing. Written answers to questions shall be submitted by a date to be specified by the Panel.

9. The parties and third parties shall make all submissions in a WTO working language. Where the original language of an exhibit or of text quoted in submissions or responses to questions is not a WTO working language, the submitting party or third party shall submit a translation of the exhibit or text into a WTO working language at the same time as the original language version. The Panel may grant extensions of time for the translation of exhibits or text into a WTO working language upon a showing of good cause. Any objection as to the accuracy of a translation shall be raised in writing and at the earliest possible moment. Any objection shall be accompanied by an explanation of the grounds of objection and, if possible, an alternative translation.

10. A party to the dispute shall make available to the Panel and the other party a written version of its oral statement not later than the first working day following the end of the meeting of the Panel at which the oral statement was presented. Third parties to the dispute shall make available to the Panel, the parties and all other third parties a written version of their oral statements not

later than the first working day following the end of the meeting of the Panel at which the oral statement was presented. Parties and third parties are encouraged to provide the Panel and other participants at the meeting with a provisional written version of their oral statements at the time that the statements are made.

11. In the interest of full transparency, oral presentations by a party shall be made in the presence of the other party. Moreover, each party's submissions, including responses to questions put by the Panel, shall be made available to the other party. Submissions by third parties, including responses to questions put by the Panel, shall also be made available to the parties. Third parties shall receive copies of the parties' first written submissions and rebuttals.

12. The parties shall provide the Secretariat with executive summaries of the claims and arguments contained in their written submissions and oral presentations. The executive summaries of the first written submissions and rebuttal written submissions shall be limited to 10 pages each, and the executive summaries of the oral statements at the meetings shall be limited to 5 pages each. Third parties are requested to provide the Panel with executive summaries of their written submissions and oral statements, of no more than 5 pages each. The executive summaries shall not serve in any way as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. Any executive summary shall be submitted to the Secretariat within ten days of the date on which the original submission is submitted or the original oral statement is submitted in written form. Paragraph 20 shall apply to the service of executive summaries.

13. The descriptive part of the Panel's report will include the procedural and factual background of the present dispute. Description of the main arguments of the parties and third parties will consist of the executive summaries referred to in paragraph 12, which will be attached to the report of the Panel as annexes.

14. Parties shall submit any requests for preliminary rulings not later than in their first written submissions to the Panel. If the United States requests such a ruling, the European Union shall submit its response to the request in its first submission. If the European Union requests such a ruling, the United States shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure may be granted upon a showing of good cause.

15. Parties shall submit all factual evidence to the Panel no later than their first written submissions, other than evidence necessary for purposes of rebuttals and answers to questions. Exceptions to this procedure may be granted upon a showing of good cause. In such a case, the other party shall be accorded a period of time for comment on the newly submitted evidence, as the Panel deems appropriate.

16. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, parties are requested to number their exhibits sequentially throughout the course of the dispute. For example, exhibits submitted by the United States should be numbered USA-1, USA-2, etc., and exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission of the European Union, for example, was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

17. The parties and third parties may submit exhibits, and serve them on each other, as electronic files saved on CD-ROMs. If a party or third party chooses to submit exhibits as electronic files, it shall, in addition, submit 3 paper copies of such exhibits to the Secretariat, and one paper copy of such exhibits to each party and third party.

18. The parties and third parties to this proceeding have the right to determine the composition of their own delegations. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings. Each party and third party shall provide a list of the members of its delegation before or at the beginning of the meeting with the Panel to the Secretary of the Panel, Mr. XXX.

19. Following the issuance of the interim report, the parties shall have three weeks to submit written requests to review precise aspects of the interim report. Following receipt of any written request for review, each party shall have two weeks to submit written comments on the other party's written request for review. Such comments shall be strictly limited to commenting on the other party's written request for review.

20. The following procedures regarding service of documents shall apply:

a. Each party shall serve its submissions directly on the other party. Each party shall, in addition, serve its first written submission and written rebuttal submission on the third parties. Each third party shall serve its submissions on the parties and all other third parties. Each party and third party shall confirm in writing that copies have been served as required, at the time it provides each submission to the Panel.

b. The parties and third parties should provide their submissions to the Secretariat by 5:30 p.m. (Geneva time) on the due dates established by the Panel, unless a different time is set by the Panel.

c. Each party and third party shall provide the Panel with eight (8) paper copies of all documents submitted to the Panel. Where a party or a third party submits exhibits as electronic files on CD-ROMs, it shall provide to the Panel four (4) CD-ROMS containing such files, as well as three (3) paper copies. All of these copies shall be filed with the Dispute Settlement Registrar, Mr. XXX (office number xxxx).

d. Each party and third party shall also provide to the Panel an electronic version of all documents at the time that it provides the paper copies, in a format compatible with that used by the Secretariat, either on a CD-ROM or diskette or as an e-mail attachment. E-mail attachments shall be sent to the Dispute Settlement Registry (xxxx@wto.org), with copies to XXXXX. If the electronic version is provided by diskette or CD-ROM, four (4) copies shall be delivered to Mr. XXX (office number xxxx).

e. The Panel will endeavour to provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE SUBSTANTIVE MEETING WITH THE PANEL

(4 April 2013)

1. The Panel's meeting with the parties will start at 10:00 a.m. on 16 April 2013. The Panel will invite the United States to first present its full opening oral statement before the floor is given to the European Union to present its full opening oral statement. The oral statements will be videotaped for later viewing, as set out in paragraph 6 below. If at any point during its oral statement a party intends to utter BCI or HSBI, it shall request that the videotaping be discontinued for the relevant portion of the oral statement, after which videotaping will be resumed. A party may first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the videotaping to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI.

2. BCI or HSBI in the texts of the oral statements provided to the panel and the other party during the meeting and prior to the delivery of the oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. BCI should be contained within single brackets. HSBI should be contained within double brackets and deleted. In addition, a party including HSBI in its oral statement shall provide, prior to delivery of the oral statement, one paper copy to the panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

3. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to videotape the proceedings. If at any point during its oral statement a party intends to utter HSBI, those individuals not having HSBI approval shall be asked to exit the room. If at any point a party intends to utter either BCI or HSBI, the team hired by the WTO Secretariat to videotape the proceedings shall be asked to exit the room.

4. After each oral statement has been delivered, the Panel will ask the parties whether they can confirm that no BCI or HSBI was pronounced during the videotaped portion of the oral statement. If both parties so confirm, the showing of the videotape will proceed according to schedule. If either party requests to review the videotape, both parties will be invited to attend that review, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. Therefore, parties should be prepared to advise the technician which portion of the oral presentation presents a concern, and limit review to those portions of the videotape to the maximum extent possible. If either party considers that a specific portion of the videotape must be deleted – because it is BCI or HSBI – the specific portion of the videotape will be deleted.

5. The third party session will start at 14:00 on 17 April 2013. Third parties shall indicate to the Panel, not later than close of business on 5 April 2013, whether they consent to the videotaping of their oral statements for later viewing. The Panel will start the third party session with the statements of those third parties so consenting. After such third parties have made their statements, any questions or comments from the parties, other third parties or the Panel concerning these statements shall be made. The Panel shall then proceed to a third party closed session during which the rest of the third parties shall make their statements. The Panel or any party or third party may pose questions to any third party or make comments concerning these statements. **Should any third party intend to include BCI in its oral statement or otherwise to refer to BCI during the third party session, it is requested to inform the Panel by close of business on 11 April 2013** so that appropriate arrangements can be made to protect the confidentiality of that information.

6. The showing of the videotape of the oral statements of the parties and third parties shall take place on 18 and 19 April 2013. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental organizations, upon presentation of their official badges. The Secretariat will place a notice by on the WTO website by **4 April 2013** informing the public of the showing. The notice shall include a link through which members on the public can register directly with the WTO. The deadline for public registration shall be close of business on **11 April 2013.**

ANNEX A-3

ADDITIONAL PROCEDURES TO PROTECT BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION

(12 July 2012)

I. GENERAL

The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Panel record. These Procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of the *SCM Agreement* and Article 13 of the *DSU*.

II. DEFINITIONS

For the purposes of these Procedures,

1. **"Approved Persons"** means Representatives or Outside Advisors of a Party, when designated in accordance with these procedures.

2. **"Business Confidential Information"** or "BCI" means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as BCI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause harm to the originators of the information. Each Party and Third Party shall act in good faith and exercise restraint in designating information as BCI, and will endeavour to designate information as BCI only if its disclosure would cause harm to the originators of the information.

3. **"Conclusion of the Panel Process"** means the earliest to occur of the following events:

   a. pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report;

   b. a Party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU;

   c. pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; or

   d. pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB.

4. **"Designated as BCI"** means:

   a. for printed information, text that is set off with bold square brackets in a document clearly marked with the notation 'BUSINESS CONFIDENTIAL INFORMATION' and with the name of the Party or Third Party that submitted the information;

   b. for electronic information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation 'BUSINESS CONFIDENTIAL INFORMATION', has a file name that contains the letters "BCI", and is stored on a storage medium with a label marked 'BUSINESS CONFIDENTIAL INFORMATION' and indicating the name of the Party or Third Party that submitted the information; and

c. for uttered information, declared by the speaker to be "Business Confidential Information" prior to utterance.[1]

d. In case either Party objects to the designation of information as BCI under paragraphs 4(a)-(c), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as BCI, the submitting Party or Third Party may either designate it as non-BCI or withdraw the information. The Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI information previously designated by that Party or Third Party as BCI.

This paragraph shall apply to all submissions, including exhibits, by a Party or Third Party.

5. **"Designated as HSBI"** means:

a. for electronic information, in characters that are set off with double bolded square brackets (or a heading with double bolded square brackets on each page) in an electronic file that contains the notation 'HIGHLY SENSITIVE BUSINESS INFORMATION', has a file name that contains the letters "HSBI", and is stored on a storage medium with a label marked 'HIGHLY SENSITIVE BUSINESS INFORMATION' and indicating the name of the Party or Third Party that submitted the information; and

b. for uttered information, declared by the speaker to be "Highly Sensitive Business Information" prior to utterance.[2]

This paragraph shall apply to all submissions, including exhibits, by a Party or Third Party.

6. **"Electronic information"** means any information stored in an electronic form (including but not limited to binary-encoded information).

7. **"Highly Sensitive Business Information"** or **"HSBI"** means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause exceptional harm to its originators. Each Party and Third Party shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party and Third Party may at any time designate as non-BCI/HSBI or as BCI information designated by that Party or Third Party as HSBI.

a. The following categories of information may be Designated as HSBI:

i. information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[3], and, except as provided in subparagraph 7(d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

ii. information gathered or produced in the context of LCA sales campaigns;

iii. information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, investment banks or the European Investment Bank, with regard to LCA products; or

[1] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the BCI in question.

[2] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the HSBI in question.

[3] This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

iv. information concerning an LCA manufacturer's costs of production, including but not limited to data regarding pricing by suppliers.

b. Each Party and Third Party may also Designate as HSBI other categories of business information that is not otherwise available in the public domain and the disclosure of which could, in the Party's view, cause exceptional harm to its originators.

c. Each Party and Third Party shall Designate as HSBI any information described in subparagraph 7(a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of either of the Parties.

d. The following categories of information may not be Designated as HSBI:

i. aggregated pricing data for a particular LCA model or family of LCA within a particular market that is indexed (i.e., does not reflect actual prices but rather movements in prices off a base of 100 for a particular year). Such data shall be treated as BCI;

ii. general legal conclusions based on HSBI (e.g., that HSBI demonstrates that a producer engaged in price undercutting). Such conclusions shall be treated as neither BCI nor HSBI;

iii. contracts on the granting of launch aid or reimbursable launch investment and project appraisal documents relating thereto, other than information described in subparagraph 7(a);

iv. the terms and conditions of loans, other than information described in subparagraph (7)a; and

v. intergovernmental agreements and government decisions, other than information described in subparagraph (7)a.

e. Information may not be Designated as HSBI simply because it is subject to bank secrecy or banker-client confidentiality.

f. In case either Party objects to the designation of information as HSBI under paragraphs 7(a)-(e), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as HSBI, the submitting Party or Third Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. The Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party or Third Party as HSBI.

8. **"HSBI Approved Person"** means Approved Persons specifically designated by the Parties as having the right to access HSBI (according to the procedures laid down in Section IV).

9. **"HSBI location"** means a room to be kept locked when not occupied and the access to which shall be possible only for HSBI Approved Persons, located:

a. for HSBI submitted by the United States, on the premises of the United States Mission to the European Union in Brussels;

b. for HSBI submitted by the European Union, on the premises of the Delegation of the European Union to the United States in Washington;

c. for HSBI submitted by a Third Party, on the premises of its Geneva Mission to the WTO.

10. **"Locked CD"** means a CD-ROM that is not rewritable.

11. **"Outside Advisor"** means a legal counsel or other advisor of a Party or Third Party, who:

a. advises a Party or Third Party in the course of the dispute;

b. is not an employee, officer or agent of an entity or an affiliate of an entity engaged in the manufacture of LCA, the provision of supplies to an entity engaged in the manufacture of LCA, or the supply of air transportation services; and

c. is subject to an enforceable code of professional conduct that includes an obligation to protect confidential information, or has been retained by another outside advisor who assumes responsibility for compliance with these procedures and is subject to such a code of professional conduct.

For purposes of this paragraph, outside legal counsel representing an LCA producer headquartered in the territory of one of the Parties or Third Parties in connection with these proceedings or outside consultants who have been retained by such counsel to provide advice with regard to these proceedings are not considered agents of an entity listed in subparagraph (b).

12. **"Panel"** means the DS316 compliance panel composed on 13 April 2012.

13. **"Party"** means the European Union or the United States.

14. **"Party-BCI"** means BCI originally submitted by a Party.

15. **"Representative"** means an employee of a Party or Third Party.

16. **"Sealed laptop computer"** means a laptop computer having (software and hardware) characteristics considered necessary by the submitting Party for protection of that HSBI, provided that it has software installed that permits such HSBI to be searched and printed in accordance with the provisions of Section VI. However, HSBI may not be edited on the sealed laptop computer.

17. **"Secure site"** means a facility to be kept locked when not occupied and the access to which shall be possible only for Approved Persons, located:

a. in the case of the European Union, the offices of WTO Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Mission of the European Union to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and three additional sites specified in accordance with subparagraph (c);

b. in the case of the United States, the offices of the General Counsel of the Office of the United States Trade Representative (600 17th Street, NW, Washington, DC, USA), the offices of the Import Administration, United States Department of Commerce (600 17th Street, NW, Washington, DC, USA), the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and three additional sites specified in accordance with subparagraph (c); and

c. three sites other than a government office that are designated by each Party for use by its Outside Advisors; provided that the identity of those sites has been submitted to the other Party and the Panel, and the other Party has not objected to the designation of that site within ten days of such submission.

d. Any objections raised under subparagraph (c) may be resolved by the Panel.

18. **"Stand-alone computer"** means a computer that is not connected to a network.

19. **"Stand-alone printer"** means a printer that is not connected to a network.

20. **"Submission"** means any written, electronic, or uttered information transmitted to the Panel, including but not limited to, correspondence, written submissions, exhibits, oral statements, and answers to questions.

21. **"Third party"** means a Member having notified its interest in the dispute to the DSB pursuant to DSU Article 10.

22. **"Third Party BCI Approved Person"** means a representative or Outside Advisor of a third party granted access to BCI pursuant to paragraphs 30, 37, 38 and 44.

23. **"WTO Approved Persons"** means the Panel members, PGE members or experts appointed by the Panel who in the opinion of the Panel require access to BCI, and persons employed or appointed by the Secretariat who have been authorized by the Secretariat to work on the dispute (and includes translators and interpreters as well as any transcribers present at Panel meetings involving BCI and/or HSBI).

24. **"WTO Reading Room"** means a room, located on the premises of the WTO, which a Third Party BCI Approved Person may use to access a Party's submission that contains Party BCI.

25. **"WTO Rules of Conduct"** means the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1).

III. SCOPE

26. These procedures apply to all BCI and HSBI received by an Approved Person and by WTO Approved Persons as a result of the Panel process, and to all BCI reviewed, in accordance with these procedures, by a Third Party BCI Approved Person.

27. Unless specifically otherwise provided herein, these procedures do not apply to a Party's or Third Party's treatment of its own BCI and HSBI.

28. The Panel is aware that the European Union may need to submit information that it internally classifies as "EU Top Secret", "EU Secret" or "EU Confidential". The Panel will to the extent possible implement procedures for the protection of such classified information in the event that either Party informs the Secretariat that it will be submitting such classified information and has not already designated it as BCI or HSBI. In such cases, the submitting Party shall propose appropriate procedures for the protection of such classified information.

IV. DESIGNATION OF APPROVED PERSONS

29. At the latest on 18 May 2012, each Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and/or Third Parties and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and/or Third Parties and whom it wishes to have designated as HSBI Approved Persons. Each Party may submit amendments to their list of Approved Persons by submitting such amendments to the other Party and Third Parties, and to the Panel.

30. There shall be no Third Party HSBI Approved Persons. The designation of Third Party BCI Approved Persons shall be governed by paragraphs 37 and 38.

31. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a total of 30 Representatives and 20 Outside Advisors as "HSBI Approved Persons".

32. WTO Approved Persons shall have access to BCI. The Director-General of the WTO, or his designee, shall submit to the Parties and Third Parties, and to the Panel, a list of the WTO Approved Persons and shall identify which of those WTO Approved Persons shall additionally have access to HSBI.

33. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list

under paragraph 29 that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days.

34. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

35. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 31 and to objections for the addition of new Approved Persons in accordance with paragraphs 33 and 34.

V. BCI

36. Only Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons may have access to BCI submitted in this proceeding. Third Party BCI Approved Persons may not have access to Party-BCI other than that included in the submissions. Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons shall use BCI only for the purposes of this dispute. No Approved Person or WTO Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. No Third Party BCI Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. These obligations apply indefinitely.

37. Each Third Party that wants to access Party-BCI contained in the first or rebuttal submission of a Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors (including clerical or support staff) who need access to such BCI and whom it wishes to have designated as Third Party BCI Approved Persons. Each Third Party shall keep the number of Third Party BCI Approved Persons as limited as possible. Each Third Party may designate no more than a total of 5 Representatives and Outside Advisors as Third Party BCI Approved Persons.

38. Unless a Party objects to the designation of an Outside Advisor of a Third Party, the Panel shall designate those persons as Third Party BCI Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 37 above that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

39. A Party shall make no more than one copy of any BCI submitted by the other Party or a Third Party for each Secure site provided for that Party in paragraph 17.

40. Parties may incorporate BCI in internal memoranda for the exclusive use of Approved Persons. Any memorandum and the BCI it contains shall be marked in accordance with paragraph 4.

41. BCI submitted by Approved Persons or by Third Party BCI Approved Persons pursuant to these procedures shall not be copied, distributed, or removed from the Secure site, except as necessary for submission to the Panel.

42. The treatment in a Party's submissions to the Panel of any BCI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to BCI.

a. Parties may incorporate BCI in submissions to the Panel, marked as indicated in paragraph 4. In exceptional cases, parties may include BCI in an appendix to a submission.

b. A Party submitting a submission or appendix containing BCI shall also submit, within a time period to be set by the Panel, a version redacting any BCI. This shall be referred to as the "Non-BCI Version". However, a Party is not required to submit a "Non-BCI Version" of any exhibit containing BCI, unless specifically directed to do so by the Panel;

c. A Non-BCI Version shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Non-BCI Version:

   i. A Party may request the Party that originally submitted the BCI, as soon as possible, to indicate with precision portions of documents containing BCI that may be included in the non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

   ii. Upon receipt of such a request, the Party that originally submitted the BCI shall, as soon as possible, indicate with precision portions of documents containing BCI that may be included in the Non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

   iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the BCI failed to indicate with sufficient precision portions of documents containing BCI that may be included in the Non-BCI Version and to produce, if necessary, a Non-BCI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

d. The responding Party may designate the personal offices of up to four of its Approved Persons as additional Secure sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' submissions to the Panel. All of the protections applicable to BCI under these procedures, including the storage rules in Paragraph 46, shall apply to such submissions. BCI exhibits to submissions may not be stored or reviewed at these additional Secure sites. The responding Party shall submit the address (including room number) of each of the additional Secure sites to the Panel and the complaining Party.

43. Any document containing BCI shall not be copied in excess of the number of copies required by the Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible. Such documents may be transmitted electronically only by using secure e-mail. If a Party or Third Party submits to the Panel an original document that cannot be transmitted electronically, it shall on the day of submission deliver a copy of that document to one of the Secure sites listed in paragraph 17. The Parties shall designate one of the Secure sites listed in paragraph 17 for this purpose.

44. Notwithstanding paragraph 20 of the Working Procedures[4], the following procedures apply to the access by Third Parties to a Party's submission that contains Party-BCI.

a. A Party's Submission containing Party-BCI shall not be serviced to Third Parties unless both Parties agree otherwise.

b. Third Party BCI Approved Persons may view Party-BCI contained in a Party's first written submission only in a Secure site or in the WTO Reading Room. Third Party BCI Approved Persons may not bring into such room any electronic recording or transmitting devices. Third Party BCI Approved Persons may not remove a Party's Submission containing Party-BCI from such room, but may take handwritten notes of the Party-BCI contained therein. Such notes shall be used exclusively for this dispute (that is, DS316). Each person viewing a Party's Submission containing Party-BCI shall complete and sign a log identifying the submission the person reviewed. The Party responsible for maintaining the particular Secure site, and the WTO Secretariat in the case of the WTO Reading Room, shall maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving the room, Outside Advisors who are Third Party BCI Approved Persons may be subject to appropriate controls.

[4] Concerning service of documents.

c. If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 44(b) above, that Third Party BCI Approved Person shall store the memo only in a locked security container. Such memo shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. The content of such memo shall not be incorporated, electronically or in handwritten form, into the Non-BCI Version, as defined in paragraph 42(b).

d. All Third Parties that have designated Third Party BCI Approved Persons must inform the Parties of the identity of the specific room (including the address and the room number) in which the locked security container, as referred to in subparagraph (c) above, is located.

e. If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 44(b) above, such memo shall not be copied in excess of the number of copies required by the Third Party BCI Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies of such memo shall be prohibited.

f. A Third Party may not incorporate into the body of its submission any Party-BCI. If a Third Party wishes to refer to any Party-BCI, the relevant arguments including such BCI should be incorporated into a separate Appendix. Such Appendix shall not be serviced to other Third Parties.

g. On the date determined by the Panel as the deadline to make the Third Party submission, a Third Party shall service its submission only to the Parties and to the Panel. The submission shall be serviced to the other Third Parties only after the Parties have confirmed that the submission does not contain or disclose Party-BCI. A Party shall make this confirmation or otherwise advise of any necessary change to the relevant Third Party within 2 working days of receiving the submissions of Third Parties.

45. A Party or Third Party that wishes to submit or refer to BCI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not Approved Persons, WTO Approved Persons or, as appropriate, Third Party BCI Approved Persons from the meeting for the duration of the submission and discussion of BCI.

46. Approved Persons and WTO Approved Persons shall store BCI only in locked security containers. In the case of BCI submitted to the Panel, such locked security containers shall be kept on the WTO Secretariat's premises, except that Panel members may maintain a copy of all relevant documents and materials containing BCI at their places of residence. Such documents and materials shall be stored in locked security containers when not in use. BCI shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. All work papers (*e.g.*, draft submissions, worksheets, etc.) containing BCI shall, when no longer needed, be shredded or burned consistent with normal government practice for destroying sensitive documents.

47. The Panel shall not disclose BCI in its report, but may make statements or draw conclusions that are based on the information drawn from the BCI.

VI. HSBI

48. Unless otherwise provided below, HSBI shall be subject to all the restrictions in Section V applicable to BCI.

49. HSBI shall be submitted to the Panel in electronic form, using locked CDs or two Sealed laptop computers connectable to 19" - 21" monitors, or in hard copy form, for access by WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI. All such HSBI shall be stored in a combination safe in a designated secure location on the premises of the WTO Secretariat. Any computer in that room shall be a Stand-alone computer. WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI may view HSBI only in the designated secure location referred to above. A Stand-alone printer may be

used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a combination safe at the designated secure location referred to above, or destroyed at the end of the relevant working session. HSBI shall not be removed from this designated secure location, except (i) in the form of handwritten notes that may be used only on the WTO Secretariat's premises and which shall be destroyed once no longer in use; and (ii) subject to appropriate precautions, for purposes of meetings of the Panel with the Parties and any internal deliberations of the Panel, as provided for in paragraph 58(j).

50. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the other Party, in the HSBI location listed in paragraph 9 located within the other Party's territory. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

51. If a Third Party submits HSBI, it shall notify the Parties of the fact that such submission has been made. Each Third Party submitting HSBI shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the Parties, in the HSBI location listed in paragraph 9. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

52. Except as otherwise provided in these procedures, HSBI shall not be stored, transmitted or copied either in written or electronic form.

53. HSBI Approved Persons may view HSBI on the Sealed laptop computer maintained by the other Party or a Third Party or, in the case of HSBI submitted on Locked CDs on a Stand-alone computer, only in a designated room at one of the HSBI locations indicated in paragraph 9, or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 49, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI location. The designated secure location referred to in paragraph 49 shall be available to HSBI Approved Persons by prior arrangement with the WTO Secretariat. HSBI Approved Persons may not bring into such room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from such room, except in the form of handwritten notes or aggregated information generated on a Stand-alone computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI location or designated secure location referred to in paragraph 49 shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI location within its territory referenced in paragraph 9, maintain such log until one year after the Conclusion of the Panel Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 49, maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

54. No HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 32 as being additionally authorized to access HSBI shall disclose HSBI to any person except another HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 32 as being additionally authorized to access HSBI, and then only for the purpose of this dispute. This obligation applies indefinitely.

55. HSBI may be processed only on Stand-alone computers. Any memorandum containing HSBI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

56. A Party or Third Party that wishes to submit or refer to HSBI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not HSBI Approved Persons or WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI from the meeting for the duration of the submission and discussion of HSBI.

57. All HSBI shall be stored in a safe at the relevant HSBI location or in accordance with paragraph 49.

58. The treatment in a Party's submissions to the Panel of any HSBI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to HSBI.

a. HSBI may be incorporated into a separate appendix to, but not the body of, a Party's submission, which appendix shall be comprehensible in itself. The document containing the HSBI shall be referred to as the "Full HSBI Version Appendix";

b. A Party submitting an appendix containing HSBI shall also submit, within a time period to be set by the Panel, a version redacting any HSBI. This shall be referred to as the "Redacted Version Appendix";

c. At the request of a Party, information contained in the Redacted Version Appendix may be treated as BCI, in accordance with the provisions of Section V;

d. A Redacted Version Appendix shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Redacted Version Appendix:

   i. A Party may request that the Party that originally submitted the HSBI, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   ii. Upon receipt of such a request, the Party that originally submitted the HSBI shall, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the HSBI failed to indicate with sufficient precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and to produce, if necessary, a non-HSBI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

e. The Full HSBI Version Appendix shall be kept in an HSBI location and in the designated secure location referred to in paragraph 49, as appropriate, in the form of a locked CD. If it is not practical to keep the Full HSBI Version Appendix in an HSBI location, the Party may keep it in a locked security container in a Secure site in the form of a locked CD.

f. The locked CD containing the Full HSBI Version Appendix shall bear the label marked 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION' and indicate the name of the Party that submitted the HSBI. In addition, the HSBI Appendix itself shall be marked with heading with double bolded square brackets on each page in an electronic file that contains the notation 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION'. The electronic file containing the HSBI Appendix shall have a file name that contains the letters "HSBI VERSION".

g. The Party shall submit one copy of the Full HSBI Version Appendix to the Panel (through Mr. XXX) and two copies to the other Party in the form of two locked CDs. The Full HSBI Version Appendix shall not be transmitted via e-mail. Parties shall agree between themselves beforehand on the name of the Approved Person that is to receive the locked CD.

h. The Party shall commence transfer of the locked CDs containing the Full HSBI Version Appendix no later than the deadline for the submission concerned, and, at the same time, provide the Panel and the other Party with proof that this has been done.

i. No more than one working day in advance of a Panel meeting with the parties, a Party may, exclusively at that Party's Permanent Mission in Geneva, use the locked CD to produce no more than one hard copy of the Full HSBI Version Appendix for each HSBI Approved Person planning to attend that Panel meeting. All paper versions produced pursuant to this subparagraph shall be collected by the Party concerned and destroyed immediately after the conclusion of the meeting.

j. WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, a Panel meeting with the parties and/or an internal meeting. When not in use, these paper versions shall be stored in a locked container in the designated secure location referred to in paragraph 49. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Panel Process as defined in paragraph 3.

k. Parties are encouraged to submit versions of exhibits containing HSBI from which all HSBI has been deleted. Such exhibits shall be referred to as "HSBI-Redacted Version Exhibits". HSBI-Redacted Version Exhibits may contain BCI.

   i. A Party may submit HSBI-Redacted Version Exhibits prepared by that Party to the Panel, and serve them on the other Party in accordance with the applicable procedures, at the time it serves the submission to which the exhibit relates.

   ii. If a HSBI-Redacted Version Exhibit is not submitted by the Party submitting the exhibit, an HSBI-Approved Person representing the other Party may prepare an HSBI-Redacted Version Exhibit of any such exhibit.

   iii. HSBI-Redacted Version Exhibits may be prepared by an HSBI-Approved person, at an HSBI location, by deleting the HSBI in the exhibit (identified by double brackets) from such exhibit and either printing or photo-copying the resulting document containing no HSBI. The deletion of HSBI from the resulting document shall be verified by a person authorized for this purpose by the Party that submitted the exhibit(s) in question. The resulting document containing no HSBI (but which may contain BCI) will constitute the HSBI-Redacted Version Exhibit of such exhibit, and may be removed from the HSBI location.

   iv. The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI-Approved Person for purposes of the verification provided for in paragraph (iii) above. HSBI-Redacted Version Exhibits may be prepared by HSBI-Approved Persons upon request during the times the designated room at the relevant HSBI location is available, as provided for in paragraph 51 of these Procedures.

   v. The Panel shall resolve any disagreement arising from the operation of this sub-paragraph, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

l. The Panel reserves the right, after consulting the parties, to amend the provisions of this paragraph at any time in order to accommodate situations arising during Panel meetings, and the preparation of the interim report and the final report.

59. The Panel shall not disclose HSBI in its report, but may make statements or draw conclusions that are based on the information drawn from the HSBI.

VII. RESPONSIBILITY FOR COMPLIANCE

60. Each Party and Third Party is responsible for ensuring that its Approved Persons and Third Party BCI Approved Persons comply with these procedures to protect BCI and HSBI submitted by each Party and Third Party, as well as with enforceable codes of professional conduct to which its Approved Persons or other Outside Advisors are subject. WTO Approved Persons shall comply with these procedures to protect BCI and HSBI submitted by a Party or Third Party. WTO Approved Persons are covered by the WTO Rules of Conduct. As provided for in the WTO Rules of Conduct, evidence of breach of these Rules may be submitted to the Chair of the DSB or to the Director-General of the WTO, or his designee, as appropriate, for appropriate action pursuant to Section VIII of the WTO Rules of Conduct.

VIII. ADDITIONAL PROCEDURES

61. After consulting with the Parties, the Panel may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures.

62. The Panel may, with the consent of both Parties, waive any part of these procedures. Such "waiver" shall be specifically set forth in writing and signed by a representative of both Parties.

IX. RETURN AND DESTRUCTION

63. Except as provided for in paragraph 64, after the Conclusion of the Panel Process as defined in paragraphs 3(a), 3(c) or 3(d), or as contemplated in paragraph 65, within a period to be fixed by the Panel, WTO Approved Persons, the Parties and Third Parties (along with all Approved Persons) shall destroy or return all documents (including electronic material) or other recordings containing BCI to the Party or Third Party that submitted such documents or other recordings. At the same time, WTO Approved Persons and the Parties shall destroy and/or return any electronic material submitted by a Party or Third Party that contains HSBI.

64. The WTO Secretariat shall retain one hard copy and one electronic version of any final report of the Panel containing BCI, and one electronic version of all documents containing BCI submitted to the Panel, recorded on locked CD(s), to be kept in sealed containers in a locked cabinet on the premises of the WTO Secretariat.

65. After the Conclusion of the Panel Process as defined in paragraph 3(b), the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. Following the adoption by the DSB of the Appellate Body report pursuant to Article 17.14 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body Report pursuant to Article 17.14 of the DSU, the provisions of paragraphs 63 and 64 shall apply.

66. The hard drive of each Stand-alone computer and all media used to back up such computers shall be destroyed at the Conclusion of the Panel Process.

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ANNEX B

ARGUMENTS OF THE UNITED STATES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. Last year, the World Trade Organization ("WTO") ruled that the European Union ("EU") and certain member States had subsidized the development of every single Airbus[1] aircraft over the course of 36 years, resulting in adverse effects to the United States, to the detriment of the sole remaining U.S. producer of large civil aircraft, The Boeing Company ("Boeing"). The Dispute Settlement Body ("DSB") recommended that the relevant Members withdraw the subsidies or take appropriate steps to remove their adverse effects by December 1, 2012.[2] Instead, the EU and the other relevant Members did the opposite – they continued and even expanded their subsidization. They did essentially nothing to remove the adverse effects of the subsidies, and in fact conferred additional subsidies (with additional adverse effects) after the period covered by the rulings of the DSB. They have accordingly failed to comply with the recommendations and rulings of the DSB and continue to maintain WTO-inconsistent subsidies.

2. At this stage, there is no dispute about the nature and effect of the subsidies, most of which came in the form of billions of dollars of financing granted by France, Germany, Spain, and the United Kingdom for the development of Airbus aircraft. Whether called "launch aid," or "member State Financing," or "LA/MSF" (the compromise term adopted by the original Panel), this financing shares the same key features:

(1) **unsecured:** the lenders have no recourse against Airbus's assets, such that repayment depends on the success of the model financed.[3]

(2) **success-dependent:** full repayment occurs only if the model in question is a commercial success;

(3) **levy-based:** repayment takes the form of per-aircraft levies tied to deliveries of the large civil aircraft financed; and

(4) **back-loaded:** the producer receives subsidies early during the development of the aircraft, but repayments become due later, after deliveries commence, with a graduated repayment schedule in some instances.

The financing confers a benefit in the sense of Article 1.1(b) of the SCM Agreement in that the relevant EU member States charged less, and typically far less, interest than a commercial lender would have charged for financing on these terms.

3. The effect of these subsidies on Airbus has been critical. The original Panel found, and the Appellate Body concurred, that absent the subsidies, Airbus would be a "much weaker LCA manufacturer," and would have had "at best a more limited offering of LCA models."[4] Under the most likely counterfactual scenarios, "Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred."[5] The effect on Boeing was stark – tens of billions of dollars of lost sales and displacement of imports and exports from markets around the world.

4. Based on these findings, the EU and the relevant member States had an obligation to withdraw the subsidies, or take appropriate steps to remove their adverse effects, by December 1, 2011. Clearly, if they neglected to do either of these things, they would fail to comply

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[1] For purposes of this submission, "Airbus" has the meaning set out in *EC – Large Civil Aircraft*: Airbus SAS, Airbus GIE, and current and predecessor affiliated companies of both Airbus SAS and Airbus GIE. *EC – Large Civil Aircraft (Panel)*, para. 7.191.

[2] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 June 2011, WT/DSB/M/247, para. 28 (11 July 2011). *EC – Large Civil Aircraft (Panel)*, para. 8.7; *EC – Large Civil Aircraft (AB)*, para. 1418.

[3] *EC – Large Civil Aircraft (Panel)*, paras. 7.374-7.375; *EC – Large Civil Aircraft (AB)*, para. 604.

[4] *EC – Large Civil Aircraft (AB)*, paras. 1269 and 1270.

[5] *EC – Large Civil Aircraft (AB)*, para. 1264.

with the obligation. They would also fail to comply if they granted new subsidies with a "close relationship" to the actionable subsidies at issue in the original dispute,[6] introduced new subsidies that *replaced* the actionable subsidies already found to exist,[7] or introduced measures that *circumvented* the DSB's recommendations and rulings.[8]

5. However, the EU's response to these massive subsidies and their adverse effects was to keep on doing what it did in the 36 years covered by the original Panel's deliberations: give subsidized funds to Airbus aircraft that took sales and market share from its U.S. competitor. On the December 1, 2011, deadline for compliance with the DSB recommendations and rulings, the EU transmitted a document to the United States and to the DSB (the "EU Notification") asserting that it had taken 36 "steps" to bring its measures into conformity with its WTO obligations. However, these steps did nothing to move toward WTO compliance:

- The EU Notification never mentions the $4 billion in LA/MSF for the A380, one of the largest LA/MSF subsidies Airbus ever received, and one that the Appellate Body confirmed as "a necessary precondition for Airbus' launch in 2000 of the A380."[9]

- The only "repayment" referenced, €1,704 billion in step 25, is no change at all, as it consists almost entirely of funds Airbus paid to the German government in 1997 and 1998.

- Steps 1 through 24 report the "termination" of LA/MSF contracts related to the A300, A310, A320, A330, and A340, without explaining what the term means. Mere "termination" is a meaningless formality without repayment of past subsidies, which the EU has neither claimed nor established. If the "termination" resulted in an effective forgiveness of amounts due, it would actually confer a new subsidy.

- Steps 31 through 33 note the "termination" of subsidized Airbus models,[10] a development rendered meaningless by the subsidization of the models that replaced them – the A330 and A350 XWB. Termination of the A340 program actually boosted Airbus earnings by €460 million[11] – scarcely an action that would eliminate subsidies or their adverse effects on U.S. interests.

- With one exception, the remaining steps reflect EU inaction based on the theory that the passage of time or other intervening events would result in the subsidies or their adverse effects fading to insignificance, without any attempt to explain why this would be so.[12]

6. Airbus has itself been frank about the pointlessness of this exercise. Hans Peter Ring, the Chief Financial Officer of EADS, Airbus' parent company, has confessed that Airbus retains every franc, mark, peseta, pound, and euro of WTO-inconsistent subsidy that it received:

> Q: "If I look at some of the articles about the WTO and complying with the WTO ruling, it would suggest that you feel that you've now done something which makes you now compliant, ex-A350, which is another debate. What exactly did you do? Have you paid any money back?"
>
> Hans Peter Ring: "No."[13]

7. This statement provides a one-word summary of the EU's plan of inaction. Instead of modifying its behavior, the EU has made light of the DSB recommendations and rulings. Where the Appellate Body found that without the subsidies, Airbus would most likely not exist at all,[14] the EU

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[6] *E.g.*, *US – Softwood Lumber CVDs (21.5) (AB)*, para. 77.
[7] *US – Upland Cotton (AB)*, paras. 237-238.
[8] *US – Softwood Lumber CVDs (21.5) (AB)*, para. 71.
[9] *EC – Large Civil Aircraft (AB)*, para. 1414(q).
[10] EU Notification (Exhibit USA-001).
[11] EADS Financial Statements 2011, p. 65 (Exhibit USA-014).
[12] The one exception to this is the infrastructure-related subsidy for the Bremen airport runway. The United States is not challenging the EU's compliance with the DSB recommendations and rulings with regard to this subsidy.
[13] Webcast, Q&A from Global Investor Forum 2011, EADS (Dec. 15, 2011), min. 21 ff. (Exhibit USA-002).
[14] *EC – Large Civil Aircraft (Panel)*, para. 7.1984.

concluded that "the economic impact of these support measures in the Large Civil Aircraft (LCA) market has been found to be very limited."[15] For its part, Airbus saw "no significant consequences for Airbus or the European support system from today's decision." [16] In fact, Airbus has interpreted the rulings as an affirmation of past funding practices – a "big victory for Europe."[17] Airbus CEO Tom Enders reacted to the Appellate Body's findings with the following statement:

> It is good to see that the WTO has *fully green lighted* the public-private partnership instruments with France, Germany, Spain and the UK. We now can and will continue this kind of partnership on future development programs.[18]

8. The EU apparently agrees. Aside from generating the list of 36 ineffectual "steps" to comply with the DSB recommendations and rulings, the responding parties' only substantive response has been to give €3.5 billion in new LA/MSF for the newest Airbus model, the A350 XWB.[19] The EU and the relevant member States have striven to keep information on the terms of the funding from public scrutiny, apparently to avoid revealing information that would suggest inconsistencies with its WTO obligations.[20] However, public documents make clear that Airbus received its new LA/MSF on the same key terms and conditions as its predecessors: unsecured, success-dependent, levy-based, and back-loaded. Government statements further confirm that the relevant member States granted the funding on better-than-commercial terms. Thus, it is clear that LA/MSF for the A350 XWB means that the EU has failed to comply with the recommendations and rulings of the DSB because the funding is closely related to the subsidies already found inconsistent with the SCM Agreement, replaces other actionable subsidies, and results in circumvention of the EU's compliance obligations.

9. The original Panel noted many examples of how the subsidies operated to create a full Airbus product line that caused the U.S. large civil aircraft industry to lose numerous sales and market share.[21] Recent developments in the twin-aisle segment of the market provide another concrete example of how LA/MSF allows Airbus to brush off its mistakes, and keeps Boeing from enjoying its successes. The EU conceded in the original Panel proceeding that the 300-400 seat A340 and its subsequent derivates were aircraft that never would have been launched when they were without LA/MSF.[22] Even so, the A340 and A340-500/600 failed commercially, yielding only 375 sales over a 19-year period, well below the 600 sales that manufacturers treat as the minimum necessary for a successful large civil aircraft.[23] Given these realities, the A340's failure should have been a big blow to Airbus, particularly as it unfolded alongside the A380's weak

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[15] EU Press Release, *WTO Airbus Case – Appellate Body overturns key findings of the Panel in favour of the EU* (May 18, 2011).

[16] Airbus Press Release, *WTO final ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit USA-004).

[17] Airbus Press Release, *WTO Final Ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit USA-004).

[18] EADS Statement, *WTO final ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit US-005) (emphasis added). Similarly, Ranier Ohler, Airbus' Head of Public Affairs and Communications, said: "'WTO confirmation of the European loan system is a big victory for Europe. We see no significant consequences for Airbus or the European support system from today's decision, as the WTO has now fully and finally rejected most of the US claims. Therefore, the WTO findings are likely to require only limited changes in European policies and practices.'" Press Release, *WTO final ruling: Decisive victory for Europe*, Airbus (May 18, 2011) (Exhibit USA-002).

[19] *E.g.*, Kevin Done and Peggy Hollinger, *Airbus set to gain aid for A350*, Financial Times (June 15, 2009) (Exhibit USA-007).

[20] Letter from Amb. Ron Kirk to Commissioner Karel Degucht (Aug. 5, 2011) (Exhibit USA-300).

[21] *E.g.*, *EC – Large Civil Aircraft (Panel)*, para. 7.1993:

> We consider that Airbus' market presence during the period 2001-2006, as reflected in its share of the EC and certain third country markets and the sales it won at Boeing's expense, is clearly an effect of the subsidies in this dispute. We therefore conclude that the displacement of United States' LCA from the EC and certain third country markets and lost sales we have found during the period 2001-2006 are an effect of the specific subsidies to Airbus that we have found."

[22] *EC – Large Civil Aircraft (AB)*, para. 1273 ("The European Union . . . accepts that a non-subsidized Airbus would not have been able to launch the A300, A310, and A340 LCA projects by the 2001-2006 reference period."); *EC – Large Civil Aircraft (Panel)*, para. 7.1939 ("LA/MSF was necessary for Airbus to have launched the A330/A340 in 1987, with LA/MSF covering between 60 and 90 percent of its development costs."); *id.* para. 7.1940 ("LA/MSF was also essential to the development of the A340-500/600.").

[23] *EC – Large Civil Aircraft (Panel)*, para. 7.1717 (finding that developing large civil aircraft "is an enormously complex and expensive undertaking" fraught with risk, where typically "at least 600 airplanes of a new model must be sold before the revenues for a programme exceed the costs.").

commercial performance and calamitous production problems.[24] At the same time, Boeing should have been able to enjoy the fruits of the unsubsidized development of the 777 and that aircraft's huge success in the 300-400 seat market segment, with more than 1300 sales in the 1995-2011 period.

10. But Airbus did not suffer from the commercial failure of the A340, and Boeing did not fully enjoy the commercial rewards for developing the 777 without subsidies. LA/MSF for the A340, A380, and other models meant that the subsidizing governments bore a significant part of the costs and risks of failure. Airbus fell far short of the number of A340 deliveries necessary to repay the LA/MSF it received – even at below-market interest rates – but far from hurting Airbus, the A340 cancellation boosted income by €406 million (€312 million net) as it cleared LA/MSF liabilities from its books. [25]

11. The preferential, success-dependent repayment terms of LA/MSF gave Airbus the flexibility to put its A340 mistakes behind it and try again in the 300-400 seat segment with the A350 XWB-900 and -1000. Before launching the A350 XWB in 2006, Airbus was "seriously questioning" whether it had the ability to finance such a program,[26] especially as it was still mired in the "monumental task" of bringing the A380 into commercial service.[27] But LA/MSF – both for prior models and for the A350 XWB itself – allowed Airbus to pass through this difficult time without having to sacrifice its key product initiatives. Based on 40-plus years of consistent subsidization, the company maintained its position as the world's largest civil aircraft manufacturer, delivered the A380, discarded the A340, and launched the all-new A350 XWB as a challenger to both the 787 and 777. On the last point, Airbus Chief Operating Officer, Customers, John Leahy is very clear about the commercial impact the company expects the A350 to have on the 777:

> "I've got to give (Boeing) credit on the 777; if you need lift in the long-range widebody market now, that's the plane," Leahy said, according to Bloomberg News. "The day we deliver the first A350-1000, the 777-300ER will become obsolete."[28]

12. The broader effect of these subsidies also appears in key market indicators, as Airbus itself noted in a series of presentations it made to investors in early 2012. With Boeing's share of gross orders falling from 81 percent in 1995 to 36 percent by year-end 2011, Airbus's market share grew from 19 percent to 64 percent: [29]

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[24] *E.g.*, *Time for a new, improved model: Airbus gets to work on its medium sized aircraft, but deeper problems remain*, Economist (July 20, 2006) (Exhibit USA-028) (noting that in light of problems with the A340 and the A380, "{t}his is . . . a horrible time for Airbus to be launching such an ambitious new project.").

[25] EADS Financial Statements 2011, p. 65 (Exhibit USA-14); Hans Peter Ring, Webcast, Q&A from 9m Results 2011, min. 41 ff. (Exhibit USA-015):

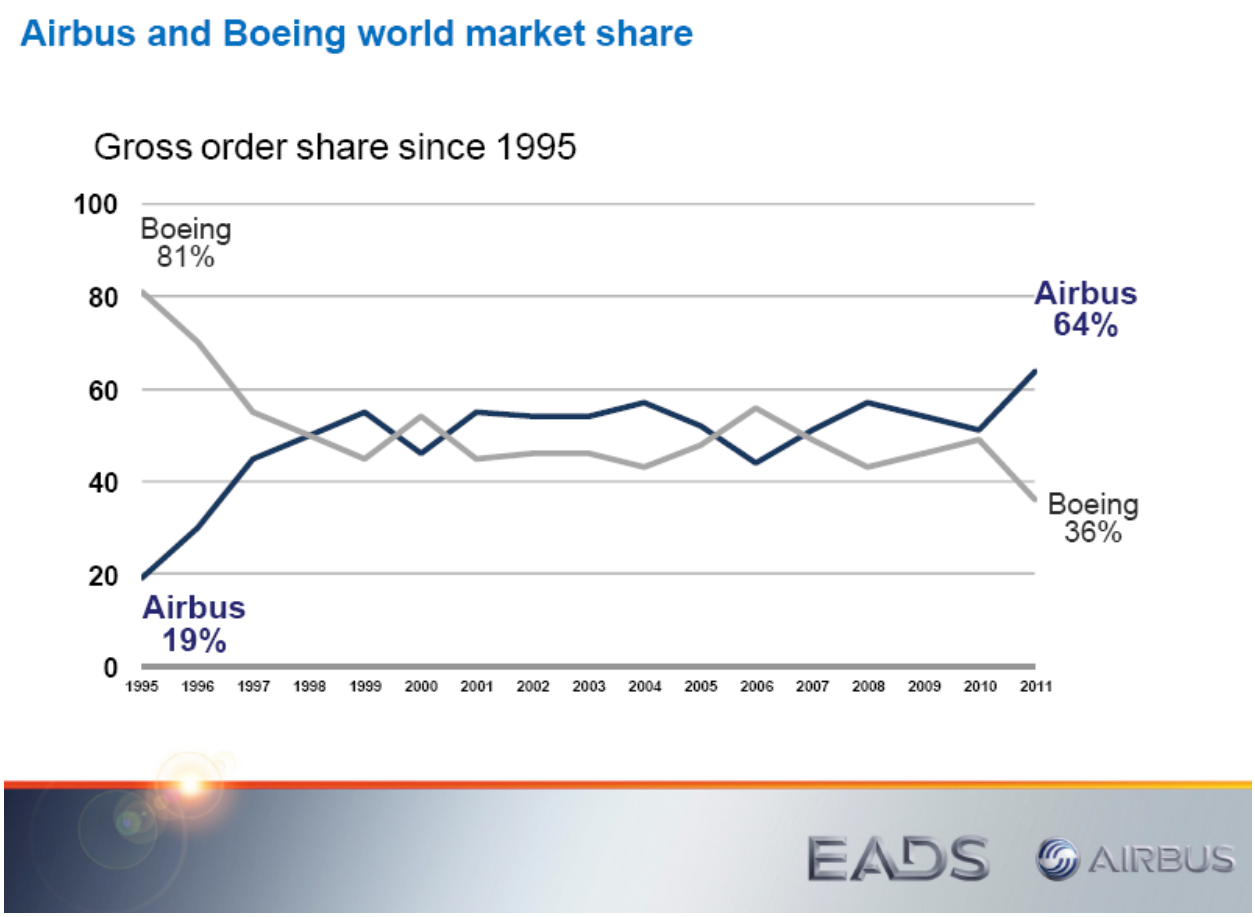
> Ring: To start with your wording, 'the launch aid balance': actually it's repayable launch investments, as we call them. I mean it's indeed that we are, I would say, adapting ourselves to reality. We have not sold 340s since almost I think two years now, after we had announced that we would build aircraft to order. So we were extremely successful as you know on the 330 and on the 350, but 380 {sic} was not selling, and that means that *there is a liability in the balance sheet which is released*, if you like, with this assessment, and that's the reason why it has a positive impact on the P&L, in EBIT, and in net income, as you've heard.

[26] Thomas Enders Interview, Le Monde (Oct. 13, 2007) (USA-008); Aaron Karp, *Airbus/EADS officials concede Boeing advantage, question A350 viability*, Air Transport World Daily News (Oct. 6, 2006) (Exhibit USA-009).

[27] Mark Piling, *Dream date,* Airline Business (Apr. 1, 2004) (Exhibit USA-010).

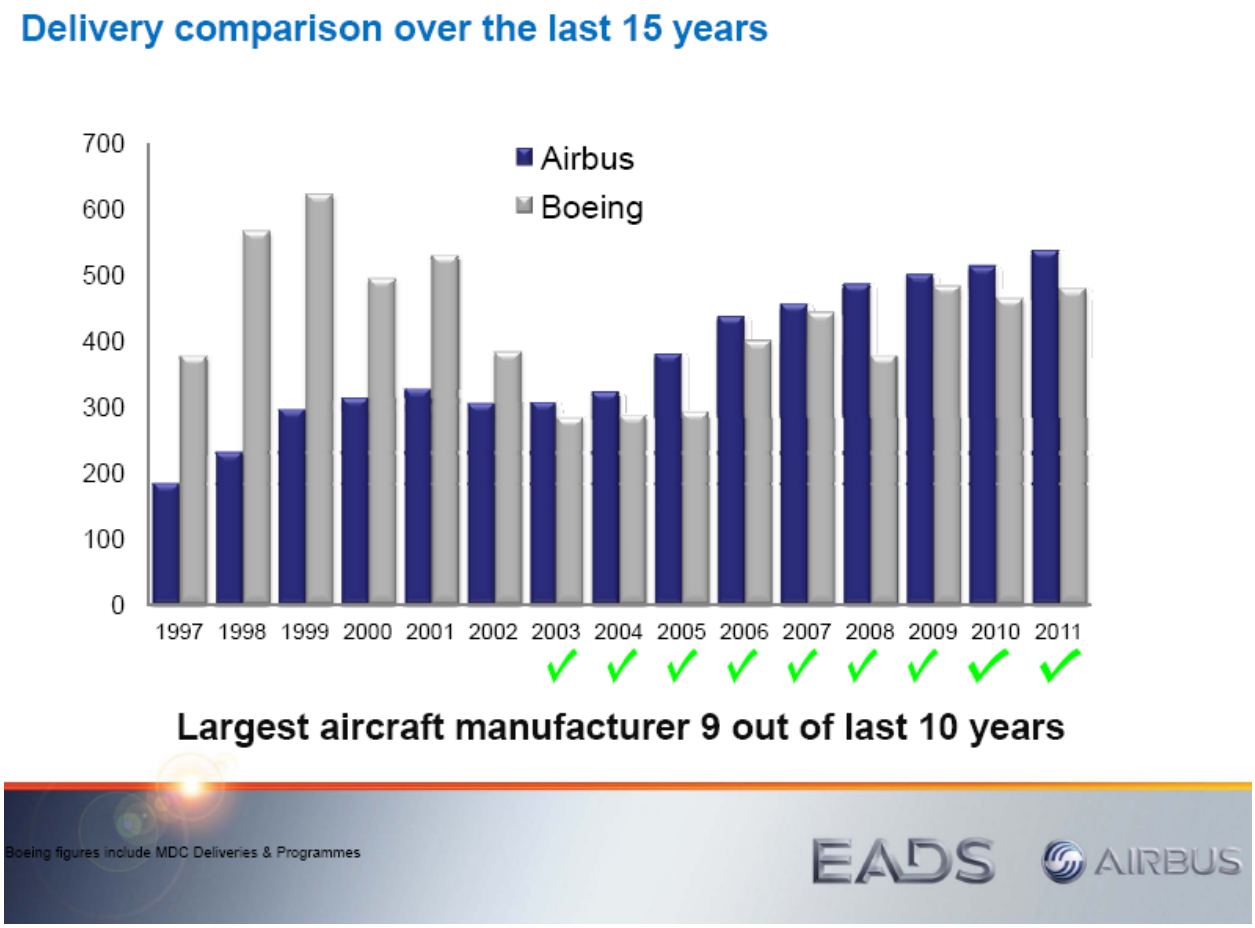
[28] Dominic Gates, *Boeing may overtake Airbus as No. 1 jet-maker in 2012*, Seattle Times (Jan. 17, 2012), (Exhibit USA-011).

[29] EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 7 (Jan. 17, 2012) (Exhibit USA-012).



13. Airbus also trumpeted its perennial success as the "largest aircraft manufacturer" in terms of deliveries from 2003 through 2011: [30]

[30] EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 18 (Jan. 17, 2012) (Exhibit USA-012).



14. As the graph shows, it was in the 2001-2006 period examined by the original panel that Airbus finally achieved its goal of splitting the market roughly in half with Boeing. In December 2011, Airbus described this market split as "the most important balance" for it to maintain.[31] However, as the original Panel found, and the Appellate Body concurred, without LA/MSF, Airbus would not have been able to achieve or maintain this strong market position,[32] and quite probably would not have existed at all.[33]

15. Country markets and individual sales campaigns parallel these broad market trends. Airbus continues to displace Boeing in EU and third country product markets, just as it causes significant lost sales for Boeing in a number of sales campaigns involving hundreds of orders and tens of billions of dollars.

16. From a compliance standpoint, the situation is largely the same as it was in the original proceeding. LA/MSF has not been withdrawn. Airbus still supplies the market with a product line that it would not have without LA/MSF. Consequently, Boeing continues to lose sales and market

[31] Marwan Lahoud, *Views on EADS Strategy and Value Creation*, slide 8 (Dec. 15-16, 2011) (Exhibit USA-013).

[32] *EC – Large Civil Aircraft (AB)*, para. 1270 ("As we see it, the Panel's conclusion that a non-subsidized Airbus would not have 'achieved the market presence it did over the period 2001 to 2006', which followed from its views that a non-subsidized Airbus would be a 'much weaker LCA manufacturer' with 'at best a more limited offering of LCA models', provided enough of a basis to establish a 'genuine and substantial relationship of cause and effect' in this case.").

[33] *EC – Large Civil Aircraft (AB)*, para. 1263 ("{The EU's appeal} is premised exclusively on scenarios 3 and 4, on which the {EU} claims the Panel focused. We do not agree that this is a proper characterization of the Panel's findings. In fact, the Panel found that scenarios 3 and 4, in which Airbus would have entered the market without subsidies, were 'unlikely'."); *ibid.*, para. 1264 ("Under scenarios 1 and 2, there was no need for the Panel to proceed further in its counterfactual analysis. Without the subsidies, Airbus would not have existed under these scenarios and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred.").

share worth many billions of dollars. The only material change is a *worsening* of the compliance situation, with the relevant EU member States in the midst of providing €3.5 billion in LA/MSF to Airbus for the A350 XWB. Accordingly, and in light of the evidence and argumentation presented, the United States respectfully requests that the compliance Panel work quickly to address the EU's failure to comply with the DSB's recommendations and rulings in *EC – Large Civil Aircraft*. Almost eight years after the commencement of this dispute, an end to LA/MSF as usual is long overdue.

17. Therefore, the United States respectfully asks the Panel to find that:

- With the exception of the Bremen airport runway subsidy, the EU and relevant member States have not withdrawn the subsidies covered by the DSB recommendations and rulings;

- French, German, Spanish, and UK LA/MSF for the A350 XWB is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement;

- French, German, Spanish, and UK LA/MSF for the A380 and the A350 XWB confers (1) an export subsidy inconsistent with Article 3.1(a) of the SCM Agreement, and (2) an import substitution subsidy inconsistent with Article 3.1(b) of the SCM Agreement;

- the EU and relevant member States have not removed the adverse effects covered by the DSB recommendations and rulings;

- the United States continues to experience serious prejudice in the form of significant lost sales under Article 6.3(c) of the SCM Agreement, including sales where the customer ordered the A350 XWB;

- the United States continues to experience serious prejudice in the form of displacement and impedance, and/or threat thereof, of its large civil aircraft imports into the EU market under Article 6.3(a) of the SCM Agreement;

- the United States continues to experience serious prejudice in the form of displacement and impedance of its large civil aircraft exports to 11 third-country markets under Article 6.3(b) of the SCM Agreement;

- all subsidies provided to Airbus large civil aircraft, including LA/MSF provided to the A350 XWB, have a genuine and substantial causal relationship with the effects found; and

- the European Union has failed to comply with the recommendations and rulings of the DSB by withdrawing the subsidies or taking appropriate steps to remove the adverse effects.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The European Union's ("EU") first written submission provides a spirited defense of . . . doing nothing.

2. More specifically, the EU asserts that, after panel and Appellate Body findings that Airbus received WTO-inconsistent subsidized financing worth billions of euros, with tens of billions of dollars of adverse effects to U.S. interests, the EU could come into compliance by doing essentially nothing. The EU goes even further to argue that the only meaningful acts it did take with regard to large civil aircraft subsidies, grants of €3.5 billion in *new* subsidies for the A350 XWB, were immune from review by this compliance panel. In any event, these new subsidies only brought the EU further from compliance with its WTO obligations.

3. This was not what the original Panel and the Appellate Body called for when they found that the EU had conferred subsidies inconsistent with Article 5 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and consequently had an obligation under Article 7.8 of the SCM Agreement to withdraw the subsidies or take appropriate steps to remove their adverse effects. The Appellate Body has found that compliance with this obligation "will usually involve some action by the respondent Member. This affirmative action would be directed at effecting the withdrawal of the subsidy or the removal of the adverse effects." The reverse is also true: "A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own."

4. Yet that is exactly what the EU proposes. It's first written submission makes clear what the EU Notification[1] strongly implied – that the measures the EU has taken either are doing nothing, or are so small as to do nothing. (In fact, the EU essentially concedes that 12 of the LA/MSF-related measures listed in the EU Notification are meaningless, as its first written submission does not reference them.) In short, for purposes of Article 21.5 of the *Understanding Governing Rules and Procedures for the Settlement of Disputes* ("DSU"), the measures taken to comply either do not exist or, in the case of LA/MSF for the A350 XWB, exacerbate the WTO inconsistencies.

II. ANALYTIC FRAMEWORK

5. After adoption of the Panel and Appellate Body Reports in *EC – Large Civil Aircraft*, the EU had an obligation to comply with the Dispute Settlement Body ("DSB") recommendation to withdraw the subsidies or take appropriate steps to remove their adverse effects. The question before this panel, in considering a manner referred to it pursuant to Article 21.5 of the DSU, is whether the responding party's declared (or undeclared) measures taken to comply with the recommendations and rulings of the DSB exist or are themselves WTO-inconsistent. The recommendations and rulings of the DSB provide the measurement for judging compliance.

6. Article 21.5 instructs a panel to evaluate "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings," which include the underlying panel and Appellate Body findings, in effect, taking them as a given. It is equally significant that Article 21.5 does not invite compliance panels to reopen or reconsider the DSB recommendations and rulings. Indeed, it is difficult to see how a compliance proceeding could function if the recommendations and rulings, which provide the basis for analyzing compliance, could be subject to challenge. Thus, the DSB recommendations and rulings, including as embodied in the panel and Appellate Body findings, are obviously important in identifying whether a measure taken to comply exists, and in evaluating whether any unchanged elements of a measure are consistent with the covered agreements. They can also play an important role in evaluating whether a revised measure is inconsistent with the covered agreements.

[1] Letter from the European Union to the United States (Dec. 1, 2011) ("EU Notification").

III. THE SCOPE OF THIS COMPLIANCE PROCEEDING

7. **Threat of serious prejudice claims.** The EU argues that the case presented in the U.S. first written submission "contains arguments regarding alleged *threats* of displacement and impedance," while "the United States' Article 21.5 Panel Request referred only to *actual*, rather than threatened, displacement and impedance of imports." Footnote 13 to Article 5(c) of the SCM Agreement explicitly provides that "'serious prejudice'…includes threat of serious prejudice." The U.S. panel request frames the U.S. claim in terms of "adverse effects" (which include threat of serious prejudice) and "subsidies . . . inconsistent with Articles 5(c), 6.3(a), 6.3(b), and 6.3(c)" (which include threat of serious prejudice). Thus, the U.S. panel request includes any claims of threat of serious prejudice embodied in the U.S. first written submission.

8. **LA/MSF for the A350 XWB.** The EU does not contest that LA/MSF for the A350 XWB has the same four core terms as all previous LA/MSF, or that LA/MSF for the A350 XWB has the effect of negating the EU's compliance with the DSB recommendations and rulings in this dispute, or that the legal instruments conferring A350 XWB LA/MSF were issued from June 2009 onward, and that disbursements occurred continually from 2009 to 2012. Rather, the EU invents and then subjects the U.S. claims to an "overarching measure" test that has no basis in the text of the DSU or previous panel or Appellate Body reports. The EU also raises several tangential issues regarding the nature, effects, and timing of LA/MSF for the A350 XWB, but these are either contrary to past Appellate Body reports or irrelevant to the issues before the Panel. Therefore, the EU has failed to undermine the U.S. demonstration that LA/MSF for the A350 XWB is properly in the scope of this proceeding because it satisfies the "close nexus" test.

9. **Prohibited subsidy claims.** The United States raised claims under Article 3.1(a) of the SCM Agreement against LA/MSF for the A380 during the original proceeding, but the Appellate Body ultimately did not resolve them. It is well established that a compliance panel may consider claims in this procedural posture. Therefore, the EU's argument that these claims fall outside the Panel's terms of reference should be rejected. The EU also argues that the U.S. claim against LA/MSF for the A380 under Article 3.1(b) falls outside of this compliance Panel's terms of reference. However, the United States could not have raised its Article 3.1(b) claim at the time of the original panel, so this closely related claim is within this Panel's terms of reference.

IV. THE EU'S WTO-INCONSISTENT SUBSIDIES HAVE NOT EXPIRED, AND HAVE NOT BEEN WITHDRAWN

A. Alleged Repayment on Subsidized Terms or "Termination" of Agreements Did Not Cause the Subsidies to Expire

10. Financing confers a subsidy if the repayment terms are more favorable than the recipient could have obtained on the market. Individual payments may be lower or they may be structured in a way that makes them better for the recipient than a commercial financier would have allowed. Therefore, the recipient's payments in accordance with the terms of subsidized financing package are the heart of the subsidy. They do not remove the subsidy, as the EU alleges, because the benefit, in the form of what the recipient would have paid for commercial financing but did not pay to the government, remains with the recipient.

B. The EU Arguments Regarding Amortization Do Not Properly Measure the Lives of the Subsidies in Question, and Do Not Prove that They have Expired

11. Faced with its obligation to withdraw billions of euros in subsidized financing or remove their adverse effects in the form of billions of dollars in lost sales and displacement in markets around the world, the EU responds that it has no obligation to do anything, because amortization has already taken care of the problem. That is wrong.

12. It is wrong because the Appellate Body has not, as the EU argues, found that the life of LA/MSF or the various equity subsidies is determined through amortization. And, it is wrong because the life of a subsidy creating a new product must be measured by the life of the product it creates, and not by accounting conventions or projections as to the period that the product is likely to remain competitive in the market. In other words, nothing that the EU has stated demonstrates in any way that the relevant subsidies at issue have expired or been repaid in any way.

C. The Transactions Identified in the EU First Written Submission Did Not "Extract" or "Extinguish" Prior Subsidies or Result in their Expiration

13. **The Dasa and CASA transactions.** The original Panel found that the Dasa and CASA transactions did not extract or extinguish prior subsidies, and the Appellate Body upheld that finding. That should end the inquiry; the EU had a chance but failed to make its case, and is accordingly precluded from raising the issue again in an Article 21.5 proceeding. In any event, if the Panel decides to revisit this question, the EU's arguments regarding the Dasa and CASA transactions fail at this stage for the same reason they failed before the original Panel and the Appellate Body – the EU has not satisfied any of the elements of the test for establishing the extraction of subsidies from Airbus. It has not shown that the cash transfers actually "extracted" anything of value from EADS in the first place. It has also failed to show that the cash involved was actually related to the value of past subsidies, rather than some other element in the value of EADS. Thus, even if the Panel were to find that the Dasa and CASA transactions were properly before it, the EU has not met its burden of proof for the proposition that the Dasa and CASA transactions reduced or eliminated the benefit from past subsidies to Airbus.

14. **The Aérospatiale-Matra merger, the creation of EADS, and acquisition of BAE shares.** The EU's arguments on extinction fail for the most basic reasons – they rely on an incorrect legal test, and the facts at issue do not satisfy the correct test. Identifying the legal test to be used in this compliance proceeding requires, among other things, a careful look at the Appellate Body findings in *EC – Large Civil Aircraft*. First, the Appellate Body reversed the original Panel's finding that partial privatizations and private-to-private transactions would not extinguish subsidies. Second, Members of the Division agreed that an assessment of whether a transaction extinguished subsidies required "a fact-intensive inquiry" into whether it was at fair market value and arm's length, involved a transfer in ownership and control, and "whether a prior subsidy could be deemed to have come to an end." Third, they could not agree on what other criteria were necessary, and took the unusual step of issuing separate views. The EU, however, does not base its argument on a careful analysis of the Appellate Body report, and instead proceeds as if there were a consensus, ignoring the serious concerns raised by two of the three Members. A proper approach, which the United States applied in its first written submission, would address the concerns of *all* of the Appellate Body Members, before reaching a conclusion as to subsidy extinction. Such an analysis demonstrates that the transactions cited by the EU did not extinguish or withdraw prior subsidies.

D. The Appellate Body's Findings in *EC – Large Civil Aircraft* Preclude Treatment of the Removal of the Financial Contribution, or the Expiration of Subsidies Alleged by the EU as Withdrawing the Subsidies

15. The Appellate Body found that the role of the LA/MSF, capital, and regional subsidies in creating the A300, A310, A320, A330, A340, and A380 established a genuine and substantial causal link between the subsidies and the lost sales and displacement experienced by Boeing between 2001 and 2006. The Appellate Body also found that the expiration of subsidies prior to the reference period would not necessarily preclude a finding that they had adverse effects during that time. The Appellate Body made explicit findings that the extractions alleged by the EU did not affect the value of past subsidies, but made no findings with regard to other transactions or events. In short, the possibility that subsidies had expired did not prevent the original Panel and the Appellate Body from finding those subsidies inconsistent with Article 5 of the SCM Agreement due to their continuing adverse effects. Thus, as a compliance matter, the alleged expiration of those same subsidies did not "withdraw" them or otherwise excuse the EU from the Article 7.8 obligation triggered by its earlier violations of Article 5.

E. The EU Fails to Rebut the U.S. *Prima Facie* Case that LA/MSF for the A350 XWB is a subsidy

16. The U.S. first written submission demonstrated that the grantors of LA/MSF for the A350 XWB agreed that such financing was necessary precisely because capital markets were unwilling to provide it. The EU attempts to rebut this evidence only by arguing that the United States has not provided sufficient evidence to sustain a *prima facie* case. Its arguments fail, however, because the EU provides no credible evidence that such financing is available from commercial financiers. The documents the EU provided in response to the Panel's request under Article 13 of the DSU confirm that LA/MSF for the A350 XWB was on better-than-market terms, as demonstrated in

economic analyses performed by NERA and included in the U.S. second written submission. The EU explicitly concedes that LA/MSF for the A350 XWB was a financial contribution, so there is no dispute on that point.

17. The EU does not dispute that the EU member States granted LA/MSF for the A350 XWB because capital markets were unwilling to provide it. Specifically, the United States presented UK and French government statements describing this financing as being "'designed to address the unwillingness of capital markets to fund projects'" like Airbus's launch of the A350, and "'necessary to supplement market financial support'." The United States also presented a German media report confirming the same point about A350 XWB LA/MSF from all four Airbus governments.

V. GRANTS OF LA/MSF FOR THE A380 AND A350 XWB ARE PROHIBITED SUBSIDIES

18. As the U.S. first written submission demonstrated, LA/MSF for both the A380 and the A350 XWB are contingent in fact upon anticipated export performance. The design, structure, and operation of the subsidies themselves, which led to high levels of export sales, support this conclusion. The U.S. first written submission also demonstrated that the Airbus governments granted LA/MSF for the A380 and the A350 XWB in anticipation that Airbus would manufacture aircraft components domestically, using domestic (rather than imported) goods and labor, and that such components would be used to construct the aircraft. The United States demonstrated that the grant of A380 and A350 XWB LA/MSF was made contingent upon such anticipated use of domestic goods, making them prohibited under Article 3.1(b) of the SCM Agreement.

19. The EU failed to rebut the U.S. *prima facie* demonstration of inconsistency with Articles 3.1(a) and 3.1(b). First, the United States demonstrates that none of the EU's attempted jurisdictional challenges regarding the A380 has any merit, in light of the unique procedural posture and procedural history of the U.S. claims involved. Second, the United States reaffirms its original presentation of the Appellate Body's interpretation of the standard for *de facto* export contingency, as well as its demonstration that A380 and A350 XWB LA/MSF meet that standard. Third, the United States demonstrates that the EU's brief comments on import substitution are contradicted by prior Appellate Body reports, fail to engage with the U.S. claims under Article 3.1(b), and fail to undermine the United States' *prima facie* case.

VI. THE UNITED STATES HAS DEMONSTRATED THAT THE EU HAS NOT TAKEN APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS OF ITS SUBSIDIES, AND THE EU HAS FAILED TO REBUT THE U.S. CASE

A. Introduction

20. The Panel's assessment of the EU's claim of compliance with the recommendations and rulings of the DSB should be straightforward. The original Panel found, and the Appellate Body affirmed, that the EU gave Airbus billions of euros in subsidized financing – the largest amount of subsidized financing in the history of the WTO and the GATT 1947 – resulting in tens of billions of dollars of adverse effects to the U.S. LCA industry. The DSB adopted these findings. As with the subsidy findings, the EU response to the adverse effects findings against it was to do nothing that would resolve the dispute. Where it did take action, it was to provide yet another round of LA/MSF, this time to enable Airbus to launch and bring to market the A350 XWB in a manner that would have been impossible otherwise. This is manifestly inappropriate. Under Article 7.8 of the SCM Agreement, the EU needed to take action to remedy the situation. Because it has not done so, the Panel should find that the EU has failed to comply.

21. With its first written submission, the EU confirmed that it relies overwhelmingly on inaction in asserting that it has taken appropriate steps to remove the adverse effects. In the face of the DSB's rulings and recommendations, the EU attempts to justify its inaction by citing two factors: (1) withdrawal of prior subsidies, and (2) the passage of time. Neither supports the EU's claim of compliance. The United States has demonstrated that the EU has not withdrawn the subsidies. The United States also demonstrates that the passage of time has not invalidated the underlying findings or eliminated the causal link between the subsidies and adverse effects, notwithstanding the EU's baseless assertions regarding Airbus's current financial situation, changes in conditions of competition, and technological advances. As found by the original Panel and the Appellate Body, Airbus's entire product line, the technologies applied on those products, and indeed Airbus's

financial condition are genuine and substantially related to the LA/MSF subsidies. Nothing has happened since the reference period to undermine that conclusion. Therefore, the EU has failed to comply with Article 7.8 of the SCM Agreement and with the rulings and recommendation of the DSB.

B. The Analytical Framework Advocated by the EU is Deeply Flawed

22. ***The starting point in a compliance proceeding is the recommendations and rulings of the DSB. This is not a "new" case.*** The EU seeks to treat this compliance proceeding as a new, entirely independent dispute. It argues that the United States must show present adverse effects, presently caused, independent from and without any regard to the EU's past conduct or to the past measures and adverse effects at issue in the original dispute. The EU also contends that the Panel should not look to any facts that pre-date December 1, 2011, as they are not "relevant to the showing that the United States must make in these compliance proceedings." For its part, the EU considers itself free to ignore and/or re-litigate the original Panel and Appellate Body findings, adopted by the DSB, that the EU gave billions of euros in subsidized financing to create a line of Airbus aircraft that causes billions of dollars in adverse effects to the interests of the United States. The EU is mistaken in each respect. The approach urged by the EU would require a prevailing Member to obtain new findings in a new dispute without regard to the recommendations and rulings adopted by the DSB in the original dispute. The EU approach is fundamentally at odds with the nature of a proceeding under Article 21.5 of the DSU. The starting point must be the DSB's recommendations and rulings.

23. In this case, the Appellate Body concurred with the original Panel's conclusion that under the most likely counterfactual scenario in the absence of the subsidies, "Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred." At a minimum, absent the subsidies, Airbus would be a "'much weaker LCA manufacturer,'" and would have had "'at best a more limited offering of LCA models.'" The original Panel and the Appellate Body made clear findings as to the product effects of LA/MSF, which enabled Airbus to develop and bring to market each of its models of LCA as and when it did. The original Panel and the Appellate Body recognized that the primary effects of LA/MSF to a given Airbus model was to cause that model to be launched when and as it was and to thereby inject supply into the market that would not exist otherwise. The presence of such subsidized aircraft enabled and continues to enable Airbus to capture sales and market share at the expense of the U.S. industry.

24. The EU has not fulfilled the mandate of Article 7.8 of the SCM Agreement and the requirement to "take appropriate steps to remove adverse effects." The United States demonstrates again the continued validity of the underlying findings – including the causal link – in the current market situation, the absence of any meaningful action by the EU to address the situation, and the unabated, continuing present adverse effects in the form of significant lost sales and displacement and impedance, and threat thereof. None of the EU's asserted compliance steps did anything to address, let alone remove, LA/MSF's adverse effects. In fact, the sole notable action that the EU did undertake was to compound the adverse effects by giving yet another round of LA/MSF to the A350 XWB.

C. Conditions of Competition and Product Markets

25. In its first written submission, the EU largely does not dispute the conditions of competition found by the original Panel and the Appellate Body and cited by the United States. The notable exception is that the EU for the first time asserts the existence of *seven* wholly separate product markets, four of which are purportedly monopoly markets with no competition. This is contrary to adopted Appellate Body findings, in which the Appellate Body agreed with the EU's prior position that LCA could properly be divided into three appropriate product markets – single aisle, twin aisle, and very large aircraft. The EU's approach in this compliance proceeding does not bear any resemblance to real patterns of competition involving large civil aircraft.

D. The EU Has Failed to Rebut the U.S. Demonstration that EU Subsidies to Airbus Continue to Cause Present Adverse Effects

26. In its first written submission, the United States demonstrated a causal link based on the findings of the original Panel and the Appellate Body, the absence of any meaningful action by the EU to address the situation, and the fact that lost sales and lost market share have continued unabated. The U.S. demonstration that LA/MSF continues to cause adverse effects is based on three principal points. *First*, the original Panel and the Appellate Body found that LA/MSF had "product effects," enabling Airbus to supply the market with aircraft that it would not otherwise have had when and as it did, and these aircraft took sales and market share from the U.S. industry. *Second,* none of the EU's asserted compliance steps did anything to address, let alone remove, the product effects of LA/MSF. In fact, the sole notable action that the EU did undertake was to compound the product effects of LA/MSF by giving yet another round of it to the A350 XWB. *Third*, the pattern of lost sales and lost market share has persisted from the original reference period up through the present, despite the EU's claims of compliance.

27. The EU's first written submission confirms that it has not taken meaningful compliance steps to remove the adverse effects that LA/MSF causes. Its submission is devoid of reference to EU action that could remove or even mitigate the effects of LA/MSF that continue to so severely distort competition in the LCA industry. Unable to rely on real compliance action, the EU tries to rebut the U.S. causation demonstration in four ways: (1) the supposed withdrawal, through expiration or extraction, of LA/MSF to all Airbus LCA from the A300 through the A340 (it argues the same for the A380 LA/MSF, although its arguments betray a lack of confidence that it has withdrawn LA/MSF to the A380); (2) subsequent investment by Airbus and its suppliers in the A320 and A330; (3) Airbus's supposed ability to launch the A380 in the absence of LA/MSF; and (4) Airbus's supposed ability to launch the A350 XWB in the absence of LA/MSF. All of these arguments fail.

28. Indeed, as is clear from its argument, the EU concedes that it did nothing to break the causal relationship between the LA/MSF and other subsidies and serious prejudice to the United States. Rather, it argues that conditions have changed such that an entirely new assessment of causation must take place. But the causal mechanism identified by the original Panel and confirmed by the Appellate Body still operates, including through LA/MSF to the A350 XWB. The EU's portrayal of the causal nexus as non-existent is incorrect, as the evidence confirms.

E. The EU has Failed to Rebut the U.S. Demonstration of Significant Lost Sales

29. The United States continues to experience significant lost sales. In its first written submission, the United States documented over one thousand lost sales, together worth tens of billions of dollars of lost revenues for the U.S. LCA industry. This pattern has continued unabated from the original reference period through the end of the RPT, December 1, 2011, and on to the date of referral of this matter to the compliance Panel. Since that time the United States has also lost significant sales campaigns involving Hong Kong Airlines and Norwegian Air Shuttle, as demonstrated in the first written submission, and also three additional sales campaigns that have occurred since the filing of the U.S. first written submission.

30. This consistent pattern of continuing significant lost sales reflects the absence of any meaningful action by the EU to remove the adverse effects of the WTO-inconsistent subsidies at issue in this dispute. Indeed, the EU does not claim to have taken any steps on its own initiative to remove adverse effects in the form of lost sales. Rather, the EU points to the "delivery" of Airbus aircraft and Airbus's termination of the A340 program as compliance "steps". These arguments are misplaced. The EU itself had an obligation itself to take appropriate steps to remove the adverse effects, and is not entitled to rely on Airbus's independent business decisions to satisfy this obligation. In any event, Airbus's completion of deliveries and the termination of the A340 program have not removed the adverse effects caused by LA/MSF.

31. Given the persistence of lost sales and the absence of meaningful compliance action, the EU has nothing to offer in rebuttal beyond erroneous arguments regarding purported "non-attribution factors." For example, the EU argues that Airbus's first sale to an airline customer generates a "strong disposition" to buy Airbus aircraft in the future and that this disposition is a "non-attribution factor," without explaining how Airbus could have offered any of the LCA it sold to that

customer without LA/MSF. In addition, according to the EU, if an airline customer purchases an Original A350, this is another "non-attribution factor" with respect to subsequent A350 orders. These are not valid "non-attribution factors." They in no way alter the fact that Airbus obtained these sales with aircraft that it would have been unable to offer in the absence of the LA/MSF and other subsidies. The EU's so-called non-attribution factors are *themselves* the effects of LA/MSF, as any incumbency advantages that Airbus enjoys by virtue of previously obtained sales are the direct result of earlier LA/MSF.

F. The EU has Failed to Rebut the U.S. Demonstration of Displacement, Impedance, and Threat Thereof in the EU Market and Certain Third Country Markets

32. The U.S. LCA industry continues to suffer adverse effects in the form of displacement, impedance, and/or the threat thereof within the meaning of Article 6.3(a) and (b) of the SCM Agreement. The U.S. first written submission demonstrated that such adverse effects are presently occurring in the EU market and 11 third-country markets. These adverse effects have continued during the first half of 2012, and the continued existence of displacement and impedance underscores the EU's failure to take any meaningful steps to remove the adverse effects at issue in this dispute.

33. In its second written submission, the United States presents updated data demonstrating displacement, impedance, and/or threat thereof in the EU market and 11 third-country markets continuing through the date of referral of the matter to the compliance Panel and to the present. These data supplement the data tables in the U.S. first written submission for the time period 2001-2011, with the inclusion of additional market activity in the first half of 2012. Data for the first half of 2012 generally reinforce the conclusions drawn from the data in the U.S. first written submission.

34. The use by the United States of pre-December 2011 market data as evidence to demonstrate continuing displacement and impedance in no way implies that WTO remedies are "retroactive," as the EU erroneously suggests. Rather, the data relied on by United States serve as evidence of present market displacement and impedance, as they demonstrate long-term market trends, and confirm that the U.S. LCA industry continues to suffer displacement and impedance during the 2001-2012 time period as a result of LA/MSF. The EU does not dispute the accuracy of the data underlying the U.S. demonstration of presently continuing market displacement and impedance. Separately, many of the EU's arguments are contradicted by points the United States made in its first written submission.

35. The remaining so-called "non-attribution factor" suggested by the EU – "Boeing's high market share" – is also an argument without merit. Nothing in the text of the SCM Agreement indicates that a WTO Member may not bring a claim for adverse effects resulting from WTO-inconsistent subsidies in markets where its industry enjoys a high market share.

36. This leaves the market data presented by the United States in its first written submission and updated in the second written submission. The data, viewed in the context of LA/MSF's product effects, demonstrate that displacement and impedance continue as a result of the EU's failure to take appropriate steps to remove the adverse effects of LA/MSF and other subsidies to Airbus. The EU contends that such data are insufficient and that independent narratives detailing evidence of lost sales campaigns are necessary to support these claims. To the contrary, such a requirement would effectively subordinate or convert displacement and impedance claims into lost sales claims, even though these explicitly are two separate and independent forms of serious prejudice under Article 6.3 of the SCM Agreement. Furthermore, in the original proceeding, the DSB adopted findings of displacement in China and Korea notwithstanding the lack of any specific findings of lost sales involving Chinese or Korean airline customers. There is simply no basis for the EU to challenge U.S. displacement and impedance claims because they may be unaccompanied by corresponding lost sales claims. And finally, there is no dispute between the parties about the underlying data.

37. In any event, the United States *has also* demonstrated particular lost sales in the EU single-aisle, twin-aisle, and very large aircraft markets (those of easyJet, Air Berlin/NIKI, Czech Airlines, Norwegian Air Shuttle, Iberia Airlines, Air France – KLM, and British Airways); the Australian single-aisle and very large aircraft markets (Qantas and Qantas Airlines/Jetstar Airways); the

Korean twin-aisle and very large aircraft markets (Korean Air and Asiana Airlines); the Singaporean twin-aisle and very large aircraft markets (Singapore Airlines); and the United Arab Emirates very large aircraft market (Emirates).

VII. CONCLUSION

38. The EU first written submission does not change the key facts of this compliance dispute: LA/MSF and other subsidies have not been withdrawn; additional LA/MSF has been provided to the A350 XWB on the same core terms and conditions as all prior LA/MSF to Airbus, including on better-than-commercial terms; Airbus still supplies the market with a product line that it would not have without LA/MSF, and that product line is now even more competitive with the market entry of the A350 XWB; and, consequently, Boeing continues to lose sales and market share worth many billions of dollars.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF THE UNITED STATES AT THE PANEL MEETING

1. What is most remarkable about this dispute is how little has changed in the last eight years. In spite of the longest, most complex WTO dispute ever, and the largest-ever findings of subsidization and serious prejudice, the EU has done nothing to change its WTO-inconsistent behavior. It has withdrawn only a few tiny subsidies, and has taken no meaningful steps to remove the adverse effects of the $15 billion in subsidized financing that it left untouched. And then, just as the original panel was completing its work, the EU granted Airbus more than $4 billion in subsidized financing for the A350 XWB with the same core terms as LA/MSF for earlier aircraft, and once again with a massive benefit.

I. THE EU'S FAILURE TO WITHDRAW THE LA/MSF SUBSIDIES AND GRANT OF NEW SUBSIDIES FOR THE A350XWB

2. The Appellate Body has found that, as used in Article 7.8, "withdraw" means "to 'remove' or 'take away' and 'to take away what has been enjoyed; to take from.'"[1] It elaborated in *US – Upland Cotton* that this obligation implies "affirmative action" by the responding Member, which "would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own."[2] The EU argues that the "accrual and diminishment of the subsidy" by itself "accomplished withdrawal."[3] But the Appellate Body explicitly found that the accrual and diminution of a subsidy is a matter for the analysis of the *effects* of the subsidy.[4]

3. Application of this analysis to the compliance measures identified by the EU establishes that they did not withdraw the subsidies found to exist.

- The supposed termination of LA/MSF contracts, which the EU now asserts as evidence that Airbus and EU member States "recogniz{e}" withdrawal of subsidies through other means, are simply their interpretation of WTO rules, and entitled to no evidentiary weight.

- EU "repayments" covered only the below-market interest rates charged by the EU member States and, accordingly, did not withdraw the subsidy, which includes the benefit conferred by those subsidies.

- The Appellate Body has identified the end of the life of a subsidy as a matter for the adverse effects analysis, not withdrawal. And, even if the life of the subsidy were relevant to the question of withdrawal, the proper measurement of that life is the actual life of the subsidized aircraft program, which means that the subsidies in question have not ended.

- As a factual and legal matter, the transactions cited by the EU did not "extinguish" subsidies or "extract" them from Airbus.

4. We now turn to the EU's latest subsidies to Airbus, more than $4 billion in LA/MSF for the A350 XWB. As we have pointed out, this financing operates just like traditional LA/MSF for earlier aircraft programs. It has the same four core terms, confers a benefit to Airbus, and has the effect of enabling aircraft launches that would otherwise not occur. These characteristics establish a close relationship with previous grants of LA/MSF that justifies including them all in the scope of this proceeding. They also establish that there is no market instrument that shifts risk in the way and on the terms that LA/MSF does.

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[1] *EC – Large Civil Aircraft (AB)*, para. 754.
[2] *US – Upland Cotton (21.5) (AB)*, para. 236.
[3] EU SWS, para. 86.
[4] *EC – Large Civil Aircraft (AB)*, para. 714.

5. Dr. Jordan demonstrated that all four instances of LA/MSF for the A350 XWB are subsidies.[5] In a report appended to the EU second written submission, Prof. Whitelaw presents a number of criticisms of Dr. Jordan's approach. It is significant, however, that Prof. Whitelaw never disagrees with Dr. Jordan's ultimate conclusion: that LA/MSF for the A350 XWB conferred a benefit. In fact, performing the calculations described (but not performed) by Prof. Whitelaw, with only one non-controversial correction, demonstrates that LA/MSF for the A350 XWB is a subsidy.

II. THE EU HAS GRANTED PROHIBITED SUBSIDIES TO AIRBUS.

6. Consistent with the Appellate Body's guidance, the United States has demonstrated that the anticipated export ratio in contemplation of receiving the A380 and A350 XWB LA/MSF, respectively, is significantly higher than the corresponding baseline ratio in the absence of the respective subsidies. Thus, the granting of the A380 and A350 XWB subsidies was tied to anticipated export performance or export earnings and, therefore, runs afoul of Article 3.1(a) of the SCM Agreement.

7. LA/MSF for the A350 XWB is also prohibited under Article 3.1(b) of the SCM Agreement. As a condition of receiving LA/MSF, Airbus, in producing the A350 XWB, is contractually required to use a variety of domestic, and not imported, goods. In addition, Airbus agreed to certain employment requirements, which could only be fulfilled by producing in the EU the goods for downstream use. Furthermore, there is no vertical integration exception to Article 3.1(b). The evidence demonstrates clearly that the EU made the granting of LA/MSF for the A350 XWB contingent upon the use of domestic over imported goods, the epitome of what Article 3.1(b) prohibits.

III. THE EUROPEAN UNION HAS FAILED TO REMOVE THE ADVERSE EFFECTS AND CAUSED ADDITIONAL ADVERSE EFFECTS BY PROVIDING NEW SUBSIDIES TO THE A350 XWB.

8. The original panel found, and the Appellate Body affirmed, that given the tremendous costs and risks associated with the development of large civil aircraft, Airbus would not have launched any of its large civil aircraft absent LA/MSF.[6] Because Airbus did receive LA/MSF, the U.S. LCA industry experienced adverse effects on a massive scale: The significant lost sales findings cover more than 400 aircraft orders worth many billions of dollars, and the displacement findings cover seven major country markets.

9. The situation is no better today. Rather than withdraw the subsidies or remove their adverse effects, the EU has carried on as if it is business as usual with LA/MSF. The latest iteration: billions of euros in LA/MSF provided to Airbus for the A350 XWB.[7] As a result, the United States continues to suffer serious prejudice, and the United States continues to be deprived of an appropriate remedy under Article 7.8 of the SCM Agreement.

10. For example, the original panel found, and the Appellate Body upheld, that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380."[8] Nothing has changed since the original Panel's finding. The EU has not withdrawn the LA/MSF that, indirectly and directly, was a necessary precondition for the launch of the A380. The EU's counter-argument regarding causation otherwise has already been rejected by the original Panel and the Appellate Body.[9] Thus the EU cannot establish now what it tried and failed to establish in the original dispute, and so its A380 causation arguments should once again be rejected *even if* the Panel were to ignore the effects of pre-A380 LA/MSF (which the United States contends is not appropriate).[10]

11. The Appellate Body found that WTO-inconsistent subsidies to the EU resulted in the displacement of Boeing like products based on three product markets: single aisle, twin aisle, and

[5] NERA, *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks*, Oct. 18, 2012 (Exhibit USA-475(BCI/HSBI)) ("Jordan Report").

[6] *EC – Large Civil Aircraft (Panel),* paras. 7.1934 (A300), 7.1936 (A310), 7.1938 (A320), 7.1939 (A330/A340), 7.1940 (A330-200), 7.1941-7.1942 (A340-500/600), 7.1948 (A380); *EC – Large Civil Aircraft (AB),* paras. 1273 (A300, A310, A340, A340-500/600), 1275 (A320, A330), 1356 (A380).

[7] *See* US FWS, Summary of U.S. Lost Sales Claims Demonstrating EU Failure to Take Appropriate Steps to Remove Adverse Effects (Exhibit USA-164).

[8] *EC – Large Civil Aircraft (Panel)*, para. 7.1948; *see EC – Large Civil Aircraft (AB)*, para. 1356.

[9] *EC – Large Civil Aircraft (Panel)*, para. 7.1948; *see EC – Large Civil Aircraft (AB)*, paras. 1352-1353.

[10] US SWS, paras. 526-547.

very large aircraft. The EU argues that there are now seven distinct product markets, four of which are monopoly markets, and one non-market. The EU does not – and cannot possibly – explain how, in a few short years, fierce competition in the twin-aisle market has given way to a total absence of any competition. The EU has given no valid reason to depart from the Appellate Body's framework consisting of three product markets.

12. The original Panel also found, and the Appellate Body upheld, that the subsidies that enabled Airbus to launch the original A320 and A330 were genuinely and substantially linked to the improved and derivative A320 and A330 aircraft that it was selling during the 2001-2006 period.[11] Thus while the EU has presented an assortment of improvements to the A320 and A330 aircraft, it fails to identify any real change in the fundamental conditions of competition in the LCA industry such that the same causal link established between subsidies and Airbus's 2000-2006 market presence remains intact. Therefore, the evidence confirms that there is a genuine and substantial link between the subsidies that Airbus has received and the current A320 and A330 models, and that further investments by Airbus – including those since 2006 – do not eliminate that link.

13. Lastly, LA/MSF constituted a necessary precondition for Airbus's recent decision to launch the A350 XWB. First, the A350 XWB program was not, as the EU argues, a can't-miss project immune to the effects of LA/MSF. Rather, it was a project that faced, and continues to face, significant risks. Second, EU support for the A350 XWB has been ever-present, from the period prior to the program's launch, through the finalization of the LA/MSF contracts, to the ongoing funding of its development costs. Indeed, the A350 XWB program could not have gone forward as planned without LA/MSF, including the effects of prior LA/MSF, without which Airbus would not have had the financial, industrial, and technological attributes that it had when it launched the A350 XWB. Finally, because Airbus would have been unable to proceed with the A350 XWB absent LA/MSF, the EU's assertions about the viability, or attractiveness, of the project[12] are beside the point. However rosy the A350's baseline sales projections might be,[13] willingness must not be confused with ability; *wanting* to market an aircraft means little without the *means* to do so. In short, the effects of prior LA/MSF worked in combination with the latest round of LA/MSF to cause Airbus to launch and bring to market the A350 XWB as and when it did, thereby becoming a genuine and substance cause of serious prejudice to the U.S. LCA industry.

14. The United States has further demonstrated that adverse effects from LA/MSF and other subsidies persist through the present. The United States has presented the Panel with evidence of significant lost sales amounting to tens of billions of dollars in lost revenue for the U.S. LCA industry, all caused by subsidies that enabled Airbus to offer and sell LCA that would have been unavailable otherwise.[14] The United States has also presented the Panel with evidence of displacement, impedance, and threat thereof, of its products, in the European Union market and 11 third-country markets.[15] Airbus retains a product line that it likely would not have absent subsidies. Now that product line is even stronger thanks to new infusions of LA/MSF that helped Airbus to launch and market the A350 XWB. The A350 XWB and other Airbus LCA continue to take sales and market share from Boeing, such that the United States continues to experience serious prejudice that would not have occurred had the EU implemented the DSB's recommendations and rulings and complied with Article 7.8 of the SCM Agreement.

15. The EU has failed to provide a valid reason for departing from the Appellate Body's product market framework, and thus the U.S. displacement and impedance claims based on this framework – single-aisle, twin-aisle, and very large aircraft – remain valid. The EU also has failed to provide a valid reason for severing the causal connection between the subsidies and the aircraft sold by Airbus, and thus the U.S. lost sales claims likewise remain valid. Finally, the EU has failed to provide a sound reason for revisiting the non-subsidized like product rule that the Panel rejected in the original dispute.

16. The Panel recalled that the original panel rejected the EU's non-subsidized like product rule, and that that decision was not appealed, and was therefore adopted by the DSB. Nevertheless, the EU forges ahead with the same argument in this compliance proceeding. The EU's alternative

[11] *EC – Large Civil Aircraft (Panel)*, para. 7.1934, 7.1940-41; *see EC – Large Civil Aircraft (AB)*, paras. 1270.

[12] EU SWS, para. 1030.

[13] *Cf.* EU SWS, para. 1030.

[14] US FWS, Section VI.G.2; US SWS, paras. 673-709; and Exhibit USA-164.

[15] US FWS, Section VI.H.3. and US SWS, paras. 718-747.

strategy is to distort the original panel's reasoning, ignoring that the Panel actually found that the EU's position had "no basis in the text" of the SCM Agreement. The EU should not be allowed to reopen a settled issue, nor should it be permitted to divert the Panel's attention from its unceasing WTO-inconsistent subsidization of Airbus.

17. In conclusion, the United States appears before the Panel because the situation has not gotten better, it's gotten worse:

- The EU has refused to withdraw the subsidies.
- EU member States have provided additional LA/MSF to the A350 XWB.
- Airbus still supplies the market with a product line that it would not have without LA/MSF.
- Consequently, Boeing continues to lose sales and market share worth many billions of dollars.

18. The United States was forced to begin this proceeding by the fact that after getting these recommendations from the DSB, the EU has done nothing. Its intransigence has left us with no other choice but to bring this issue back to the WTO dispute settlement system. It is clear now that the EU will not comply with its obligations in the normal course of events. It is going to need the impetus of another finding from another panel to do what they should have done the first time around. Our request for you today is to quickly and forcefully validate the recommendations and ruling of the DSB and find that the EU has failed to comply with its obligations. Thank you.

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ANNEX C

ARGUMENTS OF THE EUROPEAN UNION

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. The US First Written Submission in this case is remarkable for the extraordinary intensity of forceful presumption reflected throughout, both with respect to what it contains, and with respect to what it does not contain. It can be summarised in one line of overbearing assertion: the European Union subsidised Airbus in the past; all subsidies (except those granted by the United States) are objectionable; nothing has changed; Airbus (or its products) should not exist; all Airbus sales injure the United States; and this will always be so until Airbus (or its products) cease to exist. This is hardly a recipe for finding a satisfactory settlement of the matter, which is, after all, the objective here.

2. Forceful presumption is not, of course, what these legal proceedings are about. Rather, they are about a calm, meticulous, rational, reasonable, balanced and objective assessment of the law, the evidence (or lack of it) and the arguments (or lack of them). The European Union will demonstrate, in this First Written Submission, that the United States has failed to provide arguments, evidence, or a legal framework sufficient to state valid claims in these compliance proceedings.

II. THRESHOLD ISSUES

3. The European Union addresses several threshold issues, before addressing the individual elements of the United States' claims.

4. *First*, we address the *burden of proof*. It is not controversial, and the United States does not contest, that the complaining Member, the United States in this case, has the burden of proof in these compliance proceedings, which proceed under the terms of Article 21.5 of the DSU and Article 7.8 of the *SCM Agreement*. Indeed, in *SCM Agreement* cases as in any other case, in compliance proceedings, as in original proceedings, the burden of proof rests entirely with the complaining Member, and there is nothing in Article 7.8 of the *SCM Agreement*, just as there is nothing in Article 19.1 of the DSU, capable of justifying a different conclusion.

5. It is equally uncontroversial and uncontested that the Panel may not make the case for either party. In order to make a *prima facie* case, the complaining Member must: make a claim; assert facts; adduce evidence; and develop argument. The United States has failed to do so. Absent a *prima facie* case, a panel must find in favour of the responding Member, without the responding Member ever coming under any obligation to rebut a case that has not been made.

6. *Second*, we note the nature of the compliance obligation placed on the European Union in this dispute. With respect to actionable subsidies, Article 7.8 of the *SCM Agreement* provides for *two* compliance mechanisms: withdrawal (as in the case of Article 3.7 of the DSU) of the subsidy *or* removal of the adverse effects.

7. These two compliance mechanisms operate <u>independently</u>, meaning that, if the United States fails to demonstrate the existence of a subsidy, taking into account the facts relating to withdrawal, it has failed to demonstrate non-compliance. Alternatively, if the United States fails to demonstrate the existence of presently arising and presently caused adverse effects, it has failed to demonstrate non-compliance. These two compliance mechanisms also operate <u>cumulatively</u>, meaning that, if the European Union has *complied* by withdrawing a subsidy, that subsidy cannot play *any part* in an assertion or finding of *non-compliance*, based on allegedly presently caused and presently arising adverse effects. Alternatively, if the United States does succeed in demonstrating subsidies, but only of a smaller magnitude and/or greater age, the Panel must consider if the United States has demonstrated that this *different* basket of subsidies presently causes presently arising adverse effects. The United States has failed to consider or address these factors.

8. *Third*, we address the concept of "withdrawal", in Article 7.8 of the *SCM Agreement*. Withdrawal of either the financial contribution or the benefit entails withdrawal of the subsidy. A subsidy may be withdrawn or cease to exist for example through repayment of principal and interest, alignment with a market benchmark, or extinction and extraction. Affirmative action is not always required in order for a subsidy to be withdrawn or to cease to exist; a subsidy can be "withdrawn" through the passage of time. In such a case, the complaining Member can no longer demonstrate that the responding Member is "granting or maintaining" a subsidy under Article 7.8, and the responding Member has "otherwise" complied with the recommendation, within the meaning of Article 22.2 of the DSU. The United States has failed to consider or address these factors.

9. *Fourth*, we note that the United States must demonstrate presently arising adverse effects during a period following 1 December 2011, and must demonstrate a present genuine and substantial relationship of cause and effect with respect to presently arising adverse effects during the same period, taking into account intervening events (non-attribution factors). The United States has failed in this regard.

III. THE US CHALLENGE INCLUDES MEASURES AND CLAIMS THAT ARE OUTSIDE OF THE COMPLIANCE PANEL'S JURISDICTION

10. The US attempt to force certain financing agreements relating to the A350XWB into these compliance proceedings, notwithstanding the absence of any overarching programme, and in direct breach of the EU's due process rights, must be rejected. Additionally, the United States cannot presume to resurrect, in these compliance proceedings, export subsidy and domestic content claims that it lost or abandoned in the original proceedings. Moreover, the United States cannot presume to introduce threat claims that are nowhere to be found in its compliance panel request.

11. The European Union requests that the Panel find that none of the four separate A350XWB financing agreements is a "measure{} taken to comply" within the meaning of Article 21.5 of the DSU, and that they are therefore outside the scope of the Panel's jurisdiction.

12. The European Union further requests that the Panel find that the US claims that the four A380 financing agreements violate Articles 3.1(a) and (b) of the *SCM Agreement* are likewise outside the scope of the Panel's jurisdiction under Article 21.5 of the DSU, for two primary reasons: first, those claims do not relate to any "measures taken to comply"; and, second, no element of the "recommendations and rulings" of the DSB relates to Articles 3.1(a) and (b) of the *SCM Agreement*, or obliges the European Union to withdraw the measure pursuant to Article 4.7 of the *SCM Agreement*.

13. In addition, the European Union requests the Panel to find that the US Panel Request fails to satisfy the requirements of Article 6.2 of the DSU, as the United States is attempting to advance legal claims in its First Written Submission related to the alleged *threat* of displacement and impedance of imports pursuant to Article 6.3(a) of the *SCM Agreement*, that are not covered by the legal summary in the US Panel Request.

IV. ALLEGED SUBSIDIES

14. The United States cannot presume to ignore the express terms of Article 7.8 of the *SCM Agreement*, which give the responding Member the option to comply by withdrawing the subsidy, that is, by removing either the financial contribution or the benefit. A benefit may, in turn, cease to exist (i) where the Member that granted the financial contribution modifies its terms and conditions such that, going forward, it is aligned with a market benchmark and, hence, no longer confers a benefit, or (ii) where, through the passage of time, the subsidy ceases to confer a benefit on the recipient. In this context, the United States cannot presume to ignore repayments of principal and interest, alignment with a market benchmark, extinction, extraction or amortisation.

15. In *EC – LCA*, the Appellate Body found that the "removal of the financial contribution" results in the "life" of a subsidy coming "to an end".[1] This is consistent with the definition of a

[1] Appellate Body Report, *EC – Large Civil Aircraft*, para. 709.

subsidy in Article 1.1 of the *SCM Agreement*, which includes a "financial contribution" as one of the constituent elements of a subsidy. The complete removal of a financial contribution from a recipient brings the subsidy to an end.

16. In its First Written Submission, the United States has failed to demonstrate the existence of subsidies, taking into account the EU compliance measures, which address repayments of principal and interest, alignment with a market benchmark, extinction, extraction and amortisation.

17. With respect to *repayment of principal and interest*, the United States has not established that the financial contributions under a variety of the subsidies found in the original proceedings exist, despite the fact that the principal and interest due under the relevant agreements has been fully repaid, such that it has failed to establish an essential element of its *prima facie* case. Recalling that the burden of proof to establish these elements falls on the United States, the European Union establishes the circumstances that have led to the full repayment of principal and interest due under a series of UK, Spanish and French MSF agreements at issue in the original proceedings.

18. With respect to *modification of the terms and conditions of measures* adopted as part of the EU measures taken to comply, the United States has failed to establish that the recipient enjoys the financial contribution on terms and conditions that are more favourable than those available to the recipient at market. Specifically, with respect to the lease agreement for the land in the Mühlenberger Loch in Hamburg, the United States has failed to demonstrate that the terms and conditions, as amended through the EU's measure taken to comply, confer a "benefit". The same principles apply with respect to the amended take-off and landing fees at Bremen airport.

19. With respect to *amortisation*, we recall the Appellate Body's statements that the life of a subsidy comes to an end, and its benefit expires, over a period of time that must be determined *ex ante*.[2] For the vast majority of the subsidies implicated by the original proceedings, the benefits have expired and the subsidies have reached the end of their lives. It is for the United States to establish that these subsidies exist after 1 December 2011, in light of the Appellate Body's statements, and in light of the significant time that has passed since the grant of the many of these measures. Yet, the United States fails to even address the matter. Keeping in mind that the burden rests with the United States, the European Union provides evidence establishing that the lives of the vast majority of the MSF, regional development and capital contribution measures at issue in the original proceedings have come to an end.

20. With respect to *extraction and extinction*, the Appellate Body has confirmed that "intervening events" such as cash extractions and share transactions serving to extract or extinguish subsidy benefits may bring a subsidy to an end.[3] In light of the guidance provided by the Appellate Body, the European Union addresses a series of such intervening events which demonstrate that the United States has failed to establish the existence of current adverse effects from subsidies allegedly maintained after the end of the implementation period.

V. ALLEGED PROHIBITED SUBSIDIES

A. ALLEGED CONTINGENCY ON EXPORT PERFORMANCE

21. The United States attempts to re-iterate its original *de facto* export subsidy claims with respect to French, German, Spanish and UK financing for the A380. The United States also makes new claims with respect to French, German, Spanish and UK financing for the A350XWB. Grouping all of the measures together without distinction, the United States asserts that export contingency arises, because the "grantors" of financing anticipated exports, and because the "anticipated ratio" of domestic to export sales with the financing allegedly exceeds the "baseline ratio" that would be achieved by a hypothetical profit-maximising firm without subsidy.

22. The US claims fail. The United States' characterisation of this mechanistic approach as constitutive of a "test" set out by the Appellate Body is inaccurate. The US approach does *nothing* to explain why the design, structure and modalities of operation *set out in the measure*, assessed in the context of *the total configuration of facts* constituting and surrounding the grant,

[2] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 706, 707, 709, 710, 713, 1236.
[3] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 709, 710, 725, 745, 1236.

demonstrate that the alleged subsidies are *geared to induce the promotion of future exports* by the recipient, which is the standard repeatedly described by the Appellate Body.[4] The United States does not explain how its "evidence" demonstrates that *the financing agreements at issue induced Airbus to prefer an export over a domestic sale*, in ways that are *not simply reflective of the conditions of supply and demand* in the domestic and export markets.

B. ALLEGED CONTINGENCY ON THE USE OF DOMESTIC OVER IMPORTED GOODS

23. The United States alleges that French, German, Spanish and UK financing for the A380 and the A350XWB was, in each case, granted in exchange for a commitment by Airbus to locate a fixed share of the total development or production work for the aircraft in the relevant country. Specifically, the United States asserts that these "… LA/MSF agreements confirm that the granting of the subsidy was made contingent – in fact and in law – upon the location of certain specific production within specific EU member States, and/or the use and maintaining of certain EU jobs".[5] The United States submits that, by definition, this means that Airbus must use domestic components and not imports, or in other words that the subsidies exclusively benefit domestic producers.[6]

24. Assessing each of the financing agreements individually, the European Union explains that the US arguments merely demonstrate that the investment is in a French, German, Spanish or UK firm, that is, one that will develop and produce the aircraft and have a minimum of activities and employment in France, Germany, Spain or the UK. An employee is not a good. Furthermore, neither domestic development nor production is to be equated with "the use of domestic over imported goods". Thus, the financing agreements to which the United States refers do not demonstrate that the subsidy is conditioned upon the use of domestic over imported goods.

VI. ALLEGED ADVERSE EFFECTS

25. The United States has not established that there exist, at present, any subsidies. Accordingly, the EU adverse effects arguments are in the alternative only. The United States has failed to establish a number of threshold elements to sustain its claims of adverse effects:

26. *First*, Article 7.8 of the *SCM Agreement* precludes the United States from attempting to establish present adverse effects from withdrawn subsidies. *Second*, the United States fails to demonstrate that alleged present subsidies from the financing agreements may be aggregated.

27. *Third*, the United States fails to demonstrate that, following the EU measures taken to comply, there remain subsidies that, at present, cause adverse effects presently arising (after the end of the implementation period on 1 December 2011) given "current factual conditions".[7] *Fourth*, the United States fails to establish its adverse effects claims based on "markets", whose geographical, product and temporal scope are supported by evidence.

28. *Fifth*, the United States fails to demonstrate a present causal link by taking into account previous causal links no longer existing today, or that are too remote through the passage of time and the effects of intervening causes and other non-attribution factors. *Sixth*, the United States fails to demonstrate that its "like products" are "non-subsidised". Neither the United States nor the compliance Panel may ignore the established fact that the alleged U.S. "like products" are heavily subsidised. *Seventh*, the United States fails to demonstrate that any cumulation of adverse effects is warranted.

A. ALLEGED ADVERSE EFFECTS RELATED TO THE A320 FAMILY LCA

29. The subsidies that were found to have caused Airbus to launch the A320 family LCA as and when it did, have been withdrawn in full. Thus, the European Union addresses the US adverse effects arguments relating to the A320 family solely in the alternative.

[4] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1044, 1063, 1067, 1084, 1086, 1101.
[5] US FWS, para. 239. *See also Id.*, paras. 202, 203, 209, 213, 218, 219, and Title V.B.3.
[6] US FWS, paras. 203, 219, and Title V.B.2.a.
[7] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.104 and 10.248 (emphasis omitted).

30. *First*, the United States fails to recognise that A320 family LCA aircraft compete in two different markets. Recently, both Airbus and Boeing made very substantial technological enhancements to their existing single-aisle LCA – in the form of Airbus' A320 new engine option ("A320neo") launched in December 2010 and Boeing's 737MAX launched in August 2011. The modifications applied to the previous A320 and 737NG family LCA mean that there is extremely limited competition between the presently-delivered aircraft and these presently marketed improved aircraft.

31. *Second*, the withdrawal of subsidies related to the launch and production of the A320 creates a significant burden for the United States to establish A320-related lost sales and displacement claims, as the United States has claimed no new subsidies for the A320. *Third*, even if none of the original A320 subsidies are withdrawn, the United States fails to address evidence that these decades old subsidies no longer cause *genuine* and *significant* present adverse effects.

32. *Fourth*, the A320 "product" launched in 1984 is not the same product sold and delivered by Airbus in 2012. Since its launch, there have been massive and ongoing private investments into the A320 programme by Airbus and its suppliers, resulting in significant technological modifications and production improvements between 1995 and 2008. Additional significant investments and changes are in the process of being implemented to the A320 family LCA, including those related to the "Sharklet" and A320neo, which have led to significant sales since 2009. Absent its investments, Airbus would no longer be able to compete against the improved Boeing 737NG, let alone the new 737MAX. Cumulatively, these investments and the resulting product and production enhancements are the "*substantial*" causes for Airbus' present and future sales and deliveries of its A320 family LCA – not any alleged remaining A320 subsidies.

33. With respect to US lost sales claims, Airbus' present sales of the original A320 and A320neo are secured by significant product and production enhancements, not by the effect of any non-withdrawn subsidies. There is no basis for US allegations of present effects from sales Boeing's 737NG lost during the 2001-2006 reference period, because all such sales have now been delivered. The US failure to challenge 2001-2006 sales to *other* Airbus customers precludes any presumption that undelivered follow-on orders by such other customers constitute present lost sales. And US claims that hundreds of A320neo orders caused lost sales to the 737NG fail to recognise that the A320neo is not in the same market as the 737NG.

34. Regarding US claims of displacement or impedance, there is no jurisdictional basis for the US claim of *threat* of displacement or impedance in the EU market. On the substance, the US claims of impedance and displacement fail to evaluate 2012 market share data, erroneously rely on historical delivery trends not reflecting present market shares and deliveries, ignore the absence of displacement, identify no reliable or discernible trends, and fail to establish how historical, unchallenged sales of the A320 family LCA presently impede deliveries of 737NG.

B. ALLEGED ADVERSE EFFECTS RELATED TO THE A330 FAMILY LCA

35. The subsidies that were found to have caused Airbus to launch the A330 family LCA, as and when it did, have been withdrawn in full. Thus, the European Union addresses the US adverse effects arguments relating to the A330 family solely in the alternative.

36. *First*, the United States fails to recognise that the A330 family LCA aircraft compete in conditions that give them a virtual temporal monopoly for smaller twin-aisle aircraft that are available for near-term delivery. The competitive realities place the A330 in a market separate from most other twin-aisle aircraft and are a key non-attribution factor to consider in evaluating US lost sales and displacement or impedance claims.

37. *Second*, the withdrawal of A330-related subsidies creates a significant burden for the United States to overcome, as the United States challenges no new subsidies for the A330. *Third*, even if none of the original A330 subsidies are withdrawn, the United States fails to address evidence regarding the passage of considerable time.

38. *Fourth*, the United States fails to recognise that the A330 launched in 1987 is not the same product that is being sold, and delivered, by Airbus in 2012. Since the subsidised development of the A330, there have been massive and ongoing private, non-subsidised investments to the

aircraft by Airbus and its suppliers. These investments have increased the maximum take-off weight and range of the A330, resulting in significant present market demand.

39. By contrast, Boeing made no significant investments to enhance the performance and operating efficiency of the 40-year-old 767. The 767, or Boeing's 777, are too large and heavy an LCA to be attractive to airlines seeking a smaller, economically-efficient twin-aisle aircraft with a medium range. And the 787 has been plagued by delivery delays and a huge order backlog precluding the availability of any near-term delivery slots. Thus, the genuine and substantial cause of any present Airbus sales and market share related to the A330 sales are Airbus' timely and significant investments in upgrading the range and take-off weight and reducing the operating costs of the A330 – not the effects of any remaining, decades-old subsidies related to the A330.

40. Turning to the US lost sales claims, the United States offers no explanation for claiming such lost sales today when it made no such allegations during the 2001-2006 reference period. Nor does the United States address the fact that the A330 is not in the same market as the 777, that Airbus secured A330 sales based on strong airline preference for the A330 from airlines that require a smaller twin-aisle aircraft with a more medium range, and that continued low sales of the 767 are due to Boeing's failure to invest in upgrading the aircraft's 40-year-old technology.

41. The US displacement or impedance claims fail because they are based on distorted market share tables that improperly combine deliveries spanning a number of twin-aisle aircraft product markets, and ignore that the A330 is not in the same market as other twin-aisle aircraft. The US third country impedance claims ignore the absence of displacement, are not based on any relevant market trends, and fail to explain how historical, non-challenged sales of A330 LCA presently impede 767 and 777 deliveries.

C. ALLEGED ADVERSE EFFECTS RELATED TO THE A380 FAMILY LCA

42. For the A380, the United States fails to demonstrate present adverse effects that are presently caused after the end of the implementation period. Again, the United States fails to take account of the withdrawal of pre-A380 subsidies that the original panel found were the principal cause of any lost sales existing in the 2001-2006 reference period.

43. In the alternative, the United States fails to establish that any allegedly remaining subsidies benefiting the development and production of the A380 (financing from France, Germany, Spain and the UK, or regional development grants) are sufficient to constitute a present genuine and substantial link to the alleged present adverse effects. This is particularly critical because the original panel did <u>not</u> find that Airbus could not have launched the A380, as and when it did, without A380 MSF and without the regional development grants.[8]

44. Even without the A380-related subsidies, EADS would have had funds sufficient to finance the development of the A380. Moreover, the A380 business case would also have been viable absent MSF for the A380. In these circumstances, any existing subsidies benefiting the A380 are not a substantial cause of its launch and, thus, are not a substantial cause of any alleged adverse effects presently arising.

45. Any adverse effects from the US A380-related lost sales claims arising from the 2001-2006 reference period are removed by deliveries. The US lost sales claims fail because the 747-8 and A380 operate in separate markets, and because the United States ignores the very particular demands and needs of particular airlines for the operating, performance, revenue-generating and cost-savings attributes of the A380, compared to any Boeing LCA (and the 747-8 in particular).

46. US claims of displacement or impedance also fail because the A380 and 747-8 are in different markets, and in any event, there are no identifiable or reliable trends due, in part, to production and development delays for the 747-8. US claims of impedance suffer from a lack of any identifiable or reliable trends or any evidence that airlines demand particular attributes of Boeing LCA compared to the A380.

[8] Panel Report, *EC – Large Civil Aircraft*, para. 7.1948.

D. ALLEGED ADVERSE EFFECTS RELATED TO THE A350XWB FAMILY LCA

47. For the A350XWB, the United States fails to demonstrate that financing agreements for the aircraft are properly within the scope of these compliance proceedings, or that these loans constitute subsidies. On the basis of these infirmities alone, the compliance Panel could reject the US adverse effects claims relating to the A350XWB.

48. In the alternative, the US fails to establish a genuine and substantial causal link between financing for the A350XWB and any alleged present adverse effects, through the alleged product launch effect of the subsidies on the existence of the A350XWB. In particular, Airbus committed to the launch of the A350XWB, and began its development, accepted orders and signed up risk-sharing and other suppliers two and a half years before the signature of the first financing agreement. Moreover, EADS would have had the funds to finance the development of the A350XWB, even without the financing agreements for the A380 and the A350XWB.

49. Finally, the European Union establishes the dramatic technological differences between the A380 and the A350XWB, rebutting the US assertions that the aircraft benefited significantly from developments that Airbus implemented on its A380. In these circumstances, there is no basis for a finding of a presently existing causal link.

50. Moreover, there is no basis for US lost sales claims involving the A350XWB based on contractual settlements and conversions to that aircraft by airlines that had ordered the later-cancelled original A350. Since the United States has not challenged these sales in the original proceedings, there is no legal basis for it to challenge them now in these compliance proceedings. US lost sales claims related to the A350XWB also fail because the United States fails to take into account the existence of several twin-aisle markets and the distinctive demands of customers for particular types of large and smaller twin-aisle LCA that significantly limit competition between these aircraft.

51. Finally, the European Union notes that, presently, there have been no deliveries of A350XWB LCA. Consequently, there can be no present displacement or impedance based on present deliveries of A350XWB LCA. And since the United States has not raised (and cannot now do so) a threat of displacement or impedance, the Panel should reject the US displacement and impedance claims relating to the A350XWB.

E. ALLEGED ADVERSE EFFECTS RELATED TO THE A300, A310 AND A340 FAMILY LCA

52. With respect to the A300, A310, and A340, the subsidies that caused the launch of these aircraft, as and when they were launched, are fully withdrawn, such that the United States has secured the remedy it is due, and no assessment of any alleged present adverse effects is warranted. In any event, it is difficult to understand how any adverse effects could accrue to US interests from any existing subsidies for these three LCA programmes, since Airbus no longer sells nor delivers A300, A310 or A340 LCA and has, in fact, terminated these LCA programmes.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. In Section II, the EU recalls the legal framework governing these proceedings, including, in particular, the question of the burden of proof. In Section III, the EU addresses the scope of these proceedings. Section IV addresses the US failure to establish the existence of subsidies after the end of the implementation period, in light of EU measures taken to comply. Section V rebuts the US claims of prohibited subsidies. Section VI addresses the US failure to establish present adverse effects presently caused after the end of the implementation period.

II. THRESHOLD ISSUES

2. In its SWS, the US continues to shrug off its burden of proof. The US continues its failure to demonstrate present subsidies, as well as presently arising adverse effects presently caused.

III. THE US CHALLENGE INCLUDES MEASURES AND CLAIMS THAT ARE OUTSIDE OF THE COMPLIANCE PANEL'S JURISDICTION

3. None of the A350XWB financing agreements challenged by the US is a "measure{} taken to comply", such that they are outside the scope of the Panel's jurisdiction under Article 21.5 of the DSU. The US claims against the four A380 financing agreements under Articles 3.1(a) and (b) of the *SCM Agreement* are likewise outside the scope of the Panel's jurisdiction. Finally, the US Panel Request fails to satisfy Article 6.2 of the DSU; the US Panel Request does not cover claims concerning an alleged *threat* of displacement and impedance of imports pursuant to Article 6.3(a) of the *SCM Agreement*.

IV. ALLEGED PRESENT SUBSIDIES

4. Article 7.8 of the *SCM Agreement* affords an implementing Member the option to withdraw the subsidy, or to take appropriate steps to remove adverse effects. By 1 December 2011, the EU had procured withdrawal of most of the subsidies covered by the recommendations and rulings of the DSB, taking heed of the Appellate Body's statement that a subsidy is brought to an end "either through the removal of the financial contribution and/or the expiration of the benefit". Certain subsidies were withdrawn through removal of the financial contribution; certain subsidies were withdrawn through expiration or cessation of the benefit; and, withdrawal of some subsidies was accomplished through both of these means.

A. Horizontal issues

5. First, Article 7.8 permits a respondent to achieve compliance by, *inter alia*, withdrawing the subsidy. In proceedings implicating Article 7.8, a fundamental question is whether "subsidies that the DSB has already found to exist", indeed exist after the end of the implementation period, in light of, *inter alia*, any "measures taken to comply". If the complainant fails to establish, in light of the respondent's measures taken to comply, that the subsidies exist after the end of the implementation period, then it has failed to demonstrate that withdrawal has not occurred.

6. Second, the US asserts that unless *all* subsidies have been withdrawn, the withdrawal of *some* subsidies is not relevant under Article 7.8. The US errs. "Subsidy" is a defined term, consisting of three elements set out in Article 1 of the *SCM Agreement*. The existence of subsidies is not established "collectively", but is instead a matter of establishing these three elements, for each measure, individually. When Article 7.8 affords the option to comply by withdrawing "the subsidy", the term bears the meaning set out in Article 1. Thus, the EU is entitled to comply by establishing, *inter alia*, that it has withdrawn one or more of the constituent elements leading to a finding, in the original proceedings, that a given measure pursued by the US was a "subsidy".

7. Third, and recalling Appellate Body statements that withdrawing the subsidy or removing the adverse effects will "usually" or "normally" involve affirmative action by the respondent, the US argues that the EU may not rely on the passage of time to establish withdrawal (because the benefit has expired, or the life of the subsidy has otherwise come to an end). The US errs. The Appellate Body's statements beg the question whether the temporal features of this dispute are "usual" or "normal". The role the passage of time "usually" or "normally" plays in assessing compliance under Article 7.8 must be assessed in the specific temporal context in which it arises. Here, the US challenged subsidies that were provided up to 43 years ago. Moreover, the Appellate Body also stated that a subsidy has a "finite life", which "accrues and diminishes over time" and "comes to an end". The EU has provided an expert report using established methodologies charting the accrual and diminishment of the subsidies at issue over time.

8. Fourth, the US asserts that events marking the end of a subsidy's life that arise "before the finding of WTO inconsistency cannot satisfy the EU's obligation to withdraw the subsidies". The US errs. Panels and the Appellate Body have expressly ruled that "measures taken to comply" may be taken *before* a finding of WTO inconsistency is adopted by the DSB. The Appellate Body has found that "compliance with the recommendations and rulings of the DSB can be achieved before the recommendations and rulings of the DSB are adopted".

B. Termination of instruments providing the terms of subsidies

9. Termination of an instrument is an additional piece of evidence, even if not necessary or sufficient in and of itself, constituting recognition by the parties of withdrawal (or cessation of adverse effects). As such, the EU does not accept, as the US suggests, that terminations of loan agreements are irrelevant. The EU additionally notes that certain of the terminations listed by the US, while not accompanying withdrawal of the subsidy *by virtue of repayment of principal and interest* of the underlying loans, still accompany withdrawal of the subsidy, albeit *by means other than repayment*.

C. Repayment of principal and interest

10. The Appellate Body found that the "removal of the financial contribution" results in the "life" of a subsidy coming "to an end". The EU has established that the principal of a series of EU member State loans, plus the interest due, has been repaid, such that the financial contributions were returned, and the life of the subsidies brought to an end. Thus, the US has failed to demonstrate the existence of the subsidies at issue after the end of the implementation period, because they have been withdrawn. The US argues that, to make the removal of the financial contribution meaningful, the repayment effected would have to remove the "benefit" element of subsidy. However, arguing that effecting repayment of principal and interest does not remove the "benefit" of the MSF loans relative to market is, however, a response to an argument the EU has not made.

D. Amortisation

11. The US takes a number of erroneous legal positions and makes unsupported factual assertions regarding the amortisation of subsidies – or in other words, the *ex ante* trajectory of the life of the subsidies, or the accrual and diminishment of the subsidies over time. The EU demonstrates that, contrary to the US assertion, the original panel made no findings regarding present subsidisation during the original reference period. The EU then rebuts the US assertion that amortisation is not relevant under Article 7.8 to assess whether a subsidy has been "withdraw{n}". Next, the EU addresses erroneous US arguments regarding the *ex post*, rather than *ex ante*, determination of an amortisation period, and the relevance of the actual terms of the subsidies for establishing their amortisation period. Finally, the EU addresses a number of additional errors in the US amortisation arguments for specific subsidies. In summary, the US has failed to establish that, in light of amortisation, the subsidies exist after the end of the implementation period and have not been withdrawn.

E. Extinction and extraction

12. The US does not dispute that the "extinction events" are properly before the Panel, but asserts that the "extraction events" were rejected and are not properly before the Panel. The US

errs. Under Article 21.5, there is a disagreement between the Parties "as to the existence" of a measure taken to comply (the cash extractions), and "as to the consistency" of that measure with a "covered agreement", namely Article 7.8. Moreover, the Appellate Body did not resolve the question whether the cash extractions remove "all or part of a subsidy", but said it is a question to be dealt with by a compliance panel. Thus, both the extinction and extraction events are properly before the Panel.

13. Turning to the substance, the EU has established that the cash extractions removed value. Specifically, the value of the German and Spanish assets received by EADS upon its creation was lower than the value of the assets held by DASA and CASA respectively prior to the transaction. Moreover, the EU has explained how the subsidies were reflected in the companies' balance sheets, and how the cash extractions removed the remaining value of the subsidies by reducing the companies' net asset value, which reflected, indirectly, the value of these subsidies.

14. With respect to the share transactions, the US asserts that the EU "relies on an incorrect legal test" and that "the facts at issue do not satisfy the correct test". Both assertions are wrong. First, the Appellate Body set out three criteria to establish the presumption that a transaction extinguishes the residual value of subsidies, despite the US attempt to add an additional criterion. Moreover, all three share transactions at issue meet the three criteria; as the US has not provided evidence to rebut the resulting presumption, the Panel should find that the three transactions extinguish the residual value of the subsidies. Accordingly, the US has failed to establish the existence of the subsidies, which have been withdrawn.

F. A350XWB financing agreements

15. The US claims that financing agreements concluded between Airbus and France, Germany, Spain and the United Kingdom in relation to the A350XWB are subsidies that are prohibited, and that cause adverse effects. However, the US has failed to establish that the agreements confer "benefits", under Article 1.1(b) of the *SCM Agreement*. The US has abandoned its argument that the A350XWB loans confer benefits because they allegedly represent an instrument not otherwise available at market. Moreover, in assessing the terms of the loans, the US improperly understates the rates of return implied in the loan agreements, and provides a flawed benchmark that it inaccurately ascribes to Professor Whitelaw, and that overstates required market rates of return.

V. ALLEGED PROHIBITED SUBSIDIES

A. The United States has not demonstrated the existence of any subsidy contingent in fact upon anticipated export

16. The US asserts that French, German, Spanish and UK financing for the A380 and the A350XWB are subsidies contingent in fact upon anticipated export. The US compares the anticipated ratio of domestic to export sales with the subsidy, to a "baseline" ratio of domestic to export sales that would be achieved by a hypothetical profit-maximising firm without subsidy, and concludes that changes in the ratios demonstrate that the financing agreements for the A380 and the A350XWB must be subsidies contingent in fact upon anticipated export.

17. The EU establishes that the ratios calculated by the US are riddled with errors, and do not represent what the US asserts they represent. The errors in the US approach are more fundamental, however. The US presents its arguments as if it were simply a question of providing "the final piece of evidence" or "filling the gap" in order to "confirm" an inconsistency. This is untrue. In the original proceedings, the Appellate Body reversed the legal standard adopted by the panel, sweeping away the prior associated US legal argument. Consequently, the US must *demonstrate* export contingency, and not just fill in a "final piece" of or gap in the evidence allegedly remaining after the original proceedings.

18. The Appellate Body clarified that: (i) mere anticipation of exports is not sufficient to demonstrate contingency; (ii) the analysis must focus on the design, structure and modalities of operation *set out in the measure*, assessed in the context of the total configuration of facts surrounding the grant; (iii) nothing in the design, structure and modalities of operation set out in the financing agreements demonstrates or supports the existence of export contingency; and (iv) nothing in the other evidence demonstrates or supports the existence of export contingency.

19. Notwithstanding this guidance, the US attempts to pursue its claims by mischaracterising the Appellate Body's "indicative", "illustrative" "numerical examples" as a "test", re-iterating assertions about "anticipation", re-cycling evidence that has already been considered and rejected, and by relying upon "baseline ratios" that are defective in several respects. This mechanistic approach leads the US to the absurdly implausible proposition that any *benefit* in the financing agreements was anticipated to cause and in fact caused foreign airlines to massively increase *their* demand (which is in fact driven by *their* customer base and generally higher demand growth in non-EU markets). As in the original proceedings, the latest US argument does nothing to demonstrate why the granting of the subsidy might be considered geared to induce the promotion of future export performance by the recipient, in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets.

B. The United States has not demonstrated the existence of any subsidy contingent, in law or in fact, upon the use of domestic over imported goods

20. The US brings claims of subsidies contingent in fact upon the use of domestic over imported goods with respect to French, German, Spanish and UK financing for the A380 and the A350XWB. According to the US, in each case the financing was "granted" "in exchange for a commitment" by Airbus to locate a fixed share of the total development or production work for the aircraft in the relevant country. The US argues that the financing agreements thus require Airbus to produce specific "sub-assemblies and components" or "parts" in the territory of the EU, which accordingly become "domestic products" of the EU, and then use those "domestic products" as "manufacturing inputs" in the production of the finished aircraft.

21. Article 3.1(b) of the *SCM Agreement* requires the contingency to be demonstrated with respect to the "use of domestic over imported goods". Thus, the term "use of … goods" circumscribes what is prohibited. The Agreement does not use the terms "development" or "production". Accordingly, a subsidy contingent upon domestic development or production is not prohibited. Such a subsidy might or might not have adverse effects on imported goods; however, if within the scope of the *SCM Agreement*, that is a matter to be addressed under Part III. Members are not *prohibited* from tying their subsidies to domestic production, that is, granting them exclusively to domestic producers; they must only ensure that such subsidies do not *cause* adverse effects to the interests of other Members.

22. This feature of subsidies law is enshrined in the text of the GATT 1994, as interpreted in the *SCM Agreement*. In particular, Article III:8(b) is essential context for understanding the proper scope of Article 3.1(b). In exercising its rights under Article III:8(b), it is for the granting Member to select the domestic producers (that is, the firms producing particular goods) to be subsidised. Thus, if a Member merely grants a subsidy (for example to an aircraft producer), and in doing so restricts it exclusively to a domestic producer, declining to grant it to foreign producers, it benefits from the safe harbour of Article III:8(b), as interpreted in the *SCM Agreement*, and does not violate Article 3.1(b). Such a subsidy might influence the *location* of a firm (as permitted by Article III:8(b)), but, taking the location of the firm as a given, it does not create a mechanism that incentivises or favours a substitution of imported inputs with domestic inputs.

23. Article 3.1(b) does not address subsidies where the product that receives the subsidy is *the same* as the good that it is alleged must be used; nor where the producer of a downstream product that receives the subsidy is *the same* as the producer of the upstream good that it is alleged must be used. A firm *uses* an *input*; it does not *use* an *output*; and the same thing cannot be, at the same time and for the same firm, both an *input* and an *output*. It can only be one or the other. Nor can the producer of the downstream and upstream products be *the same*, because in that case there is simply no relevant *input*. To construe Article 3.1(b) in the manner argued for by the US is to trespass on the domain of Article III:8(b).

VI. ALLEGED PRESENT ADVERSE EFFECTS

24. The US claims that the EU allegedly failed to remove the adverse effects, within the meaning of Article 7.8. At the outset, the EU recalls that these claims must fail for lack of evidence of any present subsidisation, as discussed in Section IV, above. The US has failed to demonstrate that any of the subsidies exist after the end of the implementation period, and are not withdrawn. In these circumstances, compliance has been achieved; under Article 7.8, there is no basis for the

compliance Panel to find present adverse effects from subsidies that have been withdrawn, and for which compliance has been achieved.

25. Should the Panel find that there are present subsidies, the EU also explains that the US has failed to establish the existence of present adverse effects, presently caused by such subsidies after the end of the implementation period. Specifically, the US has failed to establish a present genuine and substantial causal link for each of the Airbus products for which it raises adverse effects claims:

- With respect to the A320 and A330, the US has failed to demonstrate a *present* and *substantial* causal link between any presently existing subsidies and alleged present adverse effects, given, in particular, its failure to consider the passage of considerable time since the grant of the subsidies, during which Airbus made significant non-subsidised investments in the A320 and the A330.

- With respect to the A380, the US erroneously relies on the effects of withdrawn pre-A380 subsidies to try to establish a present causal link, and ignores evidence demonstrating that EADS and Airbus could and would have launched the A380 absent EU member State financing for the A380.

- With respect to the A350XWB, the US has failed properly to account for the fact that the financing agreements were not concluded until well after Airbus had launched, partially developed and accepted 500 orders for the aircraft. Moreover, the evidence establishes that the A350XWB was economically viable without the financing agreements, that compelling strategic considerations would have led EADS and Airbus to launch the programme without those agreements, and that the companies had the financial means to fund launch and development absent those agreements. Finally, the evidence establishes that any remaining effects from any allegedly non-withdrawn pre-A350XWB subsidies are insufficient to establish a substantial causal link due to the dramatic technological differences between the A350XWB and prior Airbus aircraft.

- With respect to the A300, A310 and A340, it is difficult to understand how any adverse effects could accrue to US interests, since Airbus no longer sells nor delivers these LCA, and has terminated the programmes.

26. In addition, the specific failures in the US lost sales claims are legion, including, notably, its failure to account for non-attribution factors affecting groups of and individual sales, which make any causal link non-substantial. Similarly, the US has failed to raise present displacement and impedance (or threat thereof) claims based on properly established product markets, has failed to establish the required present trends in the flawed product markets it does identify, and has ignored non-attribution factors that affect the markets at issue.

ANNEX C-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE EUROPEAN UNION AT THE PANEL MEETING

Mr. Chairman, distinguished Members of the Panel,

1. We come to this hearing as the Party that has filed the most recent written submission, which, like our first written submission, is a substantial document. You may be relieved to hear that we therefore have a relatively short oral statement for you today.

2. So what is it that we should say to you today? We are not in a position to react, in this oral statement, to the submission just delivered by the United States, although we will of course do so in due course, in response to your written questions. You have already seen our written submissions, in which we explain how and why we have complied with the recommendations and rulings of the DSB, and we do not want to repeat ourselves. This is an oral statement, not a written submission, and we do not wish to burden you with inappropriate and excessive detail.

3. How, then, should we use the time available to us in this hearing most profitably? It seems evident to us that we should rather focus on the big picture. In particular, we would like to focus on some broad cross-cutting shortcomings and attempted (but failed) short-cuts in the overall structure of the US case.

4. That does not mean that what we have to say today is mere rhetoric, detached from the specific legal determinations you are charged with making. Rather, we take this approach in order to highlight a pattern in the US arguments in these proceedings. Specifically, when the matters in dispute get refined down to the detailed point of adjudication, the United States tends to have recourse, expressly or by implication, to one of the big picture issues we address today, attempting to use it, subjectively, to mask a shortcoming in its evidence, or to colour the adjudication in its favour. You, in contrast, are charged with making an *objective* assessment of the matter at hand. These big picture issues are, therefore, highly pertinent to the assessment that you are called upon to make in this case, in the sense that they need to be *brought out of the shadows*, *challenged* and *dispelled*. That is what we set out to do in this oral statement.

5. Were we to encapsulate these issues in one word, that word would probably be "assumption". It is sometimes said that the devil is in the detail. Well, as I have already indicated, we think we have covered the detail in our written submissions, and we would say that what is in that detail is the truth, or at least as close as one can reasonably get to it. In the case of the US submissions, we would rather say that *the devil is in the assumptions* – the subjective assumptions – that litter the entire US case. People say that the bigger the assumption the more likely it is to be believed. Thankfully, such assertions carry no weight in the WTO's unflinching rules-based system, which is based on an *objective* assessment of the matter, and particularly of the evidence.

6. What sort of subjective assumptions are we speaking of? Here are a few of them, taken from the US' submissions and public statements:

- The WTO found that the amount of the subsidies at issue in this dispute is USD 18 billion.[1]

- The complainant does not have the burden of proof in compliance proceedings involving subsidies. Accordingly, the United States need not demonstrate that subsidies exist after the end of the implementation period, in order to show that the subsidies have not been withdrawn. Nor need the United States demonstrate present adverse effects presently caused, in order to show that the adverse effects have not been removed.

[1] "In April 2012, the United States initiated compliance panel proceedings due to the EU's apparent failure to comply with the WTO's 2011 findings that $18 billion in subsidies conferred on Airbus by the EU and member countries were WTO inconsistent". The President's 2013 Trade Policy Agenda, available at: http://www.ustr.gov/sites/default/files/Chapter%201%20-%20The%20President's%20Trade%20Policy%20Agenda.pdf.

- Although a responding Member enjoys the choice between withdrawing a subsidy or removing the adverse effects, WTO implementation obligations are more stringent for subsidies than for other types of measure, such that the respondent remains responsible for allegedly lingering adverse effects from withdrawn subsidies.

- The market never engages in project finance, and risk-sharing cannot be priced at market.

- In competitive markets, *every* subsidy causes adverse effects.

- In particular, financing extended by the EU member States always causes an LCA programme to be launched, even where the programme was economically viable without the alleged subsidy, and even where the recipient could have funded the launch without the alleged subsidy, as long as newspaper articles and the generic Dorman model say so.

- A complainant can assume that subsidies benefiting one product cause economic harm to another product, without *evidence and analysis* demonstrating that the two products fall into the same product market.

- The adverse effects from an actionable subsidy do not dissipate, but instead increase, with time, for as long as a subsidised product, and any subsequent products, are in the market.

- Without the subsidies, there would be no EU LCA industry, or at least none of Airbus' current or future products would exist.

- The United States never grants subsidies, has never granted subsidies to Boeing, and in any event this is irrelevant.

7. These subjective and erroneous assumptions permeate the entire US case, expressly or by implication. When the overall effect is considered, the US approach is simply jaw-dropping, remote as it is from the requirements set out within the four corners of the *SCM Agreement*.

8. Well, we have covered these issues in our written submissions, and as I have said, we do not want to repeat ourselves. But let us take a couple of points by way of example, to illustrate what we mean.

9. Consider the proposition that where two firms compete, each and every subsidy to one must be *assumed* to cause adverse effects to the other. That is exactly what the United States does in this dispute: it asks you to accept the assumption that each and every alleged subsidy to Airbus causes adverse effects to Boeing, because the two companies compete for LCA sales.

10. Now, the WTO has indeed found that some EU member States have provided repayable loans to finance portions of Airbus' development costs. But there is no such thing as a free lunch – and this is a pertinent observation here in two senses.

11. First, these loans are not grants given without any repayment obligation in return (like the funds provided by the United States to Boeing) – they are *repayable.* Why then does the United States insist on asserting that the WTO has found that the amount of the subsidies is USD 18 billion? Every person in this room knows this assertion to be false. The WTO has "found" no such thing. The United States appears to refer to what it alleges to be the amount of the *principal* involved. But the *objective* facts and evidence reveal more – that the agreements *require repayment* (and in fact many of the loans have been *repaid*, with *interest*). The US *assumption* about USD 18 billion worth of subsidies is thus untenable, and directly contradicted by the facts and the *evidence*.

12. Second, even if the United States would have established that the interest rate on any of the loans was below a market benchmark, there has still been a ***quid pro quo***. And that *quid pro quo* is ***location*** – that is, *the* ***additional costs*** to Airbus in being constrained to develop and produce the aircraft in Europe as opposed to elsewhere.

13. As in the United States, including with respect to Boeing, a cornerstone of European industrial policy is creating and maintaining high quality jobs. We are not ashamed of that, any

more than is the United States – and a great many statements to that effect have been made by both the US authorities and by Boeing.

14. The covered agreements do not suggest that this type of measure, which is conceptually similar to financing the additional costs of adapting to more stringent local environmental standards, is particularly problematic. Quite the contrary. The *SCM Agreement* expressly recognises that government assistance for various purposes is widely provided by Members, and that the mere fact that such assistance may not be non-actionable does not restrict the ability of Members to provide it.[2] Environmental subsidies were temporarily non-actionable,[3] and even today, like all other subsidies, and by way of an additional requirement compared to other types of measure, a complaining Member must *demonstrate*, with evidence, that a subsidy *causes* serious prejudice.

15. Accordingly, if a Member finances the cost of fitting a scrubber to a firm's chimney to comply with local environmental standards in its jurisdiction, a panel bound by the requirement to undertake an objective assessment of the matter cannot *assume* that this causes serious prejudice to a firm in another jurisdiction that is not subject to the same environmental standard.

16. That observation is *just as pertinent* to the case before you today, and triggers a critical question. Even if the EU member States' financing *offsets* Airbus' *additional costs* in being constrained to develop and produce the aircraft in Europe as opposed to elsewhere, how can it be used to *cause* serious prejudice to US interests, that is, to Boeing?

17. In a rules-based dispute settlement system, the answer to this question cannot be that, because Airbus and Boeing compete in various product and geographic markets, every subsidy to one must be *assumed* to have "created" the recipient or one of its products, and for this reason, to have caused serious prejudice to the other. Rather, the existence of a subsidy to one causing adverse effects to the other must be *proven*, with *evidence*, on the basis of a reasonable and appropriately calibrated causal mechanism.

18. Rather than undertaking the required task of *demonstrating* that net funds remain, and are used to price down LCA and trigger one of the enumerated forms of serious prejudice listed in Article 6.3 of the *SCM Agreement*, the United States has resorted to various attempted short-cuts, which collectively amount to little more than a leap of faith. This is particularly true of the US' cascading "creation" causation argument, which culminates with the alleged effect of European government financing on the launch of the A350XWB. Specifically, the United States argues that EU member State financing caused Airbus to launch an aircraft that it would not otherwise have launched, and that that launch taught Airbus things that caused *subsequent* aircraft to be launched, and that each of these launches caused Airbus to win sales and take market share from Boeing, and that this harm persists for as long as *any* Airbus aircraft, including those that may subsequently be developed and launched, are sold.

19. In short, the alleged subsidy itself is not shown, with evidence, to cause any of the enumerated forms of serious prejudice listed in Article 6.3. Instead, the starting point – that Airbus received EU member State financing – and the ending point – that Boeing has made some sales but not others and has a particular market share – are simply fused together. The middle, or how those two points are bridged, is murky, and joined through attempted short-cuts, artifice and mere assumption.

20. We are not saying that an attenuated causal chain involving multiple links from alleged subsidy to alleged adverse effects is impossible to construct. But the longer and more attenuated the alleged chain, the more diligent and rigorous a complainant must be if it is to succeed, and the more demanding the adjudicator should be. In this case, the United States is asserting a particularly attenuated causal chain, in an attempt to jump the gap from alleged subsidy to alleged adverse effects, particularly by employing a series of attempted short-cuts, which are simply not supported by the evidence. It is a leap of faith that fails.

21. Thus, we are calling the US bluff. We are raising our hand and saying that the emperor has no clothes. A rules-based system requires *proof* of claims made. An *intuition* that an alleged

[2] *SCM Agreement*, footnote 23.
[3] *SCM Agreement*, Article 8.2(c).

subsidy to one firm harms a competing firm is *not enough*. A rules-based system requires *objective evidence establishing* the alleged causal links the United States asserts, rather than attempted short-cuts and assumption. What does this mean in practice in this case?

22. First, it means holding the United States to its procedural obligations. We know that the United States is trying to back-load these proceedings and deprive the European Union of its due process rights by ambushing us, and constraining our ability to respond. This tactic began by filing a first written submission that lacked any real substance and that challenged as actionable subsidies measures it had not even seen, on the false assumption that it lacked the procedural means to seek evidence in advance, through Annex V, or questions posed pursuant to Article 13.1 of the DSU. The tactic has had a knock-on effect, such that, only today, we are hearing for the first time evidence and argument that should, consistent with the United States' burden as complainant, have been provided to us and to you nearly 12 months ago. We say that untimely material must simply be rejected.

23. Second, it means holding the United States to the law, as clarified by prior disputes. When the United States sets out, as it has done in other instances, such as with respect to Annex V, to challenge the Appellate Body – the agreed final adjudicator in our treaty system – its submissions need to be dealt with accordingly. We note in this regard the United States' refusal to accept the Appellate Body's express finding, in this dispute, that a subsidy has a finite life, set on an *ex ante* basis at the time of grant. Similarly, the United States challenges the Appellate Body's finding that the repayment of the financial contribution (for example in the form of principal and interest) brings a subsidy to an end. Moreover, it challenges the Appellate Body's finding that the effects of subsidies dissipate over time, asserting instead that the effects of any subsidies to Airbus exist for as long as Airbus sells and delivers any and all of its products.

24. Third, and perhaps above all, it means holding the United States to its burden of proof and persuasion. The United States had a job to do in these proceedings, as a function of its role as complainant in a dispute governed by the DSU and Article 7.8 of the *SCM Agreement*. That was to *demonstrate* that subsidies exist after the end of the implementation period – such that they have not been withdrawn – and that those subsidies presently cause present adverse effects – such that those adverse effects have not been removed. It has shirked the task, in favour of the types of attempted short-cuts and subjective assumptions we have already mentioned.

25. Shirking that task is a choice, and the United States is free to have made it. You, however, are not free to accept it. You are charged with *objectively* assessing the *evidence*, to determine whether it supports the claims advanced by the United States. That the US gamble involves high stakes is no reason to substitute subjective assumptions for objective and detailed assessment, based on *evidence*. WTO dispute settlement is not a game of poker. It is an international legal adjudication. As I have already said, we are calling the US bluff, and we respectfully ask you to do the same. If this means rejecting the US case, then that is entirely right and proper, as a response to a strategic choice by the United States to employ attempted short-cuts and subjective assumptions instead of evidence.

26. In closing our oral statement, it is worth recalling that we evidently did not choose to bring this dispute, or the companion dispute involving US subsidies to Boeing, to the WTO. We recognise that it places a huge burden on the WTO dispute settlement system. Moreover, these disputes, triggered by a US objection to an alleged location subsidy to create jobs in the European Union, do nothing to advance trade – something evident from the mutual requests for countermeasures involving tens of billions of US dollars annually. It appears that, for Boeing, this litigation may be a relatively cheap option to pursue commercial interests by other means, with potentially substantial results. It suits Boeing to paint Airbus as "the bad guy" for domestic reasons, including US government procurement, asserting alleged WTO findings that Airbus received USD 18 billion of subsidies, whilst Boeing has, as the story goes, received none.

27. Everyone understands perfectly well that resolving the underlying issues may require an agreement of some kind, and one that may well be of interest to or involve other Members. We understand that. This is the multilateral way forward, capable of adequately reflecting the trade interests of all WTO Members. The European Union is ready to engage in it, on balanced terms. The imbalanced and unsupported assumptions that underpin the US case – to the effect that Airbus should not even exist – and which appear to be driven by an agenda that is not conducive

to trade, are fundamentally at odds with such a rational outcome, and we ask you to reject them, in favour of an objective assessment of the evidence.

Mr. Chairman, distinguished Members of the Panel, we thank you for your attention, and stand ready to answer any questions you may have.

ANNEX C-4

EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF THE EUROPEAN UNION AT THE PANEL MEETING

Mr Chairman, distinguished Members of the Panel, in our Closing Statement, we would like to address selected points that were raised over the past few days.

I. OPTION TO WITHDRAW THE SUBSIDY UNDER ARTICLE 7.8 OF THE *ASCM*

1. The AB has found that, in original proceedings involving claims under Articles 5 and 6 of the *ASCM*, it is possible for an adjudicator to find that expired subsidies have contributed to adverse effects. On Tuesday, the Panel asked whether, in that circumstance, allowing a respondent in compliance proceedings to refer to the expiry of the subsidy as a means of achieving withdrawal and compliance with Article 7.8 of the *ASCM* would make the recommendation in the original proceedings declaratory in nature.

2. To begin, the situation described by the Panel should not arise. Specifically, whatever the merits of a *finding*, no recommendation to withdraw a subsidy or to remove its adverse effects is necessary in that circumstance. Where a recommendation to withdraw the subsidy or to remove the adverse effects from a *group* of subsidies, some of which had expired, is nonetheless issued, that recommendation "do{es} not concern" the expired subsidies. After all, Article 7.8 applies only to the extent the respondent is "granting or maintaining" the subsidy. If the subsidy is no longer "maintained", because it has been withdrawn, any recommendation is unnecessary, and if made, does not apply to the withdrawn subsidy. The AB has noted that an interpreter must "give meaning and effect to the term 'maintain', which is distinct from the term 'grant', and has also been included in" Article 7.8.

3. Moreover, even if a recommendation to withdraw the subsidy or to remove its adverse effects could be said to apply to expired subsidies, *quod non*, withdrawal can be achieved through actions or events pre-dating the DSB's adoption of that recommendation. The AB has, again, explicitly confirmed that "compliance with the recommendations and rulings of the DSB can be achieved before the recommendations and rulings of the DSB are adopted".

4. In these compliance proceedings, your inquiry is governed by Article 7.8, which gave the EU a choice between withdrawing the subsidy or removing the adverse effects. The AB found that the assessment of whether withdrawal has occurred and, thus, compliance achieved, is "best left to" you, as the compliance Panel operating under Article 7.8. Contradicting the AB, the US asserts that, where a subsidy has expired before a recommendation to withdraw the subsidy or remove the adverse effects has been made, the choice expressly provided for in Article 7.8 no longer applies, because withdrawing the subsidy is no longer possible.

5. However, the only reason why withdrawing the subsidy is not possible is because *it has already been withdrawn*, in furtherance of "the first objective of the dispute settlement mechanism". While the Parties agree that withdrawal of a *prohibited* subsidy is a complete remedy, the US position is premised on the argument that achieving compliance through the withdrawal of merely *actionable* subsidies is not painful enough on the respondent. To the US, Article 7.8 always requires "affirmative action" by a respondent, such that when the subsidy is expired (e.g., through amortisation), affirmative action to achieve withdrawal is no longer possible, and the only affirmative action remaining is to remove the adverse effects.

6. In considering the US position, we have asked you to bear in mind that Article 7.8 triggers the *responsibility* of the respondent to ensure that compliance is achieved, through withdrawal of the subsidy or removal of the adverse effects. If compliance is *not* achieved, *despite* affirmative action by the respondent, its responsibility for non-compliance *persists*. Equally, if compliance *is* achieved *without* affirmative action, the respondent's responsibility is *discharged*. The requirement is that compliance with Article 7.8 is achieved, regardless whether it is achieved through the actions of the responsible State, or instead through other events that accomplish withdrawal of the subsidy or removal of the adverse effects.

7. As a closing point on the option of withdrawal, the US now argues that the phrase "withdraw the subsidy" means something different in Article 7.8, than it does in Article 4.7 of the *ASCM*. However, we recall that a "subsidy" is defined in Article 1 "{f}or the purpose of this Agreement", including both Articles 4 and 7. Withdrawing the subsidy involves "removing" or "taking away" one of the component elements of "subsidy" defined in Article 1, whether pursuant to Article 4.7, or instead Article 7.8. The US position is inconsistent with the text of the *ASCM*, as well as with the position it has taken elsewhere. It is also premised on the US assertion that compliance obligations under Part III of the *ASCM* are more stringent than compliance obligations under other agreements that form part of the WTO single undertaking, such as, for example, fiscal or regulatory measures – a proposition that is obviously incorrect.

II. AMORTIZATION

8. For the US, the expiration of the life of a subsidy through amortisation is a concept relevant solely to the assessment of whether adverse effects have been removed, but not to the question of whether a subsidy has been withdrawn. Undertaking a proper adverse effects analysis does require consideration of the degree to which a subsidy is amortised. However, amortisation is equally relevant to an assessment of whether a subsidy has been removed, taken away, expired, ceased to exist, or in other words, withdrawn. As Brazil suggested in its statement, if it's a dead subsidy, it's a dead subsidy.

9. On a related issue, on Tuesday, the US argued that amortisation over the actual life of an LCA programme is required, and is *ex ante* rather than *ex post*, on the *assumption* that the "payments under LA/MSF contracts in most cases continue over the actual life of the aircraft". This assumption is simply wrong as a matter of fact. The agreements anticipate repayment of principal and interest over an expected delivery profile that does not correspond to the life of the aircraft programme, either as anticipated at the time the agreements are concluded, or as the life of the programme unfolds with time (if different). It is simply incorrect to say that the agreements foresee repayment over the entire life of the programme.

10. In any event, the AB unambiguously stated that the finite life of a subsidy, as distinct from the period over which that subsidy causes effects, must be assessed on an *ex ante* basis. The concepts of subsidy and effects must not be "conflate{d}". Yet this is precisely what the US does when it insists on an amortization period defined by the actual life of a product allegedly created by that subsidy, destroying the choice in Article 7.8 in the process.

III. JURISDICTION OVER A350XWB MSF AGREEMENTS

11. The EU has explained that the A350XWB MSF agreements are outside the scope of the compliance Panel's jurisdiction, as they are not "measures taken to comply", within the meaning of Article 21.5 of the DSU. Indeed, the US attempt to bring the A350XWB agreements within the scope of these compliance proceedings is tantamount to rearguing the existence of "an unwritten LA/MSF Programme" – a claim that the original panel had previously rejected. Were the Panel to find that the A350XWB agreements are within the scope of these proceedings, it would be going further than the AB has ever gone in affirming jurisdiction under Article 21.5. Doing so would disrupt the delicate balance between due process and prompt settlement that the AB has faithfully maintained in its interpretation and analyses under Article 21.5.

12. In the past few days, the US has made several important admissions that confirm the EU's position on scope. First, the US has conceded for the first time that the A350XWB agreements are not part of any overarching measure. Second, the US has acknowledged the important overlap between, on the one hand, the factors relied upon by the original panel in finding that there was no LA/MSF programme, and, on the other hand, the factors of the traditional "close nexus" analysis. When considered together, these US admissions are fatal to its attempt to force the A350XWB agreements into the scope of these proceedings. Consequently, there is no need to consider further any of the US claims related to the A350XWB agreements.

IV. ALLEGED BENEFIT FROM A350XWB MSF

13. The US makes two arguments concerning an alleged "benefit" from A350XWB MSF that are difficult to reconcile. First, the US argues that, as asserted in the Dorman/Terris and Terris reports,

the market will not offer "risk-sharing" or "risk shifting", such that MSF confers a "benefit" on Airbus *per se*. Second, the US "advoca{tes}", with the assistance of Dr. Jordan, a "constructed benchmark", arguing that "rates charged on LA/MSF for the A350 XWB are below" rates the market would charge for the risk-sharing or risk-shifting characteristics of MSF. The second argument unquestionably accepts, as did the original panel, that it is possible to quantify the "rate", or price, that the market would charge for the risk-sharing attributes of MSF.

14. In essence, the US appears to be advancing two arguments in the alternative, or the second conditioned on the outcome of the first. First, the US argues that pricing the alleged benefit in A350XWB financing is *impossible*. Second, the US submits that, in case you do not accept the first argument, the alleged benefit must be priced against a market benchmark of "X". We lawyers do love our arguments, and hedging our bets. But there are some circumstances in which two arguments *cannot* co-exist, and this is one of them. This is because the second US argument *demonstrates* that pricing is *possible* relative to market. The very making of this second argument thus demonstrates, *on its own terms*, that the first argument is necessarily false. The only dispute between the Parties thus relates to the pricing of the market benchmark. The proposition that the market would not price risk-sharing on any terms, by definition abandoned by Ellis and Jordan, has no further role to play in these proceedings.

V. PRODUCT MARKET DELINEATION

15. The AB emphasised that a proper product market delineation is "a prerequisite for assessing" whether adverse effects exist. If a subsidised product and a like product do not compete in the same market, the subsidy cannot, without more, be a cause of lost sales or displacement suffered by the like product.

16. In contrast, the US identifies sales that a Boeing LCA lost to an allegedly subsidised Airbus LCA, and assumes, from that fact alone, that the subsidy caused the loss. This turns the AB's directive on its head, by *assuming* causation without first establishing the "prerequisite" that the subsidised product is *capable* of causing the lost sale. The allegedly subsidised Airbus LCA is only capable of causing the lost sale if the Airbus and Boeing LCA compete sufficiently closely to exercise significant competitive constraints on one another, such that they are in the same market. It may be that the Boeing LCA lost because it did not meet the requirements of the purchaser, and was not considered sufficiently substitutable for the Airbus LCA – in other words, the Boeing LCA was not in the same product market as the Airbus LCA. Without a proper product market assessment that looks at cross-elasticity of demand, the US assertion of causation is nothing more than an assumption divorced from the reality of the absence of any competition between specific LCA models.

VI. CAUSATION FINDING

17. On Tuesday, the Parties discussed their respective reading of the basis for the original panel's and the AB's causation finding. As explained, neither paragraphs 1261, 1267 nor 1299 of the AB Report, nor the underlying findings by the original panel referenced by the US, support its view that the causation findings in the original proceedings were based on the effect of subsides *creating* Airbus LCA. Instead, the findings were based on the effects of subsidies accelerating the launch of such LCA. An objective and comprehensive reading of these findings compels the conclusion that they offer no support for the new US *creation* theory.

18. In any event, whatever the basis for the findings of the original panel and the AB, the question in these compliance proceedings is different, and is dictated by the terms of Article 7.8. The question before this Panel is whether, *in light of the withdrawal of the subsidies*, there remains any basis on which to find present adverse effects presently caused by *subsidies allegedly existing after the end of the implementation period*.

19. For example, assume that a Member is found to have granted 10 subsidies that cause a particular adverse effect in the original reference period, such as a lost sale. If nine of those subsidies are withdrawn by the end of the implementation period, Article 7.8 requires a compliance panel to inquire whether the one remaining subsidy that is maintained presently causes, by itself, a new adverse effect in the new reference period, after the end of the implementation period. Alleged present effects of subsidies that are withdrawn, and for which compliance has been

achieved, cannot form any part of a finding of non-compliance based on present adverse effects allegedly caused, or contributed to, by such withdrawn subsidies.

VII. ECONOMIC VIABILITY OF THE A350XWB, AND EADS' CAPACITY TO FUND THE PROGRAMME

20. As in its previous submissions, the US argues that MSF for the A350XWB is a genuine and substantial cause of adverse effects to US interests because it "was a necessary precondition for the ... launch and subsequent market presence" of the aircraft. In other words, the US argues that, absent MSF for the A350XWB, the programme would not have been launched, because it was not economically viable, and could not have been funded.

21. In making this assertion, the US relies on, and distorts, a series of press articles and other statements offering the *subjective* views of reporters and parties to the MSF agreements. In contrast, the EU has offered *quantitative* evidence, built on data *contemporaneous* with the launch and funding decisions. Although not the EU's burden, that evidence *objectively* establishes the economic viability of the programme, and EADS' ability to fund its launch and development, while simultaneously pursuing all of its other objectives. Only by ignoring this evidence can the US posit, for example, the following:

- That the A350XWB programme was viable and fundable only because of the potential use of certain financing – which the US, without *any* support whatsoever apart from "assum{ption}", describes as "subsidized". In fact, the objective evidence specifically demonstrates that the programme was viable and fundable *without* such financing (or, for that matter, MSF).

- That business case sensitivities implicating less favourable outcomes, result in non-viability of the programme. In fact, the objective evidence tests for these very sensitivities and scenarios, establishing that the programme was economically viable, even absent both the referenced financing and MSF.

- That projections for A350XWB deliveries are unduly "rosy" and mask non-viability simply because they exceed historic levels of wide-body programme deliveries. In fact, at the time of launch to the present, Airbus' forecast for wide-body LCA demand has been and is consistent with Boeing's market forecast, as well as that of others. And Airbus' delivery forecast for the A350XWB are conservative.

- That a "crisis" at the company, and the global financial crisis more generally, prevented it from launching the A350XWB without certain financing or MSF, at least without "divert{ing} funds from other uses". In fact, the objective evidence establishes that, absent particular financing or MSF, and despite the financial crisis, the company's financial position was sufficiently strong to comfortably enable it to fund the programme, while simultaneously pursuing all of its other objectives.

- That the company could only have funded the A350XWB programme by "getting risk-sharing suppliers to nearly double their contributions". In fact, the objective evidence establishes that the company could have funded the programme without any increase in financing from risk-sharing suppliers.

- That the company "knew" it was "guaranteed" financing in the form of MSF, and on subsidised terms, at the time it launched the A350XWB. In fact, the objective evidence establishes that the company launched the programme in 2006, before *any* of the terms for any financing from the EU member States were *negotiated*, much less agreed. That evidence also establishes that, following launch, the company has achieved an advanced stage of development for the programme while not drawing the full amount available.

22. The US has addressed none of this objective evidence. It is not the EU that confuses "willingness" or "wanting" to launch the A350XWB with the "ability" or the "means" to do so. Instead, it is the US that is *ignoring* objective evidence establishing, on a quantitative basis and in light of contemporaneous data, that the company indeed had both the ability and the means to comfortably launch and develop an economically viable A350XWB programme, absent MSF. On

this "decisive point", it is the US, and not the EU, that ignores "indisputable" evidence, instead replacing it with mere assertion and assumption. And the US does this with respect to measures that are not even within the scope of these compliance proceedings.

VIII. RELEVANCE OF DOWN-SIDE SCENARIOS FOR ASSESSING PROJECT VIABILITY

23. Finally, in its Opening Statement, the US takes the untenable position that *any* risk that returns from a project could fall below the hurdle rate will lead a firm to decide *not to invest at all* in the project, for fear of the risk materialising. On the US view, every downside risk scenario necessarily becomes the project's base case.

24. This is a ludicrous position. It is inconsistent with "the real world" in which people decide to invest despite uncertainty about what the future holds. The US position can be compared to a family's considerations of its holiday plans, where the expectations of plenty of sunshine and days at the beach will be evaluated on the basis of a long-term weather forecast. The fact that there could be one day with rain out of 14 will not be a serious deterrent. Only a relatively high probability of persistent rain and little sunshine will lead the family to seek out alternative locations. Only a higher probability of widespread and persistent catastrophic conditions will lead the family to cancel their holiday plans altogether.

25. Similarly, Airbus assessed the relative probabilities of a base case, and that of unfavourable events, in evaluating the economic viability of the A350XWB programme over its expected duration. Airbus concluded that the project is viable because the likelihood of unfavourable events that would undermine the base case was relatively low. That assessment also took account of the likelihood that events may turn out to be *more favourable* than the conservative assessments made in the base case – something the US ignores.

26. In performing an independent comprehensive sensitivity and scenario analysis of the A350XWB, CompetitionRx concluded that the programme is viable because the base case is robust and the probability of unfavourable events is not sufficiently high to undermine the project's expected return. As both Airbus and CompetitionRx determined, the extreme circumstances captured in a "worst case" scenario, which combines multiple downside factors, would result in a return below the cost of capital. Since the probability of this combination of events is very low, however, the worst case scenario did not alter the conclusion that the A350XWB programme is economically viable. Both holiday takers and industrial investors realise that even the most carefully evaluated plan may result in days of torrential rain and worse-than-anticipated financial performance. If *absolute certainty*, as the US would have it, of sunny days and profitable returns were required before we vacationed or invested, we would all stay at home protecting the cash stuffed in our mattresses.

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ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE STATEMENT OF AUSTRALIA AT THE PANEL MEETING

Mr. Chairman, Members of the Panel

1. Thank you for the opportunity to present Australia's views on this dispute.

2. This proceeding raises a number of important issues concerning the scope of proceedings under Article 21.5 of the *Dispute Settlement Understanding* and the appropriate steps that must be taken by a Member to comply with Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*). Australia will make some brief remarks in relation to these issues.

Scope of these proceedings

3. Australia agrees with the United States (US) that the Launch Aid/ Member State Finance (LA/MSF) support for the A350XWB is within this Panel's terms of reference. Australia supports the three legal bases provided by the US for the consideration by this Panel of the A350XWB LA/MSF measure.[1]

4. Australia does not accept, as posited by the EU, that because the A350XWB financing agreements do not form part of the EU's compliance report as a "measure taken to comply"[2] or the Appellate Body was unable to discern the presence of an "overarching measure" in the original proceedings,[3] that these measures do not fall within the jurisdiction of this Panel.

5. The Appellate Body has made it clear that the limits on the scope of Article 21.5 proceedings should not allow the effective circumvention by Members of those provisions by allowing them to comply through one measure, while at the same time negating compliance through another.[4] In Australia's view, an overly narrow approach to Article 21.5 proceedings could undermine the effectiveness of the dispute settlement process.

6. Australia would encourage this Panel to consider the LA/MSF measure for the A350XWB as within its terms of reference.

Compliance

7. Under paragraph 7.8 of the *Agreement on Subsidies and Countervailing Measures*, the EU had six months, subsequent to the 1 June 2011 adoption of the Appellate Body and Panel Reports, to take "appropriate steps to remove the adverse effects" of the actionable subsidies identified by the Panel and the Appellate Body, or to withdraw the subsidies.

8. In complying with this obligation, the EU was, in Australia's view, required to take affirmative action to withdraw all current subsidies to Airbus that had been found to be non-compliant, or to take affirmative action to remove the adverse effects of those subsidies.[5]

9. Australia does not take a position on whether the specific actions taken by the EU are sufficient for the purposes of Article 7.8 of the SCM Agreement. In Australia's view, the role of this Panel is to determine the extent to which the EU has addressed these obligations. In examining compliance, Australia believes that where a complaining Member has shown a lack of appropriate action by the implementing Member, it will have established a *prima facie* case of non-compliance. The burden of demonstrating the intervening events which break the nexus between the non-

[1] US First Written Submission, Sections IV.D-E and US Second Written Submission, para. 113.
[2] EU Second Written Submission, Section III.A, para. 50.
[3] EU Comments on US Request for Preliminary Decision, Section VIII, para. 84.
[4] *US – Softwood Lumber (IV) (Article 21.5 – Canada)* (WT/DS257/AB/RW), paras. 71-72.
[5] *US – Upland Cotton (Article 21.5)* (WT/DS267/AB/RW), para. 236.

compliant measures, the adverse effects, and bringing the measures into compliance should then rest with the implementing member.

10. Mr. Chairman and Members of the Panel, this concludes Australia's remarks. Thank you for the opportunity to provide these comments.

ANNEX D-2

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF BRAZIL

I. INTRODUCTION

1. This Panel's interpretation of the relevant provisions of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*") is critical to ensuring the effectiveness of multilateral disciplines on the use of subsidies, particularly in the civil aircraft sector.

2. Brazil's comments focus on the following issues raised by the United States in its first written submission: (1) the proper interpretation and application of the requirement imposed by Article 7.8 of the *SCM Agreement* to "take appropriate steps to remove to adverse effects" or to "withdraw the subsidy"; (2) the appropriate scope of implementation proceedings under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"); and (3) the proper approach to determining the existence of *de facto* export contingency.

II. LEGAL ARGUMENT

A. THE OBLIGATION TO "TAKE APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS" OR TO "WITHDRAW THE SUBSIDY" REQUIRES A POSITIVE ACTION EITHER TO REVERSE THE COMPETITIVE ADVANTAGE THAT WAS GAINED AS A RESULT OF THE SUBSIDY OR TO PUT AN END TO THE SUBSIDY

3. The European Union was required to "take appropriate steps to remove the adverse effects" or to "withdraw" the actionable subsidies identified by the Panel and the Appellate Body within six months following the 1 June 2011 date of adoption of the Panel and Appellate Body Reports. Brazil does not take a position on whether the specific measures taken by the EU were sufficient for purposes of Article 7.8 of the *SCM Agreement* and Article 19 of the DSU. In this submission, Brazil instead focuses on the proper interpretation of the important obligation under Article 7.8 of the *SCM Agreement* to "take appropriate steps" to "remove the adverse effects" or to "withdraw the subsidy."

4. Brazil finds the jurisprudence of *US – Upland Cotton (Article 21.5 – Brazil)* to be enlightening as to the proper interpretation of the terms "shall take appropriate steps" in relation to the actions to be taken by the implementing Member. The Member is expected to take an affirmative, appropriate action and cannot be considered as having complied with the obligation of Article 7.8 of the *SCM Agreement* if it does not actively intervene to remove the adverse effects.[1]

5. The focus of Article 7.8 of the *SCM Agreement* is to remedy the specific problem found to exist that nullified or impaired the benefits under the *SCM Agreement* accruing to the complaining Member. The focus in Part III of the *SCM Agreement* on "actionable subsidies" is on the adverse effects caused by the use of a subsidy, not on the existence of the subsidy itself.

6. The fact that a subsidy was granted in the past, that the "benefit" has expired, and that the subsidy no longer exists does not prevent a finding of adverse effects caused by past subsidies. This is particularly relevant for launch aid subsidies, which may continue to cause adverse effects long after they have been granted and repaid due to the presence of aircraft models that otherwise would not have been competing in the market.

7. The question before this Panel is thus which "steps" the EU has taken and whether these steps are "appropriate to remove the adverse effects." The steps will only be "appropriate" if they impact the specific adverse effects found to exist and are likely to lead to the removal of the specific adverse competitive advantage that resulted from the use of the subsidy.

8. In a situation where one subsidy replaces another, the Panel will need to examine the consistency of the new measure taken to comply with the obligations imposed by the *SCM*

[1] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236.

Agreement. This will require the Panel to examine whether the new measure is a subsidy and whether the adverse effects continue to exist in the context of the new subsidy measure. This will likely be the case if the implementing Member has not taken any other steps to remove the adverse effects found to exist and has simply replaced one subsidy measure with another.

B. LA/MSF SUPPORT FOR THE A350XWB IS WITHIN THIS PANEL'S TERMS OF REFERENCE AS A "MEASURE TAKEN TO COMPLY" BECAUSE IT HAS A SUFFICIENTLY CLOSE NEXUS WITH THE ORIGINAL MEASURES ADDRESSED IN THE PANEL AND APPELLATE BODY REPORTS AND WITH THE MEASURES TAKEN TO COMPLY

9. Brazil considers that the it is the task of the compliance Panel to ultimately determine the appropriate scope of its own jurisdiction in a given dispute, and that it is thus not for the implementing Member to define what it considers to be the measures taken to comply.[2] Brazil suggests the Panel should not adopt an overly formalistic approach in setting its terms of reference, with a view toward protecting the effectiveness of the WTO dispute settlement process and ensuring prompt compliance and effective resolution of the dispute. These principles argue in favor of including in the scope of this Article 21.5 proceeding new LA/MSF support for the A350XWB which, in terms of its nature, timing, and effects, is very similar and thus closely related to the measures that were to be brought into conformity with the Dispute Settlement Body (DSB) recommendations.

10. The Appellate Body has observed that a panel reviewing a claim under Article 21.5 of the DSU may address not only the measures the responding Member identifies as taken to comply with the recommendations and rulings of the DSB, but also any other measures with a particularly close relationship to the declared measures taken to comply and to the recommendations and rulings of the DSB.[3] This certainly includes measures that are very closely connected because they concern the same analysis of subsidies for the same category of products and may thus undermine compliance with those recommendations and rulings.[4]

11. Brazil believes the Panel should put substance over form and focus on the nature and effects of the challenged measures in comparison with the measures taken to comply and the original measures. In Brazil's view, a very similar type of subsidy, supporting a very similar product, produced by the same company around the time that closely related subsidy measures were found to be WTO-inconsistent, is a measure that can and must be included in an examination of "measures taken to comply".

C. DEMONSTRATING EXPORT CONTINGENCY DOES NOT REQUIRE THE CONSTRUCTION OF HYPOTHETICAL SALES RATIOS

12. In the current implementation proceeding, the US requests the Panel to re-visit the question of *de facto* export contingency of the LA/MSF support for the A380 and by extension for the A350XWB. The US seeks to apply the "geared-to-induce-future-export" test as put forward by the Appellate Body in the original proceeding in order to demonstrate that the LA/MSF support was *de facto* export contingent and consequently a prohibited subsidy within the meaning of Article 3.1(a) of the *SCM Agreement*.

13. Brazil considers that a review of the Appellate Body's findings in the original proceeding demonstrates that the Appellate Body's analytical framework for considering a *de facto* export contingency claim does not *require* a hypothetical ratio-scenario that the US is now providing to the Panel. In Brazil's view, the ratio approach proposed by the Appellate Body is one possible piece of additional evidence that could provide meaningful information when it involves one of the conditions of the subsidy. However, in many situations, as demonstrated in *Canada – Aircraft*, no such additional evidence is necessary or appropriate to make the essential finding of conditionality in law or in fact.[5]

14. Brazil understands that the Appellate Body was simply indicating in the numerical example relating to sales ratios what could, in certain circumstances, be one type of evidence to bridge the gap between anticipation and conditionality in order to support, as part of the total configuration of

[2] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73.
[3] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.
[4] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 205.
[5] Appellate Body Report, para. 1037, referring to Appellate Body Report, *Canada – Aircraft*, paras. 167, 171.

the facts, a conclusion that the granting of the subsidy was in fact tied to anticipated export performance. An approach that would *require* evidence of a sales ratio change or potential change would unjustifiably impose a different standard in the context of *de facto* export contingency than the one used in a determination of *de jure* export contingency and would seek to impose an unwarranted trade effects test.

III. CONCLUSIONS

15. Brazil has focused its comments on several important issues raised in this dispute. First, Brazil considers that the obligation to "take appropriate steps to remove the adverse effects" or to "withdraw the subsidy" will usually require a positive action either to reverse the competitive advantage that was gained as a result of the subsidy or to put an end to the subsidy in a manner that is appropriate to remove the adverse effects.

16. Second, Brazil considers that the scope of a compliance proceeding under Article 21.5 of the DSU must be sufficiently broad to include measures which have a close nexus with the original measure addressed in the Panel and Appellate Body reports and with the measures taken to comply, including in this dispute LA/MSF support for the A350XWB.

17. Finally, in respect of the test for export contingency, Brazil is of the view that demonstrating export contingency does not require the construction of hypothetical sales ratios. Brazil submits that whether a measure is *de facto* contingent upon export performance depends on the conditions that are in law or in fact imposed at the time of granting the subsidy, and that this analysis should not be limited to the effect on sales ratios.

ANNEX D-3

EXECUTIVE SUMMARY OF THE STATEMENT OF
BRAZIL AT THE PANEL MEETING

I. INTRODUCTION

1. In its oral intervention Brazil focused on two main issues that it considers of particular relevance:

- The scope of the obligation under Article 7.8 to withdraw the subsidy or take appropriate steps to remove the adverse effects of the subsidy;

- The scope of this Article 21.5 proceeding in light of the panel's decision of March 27, 2013.

II. THE OBLIGATION TO "WITHDRAW THE SUBSIDY" OR TO TAKE "APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS" REQUIRES CAREFUL CONSIDERATION WHEN EXAMINING PAST SUBSIDIES

2. The overriding issue in this compliance proceeding regards the question of how a defendant should comply with the obligation of Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" or "to withdraw the subsidy." Brazil reaffirms its views put forth in its submission that, usually, this obligation requires that a Member take affirmative, appropriate action to remove the adverse effects of the subsidy or to withdraw that subsidy, as the Appellate Body found in *US – Upland Cotton*.[1]

3. Yet, Brazil understands that in order to properly address this issue, different scenarios may be taken into consideration by implementation panels:

> Scenario A: A portion of the subsidy (LA/MSF) has been disbursed, the aircraft development project is ongoing, and no royalty payments have been made. In this situation, the responding Member could simply withdraw the subsidy by modifying the terms and conditions of the remaining disbursements and royalty payments so that they reflect market conditions. If the Member were to choose, instead, to remove the adverse effects of the subsidy, the Member may find that other steps are appropriate.
>
> Scenario B: The subsidy (LA/MSF) has been fully disbursed, but part of the royalty payments remain outstanding. The recipient therefore has already received the entire financial contribution, but there is still an opportunity for the responding Member to withdraw the "prospective portion" of the subsidy by modifying the terms of the outstanding royalty payments to reflect market conditions.
>
> Scenario C: LA/MSF has been fully disbursed and all of the royalty payments have been paid in full. This scenario poses a greater challenge for it seems that the only way that the responding Member could withdraw the subsidy would be to seek repayment of the benefit already received from and repaid by the recipient company. We recall, for instance, that in the *Australia – Leather* dispute (DS126), the panel recommended that withdrawal of a subsidy that had already been disbursed required the repayment of the subsidy. Yet this recommendation was criticized by various Members as being an inappropriate "retroactive" remedy, not covered by Article 7.8.

4. Given these complexities, one way out could be to restate the "genuine and substantial" relationship analysis (between the granting of a subsidy and its adverse effects) in order to evaluate the concrete effects of past subsidies, which have been fully disbursed and repaid. If the causal pathways which led to a situation of adverse effects through the use of subsidies can no longer be established, and other causal factors have since intervened significantly, there may be

[1] Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809 ("*US – Upland Cotton (Article 21.5 – Brazil)*"), para. 236.

exceptional circumstances where the obligations of Article 7.8 may prove difficult to comply with. In the current proceedings, the AB conceded, for instance, that "LA/MSF for the A300 and A310 are likely to cause minimal, if any, adverse effects during the reference period 2001-2006."[2]

5. Brazil is of the view that this panel has an important opportunity to clarify how Members are expected to comply with rulings on adverse effects relating to non-recurring subsidies, which have sometimes been granted many years ago and fully disbursed, but which may continue to cause adverse effects in the market, taking into account that the main goal of compliance with the subsidies disciplines is to restore the level playing field.

III. THE SCOPE OF ARTICLE 21.5 PROCEEDINGS CANNOT BE USED TO RE-LITIGATE CLAIMS DECIDED BY THE APPELLATE BODY

6. Brazil recognizes that it is for the compliance panel to determine the appropriate scope of its own jurisdiction and that an overly narrow approach to an Article 21.5 panel's terms of reference would undermine the effectiveness of the dispute settlement process. It believes, however, that it is also important that compliance proceedings not be used as an instance to re-litigate matters that were decided by the Appellate Body. This would amount to use it as a "remand" proceeding not foreseen in the Dispute Settlement Understanding.

7. In this sense, in the absence of reasons underpinning the preliminary decision, on March 27, 2013, that included in its jurisdiction the claims regarding the A380 as an export subsidy, Brazil would expect the panel to exercise its jurisdictional powers carefully in order to prevent it from re-analyzing claims already rejected by the Appellate Body.

8. In any case, Brazil once again insisted that demonstrating *de facto* export contingency should not require evidence of a hypothetical sales ratio-scenario such as the one that the United States has provided to the panel. It should require rather examining the total configuration of facts surrounding the granting of the subsidy.

[2] Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, para. 1241.

ANNEX D-4

EXECUTIVE SUMMARY OF THE WRITTEN
SUBMISSION OF CANADA

I. INTRODUCTION

1. Canada is participating in these compliance proceedings because the findings of the Panel will have important consequences for the way in which the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) are interpreted and applied in future disputes.

II. PROHIBITED EXPORT SUBSIDIES

2. The United States has failed to demonstrate that Launch Aid/Member State Financing (LA/MSF) for the A380 and A350XWB granted by France, Germany, Spain and the United Kingdom is contingent in fact upon export performance in violation of Article 3.1(a) of the SCM Agreement.

3. In the initial proceedings in this dispute, the Appellate Body established the following test to determine whether a subsidy is *de facto* contingent on anticipated exportation: "is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?"

4. The Appellate Body held that the standard for *de facto* export contingency would be met when "the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy". According to the Appellate Body, *de facto* export contingency "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy".

5. The United States fails to explain how the total configuration of the facts constituting and surrounding the grant of LA/MSF supports its position. Moreover, as indicated below, the United States' calculation of ratios does not accord with the framework set out by the Appellate Body.

A. THE UNITED STATES USES WRONG INFORMATION WHEN CALCULATING RATIOS

6. The Appellate Body provided a framework for assessing whether the granting of a subsidy is in fact tied to anticipated exportation: "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy, and, on the other hand, the situation in the absence of the subsidy". The United States uses the terms "anticipated ratio" (the anticipated ratio of export sales to domestic sales for the subsidized product) and "baseline ratio" (the ratio of export sales to domestic sales in the absence of a subsidy) to describe the ratios used.

7. With respect to the anticipated ratio, the United States' reliance on the Airbus 2000 Global Market Forecast is inappropriate because the GMF does not provide a forecast for the specific subsidized product (A380), as required by the Appellate Body, but rather provides a forecast for the entire class of very large aircraft.

8. The United States also uses wrong information when calculating the baseline ratio. With respect to the calculation of the baseline ratio, the Appellate Body held that "the assessment must be on the basis of historical sales of the same product by the recipient in the domestic and export markets before the subsidy was granted". The United States fails to demonstrate how the use of historical sales data for the Boeing 747 and Boeing 777 are appropriate substitutes in the absence of historical sales data for the A380 and A350XWB, respectively.

B. THE UNITED STATES' POSITION DOES NOT ACCOUNT FOR CHANGES IN MARKET CONDITIONS

9. In comparing the anticipated and baseline ratios for both the A380 and A350XWB, the United States does not address whether, apart from the existence of LA/MSF, all other relevant factors remain the same. In fact, the United States provides evidence that suggests that it is more likely a change in market conditions, rather than subsidization, that accounts for the anticipated increase in export sales relative to domestic sales in the very large aircraft market segment.

III. IMPORT-SUBSTITUTION SUBSIDIES

10. The United States claims that LA/MSF for the A380 and the A350XWB is contingent upon the use of domestic over imported goods as certain LA/MSF requirements oblige Airbus to use Airbus-produced intermediate goods in the production of its finished aircraft.

11. The prohibition in Article 3.1(b) of the SCM Agreement covers situations where the granting of a subsidy is contingent on the recipient *purchasing* domestic over imported goods. In Canada's view, the United States' position improperly expands the scope of Article 3.1(b) to cover subsidies contingent on the recipient *producing* a particular intermediate good.

12. Given that most manufacturers produce intermediate goods as part of the production of their final goods, the United States' position would negate the right of a subsidizing Member to require a subsidy recipient to produce goods, as defined by the subsidizing Member, in its territory in order to receive a subsidy.

13. The Appellate Body decision in *Canada – Autos* demonstrates that the United States' position is incorrect.

IV. SERIOUS PREJUDICE

14. The United States takes the position in these compliance proceedings that the European Union has neither withdrawn the subsidies nor removed their adverse effects. The United States submits that LA/MSF provided for all Airbus aircraft is still causing serious prejudice given that without LA/MSF, the Airbus aircraft at issue would not be in the market to the same extent and Boeing's sales would therefore be higher.

15. Canada submits that this Panel should limit its serious prejudice analysis to an assessment of the impact of the subsidies existing at the end of the reasonable period of time the European Union had to comply with the Dispute Settlement Body's (DSB) recommendations.

16. Canada sets out below the legal framework that this Panel should use in assessing whether the European Union complies with its obligations under Articles 5, 6 and 7.8 of the SCM Agreement. Canada also makes observations as to how this framework should be applied to the facts of this dispute.

17. Article 7.8 of the SCM Agreement provides that when a panel or the Appellate Body finds that a subsidy has resulted in adverse effects to the interests of a complaining Member, the subsidizing Member must either withdraw the subsidy or remove its adverse effects. These alternatives provide a logical remedy to a Member's breach of its obligations under Articles 5 and 6. If a Member chooses the first option, there is no longer a subsidy. If a Member chooses the second option, although the subsidy may still be present, it no longer causes adverse effects.

18. Canada examines each of these two options below.

A. WITHDRAWAL OF SUBSIDY

19. By withdrawing a subsidy that was found to cause serious prejudice, a Member complies with its obligations under Articles 5, 6 and 7.8 of the SCM Agreement. Article 1.1 of the SCM Agreement defines a subsidy as a financial contribution (or any form of income or price support) that confers a benefit. The Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada*) indicated that "withdrawal" of a subsidy refers to the "removal" or "taking away" of that subsidy. Given the bipartite nature of its definition, a subsidy may be withdrawn by removing either the financial contribution or the benefit.

20. In this dispute, the United States acknowledges that the European Union actually withdrew an infrastructure-related subsidy by increasing the fee charged to Airbus for using the Bremen airport runway. The fact that the European Union properly withdrew the subsidy by removing the benefit that it would otherwise have conferred in the future, but without removing the benefit it conferred in the past, is consistent with the prospective nature of remedies in WTO compliance proceedings.

21. There are similarities between the situation where the benefit provided by a subsidy has expired and that where the benefit has been withdrawn. In both cases, a benefit is no longer being conferred on the recipient and, as a result, a subsidy no longer exists. Therefore, if a subsidy has expired, the Member should also be found to have complied with its obligations.

22. In these compliance proceedings, the United States argues that all LA/MSF provided for Airbus aircraft continues to cause serious prejudice to the interests of the United States in the form of lost sales and market displacement and impedance suffered by Boeing. Canada submits that, when LA/MSF for a given aircraft model has been withdrawn or the benefit provided by that LA/MSF has expired, LA/MSF provided for that aircraft model cannot be found to cause serious prejudice.

B. REMOVAL OF THE ADVERSE EFFECTS

23. When a subsidy has been found to cause serious prejudice and the subsidy has neither expired nor been withdrawn, Article 7.8 of the SCM Agreement requires the subsidizing Member to remove the serious prejudice. In other words, the subsidizing Member should ensure that the subsidy no longer causes serious prejudice.

24. Canada submits that only subsidies that have neither expired nor been withdrawn by the end of the reasonable period of time provided to a Member to implement DSB recommendations should serve as the basis of the analysis of serious prejudice in compliance proceedings. There must be consistency between the two options available to a Member under Article 7.8 of the SCM Agreement, namely, a Member must either withdraw the subsidies that cause adverse effects or remove the adverse effects caused by those subsidies, by the end of the reasonable period of time it has to comply with the DSB recommendations. If a subsidy has been withdrawn or has expired, a Member cannot be asked to remove the adverse effects of that subsidy.

25. Once the subsidies at issue in the compliance proceedings have been identified, the panel should proceed with its causation analysis to assess whether the identified subsidies cause serious prejudice to the interests of the complaining Member.

26. As is the case in initial proceedings, the proper method to make this assessment in compliance proceedings is to conduct a counterfactual analysis to determine what would be the situation in the absence of the subsidies at issue. Therefore, a compliance panel should analyse what the situation would be if these subsidies had been withdrawn. It is only if a panel finds that the subsidies cause serious prejudice or threaten to cause serious prejudice that a subsidizing Member should be found to violate Articles 5, 6 and 7.8 of the SCM Agreement.

27. In the single-aisle Large Civil Aircraft (LCA) product market, this Panel should first determine whether there were any subsidies still existing with respect to the A320 at the end of the reasonable period of time. Second, if there were subsidies still existing, the Panel should determine the impact of these subsidies and whether they cause serious prejudice.

28. With respect to the Very Large Aircraft product market, Canada disagrees with the European Union that the purpose of the Panel's counterfactual analysis should be to determine whether in the absence of LA/MSF for the A380 this aircraft would still have been launched.

29. Canada submits that the proper counterfactual analysis consists in assessing what the situation would be if the European Union had withdrawn the subsidy by the end of the reasonable period of time. The withdrawal could have been performed by increasing the rate of return on the A380 LA/MSF to a market level.

30. Canada's observations with respect to the proper counterfactual analysis to perform in the Very Large Aircraft product market also apply to the twin-aisle LCA product market. If LA/MSF for the A350XWB constitutes a subsidy, the Panel should focus on the impact that the withdrawal of that subsidy by the end of the reasonable period of time would have had on the twin-aisle LCA product market.

ANNEX D-5

EXECUTIVE SUMMARY OF THE STATEMENT OF
CANADA AT THE PANEL MEETING

I. INTRODUCTION

1. In our statement, we first address issues related to the conduct of a serious prejudice analysis in compliance proceedings. We then consider the United States' claims that certain Launch Aid/Member State Financing (LA/MSF) constitutes a prohibited export subsidy or import-substitution subsidy.

II. LEGAL FRAMEWORK TO USE IN DETERMINING COMPLIANCE WITH ARTICLE 7.8 OF THE SCM AGREEMENT

2. In its written submission, Canada has set out the legal framework a panel should use in determining whether a subsidizing Member has complied with its obligations under Article 7.8 of the SCM Agreement. The United States and the European Union have set out certain arguments before the Panel that are inconsistent with that framework.

3. Pursuant to Article 7.8 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), where a panel or an Appellate Body report is adopted in which it is determined that a subsidy has resulted in adverse effects, the subsidizing Member shall take appropriate steps to remove the adverse effects or withdraw the subsidy. The wording of this provision is clear: the subsidizing Member must either withdraw the subsidy or remove its adverse effects. These are two distinct alternatives, each of which can lead to compliance.

4. The first alternative available to a Member facing obligations under Article 7.8 of the SCM Agreement is to withdraw the subsidy. As we know, Article 1.1 of the SCM Agreement defines a subsidy as a financial contribution that confers a benefit. That is, without a financial contribution that confers a benefit, there is no subsidy. Yet, the United States argues that a subsidy can only be withdrawn if the benefit is withdrawn. This ignores the bipartite nature of the definition of a subsidy. The withdrawal of the financial contribution that has given rise to a benefit should, necessarily, also amount to the withdrawal of the subsidy.

5. An example illustrates Canada's position. Let us consider a loan provided to a recipient at an interest rate below that available on the market. The increase in the interest rate to market level would constitute withdrawal of the benefit. The reimbursement of the capital by the recipient would, in effect, constitute withdrawal of the financial contribution. Moreover, in this latter case, a benefit would no longer be conferred. Indeed, a recipient cannot be said to benefit from a loan that is no longer outstanding. Therefore, whether through an increase in interest rate or the reimbursement of the loan, the subsidy would be withdrawn.

6. The effect of the expiry of the benefit conferred by a financial contribution is equivalent to that of the withdrawal of a benefit. In both cases, there is no longer a benefit, nor a subsidy. In both cases, the Member that provided the subsidy should be found to have complied with its obligations under Article 7.8 of the SCM Agreement.

7. The second alternative available to a Member facing obligations under Article 7.8 of the SCM Agreement is to remove the adverse effects of the subsidy.

8. Determining whether "removal" has taken place requires a panel to assess whether the subsidies at issue cause serious prejudice. To make this assessment, a panel will have to, first, identify the subsidies at issue and, second, conduct a counterfactual analysis to determine the effects of those subsidies.

9. Canada submits that the only subsidies the effects of which must be assessed in compliance proceedings under Article 7.8 are subsidies in existence at the end of the six-month implementation period within which a subsidizing Member must remove adverse effects.

10. In this dispute, the United States argues that a subsidizing Member must remove the effects not only of subsidies outstanding at the end of that implementation period, but also those of expired and withdrawn subsidies. Adverse effects would always need to be removed. This interpretation of Article 7.8 must be rejected given that it would render the option of withdrawing the subsidy meaningless.

11. An examination of Articles 4.7 and 7.8 of the SCM Agreement further demonstrates the flaw in the United States' position.

12. Article 4.7 specifies that a Member that provides a prohibited subsidy must withdraw that subsidy. Although prohibited subsidies are generally seen as being, by their very nature, trade-distortive, there is no requirement that the effects of a prohibited subsidy that may continue past the withdrawal be removed.

13. For its part, as acknowledged by the United States, Article 7.8 provides separate options: a subsidizing Member may withdraw the subsidy or remove its adverse effects.

14. With respect to both types of subsidies, prohibited and actionable, the withdrawal of the subsidy is an appropriate remedy. If the withdrawal of a subsidy that is prohibited satisfies the obligations of a Member, withdrawal of a subsidy that causes adverse effects should also be satisfactory. Remedies against actionable subsidies cannot be more stringent than those against prohibited subsidies.

15. The proper identification of the subsidies subject to the serious prejudice analysis will affect the nature of the counterfactual analysis that must be conducted. The alternatives provided by Article 7.8 shed light on this identification. If a subsidizing Member can satisfy its obligations under Article 7.8 by withdrawing certain subsidies before the end of the implementation period, it is logical that, in assessing whether serious prejudice caused by subsidies has been removed, it is the effect of these same subsidies that will be analysed.

16. The proper counterfactual analysis to perform under Article 7.8 is, therefore, as follows: in the absence of the subsidies that existed at the end of the implementation period, what would be the situation of the relevant producers? That situation can then be compared to the actual situation of the relevant producers in order to determine whether the subsidies have caused serious prejudice.

17. The United States' position does not accord with this analysis. In its submissions, the United States argues that the Panel should take into account the effects of all LA/MSF provided to Airbus even if some LA/MSF may have been withdrawn or have expired. The Panel should reject the United States' position and identify which subsidies existed at the end of the implementation period. It is the effects of those subsidies – and those subsidies only – that should be analysed in determining whether the European Union has complied with its obligation under Article 7.8 of the SCM Agreement.

18. The counterfactual analysis presented by the European Union with respect to the LA/MSF for the A380 is also inconsistent with the analysis proposed by Canada. The European Union argues that the Panel should assess whether, in the absence of the LA/MSF for the A380, the aircraft would have been launched in 2000. This position overlooks the fact that, by withdrawing the subsidy provided by the A380 LA/MSF, and other smaller subsidies, by the end of the implementation period, the European Union would have satisfied its obligations under Article 7.8 of the SCM Agreement. Taking this fact into account, the proper counterfactual analysis should instead be: what would be the situation of Airbus and Boeing in the market in which the A380 competes if the European Union had withdrawn the subsidy provided through the A380 LA/MSF by December 1, 2011, for example by increasing the rate of return of the A380 LA/MSF to a market level?

III. PROHIBITED EXPORT SUBSIDIES

19. The United States claims that LA/MSF for the A380 and A350XWB granted by France, Germany, Spain and the United Kingdom is contingent in fact upon export performance in violation of Article 3.1(a) of the SCM Agreement.

20. In presenting its evidence the United States fails to explain how the total configuration of the facts constituting and surrounding the grant of LA/MSF supports its position. Moreover, the evidence is based on a calculation of ratios that does not accord with the framework set out by the Appellate Body.

21. In the initial proceedings in this dispute, the Appellate Body indicated that an assessment of whether the granting of the subsidy is in fact tied to anticipated exportation could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales *of the subsidized product* that would come about as a consequence of the granting of the subsidy (anticipated ratio), and, on the other hand, the situation in the absence of the subsidy (baseline ratio).

22. The United States uses the wrong information when calculating these ratios. For example, with respect to the calculation of the baseline ratio, the Appellate Body held that "the assessment must be on the basis of historical sales *of the same product by the recipient* in the domestic and export markets before the subsidy was granted". The United States fails to demonstrate how the use of historical sales data for the Boeing 747 and Boeing 777 are appropriate substitutes in the absence of historical sales data for the A380 and A350XWB, respectively.

23. Moreover, in comparing the anticipated and baseline ratios for both the A380 and A350XWB, the United States does not address whether, apart from the existence of LA/MSF, all other relevant factors remain the same. In fact, with respect to the very large aircraft market segment, the United States provides evidence suggesting that it is more likely a change in market conditions, rather than subsidization, that accounts for the anticipated increase in export sales relative to domestic sales.

IV. IMPORT-SUBSTITUTION SUBSIDIES

24. Finally, Canada addresses the specific claim by the United States that LA/MSF for the A350XWB is contingent upon the use of domestic over imported goods, given that certain LA/MSF requirements oblige Airbus to use Airbus-produced intermediate goods in the production of its finished aircraft.

25. The United States' position improperly expands the scope of Article 3.1(b) of the SCM Agreement to cover subsidies contingent on the recipient producing a particular intermediate good.

26. Nothing in the General Agreement on Tariffs and Trade or the SCM Agreement prohibits a subsidizing Member from making the granting of a subsidy contingent on a recipient producing goods in its territory. In fact, Article III:8(b) of GATT 1994 explicitly allows WTO Members to provide subsidies only to their domestic producers.

27. Given that many manufacturers produce intermediate goods as part of the production of their final goods, the United States' position would negate the right of a subsidizing Member to require a subsidy recipient to produce goods, as defined by the subsidizing Member, in its territory in order to receive a subsidy.

28. As indicated in Canada's written submission, the Appellate Body decision in *Canada – Autos* demonstrates that the United States' position is incorrect.

ANNEX D-6

EXECUTIVE SUMMARY OF THE
WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. In this submission, China will present its views on the following two issues:

(i) whether LA/MSF for the A350 XWB is within the terms of reference of these compliance proceedings; and

(ii) whether claims that grants of LA/MSF for the A380 and A350 XWB are prohibited subsidies are within the terms of reference of these compliance proceedings.

II. LA/MSF FOR THE A350 XWB IS NOT WITHIN THE TERMS OF REFERENCE OF THESE COMPLIANCE PROCEEDINGS

2. China submits that in order for a measure to be subject to review by an Article 21.5 panel, it has to fall under one or more of the following: (i) a declared "measure taken to comply"; (ii) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the DSB's recommendations and rulings made in the original proceedings; (iii) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and rulings; and (iv) in a subsidy case, a replacement subsidy which replaces the one found to be WTO-inconsistent in the original proceedings. China notes that the alleged LA/MSF for the A350 XWB falls under none of the four situations, and therefore is not within the terms of reference of these compliance proceedings.

1. Declared Measure Taken to Comply

3. In China's view, where a Member has adopted a measure to implement its obligations, and has so declared, it is necessary for a compliance panel to review such a measure in order to ascertain whether the measure at issue is actually in existence, and if so, whether it is compliant with the covered agreement. In this dispute, there is no "measure taken to comply" declared by EU in respect of A350 XWB.[1] Thus, the alleged LA/MSF for the A350 XWB could not possibly be included in the terms of reference of these compliance proceedings for the reason that it is a "declared" measure taken to comply.

2. Other Measures Taken to Comply

4. In light of the Appellate Body's analysis in *US –Lumber CVDs Final (Article 21.5)*, other measures may nevertheless constitute part of the "measures taken to comply" if an "express link" exists between those measures and the DSB's recommendations and rulings.[2] China recalls that no rulings or recommendations concerning the alleged LA/MSF for the A350 have ever been made in the original proceedings. Therefore, it is not possible for any measure, including the alleged LA/MSF for the A350 XWB, to have an "express link" to the non-existing DSB's recommendations and rulings concerning A350.

3. Other Measures Having a Particularly Close Relationship

5. In *US – Zeroing (Article 21.5 – EC)*, the Appellate Body has made it clear that, a measure not by itself a "measure taken to comply" may also fall within the scope of review under Article 21.5 of the DSU if the required particularly close relationship exists between that measure and the declared measures taken to comply and the DSB's recommendations and rulings.[3]

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[1] In the document circulated by EU ("EU Notification") regarding its implementation of the DSB's recommendations and rulings, nowhere is any "measure taken to comply" regarding A350 (XWB) declared. See *EC – Large Civil Aircraft*, *Communication from the European Union*, WT/DS316/17, dated 5 December 2011.

[2] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 68.

[3] Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 204.

6. As no relevant rulings or recommendations have ever been made concerning the LA/MSF for the A350 in the original proceedings, EU bears no obligation to adopt any "measures taken to comply" and indeed EU mentions none regarding A350 in the EU Notification. In this context, as one end of the "particularly close relationship" – the declared measures taken to comply and the DSB's recommendations and rulings – does not even exist, it is, therefore, impossible to establish that any measure could have "a particularly close relationship" with this non-existing end.

7. The U.S. argues that, for the alleged LA/MSF for the A350 XWB, a "particularly close relationship" could be established, not with the unestablished LA/MSF for the A350, but with LA/MSF for all twin aisle LCA found to be inconsistent in the original proceedings.

8. However, China notes that, in the original proceedings, (i) the DSB's findings on each LA/MSF on the basis of individual Airbus LCA models shows that the respective LA/MSF measure for each model is *separate* from and *parallel* to others; (ii) there were no findings on an "LA/MSF Programme" allegedly covering all models of Airbus LCA, not to mention a particular "LA/MSF Programme" for twin aisle LCA. Therefore, findings of a "particularly close relationship" regarding such a measure ought to be conducted within the orbit of each individual LCA model.

9. Therefore, there is no basis for the U.S. to assert that the LA/MSF for the A350 XWB has a particularly close relationship to either LA/MSF for the A350, or all other LA/MSF for twin aisle LCA.

4. Replacement Subsidy

10. The U.S. relies on the Appellate Body's conclusion in *US – Upland Cotton (21.5 – Brazil)*[4] to assert that the alleged LA/MSF for the A350 XWB is within the terms of reference of these compliance proceedings, because it is a replacement subsidy for any earlier WTO-inconsistent LA/MSF measures that the EU claims to have withdrawn. However, the U.S. ignores that the facts of *US – Upland Cotton (21.5 – Brazil)* are fundamentally different from those of the present dispute.

11. Unlike the payments at issue in *US – Upland Cotton (21.5 – Brazil)*, in the present dispute, those LA/MSF measures for respective LCA models have not been found to be provided under the same framework (a single "LA/MSF Programme"). In addition, payments made under the challenged LA/MSF are not recurring. Therefore, there is no factual basis to establish that the alleged LA/MSF for the A350 XWB is a "replacement subsidy" in relation to "any earlier WTO-inconsistent LA/MSF measures" which are actually all separate from and parallel to each other.

5. Excluding LA/MSF for the A350 XWB Circumvents the EU's Obligation

12. To assert that excluding the alleged LA/MSF for the A350 XWB from the terms of reference of these proceedings circumvents the EU's obligation, the U.S. relies on a statement made by the Appellate Body in *US – Lumber CVDs Final (Article 21.5 – Canada)* that "[limits on the claims] should not allow circumvention by Members by allowing them to comply through one measure, while at the same time, negating compliance through another."[5]

13. However, China submits that this quoted statement was made in the process of Appellate Body's integrated analysis of the "particularly close relationship" test. The U.S. incorrectly relies on the alleged "circumvention" test, which is never a separate or distinct legal standard for determining the scope of review under Article 21.5 proceedings.

[4] Appellate Body Report, *US – Upland Cotton (21.5 – Brazil)*, paras. 235-238.

[5] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 71, quoted in US First Written Submission, Para. 163.

III. CLAIMS THAT GRANTS OF LA/MSF FOR THE A380 AND A350 XWB ARE PROHIBITED SUBSIDIES ARE NOT WITHIN THE TERMS OF REFERENCE OF THESE COMPLIANCE PROCEEDINGS

1. The U.S. Claims against the LA/MSF for the A380

14. China recalls that, in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body opined that, unlike any new measures that are, or should be taken to comply with the DSB's recommendations and rulings, the old and unchanged measures in the original proceedings are not the appropriate subject of the Article 21.5 proceedings.[6]

15. Therefore, to the extent that the LA/MSF for the A380 remains unchanged ever since the original proceedings and no new measure has been taken, the LA/MSF for the A380 shall not fall under the terms of reference of these Article 21.5 proceedings. Thus, claims against the LA/MSF for the A380, including both the alleged export subsidies and the import substitution subsidies claims, shall not be reviewed in these proceedings.

16. Specifically for the claim of alleged export subsidies, China is of the view that the U.S. misapplies the legal standards established in *US – OCTG (Article 21.5 – Argentina)*. In that case, the fundamental reason for the Appellate Body to include an issue on which no findings have been made in the original proceedings into the scope of review under Article 21.5 is that, the Appellate Body found it to be part of the "measures taken to comply".[7]

17. In the present dispute, in contrast, there were no findings and relevant DSB recommendations and rulings made in the original proceedings on the alleged export subsidies provided for the A380. As a result, no new measures have been taken by the EU regarding the LA/MSF for the A380. Consequently, the U.S. argument that a party may simply raise an issue with no findings in the original proceedings again in Article 21.5 proceedings does not stand in this dispute.

18. From another perspective, it is noteworthy that the function of Article 21.5 proceedings should not be confused with that of the original proceedings. To have an unchanged measure be re-litigated in the Article 21.5 proceedings serves no extra procedural value because no further recommendations will be made regarding that measure. Notably, it amounts to converting the Article 21.5 proceedings into a remand procedure under which the complainant is granted a second chance to challenge the same measure, and the respondent has to defend it anew. Clearly, this is not the intended purpose of Article 21.5 proceedings.

2. The U.S. Claims against the LA/MSF for the A350 XWB

19. China has submitted above that the LA/MSF for the A350 is not within the terms of reference of these proceedings. On the basis of the conclusion made by the Appellate Body in *EC –Bed Linen (Article 21.5 – India)* that "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings"[8], China further submits that, the claims challenging the LA/MSF for the A350 XWB "cannot properly be raised in Article 21.5 proceedings".

IV. CONCLUSION

20. In conclusion, China is of the opinion that,

(i) LA/MSF for the A350 XWB is not within the terms of reference of these compliance proceedings, because it does not fall under any one of the following: (i) a measure taken to comply declared by the EU, (ii) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the DSB's recommendations and rulings made in original proceedings; (iii) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and

[6] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.
[7] Appellate Body Report, *US – OCTG (Article 21.5 – Argentina)*, para. 143-145, 146 and 152.
[8] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

rulings; and (iv) a replacement subsidy which replaces the one found to be WTO-inconsistent in the original proceedings.

(ii) Claims that grants of LA/MSF for the A380 and A350 XWB are prohibited subsidies are not within the terms of reference of these compliance proceedings, because for LA/MSF for the A380, it is unchanged ever since the original proceedings and should not be brought into the Article 21.5 proceedings. The U.S. arguments in this respect do not stand and are difficult to reconcile with the objectives and aims of Article 21.5 of the DSU. For claims regarding LA/MSF for the A350 XWB, because the measure itself – the LA/MSF for the A350 XWB – is not within the terms of reference of Article 21.5 proceedings, any claims challenging that measure shall not be reviewed in these proceedings.

ANNEX D-7

EXECUTIVE SUMMARY OF THE STATEMENT OF CHINA AT THE PANEL MEETING

1. Mr. Chairman, members of the Panel, it is my honor to appear before you today to present the views of China as a third party. In this oral statement, China will focus its views on whether LA/MSF for the A350 XWB, and the claim that grants of LA/MSF for the A350 XWB are prohibited subsidies, are within the terms of reference of these compliance proceedings.

2. China submits that in order for a measure to be subject to review by an Article 21.5 panel, it has to fall under one or more of the following: (i) a declared "measure taken to comply"; (ii) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the DSB's recommendations and rulings made in the original proceedings; (iii) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and rulings; and (iv) in a subsidy case, a subsidy which replaces the one found to be WTO-inconsistent in the original proceedings.

3. China notes that the alleged LA/MSF for the A350 XWB falls under none of the four situations, and therefore is not within the terms of reference of these compliance proceedings.

4. ***First***, in China's view, where a Member has adopted a measure to implement its obligations, and has so declared, it is necessary for a compliance panel to review such a measure. In this dispute, there is no "measure taken to comply" declared by EU in respect of A350 XWB. Thus, the alleged LA/MSF for the A350 XWB could not possibly be included in the terms of reference of these compliance proceedings for it's a "declared" measure taken to comply.

5. ***Second***, in light of the Appellate Body's analysis in *US –Lumber CVDs Final (Article 21.5)*, other measures may nevertheless constitute part of the "measures taken to comply" if an "express link" exists between those measures and the DSB's recommendations and rulings.[1] China recalls that no rulings or recommendations concerning the alleged LA/MSF for the A350 have ever been made in the original proceedings. Therefore, it is not possible for any measure, including the alleged LA/MSF for the A350 XWB, to have an "express link" to the non-existing DSB's recommendations and rulings concerning A350.

6. ***Third***, according to the Appellate Body in *US – Zeroing (Article 21.5 – EC)*, a measure not by itself a "measure taken to comply" may fall within the scope of review under Article 21.5 of the DSU, and the prerequisites are (i) the establishment of a "particularly close relationship"; and (ii) such relationship must exist between, on the one hand, the measure at issue, and on the other, the declared measures taken to comply and the DSB's recommendations and rulings.[2]

7. In the original proceedings, no rulings or recommendations have ever been made concerning the LA/MSF for the A350. Thus, EU bears no obligation to adopt any "measures taken to comply" and indeed EU mentions none regarding A350 in the EU Notification. In this context, as one end of the "particularly close relationship" – the declared measures taken to comply and the DSB's recommendations and rulings – does not even exist, it is, therefore, impossible to establish that any measure could have a "particularly close relationship" with this non-existing end.

8. While putting quite much strength on the close relationship test itself, the U.S. does not seem to care enough about where such a relationship should be established. The U.S. simply stresses that, by comparing the nature, effects and timing, a particularly close relationship has been established between the alleged LA/MSF for the A350 XWB, and LA/MSF for twin aisle LCA, or even "all previous LA/MSF grants".

9. However, China notes that, in the original proceedings, (i) the DSB's findings on each LA/MSF on the basis of individual Airbus LCA models shows that the respective LA/MSF measure

[1] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 68.
[2] Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 204.

for each model is *separate* from and *parallel* to others; and (ii) there were no findings on an "LA/MSF Programme" allegedly covering all models of Airbus LCA, not to mention a particular "LA/MSF Programme" for twin aisle LCA. Therefore, findings of a "particularly close relationship" regarding such a measure ought to be conducted within the orbit of each individual LCA model.

10. Therefore, there is no basis for the U.S. to assert that the LA/MSF for the A350 XWB has a particularly close relationship to either LA/MSF for the A350, or LA/MSF for twin aisle LCA, or "all previous LA/MSF grants".

11. The U.S. assertions effectively disregards the Appellate Body's explicit instruction that the close relationship should be established with "the declared measures taken to comply and the DSB's recommendations and rulings". Inevitably, it would overly expand the scope of these compliance proceedings and cause imbalance between the competing interest in prompt settlement of disputes and the interest in due process.

12. ***Fourth***, the U.S. also relies on the Appellate Body's conclusion in *US – Upland Cotton (21.5 – Brazil)*[3] to assert that the alleged LA/MSF for the A350 XWB is within the terms of reference of these compliance proceedings, because it is a replacement subsidy for any earlier WTO-inconsistent LA/MSF measures that the EU claims to have withdrawn. However, the U.S. ignores that the facts of *US – Upland Cotton (21.5 – Brazil)* are fundamentally different from those of the present dispute.

13. Unlike the payments at issue in *US – Upland Cotton (21.5 – Brazil)*, in the present dispute, those LA/MSF measures for respective LCA models have not been found to be provided under the same framework (a single "LA/MSF Programme"). In addition, payments made under the challenged LA/MSF are not recurring. Therefore, there is no factual basis to establish that the alleged LA/MSF for the A350 XWB is a "replacement subsidy" in relation to "any earlier WTO-inconsistent LA/MSF measures" which are actually all separate from and parallel to each other.

14. ***Finally***, to assert that excluding the alleged LA/MSF for the A350 XWB from the terms of reference of these proceedings circumvents the EU's obligation, the U.S. relies on a statement made by the Appellate Body in *US – Lumber CVDs Final (Article 21.5 – Canada)* that "[limits on the claims] should not allow circumvention by Members by allowing them to comply through one measure, while at the same time, negating compliance through another."[4]

15. However, China submits that this quoted statement was made in the process of Appellate Body's integrated analysis of the "particularly close relationship" test. The U.S. incorrectly relies on the alleged "circumvention" test, which is never a separate or distinct legal standard for determining the scope of review under Article 21.5 proceedings.

16. In light of the above, China submits that the LA/MSF for the A350 is not within the terms of reference of these proceedings. Further, on the basis of the conclusion made by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* that "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings"[5], China submits that the claims challenging the LA/MSF for the A350 XWB "cannot properly be raised in Article 21.5 proceedings".

17. ***In conclusion***, China is of the opinion that, LA/MSF for the A350 XWB is not within the terms of reference of these compliance proceedings, because it does not fall under any one of the four possible ways by which a measure may be reviewed by the compliance Panel. Because the measure itself – the LA/MSF for the A350 XWB – is not within the terms of reference of Article 21.5 proceedings, any claims challenging that measure shall not be reviewed in these proceedings.

[3] Appellate Body Report, *US – Upland Cotton (21.5 – Brazil)*, paras. 235-238.

[4] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 71, quoted in US First Written Submission, Para. 163.

[5] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

ANNEX D-8

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF JAPAN

I. FIRST ISSUE: THE UNITED STATES FAILS TO PRESENT A SUFFICIENT FACTUAL BASIS FOR ITS CALCULATION OF ANTICIPATED AND BASELINE RATIOS

A. ANTICIPATED RATIO OF EXPORT TO DOMESTIC SALES OF A350 XWB AND A380 LACKS FACTUAL BASIS

1. Japan considers that the Panel should proceed cautiously with the United States' submission that the sales data for the market in "*Very Large Aircraft*" (*i.e.*, the Airbus A380 and the Boeing 747) are appropriate inputs for the calculation of the anticipated ratio[1]. The Appellate Body did not recommend the use of data from the wider product market; only data pertaining to the subsidized company itself is cited as relevant in the Appellate Body's Report.[2] In Japan's opinion, the United States neither presents a compelling enough argument nor a sufficient factual basis to support its submission that anticipated sales trends from the market for Very Large Aircraft should be used as the basis for the anticipated ratio for the A380.

2. Moreover, in arguing that the Airbus report generates an anticipated ratio of 4:1 while the equivalent report from Boeing demonstrates a 5:1 predicted ratio of exports to domestic sales[3], the United States uses the former ratio with no explanation as to why the latter is validly supportive of the former.[4]

3. Further, it would have been reasonable to assume at the time of granting the subsidies that demand for Very Large Aircraft would be split between the Airbus A380 and the Boeing 747, particularly given the latter's longstanding monopoly over the market for aircraft of a 400+ passenger capacity. On that ground, Japan is of the view that the Panel should request that the United States clarify the basis on which it assumes that Airbus would have anticipated sales of the A380 in proportion to the size of the European and non-European markets respectively, because the reality is that the market demand differs depending on the market. The United States' sales forecasts of the A380 are too remote to constitute sufficient *prima facie* factual evidence.[5]

4. Insofar as the United States' proposed anticipated sales ratio for the A350 XWB is concerned, its arguments are also factually untenable. By examining Airbus' order book at the end of 2009, the United States is interpreting the order trends *before* the subsidies had been granted (*i.e.* the actual orders, before the alleged subsidies had been in operation). This information does not correspond to the Appellate Body's finding that the necessary data should be based on Airbus' *anticipated* performance at the time the subsidies were granted, not its *actual* performance thereafter.[6]

B. BASELINE RATIO OF EXPORT TO DOMESTIC SALES OF A350 XWB AND A380 LACKS FACTUAL BASIS

5. As the Appellate Body concluded, the baseline ratio can be based either on the *recipient's historical sales data* of the same product or, in the absence of such data, on what the performance of a profit-maximizing firm would be expected to achieve hypothetically and without subsidization in the same market for the same product.[7] However, in spite of the Appellate Body's findings, the

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[1] *First Written Submission of the United States, 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* (DS316), 6 June 2012 [US First Written Submission], at paras. 183 - 185.

[2] See Appellate Body Report, European Communities and Certain Member States – Measures affecting Trade in Large Civil Aircraft, WT/DS316/AB/R [EC-Aircraft], at para. 1047, where the Appellate Body states *that "[t]he situation in the absence of the subsidy may be understood on the basis of historical sales of the same product by the recipient in the domestic and export markets*" [Underlining added].

[3] US First Written Submission, at paras. 183 -185.

[4] US First Written Submission, at para. 188

[5] *i.e.* they cite only a quotation that foresees that "*over half of the projected deliveries [of the A380 are] expected to go to airlines domiciled in the Asia-Pacific region*"; see US First Written Submission, at para. 185.

[6] Appellate Body Report, *EC-Aircraft*, at para. 1049.

[7] Appellate Body Report, *EC-Aircraft*, at para. 1047.

United States has submi*tted that the sales data of Boein*g's 747 constitute an appropriate baseline ratio because it was the only comparable passenger aircraft before the launch of the A380.

6. Firstly, Japan notes that there is no historical sales data of Airbus' A380. The two models could have different strengths and weaknesses, their producers may utilize different marketing strategies for particular markets, and the markets have different consumer preferences. Other factors which may cause differences in sales include aircraft pricing strategies, warranty coverage, and maintenance needs, such as those linked to fleet interoperability. Accordingly, the market outcome may differ between these products.

7. In this connection, Japan notes that the original panel and Appellate Body made findings of actionable subsidies conferred by the United States on Boeing, including 747 Large Freight Aircraft. Moreover, Boeing operated an effective monopoly in the 400+ passenger capacity civil aircraft market before the introduction of the A380 by Airbus. On these grounds, Japan considers the use of data pertaining to Boeing's 747 is not an appropriate source for the calculation of the baseline ratio. The United States does not present any compelling reason or fact to support the hypothesis that Airbus could have sold the A380 according to the same patterns and with the same export to domestic sales ratio.

8. Japan repeats this same proposition in relation to the United States' proposed baseline ratio for the Airbus A350 XWB. Japan therefore considers: (i) that Boeing's actual historical sales trends are therefore too remote to base an assumption of how Airbus would have behaved in the absence of the subsidies; and (ii) that recourse to Boeing's historical data is not endorsed by the Appellate Body's findings.

9. Secondly, Japan notes that the United States has undertaken the calculation of both ratios using different data sources[8], but has not explained why the comparison is valid despite the differences in data sources.

10. Lastly, Japan wishes to note that the input sales data used in the ratio calculations for both the A380 and the A350 XWB are not contemporaneous.

C. HIGHER ANTICIPATED RATIO THAN BASELINE RATIO INCONCLUSIVE OF *DE FACTO* CONTINGENCY

11. As the Appellate Body pointed out, the fact that the subsidizing governments anticipated a proportional increase in export sales is insufficient to determine contingency, as the assessment on this point should be objective rather than subjective.[9]

12. The Panel should recall that the Appellate Body stressed that the subsidy must cause exports to behave in a way that "is not reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[10] The United States has not pleaded that the trends pertaining to the export to domestic sales ratios have caused the necessary *distortion* on the market. Therefore, Japan considers that, at present, the Panel should contemplate that Airbus' rise in export sales in proportion to domestic sales either: (i) was not necessarily the result of subsidization whose objective design and structure is to incentivize exports; or (ii) may not be accountable for any distortion of the market for passenger aircraft in favour of exports.

II. SECOND ISSUE: LA/MSF FOR THE A380 AND A350 XWB ARE IMPORT SUBSTITUTION SUBSIDIES

A. CONTINGENCY IN LAW UPON IMPORT SUBSTITUTION

13. Japan notes that the United States itself admits that "*the requirement to produce and use domestic components was not explicit*" with respect to German, Spanish and UK (and French) LA/MSF for the A380[11] and that with respect to LA/MSF for the A350 XWB, the United States does

[8] US First Written Submission, at paras 183-188 and 194-199.
[9] Appellate Body Report, *EC- Aircraft*, at para. 1050.
[10] Appellate Body Report, *EC-Aircraft*, at para. 1045.
[11] US First Written Submission, at para. 219.

not argue that these measures are *de jure* inconsistent with Article 3.1(b) of the *SCM Agreement*.[12]

14. Japan acknowledges that even if a challenged measure does not explicitly require the use of domestic components, the subsidy contingent in law on the use of domestic over imported goods could be found. In this connection, the Appellate Body explicitly confirmed that the standard for establishing contingency in law, which can be derived by necessary implication from the words actually used in the measure, under Article 3.1(a) of the *SCM Agreement* also applies for establishing contingency under Article 3.1(b) of the *SCM Agreement*.[13] However, Japan is of the view that an overly broad interpretation to the notion of implicit contingency in law should not be given for the following two reasons.

15. First, to establish implicit contingency in law, the Appellate Body made it clear that "*conditionality can be derived by necessary implication from the words actually used in the measure*."[14] [Underlining added] As such, what matters are the words actually used in the measure and not, as the United States appears to argue, factors not linked to the words actually used in the measure such as the structure of Airbus' productive facilities, applications by Airbus for LA/MSF from member States, press reports and other public discussions.

16. Second, as the original panel already pointed out in *EC – Aircraft*, an overly broad interpretation of the notion of implicit contingency in law would obfuscate the conditions for a finding of contingency in law with the conditions for a finding of contingency in fact[15].

B. CONTINGENCY IN FACT UPON IMPORT SUBSTITUTION

17. As far as concerns French, German, Spanish and UK LA/MSF for the A380 and the A350 XWB, the United States argues, as the main argument with respect to French LA/MSF and as an alternative argument with respect to German, Spanish and UK LA/MSF, that these are subsidies contingent in fact on the use of domestic over imported goods pursuant to Article 3.1(b) of the *SCM Agreement* and therefore prohibited import substitution subsidies.

18. Japan considers that the Panel should apply, when examining whether the LA/MSF measures granted to Airbus for the development of the A380 and the A350 XWB were contingent in fact upon the use of domestic goods over imports, the same standard as the Appellate Body set out in *EC – Aircraft* with respect to *de facto* export contingency. In other words, whether the subsidies granted to Airbus are/were in fact contingent upon the use of domestic over imported goods needs to be determined by assessing the subsidy itself, in the light of the relevant factual measures such as the design and the structure of the measure granting the subsidy; the modalities of operation set out in the subsidy measure; and the relevant factual circumstances surrounding the granting of the subsidy, and not on the basis of government motivation.

19. Japan is concerned that the standard of the permissibility of such subsidies based on a government's motivation risks being over-inclusive owing to overzealous drafting on the part of a government. Motivation is therefore an inappropriate tool to determine the WTO-permissibility of an alleged subsidy.

C. LINK BETWEEN THE LA/MSF MEASURES AND THE WORKSHARE AGREEMENTS

20. On the United States' argument that the existence of workshare agreements was a condition for the LA/MSF subsidies to be granted to Airbus and therefore the LA/MSF measures constitute impermissible import substitution schemes under Article 3.1(b) of the *SCM Agreement*, the Panel should examine carefully whether a grant of the LA/MSF measures is indeed conditioned on the existence of such workshare agreements and examine whether the workshare agreements indeed required the use of domestic products over imported products. In this regard, the Panel should examine whether the recipi*ents of the subsidie*s at issue are conditioned by the workshare agreements.

[12] US First Written Submission, at para. 230.

[13] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000 [*Canada – Autos*], at para. 123.

[14] Appellate Body Report, *Canada – Autos*, at para. 123.

[15] See the panel's findings in para. 7.692-7.716 of its report in EC – Aircraft.

21. In this connection, Japan wishes to point out that even if the Panel would find that the workshare agreements are WTO-inconsistent agreements, this does not necessarily imply that the LA/MSF measures at issue are by definition inconsistent with the EU's WTO commitments, since there may not be a link between WTO-inconsistent workshare agreements and the granting of the LA/MSF measures.

III. THIRD ISSUE: THE REMOVAL OF ADVERSE EFFECTS IN THE CONTEXT OF ARTICLE 7.8 OF THE *SCM AGREEMENT*

A. JAPAN'S VIEW OF THE MEANING OF "*REMOVAL*" OF ADVERSE EFFECTS

22. Japan considers that the removal of adverse effects under Article 7.8 of the *SCM Agreement* would mean: *if the Member granting a beneficial financial contribution makes it no longer possible for the grantee enterprise to use the benefits conferred by the financial contribution to lower the sales price of its products, for example, by having the benefit returned to the grantor government, then the adverse effects of the subsidies should be considered to have been removed*. In this situation, if the grantee enterprise is still commercially able to sell its products at a competitive price, it would be, by definition, more economically efficient to allow it to do that, rather than to disable it to do that.

23. This position is consistent with, and supported by, the Appellate Body's previous rulings in *EC-Aircraft*, and *US – Upland Cotton (Article 21.5 – Brazil)*[16].

B. THE REMOVAL OF ADVERSE EFFECTS AND THE CONTINUED EXISTENCE OF AIRBUS

24. In discussing what action the European Union should take to remove the adverse effects of the subsidies at issue, the United States repeatedly refers to the finding of the Appellate body in *EC - Aircraft* that "*[w]ithout LA/MSF, Airbus likely would not exist at all.*"[17] It appears that the United States effectively argues, or its argument is tantamount to arguing, that the adverse effects cannot be removed as long as Airbus continues to exist, since Airbus would not exist in its present form had it not received LA/MSF. This position seems to be extreme. Further, as noted above, it appears unreasonable to request that Airbus cease to exist even if it has been rendered no longer possible that Airbus will use the benefit conferred by the subsidies at issue to lower the sales prices of its products.

25. The United States' assertion in the context of remedies that Airbus likely would not currently exist but for the LA/MSF[18] is also at odds with the United States' submission in *Australia – Automobile Leather II (21.5 – US)*.[19] In this case, the United States took a prospective, forward-looking approach towards the remedy it sought under the *SCM Agreement*. By contrast, in the present proceeding the United States appears to be fixated on the theoretical continued existence of Airbus in the absence of receiving LA/MSF.

26. Therefore, Japan is apprehensive about the risk of establishing impossible standard for "removal of adverse effects" in the context of Article 7.8 of the *SCM Agreement.*

[16] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil),* WT/DS267/AB/RW, adopted 21 March 2005.

[17] US First Written Submission, at para. 323. See also at para. 243.

[18] US First Written Submission, at para. 243 and 323.

[19] Panel Report, *Australia — Automotive Leather II (Article 21.5 — US)*, WT/DS126/RW, adopted 11 February 2000.

ANNEX D-9

EXECUTIVE SUMMARY OF THE STATEMENT OF JAPAN
AT THE PANEL MEETING

I. WITHDRAWAL OF A SUBSIDY AND REMOVAL OF THE ADVERSE EFFECTS OF A SUBSIDY

1. Pursuant to Article 7.8 of the *SCM Agreement*, a subsidizing government is required to withdraw the subsidy or remove the adverse effects which still remain in the present. This conclusion follows from the general principle that remedies in WTO law are generally understood to be prospective in nature,[1] which has been followed in numerous cases.

2. Japan would like to draw the Panel's attention to the language of Article 7.8 of the *SCM Agreement*. Under this provision, a Member has an option of either withdrawing the subsidy or removing the adverse effects of the subsidy. It follows from the structure of this provision a Member that has withdrawn the subsidies at issue is deemed to have taken appropriate steps to remove the adverse effects within the meaning of this provision.

3. Japan further submits that assessing whether the subsidies at issue are presently causing adverse effects requires a proper understanding of the "life" of subsidies, as referred to by the Appellate Body. Under Article 1.1 of the SCM Agreement, a subsidy is deemed to exist if there is a financial contribution by a government or any public body and a benefit is thereby conferred. As the Appellate Body noted in *Brazil – Aircraft*, a financial contribution and benefit are two separate legal elements, and both must exist for there to be subsidy.[2]

4. Given that under Article 1.1 of the *SCM Agreement* it is only when a financial contribution confers a benefit that such a financial contribution qualifies as a subsidy, the structure of the *SCM Agreement* demonstrates that the existence of a benefit is crucial for the ability of the subsidy received by a recipient to cause adverse effects. Indeed, the *SCM Agreement* contemplates that the recipient of subsidies, through utilizing the benefit, may cause adverse effects on the like products of another Member. The Appellate Body in *EC – Aircraft* clearly held that the *SCM Agreement* requires a finding of a "genuine and substantial relationship of cause and effect" between the subsidy and the observed adverse effects.[3]

5. Japan notes that Article 7.8 of the *SCM Agreement* must be properly read to imply that the subsidizing government discharges its obligation either by the removal of the financial contribution or the benefit. The Appellate Body confirmed in *EC – Aircraft* by acknowledging the "basic proposition that a subsidy has a life, which may come to an end, either through the removal of the financial contribution and/or the expiration of the benefit."[4] Thus, in order to withdraw the subsidy it should be asked how the benefit can be removed.

1. Removal of a Benefit

6. In respect of the removal of the benefit, Japan would like to comment on the expiration of the benefit. The United States submits that the "the life of a product creation subsidy, like LA/MSF, lasts at least as long as the commercial life of the product it creates, and beyond in certain instances."[5] Japan believes that this statement conflates the concepts of the "benefit" and "effect" of a subsidy.

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[1] Appellate Body Report, *US – Subsidies on Upland Cotton (Article 21.5 – Brazil)*, WT/DS267/AB/RW, [*US – Upland Cotton (Article 21.5 – Brazil)*], at footnote 494 to para. 243.

[2] Appellate Body Report, *Brazil – Export Financing Program for Aircraft*, WT/DS46/AB/R [*Brazil – Aircraft*], at para. 157.

[3] See Appellate Body Report, *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, [*EC – Aircraft*], at para. 1232.

[4] *Ibid.*, at para. 709.

[5] US Second Written Submission, para. 175.

7. First of all, under the *SCM Agreement*, a "benefit" is capable of being calculated and quantified, and is expendable over time.[6] At the time when a subsidy is granted, the subsidizing government contemplates that this quantifiable and expendable "benefit" of the subsidy will materialize and be consumed over a certain period of time to achieve the relevant policy objectives. This approach falls squarely within the framework of the Appellate Body's reasoning that "at the time of the grant of a subsidy, the subsidy will necessarily be projected to have a finite life and to be utilized over that finite period."[7]

8. Moreover, the Appellate Body has confirmed that the determination of a benefit under the *SCM Agreement* is an *ex ante* analysis that does not depend on how the particular financial contribution actually performed after it was granted.[8] Furthermore, the Appellate Body has observed that "the nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution might be expected to flow."[9] Consequently, for the analysis as to whether the benefit has expired or ceased to exist, the materialization and consumption of the benefit usually are functions of the policy objectives of subsidies as depicted in the structure and nature of any particular subsidy.

9. In line with this proposition, the Appellate Body offered a number of factors which might be used to assess the life of a benefit, including the period of time over which the subsidy is expected to be used for future production.[10] Japan submits that the weight allocated to each factor mentioned by the Appellate Body would depend on the structure and nature of the particular subsidy. For example, the period of time over which the subsidy is expected to be used to lower the price levels of products may be relevant for the assessment of the life of research and development (R&D) subsidies. Japan understands that the function of R&D subsidies is, for example, to lower, to the extent of the "benefit" amount, the sales price of products incorporating the results of the research activities down to a competitive level. Even without such subsidies, the recipient were able to conduct such research activities successfully, and sell such products at a competitive level, a government would have little incentive to grant subsidies. If, however, the recipient had no technological potential to conduct the research activities successfully, neither would a government have little incentive to grant subsidies. A government provides R&D subsidies because the government considers that the recipient has technological potential to conduct such research activities successfully, but it will not be able to sell products incorporating the result of the research activities at a competitive level.

10. This function of such R&D subsidies contemplates that its benefit will normally be consumed as the recipient accordingly sells the product for the development of which the subsidy was provided at a price level which is lower than the anticipated price level in the absence of subsidization. Consequently, when the "benefit" is consumed in full, the recipient will no longer be able to lower price levels at the cost of further consuming the "benefit".

11. Japan would like to emphasize, however, that the assessment of the period of the life of the "benefit" should focus on the projected period or sales amount properly anticipated by granting Member when the subsidy is granted.

2. Removal of Adverse Effects

12. Japan doubts that, for the purposes of Article 7.8 of the *SCM Agreement*, a presently-existing adverse effect may be found to exist if the "benefit" has been withdrawn or consumed and the recipient is no longer able to lower the price of products by the benefit. Indeed, with respect to R&D subsidies, the recipients can use new technology which has been invented by the subsidies, even after its benefits have been removed or utilized. In Japan's view, however, the obligation to remove adverse effects should normally be limited to the price effects of R&D subsidies.

13. As mentioned above, the structure of R&D subsidies is ultimately aimed at lowering production costs so as to enable firms to lower prices to a level which is competitive in the marketplace. The fact that a recipient has invented a particular technology likely reveals that it

[6] See Article 14 of the *SCM Agreement*.
[7] Appellate Body Report, *EC – Aircraft*, at para. 709.
[8] *Ibid*., at para. 706.
[9] *Ibid*., at para. 707.
[10] *Ibid*.

must have had a technological potential to do so, but merely could not afford to do so. In this situation, the proper counterfactual is that the recipient, as a business entity, would have had to offer products using newly-invented technology at a higher price (and consequently, would have had more difficulty selling them in the market), rather than that the recipient could not have invented that technology, and thus, that product.

14. Therefore, in Japan's opinion, a finding regarding adverse effects and serious prejudice should stem primarily from the effects of the pricing policy of the firm in question with relation to the subsidized products including those incorporating new technology for the development of which the subsidy was granted, and not from the mere fact that new technology has been invented.

15. In support of this proposition, Japan submits that the *SCM Agreement* contemplates that a benefit would result in the reduction of costs of production and, therefore, cause price effects. In particular, this reality is, *inter alia*, evident from the intended purpose of countervailing duties, which effectively increase the import prices of subsidized imports. The WTO disciplines regarding the determination of injury are equally informative in this regard. Japan directs the Panel's attention to Article 15.1 of the *SCM Agreement* and Article 15.2 of the *SCM Agreement*.

16. In Japan's opinion, the adverse effects of subsidies enumerated in Article 5 of the *SCM Agreement* are ultimately related to the ability of a recipient to charge lower prices by utilizing a subsidy benefit. Therefore, Japan is of the view that it is necessary to examine carefully whether the *SCM Agreement* further addresses any other effect of subsidies that may remain after their benefit – i.e. their price effects – is accordingly consumed in full.

II. THE "ANTICIPATED EXPORT RATIO TEST"

17. The United States submits that the grants of LA/MSF for the A380 and the A350 XWB constitute prohibited subsidies, since these grants are contingent in fact upon export performance and relies on the "anticipated export ratio test" provided by the Appellate Body in *EC- Aircraft*, whereby the ratio of anticipated export and domestic sales of the subsidized product that would come about as a consequence of the granting of the subsidy is compared to the same ratio in the absence of the subsidy.

18. While Japan prefers to refrain from submitting comments regarding whether the grants of LA/MSF for the A380 and the A350 XWB are properly before the Panel, Japan has two concerns with respect to the approach proposed by the United States. First, Japan is concerned that the United States' claim regarding export contingency relies too heavily on market forecast data, thereby raising doubts whether the United States has presented a sufficient *prima facie* factual basis to support its claims. Second, Japan has a conceptual concern with respect to the "anticipated export ratio" test as proposed by the United States.

1. Applicable Legal Framework

19. The Appellate Body clarified the standard for finding *de facto* export contingency under Article 3.1(a) of the SCM Agreement in *EC – Aircraft*. The Appellate Body held that "anticipation" of exports is in itself insufficient as proof that the granting of a subsidy is tied to the anticipation of exportation and established the following test: "is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?"[11] The Appellate Body subsequently found that this test is met when "the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[12] The Appellate Body also explained that the existence of *de facto* export contingency must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy.[13]

20. The Appellate Body indicated that, where relevant evidence exists, the assessment of whether the granting of a subsidy is geared to induce the promotion of future export performance by the recipient could be based on a comparison between the ratio of anticipated export and

[11] *Ibid*., at para. 1044.
[12] *Ibid*., at para. 1045.
[13] *Ibid*., at para. 1046.

domestic sales of the subsidized product that would come about as a consequence of the granting of the subsidy and the situation in the absence of the subsidy. The situation in the absence of the subsidy may be understood on: (1) the basis of historical data; or (2) in the absence of "untainted" historical data, on the performance that a profit-maximizing firm would hypothetically be expected to achieve in the export and domestic markets in the absence of a subsidy.

2. Concerns Whether Sufficient *Prima Facie* Evidence has been Submitted

21. Japan notes that, in order to establish the "baseline ratio", the Appellate Body referred to historical sales of the recipient firm or the performance that a profit-maximizing firm would hypothetically be expected to achieve.[14] The data used by the United States to establish the baseline ratio, is, however, not based on Airbus' historical sales data but on Boeing's sales of 747 and 777 aircraft. In this respect, Japan considers that Boeing's sales data pertaining to the 747 freight aircraft and 777 aircraft are "tainted by subsidies" insofar as Boeing was in receipt of actionable subsidies during this period as per the WTO Panel's and Appellate Body's findings. Japan thus questions whether Boeing's sales data can be used to establish the baseline.

22. Japan invites the Panel to carefully examine whether the United States has provided sufficient *prima facie* evidence to support its claim that the grants of LA/MSF for the A380 and the A350 XWB constitute prohibited export subsidies. In this regard, Japan recalls that the Appellate Body itself inserted a qualifier when presenting the numerical example to illustrate whether the granting of a subsidy may be geared to induce promotion of future exports. The Appellate Body made a comparison between the anticipated ratio of export and domestic sales with the baseline ratio subject to the existence of "relevant evidence".[15]

3. Methodological Concern with Respect to the "Anticipated Export Ratio" Test

23. Japan also has a methodological concern with respect to the "anticipated export ratio" test. To be clear, Japan does not dispute that a subsidy measure providing recipients an incentive to export products abroad rather than sell them on the domestic market is likely to increase the anticipated ratio of export sales to domestic. However, the test posited by the United States may result in a finding of *de facto* export contingency even in the absence of any incentive given to recipients to increase the anticipated ratio of export sales to domestic sales when – because of certain market developments, such as higher cross-price elasticity of demand on export markets – the anticipated ratio of export sales to domestic sales is higher than the baseline ratio of export sales to domestic sales.

24. The methodological concern Japan has in this respect is that the "anticipated export ratio" test as put forward by the United States in this proceeding reduces the standard for a finding of *de facto* export contingency, as set out by the Appellate Body in *EC – Aircraft*, to a mere comparison between the anticipated ratio and the baseline ratio. Japan considers that this is not the appropriate legal standard for establishing *de facto* export contingency. Japan recalls the legal standard set out by the Appellate Body for determining *de facto* export contingency[16] and that this standard is met "when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[17]

25. Whether a subsidy is geared to induce the promotion of future export performance "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy"[18] and the Appellate Body provided its relevant factors in this respect.[19]

26. Yet the "anticipated export ratio" test put forward by the United States hollows out the legal standard set out by the Appellate Body to a simple comparison between the anticipated ratio and the baseline ratio, even though the Appellate Body was quite clear that "the standard for determining [*de facto* export contingency] is an objective standard, to be established on the basis

[14] *Ibid*.
[15] *Ibid*., at para. 1047.
[16] *Ibid*., at para. 1044.
[17] *Ibid*., at para. 1045.
[18] *Ibid*., at para. 1046. [Underlining added]
[19] *Ibid*.

of the total configuration of facts constituting and surrounding the granting of the subsidy, including the design, structure, and modalities of the measure granting the subsidy."[20]

27. Therefore, Japan submits that while a comparison between the anticipated ratio and the baseline ratio may be one of the "facts constituting and surrounding the granting of the subsidy", it cannot be determinative of whether a given subsidy measure is *de facto* export contingent. In this respect, Japan refers to the finding of the Appellate Body that "the assessment could be based"[21] on a comparison between the anticipated ratio and the baseline ratio and that such a comparison, if supported by evidence showing an incentive to skew anticipated sales towards exports, "would be an indication"[22] of *de facto* export contingency. Should the Panel endorse the "anticipated export ratio" test to determine whether a subsidy is *de facto* export contingent, Japan is concerned that such an endorsement may result in three unintended consequences.

28. First, allowing WTO Members to establish *de facto* export contingency based only on a comparison between anticipated and baseline ratios would contradict the Appellate Body's previous finding that "proving *de facto* export contingency is a much more difficult task [than proving *de jure* export contingency]."[23] Indeed, the Appellate Body in *EC – Aircraft* endorsed this conclusion regarding the complexity of establishing *de facto* export contingency.[24]

29. Second, the importance of the baseline ratio in determining whether a subsidy is *de facto* export contingent carries the risk that one and the same subsidy is considered *de facto* export contingent if the baseline ratio is set in year/period X, whereas it is not considered *de facto* export contingent if the baseline ratio is set in year/period Y. Indeed, due to changes in the market situation, the ratio between exports and domestic sales in any given year or period may be substantially different from any other year or period.

30. Third, WTO Members with small domestic markets, for whom changes in baseline ratios from one year or period to another may be more pronounced, may be more vulnerable to a finding of *de facto* export contingency compared to WTO Members with larger domestic markets. Japan believes that all WTO Members, without regard to the size of their own domestic markets, should enjoy equal treatment in terms of the restrictions on subsidies.

31. Therefore, Japan respectfully invites the Panel to examine the Appellate Body's findings set out in *EC – Aircraft*, and particularly the explicit guidance that whether a subsidy is geared to induce the promotion of the future export performance must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, when assessing whether the grants of LA/MSF for the A380 and the A350 XWB constitute prohibited export subsidies.

[20] *Ibid*., at para. 1050. [Underlining added]
[21] *Ibid*., at para. 1047. [Underlining added]
[22] *Ibid*. [Underlining added]
[23] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, at para. 167.
[24] Appellate Body Report, *EC – Aircraft*, at para. 1038. [Underlining added]

ANNEX D-10

EXECUTIVE SUMMARY OF THE STATEMENT OF THE REPUBLIC OF KOREA AT THE PANEL MEETING

Mr. Chairman and members of the Panel,

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party in this dispute. The decision of the Panel in this dispute will provide important guidelines to the WTO Members in making their policy decisions and formulating their respective government programs in a manner consistent with the relevant rules of the WTO.

2. While the parties to the dispute and third parties raise several important issues, Korea would like to briefly focus on the following two systemic points. First point is whether this Panel's terms of reference include LA/MSF for the A350XWB. Second point is whether LA/MSF for the A380 and the A350XWB constitutes subsidies contingent upon the use of domestic over imported goods, prohibited under Article 3.1(b) of the SCM Agreement.

3. To begin with, we would like to note that the issue of a compliance Panel's terms of reference has a close bearing with the enforceability of the WTO Agreements. This is so, because a compliance panel's decision will have two significant aspects. On the one hand, a compliance panel's decision is directly related to the security and predictability of the WTO dispute settlement mechanism. Without a certain limitation on the scope of a compliance panel's terms of reference, a complainant might want to re-litigate in a compliance proceeding issues it could and should have claimed in the original proceeding. This virtual re-litigation would constitute an abuse of the compliance proceeding by the complainant. On the other hand, a compliance panel should also ensure that an implementing Member does not attempt to circumvent its obligation to implement the recommendations and rulings of the DSB, by being allowed to take essentially the same measure simply because it was not included in the original proceeding.

4. In short, if a compliance panel's terms of reference are overly broad, it may open a back door for measures, which could and should have been included in the original panel proceeding (but were excluded by a complainant), to come to a compliance proceeding. On the other hand, should a compliance panel's terms of reference be overly narrow an implementing Member may attempt to introduce a new measure which share the characteristics of the impugned measure in all material respects, thereby effectively avoiding its obligation to comply with the recommendations and rulings of the DSB. Thus, a balance should be struck between the two competing considerations.

5. In determining the scope of terms of reference of the present proceeding, this Panel should carefully examine and apply the WTO jurisprudence on this issue. In Korea's view, WTO jurisprudence accumulated so far offers important guidelines in this regard.

6. First of all, Korea notes that the WTO jurisprudence has acknowledged a panel's broad authority to identify measures taken to comply. The Appellate Body has ruled that panels have a duty to examine issues of a "fundamental nature," issues that go to the root of their jurisdiction on their own motion *even* if the parties to the dispute remain silent on those issues.[1] Where the parties to the dispute identified measures, a compliance panel still has to determine which of the measures listed in the request for its establishment are indeed "measures taken to comply."[2] Hence, the WTO jurisprudence has provided a compliance panel with extensive authority not merely to be confined to the measures raised by the parties to the dispute.

7. That being said, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 - Canada)* provides us with a guideline directly on point. It considered measures other than the declared

[1] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5)*, para. 36, quoted in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.35.

[2] Appellate Body Report, *EC – Bed Linen*, para. 78.

measures taken to comply with an original WTO decision. According to the Appellate Body, terms of reference of a compliance panel are not merely limited to the measures declared to comply by an implementing party.[3] It thus stated that "some measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel, acting under Article 21.5."[4] The Appellate Body further opined that in order to determine whether there is a close relationship between the declared measures taken to comply and other measures, a compliance panel must examine the timing, nature, and effects of the other measures.[5] At the same time, a compliance panel must also "examine the factual and legal background against which a declared 'measure taken to comply' is adopted."[6]

8. It seems that the parties to this dispute and third parties all agree that the applicable test here should be whether or not there exists a "close relationship," as pronounced by the Appellate Body. Thus, the question is whether LA/MSF for the A350XWB meets the "close relationship" test. As the Panel is well aware, examining the timing, nature, and effects of other measures poses complex factual questions. Indeed, the parties maintain different positions regarding the timing, nature and effects of other measures at issue, even if they agree upon the same legal test of "close relationship." Thus, Korea requests the Panel to carefully review the facts of the dispute as a trier of facts and determine whether LA/MSF for the A350XWB can be regarded as a measure closely related to the measures taken to comply by the EU, in accordance with the jurisprudence of the Appellate Body.

9. Secondly, another issue Korea would like to raise concerns interpretation and application of Article 3.1(b) of the SCM Agreement. The United States argues that LA/MSF for the A380 and the A350XWB constitute prohibited subsidies because they are subsidies contingent upon the use of domestic goods. Article 3.1(b) of the SCM Agreement indeed prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

10. In general, Korea agrees with the statement of the United States that "[i]f the receipt of a subsidy requires a manufacturer to use domestically produced manufacturing inputs rather than foreign manufacturing inputs, then the subsidy violates" Article 3.1(b).[7] Korea believes that such a statement appropriately encapsulates the object and purpose of Article 3.1(b), which is to prevent the profoundly distortive effect of an import substitution subsidy on international trade.

11. That being said, however, Korea submits that a careful scrutiny is necessary to determine whether LA/MSF for the A380 and the A350XWB does fall under the situation of Article 3.1(b). In Korea's view, it seems that the U.S. argument does not fully detail how the workshare agreements among the Airbus countries required and imposed a condition upon the use of domestic over imported goods. Although the U.S. concluded that the workshare agreements "meant that the access to the subsidy was contingent upon the use of domestic goods over imports,"[8] it does not seem clear to us whether one could pinpoint a direct linkage between the agreements and a condition to use domestic over imported goods within the meaning of Article 3.1(b). At most, examples presented by the complainant seem to concern the Airbus countries' share, ownership rights, and job creation – somewhat general discussions and consideration of the participating countries as opposed to some sort of specific conditions.

12. The situation of the UK provides a good example in this regard. The United States argues that through the workshare agreements "the UK government anticipated that LA/MSF for the 350XWB would induce local production of particular large civil aircraft components, local employment, and *the use of domestically produced manufacturing inputs as a result of that local employment*."[9] Put differently, the argument of local content substitution is basically premised upon the alleged local employment. One would find it difficult, however, to see any direct linkage

[3] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] US First Written Submission, para. 211.
[8] *Id*. para. 239.
[9] *Id*. para. 234.

between the local employment and the alleged import substitution. Considering the strategic features of the LCA industry and the highly confidential nature of the technologies involved, the United States should first prove that there do exist substitutable parts that are being imported, and that the LA/MSF program prevented Airbus from using such imported parts because of the program. In our view, such a scheme does not seem to be reflective of the nature of the business at issue here. In order to establish a direct linkage, therefore, it seems critical for the complainant to prove why and how the local employment can be regarded as a specific condition for the utilization of domestic goods over imported goods.

13. Again, Korea appreciates this opportunity to present its view and would be happy to take questions you might have. Thank you.

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ANNEX E

RULINGS WITH RESPECT TO DSU ARTICLE 13 REQUEST

ANNEX E-1

THE UNITED STATES' ARTICLE 13 REQUEST OF 20 JULY 2012

(Panel ruling issued on 4 September 2012)

1. By letter dated 20 July 2012, the United States requests the Panel to exercise its authority under Article 13 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU") to seek information from the European Union with regard to specific assertions allegedly made by the European Union in its first written submission.[1]

2. Specifically, the United States requests the Panel to seek the following four categories of documents from the European Union, which the United States considers will assist the Panel in evaluating the evidence before it and in clarifying and distilling the legal arguments advanced by the parties, particularly those of the European Union[2]:

a. All agreements (including all amendments, attachments, and exhibits) between any of the EU member States and EADS/Airbus, related to the development and/or financing of the Original A350 or A350XWB;

b. All applications for financing for the Original A350 or A350XWB; any related project appraisals by the member States, and any other written communications between any of the EU member States and EADS/Airbus, related to the development and/or financing of the Original A350 or A350XWB;

c. All A350 business cases provided by Airbus or EADS to the member States and/or any of Airbus' risk-sharing suppliers; and

d. Documentation of any loans extended to Airbus/EADS by the *Kreditanstalt für Wiederaufbau* ("KfW") for the development and/or financing of the Original A350 or A350XWB, as well as documentation of any disbursements pursuant to such loans in 2009, 2010, 2011, or 2012.

3. Following letters from the European Union dated 20 July 2012[3], a response by the United States dated 23 July 2012[4], and a further letter from the European Union dated 24 July 2012[5], the Panel issued a communication in which it requested the European Union to respond to the United States' request by 6 August 2012.[6] This date was, at the request of the European Union, subsequently extended by the Panel to 9 August 2012.[7] On 9 August 2012, the European Union submitted a detailed response to the United States' Article 13 request, in which it asks the Panel to reject the request "at least until the written procedure is complete."[8] The United States replied to the European Union's comments on 16 August 2012.[9] In response to a request by the European Union, also dated 16 August 2012[10], the Panel granted the European Union until 23 August 2012 to submit a response to the United States' reply, limiting its response to the fresh assertions and arguments with respect to the United States' request which

[1] Letter of the United States to Chairman of the Panel, dated 20 July 2012 (hereafter, "Article 13 request").

[2] Article 13 request, p. 2. Moreover, the United States considers that the Panel may be unable to make an objective assessment of the arguments and assertions raised by the European Union in the absence of these documents.

[3] Letter of the European Union to the Chairman of the Panel, dated 20 July 2012.

[4] Letter of the United States to the Chairman of the Panel, dated 23 July 2012.

[5] Letter of the European Union to the Chairman of the Panel, dated 24 July 2012.

[6] Communication of the Panel to the Parties, dated 24 July 2012.

[7] Letter of the European Union to the Chairman of the Panel, dated 27 July 2012; Communication of the Panel to the Parties, dated 30 July 2012.

[8] European Union, Comments on the US Request for a Preliminary Ruling Decision, 9 August 2012 (hereafter "EU Comments, 9 August 2012"), paras. 1 and 112.

[9] United States' Reply to the European Union's comments on the US Request for a Preliminary Decision, 16 August 2012 (hereafter, "US Reply, 16 August 2012").

[10] Letter of the European Union to the Chairman of the Panel, dated 16 August 2012.

the European Union asserts that the United States has made in its reply.[11] The European Union submitted this response on 23 August 2012.[12] The Panel has taken into consideration all of the arguments made by the parties in the foregoing exchanges and advises the parties as follows:

4. Article 13.1 of the DSU provides:

> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it seems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

5. Article 13 of the DSU makes a grant of discretionary authority to panels enabling them to seek information from any relevant source, as they deem appropriate in a particular case.[13] The Appellate Body has stated that Article 13.1 imposes no conditions on the exercise of this discretionary authority.[14] Moreover, in *Canada – Aircraft*, the Appellate Body observed that there is nothing in either the DSU or the SCM Agreement to support the assumption that a Member's duty to respond promptly and fully to a panel's request for information arises only after the opposing party to the dispute has established a *prima facie* case that its complaint or defence is meritorious.[15] As the Appellate Body stated:

> To the contrary, a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence.[16]

6. Finally, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that in considering whether to exercise its authority under Article 13 of the DSU, particularly where a party has made an explicit request that it do so, a panel should have regard to considerations such as what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s).[17]

7. In its first written submission, the United States argues that France, Germany, Spain and the United Kingdom have given €3.5 billion in new LA/MSF for the A350XWB and that this new LA/MSF is a failure to comply with the recommendations and rulings of the DSB in the original proceeding.[18] The United States further alleges that the new LA/MSF has been granted by the relevant EU member States on the same core terms and conditions as grants of LA/MSF for previous Airbus aircraft (i.e. unsecured, success-dependent, levy-based and back-loaded) and on

[11] Communication of the Panel to the Parties, dated 17 August 2012.

[12] European Union, Comments on the US Response to the EU Comments on the US Request for a Preliminary Decision, 23 August 2012 (hereafter, "EU Comments, 23 August 2012").

[13] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84; Appellate Body Report, *EC – Hormones*, para. 147; Appellate Body Report, *US – Shrimp*, para. 106.

[14] Appellate Body Report, *Canada – Aircraft*, para. 185.

[15] Appellate Body Report, *Canada – Aircraft*, para. 192.

[16] Appellate Body Report, *Canada – Aircraft*, para. 192 (original emphasis).

[17] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140.

[18] United States' first written submission, para. 8. The United States argues that LA/MSF for the A350XWB is a "measure taken to comply" in that it is closely related to the subsidies already found inconsistent with the SCM Agreement in the original proceeding, it essentially replaces the A330/A340 LA/MSF agreements that the European Union claims to have terminated, and results in circumvention of the European Union's compliance obligations; United States' first written submission, paras. 6, 105.

better-than-commercial terms.[19] In addition, the United States argues that LA/MSF for the A350XWB is contingent in fact on export performance, contrary to Article 3.1(a) of the SCM Agreement as well as an import substitution subsidy contrary to Article 3.1(b) of the SCM Agreement. The United States makes various assertions as to the nature, structure and modalities of operation of LA/MSF for the A350XWB in support of these arguments.[20]

8. In its first written submission, the European Union requests the Panel to find that none of the four separate A350XWB financing agreements is a "measure taken to comply" within the meaning of Article 21.5 of the DSU and that they are therefore outside the scope of this compliance proceeding.[21] The European Union argues that in determining whether there is a "close nexus" between a challenged (undeclared) measure, the measures at issue in the original proceeding, and the recommendations and rulings of the DSB in the original proceeding, it must first be established that the undeclared measure can be linked to a "common overarching measure" at issue before the original panel, and then whether there is a sufficiently close nexus in terms of timing, nature and effects, between the undeclared measure, the measures at issue in the original proceeding, and the recommendations and rulings of the DSB.[22] According to the European Union, the United States has failed to satisfy both of these requirements with regard to the LA/MSF for the A350XWB. Moreover, the European Union argues that the United States has failed to establish that the LA/MSF for the A350XWB confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.[23] The European Union also disputes the United States' claims that LA/MSF for the A350XWB is contingent in fact on export performance contrary to Article 3.1(a) or an import substitution subsidy contrary to Article 3.1(b) of the SCM Agreement.[24]

9. Based on the arguments presented by the parties in their first written submissions, we consider it likely that the Panel will have to evaluate the nature, timing, and effects of the provision of LA/MSF by France, Germany, Spain and the United Kingdom in connection with the A350XWB in order to address the European Union's preliminary ruling request that the Panel find that the financing agreements for the A350XWB are outside the scope of this proceeding.[25] Moreover, should the Panel reach the United States' substantive claims with respect to LA/MSF for the A350XWB, information with respect to the nature, timing and substance of the provision of LA/MSF in connection with the A350XWB will be essential in determining whether any subsidies exist, the nature, magnitude, and effects of such subsidies, and whether any such subsidies are in fact contingent on export performance or import substitution subsidies.[26]

10. The European Union argues that for the Panel to request the information the subject of the United States' Article 13 request at this stage in the proceeding would be inconsistent with the principles regarding burden of proof and the prohibition on a panel making a case for a party. The European Union submits that the Panel will only be in a position to know whether it is necessary to clarify contradictory facts that may be relevant to addressing the European Union's preliminary

[19] United States' first written submission, para. 117.
[20] United States' first written submission, paras. 189-209, 230-239.
[21] European Union's first written submission, para. 57.
[22] European Union's first written submission, paras. 57-92.
[23] European Union's first written submission, paras. 368-379. The European Union asserts that the United States has failed to offer any evidence that LA/MSF for the A350XWB has been provided at rates that are below market, and that its argument that "unsecured, success-dependent, and back-loaded" financing is not available at market is contradicted by the evidence.
[24] European Union's first written submission, paras. 421-430, 471-475.
[25] See, United States' first written submission, paras. 139-165; European Union's first written submission, paras. 57-113. We note the European Union's position that, as the responding party, it has advanced no "claims" in this dispute. However, in raising jurisdictional objections to the Panel's consideration of financing for the A350XWB, the European Union has made a number of assertions concerning the nature and timing of that financing, which the Panel will have to resolve, which requires it to have an adequate evidentiary basis for its analysis.
[26] We note in this context that the underlying documents concerning the grant of LA/MSF for each of the models of Airbus aircraft at issue in the original proceeding, including *inter alia* business cases, contracts, schedules, annexes, and intergovernmental agreements, were essential in the Panel's evaluation of the United States' subsidy claims in the original dispute. See, e.g., Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.367-7.380 and 7.403-7.431 and associated footnotes. Some of this information was made available in the Annex V process in that dispute, but additional documents were submitted as exhibits by the European Communities in its submissions and in response to requests made in questions from the Panel. Panel Report, *EC and certain member States – Large Civil Aircraft*, footnotes 2436, 2517, 2533.

ruling request after the parties have submitted their rebuttal submissions.[27] However, given the nature of the issues concerning the alleged provision of LA/MSF in respect of the A350XWB which are before the Panel, and the absence from the record of the key information that is likely to be of direct relevance to the Panel's evaluation of those issues, it is already clear to us that we will need to carefully examine the actual LA/MSF agreements, project appraisals and business cases pertaining to the A350XWB in order to carry out our obligation under Article 11 of the DSU to make an objective assessment of the matter before us.[28] We consider the issues to be sufficiently delineated on the basis of the parties' first written submissions and that it is efficient and appropriate for the Panel to request those documents at this stage of the proceeding.[29] We regard the due process interests of both parties as being best served by the Panel requesting the information prior to the parties' respective rebuttal submissions, so that both parties have the opportunity to refer to that information in their rebuttals, at the meeting with the Panel, and in any written answers to questions that may also be put to them by the Panel.[30]

11. We are not persuaded by the European Union's arguments that to request the information at this point in the proceeding would result in unfairness to the European Union.[31] The European Union characterizes the United States' request that the Panel exercise its authority to request information pursuant to Article 13 of the DSU as an untimely request for a preliminary ruling, or preliminary "decision". However, as we have previously indicated, we do not share this understanding of the United States' request.[32] Requests for preliminary rulings ask a panel to resolve certain matters in dispute between the parties definitively prior to addressing other matters in dispute. By contrast, consideration of a request from a party that the Panel exercise its authority under Article 13 of the DSU involves a decision by the Panel as to whether the *Panel itself* will do something; namely, seek particular information which it deems appropriate and necessary to its resolution of matters in dispute - including preliminary matters. The United States has clarified that it does not seek a preliminary ruling on whether the European Union has met its burden of proof. We see no basis for treating the Article 13 request made by the United States as a request for a preliminary ruling and no basis for the conclusion that the United States' request is untimely in light of paragraph 14 of the Working Procedures adopted in this dispute.[33]

12. The European Union also characterizes the United States' Article 13 request as a unilateral attempt by the United States to amend the agreed timetable by pre-empting the Panel's plan to put questions to the parties at the stage of preparation for the substantive meeting with the parties.[34] We do not agree. Such a characterization incorrectly presumes that a panel's authority

[27] EU Comments, 23 August 2012, para. 16.

[28] While parties carry the burden of adducing evidence in support of their claims and defences, there are circumstances in which a party cannot reasonably be expected to meet that burden by adducing all relevant evidence required to make out its case; notably, when the information is in the exclusive possession of the opposing or a third party. As the Appellate Body has recognized, in such circumstances, a panel may be unable to make an objective assessment of the matter without exercising its authority under Article 13 of the DSU to seek out that information; Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1139-1140.

[29] We note that while panels have delayed making requests under Article 13 when asked to do so at an early stage of the proceedings, before written submissions have been filed, in this case, the first written submissions have been filed, and the issues in dispute have been clarified by the parties to the extent that it is clear to the Panel that it will not be able to address those issues without particular information which is not currently on the record. Due process and the "prompt settlement of situations" called for in Article 3 of the DSU do not require a panel to delay seeking information merely because it has been prompted to consider the question by a party, rather than coming to the issue on its own. In this regard, even assuming that the United States' request were somehow untimely, we do not consider that this alone would warrant declining to exercise our authority to seek information pursuant to Article 13.

[30] The European Union argues that the Panel should first rule on its request for a preliminary ruling that LA/MSF is outside the scope of this proceeding, thereby rendering the United States' Article 13 request moot; EU Comments, 9 August 2012, para. 111. However, in order to discharge our obligation under Article 11 of the DSU, the Panel will require certain information in order to address the European Union's preliminary ruling request. It is therefore logical and necessary to request this information prior to evaluating the request for a preliminary ruling.

[31] EU Comments, 9 August 2012, paras. 36 and 43; EU Comments, 23 August 2012, para. 6.

[32] Communication of the Panel to the Parties, dated 24 July 2012, page 2.

[33] Moreover, even if the United States' request were considered to be untimely, we would not consider it appropriate to deny it solely for that reason. In our view, and in light of the Appellate Body's decision in *US – Large Civil Aircraft (2nd Complaint)*, a panel must take a request that it seek information under Article 13 of the DSU seriously, and consider the substantive question of whether it can make a decision consistently with Article 11 of the DSU in the absence of the requested information before denying such a request.

[34] EU Comments, 9 August 2012, paras. 36-43.

to seek information pursuant to Article 13 of the DSU is exercised through its ability to put questions to the parties. The authority vested in panels by Article 13 of the DSU is independent of the ability of panels to put questions to the parties, which is provided for in paragraph 8 of the Appendix 3 Working Procedures.[35] That the Panel indicated its intention to put questions to the parties prior to the substantive meeting does not limit whether or when it may seek information pursuant to Article 13 of the DSU.[36] Conversely, whether or not a panel seeks information pursuant to Article 13 of the DSU does not affect the panel's ability to put questions to the parties at any time.

13. Accordingly, pursuant to the authority provided us under Article 13 of the DSU we hereby request the European Union to provide the following documents to the Panel:

a. Agreements between the governments of France, Germany, Spain and the United Kingdom and EADS/Airbus (including any amendments, schedules, annexes and exhibits thereto), related to the development and/or financing of the A350XWB;

b. Related project appraisals by the governments of France, Germany, Spain and the United Kingdom related to the development and/or financing of the A350XWB;

c. Business cases provided by EADS/Airbus to the governments of France, Germany, Spain and the United Kingdom, or to any of Airbus' risk-sharing suppliers, regarding the A350XWB;

d. Documentation of any loans extended to EADS/Airbus by the *Kreditanstalt für Wiederaufbau* (including any amendments, schedules, annexes and exhibits thereto) for the development and/or financing of the A350XWB, and of disbursements pursuant to such loans for 2009, 2010, 2011 and 2012.

14. We consider this information to be necessary to ensure a proper adjudication of the relevant claims, including the European Union's request for preliminary rulings regarding the scope of this compliance proceeding.[37] This information is not publicly available and we see no means that

[35] Paragraph 8 of the Appendix 3 Working Procedures provides:

> The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

This provision is replicated in paragraph 8 of the Working Procedures adopted by the Panel in this proceeding.

[36] We note in this regard that the Panel indicated, in a communication conveying the draft timetable to the parties, that, "although not specified in the draft timetable, the Panel plans to send questions to the parties in advance of the meeting with the parties in order to assist the parties in preparing for the meeting." This statement does not suggest that the Panel was limiting its own authority to put questions to the parties "at any time" as provided for in the Working Procedures. Still less does it suggest that the Panel had determined to refrain from seeking information pursuant to its authority under Article 13 of the DSU until such time as it had put questions to the parties. Moreover, even had the Panel indicated such an intention, it has the authority to alter the timetable, and may do so of its own volition as circumstances may warrant (including as a result of an unrelated action or request of a party), or if directly requested to do so by a party. As the Appellate Body in *US – Shrimp* stated:

> It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. … The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to the facts.

Appellate Body Report, *US – Shrimp*, paras. 105-106.

[37] The Panel's request is narrower in scope than the United States' Article 13 request. We do not regard our request as being unreasonably broad in scope or unclear. We note that the European Union refers in several places in its first written submission to the "four A350XWB financing agreements" and also refers to the MSF loan extended by KfW to Airbus Operations GmbH, implying knowledge of the documents in question. See for example, European Union's first written submission, paras. 94, 95, 102, 103, 105, 107-109, 111,112 (referring to the four A350 XWB financing agreements) and 367 (referring to the MSF loan extended by KfW to Airbus Operations GmbH). Moreover, given the background of this proceeding, and the arguments and conclusions in the original Panel Report, we consider that the meaning of terms such as "EADS/Airbus" and "Airbus' risk-sharing suppliers" is sufficiently clear to allow the European Union to determine where the documents in question may be found.

might be used to procure it other than seeking it in accordance with Article 13 of the DSU.[38] Even if the information in question is not now physically within the possession of the European Union, it is in the possession of the relevant EU member States, or private parties in those member States, whose interests are being represented in this proceeding by the European Union.[39]

15. In the original proceeding, the Panel had the LA/MSF and other financing agreements, related project appraisals, and business cases for the Airbus aircraft at issue. In that proceeding, the DSB initiated an Annex V procedure at the United States' request in which the European Communities was asked, in the first instance, 352 questions by the United States and given six weeks to respond. Of those questions, 37 related to information concerning LA/MSF, and those questions covered all grants of LA/MSF since 1969 for all models of Airbus aircraft, and associated documentation. Given that the information which the Panel now seeks is much more limited in scope, we consider that a period of three weeks is adequate time to allow the European Union to submit the information. The European Union is therefore requested to provide the above information by the close of business on 25 September 2012.[40]

16. The European Union raises two further issues that we wish to address. The first is the concern expressed by the European Union as to the United States' apparent failure to destroy EU HSBI and BCI documents from the original proceeding as the European Union alleges it was required to do.[41] The European Union requests the Panel to resolve this issue before requesting any further confidential information from the European Union. The United States argues that there is no basis to criticize it for retaining BCI and HSBI that it was never instructed to destroy.[42]

17. Paragraph 57 of the Additional Working Procedures adopted in the original proceeding requires the destruction or return of documents containing BCI and HSBI after the Conclusion of the Panel Process as defined in paragraphs 3(a), (c), or (d), but makes no reference to paragraph 3(b). Paragraph 3(b) of those Procedures defines the "Conclusion of the Panel Process" as occurring when a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, as happened in the original proceeding. We recall that paragraph 58 of the Additional Working Procedures adopted in the original proceeding provides as follows:

> After the Conclusion of the Panel Process as defined in paragraph 3(b), the Panel will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible.

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[38] It appears that the United States sought to procure the information in question by asking for it during consultations. The European Union has not indicated why the information requested during the consultations was not provided and there is no basis for the Panel to conclude that the failure to produce the information was justified, or that we are prevented from seeking that information under Article 13 of the DSU. Additionally, irrespective of whether the United States was entitled to request initiation of an Annex V procedure for this proceeding (an issue we need not decide), we note that paragraph 9 of Annex V expressly provides that nothing in the Annex V information-gathering process "shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process." See also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, footnote 1117. We see no basis to require a WTO Member to resort to municipal law processes to procure information for purposes of WTO dispute settlement, as suggested by the European Union, even assuming such processes would be available and effective, something which we cannot assess. We emphasize that we seek the requested information because we consider it appropriate to do so in light of our responsibilities in this dispute.

[39] We make no conclusions as to whether the European Union formally "represents" its member States, or any commercial stakeholders with interests at stake in this dispute. However, as in the original proceeding, it is the European Union which is appearing before the Panel and making submissions, not its individual member States. See, Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.169-7.177 (Decision on Proper Respondent). We recall that in the original proceeding, the European Communities was able to produce documents of the nature and type requested in this proceeding, both in the Annex V process and in response to requests from the Panel.

[40] We also note that original language documents in French, Spanish and English were submitted in the original proceeding without translation in many instances. As regards documents in German, which is not a working language of the WTO, the Panel is prepared to address specific concerns identified by the European Union regarding translation of German-language documents by this date.

[41] European Union's first written submission, para. 48, EU Comments, 9 August 2012, para. 110; EU Comments, 23 August 2012, paras. 32-38.

[42] US Reply, 16 August 2012, para 25.

The question of destruction or return of documents containing BCI and HSBI after adoption of Panel and Appellate Body reports following the conclusion of the appellate process is not explicitly addressed in the Additional Working Procedures adopted by the Panel in the original dispute.

18. We therefore request the United States to respond to the European Union's allegations in paragraph 48 of its first written submission, with specific reference to the materials cited at footnotes 40-43, and the terms of the Additional Working Procedures adopted in the original dispute. We will then invite the European Union to comment, if it so wishes, on the United States' response. In each case, the Panel would like the parties to suggest what actions, if any, this Panel should now take in respect of the BCI/HSBI from the original proceeding, including with respect to any evidence submitted in this compliance proceeding which was BCI/HSBI in the original proceeding.

19. However, we regard the issue of whether BCI/HSBI material submitted in the original dispute has been dealt with in conformity with the Additional Working Procedures in that proceeding to be separate from the question whether it is appropriate for this Panel to request information pursuant to Article 13 of the DSU for purposes of this proceeding. There is no allegation that the United States has disclosed confidential information to persons not authorized to view it, which might implicate the confidentiality of any new information submitted at this stage.[43] We consider allegations of non-compliance with the procedures put in place to protect the confidentiality of certain information in the original dispute to be extremely serious. However, we do not consider it necessary to resolve whether the United States failed to destroy confidential information in the record of the original dispute in violation of an obligation to do so before seeking information from the European Union information which we consider necessary for us to discharge our obligations in this proceeding.

20. The second issue raised by the European Union is its request that, should the Panel request the European Union to provide information pursuant to Article 13 of the DSU at this stage of the proceeding, it equally and within the same timeframe, should request the United States to produce certain information concerning the financing, and/or development of the Boeing 787 and other Boeing large civil aircraft, including business cases relating to those aircraft.[44] The European Union submits that such documents are critical for the Panel to conduct a thorough review of the claims made by the United States, which involve unsupported assertions regarding the Boeing 787 and other Boeing aircraft and the circumstances in which they were financed, developed, produced and marketed. The United States asserts that there is no substantive need for the information in question, asserting that it raises no claims regarding financing to Boeing, and that the European Union's arguments regarding findings of subsidization in *US – Large Civil Aircraft (2nd Complaint)* do not require additional evidence for the Panel to evaluate them.[45]

21. We understand that the information requested by the European Union relates to alleged subsidization of Boeing LCA, and is sought in connection with the European Union's arguments concerning "non-subsidized like product" in Article 6.4 of the SCM Agreement. Unlike the situation before us with respect to the United States' allegations concerning the financing of the A350XWB, and the European Union's response to those arguments, the United States has not yet had an opportunity to respond to the European Union's arguments concerning the alleged subsidization of Boeing LCA. Presumably it will do so in its rebuttal submission, at which point it would have the opportunity to submit relevant documents. In addition, we recall that in the original dispute, the Panel concluded that Article 6.4 is not the exclusive means for demonstrating displacement or impedance of exports for purposes of a finding of serious prejudice under Articles 6.3(b) of the SCM Agreement. The United States did not rely on Article 6.4, and the Panel therefore did not address the question whether there was a "non-subsidized like product" and made no determinations in that regard. Thus, the Panel rejected the arguments of the European Communities that subsidization of Boeing LCA precluded a finding of serious prejudice in the form of displacement or impedance of exports.[46] That decision by the Panel was not appealed, and was therefore adopted by the DSB. While acknowledging the lack of Appellate Body review in its first

[43] Notwithstanding its assertion concerning the United States' alleged failure to comply with the Additional Working Procedures adopted in the original proceeding, the European Union submitted BCI and HSBI in connection with its first written submission in this proceeding.

[44] EU Comments, 9 August 2012, paras. 116-117.

[45] US Reply, 16 August 2012, para. 30.

[46] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1764-7.1771, 7.1798-7.1800.

written submission[47], the European Union argues that in light of the decision in *US – Large Civil Aircraft (2nd Complaint)*, a multilateral determination that the "like products" to which the United States refers in this case are subsidized, the situation has changed and that the Panel should therefore consider this matter.[48]

22. However, it is not yet clear to us that the Panel will have to make a substantive determination as to whether the 787, or any other Boeing LCA, benefits from subsidies and we consider that it is premature to request information relevant to an issue which it is not apparent the Panel will have to address.[49] In these circumstances, because we cannot at this juncture conclude that the requested information is likely to be necessary to ensure due process and a proper adjudication of the relevant claim, we decline to seek the information requested by the European Union at this stage of the proceeding.[50]

[47] European Union's first written submission, para. 656,

[48] European Union's first written submission, para. 658.

[49] Assuming the Panel were to accept the European Union's argument and consider this matter, it would seem that the determination in *US – Large Civil Aircraft (2nd Complaint)* would be binding on the question of subsidization of at least some models of Boeing LCA. In this regard, we note that the European Communities made similar arguments concerning subsidization of Boeing LCA having been determined on a multilateral basis in WTO dispute settlement, referring to "tens of millions of dollars" received by Boeing pursuant to prohibited export subsidies applied to LCA. Panel Report, *EC and certain member States – Large Civil Aircraft*, footnote 5262. On the other hand, assuming the Panel were to conclude that the United States is once again not proceeding under Article 6.4 of the SCM Agreement, the question of a "non-subsidized like product" would not be a matter necessitating resolution, as it was not in the original dispute.

[50] We also note the breadth of the European Union's request, which covers all Boeing large civil aircraft, and is unlimited in time.

ANNEX E-2

THE EUROPEAN UNION'S ARTICLE 13 REQUEST OF 23 NOVEMBER 2012

(Panel ruling issued on 14 December 2012)

1 Introduction

1. By letter dated 23 November 2012, the European Union requested the Panel to exercise its authority under Article 13 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU") to seek information from the United States.[1] The United States responded to the European Union's request on 29 November 2011.[2] The European Union submitted its reply to the United States response on 6 December 2012.[3]

2. The Panel has carefully considered all the arguments made by the parties in the foregoing exchanges as well as all relevant claims and arguments made in the United States' first and second written submissions and the European Union's first written submission. The Panel has concluded that the requested information is not necessary for its evaluation of the United States' allegations of lost sales and displacement. The Panel therefore denies the European Union's Article 13 request and declines to seek the information requested by the European Union at this stage of the proceeding.

2 Article 13 of the DSU

3. Article 13.1 of the DSU provides:

> "Each panel shall have the right to seek information and technical advice from any individual or body which it seems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information."

4. Article 13.1 makes a grant of discretionary authority to panels enabling them to seek information from any relevant source, as they deem appropriate in a particular case.[4] The Appellate Body has stated that Article 13.1 imposes no conditions on the exercise of this discretionary authority.[5] Moreover, in *Canada – Aircraft*, the Appellate Body observed that there is nothing in either the DSU or the SCM Agreement to support the assumption that a Member's duty to respond promptly and fully to a panel's request for information arises only after the opposing party to the dispute has established a *prima facie* case that its complaint or defence is meritorious.[6] As the Appellate Body stated:

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[1] Letter of the European Union to Chairman of the Panel, dated 23 November 2012 (hereafter, "EU Article 13 request").

[2] Letter of the United States to the Chairman of the Panel, dated 29 November 2012 (hereafter "US response". The Panel had previously given the United States until 4 December 2012 to respond, and allowed for a reply from the European Union no later than 11 December. Communication from the Panel to the Parties, dated 28 November 2012. In light of the early response from the United States, and having been requested by the United States to do so, the Panel amended the deadline for the European Union to reply to 6 December 2012. Communication from the Panel to the Parties, dated 30 November 2012.

[3] European Union, Comments on the US Comments on EU request for Article 13.1 Questions and EU Request to fix the new time-limit for the filing of the EU Second Written Submission at 31 January 2013, 6 December 2012 (hereafter, "EU Comments, 6 December 2012").

[4] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84; Appellate Body Report, *EC – Hormones*, para. 147; Appellate Body Report, *US – Shrimp*, para. 106.

[5] Appellate Body Report, *Canada – Aircraft*, para. 185.

[6] Appellate Body Report, *Canada – Aircraft*, para. 192.

> "To the contrary, a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence."[7]

5. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that in considering whether to exercise its authority under Article 13 of the DSU, particularly where a party has made an explicit request that it do so, a panel should have regard to considerations such as what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s).[8]

3 Parties' Arguments with respect to the information request

6. The European Union has requested that the Panel seek information which, it asserts generally, is necessary for the Panel to evaluate the United States' claims of lost sales and displacement. Specifically, according to the European Union,

a. the requested information on the pace of development and anticipated entry into service dates for Boeing 787 aircraft is necessary for the Panel's objective assessment of the US lost sales and displacement claims, as it will help the Panel assess whether there exist any disincentives for airlines seeking near-term delivery of an aircraft to purchase 787 aircraft, and to take those considerations into account when assessing the US lost sales and displacement claims;

b. the requested information on entry into service for 737MAX aircraft is necessary to enable the Panel, in assessing US lost sales and displacement claims, to take into account uncertainty surrounding first delivery positions for Boeing's 737 MAX programme, and whether that uncertainty functions as a disincentive for airlines to purchase these aircraft;

c. the requested information on possible 787 delivery dates is necessary for the Panel to take into account Boeing's ability to deliver 787 aircraft and the pace of those deliveries, which will help the Panel assess whether there exist any disincentives for airlines seeking near-term delivery of an aircraft to purchase 787 aircraft, and to take those considerations into account when assessing the US lost sales and displacement claims;

d. the requested information on possible 737MAX delivery dates is necessary for the Panel to take into account Boeing's alleged inability to deliver 737 MAX aircraft, and the pace of those deliveries, which will help the Panel assess whether there exist any disincentives for airlines seeking delivery of an aircraft to purchase 737 MAX aircraft and to take those considerations into account when assessing the US lost sales and displacement claims;

e. the requested documentation of Boeing's final offers to AirAsiaX, AirAsia, Asiana, and Cebu Pacific Air is necessary for the Panel's objective assessment of the US lost sale claims to these carriers involving A320neo aircraft and A350XWB aircraft, which would appear to turn in substantial part on the availability of delivery positions and other terms of Boeing's final offer;

f. the requested documentation of Boeing's final offer to Malaysia Airlines is necessary for the Panel's objective assessment of the US lost sale claim for Malaysia Airlines involving the A330-200F, which would appear to turn in substantial part on the quality of the 767 Freighter aircraft and other terms of Boeing's final offer;

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[7] Appellate Body Report, *Canada – Aircraft*, para. 192 (original emphasis).
[8] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140.

g. the requested documentation of Boeing's final offer to Cathay Pacific is necessary for the Panel's objective assessment of the US lost sale claim involving A350XWB aircraft, which would appear to turn in substantial part on Boeing's ability to actually offer for sale the aircraft allegedly offered, and the terms of Boeing's offer;

h. the requested extracts from the Boeing purchase agreement with Ethiopian Airlines for the 787 is necessary for the Panel's objective assessment of the US lost sale claim for Ethiopian Airlines, which would appear to turn in substantial part on the 787 model(s) it initially ordered in 2005;

i. the requested Boeing presentations provided to potential customers outlining Boeing's views concerning the strengths, weaknesses, critical issues and strategic issues for its proposed aircraft for a number of its lost sales claims are necessary because the United States has provided such documentation for some but not all of its lost sales claims. The information for each of the orders alleged to be lost sales is necessary to enable the Panel to undertake an objective assessment of the US claims, which will require it to assess why the United States has chosen to withhold this document for certain sales covered by its lost sales claims, including to assess whether the documents reveal non-attribution factors;

j. the requested information regarding Boeing's 2012 standard marketing presentations for each of its 767, 777 and 747-8 is necessary for the Panel to objectively assess the alleged competition between Airbus and Boeing freighter aircraft; and

k. the requested presentations made to Boeing's Board of Directors during 2011 and 2012 addressing the possibility of the launch of a stretched version of the 787 and an improved version of the 777 are necessary to enable the Panel to objectively assess the US lost sales claims in light of US allegations, in the context of a number of its lost sales claims, that Boeing offered a stretched version of the 787 or an improved version of the 777, without proffering other information that would help the Panel assess whether Boeing had decided for reasons other than the alleged subsidies to defer the launch of these aircraft.[9]

7. The United States does not consider the information to be relevant to its arguments relating to lost sales and displacement in the second written submission, and asserts that the European Union does not need the information to argue that the United States has failed to make a *prima facie* case with respect to its claims.[10] Moreover, the United States contends that it is inappropriate to use Article 13 to provide information to enable the European Union to make its own case. In addition, the United States considers that it is late in the proceedings for this request, given that the United States' claims of lost sales and displacement were set out in its first written submission, filed in May, and asserts that the request is an effort to delay these proceedings.

4 Information requested with respect to the United States' allegations of lost sales

8. The Appellate Body has stated, with respect to what constitutes a "lost" sale within the meaning of Article 6.3(c) of the SCM Agreement:

> "We consider that a sale that is "lost" is one that a supplier "failed to obtain". We further understand lost sales to be a relational concept that includes consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales."[11]

[9] EU Article 13 request, Appendix.

[10] The United States did not respond individually to the European Union's questions and justifications, but did indicate that it would provide detailed comments should the Panel request it to do so, asking that any such process not result in any further delay to this proceeding. US Response, page 4.

[11] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1214, *quoting New Shorter Oxford English Dictionary*, p. 1632. *See also*, Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1052.

> "{A} lost sales claim may be supported with evidence of lost sales taking place throughout a geographical and product market, or with evidence of particular sales campaigns occurring within that market. "[12]

Lost sales are "significant" under Article 6.3(c) if they are "important, notable or consequential."[13]

9. In terms of possible approaches for analyzing a claim of significant lost sales, the Appellate Body observed that:

> "While a two-step approach to the assessment of lost sales is permissible, in our view, the most appropriate approach to assess whether lost sales are the *effect* of the challenged subsidy is through a unitary counterfactual analysis. This would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the firm(s) of the respondent Member would not have received the challenged subsidies. There would be lost sales where the counterfactual analysis shows that, in the absence of the challenged subsidy, sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member."[14]

10. In *EC and certain member States – Large Civil Aircraft,* the Appellate Body considered how the concept of a "lost" sale applies under the conditions of competition in the LCA industry when it rejected the European Union's challenge to the original Panel's finding that Boeing lost the A380 launch order placed by Emirates Airlines:

> "Given the conditions of competition in the LCA industry, it was not necessary for Boeing to have made a formal offer to Emirates Airlines – or "turn up" to use the European Union's expression – for the sales to qualify as sales that Boeing "failed to obtain." As the Panel explained, even in the absence of a formal offer from Boeing, Emirates could be expected to have considered the products manufactured by Boeing before making its purchase decision."[15]

11. In the context of an analysis of the alleged lost sales in accordance with the above elements, we fail to see the relevance of the information sought by the European Union to the question whether the effect of alleged subsidies to Airbus LCA was lost sales of competing Boeing LCA. The European Union does not dispute that Boeing "failed to obtain" the sales in question, or that Airbus was successful in winning the relevant sales. Nor does the European Union dispute the significance of the sales allegedly lost, in the sense of their importance to Boeing. Arguably, the European Union appears to be seeking the information in order to make the point that in each of the specific alleged lost sales at issue, potential entry into service or delivery dates, or details concerning the features and qualities of the particular Boeing LCA being offered, or the specific possibilities with respect to potential to-be-developed Boeing LCA offered, might have constituted a disincentive to ordering from Boeing. However, even assuming that this information might demonstrate weaknesses in the Boeing offer in a particular sales campaign, it is difficult, in the light of the interpretation of "lost sales" and the analytical framework outlined above, to see how this might undermine the conclusion that the sales at issue were lost by Boeing.[16]

12. The question for the Panel then is whether the United States can establish that any of the allegedly lost sales were caused by the alleged subsidies. In particular, the question before the Panel is whether, in the absence of the alleged subsidies, the sales made by Airbus would have been made by Boeing. Our understanding is that the basic premise of the United States' claims of lost sales caused by subsidies is that, as the Appellate Body concluded with respect to the lost sales found in the original dispute, absent the subsidies, Airbus would not have been able to offer

[12] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1230.
[13] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1052.
[14] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1220.
[15] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1223.
[16] The European Union does argue that Boeing and Airbus LCA do not compete in the three product markets identified by the United States, and thus that in some of the alleged lost sales, the LCA offered by Boeing were not competitive, and thus that the sale cannot be considered to have been lost. However, this line of argument does not rest on an evaluation of the specifics of any given sales campaign, but on an evaluation of the relevant products and competition. Moreover, we note that the European Union has not argued that, or how, the requested information is relevant to such an analysis.

the LCA it did offer in these sales campaigns, and thus, as the only other competitor in the market, Boeing[17] would have made those sales.[18] Since this counterfactual analysis rests on the effect of subsidies on the introduction of Airbus LCA to the market, we fail to see the relevance of the requested information to the analysis of lost sales in line with the considerations set out by the Appellate Body. Even assuming for purposes of this discussion that the information requested might relate to "non-attribution" factors, we fail to see how this would affect the consideration of an argument that, in the absence of subsidies, Airbus would not have been able to offer the LCA that were ultimately purchased by the customers involved in the alleged lost sales, and thus the US LCA industry would not have lost those sales. Finally, we fail to see the relevance to our task of evaluating the United States' lost sales claims of information concerning Boeing's own views concerning the strengths, weaknesses, critical issues and strategic issues for proposed aircraft, 2012 standard Boeing marketing presentations, and presentations to Boeing's Board of Directors in 2011 and 2012 concerning the possible launch of variant aircraft to an evaluation of lost sales in line with the considerations set out by the Appellate Body. We therefore conclude that the information sought by the European Union is not necessary to the Panel's proper evaluation of the United States' allegations of lost sales.

5 Information requested with respect to the United States' allegations of displacement

13. With respect to the "displacement" of imports or exports of the like product, the Appellate Body stated in *EC and certain member States – Large Civil Aircraft* that:

> "{W}e understand the term displacement to connote that there is a substitution effect between the subsidized product and the like product of the complaining Member. This means that displacement arises under subparagraph (a) of Article 6.3 where the effect of the subsidy is that imports of a like product of the complaining Member are substituted by the subsidized product in the market of the subsidizing Member. Similarly, under subparagraph (b), displacement arises where exports of the like product of the complaining Member are substituted in a third country market by exports of the subsidized product."[19]

14. The Appellate Body explained that "where a complainant puts forward a case based on the existence of displacement as a directly observable phenomenon and the panel opts to examine it under a two-step approach, as was done in this dispute, displacement arises under Article 6.3(a) of the SCM Agreement where imports of a like product of the complaining Member are declining in the market of the subsidizing Member, and are being substituted by the subsidized product."[20] The same standard would apply for Article 6.3(b) according to the Appellate Body: "displacement arises where exports of the like product of the complaining Member are declining in the third country market concerned, and are being substituted by exports of the subsidized product."[21] The Appellate Body also noted, regarding the elements of displacement, that displacement must be "discernible," the identification of displacement "should focus on trends in the markets, looking at both volumes and market shares," and the trend has to be "clearly identifiable and an assessment based on a static comparison of the situation of the subsidized product and the like product at the beginning and at the end of the reference period would be inadequate."[22]

15. In the context of an analysis of displacement based on the foregoing elements, we fail to see the relevance of information concerning anticipated dates of entry into service of Boeing LCA or delivery positions to the question whether the effect of subsidies to Airbus LCA was displacement of competing Boeing LCA in certain geographic markets. A finding of displacement would be based on an evaluation of trends in the specified geographic markets based on the number of aircraft actually delivered during a relevant reference period. Similarly, since an evaluation of

[17] Or, in the event of a US LCA industry comprising Boeing and competitor(s) (one of the other counterfactual scenarios posited by the Panel in the original dispute), by the US LCA industry.

[18] The European Union refers, in the context of alleged lost sales in the single-aisle market, to the potential market entry of other aircraft manufacturers (specifically, Bombardier). However, there is no allegation or evidence that any other aircraft manufacturer was involved in any of the sales campaigns at issue in the United States' lost sales allegations, much less any argument or evidence to suggest that any such manufacturer would have obtained any sales not made by Airbus, rather than Boeing.

[19] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1160.

[20] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1170.

[21] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1170.

[22] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1170-71.

displacement is based on aggregated data for competing products in a particular geographical market, we fail to see the relevance of specific aspects of the competition between LCA manufacturers in any given sales campaign to the determination. Again, we understand the United States' argument to be essentially that, in the absence of the subsidies, Airbus would not have had the LCA it was able to deliver, and thus Airbus LCA would not have displaced exports or imports of Boeing (or US LCA industry) aircraft. We fail to see how consideration of the requested information concerning delivery positions and entry into service dates would affect our evaluation of the United States' claims of displacement in line with the considerations set out by the Appellate Body. We therefore conclude that the information sought by the European Union is not necessary to the Panel's proper evaluation of the United States' allegations of displacement.

6 Other issues

16. The European Union's arguments indicate that, in its view, the United States should have put the requested information on the record with its second written submission, having failed to do so with its first written submission. The United States clearly considers the information not relevant to support its claims and arguments, and that therefore there was no reason to submit it. We see no basis for a conclusion that the United States should have somehow predicted that the European Union might wish to raise arguments it had not made in its first written submission, and should have submitted, of its own volition, evidence that might support such arguments with its second written submission.

17. The United States argues that, to the extent the European Union argues that the United States has failed to make a *prima facie* case, additional information is not necessary to enable the European Union to respond to the United States' claims. The United States points out that, with the exception of one question which refers to an alleged lost sale discussed in the United States' second written submission, all of the information requested by the European Union relates to lost sales and displacement claims and arguments set out in the United States' first written submission, and that the European Union responded to those claims and arguments in its first written submission with no indication that it was lacking necessary information to do so. The European Union justifies the timing of its request on the basis that the need for the information requested only became apparent during the process of reviewing the US second written submission, filed on 19 October 2012. The European Union implies that this process prevented it from realizing earlier the lack of necessary information on the record, and notes that it is still in the process of reviewing the United States' second written submission.[23] The European Union contends that the information is needed to ensure it has an adequate opportunity to prepare its own second written submission.

18. We consider it noteworthy that the European Union responded fully to the United States' first written submission, in which the facts and arguments supporting the United States' lost sales and displacement claims were set out, and for which supporting evidence was submitted, without any indication that additional evidence might be necessary for it to rebut the United States' claims. Indeed, the European Union's first line of argument is that the United States failed to make a *prima facie* case of, *inter alia*, lost sales and displacement, an argument which does not require additional evidentiary support. There is very little further elaboration with respect to those claims in the United States' second written submission, and certainly nothing that would prompt a need for additional information, as requested by the European Union, that did not previously exist. In our view, the requested information is at most relevant to possible European Union's arguments seeking to demonstrate that the alleged lost sales and displacement were not caused by subsidies, but by other factors.[24] We do not consider that the European Union was entitled to wait until after the United States filed it second written submission, which did not elaborate on the claims, arguments, and evidence concerning lost sales and displacement, to request a broad array of information of little relevance to our evaluation of the claims and arguments put forward by the

[23] The European Union asserts that the US second written submission is "a very substantial document" and includes numerous exhibits, some of which are "lengthy and substantial", as well as alleging that the submission filed on 19 October "transpired to be the preliminary version" of the US second written submission, requiring "detailed and sustained" exchanges of views, further versions, and the submission of revised exhibits, over a three week period. The United States, in opposing the European Union's separate request for an extension of time to file its second written submission, contends the complexity of issues, the length of the submission, and the submission of export reports as exhibits are not "unexpected development[s]."

[24] We recall that the European Union did not, for the most part, address the circumstances of the individual alleged lost sales in its first written submission, choosing to make its arguments more generally.

United States. Whether or not to grant an Article 13 request for information is governed by a panel's need for the information to evaluate the claims and arguments of the parties consistently with its obligations under Article 11 of the DSU, and as discussed above, we do not consider that such a need is the case here. In our view, at this stage of the proceeding, where the European Union, the party seeking information, has already had a full opportunity to respond to the claims and arguments of the United States, and the information requested relates almost exclusively to matters fully addressed in the first written submission of the United States, it would not be fair or appropriate for us to request information that might enable the European Union to make arguments in its rebuttal which it never sought to make in its first written submission, and which have no basis in the United States' second written submission to which it is now preparing a response.[25]

7 Conclusion

19. In light of the foregoing, it is clear to the Panel that the requested information is not likely to be necessary to ensure due process and a proper adjudication of the relevant claims. We therefore deny the European Union's request and decline to seek the information requested by the European Union at this stage of the proceeding.

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[25] We stress that we do not suggest that the European Union was required to make a *prima facie* case before asking the Panel to exercise its Article 13.1 authority to request information. However, in our view, a party is generally not entitled to have the Panel seek information from the other party at this stage of the proceeding without having presented some claim, defence, or argument for the consideration of which the information is likely to be necessary for the Panel. We also note the breadth of the European Union's request.

ANNEX F

MAIN PROCEDURAL RULINGS OF THE PANEL

ANNEX F-1

THE EUROPEAN UNION'S REQUEST CONCERNING THE QUESTION WHETHER THE UNITED STATES WAS REQUIRED TO RETURN OR DESTROY MATERIALS CONTAINING BCI AND HSBI FROM THE ORIGINAL PROCEEDING

(Panel ruling issued on 24 October 2012)

1. The Panel is in receipt of the response of the United States to EU allegations regarding the handling of BCI/HSBI information, dated 5 October 2012[1], submitted in response to a request from the Panel in its communication of 4 September 2012.[2] The Panel is also in receipt of the comments of the European Union on the US Response, dated 16 October 2012[3], which were submitted in response to a communication from the Panel dated 11 October 2012.[4]

2. At issue between the parties is whether BCI/HSBI submitted in the original proceeding should have been returned or destroyed such that the United States may not refer to it for purposes of this compliance proceeding. We recall that BCI/HSBI was submitted in the original proceeding pursuant to the BCI/HSBI Procedures adopted by the panel in that proceeding.[5] The interpretive question before the Panel is whether the Original BCI/HSBI Procedures required the parties to destroy or return BCI/HSBI submitted in the original proceeding.

3. The United States considers that they do not, based on the text of paragraphs 57, 58 and the defined term "Conclusion of the Panel Process" in paragraph 3 of those procedures. Thus, according to the United States, it has not acted inconsistently with the Original BCI/HSBI Procedures in referring to such information in its first written submission in this compliance proceeding. Indeed, the United States considers that it is free to refer to BCI/HSBI submitted in the original proceeding in its other submissions to the Panel in this proceeding. The United States considers that this interpretation makes sense, because BCI/HSBI that was before the panel in the original proceeding will clearly be relevant to the compliance Panel's assessment of whether there has in fact been compliance with the recommendations and rulings of the DSB in the original proceeding.

4. The European Union considers that the United States' interpretation of the Original BCI/HSBI Procedures would mean that, because the original Panel Report was appealed, there was and is no obligation on the parties to return or destroy BCI/HSBI submitted during the original proceeding. Such an interpretation is unreasonable and contrary to the whole rationale of the procedures for protection of confidential information. The European Union requests the Panel to adopt a different interpretation of the Original BCI/HSBI Procedures, which would require the United States to have returned or destroyed BCI/HSBI submitted during the original proceeding within a reasonable period following adoption of the original Panel Report, as modified by the Appellate Body Report. The consequence of such an interpretation is that the United States is not authorized to refer to BCI/HSBI submitted during the original proceeding in this compliance proceeding (a circumstance that the European Union is exceptionally prepared to overlook with respect to the United States' first written submission only). Had the United States wanted to refer to such information in the compliance proceeding, it should have requested it from the European Union through an Annex V procedure.

5. The Original BCI/HSBI Procedures are drafted in such a way that the obligation to destroy or return BCI/HSBI documents applies depending on the way in which the panel proceeding is concluded. Where the "Conclusion of the Panel Process", as defined in paragraph 3, is through an

[1] United States' Response to EU allegations regarding the handling of BCI/HSBI information, dated 5 October 2012 (hereafter "US Response").

[2] Communication of the Panel to the Parties, 4 September 2012, para. 18.

[3] European Union's letter to the Chairman of the Panel, dated 16 October 2012 (hereafter "EU Comments").

[4] Communication of the Panel to the Parties, 11 October 2012.

[5] Additional Working Procedures for DS316 - Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information, 9 November 2007 (hereafter, "Original BCI/HSBI Procedures").

appeal to the Appellate Body, paragraph 58 applies. The plain language of paragraph 58 does not contain any obligation to destroy or return BCI/HSBI, but merely refers to the transmission to the Appellate Body of BCI/HSBI separately from the rest of the record. It is only where the panel process concludes in the manner envisaged in subparagraphs (a), (c) or (d) that there is an express obligation, as clearly set out in paragraph 57, to destroy or return BCI/HSBI.

6. The European Union argues that following the appeal, the Panel Report was adopted, as modified by the Appellate Body Report, and thus that there was a "Conclusion of the Panel Process" as described in subparagraph 3(a) at that point, and a consequent obligation to return or destroy under paragraph 57. However, paragraph 3 defines the "Conclusion of the Panel Process" as the *earliest* to occur of the situations described in subparagraphs (a) through (d). Our reading of the Original BCI/HSBI Procedures is that, when the Panel Report was adopted as modified by the Appellate Body Report, subparagraph (a) was not applicable as this was not the earliest to occur of the events in (a) through (d). Plainly, the situation in subparagraph (b), namely, notifying the DSB of an appeal pursuant to Article 16.4 of the DSU, had already occurred. We are unable to agree with the interpretation of paragraphs 3 and 57 of the Original BCI/HSBI Procedures proposed by the European Union because it requires overlooking the reference to "earliest to occur" in paragraph 3.

7. In sum, the Original BCI/HSBI Procedures do not, in our understanding, impose an obligation on the parties to destroy or return BCI/HSBI in the situation in which the Panel Report was appealed. We note that this gap is addressed in the BCI/HSBI Procedures adopted by the Panel in this compliance proceeding (the New BCI/HSBI Procedures).[6]

8. Based on the foregoing, we conclude the United States did not breach the Original BCI/HSBI Procedures in referring in its submissions in this compliance proceeding to BCI/HSBI submitted during the original proceeding. No further action is required on our part in this regard, and both parties are free to refer to BCI/HSBI submitted during the original proceeding in the context of this proceeding, provided, of course, that the New BCI/HSBI Procedures are respected.[7]

9. The United States has further requested that the Panel consider revising the New BCI/HSBI Procedures to require the parties to destroy or return BCI/HSBI submitted during the compliance proceeding only at the conclusion of subsequent proceedings (including under Article 22.6 of the DSU) in this dispute. In our view, paragraphs 63 and 65 of the New BCI/HSBI Procedures make clear that, following adoption by the DSB of an Appellate Body Report in this compliance proceeding, there is an obligation to destroy or return all documents within a period to be fixed by the Panel. Indeed, we consider that paragraph 65 of the New BCI/HSBI Procedures was revised specifically in order to establish such an obligation in view of the lack of such obligation in the Original BCI/HSBI Procedures in the situation in which the report of the compliance Panel is appealed

10. Consequently, we do not consider it necessary or appropriate to make the requested revision to the New BCI/HSBI Procedures at this time. We would encourage the parties to discuss this issue with a view to arriving at a mutually acceptable arrangement for the use of BCI/HSBI in any subsequent proceedings that arise from this dispute.

[6] Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information, dated 12 July 2012 (hereafter "New BCI/HSBI Procedures"). Paragraph 65 of the New BCI/HSBI Procedures (which is the equivalent provision to paragraph 58 of the Original BCI/HSBI Procedures) expressly provides that following adoption by the DBS of the Appellate Body report pursuant to Article 17.4 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body report pursuant to Article 17.4 of the DSU, the provisions of, inter alia, paragraph 63 (requiring destruction or return of all material containing BCI/HSBI within a period to be fixed by the Panel) shall apply.

[7] We note that there is no allegation that the BCI or HSBI information at issue has been disclosed to any person not authorized to have access to such information in this proceeding.

ANNEX F-2

THE EUROPEAN UNION'S REQUESTS OF 28 MAY 2013 CONCERNING: (I) THE UNITED STATES' FULL HSBI VERSION APPENDIX AND HSBI EXHIBITS SUBMITTED IN CONJUNCTION WITH ITS ANSWERS TO THE PANEL'S FIRST SET OF QUESTIONS; AND (II) THE UNITED STATES' ALLEGED VIOLATIONS OF THE BCI/HSBI PROCEDURES

(Panel ruling issued on 5 June 2013)

1. The Panel refers to the European Union's request for an interim ruling of 28 May 2013 concerning a number of matters related to the United States' answers to the Panel's questions to the parties issued on 23 April 2013 ("Panel's questions"), and the United States' comments on the European Union's request, which were received on Friday 31 May 2013.

2. In this communication, the Panel addresses the European Union's requests for rulings with respect to: (i) the United States' Full HSBI Version Appendix ("HSBI Appendix") submitted in conjunction with its answers to the Panel's questions; (ii) the United States' HSBI exhibits submitted in conjunction with its answers to the Panel's questions; and (iii) alleged violations of the Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information ("BCI/HSBI Procedures").

3. The European Union has also requested the Panel to reject certain arguments and evidence on the grounds that they should have been addressed by the United States earlier in these proceedings.[1] The Panel will rule on this aspect of the request as soon as possible.

1 THE UNITED STATES' FULL HSBI VERSION APPENDIX

4. The European Union asserts that, on 24 May 2013, the United States provided the European Union with only one locked CD containing the HSBI Appendix submitted in conjunction with its answers to the Panel's questions. The European Union submits that paragraph 58(g) of the BCI/HSBI Procedures requires the United States to provide two such CDs. The European Union explains that the United States' failure to provide two CDs means that its agents for this dispute do not have access to the HSBI Appendix in the short time available to prepare comments on the United States' answers to the Panel's questions. The European Union argues that extending the deadline for the parties to comment on each other's answers to the Panel's questions beyond 12 June 2013 will exacerbate the prejudice it has suffered, as members of its delegation have scheduled commitments in the two weeks following 12 June 2013, and thereafter, on 27 June 2013, the European Union will receive the United States' first written submission in the *US – Large Civil Aircraft (Article 21.5)* dispute. In addition, the European Union argues that any extension of the deadline for both parties would allow the United States to benefit from their own breach of the rules. Thus, the European Union requests that the Panel reject the United States' HSBI Appendix as untimely filed.[2]

5. The United States expresses regret for this oversight but points out that the European Union could have advised the United States of this problem on 24 May when it received the first CD, with a view to arranging with the United States for delivery of the second CD to Geneva or Brussels by 27 May 2013. Instead, the European Union chose to formally complain to the Panel on 28 May; a choice which was not geared to minimize delay or any prejudice arising from such delay. The United States advises that it has consulted with the European Union and has made arrangements to deliver a second copy of its HSBI Appendix directly to a European Union representative in Brussels.[3]

6. The Panel agrees with the European Union, and the United States acknowledges, that paragraph 58(g) of the BCI/HSBI Procedures required the United States to provide two copies of

[1] European Union, Request for Interim Ruling of 28 May 2013, paras. 11-21.
[2] European Union, Request for Interim Ruling of 28 May 2013, paras. 3-5.
[3] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 3.

its HSBI Appendix in the form of two locked CDs to the European Union. The Panel notes that this HSBI Appendix includes information relating to nine of the 72 questions that were answered by the United States. The United States' failure to provide a second CD as required means that some of the European Union's agents, which the European Union has explained operate out of at least two cities, Geneva and Brussels, could not access the HSBI Appendix at the time they were entitled to. Although it appears that arrangements have been made to deliver the second CD to a European Union representative in Brussels, the delay occasioned by this oversight nonetheless could adversely affect the European Union's ability to prepare its comments to the United States' answers to the Panel's questions within the deadline set by the Panel.

7. As a usual matter, providing an extension of time to compensate for a delay in the submission of information would be the logical way to ensure that a party is able to fully respond to late-submitted information. However, the European Union argues that extending the deadline in this case would "only serve to heighten the prejudice suffered by the European Union"[4], as members of its delegation have scheduled certain (unspecified) commitments in the two weeks following the current deadline of 12 June 2013, and immediately thereafter will receive the United States' first written submission in *US – Large Civil Aircraft (Article 21.5)*. While the Panel is sympathetic to the demands that this large and complex dispute places upon delegations, especially as it is running in parallel to *EC – Large Civil Aircraft (Article 21.5)*,[5] we see no reason to believe that with an adequate extension of time the European Union would be unable to respond fully to the information in question. Nor do we consider the United States' oversight so egregious as to warrant the rejection of the HSBI Appendix where, as here, it is not necessary in order to protect the European Union's ability to participate fully in this dispute.

8. The Panel observes that the United States' failure to follow the instructions in paragraph 58(g) of the BCI/HSBI Procedures means that the European Union will receive the second CD several days after it was entitled to receive it under the BCI/HSBI Procedures. In this light, the Panel decides as follows. *First*, the Panel directs the United States to deliver the second CD as soon as possible, if it has not already done so, and to inform the Panel as soon as it has been delivered. *Second*, the Panel extends the deadline for the European Union to submit its comments on the United States' answers to questions to Wednesday, 26 June 2013, that is, an extension of 14 days. While the Panel considers that this should compensate for the delays in the United States' response, if the European Union considers that it is unable to respond fully in this time, the Panel will consider any justified request for a further extension. *Third*, we direct the United States to submit, *only to the Panel and not the European Union*, its comments on the European Union's answers to the Panel's questions as per the current deadline, on 12 June 2013; the United States is requested to submit the same document to the European Union on 26 June 2013 in accordance with the relevant procedures.

2 THE UNITED STATES' HSBI EXHIBITS

9. The European Union raises three objections concerning the submission by the United States of HSBI exhibits with its responses to questions from the Panel. First, the United States filed the HSBI exhibits during the afternoon of Friday, 24 May 2013, rather than the due date for the answers to the Panel's questions, which was Wednesday 22 May. Second, the United States had indicated, in response to an inquiry by the European Union, that it would not be making the HSBI exhibits available for viewing on a secure laptop at the United States' Mission to the European Union in Brussels until 28 May 2013. Third, the United States failed to provide an HSBI version of Exhibit US-505.[6] The European Union requests that, in light of these problems, which it asserts have seriously hampered its ability to prepare comments on the United States' answers to the Panel's questions by 12 June 2013, the United States' HSBI exhibits should be rejected as untimely filed.[7]

[4] European Union, Request for Interim Ruling of 28 May 2013, para. 4.

[5] Throughout these proceedings, the parties have at times had to work on both disputes simultaneously. In this respect, we note that the European Union's first written submission in *US – Large Civil Aircraft (Article 21.5)* was received by the United States two weeks before the substantive meeting with the Panel in this dispute. Moreover, the Panel in this dispute asked the United States to respond to 72 direct questions following the substantive meeting, during a period when the United States was no doubt preparing its first written submission in *US – Large Civil Aircraft (Article 21.5)*.

[6] James V. Jordan, NERA, Reply to Professor Whitelaw's Response to Jordan Report, 19 May, 2013.

[7] European Union, Request for Interim Ruling of 28 May 2013, para. 10.

2.1 United States' HSBI Exhibits Filed with the Secretariat on 24 May

10. The HSBI exhibits cited by the United States in its answers to the Panel's questions were filed at the WTO in Geneva on 24 May 2013. The European Union objects that the US HSBI exhibits were not filed by the due date for the submission, which was 22 May 2013. The European Union argues that, while paragraph 58(h) of the BCI/HSBI procedures requires only that a party shall have commenced transfer of the locked CDs containing the HSBI *Appendix* to a submission no later than the deadline for submission (and thus contemplates that such HSBI may be received one to two days after the filing deadline), no such allowance is made for HSBI *exhibits*.[8]

11. The United States responds that it makes every effort to send HSBI documents early so that they arrive in Geneva on the submission date, even though the quickest delivery option is for arrival on the second day after transmission. Nevertheless, for a lengthy written submission containing HSBI, exhibits are usually finalized along with the submission. The United States considers that it would be unfair to require the United States to complete all such submissions two days earlier than the deadline solely because the distance between the United States and Geneva is greater than the distance between Brussels and Geneva.[9]

12. Paragraphs 49 and 50 of the BCI/HSBI Procedures require the United States to make its HSBI available, in electronic or hard copy form, at both the WTO Secretariat and at the United States mission in Brussels. These provisions do not, however, indicate precisely when such HSBI must be made available at these locations. Guidance as to the timing of the submission of the HSBI *Appendix* may be found in paragraph 58(h) of the BCI/HSBI Procedures. Paragraph 58(h) requires parties to "commence transfer" of the locked CDs containing the HSBI Appendix no later than the deadline for the submission concerned. This rule permits a party, if necessary, to prepare the HSBI Appendix up until the date of deadline for its submission, meaning that it is possible that there will be a delay of a day or two after the deadline until receipt of the HSBI Appendix by the other party.[10]

13. Paragraph 58(h) does not explicitly refer to HSBI *exhibits*. However, a party's HSBI Appendix will necessarily make reference to HSBI exhibits.[11] It would be incongruous to permit a party to continue with the preparation of its HSBI Appendix up until the due date for the submission, but to require that HSBI exhibits, which must also comply with the special transfer requirements for HSBI set forth in paragraphs 49 and 50 of the BCI/HSBI Procedures, be received by the other party by the due date for the submission. Such an interpretation would mean that a party would need to have "commenced transfer" of HSBI exhibits one to two days before it had finalized the HSBI Appendix that refers to those exhibits. In practice, this would mean that parties would need to finalize their HSBI Appendix prior to the deadline for its completion envisaged in paragraph 58(h). In this light, the BCI/HSBI Procedures must be interpreted to permit parties to submit HSBI exhibits at the same time as they submit the HSBI Appendix. For this reason, we do not consider that the United States' HSBI exhibits submitted to the WTO Secretariat on 24 May 2013 to be untimely filed.

2.2 United States Failure to Make Available US HSBI Exhibits at the US HSBI Location in Brussels

14. The European Union notes that, in scheduling an appointment for EU HSBI Approved Persons at the United States' HSBI location in Brussels on 24 May 2013, the European Union was informed that the United States' HSBI exhibits would not be uploaded to the secure laptop until 28 May 2013. The United States responds that the HSBI exhibits were delivered to Brussels on 27 May 2013, which was a holiday in the United States and was not a business day for the United States Mission to the European Union in Brussels. The HSBI exhibits were thus available for

[8] European Union, Request for Interim Ruling of 28 May 2013, para. 7, footnote 4.
[9] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 4.
[10] HSBI cannot be submitted via email. It is transmitted to the Panel in electronic form using locked CDs or sealed laptops. Parties are required to keep electronic or hard copies of HSBI it submits to the Panel in its HSBI location, for access by HSBI Approved Persons of the other party, see paragraphs 49 and 50 of the BCI/HSBI Procedures.
[11] There were a total of nine questions in which the United States referred to HSBI in the answers, and thus which were part of the US Full HSBI Version Appendix. In responding to these nine questions, the United States referred to a total of 33 HSBI exhibits.

viewing, and were viewed by the European Union, on 28 May 2013.[12] The United States submits that the HSBI material is a small portion of the overall submission, and in the "unlikely" event that a short delay in access to the HSBI exhibits would adversely affect the European Union, the United States would be flexible in providing a solution consistent with the BCI/HSBI Procedures.

15. Paragraph 50 of the BCI/HSBI Procedures requires the United States to make its HSBI available for access by EU HSBI Approved Persons at the United States Mission to the European Union in Brussels.[13] As noted above, we understand paragraph 58(h) of the BCI/HSBI Procedures to apply to HSBI exhibits as well as to the HSBI Appendix, and the United States' obligation was thus to "commence transfer" of its HSBI exhibits to Brussels by Wednesday 22 May 2013. Although the United States has not directly spoken to this point, we would have expected that the United States would have been able have those HSBI exhibits delivered to Brussels and uploaded by Friday 24 May 2013, as in the case of Geneva. The United States' failure to do so is problematic. That impact of that failure was exacerbated by the fact that 27 May was an official holiday in the United States and that the United States Mission in Brussels was closed.[14] As a result, the European Union's access to the United States' HSBI exhibits was delayed by four days, a not insignificant period given that the European Union's comments were due nine days later, on 12 June 2013.

2.3 United States Failure to Provide a HSBI Version of Exhibit US-505

16. The European Union objects to the United States' failure to provide an HSBI version of Exhibit US-505, which is a report prepared by a US consultant addressing alleged benefits from LA/MSF for the A350XWB challenged by the United States.[15] The United States submitted a BCI version of this report on 22 May 2013, but the European Union notes that calculations and data on which the consultant appears to rely are treated as HSBI and redacted from the BCI version. This being so, the BCI version is of little use to facilitate the preparation of the European Union's comments, because the European Union cannot review the HSBI calculations and data on which the consultant and the United States appear to rely. For the reasons already outlined above, the European Union believes that an extension of the deadline for it to comment would not remedy the prejudice it has suffered as a result of not having access to the HSBI version of Exhibit US-505 (BCI). Accordingly, the European Union requests that the Panel reject Exhibit US-505 (BCI) as being untimely filed.

17. The United States advises that it has corrected this oversight.[16] The United States argues that, when an oversight causes a minor delay, the obvious fix, if a fix is necessary, is to grant a short extension, rather than to reject probative evidence. A rejection of probative evidence because of professed commitments of one party would be highly unusual, patently unfair and not in the interest of an objective determination by the Panel.

18. The Panel observes the HSBI version of Exhibit US-505 (BCI), like the other HSBI exhibits filed with the United States HSBI Appendix, should have been made available in Geneva and in Brussels by 24 May 2013. The United States advises that it has now corrected its oversight, by which the Panel assumes that the United States is making available the HSBI version of Exhibit US-505 (BCI), at the WTO Secretariat and at the United States Mission to the European Union in Brussels, by Wednesday 3 June 2013. Indeed, the United States made this exhibit available at the WTO Secretariat in Geneva yesterday, 4 June 2013. While the Panel welcomes the United States' corrective action, the fact remains that the European Union's ability to review the HSBI version of this exhibit has been delayed by 11 days.

2.4 Conclusion

19. The Panel considers that the United States' failure to make available the HSBI exhibits at its HSBI location in Brussels by 24 May 2013 and to provide an HSBI version of Exhibit US-505 (BCI) could adversely affect the European Union's ability to prepare its comments to the United States'

[12] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 5.
[13] The "HSBI location" identified in paragraph 9 of the BCI/HSBI Procedures.
[14] Paragraph 53 of the BCI/HSBI Procedures provides that the "designated room" in which HSBI is kept at this location shall be available from 9 am until 5 pm during official working days at that HSBI location.
[15] James V. Jordan, NERA, Reply to Professor Whitelaw's Response to Jordan Report, 19 May 2013.
[16] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 6.

answers to the Panel's questions by the 12 June 2013 deadline set by the Panel. However, we consider that our decision to extend the deadline for the European Union to submit its comments on the United States' answers to questions to Wednesday, 26 June 2013 sufficiently addresses the risk of any such prejudice arising. We further recall that, if the European Union considers that it is unable to respond fully by that date, the Panel will consider any justified request for a further extension. Under these circumstances, we do not consider that the failures on the part of the United States merit the Panel's rejection of the United States' HSBI exhibits as untimely filed.

20. More generally, the Panel has found in sections 1 and 2 of this ruling that the United States has failed on a number of occasions to provide information in a timely manner pursuant to the requirements of the BCI/HSBI Procedures applicable in this case. Such failures are unfortunate, and the Panel strongly urges the United States to redouble its efforts to fully comply with these Procedures. At the same time, the Panel is conscious of the unusual scale of this case, which involves thousands of pages of submissions and thousands of exhibits, and that application of highly complex BCI/HSBI Procedures in this context is a challenge. Under these circumstances, and in the absence of any indication that the errors committed by the United States were intentional, our focus is properly on ensuring that the Procedures are applied correctly going forward, and that the ability of the European Union to properly defend its case not be compromised. We see no reason to take punitive action that would prevent this Panel from accepting evidence and argument that could assist us in performing our task of performing an objective examination of the matter before us.

3 ALLEGED VIOLATIONS OF THE BCI/HSBI PROCEDURES

3.1 Alleged Transmission of BCI by Non-Secure Email

21. The European Union objects that the United States transmitted the BCI versions of its answers to the Panel's questions by "non-secure" email, in a departure from prior practice in which BCI versions of submissions have been made by delivery of CDs. The European Union requests the Panel to take remedial action to reassure stakeholders from whom BCI originates that breaches of the BCI Procedures will not be tolerated.

22. The United States advises that the transmittal on 22 May 2013 of the United States answers to the Panel's questions containing BCI by email was an inadvertent error. To avoid any repetition, it has sent instructions to all United States' BCI and HSBI Approved Persons in this dispute emphasizing proper procedures regarding electronic transmission of BCI. The United States considers that the warning and reminder are sufficient to assure future compliance, and that any further action is unnecessary.[17]

23. Paragraph 43 of the BCI/HSBI Procedures provides that documents containing BCI may be transmitted electronically only by using "secure" email. The BCI/HSBI Procedures do not define what is meant by "secure" e-mail. The European Union does not explain why the United States' transmission by e-mail of its answers to the Panel's questions (containing BCI) was not by "secure" email, although it appears that the United States agrees that the email transmission of its answers to the Panel's questions was erroneous. The Panel welcomes the parties' suggestions as to email protocols that would be acceptably secure, with a view to amending the BCI/HSBI Procedures to include a clear definition as to what is meant by "secure" email. In the meantime, the Panel takes note of the action that the United States has taken to remind its agents of the proper procedures regarding electronic transmission of BCI and has decided not to take any further action at present.

3.2 Alleged Access to European Union BCI and HSBI by Somebody Other than an Approved Person

24. The European Union notes that the United States' answers to the Panel's questions refer to a report by Dr Chetan Sanghvi which refers in multiple places to two EU BCI and HSBI exhibits.[18]

[17] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 12.

[18] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, Exhibit US-530. The two EU exhibits to which Dr Sanghvi's report refers are Christophe Mourey, "Statement on Current Competitive Conditions in the LCA Industry" 4 July 2012, Exhibit EU-8, which was submitted as BCI and Christophe Mourey, "Supplemental Statement on current competitive conditions in the LCA industry", 12 December 2012, Exhibit EU-124, which was submitted as HSBI with a BCI version prepared also.

The United States notified Dr Sanghvi as a person approved to access BCI and HSBI only on 15 May 2013, while his report is dated 21 May 2013. The European Union considers it unlikely that Dr Sanghvi prepared the report in the six days between 15 and 21 May 2013. Moreover, the European Union notes that it did not prepare a redacted version of the two exhibits and that Dr Sanghvi did not access the delegation of the European Union to the United States (the EU HSBI location) subsequent to 15 May 2013. The European Union considers that the foregoing factors demonstrate that US Approved Persons provided Dr Sanghvi with access to BCI and HSBI prior to his designation as a BCI or HSBI Approved Person, in violation of the BCI/HSBI Procedures. The European Union requests that Dr Sanghvi be removed from the Approved Person's list, and that his report be rejected. In addition, the European Union requests that the Panel seek information from the United States regarding the identity of the Approved Persons who disclosed EU BCI and HSBI to Dr Sanghvi, that those persons be removed from the Approved Persons list because of their disregard for the BCI/HSBI Procedures, and that the Panel notify the panel in *US – Large Civil Aircraft* of the identity of the US Approved Persons found to have violated the BCI/HSBI Procedures. Finally, the European Union requests the Panel to take any further action it deems necessary and appropriate to reassure the stakeholders from whom BCI and HSBI originates in these proceedings that breaches of the BCI/HSBI Procedures will not be tolerated.

25. The United States characterizes the European Union's accusation that US Approved Persons disclosed EU BCI and HSBI to Dr Sanghvi before notifying him as an Approved Person as "completely unfounded" and "absolutely false".[19] The United States criticizes the European Union for not first seeking an explanation and assurance from the United States regarding Dr Sanghvi's access to BCI and HSBI before making "reckless" assertions to the Panel. The United States asserts that Dr Sanghvi did much of his work based on extensive non-BCI, and did not have access to BCI or HSBI prior to 15 May 2013.

26. The European Union makes serious allegations against the United States and US Approved Persons. The United States strenuously denies those allegations. The Panel recognizes that its ability to conduct an objective assessment of the matter in this proceeding depends in large part on the quality of the evidence that the parties place before it, and thus understands the importance of assuring stakeholders that commercially-sensitive material will be handled strictly in accordance with the BCI/HSBI Procedures. Given the circumstances outlined by the European Union, and the importance that both parties have full confidence in the integrity of these confidential information submitted in this dispute, the Panel requests the United States to provide, by 10 June 2013, a fuller explanation of the manner in which Dr Sanghvi's report was prepared, given Dr Sanghvi's late status as an approved person. The Panel will defer its decision on this aspect of the European Union's request until it has considered the United States' explanation.

4 CONCLUSION

27. In summary, after carefully considering the European Union's request for an interim ruling and the United States' response, the Panel has decided to:

a. With respect to the European Union's request to reject the United States' Full HSBI Version Appendix as untimely -

   i. decline the European Union's request;

   ii. direct the United States to deliver the second CD to a European Union representative in Brussels as soon as possible, if it has not already done so, and to inform the Panel as soon as it has been delivered;

   iii. extend the deadline for the European Union to submit its comments on the United States' answers to questions to Wednesday, 26 June 2013, that is, and extension of 14 days; and

   iv. direct the United States to submit, only to the Panel and not the European Union, its comments on the European Union's answers to the Panel's questions as per the current deadline, on 12 June 2013. The United States is also directed to submit the

[19] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 13.

same document filed with the Panel on 12 June 2013 to the European Union on 26 June 2013 in accordance with the relevant procedures.

b. With respect to the European Union's request to reject the United States' HSBI Exhibits as untimely -

   i. decline the European Union's request;

   ii. direct the United States to provide, at the US HSBI location in Brussels, a HSBI version of Exhibit US-505 (BCI) as soon as possible, if it has not already done so, and to inform the Panel when it has done so;

   iii. extend the deadline for the European Union to submit its comments, as indicated in paragraph 26(a)(iii) and (iv) above.

c. With respect to the European Union's allegations of violations of the BCI/HSBI Procedures -

   i. decline the European Union's requests for remedial action concerning the use of non-secure email to transmit the BCI versions of the United States' answers to the Panel's questions;

   ii. request the United States to provide, by 10 June 2013, a fuller explanation of the manner in which Dr Sanghvi's report was prepared, given Dr Sanghvi's late status as an approved person, and to defer the European Union's requests until it has considered the United States' explanation.

28. Finally, the Panel recalls that the European Union's request for an interim ruling also asks the Panel to reject certain arguments and evidence on the grounds that they should have been addressed by the United States earlier in these proceedings. As noted above, the Panel will issue a ruling on this request as soon as possible. In the meantime, both parties should proceed on the basis that the information that is the subject of the European Union's request continues to be part of the record of this dispute.

ANNEX F-3

THE EUROPEAN UNION'S REQUESTS OF 28 MAY 2013 CONCERNING: (I) THE UNITED STATES' ALLEGED FAILURE TO MAKE A PRIMA FACIE CASE AND THE "BACK-LOADING" OF ARGUMENTS AND EVIDENCE; AND (II) THE UNITED STATES' ALLEGED UNAUTHORIZED ACCESS TO EUROPEAN UNION BCI/HSBI

(Panel ruling issued on 12 June 2013)

1. The Panel refers to the European Union's request for an interim ruling of 28 May 2013 concerning a number of matters related to the United States' answers to the Panel's questions to the parties issued on 23 April 2013 ("Panel's Questions") and the United States' comments on the European Union's request, which were received on Friday 31 May 2013. The Panel recalls that it has previously issued rulings on two of the four requests made by the European Union.[1] In this communication, the Panel informs the parties of its rulings with respect to the European Union's remaining requests, namely, that certain arguments and evidence of the United States be rejected on the grounds that they should have been addressed by the United States earlier in these proceedings, and that the Panel should reject a report by an outside advisor on the grounds that the advisor was given access to BCI/HSBI prior to designation as a BCI/HSBI Approved Person.[2]

1 THE EUROPEAN UNION'S COMPLAINTS CONCERNING THE "BACKLOADING" OF EVIDENCE

2. The European Union argues that the prompt provision of evidence is particularly important in compliance cases, and that in this case "the United States' belated provision of evidence necessary to support the elements of its *prima facie* case is legion." Even assuming that the United States had previously submitted evidence sufficient to establish the elements of its claims, the European Union argues, the United States made a "strategic decision" in these proceedings to forego the "first opportunity" available to it to respond to certain evidence and argument advanced by the European Union in its second written submission, and its attempt to provide a response to these European Union submissions in its answers to the Panel's Questions following the substantive meeting is untimely, prejudices its own ability to defend its interests as well as the Panel's ability to discharge its duties, and for these reasons should be rejected.[3] The European Union points to three specific instances where it considers the United States' alleged "backloading" of argument and evidence has compromised the European Union's ability to make its defence as well as the Panel's ability to conduct an objective assessment.

3. The first concerns the Expert Declaration of Dr Chetan Sanghvi, submitted by the United States as Exhibit US-530 (the "Sanghvi Report"). According to the European Union, the Sanghvi Report purports to set out a comprehensive product market delineation on behalf of the United States "for the first time".[4] The European Union recalls that, in the original proceeding in this dispute, the Appellate Body found that establishing the relevant product market or markets at issue is a "prerequisite for assessing whether" adverse effects "could be found to exist as alleged by the United States".[5] The European Union argues that, given that the proper delineation of the product markets is a prerequisite for the United States' adverse effects claims, it is not acceptable for the United States to "withhold evidence" purporting to offer a comprehensive evaluation of the relevant LCA product markets until all written submissions and the meeting with the Panel have passed. The European Union therefore requests that the Panel reject the Sanghvi Report, "lest the Panel be seen as making the case for the United States".[6]

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[1] Communication from the Panel, dated 5 June 2013.
[2] European Union, Request for Interim Ruling of 28 May 2013, paras. 11-21.
[3] European Union, Request for Interim Ruling of 28 May 2013, paras. 13, 17, 19 and 21.
[4] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, Exhibit US-530 ("Sanghvi Report"), see European Union, Request for Interim Ruling of 28 May 2013, para. 15.
[5] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128. See also Appellate Body Report, *Canada – Renewable Energy*, para. 5.169.
[6] European Union, Request for Interim Ruling of 28 May 2013, para. 17.

4. The second and third instances of alleged "backloading" by the United States concern part of the United States' answer to Panel Question 67, and the Reply to Professor Whitelaw's Response to the Jordan Report, submitted by the United States as Exhibit US-505 ("Jordan Reply to Whitelaw's Response Report"), respectively.[7] In relation to the first alleged instance of "backloading", the European Union objects particularly to the fact that, in addition to answering the Panel's question, the United States response to Panel Question 67 addresses the campaign-specific arguments of the European Union that appeared in its second written submission.[8] Similarly, the European Union explains that the Jordan Reply to Whitelaw's Response Report addresses a number of issues that were raised in a report by Professor Robert Whitelaw and submitted by the European Union as an exhibit to its second written submission.[9]

5. The European Union argues that in both instances, the United States had 13 weeks from the filing by the European Union of its second written submission to the date of the meeting with the Panel to develop its comments on the relevant arguments, and was fully capable of delivering them in its opening statement at the meeting with the Panel. The European Union submits that responding to its arguments during the meeting with the Panel would have permitted both the Panel and the European Union to engage with the United States' arguments at the meeting, and would have provided an opportunity for the Panel to consider additional questions to the parties about any assertions made by the United States at the meeting. According to the European Union, the United States instead made a "strategic decision" to "withhold its comments" on the European Union's arguments concerning the campaign-specific lost sales allegations and the alleged benefits of LA/MSF for the A350XWB (as articulated in the Jordan Reply to Whitelaw's Response Report) until after the substantive meeting with the Panel.

6. The European Union considers that there should be consequences for the United States' "backloading", "lest it undermine the Panel's ability to make an objective assessment, and the European Union's ability to make its defense".[10] Accordingly, the European Union requests that the Panel reject: (a) any material included in the United States answer to Panel Question 67 that addresses, in addition to the Panel's Question, the United States' response to the campaign-specific European Union arguments that appeared in its second written submission; and (b) the Jordan Reply to Whitelaw's Response Report submitted by the United States as Exhibit US-505.[11]

2 THE UNITED STATES' RESPONSE TO THE EUROPEAN UNION'S COMPLAINTS

7. The United States denies that it has "backloaded" evidence and argues that it is not barred from submitting additional evidence and argumentation after its first written submission to rebut the European Union's arguments, and to respond to questions from the Panel.[12] The United States argues that paragraph 15 of the Working Procedures demonstrates that the Panel envisaged at the outset that the parties would submit factual information through their responses to questions from the Panel.[13] If the parties did nothing more in their responses to the Panel's questions than repeat statements they had previously made, the question process would be futile and unhelpful to the Panel.[14]

8. As to the specific instances of "backloading" alleged by the European Union, the United States responds, first, that the Sanghvi Report was submitted in direct response to: (a) questions from the Panel about product markets, and particularly with respect to the application of competition law concepts to the product market inquiry; and (b) the European Union's arguments, made in its

[7] James V. Jordan, NERA, Reply to Professor Whitelaw's Response to Jordan Report, 19 May 2013, Exhibit US-505 (BCI/HSBI) ("Jordan Reply to Whitelaw Response Report").
[8] United States, Answer to Panel Question 67.
[9] Robert Whitelaw, Response to Dr Jordan's Report on the Benefits of MSF, 3 December 2012, Exhibit EU-121 (BCI/HSBI) ("Whitelaw Response to Jordan Report").
[10] European Union, Request for Interim Ruling of 28 May 2013, paras. 19 and 21.
[11] European Union, Request for Interim Ruling of 28 May 2013, paras. 19-21.
[12] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 7.
[13] Paragraph 15 of the Panel's Working Procedures provides that "parties shall submit all factual evidence to the Panel no later than their first written submissions, other than evidence necessary for purposes of rebuttals and answers to questions."
[14] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 7.

second written submission and at the meeting with the Panel, concerning the proper delineation of the product markets which it had supported by reference to a consultant's NPV calculations.[15]

9. Second, the United States notes that Panel Question 67 sought the identification of the airlines involved in specific sales campaigns and whether Boeing LCA were considered. The United States argues that this inquiry clearly implicates the United States' lost sales claims related to the sales campaigns identified in paragraphs 417 through 503 of the United States' first written submission. The United States submits that it was appropriate and helpful to the Panel's task of making an objective assessment, to address the European Union's arguments about those sales campaigns. The United States rejects the suggestion that it was precluded from making such arguments because it had not done so in the same detail in its opening statement at the meeting with the Panel. The United States argues that a rule in which parties effectively waived any argument omitted from their oral statements would force them to mention every potential argument in their oral statement. Moreover, no such rule appears in the Panel's Working Procedures.[16]

10. Third, with respect to the submission by the United States in its answers to the Panel's questions of the Jordan Reply to Whitelaw's Response Report, the United States notes that, while the Panel had described the United States' opening statement at the meeting with the Panel as the "first opportunity" at which the United States could have responded to the Whitelaw Response to Jordan Report, it nowhere found that it was also the last opportunity.

3 EVALUATION BY THE PANEL

3.1 General Considerations

11. We note at the outset that the European Union does not assert that the alleged "backloading" of arguments and evidence by the United States has been made contrary to the Working Procedures. Paragraph 15 of the Working Procedures provides that the parties shall submit all factual evidence to the Panel no later than their first written submissions, *other than evidence necessary for purposes of rebuttals and answers to questions*.[17] The European Union does not allege that the Sanghvi Report, the United States answer to Panel Question 67 or the Jordan Reply to Whitelaw's Response Report were not submitted in accordance with paragraph 15 of the Working Procedures as evidence necessary for purposes of rebuttals and answers to questions. Indeed, we consider that the Sanghvi Report, the United States' answer to Panel Question 67 and the Jordan Reply to Whitelaw Report were submitted in conformity with paragraph 15 of the Working Procedures.[18]

12. However, in conducting an objective assessment of the matter as required by Article 11 of the DSU, the Panel is bound to ensure that due process is respected.[19] Although panel working procedures should embody and reinforce due process, the question whether a panel has guaranteed due process in any specific situation is not simply a question of whether the working procedures have been complied with.[20]

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[15] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 9.

[16] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 10.

[17] Paragraph 15 further provides that exceptions to this procedure may be granted upon a showing of good cause. In such a case, the other party shall be accorded a period of time for comment on the newly submitted evidence, as the Panel deems appropriate.

[18] The United States' explanations countering the European Union's campaign-specific arguments in its answer to Panel Question 67 are contained in paragraphs 269, 270, 271, 272, 273, 274, 275, 276, 279, 281, 282, 283, 284, 285, 286, 287, 289, 290, 291, 292, 293, 294, 295, 297, 298, 299, 301, 302, 303, 306, 308, 310, 311, 313, 314 and 315. Our review of this information shows that it consists essentially of: (a) re-statements of the United States' arguments concerning lost sales contained its first and second written submissions; (b) references to the panel's and the Appellate Body's findings in the original DS316 dispute; and (c) specific responses to some arguments made by the European Union in its second written submission concerning lost sales.

[19] Due process is a fundamental principle of WTO dispute settlement. The Appellate Body has stated that due process is intrinsically connected to notions of fairness, impartiality and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules, see Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

[20] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 148.

13. It is well established that a panel must not make a "*prima facie* case" for a party who bears the burden of proof in relation to a claim or a defence.[21] However, this does not mean that a panel must make a specific finding that a complainant has met its burden to establish a *prima facie* case in respect of a particular claim, or that a respondent has effectively rebutted a *prima facie* case.[22] Similarly, a panel is not required to make a finding as to whether a complainant has established a *prima facie* case before it examines the respondent's arguments and evidence.[23] Indeed, WTO dispute settlement proceedings do not involve any particular temporal sequence of proof. Both parties will adduce evidence in support of their own arguments or to rebut the arguments made by the other at various stages of a dispute, sometimes simultaneously, throughout the entirety of a proceeding.

14. The "objective assessment of the matter" that a panel is called upon to perform under Article 11 of the DSU requires it to carefully and independently scrutinize the parties' arguments and any evidence submitted in support of those arguments, with a view to clarifying their meaning and exploring their implications for the particular claims being made. Consistent with this obligation, and in the light of the extremely voluminous and complex issues that have been raised in this dispute, we believe that our evaluation of the merits of the United States' claims must be conducted on the basis of a full appreciation of *all* of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding. The fact that we must discharge this responsibility in a compliance proceeding in which it was envisaged that the parties would hold only one substantive meeting with the Panel raises particular complications. This is one reason why we decided to pose a relatively large number of questions to the parties following the meeting, and why we informed the parties at the end of the substantive meeting in April 2013 that we may well need to pose additional questions and/or hold an additional meeting with the parties as our analysis of the arguments and evidence progresses.[24]

15. Needless to say, it is a basic requirement of due process that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This due process interest must be balanced against other interests, including systemic interests such as those reflected in Articles 3.3 and 12.2 of the DSU.[25] As the Appellate Body has stated, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU.[26]

16. With these considerations in mind, we now turn to address the European Union's particular requests.

3.2 The United States' Alleged "Strategic Decision" to "Withhold" Evidence and Argument

17. The European Union makes a number of specific objections to the United States' introduction of certain pieces of evidence and related arguments in its answers to the Panel's Questions. Underlying the European Union's particular complaints, however, is a broader assertion that the

[21] See, for instance, Appellate Body Report, *Japan – Agricultural Products II*, para. 129; and Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 300. A *prima facie* case has been described by the Appellate Body as one that, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14; and Appellate Body Report, *EC – Hormones*, para. 104. The evidence and arguments underlying a *prima facie* case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision. Appellate Body Report, *US – Gambling*, para. 141.

[22] Appellate Body Report, *Thailand – H-Beams,* para. 134.

[23] Appellate Body Report, *India – Quantitative Restrictions*, para. 142.

[24] In this regard, we note that it is well established that "a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding member has established its complaint or defence on a *prima facie* basis." Appellate Body Report, *Canada – Aircraft*, para. 192. Moreover, the Appellate Body has previously explained that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of issues before them". Appellate Body Report, *Thailand – H-Beams*, para. 135.

[25] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

[26] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

United States has made a "strategic decision" in this dispute to "withhold" relevant evidence and argument until its answers to the Panel's Questions in a manner which undermines the Panel's ability to make an objective assessment, and the European Union's ability to make its defense.[27] We see no reason to accept this characterization of how the United States has proceeded in this dispute. Rather, as we explain in the sections that follow, the evidence and arguments that are the subject of the European Union's objections were made as part of the process of engagement between the parties and with the Panel that typically characterizes WTO dispute settlement, whereby arguments and evidence are explored and tested, and positions clarified and/or further developed, with a view to informing the Panel's objective assessment of the matter before it.

3.3 The Sanghvi Report (Exhibit US-530)

18. The European Union's argument that the Panel should reject the Sanghvi Report appears to be premised on the view that all evidence pertaining to issues that are a "prerequisite" or "precondition" to establishing adverse effects must be submitted by a party at an early point in the proceeding, and in any case before the stage at which all written submissions have been received and the substantive meeting with the parties has taken place. Moreover, in suggesting that the Panel's receipt of the Sanghvi Report at this stage of the proceeding could be seen as the Panel making the case for the United States, it would appear that the European Union considers that the Panel's questioning of the parties that led the United States to submit the Sanghvi Report was inappropriate in the circumstances, and that the Panel should reject evidence responsive to those questions.

19. The Sanghvi Report was submitted by the United States in response to a series of questions posed by the Panel concerning the parties' diverging positions as to the proper delineation of the relevant product markets.[28]

20. In its first written submission, the United States sought to demonstrate that the European Union had not removed the adverse effects of the subsidies the subject of the recommendations and rulings of the DSB by reference to the three product markets identified by the Appellate Body for purposes of its analysis of the United States' displacement claims on appeal.[29] The European Union responded in its first written submission that the United States' reliance on these three product markets was insufficient, not least because of the recent developments relating to the competitive situation in these product markets.[30] The European Union proposed an alternative delineation of the relevant product markets, relying on a statement by Mr Christophe Mourey, among other evidence, to support its arguments.[31] The United States in its second written submission challenged the European Union's identification of the relevant product markets, submitting in support of its arguments, among other evidence, a declaration from Mr Michael Bair.[32] The European Union sought to rebut the United States' arguments and evidence concerning the relevant product markets in its second written submission, arguing that the United States had failed to apply factors relevant to assessing the existence of a product market, and to provide relevant evidence to establish the existence of the three product markets it purported to identify.[33] In so doing, the European Union submitted, among other evidence, a supplemental statement by Mr Christophe Mourey.[34] Although the parties addressed each other's arguments concerning product markets at the substantive meeting with the Panel, neither submitted any further evidence at that meeting. The Panel posed a number of oral questions to the parties on product markets at the meeting for the purpose of clarifying the parties' arguments on specific issues. These questions were subsequently transmitted to the parties in writing together with several other questions on the same matter directed to both parties, to the United States and to the European Union. The United States submitted the Sanghvi Report in support of its answers to several of those questions.[35] The Sanghvi Report refers in various places to the Mourey

[27] European Union, Request for Interim Ruling of 28 May 2013, paras. 13-14, 17, 19 and 21.
[28] The United States referred to the Sanghvi Report in its answers to Panel Questions 48-51, 54, 55, 60, 61, 63, 64 and 67.
[29] United States' first written submission, para. 290-294.
[30] European Union's first written submission, paras. 569-570.
[31] European Union's first written submission, paras. 577-633; Mourey Statement, Exhibit EU-8 (BCI).
[32] United States' second written submission, paras. 438-493; Declaration of Michael Bair, Exhibit US-339 (BCI).
[33] European Union's second written submission, paras. 608-705.
[34] Supplemental Mourey Statement, Exhibit EU-124 (BCI/HSBI).
[35] See above, footnote 28.

statement, submitted by the European Union as an exhibit with its first written submission and to the supplemental Mourey statement, submitted by the European Union as an exhibit with its second written submission.

21. We recall that in *EC – Large Civil Aircraft*, the Appellate Body faulted the panel for deferring to the United States' subsidized product allegations rather than making its own independent assessment of whether all Airbus LCA should be treated as a single subsidized product.[36] The Appellate Body considered that, in the absence of such a determination, the panel did not have a proper basis for assessing whether the alleged subsidized and like products competed in the same market or multiple markets, which it described as a prerequisite for assessing whether displacement within the meaning of Articles 6.3(a) and 6.3(b) could be found to exist as alleged by the United States.[37] However, nothing in the Appellate Body's delineation of the substantive requirement to make a product market determination suggests to us that a complaining party must establish any particular elements of the claim at any specific point in the proceeding. In other words, the fact that the Panel will need to first define the relevant product markets in order to determine whether the United States has demonstrated the existence of adverse effects does not mean that, in seeking to fulfil our obligation under Article 11 of the DSU, we may not pose questions to the parties regarding the relevant product markets after the receipt of written submissions and the substantive meeting. Nor does it mean that the parties are prevented from submitting information responsive to the any questions we may ask after the substantive meeting, or that we must reject such evidence as having been presented at too late a stage in these proceedings, subject of course to any justified due process concerns.

22. In the present proceeding, the United States claims that adverse effects from LA/MSF and other subsidies, in the form of significant lost sales and displacement, impedance and threat thereof, continue through the present, based on the product markets on which the DSB's recommendations and rulings in the original proceeding are based. The United States has made arguments and presented evidence throughout this proceeding in support of that claim. In making an objective assessment of the United States' submissions we are required to assess the conflicting arguments and evidence presented by the parties concerning the proper delineation of the product markets in which Airbus and Boeing LCA compete.[38] In our view, it is therefore appropriate, in discharging our responsibility under Article 11 of the DSU, to not only put to the parties the questions asked on 23 April 2013 concerning the identification of the relevant product markets, but also to evaluate the arguments and evidence submitted by the parties in response to those questions.

23. Thus, for all of the above reasons, we see no basis for agreeing with the European Union's contention that it would be inappropriate for the Panel to consider the Sanghvi Report, which was submitted by the United States in response to the Panel's Questions. We therefore decline the European Union's request to reject the Sanghvi Report.

3.4 The United States' answer to Panel Question 67 and the Jordan Reply to Whitelaw's Response Report (Exhibit US-505 (BCI/HSBI))

24. The European Union's requests that the Panel reject: (a) the "material" included in the United States' response to Panel Question 67 addressing campaign-specific arguments made by the European Union in its second written submission; and (b) the Jordan Reply to Whitelaw's Response Report, are based on the assertion that the United States failed to make these submissions at the "first opportunity" available to do so, namely, in its opening statement at the substantive meeting with the Panel in April 2013.[39] The European Union argues that the United States' attempt to present such "material" in response to the Panel's Questions following the Panel's substantive meeting with the parties undermines the Panel's ability to make an objective assessment and the European Union's ability to make its defence.[40]

25. The European Union's reference to the "first opportunity" appears to derive from our communication to the parties of 23 April 2013, enclosing the list of 109 Panel Questions. In that

[36] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128.
[37] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128.
[38] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1131.
[39] European Union, Request for Interim Ruling of 28 May 2013, paras. 19 and 21.
[40] European Union, Request for Interim Ruling of 28 May 2013, paras. 19 and 21.

communication, we recalled that at the meeting with the parties on 18 April 2013, the European Union objected to the United States' attempt to submit certain hand-written HSBI calculations in support of the statements it made in paragraph 24 of its confidential oral statement on the grounds that to receive them would be inconsistent with the Panel's Working Procedures. We then noted that:

> "… the Whitelaw Response to the Jordan Report was submitted to the Panel as an exhibit to the European Union's second written submission, that the United States' oral statement was its first opportunity to address that Response, and that the United States' calculations go directly to the significance of that Response. Under these circumstances, the Panel considers that it is appropriate for it to now seek these calculations from the United States, and has done so in the attached questions."[41]

26. In stating that the United States' oral statement was the first opportunity at which the United States could have addressed the Whitelaw Response to Jordan Report, but in proceeding to ask the United States to provide that response in the course of answering the Panel's Questions, we did not suggest that a party is prevented from advancing argument or adducing evidence that was not presented at the "first opportunity". Rather, our reference to the "first opportunity" was simply intended to emphasize that the United States did not have a chance to respond to the relevant submissions any earlier than at the substantive meeting with the Panel. Our statement was therefore not intended to preclude the possibility that the United States could address the relevant submissions at a later stage in the proceeding, particularly were we to request the United States to do so. In this connection, we note that the European Union does not refer to any rule of procedure or other principle of due process that requires a party in a WTO dispute settlement proceeding to present its arguments and evidence at the "first opportunity" such that a failure to do so requires a panel to reject such arguments and evidence as untimely.

27. Turning to the particular United States' submissions that are the focus of the European Union's request for an interim ruling, we note that Panel Question 67 asked the United States to clarify certain aspects of the information submitted at paragraphs 417 to 503 of the United States' first written submission. These paragraphs of the United States' first written submission introduced and discussed evidence which the United States submits helps establish its claims of serious prejudice in the form of lost sales. The European Union responded to the United States' allegations in various parts of its first written submission; and both parties engaged with each other's lost sales arguments in their respective second written submissions. At the substantive meeting, the United States noted that the European Union had made "a host of campaign-specific arguments" in its second written submission, arguing that these did not "change the basic facts surrounding the demonstrated lost sales".[42] The European Union's oral statement did not specifically address the United States' submissions with respect to lost sales. However, the relevance of sales campaign evidence to the question of identifying the appropriate product markets was raised by the Panel in the questions posed to the parties at the substantive meeting, and the parties provided oral answers. Subsequently, a series of written questions were transmitted to both parties relating to various aspects of the United States' claims of lost sales. These questions included Panel Question 67. In answering this question, the United States sought to provide the Panel with the requested information as well as address some of the arguments made by the European Union with respect to lost sales in its second written submission. In our view, the entirety of the United States' answer to Panel Question 67 is not only related to the subject matter of that question, but it also concerns a matter with respect to which the parties have engaged and exchanged contrasting views throughout these proceedings. The European Union's comments on the United States' answer to Panel Question 67 will represent another moment in this proceeding when this engagement will take place, and as we have noted above,[43] there may well be others.

28. The United States introduced the Jordan Reply to Whitelaw's Response Report in its answer to Panel Question 92, and it was referred to in the United States' answers to Panel Questions 94, 102, 103, 105, 106 and 108. By its own words, the Jordan Reply to Whitelaw's Response Report is intended to comment on the Whitelaw Response to Jordan Report in order to "respon[d] to and in the light of the Panel's questions of April 23, 2013, as well as the hearing with the Parties of

[41] Communication from the Panel, dated 23 April 2013.
[42] United States, Non-Confidential Oral Statement, para. 105.
[43] See above, para. 14.

April 16-18, 2013".[44] The European Union submitted the Whitelaw Response to Jordan Report as Exhibit EU-121 (BCI and HSBI) with its second written submission.

29. All six of the Panel Questions within which the United States cited the Jordan Reply to Whitelaw's Response Report form part of a series of questions asked to clarify certain aspects of the parties' submissions made up until and including the substantive meeting with the parties in relation to the United States' argument that the LA/MSF measures for the A350XWB constitute subsidies. In our view, the matters addressed in the Jordan Reply to Whitelaw's Response Report go directly to the issues with respect to which the Panel sought clarification in its questions. These are the very same issues with respect to which the parties have exchanged views throughout these proceedings. The European Union's comments on the United States' answers to these questions, including the Jordan Reply to Whitelaw's Response Report, will represent another moment in this proceeding when this engagement will take place, and, again, as we have noted above,[45] there may well be others.

30. As explained above, we are of the view that our evaluation of the merits of the United States' claims in this dispute must be conducted on the basis of a full appreciation of *all* of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding. We see the parties' exchange of views on the matters covered by the questions asked on 23 April 2013 to be an important part of this process. To this end, and the light of the relatively large number of questions posed, we allowed the parties more than four weeks to respond to our questions, and a full three weeks to comment on each other's responses. Further, in response to the difficulties of the European Union to review the United States' Full HSBI Appendix and certain other US HSBI Exhibits submitted with its answers to the Panel's Questions, we extended the deadline for the European Union to comment on the United States' answers by 14 additional days and informed the European Union that if it considered that it is unable to respond fully by that date, we would consider any justified request for a further extension. Under these circumstances, we do not consider that the European Union's ability to make its defense has in any way been compromised.

31. Thus, for all of the above reasons, we see no basis for agreeing with the European Union's contention that it would be inappropriate for the Panel to consider the entirety of the United States' answer to Panel Question 67 or the Jordan Reply to Whitelaw's Response Report. We therefore decline the European Union's request to reject these submissions.

4 ALLEGED UNAUTHORIZED ACCESS TO EUROPEAN UNION BCI/HSBI

32. The European Union notes that the United States' answers to the Panel's questions refer to a report by Dr Chetan Sanghvi which refers in multiple places to two EU BCI and HSBI exhibits.[46] The United States notified Dr Sanghvi as a person approved to access BCI and HSBI only on 15 May 2013, while his report is dated 21 May 2013. The European Union considers it unlikely that Dr Sanghvi prepared the report in the six days between 15 and 21 May 2013. Moreover, the European Union notes that it did not prepare a redacted version of the two exhibits and that Dr Sanghvi did not access the EU HSBI location in Washington, D.C. after 15 May 2013. The European Union considers that these factors demonstrate that US Approved Persons provided Dr Sanghvi with access to BCI and HSBI prior to his designation as an Approved Person, in violation of the BCI/HSBI Procedures. The European Union requests that Dr Sanghvi be removed from the Approved Persons list, and that his report be rejected. In addition, the European Union requests that the Panel seek information from the United States regarding the identity of the Approved Persons who disclosed EU BCI and HSBI to Dr Sanghvi, remove those persons from the Approved Persons list, and notify the Panel in *US – Large Civil Aircraft* of the identity of the US Approved Persons found to have violated the BCI/HSBI Procedures.[47]

[44] Jordan Reply to Whitelaw's Response Report, para. 1. Exhibit US-505 (BCI/HSBI).
[45] See above, para. 14.
[46] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, Exhibit US-530. The two EU exhibits to which Dr Sanghvi's report refers are Christophe Mourey, "Statement on Current Competitive Conditions in the LCA Industry" 4 July 2012, Exhibit EU-8, which was submitted as BCI and Christophe Mourey, "Supplemental Statement on current competitive conditions in the LCA industry", 12 December 2012, Exhibit EU-124, which was submitted as HSBI with a BCI version.
[47] European Union, Request for Interim Ruling of 28 May 2013, paras. 25-28.

33. In its initial response, the United States characterizes the European Union's accusation that US Approved Persons disclosed EU BCI and HSBI to Dr Sanghvi before notifying him as an Approved Person as "completely unfounded" and "absolutely false".[48] The United States asserts that Dr Sanghvi did much of his work based on extensive non-BCI, and did not have access to BCI or HSBI prior to 15 May 2013. In response to our request for a fuller explanation of the manner in which Dr Sanghvi's report was prepared[49], the United States indicates that Dr Sanghvi was retained in late April and that Outside Advisors provided him a variety of non-BCI documents, including non-BCI information from the two exhibits referred to by the European Union, which allowed him to make substantial progress before being notified as a BCI/HSBI Approved Person. The United States reiterates that only after he was notified as an Approved Person was Dr Sanghvi given access to EU BCI/HSBI. The United States notes that most of the "fundamental errors" in the European Union's general approach to product market definition were apparent with no access to EU BCI/HSBI, that Dr Sanghvi's report itself contains no BCI/HSBI and that the report did not address flaws in NPV calculations in the EU exhibits that might have required more extensive consideration of EU BCI/HSBI.[50]

34. We are conscious of the importance placed by both parties on the protection of sensitive business information, as reflected in the unprecedented BCI/HSBI Procedures applicable in this proceeding, and we take very seriously any allegations of possible violations of those Procedures. It is for this reason that we sought an explanation from the United States regarding the manner in which Dr Sanghvi's report was prepared. Having received that explanation, and in the light of the United States' categorical denial of the European Union's allegations, we see no basis to doubt the United States' contention that Dr Sanghvi had no access to BCI or HSBI prior to being notified by the United States as a BCI/HSBI Approved Person. Accordingly, we deny the European Union's request that we, *inter alia*, remove Dr Sanghvi as an Approved Person and reject his report.

5 CONCLUSION

35. In summary, after carefully considering the European Union's request for an interim ruling and the United States' response, the Panel has decided, on the basis of the foregoing considerations, to

a. with respect to the alleged "backloading" of evidence, decline the European Union's request to reject: (a) the Sanghvi Report (Exhibit US-530); (b) the "material" contained in the United States' answer to Panel Question 67 that is the focus of the European Union's objection; and (c) the Jordan Reply to Whitelaw's Response Report (Exhibit US-505);

b. with respect to alleged unauthorized access to EU BCI/HSBI, decline the European Union's request that we remove Dr Sanghvi as an Approved Person and reject his Report (Exhibit US-530).

[48] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 13.
[49] Communication from the Panel, 5 June 2013, para. 27(c)(ii).
[50] Communication from the United States, 10 June 2013.

ANNEX F-4

THE EUROPEAN UNION'S REQUEST OF 14 JUNE 2012 TO EXCLUDE CERTAIN UNTIMELY UNITED STATES' EXHIBITS

(Panel ruling issued on 28 June 2013)

1. On 10 June 2013, the United States submitted to the Panel and to the European Union by email certain documents which it referred to as "copies of exhibits referenced in the U.S. oral statement". On 14 June 2013, the European Union responded by email to the United States' submission. The European Union notes that the United States purports to provide, for the first time, the text of certain documents that it describes as exhibits to its Opening Oral Statement delivered on 16 April, that is, 55 days earlier. The European Union asks the Panel to confirm that the text of these documents does not form part of the record and that the text of these documents requires no response from the European Union, as their submission did not comply with the requirements of paragraphs 7 and 10 of the Panel's Working Procedures, paragraph 1 of the Procedures for the Partial Opening to the Public of the Meeting of the Panel and the Panel's communication of 12 April 2013.

2. In its 19 June 2013 response, the United States asserts that it did not realize until recently that it had neglected to file the exhibits referenced in its Oral Statement, and that this failure was inadvertent and due to human error. The United States notes however that the exhibits merely demonstrate that the material cited in the Oral Statement originated from EADS or Airbus documents, or from information already in the public domain. It further notes that certain of the exhibits appear in the body of the Oral Statement, that the European Union has not challenged the accuracy of the referenced material and that both the material discussed in the Oral Statement and the exhibits themselves are uncontested. The United States contends that as the exhibits were supplied to confirm the accuracy of uncontested information in the Oral Statement, and as the European Union has not been substantially prejudiced by the delay in filing copies of the exhibits, the Panel may find that its Working Procedures do not preclude if from retaining the exhibits on the record. Alternatively, the United States suggests that the Panel could consider that only those portions of the exhibits that correspond to material already quoted or cited in the Oral Statement form part of the record.

3. The Panel notes that, in its Opening Oral Statement at the meeting of the Panel with the parties on 16 April 2013, the United States quoted from, cited to or, in two cases, partially reproduced, seven documents, which it referred to as exhibits USA-492 to USA-498 (non-BCI) in the provisional written version of its Oral Statement that was distributed to the Panel and the European Union at the meeting. These documents are comprised of seven slides from three presentations prepared by EADS/Airbus employees, two pages of order/delivery information downloaded from an Airbus website, an extract from an EADS' financial statement, pages from a Corporate Finance textbook and a table of historical exchange rates, none of which contain BCI or HSBI. Although the underlying documents are identified in the Oral Statements with specific exhibit numbers, the United States does not appear to have distributed the documents themselves during the meeting, nor to have submitted them to the Panel and the European Union on 23 or 30 April 2013 at the time that it submitted the public, BCI and HSBI final written versions of its Opening Oral Statement as delivered.

4. From these facts, it is clear to us, and we do not understand the United States to contest, that it has not complied with the Panel's rules and procedures in regard to these documents. In our fax dated 12 April 2013 regarding the conduct of our substantive meeting with the parties, we requested the parties to provide paper copies of their prepared statements, and paragraph 10 of our Working Procedures required the parties to submit a written version of its Oral Statement not later than the first working day following the end of the meeting. Although the Procedures do not specifically refer to exhibits associated with the parties' Oral Statements, we consider it implicit that where an Oral Statement refers to exhibits those exhibits are to be made available at the time of the Statement. In this case, the United States did not provide the referenced documents with the provisional written version of its Oral Statement, nor at the time the Oral Statement was

delivered, nor at the time it submitted the final written versions of its Oral Statement. Indeed, these documents were only submitted 55 days after the Panel meeting. In short, it is evident to us that these documents were not timely submitted.

5. The question facing the Panel is thus not whether the United States has acted inconsistently with the Panel's rules and procedures in late-submitting these documents, but what consequences should flow from that fact. The European Union would have us "confirm" that the relevant documents do not form part of the record and that the European Union need not respond to them. We do not doubt the authority of a panel to decline to include in the record argument or evidence submitted by a party on the grounds that it was untimely filed or otherwise not submitted in accordance with the panel's rules and procedures. At the same time, we do not consider that the untimely filing of a document should necessarily result in its exclusion.[1] Rather, we believe that it is incumbent upon us, in exercising our discretion in the management of this proceeding, to determine an appropriate course of action after examining the behaviour in question in light of all the circumstances, including the extent to which the procedural error prejudices the interests of the other party or parties to the dispute or impedes the ability of the Panel to perform an objective assessment of the manner pursuant to Article 11 of the DSU.[2]

6. We recall the Appellate Body's injunction that due process requires each party to be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party.[3] In this case, the European Union does not assert that the untimely filing by the United States has impeded its ability to comment on these documents or otherwise to present its defence in this proceeding. This may reflect the fact that the seven documents at issue were offered primarily to confirm the source and accuracy of factual information that was incorporated in the body of the United States' Oral Statement itself. Indeed, for two of the documents the relevant slide was reproduced in the United States' Oral Statement,[4] while in a third case, the relevant statements were quoted in the United States' Oral Statement.[5] It is perhaps for this reason that, although the European Union in its answers to the Panel's Questions of 23 April 2013 addressed in detail those parts of the United States' Oral Statement containing references to all but one of the documents in question[6], it never indicated to the Panel or the United States any concern that it could not identify the documents referred to in the United States' Oral Statement.[7]

7. While Exhibits USA-492 to USA-498 (non-BCI) were offered primarily to confirm the source and accuracy of information incorporated in the United States' Oral Statement, and to which the European Union has had an opportunity to respond in its answers to the Panel's questions, the possibility remains that the European Union might want to respond to some aspect of these documents themselves, and due process demands the European Union be afforded the ability to do so. Accordingly, we will accord the European Union upon request such reasonable additional time as it considers it might require should it desire to further address the content of these documents. In the alternative, and should the European Union prefer, we note that we anticipate posing follow-

[1] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 148.

[2] The European Union does not allege that the United States' untimely submission of Exhibits USA-492 to USA-498 (non-BCI) was intentional. The United States asserts that "it did not realize until recently that it had neglected to file the exhibits" referenced in its Oral Statement and describes its failure to do so as "inadvertent and due to human error". We see no reason to doubt the United States' assertions in this regard. Accordingly, this is not a case where a sanction is required to address wilful misconduct. Rather, it involves an oversight on the part of the United States, albeit quite a significant one.

[3] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

[4] Exhibits USA-492, USA-493.

[5] Exhibit USA-494. The European Union specifically responded to the quoted language from this exhibit in its answer to Panel Question 47, para. 146.

[6] All but one of the exhibits (Exhibit US-492) related to the role of LA/MSF in the launch and subsequent progress of the A350XWB, an issue explored by the Panel in its question 47 and to which the European Union responded extensively in paragraphs 129-212 of its answers submitted on 22 May 2013. Exhibit US-492 relates to whether the A380 and 7478-I are in the same product markets. Although we did not pose a question directly related to this document, the area of product markets was explored in the Panel Questions 48-79.

[7] We assume that the European Union, like the Panel, did not notice that the documents cited as exhibits in the United States' Oral Statement, and listed in its list of exhibits, were not submitted and that this is why it did not bring the failure of the United States to submit these exhibits to the attention of the Panel or the United States.

up questions to the parties in late August;[8] the European Union is free to address the content of these documents at the same time as it responds to those questions.

8. Of course, procedural rules serve not only to ensure the right of an interested party to respond to the case made against it, but also to ensure the efficient and prompt settlement of disputes. Indeed, the Appellate Body has explained that "due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek recourse in a timely manner, and the need for proceedings to be brought to a close.[9] In this case, however, we do not believe that the late submission of these documents will have any significant implications for the efficient conduct of this dispute. As noted, the Panel expects to pose follow-up questions to the parties so any further time needed by the European Union to address the documents in question should not delay the Panel's work. In any event, as the respondent in this case, the European Union has not suggested that it would be prejudiced by any delay in these proceedings that might be occasioned by the United States' late submission of the relevant documents.[10] To the contrary, as we see it, any such delay would rather prejudice the interests of the United States as complainant.

9. We do not preclude that a panel might decide to exclude late-submitted information from the record in a dispute, even in a case such as this one where the late submission resulted from an oversight, did not prejudice the other party's ability to respond and did not cause undue delay in the proceeding. Indeed, a panel might conclude that exclusion is warranted in a given case to provide an appropriate incentive to a party to abide by deadlines, or indeed to deliver a systemic message about the importance of respecting procedural rules. This Panel has however been guided by a commitment to reach a sound judgement on the merits in this dispute, through an objective examination of the evidence and arguments put before it by the parties. To exclude potentially relevant evidence put before it by a party on purely procedural grounds is not a decision to be taken lightly and, although this is a close case, we have decided that, on balance, such action is not required at this time.

10. Although we have decided that we will not exclude Exhibits USA-492 to USA-498 (non-BCI) from the record in this dispute, we nevertheless would like to express our deep concern. To err is of course human, and in a highly complex proceeding such as this one, involving enormous submissions, nearly a thousand exhibits and elaborate rules regarding confidential information, some mistakes are perhaps inevitable. However, the United States has been responsible for a larger number of procedural errors in this proceeding than can be easily justified even in a case such as this one. In order to avoid further situations which could require the Panel to take stronger action, we call upon the United States to take all necessary steps to ensure compliance with the deadlines and other applicable procedures in this proceeding.

11. In conclusion, we decline the European Union's request to confirm that the text of Exhibits USA-492 to USA-498 (non-BCI) does not form part of the record and that the text of these documents requires no response from the European Union. In order to provide the European Union with a meaningful opportunity to comment upon the content of the exhibits, we will accord the European Union upon request such reasonable additional time as it considers it might require should it desire to further address the content of these documents. In the alternative, the European Union is free to address the content of these documents at the same time as it responds to follow-up questions from the Panel which we expect to pose in late August.[11]

[8] The Panel recalls that it has, on a number of occasions, informed the parties that it may need to pose additional questions on (or even hold an additional meeting with the parties to discuss) certain factual or legal matters arising in this dispute. The Panel announced this possibility to the parties at the end of the substantive meeting, as well as its cover letter to the questions posed following the substantive meeting with the parties, and its communication of 12 June 2013.

[9] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, Ibid.

[10] Indeed, the European Union itself has expressed concerns about a "procedural gap" between the timetable for this proceeding and that in *US – Large Civil Aircraft* (Art. 21.5 - EU)(DS353), and has requested that this Panel extend its timetable to reflect extensions in the other proceeding. Letter from the European Union to the Panel dated 4 April 3013.

[11] The Panel is conscious that delegations often take holidays during this period, and will set a timetable for reply to its questions that takes this factor into account.

ANNEX F-5

THE EUROPEAN UNION'S REQUESTS OF 28 JUNE 2013 CONCERNING THE UNITED STATES' "CRITIQUE" TO THE COMPETITIONRX REPORT PRESENTED IN THE UNITED STATES' COMMENTS TO THE EUROPEAN UNION'S ANSWERS TO THE PANEL'S FIRST SET OF QUESTIONS

(Panel ruling issued on 8 July 2013)

1. The Panel refers to the European Union's letter of 28 June 2013 concerning the United States' "critique" of the Expert Report on the Financial Viability and Funding Implications of the A350XWB Development Programme (the "Competition Rx Report", Exhibit EU-127 (BCI and HSBI)) set out in the United States' comments on the European Union's answer to Panel Question 47. In its letter, the European Union asks the Panel to either: (i) reject the United States' "critique" as being untimely filed, in the absence of any "showing of good cause"; or alternatively, (ii) afford the European Union a meaningful opportunity to comment on the United States' "critique", were the Panel to decide that the United States has shown "good cause" for its allegedly belated submission. In such a case, the European Union submits that it should be granted an amount of time to respond to the United States' "critique" that is equal to the time it has taken for the United States to respond to the CompetitionRx Report since it was filed (i.e. 23 weeks).

2. In its response to the European Union's letter, the United States asks the Panel to reject the entirety of the European Union's requests on the grounds that: (i) the United States' comments on the European Union's answer to Panel Question 47 were not the first submissions made by the United States concerning the argument advanced in the CompetitionRx Report, namely, that LA/MSF was not critical to the 2006 launch of the A350XWB; and (ii) the United States' "critique" of the CompetitionRx Report does not qualify as "evidence", but is rather argumentation provided in response to an explicit request from the Panel to comment upon the European Union's answer to Panel Question 47.

1 THE EUROPEAN UNION'S REQUEST TO REJECT THE UNITED STATES' "CRITIQUE" OF THE COMPETITIONRX REPORT AS UNTIMELY FILED, WITHOUT A SHOWING OF "GOOD CAUSE"

1.1 Introduction

3. The Panel understands the European Union's concerns about the timing of the United States' "critique" to be not unlike those it raised in its request for an interim ruling of 28 May 2013 with respect to the alleged "backloading of evidence" by the United States in its answers to the Panel's questions of 23 April 2013.[1] Thus, the Panel understands the European Union to be of the view that the United States was required to submit its "critique" of the CompetitionRx Report earlier in these proceedings, and that the United States' alleged "strategic decision" not to do so has not only prejudiced the European Union's ability to defend its interests but also the Panel's ability to engage with the parties and therefore properly discharge its duty to make an objective assessment of the matter. In addition, the European Union argues that the United States' "critique" of the CompetitionRx Report amounted to "evidence", which in the light of certain statements and observations of the Appellate Body in *Thailand – Cigarettes (Philippines)*, cannot be accepted by the Panel at this "late" stage in the proceedings, without any showing by the United States of "good cause".

4. We recall that in our Decision of 12 June 2013 addressing the European Union's "backloaded evidence" allegations we observed that:

[1] European Union, Letter of 28 June 2013, p. 3 and footnote 17 ("Accordingly, for reasons explained in this letter and in its 28 May 2013 Interim Ruling Request[17], the European Union requests that the Panel reject the US critique as not timely filed, without any showing of good cause") (emphasis added). Footnote 17 refers to paragraphs 11-14 of the European Union's Interim Ruling Request of 28 May 2013.

> "… it is a basic requirement of due process that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This due process interest must be balanced against other interests, including systemic interests such as those reflected in Articles 3.3 and 12.2 of the DSU.{} As the Appellate Body has stated, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU.{}"[2]

5. With these and other important due process considerations in mind,[3] we reviewed the substance and the relevant facts surrounding the introduction of the Sanghvi Report, the United States' answer to Panel Question 67 and the Jordan Reply to Whitelaw's Response Report, and decided to decline the European Union's specific requests to reject these United States' submissions, *inter alia*, because:

> "… in discharging our responsibility under Article 11 of the DSU, {it was, in our view, appropriate} to not only put to the parties the questions asked on 23 April 2013 concerning the identification of the relevant product markets, but also to evaluate the arguments and evidence {including the Sanghvi Report} submitted by the parties in response to those questions."[4]

> "… the entirety of the United States' answer to Panel Question 67 is not only related to the subject matter of that question, but it also concerns a matter with respect to which the parties have engaged and exchanged contrasting views throughout these proceedings. … "[5] and

> "… the matters addressed in the Jordan Reply to Whitelaw's Response Report go directly to the issues with respect to which the Panel sought clarification in its questions. These are the very same issues with respect to which the parties have exchanged views throughout these proceedings. …".[6]

6. In each of the above instances, we saw no reason to accept the European Union's allegation that the United States' had taken a "strategic decision" to "withhold" the relevant evidence and argument in a manner that undermined the Panel's ability to make an objective assessment of the matter before it, or the European Union's ability to make its defense. Rather, we considered the United States' submissions to have been made as "part of the process of engagement between the parties and with the Panel that typically characterized WTO dispute settlement, whereby arguments and evidence are explored and tested, and positions clarified and/or further developed, with a view to informing the Panel's objective assessment of the matter before it".[7] For the reasons explained below, we come to a similar conclusion with respect to the "critique" of the CompetitionRx Report that was set out in the United States' comments on the European Union's answer to Panel Question 47.

1.2 Relevant Facts

7. The CompetitionRx Report was prepared pursuant to a contract between Airbus SAS and CompetitionRx, requiring the latter to "undertake a study and to assess (i) the economic and financial viability of the Business Case for the development of the A350XWB, and (ii) the funding implications of the development of the A350XWB for Airbus and its parent company EADS".[8] The

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[2] Decision of the Panel, 12 June 2013, para. 15 (footnotes omitted).
[3] Decision of the Panel, 12 June 2013, paras. 11-15.
[4] Decision of the Panel, 12 June 2013, para. 22.
[5] Panel's Decision of 12 June 2013, para. 27. The Panel did not explain, as the European Union asserts, that "as long as a party is expressing a view on 'a matter with respect to which the parties have engaged and exchanged contrasting views', … it may do so at any point in the proceedings". European Union, Letter of 28 June 2013, p. 2.
[6] Panel's Decision of 12 June 2013, para. 29. Again, the Panel did not explain, as the European Union asserts, that "a party need not restrict itself to answering specific questions put to it by a panel, but may instead offer expansive observations that speak more generally to 'the issues' implicated by a particular question or series of questions". European Union, Letter of 28 June 2013, pp. 2-3 and footnote 6.
[7] Panel's Decision of 12 June 2013, para. 17.
[8] CompetitionRx Report, para. 6, Exhibit EU-127 (BCI and HSBI).

European Union first submitted the CompetitionRx Report, and the A350XWB Launch Business Case which is a principal focus of that Report,[9] with its second written submission, primarily to support its rebuttal of the United States' submissions concerning the necessity of government financing for the "launch and market presence" of the A350XWB.[10]

8. The United States did not explicitly address the analyses or conclusions of the CompetitionRx Report in its Oral Statements at the substantive meeting with the parties in April 2013. However, one aspect of the CompetitionRx Report was at least indirectly criticised by the United States in its Oral Statements;[11] and as noted by the United States, elsewhere in its Oral Statements, the United States continued to elaborate its views on the extent to which LA/MSF for the A350XWB was necessary for the launch and market presence of the A350XWB, drawing *inter alia* from two HSBI documents.[12] The European Union specifically addressed the United States' submissions in its Closing Oral Statement, arguing that they misrepresented the contents of the relevant documents and/or ignored the "objective" evidence presented in its second written submission, which included the CompetitionRx Report.[13]

9. The Panel decided that it wanted to explore the European Union's responses to the United States' submissions in more detail and therefore asked the European Union in Panel Question 47 to respond to four specific arguments made by the United States in its Confidential Oral Statement, in the light of the two HSBI documents referred to by the United States in paragraph 1 of its Confidential Oral Statement, namely, the A350XWB Launch Business Case (Exhibit EU-130 (HSBI)) and the UK Government Document relating to the A350XWB (Exhibit US-498 (HSBI)). The four arguments, as described in Panel Question 47, were: (i) "that the A350XWB project would not have gone forward without LA/MSF"; (ii) "that Airbus launched the A350XWB while making certain key assumptions related to LA/MSF"; (iii) "that the risks associated with the A350XWB launch made it likely that subsidies affected Airbus's decision to proceed with the project"; and (iv) "that the HSBI evidence confirms that prior LA/MSF had substantial effects on the A350XWB project that made the A350XWB's launch - at the time that it was launched - possible". The parties were informed at the time that the Panel asked its questions that they would be given three weeks to comment on each other's answers, and a specific deadline was set for this purpose.[14]

10. In its 27-page response to Panel Question 47, the European Union advanced a number of arguments intended to rebut the submissions made by the United States in its confidential Oral Statement. In doing so, the European Union relied upon *inter alia* the CompetitionRx Report, explicitly referring to it 11 times, in nine paragraphs and 14 footnotes. The European Union's answer draws upon various analyses undertaken, and conclusions reached, in the CompetitionRx Report to support its view that the A350XWB programme was, contrary to the position advanced by the United States, economically viable and would have proceeded even without any financing

[9] A350XWB Launch Business Case, Exhibit EU-130 (HSBI). The European Union asserts, in response to Panel Question 96, that it did not provide the A350XWB Launch Business Case earlier in response to the Panel's request under Article 13 DSU for "[a]ll A350 business cases provided by Airbus or EADS to the member States and/or any of Airbus' risk-sharing suppliers" because this document was never presented to the member States or to Airbus' risk-sharing partners. The European Union explained that it submitted that document with its second written submission because it was "relevant to the rebuttal of certain US assertions that the business case would not be viable absent financing from the EU member States".

[10] See, in particular, sections VI.E.3-4 of the European Union's second written submission.

[11] In paragraph 9 of its Confidential Opening Oral Statement, the United States cross-referred to certain paragraphs in the European Union's second written submission where the CompetitionRx Report was relied upon by the European Union to support its view that the United States "has failed to demonstrate that EADS and Airbus were unable 'to obtain adequate commercial funds' to launch the A350XWB". (European Union, SWS, heading to section VI.E.4.a). The United States relies upon the HSBI document referred to in paragraph 9 of its Confidential Opening Oral Statement to argue that one of the conclusions reached in the CompetitionRx Report should be rejected. United States, Confidential Opening Oral Statement, para. 9, (HSBI) and footnote 18. noting "e.g., EU SWS, paras. 1027, 1030, 1038".

[12] United States, Non-Confidential Opening Oral Statement, paras. 81-89; and United States, Confidential Opening Oral Statement, paras. 4-23.

[13] European Union, Closing Oral Statement (BCI and HSBI), paras. 20-22.

[14] The European Union was subsequently granted an additional two weeks to prepare its comments. Decision of the Panel, 5 June 2013.

from the French, German, Spanish and UK governments, both at the time of the project launch and in [2009].[15]

11. Both parties submitted extensive comments on the other party's answers to the Panel's Questions.[16] In the introductory paragraph to its comments on the European Union's answer to Panel Question 47, the United States submitted that the European Union's answer confirmed "its failure to rebut the U.S. demonstration that LA/MSF is a genuine and substantial cause of the launch and market presence of the A350XWB". The United States explained that the European Union could not, in its view, "avoid this conclusion by distorting the meaning of a UK government document,{} downplaying the significant effects of LA/MSF to earlier models,{} touting the badly flawed CompetitionRx Report,{} and rehashing its arguments about timing of Airbus's request for and receipt of LA/MSF"{}.[17] The United States followed this introductory paragraph with 22 pages of comments through which it responded to the European Union's answer to Panel Question 47. These comments included ten pages devoted to setting out the reasons why the United States' considers the CompetitionRx Report to be "badly flawed".

1.3 Evaluation by the Panel

12. In our view, it is sufficiently clear from the above exposition of the facts surrounding the United States' submission of its "critique" of the CompetitionRx Report that it was introduced into these proceedings as part of the ongoing, and anticipated,[18] exchange of views between the parties with respect to the United States' allegations concerning the relevance of LA/MSF for the "launch and market presence" of the A350XWB. Not only were certain specific aspects of these allegations the subject matter of Panel Question 47, but the CompetitionRx Report was explicitly and extensively relied upon by the European Union to answer that question. In these circumstances, the fact that the United States' "critique" of the CompetitionRx Report was not presented on either of the two previous occasions available for the United States to have possibly introduced it on its own initiative, namely, at the substantive meeting with the parties or in the United States' answers to the Panel's questions,[19] does not mean that the United States should be prevented from doing so in its comments on the European Union's answer to Panel Question 47. To reject the United States' "critique" on this basis would, in our view, undermine the whole purpose of the Panel's decision to pose the parties questions and afford each party an opportunity to comment on each other's answers.

13. The European Union appears to argue, however, that the United States is not entitled to present its "critique" of the CompetitionRx Report at this "late" stage in the proceeding, because it qualifies as "evidence", which cannot be accepted by the Panel without "any showing of good cause".[20] The European Union finds support for this view in certain statements and observations made by the Appellate Body in *Thailand – Cigarettes (Philippines)*. In particular, according to the European Union, the Appellate Body in *Thailand – Cigarettes (Philippines)* noted that "'the submission of factual evidence at the very last stage of the proceedings, that is, in a party's comments on the other party's answers to questions by the Panel following the second substantive meeting … should be unusual' because it is 'so late in the proceedings'".[21] Furthermore, the European Union maintains that the Appellate Body found that for "rebuttal evidence", which the European Union submits was "labelled a 'residual category' of evidence" in *Thailand – Cigarettes (Philippines)*, "'the submitting party must show good cause' for untimely filing".[22] In our view, the European Union's reliance on the Appellate Body's findings in *Thailand – Cigarettes (Philippines)* is not only partly based on a mischaracterization of the relevant Appellate Body statements, but it is

[15] European Union, Answer to Panel Question 47, paras. 136-138, 140, 153, 187-189 and 191.
[16] The United States' submitted 98 pages of comments on the European Union's answers, while the European Union submitted 283 pages of comments on the answers of the United States.
[17] United States, Comments on the European Union's Answer to Panel Question 47, para. 97 (footnotes omitted).
[18] See above, para. 9.
[19] We note that the Panel's questions of 23 April 2013 did not explicitly ask the United States to respond to any particular aspect of the CompetitionRx Report.
[20] European Union, Letter of 28 June 2013, pp. 2-3.
[21] European Union, Letter of 28 June 2013, p. 2, citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 154 and footnote 242.
[22] European Union, Letter of 28 June 2013, p. 2, citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 153.

also misplaced given the significant differences that exist between the facts of that dispute and the situation that is now before the Panel in this proceeding.

14. First, we note that the observations of the Appellate Body in *Thailand – Cigarettes (Philippines)* that are relied upon by the European Union concerned paragraph 15 of the working procedures of the panel in that dispute. The Appellate Body characterized this paragraph as allowing for the submission of "factual evidence at the very last stage of the proceedings" - namely, in the party's comments on each other party's answers to questions after the second substantive meeting of the panel with the parties. The European Union does not, however, allege that the United States has failed to comply with what is a very similar rule of procedure set out in paragraph 15 of the Panel's Working Procedures in this dispute. Moreover, and perhaps more importantly, the United States' "critique" of the CompetitionRx Report does not, in our view, introduce any *new factual evidence.* Rather, as we read it, the United States' "critique" articulates its *arguments* concerning the credibility and relevance of the CompetitionRx Report to the particular issues that were the subject of Panel Question 47 and the European Union's answer, in the light of *evidence that has already been adduced* by both parties. Likewise, the United States' "critique" of the CompetitionRx Report was not submitted at the "very last stage" of these proceedings, because as communicated to the parties on 28 June 2013,[23] the Panel intends to ask the parties a series of follow-up questions towards the end of August 2013.[24] Thus, the observations of the Appellate Body in *Thailand – Cigarettes (Philippines)* that are relied upon by the European Union were made in the context of resolving an issue that does not arise in the present circumstances.[25]

15. Second, and in any case, there is nothing in the Appellate Body's observations that are relied upon by the European Union, to suggest that a panel must *necessarily reject* any factual evidence that is submitted at the "very last stage" of a proceeding. While noting that such a situation "should be unusual",[26] the Appellate Body also clearly contemplated the possibility that there may be circumstances when a panel may decide to accept such factual evidence even without offering the other party an opportunity to comment:

> "As set out above, due process generally demands that each party be afforded a meaningful opportunity to comment on evidence adduced by the other party. At the same time, a number of different considerations will need to be factored into a panel's effort to protect due process in a particular dispute, and these may include the need for a panel, in pursuing prompt resolution of the dispute, to exercise control over the proceedings in order to bring an end to the back and forth exchange of competing evidence by the parties."[27]

16. Thus, after examining a number of "considerations that {were} germane" to its assessment of Thailand's Article 11 DSU claim, the Appellate Body found that the panel in *Thailand – Cigarettes (Philippines)* had not infringed any principles of due process when it accepted Exhibit PHL-289, submitted by the Philippines with its comments on Thailand's answers to the panel's questions after the second substantive meeting, *without offering Thailand a meaningful opportunity to comment on the contents of that exhibit*.[28]

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[23] The Panel appreciates that this communication was transmitted to the parties only after the European Union's letter of 28 June 2013 was received.

[24] The Panel recalls that, prior to its communication of 28 June 2013, it had, on a number of occasions, informed the parties that it may need to pose additional questions on (or even hold an additional meeting with the parties to discuss) certain factual or legal matters arising in this dispute. The Panel announced this possibility to the parties at the end of the substantive meeting, as well as in its cover letter to the questions posed following the substantive meeting with the parties, and its communication of 12 June 2013.

[25] Indeed, as we see it, the issue before the Appellate Body in *Thailand – Cigarettes (Philippines)* was significantly different to the one that is before us in this proceeding, as it related to the extent to which the panel in that dispute was entitled to accept a piece of *new factual evidence* as part of the Philippines' comments to Thailand's answers to the panel's questions after the second substantive meeting of the parties without giving Thailand an opportunity to comment upon this *new factual evidence*. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 141-146.

[26] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, footnote 242.

[27] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 155.

[28] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 156-160.

17. Finally, and contrary to what is argued by the European Union, the Appellate Body in *Thailand – Cigarettes (Philippines)* did not qualify "rebuttal evidence" as a "residual category" of evidence that can only be accepted "late in the proceedings" or "at the very last stage" of a proceeding if "good cause" is shown. Rather, in reviewing the rules for submitting factual evidence found in paragraph 15 of the panel's working procedures in that dispute, the Appellate Body explained that "rebuttal evidence" fell within the scope of the first category of evidence identified in those procedures, and that this category encompassed "evidence that is submitted no later than the first substantive meeting, as well as evidence that, albeit submitted at a later stage, is necessary for purposes of rebuttal, answers to questions, or comments on answers to questions".[29] The "residual category" of evidence identified by the Appellate Body did not include "rebuttal evidence" because the former comprised "evidence that does not fall within the scope of the first sentence" of the panel's working procedures. It was only with respect to the introduction of this "second category" of evidence that the Appellate Body found there was a requirement in the panel's working procedures to show "good cause". Thus, even assuming that the United States' "critique" of the CompetitionRx Report could be qualified as "rebuttal evidence", the Appellate Body's interpretation of the panel's working procedures in *Thailand – Cigarettes (Philippines)* does not stand for the proposition that the United States should have shown "good cause" in order to introduce that "critique" at the time that it commented on the European Union's answer to Panel Question 47.

18. Thus, for all of the foregoing reasons, we decline the European Union's request to reject the United States' "critique" of the CompetitionRx Report on the grounds that it was untimely filed, without any showing of "good cause".

2 THE EUROPEAN UNION'S REQUEST TO BE PROVIDED WITH A "MEANINGFUL OPPORTUNITY" (23 WEEKS) TO COMMENT ON THE UNITED STATES' "CRITIQUE"

19. The Panel recalls that it has already informed the parties that it will pose a series of follow-up questions towards the end of August 2013. With these questions, both parties will be afforded further opportunities to make submissions with respect to each other's views on a number of issues on which the Panel desires further clarification. This will include the extent to which LA/MSF was necessary for the "launch and market presence" of the A350XWB. The parties will also be given an opportunity to make any comments on each other's answers to the Panel's questions. Thus, while the Panel does not agree with the European Union's contention that, in order to secure its due process rights, it must be given the same amount of time to respond to the United States' "critique" of the CompetitionRx Report as it took the United States to make that "critique", the Panel will provide the European Union, through the questions and answers process that is expected to begin towards the end of August, ample opportunity and time to respond to the United States' "critique" of the CompetitionRx Report.

3 CONCLUSION

20. In summary, after carefully considering the European Union's request to reject the United States' "critique" of the CompetitionRx Report, and the United States' response, the Panel has decided, on the basis of the foregoing considerations, to:

a. decline the European Union's request to reject the United States' "critique" of the CompetitionRx Report; and

b. decline the European Union's request to be afforded exactly 23 weeks to respond to the United States' "critique" of the CompetitionRx Report. Nevertheless, the Panel notes that the European Union will be provided with ample opportunity and time to respond to the United States' "critique" of the CompetitionRx Report in the questions and answers process that it has previously communicated to the parties will begin towards the end of August 2013.

[29] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 153 (emphasis added).

ANNEX F-6

THE EUROPEAN UNION'S REQUESTS OF 2, 4 AND 11 SEPTEMBER 2013 CONCERNING THE ADOPTION OF ADDITIONAL INFORMATION CONFIDENTIALITY PROCEDURES FOR THE PURPOSE OF RESPONDING TO PANEL QUESTION 126

(Panel ruling issued on 16 September 2013)

1. The Panel refers to the European Union's communications of 2, 4 and 11 September 2013 concerning the information requested in Panel Question 126, and the United States' response of 4 September 2013. In its communications, the European Union asked the Panel to adopt more stringent confidentiality rules with respect to the information sought by the Panel in Question 126. The United States' objected to the European Union's request.

2. Before turning to address the merits of the European Union's request, the Panel would like to firstly recall the particular context which led it to ask the European Union for the information identified in Question 126. The redacted information Question 126 asks the European Union to disclose is found in two Exhibits that were introduced into this proceeding by the European Union for the specific purpose of rebutting the United States' submission that the A350XWB programme would not have been viable without LA/MSF. The United States has on a number of occasions raised the redactions of information from the HSBI versions of these Exhibits with the Panel, complaining that some (but not all) have hampered its ability to fully respond to the European Union's arguments. The United States has also suggested that the same redactions could hinder the Panel's own task of making an objective assessment of the matter. Panel Question 96(c) asked the European Union to explain why it had redacted certain information from one of the two Exhibits, the A350XWB Launch Business Case (Exhibit EU-130 (HSBI)). After carefully considering the European Union's response, as well as the United States' comments on this and other European Union answers to questions, the Panel decided that in order for it to conduct an objective assessment of the matter, it would need to review and consider the information requested in Panel Question 126.

3. The Panel does not understand the parties to disagree with the notion that where a party submits evidence to substantiate an argument it is making in WTO dispute settlement proceedings, it is up to that party to disclose all of the information necessary for a panel to make an objective assessment of the probative value of the evidence it relies upon. A party's submission of evidence must also take into account the due process rights of the opposing party. As in the original proceedings, both parties in this dispute have, to differing degrees, redacted certain information from parts of the evidence presented to substantiate their respective arguments. The parties have explained their actions by *inter alia* referring to the extraordinarily commercially sensitive nature of the information at issue. The Panel recalls, however, that it was to address precisely these types of concerns that it adopted, on request and after consultation with the parties, the existing BCI/HSBI Procedures. These procedures, which represent the most stringent and far reaching confidentiality rules ever applied in the history of WTO dispute settlement, were specifically designed to facilitate the parties' abilities to submit commercially sensitive information in these proceedings, including in response to all Panel requests for information considered necessary to the task of conducting an objective assessment of the claims and issues before it.

4. The Panel appreciates the seriousness of the concerns raised by the European Union with respect to the information requested in Panel Question 126. The Panel also recognizes the efforts the European Union has undertaken since its communication of 2 September 2013 to endeavour to respond to the entirety of the Panel's information request. The Panel understands from the European Union's letter of 11 September 2013 that despite its earlier reservations, the European Union is now ready to provide all of the requested information, with the exception of certain recurring cost and revenue data, under the protection of the existing BCI/HSBI Procedures. Given the exceptional nature of the European Union's acute sensitivities to disclosing the specified recurring cost and revenue data, the Panel has decided to grant the European Union's request to exclude this information, as identified in its letter of 11 September 2013, from its answer to Panel Question 126. The Panel does so, however, without prejudice to further consideration of this

matter at a later stage in these proceedings, should the Panel conclude that the information not provided by the European Union is necessary for it to complete its work.

5. On this basis, the Panel requests that the European Union provide all of the information requested in Question 126 with the exception of the following:

- Revenue data from the CompetitionRx Report (Exhibit EU-127 (HSBI)), in particular, paragraph 139; figure 4; tables 16 and 17; and the tables in Annexes C and D; and

- Recurring cost data from slide 59 of the A350XWB Launch Business Case (Exhibit EU-130 (HSBI)); as well as from paragraph 193; tables 12, 15, 16, 17; figures 6 and 7; and the tables in Annex D of the CompetitionRx Report (Exhibit EU-127 (HSBI)).

6. The Panel understands that the European Union is in a position to submit this information at the same time as its answers to all other Panel Questions, i.e. by 20 September 2013.

ANNEX F-7

THE EUROPEAN UNION'S REQUEST OF 24 MARCH 2014 CONCERNING THE PANEL'S DECISION TO POSE SIX ADDITIONAL WRITTEN QUESTIONS TO THE PARTIES

(Panel ruling issued on 31 March 2014)

The Panel refers to the European Union's letter of 24 March 2014, and the United States' reply of 26 March 2014, concerning its intention to pose six additional questions to the parties, including a number of questions concerning the alleged subsidization of the A350XWB.

The Panel has carefully considered the parties' submissions, and for the reasons explained in following pages, has decided to maintain its request. Given the relatively small number of questions[1], the Panel had originally envisaged to invite the parties to submit their answers by close of business on **Tuesday, 15 April 2014**, subject to any reasonable and justified request for an extension. Now that the questions have been provided, and in the light of the European Union's stated resource constraints, the parties are requested to confirm by close of business on **Wednesday, 2 April 2014**, whether it would be possible to meet the 15 April 2014 deadline. Should either party consider that it will be unable to provide the requested information and/or explanations within this time-limit, it should inform the Panel and request an extension, proposing an alternative date. The parties will be invited to submit any comments they may have on each other's answers to the Panel's questions on a date to be set by the Panel in the light of the responses submitted by the parties on 2 April 2014.

[1] Of the six additional questions, three are posed only to the European Union, two only to the United States, and one question is posed to both parties.

1 THE PANEL'S DECISION TO POSE ADDITIONAL QUESTIONS

1. In its letter of 24 March 2014, the European Union requests that the Panel reconsider its decision to ask additional questions with respect to the "alleged subsidization of the A350XWB". According to the European Union, "the time is now long past for this debate to come to an end";[2] and any request on the part of the Panel for the parties to answer additional questions on this issue would "at this juncture risk{} further breaching enumerated limits on the Panel's use of its interrogative powers, including notably, to make good either Party's failure to articulate and substantiate its case".[3]

2. The United States opposes the European Union's request. While the United States shares the European Union's view that the Panel has afforded the parties "ample opportunity" to address the issues presented in this dispute, it does not believe that this precludes the possibility that the Panel may need additional clarification of the parties' views or the relevant facts before it.[4] For the United States, the Panel is entitled to ask additional questions provided that it fulfils its responsibilities under the DSU, while minimizing undue delay in the proceedings.[5]

3. We recognize that the parties in a typical Article 21.5 dispute would probably not expect to receive a set of questions from the panel 11 months after the one and only substantive meeting. We are fully conscious of the 90 day deadline for a compliance panel to circulate its report,[6] and that the prompt settlement of disputes is essential to the effective functioning of the WTO and the dispute settlement mechanism.[7] However, as the parties are well aware, the present dispute is not an ordinary Article 21.5 proceeding, a fact that is reflected in *inter alia* the parties' decisions to designate over 150 government representatives and outside advisors as Approved Persons,[8] to file first and second written submissions totalling 1470 pages (not to mention scores of lesser submissions on a wide range of matters), to submit numerous expert reports and to put before the Panel some 1100 exhibits.[9] Indeed, on more than one occasion we have explained that the complex issues and voluminous arguments and evidence submitted in these proceedings create particular challenges for its work given the one-meeting format of compliance disputes. It should therefore come as no surprise that given the limited resources available in the Secretariat to assist the Panel carry out its mandate, the fine details of a number of matters at issue in this dispute have only been clearly identified and fully considered by the Panel relatively recently, much later than would otherwise be the case in an average Article 21.5 proceeding.

4. It was with these particular challenges in mind that we informed the parties on each previous occasion it decided to pose written questions that: (i) it could not "exclude that as it continue{d} to deliberate on the merits of the United States' claims, it may find it necessary to pose further questions on factual or legal issues"; and (ii) that it would "ensure that were any such further questions to be asked, the parties [would] be notified in advance and given sufficient time to respond."[10] Consistent with this stated approach, our communication of 20 March 2014 gave the parties 11 days' notice of our intention to pose six additional questions to the parties, a "number" of which may require the parties to call upon the experts they have thus far used to make submissions on the alleged subsidization of the A350XWB. All six of the additional questions were prompted by our ongoing consideration of the parties' arguments and evidence, which has led us to conclude that there are a number of important matters that need to be clarified and/or further elaborated in order for it to conduct an objective assessment of the matter. However, for the European Union, the Panel would risk doing precisely the opposite by deciding to ask any

[2] European Union's Letter to the Panel of 24 March 2014, p. 3.
[3] European Union's Letter to the Panel of 24 March 2014, p. 3.
[4] United States Response of 26 March 2014 to the European Union's Letter of 24 March 2014, p. 1.
[5] United States Response of 26 March 2014 to the European Union's Letter of 24 March 2014, p. 2.
[6] Article 21.5, DSU.
[7] Article 3.3, DSU.
[8] European Union Approved Persons List of 17 September 2013 (41 government representatives / 36 outside advisers); United States Approved Persons Lists of 7 May 2013 (33 government representatives / 47 outside advisers).
[9] The parties' written submissions in this dispute have also included answers, and comments on each other's answers, to 160 questions (often with multiple sub-parts) posed by the Panel.
[10] See cover note to the Panel's Questions to the Parties of 23 April and 23 August 2013. The Panel made a similar statement at the end of the substantive meeting with the parties, as well as in its communication of 12 June 2013 concerning the European Union's request for an interim ruling of 28 May 2013, para. 14.

additional questions with respect to the alleged subsidization of the A350XWB at this stage of the proceeding.[11] In our view, there is no basis to the European Union's concerns.

5. We are aware of no rule that, as a general matter, would prevent a panel from posing written questions to the parties in a dispute *at any stage* of a proceeding. Indeed, as we have previously noted,[12] it is well established that "a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding member has established its complaint or defence on a *prima facie* basis."[13] Moreover, the Appellate Body has explained that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of issues before them".[14] It follows that a panel's discretion to pose questions to the parties must be first and foremost guided by its obligation to conduct an objective assessment of the matter. Obviously, any decision to exercise this discretion relatively late in a proceeding must also take account of the need to settle disputes in a timely manner, particularly in the context of Article 21.5 proceedings. However, the objective of achieving a prompt settlement of disputes cannot alone dictate when a panel is entitled to request the parties to provide information and/or explanations that are considered necessary to perform its function. Thus, to accept that the Panel in this compliance dispute cannot ask the parties to answer six additional questions simply because 22 months have passed since the United States filed its first written submission (in a proceeding that is undeniably one of the most legally complex and factually intensive Article 21.5 disputes in the history of the WTO dispute settlement mechanism) would artificially and arbitrarily constrain the Panel's ability to discharge its duty and thereby bring it into conflict with the standards of the DSU. As we have previously explained:

> "The 'objective assessment of the matter' that a panel is called upon to perform under Article 11 of the DSU requires it to carefully and independently scrutinize the parties' arguments and any evidence submitted in support of those arguments, with a view to clarifying their meaning and exploring their implications for the particular claims being made. Consistent with this obligation, and in the light of the extremely voluminous and complex issues that have been raised in this dispute, we believe that our evaluation of the merits of the United States' claims must be conducted on the basis of a full appreciation of *all* of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding."[15]

6. Thus, contrary to the European Union's contentions, we see no obstacle to or risk in posing any number of additional questions to the parties concerning the alleged subsidization of the A350XWB at any stage in this proceeding, provided that we consider the information sought by any such questions to be necessary to our task of making an objective assessment of the United States' claims. Rather than tainting the neutrality of our findings in this dispute, the information and/or explanations that are requested in the additional questions we have asked the parties will, in our view, only serve to ensure that the standards of Article 11 of the DSU are respected.

7. Finally, we note that of the five additional questions asked with respect to the alleged subsidization of the A350XWB, it became necessary to pose three of them because the methodologies and underlying data used by the European Union to calculate the IRRs and Macaulay durations of the challenged LA/MSF contracts yet to be fully explained and/or completely disclosed. Had such explanations and data been provided when the relevant calculations were first submitted,[16][17] or when the Panel explicitly requested them,[18] the Panel might not have had to pose some of the questions it now seeks to have answered.

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[11] We note that the European Union's objection to the Panel's intention to ask additional questions is limited to the "number" of questions the Panel stated in its fax of 20 March 2014 it wanted to ask in respect of the alleged subsidization of the A350XWB. The European Union does not take issue with the Panel's intention to ask questions concerning any other matter at this stage of the proceeding.

[12] See Panel's communication of 12 June 2013 concerning the European Union's request for an interim ruling of 28 May 2013, para. 14.

[13] Appellate Body Report, *Canada – Aircraft*, para. 192 (underline added).

[14] Appellate Body Report, *Thailand – H-Beams*, para. 135.

[15] Panel's communication of 12 June 2013 concerning the European Union's request for an interim ruling of 28 May 2013, para. 14 (underline added).

[16] The first presentation of the final numerical values of the IRRs relied upon by the European Union was made in its second written submission on 15 January 2013 (table at para. 300) and the accompanying

2 DEADLINE TO RESPOND TO THE PANEL'S ADDITIONAL QUESTIONS

8. In its letter of 24 March 2014, the European Union revealed that were the Panel to decide to pose the additional questions, the European Union would be "unable to marshall the expert resources necessary to address questions on this issue" between 12 April and 4 May 2014, "in light of long-standing professional and personal commitments." The European Union requests that the Panel "take this factor, as well as the demands of due process, into account in considering how to proceed".[19]

9. The United States submits that the unavailability of certain "expert resources" from 12 April 2014 to 5 May 2014 does not warrant any special accommodations for responding to questions. The United States notes that these dates would leave "almost two working weeks" to answer the Panel's questions. According to the United States, this amount of time would be in "line with what the Panel has provided in previous rounds of questions, which included many more than six questions". Furthermore, the United States suggests that "given the late stage of the proceeding and the importance of resolving the dispute promptly, it would not appear to be necessary to provide for comments to answers to questions".[20]

10. In providing the parties with advance notice on 20 March 2014 of its intention to ask additional questions, the Panel had wanted to give the parties a reasonable period of time to organize their resources in order to be in a position to fully respond to its questions. Given that almost six months have passed since the parties' last submissions in this dispute, we can certainly appreciate that it may not be easy for the parties to assemble all of the relevant resources and expertise in sufficient time. However, bearing in mind that the European Union's unidentified "expert resource{}" constraints were expressed without having seen the relevant questions, and that the Panel had in any case intended to invite the parties to submit their answers by close of business on **Tuesday, 15 April 2014**, subject to any reasonable and justified request for an extension, the parties are requested to review the questions that are now before them and confirm by close of business on **Wednesday 2 April 2014**, whether it would be possible to meet the 15 April 2014 deadline. Should either party consider that it will be unable to provide the requested information and/or explanations within this time-limit, it should inform the Panel and request an extension, proposing an alternative date.

11. We do not agree with the United States when it suggests that "it would not appear to be necessary to provide for comments to answers to questions". In our view, the United States' suggestion would undermine both parties' fundamental due process right to an opportunity to comment on any submissions made by the other. Thus, the parties will be invited to submit any comments they may have on each other's answers to the Panel's questions on a date to be set by the Panel in the light of the responses the parties will submit on 2 April 2014.

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Whitelaw Response to Jordan Report (table at para. 12), Exhibit EU-121(BCI). The underlying data and specific methodology used to derive the IRRs was not disclosed. It was only eight months later, in its answers to the Panel's second set of questions submitted on 20 September 2013, that the European Union revealed *part* of the data used to derive the IRRs in the Further Report by Professor Whitelaw, Exhibit EU-421 (HSBI).

[17] The European Union's Macaulay duration calculations were first submitted in Exhibit EU-380 (HSBI) on 22 May 2013, as part of the European Union's Answer to Panel Question 92. The first explanation and justification provided by Professor Whitelaw for the use of these calculations was provided in Exhibit EU-396 (BCI/HSBI) on 25 June 2013, as part of the European Union's Comments on the United States' Answers to the first set of Questions. Professor Whitelaw's explanation did not, however, fully disclose the methodology used to derive the calculations with respect to each of the relevant LA/MSF contracts.

[18] See, in particular, Panel Question 132 to the European Union, which read: "*Please explain Professor Whitelaw's calculations of the IRRs of the A350XWB LA/MSF Agreements. Please provide all underlying data for these calculations, showing the figures and describing the methodology used with respect to all contracts, including amendments, as well as anticipated cash flows to and from the member States and any assumptions with regards to revenues, prices and/or royalties (e.g. were list prices used or actual/anticipated negotiated prices?). Please explain the extent to which the methodology used by Professor Whitelaw differs or is similar to that used by the European Union to calculate the IRRs of the LA/MSF Agreements in the original proceeding.*"

[19] European Union's Letter to the Panel of 24 March 2014, p. 4.

[20] United States Response of 26 March 2014 to the European Union's Letter of 24 March 2014, p. 2.

ANNEX G

THE EUROPEAN UNION'S COMPLIANCE COMMUNICATION OF 1 DECEMBER 2011

ANNEX G-1

THE EUROPEAN UNION'S COMPLIANCE COMMUNICATION OF 1 DECEMBER 2011

(WT/DS316/17)

1. The European Union refers to the recommendations and rulings of the WTO Dispute Settlement Body (DSB) with respect to the dispute *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316). The European Union would like to inform the DSB that it has taken appropriate steps to bring its measures fully into conformity with its WTO obligations, and to comply with the DSB's recommendations and rulings.

2. In considering appropriate steps to bring its measures into conformity with its WTO obligations, the European Union took note of all elements of the DSB's recommendations and rulings, including, in particular, the Appellate Body's guidance on the way in which subsidies and adverse effects expire, dissipate, terminate or are otherwise removed or withdrawn. In undertaking this review, we consulted, among others, independent experts in: financial economics; investor behaviour; financial and cost auditing, accounting and controlling; product engineering; and Large Civil Aircraft (LCA) fleet management. We have also closely monitored and assessed LCA product and market developments in the months and years following the period covered by the Panel's review.

3. As a result of this review, the European Union has adopted a course of action that addresses all forms of adverse effects, all categories of subsidies, and all models of Airbus aircraft covered by the DSB's recommendations and rulings.

4. Specifically, in bringing its measures into conformity with its WTO obligations, the European Union has addressed all categories of subsidy covered by the DSB's recommendations and rulings: Member State Financing (MSF) loans, capital contributions, infrastructure support and regional aid. Amongst others, the European Union has secured repayment of MSF loans and terminated MSF agreements, increased fees and lease payments on infrastructure support to accord with market principles, and ensured that capital contributions and regional aid subsidies have, in the Appellate Body's words, "come to an end" and are no longer capable of causing adverse effects. Additionally, the course of action adopted by the European Union affects Airbus' A300, A310, A320, A330, A340 and A380 aircraft, as well as derivatives thereof, as implicated by the DSB's recommendations and rulings. Finally, as a result of these steps and other intervening market events, the European Union has addressed the forms of adverse effects covered by the DSB's rulings. Information concerning the steps that have been taken by the European Union is provided in the attached list.

5. In short, by having taken appropriate steps to bring our measures into conformity with our WTO obligations, as required by Article 7.8 of the *SCM Agreement* and Article 19.1 of the DSU, the European Union has ensured full implementation of the DSB's recommendations and rulings.

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1. Termination of French MSF agreement for A300B;

2. Termination of French MSF agreement for A300B2/B4;

3. Termination of French MSF agreement for A300-600;

4. Termination of German MSF agreement for A300B;

5. Termination of German MSF agreement for A300B2/B4;

6. Termination of German MSF agreement for A300-600;

7. Termination of Spanish MSF agreement for A300B;

8. Termination of Spanish MSF agreement for A300B2/B4;

9. Termination of Spanish MSF agreement for A300-600;

10. Termination of French MSF agreement for A310;

11. Termination of French MSF agreement for A310-300;

12. Termination of German MSF agreement for A310;

13. Termination of German MSF agreement for A310-300;

14. Termination of Spanish MSF agreement for A310;

15. Termination of Spanish MSF agreement for A310-300;

16. Termination of French MSF agreements for A320;

17. Termination of German MSF agreement for A320;

18. Termination of Spanish MSF agreement for A320;

19. Termination of French MSF agreement for A330/A340 Basic;

20. Termination of German MSF agreement for A330/A340 Basic;

21. Termination of Spanish MSF agreement for A330/A340 Basic;

22. Termination of French MSF agreement for A330-200;

23. Termination of French MSF agreement for A340-500/600;

24. Termination of Spanish MSF agreement for A340-500/600;

25. Payment by Airbus, other than on deliveries under previously existing contractual terms, with respect to outstanding MSF obligations in the amount of approximately EUR 1,704,775,000;

26. Bringing "to an end"[1] the 1987, 1988, 1992 and 1994 French capital contributions into Aérospatiale; the 1989 capital contribution by Kreditanstalt für Wiederaufbau ("KfW") into Deutsche Airbus GmbH and the subsequent 1992 transfer of KfW's shares; the French MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, A330/A340 Basic, A330-200 and A340-500/600; the German MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320 and A330/A340; the Spanish MSF agreements for the A300B, A300B2/B4,

[1] Appellate Body Report, *EC – Aircraft*, para. 709.

A300-600, A310, A310-300, A320, A330/A340 Basic and A340-500/600; the UK MSF agreements for the A320 and A330/A340 Basic; the regional development grant for an A380-related facility of Airbus Deutschland GmbH (now Premium AEROTEC GmbH) in Nordenham, Germany; and, the regional development grants for largely A380-related facilities of EADS/CASA in Tablada and Puerto de Santa Maria, Spain, and of Airbus España, S.L. (now Airbus Operations, S.L.) in Illescas and Puerto Real, Spain;

27. Isolation of Spanish regional development grants to the EADS/CASA facility at La Rinconada/San Pablo, Spain, from use for LCA purposes;

28. Amendment of take-off and landing fee schedule for use of the runway extensions at Bremen Airport;

29. Amendment of the lease agreement between Airbus Deutschland GmbH and Projektierungsgesellschaft Finkenwerder mbH & Co. KG for an A380-related Airbus Deutschland GmbH facility in Hamburg Finkenwerder;

30. Subsequent share transactions and cash extractions involving subsidy recipients;

31. Termination of the A300 LCA programme;

32. Termination of the A310 LCA programme;

33. Termination of the A340 LCA programme;

34. Completed deliveries of relevant LCA to markets for which displacement was found and completed performance of sales contracts for A319s with easyJet, A320s with Air Berlin, A319s and A320s with Czech Airlines, A320s with Air Asia, A340-600s with Iberia, A340-300s and A340-600s with South African Airways, A340-500s and A340-600s with Thai Airways International, A380s with Emirates Airlines, A380s with Singapore Airlines, and A380s with Qantas;

35. Non-subsidised subsequent investments in Airbus' A320 and A330 LCA programmes;[2]

36. Attenuation, through the actions or steps taken with respect to the subsidies and through further intervening causes, of any causal link to the point that it no longer constitutes "'a genuine and substantial relationship of cause and effect' between the subsidies and the alleged market phenomenon".[3]

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[2] Appellate Body Report, *EC – Aircraft*, para. 1233.
[3] Appellate Body Report, *EC – Aircraft*, paras. 1232-1233.