



**EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES
AFFECTING TRADE IN LARGE CIVIL AIRCRAFT**

COMMUNICATION FROM THE EUROPEAN UNION

The following communication, dated 21 August 2020, was received from the delegation of the European Union with the request that it be circulated to the Dispute Settlement Body (DSB).

Please find enclosed the European Union's Third Compliance Communication in the above dispute, for circulation to the Members.

A copy of this communication is being provided directly to the United States.

Notification of additional and extraordinary compliance measures that withdraw all remaining subsidies and constitute appropriate steps to remove adverse effects, substantially in excess of what is required by Article 7.8 of the *SCM Agreement*

1. The European Union¹ 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), as altered by the first compliance panel report (WT/DS316/RW), as modified by the Appellate Body report (WT/DS316/AB/RW).²

2. In the Second Compliance Communication, the European Union informed the DSB that, following the first compliance proceedings and based on the relevant findings, it had taken further appropriate steps to bring its measures into conformity with its WTO obligations,³ particularly Article 7.8 of the *SCM Agreement* and Article 19.1 of the DSU. Accordingly, the European Union had ensured full implementation of the DSB's recommendations and rulings, such that there were no longer any subsidies causing adverse effects to the interests of the United States.⁴

3. The second compliance panel report (WT/DS316/RW2)⁵ confirmed that the European Union had taken further appropriate steps to withdraw the subsidies and/or remove the adverse effects, but concluded that the European Union had not yet achieved compliance. On 6 December 2019, the European Union appealed a number of serious legal errors in the second compliance panel report, arguing that compliance was achieved by: (i) complete repayment of UK A350XWB MSF; (ii) alignment of German A350XWB MSF with a contemporaneous market benchmark; (iii) amortisation of Spanish A380 MSF; and (iv) termination of the A380 programme.⁶ Indeed, in significant parts of its report, the second compliance panel abandoned established WTO case law that was supported by and previously applied to the United States, notably by departing from the principle that compliance obligations are prospective only, such that there is no obligation to repay benefit that has flowed in the past. The second compliance panel report represents a serious assault on the European Union's rights and a lack of even-handedness relative to the treatment afforded the United States in DS353.

4. Although the Appellate Body issued a Working Schedule, the United States failed to engage in the proceedings. Substantively, however, the United States has accepted the second compliance panel's findings, having elected not to file a notice of other appeal and other appellant's submission by the deadline set by the Appellate Body. Instead, the United States has continued to unlawfully obstruct appointments of new Appellate Body members, resulting in suspension of the appellate proceedings. The United States is thereby denying the European Union final resolution of the dispute and foreclosing any possibility for the European Union to obtain a multilateral confirmation of compliance.

5. On 2 October 2019, the arbitration panel issued a decision under Article 22.6 of the DSU approving US countermeasures of USD 7.5 billion annually. The arbitration panel report also contains multiple legal errors that would not withstand appellate review. Notably, it was wholly unreasonable to award countermeasures on an annual basis, for an essentially indefinite period of

¹ Unless the context otherwise requires, as a matter of WTO law, references in this document to the European Union include the "certain member States" (France, Germany, Spain and the United Kingdom) against which the United States commenced this dispute.

² References in this communication to the compliance panel report, as modified by the Appellate Body Report, also encompass the compliance Appellate Body Report itself. The first compliance panel and the Appellate Body reviewed a first set of compliance measures. See: First Compliance Communication, WT/DS316/17, 1 December 2011.

³ WT/DS316/34, 18 May 2018.

⁴ This Third Compliance Communication builds upon and should be read together with the Second Compliance Communication, the content of which the European Union refers to and incorporates by reference, but does not repeat.

⁵ 2 December 2019.

⁶ The European Union refers to its notice of appeal for a more complete identification of the errors of law and legal interpretation committed by the second compliance panel. See WT/DS316/43, 6 December 2019.

time, when compliance proceedings (of which the arbitration panel was fully informed) had already established the absence of any significant continuing benefit and the termination of the A380 programme. The resulting amount of countermeasures is consequently unjustified.

6. The second compliance panel and the arbitration panel, along with the United States' obstruction of appointments of new Appellate Body members, have thus created a situation where the European Union is trapped by the prospect of an essentially indefinite authorisation of countermeasures, unilaterally maintained by the United States, coupled with a denial of any legal recourse to demonstrate compliance. This represents a complete failure to safeguard the core of the WTO's dispute settlement function, which is to ensure the security and predictability of a rules-based multilateral trading system.

7. In these circumstances, given the extremely unfavourable economic conditions created by the Covid-19 crisis, and with a view to achieving a situation in which there are no countermeasures on either side, so that both LCA producers and other affected or potentially affected economic operators are properly able to contribute to a global recovery, the European Union has now procured additional and extraordinary measures with respect to the remaining two subsidies. These additional and extraordinary measures go far beyond anything that is required by Article 7.8 of the *SCM Agreement*. They fully withdraw the remaining two subsidies even though they were no longer causing adverse effects, and they also constitute steps to remove adverse effects that no longer exist. This means that, on any view, including that of the United States, which has not cross-appealed the second compliance panel report, compliance has now been achieved. These additional and extraordinary measures consist of:

- the amendment of the French A350XWB MSF loan agreement so as to align the terms of the financial instrument on a market benchmark prevailing at the time of the original measure, with prospective effect from the date of the amendment; and,
- the binding agreement to amend the Spanish A350XWB MSF loan agreement so as to align the terms of the financial instrument on a market benchmark prevailing at the time of the original measure, with prospective effect from the date of the amendment.

8. In effect, these measures impose a financial burden on the European Union's participant in the large civil aircraft industry that is not required in order to discharge the European Union's compliance obligations, effectively imposing on it a competitive disadvantage vis-à-vis the United States' participant in the industry. The amounts involved are substantial. The details of the measures have been confidentially communicated to the United States.

9. The European Union has procured these additional, extraordinary and costly compliance measures in an effort to persuade rational and reasonable stakeholders in the United States, including consumers, employers, workers, government officials and entities, airlines and other economic operators, that now is the time to draw a line under these disputes. It is not in the interests of anyone that the European Union and the United States now proceed to, or continue, mutually assured retaliation, and certainly not in the current economic climate. Instead of progressively stepping-up retaliatory measures, we should step them down, coming rapidly to the point at which there are no countermeasures applied on either side. This proposition is consistent with the fact that the European Union, like the United States, believes in the mutual benefits of open and fair trade. The step that we have now taken represents our contribution to both parties moving in that direction. We believe that the next step should be to achieve the absence of countermeasures on both sides. Only in this way will we create an environment that will best allow both aircraft manufacturers and their airline customers around the world, and indeed other sectors that would otherwise be subject to countermeasures, to weather the current economic crisis and contribute to a global recovery.
