



## **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

AB-2016-6

*Report of the Appellate Body*

*Addendum*

This *Addendum* contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS316/AB/RW.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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**ANNEX A**

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**ANNEX A-1****EUROPEAN UNION'S NOTICE OF APPEAL\***

Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Measures Affecting Trade in Large Civil Aircraft (Recourse to Article 21.5 of the DSU by the United States)* (WT/DS316/RW). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Union is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report<sup>1</sup>:

**I. WHETHER THE PANEL PROPERLY INTERPRETED ARTICLE 7.8 OF THE SCM AGREEMENT (SECTIONS 6.6.2 AND 6.6.3 OF THE REPORT)**

1. The Panel erred in interpreting Article 7.8 of the *SCM Agreement* to require an implementing Member to “remove the adverse effects” found from an actionable subsidy in original proceedings, even if that subsidy has been “withdraw{n}” and is no longer “maintain{ed}”.<sup>2</sup>
2. The Panel additionally erred in its interpretation of Article 7.8 (in conjunction with Article 1.1(a)) of the *SCM Agreement*) when finding that bringing about the end of a financial contribution does *not* result in withdrawal of the subsidy.<sup>3</sup> The European Union requests the Appellate Body to consider this appeal only if the Appellate Body reverses the Panel’s interpretation of Article 7.8 and attempts to complete the analysis under a proper interpretation of Article 7.8.

**II. WHETHER THE PANEL ERRED BY REFUSING TO ASSESS WHETHER THE EUROPEAN UNION ACHIEVED COMPLIANCE IN RESPECT OF THE MÜHLENBERGER LOCH AND BREMEN AIRPORT RUNWAY SUBSIDIES (SECTIONS 5.10, 6.2.5 AND 6.6.3.4.4 OF THE REPORT)**

3. The Panel erred in interpreting Article 21.5 of the *DSU* as providing an original respondent with the right to seek findings of compliance in Article 21.5 compliance proceedings only in the narrow factual circumstances of the *US/Canada – Continued Suspension* dispute.<sup>4</sup>

\* This notification, dated 13 October 2016, was circulated to Members as document WT/DS316/29.

<sup>1</sup> Paragraph numbers provided in footnotes to the following description of the errors of the Panel are intended to indicate the primary instance of the errors. These errors have consequences throughout the report, and the European Union also appeals all findings and conclusions deriving from or relying on the appealed errors, and in particular the relevant findings and conclusions in Sections 7.1, 7.2, 7.3 and 7.4 of the Panel Report.

<sup>2</sup> Panel Report, paras. 6.803, 6.813, 6.819, 6.822, 6.838, 6.839-6.841, 6.1078, 6.1089, 6.1094, 6.1100, 6.1101-6.1102, 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix), 7.1(d)(xii)-(xvii) and 7.2.

<sup>3</sup> Panel Report, paras. 6.1072-6.1074, 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix), 7.1(d)(xii)-(xvii) and 7.2.

<sup>4</sup> Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

4. The Panel erred in the application of Article 21.5 of the DSU by finding that no disagreement, within the meaning of Article 21.5 of the DSU, existed between the European Union and the United States, and consequently by failing to make findings concerning the European Union's withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies.<sup>5</sup>
5. Separately, by declining to make findings on a matter that was properly before it, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>6</sup>

### III. WHETHER LA/MSF FOR THE A350XWB IS A SUBSIDY (SECTION 6.5.2 OF THE REPORT)

6. The Panel erred when identifying the appropriate point in time from which to draw the *corporate borrowing rate component* of the market benchmark to determine whether each A350XWB launch aid/member state financing ("LA/MSF") contract confers a "benefit", and therefore constitutes a subsidy, under Article 1.1(b) of the *SCM Agreement*.<sup>7</sup> Specifically, in identifying the corporate borrowing rate as "the average yields {on the relevant EADS bond} one-month prior and six-months prior to the conclusion of the contract, in the form of a range",<sup>8</sup> the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.<sup>9</sup>
7. Separately, by rejecting the yield on the day of the conclusion of each contract, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>10</sup>
8. Should the Appellate Body disagree with the European Union and reject the appeals described in paragraphs 6 and 7, the European Union appeals the Panel's inclusion, in its construction of the corporate borrowing rate, of the six-month average yield on the relevant EADS bond within the Panel's range of average yields.<sup>11</sup> Specifically, by including the six-month average yield within its range, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.<sup>12</sup>
9. Separately, by including the six-month average yield within its range, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>13</sup>
10. Further, the Panel erred in identifying the *project risk premium component* of the market benchmark to determine whether each A350XWB LA/MSF contract confers a "benefit", and therefore constitutes a subsidy, under Article 1.1(b) of the *SCM Agreement*.<sup>14</sup> The Panel selected a single undifferentiated project risk premium for each A350XWB LA/MSF contract, which was developed for a different programme (i.e., the A380) in the original proceedings. In so doing, the Panel committed three sets of error.
11. First, the Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme. As a result, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.<sup>15</sup>

<sup>5</sup> Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

<sup>6</sup> Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

<sup>7</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>8</sup> Panel Report, para. 6.389.

<sup>9</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>10</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>11</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>12</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>13</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>14</sup> Panel Report, paras. 6.435, 6.459, 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>15</sup> Panel Report, paras. 6.435, 6.459, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

12. Separately, by failing to consider more appropriate benchmarks and by deviating from the approach to project-specific benchmarks taken in the original proceedings, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>16</sup>
13. *Second*, by failing to establish similarity between the risks involved in the A350XWB project and the A380 LA/MSF project, as well as between the risks involved in the A350XWB LA/MSF contracts and the A380 LA/MSF contracts, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>17</sup>
14. *Third*, and finally, the Panel erroneously adopted a single project risk premium to benchmark all four A350XWB LA/MSF contracts. As a result, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.<sup>18</sup>
15. Separately, by failing to adopt a differentiated project risk premium while adopting a differentiated corporate borrowing rate, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>19</sup>

#### **IV. WHETHER THE PANEL ERRED IN IDENTIFYING APPROPRIATE PRODUCT MARKETS (SECTION 6.6.4.4 OF THE REPORT)**

16. The Panel erred in its interpretation of the term “market” in Article 6.3 of the *SCM Agreement*, as permitting two products to be placed in the same product market on the basis of any competition between them, rather than on the basis of the existence of significant competitive constraints between them.<sup>20</sup>
17. Should the Appellate Body disagree with the European Union and reject the appeal described in paragraph 16, the Panel erred in the application of Articles 5(c), 6.3 and Article 7.8 of the *SCM Agreement* when it identified the relevant product markets for purposes of assessing the United States’ adverse effects claims in a manner that is inconsistent with its own legal standard.<sup>21</sup>
18. Separately, by limiting its assessment of the existence of the relevant product markets for purposes of assessing the United States’ adverse effects claims to competition between only those products that the United States had placed in the same product markets, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>22</sup>

#### **V. WHETHER THE PANEL ERRED IN REACHING ITS FINDINGS RELATING TO THE “NON-SUBSIDIZED LIKE PRODUCT” PROVISIONS OF ARTICLES 6.3, 6.4 AND 6.5 OF THE SCM AGREEMENT (SECTION 6.6.4.3 OF THE REPORT)**

19. The Panel erred in reaching its findings on whether there is a new matter. Specifically, the Panel erred in its interpretation and application of the term “matter” in Article 11 of the

<sup>16</sup> Panel Report, paras. 6.435, 6.459, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>17</sup> Panel Report, paras. 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>18</sup> Panel Report, paras. 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>19</sup> Panel Report, paras. 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>20</sup> Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>21</sup> Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>22</sup> Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

DSU.<sup>23</sup> The Panel also erred in failing to make an objective assessment of the matter, under Article 11 of the DSU.<sup>24</sup>

20. In addition, the Panel erred in reaching its findings on cogent reasons. Specifically, the Panel erred in its interpretation and application of "security and predictability" within the meaning of Article 3.2 of the DSU as it relates to the cogent reasons rule;<sup>25</sup> and, erred in failing to make an objective assessment of the matter, under Article 11 of the DSU.<sup>26</sup>
21. Finally, the Panel erred in its interpretation and application of Articles 6.3(a), 6.3(b), 6.3(c), 6.4 and 6.5 of the *SCM Agreement*.<sup>27</sup>

## **VI. WHETHER THE PANEL ERRED IN FINDING ADVERSE EFFECTS (SECTION 6.6.4.4 OF THE REPORT)**

### **A. EFFECTS OF LA/MSF ON THE LAUNCH AND MARKET PRESENCE OF AIRCRAFT**

22. The Panel erred in the interpretation of Article 5(c) of the *SCM Agreement* in adopting a "but for" approach to causation that failed to consider the passage of time, and events that occurred during that time, and consequently attributing the current market presence of the A320, A330 and A380 families of aircraft to pre-A350XWB LA/MSF.<sup>28</sup>
23. Should the Appellate Body disagree with the European Union and reject the appeal described in paragraph 22, the Panel erred in the application of Articles 5(c) and 7.8 of the *SCM Agreement* in adopting a "but for" approach to causation that failed to consider the passage of time, and events that occurred during that time, and consequently attributing the current market presence of the A320 and A330 families of aircraft to pre-A350XWB LA/MSF.<sup>29</sup>
24. Separately, to the extent the Panel found that LA/MSF for the A380 resulted in "direct effects" on the launch and market presence of the A380, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>30</sup>
25. The Panel additionally erred in the application of Articles 5(c) and 7.8 of the *SCM Agreement* by attributing the market presence of the A350XWB to the "indirect effects" of LA/MSF for the A380.<sup>31</sup>
26. Separately, to the extent the Panel found that LA/MSF for the A350XWB resulted in "direct effects" on the launch and market presence of the A350XWB, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>32</sup>

<sup>23</sup> Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>24</sup> Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>25</sup> Panel Report, paras. 6.1125-6.1153, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>26</sup> Panel Report, paras. 6.1125-6.1153, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>27</sup> Panel Report, paras. 6.1125-6.1154, 6.1798, 6.1817, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>28</sup> Panel Report, paras. 6.1515, 6.1527, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

<sup>29</sup> Panel Report, paras. 6.1527, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

<sup>30</sup> Panel Report, paras. 6.1507, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

<sup>31</sup> Panel Report, paras. 6.1747, 6.1771, 6.1773, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>32</sup> Panel Report, paras. 6.1717, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

**B. FINDINGS OF DISPLACEMENT, IMPEDANCE AND LOST SALES**

27. The Panel erred in the application of Articles 5(c), 6.3 and 7.8 of the *SCM Agreement* by failing, in its assessment of lost sales, displacement and impedance, to account for the differences in closeness of competition between various aircraft.<sup>33</sup>
28. The Panel erred in the application of Articles 5(c), 6.3 and 7.8 of the *SCM Agreement* by failing, in its assessment of lost sales, displacement and impedance, to account for non-attribution factors.<sup>34</sup>
29. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* in finding that non-withdrawn subsidies cause "displacement and/or impedance", thereby conflating the two separate forms of serious prejudice.<sup>35</sup>
30. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* as permitting findings of "displacement" without any assessment of sales volume and market share data.<sup>36</sup>
31. In addition, the Panel also erred in the application of Articles 5(c), 6.3(a), 6.3(b) and 7.8 of the *SCM Agreement* by finding "displacement" without any assessment of sales volume and market share data.<sup>37</sup>
32. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* as permitting findings of "impedance" without any assessment of sales volume and market share data.<sup>38</sup>
33. In addition, the Panel also erred in the application of Articles 5(c), 6.3(a), 6.3(b) and 7.8 of the *SCM Agreement* by finding "impedance" without any assessment of sales volume and market share data.<sup>39</sup>

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<sup>33</sup> Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>34</sup> Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>35</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>36</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>37</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>38</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>39</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.



**ANNEX A-2****UNITED STATES' NOTICE OF OTHER APPEAL\***

Pursuant to Rule 23(1) of the Working Procedures for Appellate Review, the United States hereby notifies the Appellate Body of its decision to appeal certain issues of law covered in the Report of the Panel in *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* (WT/DS316/RW & Add.1) ("Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's finding that the United States failed to establish that the French, German, Spanish, and UK LA/MSF subsidies for Airbus's A350 XWB constituted prohibited import substitution subsidies, within the meaning of Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").<sup>1</sup> While the United States agrees with the Panel's interpretation of Article 3.1(b), a competing interpretation is under consideration in another dispute, *US – Conditional Tax Incentives for Large Civil Aircraft* (DS487). If the Appellate Body were to determine that this competing interpretation of Article 3.1(b) is correct, then the Panel here erred in its interpretation and application of Article 3.1(b) and its finding that the French, German, Spanish, and UK LA/MSF for the A350 XWB do not constitute import substitution subsidies prohibited by Article 3.1(b). The paragraphs relating to these errors include paragraphs 6.745-6.791 of the Panel Report.

2. In addition, the United States conditionally appeals the Panel's findings that the *ex ante* lives of the French, German, Spanish, and UK LA/MSF subsidies for the A320, A330/A340 Basic, and A330-200 had passively "expired" before December 1, 2011, as a result of the amortization of benefit.<sup>2</sup> These conclusions are in error and are based on erroneous findings of law and related legal interpretations, including an erroneous interpretation and application of Article 1.1(b) of the SCM Agreement. The paragraphs relating to these errors include paragraphs 6.872-6.879 of the Panel Report. However, the United States only requests the Appellate Body to address this issue if it modifies or reverses the Panel's finding that the passive "expiry" events cited by the European Union did not satisfy its obligation to "withdraw the subsidy" for purposes of Article 7.8 of the SCM Agreement.<sup>3</sup>

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\* This notification, dated 10 November 2016, was circulated to Members as document WT/DS316/30.

<sup>1</sup> See Panel Report, paras. 6.790, 7.1(c)(ii).

<sup>2</sup> See Panel Report, paras. 6.879, 7.1(d)(ii) and (iii).

<sup>3</sup> See Panel Report, paras. 6.1094, 7.1(d)(viii).

**ANNEX B**

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**ANNEX B-1****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLANT'S SUBMISSION****1 INTRODUCTION**

1. The European Union's Appellant's Submission sets out appeals of a number of serious errors of law and legal interpretation in the Report of the Panel in *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)* ("compliance Panel" or "Panel").

**2 THE PANEL ERRED IN THE INTERPRETATION OF ARTICLE 7.8 OF THE SCM AGREEMENT<sup>1</sup>**

2. The Panel erred in interpreting Article 7.8 to require an implementing Member, found in original proceedings to have granted or maintained subsidies that cause adverse effects, to "remove the adverse effects" of the subsidies, "*irrespective of whether those subsidies continue to exist in the implementation period*".<sup>2</sup> That is, for the Panel, an obligation to "remove the adverse effects" applies even if the implementing Member no longer "grant{s} or maintain{s}" the subsidy at issue after the end of the implementation period, but has, instead, "withdraw{n} the subsidy".
3. Properly interpreted, the terms of Article 7.8, viewed in their context and in light of the object and purpose of the *SCM Agreement*, provide an implementing Member that is "*granting or maintaining*" an actionable subsidy, which was found in original proceedings to cause adverse effects, with the *option* either "to remove the adverse effects *or* ... withdraw the subsidy". Thus, as is the case throughout the covered agreements with regard to any WTO-inconsistent measure, withdrawal of the measure (here, an actionable subsidy) constitutes compliance, regardless whether any historically caused effects of the withdrawn measure temporarily linger in the marketplace. In this respect, compliance under the *SCM Agreement* follows the same principles that apply throughout the covered agreements.
4. Whilst in cases of other WTO-inconsistent measures, an adverse impact is *presumed* pursuant to Article 3.8 of the DSU, for adverse effects claims under Part III of the *SCM Agreement*, an alleged adverse effect must be *demonstrated*. In other words, in the context of adverse effects claims, the burden to establish effects in the marketplace is shifted to the complainant. This places an *additional burden on the complainant*, reflecting the fact that, unlike other measures (including a prohibited subsidy), an actionable subsidy is WTO-inconsistent solely if it is demonstrated to cause adverse effects. Thus, unlike a prohibited subsidy, an actionable subsidy is "not prohibited *per se*".<sup>3</sup> These considerations confirm that compliance with adverse effects findings can be achieved *either* by withdrawing the subsidy measure *or* by removing the adverse effects.
5. In contrast, with its interpretation of Article 7.8, the Panel *placed an additional compliance burden on a respondent* found in original proceedings to have granted an actionable subsidy. Under the Panel's interpretation of Article 7.8, respondents face *a unique and exacting compliance obligation* with regard to an actionable subsidy – an obligation that does not attach to *any* other WTO-inconsistent measure, including prohibited subsidies. Under the Panel's interpretation, compliance with recommendations and rulings concerning an actionable subsidy requires removal of any effects temporary lingering in the marketplace, even if the subsidy has already been withdrawn.
6. The Panel arrived at its erroneous interpretation of Article 7.8 not on the basis of the proper application of the *Vienna Convention* rules on treaty interpretation. Rather, the Panel's

<sup>1</sup> Panel Report, paras. 6.803, 6.813, 6.819, 6.822, 6.838, 6.839, 6.840, 6.1078, 6.1100, 6.1101, 6.1102, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix).

<sup>2</sup> Panel Report, para. 6.822 (emphasis in original).

<sup>3</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 238 (emphasis in original).

interpretative approach was *explicitly* outcome-determined, namely to “avoid ... an outcome”<sup>4</sup> that would, in the Panel’s view, make the ruling secured by the United States in the original proceedings “purely declaratory” with respect to an expired subsidy.<sup>5</sup> To “avoid an outcome” it considered undesirable, the Panel developed a contrived interpretation that conflicts not only with the ordinary meaning of the terms used in Article 7.8, but also with the context of the provision, and with the overall object and purpose of the *SCM Agreement*.

7. The Panel recognised that its interpretation is not rooted in the terms of Article 7.8. Instead, the Panel acknowledged that the reference in Article 7.8 to “granting or maintaining” of a subsidy suggests that compliance obligations regarding an actionable subsidy are triggered whenever “an implementing Member *continues* to grant or maintain a subsidy found to have caused adverse effects in an original proceeding”.<sup>6</sup> Moreover, the Panel acknowledged that “the text of Article 7.8 may arguably be viewed to suggest that a Member found to have caused adverse effects through the use of a subsidy would have no obligation to ‘take appropriate steps to remove the adverse effects’ or ‘withdraw the subsidy’ if the subsidy at issue *no longer exists* at the time of the DSB’s adoption of the adverse effects findings”.<sup>7</sup> Although the Panel acknowledged that this was the interpretation flowing from the terms “granting or maintaining”, it adopted an interpretation unsupported by the terms actually used in Article 7.8, in their context, and according to the object and purpose of the *SCM Agreement*.
8. The Panel’s interpretation also reads the option to “withdraw the subsidy” out of the text of Article 7.8. Under the Panel’s interpretation, “withdraw{al of} the subsidy” achieves compliance only if doing so *also* succeeds in “remov{ing} the adverse effects”.<sup>8</sup> As a result, the Panel’s interpretation renders inutile the phrase “withdraw the subsidy” and the conjunction “or” in Article 7.8. Under the Panel’s interpretation, there remains only one option to achieve compliance under Article 7.8, namely through removal of the adverse effects. The Panel’s interpretation is inconsistent with the plain language of Article 7.8.
9. The Panel’s interpretation also runs contrary to the context of Article 7.8, including the most proximate context (*i.e.*, Articles 7.9, 5, and 4.7 of the *SCM Agreement*), the structure and design of the *SCM Agreement*, and the DSU.
10. In assessing context, the Panel began, not with *proximate* context from the *SCM Agreement* itself, but instead from the DSU. The Panel used the DSU not to *support* the meaning flowing from the terms of Article 7.8, but rather to *replace* the terms of Article 7.8 with the terms of Article 5 of the *SCM Agreement*. Specifically, the Panel stated that, under various provisions of the DSU, implementation must “focus on securing *conformity* with the covered agreements”.<sup>9</sup> According to the Panel, this meant that a subsidy found to cause adverse effects in original proceedings must be brought into “*conformity with Article 5*” of the *SCM Agreement*.<sup>10</sup>
11. The Panel misconstrued the DSU and its relevance as context. *First*, the Panel ignores that, as set forth in Article 3.7 of the DSU, compliance under the DSU is focused on the *withdrawal* of the WTO-inconsistent measure. Where a WTO-inconsistent measure is withdrawn, the DSU does *not* impose any additional requirement to remove any lingering effects in the marketplace. On the Panel’s view, findings in original proceedings are, therefore, always “purely declarative” with respect to temporary lingering *effects* of a WTO-inconsistent measure in the marketplace. This feature of WTO dispute settlement has not stopped WTO Members from challenging WTO-inconsistent measures and seeking their withdrawal, despite the possibility of a temporarily lingering impact of the withdrawn measure on competitive opportunities in the marketplace.

<sup>4</sup> Panel Report, para. 6.819 (emphasis added).

<sup>5</sup> Panel Report, paras. 6.840, 6.1094. See *also Id.*, para. 6.819 (“merely ‘declaratory in nature’”); para. 6.830 (“would also render the disciplines of Article 5 completely ineffective”).

<sup>6</sup> Panel Report, para. 6.802 (emphasis in original).

<sup>7</sup> Panel Report, para. 6.802 (emphasis in original).

<sup>8</sup> Panel Report, paras. 6.813, 6.819, 6.840, 6.1078, 6.1088, 6.1098, 6.1099.

<sup>9</sup> Panel Report, para. 6.813 (emphasis added).

<sup>10</sup> Panel Report, para. 6.813 (emphasis added).

12. *Second*, the Panel relied on the DSU in a way that deprives Article 7.8 of independent meaning, distinct from Article 5 of the *SCM Agreement*. The Panel erroneously assumed that, with respect to an actionable subsidy in compliance proceedings, "conformity" with the *SCM Agreement* is defined exclusively by reference to Article 5, with Article 7.8 subsumed by and read exclusively through the prism of Article 5. The Panel's assumption is wrong. The Appellate Body has explained that "*Article 7.8 specifies the actions that the respondent Member must take when a subsidy granted or maintained by that Member is found to have resulted in adverse effects to the interests of another Member*".<sup>11</sup> Thus, to achieve compliance, Article 7.8 – and not Article 5 – "*specifies the actions that the respondent must take*".
13. Turning to Article 5 as context, the Panel did not explicitly rely on the terms of this provision to shed light on the interpretation of Article 7.8. Instead, it turned to the DSU to reach the erroneous conclusion that Article 7.8 must be subsumed by and read exclusively through the prism of Article 5. In so doing, the Panel collapsed the substantive obligations under Article 5 and the implementation obligations under Article 7.8, despite the textual differences between the provisions. Article 5 (like Article 6) is concerned with "*caus{ing} .... adverse effects*" through the use of any subsidy. Article 7.8 is formulated differently, and explicitly gives the implementing Member the *option either* to remove adverse effects, *or* to withdraw a subsidy it is granting or maintaining. Thus, contrary to Article 5, Article 7.8 is *not* "*focus{ed}*" on the causing of *adverse effects* through the use of any subsidy".<sup>12</sup>
14. The Panel's interpretation of Article 7.8 is also contradicted by context from Article 4.7 of the *SCM Agreement* – the provision setting out the implementation obligation for prohibited subsidy findings. Article 4.7 provides a single implementation option, namely to "withdraw the subsidy". Although the Panel agreed that the terms "withdraw the subsidy" must be given "parallel" and "consistent" meaning under Articles 4.7 and 7.8, its interpretation of Article 7.8 failed to achieve this outcome.<sup>13</sup> Indeed, the Panel's interpretation of Article 7.8 gives the phrase "withdraw the subsidy" a *very different and inconsistent* meaning than the Panel affords the same phrase in Article 4.7, resulting in more demanding compliance obligations for actionable subsidies than for prohibited subsidies. Under the Panel's interpretation, expiry of a subsidy achieves "withdrawal" of that subsidy under Article 4.7.<sup>14</sup> Under Article 7.8, however, expiry of a subsidy does not achieve "withdrawal" of that subsidy, unless expiry also achieves removal of adverse effects.<sup>15</sup>
15. This also shows that the Panel's interpretation of Article 7.8 blurs the line between *prohibited* export subsidies and *actionable* production subsidies, which is, as the Appellate Body explained, contrary to the overall design and structure of the *SCM Agreement*.<sup>16</sup> The interpretive approach taken by the Panel makes compliance with actionable subsidy-related recommendations *more exacting* than compliance with prohibited subsidy-related recommendations under Article 4.7, despite the fact that Article 4.7 relates to subsidies that are *prohibited per se*, while Article 7.8 relates to subsidies that are merely *actionable*, and are "*not prohibited per se*".<sup>17</sup>
16. Finally, the Panel's interpretation of Article 7.8 also frustrates the object and purpose of the *SCM Agreement*, as it ignores the textual flexibility afforded to implement findings regarding actionable subsidies. Under the Panel's interpretation, an *actionable* subsidy would face a unique and exacting compliance obligation, not present with regard to a *prohibited subsidy*, nor with regard to *any other WTO-inconsistent measure disciplined under the covered agreements*. This outcome cannot be reconciled with the object and purpose of the *SCM Agreement*.
17. The European Union notes that the Panel's erroneous interpretation of Article 7.8 directly informed its erroneous refusal to recognise that, with respect to each subsidy withdrawn as a

<sup>11</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 235 (emphasis added).

<sup>12</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 712 (emphasis added).

<sup>13</sup> Panel Report, para. 6.1098.

<sup>14</sup> Panel Report, para. 6.1097. *See also Id.*, paras. 6.1085-6.1086.

<sup>15</sup> Panel Report, paras. 6.1086, 6.1098.

<sup>16</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 1054 (emphasis in original).

<sup>17</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 708.

result of expiry of the life of the subsidy or otherwise, the compliance remedy specified in Article 7.8 had been provided. Consequently, the Panel's erroneous interpretation of Article 7.8 also undermined the Panel's adverse effects-related findings.<sup>18</sup> The European Union also appeals several of these findings directly, on separate and unrelated grounds.

18. If the Appellate Body reverses the Panel's interpretation of Article 7.8 and attempts to complete the analysis, the European Union raises a conditional appeal. Specifically, the Panel erred in its interpretation of Article 7.8 (in conjunction with Article 1.1(a)) when finding that repayment of a financial contribution does not constitute withdrawal of the subsidy.<sup>19</sup>
19. The Panel acknowledged that the full repayment of the principal of a subsidised loan, plus any interest due under the terms of that loan, would "bring about the end of the financial contribution, in the sense that there would be *no longer any financial contribution in existence*".<sup>20</sup> That is, the Panel accepted that, in this scenario, one of the constituent elements of the subsidy (*i.e.*, a financial contribution) is no longer present. At the same time, the Panel found that bringing about the end of the financial contribution does not suffice to bring about the end of, and thus to withdraw, the subsidy.
20. In so finding, the Panel erred in the interpretation of Article 1 and 7.8 of the *SCM Agreement*. Bringing about the end of one of the constituent element of a "subsidy", within the meaning of Article 1, also brings the life of the subsidy to an end, implying that this subsidy is no longer maintained and is, instead, withdrawn, within the meaning of Article 7.8. In the original proceedings, the Appellate Body made an express finding to this effect, when it stated that the "life" of a subsidy may come "to an end, either through the removal of the financial contribution and/or the expiration of the benefit".<sup>21</sup>

### **3 THE PANEL ERRED IN REFUSING TO ASSESS WHETHER THE EUROPEAN UNION HAS ACHIEVED COMPLIANCE IN RESPECT OF THE MÜHLENBERGER LOCH AND BREMEN AIRPORT RUNWAY SUBSIDIES<sup>22</sup>**

21. In its Compliance Communication, the European Union indicated that it had adopted "measures taken to comply" ("MTTCs") that resulted in the withdrawal of the subsidies arising under (i) the leases of the land and the special-purpose facilities in the Mühlenberger Loch, and (ii) the take-off and landing fees at Bremen airport. Specifically, the MTTCs aligned the terms of the leases and the take-off and landing fees with relevant market benchmarks.<sup>23</sup> The United States identified these MTTCs in its panel request.<sup>24</sup> Throughout the Panel proceedings, the Parties continued to disagree as to whether the two EU MTTCs had achieved compliance with the recommendations and rulings in the original proceedings,<sup>25</sup> although the United States declined to substantiate its position that they failed to do so.
22. In these circumstances, the matter was properly before the Panel. Moreover, the European Union was entitled to a finding that it had withdrawn the Mühlenberger Loch and Bremen airport runway subsidies, based on the unrefuted *prima facie* showing of withdrawal it had presented. Yet, the Panel refused to make such a finding, based on a series of errors in the interpretation and application of Article 21.5 of the DSU. The Panel also failed to undertake an objective assessment of the matter properly before it, under Article 11 of the DSU.

<sup>18</sup> Panel Report, paras. 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-(xvii), 7.2.

<sup>19</sup> Panel Report, paras. 6.1072-6.1074.

<sup>20</sup> Panel Report, para. 6.1073 (emphasis added).

<sup>21</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 709 (emphasis and underlining added).

<sup>22</sup> Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

<sup>23</sup> Communication from the European Union to the DSB, 1 December 2011, WT/DS316/17, items 28, 29, p. 4.

<sup>24</sup> US Request for Establishment of a Compliance Panel, WT/DS316/23, paras. 5(j), 6(a), 6(e).

<sup>25</sup> US FWS, paras. 5 and 97, and footnote 13; US SWS, para. 265 and heading 4; US 12 February 2016 Comments on the EU Comments on Interim Panel Report, para. 48.

23. *First*, the Panel erred in its interpretation of Article 21.5 of the DSU, finding that the right of an original respondent to request a determination of compliance is limited to situations in which (i) an original *respondent* initiates an Article 21.5 proceeding; (ii) the original *complainant* refuses to participate in that Article 21.5 proceeding; and, (iii) the original complainant had already *suspended* concessions *vis-à-vis* the original respondent under Article 22 of the DSU.<sup>26</sup>
24. The terms used in Article 21.5 do not support such an interpretation. The “disagreement” to be resolved in compliance proceedings under Article 21.5 of the DSU relates “to the existence or consistency with a covered agreement of measures taken to comply”. Such a disagreement may arise – and indeed regularly arises in Article 21.5 compliance proceedings – *before* concessions are suspended under Article 22.
25. The Panel’s interpretation is also inconsistent with the object of “prompt settlement” reflected in Article 3.3 of the DSU, and that of “prompt compliance” set out in Article 21.1 of the DSU. Contrary to these objectives, the Panel’s interpretation prolongs the dispute and forces the original respondent to endure suspension of concessions, an “abnormal state of affairs”,<sup>27</sup> before it can seek recourse to Article 21.5. Such an interpretation also disturbs the “proper balance between the rights and obligations of Members” that the dispute settlement system is tasked with preserving.<sup>28</sup>
26. *Second*, the Panel erred in the application of Article 21.5 of the DSU, in finding that a “disagreement” did not exist between the Parties in respect of the two MTTCs at issue.<sup>29</sup> According to the Appellate Body, a “disagreement” under Article 21.5 “arises from the existence of conflicting views: the original complainant’s view that such a measure is inconsistent with the WTO agreements or brings about only partial compliance, and the original respondent’s view that a measure is consistent with the WTO agreements and brings about full compliance with the DSB’s recommendations and rulings”.<sup>30</sup> The Parties repeatedly expressed “conflicting views” on the effectiveness of the two MTTCs in securing withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies. In particular, while the United States refused to *substantiate* its view that compliance was not achieved with the two EU MTTCs, it nonetheless maintained that view throughout the Panel proceedings, and did not accept that, on the facts, the alignment with market benchmarks achieved withdrawal of the subsidies. The Panel erred in mistaking the US *refusal to substantiate* its views, for a *lack of disagreement* between the Parties.
27. *Third*, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.
28. In original proceedings, where complainant alone enjoys the right to place a matter before the panel and to seek findings, a panel may forego findings on a claim abandoned by the complainant. Being the sole holder of the right to seek findings in an original proceeding, the complainant is at liberty to waive that right. In contrast, in compliance proceedings, the original complainant no longer enjoys the *sole* right to place matters before a panel and seek adjudication in the form of panel findings and conclusions regarding the adequacy of the responding Member’s compliance efforts. Instead, as the Appellate Body has clarified, “either party to the original dispute may initiate the proceedings”.<sup>31</sup> This principle reflects the fact that both parties have a shared interest in the resolution of disagreements concerning compliance.
29. Accordingly, in compliance proceedings, even if the original complainant waives its own right to adjudication of a particular matter properly placed before a compliance panel, that waiver does not prejudice the *original respondent’s right* to have the same matter adjudicated. In the present dispute, the Panel improperly “declined to exercise validly established jurisdiction and

<sup>26</sup> Panel Report, para. 5.77.

<sup>27</sup> Appellate Body Report, *US – Continued Suspension*, para. 310; Appellate Body Report, *Canada – Continued Suspension*, para. 310.

<sup>28</sup> Article 3.3 of the DSU.

<sup>29</sup> Panel Report, paras. 5.76-5.78.

<sup>30</sup> Appellate Body Report, *US – Continued Suspension*, para. 347; Appellate Body Report, *Canada – Continued Suspension*, para. 347.

<sup>31</sup> Appellate Body Report, *US – Continued Suspension*, para. 347; Appellate Body Report, *Canada – Continued Suspension*, para. 347.

abstained from making any finding on the matter before it”,<sup>32</sup> despite the European Union’s express request to the contrary, and in so doing failed to make an objective assessment of a matter properly before it.

30. The European Union requests the Appellate Body to complete the analysis and find, based on unrefuted evidence in the record, that the European Union has achieved withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies.

#### **4 THE PANEL ERRED IN DETERMINING THE CORPORATE BORROWING RATE COMPONENT OF THE MARKET BENCHMARK FOR A350XWB LA/MSF<sup>33</sup>**

31. To determine whether LA/MSF for the A350XWB confers a “benefit”, the Panel adopted a benchmark rate of return comprised of two components: (i) a corporate borrowing rate, plus (ii) a project risk premium. This appeal concerns the first component of the benchmark, whereas the appeal in Section 5 , below, concerns the second component.
32. With respect to the corporate borrowing rate component of the benchmark, the Panel erred in identifying the benchmark as “the average yields {on an EADS bond} one-month prior and six-months prior to the conclusion of the contract, in the form of a range”.<sup>34</sup> In selecting a *range* of *average* yields, instead of adopting the yield on the day of conclusion of each contract,<sup>35</sup> the Panel erred in the application of Article 1.1(b), and separately failed to make an objective assessment of the matter, under Article 11 of the DSU.
33. The Panel began by correctly identifying the legal standard under Article 1.1(b) of the *SCM Agreement*. As noted by the Appellate Body, borrowing costs “should be observed *at the time* that each particular contract was *concluded*”,<sup>36</sup> which requires that “the assessment focuses on the moment in time when the lender and borrower commit to the transaction”.<sup>37</sup>
34. The Panel’s first error arose in its application of this standard to the facts at hand. Specifically, the Panel rejected the use of actual data pertaining to the yield at the time each contract was concluded (*i.e.*, on the day of conclusion of each contract), which was “the moment in time when the lender and borrower committ{ed} to the transaction”. The Panel replaced the yield at the time each contract was concluded with a *range* based on the *average* yields one- and six-months *prior to the time* each contract was concluded. By using a range of *average* yields, the Panel’s approach risks artificially increasing or lowering the market borrowing rate, creating the danger of false positive or false negative findings of subsidisation.
35. In a second error, the Panel rejected the yield on the day of conclusion of each contract without a sufficient evidentiary basis to do so, in contravention of Article 11 of the DSU. The Panel’s justification for rejecting the yield on the day of conclusion of each contract was the possibility that the rate “*may reflect atypical fluctuations*”.<sup>38</sup> However, undisputed evidence before the Panel demonstrated that no such distortion existed.<sup>39</sup>
36. In light of the demonstrated downward trend in yields during the period leading up to the conclusion of the contracts, the Panel’s selection of a range of *average* yields *prior to* – instead of *at the time of* – conclusion of each contract, could have but one result, of which the Panel must surely have been aware: an *artificial increase* in the benchmark. These circumstances suggest a lack of objectivity and even-handedness on the part of the Panel in its identification of the corporate borrowing rate element of the benchmark.
37. Should the Appellate Body disagree with the EU’s main argument regarding these two errors, the European Union appeals the Panel’s erroneous inclusion, within its range of average yields,

<sup>32</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51.

<sup>33</sup> Panel Report, paras. 6.389, 6.430 (Table 7), 6.632 (Table 10).

<sup>34</sup> Panel Report, para. 6.389.

<sup>35</sup> Panel Report, paras. 6.389, 6.430 (Table 7), 6.632 (Table 10).

<sup>36</sup> Panel Report, para. 6.385 (emphasis added).

<sup>37</sup> Panel Report, para. 6.388 (emphasis added), referring to Appellate Body Report, *EC – Large Civil Aircraft*, paras. 706, 825-836.

<sup>38</sup> Panel Report, para. 6.389 (emphasis added).

<sup>39</sup> Panel Report, para. 6.382 (Table 6).



of the six-month average yield on the relevant EADS bond. In so doing, the Panel erred in the application of Article 1.1(b) of the *SCM Agreement*, and separately failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>40</sup>

38. *First*, the six-month average yield does not reflect the yield “*at the time* that each particular contract was *concluded*”,<sup>41</sup> and does not “focus{ } on the moment in time when the lender and borrower *commit to the transaction*”.<sup>42</sup> Indeed, the Panel itself found that the six-month average was “*less likely to reflect* expectations during the finalisation period” of each contract than the one-month average.<sup>43</sup> Including the six-month average yield within the range, therefore, amounts to error in the application of Article 1.1(b).
39. *Second*, the Panel failed to provide any explanation, let alone a reasoned and adequate explanation, for its decision to adopt a range of values that includes the six-month average, when – according to the Panel itself<sup>44</sup> – the other part of the range consisted of a more appropriate proxy (*i.e.*, the one-month average). The Panel’s reasoning is also internally inconsistent. On the one hand, the Panel criticised the use of an average yield over seven months, due to the *possibility* that such an approach *could* result in an “artificially” lower (or higher) market borrowing rate, and therefore *could* result in a “misplaced” finding of subsidisation (or of no subsidisation).<sup>45</sup> On the other hand, the Panel adopted a six-month average yield as one element of the range used for this component of the benchmark, even though the six-month average *demonstrably resulted in* an “artificial” increase of the market borrowing rate, and a heightened risk of “misplaced” findings of subsidisation. For these reasons, the Panel failed to make an objective assessment of the matter, under Article 11.
40. When the Panel’s erroneous selection of the corporate borrowing rate is corrected, based either on the EU’s main appeal argument or on its alternative appeal arguments, the Panel’s “benefit” findings become more sensitive to the correct identification of the second component of the market benchmark, *i.e.*, the risk premium. The European Union summarises its appeal of the Panel’s identification of the project risk premium component of the benchmark in the next Section.

## **5 THE PANEL ERRED IN USING THE PROJECT-SPECIFIC RISK PREMIUM FOR ASSESSING THE “BENEFIT” FROM A380 LA/MSF AS THE PROJECT RISK PREMIUM FOR A350XWB LA/MSF<sup>46</sup>**

41. In addition to identifying the wrong corporate borrowing rate component of the benchmark, the Panel also erred in identifying the second component of the benchmark for A350XWB LA/MSF, *i.e.*, the project risk premium, and, consequently, erred in finding a “benefit” from A350XWB LA/MSF.
42. The Panel’s “benefit” findings, as illustrated in Table 10 of its Report, are *highly dependent on precision and accuracy* in the benchmarking exercise, with a *small* change in the project risk premium potentially changing the results, from a finding that a particular LA/MSF loan constitutes a subsidy, to a finding that it does not. However, the project risk premium chosen by the Panel did not result from a precise and accurate benchmarking exercise that was tailored to the A350XWB project risks assumed by the LA/MSF lenders, under the terms of each of the four LA/MSF contracts.
43. Instead, for all four A350XWB LA/MSF contracts, the Panel selected a single, undifferentiated risk premium, which was developed, in the original proceedings, for a *different project*, *i.e.*, the A380, launched at a *different moment in time*, and implicating *different risks*. That is, to benchmark the four A350XWB LA/MSF contracts, the Panel applied the risk premium developed to benchmark *another* aircraft project – the A380 – and another set of LA/MSF

<sup>40</sup> Panel Report, paras. 6.389, 6.430 (Table 7), 6.632 (Table 10).

<sup>41</sup> Panel Report, para. 6.385 (emphasis added).

<sup>42</sup> Panel Report, para. 6.388 (emphasis added).

<sup>43</sup> Panel Report, para. 6.389 (emphasis added).

<sup>44</sup> Panel Report, para. 6.389.

<sup>45</sup> Panel Report, para. 6.385.

<sup>46</sup> Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 7.1(d)(xi), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvi), 7.1(d)(xvii).

contracts. The Panel did so without making any adjustments to the benchmark, *despite* its acknowledgement of differences in risks as between the A380 project and the A350XWB project, and differences in risks as between the four A350XWB LA/MSF contracts.

44. The approach taken by the compliance Panel is particularly surprising, in light of the concerns expressed by the original panel about this *very same* approach. The original panel expressed significant concern about the use of a single, *undifferentiated* project risk premium across LCA programmes receiving LA/MSF, precisely because such an approach ignores the *differentiated* risks borne by lenders for each specific LCA programme, and in each specific LA/MSF contract.<sup>47</sup> The Appellate Body echoed this concern, adding that it was “the Panel’s duty to assess, based on the evidence on record, whether the application of a *constant project risk premium* was the most appropriate approach and, to the extent that it was not, to *consider alternative approaches*”.<sup>48</sup>
45. Accordingly, the compliance Panel should have required the United States to establish the project risk premium based on the risks associated *with the A350XWB project itself*, and in light of *the terms of each specific LA/MSF contract*. Instead, the Panel acquiesced in the United States’ approach, which purported to establish the existence of a “benefit” on the basis of a single, undifferentiated project risk premium applied across two distinct LCA programmes, launched *six years* apart, and eight distinct LA/MSF contracts, concluded over a period of *10 years*.
46. The degree to which this approach required the Panel to gloss over differences between the two distinct LCA programmes and the eight distinct LA/MSF contracts is astonishing, and is particularly glaring in light, once again, of the conceit of precision reflected in the benchmarking results tabulated in the Panel’s Table 10. Even with the use of a single, undifferentiated project risk premium, to which the Panel made no adjustment whatsoever to account for differences in the risk profiles of eight LA/MSF contracts concluded at different points in time over a *ten-year* period, to finance the development of two distinct aircraft launched *six years* apart, the Panel’s Table 10 results in nothing more than small “benefits”. Those findings are sensitive to small changes in the project risk premium, and potential changes in the result, from a finding that a particular LA/MSF loan constitutes a subsidy, to a finding that it does not.
47. In reaching its “benefit” findings, the Panel committed three sets of errors.

#### **5.1 The Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme<sup>49</sup>**

48. The Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme, and therefore erred in the application of Article 1.1(b) of the *SCM Agreement*. For distinct reasons, the Panel’s approach also constitutes error under Article 11 of the DSU.
49. Beginning with the Panel’s error in the application of Article 1.1(b), the Appellate Body has explained that a benchmark loan must be identified through “a *progressive search*”, which must *begin* by assessing the commercial loan that shares “as many elements as possible in common with the investigated loan”, *before* progressing to less similar commercial loans.<sup>50</sup> The Panel failed to undertake a “*progressive search*” for and to adopt the benchmark that shared “as many elements as possible in common with” the A350XWB LA/MSF loans, and that was most closely tailored to the risks associated with the A350XWB programme.<sup>51</sup> In fact, the Panel did not engage in *any* search, progressive or otherwise, to identify the project risk premium. The Panel failed to do so despite the fact that it was well aware that there was a

<sup>47</sup> See Appellate Body Report, *EC – Large Civil Aircraft*, para. 870 (summary by the Appellate Body of the major concerns expressed by the original panel).

<sup>48</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 883 (emphasis added).

<sup>49</sup> Panel Report, paras. 6.608, 6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 7.1(c)(i), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvii).

<sup>50</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.

<sup>51</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 476, 486 (emphasis added). See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345.

more appropriate benchmark that was more closely tailored to the risks associated with the A350XWB programme – that is, A350XWB risk-sharing supplier (“RSS”) contracts. The Panel made other findings relating to RSS contracts for the A350XWB, demonstrating that it knew of their existence. Moreover, the Panel evidently thought RSS financing was an appropriate benchmark, because RSS contracts for the A380 served as the basis for the A380 project risk premium that the Panel ultimately applied.

50. The Appellate Body has further explained that, when resort to a less similar commercial loan to serve as the benchmark is necessary, *adjustments* must be made to ensure comparability with the investigated loan.<sup>52</sup> The Panel failed to make *any adjustments* to the project risk premium developed for the A380 project, despite the Panel’s own findings of differences in risk between the A380 project and the A350XWB project.
51. The Panel’s approach also constitutes error under Article 11 of the DSU. Paraphrasing the Appellate Body’s guidance from the original proceedings, the compliance Panel did *not* assess “whether the application of a{n A380-based} constant project risk premium {as suggested by the United States} was *the most appropriate approach* and, to the extent that it was not, *to consider alternative approaches*”<sup>53</sup>. Further, by inappropriately deviating from the approach taken by the original panel in this regard, the compliance Panel committed another, separate error under Article 11.

**5.2 The Panel failed to establish similarity between (i) the risks involved in the A350XWB project and the A350XWB LA/MSF contracts, and (ii) the risks involved in the A380 project and the A380 LA/MSF contracts, and therefore failed to make an objective assessment of the matter<sup>54</sup>**

52. The Panel erroneously found that the project risk premium developed for the A380 project is a suitable benchmark for the A350XWB project, on the basis that the risks posed by the A380 and the A350XWB projects were purportedly similar. However, the Panel’s finding that the risks posed by the A380 and the A350XWB projects are similar is *not* based on an objective assessment of the matter, as required under Article 11 of the DSU.
53. The Panel’s errors relate to its assessment of each of the three aspects of risk considered relevant by the Panel to assess the similarity of the risk profiles of, respectively, the A380 and A350XWB projects.

**5.2.1 Price of risk**

54. The Panel found that the United States did *not* demonstrate the similarity of the *price of risk* at the time of the provision of A380 and A350XWB LA/MSF. As a result, the Panel’s conclusion that the risks (including the price of risk) of providing financing for the A380 project are sufficiently similar to the risks of providing financing for the A350XWB project, is self-evidently based on inconsistent reasoning and lacks sufficient evidentiary support.

**5.2.2 Programme risk**

55. The Panel next addressed *programme risk*, which consists of “development” risk and “market” risk. From its finding that the A380 and A350XWB projects gave rise to *different* programme risks, the Panel erroneously concluded that the projects bore *similar* programme risks. The leap from “different” to “similar” programme risks was erroneous, because it was based on insufficient support in the evidence, and was additionally not accompanied by a reasoned and adequate explanation. More specifically, the Panel failed to reduce the differences in programme risk to common terms that are relevant under Article 1.1(b), and that allow for the comparison necessary to determine similarity. That is, the Panel failed to express the differences in programme risks between the A380 and the A350XWB projects in terms of the *impact* each project’s programme risks had *on the market price* that would be demanded by a market lender as a risk premium to bear those risks.

<sup>52</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.

<sup>53</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 883 (emphasis added).

<sup>54</sup> Panel Report, paras. 6.487, 6.492, 6.527, 6.539, 6.542, 6.579, 6.595, 6.608, 6.609, 6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 7.1(c)(i), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvii).

56. The Panel's also erred under Article 11 of the DSU in assessing the respective development risks faced by each project. *First*, the Panel failed to account for differences in the mitigation of development risks as between the A350XWB and the A380 projects. Specifically, to find similarity between the development risks of each project, the Panel was forced to ignore its own findings that, at the time the A350XWB contracts were signed, the development risk of the A350XWB project was already mitigated to some extent, whereas the development risk of the A380 was not. *Second*, the Panel made inconsistent findings in assessing the questions of "benefit" and "adverse effects" from LA/MSF for the A350XWB, suggesting a lack of even-handedness. Specifically, in its "benefit" assessment, the Panel emphasised the *novelty* of the A350XWB project (which facilitated its "benefit" findings), whereas, in its assessment of the "effects of the subsidies", the Panel emphasised the *continuity* of the A350XWB project in light of the A380 project (which facilitated its "adverse effects" findings). The Panel did not explain the reason for this disparate treatment of the evidence.

### 5.2.3 Contract risk

57. Finally, as regards contract risk, the Panel failed properly to compare the terms of the A350XWB contracts to those of the A380 contracts. For several reasons, the Panel's comparison between the A350XWB and A380 LA/MSF contracts lacks a sufficient evidentiary basis.

58. *First*, the Panel's finding of similarity in risk-reducing terms between certain A380 LA/MSF and A350XWB LA/MSF contracts is contradicted by the undisputed fact that the risk-reducing terms in certain A350XWB LA/MSF contracts were *more extensive* than in any of the A380 LA/MSF contracts. *Second*, the undisputed evidence shows that *more* A350XWB LA/MSF contracts contained certain risk-reducing terms than was the case in the A380 LA/MSF contracts. *Third*, and finally, undisputed evidence shows that risk-reducing terms in the A350XWB LA/MSF contracts are *more consequential* than risk-reducing terms in the A380 LA/MSF contracts, given that, according to the Panel, the A350XWB project would be exposed to a slightly higher development risk than the A380 project.

59. Additionally, and again with regard to contract risks, the Panel failed entirely to compare the terms of the A350XWB LA/MSF contracts to those of the RSS contracts for the A380, which were used in the original proceedings to derive the project risk premium for the A380 LA/MSF contracts. The reason is simple: the A380 RSS contracts do not form part of the record. Without a proper examination of the terms of the A380 RSS contracts, the Panel could not know whether the terms of the A350XWB LA/MSF contracts are *dissimilar* to the terms of the A380 RSS contracts.

### 5.3 The Panel erroneously adopted a single project risk premium to benchmark all four of the A350XWB LA/MSF loans<sup>55</sup>

60. The Panel erroneously found that a single project risk premium could be applied as a benchmark for each of the four distinct LA/MSF contracts for the A350XWB. This constitutes error in the application of Article 1.1(b) of the *SCM Agreement*. The Panel's own factual findings reveal that there are important differences in the terms of the four loans that affect the risk profile – and hence the market price – of each loan. However, in selecting a single, undifferentiated project risk premium, the Panel failed to consider, let alone adjust for, these differences.

61. The Panel also failed to make an objective assessment of the matter, under Article 11 of the DSU. Specifically, the Panel took inconsistent approaches to the identification of the corporate borrowing rate component of its benchmark, and the project risk premium component of that benchmark. Purportedly to avoid the risk of producing false positive or false negative subsidy findings, the differences in timing between the conclusion of the various LA/MSF contracts prompted the Panel to adopt a different corporate borrowing rate for each of the four A350XWB LA/MSF contracts.<sup>56</sup> On the other hand, as regards the project risk premium component of its benchmark, differences between the four A350XWB LA/MSF contracts did *not*

<sup>55</sup> Panel Report, paras. 6.607, 6.608, 6.609, 6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 7.1(c)(i), 7.1(d)(xiv), 7.1(d)(xv), 7.1(d)(xvii).

<sup>56</sup> Panel Report, paras. 6.385-6.388.

prompt the Panel to adopt a different risk premium for each contract, despite a similar risk of producing false subsidy findings.

## **6 THE PANEL ERRED IN ITS IDENTIFICATION OF THE APPROPRIATE PRODUCT MARKETS<sup>57</sup>**

62. The European Union appeals the Panel's finding, in paragraph 6.1411 of the Panel Report, that:

the United States has demonstrated that it would be appropriate to evaluate the merits of its claims of serious prejudice in this compliance dispute on the basis of the following three separate product markets: (a) the product market for single-aisle aircraft in which Airbus and Boeing sell the A320neo, A320ceo, 737MAX and 737ng families of LCA; (b) the product market for twin-aisle aircraft in which Airbus and Boeing sell the A330, A350XWB, 767, 777 and 787 families of LCA; and (c) the product market for VLA in which Airbus and Boeing sell the A380 and the 747.

63. This finding rests on several errors in the interpretation and application of Articles 5 and 6.3 of the *SCM Agreement*; separately, the Panel also failed to make an objective assessment of the matter, under Article 11 of the DSU.

64. *First*, the Panel erred in interpreting the term "market" in Article 6.3 to require the placement of two products in the same product market based solely on the existence of competition between those products, without regard to the nature or degree of the competitive relationship. In other words, the Panel held that, for two products to be in the same product market, it is not necessary "that they impose 'significant competitive constraints' on each other or that those products are 'closely competitive'".<sup>58</sup> This interpretation undermines the very concept of a "market" as envisaged in Article 6.3 of the *SCM Agreement*, and constitutes interpretative error. That interpretative error also undermines the Panel's identification of the relevant product markets, and the adverse effects findings based thereon.

65. As the Appellate Body explained in *US – Upland Cotton*, the ordinary meaning of the word "market" is "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices".<sup>59</sup> The Appellate Body also clarified, in the original proceedings in this dispute, that "the scope of the relevant product market in any given case will depend on the *nature and degree of competition* between the products of the complaining Member and the allegedly subsidized products of the responding Member".<sup>60</sup> It would be erroneous to group products into the same product market based solely on the *existence* of competition between them, without consideration of the "nature and degree" of the competitive relationship.

66. In the original proceedings, the Appellate Body referred to the "small but significant and non-transitory increase in prices" or "SSNIP" test to locate the proper balance, in the product market definition, between the complete absence of competitive constraints (or substitutability), on the one hand, and perfect substitutability, on the other.<sup>61</sup> This conceptual tool underscores the proposition that the mere existence of competition between two products is insufficient to group them into the same product market. Instead, two products may properly be placed in the same market where the "nature and degree of competition" between the products reveals that they exercise "*significant competitive constraints*" on one another. While circumstances may undermine the ability to apply the SSNIP test in a given case, the Appellate Body's choice of this conceptual tool supports the proposition that product markets should be defined on the basis of "significant competitive constraints", and not merely the existence of competition.

<sup>57</sup> Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 7.1(d)(xi).

<sup>58</sup> Panel Report, para. 6.1211.

<sup>59</sup> Appellate Body Report, *US – Upland Cotton*, para. 408.

<sup>60</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 1123.

<sup>61</sup> Appellate Body Report, *EC – Large Civil Aircraft*, footnote 2468, citing M. Motta, *Competition Policy: Theory and Practice*, pp. 102, 103.

67. The Panel's approach to identifying product markets based on the mere existence of competition would produce unworkable product market definitions that make identifying the effects of subsidies virtually impossible, thereby undermining the utility of the very exercise of demarcating product markets for purposes of a serious prejudice assessment. For example, under the Panel's product market standard, a product market could readily be composed of, for example, small regional aircraft, large regional aircraft, single-aisle aircraft, twin-aisle aircraft, very large aircraft, and may even include other means of transport.
68. *Second*, should the Appellate Body find that the Panel did *not* err in its interpretation of the term "market" in Article 6.3, and instead agree that two products belong in the same product market as long as competition exists between those products (regardless of the nature or degree of that competitive relationship), the Panel failed in its application of Articles 5(c) and 6.3 to the facts at hand.<sup>62</sup> Specifically, on the facts, the Panel's product market standard should have led inexorably to the conclusion that *all* LCA fall in the same *single* product market. The Panel's factual findings reveal that competition exists *across the product spectrum* covered by the US challenge, such that application of the Panel's own standard should have led it to find a single product market. In fact, in concluding its finding on product markets, the Panel emphasised that "important competitive relationships may also exist between pairings or combinations of aircraft *across* two, or even all three, of the product markets".<sup>63</sup> Thus, even assuming that the legal standard identified by the Panel was correct, *quod non*, the Panel erred in the application of that standard. This error undermines the Panel's identification of the relevant product markets, and the adverse effects findings based thereon.
69. *Third*, and finally, the Panel's failure to test its erroneous product market standard against the competitive dynamics between products that the United States alleged to fall in different product markets constitutes a failure, under Article 11 of the DSU, to make an objective assessment of the matter.<sup>64</sup> The Panel confined its analysis to an enquiry whether there existed some competitive relationship between the aircraft placed by the United States *within* each of the three product markets it alleged, without also enquiring whether there existed a competitive relationship between aircraft that the United States placed into *separate* product markets. For instance, on the sole basis that the United States alleged them to be in different product markets, the Panel neglected altogether to examine whether the A321neo exerts competitive constraints on the 767, or whether the 777-300ER or the A350XWB-1000 exert competitive constraints on the 747-8. In so doing, just as in the original proceedings, the compliance Panel took an undiscerning approach to identifying the product markets, uncritically accepting the markets proposed by the United States.
70. In these circumstances, the European Union requests the Appellate Body to reverse the Panel's product market findings. Having erred in the identification of the product markets at issue, these findings must be reversed, and with them the findings of displacement, impedance and significant lost sales that the Panel made on the basis of its erroneously identified product markets.

## 7 NON-SUBSIDIZED LIKE PRODUCT<sup>65</sup>

71. The Panel erred in the section of its report that deals with the subsidization of the like product. The Panel should have made an objective assessment of the US claim and the EU arguments under Articles 6.3(b) and 6.4, taking into account the facts and evidence submitted by the parties, and taking into account the Appellate Body's guidance that Article 6.4 provides context for the interpretation and application of Article 6.3(b). The Panel should have assessed not only the EU argument that any subsidization of the like product precludes or defeats the US claim (the original "clean hands" argument) but also the novel interpretative proposition advanced by the EU to the effect that the compliance Panel was bound to take such subsidization into account in its assessment of causation (the "causation" argument). The

<sup>62</sup> Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 7.1(d)(xi).

<sup>63</sup> Panel Report, para. 6.1416.

<sup>64</sup> Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 7.1(d)(xi).

<sup>65</sup> Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii), 7.2.

Panel was also bound to take into account the multilateral determination in DS353 that Boeing LCA are subsidized to the tune of several billion dollars.

72. Thus, the Panel erred in stating that the EU arguments were “essentially the same” as in the original proceedings, and erred in reducing the matter to two questions: whether or not there was a new matter; and whether or not there were cogent reasons. The Panel further erred in its assessment of whether or not there was a new matter, because it failed to take into account changes in the law and facts, erred in the interpretation of the term “matter” in Article 11 of the DSU, and failed to make an objective assessment. The Panel also erred in its assessment of whether or not there were cogent reasons, including by failing to make an objective assessment under Article 11 of the DSU.
73. Accordingly, the European Union requests the Appellate Body to reverse the Panel's findings that relate to or rely on its findings with respect to the subsidized like product, and complete the legal analysis with respect to the interpretation of Articles 6.3(b) and 6.4. The European Union further submits that the Appellate Body cannot complete the analysis with respect to the US claims of displacement or impedance. The European Union also asks the Appellate Body to take these matters into account when considering and reversing other aspects of the Panel's findings under Article 6, and specifically Articles 6.3(a) and 6.3(c).

**8 THE PANEL ERRED IN FINDING THAT THE LA/MSF LOANS ARE A GENUINE AND SUBSTANTIAL CAUSE OF ADVERSE EFFECTS RELATED TO AIRBUS' A320, A330, A380 AND A350XWB FAMILIES OF LCA<sup>66</sup>**

74. The European Union appeals several errors in the Panel's causation-related findings.
75. *First*, the Panel erred in finding that, despite the passage of time and events that occurred during that time, “the direct and indirect effects of the pre-A350XWB LA/MSF subsidies continue to be a genuine and substantial cause of the present-day market presence of the A320, A330 and A380 families”.<sup>67</sup> This finding is based on a “but for” approach to causation that, in the circumstances of the present dispute, was incapable of taking into account the passage of time, and events that occurred during that time, including the expiry of most of the pre-A350XWB subsidies, resulting in error in the interpretation of Article 5(c) of the *SCM Agreement*.
76. The Panel acknowledged the Appellate Body's guidance on the relevance of the passage of time and events that occurred during that time – in particular, that the effect of any subsidy must “diminish{ } and eventually come to an end”.<sup>68</sup> However, under the Panel's approach to causation, adverse effects continue to be attributable to the subsidy for as long as the subsidised product exists (as well as any subsequent products manifesting “learning”, “scope” or “financial” effects from the subsidised product), since the subsidy will continue to be the necessary “but for” cause of its market presence. This enquiry was, therefore, ill-suited and insufficient to determine whether, at present, and taking into account the passage of time and events that occurred over that time, including the expiry of the subsidies and massive non-subsidised investments by Airbus, the subsidies continue to be a “genuine and substantial” cause of adverse effects.
77. The Panel's “but for” approach to causation, coupled with its approach to the interpretation of Article 7.8, created an anomalous situation in which it is nearly impossible for a Member to bring itself into compliance with the recommendations and rulings of the DSB in relation to an actionable subsidy. Under the Panel's approach to Article 7.8, compliance cannot be achieved through withdrawal of the subsidy, though expressly recognised as an option to achieve compliance, unless accompanied by the removal of adverse effects. And under the Panel's “but for” approach, the finding from the original proceedings that the subsidies were historically a “necessary” cause of adverse effects is extended indefinitely, meaning that the causal link to alleged adverse effects does not “diminish{ } and eventually come to an end”.

<sup>66</sup> Panel Report, paras. 6.1515, 6.1527, 6.1534, 6.1774, 7.1(d)(xii)-7.1(d)(xiii).

<sup>67</sup> Panel Report, para. 6.1534.

<sup>68</sup> Panel Report, para. 6.1487, *quoting* Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1236-1238.

78. Additionally, the European Union appeals the Panel's error in the application of Article 5(c) and 7.8 of the *SCM Agreement*, by failing to examine whether Airbus' non-subsidised investments diluted the causal link between the subsidies and the alleged adverse effects related to Airbus' A320 and A330 families of LCA, such that the subsidies are no longer a "genuine and substantial" cause of present adverse effects.<sup>69</sup> Having determined that the subsidies were the historical "necessary" cause of the market presence of these aircraft, the Panel outright precluded the possibility that these investments could ever have an impact on the existence of a "genuine and substantial" *present* causal link. To the Panel, the non-subsidised post-launch investments were merely evidence that the adverse effects of the subsidies persisted, because "but for" the subsidies, the programmes into which the non-subsidised investments were made would not have existed in the first place.<sup>70</sup>
79. *Second*, the Panel may have implied that LA/MSF for the A380 resulted in "direct effects".<sup>71</sup> To the extent the Panel did make such a finding, it constitutes error under Article 11 of the DSU. The Panel defined the term "direct effects" as "the effects of any given LA/MSF loan on Airbus' ability to launch and bring to market the particular model of Airbus LCA specifically funded by that LA/MSF loan".<sup>72</sup> Having (i) expressly found that A380 LA/MSF was "not critical to {the} very existence" of the A380,<sup>73</sup> and (ii) not having found that absent A380 LA/MSF, Airbus would have delayed the launch of the A380, or that the A380 would have been any different in technology, the Panel lacked an evidentiary basis to find that LA/MSF for the A380 resulted in "direct effects".
80. *Third*, in attributing the market presence of the A350XWB to LA/MSF, the Panel erred in the application of Article 5, and under Article 11 of the DSU. Specifically, the Panel appears to have attributed the market presence of the A350XWB to "indirect effects" of LA/MSF for previous aircraft, including LA/MSF for the A380.<sup>74</sup> Moreover, certain of the Panel's statements could be read to imply that the market presence of the A350XWB is attributable to "direct effects" of LA/MSF for the A350XWB.<sup>75</sup>
81. The Panel's attribution of the market presence of the A350XWB to the "indirect effects" of the LA/MSF for the A380 constitutes error in the application of Article 5(c). The Panel's finding that A380 LA/MSF was "not critical to {the} very existence"<sup>76</sup> of the A380 precludes a finding of "direct effects" from that subsidy on the existence of the A380. In these circumstances, any "learning effects", "scope and scale effects" or "financial effects" for the A350XWB associated with the A380 would have existed even absent A380 LA/MSF, and are not attributable to those loans. Thus, as A380 LA/MSF did not result in "direct effects" for the A380, those loans were logically incapable of resulting in "indirect effects" on later LCA such as the A350XWB. Yet, the Panel appears to have erroneously included A380 LA/MSF in the aggregated group of subsidies that had "indirect effects" on the launch and market presence of the A350XWB.<sup>77</sup>
82. To the extent that the Panel attributed the market presence of the A350XWB to "direct effects" from LA/MSF for the A350XWB, the Panel's finding rests on its assertion that "*without* A350XWB LA/MSF, the Airbus company that *actually existed* could have pursued such a programme only by a narrow margin, with a high likelihood that it would, to some degree, have had to make certain compromises with respect to the pace of the programme and/or the features of the aircraft".<sup>78</sup> This single sentence – which is, incredibly, the concluding sentence in the concluding paragraph of a 182-paragraph section of the Panel Report dedicated to assessing the effects of A350XWB LA/MSF – is the sole basis on which the Panel appears to have found "direct effects" from A350XWB LA/MSF on the launch and market presence of the A350XWB.

<sup>69</sup> Panel Report, paras. 6.1527, 6.1534, 6.1774, 7.1(d)(xii)-7.1(d)(xiii).

<sup>70</sup> Panel Report, para. 6.1525.

<sup>71</sup> Panel Report, para. 6.1507.

<sup>72</sup> Panel Report, para. 6.1492.

<sup>73</sup> Panel Report, para. 6.1507 and footnote 2597.

<sup>74</sup> Panel Report, paras. 6.1747, 6.1771, 6.1773, 7.1(d)(xiii).

<sup>75</sup> Panel Report, paras. 6.1717, 7.1(d)(xiii).

<sup>76</sup> Panel Report, para. 6.1507 and footnote 2597.

<sup>77</sup> Panel Report, paras. 6.1771, 6.1773, 7.1(d)(xiii).

<sup>78</sup> Panel Report, paras. 6.1717, 7.1(d)(xiii).



83. The Panel's assertion that, without A350XWB LA/MSF, there was a "high likelihood" that Airbus would have had to "make certain compromises" to the timing and features of the aircraft, enjoys no support whatsoever in the 182-paragraph section of the Panel Report dedicated to assessing the effects of A350XWB LA/MSF. Indeed, the Panel does not cite a single piece of evidence to support such a finding; nor does it otherwise provide reasoning in support of any such finding. In fact, the Panel's speculation is *contradicted* by a number of its own factual findings, which collectively demonstrate that Airbus would not have made compromises on the timing or features of the A350XWB.<sup>79</sup> Thus, the Panel's finding of "direct effects" for the A350XWB constitutes error under Article 11 of the DSU.
84. *Fourth*, and finally, the Panel erred in its application of the requirement that there be a "genuine and substantial" causal link, under Article 5(c) and 6.3 of the *SCM Agreement* by failing to account for, in its causation analysis, the differences in the degree of competition between pairings of aircraft, and market-specific and sale-specific non-attribution factors.<sup>80</sup>
85. The Panel clarified that "it {was} *not* {the Panel's} view that the degree of competition existing within each of {the} markets will be identical between all pairings or combinations of aircraft".<sup>81</sup> The Panel also acknowledged that "where the evidence shows that the competitive relationship {between two products} is not direct and 'at most, indirect or remote', *this must be properly taken into account in the {subsequent adverse effects} analysis*".<sup>82</sup> Yet, the Panel failed to account for the differences in the degree of competition between relevant LCA in assessing the US claims of displacement, impedance and lost sales.
86. Similarly, in the context of displacement, impedance and lost sales, the Panel failed to account for the market-specific and sale-specific non-attribution factors that the European Union demonstrated as causing (or contributing to) the observed market phenomena. Having determined that, historically, the LA/MSF subsidies were the "necessary" cause of the market presence of certain Airbus aircraft, the Panel posited that any further discussion of non-attribution factors was "obviously" irrelevant.<sup>83</sup> In so doing, the Panel erred in its application of the requirement that there be a "genuine and substantial" causal link, under Article 5(c) and 6.3 of the *SCM Agreement*.

## **9 THE PANEL ERRED IN FINDING "DISPLACEMENT AND/OR IMPEDANCE" IN VARIOUS COUNTRY AND PRODUCT MARKETS<sup>84</sup>**

87. The Panel's findings of "displacement and/or impedance" rest on three sets of errors.
88. *First*, the Panel made undifferentiated findings of "displacement *and/or* impedance" with respect to each of the country and product markets at issue, without clarifying whether it had found, for a particular country and product market, *both* displacement and impedance, or instead *one or the other* of these two distinct forms of adverse effects. Articles 6.3(a) and 6.3(b) employ the words "displace" and "impede", separated by the conjunction "or", which confirms that displacement and impedance are two distinct forms of serious prejudice. Indeed, the Appellate Body has defined the term "displace" to connote a "substitution effect",<sup>85</sup> and the term "impede" to connote "obstructed" or "hindered" imports/exports.<sup>86</sup> The Appellate Body also clarified, in *US – Large Civil Aircraft*, that "'displacement' and 'impedance' are ... not interchangeable concepts".<sup>87</sup> The Panel's undifferentiated findings of "displacement and/or impedance" constitute error in the interpretation of Articles 6.3(a) and 6.3(b), and amount to treating displacement and impedance as interchangeable concepts.

<sup>79</sup> Compare Panel Report, para. 7.1717 with Panel Report, paras. 6.1542-6.1544, 6.1546, 6.1547, 6.1548, 6.1555, 6.1569, 6.1572, 6.1579.

<sup>80</sup> Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii).

<sup>81</sup> Panel Report, para. 6.1416.

<sup>82</sup> Panel Report, para. 6.1169 (emphasis added).

<sup>83</sup> Panel Report, para. 6.1814.

<sup>84</sup> Panel Report, paras. 6.1817, 7.1(d)(xiv)-7.1(d)(xv).

<sup>85</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 1160. See also Appellate Body Report, *US – Large Civil Aircraft*, para. 1071.

<sup>86</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 1161. See also Appellate Body Report, *US – Large Civil Aircraft*, paras. 1071, 1086.

<sup>87</sup> Appellate Body Report, *US – Large Civil Aircraft*, para. 1071. See also Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1160-1162.

89. *Second*, assuming, *arguendo*, that the Panel's findings of "displacement" apply to each country and product market at issue, the European Union demonstrates that all of the Panel's findings of "displacement" are in error.
90. Properly interpreted, the term "displacement" connotes a substitution effect. The Appellate Body has clarified that in deciding a claim of displacement, a panel must "assess whether this phenomenon is discernible by examining *trends* in data relating to export volumes and market shares over an appropriately representative period".<sup>88</sup> The Panel erroneously sought to distinguish the Appellate Body's guidance by postulating that it pertained solely to a "two-step" analysis of causation, and not to the type of "unitary" analysis that the Panel undertook. The Panel's application of the law to the facts confirms that the Panel interpreted Articles 6.3(a) and 6.3(b) to allow a finding of displacement without any engagement with the sales volume and market share data, and without a finding of clearly discernible and identifiable declining trends in sales volume or market shares for each of the country and product markets at issue. This constitutes error in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement*.
91. The Panel additionally erred in the application of Articles 5(c), 6.3(a) and 6.3(b) and 7.8 by effectively confining its analysis to two data points (annual data for 2012 and 2013), which, as the Appellate Body clarified in *US – Large Civil Aircraft*, "by any measure, cannot constitute a trend".<sup>89</sup>
92. The Panel further erred in the application of Articles 5(c), 6.3(a) and 6.3(b) and 7.8 in making findings of displacement entirely divorced from the data. The Panel failed to engage with the data, to determine whether it revealed a "discernible" or "clear" trend of a "substitution effect" in the markets at issue. In several instances, the Panel's findings of displacement cover markets where Boeing's market share *increased* over the period under consideration, evidencing the exact opposite of a substitution effect.
93. *Third*, assuming, *arguendo*, that the Panel's findings of "impedance" apply to each country and product market at issue, the European Union demonstrates that all of the Panel's findings of "impedance" are in error.
94. Contrary to the meaning of the term "impede", and the Appellate Body's guidance, the Panel interpreted Articles 6.3(a) and 6.3(b) to support a finding of impedance without any engagement with the sales volume and market share data, and without a finding of clearly discernible and identifiable trends in sales volume or market shares for each of the country and product markets at issue. This constitutes error in the interpretation of Articles 6.3(a) and 6.3(b).
95. Additionally, the Panel erred in the application of Articles 5(c), 6.3(a) and 6.3(b) by effectively confining its analysis to two data points (annual data for 2012 and 2013), and in making findings of impedance that are entirely divorced from the data.

## **10 CONSIDERATIONS THAT APPLY WERE THE APPELLATE BODY TO ATTEMPT TO COMPLETE THE ADVERSE EFFECTS ANALYSIS**

96. Having set out the bases on which the Appellate Body should reverse (i) the Panel's findings with respect to the withdrawal of subsidies, under Article 7.8 of the *SCM Agreement*, and (ii) the Panel's causation findings, under Articles 5 and 6.3 of the *SCM Agreement*, the European Union addresses considerations that would apply were the Appellate Body to attempt to complete the analysis regarding the United States' assertion of adverse effects.
97. The Panel employed the tools of aggregation and cumulation to undertake a *collective* assessment of the effects of LA/MSF and non-LA/MSF subsidies. Specifically, the Panel found that the aggregated group of LA/MSF subsidies is a "genuine and substantial" cause of adverse

<sup>88</sup> Appellate Body Report, *US – Large Civil Aircraft*, para. 1071.

<sup>89</sup> Appellate Body Report, *US – Large Civil Aircraft*, para. 1087.

effects, and then cumulated the effects of the non-LA/MSF subsidies, which it found to be a "genuine" cause of adverse effects.<sup>90</sup>

98. Should the Appellate Body reverse the Panel's interpretation of Article 7.8 or its causation findings, the basket of subsidies subject to the Appellate Body's analysis of the adverse effects asserted by the United States will be different from the basket considered by the Panel. In the reconstituted basket, there will no longer be a single LA/MSF subsidy or an aggregated group of LA/MSF subsidies to serve as a "genuine and substantial" cause of adverse effects. The Panel's factual findings provide no basis for a conclusion that anything short of the entire group of LA/MSF subsidies considered by the Panel is a "genuine and substantial" cause of adverse effects.
99. Without an "anchor" subsidy (or aggregated group of subsidies) that has been found to be a "genuine and substantial" cause of adverse effects, cumulation will no longer be an appropriate tool for the collective assessment of the effects of the LA/MSF and non-LA/MSF subsidies. Nor can the non-LA/MSF subsidies be aggregated with the LA/MSF subsidies, given the differences in the "design, structure and operation" of these measures. Neither aggregation nor cumulation is appropriate for the collective assessment of the effects of the non-withdrawn LA/MSF and non-LA/MSF subsidies, should the Appellate Body seek to complete the analysis.
100. While the European Union does not believe that the inapplicability of aggregation and cumulation would preclude a collective assessment of the effects of the subsidies, the European Union believes that the Appellate Body would be unable to complete the analysis to make any findings of adverse effects properly attributable to any non-withdrawn subsidies for other reasons:
  - a. The Panel erred in its identification of the relevant product markets.<sup>91</sup> In doing so, the Panel failed to undertake any examination of the competitive dynamic between products that the United States alleged to be in different product markets. The Panel's failure in this regard renders the Panel Report devoid of factual findings that would allow the Appellate Body to complete the analysis by identifying the appropriate product markets. Nor are there undisputed facts of record to enable the identification of appropriate product markets by the Appellate Body.
  - b. The Panel erroneously failed to consider whether the United States brought its claim in respect of a "non-subsidized like product", within the meaning of Article 6.4 of the *SCM Agreement*.<sup>92</sup> There are no Panel findings or undisputed facts of record that would allow the Appellate Body to identify which, if any, of the Boeing aircraft in respect of which the United States alleges adverse effects is "non-subsidized".
  - c. In its causation analysis, the Panel failed to account for the passage of time and events that occurred during that time.<sup>93</sup> There are no Panel findings or undisputed facts of record that would allow the Appellate Body to account for these factors in completing the analysis.
  - d. The nature of the adverse effects analysis advocated by the United States, and accepted by the Panel, resulted in an absence, from the record, of evidence necessary to assess properly the causal link between a *reconstituted basket* of subsidies and any adverse effects. The United States did not advance any argument or evidence that could have assisted the Panel, or that could assist the Appellate Body, in assessing whether a *reconstituted basket* of subsidies, short of even one of the subsidies that the United States included in its basket, would still be a "genuine and substantial" cause of any adverse effects.
  - e. The re-constitution of the basket of subsidies at issue would require properly accounting for the effects of those subsidies that are withdrawn, and therefore excluded from the

<sup>90</sup> Panel Report, paras. 6.1838, 6.1846, 6.1847, 7.1(d)(xvii).

<sup>91</sup> Section 6, above.

<sup>92</sup> Section 7, above.

<sup>93</sup> Section 8, above.

basket of subsidies at issue, *as non-attribution factors*. There are no Panel findings or undisputed facts of record that would allow such an exercise by the Appellate Body.

- f. With respect to claims of displacement and impedance, the Panel failed to identify, or even look for, clear and discernible trends that are capable of evidencing displacement or impedance.<sup>94</sup> While the Panel tabulated the volume and market share data pertaining to two annual data points in its Report, two data points are insufficient to constitute a trend. As for data for the years preceding 2011, there exist no Panel findings or undisputed facts of record that speak to either the existence of trends, or the data based on which such trends are to be ascertained.
- g. In assessing displacement, impedance and lost sales, the Panel failed to account for the closeness of competition and substitutability between products that it placed in the same product market, based solely on the *existence* of competition, without regard to the nature or degree of that competitive relationship.<sup>95</sup> There are no Panel findings or undisputed facts of record that would allow such an exercise by the Appellate Body.
- h. In the context of displacement, impedance and lost sales, the Panel erroneously failed to examine the market-specific and sale-specific non-attribution factors that the European Union demonstrated caused or contributed to causing the observed market phenomena.<sup>96</sup> There are no Panel findings or undisputed facts of record that would allow the Appellate Body to account for these factors in an attempt to complete the analysis.

## 11 CONCLUSION

101. For the reasons set out above, the European Union requests that the Appellate Body reverse or modify the findings and conclusions addressed in this Appellant's Submission.

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<sup>94</sup> Section 9 , above.

<sup>95</sup> Section 9 , above.

<sup>96</sup> Section 9 , above.

**ANNEX B-2****EXECUTIVE SUMMARY OF THE UNITED STATES' OTHER APPELLANT'S SUBMISSION**

1. If the Appellate Body were to reverse the Panel and find that the passive expiry of LA/MSF subsidies could satisfy the obligation under Article 7.8 in at least some cases, then the United States conditionally appeals the Panel's separate findings that the *ex ante* lives of the pre-A380 LA/MSF subsidies passively "expired" prior to December 1, 2011.
2. In line with the Appellate Body's guidance in *EC – Large Civil Aircraft*, the period in which a benefit exists should be based on an *ex ante* assessment of factors such as the nature, amount, and projected use of the challenged subsidy. If at the time of grant, the evidence indicates that the grantor expects the benefit to flow over a period whose length is defined to be contingent on some other variable event, then logically the life of the subsidy should be measured accordingly.
3. Evidently, the Panel assumed that the *ex ante* life of the subsidies must be expressed as a fixed number. It erred by focusing on the wrong expectations. It sought to retrospectively project an expected life to each aircraft program. The Panel failed to recognize that, when Airbus accepted a contingent liability and the governments agreed to make payments contingent, they expected the benefit of below-market repayments to last for a variable period defined by external factors.
4. In addition, the United States raises an appeal regarding a legal interpretive question with respect to Article 3.1(b). The United States demonstrated, and the EU did not contest, that French, German, Spanish, and UK LA/MSF is each conditioned on the production of goods in the grantor's territory to be used by Airbus in the manufacture of the A350 XWB. The Panel found that subsidies conditioned on the domestic production of inputs to be used in the manufacture of the A350 XWB are not prohibited under Article 3.1(b). The Panel determined that the contingencies in the A350 XWB LA/MSF contracts "ensure that the member States are subsidizing a domestic producer. Article 3.1(b), therefore, does not discipline them."
5. Under a competing interpretation also under consideration in a separate dispute, where a subsidy is contingent on domestic production of a good that is an input into a manufacturing process, and substituting an imported version result in the loss of an entitlement to the subsidy, the subsidy is contingent on the use of domestic over imported goods. To be clear, the United States considers this is not the best interpretation. However, the United States has an interest in ensuring that the same legal approach is applied in both proceedings.
6. Moreover, should the Appellate Body determine that this competing interpretation is indeed correct, there is no question that the Panel erred in not finding a violation of Article 3.1(b). Further, applying the competing interpretation to the undisputed facts and findings of this proceeding, the Appellate Body would be able to complete the analysis and conclude that all four instances of A350 XWB LA/MSF breach Article 3.1(b).
7. The competing interpretation – in contradiction to the interpretation adopted by the Panel – is as follows: if (i) a subsidy is granted to a domestic producer conditional on the domestic siting of production activities to produce a domestic input in an industrial process, and (ii) a substitution of imported goods for these inputs would result in the producer's loss of the entitlement to the subsidy, then the subsidy is contingent on the use of domestic over imported goods, and therefore is inconsistent with Article 3.1(b). In addition, the competing interpretation of Article 3.1(b) assumes that any good completed in a domestic territory is "domestic" for purposes of Article 3.1(b), without the need to examine the significance of the operations undertaken in the domestic territory, the proportion of foreign content contained in the good, rules of origin, or any other considerations.
8. If the goods that Airbus must use to manufacture the A350 XWB are required to be produced in the EU, then the goods are "domestic goods" and therefore Airbus is required to use domestic over imported goods to receive the subsidy.

9. The Panel, however, found that this logic reflected an improper interpretation of Article 3.1(b). Critical to the Panel's finding was the need to interpret Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement consistently. The Panel found that a review of both provisions "suggests that the act of granting subsidies to firms so long as they engage in domestic production activities, without more, should not be equated to making those subsidies contingent on the use of domestic over imported goods and hence prohibited."
10. This raises a threshold interpretive question that the Appellate Body has yet to consider. Where a subsidy is contingent not only on the production of a finished good, but is also contingent on the production, in the grantor's territory, of intermediate goods for use as inputs (or goods used to produce other goods, *i.e.*, instrumentalities of production) – which are then presumed to be "domestic" – in manufacturing the downstream good, is the subsidy in breach of Article 3.1(b)? Arguably, the subsidy could be viewed as contingent on the use of a domestic good because using an imported good in place of the domestic good would result in a loss of the entitlement to the subsidy.
11. If the Appellate Body considers that this "competing interpretation" of Article 3.1(b) – which is also under consideration in *US – Conditional Tax Incentives for Large Civil Aircraft* – is correct, then the Panel erred.
12. Each instance of LA/MSF for the A350 XWB is conditioned on the domestic siting of production activities for goods to be used by Airbus in the manufacture of the A350 XWB, and a counterfactual substitution of imported versions of these goods would result in Airbus's loss of the entitlement to the LA/MSF. The United States reviews below the undisputed facts from each of the LA/MSF contracts containing the contingencies and other relevant evidence.
13. France granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the French A350XWB *Protocole* that necessitate the use of domestic goods to manufacture the A350 XWB. If the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.
14. Germany granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.
15. Spain granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the Spanish A350XWB *Convenio* that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.
16. The UK granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the UK A350XWB Repayable Investment Agreement that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts contained in the UK A350XWB Repayable Investment Agreement establish that the subsidy is contingent on the use of domestic over imported.

**ANNEX B-3****EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION****I. INTRODUCTION AND EXECUTIVE SUMMARY**

1. Before launching into a point-by-point rebuttal of the errors in the European Union's ("EU") appeal of the Panel's findings, it is useful to recall how, after 12 years of WTO dispute settlement, we have arrived at this point. The United States requested consultations in 2004 regarding the EU's massive subsidization of its large civil aircraft industry. In 2010, the original panel issued its report finding that the EU violated its obligations under Articles 5 and 6.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") not to use subsidies so as to cause adverse effects to U.S. interests. The Appellate Body upheld the Panel's ultimate finding in 2011.<sup>1</sup> The Dispute Settlement Body ("DSB") adopted its recommendations and rulings in this dispute on June 1, 2011.<sup>2</sup>
2. The key measures, and the ones most central to the original panel and the Appellate Body findings, were approximately USD 15 *billion* in subsidized lending in the form of Launch Aid "LA/MSF" provided by the French, German, Spanish, and U.K. governments to each and every Airbus large civil aircraft ("LCA") development program: the A300/310, A320, A330/340, A340-500/600, and the A380.<sup>3</sup> The adverse effects caused by these and other subsidies were even greater – more than 300 lost aircraft orders worth tens of billions of dollars and displaced exports to seven major country markets in the 2001-2006 period alone.<sup>4</sup> The subsidies found by the original panel and the Appellate Body were unprecedented, both in terms of their immensity and their harmful market effects. As the original panel found:

Given the amount of funding transferred to Airbus under the individual LA/MSF contracts, and in the light of the formidable risks associated with the LCA business and the learning curve effects that are necessary to successfully participate in this sector, we have found that it would not have been possible for Airbus to have launched all of these models, as originally designed and at the times it did, without LA/MSF. Even assuming this were a possibility, and that Airbus had actually been able to launch these aircraft relying on only market financing, the increase in the level of debt Airbus would have accumulated over the years would have been massive.<sup>5</sup>

In confirming the original panel's findings, the Appellate Body concluded that "{w}ithout 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."<sup>6</sup>

3. The original panel recommended that "the Member granting each subsidy found to have resulted in such adverse effects 'take appropriate steps to remove the adverse effects or . . . withdraw the subsidy.'"<sup>7</sup> In line with Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the Appellate Body recommended further that "the DSB request the European Union to bring its measures, found in this Report,

<sup>1</sup> *EC – Large Civil Aircraft (AB)*, para. 1416.

<sup>2</sup> Minutes of Meeting Held in the Centre William Rappard on 1 June 2011, WT/DSB/M/297, para. 28 (11 July 2011).

<sup>3</sup> See, e.g., *EC – Large Civil Aircraft (Panel)*, para. 7.525 (finding "there is no doubt that all of the challenged LA/MSF contracts may be characterised as unsecured loans granted to Airbus on back-loaded and success-dependent repayment terms, at below-market interest rates, for the purpose of developing various new models of LCA"); US First Written Submission, para. 353.

<sup>4</sup> The original panel found, and the Appellate Body confirmed, that Boeing lost sales involving 342 firm orders. *EC – Large Civil Aircraft (Panel)*, paras. 7.1803-7.1832; *EC – Large Civil Aircraft (AB)*, para. 1414(p). The total value of these lost orders amounts to many billions of dollars by any reasonable calculation. The Appellate Body found displacement in the following markets: in the single-aisle product market in Australia and in the single-aisle and twin-aisle product markets in the European Communities, China, and Korea. *EC – Large Civil Aircraft (AB)*, para. 1414(p).

<sup>5</sup> *EC – Large Civil Aircraft (Panel)*, para. 7.1948.

<sup>6</sup> *EC – Large Civil Aircraft (AB)*, para. 1264.

<sup>7</sup> *EC – Large Civil Aircraft (Panel)*, para. 8.7 (ellipsis in original).

and in the Panel Report as modified by this Report, to be inconsistent with the *SCM Agreement*, into conformity with its obligations under that Agreement.”<sup>8</sup> The DSB adopted the reports of the panel and the Appellate Body.<sup>9</sup> Under Article 7.9 of the *SCM Agreement*, if the EU did not comply with the DSB’s recommendations within six months, the United States could seek DSB authorization to take countermeasures.

4. The responses of the EU and Airbus to the Appellate Body’s report signaled from the outset that they did not take this report, or the DSB’s request for compliance, seriously. Where the Appellate Body found that without the subsidies, Airbus would most likely not exist at all,<sup>10</sup> the EU asserted that “the economic impact of these support measures in the LCA market has been found to be very limited.”<sup>11</sup> For its part, Airbus saw “no significant consequences for Airbus or the European support system from today’s decision.”<sup>12</sup> In fact, Airbus has interpreted the rulings as an affirmation of past subsidized funding practices – a “big victory for Europe.”<sup>13</sup> Airbus CEO Tom Enders responded to the 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.<sup>14</sup>

5. Consistent with these statements, the EU and its member States took *no* affirmative steps to withdraw the LA/MSF subsidies. This is not litigation rhetoric on the part of the United States. The Panel made a factual finding that only two of the 36 steps the EU said it took to comply with the DSB recommendations and rulings were related to ongoing subsidization, and that these related exclusively to the Bremen airport subsidy and the Mühlenberger Loch subsidy. With respect to the other subsidies, including *all* of the LA/MSF, “the remaining 34 alleged compliance ‘steps’ are not ‘actions’ relating to the ongoing (or even past) subsidization of Airbus LCA . . . .”<sup>15</sup>
6. The EU did not appeal the Panel’s finding that only two of the 36 alleged steps – and none of the LA/MSF-related steps – were affirmative compliance actions. Thus, for purposes of this proceeding, it is a matter of uncontested fact that the EU took no actions to withdraw the LA/MSF subsidies or remove their adverse effects. The EU’s appeal is therefore not about alleged failures by the compliance Panel to recognize the efficacy of its nonexistent compliance with respect to LA/MSF subsidies, but about whether the Panel was correct in declining to accept a series of mere assertions and arguments as a substitute for affirmative steps that would have brought the EU’s measures into compliance.
7. To make matters even worse, the four Airbus member States actually granted *another* round of LA/MSF to Airbus, this time to launch its latest new model, the A350 XWB, amounting to an additional USD 4.8 billion,<sup>16</sup> for a total of approximately USD 20 billion in LA/MSF principal.
8. After literally thousands of pages of written submissions, 292 questions to the parties, and nearly seven years of WTO dispute settlement, the EU did nothing to withdraw the massive

<sup>8</sup> *EC – Large Civil Aircraft (AB)*, para. 1418.

<sup>9</sup> Minutes of Meeting Held in the Centre William Rappard on 1 June 2011, WT/DSB/M/297, para. 28 (11 July 2011).

<sup>10</sup> *EC – Large Civil Aircraft (Panel)*, para. 7.1984.

<sup>11</sup> *WTO Airbus Case – Appellate Body overturns key findings of the Panel in favour of the EU*, EU Press Release (May 18, 2011) (Exhibit USA-3).

<sup>12</sup> *WTO final ruling: Decisive victory for Europe*, Airbus Press Release (May 18, 2011) (Exhibit USA-4).

<sup>13</sup> *WTO final ruling: Decisive victory for Europe*, Airbus Press Release (May 18, 2011) (Exhibit USA-4).

<sup>14</sup> *WTO final ruling: Decisive victory for Europe*, EADS Statement (May 18, 2011) (Exhibit USA-5) (emphasis added). Similarly, Ranier Ohler, Airbus’s 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.” *WTO final ruling: Decisive victory for Europe*, Airbus Press Release (May 18, 2011) (Exhibit USA-4).

<sup>15</sup> *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*, WT/DS316/RW, circulated 22 September 2016, para. 6.42 (“Compliance Panel Report”).

<sup>16</sup> *Airbus set to gain aid for A350*, Kevin Done and Peggy Hollinger, *Financial Times* (June 15, 2009) (Exhibit USA-7).



amounts of LA/MSF that were the subject of the original U.S. consultation and panel requests. The United States considered that this course of inaction on the earlier LA/MSF and grant of new LA/MSF only served to bring the EU farther out of compliance with Articles 5 and 6.3 of the SCM Agreement. It accordingly commenced this proceeding under Article 21.5 of the DSU. And thus, unsurprisingly, after further thousands of pages of written submissions, 166 additional questions to the parties, and a searching evaluation, the compliance Panel came to the conclusion that the EU had not complied with the recommendations and rulings of the DSB. It found further that, as with past Airbus aircraft, the USD 4 billion in LA/MSF for the A350 XWB conferred a subsidy and caused adverse effects to U.S. interests, including lost sales of 50 airplanes worth billions of dollars.<sup>17</sup> Overall, the compliance Panel found 375 lost orders worth tens of billions of dollars,<sup>18</sup> plus displacement and/or impedance in eight different markets, including in the EU, China, India, and Australia.<sup>19</sup>

9. That brings us to the present day. The EU has appealed the compliance Panel's findings, asserting that the Panel misinterpreted and misapplied the relevant provisions of the SCM Agreement and DSU, and that it failed to conduct an objective assessment of the matter for purposes of Article 11 of the DSU. None of its claims has any merit.
10. **Section II** addresses the standard applied to evaluate whether a party has complied with a recommendation that it come into compliance with its obligation under Article 5 of the SCM Agreement not to cause adverse effects through the use of subsidies. The Panel noted that Article 5 defines WTO inconsistency in terms of the effects of subsidies, and that the Appellate Body found that "a past subsidy that no longer exists may be found to cause or have caused adverse effects that continue to be present during the reference period."<sup>20</sup> It accordingly found that the alleged passive expiry of certain LA/MSF subsidies did not relieve the EU of its obligation to come into compliance with Article 5 with respect to the effects of those subsidies. Article 7.8 of the SCM Agreement describes the remedy for inconsistencies with Article 5 as a choice between withdrawing the subsidy *or* removing its adverse effects. The EU argued before the Panel, and now argues on appeal, that the alleged passive expiry of actionable subsidies achieves their "withdrawal," and argues that it accordingly has no obligation with respect to their current adverse effects. This argument fails to account for the Appellate Body's finding in the original proceeding, based on reasoning that applies to the present time, that the EU's LA/MSF subsidies cause adverse effects with respect to all of Boeing's existing aircraft. Thus, the EU's interpretation of Article 7.8 would allow it to continue to act inconsistently with Article 5. This interpretation contradicts the proper interpretation of Article 7.8, in accordance with customary rules of interpretation applicable to the covered agreements, and improperly downplays the massive ongoing lost sales, displacement, and impedance that LA/MSF has been causing for at least a decade, as a "temporary" market effect. They provide no basis to modify or reverse the Panel's findings.
11. **Section III** addresses the EU's argument that the Panel erred in finding that there is no disagreement between the parties as to whether the EU is currently in compliance with its WTO obligations with respect to the Mühlenberger Loch and Bremen runway subsidies and, therefore, no need to make a finding on that issue. The United States has been clear throughout the proceeding that it made no claim of noncompliance with respect to the Bremen runway subsidy, and since its second written submission that it is not pursuing any claim on the Mühlenberger Loch subsidy. The EU has taken the position that any such claim would be unfounded. There is accordingly no disagreement between the parties regarding whether the EU's measures have taken to comply are consistent with the SCM Agreement's relevant disciplines, and no need for a finding by the Panel.
12. **Sections IV and V** respond to the EU's claims of error regarding the Panel's selection of a commercial benchmark for LA/MSF for the A350 XWB. Section IV pertains to the corporate borrowing rate element of the benchmark in particular. The EU argues that the Panel erred by

<sup>17</sup> Compliance Panel Report, para. 6.1781. List prices for the relevant aircraft as of 2011 are provided at paragraph 6.1295 of the compliance Panel's report. The total value of these lost orders runs well into the billions of dollars under any reasonable assumption about discounts from list price.

<sup>18</sup> Compliance Panel Report, para. 6.1781. List prices for the relevant aircraft are provided in paragraphs 6.1239, 6.1295, and 6.1373 of the Compliance Panel Report. The total value of these lost orders runs well into the tens of billions of dollars under any reasonable assumption about discounts from list price.

<sup>19</sup> Compliance Panel Report, paras. 6.1817, 7.1(d)(xv).

<sup>20</sup> Compliance Panel Report, para. 6.820, quoting *EC – Large Civil Aircraft (AB)*, para. 712.

using the one-month and six-month average yield of an EADS bond to establish the corporate borrowing rate. According to the EU, the Panel was required to limit itself to the 24-hour period coinciding with the finalization of the terms and conditions of LA/MSF in selecting data for the commercial benchmark. However, no provision of the covered agreements imposes such a limitation on panels – and in fact, the Appellate Body’s guidance suggests that panels should construct commercial benchmarks on the basis of any relevant information that is available at the time of finalization of the terms and conditions of a subsidy, including information that pre-dates finalization.<sup>21</sup> This broader approach is especially suitable on the facts of this case, because the terms and conditions of LA/MSF for the A350 XWB were negotiated through [BCI]<sup>22</sup> that extended over a period of approximately [BCI] or more.<sup>23</sup>

13. **Section V** pertains to the Panel’s selection of the project-specific risk premium (“PSRP”) element of the commercial benchmark for LA/MSF for the A350 XWB. The EU argues that the Panel should have undertaken a “progressive search” for a commercial benchmark loan instrument, which supposedly would have led it to devise a PSRP based on Airbus contracts with its risk-sharing suppliers (“RSS”) for the A350 XWB project, rather than the PSRP for LA/MSF for the A380 from the original dispute, which is what the Panel actually did. However, the Panel was under no requirement to perform the “progressive search” that the EU advocates. On the contrary, the “progressive search” requirement applies to domestic authorities conducting countervailing duty investigations, whereas in WTO disputes under Parts II and III of the SCM Agreement the burden is on the parties – not the Panel – to establish the appropriate commercial benchmark. The United States met this burden by establishing the suitability of the A380 PSRP for LA/MSF for the A350 XWB, and the EU failed to put forward any alternative. Indeed, the EU did not even submit the RSS contracts that it now argues, belatedly, are so essential to the Panel’s benchmark analysis. In any event, a “progressive search” would likely have led the Panel to select the PSRP for the A380, just as it actually did, because LA/MSF for the A380 has terms closer to those of LA/MSF for the A350 XWB than RSS contracts for the A350 XWB, as far as available evidence indicates.
14. **Section VI** addresses the EU challenge to the Panel’s finding that adverse effects should be assessed based on three product markets: single-aisle, twin-aisle, and very large aircraft (“VLA”). The EU alleges that the Panel “replaced the Appellate Body’s ‘significant competitive constraints’ standard” with a standard based on the mere existence of a competitive relationship, regardless of the nature or degree of that relationship.<sup>24</sup> Both EU premises are wrong.
15. As the Panel found, the Appellate Body did not endorse a “significant competitive constraints standard” when it used that phrase a single time in a footnote, and “there is no textual basis for interpreting the word ‘market’ that appears in Article 6.3(a), (b), and (c) of the SCM Agreement in a way that would mean that ‘serious prejudice’ could only ever be found to exist in the context of product markets where there is vigorous (‘significant’ or ‘close’) competition.”<sup>25</sup>
16. Moreover, the Panel did not apply a standard that treated products as competing in the same market where any competitive relationship existed. This is obvious in the Panel’s acknowledgment that, while the three product markets it found captures most competitive interactions, some competition exists between aircraft in different markets. Rather, the Panel’s 90-page analysis followed the Appellate Body’s guidance strictly and carefully assessed extensive argumentation and voluminous evidence, including multiple expert reports and HSBI concerning marketing strategies and sales campaigns. Therefore, the Panel correctly interpreted and applied Article 6.3 and made an objective assessment of the matter as required by DSU Article 11. Accordingly, the EU’s allegations of error are meritless, as demonstrated further in Section VI.

<sup>21</sup> *EC – Large Civil Aircraft (AB)*, para. 836.

<sup>22</sup> Compliance Panel Report, para. 6.644 (quoting Tom Williams, Executive Vice President, Programmes, Airbus SAS, May 17, 2013 (Exhibit EU-354(BCI)), para. 3).

<sup>23</sup> See Compliance Panel Report, paras. 6.55 and 6.645.

<sup>24</sup> EU Appellant Submission, paras. 602, 624.

<sup>25</sup> Compliance Panel Report, para. 6.1211.

17. **Section VII** addresses the EU argument that the finding in *US – Large Civil Aircraft* that Boeing large civil aircraft were subsidized creates a “new” factual matter. On that basis, the EU contends that “cogent reasons,” centered on what the EU purports is intervening Appellate Body guidance, require a review of the original panel’s finding that Article 6.4 of the SCM Agreement does not preclude a finding of displacement under Article 6.3(b) when the exports of the complaining Member have themselves been subsidized. The extent to which Boeing aircraft were subsidized played no role in the original panel’s legal analysis and finding. The original panel’s finding was not appealed, so the Appellate Body did not address this issue of law during the original proceeding. The DSB adopted the original panel report as modified by the Appellate Body. The EU is not entitled in this compliance proceeding to have the Appellate Body consider, pursuant to DSU Article 17.13, whether the legal finding of the original panel and recommendations and rulings of the DSB in respect of Article 6.4 of the SCM Agreement should be upheld, modified, or reversed. Therefore, the Panel did not err when it found that the EU argument fails to justify modifying or reversing the original panel’s finding that Article 6.4 does not describe the exclusive basis on which a claim of displacement or impedance under Article 6.3(b) may be demonstrated.
18. **Section VIII** addresses the EU’s challenge to the Panel’s analysis of causation. According to the EU, the Panel’s incorrect approach to causation left it blind to the effects of the the passage of time and Airbus’s post-launch investments in the A320 and A330 programs, which the EU believes severed any causal link between LA/MSF and the presence in the market of the A320, A330, and A380. These allegations are demonstrably untrue. The Panel explicitly adhered to the counterfactual approach preferred by the Appellate Body. Using the original findings as its starting point, the Panel exhaustively examined the evidence and argumentation concerning the counterfactual situation in the post-implementation period. In doing so, it carefully evaluated the EU’s arguments about the passage of time and intervening causes. It found them wanting because they were factually and legally unsupported, not because of an incorrect analytical approach.
19. The Panel followed the Appellate Body’s guidance that the effects of LA/MSF subsidies will at some point come to an end, while recognizing that the determination of when that happens will depend on the evidence, and not expectations as to the “life” of the subsidy. Accordingly, the Panel found that the indirect effects of the earliest rounds of LA/MSF did not have a genuine connection to the launch and market presence of the A350 XWB. This disproves the EU’s contention that the Panel’s analytical approach was incapable of accounting for the way that subsidy effects dissipate over time. Although the EU repeatedly asserted that the passage of time had deprived past LA/MSF subsidies of any current effect, these were mere assertions, without any evidentiary or logical basis.
20. A similar flaw undermined the EU’s critique of the Panel’s analysis of Airbus’s post-launch investments. The Panel recognized their significance but found that they did not render insubstantial the effects of LA/MSF subsidies, particularly given that the post-launch investments were dependent on those subsidy effects for their existence.
21. Overall, the EU did not provide the Panel with any basis to find that, absent LA/MSF subsidies, Airbus would have taken the sales and market share that it did during the post-implementation period.<sup>26</sup> The EU also contends that the Panel lacked a basis for finding any effects caused by LA/MSF to the A380 and A350 XWB, but these arguments are based on mischaracterizations of the findings in the original proceeding and this proceeding. In sum, the Panel found that LA/MSF and other subsidies continue to cause serious prejudice because that is what the evidence showed when considered in light of the findings in the original proceeding. Airbus’s sponsor governments have provided massive subsidies designed to create production programs lasting for decades and enable the financial, technological, and industrial bases for subsequent production programs that are also directly subsidized at a tremendous scale. This pattern continued during the pendency of the original proceedings and this compliance proceeding with the provision of still more LA/MSF subsidies to the A350 XWB.<sup>27</sup> The Panel did not err in recognizing this longstanding pattern of subsidization and its adverse effects on U.S. interests.

<sup>26</sup> See Compliance Panel Report, para. 6.1526 (“the European Union does not argue in this proceeding that a non-subsidized Airbus would have come into being some time after the end of 2006.”).

<sup>27</sup> See Compliance Panel Report, para. 6.145.

22. **Section IX** addresses the EU's critique of the Panel's displacement and/or impedance findings, which reflect an incorrect interpretation of the SCM Agreement and are at odds with the facts found by the Panel. The Panel correctly examined the U.S. claims of displacement and impedance through a unitary counterfactual analysis.<sup>28</sup> Considered together with its findings regarding the absence of Airbus LCA from the market in the plausible counterfactual scenarios, the Panel's assessment of the data demonstrated that the challenged LA/MSF and other subsidies prevented the U.S. LCA industry from realizing improved market positions, either by substituting subsidized Airbus LCA for exports of U.S. LCA (displacement) or by obstructing U.S. LCA export volumes and market share from being higher or materializing at all (impedance). Therefore, the EU has identified no valid reason to reverse or modify the Panel's findings.
23. **Section X** addresses the EU argument that, if the Appellate Body reverses or modifies certain findings by the Panel, there is no basis to complete the Panel's analysis. As Sections II through IX show, the EU has provided no basis to do this. Nonetheless, assuming *arguendo* that the Appellate Body were to reverse one or more of the Panel's findings, the EU errs in arguing that there are insufficient findings of fact and uncontested facts for the Appellate Body to complete the adverse effects analysis. The most glaring error is the contention that partial reversal of the Panel's findings regarding the EU's failure to withdraw LA/MSF subsidies would "re-constitute the basket of subsidies" that are subject to the Appellate Body's adverse effects assessment,<sup>29</sup> and transform the effects of any withdrawn subsidies into *non-attribution factors* that preclude findings of adverse effects with respect to unwithdrawn subsidies.<sup>30</sup> In effect, this argument asks the Appellate Body to find that the effects of WTO-inconsistent subsidies have themselves brought the EU fully into compliance.

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<sup>28</sup> EC – Large Civil Aircraft (AB), para. 1163.

<sup>29</sup> EU Appellant Submission, para. 1074.

<sup>30</sup> EU Appellant Submission, para. 1097.

**ANNEX B-4****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION****1 INTRODUCTION**

1. In its Other Appellant's Submission, the United States raises what it characterises as "two limited issues" with the Report of the Panel in *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)* ("compliance Panel" or "Panel").<sup>1</sup> The European Union requests that the Appellate Body reject the United States' appeal regarding both issues.

**2 THE APPELLATE BODY SHOULD REJECT THE US APPEAL THAT THE PANEL ERRONEOUSLY FOUND THAT THE LIVES OF PRE-A380 LA/MSF SUBSIDIES HAVE EXPIRED**

2. The United States appeals certain elements of the Panel's findings that the lives of the pre-A380 LA/MSF subsidies expired before or shortly after the end of the implementation period on 1 December 2011.<sup>2</sup> The US appeal is contingent on the Appellate Body reversing the Panel's interpretation of Article 7.8 of the *SCM Agreement*.<sup>3</sup>
3. According to the United States, the Panel erred in the interpretation and application of Article 1.1(b) of the *SCM Agreement* with respect to some (but not all) of the pre-A380 LA/MSF subsidies for which it had found that their *ex ante* expected lives had expired.<sup>4</sup> Although its position is not entirely clear, for the United States, this error seems to arise because *actual* repayment of principal and interest had not been effected, and/or the *actual* marketing life of the corresponding aircraft had not expired, by the end of the implementation period.
4. The Appellate Body should dismiss the US appeal. Despite paying lip-service to the firmly-established principle that the life of a subsidy must be determined on an *ex ante* basis at the time of the grant of a subsidy, the United States' appeal is in fact premised on the firmly-rejected principle that the life of a subsidy depends on how the subsidy *actually* performs following grant. At its most basic level, the Panel correctly interpreted and applied Article 1.1(b) when finding that the lives of all of the pre-A380 LA/MSF subsidies at issue in this appeal have expired, based on *ex ante* considerations regarding the expected life of each subsidy.
5. *First*, the Panel correctly interpreted Article 1.1(b). Based on the text of Article 1.1(b) and in light of its context (Article 14 of the *SCM Agreement*), the Appellate Body in the original

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<sup>1</sup> US Other Appellant's Submission, para. 1.

<sup>2</sup> The United States does not appeal the Panel's findings that the seven capital contribution subsidies had expired before the end of the implementation period, or that two regional development grants had expired in 2014. Nor does the United States appeal the Panel's findings that the life of the A300- and A310-related LA/MSF subsidies have come to an end.

<sup>3</sup> US Other Appellant's Submission, Section II.

<sup>4</sup> US Other Appellant's Submission, paras. 17-18.

proceedings found that the “benefit” analysis involves an “*ex ante*” analysis that does not depend on how the particular financial contribution actually performed after it was granted”.<sup>5</sup>

6. Consistent with the Appellate Body’s guidance, the compliance Panel found that it was required to determine the life of each LA/MSF subsidies on the basis of an *ex ante* assessment.<sup>6</sup> The United States does not advance any argument suggesting why this interpretation of Article 1.1(b) is erroneous. To the contrary, the United States seems to agree with the Panel – and with the European Union – that Article 1.1(b), properly interpreted, requires determination of the life of a subsidy on the basis of an “*ex ante* assessment”.<sup>7</sup> Both Participants thus appear to agree that the Panel properly interpreted Article 1.1(b).<sup>8</sup> There is, therefore, no interpretative appeal.
7. *Second*, the United States’ argument that the Panel erred in the application of Article 1.1(b) should also be dismissed. Despite its agreement that Article 1.1(b) calls for an *ex ante* assessment, the United States erroneously applies an *ex post* assessment, focusing on how the particular subsidy *actually performed after it was granted*.
8. The United States submits that the *ex ante* expectations of the grantor and recipient must be determined *ex post*, in light of either (i) the *actual* loan life; and/or (ii) the *actual* marketing life for the aircraft programme. Specifically, in its view, the Panel failed to recognise that “the grantor and recipient would expect the benefit to continue *as long as payments were due*”,<sup>9</sup> which the United States asserts is a “variable event” that depends on actual repayment and that is not susceptible to determination *ex ante*.<sup>10</sup> In other instances, the United States asserts that “the parties expected the benefit of LA/MSF to last *throughout the life of the subsidized aircraft programs*”.<sup>11</sup>
9. The US argument that the life of a LA/MSF subsidy must be determined in light of how the life of the subsidy or the marketing life of the funded aircraft plays out *ex post*, is contradicted by the United States’ acknowledgement that *ex ante* expectations must form the basis for the determination of the life of a subsidy.
10. Contrary to the Appellate Body’s guidance, each of the two approaches counselled by the United States by definition “depend on how the particular subsidy *actually* performed after it was granted”.<sup>12</sup> Absent the proverbial crystal ball, the *actual* marketing life and *actual* loan life are not time periods that can be determined *ex ante*. They are time periods that, by definition, can be determined only *ex post*, once the *actual* marketing life of the LCA programme has come to an end, or *actual* final repayment have occurred, often decades after the grant of the subsidy.

<sup>5</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 706 (emphasis in original). Appellate Body Report, *EC – Large Civil Aircraft*, para. 1241 (emphasis added). See also, *Id.*, paras. 707 (“a benefit analysis under Article 1.1(b) is forward looking and focuses on future projections”; “*ex ante* analysis of benefit”; “the period of time over which the subsidy is expected to be used for future production) (emphasis in original, underlining added), 709 (“{a}t 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”; a panel “must consider the trajectory of the subsidy as it was projected to materialize over a certain period at the time of grant”; “a panel must take into account that a subsidy provided accrues and diminishes over time, and will have a finite life”; “intervening events’ that ... may affect the projected value of the subsidy as determined under the *ex ante* analysis”) (emphasis in original, underlining added), 710 (“the depreciation of the subsidy that was projected *ex ante*”), 1236 (“a panel must take into account in its *ex ante* analysis how a subsidy is expected to materialize over time”; “{a} panel is also required to consider whether the life of a subsidy has ended, for example, by reason of the amortization of the subsidy over the relevant period or because the subsidy was removed from the recipient”) (emphasis in original).

<sup>6</sup> Panel Report, paras. 6.876-6.879, 6.890.

<sup>7</sup> US Other Appellant’s Submission, paras. 9, 10.

<sup>8</sup> US Other Appellant’s Submission, para. 9.

<sup>9</sup> US Other Appellant’s Submission, para. 12 (emphasis added).

<sup>10</sup> US Other Appellant’s Submission, paras. 10, 14.

<sup>11</sup> US Other Appellant’s Submission, para. 15. See also, *Id.*, paras. 8 (footnote 15) (“continue to be marketed”), 18 (“LA/MSF for the A320, A330-200, and A330/A340 Basic had not expired as of December 1, 2011, given that the corresponding large civil aircraft production programs were still active at that time (and still are)”), 17 (footnote 35) (“continue to be marketed”).

<sup>12</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 706 (emphasis added). See also, *Id.*, para. 1241.

11. The European Union notes that, in one instance, namely as regards LA/MSF for the A340-500/600, the United States takes a different approach. Because, in its view, this programme “failed prior to full repayment”, the United States submits that the life of the subsidies does not end with the actual marketing life of the A340-500/600 programme, but extends well into the future, namely until the life of any so-called “debt forgiveness” comes to an end.<sup>13</sup> For at least two separate reasons, the US argument must be rejected. *First*, and yet again, the US argument effectively rejects an *ex ante* assessment of the life of a subsidy, in favour of an approach based on an *ex post* assessment of the performance of a subsidy subsequent to grant. *Second*, the United States mischaracterises the nature of the LA/MSF subsidy as involving a second subsidy, in the form of “debt forgiveness”, in situations where contingently repayable loans remain un-repaid because the contingency (*i.e.*, delivery of an aircraft) for repayment is not triggered. The US approach results in “double-counting” of the benefit conferred on the recipient.<sup>14</sup>
12. Further, and also regarding LA/MSF for the A340-500/600, the United States argues that the Panel’s findings were in any event “irrelevant” to assess EU compliance, because these subsidies expired *after* the end of the implementation period, albeit well before the Panel made its findings and issued its report.<sup>15</sup> The United States errs.
13. It is well established that a panel, including a compliance panel, must assess the WTO-consistency of a measure before it based on the entirety of the evidence.<sup>16</sup> In the present case, in light of the *ex ante* nature of the analysis, all the evidence on the expiry of any pre-A380 LA/MSF subsidy even *predates*, by *more than a decade*, the Panel’s establishment. There is, therefore, no obstacle to the assessment of that evidence. In any event, even where evidence *post-dates* the panel’s establishment, such developments must be taken into account to assess compliance, because not doing so would frustrate the objective of the DSU to provide for the prompt settlement of disputes.
14. Finally, the European Union notes that the United States does not ask the Appellate Body to reverse the Panel’s findings that the lives of LA/MSF subsidies for aircraft programmes that were no longer marketed on 1 December 2011, namely the A300 and A310 models, have expired.<sup>17</sup> This means that, even were the Appellate Body to agree with the United States’ conditional appeal, it would still be compelled to reverse most of the Panel’s adverse effects-related findings.
15. Indeed, having reversed the Panel’s erroneous interpretation of Article 7.8 of the *SCM Agreement* (which is the condition imposed by the United States for the Appellate Body to consider this aspect of its other appeal), the Appellate Body would have to find that these adverse effects-related findings are erroneous, since the adverse effects found by the Panel are fuelled by subsidies that the United States, itself, accepts have expired, and are therefore withdrawn, within the meaning of Article 7.8.

### **3 THE APPELLATE BODY SHOULD REJECT THE UNITED STATES’ ASSERTIONS RELATING TO THE PANEL’S FINDINGS UNDER ARTICLE 3.1(B) OF THE SCM AGREEMENT**

16. The United States also makes a number of assertions regarding the compliance Panel’s findings that the United States failed to demonstrate that French, German, Spanish and UK

<sup>13</sup> US Other Appellant’s Submission, para. 17 (footnote 35). See also, *Id.*, paras. 10 (footnote 17), 12.

<sup>14</sup> *First*, at the time the loan is concluded, because the expected return on the loan falls below what a commercial lender would have demanded to assume the risk that deliveries would fall short of the number required to effect full repayment of principal and interest; and, *second*, where the number of aircraft deliveries actually made falls short of projections made by the parties at the time the loan agreements were concluded (in which case, the United States considers that an additional subsidy to the recipient in the form of the “forgiveness” of debt is conferred).

<sup>15</sup> US Other Appellant’s Submission, footnotes 14 and 35.

<sup>16</sup> See, e.g., Panel Report, para. 6.1443; Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18, 10.105 and 10.248; Panel Report, *EC – Large Civil Aircraft*, paras. 7.1694 and 7.1714; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 121-130.

<sup>17</sup> US Other Appellant’s Submission, paras. 17-18.

LA/MSF for the A350XWB constitute prohibited subsidies under Article 3.1(b) of the *SCM Agreement*.<sup>18</sup>

17. The United States does not, however, allege error with respect to those findings.<sup>19</sup> Instead, the United States limits its submissions by reference to what it calls a “competing interpretation” of Article 3.1(b) that it alleges was under consideration by the panel in *US – Conditional Tax Incentives for Large Civil Aircraft* (“DS487”). In particular, the United States requests the Appellate Body to determine the correctness of that alleged “competing interpretation” of Article 3.1(b).<sup>20</sup> Conditional on the Appellate Body agreeing with this alleged “competing interpretation”, the United States requests the Appellate Body to reverse the findings of the Panel in the present dispute and to complete the legal analysis.<sup>21</sup>
18. As a threshold matter, the European Union finds it necessary to clarify that the entirety of the United States’ “appeal” is premised on an erroneous assumption built into its choice of vocabulary. The United States alleges that “competing interpretations” of Article 3.1(b) are at issue in the present dispute and in DS487. In making that allegation, the United States assumes that *different outcomes* in two different disputes, under the same treaty provision, necessarily indicate the existence of “competing interpretations” of the provision. This assumption is erroneous – different outcomes may well be the result of differences in the application of the same interpretation to *two different fact patterns* at issue in the two disputes.
19. This is precisely what has happened in the present dispute and in DS487. The *interpretation* of Article 3.1(b) advanced by the European Union in both cases and accepted by both Panels is the same: a subsidy contingent upon the production of a particular good does not, without more, breach Article 3.1(b), irrespective of whether or not that good later becomes an input, as a matter of fact; but a subsidy contingent upon the production of an LCA and, in addition, a requirement that a particular input (the wing) be manufactured domestically, does breach the provision. The difference in outcome between the two cases is driven not by different interpretations, but rather by different *fact patterns* (and associated arguments).
20. On three separate grounds, the Appellate Body should reject the US “appeal”. *First*, for several reasons, the assertions upon which the United States seeks the Appellate Body’s review of the Panel’s findings do not properly constitute an “appeal” within the meaning of the DSU. To begin, at its most basic level, the Appellate Body should reject the US “appeal” as invalid, because the United States has failed to allege any error relating to “issues of law covered in the panel report” or “legal interpretations developed by the panel”, within the meaning of Article 17.6 of the DSU. In fact, the United States agrees with the interpretation adopted by the Panel.<sup>22</sup> Without an allegation of error, there is no “appeal” for the Appellate Body to adjudicate.
21. Moreover, considerations relating to DS487 cannot serve as a basis for appellate review, in these proceedings, of interpretative findings allegedly under consideration by a *different* panel in a *different* dispute, and cannot serve as a surrogate for a valid allegation of error by the Panel in this dispute. Deciding otherwise would prejudice the procedural rights of (i) the European Union (by forcing the European Union to comment on the correctness of an interpretative position allegedly relevant to DS487, *without the assistance of the record in that case*); and (ii) third parties in DS487 that are not third participants in the present appeal.
22. Further, the United States’ professed “interest in ensuring that the same legal approach is applied” in two disputes cannot serve as the basis for the Appellate Body to undertake appellate review in these proceedings of interpretative issues allegedly arising in DS487. Rather than pursuing a pre-emptive appeal, the appropriate course of action for the United States would be to advocate, in its appeal of the panel report in DS487, the interpretive

<sup>18</sup> US Other Appellant’s Submission, Section III.

<sup>19</sup> US Other Appellant’s Submission, para. 22.

<sup>20</sup> US Other Appellant’s Submission, paras. 21-23.

<sup>21</sup> US Other Appellant’s Submission, para. 23, Section III.B.

<sup>22</sup> US Notice of Other Appeal, para. 1; US Other Appellant’s Submission, para. 22.



approach to Article 3.1(b) adopted by the Panel in the present dispute, with which the United States explicitly “agrees”.<sup>23</sup>

23. *Second*, Rule 21(2)(b)(i) of the Working Procedures for Appellate Review requires that an appellant’s submission set out “a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof”.<sup>24</sup> The United States’ “appeal” fails to meet this requirement.
24. *Third*, and finally, the US “appeal” must be rejected because it is based on a case that is entirely different from the case advanced by the United States before the Panel. The United States seeks to litigate before the Appellate Body a fundamentally different case from the one it litigated before the Panel. Appellate proceedings are not the appropriate venue for a party to make fundamental changes to the case it has brought, especially where, as here, doing so requires reliance on factual assertions that are *not the subject of panel findings*, and that *do not constitute undisputed facts* of record.
25. In these appellate proceedings, the United States has abandoned its argument, made to the Panel, that the requirement to produce components domestically, coupled with the *fact* that these components are used in downstream assembly of the aircraft, demonstrates that the LA/MSF lenders “effectively require” the subsidy recipient to use domestic over imported goods. Instead, the United States now seeks to identify an express *de jure* requirement to “use” domestic over imported goods in certain provisions of the A350XWB LA/MSF contracts. In advancing this new case, the United States refers on appeal to specific clauses in each of the A350XWB LA/MSF contracts, and asserts that those clauses have a particular meaning. Yet, the meaning of these provisions in municipal law was never raised before the Panel or debated between the Parties, much less the subject of findings of fact by the Panel or agreement between the Parties.
26. In these circumstances, the US “appeal” cannot be sustained. In light of its authority under Article 17.6 of the DSU, the Appellate Body is “manifestly preclude{d}” from following the course requested by the United States, because doing so would require it “to solicit, receive and review new facts that were not before the Panel, and were not considered by it”.<sup>25</sup>
27. Finally, even were the Appellate Body to consider it appropriate to address the United States’ “appeal”, it should nonetheless reject the United States’ assertions on the merits.
28. *First*, the Panel did not err in its interpretation of Article 3.1(b) of the *SCM Agreement*. The ordinary meaning of the terms used in Article 3.1(b), in their context and in the light of the object and purpose of the treaty, clarify that a subsidy contingent solely on domestic production of goods is not prohibited. Accordingly, the Panel did not err in finding that “the act of granting subsidies to firms so long as they engage in domestic production activities, without more, should not be equated to making those subsidies contingent on the use of domestic over imported goods and hence prohibited”.<sup>26</sup>
29. *Second*, even were the Appellate Body to find that the Panel erred in its interpretation of Article 3.1(b), *quod non*, it would be unable to complete the legal analysis on the terms requested by the United States. In previous disputes, the Appellate Body has proceeded to complete the legal analysis only where factual findings by the panel or undisputed facts of record have allowed it to do so.<sup>27</sup> The US request for completion is, however, built on factual assertions concerning the meaning of provisions in the A350XWB LA/MSF agreements that are neither supported by factual findings by the Panel or undisputed facts of record. These factual

<sup>23</sup> US Notice of Other Appeal, para. 1; US Other Appellant’s Submission, para. 22.

<sup>24</sup> Rule 23(3) makes this requirement applicable to an other appellant’s submission.

<sup>25</sup> Paraphrasing Appellate Body Report, *Canada – Aircraft*, para. 211; Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 240-242.

<sup>26</sup> Panel Report, para. 6.785; US Other Appellant’s Submission, para. 27.

<sup>27</sup> See, e.g., Appellate Body Report, *Australia – Salmon*, paras. 117-118; Appellate Body Report, *US – Section 211*, para. 352; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 528; Appellate Body Report, *US – Large Civil Aircraft*, para. 649; Appellate Body Report, *Colombia – Textiles*, para. 5.30.

assertions *were never made by the United States before the Panel*, and are, instead, *newly made in this appeal*. The European Union never had an *opportunity* to dispute the factual assertions now raised by the United States; the European Union cannot be said to have left undisputed factual assertions that were not put to it by the United States. Accordingly, there are no findings of fact or undisputed facts of record that would allow the Appellate Body to complete the legal analysis in the manner requested by the United States.

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**ANNEX C**

## ARGUMENTS OF THE THIRD PARTICIPANTS

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## **ANNEX C-1**

### **EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION**

1. In relation to Article 7.8 of the SCM Agreement, Brazil agrees with the Panel's rejection of the European Union's argument that the end of the life of a subsidy *ipso facto* extinguishes a Member's compliance obligation under Article 7.8 of the SCM Agreement with respect to such subsidies.
2. Brazil recalls that the original panel's findings under Articles 6.3(b) and 6.4 were not appealed. Accordingly, the Appellate Body should not revisit this interpretation in the compliance proceeding.
3. Brazil also considers that the Panel conducted a correct analysis in interpreting "market" under Article 6.3 of the SCM Agreement. There is no support in WTO jurisprudence for the EU's attempt to characterize "market" as requiring a complaining Member to undertake a quantitative assessment of the degree of competition to determine if it is "significant".
4. Finally, the Panel properly interpreted Article 3.1(b) of the SCM Agreement when it found that subsidies conditioned on the domestic production of inputs to be used in the manufacture of a subsidized product are not prohibited. For Brazil, this provision does not prevent a Member from conditioning the provision of a subsidy on the performance of production steps in the country granting the subsidy.

## ANNEX C-2

### EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

#### I. EXECUTIVE SUMMARY<sup>1</sup>

1. Canada submits that the Appellate Body should uphold the Panel's interpretation of the disciplines on prohibited import-substitution subsidies under Article 3.1(b) of the SCM Agreement but reverse the Panel's interpretation of the compliance obligation under Article 7.8.

#### II. THE PANEL CORRECTLY INTERPRETED ARTICLE 3.1(B) OF THE SCM AGREEMENT

2. The Appellate Body should uphold the Panel's interpretation that Article 3.1(b) of the SCM Agreement does not prohibit subsidies merely because they require the recipient to engage in the domestic production of aircraft-related goods.
3. Article 3.1(b) does not discipline domestic production subsidies, regardless of whether the activities mandated by those subsidies result in the production of input or finished goods. GATT Article III:8(b), the Appellate Body's findings in *Canada – Autos* and the panel's findings in *US – Tax Incentives* support this view.
4. Furthermore, Article 3.1(b) does not discipline domestic production subsidies even if the activities mandated by those subsidies result in the production of specialized input goods that, because of their specialized nature, are likely to only be used in the production of finished goods by the subsidy recipient. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body found that a subsidy would not be *de facto* export contingent unless it provided the recipient with an incentive to export in a way that did not simply reflect the conditions of supply and demand in the market. Likewise, a subsidy is not a prohibited import-substitution subsidy unless it is geared to change the behaviour of a producer when choosing between domestic and imported inputs in a way that does not reflect market conditions.

#### III. THE PANEL ERRED IN ITS INTERPRETATION OF ARTICLE 7.8 OF THE SCM AGREEMENT

##### A. The Correct Interpretation of Article 7.8 of the SCM Agreement

5. Article 7.8 of the SCM Agreement sets out how a Member is to comply with its obligations when it is found to have provided a subsidy that caused adverse effects to the interests of another Member.
6. With respect to the ordinary meaning of the terms of Article 7.8, the phrase "granting or maintaining" indicates that the existence of a subsidy during the implementation period is a precondition for the compliance obligation under Article 7.8. As expired or withdrawn subsidies no longer exist, those subsidies entail no compliance obligation under Article 7.8.
7. Moreover, the phrase "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy" indicates that the compliance options are disjunctive in nature. Therefore, compliance under Article 7.8 can be achieved by withdrawing the WTO-inconsistent subsidy.
8. The following elements of the context of Article 7.8 support this understanding.
9. First, the text of Article 7.9 of the SCM Agreement confirms the compliance options under Article 7.8 are disjunctive.

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<sup>1</sup> Canada's Third-Participant Submission consists of 13,558 words. This Executive Summary consists of 1,347 words.

10. Second, the difference in wording between Article 5 and Article 7.8 underscores an asymmetry between the circumstances in which a finding of an actionable subsidy may be made and the resulting compliance obligation. This difference must be afforded meaning. Where causing adverse effects is a constituent element for an actionable subsidy, removing those adverse effects is not the only way to comply with Article 7.8. Members can also comply by withdrawing the subsidy.
11. Third, the compliance obligation for prohibited subsidies and the restrictions on the application of countervailing duties confirm that withdrawal of the subsidy constitutes compliance under Article 7.8. The Appellate Body has indicated that a Member can comply with Article 4.7 of the SCM Agreement by removing a prohibited subsidy. Moreover, if removing the subsidy negates the right to apply countervailing duties, it must also negate the right to apply countermeasures – the remedy for actionable subsidies.
12. Fourth, the general rule of compliance under the DSU is the removal of the WTO-inconsistent measure. Where no subsidy exists, as a result of expiry or withdrawal, no compliance obligation remains.
13. With respect to the object and purpose of the SCM Agreement, it is subsidies that the SCM Agreement disciplines, not the adverse effects that linger after the subsidies no longer exist. Limiting the application of the compliance obligation under Article 7.8 to existing subsidies is consistent with this object and purpose. It is also consistent with the general objective of the WTO agreements to foster security and predictability in the international trading system.

#### **B. Errors in the Panel's Interpretation of Article 7.8**

14. The Panel's interpretation of Article 7.8 under which Members are required to remove the adverse effects of subsidies that have ceased to exist is deeply flawed.
15. With respect to the text of Article 7.8, the Panel essentially ignored the "granting or maintaining" requirement in Article 7.8. Where a subsidy has expired or been withdrawn, a Member can no longer be said to be "granting or maintaining" the subsidy. Under these circumstances, the Member is no longer subject to the compliance obligation under Article 7.8.
16. The Panel also deprived the phrase "withdraw the subsidy" of its independent meaning. If Article 7.8 was intended *under all circumstances* to require the removal of the adverse effects caused by the subsidy there would be no reason to refer to the possibility of withdrawing the subsidy.
17. With respect to the context of Article 7.8, the Panel improperly relied on Article 5 of the SCM Agreement and various provisions of the DSU to conclude that "withdraw[ing] the subsidy" under Article 7.8 also requires removing adverse effects. The Panel fails to recognize that conformity with the compliance obligation under the DSU means removal of the WTO-inconsistent measure, and that conformity with the compliance obligation for an actionable subsidy means carrying out one of the two options contemplated under Article 7.8 of the SCM Agreement.
18. The Panel also ignored that withdrawing a subsidy is a complete compliance remedy under the SCM Agreement. Imposing more exacting remedial disciplines on actionable subsidies as compared to prohibited subsidies would be incongruent with the overall structure of the SCM Agreement.
19. Last, with respect to the object and purpose of the SCM Agreement, the Panel failed to take into account that the withdrawal of a subsidy constitutes compliance. Moreover, the Panel's interpretation creates significant uncertainty as to the responsibility of Members for subsidies that no longer exist.

**C. The Correct Approach to a Serious Prejudice Analysis in Compliance Proceedings**

20. The Panel improperly took into account the effects of expired subsidies when it determined that subsidies were causing serious prejudice and that the European Union had therefore failed to remove the adverse effects of the subsidies.
21. The determination of whether a Member that has not withdrawn certain subsidies has nevertheless complied with Article 7.8 through the removal of the adverse effects of these subsidies should be based on a counterfactual analysis.
22. A counterfactual analysis involves a comparison between the current market situation and a counterfactual situation without subsidies. The Panel's analysis relied on a counterfactual situation where the challenged LA/MSF would not have been granted.
23. This is the wrong counterfactual situation. The correct counterfactual situation is rather one where only the subsidies present at the end of the RPT do not exist. Indeed, there must be consistency between the two options available to a responding Member under Article 7.8. A Member must either withdraw the subsidies or remove their adverse effects by the end of the RPT. If a given subsidy has been withdrawn or has expired, a Member cannot be asked to also remove its adverse effects.
24. It is only through a comparison of the correct counterfactual situation with the current market situation that the Panel could have properly assessed whether the subsidies that remained at the end of the RPT caused serious prejudice and, relatedly, whether the European Union had removed the adverse effects of these subsidies. The Panel failed to do so.

**ANNEX C-3****EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION**

1. China's Third Party Submission discusses the following three issues on appeal that China considers to be of systemic importance.
2. **First**, China submits that under the correct interpretation of Article 7.8 of *the SCM Agreement* in accordance with customary rules of interpretation of public international law, subsidies that cease to exist prior to the beginning of the implementation period are outside the scope of an implementing Member's obligation under Article 7.8.
3. In China's view, the explicit treaty language in Article 7.8 denotes that, if a subsidy is no longer in existence, there is nothing to be withdrawn and that the Member concerned has fulfilled its obligation under Article 7.8. Nothing in Article 7.8 suggests that the implementing action to withdraw the subsidy must remove any "lingering effects" of past subsidies that are no longer in existence. The Panel's interpretation would deprive the independent meaning of the option under Article 7.8 to "withdraw the subsidy" and render the phrase redundant.
4. China's interpretation finds contextual support in Article 4.7 of *the SCM Agreement*, which requires the Member providing prohibited subsidies to "withdraw the subsidy without delay". To interpret the same compliance option in Article 7.8 in a more onerous way for the less harmful form of subsidization would be against logic. China also considers that Part V of *the SCM Agreement* provides relevant context for interpreting Article 7.8. In particular, Article 19.4 provides that countervailing duties may not be imposed when a subsidy is no longer bestowed on the subject merchandise, regardless of any lingering effects. The limits of remedies available under Part V should also inform the correct interpretation of Article 7.8 in Part III of *the SCM Agreement*.
5. In addition, by first reviewing various provisions of *the DSU* instead of Article 7.8 of *the SCM Agreement*, the Panel has allowed the general provisions of *the DSU* to subsume the "special or additional rules" of Article 7.8. In China's view, the important textual difference between Article 4.7 and Article 7.8 also suggests that Article 7.8 does not necessarily require the removal of any adverse effects, and can be read in a way that maintains its independent meaning while at the same time being in harmony with *the DSU*.
6. Finally, neither in the WTO cases cited by the Panel nor anywhere under the covered agreements does China see the basis to single out actionable subsidies as the only type of measures subject to an implementing obligation requiring the removal of trade effects caused by such measures after they are withdrawn, an obligation more onerous than those generally applicable vis-à-vis all measures under Articles 3.7 and 22.8 of *the DSU*.
7. **Second**, China submits that under the correct interpretation and application of Articles 5(c) and 6.3 of *the SCM Agreement*, the Panel's "but for" approach is not a proper analysis to determine whether the LA/MSF subsidies continue to cause serious prejudice under the present circumstances at issue.
8. For the assessment of causation, although an inquiry seeking to identify what would have occurred "but for" the subsidies is one possible approach suggested by the Appellate Body, the Panel did not examine or consider whether the factual scenario before it is one of the circumstances where the "but for" analysis will show that the subsidy is both a necessary cause of the market phenomenon and a substantial cause. Without such an examination or consideration, the Panel improperly equated the "but for" analysis with the proper legal standard for finding causation under Articles 5(c) and 6.3 of *the SCM Agreement*, which requires for a "genuine and substantial" cause.
9. The Panel's approach effectively leads to a long-lasting causal chain between subsidies and adverse effects in the LCA markets that is inconsistent with the Appellate Body's observation that the effects of any subsidy can be expected to diminish and eventually come to an end



with the passage of time. Furthermore, the Panel seems to have inappropriately allocated the burden of proof between the Parties in its application of Articles 5(c) and 6.3 of the *SCM Agreement* by requiring the European Union to prove that no “genuine and substantial” cause existed in the post-implementation period.

10. **Third**, while China is sceptical if any general rule or threshold could be pre-defined for the purpose of determining the scope of product markets, China agrees with the European Union to the extent that panels should not find two products in the same product market solely on the basis that they exercise any competitive constraints on one another. Instead, a panel must examine the nature and degree of competition so as to determine the scope of the relevant product market on a case-by-case basis. Furthermore, the “nature and degree” of competition found to exist in a given product market should inform the assessment of serious prejudice claims.

#### **ANNEX C-4**

##### **EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION**

1. Japan wishes to comment on how the effects of such subsidies including R&D subsidies as the Appellate Body in the original proceeding referred to as subsidies that (i) had the "product effect" on subject products or (ii) "complemented and supplemented" the "product effect" must be assessed.
  2. The European Union appealed by arguing that the removal of a subsidy through removal of the "financial contribution" will comply with Article 7.8.
  3. However, Japan believes that when "benefits" are removed, the subsidy is thereby withdrawn and consequently the adverse effects are removed. The definition of a subsidy under Article 1.1 and other Appellate Body findings concerning the "life" of subsidy suggest, when the recipient is no longer able to lower the price of products by using the benefit, a Member would then not be further asked to remove anything else. The function of R&D subsidies contemplates that its benefit will normally be consumed, as the recipient sells the resulting 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.
  4. The Appellate Body must carefully consider whether LA/MSF subsidies that had "expired" through the "amortization of benefit", as found by the Compliance Panel, may, as a matter of law, be considered tantamount to the removal of the benefit in connection with the projected period or sales amount properly anticipated by the granting Member when the subsidy was granted.
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**ANNEX D**

## PROCEDURAL RULINGS

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**ANNEX D-1****PROCEDURAL RULING OF 25 OCTOBER 2016**

1. On 13 October 2016, the Chair of the Appellate Body received a joint letter from the European Union and the United States requesting the Appellate Body Division hearing this appeal to adopt additional procedures to protect business confidential information (BCI) and highly sensitive business information (HSBI) in these appellate proceedings. In their letter, the European Union and the United States suggested that the additional procedures adopted by the Appellate Body in the appeal in *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)* (WT/DS353), with certain modifications, should form the basis for any procedural ruling on confidentiality in these appellate proceedings. They argued, *inter alia*, that disclosure of certain sensitive information on the record of the Panel proceedings would be severely prejudicial to the large civil aircraft manufacturers concerned, and possibly to their customers and suppliers.

2. On behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the third participants to comment in writing on the joint request by the European Union and the United States by 12 noon on Wednesday, 19 October 2016. He also informed the participants and the third participants that pending a final decision on the joint request by the participants, the Division had decided to provide interim additional protection to all BCI and HSBI transmitted to the Appellate Body in this dispute on the terms set out below:

- (a) Only Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may have access to the BCI and HSBI contained in the Panel record pending a final decision on the joint request. Appellate Body Members and Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed to any person other than those identified in the preceding sentence.
- (b) BCI shall be stored in locked cabinets when not in use. When in use by Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal all necessary precautions will be taken to protect the confidentiality of the BCI.
- (c) All HSBI shall be stored in a combination safe in a designated secure location in the offices of the Appellate Body Secretariat. Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may view HSBI only in the designated secure location in the offices of the Appellate Body Secretariat. HSBI shall not be removed from this location.
- (d) Pending a decision on the joint request for the protection of BCI/HSBI in these proceedings, neither BCI nor HSBI shall be transmitted electronically, whether by e-mail, facsimile, or otherwise.

3. On Wednesday, 19 October 2016, written comments were received from Australia, Brazil, Canada, and China. Australia and Brazil did not object to the joint request made by the participants, but requested that the Appellate Body ensure that the rights of third participants are taken into account in setting the working schedule for this appeal. China stated that it had no comments regarding the request for additional protection of BCI/HSBI. For its part, Canada stated that, while it agrees that additional procedures for the protection of confidential information are warranted by the specific facts of this case, it considers that the procedures proposed by the participants may not provide third participants with effective access to the BCI they need to adequately prepare and present their positions. In particular, Canada submitted that the procedures set out an overly onerous method for capital-based Third Participant BCI-Approved Persons to obtain access to BCI, and that in previous proceedings where similar procedures were adopted, Canadian Geneva-based BCI-Approved Persons were required to spend many hours transcribing BCI in the designated reading room and then to spend an equivalent amount of time discussing this BCI with capital-based BCI-Approved Persons. Canada therefore proposed that any additional procedures specify that, in addition to the "designated reading room" on the premises of the WTO, there be a "designated reading room" located in an embassy or other diplomatic mission of a participant in the capital of each of the third participants, where capital-based Third Participant BCI-Approved Persons can obtain effective access to BCI. According to Canada, this would ensure that third participants' rights to meaningfully participate in these appellate proceedings are fully protected.

4. On Friday, 21 October 2016, the Division invited the participants and other third participants to comment, if they so wished, on Canada's request regarding access to BCI by 5:00 PM on Monday, 24 October 2016. Comments were received from Australia, Brazil, the European Union, and the United States.

5. Australia supported Canada's proposal. Australia stated that it recognises the importance of protecting sensitive information, while facilitating the meaningful participation of third participants in these appellate proceedings. Brazil indicated that it had no comments regarding Canada's request.

6. The European Union submitted that Canada's request calls for an additional 12 designated reading rooms in the missions of the European Union and the United States in the capitals of each third participant, in addition to the designated reading room at the WTO. According to the European Union, this would impose significant additional burdens on the participants. In particular, the European Union submitted that the adjustment proposed by Canada would require that, for each of the six third participants, the participants would have to: (i) identify an appropriate contact person in each mission; (ii) designate those appropriate persons as BCI approved; (iii) communicate with them and explain what is envisaged; (iv) obtain appropriate and necessary internal authorisations; (v) identify and set aside appropriate secure locations; (vi) identify and set aside appropriate designated reading rooms; (vii) securely transmit to them all the relevant documents; (viii) arrange for copies of the necessary documents to be made; (ix) make arrangements for the appropriate monitoring and surveillance of the designated reading room during use; (x) provide appropriate training to the staff involved; and (xi) make appropriate additional arrangements for the return or destruction of the materials involved at the appropriate time. The European Union indicated that it was therefore opposed to Canada's request. It agreed, however, that third participants could be provided with some additional time to prepare their third participants' submissions. According to the European Union, this would meet the concern raised by Canada, while avoiding the imposition of unnecessary and substantial costs on the participants.

7. The United States argued, as did the European Union, that Canada's proposal would require a total of 12 new BCI reading rooms – one for each of the two participants in six different cities. According to the United States, this would require identifying officials at each site to maintain control over documents containing BCI and to monitor third participant officials during the review of the documents, and providing training to those individuals regarding their responsibilities under the BCI/HSBI procedures. The United States considered that this would impose a significant burden on the participants, with little benefit to the third participants. In particular, the United States argued that Canada's proposal would not have a meaningful effect on the burden placed on third parties because even under the proposal, a capital-based official would still need to review the BCI and take notes as to the relevant information in the reading room, just as under the original rules. Moreover, to the extent that an official considered BCI to be relevant to a third participant's submission, that official would still need to discuss the annotated information with colleagues to prepare and finalize the third participant submission, just as under the original rules. The United States noted that the only difference is that under the adjustment proposed by Canada, capital-based officials would review the BCI instead of Geneva-based officials. In so doing, according to the United States, Canada's proposal appeared to merely shift the burden of reviewing BCI from Geneva-based officials to capital-based officials, rather than reducing the burden in a meaningful way. For these reasons, the United States opposed Canada's request and asked the Appellate Body to adopt the same procedures governing third participants' access to BCI as it did in the original appellate proceedings.

8. The Division has made the following ruling having considered the arguments made by the European Union and the United States in support of their request, and the comments received from the participants and third participants:

9. As an initial matter, we recall that the Appellate Body adopted additional procedures to protect the confidentiality of sensitive information in the appellate proceedings in *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)* as well as in the original proceedings in this dispute. In this appeal, the participants suggested that the additional procedures adopted by the Appellate Body in *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)* should form the basis for any procedural ruling on confidentiality, and identified certain modifications that could be made to those additional procedures. We further note

that the participants and the third participants involved in this case are the same as those involved in *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)*. In the Procedural Ruling adopted in *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body explained the considerations relevant to a decision on whether to provide additional protection to certain sensitive information<sup>1</sup>. We believe that those considerations are also relevant to our evaluation of the request made by the European Union and the United States in this appeal and we briefly recall them before addressing the specific points raised in the joint request and in the comments of the third participants.

10. The confidentiality requirements set out in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and in the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "Rules of Conduct")<sup>2</sup> are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect the confidentiality of that information. The adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures in a manner that ensures that the proceedings are conducted with fairness and in an orderly manner. To the extent that the arrangements elaborate on the confidentiality requirements of the DSU, the adoption of such arrangements in an "appropriate procedure" needs to conform to the requirement in Rule 16(1) of the *Working Procedures*, that any additional "appropriate procedure" not be inconsistent with the DSU, the other covered agreements, and the *Working Procedures* themselves.

11. The determination of whether particular arrangements are appropriate in a given case essentially involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU, the other covered agreements, or the *Working Procedures*. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. Participants requesting particularized arrangements have the burden of justifying that such arrangements are necessary in a given case adequately to protect certain information, taking into account the rights and duties recognized in the DSU, the other covered agreements, and the *Working Procedures*. This burden of justification will increase the more the proposed arrangements affect the exercise by the Appellate Body of its adjudicative duties, the exercise by the participants of their rights to due process and to have the dispute adjudicated, the exercise by the third participants of their participatory rights, and the rights and systemic interests of the WTO membership at large.

12. Additional confidentiality protection implicates the authority of the Appellate Body, and the rights and duties of the participants, third participants, and the membership at large. In the original proceedings in this dispute and in *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body adopted additional procedures that it considered struck an appropriate balance between the risks associated with the disclosure of sensitive information, on the one hand, and the adjudicative authority of the Appellate Body and the rights and duties of the participants, third participants and the WTO membership at large. Similar considerations are relevant in these appellate proceedings. The European Union, the United States, and the third participants concur that the additional procedures adopted in *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)* provide an appropriate framework and ask that we apply the same practices in this case, with certain modifications.

13. We recall that it is for the adjudicator to decide whether certain information calls for additional protection of confidentiality. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection. We also note, however, that neither participant has appealed the Panel's decisions regarding the protection of BCI/HSBI and that there are also issues of practicality to consider. We will therefore proceed on the basis of how the information was treated before the Panel. Nevertheless, we do not exclude revisiting whether a

<sup>1</sup> See Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)*, Procedural Ruling and Additional Procedures to Protect Sensitive Information, Annex III, paras. 8 and 9.

<sup>2</sup> The *Rules of Conduct*, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the *Working Procedures for Appellate Review* (WT/AB/WP/6), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

particular piece of information meets the objective criteria justifying additional protection, or the particular degree thereof, should a dispute on the classification of that information arise before us, or should we consider that we need to refer to that information in our report if this is necessary to give a sufficient exposition of our reasoning and findings.

14. Having reaffirmed the relevant considerations that guide our decision, we turn to the modifications requested by the participants to the BCI/HSBI procedures adopted by the Appellate Body in *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)*. The participants propose, *inter alia*, that any additional BCI/HSBI procedures in this dispute specify that documents and materials containing BCI shall be sent to the Appellate Body Members by means of encrypted e-mail or courier. They also propose that HSBI contained in any appendix not be transmitted over e-mail but on a CD-ROM, labelled with an indication that it contains HSBI. In addition, the participants suggest certain adjustments to provide clarity on how the electronic version of an unredacted version of a submission by a participant and/or a third participant shall be corrected and transmitted, including an adjustment to avoid accidental inclusion of BCI in third participant submissions.

15. The arrangements that the participants have jointly proposed do not appear to affect the Appellate Body's ability to adjudicate the dispute, the rights of the third participants to be heard, or the rights and interests of the WTO membership at large. We have reflected them in the additional procedures that we adopt below. These procedures ensure that Members of the Appellate Body have sufficient access to the entirety of the Panel Report, the submissions, and the record of the dispute. They also limit the risk of inadvertent disclosure of sensitive information and render the process of correcting and transmitting redacted version of submissions more efficient.

16. We have carefully considered Canada's proposal regarding access by third participants to BCI in capitals, as well as the comments received from the participants and other third participants. It is our responsibility, in adopting any additional procedures, to strike an appropriate balance between the risks associated with the disclosure of sensitive information, the adjudicative duties of the Appellate Body, and the rights of the participants and third participants. While adoption of procedures such as those suggested by Canada may well facilitate access to BCI, we recall that the rights of third participants are more limited than those of the participants, and that third participants' interests lie mainly in the correct legal interpretation of the provisions of the WTO agreements.<sup>3</sup> Moreover, as highlighted in the comments received from the participants, it would be difficult to design and implement a regime whereby there would be a "designated reading room" located in an embassy or other diplomatic mission of a participant in the capital of each of the third participants. For these reasons, we have decided therefore not to adopt the adjustment proposed by Canada. However, we will ensure that the rights of third participants are taken into account in these appellate proceedings, including when we set the working schedule for this appeal.

17. Finally, we note, as we did in the original proceedings and in *United States – Measures Affecting Trade in Large Civil Aircraft (2<sup>nd</sup> complaint)*, that we will make every effort to draft our report without including sensitive information. The additional procedures that we adopt below foresee that the participants will be provided in advance with a copy of the Appellate Body report intended for circulation to WTO Members and will have an opportunity to request the removal of any sensitive information that is inadvertently included in the report. If we were to consider it necessary to include sensitive information in the reasoning in our report, the participants will be given an opportunity to comment. We reiterate that the participants will have a timely opportunity to comment as to the inclusion of any sensitive information in the report; we will provide further guidance at a later point in these proceedings as to the modalities and details of such a procedure.

18. For the reasons set out above, we have decided to provide additional confidentiality protection on the terms set out below. Accordingly, we adopt the following additional procedures for the purposes of this appeal:

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<sup>3</sup> See Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Procedural Ruling and Additional Procedures to Protect Sensitive Information, Annex III, para. 11.

Additional Procedures to Protect Sensitive Information

## General

(i) These additional procedures shall apply to information that was treated as business confidential information (BCI) or as highly sensitive business information (HSBI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. The additional procedures apply to written and oral submissions made in the appellate proceedings only to the extent that they incorporate information that was treated as BCI or HSBI in the Panel proceedings.

(ii) To the extent that information on the record is submitted to the Appellate Body in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants on the proper treatment of this information, the Appellate Body shall decide after hearing their views.

(iii) Each participant may at any time request that information that it has submitted and that was previously treated as BCI or HSBI no longer be treated as such.

(iv) The participants and third participants shall file their written submissions and executive summaries with the Appellate Body Secretariat in accordance with the Working Schedule drawn up by the Division for this appeal. Where a written submission and/or an executive summary contain BCI or HSBI, redacted versions of the submission and/or the executive summary (that is, a version without BCI and HSBI) shall be filed simultaneously with the Appellate Body Secretariat. Should an executive summary submitted by participants and third participants contain BCI or HSBI, the redacted version of the executive summary will be annexed as addenda to the Appellate Body Report. The redacted version shall be sufficient to permit a reasonable understanding of the substance of the relevant document. The Division may take appropriate action to ensure that this obligation is satisfied. The participants and third participants shall also provide the Appellate Body Secretariat with an electronic version of all submissions, including the redacted versions. The transmittal of participants' submissions to each other and to the third participants, and the transmittal of third participants' submissions to the participants and to the other third participants, are further regulated in the provisions below which apply *mutatis mutandis* to executive summaries of written submissions.

## Appellate Body Members and Appellate Body Secretariat Staff

(v) Only Appellate Body Members, and staff of the Appellate Body Secretariat who have been assigned by the Appellate Body to work on this appeal, may have access to the BCI and HSBI on the Panel record and in the written and oral submissions made in these appellate proceedings. Appellate Body Members and assigned Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed, to any person other than those identified in the preceding sentence or to approved persons of the participants and third participants. Appellate Body Members and assigned Appellate Body Secretariat staff are covered by the *Rules of Conduct*. As provided for in the *Rules of Conduct*, evidence of breach of these Rules may be submitted to the Appellate Body, which will take appropriate action.

(vi) BCI shall be stored in locked cabinets when not in use.

(vii) Appellate Body Members who are serving on the Division hearing this appeal may maintain a copy of all relevant documents containing BCI at their places of residence outside Geneva. Appellate Body Members who are not serving on the Division may maintain at their places of residence outside Geneva a copy of the BCI version of the Panel Report, a copy of the BCI version of the written submissions made in these appellate proceedings, a BCI version of the transcripts of any oral hearings, any internal documents containing BCI, and, where necessary, selected BCI exhibits from the Panel record. The documents and materials containing BCI kept by Appellate Body Members at their places of residence outside of Geneva shall be stored in locked cabinets when not in use. Documents and materials containing BCI shall only be sent to Appellate Body Members by secure e-mail or courier.



(viii) Participants shall provide printed copies of their submissions and other documents containing BCI that are intended for use by Appellate Body Members or assigned Appellate Body Secretariat staff on coloured paper and individually watermarked with "Appellate Body" and numbered consecutively ("Appellate Body No. 1", "Appellate Body No. 2", etc.).

(ix) All HSBI shall be stored in a combination safe in a designated secure location on the premises of the Appellate Body Secretariat. Any computer in that room shall be a stand-alone computer, that is, a computer not connected to a network. Appellate Body Members and assigned Appellate Body Secretariat staff may view HSBI only in the designated secure location referred to above. HSBI shall not be removed from this location, except as provided for in paragraph (x), or in the form of handwritten notes that may be used only on the Appellate Body Secretariat's premises and shall be destroyed once no longer used.

(x) Subject to appropriate precautions, BCI and HSBI may be taken outside of the premises of the Appellate Body Secretariat, in hard copy and electronic form, for purposes of any oral hearings that may be held in connection with this appeal.

(xi) Except as provided for in paragraph (xii), all documents and electronic files containing BCI and HSBI shall be destroyed or deleted when the Appellate Body report in this dispute has been adopted by the DSB.

(xii) The Appellate Body shall retain one hard copy and one electronic version of all documents containing BCI and HSBI as part of the appellate record. Documents and electronic media containing BCI shall be kept in sealed boxes within locked cabinets on the Appellate Body Secretariat's premises. Documents and electronic media containing HSBI shall be placed in a sealed container that will be kept in a combination safe on the premises referred to above.

#### Appellate Body Report

(xiii) The Division will make every effort to draft an Appellate Body report that does not disclose BCI or HSBI by limiting itself to making statements or drawing conclusions that are based on BCI and HSBI. A copy of the Appellate Body report intended for circulation to WTO Members will be provided in advance to the participants, at a date and in a manner to be specified by the Division. Participants will be provided with an opportunity to request the removal of any BCI or HSBI that is inadvertently included in the report. The Division will also indicate to the participants if it has found it necessary to include in the Appellate Body report information that was treated by the Panel as BCI or HSBI and will provide participants with an opportunity to comment. Comments on the inclusion of information previously treated as BCI or HSBI and requests for removal of BCI or HSBI inadvertently included in the report shall be filed with the Appellate Body Secretariat within a time period to be specified by the Division. No other comments or submissions shall be accepted. In coming to a decision on the need to include BCI or HSBI to ensure that the final report is understandable, the Division will strike an appropriate balance between the rights of the WTO membership at large to obtain a report that gives a sufficient exposition of its reasoning and findings, on the one hand, and the legitimate concerns of the participants to protect sensitive information, on the other.

#### Participants

(xiv) The participants shall provide a list of persons that are "BCI-Approved Persons" and that are "HSBI-Approved Persons". These lists shall be provided to the Appellate Body Secretariat by 5 p.m. on Thursday, 27 October 2016, and shall be served on the other participant and the third participants. Any objections to the designation of an outside advisor as a BCI-Approved Person or HSBI-Approved Person must be filed with the Appellate Body Secretariat and served on the other participant by 5 p.m. on Monday, 31 October 2016. Participants may submit amendments to their lists of BCI-Approved Persons or HSBI-Approved Persons by filing an amended list with the Appellate Body Secretariat and serving it on the other participant and the third participants. A participant may object to the designation on the amended list of an outside advisor by another participant. Any objections must be filed with the Appellate Body Secretariat within two days and simultaneously served on the other participant and the third participants. The Division will reject a request for designation of an outside advisor as a

BCI-Approved Person or an HSBI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles reflected in the *Rules of Conduct* and the illustrative list in Annex 2 thereto. BCI-Approved Persons and HSBI-Approved Persons shall not disclose BCI or HSBI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons and HSBI-Approved Persons, and Third Participant BCI-Approved Persons.

(xv) Any participant referring in its written submissions to any BCI or HSBI shall clearly identify the information as such in those submissions. If the submissions contain HSBI, the HSBI shall be included in an appendix. In that case, the version of the submission that includes the HSBI appendix shall be transmitted only to HSBI-Approved Persons. The HSBI appendix shall not be transmitted via e-mail, but solely on a CD-ROM, labelled with an indication that it contains the HSBI appendix. Each participant shall simultaneously provide a redacted version of its submissions to the other participant. Submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the other participant. The other participant shall have two days to object to the inclusion of any BCI. If there are objections, the Division shall resolve the matter, and instruct, as appropriate, the relevant participant to transmit a correctly redacted version of its submission to the other participant and the third participants, unless the participant concerned agrees to remove the information that was subject to the objection. The electronic copy of the unredacted version of the submission shall be corrected by the participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and other participant; the Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission as well as to replace the electronic copies. If there are no objections, the redacted version shall be transmitted the following day to the third participants.

#### Third Participants

(xvi) Third participants may designate up to eight individuals as "Third Participant BCI-Approved Persons". For this purpose, each third participant shall provide a list of Third Participant BCI-Approved Persons to the Appellate Body Secretariat by 5 p.m. on Thursday, 27 October 2016. A copy of the list of Third Participant BCI-Approved Persons shall be served on each participant and on each other third participant. The participants may object to the designation of an outside advisor as a Third Participant BCI-Approved Person. Objections must be filed with the Appellate Body Secretariat by 5 p.m. on Monday, 31 October 2016. Third participants may submit amendments to their lists of BCI-Approved Persons or HSBI-Approved Persons by filing an amended list to the Appellate Body Secretariat and serving it on the participants and the other third participants. A participant may object to the designation in an amended list of an outside advisor by a third participant. Any objections must be filed with the Appellate Body Secretariat within two days and simultaneously served on the other participant and the third participants. The Division will reject the designation of an outside advisor as a Third Participant BCI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles in the *Rules of Conduct* and the illustrative list in Annex 2 thereto. Third Participants BCI-Approved Persons shall not disclose BCI, or allow it to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, BCI-Approved Persons, and other Third Participant BCI-Approved Persons.

(xvii) The BCI version of all participants' submissions shall be transmitted to the third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room located on the premises of the WTO. Third Participant BCI-Approved Persons shall be allowed to view in the designated reading room the BCI version of the Panel Report and the BCI version of the submissions filed in these appellate proceedings. Third Participant BCI-Approved Persons shall not bring into that room any electronic recording or transmitting devices, nor shall they remove copies of the BCI version of the Panel Report or the BCI version of the submissions from that room. Upon request, each third participant shall be provided with one copy of the Panel Report as circulated to WTO Members and of the redacted version of the submissions for use in the reading room. Third Participant BCI-Approved Persons may take handwritten notes on the provided copies of the circulated Panel Report and redacted version of the submissions and they may take these copies with them. These documents shall be printed on coloured watermarked paper; shall bear the names of the Third Participant BCI-Approved Persons; state that "This document is not to be copied"; and the cover page of each of the documents shall state that any handwritten BCI added to the document shall only be discussed

or shared with other Third Participant BCI-Approved Persons. The content of any handwritten notes shall not be incorporated, electronically or in handwritten form, into any other copy of the Panel Report or of the submissions. These documents and any other handwritten notes taken by the Third Participant BCI-Approved Persons in the reading room shall be locked in a secure container when not in use. These documents and handwritten notes must be returned to the Appellate Body Secretariat after the final oral hearing held in this appeal.

(xviii) Each Third Participant BCI-Approved Person viewing the BCI version of the Panel Report and submissions in the designated reading room shall complete and sign a log. The Appellate Body Secretariat shall keep such log as part of the record of the appeal.

(xix) Third participants shall transmit their submission to the Appellate Body Secretariat and the participants. It shall also be transmitted to the other third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room referred to in paragraph (xvii) above. If a third participant wishes to refer in its third participant's submission to any BCI, it shall clearly identify such information. A third participant referring to BCI shall also simultaneously provide the participants with a redacted version of its submission. Third participant's submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the participants. The participants shall have two days to object to the inclusion of any BCI in a third participant's submission. If there are objections, the Division shall resolve the matter, and instruct, as appropriate, the relevant third participant to transmit a correctly redacted version of its submission to each of the participants and the other third participants, unless the third participant concerned agrees to remove the information that was subject to the objection. The electronic copy of the unredacted version of the submission shall be corrected by the third participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and the participants; the Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission as well as to replace the electronic copies. If there are no objections, the submission or the redacted submission, as the case may be shall be transmitted the following day to the other third participants and again to the participants.

#### Oral Hearing

(xx) Appropriate procedures shall be adopted to protect BCI and HSBI from unauthorized disclosure at any oral hearing held in this appeal.

**ANNEX D-2****PROCEDURAL RULING OF 21 NOVEMBER 2016**

1. On 31 October 2016, the Appellate Body Division hearing the above appeal received a communication from the United States provisionally objecting to the inclusion of Prof. Andreas Klasen on the European Union's proposed list of BCI- and HSBI-Approved Persons. The United States requested the Division to ask the European Union to provide further information concerning Prof. Klasen's employment by the European Aeronautic Defence and Space Company N.V. (EADS), whether he has ongoing involvement with Airbus in his current position, and the reason he would need access to BCI and HSBI.
2. On 1 November 2016, the Division invited the European Union to respond to the United States' provisional objection, and informed the participants and third participants that, in the meantime, the European Union's access to BCI and HSBI on the Panel Record and in written submissions in these appellate proceedings shall be restricted to the other individuals on the European Union's list of BCI-Approved Persons and HSBI-Approved Persons, dated 27 October 2016.
3. On 2 November 2016, the Division received a response from the European Union commenting on the United States' provisional objection, and providing some additional information regarding Prof. Klasen, including his full *curriculum vitae*. The European Union indicated, *inter alia*, that Prof. Klasen "is providing external advice for the European Union as well as the European Union's underlying interests in this case (Airbus)".
4. On 3 November 2016, the Division invited the United States to respond to the letter received from the European Union. On 7 November 2016, the United States reiterated its request for further information regarding Prof. Klasen. The United States explained that "knowing whether and to what extent Prof. Klasen continues to undertake work for Airbus is critical to an understanding of whether his access to Boeing BCI and HSBI would give Airbus an unfair advantage in areas outside of this proceeding." The European Union responded to the United States' letter on 11 November 2016, at the request of the Division. In its letter, the European Union reiterated that Prof. Klasen "is an expert who has been providing advice for the European Union and its underlying interests in this case (Airbus)", and that the European Union wishes to retain the possibility of including him in its delegation for that purpose. The European Union further requested that we confirm Prof. Klasen's designation as BCI- and HSBI-approved.
5. On 16 November 2016, the Division invited the European Union to indicate whether Prof. Klasen is subject to an enforceable code of professional ethics that requires him to protect confidential information, or whether he has been retained by an outside advisor who is subject to such a code of professional ethics and assumes responsibility for compliance with the additional BCI/HSBI procedures adopted by the Appellate Body in these proceedings.
6. On 18 November 2016, the European Union confirmed that Prof. Klasen has been retained by an outside advisor who is subject to an enforceable code of professional ethics and assumes responsibility for compliance with the additional BCI/HSBI procedures adopted by the Appellate Body in these proceedings. The European Union added that it has responsibility, according to the applicable rules, for the constitution and conduct of its delegation, including all of its representatives and outside advisors.

7. We recall that pursuant to paragraph 18(xiv) of our Procedural Ruling of 25 October 2016, the Division will reject a request for designation of an outside advisor as a BCI-Approved Person or an HSBI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles reflected in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes and the illustrative list of information to be disclosed in Annex 2 thereto. We further recall that the same paragraph mandates that BCI-Approved Persons and HSBI-Approved Persons shall not disclose BCI or HSBI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons and HSBI-Approved Persons, and Third Participant BCI-Approved Persons.

8. In light of the clarifications provided by the European Union, we see no compelling reason to reject the European Union's request to designate Prof. Klasen as a BCI- and HSBI-Approved Person. We therefore consider it appropriate to accept the European Union's request. Accordingly, the European Union's access to BCI and HSBI on the Panel record and in written submissions in these appellate proceedings stands extended to Prof. Klasen as a BCI- and HSBI-Approved Person in addition to the other individuals on the European Union's list of BCI-Approved Persons and HSBI-Approved Persons, dated 27 October 2016.

**ANNEX D-3****PROCEDURAL RULING OF 21 NOVEMBER 2016**

1. On 14 November 2016, we received a letter from the European Union requesting that certain text in the United States' other appellant's submission be designated as business confidential information (BCI). On 15 November 2016, the Division invited the United States to respond to the European Union's request. The United States responded in writing on 16 November 2016, indicating that it did not object to the changes proposed by the European Union to paragraphs 36, 52, 64, and 69 of the United States' other appellant's submission. However, the United States objected to the other changes proposed by the European Union (to paragraphs 35, 37, 41, 43, 45, 47, 49, 51, 53, 55, and 60) arguing that the European Union was proposing to designate certain information as BCI, even though that information could already be derived from information on the Panel record that the European Union previously did not designate as BCI or HSBI. The United States indicated that, upon resolution of this issue by the Appellate Body, it was prepared to submit revised BCI and BCI-redacted versions of its other appellant's submission and that two days after the Appellate Body's ruling would be sufficient time to complete this task.

2. In our Procedural Ruling of 25 October 2016, we surveyed considerations that are relevant to a decision on whether to provide additional protection to certain sensitive information. We believe that these considerations are also relevant to our evaluation of the European Union's request that certain text in the United States' other appellant's submission be designated as BCI.

3. As an initial matter, we recall that the determination of whether particular arrangements are appropriate in a given case involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU and the other covered agreements. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. It is ultimately for the adjudicator to decide whether certain information calls for additional protection of confidentiality, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection. This involves striking an appropriate balance between the risks associated with the disclosure of sensitive information, the adjudicative duties of the Appellate Body, and the rights of the participants and third participants.

4. The changes to BCI bracketing proposed by the European Union do not appear to affect our ability to hear this appeal or the due process rights of the participants, both of which have access to BCI and HSBI. With regard to the rights of third participants, we further recall that, in accordance with paragraph 18(xvii) of our Procedural Ruling of 25 October 2016, Third Participant BCI-Approved Persons may view in the designated reading room the BCI version of the submissions filed in these appellate proceedings. As we see it, this ensures that third participants have sufficient access to the entirety of the information contained in the United States' other appellant's submission, which the European Union considers should be subject to additional protection.

5. We further note that the United States does not object to the changes proposed by the European Union to paragraphs 36, 52, 64, and 69 of the United States' other appellant's submission. In particular, the United States has not objected to the European Union's request to designate as BCI the four words that the European Union has included between the additional brackets in each of the bullet points following paragraph 69 of the BCI-version of the United States' other appellant's submission, consistent with the designation of the terms of Section 21.14 of the UK A350XWB Repayable Investment Agreement as BCI. Nor has the United States objected to the inclusion between additional brackets of the same four words in paragraph 64 of the United States' other appellant's submission, consistent with the designation of the terms of Section 11 of the Spanish A350XWB *Convenio* as BCI.

6. With respect to the French A350XWB *Protocole*, we note that the four words at issue speak more to the substantive content of Articles 8 and 9, designated as containing BCI, rather than to the headers of those provisions, which, as the United States points out, have not been designated as containing BCI.

7. With respect to the German KfW A350XWB Loan Agreement, while we agree with the United States that the language to which it refers might provide a basis to derive the information which the European Union now seeks to have designated as BCI, we note that this information cannot be found in the Panel Report circulated to WTO Members on 22 September 2016. Nor, as we understand it, has it been argued that this information would have otherwise come into the public domain, or that it would no longer be confidential due to the passage of time.

8. We note, moreover, that there are also issues of practicality to consider. Having considered the European Union's request and the response received from the United States, we have decided to proceed on the basis of the BCI bracketing proposed by the European Union. Nevertheless, we do not exclude revisiting whether a particular piece of such information meets the objective criteria justifying additional protection, or the particular degree thereof, should we consider that we need to refer to that information in our report in this dispute if this is necessary to give a sufficient exposition of our reasoning and findings. However, we reiterate that, if we were to consider it necessary to do so, the participants will be given a timely opportunity to comment.

9. We would request the United States to kindly submit revised copies of the BCI and non-BCI versions of its other appellant's submission to the Appellate Body Secretariat and the European Union, and copies of the non-BCI version of its other appellant's submission, with BCI correctly redacted, to each of the third participants, by 5 p.m. on Wednesday, 23 November 2016. There is no need to resubmit the HSBI Appendix. We further request the BCI-Approved Persons of each of the participants to implement modified confidentiality treatment, as outlined above, in any paper copies of the United States' other appellant's submission, and to replace electronic copies.

**ANNEX D-4****PROCEDURAL RULING OF 11 JANUARY 2017**

1. On Friday, 6 January 2017, we received a communication from the European Union requesting that the Division modify the deadline for the filing of the appellees' submissions in the present dispute. In its letter, the European Union invokes Rule 16(2) of the Working Procedures for Appellate Review<sup>1</sup> (Working Procedures), and seeks to have this deadline extended by one week from 13 January 2017 to 20 January 2017. According to the European Union, strict adherence to the time periods set by the Division would result in manifest unfairness within the meaning of Rule 16(2). We understand that the United States and the third participants in this dispute were served a copy of the European Union's request.

2. The European Union highlighted that the reasons for its request are similar to those given by the United States in support of its request for extension of the deadline for filing its appellant's submission in *US – Tax Incentives* (WT/DS487). In particular, the European Union submitted that the staff assigned to the appeals in *US – Tax Incentives* and in the current dispute is to a large extent the same, and preparation and filing of submissions in these two related and demanding appeals poses a significant challenge for the European Union's resources. Moreover, the European Union argued that the absence of key staff during the holiday period has significantly impaired the preparation and revision of the European Union's appellee's submission in the present appeal. The European Union also noted that the current working schedule has left it with approximately two months to respond to the United States' other appellant's submission – which includes several aspects of a lengthy panel report – as well as to ensure proper marking of business confidential information (BCI) and highly sensitive business confidential information (HSBI).

3. Also on 6 January 2017, the Division invited the United States and the third participants to comment in writing on the communication from the European Union by 12:00 p.m. on Tuesday, 10 January 2017. Written comments were received from the Australia, Canada, and the United States. Australia requested that to the extent the Division were to grant the European Union's request, it also provide third participants with additional time to review and consider the participants' submissions prior to filing their own submissions. Canada made a similar request asking the Division to extend the deadline for filing of the third participants' submissions from 31 January 2017 to 7 February 2017, should it grant the request made by the European Union. No comments were received from the other third participants.

4. In its written comments, the United States opposed the European Union's request for an extension of the deadline for the filing of its appellee's submission. Referring to the reasons given by the Division in *US – Tax Incentives* for its denial of the United States' request for extension of the deadline for the filing of its appellant's submission, the United States did not see a basis for granting the European Union's request in the present case. In particular, the United States observed that its staff faces the same challenges as the European Union's staff in filing submissions in *US – Tax Incentives* and the present dispute. Moreover, the United States noted that the European Union's appellee's submission in this appeal responds to a submission that is considerably shorter than the one to which the United States' appellee's submission has to respond in *US – Tax Incentives*.

5. We observe that the European Union filed its appeal in the present dispute on 13 October 2016. In response to a joint letter by the European Union and the United States, the Division hearing this appeal suspended the deadline for the filing of the appellant's submission pending the adoption of additional procedures to protect sensitive information included in the record of this dispute. On 25 October 2016, the Division adopted a procedural ruling to protect sensitive information. On 1 November 2016, the Division communicated to the participants and third participants 10 November 2016 as the filing date for the United States' other appellant's submission. Subsequently, on 22 November 2016, the Division communicated to the participants and third participants 13 January 2017 as the filing date for the appellees' submissions. In setting

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<sup>1</sup> WT/AB/WP/6, 16 August 2010.



these deadlines, the Division took into account, in particular, the size and complexity of the present appeal, including the size of the Panel Report, and the need for inclusion of BCI and HSBI in the participants' submissions. Furthermore, in view of the WTO end-of-year closure, the deadline set for the filing of the appellees' submissions in the present dispute was delayed until the second working week of 2017. Finally, notwithstanding the size of the Panel Report, the United States' other appellant's submission to which the European Union has to respond in its appellee's submission is relatively brief. We observe, in this regard, that although the United States must, in its appellee's submission, respond to a very lengthy European Union appellant's submission, it has not requested that the filing deadline of 13 January 2016 be extended.

6. For these reasons, we consider that strict adherence to the time periods set by the Division for the filing of the appellees' submissions will not result in manifest unfairness within the meaning of Rule 16(2) of the Working Procedures, and that it is not, therefore, necessary or appropriate to modify the deadline for the filing of the appellees' submissions in the present dispute.

7. In these circumstances, the Division declines the European Union's request for extension of the deadline for filing the appellees' submissions in the present appeal and, instead, affirms the deadline for filing the appellees' submissions set for Friday, 13 January 2017.

**ANNEX D-5****PROCEDURAL RULING OF 19 APRIL 2017**

1. By letter dated 4 April 2017, the Appellate Body Division hearing the above appeal invited the participants, the European Union and the United States, to indicate whether they request the oral hearings in this appeal to be open to public observation, and, if so, to propose specific modalities in this respect by 5 p.m. Geneva time on Tuesday, 11 April 2017. We also invited the third participants to provide comments on any request the participants might file, by 12 noon Geneva time on Thursday, 13 April 2017.

2. On 11 April 2017, we received a joint communication from the European Union and the United States. In their letter, they propose additional procedures to protect Business Confidential Information (BCI) and Highly Sensitive Business Information (HSBI) during the oral hearings in this appeal and request that we allow observation by the public of the oral hearing.

3. Specifically, the participants propose that we adopt the same additional procedures that the Appellate Body adopted in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*<sup>1</sup>, pursuant to the procedural ruling dated 26 July 2011 in that appeal. They state that the reasons for their request and proposal are substantially the same as the reasons that were given in their joint letter of 11 July 2011 requesting such additional procedures in the conduct of the oral hearing in that appeal, which are summarized as follows:

- Only BCI-Approved Persons are authorized to access BCI, and the participants and third participants have designated a limited number of persons as BCI-Approved. Only HSBI-Approved Persons are authorized to access HSBI, and the participants have designated a limited number of persons as HSBI-Approved. Third participants may not designate HSBI-Approved Persons.
- As regards BCI that might be uttered during any segment of the hearing, the participants recall that each of them is precluded from disclosing information designated as BCI by the other to non-BCI-Approved persons. Similarly, as regards HSBI that might be uttered during a hearing, the participants recall that each of them is precluded from disclosing information designated as HSBI by the other to non-HSBI-Approved persons. Third participants are precluded from disclosing BCI to non-BCI-Approved persons.
- Accordingly, the participants consider that, as provided for in the Additional Procedures for the Protection of Sensitive Information set out in the Procedural Ruling dated 25 October 2016 in this appeal, the Division can and should adopt a further Procedural Ruling pursuant to Rule 16(1) of the Working Procedures for Appellate Review<sup>2</sup> regulating these matters for the oral hearings. This will involve striking a balance between the systemic interest in protecting sensitive information and the systemic interest in transparency, similar to that struck in the Procedural Ruling dated 25 October 2016 in this appeal and the Procedural Ruling dated 26 July 2011 in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*.
- According to the participants, there appear to be two options with respect to HSBI. The first option is that if, during the hearing, one of the participants or a Member of the Division wishes to refer to HSBI, the hearing would be momentarily suspended and the third participants, as well as members of the participants' delegations who are not HSBI-Approved, would be asked to leave the room temporarily. The second option is that the hearing be divided into two parts. The first part would deal with all matters to the greatest extent possible without uttering HSBI. The second part would complete the discussion in a closed session, to the extent necessary, by addressing HSBI. While acknowledging that neither of these options is ideal in all respects, on balance, the

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<sup>1</sup> WT/DS353/AB/R, adopted 23 March 2012. The additional procedures with respect to the oral hearing in that appeal are set out in Annex IV to that report.

<sup>2</sup> WT/AB/WP/6, 16 August 2010.

participants prefer the second option. The participants believe that this would limit unnecessary disruption during the hearing. The participants also believe that careful conduct of the first part of the hearing (such as only participants and the Members of the Division having a document before them and discussing it without uttering HSBI) could obviate the need for a second HSBI part of the hearing. In the event that a second closed session of the hearing would be necessary, it could be organized to take place at the end of each day. The participants note that the Appellate Body followed this second approach during the proceedings in *EC and certain member States – Measures Affecting Trade in Large Civil Aircraft*<sup>3</sup> and in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, and that it appears to have been effective.

- The participants further suggest that the Appellate Body establish rules regarding a public segment of the hearing. The participants recall that, to date, a participant's or third participant's oral statements and oral answers to questions have been made in public segment only if the participant or third participant so agreed. In the absence of such agreement, it has proved operationally possible and effective to divide the hearing into an open session (for Members who wish to make their statements public) and a closed session (for Members who do not wish to make their statements public). The European Union and the United States are of the view that as much of the hearing as possible should be open to the public. However, they recognize that, in light of the volume of BCI in this dispute, and its centrality to many of the issues, it may not be feasible to separate the Appellate Body's questions and the participants' answers into public and BCI segments in the same way as the oral statements. For this reason, the European Union and the United States propose that the same approach be adopted in this appeal as was adopted in the appeal in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*.
- Thus, with regard to the public segment of the hearing, the participants propose that the participants and third participants (subject to their agreement) deliver opening statements that do not contain BCI or HSBI. These would be videotaped, reviewed by the participants for confirmation that neither BCI nor HSBI has been uttered (with any disagreements to be settled by the Appellate Body), and then transmitted to the public at a later date. The participants also propose that such an approach could be used for the closing statements, or at least that part of them that does not refer to BCI or HSBI.

4. Canada and China submitted comments on the participants' request. Canada expressed its agreement with the joint proposal by the European Union and the United States that the Appellate Body allow observation by the public of the oral hearing. China submitted that the joint proposal by the participants to exclude non-BCI-Approved persons of the third participants from segments of the hearing that are dedicated to questions and answers would significantly constrain the third participants' abilities to engage fully in those segments. China added that, in the circumstances of this appeal, the need for protection of sensitive information cannot sufficiently justify a complete exclusion of non-BCI-Approved persons from hearing segments dedicated to questions and answers. China suggested that the same procedure that is applicable for the protection HSBI from unauthorized disclosure be followed for the protection of BCI in this appeal. In addition, China stated that it does not want to open its statements and oral responses to the questions during the oral hearing to the public. No comments were received from Australia, Brazil, Japan, or Korea.

5. The request of the participants raises issues similar to those that were before the Appellate Body in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*. In this appeal, we have already adopted additional procedures for the protection of sensitive information. Given the amount of information that was treated as BCI and HSBI during the Panel proceedings, we believe that it would be difficult to conduct the oral hearing in these appellate proceedings without referring to sensitive information. In carrying out our adjudicative function, it will be necessary to conduct the oral hearing in a manner that allows us to explore issues that involve sensitive information, while ensuring that this sensitive information is not improperly disclosed.

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<sup>3</sup> WT/DS316/AB/R, adopted 1 June 2011. The additional procedures with respect to the oral hearing in that appeal are set out in Annex IV to that report.

6. Pursuant to our Procedural Ruling of 25 October 2016, the participants have provided a list of persons who are authorized to have access to BCI and a list with a more limited number of persons who are authorized to have access to HSBI. These limitations on the participants' representatives who would be authorized to discuss BCI and HSBI during the oral hearing are incidental to the participants' request for additional protection for sensitive information. Therefore, only members of the participants' delegations who are BCI-Approved Persons are invited to attend the sessions of the oral hearing in which BCI will be discussed, and only members of their delegations who are HSBI-Approved Persons are invited to attend segments of the oral hearing where HSBI will be discussed.

7. Moreover, under paragraph 18(xvi) of the Procedural Ruling of 25 October 2016, the third participants have been allowed to designate up to eight individuals as Third Participant BCI-Approved Persons. We consider this to be sufficient to allow the third participants to be represented properly at the oral hearing. In view of the need to provide additional protection to BCI, only Third Participant BCI-Approved Persons are invited to attend segments of the oral hearing where BCI may be discussed, including the question and answer sessions. Having carefully considered the comments provided by China, we do not consider that this will unduly impinge upon the rights of the third participants in this case.

8. Accordingly, and for reasons similar to those adopted by the Appellate Body in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, we have decided to provide additional confidentiality protection for certain sensitive information during the oral hearings to be held in this appeal on the terms set out below. We also authorize the public observation of certain segments of the oral hearing as further indicated below.

#### **Request for additional procedures to protect sensitive information during the oral hearing**

9. We are of the view that the additional procedures adopted in *EC and certain member States – Large Civil Aircraft* provided adequate protection for sensitive information while allowing the Appellate Body to perform its adjudicative function and the third participants to exercise their rights under the Understanding on Rules and Procedures Governing the Settlement of Disputes and the Working Procedures for Appellate Review. The participants share this view and request us to adopt similar procedures in these proceedings. Thus, as in *EC and certain member States – Large Civil Aircraft*, we consider it appropriate to adopt the following arrangements to protect sensitive information during the oral hearing:

- The participants have indicated that they intend to abstain from mentioning BCI or HSBI in their opening statements, and suggest that the third participants may also agree not to mention BCI in their opening statements. In such circumstances, it is unlikely that sensitive information will be uttered in the segments of the oral hearing dedicated to the delivery of oral statements.
- Accordingly, all members of the participants' and third participants' delegations (including non-BCI Approved persons) may attend this initial segment of the oral hearing.
- Similarly, to the extent that it is confirmed by the participants, and the third participants also indicate, that no sensitive information will be referred to in the closing statements, all members of the participants' and third participants' delegations may attend this final segment of the oral hearing.
- In accordance with paragraphs xiv and xvi of our Procedural Ruling of 25 October 2016, the participants and third participants have each designated BCI-Approved Persons, and the participants have designated HSBI-Approved Persons.
- Only members of the participants' and third participants' delegations who have been authorized to have access to BCI are invited to attend the segments of the oral hearing dedicated to questions and answers.
- Only HSBI-Approved Persons of the participants are invited to attend segments of the oral hearing in which HSBI will be discussed.

- The third participants will have access to the BCI versions of the submissions filed in this appeal and the BCI version of the Panel Report in the hearing room during the BCI segments. The third participants will be provided with a single, individually watermarked copy of these documents. Access to these documents will be limited to Third Participant BCI-Approved Persons. These documents may not be removed from the hearing room.

10. The participants have proposed two options for addressing HSBI during the oral hearings. The first involves interrupting the BCI segments of the oral hearing each time reference will be made to HSBI; the second involves having dedicated segments to discuss HSBI. We believe it is important that any additional procedures to protect sensitive information should interfere as little as possible with the regular conduct of the oral hearing and allow the Division to structure its questioning by topic. Therefore, to the extent possible, we prefer to focus on HSBI in dedicated segments in order to avoid interrupting the regular flow of the hearing. It may be, however, that the full exploration of an issue will not allow for deferral of the discussion of HSBI. If such circumstance arises, we may decide to interrupt the BCI segment of the hearing to discuss HSBI with the HSBI-Approved Persons.

### **Request for public observation of the oral hearing**

11. Particular issues arise in this appeal, as they did in *EC and certain member States – Large Civil Aircraft*, in relation to the public observation of the oral hearing because of the need to avoid the disclosure of BCI and HSBI. We believe that the additional procedures adopted by the Appellate Body in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* provided an appropriate means to allow public observation of the hearing, while protecting sensitive information and safeguarding the Appellate Body's adjudicative function and the interests of the third participants.

12. Therefore, and subject to the qualification in paragraph 13 below, we authorize public observation of the delivery of the opening statements only. We will authorize public observation of the closing statements upon indication from the participants and third participants that their closing statements will not include any reference to sensitive information.

13. We authorize observation by the public of the opening statements of only those third participants who will have indicated no objection to such observation. The confidentiality of the closing statements by those third participants that do not wish to make their statements public will be preserved.

14. The participants have proposed that public observation take place by making a videotape of the relevant segments of the oral hearing and showing it to the public only after the participants have had an opportunity to review the videotape for any inadvertent utterance of sensitive information. A similar procedure was used in *EC and certain member States – Large Civil Aircraft* and in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*. We agree with the participants that deferred transmission to the public by videotape will minimize the risk of inadvertent disclosure of sensitive information and we will give the participants an opportunity to review the videotape for this purpose before it is shown to the public. In case of disagreement between the participants regarding the sensitive nature of any information referred to during the opening or closing statements, such information will not be subject to public observation.

15. For the reasons set out above, we adopt the following additional procedures for the conduct of all sessions of the oral hearing to be held in this appeal:

### **Additional Procedures on the Conduct of the Oral Hearing**

- i. These Additional Procedures shall apply to all sessions of the oral hearing to be held in this appeal and, in particular, to any information that is referred to during the course of the hearing that was treated as business confidential information (BCI) or as highly sensitive business information (HSBI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. These Additional Procedures complement the Additional Procedures for the Protection of Sensitive Information that we adopted in our Procedural Ruling of 25 October 2016.

- ii. To the extent that information on the record is presented at the hearing in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants as to the proper treatment and the degree of confidentiality of this information, the Appellate Body shall decide the matter after hearing the views of the participants.
- iii. Appellate Body Members, Secretariat staff assigned by the Appellate Body to work on this appeal, and interpreters and court reporters retained for this appeal may be present throughout the hearing, including segments dedicated to the discussion of BCI and HSBI.
- iv. In addition to the persons indicated in paragraph iii above, BCI shall be disclosed during the hearing only to BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons.<sup>4</sup>
- v. In addition to the persons indicated in paragraph iii above, HSBI shall be disclosed during the hearing only to HSBI-Approved Persons of the participants.<sup>5</sup>
- vi. The hearing segment dedicated to the opening statements of the participants and third participants shall be open to all members of the delegations of the participants and third participants. The participants and third participants shall abstain from referring to BCI or HSBI in their opening statements.
- vii. In order to protect BCI from unauthorized disclosure, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons are invited to attend the segments of the hearing dedicated to questions and answers.
- viii. Segments of the hearing may be reserved for questioning on issues that may require reference to HSBI. In order to protect HSBI from unauthorized disclosure, only HSBI-Approved Persons of the participants are invited to attend these segments.
- ix. To the extent that any participant or third participant indicates that it will make reference to BCI in its closing statement, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons will be invited to attend the closing segment of the hearing.
- x. If necessary, the Appellate Body Division hearing this appeal may interrupt a BCI segment and hold a segment dedicated to HSBI.
- xi. During the segments of the hearing dedicated to questions and answers, the BCI version of the Panel Report and the BCI versions of the submissions filed in this appeal, which will be printed and individually watermarked pursuant to paragraph xvii of our Procedural Ruling of 25 October 2016, shall be made available to each third participant. Only Third Participant BCI-Approved Persons will be allowed to consult these documents. The documents shall not be removed from the hearing room and shall be returned to the Appellate Body Secretariat at the end of each segment addressing BCI.
- xii. The parts of the transcript of the oral hearing containing BCI and HSBI shall become part of the appellate record in this appeal and shall be kept in accordance with paragraphs vi, vii, and ix-xii of our Procedural Ruling of 25 October 2016.

#### **Public observation of the oral hearing**

- xiii. The first segment of the oral hearing, which will consist of the opening statements by the participants and third participants, shall be open to public observation, subject to paragraph xv below. The final segment of the oral hearing, which will be reserved for closing statements, shall be open to public observation to the extent that the participants and

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<sup>4</sup> BCI-Approved Persons and Third Participant BCI-Approved Persons are those persons designated as such under paragraphs xiv and xvi of our Procedural Ruling of 25 October 2016.

<sup>5</sup> HSBI-Approved Persons are those persons designated as such under paragraph xiv of our Procedural Ruling of 25 October 2016.

third participants indicate that their closing statements will not refer to any sensitive information and subject to paragraph xiv below.

- xiv. The segments open to public observation shall be videotaped. Within two days of the completion of each session of the hearing, either participant may request to review the videotape to verify that no BCI or HSBI has been included inadvertently or otherwise. Upon such request, staff of the Appellate Body Secretariat shall be present while the participant(s) review the videotape. If the videotape contains BCI or HSBI, a redacted version of the videotape shall be produced in which the BCI or HSBI has been deleted. In case of disagreement between the participants regarding the sensitive nature of any information referred to during the opening or closing statements, the relevant segment(s) will not be subject to public observation.
  - xv. The opening and closing statements of third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation. Any third participant that has not already done so may request that its oral statements remain confidential and not be subject to public observation. Such requests must be received by the Appellate Body Secretariat no later than 5 p.m. Geneva time on Wednesday, 26 April 2017.
  - xvi. Notice of the oral hearing will be provided to the general public through the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat. The videotapes, or if applicable the redacted versions of the videotapes, shall be screened to WTO delegates and members of the public who have registered to observe the oral hearing once the review process referred to in paragraph xiv above has, if requested, been completed. The time and location of the videotape screening shall be announced in due course. WTO delegates are invited to indicate to the Appellate Body Secretariat no later than 5 p.m. Geneva time on Wednesday, 26 April 2017 whether they wish to have a reserved seat in the room where the videotape will be screened.
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