WORLD TRADE ORGANIZATION

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION AND CERTAIN MEMBER STATES

REPORT OF THE PANEL

Addendum

BCI deleted, as indicated **[***]**

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS316/RW2.

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WORKING PROCEDURES OF THE PANEL

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

(4) The parties shall treat business confidential information and highly-sensitive business information in accordance with the procedures set forth in the Additional Working Procedures of the Panel For the Protection of Business Confidential Information and Highly-Sensitive Business Information.

Submissions

3. (1) Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

a. To facilitate the efficient conduct of this proceeding, the written submissions referenced in the Panel's timetable (the parties' first written submissions and written rebuttals) shall not exceed 250 pages (single-spaced, font size 10) each. This limit excludes exhibits accompanying written submissions.

b. The Panel may grant an extension of this page limit upon a request from a party. A party shall submit any such request in accordance with the procedures concerning service of documents set out in paragraph 30 below and no later than seven days (one calendar week) before the deadline to file the submission at issue. The request shall include the number of additional pages requested by the party for the submission at issue and explain the circumstances that in its view warrant exceeding the page limit by the specified number of pages. The Panel shall rule on such requests promptly.

(2) Each third party that chooses to make a written submission before the substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(3) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

   a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The European Union shall submit its response to the request before the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

   b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

   c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

   d. Any request for such a preliminary ruling by the respondent before the meeting, and any subsequent submissions of the parties in relation thereto before the meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

   (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

   (2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

   (2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or the meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the

last exhibit in connection with the first submission was numbered XXX-5, the first exhibit in connection with the next submission thus would be numbered XXX-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again

(4) Insofar as a party considers that the compliance panel should take into account a document already submitted as an exhibit in the original panel proceeding or the first compliance proceeding, it should resubmit that document as an exhibit for the purpose of this proceeding. In its list of exhibits, it should refer to the number of the original exhibit in the original panel proceedings (OP) (example: [XXX]-1 ([XXX]-21-OP)) or first compliance proceeding (FCP) (example: [XXX]-1 ([XXX]-21-FCP)).

(5) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before the meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during the meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during the meeting, and in writing following the meeting, as provided for in paragraphs 16 and 21 below.

Substantive meeting

10. The Panel may open its meeting with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting with the parties.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. There shall be one substantive meeting with the parties.

16. The substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

THIRD PARTY SESSION

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third party session of the meeting with the Panel.

21. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit one integrated executive summary, which shall summarize the facts and arguments as presented to the Panel in the party's first written submission, second written submission, oral statement, and if possible, its responses to questions and comments thereon following the substantive meeting.

24. Each integrated executive summary shall be limited to no more than 15 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

b. Each party and third party shall submit 3 paper copies of its submissions and 3 paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any documents are in a format that is impractical to submit as a paper copy, then the party may submit such documents to the DS Registrar by email or on a CD-ROM, DVD or USB key only.

c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on USB keys, CD-ROMs or DVDs.

d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or on a CD-ROM or DVD only, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON OPEN PANEL MEETINGS

Adopted 4 April 2019

1. During the meeting with the parties, only Approved Persons (as defined in paragraph 1 of the Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information ("BCI/HSBI Procedures") and WTO Approved Persons (as defined in paragraph 23 of the BCI/HSBI Procedures) will be admitted into the meeting room. The Panel will invite the European Union to first present its full opening oral statement before the floor is given to the United States to present its full opening oral statement. The opening oral statements will be videotaped and be made available for later viewing, as set out in paragraph 5 below.

2. BCI or HSBI in the texts of the opening oral statements provided to the Panel and the other party during the meeting and prior to the delivery of the opening oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. If a party includes HSBI in its opening oral statement, it shall provide, prior to delivery of the opening oral statement, only one paper copy to each member of the Panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission. All other paper copies to be handed in the room shall not contain HSBI.

3. Paragraphs 44 and 55 of the BCI/HSBI Procedures shall be observed at all times during the meeting. Further in that context, if at any point during its opening oral statement a party intends to utter BCI or HSBI, it shall request that the videotaping be discontinued for the relevant portion of the opening oral statement, after which videotaping will be resumed. The party that requests the discontinuation of the videotaping shall also indicate when the BCI or HSBI portion has ended so that the videotaping can be resumed. A party is invited to first deliver a part of its opening oral statement that contains no BCI or HSBI, then ask for the videotaping to be discontinued when that part is over. It will then start the delivering of the second part of its opening oral statement containing BCI or HSBI, which will not be videotaped.

4. After both parties have delivered their opening oral statements, the Panel will ask the parties whether they can confirm that no BCI or HSBI was pronounced during the videotaped portions of the opening oral statements. If both parties so confirm, the showing of the videotape will proceed according to schedule. If either party, within a deadline to be established by the Panel, requests to review the videotape after the meeting, both parties will be invited to attend that review, accompanied by one or more representatives of the Secretariat responsible for editing, on the premises of the WTO at an appropriate time after the meeting. The parties should be prepared to advise the WTO Secretariat representative(s) which portion of the opening oral statement presents a concern, and limit review to those portions of the videotape to the maximum extent possible. If either party considers that a specific portion of the videotape must be deleted — because it is BCI or HSBI — the specific portion of the videotape will be deleted.

5. Regarding the third party session, third parties shall indicate to the Panel, not later than close of business on 3 May 2019, whether they consent to the videotaping of their oral statements for later viewing. The Panel will start the third party session with the statements of those third parties so consenting. After such third parties have made their statements, any questions or comments from the parties, other third parties or the Panel concerning these statements shall be made. The Panel shall then proceed to a third party closed session during which the rest of the third parties shall make their statements. Such statements will not be videotaped. The Panel or any party or third party may pose questions to any third party or make comments concerning these statements. Such comments, questions and answers thereto will not be videotaped. Should any third party intend to include BCI in its oral statement or otherwise to refer to BCI during the third party session, it is requested to inform the Panel by close of business on -- April 2019 so that appropriate arrangements can be made to protect the confidentiality of that information.

6. The showing of the videotape of the opening oral statements of the parties and any third party wishing to make its statement publicly available shall take place on a date to be established by the Panel after consulting the parties. It will be open to officials of WTO Members and Observers, and, upon registration with the Secretariat, to accredited journalists, accredited representatives of non-governmental organizations, and other interested persons, including members of the public. The WTO Secretariat will place a notice on the WTO website no later than four weeks before the date of the public viewing to inform the public of the showing. The notice shall include a link through which persons can register with the WTO Secretariat to attend the showing.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION ("BCI/HSBI PROCEDURES")

Adopted on 23 October 2018
Revised on 15 November 2018

I. GENERAL

The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Panel record. These Procedures do not diminish the rights and obligations of the Parties to request, disclose, or maintain the confidentiality of any information within the scope of the SCM Agreement[1] or the DSU.[2]

II. DEFINITIONS

For the purposes of these Procedures:

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

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

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

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

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

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

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

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

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

   (b) for electronic information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation 'BUSINESS CONFIDENTIAL

[1] *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").
[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

INFORMATION', has a file name that contains the letters "BCI", and is stored on a storage medium with a label marked 'BUSINESS CONFIDENTIAL INFORMATION' and indicating the name of the Party or Third Party that submitted the information; and

(c) for uttered information, declared by the speaker to be "Business Confidential Information" prior to utterance.[3]

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

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

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

(a) for printed information, text that is set off with double bolded square brackets in a document clearly marked with the notation "HIGHLY SENSITIVE BUSINESS INFORMATION" and with the name of the Party or Third Party that submitted the information.

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

(c) for uttered information, declared by the speaker to be "Highly Sensitive Business Information" prior to utterance.[4]

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

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

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

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

(i) information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[5], and, except as provided

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

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

[5] This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer

in subparagraph 7(d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

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

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

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

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

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

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

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

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

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

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

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

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

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

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including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

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

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

(a) for HSBI submitted by the United States, on the premises of (i) the United States Mission to the European Union in Brussels and (ii) the Office of the United States Trade Representative in Washington, DC;

(b) for HSBI submitted by the European Union, on the premises of the Delegation of the European Union to the United States in Washington, DC and (ii) the Directorate General for Trade of the European Commission in Brussels.

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

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

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

(a) advises a Party or Third Party in the course of the dispute;

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

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

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

12. **"Panel"** means the DS316 compliance panel composed on 28 September 2018.

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

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

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

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

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

(a) in the case of the European Union, the offices of WTO Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Mission of the European Union to the International Organisations in Geneva (Rue du Grand-Pré 66,

1202 Geneva, Switzerland), and three additional sites specified in accordance with subparagraph (c);

(b) in the case of the United States, the offices of the Office of the United States Trade Representative (600 17th Street, NW, and 1724 F Street NW, Washington, DC, USA), the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and three additional sites specified in accordance with subparagraph (c); and

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

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

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

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

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

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

22. **"Third Party BCI Approved Person"** means a representative or Outside Advisor of a third party granted access to BCI pursuant to paragraphs 30, 37, 38 and 43.

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

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

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

III. SCOPE

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

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

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

IV. DESIGNATION OF APPROVED PERSONS

29. At the latest by 12:00 p.m. (noon) on 25 October 2018, each Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and/or Third Parties and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and/or Third Parties and whom it wishes to have designated as HSBI Approved Persons. Each Party may designate new Approved Persons, remove Approved Persons, or replace Approved Persons by submitting amendments to its list of Approved Persons to the other Party and Third Parties, and to the Panel.

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

31. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate a maximum number of 30 Representatives and 22 Outside Advisors as "HSBI Approved Persons" over the duration of the proceeding. These limits shall apply in respect of all Representatives and Outside Advisors designated as HSBI Approved Persons, irrespective of whether that designation is withdrawn at any stage of the proceeding.

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

33. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 29 that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days.

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

35. The Parties or the Director-General of the WTO, or his or her designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 31 and to objections for the addition of new Approved Persons in accordance with paragraphs 33 and 34. Any such amendments or objections by a Party shall be submitted to the Panel and communicated to the other Party on the same day. Any amendments to the list of WTO Approved Persons shall be promptly communicated to the Parties.

V. BCI

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) The EU may designate the personal offices of up to four of its Approved Persons as additional Secure sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' submissions to the Panel. All of the protections applicable to BCI under these procedures, including the storage rules in Paragraph 45, shall apply to such submissions. BCI exhibits to submissions may not be stored or reviewed at these additional Secure sites. The EU shall submit

the address (including room number) of each of the additional Secure sites to the Panel and the complaining Party.

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

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

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

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

(c) If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 43(b) above, that Third Party BCI Approved Person shall store the memo only in a locked security container. Such memo shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. The content of such memo shall not be incorporated, electronically or in handwritten form, into the Non-BCI Version, as defined in paragraph 42(b).

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

(e) If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 43(b) above, such memo shall not be copied in excess of the number of copies required by the Third Party BCI Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies of such memo shall be prohibited.

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

(g) On the date determined by the Panel as the deadline to make the Third Party submission, a Third Party shall service its submission only to the Parties and to the Panel. The submission shall be serviced to the other Third Parties only after the Parties have confirmed that the submission does not contain or disclose

Party-BCI. A Party shall make this confirmation or otherwise advise of any necessary change to the relevant Third Party within 2 working days of receiving the submissions of Third Parties.

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

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

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

VI. HSBI

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

48. HSBI shall be submitted to the Panel in electronic form, using locked CDs or two Sealed laptop computers connectable to 19" - 21" monitors, or in hard copy form, for access by WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI. All such HSBI shall be stored in a combination safe in a designated secure location on the premises of the WTO Secretariat. Any computer in that room shall be a Stand-alone computer. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper and marked in accordance with paragraph 5. Such hard copies shall either be stored in a combination safe at the designated secure location referred to above, or destroyed at the end of the relevant working session. HSBI shall not be removed from this designated secure location, except in the form of handwritten notes that may be used only for working sessions on the WTO Secretariat's premises by WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI and which shall be destroyed once no longer in use. Also, documents containing HSBI may be removed if stored on a Sealed laptop computer provided by the Party or Third Party that submitted the information or if stored on Locked CDs provided by the Party or Third Party that submitted the information to the extent necessary for working sessions of the Panel and WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI, subject to the following conditions:

(a) the Sealed laptop computer or Locked CDs shall remain on the premises of the WTO at all times;

(b) the Sealed laptop computer or Locked CDs shall at all times be in the exclusive and direct custody of a WTO Approved Person designated pursuant to paragraph 32 as being additionally authorized to access HSBI;

(c) the WTO Approved Person in exclusive and direct custody of the Sealed laptop computer or Locked CDs shall ensure that no reproductions of any kind of information stored on the Sealed laptop or the Locked CDs are created in any way;

(d) information contained on the Locked CDs shall only be viewed or processed using a Stand-alone computer that is neither connected to a network nor capable of being connected to a network. When not in use, such Stand-alone

computers shall be kept in locked security containers on the premises of the WTO Secretariat; and

(e) at the conclusion of the relevant working session, the Sealed laptop computer or Locked CDs shall be immediately returned to the combination safe in the designated secure location referenced above.

Any working sessions involving HSBI that occur outside of the designated secure location referred to above shall only occur in the personal work spaces (on the premises of the WTO Secretariat) of WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI, or, for internal meetings of the Panel and/or of WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI, only in closed meeting rooms on the premises of the WTO Secretariat. During all such working sessions, and with respect to all spaces in which such working sessions occur, special care shall always be taken to ensure the security of HSBI.

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

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

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

52. HSBI Approved Persons may view HSBI on the Sealed laptop computer maintained by the other Party or a Third Party or, in the case of HSBI submitted on Locked CDs on a Stand-alone computer, only in a designated room at one of the HSBI locations indicated in paragraph 9, or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 47, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI location. The designated secure location referred to in paragraph 48 shall be available to HSBI Approved Persons by prior arrangement with the WTO Secretariat. HSBI Approved Persons may not bring into such room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from such room, except in the form of handwritten notes or aggregated information generated on a Stand-alone computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI location or designated secure location referred to in paragraph 47 shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI location within its territory referenced in paragraph 9, maintain such log until one year after the Conclusion of the Panel Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 48, maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

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

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

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

56. All HSBI shall be stored in a safe at the relevant HSBI location or in accordance with paragraph 48.

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

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

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

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

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

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

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

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

(e) The Full HSBI Version Appendix shall be kept in an HSBI location and in the designated secure location referred to in paragraph 48, as appropriate, in the form of a locked CD. If it is not practical to keep the Full HSBI Version Appendix in an HSBI location, the Party may keep it in a locked security container in a Secure site in the form of a locked CD.

(f) The locked CD containing the Full HSBI Version Appendix shall bear the label marked 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION' and indicate the name of the Party that submitted the HSBI. In addition, the HSBI Appendix itself shall be marked with a heading with double bolded square brackets on

each page in an electronic file that contains the notation 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION'. The electronic file containing the HSBI Appendix shall have a file name that contains the letters "HSBI".

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

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

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

(j) WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, a Panel meeting with the parties and/or an internal meeting. When not in use, these paper versions shall be stored in a locked container in the designated secure location referred to in paragraph 48. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Panel Process as defined in paragraph 3.

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

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

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

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

(iv) The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI-Approved Person for purposes of the verification provided for in

paragraph (iii) above. HSBI-Redacted Version Exhibits may be prepared by HSBI-Approved Persons upon request during the times the designated room at the relevant HSBI location is available.

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

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

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

VII. RESPONSIBILITY FOR COMPLIANCE

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

VIII. ADDITIONAL PROCEDURES

60. After consulting with the Parties, the Panel may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures but which the Panel considers may be of assistance in adjudicating the claims before it.

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

IX. RETURN AND DESTRUCTION

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

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

64. After the Conclusion of the Panel Process as defined in paragraph 3(b), the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. Following the adoption by the DSB of the Appellate Body report pursuant to Article 17.14 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body Report pursuant to Article 17.14 of the DSU, the provisions of paragraphs 62 and 63 shall apply.

65. The hard drive of each Stand-alone computer and all media used to back up such computers shall be destroyed within the period fixed by the Panel pursuant to paragraph 62.

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

1.1. The Panel issued its Interim Report to the parties on 17 October 2019. Both parties submitted written requests for review of precise aspects of the Interim Report on 31 October 2019, and written comments on each other's written requests on 14 November 2019. The European Union also provided written comments on the treatment of certain information as BCI in the Interim Report on 31 October 2019. Neither party requested the Panel to hold an interim review meeting.

1.2. In accordance with Article 15.3 of the DSU, this Annex responds to the issues raised by the parties in the context of the interim review. Apart from the specific changes described in the following section, we have also corrected a number of typographical errors and other non-substantive errors throughout the report, including those identified by the parties, which are not referred to specifically below.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 The European Union's 17 May 2018 compliance communication to the DSB

2.1.1 Paragraph 7.34

2.1. The United States requests the Panel to revise this paragraph to reflect the United States' specific argument that the European Union did not demonstrate that the less than full drawdown reduces the *ex ante* benefit of the subsidy. The European Union does not object to the United States' request.

2.2. The relevant text has been amended to more accurately reflect the United States' argument.

2.1.2 Paragraph 7.39

2.3. The European Union requests the Panel to explain the significance of the Panel's statement in paragraph 7.39 that "the European Union has not provided evidence indicating that the notified measures and steps were taken by the relevant member States for the specific purpose of achieving compliance with Article 7.8 of the SCM Agreement". The European Union asks the Panel to clarify the significance of this statement to the Panel's assessment whether the notified measures and steps achieved compliance with the recommendations and rulings of the Dispute Settlement Body. The United States responds that paragraph 7.39 requires no further modification because the Panel's relevant statement therein "is an observation that speaks for itself".

2.4. The statement cited in the European Union's request is a factual observation made by the Panel about the character of the 18 steps or measures the European Union maintains "bring its measures fully into conformity with its WTO obligations" and "ensure full implementation of the DSB's recommendations and rulings".[1] By noting the absence of the submission of evidence on the part of the European Union indicating that the 18 steps or measures were taken for the specific purpose of achieving compliance, the relevant statement clarifies the nature of the actions the European Union asks the Panel to find achieve compliance. The Panel considers this observation relevant to its factual characterization of the steps and measures under consideration.

2.2 The [***] amendment to the German A350XWB LA/MSF agreement

2.2.1 Paragraph 7.134

2.5. The United States requests the Panel to modify this paragraph to reflect the United States' argument that conclusions contained in the NERA German A350XWB LA/MSF report demonstrate

[1] Communication from the European Union dated 17 May 2018, WT/DS316/34, paras. 2 and 14.

that the German A350XWB LA/MSF amendment increased the subsidy provided to Airbus. The European Union does not object to the United States' request.

2.6. The relevant text has been amended to more accurately reflect the United States' argument.

2.2.2 Paragraph 7.135

2.7. The United States requests the Panel to revise the first and second sentences of this paragraph to clarify the United States' argument that, even if the Panel were to accept the European Union's analytical framework, a comparison of the IRR of the **[***]** amendment to the market benchmark used by TradeRx demonstrates that no reasonable commercial lender would have agreed to the amendment's terms. The European Union does not object to the United States' request.

2.8. The relevant text has been amended to more accurately reflect the United States' argument.

2.2.3 The [***] amendments to the French, German, Spanish and UK A380 LA/MSF loan agreements

2.2.3.1 Paragraph 7.211

2.9. The United States requests the Panel to revise the text of this paragraph to reflect the United States' argument that the PwC analysis incorrectly ignored the risk that forecast customer demand for the A380 would not materialize **[***]**. The European Union does not object to the United States' request.

2.10. The relevant text has been amended to more accurately reflect the United States' argument.

2.2.4 Market presence of the A380, A350XWB and A330neo after 2013 in the absence of the A380 and A350XWB LA/MSF subsidies

2.2.4.1 Paragraph 7.337

2.11. The United States requests the Panel to revise this paragraph to reflect the United States' specific argument that the Launch Statement contradicts the DSB's adopted findings. The European Union does not object to the United States' request.

2.12. The relevant text has been amended to more accurately reflect the United States' argument.

2.2.5 Factors allegedly attenuating the causal link between A380 and A350XWB LA/MSF subsidies and any present adverse effects

2.2.5.1 Paragraph 7.383, footnote 684

2.13. The United States requests the Panel to revise this footnote to more precisely reflect the United States' specific argument being cited. The European Union does not object to the United States' request.

2.14. The relevant text has been amended to more accurately reflect the United States' argument.

2.2.5.2 Paragraph 7.389

2.15. The United States requests the Panel to revise this paragraph to reflect the United States' specific argument that the causal pathway through which LA/MSF subsidies operate makes the present "magnitude" of any particular LA/MSF measure irrelevant. The European Union does not object to the United States' request.

2.16. The relevant text has been amended to more accurately reflect the United States' argument.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. This Integrated Executive Summary contains the arguments presented by the European Union in its Written Submissions, Oral Statements, Responses to Questions and Comments on Responses to Questions.

2. In these reverse compliance proceedings, the European Union has demonstrated, with argument and evidence, that it has achieved compliance with the recommendations and rulings of the DSB in this dispute. After the first compliance proceedings, the remaining recommendations related to adverse effects from A380 and A350XWB MSF subsides, which were found to have accelerated the launch of the A350XWB some 13 years ago, in 2006, and A380 MSF subsidies, which were found to have accelerated the launch of the A380 some 19 years ago, in 2000.

3. Specifically, under Article 7.8 of the *SCM Agreement*, the European Union has demonstrated in these proceedings that the vast majority of the subsidies that remained after the first compliance proceedings have been withdrawn; and, for any subsidies that have not been withdrawn, the European Union has demonstrated that appropriate steps have been taken to remove their adverse effects. Accordingly, full compliance has been achieved with the DSB's recommendations and rulings.

4. As regards the withdrawal of the vast majority of the subsidies at issue, the European Union has demonstrated that, of the subsidies pertaining to the eight MSF loans at issue, six have been withdrawn, within the meaning of Article 7.8 of the SCM Agreement. Specifically, the UK A350XWB MSF subsidy has been withdrawn through the full repayment of the UK A350XWB MSF loan. Moreover, five of the MSF loan agreements, *i.e.*, the French, German, Spanish and UK A380 MSF loans, as well as the German A350XWB MSF loan, have been amended such that those loans are now consistent with a contemporaneous market benchmark, resulting in the withdrawal of those subsidies. The European Union has further demonstrated that the full amortisation of the benefit from the Spanish A380 MSF subsidy provides an additional basis to find that that subsidy has been withdrawn. Finally, to the extent any of the A380 MSF subsidies remained non-withdrawn as of 14 February 2019, the wind-down of the A380 programme acted as an intervening event withdrawing those subsidies. Hence, the European Union has withdrawn all of the A380 MSF subsidies, as well as the German and UK A350XWB MSF subsidies, such that full compliance has been achieved in respect of those subsidies.

5. In addition to its demonstration that the vast majority of MSF subsidies at issue have been withdrawn, the European Union has further demonstrated that, within the meaning of Article 7.8 of the *SCM Agreement*, appropriate steps have been taken to remove the adverse effects. Those appropriate steps have removed any adverse effects from the French and Spanish A350XWB MSF subsidies, which have not been withdrawn. The steps taken by the European Union have also removed any adverse effects from the other six MSF subsidies,[1] should the Panel find, despite the argument and evidence put forward by the European Union, that those subsidies have not been withdrawn. The appropriate steps to remove the adverse effects include, but are not limited to, the wind-down of the A380 programme. This constitutes the most extreme step that could ever have been taken to remove any alleged present adverse effects related to the market presence of the A380. The wind-down of the A380 programme ensures that Boeing will never again lose a sale or market share to the A380 (due to any subsidies or otherwise), and effectively hands Boeing a monopoly in the product market for very large aircraft ("VLA"). If this does not constitute an appropriate step to remove adverse effects, nothing will.

6. Moreover, the European Union has shown that the acceleration effects of A380 MSF and A350XWB MSF subsidies have timed out, in light of the counterfactual launch dates for those aircraft, in the absence of those subsidies, that the European Union established. Thus, the MSF subsidies at issue are no longer a genuine and substantial cause of any presently occurring market phenomena

[1] French, German, Spanish and UK A380 MSF subsidies, and German and UK A350XWB MSF subsidies.

alleged by the United States to constitute present adverse effects, taking into account these counterfactual launch dates; the passage of time more generally, which results in diminishing effects of any subsidies; the reduced magnitude of any non-withdrawn MSF (through both amortisation and the reduced draw-down of certain loans); and, the impact of Airbus' post-launch investments on the continued market presence and attractiveness of the aircraft at issue.

7. Throughout these proceedings, the United States has failed to rebut the European Union's demonstration that it has fully complied with the DSB's recommendations and rulings. The United States' arguments are replete with factual and legal errors, and must be rejected. Further, the United States has also sought, inappropriately, to expand the scope of these proceedings by challenging a suite of R&TD measures that are outside the scope of these proceedings for a number of reasons, including that the measures are not within the Panel's terms of reference, and that claims against those measures have already been finally resolved, such that the United States is precluded from challenging them once again in these second compliance proceedings, and all of the measures do not properly constitute measures taken to comply. In any event, the United States has also failed to demonstrate, with argument and evidence, that these measures supplement and complement any present adverse effects caused by any remaining A380 MSF and A350XWB MSF subsidies.

8. Based on the totality of the evidence and argument presented by the European Union in these proceedings, the Panel should find that: (i) the European Union has withdrawn all of the A380 MSF subsidies at issue, as well as the German and UK A350XWB MSF subsidies at issue, such that full compliance has been achieved in respect of those subsidies; (ii) the European Union has taken appropriate steps to remove the adverse effects of any subsidies that the Panel finds have not been withdrawn, such that full compliance has been achieved in respect of those subsidies; and, (iii) all of the R&TD measures challenged by the United States are outside the scope of these proceedings, and in any event, do not complement and supplement any present adverse effects caused by any remaining A380 MSF and A350XWB MSF subsidies.

I. THE EUROPEAN UNION HAS WITHDRAWN THE A380 MSF SUBSIDIES AND THE GERMAN AND UK A350XWB MSF SUBSIDIES

9. In its submissions, the European Union has discussed the various means through which a subsidy can be withdrawn for the purposes of Article 7.8 of the *SCM Agreement*. When the proper legal standard under Article 7.8 is applied to the facts of this case, the only conclusion that can be drawn is that the European Union has withdrawn all of the A380 MSF subsidies, as well as the German and UK A350XWB MSF subsidies. Accordingly, full compliance has been achieved in respect of those subsidies.

A. The full repayment of the UK A350XWB MSF loan achieves withdrawal

10. *First*, the European Union has demonstrated that the full repayment of the UK A350XWB MSF loan has resulted in the withdrawal of that subsidy, under Article 7.8 of the *SCM Agreement*.

11. As a matter of law, the full repayment of the financial contribution removes one of the two constituent elements of the subsidy that was deemed to exist under Article 1.1 of the *SCM Agreement*. The conclusion that the repayment of a financial contribution withdraws the subsidy is consistent with, and flows from, the very definition of a subsidy. Specifically, Article 1.1 of the *SCM* Agreement, which applies "{f}or the purpose of this Agreement", identifies the constituent elements of a subsidy as "a financial contribution" and "a benefit" that is thereby conferred on the recipient. The existence of a subsidy requires that these two constituent elements *co-exist*. The conclusion that the full repayment of a subsidised loan results in the withdrawal of the subsidy is also supported by, and is fully consistent with, the Appellate Body's finding, in the original proceedings, that the "removal of the financial contribution", as one of the constituent elements of a subsidy, results in the "life" of a subsidy coming "to an end".[2]

12. The United States' argument to the contrary is based on a selective reading of findings by the first compliance panel. In any event, the findings of that panel constitute *obiter dicta*; and they were tainted by the first compliance panel's erroneous interpretation of the requirements to achieve withdrawal of the subsidy, which the Appellate Body reversed as erroneous, under Article 7.8 of the *SCM Agreement*. Accordingly, the United States failed to rebut the European Union's argument that,

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

consistent with the Appellate Body's finding in the original proceedings, the "removal of the financial contribution" results in the "life" of a subsidy coming "to an end".[3]

13. As factual matter, the European Union has further demonstrated that Airbus has repaid the UK A350XWB MSF loan in full. In response, the United States has offered flawed readings of the EU evidence, and baseless assertions. The United States has, thus, failed to rebut the European Union's demonstration that the UK A350XWB MSF loan has been repaid in full.

14. Accordingly, the UK A350XWB MSF subsidy has been withdrawn, because one of the constituent elements of the subsidy, *i.e.*, the financial contribution, is no longer extant. The European Union has thus achieved full compliance in respect of the UK A350XWB MSF subsidy.

B. All of the A380 MSF subsidies, and the German A350XWB MSF subsidy, have been withdrawn

15. *Second,* the withdrawal of a subsidy can be achieved through the replacement of a financial contribution conferred on below-market terms with a financial contribution conferred on terms consistent with a contemporaneous market benchmark. Specifically, where a subsidising Member modifies the financial terms under which a subsidised financial contribution had been provided, this amounts to the replacement of the original financial contribution by a new financial contribution.[4] This approach is consistent with the Appellate Body's endorsement of the panel finding in *Japan – DRAMS (Korea)*, identifying the following as examples of modifications to an existing financial contribution which would result in a new financial contribution: (i) debt forgiveness, (ii) extension of a loan maturity, and (iii) interest rate reduction.[5]

16. If the new financial contribution is provided on terms consistent with a contemporaneous market benchmark, it means that the subsidised financial contribution has been replaced by a new and non-subsidised financial contribution. As such, a benefit is no longer conferred. In other words, the replacement of a subsidised financial contribution with a non-subsidised financial contribution constitutes the replacement of a subsidy by a measure that does not amount to a subsidy. Such replacement brings about the prospective withdrawal of the subsidy, within the meaning of Article 7.8 of the SCM Agreement. This conclusion is further supported by the Appellate Body's finding, in the first compliance proceedings, that: "{i}n order to withdraw a subsidy, an implementing Member may be able to take action to align the terms of the subsidy with a market benchmark, or to otherwise modify the terms of the subsidy such that it no longer qualifies as a subsidy".[6]

17. The United States' arguments to the contrary have rejected the relevance of immediately applicable context from the definition of a subsidy in Article 1.1 of the SCM Agreement, in favour of distant context from Article 6.2 of the DSU. That provision governs the specificity requirements of a panel request, and speaks to the jurisdiction of a panel, under its terms of reference. That provision does not govern the substantive assessment of whether a measure is consistent with the covered agreements, including Article 7.8 of the SCM Agreement. Moreover, throughout its submissions, the United States has failed to identify any measure that a Member could adopt to withdraw a subsidy prospectively.

18. As a factual matter, the European Union has demonstrated, throughout its submissions, that the subsidies conferred by all four A380 MSF loans, as well as the German A350XWB MSF loan, have been withdrawn through amendments to each of the original loan agreements. Specifically, each of the amendments resulted in the subsidised financial contribution being replaced by a new financial contribution that is consistent with a contemporaneous market benchmark, such that there no longer exists a benefit. Thus, as the European Union recalls below, the subsidies no longer exist, and are hence withdrawn.

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

[4] EU First Written Submission, paras. 70-80 (*citing* Panel Report, *Japan – DRAMs (Korea)*, para. 7.442; Appellate Body Report, *Japan – DRAMs (Korea)*, para. 251).

[5] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 251; Panel Report, *Japan – DRAMs (Korea)*, para. 7.442.

[6] Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 5.366.

1. The European Union has demonstrated that all of the A380 MSF subsidies have been withdrawn through the amendment of each of the original A380 MSF loan agreements

19. As regards the four A380 MSF subsidies, in each instance, the subsidised financial contribution has been replaced by a new financial contribution, as a result of 2018 amendments to the loan agreements. This new financial contribution is now consistent with a contemporaneous market benchmark, such that there no longer exists a benefit and, consequently, the subsidy has been withdrawn.

20. These amendments arose against the background of the commercial situation of the A380 programme. In 2017, Airbus had not recorded any new orders for a period of approximately four years. The company decided that the only commercially acceptable option would be to terminate the programme, unless it could secure, in the near term, an additional order under negotiation with Emirates at commercially acceptable conditions that would also ensure production at least until additional future demand was expected to materialise in the mid-2020s. However, the commercial constraints facing Emirates and Airbus made such an order economically unachievable, without a restructuring of the A380 MSF agreements.

21. The A380 MSF loan agreements required payment of levies, and royalties, where applicable, on delivery of A380 aircraft. It was this feature of the MSF loans, which made them risk-sharing, that led the original panel to require a project-specific risk premium when benchmarking the A380 MSF loans. That same feature led the first compliance panel to rule that a shortfall in repayments due to a lack of sales does not constitute a new subsidy, but was anticipated by the parties when the loan agreements were signed, and reflected in the benchmark.

22. Given this risk-sharing nature of the A380 MSF loan agreements, terminating the A380 programme in 2017 or 2018 would have resulted in the MSF lenders suffering substantial losses on their investments. Faced with this certainty of loss, the lenders acted as any rational commercial actor would have acted, and agreed to the restructuring of the MSF loan agreements. Hence, each of the 2018 amendments ultimately concluded represents an attempt, by each of the lenders, to exchange the certainty of large losses in the case of programme termination, for the prospect of additional gains, by unlocking, through the restructuring of the A380 MSF loans, future upside potential when forecast demand was expected to return in the mid-2020s.

23. As explained above, "the modification of an existing loan may properly be treated as the transfer of new rights to the recipient of the modified loan", and thus as a new financial contribution.[7] The European Union has demonstrated that each of the amendments to the A380 MSF loan agreements modifies the original loan agreements in a manner that brings about a new financial contribution under each of the agreements. This means that the original financial contribution was removed, and replaced by a new financial contribution.

24. The new financial contributions under the amended A380 MSF loan agreements are each consistent with contemporaneous market benchmarks, as demonstrated in analyses undertaken by PwC. Specifically, PwC compared the losses that each of the MSF lenders would have faced in the programme termination scenario, to the net returns that the MSF lenders stand to receive under each of the amendments in a restructuring scenario. PwC concluded that each amendment placed the MSF lenders in a more favourable position, relative to programme termination. Moreover, PwC concluded that, as a standalone proposition (*i.e.*, even when not compared to the losses from programme termination), each amendment has a positive impact on expected repayments, or entails no net change to the future repayments for each Member State. PwC's analysis thus establishes that, even if the lenders were to receive only a small part of any projected net returns from the restructuring, they would still be better off than they would have been in the programme termination scenario.

25. As such, each of the EU Member State lenders acted consistently with market. The 2018 amendments to the A380 loan agreements resulted in subsidised financial contributions being replaced by new financial contributions that are consistent with a contemporaneous market benchmark, such that there no longer exists a benefit. Thus, the A380 MSF subsidies no longer exist, and are hence withdrawn. Accordingly, the European Union has achieved compliance, under Article 7.8, in relation to the A380 MSF subsidies.

[7] Panel Report, *Japan – DRAMs (Korea)*, para. 7.442.

26. The United States has failed to rebut the European Union's showing that each of the A380 MSF subsidies have been withdrawn.

27. *First*, the United States' insistence that the amendments to the original A380 agreements do not bring about the withdrawal of each of the A380 MSF subsidies flows from its erroneous understanding of the legal standard for withdrawal under Article 7.8 of the *SCM Agreement*. The United States attempts to refute the fact that the amendments result in new financial contributions by pointing to the fact that the parties to the A380 MSF loan agreements did not formally terminate the original agreements and effect "immediate disgorgement" of the original financial contribution.[8] However, this argument reflects an erroneous understanding of the applicable legal standard. To recall, the correct legal standard, as reflected in *Japan – DRAMs (Korea)*, is that *a modification of the financial terms of an existing financial contribution gives rise to a new financial contribution*.[9] Moreover, *the economic effect of either (i) a modifying amendment or (ii) the return of a financial contribution and its redrawing on amended terms*, *is identical.* Hence, the US argument is inconsistent with the applicable legal standard pertaining to the withdrawal of subsidies for the purposes of Article 7.8 of the *SCM Agreement*. The United States also places form over substance.

28. *Second*, in attempting to rebut the European Union's demonstration that the amendments to the A380 MSF agreements result in the withdrawal of the A380 MSF subsidies, the United States also erroneously relies on a comparison of the IRRs under the original A380 MSF loan agreements, and those under the amended MSF agreements. However, the European Union has demonstrated that this comparison is erroneous, and the United States has failed to explain why a comparison of those two IRRs is relevant for the particular financial contributions at issue. Indeed, such comparison evokes a "cost to government" standard for the assessment of "benefit" under Article 1.1(b) of the *SCM Agreement* that has been explicitly rejected by the Appellate Body. As the Appellate Body has confirmed, the relevant comparison assesses whether the new financial contributions brought about by the amendments is consistent with a contemporaneous market benchmark.

29. *Third*, in its futile attempt to rebut the European Union's demonstration that the amendments to the A380 loan agreements withdraw each of the A380 MSF subsidies, the United States further disputes the fact that each of the EU Member State lenders, in agreeing to the amendments, acted consistently with the manner in which rational commercial lenders would have acted in similar circumstances. In this regard, the United States erroneously asserts that a rational private creditor would not have believed that, absent the restructuring, Airbus would have terminated the A380 programme. However, this assertion is entirely undermined by the evidence of record. That evidence conclusively demonstrates that Airbus would *not* have continued the A380 programme absent the restructuring. Conversely, nothing in the PwC Report, the United States' submissions or NERA's analysis supports that US assertion. For example, the United States grossly understates the shortage of orders for the A380 programme immediately preceding the 2018 amendments, and the consequent risk of programme termination. Moreover, the United States errs when arguing that the mere fact that a company has sufficient financial resources to afford continuation of a programme, without risking its own liquidation, means that the company will spend those financial resources in an economically irrational manner. In short, the United States has failed to demonstrate, with evidence and argument, its erroneous assertion that programme continuation was a "real option".[10]

30. In its submissions to the Panel, the United States also placed much reliance on a statement by the CEO of Emirates, which expressed general support for the A380 programme. The United States used this statement in an attempt to establish its erroneous assertion that a rational private creditor would not have agreed to the amendments to the A380 MSF loan agreements. Specifically, the United States argued that a rational private creditor, relying on the statement by the CEO of Emirates, would have expected Emirates to take delivery on all of the airline's outstanding A380 orders, and to support the A380 programme by placing additional orders, *regardless of the specific terms offered by Airbus*. In its submissions, the European Union has demonstrated, however, that the United States errs in interpreting the statement made by the CEO of Emirates as an assurance that Emirates would accept deliveries on all outstanding orders for the A380, and place additional orders, in a manner and at a time that would have secured programme continuation, regardless of the specific terms on offer. Indeed, the very fact that the A380 wind-down was caused by Emirates' cancellation of a large number of its existing orders should make it plainly obvious that

[8] US First Written Submission, para. 51.

[9] Panel Report, *Japan – DRAMs (Korea)*, para. 7.442; Appellate Body Report, *Japan – DRAMs (Korea)*, para. 251.

[10] US First Written Submission, para. 65.

Emirates was not committed to incorporating additional A380s in its fleet without regard to its own interests and constraints. Moreover, the evidence of record demonstrates that even assurances from Emirates that it would want to receive all outstanding orders would not have alleviated Airbus' concerns, and thus would not have avoided programme termination. Accordingly, the United States errs in suggesting that a commercial lender would have viewed the statement by the CEO of Emirates as an indication, much less an assurance, that programme termination could be avoided even absent MSF loan restructuring.

31. In a further attempt to establish that the EU Member State lenders acted inconsistently with market in agreeing to the amendments, the United States accuses the European Union and PwC of assuming that all of the projected future deliveries would occur. The United States asserts that a rational private creditor would not have believed that the future prospects for the A380 programme were attractive enough for the creditor to accept the restructuring. The United States errs. The European Union has demonstrated that the prospects of the A380 programme were attractive enough for a private creditor to accept the restructuring. Indeed, PwC analysis demonstrates that the restructuring solution was advantageous to the MSF lenders, *in comparison with the programme termination scenario*. Moreover, PwC analysis demonstrates that even in the programme wind-down scenario that occurred in 2019, each amendment has a positive impact on the MSF lenders' returns, or entails no meaningful change. Accordingly, PwC's conclusions regarding the market consistency of the amendments do *not* rest on an assumption that all of the projected future deliveries would occur.

32. Finally, the United States asserts that the EU Member State lenders failed to act as rational commercial creditors. The United States erroneously alleges that the MSF lenders failed to perform due diligence prior to the 2018 amendments, and also failed to demand better terms. As an initial matter, the presence or absence of due diligence cannot be determinative, because the market-consistency of a financial contribution is to be determined through a comparison of the terms on which the financial contribution is provided, with the terms of a contemporaneous market benchmark. No amount of due diligence on a below-market loan leads to the conclusion that no subsidy exists; in the interests of symmetry and even-handedness, nor can the alleged failure to undertake due diligence on a loan demonstrated to have been provided on market terms turn that loan into a subsidy. In any event, contrary to the US assertions, the European Union has demonstrated that each MSF lender agreed to the terms of the 2018 amendment to its MSF loan after careful consideration of the situation, and in pursuit of their interests in multiple rounds of negotiations, in order to secure the best possible terms for themselves in a manner consistent with the market. Moreover, simply asserting that a lender could have *sought* better terms is of no moment; the circumstances demonstrate that the MSF lenders were in no position to *secure* better terms. In this connection, the MSF lenders' negotiating position was shaped by the risk-sharing terms of the original loan agreements, which led, in 2018, to a choice between the certainty of loss through programme termination, and the prospect of avoiding that loss through restructuring of the A380 MSF loans.

33. Moreover, and contrary to the US arguments, the MSF lenders' negotiating positions simply did not permit them to choose between the terms of the 2018 amendments, and terms that would have guaranteed them repayment of the entirety of their risk-sharing investment. As noted above, under the risk-sharing terms of the A380 MSF loan agreements, the MSF lenders had no contractual right to receive full repayment. While the MSF lenders could have sought anything they desired in renegotiating the A380 MSF agreements, there is a difference between "seeking" and "receiving". The lack of a legal entitlement or negotiating power meant that the terms of the 2018 amendments to the A380 MSF loans are consistent with what a rational market actor could have secured, as PwC confirms.

34. In sum, the European Union has demonstrated that, by agreeing to the amendments of the original A380 MSF loan agreements, the EU Member State lenders acted consistently with market. The European Union has further demonstrated that those amendments resulted in new financial contributions, and that those new financial contributions are consistent with contemporaneous market benchmarks. Accordingly, the amendments to the original A380 MSF loan agreements withdraw the A380 MSF subsidies at issue. Consequently, the European Union has achieved full compliance with the DSB's recommendations and rulings in respect of those subsidies.

2. The European Union has demonstrated that the German A350XWB MSF subsidy has been withdrawn through alignment with a contemporaneous market benchmark

35. As the European Union has demonstrated in these proceedings, in 2018, Germany (through KfW) and Airbus concluded an amendment to the German A350XWB MSF loan agreement that modified the financial terms of the original financial contribution and hence replaced it with a new financial contribution. When assessed against a contemporary market benchmark, the European Union demonstrated that the new financial contribution arising under the 2018 amendment is consistent with that contemporaneous market benchmark, such that there no longer exists a benefit. Thus, the subsidy no longer exists, and has been withdrawn.

36. To recall, in assessing whether the original A350XWB MSF loan agreements conferred "benefits" and constituted subsidies, the first compliance panel used a market benchmark consisting of (i) a corporate borrowing rate, (ii) a project-specific risk premium, (iii) and certain market fees.[11] Following the same approach, and adjusting the values of each of these components to reflect market conditions contemporaneous with the conclusion of the 2018 amendment, Professor Andreas Klasen compared the IRR under the amended German A350XWB MSF loan with a contemporaneous market benchmark. Professor Klasen concluded that the anticipated IRR under the amended loan is consistent with the market benchmark. Consequently, the amendment achieves the withdrawal of the German A350XWB MSF subsidy, and hence full compliance in respect of that subsidy.

37. The United States has failed to rebut the European Union's demonstration in this regard. In its failed attempt to rebut the European Union's showing, the United States asserts, *first*, that the financial contribution under the original loan was not replaced by a new financial contribution. The United States rests this erroneous assertion on the fact that the parties did not formally terminate the original agreement and effect "immediate disgorgement" of the original financial contribution.[12] The US argument is flawed, because it proceeds from an erroneous understanding of the applicable legal standard. To recall, the applicable legal standard was articulated in *Japan – DRAMs (Korea)*, where the panel and the Appellate Body confirmed that *a modification of the financial terms of an existing financial contribution gives rise to a new financial contribution*.[13] Moreover, *the economic effect of either (i) a modifying amendment or (ii) the return of a financial contribution and redrawing the contribution on amended terms*, *is identical.* Thus, contrary to the United States' assertions, and consistent with the proper legal standard, the amendment of the German A350XWB MSF loan replaces the financial contribution under the original loan agreement with a new financial contribution.

38. *Second*, the United States asserts that the comparison undertaken by Professor Klasen between the IRR under the amended German A350XWB MSF loan and the applicable contemporaneous market benchmark is inappropriate. The United States argues, on the basis of a report prepared by NERA, that the appropriate comparison is between the IRR under the original German A350XWB loan agreement, and the IRR under the amended terms. The US argument is flawed, both as a factual and legal matter.

39. As a legal matter, the United States errs in its assertion that a comparison of the IRR under the original German A350XWB MSF agreement and the IRR under the amended agreement determines whether the subsidy has been withdrawn. With its assertion, the United States adopts a "cost to government" standard for the assessment of "benefit" that has been rejected by the Appellate Body. The United States ignores the crucial role a contemporaneous market benchmark plays in the assessment of whether a financial contribution confers a benefit (and consequently constitutes a subsidy). Contrary to the US assertions, the new financial contribution must be assessed against a contemporaneous market benchmark.

40. As a factual matter, the US argument is flawed. In this regard, the United States asserts that it is appropriate to draw conclusions about subsidisation from a comparison of the two IRRs alone, because KfW enjoyed the right to retain the IRR foreseen by the original German A350XWB agreement. This argument is premised on a fundamental factual error – the terms of the original agreement entitled Airbus to seek early repayment (enabling Airbus to refinance the loan at current market conditions), and did not afford KfW the option to refuse that request. Thus, in the

[11] Panel Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 6.632, Table 10.
[12] US First Written Submission, para. 95.
[13] Panel Report, *Japan – DRAMs (Korea)*, para. 7.442; Appellate Body Report, *Japan – DRAMs (Korea)*, para. 251.

negotiations leading up to the amendment, both Airbus and KfW understood that Airbus' Best Alternative to a Negotiated Agreement, or "BATNA", was to effect prepayment. As in any negotiation between two rational actors, the knowledge of this BATNA influences the parties' positions in the negotiations.

41. As such, comparing the IRR under the amended terms to an IRR that KfW was not entitled to receive, is meaningless. The relevant and determinative comparison is between the IRR under the amended terms and a contemporaneous market benchmark. As the European Union has demonstrated, the IRR under the amended agreement is consistent with the benchmark.

42. The United States then argued that "a commercial lender would have the option to leave the loan unamended".[14] Again, the United States errs. The evidence demonstrates that the option to prepay a loan, subject to appropriate compensation is a standard term in comparable loan agreements, including, for example, those governed by German law and English law. That option was similarly included as a term of the German A350XWB MSF loan agreement.

43. Finally, the United States argues that, still, KfW would have been better off refusing the 2018 amendment, and receive early repayment instead. The United States errs once more. As part of its role as Airbus Operations GmbH's auditors, KPMG reviewed whether appropriate compensation was included in the 2018 amendment for the changes to the terms of the German A350XWB MSF loan agreement, confirming that these terms were consistent with market. This means that, from an economic perspective focusing on the existence of an appropriate compensation for agreeing to the amendment, KfW was indifferent between continuing the unamended loan, or agreeing to the 2018 amendment.

44. In sum, the European Union has demonstrated, based on the analyses by Professor Klasen and KPMG, that the amendment to the German A350XWB MSF loan achieves withdrawal of the subsidy, by replacing a subsidised financial contribution with a financial contribution that is consistent with a contemporaneous market benchmark.

3. The European Union has demonstrated that the Spanish A380 MSF subsidy has been withdrawn as a result of the full amortisation of benefit

45. The European Union has also demonstrated that the benefit from the Spanish A380 MSF subsidy has fully amortised, and has thus expired. In the first compliance proceedings, the Appellate Body found, on that basis, that the European Union had achieved full compliance under Article 7.8 in respect of the MSF loans for the development of the A300, A310, A320, A330/A340, A330-200 and A340-500/600.[15] Accordingly, the full amortisation of the benefit of the Spanish A380 MSF loan results in full compliance in respect of that subsidy.

46. In determining whether the benefit of the Spanish MSF loan for the A380 has amortised, Professor Klasen uses the "Loan Life" approach to amortisation. In the first compliance proceedings, the compliance panel and the Appellate Body accepted the use of a "Loan Life" approach to assess whether the benefit from a subsidised MSF loan had fully amortised.[16] Under that approach, the benefit of an MSF loan amortises over the period during which the parties anticipated, from an *ex ante* perspective at the time of conclusion of the loan agreement, full repayment of principal and interest, along with any royalties anticipated under the delivery forecast of the business case.[17] Specifically, the first compliance panel considered the point in time at which the parties expected, *ex ante* at the time of conclusion of the loan agreement, full repayment of principal and interest, and any anticipated royalties, to occur, on the basis of (i) the specific repayment terms included in the MSF loan agreement, and (ii) the Airbus business case delivery forecast from the time of conclusion of the MSF loan agreement. On the basis of the "Loan Life" approach, Professor Klasen concludes that the benefit from the Spanish A380 MSF subsidy has fully amortised in 2018.

47. The United States raises several erroneous criticisms of the European Union's demonstration, and of Professor Klasen's analysis. *First*, the United States asserts that "the very fact that the Spanish government negotiated to amend the terms and conditions of A380 LA/MSF" confirms that

[14] US First Written Submission, para. 97.
[15] Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 5.383.
[16] Panel Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.879, 6.1507 (footnote 2597).
[17] Panel Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 6.872, footnote 1534.

the A380 LA/MSF subsidy had not yet come to an end.[18] However, the US assertion ignores the fact that the "Loan Life" approach is based on the period over which the parties to the loan *expected*, *ex ante*, the full repayment of the loan. The fact that the loan agreement may continue to be legally valid beyond the *ex ante* expected life of the subsidy is entirely irrelevant to the determination of the *ex ante* expected life of the subsidy. The United States merely attempts to confuse the period of legal validity of the loan agreement, with the *ex ante* determined life of a subsidy conferred by a loan.

48. *Second*, the United States criticises the European Union and Professor Klasen for employing the "Loan Life" approach to the exclusion of the "Marketing Life" approach. While the first compliance panel also identified the so-called Marketing Life Approach as an alternative means of approaching amortisation of the *pre-A380* MSF subsidies, that approach applied in circumstances where the subsidy resulted in the very existence of the aircraft at issue. In contrast, the first compliance panel found that the direct effects from the A380 MSF subsidies are not "critical to {the} very existence" of the A380, and clarified that the effects of the subsidies do not endure for the entire marketing life of the programme. Instead, the first compliance panel and the Appellate Body found that the A380 MSF loans accelerated the launch of the A380. As a result, amortising the benefit of Spanish A380 MSF over the anticipated marketing life of the funded aircraft does not correspond to the nature and effect of the subsidy. To apply the logic behind the "Marketing Life" Approach to amortisation of the A380 MSF loans, it would be necessary to make adjustments to amortise the benefit over the *period during which the acceleration effect is anticipated on an* ex ante *basis to endure*, rather than the entire expected marketing life of these aircraft. That would result in the benefit from the A380 MSF loans being amortised over the two (or fewer) years following conclusion of the loan agreements. While the European Union does not object to applying that approach, it considers it more appropriate to adopt the "Loan Life" approach, which amortises benefit over a much longer period.

49. In sum, the European Union has demonstrated that the benefit of the Spanish A380 MSF loan has fully expired, such that the European Union has achieved full compliance in respect of that subsidy.

4. The European Union has demonstrated that the wind-down of the A380 programme acts as an intervening event that brings the life of any non-withdrawn A380 MSF subsidies to an end

50. Finally, and in the alternative, the European Union has also established the announcement of the wind-down of the A380 programme on 14 February 2019 brings an end to the life of the A380 MSF subsidies, under either the "Loan Life" or "Marketing Life" approaches.

51. *First*, under the "Loan Life" approach, the A380 wind-down constitutes an intervening event that brings the life of the A380 MSF subsidies to an earlier end than was expected *ex ante*. To recall, under the "Loan Life" approach, the focus is on the "benefit" of MSF subsidies amortising as it is expected to materialise with each repayment that is made. Once Airbus has discharged all of its repayment obligations, the MSF agreements no longer confer a "benefit". Accordingly, once Airbus has discharged all of its repayment obligations, no benefit continues to accrue, and therefore no subsidy continues to exist, within the meaning of Article 1.1 of the SCM Agreement.

52. By winding down the A380 programme, Airbus will deliver less than the number of A380 aircraft foreseen under the terms of the A380 MSF agreements. Therefore, since the foreseen number of aircraft under the funded programme will not be delivered, Airbus need not effect full repayment of principal and interest. This discharge of repayment obligations earlier than anticipated is a dramatic departure from the *ex ante* expectations as to when the final payment would occur, and constitutes an intervening event that brings the life of the MSF subsidies to an earlier end than was expected ex ante.

53. *Second*, the announcement of the wind-down of the A380 programme means that, even if the Panel were to choose the "Marketing Life" approach, the lives of all the A380 MSF subsidies came to an end on 14 February 2019. From that date, Airbus stopped marketing the A380, and the aircraft will no longer be sold. In fact, in announcing to the market that the A380 programme is being wound-down, Airbus did the exact opposite of "marketing" the A380.

[18] US First Written Submission, para. 82.

54. Accordingly, the announcement of the programme wind-down acts as an intervening event that brings about the end of the marketing life of the A380, and the A380 MSF subsidies would have to be considered withdrawn under the "Marketing Life" approach.

II. THE EUROPEAN UNION HAS TAKEN APPROPRIATE STEPS TO REMOVE ADVERSE EFFECTS OF ANY SUBSIDIES THAT HAVE NOT BEEN WITHDRAWN

55. As noted above, the European Union has demonstrated that the vast majority of the MSF subsidies at issue have been withdrawn – *i.e.*, all of the A380 MSF subsidies and the German and UK A350XWB MSF subsidies. Full compliance has thus been achieved in respect of these subsidies, under Article 7.8 of the *SCM Agreement*. In addition, the European Union has demonstrated that it has taken appropriate steps to remove the adverse effects of all of the withdrawn and any non-withdrawn subsidies, under Article 7.8 of the *SCM Agreement*. Specifically, steps taken by the European Union have removed any adverse effects from the French and Spanish A350XWB MSF subsidies, which the European Union does not assert have been withdrawn. The steps taken by the European Union have also removed any adverse effects from the other six MSF subsidies,[19] should the Panel find, despite the argument and evidence put forward by the European Union, that those subsidies have not been withdrawn.

56. To determine whether the European Union has achieved compliance under Article 7.8 of the *SCM Agreement* through appropriate steps to remove the adverse effects, the Panel must examine whether any subsidies it considers not to be withdrawn are, at present, a genuine and substantial cause of alleged present adverse effects. In making that determination, it is important to recall, first, the causal pathway through which the first compliance panel determined that the subsidies at issue were a genuine and substantial cause of adverse effects.

57. To recall, the remaining compliance obligations on the European Union under Article 7.8 of the *SCM Agreement* stem from certain findings, in the first compliance proceedings, regarding certain sales and deliveries of A380 and A350XWB aircraft that were found to amount to adverse effects. These adverse effects were held to be caused by the A350XWB and A380 MSF subsidies. Specifically, in the first compliance proceedings, A380 and A350XWB MSF subsidies were held to have *accelerated* the launch of the A380 and the A350XWB.[20] That is, although the A380 and the A350XWB could have been launched absent the A380 and A350XWB MSF loans, those loans enabled Airbus to launch these aircraft as and when it did.

58. Yet, the United States consistently misrepresents the findings of the first compliance panel and the Appellate Body. Specifically, the United States erroneously characterises the first compliance panel and the Appellate Body as having found that A380 and A350XWB MSF are responsible for the very existence of the aircraft. As the European Union has demonstrated, at no stage of the proceedings in this dispute did a WTO adjudicator find that the A380 and the A350XWB would never have existed in the absence of A380 and A350XWB MSF.

A. The acceleration effects of A380 and A350XWB MSF have timed out and can no longer serve as a basis for present adverse effects in 2019

59. The European Union has demonstrated that the acceleration effects of the A380 and A350XWB MSF subsidies have timed out. As a result of those acceleration effects having come to an end, the A380 and A350XWB MSF subsidies can no longer serve as the basis for findings of *present* adverse effects in 2019. Accordingly, the European Union has taken appropriate steps to remove the adverse effects of the subsidies at issue.

60. Specifically, the European Union demonstrated, based on an approach adopted by Professor David Wessels, a US expert in the first compliance proceedings, that, under a counterfactual in which the subsidies at issue had not been provided, Airbus would have launched the A380 in 2003, and the A350XWB in 2007 or 2008. In any event, the European Union has demonstrated that Airbus would have launched the A380 and the A350XWB by today, which is notable, since this Panel is charged with assessing whether there remain *present* adverse effects from any non-withdrawn subsidies.

[19] French, German, Spanish and UK A380 MSF subsidies, and German and UK A350XWB MSF subsidies.

[20] Panel Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1507 (footnote 2597), 6.1747, 6.1771, 6.1773, 7.1(d)(xiii); Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 5.632.

61. To recall, in the first compliance proceedings, the United States had engaged Professor David Wessels to develop and apply an approach to determining the counterfactual launch date for the A380. In the current compliance proceedings, the European Union applied the Wessels model in light of changed circumstances dictated by findings in the first compliance proceedings. Specifically, the counterfactual applied by the European Union to determine the counterfactual launch dates of the A380 and A350XWB does not assume the absence of the *pre-A380 MSF subsidies*, but does assume the absence of the A380 and A350XWB MSF subsidies. The counterfactual applied by the European Union does not eliminate the *pre-A380 MSF subsidies* because, as the Appellate Body confirmed in the first compliance proceedings, those subsides have been withdrawn and the European Union has, accordingly, no further compliance obligations in respect of those subsidies.

62. Under that counterfactual, the European Union demonstrated that Airbus would have substantially surpassed a Standard & Poor's ("S&P") credit rating of BBB-, which was Professor Wessels' threshold criterion for determining Airbus' ability to launch a new aircraft programme without subsidised MSF. In so doing, the European Union demonstrated that Airbus would have had the necessary financial capability to launch the A380 and the A350XWB significantly before the present period, *i.e.*, 2019. To recall, the European Union demonstrated that Airbus would have launched the A380 in 2003, and the A350XWB in 2007 or 2008.

63. While much of the adverse effect dissipates with the counterfactual launch date, the European Union recognised that a two-year delay in the launch date of the A380 and the A350XWB may still have resulted in some delay in the counterfactually *available delivery positions* that Airbus would have been able to offer in subsequent sales campaigns after 2003 (for the A380) and 2007/2008 (for the A350XWB), respectively. This would result in adverse effects continuing to exist for a period after the counterfactual launch dates, including during the 2011-2013 reference period considered in the first compliance proceedings.

64. However, as Airbus loses sales to Boeing in light of later available delivery positions for Airbus aircraft in the counterfactual, the available delivery positions in the actual world and in the counterfactual start to align. Once Airbus has lost sales campaigns to Boeing involving a number of deliveries equivalent to the number of aircraft that would have been produced during the duration of the delayed launch (one or two years) the counterfactually available delivery positions would be the same as in the real world. At that point, the outcome of subsequent sales campaigns would be the same as in the real world, and the adverse effects will have fully dissipated.

65. As the European Union has demonstrated in its submissions, the United States has failed to rebut its showing that the acceleration effects of A380 and A350XWB MSF have come to an end. The United States primary response is that the first compliance panel and the Appellate Body found A380 and A350XWB MSF subsidies to have "product creation" effects, rather than the effect of accelerating the launch of the aircraft at issue. As explained above, the US argument is unsupported by the findings from the first compliance proceedings.

66. The United States also argues that the EU approach failed to consider aspects other than Airbus' counterfactual financial position that are relevant to the launch of an aircraft. Specifically, the United States refers to evidence of the viability of a business case for a delayed launch of the A380 and A350XWB, and Airbus' technological capabilities to develop these aircraft. In this respect, the United States asserts that the European Union's evidence is insufficient, relative to the types of evidence considered in earlier proceedings.

67. Once again, the United States errs. As the European Union explained, its argument and evidence in these second compliance proceedings necessarily and appropriately build on the adopted findings from the original and first compliance proceedings, and the evidence underlying those findings. The European Union does not seek a re-assessment of that evidence. This constitutes a *strength*, not a weakness, of the European Union's demonstration in these proceedings. It was, thus, not necessary for the European Union to resubmit pieces of evidence that previous adjudicators have already reviewed and on the basis of which they made relevant factual findings. Those findings indicate that Airbus could have launched the A380 and the A350XWB absent the subsidies at issue, with a delay.

68. With respect to the viability of the counterfactual business cases for the A380 and A350XWB, the European Union explained the importance to Airbus of competing in the VLA market, as well as the first compliance panel's findings regarding the viability of a somewhat delayed launch of the

A350XWB, each supporting the EU's arguments on the counterfactual launch dates.

69. With respect to Airbus' counterfactual technological capabilities, Airbus would have had the same technological capacity in 2000 as it actually had, given that the counterfactual does not assume the absence of the pre-A380 MSF subsidies. With a conservatively assumed counterfactual launch date of the A380 in 2003, this means that Airbus would counterfactually have had *additional technological capabilities* in 2003 than it actually did in 2000, when it launched the A380. Turning to the A350XWB, the time gap between the launch of the A380 and the launch of the A350XWB is approximately the same as it was in the actual world. This means that five/six years from the counterfactual launch date of the A380, Airbus' technological capabilities would have been superior to its technological capabilities five/six years after the actual launch of the A380.

70. Accordingly, the European Union has demonstrated that the acceleration effects of the A380 and A350XWB MSF subsidies on the launch of those aircraft have come to an end. Because those effects have now timed out, they can no longer serve as the basis for findings of *present* adverse effects in 2019.

B. The passage of time, intervening events and non-attribution factors attenuate the causal link such that it can no longer be characterised as a genuine and substantial causal link

71. In addition to demonstrating that the acceleration effects of A380 and A350XWB MSF have come to an end, the European Union has further demonstrated that the passage of time, intervening events and non-attribution factors have attenuated any causal link between the MSF subsidies at issue and alleged present adverse effects, such that the MSF subsidies can no longer be characterised as having a genuine and substantial causal link with those adverse effects. As such, for any subsidies that have not been withdrawn, the European Union has achieved compliance under Article 7.8 of the SCM Agreement through appropriate steps to remove the adverse effects.

72. In demonstrating that the requisite causal link no longer exists today, the European Union takes, as its starting point, the Appellate Body's finding that "as with a subsidy that has a finite life and materializes over time, so too do the effects of a subsidy accrue and diminish over time".[21] Taking the diminishing degree to which the non-withdrawn subsidies can, with the passage of time, affect the market as the starting point of the analysis, the European Union has further demonstrated that the amortisation of A380 and A350XWB MSF loans, and the less than full drawdown of certain of those loans, reduces the magnitude of A380 and A350XWB MSF and, therefore, further diminishes the ability of these subsidies to remain a genuine and substantial cause of alleged adverse effects.

73. That is, the MSF subsidies that were held to have accelerated the initial launch of the A380 and the A350XWB, as and when they were launched, have since diminished in magnitude, and consequently their ability to remain a genuine and substantial cause of present adverse effects has also diminished. By contrast, since the launch of the A380 and the A350XWB, Airbus' post-launch investments have grown over time and have supplanted the initial impact of any non-withdrawn MSF subsidies, by renewing and sustaining the competitiveness and attractiveness of the aircraft at issue, in a manner that accounts for the ability of the aircraft to cause any of the market phenomena that the United States alleges to constitute present adverse effects.

74. Accordingly, taking into account the passage of time, the reduced magnitude of any non-withdrawn MSF (through both amortisation and the reduced draw-down of those loans), and the impact of Airbus' post-launch investments on the continued market presence and attractiveness of the aircraft at issue, the MSF subsidies are no longer a genuine and substantial cause of any presently occurring market phenomena alleged by the United States to constitute present adverse effects.

75. The United States has failed to rebut the European Union's demonstration in this regard. The United States' standard – and inaccurate – response to the EU evidence and argument concerning the various factors that attenuate the causal link is that the A380 and A350XWB *would never have existed* absent the MSF subsidies at issue. However, the European Union has demonstrated that this is an inaccurate description of the causal pathway – *i.e.* the so-called "product effects" – of A380

[21] Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, footnote 932 to para. 5.371 (*quoting* Appellate Body Report, *EC – Large Civil Aircraft*, para. 713).

and A350XWB MSF, as established in earlier proceedings in this dispute. Accordingly, the standard and inaccurate response of the United States must be rejected.

76. Moreover, the United States also attempts to ignore the impact of Airbus' post-launch investments on the continued market presence of the aircraft at issue by arguing that those investments arise by virtue of subsidies. Specifically, the United States alleges, but has entirely failed to substantiate, that certain R&TD measures are responsible for Airbus' post-launch investments, which resulted in the matured technologies and production processes applied on the aircraft today.

77. As an initial matter, and as the European Union recalls in section IV, below, the R&TD measures are not properly within the scope of these proceedings. In any event, even if the R&TD measures were properly within the scope of these proceedings (*quod non*), the United States has failed to put forward evidence and argument sufficient to establish that it is the R&TD measures, rather than specific investments made by Airbus in the A380 and the A350XWB, that are responsible for the matured technologies and production processes that are currently used on the aircraft, and that account for the continued market presence and attractiveness of the aircraft. Instead, the United States merely points to vague associations between (i) *basic* early stage research conducted under the R&TD measures and (ii) specific matured technologies applied several years later on the aircraft after launch, without demonstrating any link between those two factors. This is insufficient to establish the United States' assertion that "EU R&TD subsidies were responsible for many Airbus technological advancements"[22] that the European Union argues were funded by Airbus' post-launch non-subsidised investments.

78. In sum, while the MSF subsidies were held to have accelerated the initial launch of the A380 and the A350XWB, as and when they were launched, the magnitude of those subsidies, and consequently their ability to remain a genuine and substantial cause of present adverse effects, has since diminished – a fact that the European Union has proven throughout these proceedings. By contrast, since the launch of the aircraft, Airbus' post-launch investments have grown over time, and have supplanted the initial impact of any non-withdrawn MSF subsidies, by renewing and sustaining the competitiveness and attractiveness of the aircraft at issue, in a manner that accounts for the ability of the aircraft to cause any of the market phenomena that the United States alleges to constitute present adverse effects.

C. The wind-down of the A380 programme constitutes an appropriate step that removes any A380-related adverse effects

79. Finally, the European Union notes that the most extreme measure to remove adverse effects related to the A380 has occurred, in the form of the wind-down of the A380 programme. As a result of the programme wind-down, Boeing will never again lose a single sale to the A380, due to subsidies, or otherwise. Boeing's market share will not be obstructed or hindered by the A380, and Boeing will enjoy a monopoly in the market for VLA. Consequently, the wind-down of the A380 programme constitutes an appropriate step to remove any present adverse effects related to the market presence of the A380.

80. Moreover, the wind-down of the A380 programme also ensures that A380 MSF subsidies will not have any additional "indirect effects" – *i.e.*, "learning, scope and financial effects" – on the market presence of the A350XWB.

III. THE R&TD MEASURES REFERRED TO BY THE UNITED STATES ARE OUTSIDE THE SCOPE OF THESE PROCEEDINGS

81. Finally, apart from failing to rebut the European Union's demonstration that appropriate steps have been taken to remove the adverse effects of any non-withdrawn subsidies, the United States also attempts to bring within the scope of these compliance proceedings R&TD measures that: (i) fall outside the scope of these proceedings; and (ii), in any event, cannot supplement and complement any alleged "product effects" from A380 or A350XWB MSF subsidies.

82. The United States' attempt to bring the R&TD measures within the scope of these proceedings raises serious systemic issues concerning the finality of DSB recommendations and rulings, and the

[22] US First Written Submission, para. 203 (underlining added).

proper scope of compliance proceedings under Article 21.5 of the DSU. The Panel must reject the United States' attempt to undo a consistent and well-established approach to the proper scope of compliance proceedings under WTO law.

83. The European Union has demonstrated that the R&TD measures are outside the scope of these proceedings. *First*, and most importantly, the European Union has demonstrated that the R&TD measures, which were first cited in the US First Written Submission, are *not* covered by the EU Panel Request. Nor has the United States filed its own panel request. As a consequence, under Article 6.2 of the DSU, the Panel lacks jurisdiction to make findings regarding the WTO-consistency of the R&TD measures, including findings regarding the extent to which they "complement and supplement" any alleged effects of any remaining A380 and A350XWB MSF subsidies.

84. Contrary to the US assertion, the term "non-subsidised investments" in the EU Panel Request is not broad enough to cover the R&TD measures. As the European Union has explained, that term addresses investments made by Airbus in the A380 and the A350XWB. It does not include R&TD measures taken by the European Union and its Member States.

85. Hence, the R&TD measures are neither expressly nor implicitly covered by the term "non-subsidised investments" in the EU Panel Request. Those measures thus fall outside the Panel's terms of reference, and are not, thus, properly within the scope of these proceedings.

86. *Second*, the European Union has demonstrated that the United States is precluded from raising claims against the Second through Sixth EU Framework Programmes, and the EU member State R&TD measures, because these measures were found *not* to be WTO-inconsistent in the original proceedings.[23] Permitting the United States to raise claims against these measures in these compliance proceedings would *disturb the finality of adopted recommendations and rulings of the DSB*. The Appellate Body has explicitly stated that "a complainant should not be allowed to raise claims in compliance proceedings that were already raised and dismissed in the original proceedings in respect of a component of the implementation measure that is the same as in the original measure".[24]

87. *Third*, the European Union has demonstrated that, even if the Appellate Body had not definitively settled the matter in the original proceedings, the United States would still be precluded from raising claims against the Second through Seventh EU Framework Programmes, and the EU member State R&TD measures, in these second compliance proceedings. To recall, the United States could have, but did not, raise any claims regarding these R&TD measures in the first compliance proceedings. If the Appellate Body's ruling in the original proceedings was not a final ruling – which it was – then the United States could have, but elected not to, challenge these R&TD measures again in the first compliance proceedings. Having elected not to raise any such claims in the first compliance proceedings, the United States is precluded from doing so now. As the Appellate Body has stated, "{a} complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in an original proceeding".[25]

88. Contrary to the US assertions, the Appellate Body's guidance that a party may not pursue claims in a first compliance proceeding that it could have pursued in an original proceeding, applies *mutatis mutandis* to successive compliance proceedings. The United States' attempt to circumvent the Appellate Body's guidance is unavailing. The United States draws a false distinction between, on the one hand, the relationship between original and first compliance proceedings, and, on the other hand, the relationship between first and second compliance proceedings. For the purposes of the preclusion doctrine, this is a distinction without a difference. A Member is precluded from challenging in compliance proceedings – whether first or second – measures that it could have, but chose not to, challenge in earlier proceedings in the same dispute. The preclusion doctrine arises from *final resolution* of matters in previous phases of a dispute; the United States offers no reasons whatsoever to support its assertion that final resolution stemming from original proceedings is more consequential for first compliance proceedings, than is final resolution stemming from first compliance proceedings for subsequent compliance proceedings.

[23] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1407.
[24] Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.15 (*citing* Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 96 and 98).
[25] Appellate Body Report, *US – Upland Cotton (Article 21.5 - Brazil)*, para. 211.

89. *Fourth*, the European Union has demonstrated that, in any event, none of the R&TD measures constitute measures taken to comply ("MTTCs") under Article 21.5 of the DSU. As a result, those measures cannot fall within the proper scope of these proceedings. To establish that the R&TD measures constitute MTTCs, the United States was required to demonstrate that those measures have a "close nexus", *i.e.*, a "particularly close relationship", to the European Union's declared measures taken to comply, and to the DSB's recommendations and rulings. A determination of whether such a "close nexus" exists may, "depending on the particular facts, call for an examination of the timing, nature and effects of the various measures".[26] Specifically, the Appellate Body has held that the "close nexus test is not satisfied by merely identifying any links at all between the 'undeclared' measure and the declared measures taken to comply or the DSB recommendations and rulings".[27]

90. The United States has failed to demonstrate that a "close nexus" exists between the R&TD measures, the EU's declared measures taken to comply, and the DSB's recommendations and rulings. Indeed, in its attempt to establish the relevant "close nexus", the United States has, at most, pointed to loose subject-matter associations between *basic* early stage research conducted under the R&TD measures, and specific matured technologies applied on the aircraft. The United States then leaps to unsubstantiated assertions regarding the *degree* to which that early stage research contributed to the specific matured technologies applied on the A380 and the A350XWB in the post-launch period. The European Union emphasises that, in determining whether a "close nexus" exists, the Panel is bound by a duty to make an *objective* assessment of the matter, based on evidence. In these proceedings, the United States has offered nothing more than speculation, baseless assumptions, conjecture and innuendo.

91. Finally, even if the R&TD measures were within the scope of these proceedings (*quod non)*, the United States would have failed to demonstrate that they complement and supplement alleged product effects of MSF. As an initial matter, the United States has failed to demonstrate that the R&TD measures still *exist*. Indeed, the European Union has demonstrated that, except for the Eighth EU Framework Programme, all of the R&TD measures challenged by the United States have expired. In accordance with the Appellate Body's guidance, the European Union cannot, as a matter of law, incur compliance obligations in respect of expired subsidies. That means that there is only one R&TD measure that is still ongoing – *i.e.*, the Eighth EU Framework Programme. With respect to that measure, the United States has failed to explain how a project that aims, by *2021*, to mature technology to TRL 6 (*i.e.*, far from being mature enough for application on an aircraft) could be relevant to: (i) Airbus' ability to launch the A380 and the A350XWB, as and when it did *in 2000* and *2006*, respectively; and, (ii) Airbus' pre-2019 *completed* post-launch investments in the A380 and the A350XWB.

92. As noted above, the United States, at most, points to loose subject-matter associations between (i) *basic* early stage research conducted under the R&TD measures, and (ii) specific matured technologies applied on the aircraft, without demonstrating any contribution from one to the other, and without even considering whether, in light of the timing of the measures, such contribution is even logically possible. This is insufficient to meet the applicable legal standard. In this regard, the European Union recalls that, in the original proceedings, the Appellate Body reversed the original panel's finding that the R&TD measures at issue complemented and supplemented the product effects of MSF. Specifically, the Appellate Body agreed with the European Union "that a general finding that {the R&TD subsidies} enabled Airbus to develop 'features and aspects' of its LCA on a schedule that otherwise it would have been unable to accomplish does not provide a sufficient basis to determine that R&TD subsidies 'complemented and supplemented' the 'product effect' of LA/MSF in enabling Airbus to launch particular models of LCA".[28] The Appellate Body further held that, without a showing, based on evidence, that "technology or production processes funded by R&TD subsidies contributed to Airbus' ability to launch and bring to the market particular models of LCA",[29] the panel could not properly have concluded that the R&TD subsidies at issue complemented and supplement the effects of MSF.

[26] Panel Report, *Colombia – Textiles (Article 21.5 – Colombia)*, para. 7.56 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).
[27] Panel Report, *US – Large Civil Aircraft (Second Complaint) (Article 21.5 – EU)*, para. 7.67.
[28] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1407.
[29] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1407.

93. As in the original proceedings, the United States has failed, in these second compliance proceedings, to put forward *any evidence* sufficient to meet the applicable legal standard.

IV. CONCLUSION AND REQUEST FOR RELIEF

94. In sum, the European Union asks the Panel to find that the European Union has achieved full compliance with the recommendations and rulings of the DSB, within the meaning of Article 7.8 of the *SCM Agreement*.

95. The European Union also asks the Panel to find that the US claims against the R&TD measures are outside the Panel's terms of reference; that the United States is otherwise precluded from raising claims or arguments implicating these measures; that the measures are not MTTCs; and, that, in any event, the United States has failed to establish a causal link between those measures, and any present adverse effects.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. Over the course of this proceeding, the European Union ("EU") has not demonstrated that it has taken any meaningful steps to come into compliance with the Dispute Settlement Body's ("DSB") recommendations and rulings, adopted in 2011, or after the first compliance proceeding. Rather, the EU cobbled together compliance arguments from a series of events (and non-events) that had nothing to do with WTO compliance. In addition – and perhaps because these steps seem insubstantial in comparison to the $9 billion magnitude of the subsidized Launch Aid/Member State Financing ("LA/MSF") – the EU also asked the Panel to dilute the legal requirements for compliance under Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). All of these efforts are in the service of the same objective that the EU pursued unsuccessfully in the first compliance proceeding: to avoid meaningful compliance steps, but assert compliance to interfere with the U.S. exercise of its right to restore the balance of concessions and other obligations disrupted by the EU's WTO-inconsistent measures.

2. The U.S. submissions have explained how the so-called compliance measures identified in the EU panel request have not only failed to remedy, but have exacerbated, the EU's noncompliance. The 2018 Amendments to the four A380 LA/MSF agreements, and the 2018 Amendment to German A350 XWB LA/MSF, *increased* the pre-existing A380 LA/MSF subsidies to Airbus. The 2018 repayment of UK A350 XWB LA/MSF reflects Airbus's fulfilment of the terms of an agreement that the first compliance panel already found to provide Airbus with a WTO-inconsistent subsidy – not a modification of the agreement that could somehow bring the EU closer to compliance. As for the EU's purported measures to remove adverse effects, the EU cites a variety of extraneous events (and non-events) – "non-subsidized investments" in the A380 program by Airbus, "cancellation or completion of A380 deliveries," "the passage of time," and so on – that cannot even be attributed to the EU or its member States, and do not remove adverse effects.

3. Indeed, with respect to adverse effects, the EU's case appears to boil down to one erroneous assertion: that the adverse effects of the A380 and A350 XWB LA/MSF had already vanished by 2008. That was before the first compliance panel and appellate reports found that these subsidies were causing *present* adverse effects. In other words, the EU's adverse effects argument is an implicit rejection of the adopted findings in the first compliance proceeding. In reality, the EU mischaracterizes the DSB-adopted adverse effects findings, which indicate that, due to the unavailability in the counterfactual of the A380 and A350 XWB for offer or delivery, sales and deliveries of A380 and A350 XWB aircraft represent the adverse effects of the EU's subsidies to Airbus.

II. THE EU DID NOT WITHDRAW THE SUBSIDIES

A. The EU's Interpretation of its Compliance Obligation with Respect to Subsidy Withdrawal is Flawed

4. The EU argued that an amendment results in withdrawal if as of the time of the amendment, a *de novo* application of Articles 1 and 2 of the SCM Agreement based on a new benchmark (*i.e.*, one contemporaneous with the amendment rather than the grant of the pre-existing subsidy) establishes that there is no benefit. As demonstrated by the U.S. submissions, this interpretation is flawed. It is flawed because the option to withdraw a subsidy under Article 7.8 of the SCM Agreement entails removal of the subsidy that was the basis for DSB-adopted recommendations and rulings of inconsistency with Articles 5 and 6. Thus, the mere amendment of a subsidy – without reducing the amount of the subsidy – cannot result in withdrawal pursuant to Article 7.8.

5. The EU attempted to support its flawed interpretation of Article 7.8 by referring to the panel and appellate reports in *Japan – DRAMs (Korea)*. However, *Japan – DRAMs (Korea)* does not even address Article 7.8, and certainly provides no support to the view that amending the terms of a pre-existing subsidy necessarily withdraws it. The EU also cited the Appellate Body's statement in

the first compliance proceeding that, "{i}n order to withdraw a subsidy, an implementing Member may be able to take action to align the terms of the subsidy with a market benchmark, or to otherwise modify the terms of the subsidy such that it no longer qualifies as a subsidy." However, this statement does not indicate that merely amending the terms of a subsidy necessarily results in its withdrawal. Rather, the Appellate Body simply acknowledged that modifying the terms of a subsidy *can* remove the pre-existing subsidy. Thus, the Appellate Body's statement also does not support the EU's interpretation of Article 7.8.

6. The EU also erroneously argued that a subsidy can be withdrawn merely by removing the financial contribution, even if this does not also remove (or even lessen) the benefit. It asserted that mere subtraction of the nominal amount of the financial contribution, without regard to the terms under which it was conferred or the terms that were available to the recipient in the market at the time of its provision, is sufficient to remove the subsidy. However, Article 7.8 of the SCM Agreement permits Members to comply by "withdraw{ing} the subsidy." By its ordinary meaning, this text refers to withdrawal of the subsidy itself – not an element or component of the subsidy. Just as the governments' payment of principal to Airbus under the LA/MSF contracts was not enough for past panel and appellate reports to conclude that it conferred a subsidy, the alleged disgorgement of the principal by Airbus is not enough by itself to conclude that the subsidy no longer exists.

7. The only support that the EU identified for its current theory is the following statement in the appellate report about the views of the parties in the original proceeding: "We understand the participants to agree with the basic proposition that a subsidy has a life, which may come to an end, either through the removal of the financial contribution and/or the expiration of the benefit." However, the statement was the starting point for an analysis under Articles 5 and 6 of the SCM Agreement. As the appellate report in the first compliance proceeding stressed, Article 5 is different from Article 7.8 in that it concerns the use of subsidies in a way that causes adverse effects – not the continued existence of such subsidies. Moreover, the use of "and/or" in the statement cited by the EU signals an understanding that the parties agreed that the two options are not necessarily disjunctive. It is also significant that the SCM Agreement uses "remove" only with respect to removal of adverse effects, material injury, and countervailing duties, and never with respect to a financial contribution.

B. None of the Amendments to the LA/MSF Subsidies Achieved Withdrawal

8. **German LA/MSF for the A350 XWB.** The U.S. submissions demonstrated that the amendment in 2018 for the German LA/MSF for the A350 XWB is an intervening event that increased the subsidy to Airbus. The EU did not numerically rebut this assertion. Instead, the EU relied on its flawed interpretation of Article 7.8 that the amendment withdrew the subsidy because it aligned the terms of the subsidy with a contemporaneous market benchmark. However, even assuming *arguendo* that comparison with a contemporaneous benchmark were valid, the United States demonstrated that the terms provided to Airbus in the 2018 amendment are still more favorable than that of a contemporaneous benchmark.

9. Furthermore, the EU's argument relied on the presumption that Kreditanstalt für Wiederaufbau ("KfW") (the government financier) did not have the option to leave the agreement unamended because Airbus would repay the principal and accrued interest early. However, the EU has not provided enough information to properly assess whether KfW would have agreed to early repayment. Moreover, the United States demonstrated that KfW would have been in a better financial position if it had rejected the terms of the 2018 amendment and instead accepted early repayment of principal and interest.

10. **French, German, Spanish, and UK LA/MSF for the A380.** Similar to German LA/MSF for the A350 XWB, the United States demonstrated that the amendments made in 2018 to these LA/MSF subsidies increased the benefit conferred by the pre-existing subsidies and prolonged their lives. The EU also did not numerically rebut this assertion and also relied on its flawed interpretation of Article 7.8. In addition, the EU argument fails because it is riddled with factual errors and admissions that undermine its own mistaken approach.

11. Evidence submitted by the EU shows that the Airbus Governments entered into the 2018 amendments on the basis of non-commercial considerations, which conform to a decades-long pattern of the EU and its member States propping up Airbus in the pursuit of European industrial

policy – not a newfound inclination to adopt the practices of reasonable commercial creditors, or a desire to achieve WTO compliance, as the EU would have it. The EU also failed to rebut the U.S. demonstration that a reasonable private creditor would have doubted that the 2018 Amendments were necessary to ensure the continuation of the A380 program. Additionally, the EU failed to rebut the U.S. demonstration that the EU and its member States did not perform adequate due diligence prior to entering into the 2018 Amendments. Moreover, the United States demonstrated that the First PwC Report – which contains a financial analysis purporting to establish the market-consistency of the 2018 Amendments – uses a flawed methodology that vitiates the entire analysis.

C. Spanish LA/MSF for the A380 Was Not Withdrawn Through Amortization

12. The first compliance panel and appellate reports accepted the "marketing life" methodology as an appropriate way to measure the *ex ante* life of LA/MSF subsidies. Under the marketing life methodology, the *ex ante* life of Spanish A380 LA/MSF did not end prior to the negotiation and finalization of the Spanish 2018 Amendment. Furthermore, there are at least two intervening events that prolonged the *ex ante* life of the Spanish A380 LA/MSF subsidy, and there is no evidence that either of these events were anticipated at the time that the original Spanish A380 LA/MSF agreement was concluded.

13. The EU argued that the "marketing life" methodology only applies to subsidies that are "critical to the very existence" of a particular product, and they assert that this is not true of A380 LA/MSF. However, this contention is wrong.

14. The first compliance panel report states that the "marketing life" methodology is "at least equally appropriate" as the "loan life" methodology for measuring the *ex ante* lives of LA/MSF subsidies in general, because "it was expected that the nature, amounts and projected use of the LA/MSF subsidies would enable Airbus to develop and bring to market one or more of its LCA products." The language of the Spanish A380 LA/MSF contract fits this pattern.

15. Whether such LA/MSF was also "critical to the very existence" of the A380 is irrelevant. Indeed, the EU's focus on whether A380 LA/MSF is a product-creation subsidy improperly mixes the *ex ante* analysis of a life of the subsidy, with the *ex post* adverse effects analysis – something that the compliance appellate report specifically warned against.

16. Even assuming *arguendo* that the loan life approach were the correct way to measure the *ex ante* life of the Spanish A380 LA/MSF subsidy, the EU's compliance argument regarding Spanish A380 LA/MSF still fails. This is because, according to the EU, even under the loan life approach, the *ex ante* life of Spanish A380 LA/MSF ends after the Spanish 2018 Amendment was negotiated and finalized. Furthermore, the two intervening events noted above also worked to extend the *ex ante* life of the subsidy under the loan life approach. Accordingly, under either the loan life or the marketing life methodology, the EU fails to establish that Spanish A380 LA/MSF has expired.

D. UK LA/MSF for the A350 XWB Was Not Withdrawn Through Repayment

17. The EU argues that Airbus has repaid all outstanding principal and interest accrued under the UK A350 XWB LA/MSF contract. However, as demonstrated by the United States, repayment by a subsidy recipient of an amount that is nominally equivalent to the original financial contribution does not *ipso facto* withdraw the subsidy. Accordingly, the EU fails to establish that it has withdrawn the UK A350 XWB LA/MSF subsidy, even assuming *arguendo* that it has accurately portrayed the relevant facts.

III. THE EU FAILED TO MEET ITS BURDEN OF DEMONSTRATING IT HAS TAKEN APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS

18. The EU has not taken any genuine compliance action nor has it presented any change in market conditions that removed the adverse effects. The first compliance proceeding resulted in findings that, absent existing LA/MSF, Airbus could not have offered the A380 or A350 XWB from the end of the reasonable period of time to comply ("RPT") through at least the end of 2013. Thus, the central question posed by the EU's claims of compliance is – what has changed that would mean Airbus would be able to both offer and deliver those models in the present period in the absence of LA/MSF? Absent such a change, sales and market share lost to those models would continue to be

the result of EU subsidies, and continue to be serious prejudice for purposes of Articles 5 and 6.3. The EU has nowhere presented even a semblance of argumentation or evidence on this central question, and therefore it has failed as the Member that initiated these compliance panel proceedings to make out a *prima facie* case that it has taken appropriate steps to remove the adverse effects under Article 7.8 of the SCM Agreement.

A. LA/MSF Product Effects Have Never Been Found to Be Mere Acceleration Effects.

19. An essential premise of the EU's compliance theory is that the compliance panel and appellate reports found the sole effect of LA/MSF to be the acceleration of the launch and first delivery of the A380 and A350 XWB by a few years. The EU relies on the use of the phrase "as and when" in these reports to suggest that the findings were limited to the exact point in time when Airbus launched each of the various LCA families and nothing more. This is clearly inaccurate.

20. U.S. submissions and the adopted findings throughout this dispute – from the original panel proceedings onward – have used the phrase "as and when" to mean that, absent the subsidies, the relevant Airbus LCA *would not exist* as of the time of the relevant proceedings.

21. Moreover, the causal pathway from the product effects of LA/MSF to the adverse effects previously found to exist makes clear that the EU's interpretation of the phrase "as and when" is incorrect. To recall, the causal pathway previously found to exist was that, because in the counterfactual the relevant Airbus aircraft would not be available for offer or delivery, *i.e.*, *would not exist* at that time, the U.S. LCA industry would have captured all of the relevant sales and deliveries identified by the United States.

22. In its second written submission, the EU presented a novel interpretation of the adopted findings, which in its view makes those findings compatible with its counterfactual launch timing arguments. Specifically, the EU argues that, absent LA/MSF, launch of the A380 and A350 XWB would merely have been *delayed*, resulting in a corresponding delay in the delivery positions that Airbus would have been able to offer in sales campaigns in the 2011-2013 period, thereby making Airbus's offers less attractive to customers. Although neither the compliance panel nor appellate reports said any of this, the EU asserts that this line of reasoning was the basis for the findings of lost sales or impedance in the first compliance proceeding.

23. However, this was not the conclusion of the four panel and appellate reports in this dispute. Rather, the findings throughout this dispute were that LA/MSF subsidies cause significant lost sales and displacement or impedance because, absent the subsidies, the relevant Airbus LCA *would not exist*. Neither compliance report states or even suggests that Airbus would have been able to offer the A380 or the A350 XWB in the December 2011-2013 sales campaigns at issue, but with less attractive delivery positions.

B. The EU's Compliance Theory and Alleged Attenuation Factors Are Fundamentally Inconsistent with DSB-Adopted Findings

24. The EU focuses on four factors that it asserts attenuate or dilute the "genuine and substantial" causal link between existing LA/MSF and post-implementation-period adverse effects, namely: (1) the "timing out" of LA/MSF effects; (2) the less-than-full drawdown of French A380 and French and UK A350 XWB LA/MSF; (3) the so-called "amortization" of LA/MSF; and (4) non-subsidized investments in the A380 and A350 XWB. None of these factors attenuates the genuine and substantial causal link between existing LA/MSF and the product effects previously found to exist in this dispute. Only one – the "timing out" argument – is even notionally related to the causal mechanism by which LA/MSF subsidies result in adverse effects, but it fails because it is fundamentally inconsistent with the adopted findings.

25. The EU's "timing out" arguments are based on the proposition that, absent LA/MSF, Airbus would have launched the A380 soon after its actual launch in 2000 and the A350XWB soon after its actual launch in 2006. Therefore, according to the EU, Airbus would have been able to offer both the A380 and A350 XWB no later than 2008, well before the expiry of the RPT in December 2011. Yet, the first compliance proceeding has already determined that Airbus would not have been able to offer either model from the end of the RPT at least through the end of 2013. Accordingly, the EU's theory that it achieved full compliance no later than 2008 is simply irreconcilable with the

DSB-adopted reports finding the EU to not be in compliance in the post-implementation period. As long as the EU continues to rely on a theory that "proves" compliance prior to 2008, its adverse effects case necessarily fails in its entirety.

26. Additionally, the EU's calculation of counterfactual launch dates is based not on objective evidence but on a flawed reading of an expert report by Professor Wessels that was submitted in the first compliance proceeding. It remains that the EU has yet to establish Airbus's counterfactual financial capacity to launch the A380 and A350 XWB at any time, including the legally relevant timeframe after 2013. Even if the EU could do so, that would still be insufficient because the launch of a new LCA program requires much more than just financial capacity. Other prerequisites include a viable business case and sufficient technological and industrial know-how at the relevant counterfactual time.

27. Even if the EU's counterfactual launch dates were correct – which they are not – the EU is also wrong to argue that adverse effects "time out" as of the moment of counterfactual launch. Indeed, the EU has subsequently confirmed as much. Displacement and impedance are a function of LCA *deliveries*, which typically begin several years *after* launch. Indirect effects of LA/MSF may also persist beyond launch and impact the development, design, sales, and deliveries of other aircraft. Under the EU's new alternative causation theory, the less attractive delivery positions that Airbus would have been able to offer absent LA/MSF also mean that the subsidies would continue to be a genuine and substantial cause of adverse effects post-launch.

28. The three other attenuation factors the EU cites are no more persuasive. In fact, they are completely unrelated to the causal mechanism previously found to exist, and thus even further removed from any plausible compliance theory.

C. The EU's Failure to Make a *Prima Facie* Case is Confirmed by Evidence of Continued Adverse Effects

29. The EU's arguments concerning removal of the adverse effects focus almost exclusively on the first link in the causal chain – whether the subsidies cause product effects. With one arguable exception, the EU does not contest the second link in the causal chain by arguing that, even though product effects on Airbus continue, those product effects nevertheless do not result in adverse effects to the interests of the United States in the form of the market phenomena in Article 6.3 of the SCM Agreement.

30. Therefore, if the EU fails to show that existing LA/MSF subsidies no longer cause product effects, it has failed to meet its burden of showing that it has taken appropriate steps to remove the adverse effects for purposes of Article 7.8. It is not the U.S. burden to prove adverse effects anew.

31. Nevertheless, the United States has provided evidence of continued adverse effects in its second submission. This evidence clearly demonstrates that the A380 and A350 XWB continue to capture market share and sales at the expense of U.S. LCA.

32. The United States has also presented evidence of adverse effects regarding other Airbus models and other Airbus subsidies. The United States has shown that existing LA/MSF has indirect product effects enabling the market presence of the A330neo, Airbus's other current twin-aisle offering. All the EU can offer in response is a misplaced assertion that indirect effects of a given tranche of LA/MSF can only be felt by subsequent Airbus LCA programs, which is beside the point anyway because it ignores that the A330neo *was* launched after the A380 and A350 XWB. The United States has also shown the important role of R&TD subsidies in enabling the technologies used in the A380 and A350 XWB programs. The EU has not even disputed these facts, confining itself to meritless jurisdictional arguments that the United States has refuted.

33. In sum, once the EU's false launch timing arguments are disposed of, there can be no question that the U.S. LCA industry continues to suffer serious prejudice as a result of LA/MSF and R&TD subsidies to the A380, A350 XWB, and A330neo. In addition, deliveries associated with campaigns already found to represent significant lost sales remain outstanding, meaning the EU has failed to achieve full compliance according to the EU's own approach.

D. The Recent Cancellation of A380 Orders by Emirates Did Not Remove the Adverse Effects of Existing LA/MSF

34. The EU argued Airbus's announcement of its intent to "wind down" the A380 program as if it were a measure taken to comply, but avoided actually referring to it as a measure.

35. The United States explained in submissions that the EU provides no evidence or rationale to support its conclusory statements that the direct effects of A380 LA/MSF or the marketing life of the A380 have come to an end. To the contrary, the EU's projections show A380 deliveries continuing through the present period until 2022. Yet the EU chose to bring this reverse compliance proceeding asserting full, substantive compliance in 2018.

36. Moreover, it is entirely speculative for the EU to assert that Boeing will lose no more sales to the A380 due to the "wind-down" of the program. This is a prediction of the future, not a fact, as the EU incorrectly suggests.

37. The EU is also incorrect that "any indirect effects from the A380 MSF loans on the A350XWB have now ceased to exist, by virtue of the wind-down of the A380 programme." First, the termination of an LCA program does not mean that other existing or future Airbus LCA no longer benefit from the learning, scope or financial effects generated in the past. Indeed, as the EU itself highlights, "the first compliance panel found {that} the A380 was a very significant intermediate step, in terms of its learning effects, for Airbus future work with composites," such as on the A350 XWB and A330neo.

38. Second, the EU is incorrect that A380 LA/MSF contributed only to the *launch* of the A350 XWB, and nothing more. As the United States explained in its second written submission, the first compliance panel made a number of specific findings on how the indirect effects of A380 LA/MSF – including learning effects from post-launch development – contributed to the adverse effects *vis-à-vis* the A350 XWB. Thus, the EU is incorrect that the indirect effects of A380 LA/MSF can no longer be aggregated with the direct effects of A350 XWB LA/MSF in analyzing whether the subsidies cause adverse effects in the twin-aisle market.

IV. THE EU CONTINUES TO SUBSIDIZE AIRBUS THROUGH R&TD SUBSIDIES, WHICH FALL WITHIN THE PANEL'S TERM OF REFERENCE

39. Following issuance of the panel and appellate reports in the first compliance proceeding, the EU commenced this compliance proceeding on July 31, 2018, asserting that it had "(i) withdrawn the remaining subsidies, and/or (ii) taken appropriate steps to remove their adverse effects" so as to "bring the European Union into full compliance with its WTO obligations." In particular, the EU asserted that Airbus had "undertaken significant non-subsidised investments" in "continuous support and development" of its A380 and A350 aircraft families that, in its view, brought it into compliance with the recommendations and rulings of the DSB.

40. The U.S. first written submission accordingly challenged the EU research and technological development ("R&TD") measures as undeclared measures taken to comply with the recommendations and rulings of the DSB. The United States also observed that the existence of these subsidies rebutted the EU's assertion that Airbus's "continuous support and development" of the A380 and A350 was "unsubsidized." On December 21, 2018, the EU requested a preliminary ruling from the Panel that the U.S. arguments regarding the R&TD measures are outside the Panel's terms of reference. The Panel denied the EU's request on January 11, 2019.

A. The U.S. Arguments Regarding the R&TD Measures would not Disturb the Finality of the Original Appellate Findings

41. The U.S. first written submission recalled that the original appellate report reversed the original panel's findings against the R&TD measures because that panel had not made "specific findings that technology or production processes funded by R&TD subsidies contributed to Airbus' ability to launch and bring to market particular models of LCA." The Appellate Body did not evaluate whether the evidence before the original panel would support specific findings that the R&TD subsidies contributed to Airbus's ability to launch and bring to market any large civil aircraft model.

42. The EU nonetheless argued in its second written submission that the argument that the R&TD subsidies complement and supplement the effects of LA/MSF "is identical to the claim asserted by the United States in the original proceedings – a claim ultimately rejected by the Appellate Body as insufficiently proven." But the Appellate Body did not "reject" the U.S. argument. It rejected the original panel's analytical approach, and found further that the panel had failed to provide an objective assessment of the facts for purposes of DSU Article 11. Therefore, the EU errs in charging the United States with seeking "an unfair second chance 'to make a case that it failed to make out in the original proceeding.'" The United States is in actuality seeking a first chance to show that the facts satisfy the test the original panel should have applied, but did not.

43. The EU also objects to the U.S. statement that "the Appellate Body's findings were confined to the original panel's failure to make 'specific findings.'" As a legal matter, the Appellate Body may complete a panel's analysis "only if the factual findings of the panel and the undisputed facts in the panel record provide{} it with a sufficient basis for conducting its own analysis." Silence with respect to completion of the analysis may, therefore, indicate that the panel failed to make necessary findings or that relevant facts existed, but were disputed. Thus, the fact that the appellate report did not complete the "complement and supplement" analysis does not mean that there was no evidence to support a finding that the subsidies meet the proper cumulation standard.

44. The procedural history of that particular appellate finding further demonstrates the invalidity of the EU's contentions. The Appellate Body understood the EU's appeal as being grounded in the assertion that "the Panel erroneously presumed that all non-LA/MSF measures had the same effect as LA/MSF." With respect to the R&TD measures, "the European Union emphasizes that the Panel found that such measures enabled Airbus to develop 'features and aspects' of its LCA, but failed to link any such features and aspects to any of Airbus' actual launch decisions.'" Thus, the focus of the appeal was on alleged errors in the analytical approach taken by the original panel. Neither party requested completion of the analysis in the event that the appellate report found the panel's approach to be inconsistent with Articles 5 and 6.3 of the SCM Agreement or that the panel failed to provide an objective assessment of the facts for purposes of DSU Article 11. Nothing in the appellate report reasoning justifies the EU's assertion that the appellate report decided an issue that neither party raised.

B. The Absence of the R&TD Measures from the First Compliance Proceeding does not Preclude this Panel's Evaluation of Them in a Subsequent Compliance Proceeding Brought by the EU

45. The EU argued that, as a matter of law, a complaining party is precluded from raising claims in a second compliance proceeding that it could have raised in the first compliance proceeding, but did not. The EU provides no valid support for this assertion. In fact, successive compliance proceedings will likely involve different sets of declared (or undeclared) measures taken to comply, different conditions of competition, and may even switch the procedural postures of the complaining and responding parties. Thus, a measure not raised in a first compliance proceeding may take on a greater significance in a second compliance proceeding. To preclude consideration of that measure in the second proceeding would prevent the second panel from appreciating the full extent of compliance or noncompliance.

46. It is important to note that the EU's argument has major systemic consequences. In particular, it would incentivize parties to pursue unnecessarily expansive litigation that they do not deem at the time to be critical to resolving the dispute, solely to preserve their rights should that assessment change in a later proceeding. For many, if not most disputes, a second or third compliance proceeding will never come to pass. But Members, panels, and the Appellate Body would all be left with the burden of sprawling claims necessitated by the desire to preserve options in future proceedings that may never arrive. This would be inefficient and would be contrary to the objective of the prompt settlement of disputes.

47. In addition, it would impose a burden on the original complainant to identify *all* measures that are inconsistent with the original respondent's compliance obligations, no later than the original complainant's *first* request for the establishment of a compliance panel. Otherwise, according to the EU, the original complainant's right to challenge such measures would be forever waived (except in a wholly new dispute). Such a requirement has no basis in the covered agreements and would run contrary to the due process interests of original complainants – as well as the objective to promote "prompt compliance with recommendations or rulings of the DSB."

48. The EU failed to recognize that a complaining party's perception of what would resolve a dispute at each stage are informed by the evolving factual situation, findings in successive panel and appellate reports, and the declared and undeclared measures taken to comply then in existence. Constricting the measures challenged by an original complaining party in a second compliance proceeding would prevent it from addressing measures that have become more problematic because of the implementing Member's own actions or inaction or changing circumstances. That would prevent the second compliance panel from discharging its mandate to evaluate whether the challenged declared and undeclared measures taken to comply *in effect at the time of its establishment* exist and are consistent with the covered agreements.

V. CONCLUSION

49. For these reasons, the EU has failed to establish that it has complied with its WTO obligations.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. Introduction

1. Brazil provides the following executive summary of its participation during the panel proceedings in this dispute.

II. How to assess whether a Member has withdrawn a subsidy by virtue of a modification of its terms

2. Brazil acknowledges that, in theory, it is possible to withdraw a subsidy in order to achieve compliance with Article 7.8 by introducing modifications to a measure by means of removing their original inconsistencies with the covered agreements. Where a measure is modified, the question is whether the modification has resulted in the actual withdrawal of the subsidy.

3. Brazil does not take a position as to whether the modifications introduced by the EU to the original A380 and A350 LA/MSF Agreements managed to withdraw the subsidy and, therefore, achieve compliance as claimed by the European Union. That would require Brazil to examine in detail the terms of the amended agreements, which include a considerable amount of BCI and HSBI information, which Brazil has not accessed.

4. However, Brazil notes that the European Union's reasoning regarding the amendments made to the four A380 LA/MSF agreements gives particular cause for concern. More specifically, Brazil considers the European Union's focus on the "choice" faced by EU Member-State governments between "certain loss" in the case A380 program termination and "potential gains" that could arise if they were to consent to modifications to the terms of the original agreements to be misleading and deeply troubling.

5. The European Union's focus on the alleged choice faced by member State governments, therefore, suffer from at least two flaws. First, it is questionable whether the position of a government already involved in a subsidized investment with no exit strategy or downturn protection should be considered the proper standpoint on which to base a market benchmark. It is clear to Brazil that a market investor would not have provided success-dependent financing that would leave it without any recourse in the event of an insufficient number of sales or of program termination. This lack of recourse in case of default or protection against adversity is precisely one of the key features that characterizes LA/MSF instruments as subsidies in the first place.

6. Second, even if it is true that without the restructuring, the A380 program would have been terminated, the European Union's argument says nothing as to whether the specific terms of the restructuring are consistent with what a market investor would have required. It is one thing to accept a restructuring of a deal, and quite another to accept it under the terms that have been agreed between Airbus and the member State governments.

7. Therefore, in Brazil's view, whether it was rational for member State governments to accept the restructuring of the A380 LA/MSF under the terms that they did in order to avoid program termination is the wrong question to ask. It provides little guidance when assessing whether the amendments made to those agreements managed to withdraw the subsidies and achieve compliance. Rather, the question the Panel must answer is whether market investors would have agreed to provide a financial contribution to a project as risky as the A380 was in 2017 under the same terms that were agreed between Airbus and the four member State governments. If the Panel understands that the terms of the restructuring have not been made under market conditions, then the Panel should decide that the EU has not yet complied with Art. 7.8 of the SCM Agreement.

III. The adjusted Airbus A380 LA/MSF Agreements may be the cause of additional serious prejudice

8. In Brazil's view, the adjusted Airbus A380 LA/MSF Agreements may be the cause of additional serious prejudice to the interests of the United States. The European Union itself admits that, without

the restructuring, the A380 program would have been terminated. Therefore, if the Panel finds that the modifications introduced to the A380 failed to withdraw the subsidy, the consequence would be that after the compliance period, the European Union continues to cause adverse effects to the interests of the United States by artificially maintaining, through the granting of subsidies, an aircraft program that, left to itself, would have been terminated.

9. Brazil recalls that the original LA/MSF subsidies for the A380 enabled Airbus to launch the program "as and when it did", as found by the original Panel. Now, it seems the 2018 restructuring, by the European Union's own admission, enabled Airbus to continue the A380 program, thus avoiding "imminent programme termination". The renewed subsidies, therefore, are key to "explain the current market presence and competitiveness of the A380", since, without the subsidies, the program would have been terminated.

IV. Can exogenous commercial conditions be the determining factor in analysing whether a subsidy has been withdrawn?

10. In response to a question by the Panel, Brazil clarified that it does not believe that any one factor, including a change in exogenous commercial conditions, considered in isolation, can be the determining factor in analyzing whether a subsidy has been withdrawn. In Brazil's view, assessing withdrawal of a subsidy entails analyzing whether a subsidy remains in existence. As such, it entails an assessment of whether there is a financial contribution, by a government or public body, which confers a benefit. In order to assess whether a particular financial contribution confers a benefit, as stated by the Appellate Body in *Canada – Aircraft*[1], some sort of comparison is necessary.

11. Such a comparison, in Brazil's view, cannot be limited to any one single factor and, as such, a hypothetical lowering of commercial interest rates between the time of the original provision of a subsidized loan and the time of an amendment to that subsidized loan in and of itself, is not enough for a determination of withdrawal. This is because interest rates are not the only way in which a financial contribution may differ from what could be available to the recipient in the market, and therefore, are not the only relevant factor in assessing benefit. Instead, panels and the Appellate Body must, in Brazil's view, analyze the full terms of the financial contribution and compare those to what would be available in the market.

V. When does the life of a subsidy come to an end and how to withdraw it

12. In response to a question by the Panel, Brazil clarified that the life of a subsidy, even if provided in the form of a one-off cash grant to a recipient, does not come to an end immediately after it has been provided. In support of its position, Brazil cited prior guidance by the Appellate Body in the Original Appellate Report in this dispute. In particular, Brazil showed that the Appellate Body recognized that "the fact that a subsidy is "deemed to exist" under Article 1.1 once there is a financial contribution that confers a benefit does not mean that a subsidy does not continue to exist after the act of granting the financial contribution."[2], and that "{t}he nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution might be expected to flow."[3]

13. Brazil also noted that the Appellate Body made no caveats or distinctions regarding each of the "types" of financial contributions listed in Article 1.1(a)(1) (i) through (iv) of the SCM Agreement. As such, its statements apply equally to "grants" (including, in Brazil's view, one-off cash grants) as one of the examples of a "direct transfer of funds" under Article 1.1(a)(1)(i) of the SCM Agreement.

14. Brazil also pointed out the problems that would arise if the Panel were to accept the notion that the life of a subsidy that takes the form of a one-off cash grant ends immediately after granting. That would mean that such subsidies would always be exempt from any implementation obligation, even if found to have caused adverse effects to the interests of a Member, because they would always be considered to be withdrawn as soon as they were granted. Obviously, this would not be an acceptable reading of the disciplines regarding withdrawal of a subsidy under Article 7.8 of the SCM Agreement.

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[1] *Canada – Aircraft (AB)*, para. 157.
[2] Original Appellate Report, para. 708.
[3] Original Appellate Report, para. 706-707

15. Finally, Brazil notes that the statements quoted above also appear to support the view that the assessment of the life of a subsidy is, in essence, an assessment of how and for how long the benefits provided by the subsidy would materialize.

16. Once it has been established that a subsidy's life, even if it takes the form of a one-off cash grant, does not end immediately after its granting, the remaining question is how can a Member withdraw such a subsidy within the terms of Article 7.8 of the SCM Agreement. Regarding this issue, Brazil's view is that withdrawing a subsidy entails bringing its life to an end, which necessarily requires that a Member withdraw the benefit provided by a subsidy.

17. As indicated above, the life of a subsidy is a function of how the benefits it provides are expected to materialize over time. Because withdrawing a subsidy means that its life must come to an end, and because the life of a subsidy is, in essence, dependent on the benefit, it is Brazil's view that the benefit should be the focus of Members' efforts to withdraw a subsidy within the meaning of Article 7.8 of the SCM Agreement, not the financial contribution. The financial contribution is, after all, merely the instrument through which a government confers a benefit upon a recipient. Once granted, the determination of the life of the subsidy will necessarily depend on an assessment of the benefit it provided, that is, an assessment of how the benefit materializes over time and of how its value accrues and diminishes. There could potentially be several different ways through which a Member could withdraw such a benefit, depending on the specific characteristics of the financial contribution and of the specific ways in which the benefit it provided materialized.

VI. The proper counterfactual for assessing compliance with Article 7.8 of the SCM Agreement through the removal of adverse effects

18. The proper counterfactual for assessing compliance with Article 7.8 of the SCM Agreement through the removal of adverse effects involves, in Brazil's view, a comparison between the current situation, at the end of the implementation period and the situation that would have existed if the subsidies at issue had never been provided.

19. Article 7.8 of the SCM Agreement offers two paths for implementation when subsidies are found to be a cause of adverse effects: a Member may either withdraw the subsidy, or remove its adverse effects. If a Member chooses to withdraw the subsidy, it should do so before the end of the implementation period. However, if it chooses to maintain the subsidy and rather remove its adverse effects, it must ensure that no adverse effects are being caused after the end of the implementation period by the still existing subsidy. Under this second pathway, the end of the implementation period is neither a deadline nor a starting point when it comes to the existence of the subsidy. It is relevant only for the assessment of whether adverse effects caused by the subsidy have ceased or not.

20. In a situation where subsidies have not been withdrawn, the relevant question is whether there remain any adverse effects during the post-implementation period attributable to the subsidies. To answer this question, the only element of timing pertains to the adverse effects, not to the subsidies. As the Appellate Body has stated, "a subsidy and its effects need not be contemporaneous"[4]. Thus, as a factual matter, adverse effects in the post-implementation period may result from subsidies existing before or after the end of the implementation period.

21. The European Union's proposed counterfactual is only capable of showing whether a subsidy granted after the implementation period is causing adverse effects, since it disregards any effects of subsidization up to and until the end of the implementation period. However, nothing in the text of Article 7.8 of the SCM Agreement supports the interpretation that only adverse effects caused by subsidization given after the end of the implementation period must be removed.

22. In addition, in response to a question by the Panel, Brazil clarified that it considers that the counterfactuals proposed by the EU and by Canada are predicated on an implicit assumption that has been directly refuted by the Appellate Body in this dispute - that withdrawal of a subsidy necessarily and immediately results in removal of the adverse effects.

[4] See Appellate Body Report, *EC and certain member States — Large Civil Aircraft (Article 21.5) (AB)*, paragraph 5.371

23. Without this assumption, the explanatory power of the counterfactuals proposed by the European Union and by Canada disappears. It becomes impossible to draw a definitive conclusion regarding the presence or absence of adverse effects from a finding that the present market situation and a hypothetical market situation in which the subsidies existed but were removed either at the end of the implementation period or when a Member asserts full compliance are identical. This impossibility stems from the fact that there is another likely explanation for why the market situation in a scenario in which subsidies are still being granted could be equivalent to a counterfactual scenario in which those subsidies were withdrawn either at the end of the implementation period, as suggested by the EU, or, as suggested by Canada, at the date a Member asserts full compliance. It is possible that both market situations are the same not because subsidies are not causing adverse effects, but because their withdrawal at the points in time suggested by the European Union and by Canada would not have had the effect of removing the adverse effects they were previously causing.

24. As such, the counterfactuals proposed by the European Union and by Canada are incapable of answering the question before the Panel, which is whether unremoved subsidies are presently causing adverse effects to the interests of the United States. Brazil notes that Article 7.8 of the SCM Agreement mandates the removal of present adverse effects, not only of present adverse effects caused by subsidies granted after a certain date.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada is participating in these second compliance proceedings because of its systemic interest in the legal interpretation of certain provisions of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that are being raised.

2. Canada's third-party submission and responses to the Panel's questions address two fundamental aspects of the legal framework that applies to the European Union's claims of compliance under Article 7.8 of the SCM Agreement: the circumstances under which a subsidy can be considered withdrawn and the counterfactual analysis that should be conducted in second compliance proceedings for assessing whether an implementing Member has withdrawn the adverse effects of actionable subsidies.

II. CIRCUMSTANCES THAT RESULT IN THE WITHDRAWAL OF A SUBSIDY

3. To recall, Article 5 of the SCM Agreement provides that no Member should cause, through the use of specific subsidies, adverse effects to the interests of other Members. Article 6.3 describes serious prejudice, one of the forms of adverse effects enumerated in Article 5. Article 7.8, in turn, sets out the following compliance obligation for violations of Article 5: the Member granting or maintaining the subsidy that caused adverse effects "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy".

4. As a general rule, Canada considers that the withdrawal of a subsidy necessarily occurs when the constituent elements of the subsidy are no longer present. That is, when a subsidy no longer meets the definitional requirements under Article 1.1 of the SCM Agreement, it no longer exists. When this is the case, the subsidy has been withdrawn within the meaning of Article 7.8.

5. Article 1.1 defines a subsidy as a financial contribution that confers a benefit on the recipient. As such, actions or events affecting the financial contribution or the benefit elements of a subsidy can result in withdrawal.

6. Canada considers that the following scenarios are examples of where the withdrawal of a subsidy would take place.

7. First, repayment of the financial contribution would result in withdrawal of the subsidy. Repayment of the financial contribution necessarily brings the life of the subsidy to an end because the financial contribution element of the subsidy ceases to be present. After repayment, the recipient is no longer able to benefit from the financial contribution on a going forward basis; hence, the subsidy has been withdrawn.

8. For subsidized loans specifically, it follows that repayment of the principal amount of the loan would result in withdrawal. As the recipient of a subsidized loan benefits from having access to the principal amount of the loan on better-than-market terms, once the principal is repaid it no longer enjoys such benefit. As such, removal of the financial contribution through repayment of the loan principal constitutes withdrawal of the subsidy.

9. Second, a subsidy may also be withdrawn as a result of amending the terms of the financial contribution to reflect market conditions. Under this scenario, the financial contribution remains but no longer confers a benefit because the original terms have been replaced by those that reflect market conditions. Once this occurs, the subsidy has been withdrawn.

10. If an implementing Member amends the terms and conditions of a subsidized loan to make them consistent with market terms and conditions, the withdrawal of the subsidy would depend on

whether the amended terms and conditions are consistent with those available on the market when the compliance obligation is triggered.

11. In original compliance proceedings, the implementing Member is required to bring its measures into compliance by the end of the implementation period. Accordingly, whether a subsidized loan has been withdrawn in original compliance proceedings depends on whether the amended terms and conditions are consistent with terms and conditions available on the market at the end of the implementation period.

12. In respondent-initiated second compliance proceedings, the implementing Member asserts that it has brought its measures into compliance at a later point in time. As such, whether a subsidized loan has been withdrawn depends on whether the amended terms and conditions of the loan are consistent with terms and conditions available on the market at the time when full compliance is asserted.

13. Third, expiry of the benefit also amounts to withdrawal of the subsidy. When the period in which the benefit from a financial contribution is expected to flow comes to an end, the subsidy no longer exists. Therefore, it has been withdrawn.

14. For a non-recurring subsidy in the form of a one-off cash grant, repayment of the grant (i.e. the entire financial contribution) would result in the subsidy being withdrawn, as no benefit would remain with the subsidy recipient. However, doing so would be more than what is necessary to withdraw the subsidy, as a certain portion of the benefit associated with the grant will have expired in the period following its provision. As such, it is only the non-expired portion of the benefit that must be repaid in order to withdraw the subsidy, as that is the portion of the subsidy that will benefit the recipient on a prospective basis.

15. The benefit of the subsidy will exist for the period of time over which it is appropriately allocated. Previous disputes indicate that, depending on the factual circumstances surrounding the contribution, an appropriate period of allocation may be the average useful life of assets in the relevant industry or the marketing life of the product. This period of allocation, as well as the timing of the compliance obligation, will determine the non-expired portion of the benefit that the implementing Member would have to remedy.

III. THE APPROPRIATE COUNTERFACTUAL ANALYSIS IN SECOND COMPLIANCE PROCEEDINGS FOR ASSESSING ADVERSE EFFECTS

16. For subsidies that have not expired or been withdrawn, an implementing Member may comply with the requirements of Article 7.8 by taking appropriate steps to remove the relevant adverse effects of the subsidies deemed inconsistent with Article 5. In this respect, Canada recalls that, in the initial compliance proceedings, the Appellate Body confirmed that the compliance obligation under Article 7.8 is conditional on the continued presence of subsidies during the implementation period. Relatedly, the Appellate Body confirmed that Article 7.8 provides for two distinct compliance options: withdrawing the subsidy or removing their adverse effects. As such, in initial compliance proceedings, an implementing Member may comply with Article 7.8 by either withdrawing the relevant subsidies or, if it has not, ensuring that those subsidies no longer cause adverse effects by the end of the implementation period.

17. As Canada indicated in the initial compliance proceedings, these features of Article 7.8 have direct implications on the counterfactual analysis that should be conducted in initial compliance proceedings to determine whether subsidies cause adverse effects in the post-implementation period. In particular, the counterfactual analysis should:

- Focus exclusively on subsidies that continue to exist in the implementation period; and
- Be based on a counterfactual scenario under which those subsidies are withdrawn at the end of the implementation period, rather than a scenario under which those subsidies were never provided.

18. In initial compliance proceedings, this approach to the counterfactual analysis is appropriate as it ensures there is consistency between the two compliance options available under Article 7.8.

In particular, since compliance may be achieved through the withdrawal of the subsidies by the end of the implementation period, the analysis of whether a Member has removed the adverse effects caused by the remaining subsidies must be based on a counterfactual scenario under which those subsidies have been withdrawn at the end of the implementation period. It is only by comparing this counterfactual situation with the actual market situation that the nature and extent of any present causal relationship between the remaining subsidies and any adverse market phenomena can be properly assessed.[1]

19. However, in second compliance proceedings, Canada considers that the counterfactual analysis should be adjusted to reflect any additional compliance steps undertaken by the responding Member and the fact that the assessment of adverse effects necessarily takes place significantly after the end of the implementation period. As such, in order to assess whether the remaining subsidies presently cause adverse effects to the interests of the complaining Member, the counterfactual analysis in second compliance proceedings should:

- Focus exclusively on the remaining subsidies, i.e. the subsidies that have not expired or been withdrawn; and

- Be based on a counterfactual scenario under which those subsidies are withdrawn by the date on which the responding Member asserts full compliance (in the case of respondent-initiated second compliance proceedings).

20. In this respect, Canada recalls that a panel's role in assessing adverse effects is always present-oriented. That is, a panel is tasked with determining whether the relevant subsidies are presently causing adverse effects. To do so, a panel is required to select a reference period from the past that provides an appropriate approximation of the present effects of the subsidies on the market.

21. These principles are well-established and continue to apply in the context of second compliance proceedings. Accordingly, when determining whether the remaining subsidies are a present cause of adverse effects, it would be logical for the panel to assess a counterfactual scenario in which the subsidies are withdrawn at a recent point in time. If the implementing Member may bring itself into compliance through withdrawing the relevant subsidies at a later stage in the dispute (such as by the date of a second compliance communication), it must also be able to bring itself into compliance by taking appropriate steps to ensure that any subsidies it has not withdrawn by that point no longer cause adverse effects. A counterfactual under which those subsidies are withdrawn by that point therefore provides an appropriate basis upon which to assess whether those subsidies are a present cause of adverse effects.

[1] With respect to original proceedings, Canada recognizes that the Appellate Body has previously clarified that subsidization and adverse effects need not be contemporaneous, and that there may be scenarios under which a subsidy has expired, but a Member still, through that subsidy, causes adverse effects within the meaning of Articles 5(c) and Article 6.3 of the SCM Agreement.

However, these principles are no longer directly relevant with respect to whether an implementing Member has complied with Article 7.8. As the Appellate Body clarified in the initial compliance proceedings of this dispute, the expiration of a subsidy means that an implementing Member no longer bears any compliance obligation with respect to that subsidy. This clarification was well-founded, as the text of Article 7.8 provides that the compliance obligation only attaches to subsidies that are being granted or maintained; it also makes clear that the compliance obligation is achieved when the remaining subsidies are withdrawn. As such, unlike in original proceedings, the continued existence of the subsidy in compliance proceedings is legally significant – and potentially dispositive – with respect to whether an implementing Member is acting consistently with its obligations under Part III of the SCM Agreement.

Therefore, in compliance proceedings, a counterfactual under which the remaining subsidies have been withdrawn provides an appropriate basis upon which to assess whether those subsidies are a present cause of adverse effects.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Benefit assessment

Japan submits that the determination of the benefit that is conferred by a given financial contribution is an *ex ante* analysis that does not depend on how a particular financial contribution actually performed after it was granted. Thus, Japan maintains that a "benefit" is basically identified by determining how the subsidizing government contemplated that the "benefit" of the subsidy would flow at the time when the subsidy was granted. That is to say, a benefit is essentially identified by determining how the subsidy has been structured to be consumed in order to achieve the relevant policy objectives, which is to lower, to the extent of the amount of the "benefit", the sales price of the products manufactured by the beneficiary of the subsidy.

II. Research & Development (R&D) subsidies

Japan understands that generally speaking, the function of a subsidy to promote research and development (R&D) is to lower, to the extent of the "benefit" amount, the sales price of the product incorporating the results of the research activities thereby creating an incentive for R&D activities that may generate positive spillover effects. Consequently, once the "benefit" has been consumed in full during a certain period, the recipient will no longer be able to lower the price levels of its subsidized products. Since the determination of the benefit is an *ex ante* analysis, Japan submits that the assessment of the life of the "benefit" in this context should focus on the projected period or sales amount properly anticipated by the granting Member when the subsidy is granted.

III. Remedies under Article 7.8 of the SCM Agreement

A. Removal of adverse effects under Article 7.8 of the SCM Agreement

Japan submits that under Article 7.8 of the SCM Agreement, the starting point of the examination of the existence and, by implication, of the removal of adverse effects should be the analysis of the benefit conferred by a subsidy. This is because the recipient of subsidies may cause adverse effects on like products of other Members by lowering the price of the subsidized products through the utilization of the benefit. Japan therefore believes that the adverse effects of such a subsidy cease to remain in existence after the benefit has been removed and the recipient is no longer able to lower the price of the products by using the benefit.

B. Withdrawal of a subsidy under Article 7.8 of the SCM Agreement

Japan is of the view that withdrawal of a subsidy under Article 7.8 of the SCM Agreement would always require that the benefit no longer exist. Therefore, while Japan does not wish to delve into the fact findings in this case, whether the benefit conferred has been removed must be the key factor to assess whether the subsidy has been withdrawn and therefore compliance with Article 7.8 of the SCM Agreement achieved.

C. Exogenous changes of commercial conditions and compliance with Article 7.8 of the SCM Agreement

Japan is of the view that exogenous changes of commercial conditions are not always sufficient to show that a Member complied with its obligations contained in Article 7.8 of the SCM Agreement. Japan submits that when a subsidized loan's favourable terms are adjusted to the market benchmark through exogenous changes of commercial conditions, no *further* benefit will be conferred by the loan in question. Nonetheless, Japan posits that such an adjustment will not remove the benefit *already conferred* to the recipient and may therefore not be sufficient to comply with Article 7.8 of the SCM Agreement.

D. One-off cash grants under Article 7.8 of the SCM Agreement

Japan considers that an *ex ante* analysis of the benefit is also relevant for the analysis of the life of a one-off cash grant. In this regard, Japan submits that the issue to be assessed under Article 7.8 of the SCM Agreement for a one-off cash grant is whether its adverse effects have been removed – by ensuring that its benefit has been removed – rather than whether the subsidy has been withdrawn. This is so because when a one-off cash grant is provided by a government, its granting process has finished although the benefit can still remain in existence up to a certain point until it is either consumed or removed. Japan thus believes that, under Article 7.8 of the SCM Agreement, the question of how to "withdraw" such a subsidy is of no relevance in the case of a one-off cash grant.

IV. Assessment of a proper counterfactual in compliance proceedings

Japan submits that a proper counterfactual analysis needs to be conducted under Article 7.8 of the SCM Agreement in the context of compliance proceedings. Japan maintains that in compliance proceedings the analysis of whether a Member has removed the adverse effects caused by the remaining subsidies (through the examination of the benefit) must be based on a counterfactual scenario under which the adverse effects of the remaining subsidies have been removed (*i.e.* the remaining benefit has been removed or otherwise ceased to exist) at the end of the implementation period.

However, the purpose of the proceedings before this compliance Panel is to assess the EU's actions undertaken *after* the implementation period in order to satisfy its remaining obligation under Article 7.8 of the SCM Agreement. Consequently, in the context of this case specifically, Japan broadly agrees with Canada's view, and considers that the Panel should, for the purpose of these second compliance proceedings, examine and compare the current situation with a situation under which the European Union would have withdrawn the subsidies, or with a situation under which the adverse effects of the subsidies would have been removed or otherwise would have ceased to exist, by the date on which it asserts full compliance.

V. Wind-down of the A380 programme

Finally, while Japan does not wish to take a categoric position as to the facts of the case, Japan disagrees with the arguments of the European Union according to which the wind-down of the A380 programme will result in the withdrawal of the relevant subsidy and that in any event it will represent an appropriate step to remove its adverse effects. Japan's position is that the mere fact that a product will be discontinued at a given point in time does not render a Member in conformity with its obligations under Article 7.8 because if the unused benefit, should any exist, remains with the recipient after the winding down of subsidized operations, it may be used for a different purpose, for example, to lower the sales price of another product line of the recipient.

ANNEX D

RULING OF THE PANEL ON THE EUROPEAN UNION'S REQUEST OF 12 JULY 2019

ANNEX D-1

RULING OF THE PANEL ON THE EUROPEAN UNION'S REQUEST OF 12 JULY 2019 CONCERNING: (I) THE ALLEGED UNTIMELY FILING OF CERTAIN NEW ARGUMENTS AND EVIDENCE; AND (II) ALLEGATIONS OF ADDITIONAL DUE PROCESS CONCERNS

5 AUGUST 2019

1 INTRODUCTION

1. The Panel refers to the European Union's 12 July 2019 letter concerning certain arguments and evidence contained in the United States' comments on the European Union's responses to the Panel's questions following the substantive meeting, which were received on 25 June 2019. In its letter, the European Union requests the Panel to either: (i) reject as "untimely filed" certain new arguments and evidence; or alternatively, (ii) afford the European Union an opportunity to comment on the alleged new arguments and evidence, if the Panel were to decline to reject those arguments and evidence as untimely filed.[1] The European Union additionally requests the Panel to deny any invitations by the United States to pose unnecessary additional questions to the European Union.[2] Finally, the European Union requests that the Panel deny what the European Union considers to be an assertion that the European Union "did not engage in good faith in the first compliance proceedings".[3]

2 THE EUROPEAN UNION'S REQUEST TO REJECT CERTAIN ARGUMENTS AND EVIDENCE AS "UNTIMELY" FILED

2.1 The European Union's complaints

2. The European Union argues that the United States has filed a substantial amount of new arguments and evidence with the submission of its comments on EU responses, including two new expert reports authored by NERA Economic Consulting, as well as six further exhibits. The European Union considers that certain of these arguments and evidence are filed belatedly because they address EU arguments and evidence filed as early as the European Union's first written submission. The European Union submits that the United States "could and should have filed those arguments many months ago, had it considered them pertinent to the issues arising in this dispute".[4] For the European Union, the failure to do so raises serious due process issues. The European Union emphasises that it does *not* request the Panel to reject *all* new arguments and evidence as untimely filed but submits that it "focuses on the most egregious examples of belatedly-filed new US arguments and evidence".[5]

3. The European Union recognizes that a party may progressively refine arguments throughout the course of the proceedings, including through the parties' responses to panel questions, and their comments on the other party's responses.[6] However, the European Union argues that due process requires that arguments and evidence be presented *in a timely manner* – i.e. as early as possible in panel proceedings, to enable their progressive refinement over the course of the proceedings.[7] In contrast, the European Union submits that acceptance of new arguments and evidence in a final set of comments in panel proceedings is inconsistent with due process obligations where those arguments and evidence respond, for the first time, to arguments and evidence by the other party

[1] European Union's request for interim ruling (12 July 2019), para. 2.
[2] European Union's request for interim ruling (12 July 2019), paras. 5 and 40, referring to United States' comments on the European Union's response to Panel question Nos. 4 and 7, paras. 30, 42, 52, 56; Third NERA Report on German A350 XWB LA/MSF (Exhibit USA-173 (BCI/HSBI)), para. 7;
[3] European Union's request for interim ruling (12 July 2019), paras. 36-38, referring to United States' comments on the European Union's response to Panel question No. 9, para. 51.
[4] European Union's request for interim ruling (12 July 2019), para. 2.
[5] European Union's request for interim ruling (12 July 2019), para. 3.
[6] European Union's request for interim ruling (12 July 2019), para. 11, referring to Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.
[7] European Union's request for interim ruling (12 July 2019), paras. 11 and 14.

offered many submissions ago. In those circumstances, a panel must safeguard other interests, such as the right to timely redress, and reject such arguments and evidence as untimely filed.[8]

4. The European Union considers that the United States' decision to file its new arguments and evidence in its final submissions "appear{s} designed to unnecessarily prolong these proceedings, threatening to violate further the European Union's due process rights."[9] According to the European Union, permitting further delay would be inconsistent with Article 3.3 of the DSU, which requires the "prompt settlement" of disputes, but would also deprive the European Union of its right to timely findings on its compliance measures, and appellate review thereof, should the need arise.[10] In this latter respect, the European Union submits that only circulation of the panel report prior to 10 December 2019 will ensure that the Parties may, if required, file an appeal that will be heard in a timely manner due to the United States' blocking of the appointment of new Appellate Body members.[11] The European Union submits that it also "relies on these second compliance proceedings to bring the upcoming US countermeasures to an end", pending any DSB authorisation for the United States to impose countermeasures.[12]

5. The European Union identifies three specific instances where it considers the United States' untimely filing of arguments and evidence has compromised the European Union's ability to respond to arguments and evidence and make its case.

6. First, the European Union refers to paragraphs 44-46 of the US comments, and Sections V and VI of the third NERA report on the German A350XWB LA/MSF loan, and in particular the United States' argument that the delivery forecast Professor Klasen used "is implausible and inconsistent with contemporaneous evidence", and that, with NERA's newly constructed delivery forecast, the 2018 amendment "has a lower IRR than the market benchmark identified by Professor Klasen".[13] The European Union submits that the United States and NERA Economic Consulting address the delivery forecast that Professor Klasen relied upon to determine the IRR under the 2018 German A350XWB LA/MSF amendment, for the first time. The European Union submits that the United States had access to that delivery forecast since October 2018 and that it offers no justification for its belated filing of arguments and evidence concerning that IRR calculation and the underlying delivery forecast.[14]

7. Second, the European Union refers to paragraph 47 of the US comments, and Section VII of the third NERA report on the German A350XWB LA/MSF loan, and in particular the United States' argument that "the EU and Professor Klasen appear to have improperly ignored that, even under an early repayment scenario, KfW would have been entitled to **[***]**", and that, taking these into account, "the IRR of early repayment is higher than the IRR under the 2018 amendment".[15] The European Union argues that United States provides no justification for its belated filing of arguments and evidence in this respect because the United States had the terms of the original KfW loan agreement since the first compliance proceedings and the terms were also provided with the European's Union's first written submission in these second compliance proceedings.[16]

8. Third, the European Union refers to paragraphs 243-277 of the US comments, in which the European Union argues that the United States engages, for the first time, with the detail of the EU argument and evidence that was provided back in January 2019 concerning counterfactual launch dates for the A380 and A350XWB, in the absence of A380 and A350XWB MSF subsidies. The European Union based this analysis on the Wessels Report, which was provided as evidence by the

[8] European Union's request for interim ruling (12 July 2019), para. 15.
[9] European Union's request for interim ruling (12 July 2019), para. 5.
[10] European Union's request for interim ruling (12 July 2019), para. 9.
[11] European Union's request for interim ruling (12 July 2019), para. 7.
[12] European Union's request for interim ruling (12 July 2019), para. 7.
[13] United States' comments on the European Union's response to Panel question No. 7(b), para. 44, citing Third NERA Report on German A350 XWB LA/MSF (Exhibit USA-173 (BCI/HSBI)), Sections V, VI.
[14] European Union's request for interim ruling (12 July 2019), para. 18.
[15] United States' comments on the European Union's response to Panel question No. 7(b), para. 47, citing Third NERA Report on German A350 XWB LA/MSF (Exhibit USA-173 (BCI/HSBI)), Section VII.
[16] European Union's request for interim ruling (12 July 2019), para. 21, referring to European Union's first written submission, paras. 90, 92-99, German Loan Agreement between KfW and Airbus Operations GmbH and Airbus S.A.S, Toulouse, **[***]**, (Exhibit EU-10 BCI/HSBI); German Loan Agreement between KfW and Airbus Operations GmbH and Airbus S.A.S, Toulouse, **[***]** (English translation), (Exhibit EU-10 (BCI/HSBI-ENG)).

United States in the first compliance proceeding, as well as the Airbus Counterfactual Launch Statement.[17] The European Union submits that the United States offers no justification for its belated filing of arguments and evidence in this respect.[18]

9. In each case, the European Union requests that the Panel reject as untimely filed the arguments and evidence specifically identified above because, in each instance, the United States has had numerous opportunities to present relevant arguments and evidence at earlier stages in these proceedings, but chose not to do so, prejudicing the European Union's right to timely redress. If the Panel declines the EU request to reject any of the evidence as untimely filed, the European Union argues that the Panel should afford the European Union an opportunity to comment on the aforementioned arguments and evidence.[19]

2.2 The United States' response to the European Union

10. The United States argues that it has submitted its comments fully in conformity with the Panel's Working Procedures and timetable, and the European Union has no valid argument that any argument in the US comments was untimely. The United States argues that there is no requirement in the Working Procedures or the DSU barring a party from raising responsive arguments in one submission that allegedly could have been made in an earlier submission. Rather, according to the United States, WTO proceedings typically operate in an iterative manner, with the parties successively refining, elaborating, and adding to their arguments in response to issues raised by the other party in its submissions or by the panel in its questions. To preclude a party revisiting past issues in these circumstances would preclude the party from defending its interests and would further prevent the Panel from making an objective assessment of the matter as required under Article 11 of the DSU.[20] The United States argues that, just as either party is free to reference or elaborate on earlier arguments in responding to Panel questions, parties must be able to elaborate on earlier arguments in their comments on those answers to make those comments "meaningful".[21]

11. The United States also submits that there is no basis to "speed its deliberations" to bring to an end theoretical US countermeasures that have not yet been imposed, or to enable the Panel to circulate its final report before 10 December 2019 to ensure that the European Union may file an appeal. The United States argues that neither of these reasons provide a valid justification.[22] To the contrary, the United States submits that DSU Article 12.2 provides that "Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process." Therefore, the United States submits that the DSU does not authorize a panel to reject evidence and argumentation submitted within the time period provided by the panel and relevant to the matter before it so as to expedite its review.[23]

12. Regarding the specific instances of alleged "belatedly-filed" evidence, the United States argues that its comments on the EU response to Panel question 7 respond directly to arguments the European Union made and evidence submitted in its responses. In particular, the United States submits that the EU responses provided new information regarding the terms of German A350 XWB LA/MSF agreement and how the European Union calculated the **[***]** associated with a

[17] European Union's request for interim ruling (12 July 2019), para. 23, referring to European Union's first written submission, paras. 335-353; European Union's second written submission, paras. 415-460; Wessels Report, (Exhibit EU-40); Airbus Counterfactual Launch Statement, (Exhibit EU-92-HSBI and BCI).

[18] European Union's request for interim ruling (12 July 2019), paras. 23 and 24.

[19] See European Union's request for interim ruling (12 July 2019), paras. 19, 22 and 25.

[20] United States' comments on the European Union's interim ruling request (19 July 2019), paras. 9 and 10.

[21] United States' comments on the European Union's interim ruling request (19 July 2019), para. 12. The United States recognizes that it would be "ideal" for either party to raise its arguments as early as possible in proceedings but argues that this cannot imply a prohibition on raising arguments later in the proceeding. The United States argues that prior reports cited by the European Union provide no basis for rejecting such arguments. (United States' comments on the European Union's interim ruling request (19 July 2019), para. 13 referring to Appellate Body Reports: *US – Gambling*, para. 276; *Thailand – Cigarettes*, paras. 156, 160; *US – Tuna II (Mexico) (21.5)*, para. 7.181; *Australia – Salmon*, para. 278).

[22] United States' comments on the European Union's interim ruling request (19 July 2019), para. 2.

[23] United States' comments on the European Union's interim ruling request (19 July 2019), para. 2. The United States also argues that there is no basis for the European Union's accusation that the United States framed its comments so as to "delay" this proceeding. To the contrary, the United States submits that it has sought at each stage to facilitate the Panel's deliberations by focusing on the key issues and addressing them in a concise fashion. (United States' comments on the European Union's interim ruling request (19 July 2019), para. 3).

hypothetical early repayment. According to the United States, this in turn, highlighted the criticality of Professor Klasen's assumptions regarding the revenue stream associated with future LA/MSF payments, and the importance of A350XWB delivery forecasts. The United States submits that this led it to address the delivery forecasts in its comments in assessing the calculation of the IRR for the amended A350XWB LA/MSF loan agreement.[24]

13. Second, the United States notes that its comments on the role of **[***]** in calculating the IRR of German LA/MSF for the A350XWB directly address the European Union's responses to Panel questions 7, 11, and 12. The United States argues that these comments flowed from the same series of developments outlined above with respect to the delivery schedule. In particular, the United States submits that the EU's explanation of the **[***]** calculation clarified for the first time how the EU derived its benchmark for the behaviour of KfW, the importance of assumptions Professor Klasen made in his calculations, and the sensitivity of the results to those assumptions. The United States further argues that the European Union is incorrect that the United States and NERA could have made these same arguments at the time of its first written submission, since the European Union's own arguments and explanation evolved through its various submissions.[25]

14. Third, the United States argues that its comments concerning the counterfactual launch dates of the A380 and A350XWB and the Wessels Report respond directly to arguments made by the EU in response to questions 68 and 69. In particular, the United States notes that question 69 requested the European Union's views as to the relevance of whether launch of the A380 would have been economically viable at a later date, to which the European Union responded with 21 paragraphs of argumentation, including a lengthy elaboration on its views on the Wessels' report.[26] The United States submits that its comments address the specific points raised by the European Union.[27]

2.3 Evaluation by the Panel

15. We note at the outset that the European Union made similar requests in the first compliance panel proceeding regarding arguments and evidence that the United States submitted in its responses to questions following the meeting held with the parties in that proceeding.[28]

16. As was the case in that compliance proceeding, the European Union does not assert that the United States' submission of arguments and evidence in its comments to the European Union's responses has been made contrary to the Panel's Working Procedures. Paragraph 5(1) of the Working Procedures provides that "{e}ach party shall submit all evidence to the Panel no later than during the substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party." We share the United States' view that the United States' arguments contained in its comments and the included exhibits conformed with the Panel's Working Procedures in form and substance. The European Union specifically alleges that the timing of the submission of certain arguments and evidence in the United States' last substantive submission constitutes a serious violation of the European Union's due process rights.

17. As the first compliance panel observed, in conducting an objective assessment of the matter, we are bound to ensure that due process is respected. Due process is intrinsically connected to notions of fairness, impartiality and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules.[29]

18. As part of our objective assessment of the matter that we are required to perform under Article 11 of the DSU, we are required to carefully and independently scrutinize the parties'

[24] United States' comments on the European Union's interim ruling request (19 July 2019), paras. 15 and 17.
[25] United States' comments on the European Union's interim ruling request (19 July 2019), paras. 18-20.
[26] United States' comments on the European Union's interim ruling request (19 July 2019), para. 21, referring to European Union's responses to Panel questions 68 and 69, paras. 347-367.
[27] United States' comments on the European Union's interim ruling request (19 July 2019), para. 21.
[28] See WT/DS316/RW/Add.1., pp. F-13 – F-18 and F-23 – F-28.
[29] See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147. The Appellate Body also stated that the question of whether a panel has ensured due process in any particular instance may go beyond whether a party has complied with the panel's working procedures. (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 148).

arguments and any evidence submitted in support of those arguments, with a view to clarifying their meaning and exploring their implications for the particular claims being made. There is no particular temporal sequence of proof in a WTO proceeding and both parties will adduce evidence in support of their own arguments or to rebut the arguments made by the other at various stages of a dispute throughout the entirety of a proceeding. Due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. However, this due process interest must be balanced against other interests, including systemic interests such as those reflected in Articles 3.3 and 12.2 of the DSU.[30] We also take into account the complex nature of issues that have been raised and the fact that we must discharge this responsibility in a compliance proceeding in which it was envisaged that the parties would hold only one substantive meeting with the Panel. We address the European Union's specific requests with these considerations in mind.

2.3.1 The United States' comments on the EU response to Panel question 7 (paragraphs 44-46) and Sections V and VI of the third NERA report on the German A350XWB LA/MSF loan (Exhibit USA-173 (BCI/HSBI))

19. Sections V and VI of the third NERA report on the German A350XWB LA/MSF loan and the United States' related comments address the delivery schedule that was relied upon in the Klasen Report (Exhibit EU-11) to calculate the IRR of the German A350XWB LA/MSF loan following the 2018 amendment. In its report, NERA contests whether a commercial lender at the time of the 2018 amendment would have had reason to question Airbus' forecast deliveries based on publicly available information and the A350XWB business case.[31] NERA constructs a delivery schedule for future A350XWB deliveries based on forecasts from the Ascend database and other information and uses this constructed schedule to calculate a the IRR for the German A350XWB LA/MSF loan following the 2018 amendment, determining a value that is lower than the market benchmark that was calculated in the Klasen Report.[32]

20. Along with its first written submission, the European Union submitted the Klasen Report seeking to demonstrate that the German A350XWB LA/MSF subsidy was withdrawn within the meaning of Article 7.8 of the SCM Agreement through the alignment of its terms with a contemporaneous benchmark. The Klasen Report calculates an expected IRR under the German A350XWB LA/MSF loan following the **[***]** amendment based on delivery forecasts and the terms of the amended loan agreement.[33] The European Union submits that the Klasen Report verifies the reliability of the forecast through a review of market forecasts for wide-body aircraft and specific A350XWB forecasts.[34] The United States responded in its first written submission that the Klasen Report applied the wrong analytical framework by failing to assess the effect of the amendment on the pre-existing loan.[35] The United States submitted a first NERA report comparing the IRR of the original German A350XWB LA/MSF loan agreement unamended with the IRR of the amended agreement.[36] NERA relied on the expected IRR under the amended German A350XWB LA/MSF that was calculated in the Klasen Report, although NERA submitted that the Klasen Report did not provide sufficient information to enable it to verify this IRR calculation.[37] In its second written submission, the European Union argued that NERA's approach comparing the IRR under the original agreement and the IRR under the amended terms was erroneous.[38] The European Union also submitted a supplemental report authored by Professor Klasen.[39] The United States' recalled the conclusions in the first NERA report in its second written submission based on the IRR comparison.[40] The parties' addressed each other's arguments at the meeting, but did not submit any further evidence. At the

[30] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.
[31] Third NERA Report on German A350 XWB LA/MSF (Exhibit USA-173 (HSBI)), para. 12.
[32] Third NERA Report on German A350 XWB LA/MSF (Exhibit USA-173 (HSBI)), paras. 13-23.
[33] European Union's first written submission, paras. 105-107; Professor Klasen, "Market Consistency of the **[***]** Amendment to German MSF Agreement", October 8, 2018, (Exhibit EU-11 (BCI/HSBI)), paras. 44-56.
[34] European Union's first written submission, para. 106.
[35] United States' first written submission, para. 96.
[36] Effects of the **[***]** Amendment of German LA/MSF for the A350XWB on Pre-Existing LA/MSF, NERA (19 December 2018) (Exhibit USA-26 (BCI/HSBI)), paras. 3-9.
[37] Effects of the **[***]** Amendment of German LA/MSF for the A350XWB on Pre-Existing LA/MSF, NERA (19 December 2018) (Exhibit USA-26 (BCI/HSBI)), para. 6.
[38] European Union's second written submission, paras. 102, 113.
[39] Professor Klasen, "Analysis addressing the US comments on Trade Rx's A350XWB Report, 26 January 2019" (Exhibit EU-82 BCI/HSBI), paras. 3-7.
[40] United States' second written submission, paras. 103-105.

meeting and subsequently in writing, the Panel posed a number of questions to the parties concerning German A350XWB LA/MSF, including one question directed at the European Union asking how the 2018 delivery forecast that factors into the IRR assessment compares to the delivery forecast at the time of signing the original A350XWB LA/MSF loan agreement.[41] The United States submitted the third NERA report on the German A350XWB LA/MSF loan in connection with the European Union's responses to several Panel questions.[42]

21. As the European Union has observed, the United States could have raised its concerns with reliability of the delivery forecast relied upon in the Klasen Report at an earlier stage. However, we do not consider the fact that the United States did not present its arguments and evidence at an earlier point, when it possibly could have done so, means that the United States should be prevented from doing so in later submission, including in its comments to the European Union's responses to Panel questions. There is no specific rule of procedure or principle of due process that requires a party to a WTO dispute proceeding to present its arguments and evidence at the first possible opportunity such that a failure to do so requires a panel to reject such argument and evidence as untimely.

22. We recognize that the United States initially relied on the expected IRR under the amended German A350XWB LA/MSF that was calculated in the Klasen Report in performing its own assessment of the effect of the amendment on the pre-existing LA/MSF loan. Nevertheless, the first NERA report expressed concern that there was insufficient sufficient information to enable it to verify this IRR calculation. While the United States or NERA may have presented its own arguments and evidence in assessing the reliability of the delivery forecast and calculation of the IRR at an earlier point in time, we consider that our evaluation of the merits of the issues in this dispute must take into account all of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding. We therefore decline the European Union's request to reject the United States' arguments and evidence contained in its comments and the third NERA Report on the grounds that it was untimely filed.

23. The European Union has requested that it be permitted to comment on NERA's expertise in the developing its own delivery forecast, certain assumptions that NERA made, and the consistency of NERA's forecast with contemporaneous demand forecasts, if we decline the European Union's request.[43] The arguments set out in the third NERA report present a significant revision of the IRR under the amended German A350XWB LA/MSF and reflect a shift from the United States' own previous reliance upon the expected IRR as calculated in the Klasen Report. Due to this, and the fact that the third NERA report was submitted along with the United States' comments, we have decided to provide the European Union until 16 August 2019 to comment on the specified US and NERA arguments, to the extent that the European Union considers it necessary to comment further regarding the delivery schedule that was relied upon in the Klasen Report and the constructed schedule used to calculate a revised IRR for the amended German A350XWB LA/MSF agreement.

2.3.2 The United States' comments on the EU response to Panel question 7 (paragraph 47) and Section VII of the third NERA report on the German A350XWB LA/MSF loan (Exhibit USA-173 (BCI/HSBI))

24. The European Union additionally requests that we reject the United States' arguments and evidence contained in Section VII of the third NERA Report and in paragraph 47 of the US comments, concerning NERA's observation that the Klasen Report improperly ignores that KfW would have been entitled to **[***]** provided for under the terms of the original German A350XWB LA/MSF agreement had Airbus made an early repayment of outstanding principal. According to NERA, the IRR of early repayment is higher than the IRR under the **[***]** amendment, if these **[***]** are taken into account.[44]

25. The European Union did not address the issue of whether Airbus may have repaid the outstanding principal and interest had KfW not agreed to amend the terms of the original German A350XWB LA/MSF agreement. In its first written submission, the United States asserted that KfW

[41] See European Union's response to Panel question No. 8.
[42] See United States' comments on the European Union's response to Panel question Nos. 4, 5 and 7.
[43] European Union's request for interim ruling (12 July 2019), para. 19.
[44] United States' comments on the European Union's response to Panel question No. 7, para 47; Third NERA Report on German A350 XWB LA/MSF (Exhibit USA-173 (HSBI)), paras. 24-27.

would have been in a better financial position if it had left the terms of the original German A350XWB LA/MSF agreement unamended.[45] The European Union raised the possibility of repayment in its second written submission in response to the United States' argument, and the operation of the early repayment charge/credit in Clause 7.1 in the original German A350XWB LA/MSF agreement, arguing that KfW acted as a rational market actor in deciding to amend the original terms.[46] In its second written submission, the United States responded to the European Union's arguments.[47] The parties additionally addressed these issues at length in their oral statements at the meeting and in their responses to questions and comments on responses.[48]

26. In our view, it is sufficiently clear from our review of the parties' submissions that the prospect of early repayment of outstanding German A350XWB LA/MSF and its relevance to the question of whether the German A350XWB LA/MSF subsidy has been withdrawn, were discussed as part of the process of engagement between the parties and with the Panel, including in response to questions from the Panel. It is reasonable and to be expected that parties will clarify their positions and further develop their arguments as the debate progresses. In addition, as the United States has pointed out, the European Union argued in its responses to questions that the rate that Airbus would have paid on a comparable commercial loan at the time of the amendment serves as a benchmark to indicate what KfW would have earned had it received prepayment and reinvested the money at market in a comparable instrument.[49] The United States' argument that **[***]** must also be taken into account is a response to that argument. We therefore consider relevant and also appropriate to take the United States' comments into account in conducting our objective assessment of the matter. We therefore decline the European Union's request to reject the United States' arguments and evidence on this issue on the grounds that the arguments and evidence were untimely filed.

27. The European Union requested the opportunity to comment on the United States and NERA's assertions, in the event that we deny its request, including *inter alia* to address "the presence of the **[***]** and its *neutralising* effect on KfW's financial position in the event of a **[***]** that affects the **[***]** KfW earns."[50] We note that, in light of its argument that KfW would have received **[***]** under the original A350XWB LA/MSF agreement had it accepted early repayment, NERA calculates an IRR of investing the **[***]** at the market benchmark and also receiving **[***]**.

28. Given the centrality of this new calculation to the United States' position that the **[***]** amendment did not achieve withdrawal of the German A350XWB LA/MSF subsidy, we have decided to grant the European Union until 16 August 2019 to comment on the United States' and NERA's argument, to the extent that the European Union considers it necessary to comment further regarding whether KfW would have been entitled to **[***]** provided for under the terms of the original German A350XWB LA/MSF agreement had Airbus made an early repayment of outstanding principal in order to ensure the European Union's due process rights.

2.3.3 The United States' comments on the EU response to Panel questions 68 and 69 (paragraphs 243-277)

29. The European Union asserts that the United States, in its comments "engages for the first time, with the detail of the EU argument and evidence that was provided back in January 2019 concerning counterfactual launch dates for the A380 and A350XWB, in the absence of A380 and A350XWB MSF subsidies."[51] In its comments, the United States comments on the European Union's response regarding conservative assumptions made in the Wessels Report.[52]

[45] United States' first written submission, para. 93.
[46] European Union's second written submission, paras. 105, 108-117.
[47] United States' second written submission, paras. 106-111.
[48] See European Union's opening oral statement, paras. 63-69; United States' opening oral statement, paras. 28-29; See also European Union's response to Panel question Nos. 7, 12 and 16; United States' response to Panel question Nos. 7, 12 and 16; European Union's comments on United States' response to Panel question Nos. 7, 12 and 16; and United States' comments on the European Union's response to Panel question Nos. 7, 12 and 16.
[49] European Union's response to Panel question No. 7, para. 62.
[50] European Union's request for interim ruling (12 July 2019), para. 22.
[51] European Union's request for interim ruling (12 July 2019), para. 24.
[52] See European Union's response to Panel question No. 68, paras. 347-367.

30. The parties' discussion of the European Union's proposed counterfactual launch dates of the A380 and the A350XWB dates back to the parties' first written submissions.[53] In its first written submission, the United States specifically responded to the European Union's reliance on the Wessels Report, including the fact that the Wessels Report made conservative assumptions, was limited to assessing Airbus' financial capacity and did not consider whether a given project would have an attractive business case.[54]

31. The European Union based this analysis on the Wessels Report, which was provided as evidence by the United States in the first compliance proceeding, as well as the Airbus Counterfactual Launch Statement.[55] The European Union submits that the United States offers no justification for its belated filing of arguments and evidence in this respect.[56] The United States resumed its discussion of the European Union's reliance on the Wessels Report and its proposed counterfactual in its second written submission[57], oral statement[58] and in its responses to questions and comments on EU responses. Notably, in its comments to the European Union's response to question 68, the United States respond directly to arguments made by the European Union, including on the issue of whether the launch of the A380 would have been economically viable at a later date.[59]

32. The European Union requests that we reject the United States' arguments in its comments on the EU response to questions 68 and 69, or alternatively, that we allow the European Union an additional opportunity to comment. Specifically, the European Union has requested the opportunity to further explain:

> *inter alia*, that (i) Airbus would have met, at the relevant times, the Wessels criteria for the launch of a new aircraft; (ii) Airbus would have had the technological and industrial capability to support the counterfactual launch of the A380 and A350XWB; and, (iii) that the United States errs in its speculation about the role of counterfactual orders of Boeing very large aircraft by Emirates, Singapore and Qantas in the determination of the viability of a counterfactual A380 business case in 2003, two years after the A380's actual launch. The European Union would also explain (iv) that the same viability-related considerations that the United States raises with respect to the counterfactual launch of the 787 in DS353 apply with equal force to the counterfactual launch of the A380 and A350XWB in these proceedings; in both proceedings, the relevant findings are grounded in findings that subsidies accelerated the launch of an aircraft. Finally, the European Union would (v) correct the mischaracterisation by the United States of EU arguments on appeal in the first compliance proceedings.[60]

33. We see no basis for granting either request. In our view, the United States' comments at issue are grounded in issues that have been before the Panel from the outset of this proceeding. These include the relevance of the findings in the Wessels Report to establish counterfactual launch dates for the A380 and A350XWB, and issues related to the technological and economic viability of proceeding with the launch of either aircraft in the absence of the subsidies. These issues have been addressed by both parties in their written submissions and responses. In requesting a further opportunity to comment, the European Union has indicated that it seeks to readdress effectively all of the major issues pertaining to the counterfactual launch timing of the A380 and A350XWB. At this stage, we consider that both parties have had sufficient opportunity to articulate their positions on these issues and react to the other party's arguments.

34. For the foregoing reasons, we decline the European Union's request to reject the United States' arguments and evidence contained in its comments to the European Union's responses to Panel questions 68 and 69 on the grounds that they were untimely filed. We also reject the

[53] See e.g. European Union's first written submission, paras. 335-353; United States' first written submission, paras. 207-235.
[54] United States' first written submission, paras. 221-222, 225.
[55] European Union's request for interim ruling (12 July 2019), para. 23, referring to European Union's first written submission, paras. 335-353; European Union's second written submission, paras. 415-460; Wessels Report, (Exhibit EU-40); Airbus Counterfactual Launch Statement, (Exhibit EU-92 (BCI/HSBI)).
[56] European Union's request for interim ruling (12 July 2019), paras. 23 and 24.
[57] United States' second written submission, paras. 226-255.
[58] United States' opening statement at the meeting of the Panel, paras. 45-50.
[59] United States' comments on the European Union's response to Panel question No. 68, paras. 264-265.
[60] European Union's request for interim ruling (12 July 2019), para. 25.

European Union's request for an additional opportunity to comment on the issues addressed in those responses.

3 THE EUROPEAN UNION'S ADDITIONAL DUE PROCESS CONCERNS

35. Apart from its request to reject certain arguments and evidence as "untimely" filed, the European Union submits that the United States raises additional due process concerns by: (i) asserting that the European Union has withheld certain evidence allegedly necessary for the adjudication of the claims at issue in these proceedings, requesting the Panel to pose further questions to the European Union[61]; and (ii) by "rais{ing} an argument that the European Union did not engage in good faith in the first compliance proceedings."[62] The European Union requests the Panel to deny the various US requests to pose unnecessary additional questions to the European Union, and further deny any assertion that the European Union did not engage in good faith in the first compliance proceedings.

3.1 The European Union's request to deny the US request for the Panel to pose allegedly unnecessary additional questions to the European Union

36. The European Union argues that various of the United States' comments also raise due process concerns "through its unfounded assertions that the European Union has withheld evidence allegedly necessary for the adjudication of the claims at issue in these proceedings, and its invitation that the Panel pose further unnecessary questions to the European Union".[63] The European Union specifically refers to the United States' requests related an array of information concerning the German A350 LA/MSF loan agreement, including information in an expert report from KPMG, the terms of a **[***]** amendment of German LA/MSF for the A350 XWB **[***]**, and the original repayment schedule for A350XWB LA/MSF as contained in **[***]** to the A350XWB LA/MSF loan agreement.[64] The European Union also refers to the United States' request for the Panel to "exercise its authority under Article 13 of the DSU to gather the relevant information from the EU" to the extent "it needs additional information to evaluate the relationship between the R&TD subsidies and the EU's declared measures taken to comply in this dispute".[65]

37. Regarding questions concerning German A350 LA/MSF, the European Union argues that the United States has not explained why it considers certain of the information necessary.[66] The European Union further submits that the United States has known of the existence of the relevant terms of the **[***]** amendment since the European Union's first written submission, and even performed calculations based on the original KfW loan agreement **[***]**, without an indication that it required additional information on the terms of that amendment.[67] The European Union further submits that the original repayment schedule in **[***]** was provided to the first compliance panel and thus the United States has had access to the information.[68] The European Union considers the United States' requests for this information to be nothing more than an attempt to delay these proceedings in a manner that undermines the European Union's due process rights.[69]

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[61] European Union's request for interim ruling (12 July 2019), paras. 4 and 27-35, referring to United States' comments on the European Union's responses to Panel question Nos. 4, 7, 9, 10, 31, 32 and 84, paras. 30, 34, 42, 52, 56, 115, 116, 361.

[62] European Union's request for interim ruling (12 July 2019), paras. 36-38.

[63] European Union's request for interim ruling (12 July 2019), para. 26.

[64] European Union's request for interim ruling (12 July 2019), paras. 29, 31, 32 and 33, referring to United States' comments on the European Union's responses to Panel questions, paras. 30, 42, 52, 56; and Third NERA Report on German A350 XWB LA/MSF (Exhibit USA-173 (HSBI/BCI)), para. 7

[65] European Union's request for interim ruling (12 July 2019), para. 33, referring to United States' comments on the European Union's responses to Panel question No. 84, para. 361.

[66] European Union's request for interim ruling (12 July 2019), para. 30.

[67] European Union's request for interim ruling (12 July 2019), para. 31, referring to European Union's first written submission, para. 93; Professor Klasen, "Market Consistency of the **[***]** Amendment to German MSF Agreement", 8 October 2018, (Exhibit EU-11 (HSBI/BCI)), para. 35. See also United States' comments on the European Union's responses to Panel question No. 5, paras. 35-37.

[68] In this respect, the European Union notes that the United States relies on different Article 13 documents from the first compliance proceedings. See European Union's request for interim ruling (12 July 2019), para. 32 and accompanying fns, referring to United States' comments on the European Union's responses to Panel question No. 7, paras. 45, 51. See also European Union's comments on the United States' response to Panel question No. 4(a), paras. 23-25.

[69] European Union's request for interim ruling (12 July 2019), para. 30.

38. The United States argues that the requested information is "potentially critical to the Panel's evaluation of the matter before it."[70] In addition, the United States submits that to date, the European Union has only provided its own "characterizations of the terms" of the **[***]** amendment of German A350XWB LA/MSF despite the United States' request for a copy of the legal documents implementing the amendment dating back to the first written submission[71] and such characterizations amounts to "second-hand sourcing" which "is not enough."[72] Finally, the United States argues that it is in fact the European Union—and not the United States—that is under a duty to provided copies of the original repayment schedule contained in **[***]**, as Paragraph 7(4) of the Working Procedures requires the party identifying a document already submitted as an exhibit in the first compliance proceeding to resubmit that document.[73]

39. Regarding information concerning the R&TD measures, the European Union considers that the United States' request should be denied primarily because the request amounts to an invitation to the Panel "to abuse its discretion to make the case for the United States".[74] In addition, the European Union submits that the United States has had numerous opportunities to invite the Panel to pose questions on this matter but chose not do so. For the European Union, final submissions are not the proper stage to invite a panel to pose questions.[75]

40. The United States contends that it has made a *prima facie* case that the R&TD subsidies are contributing to the adverse effects caused by LA/MSF for the A380 and A350 XWB, and considers it would be entirely appropriate for the Panel to gather additional information under these circumstances.[76] To the extent the European Union considers this to be "relatively late" in the proceeding, the United States submits that it is due to the European Union's refusal, even when requested by the Panel, to provide information exclusively in its possession regarding the terms and magnitude of the R&TD subsidies.[77]

41. The European Union's request to deny the US request for the Panel to pose allegedly unnecessary additional questions to the European Union covers an array of information concerning the provision of German A350 LA/MSF, on the one hand, and information pertaining to the R&TD measures, on the other hand. The European Union's request appears to centre on several distinct concerns: (i) the information is either not necessary to the matter before it or the United States has not demonstrated that it is necessary; (ii) that it is too late in the proceeding to seek this information; and (iii) the Panel is not permitted to make the case for the United States (in the case of the R&TD measures) and therefore is not permitted to gather the relevant information in the exercise of its authority under Article 13 of the DSU.

42. In the first compliance proceeding in this dispute, the European Union made a similar request that the panel to reconsider its decision to ask additional questions concerning the "alleged subsidization of the A350XWB".[78] As the first compliance panel explained, in connection with that request, the European Union referred to the need for "{that} debate to come to an end"[79], and that the panel should avoid "use of its interrogative powers, including notably, to make good either

[70] United States' comments on the European Union's interim ruling request (19 July 2019), para. 24.
[71] United States' first written submission, para. 90.
[72] United States' comments on the European Union's interim ruling request (19 July 2019), para. 25.
[73] United States' comments on the European Union's interim ruling request (19 July 2019), para. 26.
[74] European Union's request for interim ruling (12 July 2019), para. 33.
[75] European Union's request for interim ruling (12 July 2019), para. 34. The European Union also reiterates its view that the R&TD measures are not within the Panel's terms of reference. Had the United States wished to pursue its challenge to the R&TD measures, the European Union submits that the United States could have filed its own panel request which would have given the United States access to the information gathering process under Annex V of the SCM Agreement, and would have permitted the United States to post questions to the European Union for relevant evidence. (European Union's request for interim ruling (12 July 2019), para. 35).
[76] In this regard, the United States emphasizes that it explicitly conditioned its suggestion on "{i}f the Panel considers that it needs additional information to evaluate the relationship between the R&TD subsidies and the EU's declared measures taken to comply…." United States' comments on the European Union's interim ruling request (19 July 2019), para. 27 referring to United States' comments on the European Union's response to Panel question No. 84, para. 361.
[77] United States' comments on the European Union's interim ruling request (19 July 2019) para. 27 referring to United States' comments on the European Union's response to Panel question No. 84, para. 361.
[78] See WT/DS316/RW/Add.1., pp. F-32 – F-34.
[79] See WT/DS316/RW/Add.1., para. 1.

Party's failure to articulate and substantiate its case".[80] The first compliance panel rejected the European Union's request, concluding that the decision not to ask further questions would "artificially and arbitrarily constrain the Panel's ability to discharge its duty", including the obligation to conduct an objective assessment of the matter under Article 11 of the DSU. In reaching its decision, the panel noted the 90-day deadline for a compliance panel to circulate its report.[81] Nevertheless, the Panel considered that the complex issues and arguments and evidence at issue created particular challenges, necessitating further consideration of the matters at issue.[82]

43. The first compliance panel went on to explain that panels are vested with discretion to pose questions to the parties and there are no explicit limitations on when a panel may exercise that discretion, although a decision to exercise this discretion relatively late in a proceeding must also take account of the need to settle disputes in a timely manner, particularly in the context of Article 21.5 proceedings. The panel was clear in its view, however, that the objective of achieving a prompt settlement of disputes cannot alone dictate when a panel is entitled to request the parties to provide information and/or explanations that are considered necessary to perform its function.[83] Finally, the panel noted that it had previously informed the parties of the possibility that it may need to pose further questions on both factual and legal issues as necessary in considering the claims before it.[84]

44. We consider the guidance of the first compliance panel relevant to the circumstances of this proceeding, in the event that the Panel were to address further questions to the parties, including as necessary, on those matters referred to by the United States in its comments on the European Union's responses to Panel questions. Notably, we have also informed the parties at the conclusion of its meeting that it may need to pose further questions on factual or legal issues in addition to those sent following the meeting. In light of this, we see no basis to rule on the European Union's request that we deny US requests to pose additional questions to the European Union.

45. Finally, we recall the United States' observation that the European Union is under an obligation to provide copies of the original repayment schedule contained in **[***]** pursuant to paragraph 7(4) of the Working Procedures.[85] Paragraph 7(4) of the Working Procedures provides:

> Insofar as a party considers that the compliance panel should take into account a document already submitted as an exhibit in the original panel proceeding or the first compliance proceeding, it should resubmit that document as an exhibit for the purpose of this proceeding. In its list of exhibits, it should refer to the number of the original exhibit in the original panel proceedings (OP) (example: [XXX]-1 ([XXX]-21-OP)) or first compliance proceeding (FCP) (example: [XXX]-1 ([XXX]-21-FCP)).

46. Based on our reading of paragraph 7(4), the parties appear to have discretion to determine whether to submit information contained in a document that was already submitted as an exhibit at an earlier phase in the proceeding. This would depend on the extent to which a party considers a compliance panel should directly consider the information ("insofar as a party considers that the compliance panel should take into account a document"). We therefore do not consider it necessary to request the European Union to provide a copy of **[***]**. Nevertheless, consistent with our view expressed above, we may exercise our discretion to request this information if we consider it necessary to do so.

[80] European Union's communication (24 March 2014), p. 3.
[81] Article 21.5, DSU.
[82] WT/DS316/RW/Add.1., para. 3.
[83] WT/DS316/RW/Add.1., paras. 3-5, referring to Appellate Body Reports: *Canada – Aircraft*, para. 192; *Thailand – H-Beams*, para. 135.
[84] WT/DS316/RW/Add.1., para. 4.
[85] United States' comments on the European Union's interim ruling request (19 July 2019), para. 26.

3.2 The European Union's request to deny any assertion that the European Union did not engage in good faith in the first compliance proceedings

47. In its response to Panel questions 5(b) and 9 and as part of the KPMG report, the European Union provided the **[***]** of the German A350XWB MSF loan.[86] In its comments on the EU response to question 9, the United States noted that the **[***]** that Dr. Jordan and the European Union's consultant, Professor Whitelaw, both assumed in the first compliance proceeding.[87] Based on this observation, the United States commented that "it is difficult to understand why the EU allowed its expert to base his analysis on an estimate that differed **[***]** from an actual figure known to the EU, and differed in a way that could have **[***]**."[88]

48. In response to this comment, the European Union submits that the United States "implies that the allegedly belated disclosure of the **[***]** reveals that the European Union did not engage in good faith in the first compliance proceedings."[89] The European Union submits that the United States' observation is not relevant, as Professor Whitelaw's and Dr. Jordan's (i) calculation of the *ex ante* expected return and (ii) their determination of the corresponding market benchmark in the first compliance proceedings "were both properly performed on an *ex ante* basis, as of the date of the MSF loan agreement – i.e., **[***]**."[90] Thus, according to the European Union, it is irrelevant what the **[***]**.[91] Thus, the European Union asks the Panel to deny any assertion that the European Union did not engage in good faith in the first compliance proceedings.

49. The United States argues that the European Union cannot "explain away its silence on this issue by arguing that the actual rate was set in response to market developments after signature of the agreement", submitting that the "proper action" would have been to report the actual rate and allow the Panel to determine what, if any, relevance that figure had on the determination of the IRR of the German LA/MSF for the A350 XWB.[92] Thus, the United States reiterates its view from its comments to question 9 that the European Union's approach is "difficult to understand".[93]

50. The Panel does not deem it necessary to address this particular aspect of the European Union's request. Although the European Union considers that the United States has implied that the European Union did not act in good faith, we do not reach the same conclusion. Moreover, the European Union has provided an explanation for why **[***]**, given the need to conduct an *ex ante* analysis, and the Panel sees no problem with that explanation. The Panel therefore does not consider it necessary to address the matter further.

4 CONCLUSION

51. In summary, after carefully considering the European Union's request for an interim ruling and the United States' response, the Panel has decided the following:

a. The Panel declines the European Union's request to reject the United States' arguments and evidence contained in paragraphs 44-46, 47 and 243-277 of the US comments and Sections V, VI and VII of the Third NERA Report on German A350 XWB LA/MSF. Nevertheless, the Panel has decided to provide the European Union an opportunity to comment on: (i) the specific US and NERA arguments that address the delivery schedule that was relied upon in the Klasen Report and constructed schedule used to calculate a revised IRR for the amended German A350XWB LA/MSF; and (ii) the specific US and

[86] European Union's responses to Panel question Nos. 5(b) and 9, paras. 87-90, 102; KPMG Report, Assessment of **[***]**, 28 May 2019, (Exhibit EU-105 (BCI/HSBI)), pp. 5, 10.
[87] United States' comments on the European Union's response to Panel question No. 9, referring to First NERA A350 XWB Report, para. 5 (Exhibit USA-26 (HSBI)); James Jordan, Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks (18 October 2012) ("Jordan Report"), p. 4, Table 1 (Exhibit USA-114 (USA-475-FCP) (HSBI)); and Robert Whitelaw, Update on certain calculations of IRRs and Macaulay durations (14 April 2014), Table 1 (Exhibit USA-115 (EU-507-FCP) (HSBI)).
[88] United States' comments on the European Union's response to Panel question No. 9, fn 87.
[89] European Union's request for interim ruling (12 July 2019), para. 37.
[90] European Union's request for interim ruling (12 July 2019), para. 38.
[91] The European Union submits that **[***]** over the two weeks that passed between those 14 June and the end of that month explain the difference. (European Union's request for interim ruling (12 July 2019), para. 38).
[92] United States' comments on the European Union's interim ruling request (19 July 2019), para. 28.
[93] United States' comments on the European Union's interim ruling request (19 July 2019), para. 28, referring to United States' comments on European Union's response to Panel question No. 9, para. 51 and fn 87.

NERA argument concerning whether KfW would have been entitled to **[***]** provided for under the terms of the original German A350XWB LA/MSF agreement has Airbus made an early repayment. The Panel requests the European Union to submit its comments by no later than 16 August 2019.

b. The Panel declines the European Union's request to deny any US requests to pose additional questions to the European Union.

c. The Panel does not consider it necessary to address the European Union's request to deny what the European Union considers to be an assertion that the European Union did not engage in good faith in the first compliance proceedings.