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

DECISION OF THE ARBITRATOR

*Addendum*

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

This *addendum* contains Annexes A to C to the Decision of the Arbitrator to be found in document WT/DS316/ARB.

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**ANNEX A**

WORKING PROCEDURES OF THE ARBITRATOR

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## **ANNEX A-1**

### **WORKING PROCEDURES OF THE ARBITRATOR**

Adopted 17 August 2018

#### **General**

1. (1) In this proceeding, the Arbitrator 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 Arbitrator reserves the right to modify these procedures as necessary, after consultation with the parties.

#### **Confidentiality**

2. (1) The deliberations of the Arbitrator and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Arbitrator by another Member which the submitting Member has designated as confidential.  
  
(2) Nothing in the DSU or in these Working Procedures shall preclude a 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 Arbitrator, 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) Upon request, the Arbitrator may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

#### **Submissions**

3. (1) Before the substantive meeting of the Arbitrator with the parties, the United States shall transmit to the Arbitrator and to the European Union a communication explaining the basis for its request, including the methodology and data supporting it, in accordance with the timetable adopted by the Arbitrator.  
  
(2) Each party to the dispute shall also transmit to the Arbitrator a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Arbitrator.
  - a. To facilitate the efficient conduct of this proceeding, the written submissions referenced in the Arbitrator's timetable (United States' written communication explaining the basis for its request (Methodology Paper), the European Union's written submission, and the United States' written submission) shall not exceed 125 pages (single-spaced, font size 10) each. This limit excludes exhibits accompanying written submissions.
  - b. The Arbitrator 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 21 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 Arbitrator shall rule on such requests promptly.
- (3) The Arbitrator may invite the parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

**Preliminary rulings**

4. (1) If either party considers that the Arbitrator should make a ruling prior to the issuance of the Decision that certain issues are not properly before the Arbitrator, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
  - a. A party shall submit any such request for a preliminary ruling at the earliest possible opportunity. The other party shall submit its response to the request at a time to be determined by the Arbitrator in light of the request.
  - b. The Arbitrator may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the substantive meeting, or the Arbitrator may defer a ruling on the issues raised by a preliminary ruling until it issues its Decision to the parties.
  - c. In the event that the Arbitrator finds it appropriate to issue a preliminary ruling prior to the issuance of its Decision, the Arbitrator may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Decision.
- (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Arbitrator may follow with respect to such requests.

**Evidence**

5. (1) Each party shall submit all evidence to the Arbitrator no later than 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 Arbitrator shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Arbitrator 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 filing 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 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 United States should be numbered USA-1, USA-2, etc. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the last exhibit in connection with a 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 Arbitrator should take into account a document already submitted as an exhibit in the prior panel proceedings, 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 proceeding (OP) and Article 21.5 panel proceedings (CP), if applicable (for example: XXX-1 (XXX-21-OP), XXX-2 (XXX-11-CP)).

### **Editorial Guide**

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

### **Questions**

9. The Arbitrator may pose questions to the parties at any time during the proceedings, including by:

- a. sending a list of written questions prior to the meeting, or a list of topics it intends to pursue in questioning orally in the course of the meeting. The Arbitrator may ask different or additional questions at the meeting; and
- b. putting questions to the parties orally in the course of the meeting, and in writing following the meeting, as provided for in paragraph 16 below.

### **Substantive meeting**

10. The Arbitrator shall conduct its internal deliberations in closed session. The Arbitrator may, upon request by either party, open its substantive meeting with the parties to the public subject to appropriate procedures to be adopted by the Arbitrator after consulting with the parties.

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

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

(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.

13. Each party shall provide to the Arbitrator and the other party the list of members of its delegation no later than 5:00 p.m. (Geneva time) three working days prior to the first day of the meeting with the Arbitrator.

14. A request for interpretation by any party should be made to the Arbitrator 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 Arbitrator with the parties shall be conducted as follows:

- a. The Arbitrator shall invite the European Union to make an opening statement to present its case first. Subsequently, the Arbitrator shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Arbitrator and the other party with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters.
- b. After the conclusion of the opening statements, the Arbitrator shall give each party the opportunity to make comments or ask the other party questions.
- c. The Arbitrator may subsequently pose questions to the parties.
- d. Once the questioning has concluded, the Arbitrator 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 Arbitrator and the other party at the meeting with a provisional written version of its closing statement, if available.

e. 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 Arbitrator prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
- iii. The Arbitrator shall send in writing, within the timeframe established by the Arbitrator prior to 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 Arbitrator, and to any questions posed by the other party, within the timeframe established by the Arbitrator prior to the end of the meeting.

### **Descriptive part and executive summaries**

17. The description of the arguments of the parties in the Decision of the Arbitrator shall consist of executive summaries provided by the parties, which shall be annexed as addenda to the Decision. These executive summaries shall not in any way serve as a substitute for the submissions of the parties in the Arbitrator's examination of the case.

18. Each party shall submit one integrated executive summary, which shall summarize the facts and arguments as presented to the Arbitrator in the party's submissions and statements, and where possible, its responses to questions and comments thereon following the substantive meeting.

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

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

### **Service of documents**

21. The following procedures regarding service of documents apply to all documents submitted by parties in the course of the proceeding (including exhibits):

- a. Each party shall submit all documents to the Arbitrator by submitting them with the DS Registry (office No. 2047).
- b. Each party shall submit one (1) paper copy of all documents it submits to the Arbitrator by 5:00 p.m. (Geneva time) on the due dates established by the Arbitrator. 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.
- c. Each party shall also submit two CD-ROMs or two DVDs to the DS Registry, at the same time that it submits the paper versions, each containing an electronic copy of all documents that it submits to the Arbitrator, preferably in both Microsoft Word and PDF format.
- d. In addition, each 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 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 Arbitrator directly on the other party. A party may submit its documents to another party on a CD-ROM or DVD only, unless the recipient party has previously requested a paper copy. Each party shall confirm, in writing, that copies have been served on the parties, as appropriate, at the time it provides each document to the Arbitrator.
- f. Each party shall submit its documents with the DS Registry and serve copies on the other party by 5:00 p.m. (Geneva time) on the due dates established by the Arbitrator.
- g. All communications from the Arbitrator to the parties will be via email.

**Correction of clerical errors in submissions**

22. The Arbitrator may grant leave to a 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 FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION

Adopted 27 September 2019

#### I. GENERAL

The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Arbitration 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<sup>1</sup> or the DSU.<sup>2</sup>

#### 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. **"Arbitrator"** means the DS316 Arbitrator under Article 22.6 of the DSU.
3. **"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 has "Designated as BCI" because it is not otherwise available in the public domain and its disclosure could, in the Party's view, cause harm to the originators of the information. Each 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.
4. **"Conclusion of the Arbitration Process"** means the earliest to occur of the following events:
  - (a) the date of circulation of the decision of the Arbitrator; or
  - (b) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB.
5. **"Designated as BCI"** means:
  - (a) for printed information, text that is set off with bolded square brackets in a document clearly marked with the notation "BUSINESS CONFIDENTIAL INFORMATION" and with the name of the Party that submitted the information;
  - (b) for electronic information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation "BUSINESS CONFIDENTIAL INFORMATION", has a file name that contains the letters "BCI", and is stored on a storage medium with a label marked "BUSINESS CONFIDENTIAL INFORMATION" and indicating the name of the Party that submitted the information; and

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<sup>1</sup> *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

<sup>2</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

- (c) for uttered information, declared by the speaker to be "Business Confidential Information" prior to utterance.<sup>3</sup>
- (d) In case either Party objects to the designation of information as BCI under paragraphs 5(a)-(c), the dispute shall be resolved by the Arbitrator. If the Arbitrator disagrees with designation of information as BCI, the submitting Party may either designate it as non-BCI or withdraw the information. In the case of withdrawal, the Arbitrator shall either destroy such information or return it to the submitting Party. Each Party may at any time designate as non-BCI information previously designated by that Party as BCI.

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

6. **"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 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 that submitted the information; and
- (c) for uttered information, declared by the speaker to be "Highly Sensitive Business Information" prior to utterance.<sup>4</sup>

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

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

8. **"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 has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's view, cause exceptional harm to its originators. Each Party shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that 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<sup>5</sup>, and, except as provided in subparagraph 8(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;

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<sup>3</sup> The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the BCI in question.

<sup>4</sup> The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the HSBI in question.

<sup>5</sup> This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

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- (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 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 shall Designate as HSBI any information described in subparagraph 8(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 8(a);
    - (iv) the terms and conditions of loans, other than information described in subparagraph 8(a); and
    - (v) intergovernmental agreements and government decisions, other than information described in subparagraph 8(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 8(a)-(e), the dispute shall be resolved by the Arbitrator. If the Arbitrator disagrees with designation of information as HSBI, the submitting Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. In the case of withdrawal, the Arbitrator shall either destroy such information or return it to the submitting Party. Each Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party as HSBI.

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

10. **"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.

11. **"Locked CD"** means a CD-ROM that is not rewritable.
12. **"Outside Advisor"** means a legal counsel or other advisor of a Party, who:
- (a) advises a 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 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).

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.
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 Arbitrator, 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 Arbitrator.

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 Arbitrator, including but not limited to, correspondence, written submissions, exhibits, oral statements, and answers to questions.
21. **"WTO Approved Persons"** means the members of the Arbitrator 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 Arbitrator meetings involving BCI and/or HSBI).
22. **"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

23. These procedures apply to all BCI and HSBI received by an Approved Person and by WTO Approved Persons as a result of the Arbitration.
24. Unless specifically otherwise provided herein, these procedures do not apply to a Party's treatment of its own BCI and HSBI.
25. The Arbitrator 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 Arbitrator 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

26. At the latest by 12:00 p.m. (noon) on 3 September 2018, each Party shall submit to the other Party, and to the Arbitrator, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party 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 whom it wishes to have designated as HSBI Approved Persons. Each Party may designate new Approved Persons, remove, or replace Approved Persons by submitting amendments to its list of Approved Persons to the other Party and to the Arbitrator.
27. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a total of 30 Representatives and 20 Outside Advisors as "HSBI Approved Persons".
28. WTO Approved Persons shall have access to BCI. The Director-General of the WTO, or his or her designee, shall submit to the Parties, and to the Arbitrator, a list of the WTO Approved Persons and shall identify which of those WTO Approved Persons shall additionally have access to HSBI.
29. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Arbitrator 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 26 that would suggest that designation of an individual is not appropriate. If a Party objects, the Arbitrator shall decide on the objection within ten working days.
30. 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.

31. 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 27 and to objections for the addition of new Approved Persons in accordance with paragraphs 29 and 30. Any such amendments or objections by a Party shall be submitted to the Arbitrator 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**

32. Only Approved Persons and WTO Approved Persons may have access to BCI submitted in this proceeding. Approved Persons and WTO 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 or WTO Approved Person. These obligations apply indefinitely.

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

34. 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 5.

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

36. The treatment in a Party's submissions to the Arbitrator 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 Arbitrator, marked as indicated in paragraph 5. 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 Arbitrator, 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 Arbitrator;
- (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 Arbitrator 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 European Union 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 Arbitrator. All of the protections applicable to BCI under these procedures, including the storage rules in paragraph 39, 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 Arbitrator and the complaining Party.

37. 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 submits to the Arbitrator 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.

38. A Party that wishes to submit or refer to BCI at an Arbitration meeting shall so inform the Arbitrator and the other Party. The Arbitrator shall exclude persons who are not Approved Persons or WTO Approved Persons from the meeting for the duration of the submission and discussion of BCI.

39. 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 Arbitrator, such locked security containers shall be kept on the WTO Secretariat's premises, except that members of the Arbitrator 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.

40. The Arbitrator shall not disclose BCI in its decision, but may make statements or draw conclusions that are based on the information drawn from the BCI. Before the Arbitrator makes its decision publicly available, the Arbitrator shall give each party an opportunity to ensure that the decision does not contain any information that it has designated as BCI.

## **VI. HSBI**

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

42. HSBI shall be submitted to the Arbitrator 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 28 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 6. 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 28 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 that submitted the information, if stored on Locked CDs provided by the Party that submitted the information, or if stored on a Stand-alone computer on which HSBI has been saved pursuant to paragraph 47, to the extent necessary for working sessions of the Arbitrator and WTO Approved Persons designated pursuant to paragraph 28 as being additionally authorized to access HSBI, subject to the following conditions:

- (a) the Sealed laptop computer, Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 shall remain on the premises of the WTO at all times;
- (b) the Sealed laptop computer, Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 shall at all times be in the exclusive and direct custody of a WTO Approved Person designated pursuant to paragraph 28 as being additionally authorized to access HSBI;
- (c) the WTO Approved Person in exclusive and direct custody of the Sealed laptop computer, Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 shall ensure that no reproductions of any kind of information stored on the Sealed laptop, the Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 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, Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 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 28 as being additionally authorized to access HSBI, or, for internal meetings of the Arbitrator and/or of WTO Approved Persons designated pursuant to paragraph 28 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.

43. 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 10. 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.

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

45. HSBI Approved Persons may view HSBI on the Sealed laptop computer maintained by the other 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 10 or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 42, unless otherwise mutually agreed by the Parties. The designated rooms shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. (local time) during official working days at the respective HSBI location. The designated secure location referred to in paragraph 42 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 42 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



10, maintain such log until one year after the Conclusion of the Arbitration Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 42, maintain such log until one year after the Conclusion of the Arbitration Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

46. No HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 28 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 28 as being additionally authorized to access HSBI, and then only for the purpose of this dispute. This obligation applies indefinitely.

47. HSBI may be processed only on Stand-alone computers. WTO Approved Persons designated pursuant to paragraph 28 as being additionally authorized to access HSBI may create electronic files containing HSBI and may save such files on a Stand-alone computer that is neither connected to a network nor capable of being connected to a network. Any electronic file containing HSBI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

48. A Party that wishes to submit or refer to HSBI at an Arbitration meeting shall so inform the Arbitrator and the other Party. The Arbitrator shall exclude persons who are not HSBI Approved Persons or WTO Approved Persons designated pursuant to paragraph 28 as being additionally authorized to access HSBI from the meeting for the duration of the submission and discussion of HSBI.

49. All HSBI shall be stored in a safe at the relevant HSBI location or in accordance with paragraph 42.

50. The treatment in a Party's submissions to the Arbitrator 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 Arbitrator, 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 Arbitrator 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 42, 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 Arbitrator (through a WTO Approved Person identified by the Arbitrator) 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 CDs.
- (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 Arbitrator and the other Party with proof that this has been done.
- (i) No more than one working day in advance of an Arbitration 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 Arbitration 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 28 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, an Arbitration 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 42. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Arbitration Process as defined in paragraph 4.
- (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 Arbitrator, 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 Arbitrator 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 Arbitrator reserves the right, after consulting the parties, to amend the provisions of this paragraph at any time in order to accommodate situations arising during Arbitration meetings, and the preparation of the decision.

51. The Arbitrator shall not disclose HSBI in its decision, but may make statements or draw conclusions that are based on the information drawn from the HSBI. Before the Arbitrator makes its decision publicly available, the Arbitrator shall give each party an opportunity to ensure that the decision does not contain any information that it has designated as HSBI.

#### **VII. RESPONSIBILITY FOR COMPLIANCE**

52. Each Party is responsible for ensuring that its Approved Persons comply with these procedures to protect BCI and HSBI submitted by each 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. 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**

53. After consulting with the Parties, the Arbitrator 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.

54. The Arbitrator 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**

55. Except as provided for in paragraph 56 immediately below, after the Conclusion of the Arbitration Process as defined in paragraph 4, within a period to be fixed by the Arbitrator, WTO Approved Persons and the Parties (along with all Approved Persons) shall destroy or return all

documents (including electronic material) or other recordings containing BCI to the Party that submitted such documents or other recordings. At the same time, WTO Approved Persons and the Parties shall destroy or return any electronic material containing HSBI, together with any typed or manuscript record thereof.

56. The WTO Secretariat shall retain one hard copy and one electronic version of the Decision of the Arbitrator containing BCI, and one electronic version of all documents containing BCI (except documents destroyed or returned pursuant to paragraph 55 immediately above because such documents contained HSBI) that were submitted to the Arbitrator. The Decision and the documents containing BCI referred to in the preceding sentence shall be recorded on locked CD(s), to be kept in sealed containers in a locked cabinet on the premises of the WTO Secretariat.

57. The hard drive of each Stand-alone computer that has been used to store HSBI at any time and all media used to back up such computers shall be destroyed within the period fixed by the Arbitrator pursuant to paragraph 55.

**ANNEX A-3**

**ADDITIONAL WORKING PROCEDURES FOR THE SUBSTANTIVE MEETING WITH THE ARBITRATOR**

Adopted 6 December 2018

1. During the meeting with the parties, the following persons will be admitted into the meeting room: (a) the Arbitrator; and (b) all Approved Persons, HSBI Approved Persons, and WTO Approved Persons. The Arbitrator 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 Arbitrator 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. In addition, a party including HSBI in its opening oral statement shall provide, prior to delivery of the opening oral statement, one paper copy to each member of the Arbitrator and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.
  3. Paragraphs 38 and 48 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, and then ask for the videotaping to be discontinued, before delivering a second part of its opening oral statement containing BCI or HSBI.
  4. After both opening oral statements have been delivered, the Arbitrator 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 each party so confirms, the showing of the videotape will proceed according to schedule. If either party, within a deadline to be established by the Arbitrator, 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. The showing of the videotape of the opening oral statements of the parties shall take place on a date to be established by the Arbitrator 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.
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**ANNEX B**

ARGUMENTS OF THE PARTIES

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## ANNEX B-1

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

#### INTRODUCTION

##### I. THE FRAMEWORK FOR ASSESSING THE U.S. PROPOSED COUNTERMEASURES

1. Pursuant to Article 7.10 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the Arbitrator's task is to "determine whether countermeasures {proposed by the United States} are commensurate with the degree and nature of the adverse effects determined to exist." The dictionary definition of degree is "the amount, level, or extent to which something happens or is present" and of nature is "the basic or inherent features of something, especially when seen as characteristic of it."<sup>1</sup> In the only arbitration to date regarding actionable subsidies, *US – Upland Cotton (22.6 II)*, the arbitrator considered that the ordinary meaning of these terms in Article 7.10 was consistent with these definitions.<sup>2</sup> Determining the degree and nature of adverse effects invites a case-specific inquiry that seeks to understand the causal findings and rationale in the underlying proceedings.<sup>3</sup>

2. The arbitrator in *US – Upland Cotton (22.6 II)* further found that "'commensurate' essentially connotes 'correspondence' between two elements,"<sup>4</sup> but that "'commensurate' does not suggest that exact or precise equality is required between the two elements to be compared, i.e., in this case, the proposed countermeasures and the 'degree and nature of the adverse effects determined to exist'."<sup>5</sup> Thus, the arbitrator continued, "'commensurate' connotes a less precise degree of equivalence than exact numerical correspondence."<sup>6</sup> In addition, "the expression 'adverse effects' determined to exist' refers us to the specific 'adverse effects' within the meaning of Articles 5 and 6 of the *SCM Agreement* that form the basis of the underlying findings in the case at hand."<sup>7</sup>

3. The arbitrator in *US – Upland Cotton (22.6 II)* also observed that "it is normally not the task of arbitrators under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") to review whether compliance has been achieved or not, as arbitral proceedings under this provision assume that there has been no compliance, and this will normally have been determined through compliance proceedings under Article 21.5 of the DSU."<sup>8</sup> Of course, in this dispute, the EU's failure to comply has in fact been determined through a compliance proceeding in which the findings were adopted by the DSB.<sup>9</sup> Indeed, the parties agreed to a sequencing agreement in which the arbitration would be suspended while the EU's initial claims of compliance would be adjudicated first, and then the arbitration regarding the extent of the countermeasures would continue if the EU was found to have failed to comply, as it was.<sup>10</sup>

4. The arbitrator in *US – COOL (22.6)* discussed the objecting party's burden in an arbitration. Specifically, the arbitrator stated:

In the absence of a demonstration that the proposing party's methodology is incorrect, the mere submission of an alternative methodology would not meet the objecting party's burden of proof. This is because the alternative methodology does not, in itself, assist the Arbitrator in determining whether the result from the first methodology is (or is not) equivalent to the level of nullification or impairment. In

<sup>1</sup> Oxford English Dictionary online (US version), <https://en.oxforddictionaries.com/definition/us/degree> (accessed November 8, 2018); Oxford English Dictionary online (US version), <https://en.oxforddictionaries.com/definition/us/nature> (accessed November 8, 2018).

<sup>2</sup> See *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, WT/DS267/ARB/2 and Corr.1, paras. 4.20, 4.40-4.48 (31 August 2009) ("*US – Upland Cotton (22.6 II)*").

<sup>3</sup> See *US – Upland Cotton (22.6 II)*, paras. 4.88-4.89. See also *ibid.*, para. 4.43.

<sup>4</sup> *US – Upland Cotton (22.6 II)*, para. 4.37.

<sup>5</sup> *US – Upland Cotton (22.6 II)*, para. 4.39.

<sup>6</sup> *US – Upland Cotton (22.6 II)*, para. 4.39.

<sup>7</sup> *US – Upland Cotton (22.6 II)*, para. 4.50.

<sup>8</sup> *US – Upland Cotton (22.6 II)*, para. 3.17.

<sup>9</sup> See Compliance Appellate Report, paras. 6.43-6.44.

<sup>10</sup> Sequencing Agreement, para. 6

such a situation, it would follow from the rules on burden of proof that the objecting party has not proved that the act at issue is WTO-inconsistent.<sup>11</sup>

## II. THE LEVEL OF COUNTERMEASURES REFLECTED IN THE U.S. METHODOLOGY PAPER COMPORTS WITH THE REQUEST FOR COUNTERMEASURES UNDER ARTICLE 22.2 OF THE DSU.

5. In accordance with its request for authorization, the United States requested countermeasures "commensurate on an annual basis with the degree and nature of the adverse effects determined to exist."<sup>12</sup> At the time the Arbitrator resumed its work on July 17, 2018,<sup>13</sup> the "adverse effects determined to exist" were those found in the compliance panel and appellate reports adopted by the DSB on May 28, 2018. In its methodology paper, the United States used a series of calculations to determine the value of the adverse effects during the period covered by the adopted findings, and expressed that as \$11.2 billion per year as of 2018. The process and output follow exactly the approach outlined in the request for countermeasures.

6. The EU argues that the U.S. "estimate{"<sup>14</sup> in its 2011 request for authorization of \$7-10 billion "based on currently available data in a recent period,"<sup>15</sup> acts as a ceiling on the amount of any countermeasures the United States may properly request now that the Arbitrator has resumed its work in 2018. The EU goes on to argue that the Article 22.2 request has a "jurisdictional nature." It then contends, quoting the *EC – Bananas (22.6 – Ecuador)* arbitrator, that this means that the \$7-10 billion figure (or the formula used to derive that figure) "defines the amount of requested suspension for purposes of this arbitration proceeding".<sup>16</sup> The EU notes that the *Bananas* arbitrator rejected Ecuador's effort to add "additional amounts" to the figure set out in its request for countermeasures as not "compatible with the minimum specificity requirements for such a request".<sup>17</sup> The EU's argument is meritless.

7. The U.S. request identified the level of countermeasures in functional terms, as the annual level of adverse effects "determined to exist," caused to the interests of the United States by the EU's failure to comply with the DSB's recommendations and rulings. Therefore, under the EU's reasoning, it is this functional description that "defines the amount of requested suspension for purposes of this arbitration proceeding." While the U.S. request values "this figure" as \$7-10 billion, the result is explicitly stated as illustrative and temporary, framed as an "estimate{" based on "currently available data in a recent period."<sup>18</sup> This point is further underscored by the indication that the United States would update the figure annually using the most recent publicly available data.

8. Moreover, the parties requested suspension of this proceeding pending adoption by the DSB of a finding that the EU failed to comply with the recommendations and rulings of the DSB.<sup>19</sup> In doing so, they evinced the clear intention that the results of that report would inform the work of the Arbitrator.<sup>20</sup> This includes updating the countermeasures amount in 2018 following the nearly seven-year compliance period, which does not pose concerns regarding the EU's due process.<sup>21</sup>

<sup>11</sup> *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 22.6 of the DSU the United States*, WT/DS384/ARB and Add.1 / WT/DS386/ARB and Add.1, para. 4.12 (7 December 2015) ("*US – COOL (22.6)*").

<sup>12</sup> WT/DS316/18, p. 2 (12 Dec. 2011).

<sup>13</sup> WT/DS316/38 (19 July 2018).

<sup>14</sup> WT/DS316/18, p. 2 (12 Dec. 2011).

<sup>15</sup> WT/DS316/18, p. 2 (12 Dec. 2011).

<sup>16</sup> EU Written Submission, para. 86 (*quoting EC – Bananas (22.6 – Ecuador)*, para. 24 (emphasis added by EU)).

<sup>17</sup> EU Written Submission, para. 86 (*quoting EC – Bananas (22.6 – Ecuador)*, para. 24).

<sup>18</sup> WT/DS316/18, p. 1 (12 Dec. 2011) (footnote omitted).

<sup>19</sup> Sequencing Agreement, para. 6.

<sup>20</sup> It is worth noting that in the *EC – Bananas (22.6 – Ecuador)* arbitration, Ecuador proposed to add to the amount of nullification and impairment based on previously existing findings and information. *EC – Bananas (22.6 – Ecuador)*, para. 23. Unlike this proceeding, there had been no compliance proceeding, and no finding that in addition to maintaining existing WTO-inconsistent measures, the responding party had adopted new WTO-inconsistent measures.

<sup>21</sup> Cf. EU Written Submission, para. 85.



**III. THE UNITED STATES FOLLOWED THE CORRECT APPROACH IN DEVELOPING COUNTERMEASURES THAT ARE COMMENSURATE WITH THE ADVERSE EFFECTS DETERMINED TO EXIST.**

9. The U.S. countermeasures, as outlined in the U.S. methodology paper and subsequent submissions, are faithful to the requirements of DSU Articles 22.6 and 22.7 and SCM Articles 7.9 and 7.10, as well as the guidance provided by the decisions of past arbitrators.

10. The United States based the methodology on the text of those provisions and the DSB-adopted findings from the compliance proceeding in this dispute. The United States valued the LCA in the specific orders underlying the significant lost sales findings and the LCA in the specific deliveries underlying the impedance findings, which reflect the instances of adverse effects caused by the A380 LA/MSF and A350 XWB LA/MSF in the December 2011 – 2013 period reviewed by the compliance panel. The U.S. calculation relies on the actual transactions underlying the findings for two reasons. First, this approach is consonant with the text of the agreement, which states SCM Agreement Article 7.9 that countermeasures must be commensurate with "the degree and nature of the adverse effects determined to exist." And second, because these are adopted findings, they do not require speculation as to their nature and extent.

11. The SCM Agreement disciplines actionable subsidies when they cause adverse effects to the interests of another Member. When significant sales are lost, or imports and exports (into the EU and third country markets, respectively) are impeded, the United States suffers adverse effects in the form of serious prejudice. It is the determination that particular subsidies cause adverse effects that provides the basis for countermeasures.<sup>22</sup> Therefore, the United States methodology values the instances of adverse effects as of the time they occur. By valuing a lost sale at the time the sale was lost, and valuing impedance at the time the imports and exports (through deliveries) were impeded, the U.S. calculation appropriately reflects the adverse effects determined to exist.

12. The United States methodology then re-states in 2013 dollars the value of instances of adverse effects in 2011 and 2012 to ensure comparability, and derives an annual average value. Finally, to make sure that the countermeasures remain commensurate with the adverse effects determined to exist, the United States proposes a formula that accounts for inflation between 2013 and a given year in which countermeasures are applied.

13. The U.S. methodology reflects the proper understanding of the degree and nature of the adverse effects determined to exist. During the original reference period, the United States established that "the effect of the subsidy is" certain forms of serious prejudice contained in SCM Article 6.3(a)-(c). The United States proved as much by relying on specific instances of these phenomena. During the first compliance proceeding, the United States again proved, based on other specific instances after the end of the implementation period, that LA/MSF continues to cause adverse effects. As a result, the DSB adopted findings that the effects of non-withdrawn LA/MSF is significant lost sales of U.S. twin-aisle LCA and significant lost sales and impedance of U.S. very large aircraft (VLA).<sup>23</sup>

14. As the DSB found, LA/MSF causes "product effects;" that is, it enables Airbus to launch and bring to market new LCA models.<sup>24</sup> When Airbus makes a sale through an order, or gains market share through a delivery, of an LCA model that, absent the subsidies, would not be available for sale or delivery, a causal link is established between the LA/MSF responsible for the market presence of that Airbus model, and the lost sale or impedance suffered by the U.S. LCA industry.<sup>25</sup> Thus, the market presence of an LCA model attributable to the subsidies leads to sales and deliveries year after year, to a variety of customers that would not otherwise occur, making these subsidies "profound and long-lasting."<sup>26</sup> LA/MSF subsidies to one aircraft program also have been found to enable Airbus to build on the competitive advantages from LA/MSF subsidies,<sup>27</sup> and further, to provide Airbus with technologies, experience, and financial benefits that make it easier to bring to

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<sup>22</sup> See SCM Agreement, Art. 7.9.

<sup>23</sup> WT/DS316/35 (29 May 2018).

<sup>24</sup> Compliance Appellate Report, para. 5.587.

<sup>25</sup> See, e.g., Compliance Appellate Report, paras. 5.725-5.726, 5,740.

<sup>26</sup> Compliance Panel Report, para. 6.1528.

<sup>27</sup> See Compliance Appellate Report, para. 5.644.

market subsequent new LCA models, which the compliance appellate report recognized as "indirect effects."<sup>28</sup>

15. In both the original and the compliance proceedings, the adverse effects findings relied on the counterfactual proposition that the Airbus LCA model that won a particular sale or accounted for market share would not have even been available in the market, and neither would any other non-U.S. competing model.<sup>29</sup> Given these adopted findings, the existing LA/MSF subsidies' effects of causing significant lost sales and impedance is not limited to the specific transactions that panels and the Appellate Body have cited as evidence. That effect is ongoing. It is manifest in repeated instances of lost sales and impedance, which will continue to arise as long as LA/MSF subsidies continue to have "product effects."

16. Therefore, to ensure that countermeasures are commensurate with the degree and nature of the adverse effects determined to exist, the United States proposes annual countermeasures that reflect the adopted findings in that regard, including the findings that LA/MSF subsidies continue – in the present tense – to cause adverse effects after the end of the implementation period.<sup>30</sup> Thus, just as Boeing LCA compete with A380 and A350 XWB aircraft that are in the market when and as they are because of the LA/MSF subsidies, the United States proposes to apply countermeasures annually until the DSB finds that the EU has come into compliance or the parties reach a positive solution to the dispute.<sup>31</sup> This is also consistent with the prospective nature of WTO dispute settlement.

17. By ignoring the nature of the adverse effects determined to exist, especially the causal link between the A380 LA/MSF and A350 LA/MSF subsidies and the adverse effects they were found to continue to cause, the EU erroneously treats as the full extent of the adverse effects the five transactions during the December 2011 – 2013 period identified in the compliance proceeding, and deliveries during that same period to the six country markets that served as the basis for impedance findings.

#### **IV. ONGOING COUNTERMEASURES, AS ALMOST ALL PAST ARBITRATORS HAVE AWARDED, ARE APPROPRIATE IN THIS PROCEEDING.**

18. The continuing adverse effects of LA/MSF subsidies were the explicit focus of the successful U.S. claim in the first compliance proceeding that "the challenged subsidies *continue to cause* the same types of 'adverse effects' today."<sup>32</sup> At the heart of both the U.S. claim and the compliance findings of continued, or ongoing, adverse effects are the "product effects" of LA/MSF and their operation in the LCA industry where the subsidy-enabled market presence of Airbus LCA has an obvious and direct adverse impact on Boeing LCA.

19. Consistent with the original findings of adverse effects, the compliance findings of adverse effects are based on the "direct" and "indirect" product effects that existing LA/MSF has in enabling Airbus to offer and deliver LCA where it would otherwise be unable to do so. LA/MSF thus allows Airbus to take sales, deliveries, and market share that it would not otherwise obtain, resulting in continued adverse effects to the United States for as long as those product effects operate.

20. Relying in large part on the compliance panel's findings, the appellate report concluded that existing subsidies did indeed continue to cause adverse effects into the post-implementation period, and it did so in terms that leave no doubt as to the ongoing nature of LA/MSF's adverse effects:

- "{O}ur discussion of the Panel's findings reveals that the LA/MSF subsidies existing in the post-implementation period – i.e. the A380 and A350XWB LA/MSF subsidies – enabled Airbus to proceed with the timely launch and development of the A350XWB, and to bring to market

<sup>28</sup> See Compliance Appellate Report, paras. 5.637-5.639.

<sup>29</sup> See Original Appellate Report, para. 1264; Compliance Appellate Report, paras. 5.725-5.726, 5,740.

<sup>30</sup> See Compliance Appellate Report, paras. 5.413, 5.605, 5.609, 5.640, 5.646-5.647, 5.694, 5.768, 6.37(a), 6.43(a).

<sup>31</sup> See DSU, Art. 22.8. The United States notes that the EU attacks a straw man by quoting a phrase in the U.S. methodology paper out of context. The United States never suggested, as the EU implies, that its basis for applying countermeasures going forward is that doing so is common and administrable. See EU Written Submission, para. 92. Rather, the U.S. point was that it was using a one-year period, rather than, for example, a 25-month period, because considering imports on an annual basis is both common and easily administrable. The United States could have sought a 25-month countermeasure figure that would apply in each 25-month period. But that would be unusual and more difficult to administer.

<sup>32</sup> Compliance Panel Report, para. 6.1112 (emphasis original).

and to continue developing the A380. Both these events, as the above analysis shows, *were crucial to renew and sustain Airbus' competitiveness in the post-implementation period.*"<sup>33</sup>

- "{T}he Panel's findings support the conclusion that the sales of the A350XWB identified in Table 19 of the Panel Report represent 'significant lost sales' to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, *including its finding concerning the 'product effects' of the LA/MSF subsidies existing in the post-implementation period on Airbus' timely launch of the A350XWB*, and the existence of sufficient substitutability between Boeing's and Airbus' twin-aisle product offerings."<sup>34</sup>
- "{T}he orders identified in Table 19 of the Panel Report in the twin-aisle LCA market represent 'significant lost sales' to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period *are* a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement."<sup>35</sup>
- "{T}he Panel's findings support the conclusion that the sales of the A380 identified in Table 19 of the Panel Report represent 'significant lost sales' to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. This conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning ***the 'product effects' of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380***, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings."<sup>36</sup>
- "{T}he orders identified in Table 19 of the Panel Report in the VLA market represent 'significant lost sales' to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period ***continue to be*** a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement."<sup>37</sup>

21. In sum, the DSB adopted findings both that existing LA/MSF subsidies have adverse effects of an ongoing, or continuing, nature, and that the subsidies were continuing to cause – in the present tense – such adverse effects throughout the post-implementation period. Thus, there is no merit to the EU's objections to annual countermeasures, or its attempts to again limit the adverse effects caused by LA/MSF to the specific instances identified in the reference period. The DSU provides for countermeasures until the EU is found to have complied in an appropriate forum and the DSB adopts the findings, or a positive solution is reached.

## V. EU OBJECTIONS TO THE U.S. METHODOLOGY ARE ERRONEOUS

### A. The Proper Counterfactual

22. However, the EU has alleged no anomaly with the compliance reference period – December 2011 – 2013 – in terms of LCA prices or other inputs into the U.S. methodology that were not germane to the adopted compliance findings. Thus, the EU has failed to prove that any such data utilized by the U.S. methodology are "unrepresentative." The EU's arguments in this respect therefore fail.

23. The fact is that the adverse effects flow from the product effects caused by the LA/MSF subsidies. Those product effects continue to result in significant lost sales and impedance. The subsidies are in no way specific to certain sales or deliveries. Thus, because the DSB adopted findings that, following the end of the RPT, the causal chain remained intact, there is no basis to treat the instances of adverse effects that manifested in the December 2011 – 2013 period as the

<sup>33</sup> Compliance Appellate Report, para. 5.647 (emphasis added).

<sup>34</sup> Compliance Appellate Report, para. 6.31 (emphasis added).

<sup>35</sup> Compliance Appellate Report, para. 6.31(a) (emphasis added).

<sup>36</sup> Compliance Appellate Report, para. 6.37 (emphasis added).

<sup>37</sup> Compliance Appellate Report, para. 6.37(a) (emphasis added).

full extent of the adverse effects. Rather, as the compliance panel observed, the adverse effects of LA/MSF are "profound and long-lasting."<sup>38</sup>

24. The EU alleges that the United States mischaracterizes the causal pathway "to turn adverse effects findings based on a temporally-limited acceleration effect into findings of adverse effects that apply in perpetuity."<sup>39</sup> According to the EU, "the first compliance panel found, and the Appellate Body upheld, that the subsidised element of A380 MSF loans and A350XWB MSF loans accelerated the launch of the A380 and the A350XWB."<sup>40</sup>

25. But the EU is flatly wrong. As we already discussed, the compliance panel in *US – Large Civil Aircraft* specifically contrasted the acceleration effects in that dispute with the product creation effects found by the original and compliance panels in this dispute.<sup>41</sup> Indeed, the EU itself has stated in this proceeding:

Where the market presence of a model of aircraft, at the time of a sales campaign, was attributable to the direct effects and indirect effects from subsidies, this served as the basis for findings of significant lost sales, on the notion that, **absent the subsidies, the Airbus product would not have competed in the sales campaign**, and Boeing would instead have won the sale. Similarly, **these findings relating to the market presence of Airbus' models also served as the eventual basis for findings of other forms of volume effects** (and specifically, impedance).<sup>42</sup>

Thus, although it repeatedly fights the conclusion, at least once in this proceeding the EU has specifically and concisely acknowledged that both the significant lost sales findings and the impedance findings were based on the unavailability of the Airbus LCA in the absence of LA/MSF. This adopted multilateral finding – including the causal pathway by which the presence of Airbus LCA continually causes Boeing to lose sales and deliveries it would otherwise obtain – remains in effect and cannot be disturbed. Accordingly, contrary to the EU's assertions, the U.S. methodology results in annual countermeasures commensurate with the degree and nature of the adverse effects determined to exist.

## B. Counterfactual Airplane Prices

26. The EU has also faulted the United States for the prices it used for calculating significant lost sales and impedance values. With respect to lost sales, the EU objects to the United States' use of somewhat contemporaneous orders (for all but one of the customers) by the same customer of the relevant Boeing model. The EU's allegations fail to prove that the U.S. approach would render the countermeasures not commensurate.

27. The EU's criticisms typically take the form of pointing out some way in which these comparator orders are not identical to the counterfactual order. For example, in some instances, the number of aircraft ordered is not exactly the same. But the EU's burden requires more than demonstrating that the proxies the United States chose are imperfect. Of course, they are. They are proxies. There is no actual information available; it's a **counterfactual** order. The proxies the United States chose are eminently reasonable, and therefore, do not result in countermeasures that are not commensurate.

28. It would be erroneous to value the instances of lost sales from the first compliance proceeding as if they involved orders for Airbus models other than those identified in the first compliance appellate report.<sup>43</sup> To do so would amount to a collateral attack on the findings in the reports adopted by the DSB.

29. In addition, such an approach would presume erroneously that, if a customer actually converted an original order for a given Airbus model (e.g., the A350 XWB-1000) to another Airbus model (e.g., the A350 XWB-900), then the same customer in the counterfactual situation would

<sup>38</sup> Compliance Panel Report, para. 6.1528.

<sup>39</sup> EU RAQ 56, para. 48.

<sup>40</sup> EU RAQ 56, para. 48.

<sup>41</sup> See *United States – Large Civil Aircraft (21.5) (Panel)*, para. 9.127, note 2849.

<sup>42</sup> Exhibit A to EU Preliminary Ruling Request, para. 41 (citing Compliance Panel Report, paras. 6.1785-6.1789, 6.1806-6.1817) (emphasis added).

<sup>43</sup> See U.S. RAQ 58, paras. 14-16. See also Compliance Appellate Report, para. 5.705, Table 10 and para. 5.723, Table 12; Compliance Panel Report, para. 6.1781, Table 19.

necessarily have converted the originally ordered Boeing model (*e.g.*, the 777-300ER) to another Boeing model (*e.g.*, the 787-10). Conversion activity can result from various factors, including factors specific to Airbus models and Airbus's customer relationships, such that it cannot be assumed that actual Airbus conversions would translate to counterfactual Boeing conversions.

30. The specifications of the aircraft that each customer actually ordered from Boeing provide the best proxy for the specifications of aircraft they likely would have ordered in the counterfactual. The price that they paid accordingly provides the best measure of the value of the aircraft that would have been ordered in the counterfactual. In addition, there are not reliable methods to adjust LCA pricing for differences in the countless physical characteristics and other specifications between Airbus and Boeing aircraft.

31. The United States also notes that these prices are just proxies for counterfactual sales. Even if the requisite information was available and there was a reliable methodology to make price adjustments, there is no indication that any differences in physical characteristics or other specifications between the Airbus aircraft ordered and the counterfactual Boeing model would necessitate price adjustments so large as to affect the conclusion whether proposed countermeasures are "commensurate." Accordingly, there is no basis to undertake an immensely complicated, unreliable, and improper exercise of adjusting the submitted prices, if that indeed is what the EU is advocating.

32. The EU argues that the Arbitrator should attempt to exclude non-U.S. inputs from the valuation of Boeing aircraft in the calculation of countermeasures. The EU goes so far as to ask that all "engine costs" should be excluded from the calculations because one Boeing model, the 787, offers customers a choice between Rolls Royce engines and General Electric engines.<sup>44</sup> As demonstrated previously, the EU's argument is untenable, and would inherently result in countermeasures that are *not* "commensurate" because the goods experiencing serious prejudice are U.S. LCA, not the U.S. parts thereof.<sup>45</sup> The EU's argument is also incoherent: for LCA incorporating millions of parts from several tiers of suppliers, it would exclude complex assemblies, such as engines, based on the country in which they were assembled, without regard to any U.S.-origin parts in such assemblies.<sup>46</sup>

33. In sum, the EU's criticisms of the U.S. lost sales evidence are meritless. They include a mixture of inaccurate guesswork, legal error, and demands for documentation that is now on the record. These arguments are emblematic of the EU's failure to demonstrate that the U.S. calculations are not "commensurate with the degree and nature of the adverse effects determined to exist."

### **C. Alleged Dissipation of Adverse Effects**

34. The counterfactual launch of the A380 and A350 XWB is a necessary, but not necessarily sufficient, condition for the dissipation of adverse effects based on sales and deliveries of the A380 and A350 XWB. That is, as long as the A380 and A350 XWB would not be available for offer in the counterfactual situation absent existing LA/MSF – and therefore not available for delivery – the sales and deliveries they take during that period from competing Boeing LCA continue to represent adverse effects caused by the subsidies.

35. However, the point at which the A380 and A350XWB would launch in the counterfactual is not necessarily the point at which adverse effects would cease. There are several reasons why adverse effects would not cease at the moment of a counterfactual launch in this dispute, including those discussed below.

36. First, A380 LA/MSF would still contribute to the adverse effects caused in the twin-aisle market. Both A380 LA/MSF and A350 XWB LA/MSF – assessed through aggregation as a single subsidy – were found to cause significant lost sales in the twin-aisle market. Therefore, both A380 LA/MSF and A350 XWB LA/MSF would remain out of compliance unless the EU somehow could have

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<sup>44</sup> See EU RAQ 52, para. 3 (seventh bullet).

<sup>45</sup> See U.S. Written Submission, paras. 266-269.

<sup>46</sup> See U.S. Written Submission, para. 269.

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demonstrated, in addition to a counterfactual A380 launch, that Airbus also would have been able to offer and deliver the A350 XWB in the absence of the aggregated LA/MSF subsidies.

37. Second, there would still be adverse effects in the form of impedance in the VLA market. The findings of impedance in the VLA market were based on *deliveries*. Delivery of an aircraft necessarily lags by several years behind the launch of an aircraft. The real-world A380 was launched in 2000, but first delivery did not occur until 2007.<sup>47</sup> Therefore, even if the counterfactual launch of the A380 marked the moment at which a customer could *order* A380s, at least another seven years would have to pass before Airbus could make deliveries of the A380. Accordingly, counterfactual launch will not coincide with an end to impedance resulting from LA/MSF-enabled A380 deliveries.

38. Third, there may even still be significant lost sales involving the A380 in the global VLA product market after the counterfactual A380 launch. A later launch can have several important effects on a sales campaign. For example, market perceptions regarding the value proposition an LCA model offers can be strengthened by a model's demonstrated success in service. A manufacturer cannot benefit in early sales campaigns from such demonstrated success. In addition, the timing of a launch may affect the delivery slots a manufacturer is able to offer in a particular campaign. Whether or not the subsidies would continue to cause significant lost sales in the global VLA market after the counterfactual A380 launch would be a fact-specific inquiry assessed on the basis of the relevant campaign-specific evidence. If these or other factors made it so that Airbus's offer in a particular campaign would have been less attractive in the counterfactual, and as a result Boeing would have won the sale, then the subsidies would still be the cause of a lost sale even though in the counterfactual the A380 would have launched.

39. As the United States has demonstrated, these are not proper considerations in the context of this arbitration. However, even in the context of a compliance proceeding, compliance would require that any existing subsidies no longer cause adverse effects. In particular, with respect to the VLA market, the EU would have failed to achieve compliance if, absent existing LA/MSF, Boeing would have made additional significant sales. To be sure, establishing compliance by severing the causal link would have meant showing that the A380 would have been launched in the absence of LA/MSF. But demonstrating a counterfactual launch alone would be insufficient if it were still the case that, for any of the reasons listed above or based on any other considerations, Boeing still would have made sales after the end of the RPT to customers that instead ordered the A380.

40. For these reasons, even if a counterfactual launch date had been established, it is not certain that any of the forms of adverse effects in any of the relevant product markets would have ceased at the time of that launch. Of course, the EU established no such thing. The compliance proceeding found that the subsidies cause significant lost sales and impedance in the VLA product market, and significant lost sales in the twin-aisle product market.

41. There are other ways in which the adverse effects caused by A380 LA/MSF and A350 XWB LA/MSF could dissipate. In particular, if generations of LCA passed and the technological knowledge, experience, and financial gains from the subsidies no longer bore a significant relationship with the LCA models being sold at that time, the effects could be found to have dissipated. Specifically, the compliance panel explained:

Nevertheless, it is possible to envisage a number of different scenarios pursuant to which the "product-creating" effects of the pre-A350XWB LA/MSF subsidies might well come to an end. One such possibility could be through the launch of new *unsubsidized* models of Airbus LCA. The introduction of a new *unsubsidized* model of Airbus LCA would ensure that its market presence could not be attributable to the *direct effects* of LA/MSF. Yet because of the particular features of LCA production, it is highly unlikely that a new unsubsidized model of Airbus LCA could be launched today in the absence of the "learning", scope and financial effects associated with the LA/MSF subsidies provided for certain (but not necessarily all) previous models of LCA. Indeed, as already noted, it is undisputed that "learning" effects are fundamental to the very existence of any competitive LCA producer. However, were a *second* unsubsidized LCA model to be developed, it is possible that the *indirect effects* of the LA/MSF subsidies provided for the purpose of developing previous

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<sup>47</sup> See Compliance Panel Report, paras. 6.1220, 6.1383 (citing to a 2011 Airbus presentation entitled "A380 Update: Four Years in Service").

models of LCA would play a relatively minor role in its launch and bringing to market compared with the *first* unsubsidized new model of Airbus LCA. The impact of the same *indirect effects* on a *third* unsubsidized new model of Airbus LCA would be even smaller as its development would most likely be based on mainly the "learning", scope and financial effects generated from the *first* and *second unsubsidized* models of Airbus LCA.<sup>48</sup>

42. Finally, the United States recalls that these findings were adopted by the DSB and cannot be re-evaluated in this arbitration. Article 7.10 of the SCM Agreement requires the Arbitrator to determine whether the proposed countermeasures are commensurate with the degree and nature of the adverse effects determined to exist. It would therefore be improper to replace the degree and nature of the adverse effects determined to exist with new adverse effects findings. The EU is welcome to argue (again) that the adverse effects have dissipated. The United States is confident any such effort will fail (again). However, this is not the forum for those arguments.

### CONCLUSION

43. Effective countermeasures are the last remaining hope to force the EU to reckon with the pernicious effects its LA/MSF subsidies cause, and hopefully achieve a solution to this longstanding failure to comply with its WTO obligations. For the United States, as with the DSU, these countermeasures are not the preferred option. But after 14 years of litigation, and ten years since the original panel findings against the EU, without a single, meaningful step by the EU to reform LA/MSF – and, in fact, a period in which the EU reinforced its WTO-inconsistent behavior by providing the latest and largest tranche of subsidized LA/MSF to date (and with no guarantee that it will not once again do the same) – this option is all that remains.

44. The EU's efforts to greatly expand the limited scope of this proceeding to evade the consequences of its WTO-inconsistent behavior for longer still, represent an attack on the very utility of dispute settlement at the WTO. Despite that the EU has provided these WTO-inconsistent LA/MSF subsidies to every single Airbus LCA program, and that the EU has taken zero meaningful steps to address these subsidies or the effects they cause, the EU seeks to avoid countermeasures commensurate with the degree and nature of the adverse effects determined by the WTO to exist. The EU tries to guarantee itself the right to continue its course of unabated, WTO-inconsistent subsidies with limited and ineffectual, if any, consequences. The EU therefore, in effect, seeks to have the Arbitrator declare that the WTO rules and dispute settlement system simply cannot deal effectively with the EU's massive subsidization of Airbus, or with subsidies of this nature in general.

45. But the EU is wrong. The DSB adopted reports twice, making clear that the EU's LA/MSF subsidies breach the EU's WTO obligations by causing massive adverse effects to the United States. The SCM Agreement and the DSU explicitly provide for the United States now to obtain authorization to impose countermeasures commensurate with the degree and nature of those adverse effects. To deny the United States that right would be to cement in perpetuity the imbalance imposed by the EU's subsidies. It is long past the appropriate time for the EU to argue about whether, or the extent to which, its subsidies cause adverse effects.

46. We must distinguish between so-called technical errors with the U.S. methodology alleged by the EU, and the EU's broader attempt to draw out and expand this proceeding far beyond its intended purpose. The EU may not like the potential consequences of the requested countermeasures. But they are unfortunately necessary to induce the EU to finally confront the economic pain its subsidies have caused for at least two decades – a burden the United States alone has shouldered for the duration of this long dispute. It is our hope that, consistent with the DSU and the parties' joint sequencing agreement, the "technical" disagreements can be adjudicated relatively quickly, so that the balance of concessions can be restored and the EU is given appropriate additional incentive to pursue in earnest a lasting solution.

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<sup>48</sup> Compliance Panel Report, para. 6.1529 (emphasis original).

## ANNEX B-2

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

#### I. INTRODUCTION

1. The US methodology results in an amount of countermeasures that is not "commensurate" with the degree and nature of the adverse effects determined to exist, as required under Articles 7.9 and 7.10 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"), and that is inconsistent with the US request for countermeasures under Article 22.2 of the DSU ("Article 22.2 request").<sup>1</sup>

2. The United States designed an approach purporting to value the "precise findings"<sup>2</sup> of five specific lost sales, and impedance in six specific third-country markets for very large aircraft ("VLA"), each during the December 2011 to 2013 period.<sup>3</sup> The total value of those adverse effects, according to the United States and before correcting multiple errors it has made, is USD 22 billion. USD 22 billion is an exceptionally high amount. Even a fraction of that amount is significantly larger than any countermeasures authorised in previous arbitrations. However, the US request does not stop there. The United States asks for an amount of countermeasures that is *multiple* times the value of the "precise findings" of adverse effects. The United States asks to *multiply* the precise findings of past adverse effects an indefinite number of times, and to authorise, on that basis, the full amount of countermeasures – USD 22 billion – on a recurring basis, again and again, without bound. Such recurring countermeasures are evidently not "commensurate" with the "precise findings" of the adverse effects determined to exist.<sup>4</sup> Below, the European Union summarizes key flaws in the United States' approach.

#### II. THE ARTICLE 22.2 REQUEST PROVIDES NO BASIS FOR AUTHORIZING COUNTERMEASURES FOR FINDINGS OF IMPEDANCE

3. In its Article 22.2 request, the United States requests countermeasures that correspond to lost sales and displacement, but not impedance.<sup>5</sup> Since the Article 22.2 request fails to meet the applicable "specificity" requirements with respect to adverse effects in the form of "impedance", the Article 22.2 request provides no basis for requesting, let alone authorising, countermeasures for findings of impedance.

4. An Article 22.2 request must "set out a *specific level of suspension*, i.e. a level equivalent to the nullification and impairment caused by the WTO-inconsistent measure".<sup>6</sup> The United States submits that its Article 22.2 request specifies the level of countermeasures in "functional terms", rather than in numerical terms, and that those "functional terms" cover impedance.<sup>7</sup> The United States errs.

5. *First*, the US reading of its Article 22.2 request is unsupported by the terms of that request. The amount requested by the United States "corresponds to the annual value of *lost sales*, of imports of US large civil aircraft displaced from the EU market, and of exports of US large civil aircraft *displaced* from third country markets".<sup>8</sup> Thus, the purported "functional terms" in the Article 22.2 request specifically identify lost sales and displacement, but do not identify impedance, and hence fail to cover impedance.

6. *Second*, the erroneous reading advanced by the United States would imply that its request fails to "set out a *specific level of suspension*".<sup>9</sup> The United States asserts that the level of countermeasures in functional terms corresponds to "*the annual level of adverse effects determined*

<sup>1</sup> WT/DS316/18.

<sup>2</sup> US Methodology Paper, para. 25 (citing Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.49).

<sup>3</sup> US Methodology Paper, paras. 26-30.

<sup>4</sup> US Methodology Paper, para. 25.

<sup>5</sup> WT/DS316/18.

<sup>6</sup> Decision by the Arbitration Panel, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 21, 24 (emphasis added); Decision by the Arbitration Panel, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 16.

<sup>7</sup> US Written Submission, para. 74; US Response to Arbitration Panel Question 133, paras. 145-149.

<sup>8</sup> US Response to Arbitration Panel Question 133, para. 146 (emphasis and underlining added).

<sup>9</sup> Decision by the Arbitration Panel, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 21, 24 (emphasis added); Decision by the Arbitration Panel, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 16.



to exist,' caused to the interests of the United States by the EU's failure to comply with the DSB's recommendations and rulings".<sup>10</sup> In the US view, the references in its Article 22.2 request to the specific *types* of adverse effects (*i.e.*, lost sales and displacement), and to the *amount* of adverse effects (*i.e.*, "between \$7 and \$10 billion per year"), are not part of this description, but merely "explained how the United States valued those adverse effects *at that time*".<sup>11</sup>

7. If that is the proper construction of the Article 22.2 request, the request does not provide any specificity whatsoever as regards the level of countermeasures, either in terms of the *types* of adverse effects, or in terms of *amount* requested by the United States. Instead, the purported "functional description" advanced by the United States would merely paraphrase the language of Articles 7.9 and 7.10 of the *SCM Agreement*. It follows that, if that is the proper construction of the Article 22.2 request, it does not support the authorisation of any countermeasures whatsoever.

### III. THE UNITED STATES ERRS IN REQUESTING RECURRING COUNTERMEASURES

8. Without any explanation in its Methodology Paper, the United States took the position that it must be granted authorisation to impose not only countermeasures commensurate with the specific adverse effects determined to exist in the first compliance proceedings, but, in addition, recurring countermeasures for an indefinite period and total amount. For numerous reasons, the United States errs in requesting recurring countermeasures.

#### A. The US' "static" approach provides no basis for recurring countermeasures

9. The approach adopted by the United States does not permit authorisation of recurring countermeasures.<sup>12</sup> The US approach is premised on a particular understanding of the treaty terms "commensurate with the degree and nature of the adverse effects determined to exist", in Articles 7.9 and 7.10 of the *SCM Agreement*.

10. The United States has adopted what one might refer to as a "static" approach, which is based on the following related legal premises.<sup>13</sup> *First*, the US approach is premised on the understanding that the term "*determined*" (which is the past tense) refers to what has already been "determined" in the compliance panel report, as modified by the Appellate Body report in the first compliance proceedings. *Second*, and relatedly, the US approach is premised on the understanding that the term "exist" refers to the existence or non-existence of a particular phenomenon *between December 2011 and 2013* (that is, within defined temporal parameters related to the past). *Third*, and relatedly, the US approach is premised on the understanding that the term "exist" does not allow the Parties and the Arbitration Panel – in determining the continued existence or non-existence of a particular phenomenon – to consider any argument or evidence related to the period *after December 2013* (that is, after the defined parameters related to the past). For the specific purposes of this argument, the European Union does not take issue with these legal premises. They are, therefore, not in dispute between the Parties.

11. However, in light of the US static approach, the Arbitration Panel cannot authorise recurring countermeasures, which are premised on the proposition that the United States is experiencing the same degree of adverse effects over time, including up to the present. This would amount to assuming, in an entirely speculative fashion, that new adverse effects, which have *not* been *determined* to exist (and may not, under the very approach proposed by the United States, be assessed), will occur to the same degree over time. Indeed, the United States acknowledges that its "static" approach does not show, and is not designed to show, that the "adverse effects determined to exist" consist of *any* sales other than the five lost sales identified, or impedance in *any* market other than the six markets identified during the December 2011 to 2013 period.<sup>14</sup> Even if the US approach were to provide a basis for countermeasures calibrated accurately to the "precise findings" of adverse effects determined to exist, it provides no basis for recurring countermeasures for an indefinite period and total amount.

<sup>10</sup> US Response to Arbitration Panel Question 133, para. 149 (emphasis added).

<sup>11</sup> US Response to Arbitration Panel Question 133, paras. 146, 149 (emphasis in original); US Written Submission, para. 74.

<sup>12</sup> See, *e.g.*, EU Responses to Questions 8, 9, and 12; EU Oral Statement, paras. 21-25.

<sup>13</sup> See, *e.g.*, US Written Submission, paras. 5, 9, 21, 53, 70, 77, and Section IV.B.

<sup>14</sup> US Response to Arbitration Panel Question 19, para. 29.

**B. The US errs in arguing that the precise adverse effects findings support the conclusion that the same adverse effects still exist to a similar degree six to eight years later, in 2019, and in future years**

12. Because its own methodology is not even designed to calibrate the level of countermeasures to any adverse effects over time, the United States attempts a different approach to establish the required correspondence. The United States argues that the first compliance panel, and the Appellate Body, made findings about what would be present adverse effects *in 2019 and beyond*. Thus, in the US view, the precise findings of adverse effects in the December 2011 to 2013 period support the conclusion that the *same* degree of adverse effects is present today, six to eight years later, and will continue unchanged into the future. The United States is wrong.<sup>15</sup>

13. *First*, the United States asserts that, even today, the A380 and the A350XWB "would not have even been available in the market" in the absence of the subsidy measures.<sup>16</sup> No such findings have ever been made. The United States simply assumes a counterfactual world without the A380 and the A350XWB. This assumption is not based on the required "plausible or reasonable" counterfactual, in light of the findings in the first compliance proceedings and the EU argument and evidence.<sup>17</sup>

14. In the original and the first compliance proceedings, the United States chose, and succeeded with, an approach to establishing causation based on so-called "product effects" of the subsidies on the "as and when" launch of these aircraft *at specific moments in time* – that is, an *acceleration* effect. That causation theory served the United States well. However, the original and first compliance panels did not make findings about the counterfactual launch dates for the A380 and the A350XWB.<sup>18</sup> That is, they did not determine *when* the aircraft would have been launched absent subsidisation. Neither the original panel nor the first compliance panel found that the A380 and the A350XWB would not have been launched by 2011-2013; nor did they find that the aircraft would not have been launched as of today; and they certainly did not find that the aircraft would *never* be launched in the future.

15. Moreover, in the present proceedings, employing an approach developed by the United States *itself* in the first compliance proceedings, the European Union has demonstrated that the A380 and the A350XWB, in their current form, would, at a minimum, have been launched as of today, and indeed several years earlier.<sup>19</sup> The United States has not even addressed, much less contested, that showing.

16. Instead of engaging with the European Union's evidence, the United States takes the position that this evidence and argument involve an improper "collateral attack" on the findings on the causal pathway in the first compliance proceedings.<sup>20</sup> The United States errs. The European Union's demonstration of the counterfactual launch dates for the A380 and the A350XWB does not constitute a "collateral attack" on the findings adopted by the DSB.<sup>21</sup> Unlike the United States, the European Union takes the findings of the first compliance proceedings at face value, and accepts them. It is the United States that mischaracterises the findings in the first compliance proceedings concerning the causal pathway, as a means of justifying its request for recurring countermeasures for an indefinite period and total amount. If anything, it is the US assertion – *i.e.*, that the A380 and the A350XWB would not have come into existence by 2013, or even today – that constitutes a "collateral attack" on adopted findings.

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<sup>15</sup> See, EU Framework Response, paras. 24-31; EU Responses to Arbitration Panel Questions 4, 8, 10, 11, 12, 14, 15, 56.

<sup>16</sup> US Written Submission, para. 82.

<sup>17</sup> Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, paras. 3.10-3.11. See also Decision by Arbitration Panel, *US – Gambling (Article 22.6 – US)*, paras. 3.27, 3.30.

<sup>18</sup> See, e.g., EU Response to Arbitration Panel Questions 4, 56 (paras. 48-68). See also Panel Report, *EC – Large Civil Aircraft*, paras. 7.1944-7.1949; Panel Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1717.

<sup>19</sup> See, e.g., EU second written submission in *EC – Large Civil Aircraft (Article 21.5 II – EU)*, 28 January 2019, (**Exhibit EU-97-HSBI and BCI**), Section III.C.4; EU First Written Submission in *EC – Large Civil Aircraft (Article 21.5 II – EC)*, October 2018, (**Exhibit EU-A-BCI**), Sections V.B.4.d, V.B.5.e. See also EU Responses to Arbitration Panel Questions 4 (paras. 119-123), 56 (paras. 62-68), 101; EU Opening Statement, para. 28.

<sup>20</sup> US Response to Arbitration Panel Question 18, paras. 25, 27; Question 19(b), para. 32.

<sup>21</sup> US Response to Arbitration Panel Question 18, para. 25.

17. *Second*, the United States submits that the adverse effects determined to exist would, *ad infinitum*, remain "present", because the findings at issue were phrased in the present tense.<sup>22</sup> This argument is not only grammatically and legally incorrect, it is also at odds with the US acknowledgement that the findings were made with respect to the December 2011 to 2013 period.<sup>23</sup>

18. *Third*, the United States submits that the first compliance panel made findings not of specific instances of adverse effects in December 2011 to 2013, but rather of "various forms of serious prejudice that LA/MSF subsidies *continue to cause* today through its {sic} product effects".<sup>24</sup> Yet, the first compliance panel made no findings about adverse effects today, in 2019, or in future years. As the United States acknowledges, the adverse effects determined to exist "consist" of "precise findings" of particular lost sales and impedance in particular geographic markets, during the December 2011 to 2013 period.<sup>25</sup>

**C. The United States erroneously rejects the relevance of the non-recurring nature of the subsidy measures**

19. Holding all other factors constant, when a measure is continuous, or recurring, it may cause continuous, or recurring, trade effects over time. Assuming a representative period is identified, an arbitration panel could then authorise an amount of recurring countermeasures that is calibrated to the recurring trade effects caused by the recurring measure. In the only previous arbitration under Article 7.10 of the *SCM Agreement*, this is precisely what happened. The arbitration panel in *US – Upland Cotton (Articles 22.6 and 7.10 – US)* authorised recurring countermeasures *because* the subsidies were recurring and made under a continuous programme. The United States agrees.<sup>26</sup> Based on proper econometric modelling and analysis proposed by the parties, that arbitration panel authorised recurring countermeasures calibrated to adverse effects resulting from *recurring* subsidies under a programme.

20. In the present case, the United States also tried to establish the existence of an MSF subsidy programme. It failed. However, the United States requests countermeasures as if it had succeeded on that claim. It asks to multiply an indefinite number of times the "precise findings"<sup>27</sup> of adverse effects from the past into the present and the future, and to ignore the non-recurring nature of the subsidy measures, of which, as the Appellate Body recently confirmed again, the effects "ordinarily dissipate" over time.<sup>28</sup>

21. The case law shows a *perfect* parallelism between (i) *the (non-) recurring nature of the measure* at issue and (ii) *the (non-) recurring nature of the countermeasures* authorised by past arbitration panels. Recurring countermeasures have been authorised *only* where the measure was recurring, whereas *only* non-recurring countermeasures have been authorised where the measure was non-recurring.<sup>29</sup> The United States erroneously asks the Arbitration Panel to deviate from the consistent past case law, and to authorise *recurring* countermeasures (for an indefinite period and total amount) in response to *non-recurring* measures, despite the Appellate Body's explicit confirmation that the adverse effects of non-recurring subsidies "ordinarily dissipate" over time.<sup>30</sup>

**E. Recurring countermeasures do not reflect a "reasonable estimation" of the "actual continued adverse effects of the {subsidies} over time"**

22. The Parties agree on one important point – *i.e.*, as explained by the arbitration panel *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, to meet the test of "commensurateness" under Article

<sup>22</sup> See, e.g., US Written Submission, paras. 83, 86, 116.

<sup>23</sup> EU Response to Arbitration Panel Question 11, paras. 241-252.

<sup>24</sup> US Response to Arbitration Panel Question 17, para. 18 (emphasis added). See also *ibid.*, para. 16.

<sup>25</sup> US Methodology Paper, para. 29. See also EU Response to Arbitration Panel Question 56, paras. 24-

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<sup>26</sup> US Response to Arbitration Panel Question 59, para. 21 (emphasis added).

<sup>27</sup> US Methodology Paper, para. 25.

<sup>28</sup> Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.336. See also Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 5.371 (footnote 932); *EC – Large Civil Aircraft*, para. 713.

<sup>29</sup> See, e.g., EU Written Submission, paras. 108-112; EU Response to Arbitration Panel Question 20, paras. 338-342.

<sup>30</sup> See above footnote 28.

7.10 of the *SCM Agreement*, recurring countermeasures must reflect a "reasonable estimation" of "actual continued adverse effects of the {subsidies} over time".<sup>31,32</sup>

23. In its belated and *ex post* attempt to justify its request for recurring countermeasures, the United States asserts that its approach achieves the required commensurateness, or correspondence, under Article 7.10 of the *SCM Agreement*, arguing as follows:

the U.S. approach of valuing the instances of adverse effects underlying the adopted findings is, ... **representative of the adverse effects LA/MSF subsidies will continue to cause in future years** (subject to inflation). And, consistent with *US – Upland Cotton (22.6 II)*, the U.S. approach provides the **most reasonable estimation of continued adverse effects over time**.<sup>33</sup>

24. The substantial time gap of, at least, six to eight years between the December 2011 to 2013 period and today, 2019, enables the Arbitration Panel to *test* the United States' assertion based on the most recent available data and evidence. This does away with the need to address any alleged "inherent uncertainty"<sup>34</sup> about how present adverse effects of the non-recurring subsidy measures at issue, if any, may "dissipate"<sup>35</sup> further in the future.

25. Indeed, to test the United States' assertion, there is no need for the Arbitration Panel to speculate about the future. Using the most recent available data and evidence, the European Union has demonstrated that the specific instances of adverse effects determined to exist in December 2011 to 2013 do not provide a "reasonable estimation" of "the actual continued adverse effects of the {subsidies} over time".<sup>36</sup> Specifically, the European Union submitted the following evidence and argument:

(a) *First*, using the methodology developed by the United States' own expert in the first compliance proceedings, the European Union established that, in the counterfactual world, the relevant aircraft (A380 and A350XWB), in their current form, would have been in the marketplace today, without the subsidies.<sup>37,38</sup>

The United States has **not** contested that showing, despite the fact that it directly rebuts and disproves the basis for the United States' assertion that the adverse effects determined to exist in December 2011 to 2013 provide a reasonable estimation of adverse effects today, and in the future. That is, the United States asserts correspondence based on the erroneous assertion that the relevant aircraft would not be available in the market today, and in future years.<sup>39</sup>

(b) *Second*, the European Union submitted its first and second written submissions from the second compliance proceedings, showing that the specific instances of adverse effects determined to exist in December 2011 to 2013 do not provide a reasonable estimation of adverse effects today.<sup>40</sup>

The United States has **not** contested that showing.

<sup>31</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

<sup>32</sup> See, e.g. US Response to Arbitration Panel Question 19(b), paras. 31, 35; US Response to Arbitration Panel Question 21, para. 44. See, e.g., EU Response to Arbitration Panel Questions 10 and 21.

<sup>33</sup> US Response to Arbitration Panel Question 19(b), para. 35 (emphasis and bold added). See also *ibid.*, para. 31.

<sup>34</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

<sup>35</sup> See above footnote 28.

<sup>36</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

<sup>37</sup> See above footnote 19.

<sup>38</sup> In response to a question by the Arbitration Panel, the European Union also explained that the presence of adverse effects, if any, after the counterfactual launch dates cannot be the basis to authorise recurring countermeasures in the same amount for an indefinite period. Diminishing effects *weaken* and *dissipate* with the passage of time, and therefore contradict the premise of the US request for recurring countermeasures, which assumes that adverse effects remain *constant* over time (and prohibits testing of that assumption). The United States argued that the Arbitration Panel has no authority to consider mechanisms through which adverse effects dissipate over time. EU Response to Arbitration Panel Question 101; US Response to Arbitration Panel Question 101; EU Comment on US Response to Arbitration Panel Question 101.

<sup>39</sup> See e.g., US Response to Arbitration Panel Questions 20, 101; EU Response to Arbitration Panel Question 101.

<sup>40</sup> See, e.g., EU Written Submission, paras. 113-130; EU Responses to Arbitration Panel Questions 10, 21, 56 (Section C), 57, 101, 104, and 147; EU Opening Statement, paras. 48-57.

(c) *Third*, even when taking the most extreme (and unsupported) US assumption – that every A380 order and, in addition, every A380 delivery, today amounts to an adverse effect to the US (and disregarding, for the moment, the wind-down of the A380 programme) – the US assertion of correspondence fails. According to the US approach, the annual level of A380 orders and deliveries allegedly lost to Boeing between 2016 and 2018 is 47 units. Yet, in reality, the annual *total* A380 orders and deliveries during that same time period was only 27 units.<sup>41</sup> Thus, even before taking into account the wind-down of the A380 programme, the United States claims vastly higher adverse effects than the total number of annual Airbus orders and deliveries.

The United States has **not** contested that showing.

(d) *Fourth*, when taking into account the wind-down of the A380 programme, the lack of any correspondence becomes only starker. With the wind-down of the A380 programme by 2021, there remain a total of [[\*\*\*]] A380 aircraft to be delivered in 2019-2021, of which [[\*\*\*]] are destined for Emirates under the 2013 lost sale.<sup>42</sup> That is, during the 2019-2021 period, the annual number of A380 orders and deliveries will be [[\*\*\*]] aircraft (without correcting for double-counting), or [[\*\*\*]] aircraft (when correcting for double-counting).<sup>43</sup> From 2022 onwards, the annual number of A380 orders and deliveries will be zero.

This evidence further demonstrates the extreme degree to which the US approach, which, for an indefinite period, results in countermeasures commensurate with an annual number of 47 A380 orders and deliveries, does not achieve the required correspondence with "the actual continued adverse effects of the {subsidies} over time".<sup>44</sup>

Again, the United States has **not** contested that showing.

26. In sum, while the Parties agree on the legal standard for authorising recurring countermeasures, the European Union has shown that the United States' request for countermeasures does not meet that standard. Specifically, the United States' request does not reflect a "reasonable estimation" of "the actual continued adverse effects of the {subsidies} over time".<sup>45</sup> This lack of correspondence should not come as a surprise. The US approach is simply not designed to ensure correspondence. Rather, the US approach seeks recurring countermeasures that are *permanently fixed* by reference to adverse effects determined to exist in the past (*i.e.*, the December 2011 to 2013 period), *regardless* of what is actually happening today, in 2019, and regardless of what is known will change in the future.<sup>46</sup>

27. Given that the United States has not contested that showing, there is no basis in law or in fact for this Arbitration Panel to authorise recurring countermeasures. Similarly, there is no basis for the European Union to accept such an award.

28. Moreover, the European Union notes that the untenable US position becomes even more problematic in light of the recent Appellate Body report in *US – Large Civil Aircraft (Article 21.5 – EU)*. Recalling its jurisprudence that "effects of a subsidy will ordinarily *dissipate over time*", the Appellate Body found that an adjudicator cannot assume that "the phenomena {of price suppression and lost sales} manifest themselves to *the same degree* throughout the time period from order to delivery".<sup>47</sup> Thus, there is no basis for the adjudicator to assume that even later deliveries under the very *same* lost sale, and much less under *later* sales alleged to be lost due to subsidies, constitute present adverse effects, nor that they do so "to the same degree".<sup>48</sup>

29. In the present proceeding, the United States asks the Arbitration Panel to do the *exact opposite* of what the Appellate Body requires of an adjudicator. That is, the United States asks the Arbitration Panel to assume, without any further assessment, that adverse effects during the December 2011 to 2013 period manifest "to the same degree"<sup>49</sup> (*i.e.*, are constant) over time, and,

<sup>41</sup> This comparison is even *before* controlling for double-counting or over-counting, as discussed in Section I.G, below.

<sup>42</sup> See EU Response to Arbitration Panel Question 147.

<sup>43</sup> EU Response to Arbitration Panel Question 147.

<sup>44</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

<sup>45</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

<sup>46</sup> US Methodology Paper, paras. 90-94.

<sup>47</sup> Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.336 (emphasis added).

<sup>48</sup> Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 5.336, 5.340.

<sup>49</sup> Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.336.

therefore, provide "a reasonable estimation" of "the actual continued adverse effects of the {subsidies} over time".<sup>50</sup> The Appellate Body's jurisprudence confirms that there is simply no basis in law or fact for the US position, which is that, as a matter of default, the Arbitration Panel must assume that adverse effects do not dissipate with time, and are the same today as they were during the December 2011 to 2013 period.

**F. The United States errs in arguing that the Arbitration Panel has no authority to test whether recurring countermeasures reflect a "reasonable estimation" of the "actual continued adverse effects of the {subsidies} over time"<sup>51</sup>**

30. As explained above, in its attempt to justify its request for recurring countermeasures, the United States asserts, without any evidence (and without engaging with the EU's rebuttal evidence), that the "instances of adverse effects underlying the adopted findings" are "*representative* of the adverse effects LA/MSF subsidies will continue to cause in future years", and are "the most *reasonable estimation* of continued adverse effects over time".<sup>52</sup> The United States thus assumes that the effects of A380 and A350XWB MSF subsidies do not "diminish",<sup>53</sup> or "dissipate",<sup>54</sup> over time, but instead remain constant, such that adverse effects during the December 2011 to 2013 time period are "representative" of effects over time.

31. At the same time, the United States asserts that the Arbitration Panel has no authority to test this assertion.<sup>55</sup> The United States cannot have its cake and eat it. The European Union is not aware of any court of law that would accept an assertion that:

- (a) The party putting forward the assertion (*i.e.*, the United States) leaves that assertion unproven;
- (b) The opposing party (*i.e.*, the European Union) disproved that assertion, without any rebuttal by the other side (*i.e.*, the United States); and,
- (c) The adjudicator (*i.e.*, the Arbitration Panel) is not even allowed to test the assertion – *i.e.*, to assess in an objective manner the assertion put forward.<sup>56</sup>

32. The US position is untenable.

33. *First*, and as the arbitration panel in *US – Washing Machines* recently confirmed, the task before this Arbitration Panel is to assess the "reasonableness and plausibility" of the counterfactual at issue.<sup>57</sup> In these proceedings, that involves testing the counterfactual underpinning the US assumption that non-recurring subsidy measures cause constant adverse effects over time, based on the assertion that the A380 and A350XWB would not be available in the market. While the European Union explained that the Arbitration Panel should coordinate its work with the second compliance panel, the European Union did *not* ask the Arbitration Panel also to assess compliance. Instead, the Arbitration Panel must test the "reasonableness and plausibility" of the US counterfactual in these proceedings, and in so doing, should rely on recent "credible, factual and verifiable information",<sup>58</sup> including the EU evidence.

34. *Second*, the fact that the second compliance panel is, to some extent, looking at the same evidence for a *different purpose* – that is, to assess compliance under Article 7.8 of the *SCM Agreement* – does not mean that the Arbitration Panel may abdicate its separate and distinct duty, under Article 7.10 of the *SCM Agreement* and Article 11 of the DSU, to make an objective assessment on a key question that, because of the US request for recurring countermeasures, is before the

<sup>50</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

<sup>51</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

<sup>52</sup> US Response to Arbitration Panel Question 19(b), para. 35 (emphasis added).

<sup>53</sup> Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 5.371 (footnote 932); *EC – Large Civil Aircraft*, para. 713; *US – Large Civil Aircraft (Article 21.5 – EU)*, footnote 758.

<sup>54</sup> See above footnote 28.

<sup>55</sup> US Written Submission, paras. 99, 100, 105-107; US Response to Arbitration Panel Questions 18 (paras. 24-27), 22 (para. 49), 103 (paras. 28-29), 101 (paras. 19, 22). See, e.g., EU Framework Response, paras. 39-50; EU Responses to Arbitration Panel Questions 9, 10, 14, 21, 56, 103; EU Opening Statement, paras. 53-57.

<sup>56</sup> See also EU Response to Arbitration Panel Question 104, paras. 130-131.

<sup>57</sup> Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, paras. 1.16, 3.10, 3.11, 3.29.

<sup>58</sup> Decisions by the Arbitration Panel, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54; *EC – Hormones (US) (Article 22.6 – EC)*, para. 41; *US – Washing Machines (Article 22.6 – US)*, para. 1.16.

Arbitration Panel. To support its erroneous request for recurring countermeasures, the United States asks the Arbitration Panel to make a finding that adverse effects in the December 2011 to 2013 period are a reasonable estimation of adverse effects over time, but denies the Arbitration Panel any opportunity to test the US assertion on the basis of the evidence. Consistent with its duty to make an objective assessment of the matter, the Arbitration Panel must test the US assertion in light of the recent evidence and argument.

35. *Third*, the European Union recalls that, in prior phases of this dispute, the Appellate Body faulted the adjudicator for accepting assertions by the United States without "making its own independent assessment" thereof.<sup>59</sup> By simply deferring to the United States, and ignoring EU evidence and argument, that adjudicator failed to make an objective assessment, under Article 11 of the DSU. Likewise, in the recent report in *US – Large Civil Aircraft (Article 21.5 – EU)*, the Appellate Body again faulted the adjudicator, in several instances, for its failure "to assess properly the European Union's evidence" and to "provide a reasoned and adequate explanation for {rejecting the European Union's argument}".<sup>60</sup> The Arbitration Panel cannot simply disregard the European Union's evidence and argument, as the United States has consistently asked it to do, and deny its duty to test the reasonability and plausibility of the US assertions about the relevant counterfactual.<sup>61</sup>

36. *Fourth*, even with recurring subsidies that caused "continued adverse effects" over time, the arbitration panel in *US – Upland Cotton (Articles 22.6 and 7.10 – US)* did not simply *assume* that past adverse effects provided a "reasonable estimation" of "actual continued adverse effects of the measure over time" in that particular case.<sup>62</sup> Rather, the arbitration panel *tested* this assertion in light of the Parties' evidence, including recent evidence.<sup>63</sup> The arbitration panel recognised that the outcome of this inquiry may depend on "*a number of economic or other factors* that would affect the evolution over time of the impact of the subsidies at issue".<sup>64</sup> Based on an assessment of the parties' evidence and argument, including recent evidence, the arbitration panel in that case found that the reference period proposed by Brazil was not "unrepresentative".<sup>65</sup> This confirms, *all the more*, that this Arbitration Panel *cannot* authorise recurring countermeasures in response to non-recurring subsidy measures, much less without similarly testing the US assertion that the December 2011 to 2013 period is representative.

37. *Fifth*, and finally, the European Union notes that, while the United States rejects the Arbitration Panel's authority to engage with the recent evidence, the United States asserts that "any 'representativeness' inquiry must be with respect to *an aspect* of the countermeasures calculation that was *not part of, or incorporated* in, the adverse effects determination in the compliance proceeding".<sup>66</sup> The United States offers, as an example, the price of a particular LCA model, which was "not part of or incorporated in the adverse effects determined to exist".<sup>67</sup> The United States errs.

38. There is a substantial logical disconnect in the US position that the Arbitration Panel is allowed to test for representativeness for some limited issues (*e.g.*, "the price of a particular LCA model"<sup>68</sup>), but not for any other issue (*e.g.*, cause-and-effect pathway, sales of A380 aircraft); while still insisting that recurring countermeasures are appropriate. As the United States agrees, recurring countermeasures are appropriate only if the adverse effects in the December 2011 to 2013 period provide a "reasonable estimation" of "the actual continued adverse effects of the measure over time".<sup>69</sup> Such representativeness cannot be established based on an all-too-convenient assessment

<sup>59</sup> Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128.

<sup>60</sup> Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 5.78, 5.104, 5.116.

<sup>61</sup> See, *e.g.*, US Written Submission, paras. 99, 100, 105-107; US Responses to Arbitration Questions 18 (paras. 24-27); 22 (para. 49); 101 (paras. 19, 22); 103 (paras. 28-29). See, *e.g.*, EU Framework Response, paras. 39-50; EU Responses to Arbitration Panel Questions 9, 10, 14, 21, 56, 103; EU Opening Statement, paras. 53-57.

<sup>62</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

<sup>63</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, paras. 4.117-4.118.

<sup>64</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117 (emphasis added).

<sup>65</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.118.

<sup>66</sup> US Response to Arbitration Panel Question 103, para. 28 (emphasis added).

<sup>67</sup> US Response to Arbitration Panel Question 103, para. 29.

<sup>68</sup> US Response to Arbitration Panel Question 103, para. 29.

<sup>69</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

of a narrow subset of issues (e.g., "the price of a particular LCA model"), while ignoring all other issues.<sup>70</sup>

39. To give a concrete example, according to the United States, adverse effects in the VLA market determined to exist in December 2011 to 2013 are "representative of the adverse effects LA/MSF subsidies will continue to cause in future years".<sup>71</sup> The United States seems to accept that, in testing this proposition, the Arbitration Panel is allowed to test if the *price* of the A380 in December 2011 to 2013 is similar to the price today, but the Arbitration Panel is not allowed to test if the A380 is still *sold* today, and to a similar degree. According to the United States' logic, the Arbitration Panel must accept representativeness in the VLA market if the *price* of the A380 has not changed, even though the average annual number of A380 *orders and deliveries* is vastly lower today than in the December 2011 to 2013 period, and the A380 programme is *winding-down*.<sup>72</sup>

40. Moreover, the inquiry into "representativeness" set out by the arbitration panel in *US – Upland Cotton (Articles 22.6 and 7.10 – US)* was considerably more comprehensive than what the United States inaccurately asserts. If that arbitration panel had adopted the narrow inquiry into "representativeness" proposed by the United States, it simply could not have tested for representativeness in the way it actually did. In testing representativeness, that arbitration panel did consider an "aspect" – i.e., the world price of cotton – "that was *part of, or incorporated* in, the adverse effects determination in the compliance proceeding".<sup>73</sup>

41. Thus, if the United States insists that recurring countermeasures are appropriate, it must logically accept that the inquiry into "representativeness" cannot be confined to a self-selected, limited and biased subset of issues designed to favour the United States' position.

#### **G. The US request for recurring countermeasures results in improper double-counting and over-counting**

42. The US request for recurring countermeasures is unwarranted for at least two other reasons. *First*, the US request to multiply past adverse effects into the present and the future will lead to improper *double-counting*. The US approach counts a transaction *once* as a lost sale in the year an order is made and, *again*, when the delivery actually occurs several years after the order, as part of the exercise of quantifying impedance.

43. The United States submits that, because its approach values "*non-overlapping instances of adverse effects*" during the December 2011 to 2013 period, "*utilizing this figure for future years in which countermeasures will be applied*" does not risk double-counting.<sup>74</sup> The US reasoning is erroneous, and shows a misunderstanding of the concept of double-counting. The US approach risks double-counting, because it *assumes* an *equal number* of instances of lost sales and impedance occurring for an indefinite period of time. However, the lost sale of today is necessarily the impedance of tomorrow, and under the US approach, the same transaction will therefore be counted twice.

44. The European Union illustrates this by reference to the unsupported US assumption that *every* A380 *order* today and, in addition, *every* A380 *delivery* today, amounts to adverse effects.<sup>75</sup> Under the US approach, "*non-overlapping instances of adverse effects*" during the period December 2011 to 2013 related to the A380 result in double-counting when used as the basis for recurring countermeasures. The European Union demonstrated that the United States is counting the very *same* transactions twice: once as a lost sale during the December 2011 to 2013 period, and *again* when the delivery actually occurred. As a result, improper double-counting distorts the alleged correspondence between the requested recurring countermeasures and the adverse effects determined to exist.

45. *Second*, the United States' mixing of an order-centric metric for lost sales and a delivery-centric metric for impedance during the same reference period improperly inflates the alleged level of adverse effects and leads to *over-counting*. Any method for quantifying adverse effects must be

<sup>70</sup> US Response to Arbitration Panel Question 103, para. 29.

<sup>71</sup> US Response to Arbitration Panel Question 19(b), para. 35 (emphasis added). See also US Written Submission, paras. 82, 137, 139, 260; US Response to Arbitration Panel Question 19(a), para. 28; US Response to Arbitration Panel Question 19(b), para. 38; US Response to Arbitration Panel Question 20, para. 37; US Opening Statement, para. 37.

<sup>72</sup> See, e.g., EU Response to Arbitration Panel Question 147.

<sup>73</sup> US Response to Arbitration Panel Question 103, para. 28 (emphasis added).

<sup>74</sup> US Response to Arbitration Panel Question 69, para. 43 (emphasis added).

<sup>75</sup> EU Response to Arbitration Panel Question 57.



consistent, and use a *single* metric; a quantification for the same period cannot mix an order-centric metric and a delivery-centric metric. Just as the United States would be wrong to calculate a company's turnover by mixing both an order-centric valuation and a delivery-centric valuation for sales and deliveries occurring in the same year, the United States errs in quantifying both lost sales and deliveries during the reference period in question. Doing so misallocates economic harm from a temporal perspective, and *necessarily* results in over-counting.

**H. To authorise recurring countermeasures, the Arbitration Panel is required to coordinate with the second compliance panel**

46. In the European Union's preliminary ruling request, the European Union explained that the Arbitration Panel should coordinate with the parallel second compliance proceeding, because, to the extent that the second compliance panel confirms that the European Union has achieved compliance, the Arbitration Panel could not award any countermeasures to the United States.<sup>76</sup>

47. Moreover, there is an additional and distinct need for coordination, which results from the United States' unwarranted request for recurring countermeasures. The potential consequences of any failure to co-ordinate are exacerbated by the US request for *recurring* countermeasures, which, one way or another, would require the Arbitration Panel to make findings about *present* adverse effects, if any. If, on the other hand, the Arbitration Panel authorises non-recurring countermeasures (based on the findings related to the December 2011 to 2013 period), as it must, it would avoid this risk altogether.

48. The risk of conflicting findings is a particular feature of proceedings under Part III of the *SCM Agreement*.<sup>77</sup> An arbitration panel in the context of Part III does not have exclusive jurisdiction with respect to the existence (or non-existence) of adverse effects. These are also issues that will be considered by original and compliance panels. Therefore, when *parallel* compliance proceedings take place, the compliance panel will likewise make findings about present adverse effects, if any. As a result, there is a unique interdependence between the present arbitration panel proceedings and the parallel second compliance proceedings in the context of proceedings under Part III of the *SCM Agreement* – a connection that was not present in other disputes, such as *US – Tuna II (Mexico)* (Article 22.6 – US).

49. The United States disagrees that this interdependence is unique to Part III of the *SCM Agreement*. With reference to Article III of the GATT 1994, the United States submits that demonstrating trade effects is also required outside of Part III of the *SCM Agreement*.<sup>78</sup> The United States errs. The Appellate Body in *Brazil – Taxation* recently confirmed that the requirement to show adverse effects distinguishes the disciplines on actionable subsidies from other disciplines under the covered agreements.<sup>79</sup> Because trade effects "pervade{"<sup>80</sup> the disciplines on actionable subsidies, they create a unique need for coordination between the Arbitration Panel and the second compliance panel.

**IV. THE UNITED STATES ERRS IN REJECTING THE RELEVANCE OF "TRADE EFFECTS" TO QUANTIFY THE VALUE OF ADVERSE EFFECTS**

**A. The Arbitration Panel should focus on a "trade effects" metric to quantify the value of adverse effects determined to exist**

50. In addition to the fundamental errors in the US request for recurring countermeasures, there are numerous additional errors in the US approach. In particular, the United States erroneously objects to the proper metric for quantifying countermeasures, *i.e.*, *actual* trade effects as they arise when aircraft are actually delivered, and argues for the use of sales and resulting *anticipated* deliveries.

51. Curiously, the Parties agree that, in the present dispute and as a factual matter, trade effects arise at the moment of actual delivery of an aircraft, and not at the moment the order is placed, several years earlier.<sup>81,82</sup> However, the United States asserts that the Arbitration Panel must ignore

<sup>76</sup> See the European Union's request for preliminary ruling, 15 October 2018.

<sup>77</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.117.

<sup>78</sup> US Written Submission, para. 52.

<sup>79</sup> Appellate Body, *Brazil – Taxation*, para. 5.136.

<sup>80</sup> Appellate Body, *Brazil – Taxation*, para. 5.136.

<sup>81</sup> See, *e.g.*, US Response to Panel Question 53, paras. 3-5.

<sup>82</sup> See also Panel Report, *US – Large Civil Aircraft*, para. 7.1685.

"trade effects", as they actually arise, in determining whether the countermeasures requested by the United States are "commensurate" with the adverse effects determined to exist.<sup>83</sup>

52. Specifically, the United States asks the Arbitration Panel to ignore how the specific adverse effects in December 2011 to 2013 have resulted in actual trade effects over time. That is, the United States asks the Arbitration Panel: (i) to ignore the *pace* of deliveries over time; (ii) to ignore that a number of deliveries pursuant to the "precise findings" of adverse effects *have already occurred*; and, (iii) to ignore even the fact that some deliveries will *never occur* (such as the Transaero Airlines order).<sup>84</sup>

53. The United States errs. The US assertion that the Arbitration Panel must look "simply" at adverse effects does not answer how the Arbitration Panel is to calibrate and quantify those adverse effects. Rather, the Arbitration Panel must choose a relevant and appropriate metric to quantify and calibrate the value of adverse effects determined to exist – *i.e.*, trade effects. As the arbitration panel in *US – Washing Machines* recently confirmed, past arbitration panels have typically used trade effects as the metric to perform their task and this Arbitration Panel should do the same.<sup>85</sup>

54. The United States also entirely ignores that, in the only prior arbitration panel under Article 7.10 of the *SCM Agreement*, the arbitration panel did *precisely* what the United States considers "unnecessary and inappropriate".<sup>86</sup> That is, the arbitration panel in *US – Upland Cotton (Articles 22.6 and 7.10 – US)* used *trade effects* as the metric to quantify the value of adverse effects determined to exist.<sup>87</sup> The Arbitration Panel in these proceedings should similarly use a trade effects metric.

**B. The Arbitration Panel should quantify adverse effects determined to exist on a prospective basis, considering present and outstanding deliveries**

55. An arbitration panel must ensure that it authorises solely those countermeasures that are "*prospective*" in nature,<sup>88</sup> and that countermeasures authorised are not "in excess of the benefits that are nullified or impaired".<sup>89</sup> In the circumstances of the United States' static approach, the quantification and calibration of countermeasures must, therefore, focus on present and outstanding trade effects.

56. However, the United States considers that deliveries that have occurred in the past must be taken into account, even though the related trade effects have happened in the past. To support its position, the United States essentially recycles the same flawed arguments it put forward to defend its request for recurring countermeasures. The United States argues that, in quantifying adverse effects determined to exist in the December 2011 to 2013 period, the fact that some of those adverse effects have subsequently ceased to exist is irrelevant.<sup>90</sup>

57. The European Union has explained at length that the Dispute Settlement Body ("DSB") made no findings with respect to the existence, let alone the degree, of "annual" adverse effects, including in 2019 or any other subsequent year. The prior findings relate only to adverse effects in the December 2011 to 2013 period.<sup>91</sup> The United States itself concedes that the adopted findings "consist" of specific instances of adverse effects, each during December 2011 to 2013.<sup>92</sup> No findings exist that would support the view that similar adverse effects occur today, six to eight years later,

<sup>83</sup> See, e.g., US Written Submission, para. 135. See also US Response to Arbitration Panel Question 54.

<sup>84</sup> See, e.g., US Response to Arbitration Panel Questions 54 (paras. 7-10); 58 (para. 16).

<sup>85</sup> See, e.g., Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, para. 3.7 (footnote 40).

<sup>86</sup> US Response to Arbitration Panel Question 94, para. 4.

<sup>87</sup> See Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, paras. 4.193, 4.194.

<sup>88</sup> Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 5.374 (emphasis in original).

<sup>89</sup> Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, paras. 3.11, 3.22. See also Decision by Arbitration Panel, *US – Gambling (Article 22.6 – US)*, paras. 3.27, 3.30.

<sup>90</sup> US Written Submission, para. 137.

<sup>91</sup> See, e.g., EU Framework Response, paras. 24-31; EU Responses to Arbitration Panel Questions 4, 8, 10, 11, 12, 14, 5, 56.

<sup>92</sup> US Methodology Paper, para. 29.

or will occur in the future. Moreover, the European Union has affirmatively shown that adverse effects are not present today.<sup>93</sup> The United States has refused to engage with this evidence.

58. Therefore, to determine "commensurate" countermeasures that are prospective in nature, the Arbitration Panel must calibrate the level of countermeasures to present and outstanding deliveries that result from the precise findings of adverse effects made.

## **V. COUNTERMEASURES SHOULD BE COMMENSURATE WITH THE ADVERSE EFFECTS DETERMINED TO EXIST IN EACH PRODUCT MARKET**

59. The Parties agree that the Arbitration Panel is permitted to determine, separately for each product market, a level of countermeasures corresponding to the degree of adverse effects determined to exist.<sup>94</sup> As the United States observes, correctly, "the U.S. methodology makes it easy to discern what portion of the countermeasures corresponds to the adverse effects in each of the respective product markets".<sup>95</sup> The United States disagrees, however, that, in the circumstances of this dispute, the Arbitration Panel should exercise its discretion and award separate amounts for each product market. The United States errs.

60. *First*, under Article 7.10 of the *SCM Agreement*, an arbitration panel must determine a level of countermeasures that bears "a relationship of *correspondence*" with the precisely defined second element, namely, "the degree and nature of the adverse effects determined to exist".<sup>96</sup> As the United States agrees, the "precise findings"<sup>97</sup> in the first compliance proceedings concern separate product markets, resulting in separate findings of inconsistency for each product market.<sup>98</sup> Those separate findings also concern different types of adverse effects for the two product markets.<sup>99</sup> It follows that the need to make a separate determination for each product market is not, as the United States asserts, an "additional requirement" for which there is no textual support in Article 7.10 of the *SCM Agreement*.<sup>100</sup> Rather, in the circumstances of the present case, the Arbitration Panel should do so as *part and parcel* of its obligation to ensure "a relationship of *correspondence*" with the "precise findings"<sup>101</sup> of adverse effects determined to exist in the first compliance proceedings.<sup>102</sup>

61. *Second*, the United States ignores that arbitration panels have determined countermeasures separately for different product markets and types of inconsistency,<sup>103</sup> or even depending on uniquely identifiable instances of WTO-inconsistency.<sup>104</sup> In *US – Washing Machines*, the arbitration panel accepted the *United States'* request that it determine separately the amounts of suspension for the anti-dumping and countervailing duty measures. The arbitration panel did so, and found that, in the circumstances of that case, a "single awarded amount ... would risk a result contrary to the DSU".<sup>105</sup> Awarding separate amounts, instead, was considered: (i) to be consistent with Article 22.8 of the DSU, which requires suspension to be "temporary"; (ii) to "maintain equivalence"; (iii) to "provide guidance to the parties on the authority to suspend and the obligation to comply"; and, (iv) "may limit the need for future recourse to dispute settlement proceedings".<sup>106</sup>

62. These same considerations apply in the present dispute, and mean that the Arbitration Panel should exercise its discretion and award separate amounts for each of the respective product markets. The "adverse effects determined to exist" in the first compliance proceedings consist of two separate sets of inconsistencies, one in the VLA market, which includes the A380, and another in the twin-aisle market, which includes the A350XWB. The European Union has taken distinct steps

<sup>93</sup> See EU Response to Arbitration Panel Question 4, paras. 119-123. See also EU First Written Submission in *EC – Large Civil Aircraft (Article 21.5 II – EC)*, October 2018, (Exhibit EU-A-BCI), Sections V.B.4.d, V.B.5.e, especially para. 343.

<sup>94</sup> US Response to Arbitration Panel Question 102, para. 25.

<sup>95</sup> US Response to Arbitration Panel Question 102, para. 25.

<sup>96</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.39 (emphasis in original).

<sup>97</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.49.

<sup>98</sup> US Response to Arbitration Panel Question 102, para. 25.

<sup>99</sup> US Response to Arbitration Panel Question 102, para. 25.

<sup>100</sup> US Response to Arbitration Panel Question 102, para. 23.

<sup>101</sup> US Methodology Paper, para. 25. See also US Written Submission, para. 41.

<sup>102</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, paras. 4.39, 4.49.

<sup>103</sup> See, e.g., Decision by the Arbitration Panel, *US – COOL (Article 22.6 – US)*, paras. 6.78-6.79; Decision by the Arbitration Panel, *US – Byrd Amendment (EC) (Article 22.6 – US)*, para. 3.121; Decision by the Arbitration Panel, *EU – Hormones (US) (Article 22.6 – EC)*, paras. 65, 78.

<sup>104</sup> Decision by the Arbitration Panel, *US – 1916 Act (Article 22.6 – US)*, paras. 6.14, 6.17.

<sup>105</sup> Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, para. 3.5.

<sup>106</sup> Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, para. 3.5.

to ensure compliance in each product market.<sup>107</sup> The European Union fully expects that, in the parallel second compliance proceedings, the second compliance panel will find that the European Union has fully complied with its obligations under Article 7.8 of the *SCM Agreement*. However, to the extent the second compliance panel were to find that the European Union has complied with only one or the other inconsistency in one or the other product market, the level of countermeasures must be reduced accordingly to "maintain {correspondence}" and ensure that countermeasures are "temporary".<sup>108</sup> Therefore, to paraphrase the arbitration panel in *US – Washing Machines*, "separating the amounts of suspension would resolve potential ambiguities on the level of suspension, following an Article 21.5 determination, and diminish the need for future proceedings".<sup>109</sup> Such an approach is readily available, and allows the Arbitration Panel to greatly improve the clarity of its findings, while complying with the requirement to "maintain {correspondence}" and to ensure that countermeasures are "temporary".<sup>110</sup>

## VI. THE US APPROACH TO QUANTIFYING THE DEGREE OF LOST SALES DETERMINED TO EXIST IS FLAWED

63. The US approach to valuing "lost sales" contains numerous further errors. While the Parties agree on the identity of the specific lost sales determined to exist – that is, five specific lost sales, and not others, each during the December 2011 to 2013 period – the Parties disagree on how to quantify these lost sales.

64. The US approach to quantifying the level of adverse effects from the five lost sales at issue consists of determining the "present value" of orders counterfactually won by Boeing in the December 2011 to 2013 period. The United States implements this "valuation of lost sales"<sup>111</sup> approach by combining (i) *Airbus* delivery schedules – as (ii) *estimated* by Boeing employees pretending to assume a 2011 to 2013 perspective<sup>112</sup> – with (iii) *Boeing* prices (taken from "comparator orders" that are allegedly similar to the lost sales at issue), and (iv) bringing back (*i.e.*, discounting) expected delivery revenues using a risk-free *US-Government* discount rate (the 10-year T-Bond yield rate).<sup>113</sup> There is an obvious inconsistency in the US attempt to combine – in one calculation – *estimates* of *Airbus* delivery schedules with *actual Boeing* prices and a risk-free *US Government* discount rate.<sup>114</sup>

65. In addition, the United States committed numerous, and consequential, technical errors in *implementing* its approach.<sup>115</sup> Here, the European Union focuses on one conceptual error that permeates the US valuation of lost sales, namely the United States' inconsistent and erroneous position concerning evidence post-dating the December 2011 to 2013 period.

66. On the one hand, the United States submits that the Arbitration Panel is not allowed to consider any evidence speaking to the period after December 2013, and that the Arbitration Panel is precluded from considering: (i) the cancellation of the Transaero A380 order in 2015;<sup>116</sup> (ii) actual delivery schedules;<sup>117</sup> and, (iii) certain escalation rates.<sup>118</sup> The United States argues that the Arbitration Panel must base its work "on the same evidence that {was before the first compliance panel and} formed the basis of the significant lost sales determination".<sup>119</sup> The United States also asserts that there is a general "preference for verifiable facts over unverifiable speculation".<sup>120</sup>

<sup>107</sup> See, e.g., WT/DS316/34.

<sup>108</sup> Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, para. 3.5.

<sup>109</sup> Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, para 3.5 (footnote 38).

<sup>110</sup> Decision by the Arbitration Panel, *US – Washing Machines (Article 22.6 – US)*, para. 3.5.

<sup>111</sup> See, e.g., US Methodology Paper, para. 31.

<sup>112</sup> See US Response to Arbitration Panel Question 70.

<sup>113</sup> See EU Written Submission, paras. 33-34, 207.

<sup>114</sup> See, e.g., EU Written Submission, paras. 223, 275; EU Response to Arbitration Panel Question 80, paras. 284-285.

<sup>115</sup> See, e.g., EU Written Submission, paras. 207-290, 353-373; EU Opening Statement, paras. 83-91, 102-111; EU Responses to Arbitration Panel Questions 31, 40, 41, 42, 43, 48, 49, 52, 54, 60(c), 63, 64, 65, 67, 68, 77, 78, 79, 80, 91, 95, 96, 97, 105, 106, 110, 112, 148, 161, 162, 164, 165, 166; EU Comments on US Responses to Arbitration Panel Questions 93, 94, 100, 110, 112, 115, 117, 118, 120, 121, 125, 126, 134, 135, 136.

<sup>116</sup> US Response to Arbitration Panel Question 58, para. 16.

<sup>117</sup> US Response to Arbitration Panel Question 58, paras. 17-19.

<sup>118</sup> US Written Submission, paras. 186-190; US Response to Panel Question 70.

<sup>119</sup> US Response to Arbitration Panel Question 58, para. 14.

<sup>120</sup> US Response to Arbitration Panel Question 58, para. 13 (underlining added).

67. On the other hand, the United States submits that the Arbitration Panel *is* allowed – and even *required* – to consider evidence from the post-2013 period, including: (i) the Producer Price Index ("PPI");<sup>121</sup> (ii) Boeing's cancellation rate (if any is applied);<sup>122</sup> (iii) certain "comparator orders" with which to compare the lost sales;<sup>123</sup> and, (iv) the existence of the 747-8I during the years countermeasures will be applied.<sup>124</sup> The United States justifies these evidentiary requirements with the need to address inevitable "uncertainty" in the quantification exercise.<sup>125</sup> It also asserts that the post-2013 evidence it introduced is permissible because it "was introduced in this arbitration as relevant ... and not related to the underlying adverse effects determination".<sup>126</sup>

68. The United States attempts to explain away the evident contradictions in its position by arguing that "uncertainty is not speculation".<sup>127</sup> Thus, it seems that, for the United States, uncertainty is just a normal and acceptable state of affairs that results from US assertions that are unsupported by any valid legal argument or prior finding, and that are unsupported by evidence. At the same time, for the United States, "speculation" arises whenever the *European Union* asks the Arbitration Panel to consider the actual facts and evidence pertaining to the real world; in that circumstance, the United States asserts that the Arbitration Panel is precluded from looking at the evidence. The distinction posited by the United States amounts to the denial of an objective, even-handed assessment of the matter. The United States' attempt to discredit the use of the freshest, most contemporary data as "speculation", while at the same time promoting its own use of post-2013 data as a mere attempt to reckon with "uncertainty", must fail. The only "principle" on which the US position rests is whether or not excluding post-2013 evidence serves its interests by artificially inflating the adverse effects determined to exist.

69. As a matter of law, there is no temporal constraint on any evidence that the Arbitration Panel may consider in valuing the lost sales findings.<sup>128</sup> In arbitration proceedings, a new factual record is built, based on new evidence and arguments by the parties regarding the *quantification* of adverse effects determined to exist. This new factual record enables an arbitration panel to fulfil its mandate to determine, on an objective basis, a commensurate level of countermeasures. Moreover, the Arbitration Panel is duty-bound to make an objective assessment of the Parties' evidence and argument. An arbitration panel must consider "all the evidence",<sup>129</sup> including recent evidence, in an even-handed manner.<sup>130</sup>

## VII. THE US APPROACH TO QUANTIFYING THE DEGREE OF IMPEDANCE DETERMINED TO EXIST IS FLAWED

70. With respect to quantifying the level of adverse effects from impedance, the United States simply *assumes* – without evidence or basis in the findings in the first compliance proceedings – that *all* A380 deliveries in the six markets at issue would have been replaced one-for-one by 747-8Is. According to the United States, this would have afforded Boeing a 100 percent market share in all six VLA markets at issue, with each assumed to be equally large in the counterfactual as in reality.<sup>131</sup> These assumptions are baseless.

71. The United States simply assumes that, absent A380MSF and A350XWB MSF subsidies, the A380 and the A350XWB would not have been present in the market today, or *in the undefined future over which the United States seeks countermeasures*. However, the original and first compliance panels did not determine *when* the aircraft would have been launched absent subsidisation. Neither the original panel nor the first compliance panel found that the A380 and the A350XWB would not have been launched by 2011-2013; nor did they find that the aircraft would not have been launched as of today; and they certainly did not find that the aircraft would *never* be launched in the future. Instead, the European Union has demonstrated, employing the approach advocated by the United States in the first compliance proceedings, that both the A380 and the A350XWB would have

<sup>121</sup> US Methodology Paper, para. 94.

<sup>122</sup> US Response to Arbitration Panel Question 73, para. 87.

<sup>123</sup> US Methodology Paper, para. 73.

<sup>124</sup> US Written Submission, para. 239.

<sup>125</sup> US Response to Panel Arbitration Question 58, para. 13 (underlining added).

<sup>126</sup> US Response to Panel Arbitration Question 58, para. 17.

<sup>127</sup> US Response to Panel Arbitration Question 58, para. 13.

<sup>128</sup> See, e.g., EU Response to Arbitration Panel Question 40, para. 450.

<sup>129</sup> See, e.g., Appellate Body Reports, *Brazil – Retreated Tyres*, para. 185; *EC – Hormones*, para. 133; *Korea – Dairy*, para. 137; *Philippines – Distilled Spirits*, para. 140; *US – Carbon Steel (India)*, para. 4.448.

<sup>130</sup> Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.118.

<sup>131</sup> See, e.g., US Written Submission, para. 173.

counterfactually come into existence, absent MSF subsidies, soon after their actual launch, and in any event, well in advance of any period relevant to the assessment of this Arbitration Panel.<sup>132</sup>

72. The US assumption of a 747-8I-only scenario further ignores important demand-side and supply-side factors, and the interaction of those factors. Specifically, faced with delayed deliveries of the A380, as well as with delayed deliveries and production bottlenecks of the 747-8I, customers might have reacted in a number of different ways, including: (i) deferring purchase of A380s to a time as and when they become available; (ii) substituting A380s for 747-8Is (as and when the latter become available); (iii) selecting alternative Airbus twin-aisle aircraft; (iv) selecting alternative Boeing twin-aisle aircraft, such as the 777-300ER; (v) purchasing VLA or twin-aisle aircraft on the second-hand market; and, (vi) leasing, rather than purchasing, aircraft.<sup>133</sup> These options must be included – and examined – in *any* assessment of a counterfactual world in which the subsidised element of the MSF loans at issue is absent. They cannot be assumed away. The exact market outcome is dependent on consumer-specific behaviour and preferences, the availability of aircraft models, and the competitive dynamics between Airbus and Boeing, including prices offered in the counterfactual world.<sup>134</sup>

73. The United States has failed to support its assertions regarding the degree of impedance in the counterfactual with a proper, robust modelling exercise based on the freshest, most recently available data and evidence.<sup>135</sup> Such a quantification and calibration exercise would have replaced the US conjectures with a proper facts-based assessment, rooted in elementary economics.

74. In this respect, the European Union notes that it has established that the 747-8I was only available for delivery *after* April 2012, and that deliveries of 47 additional 747-8Is during the December 2011 to 2013 period would have caused substantial production bottlenecks for Boeing, and ensuing delays.<sup>136</sup> In response, the United States *amended* its previous position, by simply *assuming* that, in the absence of the 747-8Is, LCA customers would then have substituted *all* A380s for 777-300ERs or 747-400s in *all* six geographic markets at issue.<sup>137</sup> Unsurprisingly, this assumption is yet again unsupported by compliance findings or evidence, as even the United States acknowledges.<sup>138</sup>

75. Moreover, the European Union also established<sup>139</sup> – and the United States has acknowledged<sup>140</sup> – that Boeing would not have been able to deliver 47 additional 747-8Is *during* the December 2011 to 2013 period. That is, deliveries of 747-8I would either never occur, because other alternatives would have been more attractive, or would occur in 2014, or thereafter. In valuing the degree of impedance, the Arbitration Panel should not include Boeing's counterfactual delivery positions falling outside the December 2011 to 2013 reference period. Those delivery positions were, by definition, not covered by the "precise"<sup>141</sup> findings of impedance in the first compliance proceedings.

76. For these reasons, the Arbitration Panel should reject the degree of impedance posited by the United States.

### **VIII. THE BELATED SUBMISSION OF PRIMARY EVIDENCE BY THE UNITED STATES PREJUDICES THE EUROPEAN UNION'S DUE PROCESS RIGHTS**

77. Finally, the European Union recalls that, throughout the proceedings, the European Union repeatedly observed that the United States had failed to provide verifiable primary-source evidence and documents for its factual assertions. The European Union also demonstrated the importance of carefully assessing the veracity and authenticity of the United States' factual assertions. The

<sup>132</sup> See above footnote 19.

<sup>133</sup> See EU Responses to Arbitration Panel Questions 5 (para. 126); 46 (para. 475); 64 (para. 211); 84 (para. 302).

<sup>134</sup> EU Written Submission, para. 200; EU Response to Arbitration Panel Question 84.

<sup>135</sup> See EU Written Submission, paras. 200-203, 296-299; EU Response to Arbitration Panel Questions 3 and 4 (paras. 91-95); 5 (paras. 128, 136-137); 6 (paras. 143-149); 12 (para. 258); 46 (para. 478); 64 (paras. 214-215); 65 (para. 223); 84 (paras. 309-310); 88 (paras. 326-327).

<sup>136</sup> See EU Written Submission, paras. 300-305; EU Response to Arbitration Panel Questions 6, 64, 84, 85, and 88.

<sup>137</sup> US Response to Arbitration Panel Questions 46 (para. 114); 87 (para. 122); 88 (para. 128).

<sup>138</sup> See US Response to Arbitration Panel Question 87, para. 121.

<sup>139</sup> EU Comment on US Responses to Arbitration Panel Questions 114, 144; EU Response to Arbitration Panel Question 146.

<sup>140</sup> US Response to Arbitration Panel Question 114, para. 48 (*citing* Exhibit USA-64 (BCI)).

<sup>141</sup> US Methodology Paper, para. 25.

European Union discovered, for example, that eight out of 12 Boeing 747-8I deliveries included in the 747-8I "global average delivery prices" for the 2012 impedance valuation were made to non-commercial VIP customers at prices [[\*\*\*]] airline pricing.<sup>142</sup> The United States conceded that the inclusion of VIP prices was improper,<sup>143</sup> and adjusted its assessment [[\*\*\*]] of USD [[\*\*\*]].<sup>144,145</sup>

78. Despite the importance of verifying the US assertions, only in the final stage of these proceedings, and upon explicit request by the Arbitration Panel in its Third Set of Questions, did the United States provide support for numerous factual assertions that it made as far back as its Methodology Paper, and that it should have addressed much earlier in the proceedings, specifically in its Methodology Paper. In response to specific Questions by the Arbitration Panel, the United States finally provided some primary-source evidence and documentation, covering 45 new exhibits,<sup>146</sup> running to 2,033 pages of HSBI material and 22 pages of non-HSBI material.

79. The US approach to backloading evidence has compromised the European Union's due process right to a meaningful opportunity to answer the case put to it by the United States. Rather than having *multiple* opportunities over a *series of months* to address the key evidence in these proceedings, the United States' decision to withhold the evidence until the end of the proceedings resulted in *one* opportunity for the European Union to review the evidence and to comment, and, additionally, in a compressed time period of just over three weeks that was complicated by overlapping deadlines imposed by the Arbitration Panel.

80. The United States' conduct also undermines the Arbitration Panel's ability to make an objective assessment of the matter before it, consistent with its obligation under Article 11 of the DSU. A proper objective assessment requires an exchange between the parties, and between the parties and the adjudicator.<sup>147</sup> The United States' decision to withhold information until this late stage of the proceedings renders that feature of a proper objective assessment impossible.

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<sup>142</sup> See EU Written Submission, paras. 322-325.

<sup>143</sup> See US Written Submission, paras. 247-248.

<sup>144</sup> See Exhibit USA-27 (HSBI).

<sup>145</sup> Other instances in which the United States modified evidence submitted to the Arbitration Panel over the course of these proceedings include: (i) a two-aircraft discrepancy between VIP sales (US Response to Arbitration Panel Question 116, para. 57); (ii) a switch from pricing information contained in "Delivery Invoices" to pricing information contained in "Purchase Agreements", thereby artificially inflating LCA gross prices and deflating Boeing price concessions (US Response to Arbitration Panel Question 135, para. 156(i) and footnotes 139, 147, 149, 153, and 198; EU Comment on US Responses to Arbitration Panel Question 135, paras. 360, 362, 363, 364); and, (iii) a switch from "average final net revenue" data at the time of delivery to net base-year prices at the time of order (adjusted for price concessions and escalated) for the purposes of artificially inflating the amount of the United States' impedance claims (US Response to Arbitration Panel Question 153, para. 7; EU Comment on US Responses to Arbitration Panel Question 153, paras. 7-16).

<sup>146</sup> Compare this with the US Methodology Paper, which was accompanied by only 22 exhibits.

<sup>147</sup> See, e.g., Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.177; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150; Appellate Body Report, *US – Continued Zeroing*, para. 347; Appellate Body Report *US – Large Civil Aircraft (2nd complaint)*, para. 1137 (footnote 2323).

**ANNEX C**

DECISION OF THE ARBITRATOR CONCERNING THE EUROPEAN UNION'S PRELIMINARY RULING REQUEST

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**ANNEX C-1**

**COMMUNICATION FROM THE ARBITRATOR  
PRELIMINARY RULING  
(CONCLUSION)**

**18 February 2019**

1.1. Pursuant to the Arbitrator's letter to the parties of 29 October 2018, and the announcement at the meeting of the Arbitrator with the parties, the Arbitrator is issuing today its conclusion in respect of the preliminary ruling requested by the European Union of 15 October 2018. The reasons supporting this conclusion will, in the interest of efficiency of proceedings, be provided at the end of the proceedings in the Arbitrator's decision. This conclusion and the reasons supporting it will form an integral part of the Arbitrator's decision in this matter.

1.2. The Arbitrator has carefully considered the issue raised by the European Union's request of 15 October 2018 for a preliminary ruling and the parties' relevant arguments and evidence contained or referenced, *inter alia*, in: (i) the European Union's preliminary ruling request of 15 October 2018, (ii) the European Union's letter of 22 October 2018, (iii) the United States' letter of 25 October 2018, (iv) the United States' written submission of 9 November 2018 and (v) the European Union's response to the Arbitrator's question No. 50 of 16 November 2018.

1.3. The Arbitrator has concluded that, contrary to the European Union's view, it is neither necessary nor appropriate for it to "await[] the outcome of the second compliance proceedings before proceeding to determine the level of countermeasures, if any, legitimately due the United States".<sup>1</sup> In the light of this, the Arbitrator declines the European Union's request that it coordinate its work with the second compliance panel and wait for the outcome of the second compliance proceedings, which may include appellate review proceedings, before determining whether the countermeasures proposed by the United States are commensurate with the degree and nature of the adverse effects determined to exist.

1.4. Consistent with this conclusion, the Arbitrator will proceed with its work and looks forward to receiving the parties' replies to its forthcoming questions.

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<sup>1</sup> European Union's preliminary ruling request, para. 3.