

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

## ANNEX C

### **REPORT OF THE DESIGNATED REPRESENTATIVE, INCLUDING ATTACHMENTS 1 AND 2 (WORKING PROCEDURES FOR DEVELOPING INFORMATION UNDER ANNEX V OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES; AND PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION)**

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## ANNEX C

### *EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT (WT/DS316)*

#### **PROCEDURE UNDER ANNEX V OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES**

##### Report to the Panel from the Facilitator

(24 February 2006)

#### A. BACKGROUND

1. On 20 July 2005, the Dispute Settlement Body ("DSB") established a Panel at the request of the United States with respect to the above matter. In its request for establishment of a panel, the United States invoked, *inter alia*, paragraph 4 of Article 7 of the *SCM Agreement* and requested that, upon establishment of a panel in this matter, the DSB initiate the procedures provided for in Annex V of the *SCM Agreement*, pursuant to paragraph 2 of that Annex.<sup>1</sup>

2. On 23 September 2005, the DSB initiated the procedures for developing information concerning serious prejudice under Annex V of the *SCM Agreement*, pursuant to paragraph 2 of Annex V of the *SCM Agreement*, and designated Mr. Mateo Diego-Fernández as a representative to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the *SCM Agreement*.<sup>2</sup>

#### B. WORKING PROCEDURES

3. Annex V does not describe all aspects of the procedures for developing information concerning serious prejudice. On 30 September 2005, Mr. Diego-Fernández (the "Facilitator") adopted Working Procedures for the Annex V procedure<sup>3</sup> (the "Working Procedures") after consulting upon them with the United States and the European Communities.

4. The Working Procedures provided for a round of questions and responses, and then a round of follow-up questions and responses. In each round, the United States and the European Communities would submit draft questions, comment on each other's draft questions and then pose final versions of the draft questions. Upon review of the questions submitted by the parties, the Facilitator would transmit questions that he considered necessary "to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute" as set out in paragraph 4 of Annex V. Questions could be addressed to third-country Members in the initial round of questions. Each party and third-country Member would respond to each question, or specify the reason why it did not respond, by a particular date.

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<sup>1</sup> Document WT/DS316/2. See also the minutes of the meetings of the DSB held on 13 June 2005 (WT/DSB/M/191, para. 4) and 20 July 2005 (WT/DSB/M/194, para. 49).

<sup>2</sup> See the minutes of the meeting of the DSB held on 23 September 2005 (WT/DSB/M/197, paras. 6 and 9).

<sup>3</sup> The Working Procedures, as modified, are contained in Attachment 1 to this report.

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5. Third-country Members were identified by the parties in their draft questions.<sup>4</sup>
6. The Working Procedures were transmitted to the parties upon adoption and to third-country Members at the time of transmission of questions to such Members.
7. The Working Procedures were modified on various occasions after consultations with the parties, in accordance with paragraph 16. On 4 November 2005, at the request of the parties, the Facilitator modified the date for submission of responses to initial questions in paragraph 6 by postponing it one week. On 15 November 2005, at the request of the parties, the Facilitator modified the method of delivery of responses in paragraph 12 to allow submissions to be made exclusively in electronic form. On 24 November 2005, the Facilitator modified the date for submission of draft follow-up questions in paragraph 7 by postponing it one week, with additional time for those questions which followed up on certain responses submitted after the deadline. At the same time, the Facilitator also eliminated the procedures for submission of comments on follow-up questions and finalized versions in paragraphs 7 and 8, in order to avoid undue delays in the process. Modifications to the Working Procedures were notified to the parties and to third-country Members upon adoption.

#### C. BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION

8. The Annex V process shall – pursuant to footnote 67 of Annex V – take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process. In this connection, and in light of the particularities of the large civil aircraft ("LCA") industry, the need to establish rules for the enhanced protection of certain information was recognized. Accordingly, paragraph 17 of the Working Procedures provided for the possibility of procedures for the protection of business confidential information. On 10 October 2005, the European Communities requested that the Facilitator adopt additional procedures for the protection of business confidential information and highly sensitive business information, and submitted a set of draft procedures. At the invitation of the Facilitator, the United States submitted comments to this draft on 13 October 2005.

9. The Facilitator responded by suggesting ways to most efficiently solicit necessary information as well as encourage the co-operation of the parties, consistent with paragraph 4 of Annex V of the *SCM Agreement*. Throughout the development of the procedures, the parties underlined that they should be specifically tailored to the particular nature of the market for LCA. As this market has only two producers and a limited number of major purchasers, the parties asserted that certain (e.g. price and cost) data of the LCA producers in these disputes was extraordinarily and uniquely sensitive. It was for this reason that, at the request of the parties, the Facilitator undertook to establish procedures to protect this information that substantially exceeded the protections that prior WTO panels had provided for certain kinds of information. On 19 October 2005, the Facilitator met the United States and the European Communities, and on 21 October 2005, he posed a series of questions to both of them. On 25 October 2005, the United States and the European Communities responded to the Facilitator's questions and, on 28 October 2005, commented on each other's responses. On

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<sup>4</sup> The European Communities, in its draft questions (and in document WT/DS317/2), identified the following 49 Members as third country Members: Argentina; Australia; Bahrain; Brazil; Brunei; Cameroon; Canada; Chile; China; Colombia; Egypt; El Salvador; Fiji; Hong Kong, China; Iceland; India; Indonesia; Israel; Japan; Jordan; Kenya; Kuwait; Madagascar; Malaysia; Mauritania; Mexico; Mongolia; Morocco; Namibia; New Zealand; Norway; Oman; Pakistan; Panama; Peru; Philippines; Romania; Senegal; Singapore; South Africa; Republic of Korea; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; Trinidad and Tobago; Tunisia; Turkey; United Arab Emirates and Venezuela. The Facilitator sent the questions to all these 49 Members.

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1 November 2005, the Facilitator transmitted to the parties a set of draft procedures, on which the parties commented on 3 November 2005.

10. On 4 November 2005, the Facilitator adopted the Procedures for the protection of business confidential information and highly sensitive business information for the Annex V procedure<sup>5</sup> (the "BCI/HSBI Procedures") in accordance with paragraph 17 of the Working Procedures. The Procedures were transmitted to the parties and third-country Members.

11. Briefly, the BCI/HSBI Procedures accord enhanced protection to information designated by a Party or Third Country Member as "Business Confidential Information" ("BCI") or "Highly Sensitive Business Information" ("HSBI"). In respect of BCI, only "Approved Persons", designated under the Procedures, may have access to such information, under specific conditions, and they must use such information only for the purposes of the Annex V process. No Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person. The Procedures also restrict copying, transmission and storage of BCI. In respect of HSBI, the Procedures stipulate, in addition, that HSBI shall be submitted to the WTO in electronic form, using locked CDs or two sealed laptop computers, and stored at the special HSBI location at the WTO Secretariat. No HSBI Approved Person shall disclose HSBI to any person except another HSBI Approved Person, and then only for the purpose of the specific dispute in which it is being used. Except as otherwise provided, HSBI shall not be stored, transmitted or copied either in written or electronic form. HSBI Approved Persons of a Party may view HSBI on the Sealed laptop computer submitted 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, subject to certain conditions. All HSBI must be stored in a safe at the relevant HSBI location.

#### D. PROCEDURAL ISSUES

##### 1. Approved Persons

12. On 11 November 2005, pursuant to paragraph 23 of the BCI/HSBI Procedures, the United States and the European Communities each submitted to the Facilitator a list of Representatives and Outside Advisors who needed access to BCI and HSBI submitted by the other party. On the same day, the designee of the Director-General of the WTO submitted to the Facilitator a list of Secretariat employees who needed access to BCI and HSBI in this dispute. On 18 November 2005 the United States revised its list by reducing the number of Representatives and Outside Advisors who needed access to HSBI.<sup>6</sup>

13. On 18 November 2005, in accordance with paragraph 26 of the BCI/HSBI Procedures, the Facilitator designated as Approved Persons those persons included on the list submitted on 11 November 2005 by the United States, as confirmed on 18 November 2005; those persons included on the list submitted on 11 November 2005 by the European Communities; and those persons included on the relevant list submitted on 11 November 2005 by the designee of the Director-General of the WTO. He indicated that HSBI Approved Persons were those Approved Persons specifically designated as such on the list submitted by the United States on 18 November 2005 (16 Representatives and 12 Outside Advisors), on the list submitted by the European Communities on

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<sup>5</sup> The Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information for the Annex V Procedure are contained in Attachment 2 to this report.

<sup>6</sup> The United States reduced its list in reaction to a comment from the European Communities received on 18 November 2005, pointing out that the United States had proposed the maximum number of persons possible under the BCI/HSBI Procedures, and that parties could not, in the future, give access to more persons by withdrawing some of the currently approved persons.

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

11 November 2005 (14 Representatives and 8 Outside Advisors) or by the designee of the Director-General of the WTO on the list submitted on 11 November 2005, as well as himself.

14. On 5 January 2006, the European Communities notified the designation of two of its existing Approved Persons as HSBI Approved Persons and the addition of three new persons to its list of Approved Persons. On 9 January 2006, the United States expressly indicated that it did not object to the designation of the two existing persons. On 27 January 2006, as no objection was received, one additional person, who had been notified by the Secretariat on 25 January, was added to its list of Approved Persons.

## **2. Designation of information**

15. On 10 January 2006, the United States formally objected to the European Communities' designation of certain information in 17 documents as highly sensitive business information. On 16 January 2006, the European Communities commented on the objections, at the invitation of the Facilitator. On 3 and 13 February 2006, the Facilitator posed questions to the European Communities concerning certain documents, without prejudice to the status of any other documents. On 8 and 14 February 2006, the European Communities responded to the Facilitator's questions.

16. On 15 February 2006 the Facilitator communicated to the parties his view that, while he rejected many of the US objections, he accepted the US objection that four documents or parts thereof designated as HSBI by the European Communities may not be designated as HSBI and that the European Communities should communicate in writing any action taken in light of the Facilitator's views and the BCI/HSBI Procedures by 20 February 2006. On that date, the European Communities requested the Facilitator to reconsider certain of his views, and the United States sent a related communication on 21 February 2006. On 21 and 22 February, the Facilitator took note of the parties' communications, confirmed his 15 February views and recalled his 15 February request that the European Communities submit written confirmation of any actions taken in light of those views. The European Communities was also requested to inform him whether it had decided to redesignate or withdraw the information concerned, so that he could act accordingly. On 22 February 2006, the European Communities indicated, among other things, that, due to the sensitivity of the documents concerned, "...the originators ha[d] indicated that they need a reasonable time to consider and discuss internally how to best proceed. On the basis of this, the EC s[aw] no other immediate solution than to exclude the four documents concerned ... from the batch of translations due [that] day." The European Communities indicated that it was "working closely with the parties concerned to reach a decision before the end of th[e] week", and requested the Facilitator to "hold off" on issuing his final report until the classification issue was settled and all the translations had been submitted. On 23 February, the Facilitator took note of the EC communication and indicated that he intended to issue his report by 24 February 2006, and unless he heard otherwise from the European Communities by a certain time on that day, he intended to deem the European Communities to have withdrawn the information concerned. On 24 February, the European Communities designated two of the documents concerned as BCI and withdrew the other two documents.

## **3. Other procedural issues**

17. On 16 November 2005, pursuant to paragraph 17(d) of the BCI/HSBI Procedures, the European Communities designated the Brussels office of Sidley Austin Brown Wood LLP as an additional Secure site for BCI. On 17 November 2005, pursuant to paragraph 17(d) of the BCI/HSBI Procedures, the United States designated the Washington D.C. and Berlin offices of Wilmer Hale as two additional Secure sites for BCI.

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

18. On 18 November 2005, at the time of delivery of responses, the Facilitator met with the United States and the European Communities to discuss certain practical matters concerning the smooth functioning of the Annex V process, including the parties' proposed modification of the timetable under the Working Procedures, as well as the operation of the HSBI location at the WTO in accordance with the BCI/HSBI Procedures.

19. On 25 November 2005, pursuant to paragraph 14 of the Working Procedures, the United States requested that the European Communities provide English-language translations of all the German language documents that it had provided in its responses to questions and of all the German language documents identified in Section VIII of the questions to the European Communities (Questions Nos. 340-352). On 30 November 2005, the European Communities objected to the request insofar as it related to publicly available official documents or websites to which the United States allegedly already had at its disposal before the Annex V process. After consulting with the United States and the European Communities, on 5 December 2005 the Facilitator fixed a staggered time-limit for the European Communities to provide the requested translations into English of documents provided in response to questions as follows: 6 January 2006 (750 pages); 31 January 2006 (750 pages); and 22 February 2006 (remaining pages).

20. Over the course of the Annex V process, the United States and the European Communities each made a series of comments regarding alleged deficiencies in the responses submitted by the other. The Facilitator took note of these comments.

#### E. EC MEMBER STATES

21. Four EC member States (France, Germany, Spain and the United Kingdom) are named as respondents in the request for consultations and the request for establishment of a panel in this dispute. Much of the information developed in this procedure under Annex V may concern measures of these four EC member States. However, whilst the European Communities spoke during the DSB meetings which led to the initiation of this procedure under Annex V of the *SCM Agreement* and communicated directly with the Facilitator during this procedure, the EC member States did not.

22. On 5 October 2005, in light of certain comments by the United States and the European Communities on draft questions<sup>7</sup>, the Facilitator wrote to the European Communities stating that it was his understanding that in this procedure under Annex V, the European Communities represented all five respondents in this dispute, namely itself, France, Germany, Spain and the United Kingdom. Accordingly, he intended to transmit questions to the European Communities on behalf of all five respondents and expected that the European Communities would respond on behalf of all five respondents.

23. On 6 October 2005, the European Communities replied that it was the proper respondent in this case. It advised that it had never said that it "represent[ed]" its member States but took full responsibility in these proceedings for the actions of its member States and would to the best of its ability provide documents that were properly requested wherever they might be located and trusted that the United States would do the same. It also considered that the term "and certain member States" could be deleted from the title of the dispute.

24. On 5 December 2005, the United States alleged that several responses submitted by the European Communities were ambiguous because they referred to the "European Commission". The

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<sup>7</sup> The European Communities and the United States exchanged views about whom the questions should be addressed to. (For example, the European Communities opined on this matter in its 29 September 2005 comments, and the United States, in turn, submitted its views in its 3 October 2005 comments).

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

United States stated that it was seeking information in the possession of EC institutions as well as the member States, all of which, in its view, were respondents in the dispute in their own right. It asked the Facilitator to send the questions directly to the member States themselves to ensure full and adequate responses.

25. On 7 December 2005, the European Communities reiterated its view that it was the sole respondent. It stated that it had internally closely cooperated with the member States and other bodies concerned to ensure the timely development of information and would continue to do so throughout the case. It recalled that the European Commission represented the European Communities before the WTO but, for clarity, references to the "European Commission" should be read as "European Communities". It asked the Facilitator to dismiss the United States' request.

26. In light of the above statements, the Facilitator did not transmit any questions directly to the EC member States but included several follow-up questions requesting documents and information that could be expected to be in the possession of a particular EC member State but which had not been provided by the European Communities in its responses to the original questions.

27. The Facilitator submits this report without prejudice to the issue whether France, Germany, Spain and the United Kingdom are separate respondents in this dispute represented by the European Communities, or whether they are incorporated within the European Communities as the sole respondent.

#### F. INFORMATION GATHERED

28. On 7 October 2005, in accordance with paragraph 5 of the Working Procedures, the Facilitator transmitted 352 questions (many including sub-questions) to the European Communities, 115 questions (some including sub-questions) to the United States, and eight questions to 49 third-country Members identified by the parties.

29. The Facilitator did not transmit certain draft questions that he did not consider "necessary to facilitate the expeditious subsequent multilateral review of the dispute" in accordance with paragraph 4 of Annex V of the *SCM Agreement* and paragraph 5 of the Working Procedures. Certain of these draft questions were submitted by the European Communities, in particular 216 draft questions addressed to the United States concerning the existence and amount of subsidization of Boeing by the United States and 54 draft questions addressed to Japan concerning the existence and amount of subsidization of Boeing's component manufacturers by Japan. Certain draft questions submitted by the United States were also excluded. The Facilitator also modified certain draft questions in order to ensure "the timely development of information" in accordance with paragraph 4 of Annex V of the *SCM Agreement* and paragraph 5 of the Working Procedures.

30. On 17 November 2005, the United States and the European Communities jointly informed the Facilitator that they had agreed that neither of them would respond, in the Annex V process, to a number of cost-related questions. As such, they provided a list of 24 questions or sub-questions posed to the European Communities and 27 questions posed to the United States. They indicated that this agreement did not affect the rights and obligations of the parties to request and disclose any information at a later stage in the dispute settlement proceeding.

31. On 18 November 2005, the European Communities and the United States provided responses to questions and specified the reason why they did not respond to certain other questions. The following third-country Members responded to questions posed to them – albeit with widely ranging degrees of comprehensiveness – or specified the reason why they did not respond to some or all of the

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questions<sup>8</sup>: Argentina; Australia; Brazil; Canada; Chile; China; Colombia; El Salvador; Hong Kong, China; Iceland; India; Indonesia; Israel; Japan; Jordan; Korea; Madagascar; Malaysia; New Zealand; Norway; Panama; Peru; the Philippines; Romania; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Turkey.

32. On 9 December 2005, in accordance with paragraph 9 of the Working Procedures, the Facilitator transmitted 280 follow-up questions (many including sub-questions) to the European Communities and 31 follow-up questions to the United States.

33. The Facilitator did not transmit certain draft follow-up questions that he considered did not ask for clarification or elaboration of responses provided to the original questions, in accordance with paragraph 7 of the Working Procedures.

34. On 22 December 2005, in accordance with paragraph 10 of the Working Procedures, the European Communities and the United States provided responses to follow-up questions and specified the reason why they did not respond to certain other follow-up questions.

35. On 6 and 31 January and 22 February 2006, the European Communities provided translations into English of documents provided in response to questions, in accordance with the staggered time-limits fixed by the Facilitator on 5 December 2005.<sup>9</sup>

36. The questionnaires, replies to questionnaires, follow-up questions and replies to follow-up questions constitute Annexes I – III to this report. However, the annexes omit information designated as Business Confidential Information ("BCI") and Highly Sensitive Business Information ("HSBI"). In accordance with paragraphs 30 and 40 of the Procedures for the protection of business confidential information and highly sensitive business information for the Annex V procedure, the Facilitator will submit BCI and HSBI to the Panel once the Panel has adopted its own BCI and HSBI procedures.

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## ATTACHMENT 1

[Working Procedures, as modified]

## ATTACHMENT 2

[BCI/HSBI Procedures]

### ANNEX 1: INFORMATION SUBMITTED BY THE EUROPEAN COMMUNITIES<sup>10</sup>

[Non BCI/HSBI CD-ROMs]

### ANNEX 2: INFORMATION SUBMITTED BY THE UNITED STATES

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<sup>8</sup> The following 20 Members did not respond: Bahrain; Brunei; Cameroon; Egypt; Fiji; Kenya; Kuwait; Mauritania; Mexico; Mongolia; Morocco; Namibia; Oman; Pakistan; Senegal; South Africa; Trinidad and Tobago; Tunisia; United Arab Emirates and Venezuela.

<sup>9</sup> See *supra*, para. 19.

<sup>10</sup> {Footnote added for the Panel report.} Annexes 1-3 are not reproduced in the Panel report.

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

[Non BCI/HSBI CD-ROMs]

**ANNEX 3: INFORMATION SUBMITTED BY THIRD-COUNTRY MEMBERS**

[Non BCI/HSBI CD-ROM produced by the Secretariat]

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ATTACHMENT 1

*EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES –  
MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT  
(DS316)*

and

*UNITED STATES – MEASURES AFFECTING TRADE IN  
LARGE CIVIL AIRCRAFT  
(DS317)*

**WORKING PROCEDURES FOR DEVELOPING INFORMATION  
UNDER ANNEX V OF THE AGREEMENT ON SUBSIDIES  
AND COUNTERVAILING MEASURES**

(24 November 2005)

**I. SCOPE OF THE PROCEDURES**

1. These procedures apply to the development of information between the parties pursuant to Annex V in disputes DS316 and DS317. These procedures provide for the application of identical rules and schedules for the separate Annex V processes that will develop the factual records in the two disputes. It shall be without prejudice to the rights and obligations of the parties under the *SCM Agreement* and the DSU, unless explicitly otherwise provided herein.

**II. STEPS IN THE PROCEDURE**

2. On 23 September 2005, each party submitted to the other party and to the facilitator a draft of the questions the party proposes be asked of the other party and of third-country Members. On 29 September 2005, each party submitted to the other party and to the facilitator comments on the draft questions submitted by the other party on 23 September 2005.

3. At the request of a party, the facilitator may direct a question equivalent to one directed to that party in the Annex V process in one dispute to the other party in the Annex V process in the other dispute.

4. At the latest on 3 October 2005, each party will transmit to the other party and to the facilitator a final version of its questions, which may incorporate revisions to reflect the other party's comments and additional questions only in accordance with paragraphs 2 and 3.

5. Upon review of the questions submitted by the parties, and any comments submitted under paragraph 2, the facilitator will transmit to the parties and to third-country Members any questions that he considers necessary to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute, at the latest on 7 October 2005.

6. Each party / third-country Member will respond to each question transmitted to it by the facilitator pursuant to paragraph 5 or specify the reason why it does not respond, at the latest on 18 November 2005.

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7. The parties may submit draft follow-up questions to each other at the latest on 5 December 2005, except as provided in paragraph 8. "Follow-up questions" are exclusively those questions that ask for clarification or elaboration of responses provided under paragraph 6.

8. The European Communities may submit draft follow-up questions that ask for clarification or elaboration of responses provided by the United States on 23 November 2005 at the latest on 7 December 2005.

9. Upon review of the follow-up questions submitted by the parties, the facilitator will endeavour to transmit to the parties the follow-up questions that he considers necessary to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute at the latest on 9 December 2005.

10. Each party will respond to each follow-up question transmitted to it by the facilitator, or specify the reason why it does not respond, at the latest on 22 December 2005.

11. For ease of reference, when submitting documents annexed to responses to questions and follow-up questions, parties and third-country Members will number exhibits sequentially, with US exhibit numbers prefixed with "US-" and EC exhibit numbers prefixed with "EC-" (and third-country Members using a suitable prefix).

12. Each party / third-country Member will file the submissions envisaged in these procedures with the Secretariat (Mr. Ferdinand Ferranco (Office 3154)), by 5pm on the deadlines established by the facilitator. In addition, each party must serve a single copy of the submissions envisaged in these procedures on the other party, and third-country Members must serve single copies of their responses on both of the parties.

13. The parties and third-country Members may file submissions with the Secretariat in hard copy or electronic format. They will provide electronic copies of any hard copy submissions to the Secretariat at the time they provide any such submissions. Submissions in electronic format should, if possible, be in a format compatible with that used by the Secretariat. If the electronic version is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to guy.evans@wto.org, hiromi.yano@wto.org and matthew.kennedy@wto.org. If a diskette or CD-ROM is provided, it should be delivered to Mr. Ferdinand Ferranco. Each party will also provide electronic copies of their submissions to the other party, and third-country Members will provide electronic copies of their submissions to both parties.

14. A party / third-country Member submitting documents in response to a question or follow-up question will provide a copy in the original language, it being understood that the party / third-country Member will also submit an English version if one is available. Each party may request translations into English of any document or information provided in response to a question that is not submitted in a WTO language as of 25 November 2005. Each party may also request translations into English of any document or information provided in response to a follow-up question that is not submitted in a WTO language as of 9 January 2006. Any such translations will be provided by the party / third-country Member submitting the relevant document or information. The time limit for providing these translations will be fixed by the facilitator.

15. The facilitator will transmit any responses submitted by parties and third-country Members, as well as the requested documents and any translations thereof, taking account of the time that he considers to be necessary for the translation of documents as set out in paragraph 14 above. The facilitator will submit this information to each of the panels separately, but on the same day.

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

### **III. FINAL CLAUSES**

16. The facilitator may at any time modify these working procedures, including the timetable, after consulting with the parties.

17. The parties may propose to the facilitator procedures for the protection of business confidential information during the present Annex V procedure. If the parties do so, the facilitator will adopt procedures for the protection of business confidential information during the course of the present Annex V procedure. The facilitator will be considered a "covered person" for purposes of paragraphs II:1, III:1, III:2, VI:2, VI:5, VII:1, VII:2, VIII:1, VIII:2, and VIII:5 of the Rules of Conduct, and will be subject to the same obligations as a panellist under paragraphs IV:1, VI:1(a); VI:4(a), VIII:5, and VIII:7.

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

ATTACHMENT 2

*EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES –  
MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT  
(WT/DS316)*

and

*UNITED STATES – MEASURES AFFECTING TRADE IN  
LARGE CIVIL AIRCRAFT  
(WT/DS317)*

**PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL  
INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION  
IN THE PROCEDURE UNDER ANNEX V OF THE SCM AGREEMENT**

(4 November 2005)

**I. GENERAL**

These procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of Annex V of the SCM Agreement and Article 13 of the DSU.

**II. DEFINITIONS**

1. **"Approved Persons"** means:
  - (a) Representatives or Outside Advisors of a Party, or Employees of the Secretariat, when designated in accordance with Section IV of these procedures; and
  - (b) the Facilitator.
2. **"Business Confidential Information"** or **"BCI"** means any business information that a Party or a Third-country Member has "Designated as BCI" regardless of whether contained in a document provided by a public or private body because it is not otherwise available in the public domain. Each Party and Third-country Member shall act in good faith and exercise restraint in designating information as BCI, and will endeavor to designate information as BCI only if its disclosure would cause harm to the originators of the information.
3. **"Conclusion of the Panel Process"** means the earliest to occur of the following events:
  - (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the report;
  - (b) pursuant to Articles 16.4 and 17.14 of the DSU, the Appellate Body report is adopted and the Panel report is adopted as modified, if at all, by the Appellate Body report;
  - (c) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; and

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

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

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

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

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

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

7. **"Employee of the Secretariat"** means a person employed or appointed by the Secretariat who has been authorized by the Secretariat to work on the dispute.

8. **"Facilitator"** means the person designated by the DSB in accordance with paragraph 4 of Annex V of the *SCM Agreement*.

9. **"Highly Sensitive Business Information"** or **"HSBI"** means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third-country Member has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third-country Member's view, cause exceptional harm to its originators. Each Party and Third-country Member shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party and Third-country Member may at any time designate as non-BCI/HSBI or as BCI information designated by that Party or Third-country Member 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>1</sup>, and, except as provided

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<sup>1</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

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- in subparagraph (d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;
- (ii) information gathered or produced in the context of LCA sales campaigns;
  - (iii) information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, investment banks or the European Investment Bank, with regard to LCA products; or
  - (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 is not otherwise available in the public domain and the disclosure of which could, in the Party's view, cause exceptional harm to its originators. In case the other Party objects to the designation of such information as HSBI, the dispute shall be resolved by the Facilitator. If the Facilitator disagrees with designation of information as HSBI, the submitting Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. The Facilitator 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.
- (c) Each Party shall Designate as HSBI any information described in subparagraph (a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of the other Party.
- (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 (a);
  - (iv) the terms and conditions of loans, other than information described in subparagraph (a); and
  - (v) intergovernmental agreements and government decisions, other than information described in subparagraph (a).

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information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

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

10. "**HSBI Approved Person**" means Approved Persons specifically designated by the Parties and the Director-General of the WTO or his designee as having the right to access HSBI (according to the procedures laid down in Section IV), as well as the Facilitator.

11. "**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 the HSBI submitted by the United States, the European Communities and any Third-country Members, on the premises of the WTO (Centre William Rappard, Rue de Lausanne 154, Geneva, Switzerland);
- (b) for HSBI submitted by the United States, on the premises of the United States Mission to the European Union in Brussels;
- (c) for HSBI submitted by the European Communities, on the premises of the Delegation of the European Commission to the United States in Washington;
- (d) for HSBI submitted by a Third-country Member, on the premises of its Geneva Mission to the WTO, should that Third-country Member so wish.

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

13. "**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).

14. "**Party**" means the European Communities or the United States.

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 paragraph 37. However, HSBI may not be edited on the sealed laptop computer.

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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 Facilitator and the Secretariat, on the premises of the WTO (Centre William Rappard, Rue de Lausanne 154, Geneva, Switzerland);
- (b) in the case of the European Communities, the offices of External Relations 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 Delegation of the European Communities to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and one additional site specified in accordance with subparagraph (d);
- (c) in the case of the United States, the offices of the General Counsel of the Office of the United States Trade Representative (600 17<sup>th</sup> Street, NW, Washington, DC, USA), the offices of the United States International Trade Commission (500 E Street, S.W., Washington, DC, USA) the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and one additional site specified in accordance with subparagraph (d); and
- (d) two 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, the Facilitator, and the other Party has not objected to the designation of that site within ten days of such submission.

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

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. "**Third-country Member**" means Members to whom questions have been submitted by the Facilitator in accordance with paragraph 3 of Annex V of the SCM Agreement.

### **III. SCOPE**

21. These procedures apply to all BCI and HSBI received by an Approved Person as a result of the Annex V procedures. Unless this Understanding specifically provides otherwise, these procedures do not apply to a Party's treatment of its own BCI and HSBI.

22. The Facilitator is aware that, in order to respond fully to all questions, the United States may need to submit information pertaining to United States Special Access Programs, and/or information that it internally classifies as "Top Secret", "Secret", or "Confidential". Similarly, the European Communities may need to submit information that it internally classifies as "EU Top Secret", "EU Secret" or "EU Confidential". The Facilitator 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 in the context of the present Annex V procedure 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**

23. At the latest on 11 November 2005, each Party shall submit to the other Party, and to the Facilitator a list of the names and titles of its Representatives and Outside Advisors who need access to BCI and HSBI submitted by the other Party and whom it wishes to have designated as Approved Persons for either DS316 and/or DS317, along with any clerical or support staff that would have access to the BCI and HSBI.

24. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a combined total of 20 Representatives and 15 Outside Advisors as "HSBI Approved Persons" for both disputes.

25. The Facilitator shall have access to BCI and HSBI. The Director-General of the WTO, or his designee, shall submit to the Parties, and the Facilitator, a list of the employees of the Secretariat who need access to BCI and/or HSBI for each dispute.

26. Unless a Party objects to the designation of an Outside Advisor of the other Party or an Employee of the Secretariat, the Facilitator 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 paragraphs 23 or 25 that would suggest that designation of an individual is not appropriate. If a Party objects, the Facilitator shall decide on the objection within ten days.

27. 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.

28. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to objections for the addition of new Approved Persons in accordance with paragraph 27.

#### **V. BCI**

29. To the extent possible, BCI should be submitted in an exhibit or annex to a response to an Annex V question or to a submission. An entire response to an Annex V question or an entire submission, or significant parts thereof, may be designated as BCI only when necessary.

30. Only Approved Persons may have access to BCI submitted in each of these proceedings. Approved Persons shall use BCI only for the purposes of the Annex V process. No Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person. The Facilitator is entitled to disclose BCI information to the members of each Panel, once these have adopted their own procedures on BCI.

31. A Party shall make no more than one copy of any BCI submitted by the other Party and any Third-country Member for each Secure site provided for that Party in paragraph 17.

32. BCI submitted pursuant to these procedures shall not be copied, distributed, or removed from the Secure site, except as necessary for submission to the Panel in accordance with paragraph 5 of Annex V of the SCM Agreement.

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

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34. Any document or annex referenced in paragraph 33 shall not be copied in excess of the number of copies required by the Approved Persons. All copies of such documents or annexes shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible. Such documents may be transmitted electronically only by using secure e-mail. Unless the submitting Party agrees otherwise, original documents containing the information designated as BCI shall not be transmitted electronically, and shall be viewed only on a Stand-alone computer and printed on a Stand-alone printer. If a Party submits to the Facilitator an original document that cannot be transmitted electronically, it shall on the day of submission deliver a copy of that document to the first secure site listed for the other Party in paragraph 17.

35. Approved Persons shall store BCI only in locked security containers. 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.

## VI. HSBI

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

37. HSBI shall be submitted to the WTO in electronic form, using locked CDs or two Sealed laptop computers connectable to 19" - 21" monitors.<sup>2</sup> HSBI shall be stored at the HSBI location indicated in paragraph 11a) and shall be made available for viewing and use by HSBI Approved Persons pursuant to paragraph 39 below. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO for access by HSBI Approved Persons acting on behalf of the other Party in the HSBI location listed in paragraph 11 located within its territory. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper and marked in accordance with paragraph 5. 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.

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

39. HSBI Approved Persons of a Party may view HSBI on the Sealed laptop computer submitted 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 11, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI location, except at the location indicated in paragraph 11a) where the room will also be available during weekends to the Facilitator and HSBI Approved Persons designated by the Director-General of the WTO or his designee. HSBI Approved Persons may not bring into that room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from that 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 the individual dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI location 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 11, maintain such log until one year after the Conclusion of the Panel Process. Before

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<sup>2</sup> Only Locked CDs may be used for HSBI submitted by a Third-country Member.

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entering and when leaving the room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls. Viewing of HSBI at the location indicated in paragraph 11(a) by HSBI Approved Persons designated by the Parties shall be conducted under the observation of a WTO security guard or employee.

40. No Approved Person shall disclose HSBI to any person except another HSBI Approved Person, and then only for the purpose of the specific dispute in which it is being used. The Facilitator is entitled to submit HSBI to each Panel pursuant to paragraph 5 of Annex V of the SCM Agreement, once that Panel has adopted its own HSBI procedures.

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

42. All HSBI shall be stored in a safe at the relevant HSBI location.

## **VII. RESPONSIBILITY FOR COMPLIANCE**

43. Each Party is responsible for ensuring that its Approved Persons and designated Representatives 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. The Secretariat is responsible for ensuring that its employees comply with these procedures to protect BCI and HSBI submitted by a Party or Third-country Member and for adhering to the requirements to provide access in the WTO to Approved Persons and to control the use by HSBI Approved Persons when reviewing the material in the WTO premises. The Facilitator shall comply with these procedures to protect BCI and HSBI submitted by a Party or Third-country Member.

## **VIII. ADDITIONAL PROCEDURES**

44. After consulting with the Parties, the Facilitator may apply any other additional procedures that he considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures. In the event that the Facilitator applies additional procedures or modifies these procedures as applied in that dispute, the Parties will endeavour to obtain adoption of the same procedures in the other dispute.

45. The Facilitator 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**

46. After the Conclusion of the Panel Process, within a period fixed by the Facilitator, the Facilitator, the Secretariat and the Parties (along with all Approved Persons) shall return all documents (including electronic material) or other recordings containing BCI to the Party or Third-country Member that submitted such documents or other recordings. The Facilitator, Secretariat, and the Parties shall destroy and/or return any electronic material submitted by a Party or Third-country Member that contains HSBI.

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