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ANNEX F

SELECTED RULINGS OF THE PANEL CONCERNING BCI/HSBI PROCEDURES AND THEIR APPLICATION

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ANNEX F-1

COMMUNICATION OF 13 MARCH 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. Having considered the United States' comments on the proposed non-BCI version of the European Communities' first written submission, and the EC's response, the Panel has reached certain decisions on this issue, and on certain other matters concerning the application of the Panel's BCI/HSBI Procedures in this dispute. Because the Panel recognizes the importance of clarifying issues relating to these Procedures as soon as possible, it has decided to issue a ruling on the issue of designation of BCI in the EC's first written submission, and certain other matters, at this time. The Panel is still considering other issues before it, including issues relating to the designation of HSBI in the EC's first written submission, and will address these issues as soon as possible.

2. Before turning to the resolution of the issue of designation of BCI in the EC's first written submission, the Panel observes, as a general matter, that the Panel's BCI/HSBI Procedures are designed to protect specific *information*, not entire submissions or other documents. It is for this reason that paragraph 4 of the BCI/HSBI Procedures requires that the specific information designated as BCI/HSBI be set off within brackets (single or double, as appropriate) within any given printed or electronic document. This general understanding of the meaning of BCI and HSBI has implications with respect to the manner in which the BCI/HSBI Procedures are to be applied.

- (a) First, the Panel would like to clarify that the Parties are not to present entire submissions or exhibits categorized as BCI or HSBI, but rather are to specifically identify, through the use of brackets as provided for in paragraph 4, the information *within* those submissions or exhibits they consider should be so designated. We note, for example, that the EC did not, in its letter dated 6 March submitted as "BCI version", specifically identify through the use of brackets *any* specific information as BCI. If a Party considers that a submission or exhibit contains BCI it **must** identify that information through the use of brackets as envisaged by paragraph 4.
- (b) Second, the Panel does not consider that "opinions" or "positions" may be designated as BCI or HSBI merely because those opinions or positions were expressed in relation to BCI or HSBI.¹ This is clear from the BCI/HSBI Procedures themselves, which specifically envision that "the Panel may make statements or draw conclusions that are based on the information drawn from" the BCI or HSBI (paras. 42 and 53), and further require that a Party provide on request a non-BCI or non-HSBI summary of BCI or HSBI sufficient to permit a reasonable understanding of the substance of the information (paras. 38(c)(i) and 52(d)(ii)). Of course, the Parties must exercise caution to ensure that the "opinions" or "positions" drawn from the BCI or HSBI do not reveal any specific BCI or HSBI information. This line may be a difficult one to draw in some cases, but this does not justify a blanket approach to designating such "positions or "opinions" as BCI or HSBI in their entirety.
- (c) Third, the BCI/HSBI Procedures clearly state that information can be treated as BCI or HSBI only if it is "not otherwise in the public domain" (paras. 2 and 9). The fact

¹ It should be evident from the foregoing that the Panel does not accept the view of the EC that personal opinions may in and of themselves be BCI or HSBI merely because those *opinions* are not in the public domain.

BCI deleted, as indicated [***]

that information is also found in "BCI [or HSBI] documents" does not mean that such information can be treated as BCI or HSBI if it is demonstrably and unambiguously available in the public domain. The relevant question for designation of information as BCI or HSBI is not the source of the information *per se*. The Panel notes that the decision whether information is demonstrably and unambiguously available in the public domain may be difficult. Thus, the Panel has erred on the side of caution in resolving the specific objections at this point, where it has been unable to satisfy itself on the basis of available information. The Panel may revisit these objections in the future.

- (d) Fourth, the Panel notes the EC's concern for the protection of Boeing documents and its designation of such documents as BCI or HSBI. The Panel considers, however, that the standard for determining whether such information is BCI or HSBI relates to the possibility of harm to the "originator" of the information, which in this case is Boeing, in the event of disclosure. In our view, the originator of a document is entitled, through its government, to waive BCI or HSBI status where it believes that disclosure of the information would not cause the requisite harm, or where it is prepared to accept such harm. The Panel doubts that it would be consistent with fundamental fairness for it to rely on documents originated by a stakeholder where that stakeholder was unaware that those documents were even before the Panel because they were designated as BCI or HSBI by the other party.
- (e) Fifth, with respect to titles of exhibits, the Panel emphasizes its view that it is not documents themselves, much less the very existence of such documents, which may be designated as BCI or HSBI, but information within those documents. In this light, the Panel does not believe it appropriate, as a general matter, to bracket the titles of exhibits as BCI and HSBI in their entirety. If, as an exceptional matter, the title itself contains specific information that a Party considers to be BCI or HSBI, the Panel requests that the Party identify the document with a non-BCI/HSBI title that permits a reasonable understanding of the nature of the exhibit in question.
- (f) Finally, the Panel notes that the EC has indicated, in numerous instances, its willingness to re-designate certain information as non-BCI. The Panel has accepted such re-designations as resolving the US objection with respect to the information in question and appreciates the cooperative spirit shown by the EC in this respect.

The Panel has applied these general principles in resolving the specific objections raised by the US regarding designation of BCI in the EC's first written submission. The Panel's specific decisions are set out in the attached annex, which contains BCI. The annex also indicates those instances where the Panel has accepted the EC's proposed re-designation of information as non-BCI. The Panel directs the EC to prepare a revised version of its first written submission, reflecting the Panel's decisions and the re-designations proposed by the EC and accepted by the Panel, and submit it to the Panel, and serve the United States, no later than close of business **Thursday 15 March 2007**.

3. Turning to other issues, the Panel notes the United States' concern regarding the EC's decision to provide HSBI in the body of its submission rather than as a separate stand-alone Appendix. The EC disputes the US understanding that such a stand-alone document is required², but indicates its willingness to provide an Appendix consisting of the full text of the paragraphs and footnotes of the

² The Panel notes, however, that the EC itself stated when explaining the proposed language for the provision that corresponds to the current paragraph 52 "the suggested language clarifies that *HSBI must be provided separately from other parts of the written submission which allows the separate treatment of this part of the written submission as required by the rules pertaining to HSBI.*" "Note 14" in EC letter of 29 September 2006. (Emphasis added.)

BCI deleted, as indicated [***]

EC's first written submission in which information designated as HSBI appears. While the Panel does not consider that such an Appendix fully satisfies the requirement for a "Full HSBI Version Appendix" envisaged in paragraph 52(b) of the BCI/HSBI Procedures, it considers the EC's proposal to be a reasonable effort to address the issue identified by the United States with respect to the first written submission. The Panel therefore requests that the EC prepare such an Appendix in respect of its first submission by close of business **Thursday 15 March 2007**, in order to facilitate the first meeting of the Panel.³

4. The Panel further requests that the Parties prepare an appropriate "Full HSBI Version Appendix" in respect of all future submissions to the Panel that contain HSBI, as envisaged by the BCI/HSBI Procedures. In the view of the Panel, such an Appendix must be a readable document in its own, and not simply a compilation of paragraphs containing HSBI.⁴

5. With regard to the treatment of the HSBI exhibits that accompanied the EC's first written submission⁵, the Panel realizes that there is certain ambiguity in the BCI/HSBI Procedures.⁶ However, given the fact that the US has provided an electronic copy of its HSBI Exhibit in CD form,⁷ the Panel considers it fair to request the EC to submit the HSBI exhibits in locked CD form, by close of business on **Thursday 15 March 2007**. The Panel draws the attention of the EC to the fact that it must serve this CD in accordance with paragraph 52(g) of the BCI/HSBI Procedures.

6. The Panel notes the US request that the Panel "permit the United States to produce one paper copy of the 'HSBI version' of the EC's written submission for each of its three secure sites".⁸ As this would be a major deviation from the carefully negotiated provisions of the BCI/HSBI Procedures, the Panel declines to grant this request.

7. The Panel recognizes that the application of the BCI/HSBI Procedures implies a significant burden on the Parties (and on the Panel), but the Parties were well aware that this would be the case when they sought such procedures. The Panel considers it essential that these Procedures be implemented in a manner that protects the legitimate rights of defence of both Parties, and that allows the Panel to perform its work and to explain its ultimate decision in a comprehensible manner. If these Procedures prove inadequate as implemented, the Panel could be forced to re-examine them. The Panel further notes that the efficiency of these Procedures at the panel level may influence the views of the Appellate Body with respect to how to treat information in the event of an appeal. It is therefore important that the Parties work together in a cooperative spirit to maintain the credibility of these Procedures.

³ Given that the issue of the designation of HSBI is unlikely to be resolved in advance of the Panel's first meeting, the Panel requests that the EC prepare an interim version of this Appendix on the basis of existing designations.

⁴ Parties have already confirmed this understanding. See letters from the US and from EC dated 17 October 2006.

⁵ As requested by the US in section C of its 28 February letter.

⁶ For example, the Panel notes that BCI exhibits are not part of the record to which Third Parties BCI Approved Persons are granted access.

⁷ The Panel notes that the EC did not object to such treatment of an HSBI exhibit.

⁸ Cover letter of the US dated 28 February.

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ANNEX

SPECIFIC ISSUES RAISED BY THE US REGARDING DESIGNATION
OF BCI IN THE EC'S FIRST WRITTEN SUBMISSION

No. of paragraph	CONTENT	DECISION OF THE PANEL
120	A summary of the European Communities' perception on the United States' compliance with Article 5 was communicated by Sir Leon Brittan, the then Commissioner for Trade, to his counterpart in 1997: [***. ⁹]	The Panel accepts the EC re-designation.
121	In her response, Mrs. Barshevsky put forward the following view: [*** ¹⁰]	The Panel accepts the EC re-designation.
321	The amount of the levy [***]. This [***] reflects the fact that the effect of a manufacturer's learning curve for an aircraft reduces production costs and, thereby, increases cash on hand. ¹¹	The Panel sustains the US objection.
322	After MSF debt and interest are repaid in full, AMs/NatCos may be required to [***] for subsequent aircraft deliveries. The [***] is calculated either as [*** ¹²] [***] may significantly enhance an MSF creditor's return on its investment.	With respect to information in the first and fourth sets of brackets, the Panel accepts the EC re-designation. With respect to information in the second set of brackets, the Panel sustains the US objection.
336	The French government also provided [***] in MSF loans to support the development of the A340-500/600. ¹³	The Panel is not prepared to rule on this objection at this time.
337	Likewise, the Spanish government provided [***] in loans for the A340-500/600 variant.	The Panel is not prepared to rule on this objection at this time.
339	To protect governments from unfavourable changes in interest rates, repayment obligations for the A380 are generally tied to variable, as opposed to fixed, rates of return. The loan amounts were [***]	The Panel is not prepared to rule on this objection at this time.
364	-	The Panel accepts the EC re-designation.
365	-	The Panel accepts the EC re-designation.

⁹ [***].

¹⁰ [***].

¹¹ [***].

¹² [***].

¹³ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
366	-	The Panel accepts the EC re-designation.
369 and notes 280-284	-	The Panel accepts the EC re-designation.
370	-	The Panel accepts the EC re-designation.
371	-	The Panel accepts the EC re-designation.
372	-	The Panel accepts the EC re-designation.
note 284	Sondergutachten der Monopolkommission, at p. 71, Table 11, table entry "davon bis Ende 1988 ausbezahlt" for the A320 (Exhibit US-30). The US itself notes the fact that disbursement had reached the level of [***] already in 1988 (US first written submission, p. 51, note 194).	The Panel accepts the EC re-designation.
377	The Spanish commitments for the A330/A340 reached the level of [***].	The Panel accepts the EC re-designation. The Panel understands that the US is not objecting to other BCI in this paragraph.
378	-	The Panel accepts the EC re-designation.
note 356	(to para. 483, which reads: <i>By way of background, the US approach correctly conceives of MSF as a form of debt financing. The Ellis report repeatedly refers to MSF as "launch aid debt" and "launch aid loans."</i>¹⁴ Consistent with this conception of MSF as debt, the first two steps of the Ellis model (i.e., the risk-free rate and the premium for general corporate risk) rely entirely on bond yields.³⁵⁶) [***]	The Panel sustains the US objection. The Panel requests that the EC re-designate all citations of the "Ellis Report" in all of the footnotes in its first submission as non-BCI.
508	Professor Whitelaw explains that Ellis overstates the cost of equity by employing incorrect assumptions. Professor Whitelaw [*** ¹⁵] Drawing on recent scholarship, Professor Whitelaw concludes that the risk premium would be no more than [*** ¹⁶ . *** ¹⁷]	The Panel sustains the US objection.

¹⁴ [***].

¹⁵ [***].

¹⁶ [***].

¹⁷ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
509	In sum, the European Communities calculates the alternative benchmark rates by [***]. The European Communities notes that the Ellis report applies a fixed project-specific risk premium for all Airbus aircraft models. ¹⁸ The European Communities adopts the same approach.	The Panel sustains the US objection.
515	<i>Second</i> , recent scholarship confirms that the Ibbotson methodology substantially overstates the equity risk premium. Professor Whitelaw explains that many scholars have <i>rejected</i> the Ibbotson approach, which is based on historical (<i>ex post</i>) results that fail to reflect investor expectations <i>ex ante</i> . Instead, more recent studies show that the actual equity-based risk premium is between [***]. ¹⁹	The Panel sustains the US objection.
595	The European Communities has provided the Panel with the measure. The United States alleges that there is an export contingent subsidy in the provisions of Article 7 of the measure that refer to payments on the [***] aircraft, and which provide as follows ²⁰ : The repayment instalment per aircraft is defined as follows on the basis of the overall loan in the amount of [***]. It is for {...}:	The Panel is not prepared to rule on this objection at this time.
878	-	The Panel accepts the EC re-designation.
881	-	The Panel accepts the EC re-designation.
907	-	The Panel accepts the EC re-designation.
912	[*** ²¹ . ***]. The development of the ZAC involved two types of works:	The Panel is not prepared to rule on this objection at this time.
917	Furthermore, [***].	The Panel is not prepared to rule on this objection at this time.
929	<i>Second</i> , the findings of a commercial appraiser confirm that the price of the land purchased by Airbus France in the ZAC Aéroconstellation was consistent with market terms. ²² [***].	The Panel sustains the US objection.
949	-	The Panel accepts the EC re-designation.

¹⁸ [***].

¹⁹ [***].

²⁰ [***]; US first written submission, paras. 321, 328, 347, 353 second bullet and footnote 415, 354, 357 and footnote 419, and 360.

²¹ [***].

²² [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
950	-	The Panel accepts the EC re-designation.
951	-	The Panel accepts the EC re-designation.
952	-	The Panel accepts the EC re-designation.
953	-	The Panel accepts the EC re-designation.
955	-	The Panel accepts the EC re-designation.
957	-	The Panel accepts the EC re-designation.
958	-	The Panel accepts the EC re-designation.
959	-	The Panel accepts the EC re-designation.
984 and 985	<p><i>{Footnotes omitted}</i></p> <p>984 The United States alleges that the Welsh Assembly Government (WAG) provided an <i>ad hoc</i> grant of [***] to Airbus UK in Broughton and seems to argue that for this reason the grant is specific. It bases its claim on an application for a grant that it admits Airbus UK did not receive. Airbus UK's request for a [***] grant under the "Regional Selective Assistance" (RSA) programme was rejected by the WAG in March 2000. The United States assumes, without any evidence, that the [***] granted in September 2000 was an <i>ad hoc</i> replacement for the failed RSA claim.</p> <p>985 This claim is without foundation. In fact, the [***] was neither <i>ad hoc</i>, nor an RSA grant. Rather, it was made up of two grants of [***], each made under other generally-available programmes and therefore non-specific within the meaning of Article 2 of the <i>SCM Agreement</i>. Indeed, the US allegation of specificity of the two grants is based entirely on its assumption that they were a direct substitute for the RSA grant. Since there was no RSA grant, the United States has not made a <i>prima facie</i> case of specificity. However, for the sake of completeness, the European Communities will demonstrate that the grants are non-specific.</p>	<p>(Para 984) The Panel accepts the EC re-designation.</p> <p>(Para 985) With respect to the first set of brackets, the Panel accepts the EC re-designation. With respect to the second set of brackets, the Panel sustains the US objection.</p>
986	In 2000, the Welsh Assembly Government, through the North Wales Training and Enterprise Council (CELTEC), awarded [***] grant {...}.	The Panel sustains the US objection.

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
994	Although the United States did not allege the contrary, the European Communities would like to (pre-emptively) add, that there was neither a <i>de facto</i> specificity under Article 2.1(c) of the <i>SCM Agreement</i> . During the period when the grant of [***] to Airbus UK was disbursed (FY 2000/2001 – FY 2005/2006), {...}.	The Panel sustains the US objection.
1036	The European Communities notes, first, that while the EIB established in 2002 a "credit" or "commitment" in favour of EADS in the amount of EUR 700 million, only EUR [***] was ever actually drawn by EADS and this took place in [***]. The other [***] commitment [***]. ²³	The Panel accepts the EC re-designation. The Panel understands that the US is not objecting to other BCI in this paragraph.
1041	-	The Panel accepts the EC re-designation.
1057	The United States ignores completely the fact that none of the 1988-1993 loans (outstanding or not ²⁴) was provided to the company that markets and produces LCA today (Airbus SAS). With regard to the outstanding loans, the [***] was granted to [***], and the [***] ²⁵ . The United States has not explained how any benefit allegedly conferred by these loans has passed through to Airbus SAS in such a manner as to cause the types of present adverse effects to US LCA-related interests alleged by the United States in these proceedings.	The Panel sustains the US objection with respect to the phrase "[***]" and denies the remainder of the US objection.
1092	EADS [***].	The Panel sustains the US objection except with respect to the phrase "[***]", with respect to which the Panel denies the US objection.
1098	[***]. ²⁶	The Panel sustains the US objection.
1099	[***]. ²⁷	The Panel sustains the US objection, except with respect to the phrase "[***]", with respect to which the Panel denies the US objection.

²³ [***].

²⁴ See also the discussion above where the EC explains that except for the [***], none of the 1988-1993 loans is still outstanding.

²⁵ [***].

²⁶ Daily Treasury Yield Curve Rates from http://www.ustreas.gov/offices/domestic-finance/debt-management/interest-rate/yield_historical_2004.shtml

²⁷ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
1103	Finally, the European Communities notes that with regard to the [***] loan, {...}.	The Panel sustains the US objection.
1184	These claims consisted of: [***, ²⁸ ***].	The Panel is not prepared to rule on this objection at this time.
1399	-	The Panel accepts the EC re-designation.
1404	Both Boeing and Airbus, along with market analysts, use the respective manufacturer's current year order book to evaluate the competitive position of Airbus and Boeing. Christian Scherer, Airbus Executive Vice President Head of Future Programs and former Deputy Head of Airbus' commercial department, notes that [*** ²⁹] Also, Boeing uses order data to demonstrate the success and "market share" of, <i>inter alia</i> , its 787, 777 and 747 families. This is reflected in the Boeing marketing slide below ³⁰ :	The Panel sustains the US objection.
1406	Orders are important for the manufacturer because the terms and conditions of the purchase are set at the time of order. Aircraft specification, net price, discounts, non-price concessions and financing arrangements involving the manufacturer are all agreed upon when an airline or leasing company signs a purchase agreement. [*** ³¹] [*** ³²]. Finally, the order intake determines the amount of future deliveries. ³³	The Panel sustains the US objection.
1416	Airlines and leasing companies often decide to order a certain aircraft model without considering the competitor's equivalent product. An airline may choose not to initiate a bidding process between the two manufacturers [***. ³⁴ ***:] [***. ***] ³⁵ .	The Panel sustains the US objection.
1418	There are also situations in which one manufacturer cannot compete for lack of having a product that can fulfil the customer's requirements. For example, if a customer needs a 555-seat aircraft, Airbus can offer its A380, yet Boeing cannot offer any equivalent product. Similarly, if a customer needs a 450-seat LCA, Boeing	The Panel sustains the US objection.

²⁸ See also section X.C.2 of this submission.

²⁹ [***].

³⁰ Randy's Journal: Looking ahead, 23 January 2007 (Exhibit EC-286) (Non-BCI). Mr. Baseler's comparison of orders for the 747 compared to the Airbus A380 is for comparison purposes only. His numerous statements regarding competition between the A380 and the Boeing 747 confirm his view that the 747 and the A380 are in different markets. See Section XII.G.

³¹ [***].

³² [***].

³³ See Expert Statement of Rod Muddle, para. 17 (Exhibit EC-19) (Non-BCI); [***].

³⁴ [***].

³⁵ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
	can offer its 747-8, yet Airbus cannot offer an equivalent product. As a result, Airbus will not even submit a proposal. [*** ³⁶].	
1419	[*** ³⁷ *** ³⁸] Randy Baseler, vice president of Marketing for BCA, has acknowledged this as well. Mr. Baseler stated that "{a}bout 150 of the {A320} orders {in 2005} were from China, and {Airbus} did it on the government's decision, not on the airlines' orders. But China took 150 from each of us." ³⁹	The Panel sustains the US objection.
1420	An airline may also choose to exercise options or purchase rights without initiating a bidding process. Options and purchase rights are secured at the same time of a purchase contract. [***]. [*** ⁴⁰].	The Panel sustains the US objection.
1421	Although scale efficiencies favour follow-on orders from the same manufacturer, follow-on orders can also be the subject of fierce competition. ⁴¹ Customers are sometimes concerned about having a "sole-supplier" of airframes. [*** ⁴²] Customers therefore sometimes decide to diversify their fleet.	The Panel sustains the US objection.
1426	[*** ⁴³].	The Panel sustains the US objection, except with respect to the specific figures in the fifth and sixth sentences, <i>i.e.</i> , [***], with respect to which the Panel denies the US objection.
1432	[*** ⁴⁴]. Seemingly small differences in the physical or economics characteristics of competing Boeing and Airbus LCA can, thus, be decisive in the purchasing decision of an airline. EC LCA market expert Rod Muddle notes that "{f}or a model to win a competition its manufacturer has to do better on the criteria to which the airline attaches greatest priority according to its strategic plans." ⁴⁵	The Panel sustains the US objection.

³⁶ [***].

³⁷ [***].

³⁸ [***].

³⁹ "What's Next for Boeing?," US News.com, 19 October 2006, <http://www.usnews.com/usnews/biztech/articles/061019/19boeing.htm> (visited 4 January 2007, Exhibit EC-278) (Non-BCI).

⁴⁰ [***].

⁴¹ Compare the first written submission of the United States, para 712: "Once an airline orders a particular LCA type, however, the scale efficiencies favor follow-on orders of the same type, as well as orders of other aircraft from the same manufacturer in order to take advantage of commonalities across an LCA fleet."

⁴² [***]

⁴³ [***]

⁴⁴ [***].

⁴⁵ See Expert Statement of Rod Muddle, para. 101.

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
1433	Differences in seating and cargo capacity are amongst the most important product-related elements of competition in LCA sales campaigns. Capacity has a direct impact on the future costs and revenues an airline will incur and generate over the life of the LCA. ⁴⁶ [*** ⁴⁷] Furthermore, at times, a particular LCA can be viewed by an airline as being the more technologically-advanced aircraft amongst competing Airbus and Boeing LCA. ⁴⁸	The Panel sustains the US objection.
1434	Direct operating costs are crucial in an airline's evaluation of competing offers, in particular since the cost of operating a LCA over its life far outweighs its purchase price. ⁴⁹ [*** ⁵⁰]	The Panel sustains the US objection.
1435	Engine manufacturers can also play a significant role in determining the outcome of a sales campaign. ⁵¹ Engines are the single most expensive item on an LCA. ⁵² [*** ⁵³].	The Panel sustains the US objection.
1436	The net "fly-away" price a customer pays is the combination of the airframe price and the engine price. While Airbus may offer modest discounts, the engine manufacturer may offer the customer very large discounts. As a result, the final fly-away price secured by a customer may be low, even though Airbus secured a relatively high price. [*** ⁵⁴].	The Panel sustains the US objection.
1437	An airline may also attach great value to a certain delivery date of its newly-acquired aircraft. ⁵⁵ Airlines might require additional aircraft to expand their route network. A late delivery schedule by one LCA manufacturer would thus mean revenue foregone for that	The Panel sustains the US objection.

⁴⁶ See first written submission of the United States, para. 712. [***]; and Expert Statement of Rod Muddle, para. 66 (Exhibit EC-19) (Non-BCI).

⁴⁷ [***].

⁴⁸ See Expert Statement of Rod Muddle, para. 35 (Exhibit EC-19) (Non-BCI).

⁴⁹ Cash Airplane Related Operating Costs (including crew, fuel, maintenance and landing costs) constitute 60% of a LCA's related operating costs, compared to 40% capital costs (including financing, insurance and depreciation). Karen Willcox, "Cost Analysis," Massachusetts Institute of Technology Aerospace Computational Design Laboratory, 19 September 2004, http://ocw.mit.edu/NR/rdonlyres/Aeronautics-and-Astronautics/16-885JFall-2004/9DFE0985-C9C2-486B-BD37-42060E082AB2/0/pres_willcox.pdf, slide 6 (visited on 10 December 2006, Exhibit EC-292) (Non-BCI).

⁵⁰ [***].

⁵¹ [***] See also Expert Statement of Rod Muddle, paras. 27-34 and 63-64 (Exhibit EC-19) (Non-BCI).

⁵² See [***]; See also Expert Statement of Rod Muddle, para. 27 (Exhibit EC-19) (Non-BCI).

⁵³ [***] See also Expert Statement of Rod Muddle, para. 27 (Exhibit EC-19) (Non-BCI).

⁵⁴ [***].

⁵⁵ See Expert Statement of Rod Muddle, paras. 70-71 (Exhibit EC-19) (Non-BCI).

⁵⁶ See Expert Statement of Rod Muddle, para. 70 (Exhibit EC-19) (Non-BCI).

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
	<p>airline while it awaits delivery of its aircraft.⁵⁶ Alternatively, an airline might want to downsize its fleet to reduce costs in times of an economic downturn. Again, a late delivery schedule would mean additional costs incurred by the airline pending delivery of the smaller aircraft. Under those circumstances, an earlier delivery slot offered by a manufacturer might be decisive in an airline's decision to buy Airbus over Boeing. Alternatively, a manufacturer can facilitate the "transfer" of a delivery slot from a leasing company or other customer to the customer involved. [***] [***]⁵⁷</p>	
<p>1449</p>	<p>Not only did Boeing neglect leasing companies as potential customers, but Boeing decided to compete with them by providing LCA financing support to airlines itself.⁵⁸ [***⁵⁹] It created "Aircraft Financial Services" ("AFS"), a group under Boeing Capital Corporation ("BCC"), a wholly-owned subsidiary of The Boeing Company. AFS was intended to provide financing for Boeing commercial aircraft. Instead of transferring the risks and benefits associated with aircraft financing to the leasing companies – as Airbus did – Boeing kept, to a certain extent, the financing of aircraft in-house in an attempt to make further profits. Thereby, Boeing added a further risk to its LCA business. In other words, a crisis like the one caused by 9/11 would hit Boeing twice – first, its LCA manufacturing business, and at the same time also its financing business.</p>	<p>The Panel sustains the US objection.</p>
<p>1451</p>	<p>Airbus's strategy of securing orders with leasing companies proved to be very valuable following the events of 9/11, the resulting global economic downturn, and the Asian SARS crisis. [***.⁶⁰ ***.⁶¹ ***.⁶² ***.⁶³]</p>	<p>The Panel sustains the US objection.</p>
<p>1536</p>	<p>These slides identify the same "markets" that the European Communities has identified above: [***⁶⁴].</p>	<p>The Panel sustains the US objection.</p>

⁵⁷ [***].

⁵⁸ [***].

See further GE Commercial Aviation Services, Loans and Structured Finance, <http://www.gecas.com/financing.asp> (visited 20 December 2006, Exhibit EC-303) (Non-BCI). Leasing companies regularly sell and buy LCA to maintain a sound portfolio of both Airbus and Boeing LCA. Although leasing companies primarily offer LCA on operating leases to airlines, leasing companies also provide financing support to airlines "to help [airlines] renew their fleets, increase liquidity, lower debt, and move asset risk off their books."

⁵⁹ [***].

⁶⁰ [***].

⁶¹ [***].

⁶² [***].

⁶³ [***].

⁶⁴ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
1539	The table below reflects Airbus' as well as Boeing's categorization of where their respective aircraft fall within these various LCA markets ⁶⁵ : {Table omitted}	The Panel sustains the US objection.
note 1579	<i>(refers to para. 1712, which reads: [***] This is confirmed by the fact that, [***]¹⁵⁷⁹)</i> ¹⁵⁷⁹ [***]	The Panel cannot rule on this objection, as it cannot determine to what BCI-designation the US is objecting in paragraph 1579.
1542	The United States alleges that the Boeing 747 family was in competition with the Airbus A380 family. However, as discussed in more detail below, [***]. ⁶⁶ Section XII.J below sets forth further detailed evidence of the separate nature of the markets for the A380 family and the 747 family.	The Panel sustains the US objection.
1543	-	The Panel accepts the EC re-designation.
1546	-	The Panel accepts the EC re-designation.
1547	[***]	The Panel sustains the US objection. The Panel understands that the US is not objecting to other BCI in this paragraph.
1548	[***]	The Panel sustains the US objection. The Panel understands that the US is not objecting to other BCI in this paragraph.
1560	Finally, the United States provides a handful of examples where certain airlines fly Boeing or Airbus LCA from different LCA families to or from the same location to support its finding of a single like product. ⁶⁷ However, this evidence of "demand substitution" ignores [***]. ⁶⁸ [***].	The Panel sustains the US objection except with respect to the sentence "[***]", with respect to which the Panel denies the US objection.

⁶⁵ [***]

Boeing markets the 787-3 as a 290-330 seat aircraft in a 2-class seating configuration. As the 787-3 has the same fuselage as the 787-8, the 787-3 is assumed to have the same 3-class seating capacity as the 787-8. Boeing markets the 787-8 as a 210-250 seat aircraft in a 3-class configuration.

⁶⁶ See Section XII.J, below.

⁶⁷ See First Written Submission of the United States, para. 728.

⁶⁸ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
1618	The US/Boeing methodology therefore reflects these established principles. It allocates alleged subsidies associated with MSF loans tied to a specific LCA programme over the marketing life of that programme, beginning in the year of launch. ⁶⁹ [***]. ⁷⁰ Because R&T grants support basic research that is not tied to a specific aircraft programme, these subsidies are allocated over [***]. ⁷¹	The Panel sustains the US objection except with respect to the figures "[***]", with respect to which the Panel denies the US objection.
1619	[***]. The European Communities recalls that the "base case" simulation for the model described in the Dorman report assumes only a 15-year period of deliveries. ⁷² [***].	The Panel sustains the US objection except with respect to the figures "[***]", with respect to which the Panel denies the US objection.
1623	As described above, the amount of the subsidy conferred by R&T support (which is not tied to a specific programme) is allocated across all Airbus LCA programmes. ⁷³ Beginning in the year of grant, it is allocated across all programmes and [***]. As more fully explained in Section V, above, the European Communities reduces these subsidy magnitudes to account for subsidies that were extinguished or extracted when new owners acquired portions of the Associated Manufacturers or Airbus S.A.S. ⁷⁴	The Panel sustains the US objection except with respect to the figure "[***]", with respect to which the Panel denies the US objection.
1629	<i>Third</i> , the amount of subsidy associated with the four MSF loans is allocated across all orders in the A320 programme [***]. This period is based on [***]. Further, beginning in the year of grant, the amount of subsidy associated with R&T support is allocated across all programmes (including the A320 programme) [***]. This approach provides a magnitude of the subsidy for each order in the A320 programme for a given year. ⁷⁵	The Panel sustains the US objection except with respect to the figures "[17", "four", "16", "three" and "18]", with respect to which the Panel denies the US objection.
1640	[***]. In other words, MSF loans do not inherently confer a benefit.	The Panel accepts the EC re-designation.
1650	[***]. Because of these repayment provisions, market risk has become less relevant and less costly for creditors to bear over time.	The Panel sustains the US objection except with respect to the figure "[***]", with respect to which the Panel denies the US objection.

⁶⁹ [***].

⁷⁰ [***].

⁷¹ [***].

⁷² Dr. Gary J. Dorman, "The Effect of Launch Aid on the Economics of Commercial Airplane Programs," October 2006 (hereinafter "Dorman report"), exhibit US-70, p. 3.

⁷³ [***].

⁷⁴ See Section V, above; [***].

⁷⁵ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
1668	Finally, to the extent that the US arguments can be construed to assert that Airbus' A380 programme [***], the European Communities demonstrates that this is not the case.	The Panel sustains the US objection.
Title before 1728	-	The Panel accepts the EC re-designation.
1734	Like Boeing, [***] ⁷⁶ In developing the A380, Airbus "deliberately planned the capacity of the A380 away from the A340-600 and 747." ⁷⁷	The Panel sustains the US objection.
1735	... [***] ⁷⁸ EC LCA market expert Rod Muddle confirms Mr. Scherer's assessment. ⁷⁹	The Panel sustains the US objection.
1738	-	The Panel accepts the EC re-designation.
1739	-	The Panel accepts the EC re-designation.
1742	...[***] ⁸⁰ As a result, large airlines decided to "park the big airplanes" ⁸¹ – a development that had dramatic effects on Boeing 747-400 market values.	The Panel sustains the US objection.
1759	Finally, as part of its "general" causation arguments, the United States suggests that Airbus would not have launched the A380 programme but for MSF loans. ⁸² This argument has no merit, because Airbus' decision to invest in the A380 programme was based on a sound assessment of the business case for the programme. [***]	The Panel sustains the US objection.
1767	[***] ⁸³	The Panel sustains the US objection.
1809	[***. ⁸⁴ ***]. ⁸⁵	With respect to the first sentence, the Panel accepts the EC re-designation. With respect to the second sentence, the Panel sustains the US objection.

⁷⁶ [***].

⁷⁷ "On a Roll," *Airline Business*, April 2005, p. 45 (Exhibit EC-351).

⁷⁸ [***].

⁷⁹ See Expert Statement of Rod Muddle, paras. 38 and 44 (Exhibit EC-19).

⁸⁰ [***].

⁸¹ "Is This Old Bird About to Get its Wings Clipped?," *USA Today*, 12 August 2004 (Exhibit EC-401).

⁸² See First Written Submission of the United States, para. 813.

⁸³ [***].

⁸⁴ Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

⁸⁵ Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
1810	[***. ⁸⁶ ***. ⁸⁷ ***].	With respect to the second and third sentences, the Panel accepts the EC re-designation. With respect to the first and fourth sentences, the Panel sustains the US objection.
1814	-	The Panel accepts the EC re-designation.
1829/1830	<p>Third, the causal link between any effects of <i>de minimis</i> alleged A320 subsidies and lower Airbus pricing is broken if there are other important non-price-related reasons why the company won the particular sale. The airlines in the challenged sales campaigns noted that the following reasons were amongst the determining factors for choosing the A320 family LCA over the Boeing 737NG:</p> <ul style="list-style-type: none"> • advantages in a variety of A320 attributes, including wider aisles¹⁷²⁵ and cockpit technology¹⁷²⁶; • advantages in the economics of the A320 family, including savings in maintenance cost and lower fuel burn¹⁷²⁷; • higher passenger capacity of the A320 family LCA¹⁷²⁸; • savings resulting from commonality with the airline's existing Airbus fleet¹⁷²⁹, • [***]¹⁷³⁰ 	The Panel sustains the US objection.
1880	<p>The easyJet sales campaign took place in 2002, when the airline industry was "in the midst of the most serious short-term downturn in modern aviation history."⁸⁸ LCA demand collapsed during the 2001-2003 period, due to the collapse of the "dot.com" economy, the events of 9/11 and the global economic recession that resulted.⁸⁹ Furthermore, many LCA that were previously ordered but not yet delivered were cancelled or deferred. [***]</p>	The Panel sustains the US objection.
1959	<p>Causal Link: Most important in assessing the causal link is the fact that [***.⁹⁰ ***.⁹¹ ***.⁹² ***]. Boeing has acknowledged this fact publicly.⁹³</p>	The Panel denies the US objection.

⁸⁶ Ryanair ordered 100 737-800 from Boeing on 24 January 2002. See Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

⁸⁷ EasyJet ordered 120 A319s on 31 December 2002. See Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

⁸⁸ Boeing 2003 Current Market Outlook, p. 4 (Exhibit EC-295).

⁸⁹ Boeing 2003 Current Market Outlook, p. 6 (Exhibit EC-295).

⁹⁰ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
Title before 2011	-	The Panel accepts the EC re-designation.
2012	-	The Panel accepts the EC re-designation.
2015	The [***] between the A330 and 767 families during 2004-2006, and the [***] between 2001-2003 are key facts for the Panel's assessment of the US serious prejudice claims with respect to alleged subsidies benefiting Airbus A330 family LCA. Effects of such subsidies will generally only be experienced where there is actual competition. The lack of competition is consistent with the absence of a genuine and substantial relationship of cause and effect between any A330 subsidies and lower 767 prices.	The Panel sustains the US objection.
2033	<i>Causal Link:</i> The small number of orders and deliveries in every one of the eight third country markets makes it impossible to discern any clear trends in the development of orders or deliveries. Further, the small amounts of alleged subsidies for Airbus A330 LCA have not been shown by the United States to cause any displaced or impeded US market share in 200-300 seat product markets in any of these seven countries. As discussed in Section XII.L.1.(b) above, there was [***]	The Panel sustains the US objection.
2048	Second, as discussed in Section XII.L.1.(b) above, the Airbus [***].	The Panel sustains the US objection.
2071	As the Airbus A340 and the Boeing 777 are the only LCA in the 300-400 seat market currently in production, they compete directly in certain sales campaigns. [***]. ⁹⁴	The Panel accepts the EC re-designation. The Panel understands that the US is not objecting to BCI in the remainder of this paragraph.

⁹¹ [***].

⁹² [***].

⁹³ For example, Randy Baseler, vice president of Marketing for Boeing Commercial Airplanes, noted in a recent interview that

{o}rders for the A320 aren't as robust as they have been, but of course they put on a surge late last year {2005} to beat us. About 150 of the orders were from China, and they did it on government's decision, not on the airlines' orders. But China took 150 from each of us.

Interview with Randy Baseler, What's Next for Boeing? (Exhibit EC-278) (underlining added).

⁹⁴ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
2074	The European Communities has discussed in detail, in Section XII.I above, the nature of the MSF and other measures challenged by the United States. A significant aspect of the nature of these alleged subsidies that are tied or allocated to A340 LCA is their age. MSF loans for the A340 were granted [***]. ⁹⁵ Likewise, Member States entered into MSF loans for the A340-500/600 [***]. ⁹⁶ Thus, the age of these subsidies strongly militates against the existence of present adverse effects.	The Panel sustains the US objection.
2097	Having chosen the Airbus A340 over the 777 based on performance considerations, Iberia also requested price discounts from Airbus. This was because the A340s being offered by Airbus were "white-tail" aircraft rendered homeless by the bankruptcy of Swissair. ⁹⁷ [***]. ⁹⁸ [***]. ⁹⁹	With respect to the first bracketed sentence, the Panel sustains the US objection. With respect to the second bracketed sentence, the Panel accepts the EC re-designation.

⁹⁵ [***].

⁹⁶ [***].

⁹⁷ "The long hello," *Flight International*, 3 May 2005, <http://www.flightglobal.com/articles/2005/05/03/197483/the-long-hello.html>, p. 36 (Exhibit EC-496).

⁹⁸ [***]

⁹⁹ See Expert Statement of Rod Muddle, paras. 58-60. (Exhibit EC-19).

BCI deleted, as indicated [***]

ANNEX F-2

COMMUNICATION OF 15 MARCH 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel is in receipt of the EC's revised version of its First Written Submission, submitted in response to the Panel's ruling of 13 March 2007 on the United States' objections to certain of the designations in the proposed non-BCI version of the European Communities' first written submission.
2. At the outset, the Panel notes that it is surprised and disappointed that the EC chose to make this submission only in the form of an HSBI submission. Given that the revised version does not change anything with respect to HSBI information, and that it is important that the parties and the Panel have a clear understanding of which information is to be treated as BCI in preparing for next week's meeting, it would have been far preferable for the EC to simply revise the BCI version of its First Written Submission in order to implement the Panel's ruling. Indeed, while we did not so specify, this is what we had anticipated would occur.
3. Under the circumstances, given the limited time remaining to prepare for next week's meeting, the EC is directed to prepare a revised BCI version of its First Written Submission, reflecting the Panel's ruling of 13 March, as modified below, and submit it to the Panel and the United States at the earliest possible moment, and in any event no later than 17.30 on Friday 16 March 2007.
4. The Panel notes that, should the EC conclude, in light of this decision that it would have to consider withdrawing any information, the Panel would expect it to withdraw only the minimum specific information necessary to satisfy itself. Any withdrawal of information should be notified to the Panel and the United States at the earliest possible moment, and in any event no later than 17.30 on Friday 16 March 2007.

No. of paragraph	CONTENT	DECISION OF THE PANEL
1036	The European Communities notes, first, that while the EIB established in 2002 a "credit" or "commitment" in favour of EADS in the amount of EUR 700 million, only EUR [***] was ever actually drawn by EADS and this took place in [***]. The other [***] commitment [***]. ¹	The Panel accepts the EC re-designation of 15 March 2007.
1092	EADS [***]	The Panel accepts the EC re-designation of 15 March 2007.
1098	[***] ²	The Panel accepts the EC re-designation of 15 March 2007.
1099	[***]. ³	The Panel accepts the EC re-designation of 15 March 2007.

¹ [***].

² Daily Treasury Yield Curve Rates from http://www.ustreas.gov/offices/domestic-finance/debt-management/interest-rate/yield_historical_2004.shtml

³ [***].

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
1419	[***. ⁴ *** ⁵] Randy Baseler, vice president of Marketing for BCA, has acknowledged this as well. Mr. Baseler stated that "{a}bout 150 of the {A320} orders {in 2005} were from China, and {Airbus} did it on the government's decision, not on the airlines' orders. But China took 150 from each of us." ⁶	The Panel confirms and maintains its original decision. The Panel notes its views, expressed in its communication of 13 March, that it does not consider that "opinions" or "positions" may be designated as BCI or HSBI merely because those opinions or positions were expressed in relation to BCI or HSBI.
1451	Airbus's strategy of securing orders with leasing companies proved to be very valuable following the events of 9/11, the resulting global economic downturn, and the Asian SARS crisis. [***. ⁷ ***. ⁸ ***. ⁹ ***. ¹⁰]	The Panel confirms and maintains its original decision.
1759	Finally, as part of its "general" causation arguments, the United States suggests that Airbus would not have launched the A380 programme but for MSF loans. ¹¹ This argument has no merit, because Airbus' decision to invest in the A380 programme was based on a sound assessment of the business case for the programme. [***.]	The Panel confirms and maintains its original decision. The Panel notes that there is nothing in the bracketed text that suggests that this is a statement of information, as opposed to a statement of opinion or position, which as noted, it does not consider may be designated as BCI or HSBI merely because such opinion or position is expressed in relation to BCI or HSBI.
1810	[***. ¹² ***. ¹³ ***.]	The Panel accepts the EC re-designation of 15 March 2007.
1829/1830	Third, the causal link between any effects of <i>de minimis</i> alleged A320 subsidies and lower Airbus pricing is broken if there are other important non-price-related reasons why the company won the particular sale. The airlines in the challenged sales campaigns noted that the following reasons were amongst the determining factors for choosing the A320 family LCA over the Boeing 737NG:	The Panel accepts the EC re-designation of 15 March 2007.

⁴ [***].

⁵ [***].

⁶ "What's Next for Boeing?," US News.com, 19 October 2006, <http://www.usnews.com/usnews/biztech/articles/061019/19boeing.htm> (visited 4 January 2007, Exhibit EC-278) (Non-BCI).

⁷ [***].

⁸ [***].

⁹ [***].

¹⁰ [***].

¹¹ See first written submission of the United States, para. 813.

¹² Ryanair ordered 100 737-800 from Boeing on 24 January 2002. See Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

¹³ easyJet ordered 120 A319s on 31 December 2002. See Airclaims CASE database, data query as of 19 January 2007 (Exhibit EC-21).

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
	<ul style="list-style-type: none"> • advantages in a variety of A320 attributes, including wider aisles¹⁷²⁵ and cockpit technology¹⁷²⁶; • advantages in the economics of the A320 family, including savings in maintenance cost and lower fuel burn¹⁷²⁷; • higher passenger capacity of the A320 family LCA¹⁷²⁸; • savings resulting from commonality with the airline's existing Airbus fleet¹⁷²⁹, • [***]¹⁷³⁰ 	
2015	<p>The [***] between the A330 and 767 families during 2004-2006, and the [***] between 2001-2003 are key facts for the Panel's assessment of the US serious prejudice claims with respect to alleged subsidies benefiting Airbus A330 family LCA. Effects of such subsidies will generally only be experienced where there is actual competition. The lack of competition is consistent with the absence of a genuine and substantial relationship of cause and effect between any A330 subsidies and lower 767 prices.</p>	<p>The Panel accepts the text as modified by the EC on 15 March 2007.</p>
2033	<p>Causal Link: The small number of orders and deliveries in every one of the eight third country markets makes it impossible to discern any clear trends in the development of orders or deliveries. Further, the small amounts of alleged subsidies for Airbus A330 LCA have not been shown by the United States to cause any displaced or impeded US market share in 200-300 seat product markets in any of these seven countries. As discussed in Section XII.L.1.(b) above, there was [***].</p>	<p>The Panel accepts the text as modified by the EC on 15 March 2007.</p>
2048	<p>Second, as discussed in Section XII.L.1.(b) above, the Airbus [***].</p>	<p>The Panel accepts the text as modified by the EC on 15 March 2007.</p>

BCI deleted, as indicated [***]

No. of paragraph	CONTENT	DECISION OF THE PANEL
2097	Having chosen the Airbus A340 over the 777 based on performance considerations, Iberia also requested price discounts from Airbus. This was because the A340s being offered by Airbus were "white-tail" aircraft rendered homeless by the bankruptcy of Swissair. ¹⁴ [***]. ¹⁵ ***.] ¹⁶	The Panel accepts the EC re-designation of 15 March 2007.

¹⁴ "The long hello," *Flight International*, 3 May 2005, <http://www.flightglobal.com/articles/2005/05/03/197483/the-long-hello.html>, p. 36 (Exhibit EC-496).

¹⁵ [***].

¹⁶ See Expert Statement of Rod Muddle, paras. 58-60. (Exhibit EC-19).

BCI deleted, as indicated [***]

ANNEX F-3

COMMUNICATION OF 30 MARCH 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel has considered a number of outstanding issues concerning designation of information as BCI or HSBI in this dispute, including issues raised in the United States' objections dated 28 February 2007 to the EC's designation of certain information in its first written submission as "highly sensitive business information", the United States' letter of 27 March 2007 commenting on whether the version of the EC first written submission submitted on 16 March 2007 may be considered the basis of a version redacting any BCI, the United States letter of 8 February 2007, and the United States' answers, dated 12 February 2007, to certain questions posed by the Panel.
2. Before turning to the resolution of the specific issues raised by the United States, the Panel wishes to remind the Parties of the general principles set forth in our 13 March 2007 decision concerning the designation of "business confidential information" in the EC's first written submission. As the Panel indicated at that time, those same general principles apply with equal force in the context of the designation of "highly sensitive business information" in this dispute.
3. As we noted in our 13 March 2007 decision, the Panel's BCI/HSBI Procedures are designed to protect specific information, not entire submissions or other documents. It is for this reason that paragraphs 4 and 5 of the BCI/HSBI Procedures requires that the specific information designated as BCI/HSBI be set off within brackets (single or double, as appropriate) within any given printed or electronic document. We set out in our previous decision a number of implications of this principle for the manner in which the BCI/HSBI Procedures are to be applied in this dispute, including our view that the Parties are not to present entire submissions or exhibits categorized as BCI or HSBI, but rather are to specifically identify, through the use of brackets as provided for in paragraphs 4 and 5, the information within those submissions or exhibits they consider should be so designated.
4. The Panel has applied the general principles set out in our 13 March 2007 decision in resolving pending issues concerning the designation of BCI and HSBI. The Panel's specific decisions regarding the designation of HSBI in the EC's first written submission are set out in the attached annex, which contains BCI. The annex also indicates those instances where the Panel has accepted the EC's proposed re-designation of certain information as BCI, or non-BCI, as the case may be.
5. The Panel also notes the continuing designation of titles of exhibits as BCI in the version of the EC's first written submission submitted on 16 March 2007. As the Panel instructed in its 13 March 2007 decision, it "does not believe it appropriate, as a general matter, to bracket the titles of exhibits as BCI and HSBI in their entirety. If, as an exceptional matter, the title itself contains specific information that a Party considers to be BCI or HSBI, the Panel requests that the Party identify the document with a non-BCI/HSBI title that permits a reasonable understanding of the nature of the exhibit in question".
6. The EC is directed to prepare a revised version of its first written submission, fully implementing the Panel's decisions of 13 March 2007 and today, and the re-designations proposed by the EC and accepted by the Panel, and submit it to the Panel, and serve the United States, no later than close of business **Thursday 5 April 2007**. The EC shall, at the same time, serve a draft non-BCI version on the third parties. The Panel notes that it has made no decisions, in the abstract, as to

BCI deleted, as indicated [***]

whether information which it is ruling is not properly designated as HSBI may be re-designated as BCI.¹

7. In addition, we direct that the EC specify precisely the information which it considers to be BCI or HSBI in the following documents, by enclosing it within brackets (single or double, as appropriate), as provided for in paragraphs 4(a) and 5(a) of the BCI/HSBI procedures, and resubmitting the relevant documents:

- statements of Messrs Scherer and Gordon (Exhibits EC-14 (BCI) and EC-16 (BCI))
- document DS316-EC-HSBI-0001143 (the French project appraisal for the A340-500/600)
- document DS316-EC-HSBI-0001174 (the French project appraisal for the A380)
- document DS316-EC-HSBI-0001199 (the French project appraisal for the A330-200)
- document DS316-EC-HSBI-0001211 (the UK project appraisal for the A380)
- document DS316-EC-BCI-0006130 (Exhibit US-49)
- document DS316-EC-BCI-0000532 (Exhibit US-125)
- document DS316-EC-HSBI-000088 (Further Calculations of Present Value of Outstanding Airbus Debt to German Government (1999))
- document DS316-EC-HSBI-000146 (Calculations of Present Value of Outstanding Airbus Debt to German Government (1998))
- document DS316-EC-HSBI-000199 (Comments to Present Value Calculations of Outstanding Airbus Debt to German Government of 23 June 1997 (Present Value 1998))
- document DS316-EC-HSBI-000205 (C&L German Auditing Agency's Letter to the German Ministry of Economics of 26 July 1999)

8. While the Panel recognizes the point raised by the United States in its request that the EC resubmit all of its BCI exhibits with proper bracketing, the Panel considers that it would be unrealistic to expect that this could be accomplished at this late stage without causing unacceptable delays in the proceedings. Nonetheless, the Panel considers it imperative, in order for this dispute to go forward based on a clear understanding of the status of information submitted to the Panel, that BCI and HSBI submitted to the Panel be clearly identified. Therefore, the Panel considers that additional steps are necessary to properly identify such information in exhibits already submitted.

9. Therefore, with respect to exhibits already submitted to the Panel in connection with the parties' first submissions and the meeting with the Panel, the Panel directs each party to designate, by close of business **Tuesday, 3 April 2007** specific exhibits which it considers contain information originating with the other party, which require bracketing in order to enable a party to defend its interests. Such designation is without prejudice to either party making further requests with respect to

¹ The Panel recognizes the possibility that the non-BCI version served on third parties on 5 April 2007 may require further revision in light of subsequent events. However, the Panel considers it important to avoid additional delays in providing the third parties with a non-BCI version of the EC's first written submission from which they can begin to prepare their own submissions.

BCI deleted, as indicated [***]

designation of information in previously submitted exhibits at a later date, should this become necessary.² The Panel expects that the parties will cooperate in this task by limiting, to the maximum extent possible, their requests to re-bracket previously submitted exhibits. The parties will then have until **Monday, 16 April 2007** to resubmit the designated exhibits with bracketing of information considered by the originating party to be BCI or HSBI. The parties should be guided in this regard by the general principles enunciated in our decision of 13 March 2007, as well as be informed by the specific rulings we have made with respect to contested designations to date.

10. The Panel expects that any exhibits to be submitted in the future will comply with paragraphs 4 and 5 of the BCI/HSBI Procedures. To be clear, parties shall set off, within brackets (single or double, as appropriate), the specific information designated as BCI/HSBI in all submissions to the Panel, **including all exhibits**.

11. As we noted in our 13 March 2007 decision, we "recognize{} that the application of the BCI/HSBI Procedures implies a significant burden on the Parties (and on the Panel), but the Parties were well aware that this would be the case when they sought such procedures. The Panel considers it essential that these Procedures be implemented in a manner that protects the legitimate rights of defence of both Parties, and that allows the Panel to perform its work and to explain its ultimate decision in a comprehensible manner. If these Procedures prove inadequate as implemented, the Panel could be forced to re-examine them. The Panel further notes that the efficiency of these Procedures at the panel level may influence the views of the Appellate Body with respect to how to treat information in the event of an appeal. It is therefore important that the Parties work together in a cooperative spirit to maintain the credibility of these Procedures."

² This is also without prejudice to a party requesting that the party that originally submitted the information indicate with precision the portions of a document containing BCI and HSBI, as provided for in paragraphs 38(c)(i) and 52(d)(i) of the BCI/HSBI Procedures. We note that we have decided **not** to amend those procedures as we had proposed in our communication dated 20 February 2007.

BCI deleted, as indicated [***]

ANNEX

SPECIFIC ISSUES RAISED BY THE US REGARDING DESIGNATION
OF HSBI IN THE EC'S FIRST WRITTEN SUBMISSION

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
footnote 153	footnote to paragraph 230 [***]	The Panel sustains the US objection.
233	Both Lagardère and the French State, as is standard practice for large merger transactions, commissioned highly respected investment banks to determine the market value of their respective contributions to the new company, ASM. The French State retained [***], and Lagardère retained [***] These firms valued MHT, Aérospatiale, and the combined firm, ASM. The experts applied a combination of a discounted cash flow ("DCF") method and the comparables method to determine the absolute and relative values of Aérospatiale and MHT. ³	The Panel sustains the US objection.
234 and footnote 156	Based on MHT's pre-merger business plans, [***] found the relative value of MHT to the combined company to be [***] percent. It derived this ratio by calculating a high and low estimated value for each entity. Based on these values, it found the relative value of MHT to the combined company to be in the range of [***] percent to [***] percent, with an average ratio of [***] percent. ⁴ Footnote blanked: [***]	The Panel sustains the US objection.

³ In market transactions, such as sales, spin-offs, mergers, or share offerings, it is standard practice to involve professional investment bankers to prepare valuations of the company or production subject to the transaction. The valuation methods used by investment bankers are widely recognized and, although methods may vary, they all aim at valuing a company's net present value at the time of the transaction. One of the most commonly applied methods is "Discounted Cash Flow", which determines the value based on the projected future cash flows while taking into consideration a discount rate that reflects the probability that the cash flow will be realized (the risk factor).

⁴ [***].

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
235 and notes 157 and 158	<p>[[***]] using a DCF method, found that MHT had a value relative to ASM falling between [[***]] percent and [[***]] percent, the mid-range of which is [[***⁵]]. Thus, [[***]] found the synergies of the companies were such that MHT had more value relative to the new company than simply the sum of its parts. [[***]] used the comparables valuation method and obtained a relative value for MHT of [[***]] percent.⁶</p> <p>Blanked Footnotes 157 and 158: [[***]]</p>	The Panel sustains the US objection.
248	<p>The parties to the EADS transaction retained reputed investment banks to assess the proposed deal and establish the relative values of each of the merging entities. To perform this due diligence, Chrysler engaged [[***]]; Lagardère engaged [[***]]; ASM engaged [[***]]; the Spanish State engaged [[***]], and the French State engaged [[***]]. These six investment banks were supported by an army of accountants and lawyers. Each investment bank conducted extensive assessments of the value of the assets of its client, the value of assets of potential partners, and the value of the proposed combined entity.</p>	The Panel sustains the US objection.
252 and footnotes 166 and 167	<p>For example, [[***]], on behalf of ASM, employed two income approaches to business valuations – segment DCF and EBITDA. Applying these methods, Lazard obtained valuation ratios of [[***]] percent to [[***]] percent for ASM; [[***]] percent to [[***]] percent for DASA; and [[***]] percent to [[***]] percent for CASA.⁷ Similarly, [[***]], on behalf of the Spanish State, applied the DCF method, including a sensitivity analysis for valuating ASM, DASA and CASA, and arrived at a valuation of CASA that fell within the exchange ratios finally agreed upon.⁸</p> <p>Blanked Footnotes 166 and 167: [[***]]</p>	<p>The Panel accepts the EC re-designation with respect to paragraph 252 and note 167.</p> <p>The Panel sustains the US objection with respect to note 166.</p>
Paragraph 310 and footnote 214	<p>The Associated Manufacturers and NatCos also enter into industrial agreements with Airbus GIE or Airbus SAS. By signing these agreements, the AMs and NatCos commit</p>	The Panel sustains the US objection.

⁵ [[***]] (HSBI Annex V, EC-HSBI-0000903).

⁶ [[***]].

⁷ [[***]].

⁸ [[***]] is described in the report of the Consejo Consultivo de Privatizaciones, Informe de Actividades – 2000, at pp. 49-53 (Exhibit EC-58) (Non-BCI).

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
	<p>themselves to the terms of the framework agreements.⁹ In addition, the AMs and NatCos agree to abide by the provisions of the [***] which distributes work share among the AMs and NatCos, and the [***], which identifies the development costs that each entity will incur based on its work share.¹⁰</p> <p>Blanked Footnote 214: [***]</p>	
<p>419</p>	<p>The United States finally alleges¹¹ that France "based its repayment schedule on Airbus's own optimistic sales forecasts". This statement is misleading. The Airbus forecast for the A380, which was in no sense "optimistic", was [***] sales in the first [***]. In compliance with Article 4.1 of the <i>1992 Agreement</i>, France carried out its own project appraisal for the A380¹² and conservatively sought accelerated repayment of the MSF in [***] after disbursement over the much lower number of [***].</p>	<p>The Panel accepts the EC re-designation with respect to the sales projections.</p> <p>The Panel understands that the US is not objecting to designation of other information as HSBI.</p>
<p>425</p>	<p>With regard to Article 4.1 of the <i>1992 Agreement</i>, the European Communities addresses the misleading statement by the United States mistakenly states¹³ that Germany "joined France in basing its repayment schedule on Airbus's own optimistic forecasts". The Airbus forecast for the A380 was [***] sales in the first [***]. Germany conservatively sought accelerated repayment on [***], the same as that used by France and the UK on the basis of their own project appraisals.</p>	<p>The Panel accepts the EC re-designation with respect to the sales projections.</p> <p>The Panel understands that the US is not objecting to designation of other information as HSBI.</p>
<p>431</p>	<p>Finally, with regard to Article 4.1 of the <i>1992 Agreement</i>, the United States misleadingly states that the Spanish Government's return is based on "Airbus's own optimistic sales forecasts".¹⁴ Like other Member States, Spain conservatively required accelerated repayment on a lower number of sales, in its case [***] as compared with the Airbus forecast of [***]</p>	<p>The Panel accepts the EC re-designation with respect to the sales projections.</p> <p>The Panel understands that the US is not objecting to designation of other information as HSBI.</p>

⁹ [***].

¹⁰ [***]; [***].

¹¹ US first written submission, para. 269.

¹² [***].

¹³ US first written submission, para. 277.

¹⁴ US first written submission, para. 286.

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
475	The Member States also structured MSF contracts for the A380 on the basis of conservative forecasts and methodologies. The "base case" estimate for the A380 business case predicted that Airbus SAS would deliver a total of [***] ¹⁵ Indeed, the longer term forecasts foresaw a demand of up to [***] ¹⁶	The Panel accepts the EC re-designation with respect to the sales projections. The Panel understands that the US is not objecting to designation of other information as HSBI.
501	Professor Whitelaw calculates the average expected returns for [***] ¹⁷ These returns provide an ideal benchmark for evaluating the market-consistency of MSF loans. Financing through risk-sharing suppliers is an important funding source for the development of Airbus and Boeing aircraft. Indeed, risk-sharing suppliers financed an estimated 60% of the development costs for the Boeing 787. ¹⁸	The Panel sustains the US objection.
504	Professor Whitelaw demonstrates that the average anticipated return for [***]. Subtracting the applicable risk-free rate and premium for general corporate risk, the project-specific risk premium derived from this data is [***]. ¹⁹ [***]. Thus, in calculating a market benchmark, the European Communities applies a fixed project-specific risk premium of [***].	The Panel sustains the US objection.
511	The methodologies offered by the United States to supposedly "cross-check" its results do not support the US benchmark. The United States invokes four disparate sources: i) A study of equity market risk conducted by Ibbotson Associates; ii) [***] iii) An appraisal of the A380 conducted by UK analysts; and iv) A European Commission decision on the legal status of a loan to a regional aircraft manufacturer.	The Panel sustains the US objection.
516 heading (b)	[***]	The Panel sustains the US objection.

¹⁵ [***].

¹⁶ [***].

¹⁷ [***].

¹⁸ [***].

¹⁹ [***].

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
516	The second "cross-check" proposed by the United States fares no better. The Ellis report relies on the negotiating posture adopted (and later abandoned) [*** ²⁰] The Ellis report latches onto an inflated discount rate proposed by [***] to reduce the net present value of, <i>inter alia</i> , [*** ²¹] Contrary to the US suggestion, this so-called [***] is inappropriate as the basis of a benchmark for MSF loans and, in any event, does not support the benchmark rates adopted in the Ellis report.	The Panel sustains the US objection.
517	<i>First</i> , [***]. As the Ellis report concedes, [***] ²² In his report, Professor Whitelaw explains that an equity measure is not appropriate for MSF loans and overstates the risk premium required by market investors. ²³	The Panel sustains the US objection.
518	<i>Second</i> , even if an equity measure were appropriate, [*** ²⁴] This is not surprising. [*** ²⁵] As discussed, scholars have rejected the Ibbotson data, which substantially overstates the equity risk premium. Accordingly, the [***] – cannot support the risk premium derived in the Ellis report.	The Panel sustains the US objection.
519	<i>Third</i> , the context in which [***] proposed its discount rate confirms that this measure is inflated. [***]	The Panel sustains the US objection.
520	[***]	The Panel sustains the US objection.
521	Significantly, [***], which was engaged as the outside auditor for this transaction, [***], concluding that it was excessive given the risks involved. ²⁶ Moreover, [***]. Not surprisingly, the Ellis report neglects to mention these facts.	The Panel sustains the US objection.

²⁰ [***].

²¹ [***].

²² [***].

²³ [***].

²⁴ [***].

²⁵ [***].

²⁶ For details *see* Section X. B.

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
522	In sum, it is inappropriate for the United States to rely on a discount rate based on a flawed equity measure. And it is particularly inappropriate for the United States to rely on a rate [***]. For the reasons set out above, as an equity measure, this methodology does not call into question the validity of the benchmark rates calculated by the European Communities.	The Panel sustains the US objection.
528	<i>Fourth</i> , governments based the repayment schedule for MSF loans on the Airbus GIE A380 business case – not on predictions suggesting a [***]. The United States, itself, notes that the UK government ultimately "disregarded" EID's advice regarding how to structure the repayment schedule. ²⁷ The Airbus GIE "baseline" business case for the A380 predicts [***]. ²⁸ Echoing these projections, the UK A380 contract calls for per-aircraft levies [***]. As previously discussed, levies paid on deliveries [***]; other Member States adopted [***]. ²⁹ The UK return would then be enhanced through levies paid on deliveries [***]. ³⁰ Likewise, private commercial actors [***]. ³¹	The Panel accepts the EC re-designation with respect to the sales projections. The Panel understands that the US is not objecting to designation of other information as HSBI.
540	The UK A380 contract provides further evidence of the linkage between the company's business case and the repayment terms for MSF loans. This contract is structured to ensure an overall return that is well in excess of the minimum return required by the <i>1992 Agreement</i> . Repayment is structured in two phases. As previously discussed, the first phase calls for per-aircraft levies [***]. ³² When the contract levy is applied to the [***], principal and interest will be repaid within 17 years of the first receipt of MSF – as required by the <i>1992 Agreement</i> .	The Panel sustains the US objection.

²⁷ [***].

²⁸ [***] The delivery forecasts contained in the business case were presented to MSF lenders such as the UK government before the execution of MSF agreements. *See* [***].

²⁹ [***].

³⁰ [***].

³¹ [***].

³² [***].

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
762	ProFi and Airbus Germany also concluded four lease agreements for six special-purpose facilities, including one for the Northern runway extension ³³ . The term for each of these agreements is 20 years. The amount of rent is set to provide the City of Hamburg with a market return of [***] on its investment in each of the facilities, including a return on capital for the portion of each facility's economic life depleted during the 20 year lease term. ³⁴	The Panel sustains the US objection.
765 and footnote 637	In two separate opinions issued on 23 October 2003 ³⁵ , the Experts Committee concluded that the terms of all of the leases were consistent with the terms Airbus Germany could have secured from a private, non-governmental lessor. Before discussing the Experts Committee's findings in detail, the European Communities first addresses the Committee's function as an independent appraiser. Blanked Footnote 637: [***]	The Panel sustains the US objection.
801	[*** ³⁶]	The Panel sustains the US objection.
804	[*** ³⁷]	The Panel sustains the US objection.
806	The European Communities notes that the US expert comes to the same conclusion with regard to the value of the land. Also drawing from the <i>Bodenrichtwert</i> , he concludes that the land value is between €1.13/m ² and €1.36/m ² . ³⁸ [***]	The Panel sustains the US objection.

³³ [***].

³⁴ Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 18/33, pp. 6-7. (Exhibit EC-562) (Non-BCI).

³⁵ [***].

³⁶ [***].

³⁷ [***]. The estimate of [***] coincides with the Expert Committee's yearly estimations of property value in Hamburg. Compare Gutachterausschuss für Grundstückswerte in Hamburg, Der Grundstücksmarkt in Hamburg 2002, 2003, 2004, 2005, setting an average return on real estate for the relevant area at 6,2%. (Exhibit EC-565) (Non-BCI).

³⁸ Expert Opinion No. 27649/06, Benchmarks for Land Values concerning Hamburg Airbus Site, "Mühlenberger Loch," Kreetslag 10, 21129 Hamburg Finkenwerder, 9 October 2006 ("Keunecke Report"), p. 5 of the English translation (Exhibit US-189).

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
807	Drawing from a median value of €6,25/m ² and applying a return on real estate of [***], a market rent would amount to €3,70/m ² per year, or €0,30/m ² per month. This is in accordance with the rent paid by Airbus Germany.	The Panel sustains the US objection.
808	The difference between the assumptions of the Hamburg real estate Experts Committee and that of the expert commissioned by the United States lies in the applicable return on real estate, set at 9 to 12 % in the Keunecke Report as opposed to [***] of the Expert Committee.	The Panel sustains the US objection.
816	Assuming, conservatively, that the properties represented in the report cited by Dr. Keunecke have an average economic life of 40 years, a ratio of rent revenue to value of between 6.0 percent to 8.5 percent represents an actual return of between 5.2 percent and 8.0 percent, respectively. The median ROI of rent revenue to value included in the report's data (<i>i.e.</i> , 7.2 percent) represents an actual return of 6.2 percent, [*** ³⁹]	The Panel sustains the US objection.
830	Before discussing the Committee's appraisal, the European Communities offers a general note about the Committee's approach. [***]	The Panel sustains the US objection.
831	[***]	The Panel sustains the US objection.
833	<p>The Experts Committee assessed the market consistency of the Agreement separately with respect to each facility. Each of these agreements follows the method of the Experts Committee in determining the market rent. The actual figures for each agreement are laid down in a report to the Hamburg Parliament of January 2007.⁴⁰</p> <p>As a basis for its assessment, [***]. The Experts Committee – and the report to the Hamburg Parliament referred to directly above – also expressed the required rent to achieve a [***] actual return on investment (ROI) as a percentage of the amount invested to determine the amount of the total annual rent payment. The annual rent for each facility, including the actual ROI and the amount of</p>	The Panel sustains the US objection.

³⁹ Gutachterausschuss für Grundstückswerte in Hamburg, Der Grundstücksmarkt in Hamburg 2002, 2003, 2004, 2005, (Exhibit EC-565) (Non-BCI).

⁴⁰ Bürgerschaft der Freien und Hansestadt Hamburg, Drs. 18/33 (Exhibit EC-562) (Non-BCI).

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
	the investment repaid to compensate the investor for the consumed value of each facility (<i>i.e.</i> , depreciation), varies from [***] depending on the useful life of the relevant facility (from 20 to 50 years).	
834	[[*** ⁴¹]] ⁴²	The Panel sustains the US objection.
835	[[***]].	The Panel sustains the US objection.
836	[[***]] ⁴³	The Panel sustains the US objection.
837	[[⁴⁴]]. ⁴⁵	The Panel sustains the US objection.
838	[[***]]	The Panel sustains the US objection.
839	[[***]]. The City of Hamburg has not, therefore, conferred a "benefit," or a "subsidy," on Airbus Germany, within the meaning of Article 1.1 of the <i>SCM Agreement</i> .	The Panel sustains the US objection.
850	In contrast, the actual rate of return of [***] expressed by the Experts Committee includes only the first component, actual return on investment. The second component, refund of the investment consumed during the lease, is separately accounted for by the Experts Committee in the actual rental payment for the special-purpose facilities leases.	The Panel sustains the US objection.
851	When both components of the Hamburg Special Facilities leases are combined (<i>i.e.</i> , actual return on investment and the refund of the portion of the investment consumed during the lease), the returns – now stated in the same manner as Dr. Keunecke (rent/investment value) – range from a low of [***].	The Panel sustains the US objection.
852	The distinction between real return required of [***] required by the Hamburg Experts Committee and Dr. Keunecke's ROI expressed as rent revenue over the value of the property is comparable to the difference between the return earned by a bank on a home mortgage and annual mortgage payment as percent of the loan. A 20 year home mortgage for	The Panel sustains the US objection.

⁴¹ [***].

⁴² [***].

⁴³ [***].

⁴⁴ [***].

⁴⁵ [***].

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
	€100,000 with an interest rate of [***] would required a annual payment of [***]. The values [***] are therefore equivalent and simply stated on a different basis. The Experts Committee specified the former, actual return, and Dr Keunecke measures the latter, total payment.	
853	Therefore, to make a fair comparison of the Experts Committee's required [***] to Dr. Keunecke's measure, it is necessary to put them on the same economic basis. The European Communities first restates Dr. Keunecke's measure of return to that of the Hamburg Experts Committee.	The Panel sustains the US objection.
1176 and footnote 948	This is not surprising, as the 1998 settlement reflected the fair market value of the repayment claims of the German government against Deutsche Airbus. The amount of the settlement was based on [*** ⁴⁶] Moreover, [***] The terms of the 1998 settlement therefore did not confer on Deutsche Airbus any benefit within the meaning of Article 1.1 of the <i>SCM Agreement</i> .	The Panel sustains the US objection.
1185	To begin the negotiations, [***] To avoid undervaluing its claims, however, the German government [***]	The Panel accepts the EC re-designation with respect to first set of brackets. With respect to remainder of the paragraph, the Panel sustains the US objection.
1186	[*** ⁴⁷ ***]	The Panel sustains the US objection.
1187	[*** ⁴⁸]	The Panel sustains the US objection.
1188	[***]	The Panel sustains the US objection.
1189	[***]	The Panel sustains the US objection.
1190	[***]	The Panel sustains the US objection.
1191	[*** ⁴⁹]	The Panel sustains the US objection.

⁴⁶ [[]].

⁴⁷ [[.]].

⁴⁸ [[.]].

⁴⁹ [***]

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
1192	[[***]] ⁵⁰	The Panel sustains the US objection.
1193	Using the [[***]] as a basis, the government entered into negotiations with to determine the settlement amount. Ultimately, the German government secured from Deutsche Airbus agreement to a settlement amount <i>higher</i> than the upper [[***]] the German government and Deutsche Airbus agreed on a settlement of DM 1.75 billion – [[***]]	The Panel sustains the US objection.
1196	On the request of the German government, [[***]]	The Panel sustains the US objection.
1197	[[*** ⁵¹]] The European Communities fails to understand why the United States has not addressed [[***]] in its first written submission and thereby disclosed only a portion of the pertinent facts known to it. The United States was obliged, under paragraphs 5 and 15 of the Working Procedures, to provide all its factual evidence with its first written submission.	The Panel sustains the US objection.
1199	As explained by the Appellate Body, a "benefit" under Article 1.1(b) of the <i>SCM Agreement</i> is conferred if a recipient secures a financial contribution on terms more advantageous than those that would have been available on the market. ⁵² Like any market participants operating at arm's length, the German government and Deutsche Airbus used [[***]] report as an indication of value around which to negotiate the terms of settlement.	The Panel sustains the US objection.
1201	[[*** ⁵³]]	The Panel sustains the US objection.

⁵⁰ [[***]].

⁵¹ [[***]].

⁵² Appellate Body Report, *Canada – Aircraft*, para. 157.

⁵³ [[***]].

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
1202	Based on additional negotiations, the German government and Deutsche Airbus agreed on values above [***]. Deutsche Airbus paid the German government fair value of its claims, and thus did not receive any advantage relative to that it would have been accorded by a market-based creditor. No "benefit" was conferred on Deutsche Airbus, within the meaning of Article 1.1(b) of the <i>SCM Agreement</i> .	The Panel sustains the US objection.
footnote 963	<i>(footnote to paragraph 1187)</i> [***]	The Panel sustains the US objection.
1208	Upon the advice of two independent accounting firms, [***], requested jointly by the German government and DASA/MBB, it was determined that the value of KfW's 20 percent stake in Deutsche Airbus, as of 1 January 1992, [***].	The Panel sustains the US objection.
1209	[***] Since the valuation fell below DM 505 million, the German government was entitled above and beyond the [***] value ascribed by [***], to an additional [***] in return for KfW's 20% stake. The German Government, MBB and Deutsche Airbus negotiated that a transfer price of [***] to be paid by Deutsche Airbus under the terms of the debtor warrant, along with the [***] million specified in the 1989 restructuring agreement. Like all other claims, this claim was settled in its entirety for fair market value as a part of the 1998 settlement (see above). ⁵⁴ Therefore, contrary to the United States' assertions, the transfer was not free of charge ⁵⁵ , and did not provide any benefit to Deutsche Airbus. ⁵⁶	The Panel sustains the US objection.
Exhibit EC-98	[***]	The Panel sustains the US objection.
Exhibit EC-563	[***]	The Panel sustains the US objection.
Exhibit EC-564	[***]	The Panel sustains the US objection.
Exhibit EC-20	[***]	The Panel sustains the US objection.

⁵⁴ The European Communities notes that the terms of the debtor warrant itself were amended in 1992 (see also above section X.B.2(a)).

⁵⁵ US First Written Submission, para. 550.

⁵⁶ Cf. US First Written Submission, para. 555.

BCI deleted, as indicated [***]

No. of Paragraph, Note or Exhibit	CONTENT	DECISION OF THE PANEL
Exhibit EC-327	[[***]]	The Panel sustains the US objection.
Exhibit EC-336	[[***]]	The Panel sustains the US objection.
Exhibit EC-478	[[***]]	The Panel sustains the US objection.

BCI deleted, as indicated [***]

ANNEX F-4

COMMUNICATION OF 24 APRIL 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel is in receipt of the EC's letter dated 16 April 2007, submitted in response to the direction contained in paragraph 7 of the Panel's communication of 30 March 2007.
2. The Panel notes that in its letter dated 16 April 2007, the EC indicates that it has complied with the Panel's direction contained in paragraph 7 of the communication of 30 March 2007 to specify precisely the BCI and HSBI information contained in four documents (DS316-EC-HSBI-000088; DS316-EC-HSBI-000146; DS316-EC-HSBI-000199; and DS316-EC-HSBI-000205) on the understanding that, *despite* the designation of some information in these documents as BCI, the documents as a whole, and the remainder of the HSBI documents which contain BCI designations, "will retain their HSBI status and remain accessible only in the Secure Room and only to HSBI approved persons."
3. The Panel notes that the Panel's BCI/HSBI Procedures provide that information designated as BCI shall be subject to the restrictions set forth in Section V of the Procedures, while information designated as HSBI shall be subject to the restrictions set forth in Section VI. The Panel's BCI/HSBI Procedures do not make provision for information to be designated as BCI yet be subject to the restrictions applicable to information designated as HSBI. In other words, the Panel's BCI/HSBI Procedures contemplate only two distinct restrictions for the protection of information which apply according to whether information is designated as BCI or as HSBI.
4. The Panel therefore considers that the EC's "understanding" that, despite the designation of certain information in the afore-mentioned documents as BCI, the documents as a whole will retain their "HSBI status" is not in accordance with the Panel's BCI/HSBI Procedures or the general principles set forth in the Panel's communication of 13 March 2007. Neither is it consistent with the provisions of the BCI/HSBI Procedures concerning the submission of Redacted Version Appendices.
5. Thus, the Panel directs the EC to submit to the Panel, and serve upon the United States, BCI versions of these documents, with information designated as HSBI redacted from them, no later than close of business on **Tuesday, 1 May 2007**. Should the EC be unwilling to comply with this ruling, it may withdraw these documents from these proceedings. However, the Panel notes that, in cases where a party fails to provide necessary information, a panel may draw appropriate inferences from this fact. *See* Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("Canada – Aircraft"), WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, paras. 197-206.
6. The Panel has taken no view as to the propriety of the designations of information in the afore-mentioned documents as BCI or HSBI.
7. The United States is invited to submit, by close of business on **Friday, 27 April 2007**, any comments it may have on the propriety of the EC's re-designations of information as BCI or HSBI in response to the Panel's rulings of 30 March and 4 April 2007.

BCI deleted, as indicated [***]

ANNEX F-5

COMMUNICATION OF 30 APRIL 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel is in receipt of the EC's letter dated 25 April 2007. The Panel acknowledges the EC's undertaking to submit to the Panel and serve upon the United States by 1 May 2007, BCI versions (from which designated HSBI information has been redacted) of the documents referred to in the Panel's communication of 24 April 2007.
2. In response to the EC's request for an explanation of the Panel's understanding of the BCI/HSBI procedures concerning redacted versions of exhibits, the Panel observes that the issue addressed in the Panel's communication of 24 April 2007 was not whether the BCI/HSBI Procedures require a Party to produce redacted versions of exhibits *per se*. To the extent that the BCI/HSBI Procedures are understood not to require redacted versions of exhibits, the EC's letter has identified a serious problem with those Procedures. If the EC's view that, under those Procedures, BCI contained in "HSBI documents" should effectively be treated as HSBI were correct, the right of BCI-Approved Persons to have access to BCI would be nullified to the extent that BCI is contained in exhibits also containing HSBI.
3. A rule requiring the submission of BCI versions of all exhibits with HSBI redacted from them would appear to be a practical means of ensuring that Approved Persons are able to view the categories of confidential information to which they are entitled to have access.¹ The Panel therefore proposes to amend the BCI/HSBI Procedures to clarify that there is such a rule. The alternative would seem to be, as the EC observes, to allow HSBI-Approved Persons to redact HSBI from exhibits which also contain BCI, and remove the resulting "redacted version" from the HSBI secure room and treat it according to the rules governing BCI. The Panel is reluctant to impose the responsibility to redact the exhibits of the other party on the HSBI-Approved Persons of either party.
4. The Parties are directed to submit any comments on its proposal, or any other suggestions they may have for ensuring that BCI-Approved Persons have access to BCI in exhibits which also contain HSBI, by close of business on **Friday, 4 May 2007**.

¹ The Panel notes that BCI versions of exhibits with HSBI redacted from them have been submitted by the United States in connection with its first submission.

BCI deleted, as indicated [***]

ANNEX F-6

COMMUNICATION OF 23 MAY 2007

European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)

1. The Panel is in receipt of the European Communities' letter dated 18 May 2007, and the United States' comments thereon dated 22 May 2007. The Panel acknowledges the EC's undertaking regarding preparation of a appropriate Full HSBI Version Appendix, in compliance with paragraph 52 of the BCI/HSBI Procedures and with the Panel's communications of 13 March 2007 and 14 May 2007, in respect of its answers to questions and second written submission.

2. The Panel has considered the EC's proposed change to the procedure for verifying HSBI-Redacted Version Exhibits contained in clause (iii) of paragraph 52(*kbis*) of the revised version of 14 May 2007, to enable such verification to be carried out by a representative authorized for this purpose. In light of paragraph 24 of the BCI/HSBI Procedures, which provides that, unless otherwise specifically provided otherwise, the BCI/HSBI Procedures do not apply to a Party's or Third Party's treatment of its own BCI or HSBI, and the lack of any objection, the Panel accepts the EC's proposed amendment. The relevant amendment to paragraph 52 is incorporated in the attached revised version of the BCI/HSBI Procedures.

3. With respect to the EC's suggested amendment to paragraph 52(a) of the BCI/HSBI Procedures, the Panel notes that it has previously stated its view that an HSBI Appendix must be a readable document on its own, and not simply a compilation of paragraphs containing HSBI. The EC's proposal appears to reflect that view, and therefore, with a slight clarifying modification, the Panel accepts that change, which is reflected in the attached revised version of the BCI/HSBI Procedures.

4. With regard to the EC's comments on bracketing of exhibits, the Panel notes that the amendments to the BCI/HSBI Procedures it transmitted to the Parties on 14 May 2007, incorporating new paragraphs 4(d) and 5(b), are intended to incorporate in the BCI/HSBI Procedures themselves the requirement, identified by the Panel in various rulings in this dispute, to identify specifically, through the use of brackets, single or double as appropriate, BCI or HSBI contained in, *inter alia*, exhibits. Although this requirement was not explicit in the BCI/HSBI Procedures as originally adopted, the Panel has concluded that bracketing of BCI contained in exhibits is required by the those Procedures. In paragraph 2(a) of its communication of 13 March 2007, the Panel clarified that:

"Parties are not to present entire submissions or exhibits categorized as BCI or HSBI, but rather are to specifically identify, through the use of brackets as provided for in paragraph 4, the information *within* those submissions or exhibits they consider should be so designated.... If a Party considers that a submission or exhibit contains BCI it **must** identify that information through the use of brackets as envisaged by paragraph 4." (Underlining added - other emphasis in original)

The Panel reiterated its view in this regard in paragraph 3 of its communication of 30 March 2007, stating again that "the Parties are not to present entire submissions or exhibits categorized as BCI or HSBI, but rather are to specifically identify, through the use of brackets as provided for in paragraphs 4 and 5, the information within those submissions or exhibits they consider should be so designated." Thus, the addition of paragraphs 4(d) and 5(d) to the BCI/HSBI Procedures does not represent a new requirement. Rather, these paragraphs incorporate in the text of the BCI/HSBI Procedures the substance of the Panel's previous rulings. Therefore, the Panel declines to delete them.

BCI deleted, as indicated [***]

5. In order to be clear, the Panel confirms that these amendments take effect as of 14 May 2007. That is, the Parties (and Third Parties) are required to bracket the specific information designated as BCI (or HSBI) contained in any exhibit submitted subsequent to 14 May 2007. Parties are **not**, however, required to retroactively re-bracket BCI or HSBI contained in exhibits filed prior to 14 May 2007, except to the extent that the Panel has already directed them to do so. This does not preclude the possibility that the Panel may direct a Party to re-bracket BCI or HSBI in an exhibit submitted prior to that date, on a case-by-case basis.

6. The Panel notes the concern expressed by the EC regarding the production of non-BCI versions of exhibits. The Panel clarifies that the BCI/HSBI Procedures, as amended, are not intended to require Parties to produce and submit non-BCI versions of exhibits (*i.e.* versions of exhibits from which BCI has been redacted), although such versions are, of course, welcome. The Panel has reflected this view in a clarifying modification to paragraph 38(b).

7. Concerning exhibits EC-167, EC-551 through EC-561 and EC-077, the Panel notes the EC's request that the Panel ask the United States "to specify what information it wants to be unbracketed and to substantiate in what way the alleged over-bracketing is prejudicing its possibility to prepare its second written submission before the burden is put on the European Communities and the stakeholders to re-bracket these exhibits." The EC makes this request despite having failed to submit any responses to the United States' objections to the alleged over-designation of information as BCI in the aforementioned exhibits by the applicable deadline. The Panel further notes that, in its communication of 14 May 2007, the Panel sustained the United States' objections to the EC's designation of information as BCI in the aforementioned exhibits, and directed the EC to re-submit these exhibits, bracketing only the specific BCI contained therein, by 18 May 2007.

8. The Panel recalls that paragraph 2 of the BCI/HSBI Procedures makes it clear that a Party submitting information which it seeks to have treated as BCI is obligated to act in good faith and exercise restraint in designating information as BCI, and endeavour to designate information as BCI only if its disclosure *would cause harm to the originators* of the information. Similarly, paragraph 9 of the BCI/HSBI Procedures makes it clear that a Party submitting information which it seeks to have treated as HSBI is obligated to act in good faith and exercise restraint in designating information as HSBI, and endeavour to designate information as HSBI only if its disclosure *would cause exceptional harm to the originators* of the information, and sets forth categories of information that may, and may not, be designated as HSBI. It is the Panel's view that the Procedures place the burden on a Party designating information as BCI or HSBI to demonstrate, if challenged, that the information in question satisfies the criteria for such treatment. The EC's proposed modifications to paragraph 38(d) and 52(*kbis*) would shift this burden, imposing obligations on the non-submitting Party, and the Panel. The Panel considers that a Party receiving information designated as BCI is not required to identify specific information it seeks to have 'debracketed' and justify its request on the basis that the designation of such information as BCI is prejudicial to its ability to prepare its submissions to the Panel. Nor is it the Panel's obligation to identify to a Party the portions of exhibits it may wish to discuss in its report in order to ascertain whether specific information is considered by the submitting Party to be BCI.¹

9. The Panel considers that it is incumbent upon the EC to comply with the Panel's direction of 14 May 2007, and declines to direct the United States to justify its objections as requested by the EC. The EC having failed to respond to the US objections to the designation of almost the entirety of the afore-mentioned exhibits as BCI, the Panel is not in a position to rule on the question of whether specific information in those exhibits may properly be designated as BCI.² The Panel notes that,

¹ The Panel will, of course, work with the Parties to ensure that any public documents in this dispute do not contain BCI or HSBI.

² The Panel notes, however, that based on the principles it has articulated in its rulings on the issue of designation of information as BCI or HSBI, the Panel has difficulty accepting that, for example, portions of the

BCI deleted, as indicated [***]

pursuant to paragraph 2 of the BCI/HSBI Procedures, the fact that information is not in the public domain is only one element to be considered in designating information as BCI. The EC is directed to comply with the Panel's earlier ruling, and to submit re-bracketed versions of the afore-mentioned exhibits no later than **close of business on Wednesday 30 May 2007**.

10. Finally, the Panel notes that it does not consider it necessary to meet with the parties at this time to discuss these matters.

11. Based on the foregoing, the Panel declines to incorporate the EC's proposed paragraphs 38(d) and 52(*kbis*) in, and declines to delete paragraphs 4(d), 5(d), and 20*bis* from, the BCI/HSBI Procedures (revised version of 14 May 2007). The Panel does, however, incorporate the changes proposed to paragraph 52(a) and paragraph 52(*kbis*) concerning persons authorized to verify the redaction of HSBI from exhibits. A revised version of the BCI/HSBI Procedures reflecting the Panel's rulings is attached.
