WORLD TRADE ORGANIZATION

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UNITED STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT (SECOND COMPLAINT)

RECOURSE TO ARTICLE 22.6 OF THE DSU BY THE UNITED STATES

DECISION BY THE ARBITRATOR

Addendum

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

This *addendum* contains Annexes A to C to the Decision of the Arbitrator to be found in document WT/DS353/ARB.

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WORKING PROCEDURES OF THE ARBITRATOR

ANNEX A-1

WORKING PROCEDURES OF THE ARBITRATOR

Adopted 8 July 2019

General

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

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

Confidentiality

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

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

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

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

Submissions

3. (1) Before the substantive meeting of the Arbitrator with the parties, the European Union shall transmit to the Arbitrator and to the United States a communication explaining the basis for its request, including the methodology and data supporting it, in accordance with the timetable adopted by the Arbitrator.

(2) Each party to the dispute shall also transmit to the Arbitrator a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Arbitrator.

a. To facilitate the efficient conduct of this proceeding, the written submissions referenced in the Arbitrator's timetable (European Union's written communication explaining the basis for its request (Methodology Paper), the United States' written submission, and the European Union's written submission) shall not exceed 125 pages (single-spaced, font size 10), or 160 pages (single-spaced, font size 12) each. This limit excludes exhibits accompanying written submissions.

b. The Arbitrator may grant an extension of this page limit upon a request from a party. A party shall submit any such request in accordance with the procedures concerning service of documents set out in paragraph 21 below and no later than seven days (one calendar week) before the deadline to file the submission at issue. The request shall include the number of additional pages requested by the party for the submission at issue and explain the circumstances that in its view warrant exceeding the page limit by the specified number of pages. The Arbitrator shall rule on such requests promptly.

(3) The Arbitrator may invite the parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If either party considers that the Arbitrator should make a ruling prior to the issuance of the Decision that certain issues are not properly before the Arbitrator, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

   a. A party shall submit any such request for a preliminary ruling at the earliest possible opportunity. The other party shall submit its response to the request at a time to be determined by the Arbitrator in light of the request.

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

   c. In the event that the Arbitrator finds it appropriate to issue a preliminary ruling prior to the issuance of its Decision, the Arbitrator may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Decision.

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

Evidence

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

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

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

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

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with a submission was numbered XXX-5, the first exhibit in connection with the next submission thus would be numbered XXX-6.

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

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

(4) Insofar as a party considers that the Arbitrator should take into account a document already submitted as an exhibit in the prior panel proceedings, it should resubmit that document as an exhibit for the purpose of this proceeding. In its list of exhibits, it should refer to the number of the original exhibit in the original panel proceeding (OP) and Article 21.5 panel proceedings (CP), if applicable (for example: XXX-1 (XXX-21-OP), XXX-2 (XXX-11-CP)).

Editorial Guide

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

Questions

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

a. sending a list of written questions prior to the meeting, or a list of topics it intends to pursue in questioning orally in the course of the meeting. The Arbitrator may ask different or additional questions at the meeting; and

b. putting questions to the parties orally in the course of the meeting, and in writing following the meeting, as provided for in paragraph 16 below.

Substantive meeting

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

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

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

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

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

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

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

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

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

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

c. The Arbitrator may subsequently pose questions to the parties.

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

e. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5:00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

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

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

iv. Each party shall respond in writing to the questions from the Arbitrator, and to any questions posed by the other party, within the timeframe established by the Arbitrator prior to the end of the meeting.

Descriptive part and executive summaries

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

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

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

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

Service of documents

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

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

b. Each party shall submit one (1) paper copy of all documents it submits to the Arbitrator by 5:00 p.m. (Geneva time) on the due dates established by the Arbitrator. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute.

c. Each party shall also submit two CD-ROMs or two DVDs to the DS Registry, at the same time that it submits the paper versions, each containing an electronic copy of all documents that it submits to the Arbitrator, preferably in both Microsoft Word and PDF format.

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

e. Each party shall serve any document submitted to the Arbitrator directly on the other party. A party may submit its documents to another party on a CD-ROM or DVD only, unless the recipient party has previously requested a paper copy. Each party shall confirm, in writing, that copies have been served on the parties, as appropriate, at the time it provides each document to the Arbitrator.

f. Each party shall submit its documents with the DS Registry and serve copies on the other party by 5:00 p.m. (Geneva time) on the due dates established by the Arbitrator.

g. All communications from the Arbitrator to the parties will be via email.

Correction of clerical errors in submissions

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

ANNEX A-2

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

Adopted 8 July 2019 and amended 9 October 2020

I. GENERAL

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

II. DEFINITIONS

For the purposes of these Procedures:

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

2. **"Arbitrator"** means the DS353 Arbitrator under Article 22.6 of the DSU.

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

4. **"Conclusion of the Arbitration Process"** means the earliest to occur of the following events:

   (a) the date of circulation of the decision of the Arbitrator; or

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

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

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

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

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

[1] *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").
[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").
[3] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the BCI in question.

(d) In case either Party objects to the designation of information as BCI under paragraphs 5(a)-(c), the dispute shall be resolved by the Arbitrator. If the Arbitrator disagrees with designation of information as BCI, the submitting Party may either designate it as non-BCI or withdraw the information. In the case of withdrawal, the Arbitrator shall either destroy such information or return it to the submitting Party. Each Party may at any time designate as non-BCI information previously designated by that Party as BCI.

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

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

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

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

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

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

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

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

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

(i) information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[5], and, except as provided in subparagraph 8(d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

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

(iii) information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, or

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

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

investment banks or the European Investment Bank, with regard to LCA products; or

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

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

(c) Each Party shall Designate as HSBI any information described in subparagraph 8(a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of either of the Parties.

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

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

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

(iii) contracts on the granting of launch aid or reimbursable launch investment and project appraisal documents relating thereto, other than information described in subparagraph 8(a);

(iv) the terms and conditions of loans, other than information described in subparagraph 8(a); and

(v) intergovernmental agreements and government decisions, other than information described in subparagraph 8(a).

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

(f) In case either Party objects to the designation of information as HSBI under paragraphs 8(a)-(e), the dispute shall be resolved by the Arbitrator. If the Arbitrator disagrees with designation of information as HSBI, the submitting Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. In the case of withdrawal, the Arbitrator shall either destroy such information or return it to the submitting Party. Each Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party as HSBI.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) in the case of the European Union, the offices of WTO Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Mission of the European Union to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and three additional sites specified in accordance with subparagraph (c);

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

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

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

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

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

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

21. **"WTO Approved Persons"** means the members of the Arbitrator and persons employed or appointed by the Secretariat who have been authorized by the Secretariat to work on the dispute (and includes translators and interpreters as well as any transcribers present at Arbitrator meetings involving BCI and/or HSBI).

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

III. SCOPE

23. These procedures apply to all BCI and HSBI received by an Approved Person and by WTO Approved Persons as a result of the Arbitration.

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

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

IV. DESIGNATION OF APPROVED PERSONS

26. At the latest by 12:00 p.m. (noon) on **12 July 2019**, each Party shall submit to the other Party, and to the Arbitrator, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and whom it wishes to have designated as HSBI Approved Persons. Each Party may designate new Approved Persons, remove, or replace Approved Persons by submitting amendments to its list of Approved Persons to the other Party and to the Arbitrator.

27. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a total of 30 Representatives and 20 Outside Advisors as "HSBI Approved Persons".

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

29. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Arbitrator shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 26 that would suggest that designation of an individual is not appropriate. If a Party objects, the Arbitrator shall decide on the objection within ten working days.

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

31. The Parties or the Director-General of the WTO, or his or her designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 27 and to objections for the addition of new Approved Persons in accordance with paragraphs 29 and 30. Any such amendments or objections by a Party shall be submitted to the Arbitrator and communicated to the other Party on the same day. Any amendments to the list of WTO Approved Persons shall be promptly communicated to the Parties.

V. BCI

32. Only Approved Persons and WTO Approved Persons may have access to BCI submitted in this proceeding. Approved Persons and WTO Approved Persons shall use BCI only for the purposes of this dispute. No Approved Person or WTO Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person or WTO Approved Person. These obligations apply indefinitely.

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

34. Parties may incorporate BCI in internal memoranda for the exclusive use of Approved Persons. Any memorandum and the BCI it contains shall be marked in accordance with paragraph 5.

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

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

(a) Parties may incorporate BCI in submissions to the Arbitrator, marked as indicated in paragraph 5. In exceptional cases, parties may include BCI in an appendix to a submission.

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

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

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

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

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

(d) The European Union may designate the personal offices of up to four of its Approved Persons as additional Secure sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' submissions to the Arbitrator. All of the protections applicable to BCI under these procedures, including the storage rules in paragraph 39, shall apply to such submissions. BCI exhibits to submissions may not be stored or reviewed at these additional

Secure sites. The EU shall submit the address (including room number) of each of the additional Secure sites to the Arbitrator and the complaining Party.

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

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

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

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

VI. HSBI

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

42. HSBI shall be submitted to the Arbitrator in electronic form, using Locked CDs or two Sealed laptop computers connectable to 19" - 21" monitors, or in hard copy form, for access by WTO Approved Persons designated pursuant to paragraph 28 as being additionally authorized to access HSBI. All such HSBI shall be stored in a combination safe in a designated secure location on the premises of the WTO Secretariat. Any computer in that room shall be a Stand-alone computer. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper and marked in accordance with paragraph 6. Such hard copies shall either be stored in a combination safe at the designated secure location referred to above, or destroyed at the end of the relevant working session. HSBI shall not be removed from this designated secure location, except in the form of handwritten notes that may be used only for working sessions on the WTO Secretariat's premises by WTO Approved Persons designated pursuant to paragraph 28 as being additionally authorized to access HSBI and which shall be destroyed once no longer in use. Also, documents containing HSBI may be removed if stored on a Sealed laptop computer provided by the Party that submitted the information, if stored on Locked CDs provided by the Party that submitted the information, or if stored on a Stand-alone computer on which HSBI has been saved pursuant to paragraph 47, to the extent necessary for working sessions of the Arbitrator and WTO Approved Persons designated pursuant to paragraph 28 as being additionally authorized to access HSBI, subject to the following conditions:

(a) the Sealed laptop computer, Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 shall remain on the premises of the WTO at all times;

(b) the Sealed laptop computer, Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 shall at all times be in the

exclusive and direct custody of a WTO Approved Person designated pursuant to paragraph 28 as being additionally authorized to access HSBI;

(c) the WTO Approved Person in exclusive and direct custody of the Sealed laptop computer, Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 shall ensure that no reproductions of any kind of information stored on the Sealed laptop, the Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 are created in any way;

(d) information contained on the Locked CDs shall only be viewed or processed using a Stand-alone computer that is neither connected to a network nor capable of being connected to a network. When not in use, such Stand-alone computers shall be kept in locked security containers on the premises of the WTO Secretariat; and

(e) at the conclusion of the relevant working session, the Sealed laptop computer, Locked CDs, or Stand-alone computer on which HSBI has been saved pursuant to paragraph 47 shall be immediately returned to the combination safe in the designated secure location referenced above.

Any working sessions involving HSBI that occur outside of the designated secure location referred to above shall only occur in the personal work spaces (on the premises of the WTO Secretariat) of WTO Approved Persons designated pursuant to paragraph 28 as being additionally authorized to access HSBI, or, for internal meetings of the Arbitrator and/or of WTO Approved Persons designated pursuant to paragraph 28 as being additionally authorized to access HSBI, only in closed meeting rooms on the premises of the WTO Secretariat. During all such working sessions, and with respect to all spaces in which such working sessions occur, special care shall always be taken to ensure the security of HSBI.

43. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the other Party, in the HSBI locations listed in paragraph 10. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

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

45. HSBI Approved Persons may view HSBI on the Sealed laptop computer maintained by the other Party or, in the case of HSBI submitted on Locked CDs on a Stand-alone computer, only in a designated room at one of the HSBI locations indicated in paragraph 10 or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 42, unless otherwise mutually agreed by the Parties. The designated rooms shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. (local time) during official working days at the respective HSBI location. The designated secure location referred to in paragraph 42 shall be available to HSBI Approved Persons by prior arrangement with the WTO Secretariat. HSBI Approved Persons may not bring into such room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from such room, except in the form of handwritten notes or aggregated information generated on a Stand-alone computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI location or designated secure location referred to in paragraph 42 shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI location within its territory referenced in paragraph 10, maintain such log until one year after the Conclusion of the Arbitration Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 42, maintain such log until one year after the Conclusion of the Arbitration Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

46. No HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 28 as being additionally authorized to access HSBI shall disclose HSBI to any person except another HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 28 as being

additionally authorized to access HSBI, and then only for the purpose of this dispute. This obligation applies indefinitely.

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

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

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

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

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

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

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

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

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

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

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

(e) The Full HSBI Version Appendix shall be kept in an HSBI location and in the designated secure location referred to in paragraph 42, as appropriate, in the form of a Locked CD. If it is not practical to keep the Full HSBI Version Appendix in an HSBI location, the Party may keep it in a locked security container in a Secure site in the form of a Locked CD.

(f) The Locked CD containing the Full HSBI Version Appendix shall bear the label marked "FULL VERSION OF HSBI APPENDIX TO SUBMISSION" and indicate the name of the Party that submitted the HSBI. In addition, the HSBI Appendix itself shall be marked with a heading with double bolded square brackets on each page in an electronic file that contains the notation "FULL VERSION OF HSBI APPENDIX TO SUBMISSION". The electronic file containing the HSBI Appendix shall have a file name that contains the letters "HSBI".

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

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

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

(j) WTO Approved Persons designated pursuant to paragraph 28 as being additionally authorized to access HSBI may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, an Arbitration meeting with the parties and/or an internal meeting. When not in use, these paper versions shall be stored in a locked container in the designated secure location referred to in paragraph 42. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Arbitration Process as defined in paragraph 4.

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

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

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

(iii) HSBI-Redacted Version Exhibits may be prepared by an HSBI-Approved person, at an HSBI location, by deleting the HSBI in the exhibit (identified by double brackets) from such exhibit and either printing or photo-copying the resulting document containing no HSBI. The deletion of HSBI from the resulting document shall be verified by a person authorized for this purpose

by the Party that submitted the exhibit(s) in question. The resulting document containing no HSBI (but which may contain BCI) will constitute the HSBI-Redacted Version Exhibit of such exhibit, and may be removed from the HSBI location.

(iv) The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI-Approved Person for purposes of the verification provided for in paragraph (iii) above. HSBI-Redacted Version Exhibits may be prepared by HSBI-Approved Persons upon request during the times the designated room at the relevant HSBI location is available.

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

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

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

VII. RESPONSIBILITY FOR COMPLIANCE

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

VIII. ADDITIONAL PROCEDURES

53. After consulting with the Parties, the Arbitrator may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures.

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

IX. RETURN AND DESTRUCTION

55. Except as provided for in paragraph 56 immediately below, after the Conclusion of the Arbitration Process as defined in paragraph 4, within a period to be fixed by the Arbitrator, WTO Approved Persons and the Parties (along with all Approved Persons) shall destroy or return all documents (including electronic material) or other recordings containing BCI to the Party that submitted such documents or other recordings. At the same time, WTO Approved Persons and the Parties shall destroy or return any electronic material containing HSBI, together with any typed or manuscript record thereof.

56. The WTO Secretariat shall retain one hard copy and one electronic version of the Decision of the Arbitrator containing BCI, and one electronic version of all documents containing BCI (except documents destroyed or returned pursuant to paragraph 55 immediately above because such documents contained HSBI) that were submitted to the Arbitrator. The Decision and the documents

containing BCI referred to in the preceding sentence shall be recorded on locked CD(s), to be kept in sealed containers in a locked cabinet on the premises of the WTO Secretariat.

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

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE SUBSTANTIVE MEETING WITH THE ARBITRATOR

Adopted 6 December 2019

1. During the meeting with the parties, the following persons will be admitted into the meeting room: (a) the Arbitrator; and (b) all Approved Persons, HSBI Approved Persons, and WTO Approved Persons. The Arbitrator will invite the United States to first present its full opening oral statement before the floor is given to the European Union to present its full opening oral statement. The opening oral statements will be videotaped and be made available for later viewing, as set out in paragraph 5 below.

2. BCI or HSBI in the texts of the opening oral statements provided to the Arbitrator and the other party during the meeting and prior to the delivery of the opening oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. In addition, a party including HSBI in its opening oral statement shall provide, prior to delivery of the opening oral statement, one paper copy to each member of the Arbitrator and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

3. Paragraphs 38 and 48 of the BCI/HSBI Procedures shall be observed at all times during the meeting. Further in that context, if at any point during its opening oral statement a party intends to utter BCI or HSBI, it shall request that the videotaping be discontinued for the relevant portion of the opening oral statement, after which videotaping will be resumed. The party that requests the discontinuation of the videotaping shall also indicate when the BCI or HSBI portion has ended so that the videotaping can be resumed. A party is invited to first deliver a part of its opening oral statement that contains no BCI or HSBI, and then ask for the videotaping to be discontinued, before delivering a second part of its opening oral statement containing BCI or HSBI.

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

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

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. More than 14 years after the European Union ("EU") had requested consultations in this dispute, the compliance adjudicators agreed with the EU that the United States ("US") had still not brought its WTO-inconsistent subsidies to Boeing into compliance with its WTO obligations. While the US *asserted* that it had taken steps to comply with the DSB recommendations and rulings from the original proceedings, the compliance adjudicators disagreed. The Appellate Body preserved the *entirety* of the compliance panel's findings in the EU's favour; rejected *every* US appeal; and, agreed with *additional* EU appeals.

2. The EU, therefore, requested the Arbitration Panel to resume its work under Articles 7.10 and 7.9 of Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"). Under those provisions, the EU has the right to request and obtain authorisation to impose countermeasures at a level "commensurate" with the "adverse effects determined to exist", until the US secures a "multilaterally confirmed" finding of compliance (or the Parties find a mutually agreed solution).[1] The EU has developed a methodology that values the adverse effects determined to exist, and that arrives at an annual amount of countermeasures that is "commensurate" with the degree and nature of the adverse effects determined to exist, as required under Articles 7.10 and 7.9. The EU methodology is, moreover, fully consistent with the methodology applied by the DS316 arbitration panel.[2]

3. The US has failed to meet its burden of demonstrating that the EU methodology is "inconsistent" with Articles 7.10 and 7.9. Indeed, many of the US arguments in these proceedings are themselves inconsistent with Articles 7.10 and 7.9. Some even imply that the DS316 arbitration panel report is WTO-inconsistent, when it followed the very same methodology that the EU adopts here.

4. It follows that the Arbitration Panel and, in turn, the Dispute Settlement Body ("DSB"), should authorise the EU's proposed countermeasures. Those countermeasures are based on the "precise findings"[3] of adverse effects determined to exist as a result of US subsidies operating through, *first*, a price effects causal mechanism (Section II); and, *second*, a technology effects causal mechanism (Section III). The EU summarises the technical implementation of its methodology in Section IV.

II. THE VALUATION OF THE "ADVERSE EFFECTS DETERMINED TO EXIST" AS A RESULT OF US SUBSIDIES OPERATING THROUGH A PRICE EFFECTS CAUSAL MECHANISM

5. The Parties agree that the "adverse effects determined to exist" as a result of US subsidies operating through a price effects causal mechanism are (i) three "lost sales" (*i.e.*, the 2013 Air Canada lost sale; the 2013 Icelandair lost sale; and, the 2014 Fly Dubai lost sale) that took place in the post-implementation period; and, (ii) "threat of impedance" in the US and UAE markets, respectively, for which the compliance reports relied, *inter alia*, on intermediate findings regarding two sales (*i.e.*, the 2011 Delta Airlines lost sale; and, the 2008 Fly Dubai lost sale) that took place before the end of the implementation period.[4] However, the Parties disagree on how to value these adverse effects. Whilst the EU adopts a methodology that values the adverse effects in a manner consistent with Articles 7.10 and 7.9 of the *SCM Agreement*, with the adopted findings, and with the DS316 decision, the US asks the Arbitration Panel to deviate from this approach in several important and erroneous ways for both (i) the three lost sales (Section II.A); and, (ii) the threat of impedance in the US and UAE markets (Section II.B).

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[1] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.52.

[2] The EU made certain adjustments to its initial methodology to reflect the subsequent DS316 arbitration decision.

[3] Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.49.

[4] *See*, *e.g.*, EU Methodology Paper, paras. 40-48; US Written Submission, para. 3.

A. Lost sales

6. To value the three "lost sales" in the post-implementation period, the EU adopts a methodology that is consistent with Articles 7.10 and 7.9 of the *SCM Agreement* and the adopted findings, and mirrors the approach of the DS316 arbitration panel. The US, however, asks the Arbitration Panel to deviate from this approach in at least three erroneous ways (Section II.A.1, Section II.A.2, and Section II.A.3).

1. The US has failed to demonstrate that the Arbitration Panel should reduce the value of lost sales by a "probability" that Boeing would still have won those sales

7. The EU methodology proceeds on the basis that, absent the Business and Occupation ("B&O") tax rate reduction, Airbus – instead of Boeing – would have won the three sales at issue.[5] Indeed, the compliance adjudicators found that, as an "effect of the subsidy", within the meaning of Article 6.3 of the *SCM Agreement*, Airbus had "failed to obtain"[6] these sales, such that they were determined to be "lost sales".[7]

8. By contrast, the US asks the Arbitration Panel to "alter" and "invalidate" these adopted findings.[8] Despite the express findings, the US argues that, absent the subsidies, Airbus had, "*at most*", a "*chance* of winning" each sale.[9] According to the US, the Arbitration Panel must, therefore, "incorporate the *probability* that Boeing still would have made the relevant sales in the counterfactual".[10] Specifically, based on a "model" proposed for the first time in these proceedings, the US submits that, absent the B&O tax rate reduction, Airbus still faced a [[***]] chance of losing each "lost sale".[11]

9. The US argument is (i) wrong as an *interpretative* matter (Section II.A.1.a); (ii) wrong as a matter of *fact*, in light of the specific compliance findings (Section II.A.1.b); and, (iii) based on a *methodology* that is neither fit for purpose, nor reliable (Section II.A.1.c)[1].

a. The US argument that Boeing still would have made the "lost sales" is wrong as an interpretative matter

10. As the Appellate Body explained, "lost sales" are "sales *that suppliers {i.e., Airbus} of the complaining Member {i.e., the EU} 'failed to obtain*' and that *instead* were won by suppliers {*i.e.*, Boeing} of the respondent Member {*i.e.*, the US}".[13] With respect to each of the sales at issue, the compliance adjudicators concluded that Airbus "*failed to obtain*" the sale as an "*effect of the subsidy*", within the meaning of Article 6.3(c) of the *SCM Agreement*.[14]

11. The US argues that there would remain a [[***]] probability that Boeing would still have won the lost sales, resulting in a net present value of the "lost sale" at issue of "$0".[15] The US approach, therefore, "invalidate{s}" the adopted findings that the sales at issue were "lost" as an "effect of the subsidy". In particular, the "lost sale" would *no longer* be the "effect of the subsidy".[16] This is in direct conflict with the adopted findings, which establish that, as a matter of law, the "lost sale" is "the effect of the subsidy".

12. The US asserts that its approach is justified in light of the applicable causation standard. According to the US, it follows from the Appellate Body's confirmation of the causation standard (*i.e.*, that the subsidy must "contribute" as a "genuine and substantial" cause to the lost sales for them to be the "effect of the subsidy") that the value of Airbus' lost sales that the compliance

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[5] As well as the two sales underlying the threat of impedance findings (*see* Section II.B, below).

[6] Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.331; Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1214, 1220.

[7] *See*, *e.g.*, EU Methodology Paper, paras. 72-77. *See* footnote 14, below.

[8] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.210.

[9] US Written Submission, para. 84 (emphasis added).

[10] US Written Submission, para. 84 (emphasis added).

[11] *See* Annex to US Written Submission.

[1] See e.g., EU Written Submission, paras. 16-124.

[13] Appellate Body, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.331 (emphasis added). *See also* Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1214, 1220.

[14] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 9.404, 9.404 (footnote 3329), 9.406, 9.406 (footnote 3335), 9.438, 9.443, 9.446 (footnote 3375), 11.8(c), 11.8(d); Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 5.476, 5.477, 5.526, 6.13.

[15] US Responses to Arbitration Panel Questions 49 (para. 34), 13 (paras. 58-59).

[16] *See*, *e.g.*, EU Opening Statement, paras. 20-37.

adjudicators determined to exist must be reduced by a probability that Boeing would still have won them in the counterfactual.

13. The US reasoning is a *non sequitur*. Either the causation standard was met, or it was not. As the Appellate Body upheld the compliance panel's lost sales findings, the causation standard was met, and the sale was found, as a matter of law, to be a "lost sale" caused by the subsidies. In other words, the lost sale is "the effect of the subsidy", within the meaning of Article 6.3(c). These are the adopted findings that the Parties must accept, and that the Arbitration Panel must value.

14. The US reasoning also has broad systemic implications for the mandate of arbitration panels. It implies that "unless a panel/the Appellate Body finds a subsidy to be the *sole* cause of a serious prejudice phenomenon", "an arbitrator under Article 7.10 of the SCM Agreement must assess the degree of contribution of a subsidy to that serious prejudice phenomenon".[17] Yet, assessing the degree of contribution of a subsidy to a market phenomenon – such as lost sales – implies re-visiting the causation findings made by prior adjudicators. Thus, the US argument implies that, in most instances, determining what constitutes a "commensurate" level of countermeasures would require an arbitration panel to revisit the very causation findings already made. Under its mandate, it cannot do so.

b. The US argument that Boeing still would have made the "lost sales" is wrong as a matter of fact, in light of the specific compliance findings

15. Next, the specific findings underlying the ultimate "lost sales" determination also eliminate any basis for the US assertion that there is a [[***]] probability that Boeing would still have won the sales at issue.[18]

16. *First*, the US "probability" argument mischaracterises the compliance findings regarding differences in net prices between Airbus' and Boeing's offers.[19] In the US' view, the compliance adjudicators found that the subsidy amount was "not necessarily enough to cover observed gaps between the net prices offered by Airbus and Boeing".[20] However, with respect to each of the three lost sales arising during the compliance reference period, the US' assertion is directly contradicted by the compliance adjudicators' explicit findings that the per-aircraft subsidy *fully closed* the gap between the net prices in Airbus' and Boeing's offers.[21] On its own terms, the US argument must, therefore, fail for the three lost sales arising during the compliance reference period.

17. *Second*, and more importantly, for each of the five lost sales,[22] the compliance adjudicators did not rest the causation finding on a comparison of net prices. The US ignores – as it did before the Appellate Body[23] – that the compliance adjudicators properly understood that net prices are not determinative, in light of the need to account for the value of *non-price differences* between the two offers, by way of a net present value ("NPV") assessment.[24] Having assessed all factors, the compliance adjudicators found that all five sales were price-sensitive, in the sense that "there were *no non-price factors* that explain Boeing's success in obtaining the sale".[25] In fact, for two lost sales (*i.e.*, 2008 Fly Dubai and 2014 Fly Dubai), the compliance adjudicators found that *the US had not even advanced any non-price factors* that could explain Boeing's success in obtaining those sales.[26] For the three remaining sales, the compliance panel found that "Boeing appeared to be under particular pressure to reduce its prices in order to secure the sale, and there *were no non-price factors that explain Boeing's success in obtaining the sale*".[27] These findings directly contradict the US assertion that the adopted findings "left open the possibility that a buyer may have determined that the totality of Boeing's offer, including the quality of its products and associated services, was

[17] Arbitration Panel Question 13 (emphasis in original).

[18] *See also* EU Written Submission, paras. 44-86.

[19] *See e.g.,* US Opening Statement, para. 21; US Written Submission, paras. 44, 86.

[20] US Opening Statement, para. 21.

[21] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 9.402. *See also* Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.474.

[22] For the 2011 Delta Airlines and 2008 Fly Dubai sales, the "lost sale" finding was an intermediate finding used by the compliance adjudicators to find adverse effects in the form of "threat of impedance".

[23] Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 5.510-5.512.

[24] Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.473. *See also* Statement of K. Rao, 7 October 2015, **(Exhibit EU-33-HSBI)**, as *cited* by Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 9.399, 9.402; Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 5.473, 5.510, 5.511, 5.515, 5.517, 5.520, 5.523.

[25] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 9.383 (emphasis added).

[26] Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.461.

[27] Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.461 (emphasis added).

preferable to Airbus's even at a price unaffected by the subsidy".[28] The compliance adjudicators have explicitly dismissed the relevance of such non-price factors.

18. *Third*, the adopted findings concerning the role of an assessment of NPV differences eliminate the probability that Boeing would have won any of the five sales at issue. The compliance adjudicators found that the per-aircraft subsidy "*does* exceed the NPV difference that the evidence before us suggests can be determinative of the outcomes of sales campaigns involving single-aisle aircraft", including in the five price-sensitive sales.[29] Because these five sales were price-sensitive, the NPV differences between the two competing offers were close, falling within a range where subsidies change the outcome of each campaign.[30] In other words, the adopted findings concerning the NPV evidence establish that, absent the subsidy, Airbus, instead of Boeing, would have won the five price-sensitive sales.

19. For all the reasons above, the compliance adjudicators in this dispute fully closed the door for a re-assessment of causation. The situation here is no different from DS316, where the arbitration panel accepted that the door was closed for a re-assessment of the causation finding.[31]

c. The US argument that Boeing still would have won the "lost sales" is based on a methodology that is neither fit for purpose, nor reliable

20. Finally, and in any event, the EU has explained, in detail, that the US model is not fit for purpose and unreliable. Throughout the proceedings, the US failed entirely to engage with any of the EU criticisms.

21. *First*, the US model is not fit for purpose. No model from the family of "random utility models", to which the US model belongs, is able to predict the outcome of a set of *individual sales* that are taken from a *non-random* group of observations. Such models can only make *average* market-wide predictions, and cannot be used to predict the outcome of *any individual* sale, let alone the outcome of sales that are distinctly *not average*, like the *particularly price-sensitive sales* at issue.[32]

22. *Second*, the model is unreliable. The model is mis-specified, as it fails to capture the basic realities of the Large Civil Aircraft ("LCA") market, including many relevant demand-side and supply-side factors. Moreover, the model implementation is flawed, because fundamental parameters are mis-specified. Finally, key data points necessary to operationalise the model are either inappropriate for the purpose at hand (such as cost and margin data) or incompatible with each other (such as different metrics for Boeing and Airbus LCA prices, respectively), making it impossible for the model to produce reliable predictions.[33]

2. The US has failed to demonstrate that the EU relied on the wrong number of aircraft

23. The EU methodology values the number of Boeing aircraft already delivered, and to be delivered in the future, in the sales at issue. The EU methodology mirrors that adopted by the DS316 arbitration panel, a methodology that the US itself had considered, in DS316, to be consistent with Articles 7.10 and 7.9 of the *SCM Agreement*, the adopted findings, and the demand-side needs in the LCA market.[34] Yet, the US asks the Arbitration Panel to deviate from this approach, and to rely, instead, on the number of aircraft deliveries proposed in Airbus' final offers. The US errs.

24. *First*, the EU approach is consistent with the adopted findings. As in DS316, the adopted findings of adverse effects are based on the number of *Boeing* deliveries made and due under each

[28] Annex to US Written Submission, para. 2.

[29] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 9.402 (emphasis in original); Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 5.473, 5.510, 5.511, 5.515, 5.517, 5.520, 5.523.

[30] *See* Statement of K. Rao, 7 October 2015, **(Exhibit EU-33-HSBI)**, *cited* by Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 9.399, 9.402; Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 5.473, 5.510, 5.511, 5.515, 5.517, 5.520, 5.523.

[31] *See*, *e.g.*, Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, paras. 6.79, 6.104, 6.200, 6.211, 6.213, 6.477.

[32] *See* EU Written Submission, paras. 94-111.

[33] *See* EU Written Submission, paras. 112-123.

[34] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.221 (footnote 377).

of the sales at issue.[35] That is, the number of aircraft deliveries that the losing manufacturer – in this case, Airbus – "lost" as a result of the subsidy equals the number of aircraft involved in the order from the winning manufacturer – in this case, Boeing.

25. *Second*, the EU approach is consistent with the demonstrated demand-side needs of the airline customers. The DS316 arbitration panel decided to rely on the number of Airbus deliveries in light of "the substitutability of the closest competing Boeing and Airbus models, and the demonstrated customer demand for the specified number of aircraft involved in the lost sales".[36] The exact same demand-side considerations are present when a sale is lost by Airbus, instead of Boeing.[37]

26. *Third*, the EU approach is consistent with the approach in DS316. The Arbitration Panel's Question whether it could, nonetheless, deviate from the DS316 approach revealed an apparent misunderstanding of the DS316 decision.[38] As in DS316, "*direct evidence of … {Airbus'} counterfactual negotiating results*"[39] is absent in the present proceedings. In fact, "direct evidence" of the counterfactual delivery numbers Airbus would have secured had it won the sales at issue is, by definition, never available, *because it is counterfactual*. Indeed, when referring to the absence of "*direct evidence of the counterfactual negotiating results*", the DS316 arbitration panel was not referring to the absence of Boeing ***final offers***, because (i) *Boeing's* final offers were not *absent* from the record of the DS316 arbitration panel proceedings; and, (ii) more importantly, final offers represent *actual* negotiating *proposals* – not *counterfactual* negotiating *results*. Importantly, the Parties agree that final offers remain subject to further negotiations, including potentially with respect to the number of aircraft involved. In these circumstances, it is the *Boeing* purchase agreement that shows, most directly, what the airline actually procured from Boeing, in terms of the number of aircraft, and thus did not procure from Airbus. Accordingly, the most direct evidence of the number of counterfactual deliveries is the Boeing purchase agreement, not the Airbus final offer. Consistent with the approach in DS316, the Arbitration Panel should, therefore, rely on Boeing's actual purchase agreements to identify the delivery numbers.

3. The US has failed to demonstrate that the EU used the wrong reference period over which to annualise the value of the three lost sales at issue

27. Finally, to express the level of countermeasures as an annual value, the EU methodology distributes the total value of the three lost sales over the 33-month reference period used in the compliance proceedings – *i.e.*, between January 2013 and September 2015. In so doing, the EU methodology ensures, as it must, consistency between the numerator (*i.e.*, the total value of adverse effects over the reference period) and the denominator (*i.e.*, the *same* reference period, over which the total value of adverse effects is distributed). This approach mirrors the approach adopted by the DS316 arbitration panel, is consistent with Articles 7.10 and 7.9, and is dictated by basic logic and mathematics.

28. The compliance adjudicators found adverse effects during a "*temporally circumscribed reference period*"[40] of 33 months.[41] To obtain an *annual* average value of a total sum that derives from a period other than 12 months (*i.e.*, the 33-month reference period), the total sum must be annualised based on the *same* period (*i.e.*, the 33-month reference period), and not based on a different period. Otherwise, the denominator does not achieve its intended purpose, which is to

[35] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 9.381 (Table 12), 9.406, Appendix 2 (HSBI) (Iceland Air, title before para. 245; Fly Dubai, title before para. 266). *See also* Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 5.472, 5.480, 5.498 (footnote 1117).

[36] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.221 (footnote 377).

[37] *See* Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 9.247-9.248; Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.459.

[38] Arbitration Panel Question 9, *citing* Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.263.

[39] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.263 (emphasis added).

[40] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.46 (emphasis added).

[41] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 9.432 (footnote 3368). *See also* Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 5.480. The US agrees on the end point of the reference period, *i.e.*, September 2015. *See e.g.*, US Written Submission, paras. 100, 111, 133.

annualise a total sum obtained over a period of time other than one year, so as to "obtain the average *annual* value" thereof.[42]

29. While the US agrees that there needs to be consistency between the numerator and the denominator,[43] it asks the Arbitration Panel to distribute the lost sales not over the 33-month reference period (as logic dictates), but over a much longer 105-month period (or 8.75 years), allegedly reflecting "*the evidence included* in the numerator".[44] The US errs.

30. *First*, given a numerator that consists of the value of the adverse effects determined to exist in the 33-month reference period, the US approach of distributing the adverse effects over a different period (105 months) creates a mismatch between the numerator (*i.e.*, the adverse effects determined to exist during the reference period) and the denominator (*i.e.*, annualisation over a much longer 105-month period), and must be rejected. For the numerator, the US accepts, as it must, that the compliance reference period was certainly *not* 105 months, but much shorter (33 months, or, according to the US, 36 months).[45] On that basis alone, and given the requirement for consistency, the Arbitration Panel should reject the US argument using a 105-month annualisation period (*i.e.*, the denominator).[46]

31. *Second*, the US approach is also inconsistent with the practice of previous arbitration panels, including DS316, which selected "short-term periods immediately following or including the time at which the responding party should have come into compliance".[47] By spanning 8.75 years, of which more than 5.5 years are *before* the end of the implementation period, the US approach is inconsistent with that guidance.

32. *Third*, the US asserts that its approach is justified because, according to the US, "it is clear that the five lost sales at issue occurred over the 105-month period".[48] Here, the US misrepresents the "adverse effects determined to exist". The adopted findings do *not* concern adverse effects in the form of five lost sales over 105 months. Rather, the adopted findings concern (i) three lost sales and (ii) threat of impedance in the US and UAE markets, each of which arose *during* the 33-month reference period.

33. *Fourth*, the US itself accepts that, if a so-called "threat of impedance" approach were adopted for the US and UAE markets, the three lost sales should **not** be distributed over 105 months, but rather over the much shorter 33-month reference period (or 36 months, according to the US).[49] The US' acceptance of this proposition illustrates that its own approach defies logic. Under the US approach, the exact *same* three lost sales are valued fundamentally differently, depending on how the Arbitration Panel decides to value *separate and additional* types of adverse effects (*i.e.*, the threat of impedance in the US and UAE markets). Indeed, depending on the valuation methodology for *other* adverse effects, the annual value of the *same* three lost sales would be *reduced by nearly 70 percent*.

34. *Fifth*, and finally, the US approach is illogical for another reason. Under the US approach, the *total* level of countermeasures would be *higher*, had there been *no finding of threat of impedance*. Specifically, higher countermeasures result (i) in a scenario with only three lost sales (which must be annualised over a 33-month, or, in the US view, 36-month period), than (ii) in a scenario with three lost sales and threat of impedance findings (which, in the US view, must be annualised over a 105-month period). Thus, under the US approach, the level of countermeasures would have been *higher* had the compliance adjudicators found *fewer* adverse effects, namely only three lost sales, *without* a threat of impedance in the US and UAE markets.

B. Threat of impedance in the US and UAE markets

35. With respect to the valuation of the "threat of impedance" in the US and UAE markets, the Parties agreed that, in light of the adopted findings, the "lost sales" approach discussed above could be used. Specifically, to value the threat of impedance in the US market, the Parties agreed to value

[42] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.475 (emphasis added).
[43] US Responses to Arbitration Panel Questions 35 (para. 107), 74 (para. 124).
[44] US Response to Arbitration Panel Question 74, paras. 124, 126 (emphasis added).
[45] US Responses to Arbitration Panel Questions 66 (para. 98), 71 (para. 115), 33 (para. 105), 35 (para. 110), 37 (para. 117); US Written Submission, para. 36.
[46] US Response to Arbitration Panel Question 74, para. 124.
[47] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.56.
[48] US Response to Arbitration Panel Question 35, para. 109.
[49] US Response to Arbitration Panel Question 66, para. 98.

the 2011 Delta Airlines lost sale.[50] To value the threat of impedance in the UAE market, the Parties agreed to value the 2008 Fly Dubai lost sale (including deliveries that occurred *before* the reference period).[51] The Parties' disagreement in this respect was limited to the same three issues discussed in the context of the valuation of the three "lost sales". For reasons explained above, the US failed to demonstrate that the EU approach is inconsistent with Articles 7.10 and 7.9 (*i.e.*, Sections II.A.1, II.A.2, and II.A.3, above).

36. Nonetheless, the Arbitration Panel asked the Parties to adopt a different approach. The Arbitration Panel suggested the use of a "delivery-centric" approach, which it defined as an approach that values "deliveries", rather than a "lost sales" approach "that values the underlying lost sales at the time they occurred".[52] The term "delivery-centric" does not, however, properly characterise an appropriate alternative approach, because it wrongly suggests that the Arbitration Panel would value a finding of *present* (or actual) impedance, whereas the Arbitration Panel is obliged, under the adopted findings, to value a *threat* of impedance finding. The EU, therefore, uses the term "threat of impedance approach".

37. The valuation of the threat of impedance in the US market must reflect the precise findings that grounded the "threat of impedance" finding – *i.e.*, the 2011 Delta Airlines transaction for 100 aircraft (and 30 option aircraft, for which the same arguments apply). Similarly, the valuation of the threat of impedance in the UAE market must reflect the precise findings that grounded the "threat of impedance" finding – *i.e.*, the 2008 Fly Dubai transaction for 50 aircraft (together with the other matters referred to in the compliance reports). In this respect, it is relevant that:

a) For the 2011 Delta Airlines transaction, as a factual matter, all deliveries occurred either *during* or *after* the reference period. Accordingly, to value the threat of impedance in the US market, the Arbitration Panel must value the threat related to all deliveries resulting from the 2011 Delta Airlines transaction, since all deliveries occurred *during* or *after* the reference period; and,
b) For the 2008 Fly Dubai transaction, as a factual matter, all deliveries occurred either *before* or *during* the reference period. To value the threat of impedance in the UAE market, the Arbitration Panel must, therefore, value the threat related to deliveries resulting from the 2008 Fly Dubai transaction that occurred *during* the reference period.

38. Thus, *subject to conditions (a) through (c) below*, the EU would agree that, if the Arbitration Panel were to adopt a genuine "threat of impedance" approach, as set out below, it need not value the 2008 Fly Dubai deliveries that occurred *before* the start of the reference period. The conditions attached to the EU's agreement are as follows:

a) The Arbitration Panel must value the entirety of the threat of impedance arising in the reference period (*i.e.*, the numerator);[53]
b) It must annualise the value of that threat over the reference period (*i.e.*, the denominator); and,
c) It must reject the US argument that there is a probability that, in the counterfactual, Boeing would still have made some of these deliveries.

39. The US disagrees with each element of the calculation, but fails to demonstrate that the EU approach is inconsistent with Articles 7.10 and 7.9 of the *SCM Agreement*, as explained below.[54]

1. The US has failed to demonstrate that the inclusion of the threat of future deliveries, whether during or after the reference period, is inconsistent with Articles 7.10 and 7.9 of the *SCM Agreement*

a. The EU approach is consistent with the adopted findings, and with Articles 7.10 and 7.9 of the *SCM Agreement*

40. In "plac{ing} a value"[55] on the threat of impedance in the US and UAE markets, the Arbitration Panel must value the *entirety* of the threat of impedance *arising in* the reference period. Any approach that would ignore a portion of the value of the threat of deliveries *arising in* the

[50] EU Written Submission, paras. 248-250; US Written Submission, para. 105; US Response to Arbitration Panel Question 30.
[51] EU Written Submission, paras. 283, 284, 390; US Written Submission, paras. 148 (footnote 171), 105; US Responses to Arbitration Panel Questions 30 (para. 87), 31 (paras. 89-92).
[52] Arbitration Panel Question 66.
[53] The threat of impedance covers the threat of deliveries later in, or after, the reference period.
[54] The EU addressed the flawed US probability argument in Section II.A.1, above.
[55] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.210.

reference period would be inconsistent with Articles 7.10 and 7.9, and an unacceptable breach of the Arbitration Panel's mandate, which is circumscribed by findings multilaterally adopted by WTO Members acting through the DSB.

41. The compliance adjudicators made "precise findings"[56] regarding the existence of the "threat of impedance" in those markets. Those findings were (i) based on specific sales transactions in the pre-reference period, and (ii) reflected the particularities of the LCA industry (in which there is typically a significant time lag of some years between order and delivery). That is, when Boeing won and Airbus lost the transactions at issue (on 25 August for the 2011 Delta Airlines transaction; and, on 4 July 2008 for the 2008 Fly Dubai transaction), it was the fact of those lost transactions that gave rise to the threat of impedance in, respectively, the US and UAE markets. In other words, the contractual order created the threat of impedance. It is for that reason that the impedance was threatened – *i.e.*, "*clearly foreseen and imminent*"[57] – with effect from the date on which the Boeing contract was concluded. Indeed, as the compliance panel found, "owing to Airbus losing the 2011 Delta Airlines sales campaign {*i.e.*, on 25 August 2011} …, its imports of single-aisle LCA to the United States market **will**, ***to that extent*** {*i.e.*, for 100 aircraft} be *obstructed, hindered or held back*".[58] On this basis, the compliance panel found a threat of impedance in the US market. Likewise, the compliance panel explicitly relied on "Fly Dubai's 2008 … ***orders of 50***"[59] Boeing LCA, which Airbus lost on 4 July 2008, to find a "threat" of impedance in the UAE market.

42. The US accepts that the contract created the threat of impedance, explaining that, as a result of the "*lost sales*" in the pre- implementation period, "{t}*he deliveries associated with lost orders are then impeded*", giving rise to "*the threat of impedance*" "*in the post-implementation period*".[60]

43. It follows from these findings, and the Parties' agreed view thereon, that the correct temporal perspective, and the one adopted by the compliance adjudicators, is that the threat of impedance arose on the date of order. The findings by the compliance adjudicators then addressed the future in relation to that point in time and, insofar as is legally relevant, the start of the reference period (1 January 2013). The threat of impedance was, to that extent, present in the reference period. It is uncontested that, at the start of the reference period, none of the aircraft associated with the 2011 Delta Airlines transaction had been delivered; and, about half of those associated with the 2008 Fly Dubai transaction had not been delivered. All these aircraft must, therefore, be valued as threat of impedance arising in the reference period.

b. The US mischaracterises the EU approach and the adopted findings

44. In its attempt to rebut the EU approach, the US mischaracterises both the EU approach, and the adopted findings.

45. *First*, the compliance panel considered the existence of adverse effects *arising in* the reference period – *i.e.*, *at any time* during this period (*e.g.*, at the time of the 2013 Air Canada lost sale (11 December 2013)).[61] In so doing, the compliance panel did not take a "snapshot of the market situation"[62] on the first day of the reference period. Rather, consistent with its mandate, the compliance panel determined the presence of serious prejudice, and threat thereof, *arising at any time during* this period. Thus, the US errs in characterising the EU position, and by extension the compliance panel's findings, as considering a "snapshot of the market situation"[63] on the first day of the reference period.

46. *Second*, the US then asks the Arbitration Panel to accept the erroneous proposition that the compliance panel adopted a snapshot of the market situation as of the *last* day of the compliance period (*i.e.*, 30 September 2015). Again, the US errs. In making its findings of threat of impedance, the compliance panel did *not* (and did *not* have to) situate itself solely at the *end* of the reference period (30 September 2015), and did *not* (and did *not* have to) consider data on actual deliveries arising *during* the reference period (1 January 2013 to 30 September 2015) separate from data on threatened deliveries *after* the reference period (*i.e.*, after 30 September 2015). Nor did the compliance panel then determine that a threat of impedance arose in the reference period, solely

[56] Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.49.
[57] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1171 (emphasis added).
[58] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 9.437 (italics in original; bold added).
[59] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 9.443 (emphasis added).
[60] US Response to Arbitration Panel Question 66, paras. 101-102 (emphasis added).
[61] *See*, *e.g.*, EU Opening Statement, para. 106.
[62] US Response to Arbitration Panel Question 69, para. 107.
[63] US Response to Arbitration Panel Question 69, para. 107.

with reference to threatened deliveries *after* the reference period. Any such assertion would contradict the findings actually made by the compliance panel in this particular case.

47. Moreover, if the compliance panel had taken the end of the reference period (30 September 2015) as its temporal viewpoint, it could not have relied on "Fly Dubai's 2008 … orders of 50"[64] Boeing LCA as a basis for a threat of impedance finding, given that *all* deliveries under that transaction occurred *before* the end of the reference period (*i.e.*, *before* 1 October 2015). The fact that the compliance panel explicitly relied on the 2008 Fly Dubai transaction, therefore, confirms that the "threat" of impedance includes the threat of deliveries arising at any time during the reference period.[65]

48. *Third*, implicit in the US mischaracterisation of the EU position may also be the assumption that a threat must remain extant *throughout the entirety of* the reference period, and must not have materialised as (alleged) present impedance during the reference period. The US assertion is, again, incorrect. Since the compliance adjudicators found a threat of impedance arising "in" the reference period, the Arbitration Panel must value that adverse effect. The Arbitration Panel is not released from its obligation to value that threat of impedance because the responding Member asserts, *before the Arbitration Panel*, that some deliveries occurred during the reference period, that these might have constituted present impedance, and that this must diminish the adverse effects determined to exist.

49. As a matter of law and fact, it is perfectly possible that particular facts and evidence are capable of supporting findings of two different types of adverse effects. Here, the facts and evidence regarding the lost transactions fully supported the threat of impedance findings for all the relevant aircraft, irrespective of whether deliveries were scheduled to occur later in the reference period or after the reference period.[66] At the same time, the facts and evidence regarding deliveries during the reference period might, as the US asserts, have supported a separate finding of impedance (though the compliance adjudicators made no such findings). However, the US affirmation that they do is incapable, as a matter of law, of diminishing the adverse effects determined to exist (threat of impedance arising in the reference period).

c. The US approach is inconsistent with Articles 7.10 and 7.9 of the SCM Agreement, and with the adopted findings

50. In light of the adopted findings, the US cannot meet its burden of demonstrating that the inclusion of threatened deliveries during and after the reference period as part of the threat of impedance that arose *during* the reference period is inconsistent with Articles 7.10 and 7.9. Nonetheless, the EU goes further, and explains that the alternative US approach is inconsistent with Articles 7.10 and 7.9.

i. The US approach "invalidate{s}" and "alter{s}" the adopted findings

51. The US does not explain how its position is consistent with the "precise findings"[67] of threat of impedance. Instead, the US points to a single footnote in which the compliance panel stated, unremarkably, that threat claims "necessarily require evidence of projected future deliveries".[68]

52. It does not follow from this footnote that the threat of future deliveries is partially negated with respect to deliveries occurring later on in the reference period, merely because those deliveries could *also* have grounded a finding of present impedance. The compliance panel made no finding of present impedance, as the US seems to accept. Indeed, even the US only purports to find an "***indicat{ion}***"[69] of support in this footnote. In truth, the footnote merely indicates that "threat" is about the future, looking forward from the relevant temporal view point. On the facts of this case, that is the date of the lost transactions, and by extension, the beginning of the reference period.

[64] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 9.443 (emphasis added).

[65] *See also* EU Response to Arbitration Panel Question 66, paras. 221-226.

[66] This was complemented by certain additional observations made with respect to the UAE market (observations which, as both Parties agree, do not diminish the threat of impedance resulting from the 2008 Fly Dubai transaction). US Responses to Arbitration Panel Questions 66 (para. 102), 31 (para. 90); US Written Submission, para. 105.

[67] Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.49.

[68] US Responses to Arbitration Panel Questions 66 (paras. 84-85) (*citing* Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 9.432 (footnote 3368)), 69 (para. 107).

[69] US Response to Arbitration Panel Question 66, para. 85 (emphasis added).

53. Thus, the fact that threat claims "*necessarily* require evidence of projected future deliveries" does not mean that evidence of a threat of deliveries later in the reference period is irrelevant to establish the existence of a threat of impedance arising in the reference period. In light of the facts and the particular findings at issue, the correct temporal viewpoint reveals that evidence of future scheduled deliveries *during* the reference period necessarily constitutes evidence of threat.

ii. The US approach requires the Arbitration Panel to accept two erroneous propositions, and to step outside its mandate

54. To accept the US approach, the Arbitration Panel would have to ignore not only the adopted findings; it would also have to accept two erroneous propositions, each requiring it to step outside its mandate. The US asks the Arbitration Panel to agree that, "{i}f the compliance panel considered that deliveries during the reference period supported findings of serious prejudice, it would have made findings of *present* impedance, not *threat* of impedance" (**First Proposition**).[70] The US errs.

55. *First*, and foremost, the Arbitration Panel is not allowed to place itself in the position of the compliance panel, and to speculate that, as a compliance panel, it may have found impedance during the reference period (a finding that the compliance panel did not make). Nor may the Arbitration Panel, on that erroneous basis, diminish the harm covered by the threat of impedance, by refusing to value the deliveries that subsequently occurred later during the reference period.

56. *Second*, while it is not the Arbitration Panel's mandate to speculate what the compliance panel *would or could* have found, there is no basis to assume that, in relation to the deliveries during the reference period, the compliance panel "would have made findings of *present* impedance, not *threat* of impedance".[71] As noted, facts and evidence may be capable of supporting findings of two different types of adverse effects. The question is not, thus, whether one or the other finding would have been appropriate. Here, the "threat" findings were particularly apt because they captured the threat of *all* the relevant deliveries. By contrast, an impedance finding would have been too limited to reflect the "*extent*" to which the transactions at issue "*held back*" Airbus LCA, because it would, by its nature, have been confined to deliveries during the compliance reference period (and would not have related to post-reference period deliveries, which also threatened to impede Airbus LCA imports).[72] That is, the threat finding was faithful to the root cause – *i.e.*, the lost transaction in the pre-reference period.

57. *Third*, while it is not the Arbitration Panel's mandate to speculate why the compliance panel made findings of a threat of impedance, the EU notes that the compliance panel explicitly found a threat of impedance on the basis of deliveries scheduled to occur in the future, irrespective of whether that was later during the reference period or after the reference period. As noted, that finding was particularly apt in light of the facts and evidence before it. The compliance panel did not need to make an additional finding that deliveries during the reference period would *also* give rise to present impedance: one finding suffices, and one finding was made in this particular instance.

58. *Fourth*, and finally, if the compliance panel had adopted the US position (*quod non*), and found a "threat" in relation to post-reference period deliveries *only*, then the compliance panel would have been under an obligation to make an *additional* impedance finding in order to cover the deliveries *during* the reference period. If the threat of deliveries *during* the reference period had not been covered by the compliance panel's threat of impedance findings, the compliance panel would have failed to make an objective assessment of the entire matter placed before it under Article 11 of the DSU. Instead, consistent with its obligation to make an objective assessment, the compliance panel found that the threat of impedance includes the threat of deliveries scheduled to occur during the reference period, as well as the threat of post-reference-period deliveries. It is not within the Arbitration Panel's mandate to adopt a reading of the compliance panel's findings that would imply a finding that the compliance panel violated its obligation under Article 11 of the DSU.

59. In addition, the US asks the Arbitration Panel to accept the erroneous proposition that "there can *only* be threat of impedance findings if there is no present impedance" (**Second Proposition**).[73] The US errs.

60. In *US – Cotton*, on which the US relies for its erroneous proposition, the Appellate Body explicitly found that "{a} claim of serious prejudice *may relate to a different situation* than a claim of threat of serious prejudice", and that, therefore, "a threat of serious prejudice claim does *not*

[70] US Responses to Arbitration Panel Questions 66 (para. 85) (emphasis in original), 69 (para. 109).
[71] US Responses to Arbitration Panel Questions 66 (para. 85) (emphasis in original), 69 (para. 109).
[72] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 9.437 (emphasis in original).
[73] US Response to Arbitration Panel Question 69, para. 108 (emphasis added).

necessarily capture and provide a remedy with respect to the same scenario as a claim of present serious prejudice".[74] Thus, the Appellate Body did not foreclose the possibility that, in particular circumstances, a claim of present serious prejudice (*e.g.*, impedance) *may* relate to the same situation as a threat of serious prejudice (*e.g.*, threat of impedance); and that a threat of serious prejudice claim *may* capture and provide a remedy also with respect to the same scenario as a claim of present serious prejudice. Nor did the Appellate Body foreclose that, as a matter of law, there could be an overlap in the evidence on which a claim of "threat" of impedance and a claim of present impedance could be established. On the facts of this case, the threat of impedance findings "*capture{d} and provide{d} a remedy*" for the economic harm resulting from threatened deliveries during the reference period.[75]

61. Finally, and in any event, it is not for the Arbitration Panel to decide, based on some generalised concept of "threat", whether the compliance panel's characterisation of threat of impedance was or was not in its view proper. The compliance adjudicators have definitively spoken on the characterisation of the transaction as threat of impedance arising in the reference period, and the DSB has adopted those findings. Those findings are definitive, and must be accepted by the Arbitration Panel.

2. The US has failed to demonstrate that the EU used the wrong reference period over which to annualise the threat of impedance

62. Consistent with its approach to the three lost sales, the EU methodology distributes the total value of the threat of impedance in the US and UAE markets over the 33-month reference period in order to obtain an annual level of countermeasures. As explained above,[76] this approach mirrors the DS316 approach, is consistent with Articles 7.10 and 7.9, and is dictated by basic logic and mathematics.

63. The US agrees, *first*, that a "threat" of impedance was found in the "compliance proceeding reference period";[77] and, *second*, that under the threat of impedance approach, "the objective would be to value the threat of impedance that existed *during the compliance proceeding reference period*".[78] Thus, the Parties agree that the value of the numerator is the value of "the threat of impedance that existed *during the compliance proceeding reference period*",[79] which the EU established extends over 33 months. In order to achieve consistency between the numerator and the denominator (a requirement on which the Parties agree), the EU annualises the threat of impedance over the *same* 33-month reference period.

64. Yet, the US disagrees with the EU approach. The US does not annualise the value of the threat of impedance over the *same* reference period (*i.e.*, the denominator), but over a conceptually and temporally *different* period, namely the *delivery years after the reference period*. It is unclear how the US can adopt this approach, given its acceptance that a threat arose in the reference period and must be annualised over the same period (*see* paragraph 63). Indeed, the mismatch alone means that the US approach is not consistent with Articles 7.10 and 7.9. Yet, even if the US approach were appropriate (*quod non*), its application to the UAE market must nonetheless be rejected because it artificially inflates the denominator by collapsing the threat of impedance in that market with the separate threat of impedance in the US market, despite the fact that these are *distinct* adverse effects, occurring in *distinct* markets (and under the US logic, over distinct periods of time).

III. THE VALUATION OF THE "ADVERSE EFFECTS DETERMINED TO EXIST" AS A RESULT OF US SUBSIDIES OPERATING THROUGH A TECHNOLOGY EFFECTS CAUSAL MECHANISM

65. The original panel and the Appellate Body found that the US provided WTO-inconsistent aeronautics research and development ("R&D") subsidies that cause, through a technology effects causal mechanism, adverse effects related to certain twin-aisle LCA.[80] In the compliance proceedings, the panel found that the US had failed to withdraw the pre-2007 aeronautics R&D

[74] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 244 (emphasis added).
[75] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 244 (emphasis added).
[76] *See* paragraphs 27-34, above.
[77] US Responses to Arbitration Panel Questions 35 (para. 110), 33 (para. 105), 37 (para. 117); US Written Submission, paras. 36, 109, 111.
[78] US Response to Arbitration Panel Question 66, para. 94 (emphasis added).
[79] US Response to Arbitration Panel Question 66, para. 94 (emphasis added).
[80] Panel Report, *US – Large Civil Aircraft*, paras. 7.1797, 7.1854(a), 8.3(a)(i); Appellate Body Report, *US – Large Civil Aircraft*, paras. 1126, 1127, 1350(d)(i).

subsidies at issue ("aeronautics R&D subsidies").[81] Moreover, agreeing with the EU, the Appellate Body reversed the compliance panel's finding that the US had removed the adverse effects caused by these subsidies.[82] As a result, there is no multilaterally adopted finding that the US has achieved "substantive compliance" with regard to the effects of the aeronautics R&D subsidies at issue.[83] In contrast, there *is* a multilaterally adopted finding from the original proceedings that the aeronautics R&D subsidies at issue cause adverse effects through a technology effects causal mechanism, and a consequent multilateral DSB recommendation directing the US to withdraw these subsidies or remove their adverse effects.

66. Lest it diminish the US' obligations and the EU's rights, the Arbitration Panel must rely on "the adverse effects determined to exist" in the original proceedings to place a value on the adverse effects caused by the aeronautics R&D subsidies. The EU methodology, therefore, values the original lost sales findings, based on the same "lost sales" approach that it applied to the valuation of the adverse effects caused by subsidies operating through a price effects causal mechanism. Authorising countermeasures on this basis provides the only means for the EU to induce the US to bring its WTO-inconsistent subsidies into compliance, as mandated by the multilateral DSB recommendation that flowed from the original proceedings, and that has not been satisfied.

A. The allocation of burdens in the compliance proceedings does not bar the EU from requesting and obtaining authorisation to impose countermeasures

67. The US has not argued that the "lost sales" approach would be inappropriate in this context. Moreover, the US accepts that there is no multilateral finding that it has complied with the DSB's recommendation relating to its aeronautics R&D subsidies. Nonetheless, the US submits that the EU is barred from requesting and obtaining authorisation to impose *any* countermeasures.

68. The US initially argued that the EU is so barred because, as the complainant, the EU bore the burden of proof in the compliance proceedings.[84] However, under the pressure of argument, the US conceded that the allocation of the burden of proof in the underlying compliance proceedings is irrelevant to deciding whether the EU is authorised to adopt countermeasures.[85]

69. Fundamentally, the Parties are, therefore, in agreement that the Arbitration Panel must decide on a novel question, not yet addressed by prior arbitration panels. That is, "which Party bears the consequence"[86] of the absence of a finding of compliance in the compliance proceedings?

70. Is it the complainant, here the EU, that bears those consequences, in circumstances where that Party:

a) In the **original proceedings**, *successfully demonstrated* that the respondent grants subsidies causing adverse effects to its interests, thus triggering a DSB recommendation that the respondent withdraw the subsidy or take appropriate steps to remove the adverse effects;

b) In the **compliance proceedings**, *successfully demonstrated* that the respondent failed to withdraw the WTO-inconsistent subsidies;

c) In the **compliance proceedings**, *successfully demonstrated* before the Appellate Body that the compliance panel erred in finding that the adverse effects of the WTO-inconsistent subsidies have been removed; and,

d) Before the **arbitration panel**, *submitted evidence* demonstrating that the non-withdrawn subsidies continue to cause adverse effects in the post-implementation period?

71. Or, is it the respondent, here the US, that bears those consequences, in circumstances where that Party:

a) In the **original proceedings**, was found to provide *WTO-inconsistent subsidies* causing adverse effects to the complainant's trade interests;

b) As a consequence, following the **original proceedings**, was *directed by the DSB* to withdraw those subsidies or take appropriate steps to remove their adverse effects;

[81] Panel Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, para. 11.7(a).

[82] Appellate Body Report, *US – Large Civil Aircraft (Article 21.5 – EU)*, paras. 5.386-5.421, 6.11.

[83] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.52. *See also ibid.*, paras. 6.49 (including footnote 148), 6.53, 6.54.

[84] *See e.g.*, US Written Submission, paras. 55, 56, 57, 69, 70, 71.

[85] US Response to Arbitration Panel Question 47, para. 31. *See also* EU Opening Statement, paras. 130-135; EU Comment on US Responses to Arbitration Panel Question 47.

[86] US Response to Arbitration Panel Question 45, para. 24.

c) In the **compliance proceedings**, was found to have *failed to withdraw* the subsidies that have been found to cause adverse effects;
d) In the **compliance proceedings**, was found by the compliance panel to have removed the adverse effects, in a finding that was *reversed* by the Appellate Body, such that it remains subject to the DSB recommendation to withdraw the subsidies or to take appropriate steps to remove the adverse effects;
e) Before the **arbitration panel**, nonetheless *unilaterally asserts* that it has *removed any adverse effects* caused by the unwithdrawn subsidies in the post-implementation period; and,
f) Before the **arbitration panel**, *fails to address – let alone rebut* – the complainant's evidence that the non-withdrawn subsidies continue to cause adverse effects in the post-implementation period?

72. The US maintains that the EU bears those consequences because the US *asserts* that it has achieved compliance with respect to the aeronautics R&D subsidies. Specifically, for the US, "where the original responding party *asserts* that it has removed the adverse effects or withdrawn the subsidy",[87] the default position is that compliance has been achieved, even where the Appellate Body has *reversed* findings of compliance in compliance proceedings, and no "multilaterally confirmed"[88] finding of compliance exists.[89] In the US' view, it is "a ***prerequisite***" for authorising countermeasures that the complaining party has obtained an affirmative finding of non-compliance in the post-implementation period.[90] According to the US, since the "EU failed to obtain that prerequisite finding", the Arbitration Panel is not allowed to value related countermeasures.[91]

73. The US' position is inconsistent with both Articles 7.10 and 7.9 of the *SCM Agreement*, and the findings of the DS316 arbitration panel (Section III.B). Even if the Arbitration Panel were to disagree, the EU has, in any event, demonstrated non-compliance in the post-implementation period (Section III.C).

B. The US errs in arguing that a finding of non-compliance in the post-implementation period is a "prerequisite" for authorising countermeasures

74. *First*, the US effectively asks the Arbitration Panel to rewrite Articles 7.10 and 7.9. The US asserts that the "*adverse effects determined to exist*" in Article 7.10 (and Article 7.9) are "those 'determined to exist' ***after the six months {implementation} period***".[92] However, Article 7.9 does not require a *finding* of non-compliance with respect to a reference period after the end of the implementation period "{a}s a prerequisite to imposing countermeasures".[93] Instead, Article 7.9 simply sets out a trigger condition for a complaining Member to request and obtain authorisation to impose countermeasures. Specifically, the "DSB shall grant authorization" to impose countermeasures "{i}n the event the {responding} Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report".

75. Nothing in Article 7.9 requires the trigger condition to be met through a *finding* of non-compliance after the end of the implementation period. Indeed, the US *itself* accepts that a finding of non-compliance is not a "prerequisite" to imposing countermeasures, *if non-compliance is conceded*.[94] Importantly, the question of **when** a complaining Member is allowed to obtain authorisation to impose countermeasures (as defined in the introductory clause in Article 7.9), is different from the question of **what** amount of countermeasures a complaining Member is entitled to request, and **which** adverse effects determined to exist the arbitration panel is directed to value (as defined by the phrase "the degree and nature of the adverse effects determined to exist" in Articles 7.10 and 7.9). When properly separating those questions, it is clear that the Arbitration Panel would not "assume" that the aeronautics R&D subsidies cause adverse effects in the post-implementation period, as the US alleges. Rather, once the trigger condition in Article 7.9 is met, the Arbitration Panel must place a value on the "adverse effects determined to exist", as its mandate under Article 7.10 prescribes.

[87] US Response to Arbitration Panel Question 2, para. 9 (emphasis added).
[88] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.52.
[89] US Opening Statement, paras. 11, 12; US Written Submission, para. 74, Section III; US Responses to Arbitration Panel Questions 2 (paras. 7, 9), 3, 4.
[90] US Opening Statement, para. 11 (emphasis added). *Ibid.*, para. 12.
[91] US Opening Statement, para. 12.
[92] US Response to Arbitration Panel Question 43, para. 9 (emphasis added).
[93] US Response to Arbitration Panel Question 44, para. 11.
[94] US Response to Arbitration Panel Question 44, para. 12.

76. In the present circumstances, the trigger in Article 7.9 has been met by virtue of the Appellate Body's reversal of the compliance panel's finding that the US achieved compliance in relation to aeronautics R&D subsidies. Through the Appellate Body's reversal, the multilaterally-adopted DSB recommendations from the original proceedings "remain operative",[95] and provide a valid basis to request and obtain countermeasures until a future adjudicator issues a "multilaterally confirmed"[96] finding of compliance (or a mutually agreed solution is achieved).

77. Turning to the required valuation, the only "precise findings"[97] of adverse effects "determined to exist" as a result of the aeronautics R&D subsidies are those found by the panel and the Appellate Body in the original proceedings, which the Arbitration Panel may rely on.[98] Indeed, while the US argues, erroneously, that the phrase "determined to exist" in Article 7.10 (and 7.9) refers, as a matter of law, to adverse effects determined to exist *in the post-implementation period*,[99] it ultimately concedes that this phrase does not exclude, as a matter of law, reliance by an arbitration panel on adverse effects determined to exist by the *original* adjudicators, *before* the end of implementation period.[100]

78. *Second*, as confirmed by the DS316 arbitration panel, absent a "multilaterally confirmed"[101] finding of compliance, the default position is not *compliance* – as the US argues – but that which is expressed by the recommendation of the Members sitting collectively as the DSB, *i.e.*, *non-compliance*. The US cannot convert the *absence* of a finding of compliance into an affirmative finding that it *has* complied with the DSB's recommendation, on the sole basis of its own *unilateral assertion* of compliance. Indeed, for the Arbitration Panel to accept the US position would mean to accept the untenable proposition that, based on a *unilateral* assertion of compliance, a *multilaterally-adopted* DSB recommendation to bring a WTO-inconsistent measure into compliance becomes moot and of no legal effect, even absent a multilateral determination that "*the problem*" *has been* "*fixed*".[102]

79. *Third*, and finally, if the Arbitration Panel were to deny the EU's right to impose countermeasures in the present circumstances, the Arbitration Panel would effectively "invalidate" and "alter" both the Appellate Body's reversal of the compliance panel's finding that the US achieved compliance in relation to the aeronautics R&D subsidies, and the multilaterally-adopted DSB recommendations to comply from the original proceedings that "remain operative"[103] as a result of the compliance Appellate Body's reversal. In the scenario envisioned by the US, the Arbitration Panel would erroneously put a value on the "adverse effects determined to exist" *as if the Appellate Body had upheld the compliance panel's finding of compliance*, thus satisfying and exhausting the DSB's recommendation that the US comply.

C. In any event, the EU has demonstrated non-compliance in the post-implementation period

80. In the alternative, if the Arbitration Panel were to disagree with the EU position that a finding of non-compliance in the post-implementation period is not a prerequisite under Article 7.9, the EU has, in any event, established the prerequisite non-compliance in at least two ways.

81. *First*, in the compliance proceedings, the EU demonstrated non-compliance after the end of the implementation period with respect to the B&O tax rate reduction subsidy. That is, the EU successfully demonstrated that, 14 years after the EU requested consultations in this dispute, the US continues to provide WTO-inconsistent subsidies to Boeing that cause adverse effects to EU interests.

82. *Second*, before the Arbitration Panel, the EU has demonstrated non-compliance after the end of the implementation period with respect to the aeronautics R&D subsidies. The US accepts that "an original complaining Member arguably could establish non-compliance after the end of the RPT through arguments and evidence *in an arbitration under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*".[104] The EU has established such non-compliance before this Arbitration

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[95] Panel Report, *US – FSC (Article 21.5 – EC II)*, para. 7.36. *Ibid.*, paras. 7.40-7.43, 7.52. *See also* Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, paras. 83, 94-96.

[96] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.52.

[97] Decision by the Arbitration Panel, *US – Upland Cotton (Articles 22.6 and 7.10 – US)*, para. 4.49.

[98] *See* EU Methodology Paper, paras. 171-174. *See also* EU Written Submission, Section III.

[99] *See e.g.*, US Response to Arbitration Panel Question 43, para. 9 (emphasis added).

[100] US Response to Arbitration Panel Question 44, para. 12.

[101] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.52.

[102] *See* footnote 95, above.

[103] *See* footnote 95, above.

[104] US Response to Arbitration Panel Question 44, para. 13 (emphasis added).

Panel,[105] while the US ***explicitly declined to address, let alone rebut***, the EU evidence and argument. In these circumstances, if the Arbitration Panel were to consider that Article 7.9 requires a showing of non-compliance in the post-implementation period in relation to the aeronautics R&D subsidies (*quod non*), the Arbitration Panel must conclude, based on the uncontested EU evidence and argument before it, that the US has failed to take appropriate steps to remove the adverse effects of the aeronautics R&D subsidies. Deciding otherwise would mean that the Arbitration Panel has made the case for the US, in violation of its duty to make an objective assessment. As the Appellate Body explained, in making an *objective* assessment under Article 11 of the DSU, an adjudicator "may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so".[106]

83. In sum, irrespective of which interpretation of Articles 7.10 and 7.9 the Arbitration Panel adopts, there is no basis to deny the EU's right to authorisation of "commensurate" countermeasures designed "to induce {US} compliance"[107] with the DSB recommendation concerning the aeronautics R&D subsidies.

IV. TECHNICAL IMPLEMENTATION OF THE EU APPROACH

84. In light of the above, the EU values the adverse effects determined to exist as follows. *First*, to value the "lost sales" caused by the US subsidies operating through a price effects causal mechanism (*i.e.*, the 2013 Air Canada lost sale; the 2013 Icelandair lost sale; and, the 2014 Fly Dubai lost sale), the EU applies the following steps:

a) **Determine the counterfactual delivery numbers and schedules:** Consistent with the DS316 approach,[108] the EU determines the counterfactual delivery numbers and schedules using the number and pace of *Boeing*'s deliveries in the lost sales at issue. If the Arbitration Panel were to base counterfactual delivery numbers and schedules on Airbus final offers (which it should not do),[109] it would have to use not only firm orders, but also [[***]] the number of Boeing LCA actually sold.[110]

b) **Adjust for order cancellations triggered by demand-side factors:** Consistent with the DS316 approach,[111] the EU reduces the counterfactual delivery numbers for those deliveries that would also have been cancelled in the counterfactual. The Parties agree that a single LCA (one 737-800 NG as part of the 2014 Fly Dubai transaction) was cancelled due to demand-side factors that would likewise have occurred in the counterfactual.[112]

c) **Determine the counterfactual delivery price for each year of expected delivery:** The EU selects the appropriate Net Fly-away Prices and the appropriate escalation factors, as reflected in the respective Airbus final offers. The EU demonstrated (and the US acknowledged)[113] that there is no justification to exclude [[***]].[114]

d) **Perform downward-adjustment for future cancellation risk:** Consistent with the DS316 approach,[115] the EU reflects the risk of cancellation of future deliveries triggered by demand-side factors. For every outstanding delivery, the EU adjusts the counterfactual delivery price by the estimated future survival rate, which is a function of expected cancellation rates. The most reliable, robust, and relevant proxy for future Airbus cancellation risk is derived from *actual cancellations* that Boeing experienced *in*

[105] *See* EU Written Submission, paras. 359-360 (footnotes 477-479), and evidence and argument cited therein. *See also* EU Written Submission, para. 358 (footnote 476); EU Opening Statement, para. 141 ("the EU explicitly offered that, on request, it is willing to provide the underlying exhibits on short notice").

[106] Appellate Body Report, *US – Gambling*, para. 282 (emphasis added).

[107] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 5.2.

[108] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.221 (including footnote 377).

[109] *See*, *e.g.*, EU Opening Statement, paras. 39-62; EU Responses to Questions 8, 9, 54.

[110] *See* EU Written Submission, paras. 228-229; EU Opening Statement, para. 50.

[111] *See* Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, paras. 6.225, 6.478.

[112] *See* US Responses to Arbitration Panel Questions 20 (para. 80), 57 (para. 55), 60 (para. 66); EU Written Submission, para. 216; Historic order cancellations in the single-aisle and twin-aisle LCA sales campaigns at issue, **(Exhibit EU-46-BCI)**.

[113] *See* Letter by the United States to the Chairperson, dated 4 February 2020.

[114] *See*, *e.g.*, EU Comment on US Response to Arbitration Panel Question 79, paras. 427-430.

[115] *See* Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, paras. 6.237-6.241, 6.484.

the five price-sensitive single-aisle LCA transactions at issue as a fraction of all Boeing deliveries effectuated to date in these transactions (*i.e.*, 0.40 percent).[116]

e) **Perform temporal backward-adjustment, using Airbus' cost of debt as discount rate:** Next, the EU performs a backward-adjustment to express each counterfactual Airbus delivery price (modified by its future cancellation risk, if applicable) in terms of the delivery price at the time the sale was lost, *i.e.*, in order-year US dollar terms. The EU again follows the DS316 approach, and applies Airbus' cost of debt as discount factor.[117] The US failed to demonstrate that this approach is inconsistent with Articles 7.10 and 7.9; in any event, the EU demonstrated that the alternative approach suggested by the US (*i.e.*, using as the discount rate Airbus' weighted average cost of capital) is an inferior discount rate in present circumstances, and was properly rejected by the DS316 arbitration panel.[118]

f) **Express values of lost sales in terms of a "common basis" (2015 dollars):** Consistent with the DS316 approach,[119] the EU converts 2013 and 2014 US dollar values into 2015 US dollars, so as to express all lost sales in terms of a "common basis". The factor used to effectuate this forward-adjustment is the Airbus LCA inflation index ("ALII"), which is based on Airbus' contractual escalation rates, thereby reflecting [[***]] changes in labour and material costs resulting from inflation and other economic changes.[120]

g) **Determine the aggregated *annualised* value of the adverse effects from the lost sales at issue:** The EU divides the total value by 33 (the number of months in the reference period), and multiplies that amount by 12, so as to generate an amount of annual adverse effects from the three lost sales.

85. The annualised 2015 value of these adverse effects is USD [[***]] billion (based on Boeing delivery schedules) and USD [[***]] billion (based on Airbus delivery schedules).[121]

86. *Second*, to value the "threat of impedance" in the US and UAE markets that were caused by US subsidies operating through a price effects causal mechanism, the EU applies the steps described above (at paragraph 84) to, respectively, the 2011 Delta Airlines and 2008 Fly Dubai transactions, with two differences. *First*, to implement a *threat* of impedance approach under step (a), the Arbitration Panel must value the threat of deliveries that occurred *during* and *after* the reference period, but does not need to value deliveries that occurred *before* the reference period.[122] *Second*, to perform the temporal backward-adjustment under a threat of impedance approach (step (e)), the EU does not discount delivery prices back to the order year, but to the start of the reference period (January 2013).[123] The annualised 2015 value of these adverse effects is USD [[***]] billion (based on Boeing delivery schedules) and USD [[***]] billion (based on Airbus delivery schedules).[124]

87. *Third*, and finally, to value the "lost sales" that were caused by US subsidies operating through a technology effects causal mechanism (*i.e.*, 2005 Qantas lost sale; 2005 Ethiopian Airlines lost sale; 2005 Icelandair lost sale; and, 2006 Kenya Airways lost sale), the EU applies the steps described above (at paragraph 84), with one difference. To determine the aggregated *annualised* value of the adverse effects (step (g)), the EU divides the total value by the length of the original reference period (*i.e.*, 36 months) instead of the compliance reference period (*i.e.*, 33 months). The annualised 2015 value of these adverse effects is USD [[***]] billion (based on Boeing delivery schedules) and USD [[***]] billion (based on Airbus delivery schedules).[125]

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[116] *See* EU Response to Arbitration Panel Question 61, para. 177 (footnote 187).

[117] Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, paras. 6.352-6.354.

[118] *See* EU Comment on US Response to Arbitration Panel Question 75, paras. 407-413.

[119] *See* Decision by the Arbitration Panel, *EC – Large Civil Aircraft (Article 22.6 – EU)*, paras. 6.495-6.497.

[120] *See* EU Methodology Paper, para. 101.

[121] 2RPQ valuation of single-aisle lost sales – Boeing delivery schedules, **(Exhibit EU-84-HSBI)**; 2RPQ valuation of single-aisle lost sales – Airbus delivery schedules, **(Exhibit EU-85-HSBI)**.

[122] For the conditions that need to be fulfilled under a genuine "threat of impedance" approach, *see* paragraph 38, above.

[123] *See* EU Response to Arbitration Panel Question 66, paras. 269, 270.

[124] 2RPQ valuation of single-aisle threat of impedance – Boeing delivery schedules, **(Exhibit EU-76-HSBI)**; and 2RPQ valuation of single-aisle threat of impedance – Airbus delivery schedules, **(Exhibit EU-77-HSBI)**.

[125] 2RPQ valuation of twin-aisle lost sales – Boeing delivery schedules, **(Exhibit EU-86-HSBI)**; 2RPQ valuation of twin-aisle lost sales – Airbus delivery schedules, **(Exhibit EU-87-HSBI)**.

88. The EU therefore requests the Arbitration Panel and, in turn, the DSB, to authorise an annual level of countermeasures in these amounts.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1 INTRODUCTION

I. Legal Framework for Assessing the EU Proposed Countermeasures

1. Pursuant to Article 7.10 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the Arbitrator's task is to "determine whether countermeasures {proposed by the EU} are commensurate with the degree and nature of the adverse effects determined to exist." The *Oxford English Dictionary* defines degree as "the relative intensity, extent, or amount of a quality, attribute, or action" and nature as the "inherent or essential quality of constitution of a thing." In *US – Upland Cotton (22.6 II)*, the arbitrator considered that the ordinary meaning of these terms in Article 7.10 was consistent with these definitions.

2. Determining the degree and nature of adverse effects invites a case-specific inquiry that seeks to understand the causal findings and rationale in the underlying proceedings. The arbitrator in *US – Upland Cotton (22.6 II)* indicated that "'commensurate' essentially connotes 'correspondence' between two elements," but that "'commensurate' does not suggest that exact or precise equality is required between the two elements to be compared, i.e., in this case, the proposed countermeasures and the 'degree and nature of the adverse effects determined to exist'." Thus, the arbitrator continued, "'commensurate' connotes a less precise degree of equivalence than exact numerical correspondence'." In addition, as explained further in Section II, in the circumstances here, "the adverse effects determined to exist" refers to those determined in the compliance proceeding reports adopted by the DSB.

II. The EU Improperly Requests Countermeasures for Measures for Which the EU Failed to Obtain Findings of WTO Inconsistency in the Compliance Proceeding.

3. The EU improperly requests countermeasures for pre-2007 R&D subsidies operating through a technology effects causal mechanism. There is no basis for any countermeasures with respect to R&D measures. In the compliance proceeding, the EU alleged that pre-2007 R&D subsidies, operating through a technology effects causal mechanism, continued to cause adverse effects in the post-implementation period. However, the adopted compliance proceeding reports made no such finding.

4. Having failed to obtain the finding of WTO inconsistency that it sought, the EU nonetheless requests the Arbitrator to determine that the EU should be authorized to take countermeasures commensurate with the adverse effects that the original panel found with respect to the pre-2007 R&D subsidies for its 2004-2006 reference period. The EU attempts to justify this by pointing to the compliance appellate report's inability to complete the analysis on certain questions in the compliance proceeding. This is clearly erroneous.

5. Article 7.9 authorizes countermeasures only "{i}n the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy." A subsidy found to cause adverse effects in an original proceeding – prior to any reasonable period of time ("RPT") – *cannot* be presumed to continue to cause adverse effects in the post-implementation period. Therefore, absent agreement between the parties, the original complaining party must ***establish*** that any such subsidy that is unwithdrawn does, in fact, continue to cause adverse effects in the post-implementation period; this is a prerequisite to imposing countermeasures under Article 7.9.

6. Furthermore, findings of adverse effects in an original reference period are based on arguments and evidence relevant to that period. While those findings can serve as the starting point for analyzing the continued existence of adverse effects in the post implementation period, they certainly cannot be relied upon without more to assume non-compliance after the end of the RPT. Thus, as observed in the compliance appellate report in this dispute:

> {A}lthough original findings of adverse effects necessarily serve as the starting point of the analysis in compliance proceedings, it is incumbent on a complaining Member to establish afresh through arguments and evidence whether, and to what extent, the specific serious prejudice phenomena from the original proceedings continue to exist in the post-implementation period.

7. It is also telling that the EU cites no support from prior reports for its flawed interpretation of Articles 7.9 and 7.10 of the SCM Agreement. Its only recourse is to repeatedly cite to the DS316 arbitrator's statement that "'there remains *a valid rationale for granting*' countermeasures '*{u}ntil and unless substantive compliance has been achieved and is multilaterally confirmed* or a mutually agreed solution has been reached'." However, this statement provides the rationale for authorizing annual countermeasures, and does not signal that countermeasures are available to a Member without demonstrating non-compliance in the post-implementation period. Therefore, the "valid rationale" statement provides no support for the EU's attempt to avoid the DS316 arbitrator's statement as to the "basic purpose" of an arbitration.

8. On a final note, the EU's methodology is inconsistent with the positions it has taken previously. Specifically, the EU has previously maintained that, where a party considers that it has achieved compliance following findings of WTO inconsistency in an original proceeding, it is that subsequent scenario of alleged compliance that governs suspension of concessions or other obligations (including countermeasures under the SCM Agreement), not the original scenario that resulted in adopted reports finding WTO inconsistencies. The EU's position has also been that an arbitrator under Article 22.6 of the DSU is precluded from even assessing the WTO consistency of the measures in the post-implementation period, i.e., the revised factual scenario.

9. Based on these prior positions, the EU would be precluded from even having an opportunity to demonstrate that the pre-2007 R&D measures (or any other measures beside the Washington B&O tax rate reduction) continue to cause adverse effects in the post-implementation period. Moreover, if the EU maintains even just the first position – that countermeasures cannot be based on the factual scenario evaluated during the original proceeding, but rather must be based on the WTO consistency of the measures in the new scenario prevailing in the post-implementation period – it would foreclose the EU's reliance on the findings that it cites from the original proceedings.

III. The EU Methodology Improperly Assumes that Airbus Would Have Won All of the Price-Sensitive Campaigns but for the Washington B&O Tax Rate Reduction.

10. The EU's methodology adopts as an invalid premise that, but for the subsidy, Airbus would have won all of the price-sensitive sales campaigns that served as the bases for the adverse effects findings in the compliance proceeding. The EU argues that "the adopted findings demonstrate that, in the counterfactual, there is no probability that Boeing would still have won the lost sales at issue." But the adopted findings demonstrate no such thing.

11. In fact, the United States pursued an appeal on this very basis, arguing that because it was not established that Airbus would have won the price-sensitive sales campaigns but for the subsidy, there was no basis to find that the lost sales were the effect of the subsidy for purposes of Articles 5 and 6.3 of the SCM Agreement. The EU, relying on *US – Upland Cotton (Article 21.5 – Brazil)*, argued that but-for causation was too demanding and that the absence of but-for causation was not dispositive of whether the subsidy met the genuine and substantial standard for causation. The compliance appellate report agreed with the EU, finding that, even if Boeing would have won a sale in the counterfactual by maintaining a pricing advantage, this does not prevent a finding that the lost sale was the effect of the subsidy for purposes of Articles 5 and 6.3 of the SCM Agreement.

12. Yet, in this Arbitration stage, the EU argues the exact opposite proposition: that finding causation for purposes of Article 6.3 – *i.e.*, finding that lost sales are "the effect of" the subsidy – necessarily means that, but for the subsidy, Airbus would have won the relevant sales campaigns in the counterfactual. It would fail to reflect the compliance proceedings findings to turn around in the arbitration and start from the premise that, but for the subsidy, Airbus certainly would have won all of the price-sensitive campaigns.

13. The findings left uncertain which producer would have won a given price-sensitive sales campaign absent the subsidy, just as the findings of lost sales left uncertain whether some deliveries associated with those sales would have been cancelled. Thus, by accounting for the uncertainty

inherent in the causation findings in a probabilistic manner, the United States' methodology reflects the compliance proceeding findings. It does not invalidate any findings because there were no findings of but-for causation.

14. The United States' methodology takes into account the probability of Airbus obtaining orders in price-sensitive campaigns in the absence of the B&O tax rate reduction. Because there remains a complementary probability that Boeing would win a price-sensitive sales campaign in the counterfactual absent the subsidy, the level of the adverse effects of the subsidy cannot be the full revenue from each of the price-sensitive campaigns. The value of each campaign must instead be reduced to reflect the probability that Boeing might have won it in the counterfactual.

15. The U.S. methodology incorporates a standard economic approach to valuing an economic outcome in the presence of uncertainty by calculating an "expected value." The methodology assesses the probability that Airbus would have won a sale in a price-sensitive campaign if the absence of the subsidy had resulted in Boeing increasing its price by $1.99 million per airplane. Under this approach, the value of an outcome in which Airbus won a price-sensitive campaign is the full net present value ("NPV") of the aircraft ordered in that campaign. Likewise, the NPV of an outcome in which Airbus did not win a price-sensitive campaign, even in the absence of the subsidy, is $0. The expected value is just the weighted average of those two outcomes according to the probability that Airbus would win a sale in a price-sensitive campaign in the absence of the subsidy. As such, the United States provides an economic approach to valuing the adverse effects that reflects the multiple counterfactual outcomes inherent in the adopted compliance proceeding findings.

16. The EU accuses the United States of invalidating the compliance proceeding findings that: (1) "there were no non-price factors that explain Boeing's success in obtaining the sale;" and (2) the per-aircraft subsidy amount exceeds "the NPV difference that the evidence before us suggests can be determinative of the outcomes of sales campaigns." However, the U.S. arguments do not invalidate either of these findings.

17. First, the finding that "no non-price factors explain Boeing success" was part of the determination that a particular campaign was price-sensitive. The opposite finding, that a non-price factor explained Boeing's success, meant that some non-price factor was so significant that there was no basis to consider that the subsidy-enabled price difference was a genuine and substantial causal factor. But the finding that no non-price factor ***explained*** the outcome without respect to price, did not mean that all non-price factors were completely irrelevant.

18. Moreover, the EU misunderstands the relevance of non-price factors in the U.S. argument. According to the EU's misconception of the U.S. argument, Boeing would still have won the five sales campaigns at issue "as a result of non-price factors." However, as the EU recognizes elsewhere, the U.S. position is that Boeing may have won price-sensitive campaigns in the counterfactual based on "the totality of Boeing's offer" – which would include both price and non-price factors. The United States certainly is not making any arguments about Boeing winning price-sensitive campaigns on the basis of non-price factors alone.

19. Second, the United States does not seek to invalidate or ignore the finding regarding the NPV difference that evidence suggested can be determinative of the outcomes of sales campaigns. Contrary to the EU's position, the NPV evidence, and the compliance appellate report's references to it, ***support*** the U.S. position. As the EU indicates, there was evidence that the $1.99 million subsidy amount exceeds the magnitude of the NPV difference "that ***could*** change the outcome" of a single-aisle price sensitive campaign. Rather than having ignored this evidence, the United States has emphasized that this evidence was generic, not campaign-specific. It indicated how small an NPV difference ***could*** be; not how small it was in any of the relevant sales campaigns.

20. Furthermore, the compliance appellate report's reliance on the generalized NPV evidence further underscores that it found it necessary only to determine that the per-aircraft subsidy amount was large enough to be a genuine and substantial factor, without regard to whether it was large enough to flip the outcome of a particular sales campaign. The notion that a subsidy altering Boeing's price by $1.99 million ***could*** flip a price-sensitive sales campaign is distinct from a finding that it ***did*** flip particular campaigns. Importantly, the reliance on evidence of what ***could***, or could not, flip a price-sensitive sales campaign reinforces the uncertainty that the U.S. approach takes into account, and undermines the certainty reflected in the EU's approach.

IV. The EU Methodology Improperly Assumes that Airbus Would Have Sold the Same Number of Aircraft as Boeing If It Had Won a Particular Sales Campaign.

21. The EU's calculation improperly incorporates Boeing order numbers and delivery schedules into the valuation of the Airbus lost sales. It relies on Airbus's final offer in the lost sales campaigns to establish the models Airbus would have sold in the counterfactual and the counterfactual prices, but then ignores the number of firm order aircraft that Airbus included in those final offers and relies instead on the number of firm orders in the *Boeing* sales that actually occurred. In accordance with the findings of the compliance panel, Airbus's final offer – including the number of aircraft sold – represents the offer that the customer would have chosen if it indeed would have chosen Airbus absent the subsidy. Therefore, the calculation of the countermeasures should be based on the number of firm orders offered by Airbus in its final offer, not the number of firm orders that Boeing obtained.

22. Sales campaigns are an iterative process where the manufacturers work with the customers to understand their fleet planning needs, and attempt to put together the best offer possible, in light of their profit-maximizing interests. By its very nature, and in each instance, Airbus's final offer consists of a variety of elements (*e.g.,* model, per-aircraft price, quantity of firm orders, delivery schedule, etc.) that Airbus believed gave it the best chance of winning new orders from the customer at issue from among the options to which it was willing to commit.

23. The EU argues that "the sales that Boeing actually won as a result of the US subsidies at issue in this dispute 'represent' lost sales to Airbus, as much as the sales that Airbus won as a result of the subsidies at issue in DS316 'represented' lost sales to Boeing." The EU is mistaken.

24. In DS316, the adopted compliance reports used a counterfactual significantly different from the real world and significantly different from the counterfactual adopted by the compliance panel in this proceeding. In the counterfactual in DS316, Airbus would not have offered the relevant model competing with certain Boeing models because that Airbus model *would not have existed* and, therefore, Boeing would have won all of the relevant orders and made all of the relevant deliveries (in the case of present impedance) in the absence of the subsidy. There was no obvious real world information that would have been probative of the counterfactual competition in which the relevant Airbus aircraft did not exist. By contrast, it was much more reliable that the customer's preferences in the real world would reflect the customer's preferences in the counterfactual. In other words, in the counterfactual in DS316, while customer preferences, *i.e.*, demand-side pressures, were reasonably reliable, supply-side factors were particularly unreliable because the nature of the competition in the counterfactual would have differed so drastically from the observed real-world competition.

25. The findings and applicable counterfactual, as well as the available evidence, in this dispute are significantly different. First, there are no findings that Boeing's LCA offerings would have been absent in the sales campaigns in the counterfactual. Instead, the adopted findings indicate that Boeing would have bid for the sales, albeit at prices that were higher by some unspecified amount up to $1.99 million per aircraft. Therefore, the counterfactual should entail competing offers between Boeing and Airbus almost identical to what actually occurred, with the only difference being that the prices in the Boeing offer would have been slightly higher. Had the customer chosen Airbus in the counterfactual in light of the higher Boeing pricing, it is Airbus's actual final offer that the customer would have chosen.

26. Second, contrary to the claims of the EU, there *is* "an evidentiary distinction between these proceedings and those in DS316." Specifically, in DS316, there were some lost sales and deliveries for which Boeing did not even submit an offer. However, adverse effects findings were still made even where Boeing submitted no formal offer because of the counterfactual in that dispute – namely, that absent the subsidies the relevant Airbus aircraft would not exist. By contrast, in this dispute, Airbus did submit a final offer in all five of the relevant sales campaigns, and each of those final offers is on the record before the Arbitrator.

27. Thus, the EU errs in asserting that "the circumstances in DS316 and in these proceedings are largely identical." To the extent that Airbus would have won a campaign in the counterfactual, it would have done so based on the terms it actually offered – including the number of firm orders it committed to provide each customer.

V. The EU Unjustifiably Includes Options for Additional Aircraft in its Countermeasure Valuation.

28. According to the EU, if the Arbitrator were to base the delivery numbers and schedules on Airbus's final offers, then it "will need to take into account all of the offer terms contained in these proposal documents" and "include LCA options contained in Airbus' final offers in the calculations of adverse effects from lost sales." It simply does not follow that, if counterfactual firm order delivery numbers and schedules are sourced from Airbus final offers, then Airbus's proposed options must be treated as equivalent to a firm order and thereby included in the countermeasures calculation.

29. The compliance panel drew a clear distinction between firm orders and options. It rejected the EU's attempt to demonstrate a threat of lost sales by treating options as "firm orders that are waiting to materialize," finding that "{w}e do not consider that the mere fact that an LCA customer was additionally granted options or purchase rights is sufficient to demonstrate that lost sales in relation to these options and purchase rights are clearly foreseen and imminent, and thus give rise to a threat of significant lost sales." Thus, regardless of whether Airbus final offers include proposed options or an actual Boeing sale included options, including the value of the options would result in countermeasures not commensurate with the adverse effects determined to exist.

30. This is true notwithstanding the EU's reference to "the airline's express need for the specific number of Boeing aircraft actually ordered." An airline order for a specific number of Boeing aircraft does not mean that Airbus could have and would have sold the airline the same number of Airbus aircraft, as Airbus's final offer materials demonstrate. Accordingly, there is no reason to add proposed options to the number of firm orders Airbus proposed.

31. Similarly unavailing is the EU's assertion that "LCA options are an integral part of LCA purchasing agreements." Many things are an integral part of LCA purchasing agreements, but that does not mean that they are all the same. As the compliance panel recognized, a firm order and an option are two different things, and the panel excluded the latter from the adverse effects with which the countermeasures must be commensurate.

32. LCA producers seek a reliable stream of firm orders that can support smooth and efficient production operations, as opposed to volatile swings between higher and lower production that are costly and inefficient. At the same time, LCA producers recognize that "not all orders and commitments (such as options) will materialize as scheduled: some delivery dates may shift later or earlier in time, some options will never be exercised, and in rarer cases, some firm orders may be cancelled." Therefore, LCA producers engage in sophisticated "skyline management" practices, one of which is to overbook, or overcommit, delivery slots.

33. Moreover, an option – as the term connotes – gives the customer the right to exercise or *not* to exercise it. In the latter case, the customer could decide that it does not need to order additional aircraft before the option's expiration. Furthermore, even if a customer does need additional aircraft, it may decline to exercise options and instead conduct another campaign between Boeing and Airbus, which offers the customer the potential of winning additional concessions from the producers or otherwise altering terms based on revised priorities.

34. In addition, the decision whether to exercise an option will tend to be influenced by the customer's experience operating the aircraft it has taken delivery of pursuant to firm orders in the original sales campaign. In particular, because LCA are differentiated products, a positive experience with a given Boeing model does not necessarily mean it would have had a similarly positive counterfactual experience with a given Airbus model. In these respects, options represent new, subsequent customer decision points *after* a sale has been won or lost. Even if Airbus would have had the capacity to satisfy a firm order placed through an option exercise, that does not mean the customer necessarily would have exercised the option.

35. The speculative nature of options was among the reasons the compliance panel did not find that the options at issue were equivalent to allegedly lost firm orders. Accordingly, options were not included in the adverse effects determined to exist. For this reason alone, it would be improper to value options in calculating the maximum level of countermeasures because it would render them in excess of what is commensurate with the adverse effects determined to exist. Furthermore, the proposition that options can be treated identically to firm orders directly contradicts the compliance panel's reasoning.

VI. The EU's Methodology Fails to Appropriately Account for the Risk of Cancellation.

36. The United States considers that each counterfactual delivery should be assigned a probabilistic risk of cancellation, and the value of that delivery adjusted accordingly. Because the deliveries, even if scheduled for a date in the past, are counterfactual, there is no certainty that any would (or would not) have been delivered. Unlike the counterfactual Airbus model or number of aircraft, which are evidenced by the final Airbus offer, there is no equivalent indication in the Airbus final offer or any other document of how many aircraft would have been cancelled following a firm order, or when such cancellations would have occurred.

37. The EU ignores this completely and simply assumes that, if a delivery in an Airbus final offer was scheduled to have occurred by the present day, then it necessarily would have been delivered in the counterfactual. No basis exists for such an assumption. In fact, as both parties acknowledge, there were actual cancellations related to these orders that need to be taken into account.

38. One way to approach the problem would be to look at an Airbus-specific survival rate and apply it to each counterfactual delivery. This would ignore Boeing's experience in the real world with deliveries stemming from these sales campaigns.

39. There are good reasons to think Airbus's experience in the counterfactual could have differed from Boeing's actual experience. First, these aircraft are differentiated products. A customer's assessment regarding the economics of one manufacturer's aircraft may differ from its assessment of even the closest competing model from the other manufacturer. Second, cancellations can sometimes be caused, or at least influenced, by seller-side factors. Delays in the ability to deliver a model provide an obvious example. But less obvious factors may also influence cancellation decisions, such as trouble meeting mechanical reliability or fuel efficiency expectations, which can affect the projected operating economics of an aircraft from a customer's perspective. Third, the contractual consequences of buyer cancellation may differ. From a purely legal perspective, the contractual penalty in one contract could be lower than it was in the competitor's offer. Moreover, an airline may have a longer-standing, better relationship with one manufacturer, which in turn could lead it to believe that the manufacturer would show greater flexibility in accommodating a near-term cancellation where such a cancellation served the customer's financial interests. All of these reasons suggest that, just because a Boeing aircraft was or was not cancelled, it is not certain that an Airbus aircraft would have experienced the same fate had Airbus won the campaign in the counterfactual.

40. On the other hand, there are reasons to believe that Boeing's real-world experience does offer probative evidence of what would have transpired in the counterfactual. Where the cancellation was driven exclusively, or even primarily, by the customer, that would of course be relevant to assessing the likelihood of cancellation in the counterfactual. This evidence of customer preferences is specific to the deliveries associated with the relevant sales campaigns. By contrast, a generic Airbus cancellation rate would not be specific to the preferences of the particular customers involved in the relevant sales campaigns.

41. The United States considers that both approaches could be reasonable under the circumstances. That is, the Arbitrator could reasonably rely on Airbus's experience more generally, which reflects supply-side factors influencing cancellations, or Boeing's experience for these specific sales, which in part reflects demand-side factors, to develop a theoretical cancellation rate.

42. However, to be conservative, the rate incorporated in the United States' latest revised calculation is based on Boeing's actual experience for known cancellations and Airbus's rate for any future deliveries not yet cancelled.

VII. The EU's Methodology Fails to Use the Appropriate Discount Factor.

43. The EU erroneously advocates for the use of Airbus's cost of debt, rather than its WACC, as a discount rate for purposes of valuing the adverse effects determined to exist. This is based, in part, on the arbitrator's use of cost of debt in DS316, but the arbitrator in that dispute recognized that WACC was superior to cost of debt as a discount rate. It simply could not overcome certain evidentiary issues there that are not present in this proceeding. Therefore, as this Arbitrator has the necessary evidence, it should use the WACC instead of cost of debt.

44. The United States agrees that both the WACC and the cost of debt depend on the risk that investors associate with a company and its investments. As measures of the overall risk associated with the business, the rates would reflect risks faced by the company, including, among others, cancellation risk, the risk of aircraft design or performance issues, cost overruns, and fluctuating demand. The WACC remains the best discount rate for expected cash flows because the WACC represents the opportunity cost of alternative investments in projects within the company.

45. The EU makes a series of assertions – often unsupported – to justify use of the cost of debt over the WACC as a discount rate for the value of future payments for aircraft. In evaluating these assertions, it is important to keep in mind the purpose of a discount rate.

46. At the conceptual level, a discount rate is applied to account for the time value of money, which reflects the opportunity cost of money. In short, the discount rate is applied because a dollar tomorrow is not worth as much as a dollar today. This is applicable in the case of specific LCA delivery streams because these delivery streams will generate revenue for the aircraft manufacturers at various points in the future. Therefore, a delivery scheduled 10 years from now that will generate $10 million at the time of delivery is not worth $10 million today; it is worth less than $10 million. The value today is the amount of money that the aircraft manufacturer would have to invest today so that, compounded over 10 years, the aircraft manufacturer would have $10 million in 10 years, *i.e.*, at the time of scheduled delivery.

47. At a practical level, the current value of future income is determined by calculating the dollar amount in today's dollars that would garner the future amount assuming a specific rate of return. In the example above, this would be measured by establishing what amount of money in today's dollars would result in $10 million ten years from now, assuming a certain return on investment. The correct discount rate, therefore, reflects this assumed return on investment. The United States has used Airbus's WACC because the WACC represents the minimum return that the investors in Airbus require the firm to earn on its investments, as measured by the weighted average of the cost of debt and the cost of equity for the firm. In other words, a company can always earn a return equal to its WACC by using available cash to proportionally repay its debt and return capital to shareholders (through dividends or buybacks).

48. Critically, a discount rate must be applied *in addition to* a cancellation rate to account for the risk of cancellation. In the example above, even if one discounts the $10 million that the aircraft manufacturer would have received, one must still apply a cancellation rate to calculate the correct net present value. This is because the aircraft manufacturer will only receive the $10 million if the order is not cancelled. If the order is cancelled, the aircraft manufacturer will receive $0. If there is a five percent likelihood that the order will be cancelled, the aircraft manufacturer would expect to receive $0 five percent of the time and $10 million 95 percent of the time. This means that the expected value in 10 years for the delivery of the aircraft is $9.5 million. To arrive at the expected value of the sale today, one has to *additionally* account for the time value of money by applying a discount rate.

49. The cost of debt does not correctly measure the opportunity cost of money because it reflects only one potential alternative use – reduction of debt. These considerations alone demonstrate the error in the EU's advocacy of the cost of debt exclusively as the discount rate.

VIII. Valuation of Threat

A. Lost Sales Approach

50. The United States' primary position with respect to the valuation of threat is that because the threat of impedance findings are based entirely, from a causation standpoint, on the lost sales findings, these adverse effects can best be valued by following the same approach applied to the significant lost sales findings – that is, calculating a net present value of the aircraft Airbus would have sold in the counterfactual.

51. Under this approach, the five price-sensitive campaigns (the three underlying the significant lost sales finding and the two underlying the threat of impedance finding) are valued identically. Once these values are placed on a common basis in 2015 dollars, the resulting value must be analyzed over the 105 months, or 8.75 years, during which they occurred. When implemented in this manner, the lost sales approach would accurately reflect the degree and nature of the adverse

effects determined to exist – namely that a campaign resulting in adverse effects occurs approximately once every 21 months.

52. The calculation would need to include all deliveries resulting from each campaign to accurately reflect the degree of the adverse effects determined to exist. However, there would be no basis to include the Fly Dubai 2014 sale in the threat of impedance valuation if it were already being valued in the significant lost sales valuation. This would be literal double counting – that is, counting the same exact airplanes twice. Additionally, as discussed above, the EU's inclusion of options under a lost sales approach is baseless. Thus, regardless of whether Airbus final offers include proposed options or an actual Boeing sale included options, quantifying them would result in countermeasures not commensurate with the adverse effects determined to exist.

B. Delivery-centric Approach

53. If the Arbitrator determines to use a "delivery-centric" approach to value the threat of impedance findings, it should include only those deliveries occurring in the *future*, after the end of the compliance proceeding reference period. The compliance panel considered market share trends for delivery data over a period that "extends both prior to and beyond the reference period of 2013-2015 that we use elsewhere in our findings." The compliance panel understood the need to "discern the existence of clear trends," noting that such an approach "is particularly important for the European Union's threat of displacement and impedance claims, which necessarily require evidence of projected future deliveries." In other words, for threat of impedance – that is impedance that is imminent but has not yet materialized – the compliance panel found it necessary to establish clear trends based on evidence of projected future deliveries.

54. Thus, as the compliance panel report indicates, the threat of impedance findings reflect *future* deliveries, not deliveries made prior to and during the reference period. (If the compliance panel considered that deliveries during the reference period supported findings of serious prejudice, it would have made findings of *present* impedance, not *threat* of impedance.) Accordingly, only deliveries that occurred after the reference period should be included in the calculation of adverse effects if a "delivery-centric" approach is used.

55. Under this approach, the deliveries included in this valuation should be limited to the deliveries included in the 2008 Fly Dubai and the 2011 Delta Airbus final offers scheduled to occur after the end of the reference period. As the 2014 Fly Dubai lost sale is included in the significant lost sales valuation, it cannot also be included in the threat of impedance valuation because valuing identical deliveries from a single sales campaign twice – *i.e.*, including them in both the significant lost sales and the threat of impedance valuations – would double count those deliveries.

56. Further, for the reasons discussed above, any deliveries scheduled in the Airbus final offers to occur before the beginning of the reference period should not be included in the valuation of the adverse effects for the threat of impedance findings because – by making a *threat* of impedance findings – the compliance panel concluded that impedance had not yet materialized. Therefore, counterfactual Airbus deliveries scheduled prior to or during the reference period, should not be included in any delivery-centric valuation of threat of impedance.

57. The objective would be to value the threat of impedance that existed during the compliance proceeding reference period, the last year of which was 2015. Because the finding was of threat, however, the relevant deliveries were in the future – that is, after the compliance proceeding reference period. Therefore, the objective would be to calculate the 2015 expected value of those future deliveries from Airbus's perspective. Accordingly, Airbus's WACC remains the appropriate discount rate.

58. Annualizing the deliveries associated with the threat of impedance findings is relatively straightforward. However, separate annualization calculations will be required for the significant lost sales valuation and the threat of impedance calculation. Weight-averaging is the best approach if these two annual figures must be combined, but it is not ideal and inferior to other approaches to valuing the adverse effects, which further reinforces the rationale for using the U.S. lost sales approach.

ANNEX C

DECISION AND OTHER COMMUNICATIONS OF THE ARBITRATOR

ANNEX C-1

ARBITRATOR'S COMMUNICATION TO THE PARTIES REGARDING THE TIMETABLE AND WORKING PROCEDURES, DATED 8 JULY 2019

Please find accompanying this communication the Working Procedures and BCI/HSBI Procedures, as adopted by the Arbitrator on 8 July 2019, and a revised draft Timetable for this arbitration. In finalizing the Working Procedures and BCI/HSBI Procedures, the Arbitrator has carefully considered the comments provided by the parties at the Organizational Meeting and subsequently in writing on 1 July 2019.

As regards the parties' requests to hold an open substantive meeting, the Arbitrator has decided that it will open the meeting. It will revert to the parties at a later stage with proposed procedures for the open meeting. The Arbitrator also takes note of the United States' suggestion that it adopt the same open meeting procedures as adopted by the arbitrator in DS316.

Regarding the revised draft Timetable, after carefully considering the European Union's letter of 25 June 2019, as well as the comments provided by the parties at the Organizational Meeting and subsequently in writing on 1 July 2019, the Arbitrator wishes to note the following:

- The Arbitrator has carefully considered the European Union's proposed amendments to the Timetable that would envisage the meeting with the parties being held in December 2019 rather than February 2020.

- The Arbitrator is fully cognizant of the importance to the European Union that the Timetable in these proceedings does not enlarge the existing time-gap with the DS316 arbitration proceedings. The Arbitrator is also aware that its members, all of whom have been recently appointed, require adequate time to become fully-acquainted with the background to this dispute, to carefully read the parties' submissions, to review all relevant evidence prior to the meeting, and to be able to demonstrate that at the meeting. This level of preparation is necessary for the members of the Arbitrator to make a substantial contribution to the quality of the Arbitrator's report and the Arbitrator understands that this would also be consistent with the parties' expectations of the Arbitrator.

- Moreover, the Arbitrator regards this preparation as essential to the ensuring that the proceedings are conducted as expeditiously as possible.

- To this end, the Arbitrator considers that it is preferable to allow both parties adequate time to prepare concise written submissions clearly identifying the relevant issues, and all relevant factual material, which can then be fully examined at the meeting. The Arbitrator expects that this process will minimize the need for excessive or multiple rounds of questioning following the meeting and will be conducive overall to a more efficient and timely process.

- Therefore, the Arbitrator does not agree with the European Union that, in order not to enlarge the time-gap with the DS316 arbitration proceedings, the meeting with the parties must be held in the week of 16 December 2019. On the contrary, the Arbitrator considers that rushing the parties' preparation of submissions and the Arbitrator's preparation for the meeting is very likely to lead to delays later in the process which could have been prevented had there been adequate preparation time prior to the meeting.

- That said, after considering the availability of the members of the Arbitrator and consulting with the Secretariat, the Arbitrator has decided that it would be possible to bring the meeting date forward by two weeks without unduly compromising the Arbitrator's ability to adequately prepare for the meeting. The Arbitrator therefore proposes revising the dates for the meeting with the parties to the last week of January 2020 (i.e. 28-30 January). In this regard, the Arbitrator notes that the United States has requested that the Arbitrator first propose the alternative dates and allow the parties to comment. The parties are therefore requested to indicate by cob on **9 July** 2019 whether the proposed dates of 28-30 January 2020 present any actual conflicts.

ANNEX C-2

ARBITRATOR'S COMMUNICATION TO THE PARTIES REGARDING CERTAIN HSBI, DATED 6 FEBRUARY 2020

The Arbitrator is in receipt of the United States' letter dated 27 January 2020, in which the United States objects to the European Union's inclusion of certain HSBI in the European Union's responses to the first set of Arbitrator questions to the parties and, based on that objection, requests that the Arbitrator take certain actions. The Arbitrator is further in receipt of the European Union's letter dated 31 January 2020, explaining the circumstances surrounding the inclusion of the relevant HSBI in its responses to questions. Finally, the Arbitrator is in receipt of the United States' letter dated 4 February 2020, stating that, in the light of the European Union's explanations, the United States withdraws the objection contained in the United States' previous letter. The Arbitrator therefore notes that the United States' letter of 4 February 2020 effectively moots the United States' objection and associated requests for Arbitrator action included in its letter of 27 January 2020. The Arbitrator thus considers it unnecessary, and accordingly declines, to rule on the United States' objection and its associated requests for Arbitrator action.

Additionally, the Arbitrator recalls that the European Union, in its letter of 31 January 2020, claimed that the United States compromised the European Union's due process rights because the United States "deprived the {Arbitrator} and the European Union of the opportunity for a fulsome exchange of views at the oral hearing on the issues covered by Questions 23 and 26 {of the Arbitrator's questions to the parties}", and requested that the Arbitrator issue a ruling to the effect that the United States "should not be allowed to develop further its arguments and evidence on those issues for the remainder of these proceedings".[1] The Appellate Body has explained that, "{a}s a general rule, due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party".[2] Such an opportunity must be "meaningful in terms of that party's ability to defend itself adequately".[3] We are unable to discern a way in which the European Union has been deprived of a meaningful opportunity to comment on any particular issue before the Arbitrator relating to the topics covered in Questions 23 and 26. In particular, the European Union has objected to the fact that the United States did not, in the European Union's view, adequately engage, at the oral hearing, with the European Union's own answers to Questions 23 and 26 regarding the [[***]] issue. The European Union does not, however, identify any instance in which it was deprived of an opportunity to respond to any arguments or evidence that the United States has put forward in this proceeding in this context. We further note that the European Union has had an opportunity to comment on the issues presented by the Arbitrator in Questions 23 and 26 in its responses to those questions, and the European Union will have an opportunity to further offer its comments with respect to [[***]]-related issues following the Arbitrator's second set of questions to the parties.

[1] European Union's letter of 31 January 2020, p. 5.
[2] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.
[3] Appellate Body Report, *US – Gambling*, para. 270. According to the Appellate Body, due process is also intrinsically connected to notions of fairness, impartiality and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules. (Appellate Body Report, *Thailand –Cigarettes (Philippines)*, para. 147).

ANNEX C-3

ARBITRATOR'S COMMUNICATION REGARDING THE UNITED STATES' REQUEST FOR EXTENSION OF THE DATE FOR RESPONSES TO QUESTIONS, DATED 14 FEBRUARY 2020

The Arbitrator is in receipt of the United States' letter of 10 February 2020 and the European Union's response of 12 February 2020 regarding the deadlines associated with the responses to the Arbitrator's second set of written question and comments thereon.

Having carefully reviewed the contents of these letters and the relevant circumstances, the Arbitrator hereby grants the United States' extension request, and revises the relevant deadlines as follows: (i) responses to the Arbitrator's second set of written questions are now due on 2 March 2020; and (ii) comments thereon are now due on 16 March 2020. A copy of the revised timetable is attached.

The Arbitrator considers that, on balance, granting the extension is in the interests of receiving complete and thoughtful responses to the Arbitrator's questions, supported by appropriate evidence. The Arbitrator appreciates, however, the European Union's comments to the effect that such extensions should not materially delay this arbitration proceeding. The Arbitrator thus notes that it does not expect this extension to materially delay the Arbitrator's work overall. The Arbitrator further notes that it does not anticipate granting any further extensions and intends to complete its work in this proceeding without material delays. To that end, the Arbitrator reminds each party to deploy maximum efforts to adhere to the dates set out in the timetable as modified herein.

ANNEX C-4

ARBITRATOR'S COMMUNICATION TO THE PARTIES REGARDING RESTRICTIONS ON ACCESS TO THE WTO PREMISES AND TO HSBI DUE TO COVID-19, DATED 1 APRIL 2020

As the parties would be aware, in his communication of 14 March 2020 to WTO Heads of Delegation, the WTO Director-General directed that WTO staff should work from home as from 16 March 2020.

In that communication, the Director-General also advised WTO staff that, starting on 16 March 2020, access to the WTO premises would be limited to designated critical staff only, i.e. staff whose presence on the WTO's Centre William Rappard (CWR) site is necessary to ensure that WTO's critical functions can be continued, and particularly, functions necessary to support staff working from home. As of 16 March 2020, the Secretariat staff assisting the Arbitrator in these proceedings had been, on an exceptional basis, granted by the WTO Coronavirus Health Task Force (HTF) limited access to the CWR solely for the purpose of facilitating the filing of new HSBI materials and their storage in the secure location on the WTO premises, allowing access to representatives of the parties, and reviewing that HSBI on behalf of the Arbitrator.

Since the initial restrictions on access to the CWR were put in place, however, the situation with regard to the new Coronavirus 2019 (Covid-19) in Geneva (and Switzerland more broadly) has become ever more serious. The HTF guidelines have been revised to further restrict the number of staff authorized to work in the CWR. The HTF has also underlined that no staff member can be required to work in the CWR in current circumstances. In addition, the current "Working from Home" arrangements were further extended on 26 March to the end of April 2020.

Against this background, the Arbitrator wishes to advise the representatives of the parties that the current situation has implications for the access of Secretariat staff to the CWR for HSBI related reasons, in the period between now and the end of April. The Arbitrator will update the parties by the end of April on further developments in this regard.

The Arbitrator appreciates the sensitivity of the HSBI materials and the need for special safeguards for preserving their confidentiality. The following alternative arrangements are being proposed in light of the extraordinary restrictions on working from the CWR that have been implemented in response to the Covid-19 pandemic.

The Arbitrator considers that, for the Secretariat staff assisting the Arbitrator in this proceeding to replicate the access that they would have to HSBI stored on the WTO premises during ordinary times when working from the WTO premises, it would be necessary to temporarily authorize such staff to access and store the HSBI at their homes. This authorization thus would entail storage of the HSBI in alternative locations and in an alternative manner than is provided for in the Additional Working Procedure for the Protection of Business Confidential Information and Highly Sensitive Business Information (BCI/HSBI Procedures) for the duration of the current prohibition on working from the WTO premises.

Specifically, each of the five Secretariat staff members assisting the Arbitrator, listed below, would need to be authorized to take home one of the two Sealed laptops provided by the European Union and one of the Stand-alone computers provided by the WTO on which electronic files containing US HSBI and EU HSBI would have been created and saved. Those staff members would need to be further authorized to have individual working sessions with HSBI, and to store HSBI, in their respective homes on those Sealed laptops and Stand-alone computers. Finally, the Secretariat staff members would also need to be authorized to discuss the HSBI materials with each other and with the Arbitrator through secure communication methods, such as Skype for Business.

The above-referenced Secretariat staff members are: [[omitted]]

The Arbitrator requests the parties to advise whether they would agree to waive the restrictions on Secretariat staff members working with HSBI at their homes in the manner detailed above so as to enable the Arbitrator and Secretariat staff to implement the above-referenced alternative arrangements.

The Arbitrator is willing to consider alternative arrangements mutually proposed by the parties which would enable the Secretariat staff assisting the Arbitrator to work with the HSBI from their homes and otherwise maintain the social distancing protocols that are currently in place in Switzerland.

The Arbitrator would welcome the views of the parties by **5pm** on **Wednesday**, **8 April 2020**.

ANNEX C-5

ARBITRATOR'S COMMUNICATION TO THE PARTIES REGARDING ACCESS TO HSBI IN THE CONTEXT OF COVID-19, DATED 23 APRIL 2020

The Arbitrator is in receipt of the parties' responses of 8 April 2020 to the Arbitrator's communication of 1 April 2020, in which the Arbitrator requested the parties to advise on alternative arrangements regarding access to and storage of HSBI for the duration of the current restrictions on access to the WTO's Centre William Rappard (CWR).

The Arbitrator takes note of the absence of agreement between the parties on this issue, and accordingly advises that, for the time being, it will not be implementing the proposed alternative arrangements regarding access to and storage of HSBI.

The Arbitrator and the Secretariat staff assisting the Arbitrator continue to progress their work and expect to continue to do so while the current restrictions on access to the CWR remain in effect. The Arbitrator recalls that the current "Working from Home" arrangements were further extended on 26 March to the end of April 2020. The Arbitrator advises that it will update the parties on further developments in this regard as soon as practicable thereafter. The Arbitrator also advises the parties that it will make every effort to minimize any delays occasioned by the COVID-19 pandemic.

ANNEX C-6

ARBITRATOR'S COMMUNICATION TO THE PARTIES REGARDING PHASED RELAXATION OF RESTRICTIONS ON ACCESS TO WTO PREMISES DUE TO COVID-19, DATED 4 MAY 2020

The Arbitrator wishes to inform the parties of recent developments concerning the restrictions on access of Secretariat staff members to the WTO's Centre William Rappard (CWR). The Arbitrator is advised by the Secretariat that, on 24 April 2020, the WTO Health Task Force (HTF) announced that a phased reintroduction of staff members to the CWR is expected to begin on 11 May 2020. While specific procedures governing that phased reintroduction are still being formulated by the HTF, the Arbitrator understands that, for the duration of the first phase that will start on 11 May 2020, a maximum of 20% of the staff members of each Division will be allowed to work from the CWR.

The Arbitrator and the Secretariat staff assisting the Arbitrator have continued to progress with their work in this proceeding since the Arbitrator's last communication to the parties, and expect to continue to do so while the current restrictions on access to the CWR remain in effect. The Arbitrator anticipates that, as of 11 May 2020, the above-mentioned phased reintroduction should progressively allow the staff members assisting the Arbitrator to access and work with HSBI stored in the secure location on the WTO premises. The Arbitrator will update the parties by the end of May 2020 on additional developments regarding access to the CWR.

ANNEX C-7

ARBITRATOR'S DECISION ON THE UNITED STATES' REQUEST FOR LEAVE TO FILE AN ADDITIONAL SUBMISSION REGARDING THE IMPLICATIONS OF THE PURPORTED ELIMINATION OF THE WASHINGTON STATE B&O TAX RATE REDUCTION ON THE PERMITTED LEVEL OF COUNTERMEASURES, DATED 17 JUNE 2020

1.1. On 13 May 2020, the Arbitrator received a letter from the United States advising that the State of Washington had, effective 1 April 2020, eliminated the Business and Occupation (B&O) tax rate reduction. In that letter, the United States requests leave to file an additional "Submission of the United States regarding the Withdrawal of the Washington B&O Tax Rate Subsidy", attached to the letter of 13 May 2020, (the Additional Submission), purporting to set out "the implications of the elimination of this measure on the permitted level of countermeasures".[1] The European Union responded to the United States' request on 20 May 2020. The United States submitted a reply to the European Union's response on 22 May 2020. The European Union was invited, but declined, to submit further comments on the United States' reply.

1.2. In support of its request for leave to file the Additional Submission, the United States refers to paragraph 5(1) of the Arbitrator's Working Procedures, which permits the submission of evidence after the substantive meeting, to the extent necessary for purposes of rebuttal, or exceptionally upon a showing of good cause. The United States argues that the Additional Submission constitutes critical rebuttal evidence and argumentation, and in any event, good cause exists to grant the United States leave to file the Additional Submission.

1.3. The United States advises that the new evidence and associated argumentation contained in its Additional Submission centres on the State of Washington's elimination of the B&O tax rate reduction, effective 1 April 2020.[2] The United States argues that this development occurred after the most recent substantive submission of the parties, which was the submission of the parties' comments on each other's responses to the second set of Arbitrator questions on 16 March 2020. According to the United States, the majority of the European Union's request for countermeasures is based on the Washington State B&O tax rate reduction. The United States considers that the elimination of the Washington State B&O tax rate reduction as of 1 April 2020 is of paramount importance to the aims of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) and to the Arbitrator's assessment of the European Union's request for countermeasures under the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) because, according to the United States, elimination of a WTO-inconsistent measure necessarily affects the level of permitted countermeasures. In its argumentation in support of the Additional Submission, the United States expressly "does *not* ask the Arbitrator to make any findings about compliance".[3]

1.4. The European Union argues that the Arbitrator should reject the United States' request for leave to file the Additional Submission for three main reasons. First, the European Union argues that the request is untimely, given that the measure in question was enacted on 25 March 2020, and the United States waited almost 50 days to request leave to file the Additional Submission. Second, the European Union argues that the subject of the United States' request (i.e. the purported elimination of the Washington State B&O tax rate reduction) is irrelevant to the Arbitrator's mandate under Articles 7.9 and 7.10 of the SCM Agreement. This is so, in the European Union's view, because its entitlement to countermeasures *vis-à-vis* the Washington State B&O tax rate reduction is based on the value of the "adverse effects determined to exist" in the prior compliance proceedings, and not by reference to the current situation. Third, the European Union argues that the Arbitrator's decision

[1] United States' letter to the Arbitrator, dated 13 May 2020.

[2] The United States advises that the bill was enacted on 25 March 2020, but the revised tax treatment took effect on 1 April 2020. (United States' letter to the Arbitrator, dated 13 May 2020).

[3] United States' letter to the Arbitrator, dated 22 May 2020. (emphasis original) See also United States' letter to the Arbitrator, dated 13 May 2020; and Additional Submission. We note that the United States, in a communication to the Dispute Settlement Body (DSB), indicated that the elimination of the B&O tax rate reduction means that "the United States has brought its measures into conformity with its obligations under the SCM Agreement and therefore fully implemented the DSB's recommendations in this dispute". (Communication by the United States, WT/DS353/34, para. 3).

to accept information after the end of the briefing phase should take into account the requirement of securing a "prompt settlement" of the dispute, particularly in light of the expeditious nature of arbitration proceedings and, even more so, the "specific circumstances of the present case", where the Arbitrator has previously acknowledged the importance to the European Union that the timetable in this proceeding not enlarge the existing time-gap with the arbitration proceeding in *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)* (the DS316 arbitration proceedings).[4]

1.5. The Arbitrator notes that the content of the United States' Additional Submission is effectively an objection to the European Union's request for countermeasures in the form of Annual Suspension with respect to the Washington State B&O tax rate reduction. The term "Annual Suspension" refers to a situation whereby an arbitrator "establishe{s} a single, maximum level of countermeasures or suspension of concessions or other obligations that the complaining party {is} then authorized to impose annually".[5] This is what the European Union requests with respect to the Washington State B&O tax rate reduction, i.e. the European Union asks the Arbitrator to: (a) calculate a single maximum level of countermeasures based on the value of the effects of the measure in a past time-period occurring immediately after the time the United States should have come into compliance (i.e. the reference period used in the compliance proceeding); and (b) authorize the European Union to impose that maximum value annually.[6]

1.6. The United States did not challenge this general approach until now. Now, the United States asks the Arbitrator to find that, due to the purported elimination of the B&O tax rate reduction, "the EU is not *currently* entitled to impose countermeasures of any amount as long as the preferential rate remains withdrawn", however, "the Arbitrator may make explicit that the EU would be entitled to impose countermeasures at the level determined by the Arbitrator in the event that, in the future, the State of Washington applies a B&O tax rate to aircraft manufacturing, wholesaling, or retailing that is lower than the generally applicable, standard B&O tax rate".[7]

1.7. In assessing the United States' request in this context, we recall that the arbitrator in *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)* (the DS316 arbitrator) explained in detail the legal rationale for Annual Suspension, generally, and specifically its consistency with an arbitrator's mandate under Article 7.10 in circumstances materially similar to those existing here. In that proceeding, as it effectively is here, the relevant issue before the arbitrator was "whether {the Arbitrator} may accept countermeasures in the form of Annual Suspension at a level that reflects the level of the adverse effects determined to exist in the … Reference Period {used in the compliance proceedings}".[8] The DS316 arbitrator answered this in the affirmative, analysing two key sub-issues: (a) whether the maximum *level* of countermeasures (taking the form of suspension of concessions or other obligations) could be reasonably determined based on the effects of the relevant subsidies during the compliance panel's reference period; and, if so (b) whether it was reasonable to allow that maximum level to be maintained indefinitely (i.e. the *duration* of the maximum level of suspension). Those analyses are, in our view, instructive and directly relevant here. We thus review the arbitrator's key reasoning below and apply that reasoning to the present circumstances.

1.8. We therefore note that the United States' Additional Submission might be interpreted as an objection to the European Union's general proposed method of determining the maximum *level* of countermeasures (taking the form of suspension of concessions or other obligations). With respect to this issue, the DS316 arbitrator explained that with respect to "the issue of what determines the level of countermeasures that may be granted", "{o}ur mandate under Article 7.10 is to determine whether the proposed 'countermeasures' are 'commensurate with the degree and nature of the

[4] European Union's letter to the Arbitrator, dated 20 May 2020 (referring to, *inter alia*, Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*).

[5] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.3.

[6] The European Union asks the Arbitrator to sum this amount with a separate amount calculated with respect to the effects of the pre-2007 aeronautics R&D subsidies to create a single, overall level of Annual Suspension. Issues concerning the pre-2007 aeronautics R&D subsidies will be addressed in the forthcoming Decision of the Arbitrator.

[7] United States' Additional Submission, para. 11. (emphasis original; internal quotation marks and fn omitted)

[8] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.42.

adverse effects determined to exist'".[9] That arbitrator noted that in the context of that dispute the phrase "adverse effects determined to exist" required reference "to the findings on adverse effects made in the compliance proceedings that provide the basis for the DSB to authorize the United States to take countermeasures".[10] The DS316 arbitrator also emphasized that no adverse effects were determined to exist at any point after the end of that reference period.[11] The reference period used in the prior compliance proceedings, as it is in this current case, also occurred immediately after the time that the respondent should have come into compliance. Thus, valuing the effects of the subsidies in that reference period was deemed consistent with "the basic purpose of an arbitration proceeding{, i.e.} to determine the harm to the complaining party caused by {the respondent's} failure {to comply}".[12] Thus, that DS316 arbitrator indicated that it was consistent with the arbitrator's mandate in Article 7.10 that the maximum *level* of countermeasures be determined with respect to the effects of the relevant subsidies in the compliance panel's reference period.[13] We concur.

1.9. In this arbitration, the Arbitrator's mandate is to value "the adverse effects determined to exist". The European Union considers that the "adverse effects determined to exist" for purposes of the B&O tax rate reduction are those identified in the compliance proceedings, and specifically in the reference period used in the compliance proceedings using fact-specific analyses. The United States raises no specific objection to this general approach, apparently accepting even in the Additional Submission that the Arbitrator may determine a maximum (non-zero) level of countermeasures calculated with reference to the value of the adverse effects identified in the compliance proceedings. We see no reason to question the European Union's approach in this context, as no analysis regarding the presence of relevant adverse effects has been conducted *vis-à-vis* any time-period following the reference period used in the compliance proceedings.[14] The compliance reference period also occurred immediately after the time the United States should have come into compliance, and thus the adverse effects identified therein represent the harm to the European Union caused by the United States' failure to comply. We therefore discern no reason to calculate the maximum level of countermeasures *vis-à-vis* the B&O tax rate reduction with reference to anything other than the value of the adverse effects determined to exist during the compliance reference period. The value of such adverse effects, under the United States' newly proposed level of countermeasures, would be zero. We cannot accept that the asserted "elimination" of the Washington State B&O tax rate reduction in 2020 affects the level of countermeasures that the European Union is authorized to take.

1.10. We further note that the United States' request, insofar as it concerns the *level* of countermeasures, seems to advocate a way to vary the level of countermeasures on a prospective basis according to the legal status of the relevant measure. The United States, however, could have proposed such an approach at any time during the briefing phase of this arbitration. The United States failed to do so, choosing only to do so now.[15]

1.11. Thus, insofar as the United States objects to the general manner in which the European Union proposes to determine the maximum *level* of Annual Suspension, the United States' request lacks substantive merit and is untimely.

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[9] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.43.

[10] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.43.

[11] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.44.

[12] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.56. See also Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.57.

[13] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.46.

[14] The only other adverse effects that have been identified as having been caused by the B&O tax rate reduction in this dispute are those that the original panel determined were caused by the B&O tax rate reduction in the original reference period (i.e. 2004-2006). Neither party advocates calculating a level of countermeasures with reference to those adverse effects, and we discern no reason to do so under the circumstances.

[15] For example, the United States could have proposed in its written submission that the level of countermeasures should vary with the legal status of the measure in question, even if there had not yet been a change in that legal status that the United States deemed relevant.

1.12. We recognize that the United States' Additional Submission might also be interpreted as objecting to the European Union's proposal that the maximum level of countermeasures be maintained indefinitely (i.e. the *duration* of the maximum level of suspension). The DS316 arbitrator also examined "the question of the time-period during which countermeasures may be imposed at {the} level {determined by valuing the adverse effects determined to exist during the compliance panel's reference period}".[16] In that context, the arbitrator explained that relevant articles of the DSU[17] were consistent with the Appellate Body's explanation "that the authorization to maintain the Annual Suspension at issue would only lapse following confirmation, through WTO dispute settlement proceedings or a mutually agreed solution, of the responding party's substantive compliance".[18] That is, "it is the formal multilateral compliance status of the responding party that justifies the maintenance of Annual Suspension at the previously authorized level, not the notion that the authorized level correctly reflects the relevant effects of the responding party's measures over time".[19]

1.13. We therefore note that the United States might effectively be asking the Arbitrator to limit the *duration* of the maximum level of Annual Suspension to the period of time in which the B&O tax rate reduction (or perhaps a replacement measure) is in legal effect. Conceived as such, however, the United States' request is moot. That is so because, as explained, it is the respondent's compliance status that determines the duration of the maximum level of Annual Suspension, and the United States explicitly does *not* ask the Arbitrator to determine that the United States has come into compliance in any relevant manner.[20]

1.14. Thus, insofar as the United States might object to the manner in which the European Union proposes to determine the *duration* of Annual Suspension, the United States' request is moot.[21]

1.15. We note that two recent arbitrators have rejected similar requests by respondents using similar and instructive reasoning. In *US – Tuna II (Mexico) (Article 22.6 – US)*, the United States revised the relevant measure after the first compliance proceedings occurred, and claimed that the arbitrator should determine a level of suspension with reference to the effects of the new revised measure, rather than the measure that existed at the time that the reasonable period of time to comply expired.[22] The arbitrator rejected the United States' request, instead determining a maximum level of Annual Suspension with respect to the effects of the measure that existed at the time the reasonable period of time to comply expired using a reference period occurring around that time. According to the arbitrator, this was justified because the text of Article 22.6 of the DSU mandates an arbitrator to assess the level of nullification or impairment caused by the WTO-inconsistent original measure (where no compliance measure was subsequently taken), or a subsequent WTO-inconsistent compliance measure that was in existence at the time of the expiry of the reasonable period of time for implementation of the DSB recommendations and rulings.[23]

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[16] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.48.

[17] The arbitrator cited Articles 22.2, 22.6 and 22.8 of the DSU in this context. (Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, fn 147).

[18] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.51 (citing Appellate Body Report, *US – Continued Suspension*, section IV.E). "In other words … pending such confirmation, the Annual Suspension may continue in place for a certain period of time, even though the relevant effects of the latest measures taken to comply would, in fact, be valued at zero given that substantive compliance was achieved. This, in our view, further supports that it is the formal multilateral compliance status of the responding party that justifies the maintenance of Annual Suspension at the previously authorized level, not the notion that the authorized level correctly reflects the relevant effects of the responding party's measures over time". (Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.51).

[19] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.51. "Annual Suspension may remain in place at the authorized level until a WTO adjudicator finds the responding party to have achieved substantive compliance or the parties have found another solution". (Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.53).

[20] United States' letter to the Arbitrator, dated 22 May 2020. See also United States' Additional Submission, fn. 1. There has also been no mutually agreed solution between the parties.

[21] The United States cites Articles 3.7, 22.4, and 22.8 of the DSU and Articles 7.9 and 7.10 of the SCM Agreement in support of its arguments. We discern nothing in such provisions that calls our analysis into question.

[22] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 3.4.

[23] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 3.24.

1.16. In *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, the arbitrator declined to exclude from its assessment of the level of nullification and impairment an anti-dumping order that had been revoked after the expiration of the reasonable period of time to comply, on the basis that to do so would be inconsistent with its mandate because it "would be ignoring the nullification or impairment caused by the failure of the United States to implement the DSB recommendations and rulings … by the expiry of the reasonable period of time".[24] The arbitrator cited the *Tuna II (Mexico)* arbitration decision, discussed immediately above, in support of its reasoning.[25]

1.17. We further note that the United States argues that the arbitration decision in *US – 1916 Act (EC) (Article 22.6 – US)* supports its approach. We consider this arbitration decision inapposite in this context. In that proceeding, the arbitrator, acting under Article 22.7 of the DSU, determined a prospective way for the European Communities to adjust the level of suspension of concessions over time with reference to the occurrence of certain applications of the relevant measure found to be "as-such" WTO-inconsistent.[26] That was considered appropriate in that arbitration because, in particular, there had been no demonstrated, relevant applications of the measure as of the date the arbitrator issued its decision, yielding an initial level of suspension of zero.[27] In short, nothing relevant had occurred yet for the arbitrator to value. Thus, the *US – 1916 Act (EC)* arbitration concerned facts and circumstances materially different than what we face here. It did not concern Annual Suspension or the propriety thereof, generally, or under Article 7.10 of the SCM Agreement, specifically.

1.18. Finally, we recall that many disputes in which arbitration proceedings occurred resulted in the complainant being granted Annual Suspension, including in both previous arbitrations occurring under Article 7.10 of the SCM Agreement, i.e. the DS316 arbitration proceedings and *US – Upland Cotton (Article 22.6 – US II)*. The arbitrator in the former proceeding explained that the "levels of such Annual Suspension have generally been determined based on the trade effects of relevant measures during past time-periods …. The past time-periods selected were usually short-term periods immediately following or including the time at which the responding party should have come into compliance".[28] Determining a maximum level of Annual Suspension in the general manner that the European Union requests is therefore an accepted practice.

1.19. For the foregoing reasons, we consider the United States' Additional Submission to lack substantive merit, to be untimely, and/or to be moot. As such, we find that the Additional Submission is neither necessary for purposes of rebuttal nor that good cause exists to accept the Additional Submission at this time. The United States' request for leave to file the Additional Submission is accordingly denied.

[24] Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 3.10.
[25] Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, fn 49.
[26] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 6.14-6.17 and 7.8.
[27] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 6.5 and 6.11.
[28] Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.56. (fns omitted)

ANNEX C-8

ARBITRATOR'S COMMUNICATION TO THE PARTIES, DATED 26 JUNE 2020

The Arbitrator acknowledges receipt of the European Union's letter of 22 June 2020, objecting to the indication provided by the Arbitrator in its communication of 17 June 2020 regarding its best estimate of the time at which it expects to deliver its decision to the parties.

The Arbitrator unequivocally assures the parties that the members of the Arbitrator and the Secretariat staff assisting the Arbitrator have at all times acted with the dedication, integrity and objectivity that befit their roles in these proceedings. In spite of the multiple challenges arising from the COVID-19 pandemic that have impaired their modalities for work and greatly affected their workplaces, families, communities, and countries, the Arbitrator and the Secretariat staff assisting it continue to work diligently towards fulfilling the Arbitrator's mandate in these proceedings. The Arbitrator is keenly aware of the importance to the European Union that these proceedings be completed as expeditiously as possible.

ANNEX C-9

ARBITRATOR'S COMMUNICATION TO THE PARTIES REQUESTING AUTHORIZATION TO DISCUSS SPECIFIC EU HSBI, DATED 5 AUGUST 2020

As the parties are aware, the Covid-19 pandemic continues to present serious challenges for international travel. In the light of such challenges, and moving forward into the last stages of this proceeding, the Arbitrator is considering options to conduct final internal meetings remotely. With a view to facilitating that mode of meeting, the Arbitrator hereby inquires as to whether the European Union would grant, on a temporary basis, permission to the Arbitrator and other WTO approved persons who are additionally authorized to access HSBI to *verbally* discuss certain HSBI, strictly for the purpose of the internal meetings of the Arbitrator to be held on Skype for Business to occur during the time-frame of 24 August until 30 September 2020. At present, the Arbitrator's inquiry concerns the following HSBI materials only:

- European Union's response to Arbitrator question No. 75, paras. 392-393 and 405-406 (including footnote 425); and Declaration by [[***]], 25 February 2020 ("Airbus' use of discount rates"), (Exhibit EU-78-HSBI)).

- Proposed delivery schedules in Airbus final offer in the 2008 Fly Dubai sales campaign (Fly Dubai 2008 final offer, **[[**HSBI**]]**, (Exhibit EU-5-HSBI, p. 7 (information contained in columns "Aircraft Rank" and "Delivery Period"))) and in the 2011 Delta Airlines sales campaign (Delta Airlines final offer, **[[**HSBI**]]**, (Exhibit EU-4-HSBI, p. 26)).

The Arbitrator notes that the Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information (BCI/HSBI Procedures) allow a party to "treat{} … its own BCI and HSBI"[1] as it sees fit (unless otherwise provided for in the procedures) and, as a result, allow the parties to authorize the Arbitrator and designated Secretariat staff to discuss such materials in the manner described above in respect of its own HSBI. The Arbitrator thus considers that, if the European Union were to respond favourably to the Arbitrator's inquiry, allowing the Arbitrator to discuss such materials in the above-described manner leaves the BCI/HSBI Procedures, and the protections afforded to BCI and HSBI therein, unchanged.

The Arbitrator requests that the European Union advise whether it agrees to grant the above-referenced temporary permission by close of business on Friday, 14 August 2020.

[1] Paragraph 24 of the BCI/HSBI Procedures.

ANNEX C-10

ARBITRATOR'S COMMUNICATION TO THE PARTIES REQUESTING AUTHORIZATION TO DISCUSS ADDITIONAL SPECIFIC EU HSBI, DATED 19 AUGUST 2020

1.1. The Arbitrator acknowledges receipt of the European Union's letter of 10 August 2020 which refers to the Arbitrator's communication of 5 August 2020. The Arbitrator notes also its communication of 17 June 2020, the European Union's letter of 22 June 2020 and the Arbitrator's response to that letter of 26 June 2020.

1.2. In its communication of 17 June 2020, the Arbitrator indicated that the earliest possible time that it expected to provide the Decision to the parties (for purposes of ensuring appropriate redaction of BCI/HSBI) was the end of September 2020. The Arbitrator advises that it now expects to provide the Decision to the parties for that purpose by the end of September 2020 at the latest. The Arbitrator's request for authorization to discuss certain HSBI to cover the whole period up until the delivery of the Decision to the parties for BCI/HSBI review was to facilitate any unforeseen need to discuss HSBI which might otherwise delay its work.

1.3. In that respect, the Arbitrator additionally requests the European Union for authorization to discuss (in the same manner as, and over the same time-period, referenced in the Arbitrator's communication of 5 August 2020) the following EU HSBI:

1. Proposed number of firm orders (and associated Airbus LCA models) in:

    a. 2008 Fly Dubai sales campaign (Fly Dubai 2008 final offer, **[[HSBI]]**, (Exhibit EU-5 (HSBI), p. 7, clause 3.1.1));
    b. 2013 Air Canada sales campaign (Air Canada final offer, **[[HSBI]]**, (Exhibit EU-3 (HSBI), p. 37 clause 2.1));
    c. 2013 Icelandair sales campaign (Icelandair final offer, **[[HSBI]]**, (Exhibit EU-8 (HSBI)), p. 7 clause 3.1)); and
    d. 2014 Fly Dubai sales campaign (Fly Dubai 2014 final offer, **[[HSBI]]**, (Exhibit EU-6 (HSBI), p. 5 clause 1.1, and pp. 9-10 clause 3.1.1)).

2. Numerical values of the adverse effects specifically contained in:

    a. 2RPQ valuation of single-aisle lost sales – Airbus delivery schedules, (Exhibit EU-85 (HSBI), Worksheet "Total Adverse Effects");
    b. Updated valuation of single-aisle threat of impedance, (Exhibit EU-60 (HSBI), Worksheet "Total Adverse Effects"); and
    c. 2RPQ valuation of single-aisle threat of impedance – Airbus delivery schedules, (Exhibit EU-77 (HSBI), Worksheet "Total Adverse effects").

3. Narrative discussion (excluding footnotes) in Appendix 2 (HSBI) of the compliance panel report (Exhibit EU-65 (HSBI), paras. 160-166 (excluding the first sentence of para. 163 and the last sentence of para. 164) and 266-271 (excluding the second sentence of para. 270)).

1.4. In the event that the Arbitrator makes a subsequent request in relation to any other EU HSBI, it will do so by close of business on Monday, 31 August 2020.

ANNEX C-11

ARBITRATOR'S COMMUNICATION TO THE PARTIES REGARDING MEDIA REPORTS CONTAINING THE ARBITRATOR'S CALCULATED LEVEL OF COUNTERMEASURES, DATED 9 OCTOBER 2020

You will recall that on 28 September 2020, the Arbitrator provided the parties with advance copies of the non-BCI and BCI versions of the Decision in *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, as well as a CD-ROM with the Arbitrator's HSBI calculations.

The parties were informed that the documents may at that point contain BCI and/or HSBI and the documents were provided prior to the circulation of the Decision for the express purpose of enabling the parties to check the contents of the Decision to ensure that no BCI or HSBI would be inadvertently disclosed in the public version of the Decision. This was a procedure provided for by the Arbitrator's BCI/HSBI Procedures specifically to protect the parties' confidential information for purposes of this dispute.

Accordingly, and as explained in the cover letter transmitting these materials, the Arbitrator expressly indicated that the entirety of the text of the Arbitrator's Decision, including figures and information not designated as BCI, must remain strictly confidential until the public version of the Decision is circulated.

The Arbitrator became aware of media reports of the amount of the countermeasures in publications in the early hours of 30 September 2020, followed by reports in other media outlets on 30 September 2020 and subsequently. The list of media reports of which the Arbitrator is currently aware is attached to this letter.

In its communication of 2 October 2020, the United States referred to a Bloomberg press article of 30 September 2020, and stated that none of its approved persons "leaked the contents of the confidential report". It also asked the Arbitrator to investigate the source of this leak and take any appropriate action.

In its communication of 6 October 2020, the European Union also expressed similar concern regarding the leak and asserted that the leak originally appeared in a Reuters article of 30 September 2020. The European Union stated that none of its approved persons, nor any member of its delegation (whether or not BCI/HSBI approved) "was the source of the leak".

The members of the Arbitrator fully affirmed that at all relevant times they have (i) handled the Decision, including the BCI/HSBI therein, in accordance with the BCI/HSBI Procedures, and (ii) in all other respects, treated the Arbitrator's Decision as strictly confidential.

The Arbitrator has also requested the Director of the WTO Legal Affairs Division to make inquiries of all WTO Secretariat staff who had access to the draft Decision (all such persons comprising the WTO Approved Persons appearing on the attached letter). All such persons have fully affirmed that at all relevant times they have (i) handled the Decision, including the BCI/HSBI therein, in accordance with the BCI/HSBI Procedures, and (ii) in all other respects, treated the Arbitrator's Decision as strictly confidential.

The Arbitrator considers that if all persons who had access to the Decision had in fact treated the Decision in all respects as strictly confidential, it is simply not possible that the amount of the countermeasures would have been communicated to any person who was authorized to communicate it to a journalist for publication in a media report.

The Arbitrator condemns the failure to uphold the strict confidentiality of the contents of the Arbitrator's Decision. The Arbitrator considers that such actions ultimately undermine the integrity of the dispute settlement process, and the necessary respect for the principle of good faith, a fundamental and necessary tenet for engagement in a proceeding of this nature.