



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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION

AB-2017-4

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS353/AB/RW.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

LIST OF ANNEXES

ANNEX A

NOTICES OF APPEAL

Contents		Page
Annex A-1	European Union's Notice of Appeal	4
Annex A-2	United States' Notice of Other Appeal	10

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of the European Union's appellant's submission	13
Annex B-2	Executive summary of the United States' other appellant's submission	36
Annex B-3	Executive summary of the United States' appellee's submission	38
Annex B-4	Executive summary of the European Union's appellee's submission	44

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Brazil's third participant's submission	54
Annex C-2	Executive summary of Canada's third participant's submission	55
Annex C-3	Executive summary of China's third participant's submission	56
Annex C-4	Executive summary of Japan's third participant's submission	57

ANNEX D

PROCEDURAL RULINGS

Contents		Page
Annex D-1	Procedural Ruling of 21 July 2017 regarding additional procedures to protect business confidential information (BCI) and highly sensitive business information (HSBI)	59
Annex D-2	Procedural Ruling of 9 August 2017 regarding the United States' request to extend the deadline for objection to the inclusion of any business confidential information (BCI) in the European Union's appellant's submission	67
Annex D-3	Procedural Ruling of 30 August 2017 regarding the United States' request to extend the deadline to file the HSBI Appendix to its other appellant's submission	68
Annex D-4	Procedural Ruling of 12 October 2017 regarding the European Union's request to extend the deadline for objection to the inclusion of any business confidential information (BCI) in the United States' appellee's submission	69
Annex D-5	Procedural Ruling of 18 October 2017 regarding the objection by the European Union to the inclusion of certain highly sensitive business information (HSBI) in the HSBI-redacted version of the United States' appellee's submission	70
Annex D-6	Procedural Ruling of 5 April 2018 regarding the joint request by the European Union and the United States for the oral hearing to be open to public observation	71

ANNEX A

NOTICES OF APPEAL

Contents		Page
Annex A-1	European Union's Notice of Appeal	4
Annex A-2	United States' Notice of Other Appeal	10

ANNEX A-1

EUROPEAN UNION'S NOTICE OF APPEAL*

Pursuant to Article 16.4 and Article 17.1 of the *DSU* and Article 7.6 of the *SCM Agreement*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union)* (WT/DS353/RW). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Union is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify, or declare moot and of no legal effect the findings, conclusions, and recommendations of the Panel, and to complete the legal analysis, with respect to the following errors of law and legal interpretations contained in the Panel Report:¹

I. SUBSIDIES

A. DOD Procurement Contracts

1. The Panel failed to make an objective assessment of the matter, pursuant to Article 11 of the *DSU*, when finding that the provision to Boeing of funding, and of access to DOD facilities, equipment, and employees, by the United States Department of Defense ("DOD") through pre-2007 and post-2006 DOD procurement contracts are not subsidies within the meaning of Article 1 of the *SCM Agreement*.² The Panel erred in characterising the provision of funding and support to Boeing as "purchases of services", rather than as, respectively, a direct transfer of funds under Article 1.1(a)(1)(i) and the provision of goods and services under Article 1.1(a)(1)(iii).³
2. The Panel also failed to make an objective assessment of the matter, pursuant to Article 11 of the *DSU*, when finding (in the alternative) that the allocation of intellectual property rights arising from the DOD procurement contracts does not demonstrate conferral of a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*.⁴

B. Foreign Sales Corporation/Extraterritorial Income Act Subsidies

3. The Panel erred in the interpretation of Articles 7.8 and 1.1(a)(1)(ii) of the *SCM Agreement*, when finding that the United States no longer continues to grant or maintain the subsidies provided pursuant to the Foreign Sales Corporation/Extraterritorial Income ("FSC/ETI") Act after the end of the implementation period.⁵ The Panel erred in finding that, because there is

* This document, dated 29 June 2017, was circulated to Members as document WT/DS353/27.

¹ Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

² Panel Report, paras. 8.360-8.378, 8.311-8.316, 8.418-8.437, 8.1077.a, 9.220, 9.291, 9.298, 9.332, 9.333-9.335, 9.373, 9.476, 9.485, 9.486(a), 9.487(a), 9.487(c), 11.7.c.i, 11.8.a, 11.8.b, 11.8.e.

³ Panel Report, paras. 8.363-8.378, 8.311-8.316, 8.1077.a, 9.220, 9.291, 9.298, 9.332, 9.333-9.335, 9.373, 9.476, 9.485, 9.486(a), 9.487(a), 9.487(c), 11.7.c.i, 11.8.a, 11.8.b, 11.8.e.

⁴ Panel Report, paras. 8.418-8.437, 8.311-8.316, 8.1077.a, 9.220, 9.291, 9.298, 9.332, 9.333-9.335, 9.373, 9.476, 9.485, 9.486(a), 9.487(a), 9.487(c), 11.7.c.i, 11.8.a, 11.8.b, 11.8.e.

⁵ Panel Report, paras. 8.596-8.612, 8.1077.b, 9.252, 9.293, 9.333-9.335, 9.487(a), 11.7.c.ii, 11.8.a, 11.8.b, 11.8.e.

insufficient evidence that Boeing has actually used the tax concessions after 2006, there can be no foregoing of revenue otherwise due within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*.⁶

C. City of Wichita Industrial Revenue Bond Programme

4. The Panel erred in the interpretation of Articles 7.8 and 2.1(c) of the *SCM Agreement*, when finding that the City of Wichita's Industrial Revenue Bond ("IRB") programme is no longer *de facto* specific.⁷
5. The Panel erred in the application of Articles 7.8 and 2.1(c) of the *SCM Agreement*, when finding that the City of Wichita's IRB programme is no longer *de facto* specific.⁸
6. The Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, when finding that the City of Wichita's IRB programme is no longer *de facto* specific, within the meaning of Article 2.1(c) of the *SCM Agreement*.⁹

D. South Carolina Economic Development Bonds

7. The Panel erred in the interpretation of Articles 7.8 and 2.1(c) of the *SCM Agreement*, when finding that the subsidy provided by South Carolina to Boeing, through economic development bond ("EDB") proceeds used to fund Project Gemini facilities and infrastructure, is not specific within the meaning of Article 2.1(c) of the *SCM Agreement*.¹⁰
8. The Panel erred in the application of Articles 7.8 and 2.1(c) of the *SCM Agreement*, when finding that the subsidy provided by South Carolina to Boeing, through EDB proceeds used to fund Project Gemini facilities and infrastructure, is not specific within the meaning of Article 2.1(c) of the *SCM Agreement*.¹¹
9. The Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, when finding that the subsidy provided by South Carolina to Boeing, through EDB proceeds used to fund Project Gemini facilities and infrastructure, is not specific within the meaning of Article 2.1(c) of the *SCM Agreement*.¹²

E. Multi-County Industrial Park Job Tax Credits

10. The Panel erred in the application of Articles 7.8 and 2.2 of the *SCM Agreement*, when finding that the subsidy provided by South Carolina to Boeing through the multi-county industrial park ("MCIP") job tax credits is not specific within the meaning of Article 2.2 of the *SCM Agreement*.¹³

⁶ Panel Report, paras. 8.596-8.612, 8.1077.b, 9.252, 9.293, 9.333-9.335, 9.487(a), 11.7.c.ii, 11.8.a, 11.8.b, 11.8.e.

⁷ Panel Report, paras. 8.634-8.640, 8.1077.c, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.iii, 11.8.a, 11.8.b, 11.8.e.

⁸ Panel Report, paras. 8.634-8.640, 8.1077.c, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.iii, 11.8.a, 11.8.b, 11.8.e.

⁹ Panel Report, paras. 8.634-8.640, 8.1077.c, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.iii, 11.8.a, 11.8.b, 11.8.e.

¹⁰ Panel Report, paras. 8.837-8.841, 8.843, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.8.a, 11.8.b, 11.8.e, 8.1077.e, 11.7.c.v.

¹¹ Panel Report, paras. 8.837-8.841, 8.843, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.8.a, 11.8.b, 11.8.e, 8.1077.e, 11.7.c.v.

¹² Panel Report, paras. 8.837-8.841, 8.843, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.8.a, 11.8.b, 11.8.e, 8.1077.e, 11.7.c.v.

¹³ Panel Report, paras. 8.931, 8.933, 8.1077.g, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.vii, 11.8.a, 11.8.b, 11.8.e.

11. The Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, when finding that the subsidy provided by South Carolina to Boeing through the MCIP job tax credits is not specific within the meaning of Article 2.2 of the *SCM Agreement*.¹⁴

II. ADVERSE EFFECTS

A. Continuing Adverse Effects

12. The Panel erred in the interpretation of Article 7.8 of the *SCM Agreement*, when finding that, to "take appropriate steps to remove the adverse effects" under that provision, a responding Member found to be granting or maintaining an actionable subsidy need not remove adverse effects that remain present after the end of the implementation period, in circumstances where those effects result from sales transactions that were agreed prior to the end of the implementation period and for which performance remains incomplete.¹⁵
13. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that sales that had occurred prior to the end of the implementation period cannot constitute "present" adverse effects under Article 7.8 of the *SCM Agreement*, even where deliveries under those sales remain outstanding after the end of the implementation period.¹⁶
14. The Panel failed to make an objective assessment of the matter under Article 11 of the DSU, when finding that sales that had occurred prior to the end of the implementation period cannot constitute "present" adverse effects under Article 7.8 of the *SCM Agreement*, even though the original panel had determined that an adverse effect from such sales lasts until deliveries under the sale are completed.¹⁷
15. The Panel failed to make an objective assessment of the matter under Article 11 of the DSU, when finding that the European Union's continuing adverse effects arguments were "unsupported by the evidence and/or in contradiction with the findings made in the original proceeding".¹⁸
16. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding, on the basis of an erroneous counterfactual, that the European Union's continuing adverse effects arguments were "unsupported by the evidence and/or in contradiction with the findings made in the original proceeding".¹⁹

B. Role and Consequence of Product Market Delineation

17. The Panel erred in the interpretation of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when interpreting those provisions to require that, as regards significant price suppression, price depression, or lost sales, "a subsidized product can only cause serious prejudice to another product if the two products in question compete in the same market".²⁰

¹⁴ Panel Report, paras. 8.931, 8.933, 8.1077.g, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.vii, 11.8.a, 11.8.b, 11.8.e.

¹⁵ Panel Report, paras. 9.107, 9.312-9.314, 9.332, 9.333-9.335, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

¹⁶ Panel Report, paras. 9.307-9.314, 9.332, 9.333-9.335, 9.403 (footnotes 3323, 3329), 9.407, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

¹⁷ Panel Report, paras. 9.307-9.314, 9.332, 9.333-9.335, 9.403 (footnotes 3323, 3329), 9.407, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

¹⁸ Panel Report, paras. 9.315, 9.321-9.323, 9.326, 9.331, 9.332, 9.333-9.335, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

¹⁹ Panel Report, paras. 9.315, 9.321-9.323, 9.326, 9.331, 9.332, 9.333-9.335, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁰ Panel Report, paras. 9.33, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

C. Collective Assessment of Effects of Multiple Subsidies

18. The Panel erred in the interpretation of Articles 7.8, 5, and 6.3 of the *SCM Agreement* in identifying "aggregation" and "cumulation" as the only two permissible approaches to assess collectively the effects of multiple subsidies.²¹

D. Causation Standard for Lost Sales

19. The Panel erred in the interpretation of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that there must be "no non-price factors that explain Boeing's success in obtaining the sale" in order for the subsidies at issue to be found to cause significant lost sales.²²

E. Price Effects

20. The Panel erred in the interpretation of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that the European Union had failed to demonstrate that the untied state and local cash flow subsidies and the untied post-2006 aeronautics R&D subsidies resulted in lower prices for Boeing LCA.²³
21. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that the European Union had failed to demonstrate that the untied state and local cash flow subsidies and the untied post-2006 aeronautics R&D subsidies resulted in price effects.²⁴
22. The Panel failed to make an objective assessment of the matter under Article 11 of the DSU, when finding that the European Union had failed to demonstrate that the untied state and local cash flow subsidies and the untied post-2006 aeronautics R&D subsidies resulted in price effects.²⁵

F. Technology Effects

23. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that the "technology effects" of the pre-2007 US aeronautics R&D subsidies, which were found in the original proceedings to have accelerated the development of technologies applied on the 787-8/9, do not continue to cause adverse effects in the post-implementation period.²⁶
24. The Panel failed to make an objective assessment of the matter under Article 11 of the DSU, when finding that the "technology effects" of the pre-2007 US aeronautics R&D subsidies, which were found in the original proceedings to have accelerated the development of technologies applied on the 787-8/9, do not continue to cause adverse effects in the post-implementation period.²⁷
25. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding, based exclusively on the counterfactual launch date of the 787 and without

²¹ Panel Report, paras. 9.62, 9.89, 9.93, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²² Panel Report, paras. 9.240, 9.241, 9.242, 9.243, 9.246, 9.250-9.252, 9.292, 9.293, 9.333-9.335, 9.379, 9.380, 9.383, 9.426, 9.446, 9.458, 9.477 (footnote 3433), 9.486(d), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²³ Panel Report, paras. 9.271, 9.273, 9.277, 9.288, 9.291, 9.293, 9.297-9.298, 9.333-9.335, 9.470, 9.472, 9.474, 9.475, 9.476, 9.483, 9.484, 9.485, 9.486(c), 9.486(d), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁴ Panel Report, paras. 9.271, 9.273, 9.277, 9.288, 9.291, 9.293, 9.297-9.298, 9.333-9.335, 9.470, 9.472, 9.474, 9.475, 9.476, 9.483, 9.484, 9.485, 9.486(c), 9.486(d), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁵ Panel Report, paras. 9.271, 9.273, 9.277, 9.288, 9.291, 9.293, 9.297-9.298, 9.333-9.335, 9.470, 9.472, 9.474, 9.475, 9.476, 9.483, 9.484, 9.485, 9.486(c), 9.486(d), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁶ Panel Report, paras. 9.128, 9.152, 9.153, 9.156, 9.157, 9.158, 9.161, 9.162, 9.163, 9.164, 9.165, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.333-9.335, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁷ Panel Report, paras. 9.128, 9.152, 9.153, 9.156, 9.157, 9.158, 9.161, 9.162, 9.163, 9.164, 9.165, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.333-9.335, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

consideration of the counterfactual timing of deliveries, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.²⁸

26. The Panel failed to make an objective assessment under Article 11 of the DSU, when finding, based exclusively on the counterfactual launch date of the 787 and without consideration of the counterfactual timing of deliveries, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.²⁹
27. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding, based on evidence regarding the time required to *further develop and mature certain technologies at already advanced stages of technology development*, rather than evidence regarding the time required to *conduct early-stage fundamental R&D for such technologies*, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.³⁰
28. The Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, when finding, based on evidence regarding the time required to *further develop and mature certain technologies at already advanced stages of technology development*, rather than evidence regarding the time required to *conduct early-stage fundamental R&D for such technologies*, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.³¹
29. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding, based on a failure to consider the proper sequence of technology development, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.³²
30. The Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, when finding, based on a failure to consider the proper sequence of technology development, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.³³
31. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when accepting the United States' estimate of the counterfactual launch date of the 787 on the basis that the European Union did not "*itself* enumerate the specific additional tasks that Boeing should have reflected in its assessment" and did "not provide evidence of how long Boeing would have needed to conduct any of the R&D tasks that were actually performed under the NASA and DOD aeronautics R&D programmes".³⁴
32. The Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, when accepting the United States' estimate of the counterfactual launch date of the 787 on the basis that the European Union did not "*itself* enumerate the specific additional tasks that Boeing should have reflected in its assessment" and did "not provide evidence of how long

²⁸ Panel Report, paras. 9.128, 9.152, 9.153, 9.157, 9.161, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁹ Panel Report, paras. 9.128, 9.152, 9.153, 9.157, 9.161, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³⁰ Panel Report, paras. 9.128, 9.161, 9.162 (referring to paras. 9.136, 9.139), 9.163, 9.164, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³¹ Panel Report, paras. 9.128, 9.161, 9.162 (referring to paras. 9.136, 9.139), 9.163, 9.164, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³² Panel Report, paras. 9.128, 9.152, 9.161, 9.165, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³³ Panel Report, paras. 9.128, 9.152, 9.161, 9.165, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³⁴ Panel Report, paras. 9.128, 9.153, 9.158, 9.162, 9.163, 9.164, 9.165, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

Boeing would have needed to conduct any of the R&D tasks that were actually performed under the NASA and DOD aeronautics R&D programmes".³⁵

33. The Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, when it misconstrued a European Union argument in the original proceedings, in support of its finding that "the acceleration effect of the pre-2007 aeronautics R&D subsidies in relation to Boeing's technology development for the 787, has {not} continued into the post-implementation period".³⁶

³⁵ Panel Report, paras. 9.128, 9.153, 9.158, 9.162, 9.163, 9.164, 9.165, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³⁶ Panel Report, paras. 9.156, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

ANNEX A-2

UNITED STATES' NOTICE OF OTHER APPEAL*

Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the United States hereby notifies the Appellate Body of its decision to appeal certain issues of law covered in the Report of the Panel in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint): Recourse to Article 21.5 of the DSU by the European Union* (WT/DS353/RW) ("Compliance Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's finding that European Union ("EU") claims regarding procurement contracts between the U.S. Department of Defense ("DoD") and The Boeing Company ("Boeing") were within its terms of reference. This conclusion is in error and is based on erroneous findings of law and related legal interpretations, including an erroneous interpretation and application of Articles 6.2 and 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). The paragraphs relating to these errors include paragraphs 7.111-7.131 and 11.5.a.ii of the Compliance Panel Report.

2. The United States appeals the Panel's finding regarding the approximate rate of subsidization per 737 MAX and 737NG, resulting from the Washington State B&O tax rate reduction. This finding is in error and is based on erroneous findings of law and related legal interpretations, including an erroneous interpretation or application of Articles 5(c) and 6.3(c) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). In the alternative, the Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements for purposes of Article 11 of the DSU. The paragraphs relating to these errors include paragraphs 9.385, 9.395, and 9.402-9.403 of the Compliance Panel Report.

3. The United States appeals the Panel's findings that the price difference in the Air Canada sales campaign was somewhat smaller than the price difference in the Icelandair 2013 sales campaign, and that, in the concluding stages of the Air Canada 2013 sales campaign, Airbus thought it was close enough to Boeing on price that relatively small improvements on price could affect the outcome of the campaign. The Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements for purposes of Article 11 of the DSU. The paragraphs relating to these errors include paragraph 9.403 of the Compliance Panel Report and paragraph 264 of the HSBI Appendix to the Compliance Panel Report.

4. The United States appeals the Panel's finding that the evidence regarding the price differential in the Icelandair 2013 sales campaign was somewhat contradicted by other evidence, which suggests that at the final stage, Airbus may have closed the gap. The Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements for purposes of Article 11 of the DSU. The paragraphs relating to these errors include paragraph 9.403 of the Compliance Panel Report and paragraphs 247 and 250 of the HSBI Appendix to the Compliance Panel Report.

5. The United States appeals the Panel's finding that the European Union has established that the effects of the Washington State B&O tax rate reduction are a genuine and substantial cause of significant lost sales within the meaning of Articles 5(c) and 6.3(c) of the SCM Agreement of A320neo and A320ceo families of LCA in the single-aisle LCA market, in respect of the sales campaigns for Fly Dubai in 2014, Air Canada in 2013, and Icelandair in 2013, in the post-implementation period. This conclusion is in error and is based on erroneous findings of law and related legal interpretations,

* This document, dated 12 September 2017, was circulated to Members as document WT/DS353/28.

including an erroneous interpretation or application of Articles 5(c) and 6.3(c) of the SCM Agreement. In addition, the Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements for purposes of Article 11 of the DSU. The paragraphs relating to these errors include paragraphs 9.385, 9.395, 9.402-9.404, 9.407, and 11.8(c) of the Compliance Panel Report.

6. The United States appeals the Panel's finding that the European Union has established that the effects of the Washington State B&O tax rate reduction are a genuine and substantial cause of a threat of impedance of imports of the A320ceo to the United States single-aisle market, and a threat of impedance of exports of Airbus single-aisle LCA in the United Arab Emirates third country market, within the meaning of Articles 5(c) and 6.3(a) and (b) of the SCM Agreement in the post-implementation period. This conclusion is in error and is based on erroneous findings of law and related legal interpretations, including an erroneous interpretation or application of Articles 5(c) and 6.3(c) of the SCM Agreement. The paragraphs relating to these errors include paragraphs 9.385, 9.395, 9.402-9.404, 9.438, 9.443, 9.444, and 11.8(d) of the Compliance Panel Report.

7. The United States *conditionally* appeals the Panel's findings that post-2006 National Aeronautics and Space Administration ("NASA") procurement contracts and cooperative agreements, DoD assistance instruments, and the Aviation Administration ("FAA") Other Transaction Agreement DTFWA-10-C-00030 conferred a benefit on Boeing. These conclusions are in error and are based on erroneous findings of law and related legal interpretations, including an erroneous interpretation and application of Article 1.1(b) of the SCM Agreement. In addition, the Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements for purposes of Article 11 of the DSU. The paragraphs relating to these errors include paragraphs 8.30, 8.44-8.50, 8.176-8.178, 8.181-8.187, 8.408-8.414, 8.533-8.541, and 11.7(b)(i)-11.7(b)(iii) of the Compliance Panel Report. The United States only requests the Appellate Body to address this issue if it modifies or reverses the Panel's finding that subsidies conferred through the measures referenced in this paragraph did not cause adverse effects under Articles 5 and 6.3 of the SCM Agreement.

8. The United States *conditionally* appeals the Panel's findings that subsidies conferred by the NASA, DoD, and FAA measures referenced in paragraph 2 were specific subsidies. These conclusions are in error and are based on erroneous findings of law and related legal interpretations, including an erroneous interpretation and application of Article 2.1 of the SCM Agreement. The paragraphs relating to these errors include paragraphs 8.210-8.211, 8.222-8.231, 8.460-8.469, 8.547, 8.548-8.553, and 11.7(b)(i)-11.7(b)(iii) of the Compliance Panel Report. The United States only requests the Appellate Body to address this issue if it finds that DoD procurement contracts create the same type of financial contribution as the measures referenced in paragraph 2.

9. The United States *conditionally* appeals the Panel's finding that the State of South Carolina's payment to Boeing of \$270 million in Economic Development Bond and Air Hub Bond proceeds, conferred a benefit to Boeing. The Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements for purposes of Article 11 of the DSU. The paragraphs relating to these errors include paragraphs 8.823, 8.849, and 11.7(b)(ix) of the Compliance Panel Report. The United States only requests the Appellate Body to address this issue if it modifies or reverses the Panel's finding that subsidies conferred through the measures referenced in this paragraph did not cause adverse effects under Articles 5 and 6.3 of the SCM Agreement.

10. The United States *conditionally* appeals the Panel's finding that the EU's claim of A330 price suppression did not fail as a matter of law, despite that the EU failed to allege that the A330 is "in the same market" as an allegedly subsidized product. This conclusion is in error and is based on erroneous findings of law and related legal interpretations, including an erroneous interpretation or application of Articles 5(c) and 6.3(c) of the SCM Agreement. The portions of the compliance Panel report relating to these errors include footnote 3173. The United States only requests the Appellate Body to address this issue if it modifies or reverses Panel findings regarding the EU's claim of adverse effects suffered by the A330.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of the European Union's appellant's submission	13
Annex B-2	Executive summary of the United States' other appellant's submission	36
Annex B-3	Executive summary of the United States' appellee's submission	38
Annex B-4	Executive summary of the European Union's appellee's submission	44

ANNEX B-1

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLANT'S SUBMISSION

I. INTRODUCTION

1. The European Union¹ ("EU") appeals discrete errors of law and legal interpretation developed in the Report of the Panel in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union)* ("Panel Report" or "compliance Panel Report").²
2. The European Union prevailed on significant parts of its claims before the Panel, with the Panel ultimately concluding that "the United States has failed to implement the DSB recommendations and rulings to bring its measures into conformity with its obligations under the SCM Agreement".³ Nevertheless, the European Union files its appeal first, with the objective of avoiding any further unwarranted delay in these proceedings.

II. THE PANEL ERRED IN FINDING THAT THE DOD RDT&E PROCUREMENT CONTRACTS ARE NOT "SUBSIDIES" UNDER ARTICLE 1.1 OF THE SCM AGREEMENT

3. The European Union appeals the Panel's finding that the payments and access to Department of Defense ("DOD") facilities, equipment, and employees provided to Boeing through pre-2007 and post-2006 DOD procurement contracts are not subsidies within the meaning of Article 1.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). These contracts were funded by several DOD Research, Development, Test & Evaluation ("RDT&E") program elements ("PEs") supporting research and development ("R&D") relevant to large civil aircraft ("LCA").
4. The Panel's conclusion stems from a failure to make an objective assessment of the matter in violation of Article 11 of the Dispute Settlement Understanding ("DSU").⁴ The European Union's Article 11 appeal extends to the Panel's findings with respect to both financial contribution and benefit, under Articles 1.1(a)(1) and 1.1(b) of the *SCM Agreement*, respectively.
5. The Panel found that the DOD procurement contracts (including the funding, goods, and services provided by DOD pursuant to those contracts) are most appropriately characterised as "purchases of services", a category not explicitly listed in Article 1.1(a)(1) of the *SCM Agreement*.⁵ The Panel then considered whether, assuming purchases of services constitute financial contributions, the DOD procurement contracts confer a benefit under Article 1.1(b). The Panel concluded that, in view of the market benchmarks on the record, the European Union had not demonstrated that the DOD procurement contracts confer a benefit.⁶ The Panel thus found that the DOD procurement contracts are not subsidies.
6. In so finding, the Panel committed two principal errors. The Panel erred in: (1) characterising the DOD procurement contracts as purchases of services; and (2) finding that the DOD procurement contracts do not confer a benefit.
7. *First*, the Panel failed to make an objective assessment of the matter, including an objective assessment of the facts, in violation of Article 11 of the DSU, when it erroneously characterised the payments and access to DOD facilities, equipment, and employees,

¹ The European Union uses the terms "European Union" and "EU" interchangeably to refer to both the European Union and its predecessor, the European Communities.

² The European Union considers that errors in the interpretation of Articles 1, 2, 5, and 6 of the *SCM Agreement* also involve errors in the interpretation of Article 7.8 of the *SCM Agreement*.

³ Panel Report, para. 11.12.

⁴ Panel Report, paras. 8.360-8.378, 8.418-8.437.

⁵ Panel Report, para. 8.376.

⁶ Panel Report, paras. 8.377-8.378.

provided to Boeing through DOD procurement contracts, as "purchases of services".⁷ Specifically, the Panel failed to base its findings in the evidence, failed to engage with EU evidence and arguments, disregarded key evidence, and failed to provide coherent reasoning or adequate explanations in support of its findings.

8. The European Union provided evidence that the DOD procurement contracts share all of the relevant characteristics of the National Aeronautics and Space Administration ("NASA") procurement contracts and DOD assistance instruments that led the Appellate Body to conclude that those measures involved financial contributions to Boeing.⁸ In particular, the European Union demonstrated that, like NASA procurement contracts and DOD assistance instruments, DOD procurement contracts are collaborative research arrangements "akin to a species of joint venture", as: (i) both parties commit resources; (ii) the parties share the fruits of their research; and (iii) the subjects to be researched are often determined collaboratively.⁹ Further, the European Union explained that these joint venture arrangements provide funding analogous to equity infusions, as it was uncontested that: (i) funding is provided in expectation of some kind of return; (ii) there is no certainty that the research will be successful;¹⁰ (iii) the funder's risks are limited to the amount of money committed and the opportunity cost of other support provided; and (iv) the funder contributes by providing access to facilities, equipment, and employees (like some, but not all, equity investors).
9. The Panel's factual findings regarding the operation of DOD procurement contracts (namely, that the contracts are not akin to a species of joint venture) are contradicted by the evidence. The European Union provided critically important evidence related to: (i) Boeing's contribution of its background intellectual property ("IP"), including IP resulting from non-reimbursed Independent Research and Development ("IR&D") spending; (ii) Boeing's ability to share in the rewards of the R&D conducted under DOD procurement contracts (despite export control rules), including in both its LCA and military business; and (iii) the collaborative nature and purpose of the DOD procurement contracts.
10. As evidence that DOD procurement contracts can lead to technologies with civil applications, and, thus, that Boeing can share in the rewards, the European Union identified numerous exemplary DOD-funded Boeing patents (drafted by Boeing's engineers and patent attorneys) that explicitly indicate, on the face of the patents themselves, the potential LCA-related applications. As evidence that the United States intends for, and encourages, DOD contractors to extract commercial benefit from their work under the RDT&E PEs, the European Union referenced undisputed evidence that the DOD decided to terminate its previous recoupment policy in favour of "assist{ing} the U.S. defense industry to be more competitive on a global basis".¹¹
11. The Panel's imbalanced treatment of EU evidence, including its outright failure to acknowledge or engage with EU arguments and critical evidence, led the Panel to conclude that the DOD procurement contracts are not akin to a species of joint venture in which DOD provides a direct transfer of funds analogous to an equity infusion. Properly assessed, the evidence would have compelled the finding that the DOD procurement contracts establish a joint-venture-type relationship in which DOD provides financial contributions to Boeing akin to an equity infusion under Article 1.1(a)(1)(i), and in which DOD also provides Boeing with goods and services under Article 1.1(a)(1)(iii) of the *SCM Agreement*.
12. *Second*, in assessing benefit under Article 1.1(b), the Panel failed, under Article 11 of the DSU, to make an objective assessment of the matter, including the facts, when finding, in the alternative, that the distribution of IP rights pursuant to the DOD procurement contracts

⁷ Panel Report, paras. 8.354-8.378.

⁸ Panel Report, paras. 8.320, 8.356.

⁹ Panel Report, para. 8.321.

¹⁰ In this context, "success" is understood to mean "whether any inventions are discovered and the usefulness of the data collected, as well as the scientific and technical information produced". Appellate Body Report, *US – Large Civil Aircraft*, para. 623.

¹¹ EU FWS, para. 241, *quoting* Final Rule, Recoupment of Nonrecurring Costs on Sales of US Items, 58 FR 16497, 29 March 1993 (exhibit EU-279). See also EU SWS, para. 396; EU Response to Panel Question 29, para. 176.

does not confer a benefit on Boeing.¹² The Panel based its alternative benefit finding on the same factual findings that led it to characterise the provision of funding and support, under DOD procurement contracts, as involving purchases of services. In the benefit context, the Panel thus failed to make an objective assessment of the matter, including the facts, for the same reasons as it also failed in the financial contribution context.

13. Under DOD procurement contracts (and US government contracts generally), Boeing receives the IP rights to any technologies developed by Boeing employees in the course of conducting R&D, while DOD receives a limited license to use these technologies without having to pay royalties to Boeing. The European Union argued that this distribution of IP rights confers a benefit on Boeing, as it is more favourable to Boeing as a commissioned party than to any other commissioned party on the market, and less favourable to DOD as a commissioning party than to any other commissioning party on the market. In considering this argument (in the alternative), the Panel failed to comply with Article 11 of the DSU.
14. In particular, the Panel failed to take into account EU evidence that, notwithstanding any stated "military" objectives of the DOD RDT&E PEs pursuant to which the DOD procurement contracts are funded, DOD intends for contractors such as Boeing to extract *commercial* benefit from their work under the RDT&E PEs, and DOD and Boeing's interests are aligned in this regard.
15. Further, the Panel considered that the license DOD receives to use technologies developed by Boeing captures the full economic value of the R&D. However, the Panel failed to engage with, and indeed disregarded, evidence that (1) in the military context, Boeing sells military aircraft to foreign governments; and (2) outside the military context, legal restrictions on the use of military technologies do not prevent Boeing from applying to LCA the processes, expertise, and derivative technologies developed under DOD procurement contracts.
16. As a result of the Panel's failure to follow the requirements in Article 11 of the DSU, the European Union requests the Appellate Body to reverse the Panel's findings and complete the legal analysis to determine that the funding, and access to facilities, equipment, and employees, that DOD provides to Boeing pursuant to DOD procurement contracts, are specific subsidies within the meaning of Articles 1.1(a)(1), 1.1(b), and 2.1(a) of the *SCM Agreement*. The European Union additionally requests the Appellate Body to consider this subsidy in its completion of the analysis of technology effects and price effects.

III. THE PANEL ERRED IN FINDING THAT THE UNITED STATES HAS WITHDRAWN THE FSC/ETI TAX SUBSIDIES

17. The European Union appeals the Panel's finding that the United States does not continue to grant or maintain the tax concession subsidies provided pursuant to the Foreign Sales Corporation/Extraterritorial Income ("FSC/ETI") legislation and successor acts.¹³ The Panel erred in the interpretation of Article 1.1(a)(1)(ii) of the *SCM Agreement*,¹⁴ when finding that, in order to demonstrate the foregoing of revenue otherwise due, the European Union was required to establish that the FSC/ETI benefits were actually *used* by a particular subsidy recipient after 2006.¹⁵ This reflects an error in the interpretation of the phrase "government revenue that is otherwise due is foregone", which concerns the foregoing of an *entitlement* to government revenue, irrespective of whether that entitlement is actually exercised by the recipient.¹⁶
18. The original panel found, and the United States did not appeal, that from 1989-2006, the United States provided \$2.199 billion in actionable and prohibited subsidies to Boeing

¹² Panel Report, paras. 8.421-8.436.

¹³ Panel Report, paras. 8.596-8.612.

¹⁴ The European Union notes that the Panel properly referred to Article 1.1 of the *SCM Agreement* to determine, under Article 7.8 of the *SCM Agreement*, whether the subsidy continues to exist in the post-implementation period. The European Union, therefore, considers that the error in the interpretation of Article 1.1 identified in this section also involves an error in the interpretation of Article 7.8.

¹⁵ Panel Report, paras. 8.596-8.601.

¹⁶ See Appellate Body Report, *US – FSC*, para. 90; Panel Report, *US – Tax Incentives*, paras. 7.44-7.55.

through tax exemptions under FSC/ETI legislation and successor acts.¹⁷ The European Union provided evidence that FSC/ETI tax concessions, with respect to certain foreign income recognised *after* 2006, continued to be available to Boeing. In particular, the European Union cited the US Government's own interpretation, in a 2006 Internal Revenue Service ("IRS") memorandum ("2006 IRS Memorandum"), of the effect of the most recent FSC/ETI successor act, the Tax Increase Prevention and Reconciliation Act of 2005 ("TIPRA") – namely, that certain transactions continue to be eligible for FSC/ETI tax concessions after 2006. The United States confirmed that the TIPRA has not been superseded by any further IRS guidance, and did not contest the European Union's description of the effect of the 2006 IRS Memorandum. The European Union also provided evidence identifying Boeing income that is eligible to receive FSC/ETI benefits after 2006.

19. The Panel erred in the interpretation of Article 1.1(a)(1)(ii) of the *SCM Agreement* in requiring the European Union to demonstrate that Boeing actually *used* the FSC/ETI tax concessions, and in not finding it sufficient that the tax concessions remained *available*. The Panel's interpretation is not supported by the ordinary meaning of Article 1.1(a)(1)(ii), in its context and in light of the object and purpose of the *SCM Agreement*. As the Appellate Body has explained, a proper assessment of whether "government revenue that is otherwise due is foregone" within the meaning of Article 1.1(a)(1)(ii) does *not* require consideration of whether, or how, the tax concession provided to the recipient is *used* by an individual recipient, but a comparison between what the challenged tax treatment provides and what the baseline tax treatment provides. Actual revenue itself need not have been foregone; rather it is the government's entitlement to collect revenue otherwise due, either now or in the future, that is foregone.¹⁸
20. Based on a proper interpretation of Article 1.1(a)(1)(ii), the Panel should have found that the FSC/ETI measures provide financial contributions to Boeing in the form of the foregoing by the US Government of revenue otherwise due.
21. For the reasons detailed above, the Panel erred in the interpretation of Article 1.1(a)(1)(ii). As a result, the Panel also erred in the interpretation of Article 7.8 of the *SCM Agreement*. The European Union requests the Appellate Body to reverse the Panel's findings and complete the analysis to determine that the United States continues to grant or maintain prohibited FSC/ETI subsidies, such that the subsidies have not been withdrawn within the meaning of Article 7.8 of the *SCM Agreement*.

IV. THE PANEL ERRED IN FINDING THAT THE WICHITA INDUSTRIAL REVENUE BOND SUBSIDIES ARE NOT SPECIFIC

22. The European Union appeals the Panel's finding that the City of Wichita's Industrial Revenue Bond ("IRB") subsidy programme is no longer *de facto* specific, within the meaning of Article 2.1(c) of the *SCM Agreement*, on the basis that the Panel erred in the interpretation and application of that provision, and failed to make an objective assessment of the matter under Article 11 of the DSU.¹⁹
23. IRBs are issued by cities and counties in the State of Kansas, on behalf of private entities aiming to raise revenue to fund the purchase, construction, or improvement of industrial and commercial property. While IRBs are generally purchased by the public, Boeing has purchased for itself IRBs issued by the City of Wichita. Boeing then receives property and sales tax exemptions on property associated with the IRBs for a period of 10 years. The City of Wichita also issues IRBs to Spirit Aerosystems ("Spirit"), which purchased Boeing's Wichita LCA facilities in 2005. Over the life of the IRB subsidy programme, from 1979 to 2012,

¹⁷ Panel Report, para. 8.568, *citing* Panel Report, *US – Large Civil Aircraft*, para. 7.1429.

¹⁸ See Appellate Body Report, *US – FSC*, para. 90; Panel Report, *US – Tax Incentives*, paras. 7.44-7.55.

¹⁹ Panel Report, paras. 8.634-8.638. The Panel properly referred to Article 2.1(c) of the *SCM Agreement* to determine, under Article 7.8 of the *SCM Agreement*, whether the subsidy has been withdrawn or instead, whether the subsidy continues to exist in the post-implementation period. The European Union, therefore, considers that the errors in the interpretation and application of Article 2.1(c) identified in this section also involve errors in the interpretation and application of Article 7.8.

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- Boeing and Spirit received 59% of the total amount of IRBs issued by the City of Wichita (which serves as a proxy for the percentage of tax abatement granted²⁰).
24. While the Panel properly found that the City of Wichita continues to provide subsidies to Boeing through tax benefits deriving from IRBs, it erroneously concluded that those subsidies are no longer *de facto* "specific" within the meaning of Article 2.1(c).²¹ In so finding, the Panel erred in the interpretation and application of Article 2.1(c), and failed to make an objective assessment of the matter under Article 11 of the DSU.
25. *First*, the Panel's interpretation of the term "disproportionately large" is unsupported by the text of Article 2.1(c), considered in its context, and in light of the object and purpose of the *SCM Agreement*. Specifically, the Panel erred when it failed to follow the requirement, found in Article 2.1(c) itself, that "account shall be taken . . . of the length of time during which the subsidy programme has been in operation" (*i.e.*, 1979 onwards), when adjudging whether certain enterprises (namely, Boeing and Spirit) had received "disproportionately large amounts of the subsidy".
26. Instead, and without legal basis, the Panel limited its assessment of disproportionality of Wichita's IRB subsidy programme to the period of time "after the end of the implementation period" (*i.e.*, 2013 onwards).²² Based on this shortened period, the Panel found that Boeing and Spirit received 32% of the amount of IRBs issued, which it did not consider to be "disproportionately large". A proper interpretation of Article 2.1(c) would have led the Panel to conclude that the relevant period over which to assess disproportionality is the entire period of the IRB programme's existence, beginning in 1979. Over that period, Boeing and Spirit received 59% of the amount of IRBs issued, which the Panel should have found to be "disproportionately large", in line with the findings of the original panel and the Appellate Body.
27. *Second*, the Panel erred in the application of Article 2.1(c). Namely, the Panel assessed specificity based on facts restricted to "after the end of the implementation period", and failed to consider data for the entire duration of the subsidy programme, as required by Article 2.1(c).
28. *Finally*, the Panel failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU, when it inappropriately deviated from the approach taken by the panel and the Appellate Body in the original proceedings. Both the original panel and the Appellate Body assessed disproportionality with reference to the entire period during which the IRB subsidy programme had been in operation, then 1979 through 2005. The Appellate Body concluded that the IRB programme was specific, as 69% of IRBs had been granted to Boeing and Spirit during that time, which was disproportionately large.
29. The original panel indicated that only two circumstances would justify a deviation from the general rule that specificity is to be assessed with reference to the life of the subsidy programme. First, where a subsidy programme has been in operation for a short period of time, it may be too early to draw conclusions regarding specificity. Second, where a subsidy programme has been in operation for a long period of time, and there has been a change in the structure of the economy and the importance of the subsidised activity in the economy, reference to the period following the change might be more appropriate. The Panel, despite the United States' arguments to the contrary, did not find that there had been a significant change to the structure of the Wichita economy and the importance of the subsidised activity. (And the IRB subsidy programme had not been in operation for only a short time.) Accordingly, in limiting its assessment to the post-implementation period, the Panel inappropriately, and without justification, deviated from the approach of the original panel and the Appellate Body.
30. In sum, the Panel erred in the interpretation and application of Article 2.1(c) of the *SCM Agreement*, and, as a result, also erred in the interpretation and application of Article 7.8 of the *SCM Agreement*. The Panel also failed to satisfy the requirements of Article
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²⁰ Panel Report, para. 8.630.

²¹ Panel Report, paras. 8.634-8.638.

²² Panel Report, para. 8.634.

11 of the DSU. Based on these errors, the European Union requests the Appellate Body to reverse the Panel's findings, and complete the analysis to determine that the IRB subsidies continue to be specific under Article 2.1(c) of the *SCM Agreement*.

V. SOUTH CAROLINA MEASURES

31. The European Union appeals the Panel's findings that two South Carolina subsidies are not specific: (A) South Carolina's funding of Boeing facilities and infrastructure through economic development bonds ("EDBs"); and (B) South Carolina's provision of additional corporate income tax credits to Boeing, as a result of the designation of Boeing property as being located in a multi-county industrial park ("MCIP").

A. The Panel erred in finding that South Carolina's funding of Project Gemini facilities and infrastructure, through EDBs, is not specific

32. The European Union appeals the Panel's finding that the \$220 million subsidy provided by South Carolina to Boeing through EDBs is not "specific" within the meaning of Article 2.1(c) of the *SCM Agreement*.²³ In reaching this conclusion, the Panel erred in the interpretation and application of Article 2.1(c),²⁴ and failed to make an objective assessment of the undisputed evidence before it, in contravention of Article 11 of the DSU.
33. As the Panel explained, the State of South Carolina provides Boeing with funding for facilities and infrastructure at the site of Boeing's 787 final assembly and delivery facility, also known as the "Project Gemini" facility.²⁵ This funding is generated from the sale of EDBs issued by the State, as well as through air hub bonds. Since the inception of the EDB subsidy programme in 2002, South Carolina had issued EDBs on behalf of only three private ventures, *i.e.*, Boeing, BMW, and Boeing's suppliers (the Project Emerald companies).²⁶ Over that time period, 79% of the bonds have been issued to support Boeing and its suppliers alone. Air hub bonds have been issued only to Boeing.
34. In concluding that the issuance of EDBs to three private firms does not demonstrate use of the subsidy programme by a limited number of certain enterprises, and that use of 79% of the subsidy by Boeing and its suppliers does not demonstrate predominant use, the Panel committed three principal errors.
35. *First*, the Panel erred in the interpretation of Article 2.1(c). The Panel implicitly interpreted the term "limited number" to mean fewer than three (even in the context of a large economy), when finding that the issuance of air hub bonds to only one company (Boeing) constitutes use by a limited number of certain enterprises, but that the issuance of EDBs to only three companies does not. This interpretation is not supported by the plain meaning of "limited number", understood in its proper context.
36. The Panel also misinterpreted the term "enterprises" to include public entities. Specifically, the Panel stated that the fact that EDBs have been issued to public entities (two cities and a public college) in addition to private entities suggests that the subsidy is not limited to certain enterprises.²⁷ However, Appellate Body guidance indicates that the term "certain enterprises" encompasses only *private* entities. Thus, the Panel should not have factored EDB issuances to public entities into its analysis.
37. Finally, the Panel erred in the interpretation of the word "predominant", when finding that "predominant" use involves a concept entirely different from "disproportionate" use, such that evidence that would be relevant to showing disproportionality could not be relevant to

²³ Panel Report, paras. 8.838-8.841, 8.843.

²⁴ The Panel properly referred to Article 2.1(c) of the *SCM Agreement* to determine, under Article 7.8 of the *SCM Agreement*, whether the subsidy has been withdrawn or instead, whether the subsidy continues to exist in the post-implementation period. The European Union, therefore, considers that the errors in the interpretation and application of Article 2.1(c) identified in this section also involve errors in the interpretation and application of Article 7.8.

²⁵ See Panel Report, para. 8.682(a); EU FWS, para. 552.

²⁶ Panel Report, para. 8.838.

²⁷ Panel Report, para. 8.841.

predominance. Nothing in Article 2.1 indicates that evidence relevant to one *de facto* specificity factor is exclusive to that factor. The Panel therefore improperly dismissed key EU evidence as irrelevant, based on an erroneous interpretation of "predominant use".

38. *Second*, the Panel erred in the application of Article 2.1(c), by including EDBs issued to public entities, such as cities and public colleges, in its evaluation of whether the EDBs were, in fact, used by a limited number of enterprises. The fact that public entities may have also received EDBs is immaterial to the specificity analysis, and should not have been factored in. Accordingly, in including public entities in its analysis, the Panel improperly applied Article 2.1(c).
39. *Third*, in considering specificity under Article 2.1(c), the Panel failed to make an objective assessment of the level of diversification of the South Carolina economy, or the length of time that the subsidy programme has been in operation, in contravention of Article 11 of the DSU. Without a basis in the evidence, the Panel found that the European Union had not "addressed" these two factors, and failed to consider the evidence of record on these questions. In particular, the Panel had undisputed evidence before it of (i) a diverse economy in which many companies operated, and (ii) the length of time that the authorising measure had existed, but failed to consider such evidence. Based on an objective assessment of the facts, taking into account this evidence, the Panel would have found that the provision of EDBs to only three private entities constitutes use by a "limited number of certain enterprises", and use of 79% of the subsidy by Boeing and its suppliers amounts to predominant use by certain enterprises.
40. In sum, the Panel erred in the interpretation and application of Article 2.1(c). As a result, the Panel also erred in the interpretation and application of Article 7.8 of the *SCM Agreement*. The Panel also failed to objectively evaluate the facts before it in line with Article 11 of the DSU. The European Union requests the Appellate Body to reverse the Panel's erroneous findings and complete the legal analysis to conclude that the EDB subsidies are specific within the meaning of Article 2.1(c).

B. The Panel erred in finding that the subsidy provided through the multi-county industrial park job tax credits is not specific

41. The European Union appeals the Panel's finding that the subsidy provided to Boeing through the multi-county industrial park ("MCIP") job tax credits is not "specific" within the meaning of Article 2.2 of the *SCM Agreement*.²⁸ In particular, the European Union appeals this finding as it relates to the designation of the Project Gemini site in North Charleston, as part of an industrial park jointly established and developed by two distinct regional governments in South Carolina, *i.e.*, Charleston County and Colleton County.²⁹
42. As the Panel explained, South Carolina provides Boeing with corporate income tax credits as a result of the designation of Boeing's Project Gemini site as part of an MCIP.³⁰ These credits are above and beyond the "traditional" annual job tax credits that South Carolina provides to certain qualifying businesses.³¹ The "additional" tax credits are available to taxpayers only if they are *located in an MCIP* and also qualify for the traditional job tax credits.³² While the Panel properly found that these MCIP job tax credits constitute a "subsidy", it erred when finding that the subsidy is not specific, within the meaning of Article 2.2, because it is not "limited to certain enterprises located within a designated geographical region".
43. *First*, the Panel erred in the application of Article 2.2, when finding that the limitation on access to the subsidy to enterprises located within an MCIP "cannot be meaningfully

²⁸ Panel Report, paras. 8.931, 8.933. The Panel properly referred to Article 2.2 of the *SCM Agreement* to determine, under Article 7.8 of the *SCM Agreement*, whether the subsidy has been withdrawn or instead, whether the subsidy continues to exist in the post-implementation period. The European Union, therefore, considers that the errors in the application of Article 2.2 identified in this section also involve errors in the application of Article 7.8.

²⁹ Panel Report, para. 8.913.

³⁰ Panel Report, para. 8.913.

³¹ Panel Report, para. 8.912. The European Union did not challenge this "traditional" annual jobs tax credit. Panel Report, para. 8.914 (footnote 2352).

³² Panel Report, paras. 8.912-8.913.

considered to amount to a limitation under Article 2.2".³³ The Panel effectively found that just the possibility that a Member can amend or expand an MCIP in the future, through the passage of new legislation by local governments (*i.e.*, "ordinances"), provides sufficient reason to disregard the fact that, *at the present time*, a subsidy is indisputably "limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority". Simply because a "designated geographical region" theoretically can be expanded through additional legislation, at some point in the future, does not change the fact that it is, based on the evidence of record, understood to be a "designated geographical region" at the time of the panel proceedings.

44. *Second*, the Panel's finding that the "MCIP designation is readily available upon request", on which it based its conclusion that the MCIP tax credits are not regionally specific, lacks any basis in fact and is contrary to the undisputed evidence before the Panel. Indeed, the European Union provided undisputed evidence that the MCIP designation requires affirmative legislative action by multiple counties, indicating that the designation is not so easily "available". In concluding that the MCIP designation is "readily available", the Panel failed to cite to any evidence. The Panel thus failed to make an objective assessment of the matter, including the facts, in violation of Article 11 of the DSU.
45. In sum, the Panel erred in the application of Article 2.2. As a result, the Panel also erred in the application of Article 7.8 of the *SCM Agreement*. Further, the Panel failed to objectively assess the facts, as required by Article 11 of the DSU. Consequently, the European Union requests the Appellate Body to reverse the Panel's erroneous findings, and to complete the analysis, to find that the MCIP job tax credits constitute a specific subsidy within the meaning of Article 2.2.

VI. THE PANEL ERRED IN ITS FINDINGS REGARDING LOST SALES AND PRICE SUPPRESSION OF SALES CAMPAIGNS FOR WHICH THE FINAL DELIVERY HAD NOT YET OCCURRED BY THE END OF THE IMPLEMENTATION PERIOD

46. The European Union appeals the Panel's failure to find *present* adverse effects on the basis of (i) sales that occurred prior to the end of the implementation period, but for which (ii) delivery was still pending at the end of the implementation period.³⁴ The Panel, thereby, erred in the interpretation and application of Article 7.8 of the *SCM Agreement*, and failed to make an objective assessment of the matter, under Article 11 of the DSU.
47. In the original proceedings, the panel found that the phenomena of "lost sale" and "price suppression" do not begin and end at the time the aircraft is ordered, but rather begin at the time of order and continue until the final aircraft is delivered.³⁵ It follows from this finding that, for price-suppressed sales, or any lost sale, for which there remain outstanding deliveries of aircraft at the end of the implementation period, *present* adverse effects exist in the post-implementation period when the subsidy that caused the adverse effects has not been withdrawn. For any such present adverse effects, the responding Member has failed to achieve compliance under Article 7.8.
48. However, the Panel disagreed, finding instead that this factual circumstance does not involve *present* adverse effect for the purposes of Article 7.8.³⁶ For the Panel, this factual circumstance constitutes "continuing manifestations or effects of past adverse effects".³⁷

A. The Panel erred in interpreting Article 7.8

49. The Panel erroneously narrowed the scope of Article 7.8 by excluding any adverse effects "found in relation to specific transactions during the original reference period" from the

³³ Panel Report, para. 8.931.

³⁴ The European Union requests the Appellate Body to reverse the Panel's findings at paragraphs 9.307-9.314.

³⁵ EU FWS, paras. 1226, 1335, *citing* Panel Report, *EC – Large Civil Aircraft*, para. 7.1685.

³⁶ Panel Report, para. 9.107.

³⁷ Panel Report, para. 9.314.

obligation to take steps to remove adverse effects.³⁸ The Panel's interpretation does not flow from the proper application of the *Vienna Convention* rules on treaty interpretation.

50. *First*, the text of Article 7.8 does not support the Panel's interpretation. Adverse effects found in relation to specific transactions during the original reference period are not excluded from the obligation "to take appropriate steps to remove the adverse effects".³⁹ Instead, Article 7.8 states that "the Member granting or maintaining *such* subsidy" – which refers to "any subsidy that has resulted in adverse effects", as determined in the original proceeding – must take appropriate steps to remove "the adverse effects", or withdraw the subsidy.⁴⁰
51. *Second*, the context of Article 7.8 shows the erroneous nature of the Panel's interpretation. Specifically, Articles 7.9 and 7.10 of the *SCM Agreement* provide that, in case of non-compliance, any countermeasures must be "commensurate with the degree and nature of the adverse effects determined to exist".⁴¹ This provision "sends the treaty interpreter back to the precise findings on adverse effects made by the panels and the Appellate Body".⁴² Thus, these adverse effects include specific transactions on which the original adverse effects findings were based, and that continue to exist. If these adverse effects must be taken into account to calculate the amount of countermeasures in case of non-compliance, they must logically also fall within the scope of the respondent's obligations under Article 7.8.
52. *Third*, the Panel's interpretation is also not supported by the object and purpose of the *SCM Agreement*, as it fails to provide appropriate remedies for an actionable subsidy, parallel to those available in the case of measures found to be inconsistent with other provisions of the covered agreements. Under the Panel's interpretation, as regards a WTO-inconsistent actionable subsidy that is still maintained, no compliance obligation exists with respect to "original" adverse effects that are still present.
53. In developing its interpretation of Article 7.8, the Panel did not apply the *Vienna Convention* rules of treaty interpretation. Instead, the Panel chose its interpretation because it expressed certain concerns with the interpretation advanced by the European Union.⁴³ However, the Panel's concerns do not justify deviating from a proper interpretation derived from a *Vienna Convention* analysis. Moreover, the Panel's concerns are unwarranted.
54. Specifically, the Panel found the interpretation put forward by the European Union "difficult to reconcile with the prospective interpretation of Article 7.8" and "not meaningful in a practical sense".⁴⁴ However, to the extent adverse effects continue after the end of the implementation period, requiring a respondent to take appropriate steps to remove those effects does not involve imposing a retrospective remedy. Moreover, a complainant cannot be faulted for practical difficulties that may arise for a respondent tasked with taking appropriate steps to achieve compliance. As the Appellate Body has explained, "a WTO Member's domestic law does not excuse that Member from fulfilling its international obligations".⁴⁵

B. The Panel erred in the application of Article 7.8 and failed to make an objective assessment pursuant to Article 11 of the DSU

55. The Panel also erred in finding that new lost sales – *i.e.*, sales that had occurred after the end of the original 2004-2006 reference period – cannot constitute "present" adverse effects under Article 7.8 of the *SCM Agreement*, even where deliveries under those sales are still outstanding at the end of the implementation period. The Panel, thereby, erred in the

³⁸ Panel Report, para. 9.312.

³⁹ Panel Report, para. 9.312.

⁴⁰ Emphasis added.

⁴¹ Emphasis added.

⁴² Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US II)*, paras. 4.49-4.50.

⁴³ Panel Report, paras. 9.313-9.316.

⁴⁴ Panel Report, paras. 9.314-9.316.

⁴⁵ Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 46.

application of Article 7.8, and failed to make an objective assessment of the matter, under Article 11 of the DSU.

56. *First*, in applying Article 6.3 of the *SCM Agreement* to the facts of the LCA markets, the Panel erroneously found that lost sales and price suppression begin and end at the time at which an LCA is ordered, and do not continue until the final aircraft is delivered.⁴⁶ However, as the original panel and Appellate Body found, the specific treaty terms in Article 6.3, particularly the term "sale" (and, by extension, price effects), must be understood as capturing the life of the contract as a whole. Thus, if the contract continues to exist (uncompleted) after the end of the implementation period, by definition the adverse effects must also continue to exist. This means that adverse effects are "present", for the purpose of Article 7.8, throughout the life of the contract.
57. *Second*, the Panel failed to make an objective assessment, under Article 11 of the DSU. The original panel found that "price suppression and lost sales ... exist from the time an order for LCA is made, up to and including its delivery".⁴⁷ Without identifying any change in the characteristics of LCA sales, the compliance Panel deviated from this finding, by concluding that lost sales and price suppression do not continue until final delivery.⁴⁸ The Panel, therefore, inappropriately deviated from the original panel's finding "in the absence of any change in the underlying evidence in the record".⁴⁹

VII. THE PANEL ERRED IN THE INTERPRETATION OF ARTICLES 5, 6.3, AND 7.8 OF THE SCM AGREEMENT, IN FINDING THAT CERTAIN FORMS (OR INDICIA) OF ADVERSE EFFECTS CAN BE FOUND ONLY WHEN THE SUBSIDISED PRODUCT AND THE AFFECTED PRODUCT ARE IN THE SAME PRODUCT MARKET

58. The European Union agrees with, and consequently does not appeal, the Panel's identification of the legal standard for delineating product markets – specifically, that two products are to be placed into the same market where they exercise "meaningful competitive constraints" on one another. The European Union does, however, appeal a related legal interpretation. Specifically, the European Union appeals the Panel's interpretation of Articles 5 and 6.3 of the *SCM Agreement* as requiring that, with respect to significant price suppression, price depression, or lost sales, "a subsidized product can only cause serious prejudice to another product if the two products in question compete in the same market".⁵⁰
59. The Panel's finding constitutes error in the interpretation of Articles 5 and 6.3. Additionally, given that the question before the Panel was whether the United States has "take{n} appropriate steps to remove the adverse effects", under Article 7.8 of the *SCM Agreement*, the Panel's error also constitutes error in the interpretation of that provision.
60. In reaching this erroneous interpretation, the Panel purported to rely on guidance from the Appellate Body in *EC – Large Civil Aircraft*.⁵¹ However, the referenced Appellate Body statement, on its own terms, is limited to displacement under Articles 6.3(a) and (b), and does not apply, in particular, to significant price suppression, price depression, or lost sales under Article 6.3(c).
61. Proper application of the *Vienna Convention* rules on treaty interpretation confirms that serious prejudice in the form of significant price suppression, price depression, and lost sales (but not in the form of displacement, impedance, or significant price undercutting) may *manifest* in groups of products that fall "in the same market", even when the *subsidised* product is not placed in that same market. That is, whether or not a subsidy causes adverse effects in these circumstances is a question to be assessed based on the *evidence* on subsidy

⁴⁶ Panel Report, paras. 9.307-9.314, 9.332, 9.403 (footnotes 3323, 3329, 3335), 9.407.

⁴⁷ Panel Report, *US – Large Civil Aircraft*, paras. 7.1685-7.1686.

⁴⁸ Panel Report, *US – Large Civil Aircraft*, paras. 9.312, 9.316.

⁴⁹ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.

⁵⁰ Panel Report, para. 9.33.

⁵¹ Panel Report, para. 9.24 (footnote 2682), citing Appellate Body Report, *EC – Large Civil Aircraft*, para. 1119.

/ attribution and non-subsidy / non-attribution factors, and whether this evidence reveals that the subsidy is a *genuine and substantial cause* of the asserted adverse effects.

62. The European Union derives this interpretation from the ordinary meaning of the terms "the effect of the subsidy is ... significant price suppression ... in the same market", "the effect of the subsidy is ... significant ... price depression ... in the same market", and "the effect of the subsidy is ... significant ... lost sales in the same market". This interpretation is corroborated by contextual support afforded by Articles 5, 6.4, and 6.5 of the *SCM Agreement* and Article XVI:1 of GATT 1994.
63. The Panel's erroneous interpretation frustrates the object and purpose of the *SCM Agreement* by artificially limiting the scope of the adverse effects disciplines in Articles 5 and 6.3(c). In a range of circumstances, the Panel's interpretation prevents recourse against subsidies that cause adverse effects, even when a complainant is able to demonstrate such adverse effects, and a genuine and substantial causal link to the subsidies, based on evidence. To take one particularly troubling example of such a situation, the Panel's interpretation prevents recourse against those subsidies that distort the market the most – subsidies that distort the market in favour of the subsidised product to such a degree that the complainant's product is no longer able to exercise meaningful competitive constraints on the subsidised product.
64. A proper interpretation of Articles 5 and 6.3 avoids this result, by requiring that a panel assess the evidence on subsidy / attribution and non-subsidy / non-attribution factors to determine whether the subsidy is a *genuine and substantial cause* of the asserted adverse effects. As a result of the Panel's errors in the interpretation of Articles 5 and 6.3, the Panel also erred in the interpretation of Article 7.8.

VIII. THE PANEL ERRED IN THE INTERPRETATION OF ARTICLES 5, 6.3, AND 7.8 OF THE *SCM AGREEMENT*, WITH RESPECT TO THE COLLECTIVE ASSESSMENT OF THE EFFECTS OF ALL SUBSIDIES AT ISSUE

65. The Panel erred in the interpretation of Articles 5 and 6.3 of the *SCM Agreement* in identifying "aggregation" and "cumulation" as the only two permissible approaches to collectively assessing the effects of multiple subsidies.⁵² Limiting the analytical tools available to panels in their collective assessment of the effects of multiple subsidies is inconsistent with the text of Articles 5 and 6.3, and artificially restricts the effectiveness of the adverse effects disciplines under the *SCM Agreement*.
66. To recall, panels and the Appellate Body have previously relied upon "aggregation" and "cumulation" as two helpful analytical tools that panels may employ in assessing the existence of the requisite causal link between multiple subsidies and the alleged adverse effects. "Aggregation" allows a panel to assess the effects of a group of subsidies, as if they were a single subsidy, provided that the subsidies at issue share sufficient similarities, in terms of their design, structure, and operation.⁵³ "Cumulation" applies when at least one of the subsidies at issue, or an aggregated group of subsidies, has already been demonstrated to be a "genuine and substantial cause" of adverse effects (the "anchor subsidy"); in those circumstances, other subsidies may be included in the scope of the adverse effects findings, provided they are found to be a genuine cause that supplements and complements the effects of the anchor subsidy.⁵⁴
67. When endorsing the use of these two analytical tools, the Appellate Body was careful not to define an exhaustive list of analytical tools that panels may use for the collective assessment of the effects of multiple subsidies. Instead, the Appellate Body clarified that "aggregation"

⁵² The European Union notes that the Panel properly referred to Articles 5 and 6.3 of the *SCM Agreement* to determine, under Article 7.8 of the *SCM Agreement*, whether adverse effects had been removed, or instead, whether adverse effects continued to arise in the post-implementation period. The European Union, therefore, considers that the errors in the interpretation of Articles 5 and 6.3 of the *SCM Agreement* identified in this section also involve errors in the interpretation of Article 7.8 of the *SCM Agreement*.

⁵³ Appellate Body Report, *US – Large Civil Aircraft*, para. 1285.

⁵⁴ Appellate Body Report, *US – Large Civil Aircraft*, para. 1292.

and "cumulation" are among "*at least* two approaches to a collective assessment of the effects of multiple subsidy measures {that} may be used".⁵⁵

68. The ordinary meaning of the terms in Articles 5 and 6.3, in their context and in the light of the object and purpose of the *SCM Agreement*, supports the view that a panel should undertake a collective assessment of the effects of all the subsidies at issue. Nothing in the terms of these provisions, their context, or the object and purpose of the *SCM Agreement*, suggests that a panel's duty to perform a collective assessment of the effects of multiple subsidies applies only in situations where the analytical tools of "aggregation" and "cumulation" are available. In fact, the Appellate Body was cautious to use the terms "at least" in introducing "aggregation" and "cumulation" as permissible analytical tools, indicating that the Appellate Body did not intend to define an exhaustive list of analytical tools to be used for the collective assessment of the effects of multiple subsidies. The fundamental thrust of the Appellate Body's guidance in this regard is that the adjudicator "must take care *not to segment* unduly its analysis such that, when confronted with multiple subsidy measures, it considers the effects of each on an individual basis only and, as a result of such an *atomized approach*, finds that no subsidy is a substantial cause of the relevant adverse effects".⁵⁶
69. Limiting the analytical tools available to assist in the collective assessment of the effects of multiple subsidies artificially restricts the effectiveness of the adverse effects disciplines under the *SCM Agreement*. For example, to reach a finding that subsidies cause adverse effects, within the meaning of Articles 5 and 6.3, both "aggregation" and "cumulation" require that at least one subsidy (or one aggregated group of subsidies) should be found to be a "genuine and substantial" cause of adverse effects ("anchor subsidy"). The Panel's interpretation would preclude an adjudicator from finding adverse effects in circumstances where a number of subsidies (or aggregated groups of subsidies) collectively constitute a "genuine and substantial" cause of adverse effects, but where, on its own, each subsidy (or aggregated group of subsidies) constitutes only a "genuine", but not a "substantial", cause of adverse effects.
70. The Panel's restrictive interpretation artificially precludes panels from finding adverse effects that do, in fact, exist. In other words, the Panel's interpretation results in the very "atomized approach", and undue segmentation of the analysis, that the Appellate Body cautioned must not be adopted, when it set out its guidance on the requirement for a collective assessment of the effects of challenged subsidies.⁵⁷
71. In sum, the Panel erred in the interpretation of Articles 5 and 6.3. As a result, the Panel also erred in the interpretation of Article 7.8 of the *SCM Agreement*.

IX. THE PANEL ERRED IN THE INTERPRETATION OF ARTICLES 5, 6.3, AND 7.8 OF THE SCM AGREEMENT WHEN FINDING THAT THE SUBSIDIES MUST BE THE SOLE CAUSE OF A LOST SALE

72. The Panel erred in the interpretation of Articles 5 and 6.3 of the *SCM Agreement* when identifying the applicable causation standard for assessing whether the subsidies at issue caused "significant lost sales", within the meaning of Article 6.3(c).⁵⁸
73. Specifically, the Panel held that, to find that the subsidies at issue cause significant lost sales, there *must be* "*no non-price factors* that explain Boeing's success in obtaining the

⁵⁵ Appellate Body Report, *US – Large Civil Aircraft*, para. 1290 (emphasis added).

⁵⁶ Appellate Body Report, *US – Large Civil Aircraft*, para. 1284 (emphases added).

⁵⁷ Appellate Body Report, *US – Large Civil Aircraft*, para. 1284.

⁵⁸ The European Union notes that the Panel properly referred to Articles 5 and 6.3 of the *SCM Agreement* to determine, under Article 7.8 of the *SCM Agreement*, whether adverse effects had been removed, or instead, whether adverse effects continued to arise in the post-implementation period. The European Union, therefore, considers that the errors in the interpretation of Articles 5 and 6.3 of the *SCM Agreement* identified in this section also involve errors in the interpretation of Article 7.8 of the *SCM Agreement*.

sale".⁵⁹ In other words, for the Panel, a lost sales finding, within the meaning of Article 6.3(c), requires that there are *no* non-subsidy / non-attribution factors that contribute to Boeing's success in obtaining a sale.⁶⁰

74. The Panel adopted this legal standard without an interpretative analysis. Instead, the Panel opted to apply an approach that the Appellate Body had applied in the original proceedings *for the limited purpose of completing the legal analysis for lost sales*, when faced with critical limitations in the undisputed facts and factual findings at its disposal.⁶¹ In so doing, the Panel opted not to apply the proper legal standard for a *panel's assessment* of the existence of significant lost sales, as also set out by the Appellate Body in the original proceedings.⁶²
75. The Panel's interpretive error led it to identify the wrong standard for assessing causation under Article 6.3(c). As the Appellate Body has consistently held, a finding of "causation" requires panels to assess whether there is "a genuine and substantial relationship of cause and effect" between the subsidies at issue and the adverse effects.⁶³ Indeed, the Appellate Body specifically emphasised that "a panel need not determine {the subsidy} to be the *sole* cause of that effect, or even that it is the *only* substantial cause of that effect".⁶⁴ In other words, the causation standard under Articles 5 and 6.3 does *not* require that the subsidies at issue be the sole cause, or even the only substantial cause, of adverse effects, including significant lost sales. Instead, the subsidies must be a "genuine and substantial" cause of the adverse effects at issue. The Appellate Body's approach in the specific circumstances of completing the legal analysis did not modify or contradict this long-standing and well-accepted standard for assessing causation.⁶⁵
76. In sum, the Panel erred in the interpretation of Articles 5 and 6.3. As a result, the Panel also erred in the interpretation of Article 7.8 of the *SCM Agreement*.

X. THE PANEL ERRED WHEN FAILING TO FIND "PRICE EFFECTS" FROM THE UNTIED SUBSIDIES

77. The European Union appeals additional Panel errors in the interpretation and application of Articles 5 and 6.3 of the *SCM Agreement*.⁶⁶ These errors arise from the failure to find that the untied state and local cash flow subsidies (*i.e.*, those that are not tied to the production

⁵⁹ Panel Report, paras. 9.242, 9.243, 9.379, 9.380, 9.383, 9.426, 9.446 (emphasis added). The Panel used the phrase "no non-price factors" interchangeably with the phrase "no other non-price factors", which the European Union understands to mean "no factors other than subsidy affected pricing". See, *e.g.*, Panel Report, paras. 9.240, 9.241, 9.246, 9.250, 9.292, 9.293, 9.458, 9.477 (footnote 3433).

⁶⁰ See, *e.g.*, Panel Report, paras. 9.240-9.243, 9.246, 9.250, 9.292, 9.293, 9.379-9.380, 9.383, 9.426, 9.446, 9.477 (footnote 3433).

⁶¹ Panel Report, para. 9.242. See also Appellate Body Report, *US – Large Civil Aircraft*, paras. 1261-1265.

⁶² Appellate Body Report, *US – Large Civil Aircraft*, paras. 913-914. See *Id.*, paras. 984, 1206.

⁶³ Appellate Body Report, *US – Large Civil Aircraft*, paras. 913, 913 (footnote 1864), referring to, *inter alia*, Appellate Body Report, *US – Upland Cotton*, para. 438; Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374; Appellate Body Report, *EC – Large Civil Aircraft*, para. 1232.

⁶⁴ Appellate Body Report, *US – Large Civil Aircraft*, para. 914 (emphasis in original). See *Id.*, paras. 984, 1206.

⁶⁵ See Appellate Body Report, *US – Large Civil Aircraft*, paras. 1261-1265.

⁶⁶ The European Union notes that the Panel properly referred to Articles 5 and 6.3 of the *SCM Agreement* to determine, under Article 7.8 of the *SCM Agreement*, whether adverse effects had been removed, or instead, whether adverse effects continued to arise in the post-implementation period. The European Union, therefore, considers that the errors in the interpretation and application of Articles 5 and 6.3 of the *SCM Agreement* identified in this section also involve errors in the interpretation and application of Article 7.8 of the *SCM Agreement*.

of each unit of aircraft), along with the untied post-2006 aeronautics R&D subsidies,⁶⁷ resulted in lower prices for Boeing LCA ("price effects"). The European Union also appeals the Panel's failure to make an objective assessment of the matter, under Article 11 of the DSU.⁶⁸

A. The Panel's interpretative error in requiring concrete demonstration of Boeing's use of a particular subsidy dollar

78. The Panel held that, in order to find that the subsidies at issue cause price effects, it must be shown that Boeing "used" or "allocated" the additional cash represented by those subsidies to "lower the prices of its LCA".⁶⁹ In other words, the Panel held that it must be possible to *trace the dollars* from the subsidies to price reductions.
79. Imposing a "tracing the dollars" requirement to assess the existence of price effects from untied subsidies constitutes error in the interpretation of Articles 5 and 6.3 of the *SCM Agreement*. As the panel and the Appellate Body explained in the original proceedings, as an interpretative matter, Articles 5 and 6.3 do *not* impose a requirement to trace particular payments into particular pricing decisions.⁷⁰ Instead, panels must assess price effects by determining whether there is a "genuine and substantial relationship of cause and effect" between the subsidies and price effects at issue. The Appellate Body held that the following elements lead to untied subsidies causing, or contributing to causing, price effects: (i) the competitive conditions in the LCA market; and (ii) the nexus between the subsidy and Boeing's LCA development, production, and sale.
80. In short, the Panel erred in the interpretation of Articles 5 and 6.3 by failing to identify the proper causation standard for analysing price effects from untied subsidies. As a result, the Panel also erred in the interpretation of Article 7.8 of the *SCM Agreement*.

B. The Panel's error of application with respect to the legal standard for assessing price effects

81. To the extent the Appellate Body finds that the Panel identified the proper legal standard for assessing price effects from untied subsidies (and thereby disagrees with the European Union's appeal of the Panel's interpretation), the Appellate Body should find that the Panel erred in the *application* of that standard by considering that the absence of evidence allowing the Panel to "trace the dollars" was determinative of its assessment. The Appellate Body should also find that, as a result of the Panel's errors in the application of Articles 5 and 6.3, the Panel also erred in the application of Article 7.8 of the *SCM Agreement*.

C. The Panel's deviation from the adopted findings in the original proceedings constitutes a violation of Article 11 of the DSU

82. The Appellate Body has held that deviations from findings in original proceedings, or from the approach taken in original proceedings to the application of the law to the facts, may indicate a failure on the part of a compliance panel to undertake an objective assessment of

⁶⁷ These consist of: (i) Washington State B&O tax credit for preproduction/aerospace product development; (ii) Washington State B&O tax credit for property taxes; (iii) Washington State B&O tax credit for leasehold excise taxes; (iv) Washington State sales and use tax exemptions for computer hardware, software, and peripherals; (v) South Carolina property tax exemption in respect of Boeing's large cargo freighters; (vi) South Carolina sales and use tax exemptions for aircraft fuel, computer equipment, and construction materials; (vii) South Carolina Air Hub Bonds; (viii) post-2006 NASA aeronautics R&D procurement contracts, cooperative agreements, and Space Act Agreements; (ix) post-2006 DOD assistance instruments; (x) FAA aeronautics R&D subsidy. See Panel Report, paras. 9.253, 9.278, 9.468, 9.473, 9.468 (footnote 3423). The European Union notes that it is also appealing the absence of Panel findings that the following measures constitute specific subsidies, within the meaning of Articles 1 and 2 of the *SCM Agreement*: (i) South Carolina Economic Development Bonds; (ii) South Carolina MCIP tax credits; (iii) City of Wichita IRB-related property and sales tax abatements; and (iv) the provision of funding and access to DOD facilities, equipment, and employees to Boeing, pursuant to pre-2007 and post-2006 DOD RDT&E procurement contracts.

⁶⁸ Panel Report, paras. 9.271, 9.273, 9.277, 9.288, 9.291, 9.470, 9.472, 9.474, 9.476.

⁶⁹ Panel Report, para. 9.273.

⁷⁰ Panel Report, *US – Large Civil Aircraft*, para. 7.1828; Appellate Body Report, *US – Large Civil Aircraft*, para. 1348.

the matter, as required by Article 11 of the DSU.⁷¹ The Panel's imposition of the "tracing the dollars" requirement impermissibly deviated from the adopted findings of the original panel and the Appellate Body.

83. The Appellate Body has held that panels may deviate from factual findings in the original proceedings, where there is a "change in the underlying evidence in the record".⁷² Yet, the United States pointed to no change in the evidence that would undermine the continued applicability of the Appellate Body's findings regarding price effects from untied subsidies. Indeed, the Panel's own factual findings confirmed the continued existence of the relevant conditions of competition in the LCA market.⁷³ Under these circumstances, the Panel's deviation from the adopted findings of the original panel and the Appellate Body was impermissible, and is indicative of a lack of objective assessment.

D. Request for completion of the analysis

84. The European Union requests the Appellate Body to complete the analysis to reinstate its own findings in the original proceedings. Since there was no basis for the compliance Panel to deviate from the findings of the panel and the Appellate Body in the original proceedings, the Appellate Body should reinstate its own findings by concluding that these untied subsidies contribute to adverse effects through a "price effects" causal pathway.⁷⁴
85. The European Union also requests the Appellate Body to find that the untied state and local cash flow subsidies, and the post-2006 aeronautics R&D subsidies, all⁷⁵ result in Boeing lowering its prices for LCA ("price effects"). These lower prices thereby contribute to a genuine and substantial causal link between all of the US subsidies and the adverse effects, under Articles 7.8, 5, and 6.3 of the *SCM Agreement*.

XI. THE PANEL ERRED WHEN FAILING TO FIND PRESENT TECHNOLOGY EFFECTS FROM THE PRE-2007 R&D SUBSIDIES

86. The original panel and the Appellate Body found that the pre-2007 US aeronautics R&D subsidies to Boeing cause adverse effects in the LCA markets through a "technology effects" causal pathway. Specifically, these subsidies were found to accelerate the research and development of technologies that Boeing can apply on its LCA, and did apply on the 787-8/9, thereby accelerating its launch, as well as promised and actual deliveries.⁷⁶ The Appellate Body agreed with the original panel that the pre-2007 US aeronautics R&D "subsidies accelerated the technology development process by some amount of time, and,

⁷¹ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103. The Appellate Body has also held that "panels established under {Article 21.5 of the DSU} are bound to follow the legal interpretation contained in the original panel and Appellate Body reports that were adopted by the DSB". See Appellate Body Report, *US – Stainless Steel from Mexico*, para. 158 (footnote 309) (emphasis added).

⁷² Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.

⁷³ Panel Report, para. 9.17.

⁷⁴ The findings in the original proceedings are consistent with the European Union's arguments and evidence in these proceedings, establishing the existence of price effects from untied subsidies. Thus, the Appellate Body may reinstate its previous findings and conclude that the untied subsidies caused serious prejudice through a "price effects" mechanism, without needing to complete the analysis. However, if it should decide to complete the analysis, the Appellate Body may rely on the undisputed facts in the panel record. See Appellate Body Report, *US – Hot Rolled Steel*, para. 235.

⁷⁵ These subsidies consist of: (i) Washington State B&O tax credit for preproduction/aerospace product development; (ii) Washington State B&O tax credit for property taxes; (iii) Washington State B&O tax credit for leasehold excise taxes; (iv) Washington State sales and use tax exemptions for computer hardware, software, and peripherals; (v) South Carolina property tax exemption in respect of Boeing's large cargo freighters; (vi) South Carolina sales and use tax exemptions for aircraft fuel, computer equipment, and construction materials; (vii) South Carolina Air Hub Bonds; (viii) South Carolina Economic Development Bonds; (ix) South Carolina MCIP tax credits; (x) City of Wichita IRB-related property and sales tax abatements provided; (xi) post-2006 NASA aeronautics R&D procurement contracts, cooperative agreements, and Space Act Agreements; (xii) post-2006 DOD assistance instruments; (xiii) FAA aeronautics R&D subsidy; and (xiv) post-2006 DOD procurement contracts. This list includes those measures for which the European Union is appealing the absence of Panel findings that these measures constitute specific subsidies. See Panel Report, paras. 8.1076, 9.253, 9.278, 9.468, 9.473, 9.468 (footnote 3423).

⁷⁶ Appellate Body Report, *US – Large Civil Aircraft*, paras. 980, 1350(d)(A)(1); Panel Report, *US – Large Civil Aircraft*, para. 7.1773.

therefore gave Boeing an advantage in bringing its technologies to market. The exact amount of time was not critical: that the NASA research enabled Boeing to accelerate the research process was".⁷⁷

87. The Panel was tasked with evaluating whether the effects of the pre-2007 US aeronautics R&D subsidies had continued into the post-implementation period. In so doing, the Panel correctly identified the counterfactual question it had to assess in view of the United States' arguments – namely, "whether it is likely that, absent these subsidies, the 787 technologies would still not have been developed by the end of the implementation period and thus the 787 would not have been present in the market by that time".⁷⁸
88. The European Union argued that, in light of the delays that would have occurred in the development of technologies for the 787 absent the pre-2007 US aeronautics R&D subsidies, there remained technology effects on, *inter alia*, two bases: *first*, these subsidies continued to cause effects through sales and deliveries of Boeing's 787-8 LCA ("original subsidy technology effects");⁷⁹ and, *second*, these subsidies continued to cause effects through Boeing's use of the subsidised 787 technologies that have "spilled over" onto *other* Boeing LCA developments, by accelerating the launch and subsequent delivery of Boeing's more recent 787-9/10, 737 MAX, and 777X ("spill-over" technology effects).⁸⁰
89. The Panel, however, found that no such technology effects continued to exist after the end of the implementation period. It instead held that the European Union had failed to establish the continued existence of technology effects with respect to either Boeing's 787-8/9 (which were the subject of the findings in the original proceedings), or Boeing's more recent LCA developments, namely the 787-10, 777X, and 737 MAX.⁸¹ The Panel cited arguments included in statements by Boeing engineers, in which they asserted that, upon identifying a market demand in 2002 for an aircraft with advanced technologies, Boeing would have been able to "replicate ... in less than two years"⁸² the fundamental research that Boeing had actually performed over *decades* under the NASA and DOD aeronautics R&D subsidies.
90. The European Union appeals several aspects of the Panel's findings that the European Union failed to establish that the technology effects of the pre-2007 US aeronautics R&D subsidies continue into the post-implementation period,⁸³ as detailed below.

A. The Panel's error in focusing on the counterfactual date of the *launch* of the 787 to the exclusion of the counterfactual *delivery* timing, when considering the effects of the US aeronautics R&D subsidies

91. The European Union appeals the Panel's erroneous focus, in assessing the existence of present effects of the US aeronautics R&D subsidies, on solely the 787's counterfactual *launch* date, to the exclusion of additional consideration of the anticipated timing of *deliveries* in the counterfactual.⁸⁴ In so doing, the Panel erred in the application of Articles 5 and 6.3 of the *SCM Agreement*. A proper counterfactual analysis also required consideration of the

⁷⁷ Appellate Body Report, *US – Large Civil Aircraft*, para. 980.

⁷⁸ Panel Report, para. 9.128.

⁷⁹ Panel Report, para. 9.118(a). See also EU FWS, paras. 984-987, 992-995 (general), 1205-1212 (787-8/9/10); EU SWS, paras. 955-1057 (general), 1116-1134 (787-8/9/10). See also Airbus Engineers Statement, paras. 6-17 (exhibit EU-31) (HSBI).

⁸⁰ Panel Report, para. 9.118(b). See also EU FWS, paras. 984-987, 992-995 (general), 1024, 1028-1073 (spill-over effects), 1025, 1205-1212 (787-8/9/10), 1213-1222 (777X), 1620-1625 (737 MAX); EU SWS, paras. 955-1057 (general), 1116-1134 (787-8/9/10), 1135-1141 (777X), 1595-1604 (737 MAX). See also Airbus Engineers Statement, paras. 6-83 (exhibit EU-31) (HSBI).

⁸¹ Panel Report, paras. 9.176-9.177, 9.218(a), 9.219-9.220 (original subsidy technology effects), 9.186, 9.218(b), 9.219-9.220, 9.353-9.355, 9.368, 9.372-3.73 (spill-over technology effects), 11.8 (a), 11.8(b), 11.8(e).

⁸² Boeing Engineers Statement, para. 13 (exhibit USA-283) (BCI).

⁸³ The European Union notes that the Panel properly referred to Articles 5 and 6.3 of the *SCM Agreement* to determine, under Article 7.8 of the *SCM Agreement*, whether adverse effects had been removed, or instead, whether adverse effects continued to arise in the post-implementation period. The European Union, therefore, considers that the errors in the application of Articles 5 and 6.3 of the *SCM Agreement* identified in this section also involve errors in the application of Article 7.8 of the *SCM Agreement*.

⁸⁴ Panel Report, paras. 9.152. See also Panel Report, paras. 9.153, 9.157, 9.161, 9.170, 9.176, 9.183.

effect of the pre-2007 US R&D subsidies on the timing of deliveries of each of the Boeing aircraft at issue.

92. Separately, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, since its focus on the timing of the *launch* of the 787 is internally inconsistent and at odds with its findings elsewhere in its report. Moreover, the Panel inappropriately deviated from the findings of the original panel and the Appellate Body in this respect.

B. The Panel's errors regarding the nature of the R&D at issue

93. To properly assess whether the pre-2007 US aeronautics R&D subsidies continued to be a genuine and substantial cause of adverse effects in the post-implementation period, the Panel was required to undertake a counterfactual analysis using relevant facts.
94. The original panel was clear about the nature of the research that it found to have been accelerated by the US subsidies. In describing the pre-2007 US aeronautics R&D subsidies, the original panel explained that those subsidies funded research in "foundational science and discipline-centric research",⁸⁵ for the development of technologies "at the earliest, most fundamental stages of research".⁸⁶
95. The compliance Panel was therefore tasked with assessing what the impact on the timing of the 787 launch would have been had Boeing waited until 2002 to start conducting its *fundamental* R&D relevant to 787 technologies. The original panel had found that the "real value of the aeronautics R&D subsidies"⁸⁷ was not the actual development of near-term technologies, but the experience gained and lessons learned from doing the early-stage fundamental research with much of the risk take on by the US Government.
96. In undertaking its counterfactual assessment, the Panel relied on facts that were not fit for purpose. In following the US lead as set out by the Boeing engineers, the Panel focused its assessment on non-subsidised technology developments involving *later* stages of LCA development, rather than taking into account the early phases of *fundamental* R&D.⁸⁸ Yet, because early-stage R&D was the focus of the original panel's analysis (and of the NASA and DOD R&D subsidies), it should have also been the compliance Panel's focus in a proper counterfactual analysis.
97. In conducting its counterfactual analysis based on evidence inherently unsuited for the purpose, the Panel erred in its application of Articles 5, 6.3, and 7.8 of the *SCM Agreement*.
98. Moreover, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU. Specifically, the Panel failed to explain how the amount of time required to perform the late-stage R&D identified by the Boeing engineers provides a legitimate proxy for the amount of time it would have taken Boeing, without the aeronautics R&D subsidies, to conduct the early-stage, fundamental R&D underlying the recommendations and rulings in this dispute.

C. The Panel's errors regarding the sequencing of R&D

99. The European Union further appeals the Panel's erroneous findings regarding the sequencing of R&D in the overall R&D process. The Panel analysed the counterfactual question before it in a manner that disregarded the sequencing of the relevant R&D.
100. Specifically, the Panel accepted the illogical proposition that initial fundamental research into technologies could be conducted even *after* some technology maturation has taken place for the same technologies.⁸⁹ In so doing, the Panel erred in the application of Articles 5 and 6.3

⁸⁵ Appellate Body Report, *US – Large Civil Aircraft*, paras. 940-941, 966, citing Panel Report, *US – Large Civil Aircraft*, para. 7.1737.

⁸⁶ Appellate Body Report, *US – Large Civil Aircraft*, para. 986, citing Panel Report, *US – Large Civil Aircraft*, para. 7.1756.

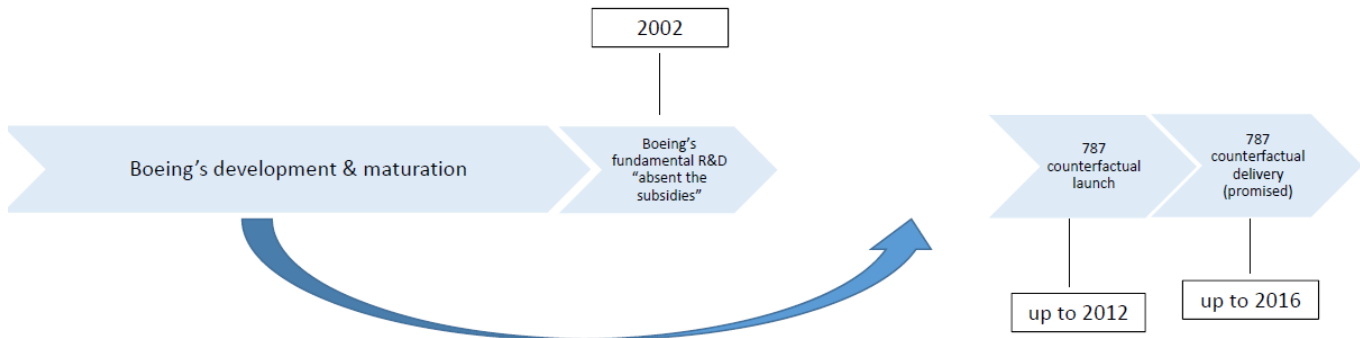
⁸⁷ Panel Report, *US – Large Civil Aircraft*, para. 7.1756.

⁸⁸ Panel Report, paras. 9.162-9.165. See also Panel Report, paras. 9.139-9.140.

⁸⁹ Panel Report, paras. 9.170-9.173.

of the *SCM Agreement*. In particular, the Panel erred when focusing solely on the identification of the *amount of time* needed to perform certain fundamental research, without considering the implications for the overall progression of R&D. Such progression must start with fundamental R&D at the counterfactual start-date of the R&D, and continue through the subsequent maturation of technologies for product launch and development.

101. Thus, a proper application of the Panel's counterfactual analysis would have begun at the time Boeing needed to conduct necessary fundamental R&D, starting in 2002, and then (in proper sequence) added the time of technology maturation needed after the fundamental R&D was undertaken. The graph below depicts what the Panel's counterfactual R&D process should have looked like:



102. Separately, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, by failing to provide reasoned and adequate explanations and coherent reasoning for the illogical progression of research on which its findings rest.
103. The European Union explains that even if the Appellate Body were to find that the Boeing engineers' description of near-term R&D constituted an adequate proxy for purposes of the Panel's counterfactual assessment (despite the appeal set out in Section X1.B), the Panel's errors regarding the sequencing of the relevant R&D alone provide sufficient legal basis for the Appellate Body to reverse the Panel's findings on technology effects.

D. The Panel's errors regarding the standard it placed on the European Union for establishing technology effects

104. The European Union appeals the Panel's erroneous imposition on the European Union of an artificial and rigid requirement to establish technology effects – *i.e.*, for the European Union to show the specific amount of time for each stage of the counterfactual in which Boeing recreates the R&D funded by NASA and DOD.⁹⁰
105. By imposing this requirement, the Panel erred in the application of Articles 5 and 6.3 of the *SCM Agreement*, which do not, in light of the applicable causation standard, impose such a requirement.
106. In addition, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, by placing upon the European Union an impossible burden of proof. The evidence demanded by the Panel would have simply been impossible for the European Union to adduce, as its participant in the LCA markets, Airbus, does not have insight into the proprietary internal R&D operations of its sole competitor, Boeing (beyond that which is publicly reported). The Panel then also rejected all of the EU critiques of the US estimates, simply because they did not satisfy the impossible burden imposed by the Panel. As for the US estimate, the Panel accepted it without applying any rigour in its scrutiny (unlike its treatment of the EU estimates and evidence).

⁹⁰ Panel Report, paras. 9.164-9.165.

E. The Panel misconstrued the European Union's arguments as supporting the Panel's erroneous findings

107. Finally, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, when misconstruing an EU statement from the original proceedings regarding the time when Boeing would have developed the 787 absent the US aeronautics R&D subsidies.⁹¹ Reviewing what the European Union actually said, as summarised by the original panel, reveals an argument that, "had Boeing needed to develop the 787 using its own resources, the 787 would likely not have been launched *any earlier than* mid-2006",⁹² but likely later. Thus, contrary to the Panel's view, this statement concerns Boeing's inability to launch the 787 in the reference period at issue in the original proceedings, and does not constitute confirmation that, in a counterfactual, Boeing could have launched the 787 by late 2006.

F. Conclusion and request for completion of the analysis

108. On the basis of any or all of these appeals, the European Union requests that the Appellate Body reverse the Panel's findings that there no longer exist, in the post-implementation period, "original subsidy technology effects of the pre-2007 aeronautics R&D subsidies";⁹³ "spill-over technology effects of the pre-2007 aeronautics R&D subsidies in respect of the 787-9/10{,} ... 777X",⁹⁴ and 737MAX;⁹⁵ and the dependent findings that those subsidies no longer cause adverse effects.⁹⁶
109. If the Appellate Body were to reverse the Panel's technology effects findings, the European Union requests that the Appellate Body complete the legal analysis and conclude that the following technology effects continue in the post-implementation period: (i) the original technology effects of the pre-2007 aeronautics R&D subsidies, in respect of the 787-8 family LCA; and, (ii) the spill-over technology effects of the pre-2007 aeronautics R&D subsidies, in respect of Boeing's 787-9/10, 737 MAX and 777X.
110. The European Union sets out below the properly-calculated counterfactual launch and delivery dates of the 787-8/-9/-10, 737 MAX, and 777X, which can be determined based on the factual findings by the Panel and undisputed facts of record:

⁹¹ Panel Report, para. 9.156 (footnote 2921), *citing* Panel Report, *US – Large Civil Aircraft*, para. 4.280, *citing*, in turn, the Executive Summary of the EU FWS, para. 56.

⁹² Panel Report, para. 9.156 (footnote 2921), *citing* Panel Report, *US – Large Civil Aircraft*, para. 4.280, *citing*, in turn, the Executive Summary of the EU FWS, para. 56.

⁹³ Panel Report, para. 9.177.

⁹⁴ Panel Report, para. 9.186.

⁹⁵ Panel Report, para. 9.335.

⁹⁶ Panel Report, paras. 9.219-9.220 (787/777X), 9.352-9.355, 9.372-9.373 (737 MAX), and 11.8(a), (b) and (e).

	LCA Model	Start of intensive pre-launch R&D	Launch	Promised first delivery	Actual first delivery
Actual	787-8	2002	2004	2008	2011
Counterfactual	787-8	2002	Up to 2012	Up to 2016	Up to 2019
Actual ⁹⁷	787-9	Not on the record	2004	2014	Not on the record
Counterfactual	787-9	--	2012	2022	--
Actual ⁹⁸	787-10	Not on the record	2013	2018/2019	Not on the record
Counterfactual	787-10	--	2021	2026	--
Actual ⁹⁹	737 MAX	Not on the record	2011	2017	Not on the record
Counterfactual	737 MAX	--	2019	2025	--
Actual ¹⁰⁰	777X	--	2013	2019	Not on the record
Counterfactual	777X	--	2021	2027	--

111. These properly-adjusted counterfactual launch and delivery dates for the 787-8/9/10, 737 MAX, and 777X fall well beyond the implementation deadline (September 2012), even if the Appellate Body were to revise downwards the estimates supplied by the European Union. The European Union notes that these estimates are realistic, if not conservative, given that they reflect Boeing's actual, undisputed time gaps between the launch dates for this series of LCA developments since 2004. The actual time gaps reflect resource and engineering constraints Boeing faced when launching several LCA models in close succession. Absent the non-withdrawn US aeronautics R&D subsidies, Boeing's engineering and resource constraints would likely have further delayed, or, at a minimum, not accelerated, counterfactual first deliveries of the 787-8-9/10, 737 MAX, and 777X.
112. In concluding, the European Union notes that, while the factual findings by the Panel and undisputed facts of record support the above dates, in completing the legal analysis, it is not necessary to identify the precise times at which the launch, and subsequent delivery, of the 787-8 and other aircraft would have occurred. Rather, the Appellate Body merely needs to confirm, based on undisputed facts and the Panel's factual findings, that the launches and deliveries of these aircraft, absent the non-withdrawn subsidies, would have been delayed until after September 2012, *i.e.*, after the end of the implementation period. Similarly, in completing the legal analysis for the spill-over technology effects, the Appellate Body would merely need to confirm, based on undisputed facts and the Panel's factual findings, that the launch and subsequent delivery of the 787-9/10, 737 MAX, and 777X would have taken place sometime after they actually occurred (or are to occur).

XII. THE PANEL ERRED WHEN FAILING TO FIND CONTINUING ADVERSE EFFECTS FROM THE PRE-2007 AERONAUTICS R&D SUBSIDIES

113. The Panel committed several legal errors when finding that the European Union had failed to demonstrate that the pre-2007 US aeronautics R&D subsidies cause adverse effects that continue after the end of the implementation period.¹⁰¹
114. In Section VI, above, the European Union has already established one of the legal errors that resulted in the Panel's failure to find adverse effects that continue after the end of the implementation period; namely, an erroneous interpretation and application of Article 7.8 of the *SCM Agreement*. In particular, the Panel erroneously excluded, from consideration of

⁹⁷ EU FWS, para. 1032.

⁹⁸ EU FWS, para. 1034.

⁹⁹ EU FWS, para. 1038.

¹⁰⁰ EU FWS, para. 1062.

¹⁰¹ Panel Report, paras. 9.315, 9.321, 9.322, 9.326, 9.331, 9.332.

lost sales and price suppression arguments, LCA orders that occurred prior to the end of the implementation period (including those that occurred during the original reference period), but where there remained deliveries of LCA outstanding under those orders after the end of the implementation period.

115. In addition, the Panel committed several further errors that each relate to the Panel's finding that the European Union's continuing adverse effects arguments were "unsupported by the evidence and/or in contradiction with the findings made in the original proceeding".¹⁰² These errors stem from the Panel's failure to make an objective assessment of the matter, under Article 11 of the DSU, and its failure to apply the proper legal standard for the assessment of significant price suppression, under Articles 5 and 6.3 of the *SCM Agreement*.

A. The Panel violated Article 11 of the DSU by deviating from the adopted findings in the original proceedings with respect to price suppression, lost sales, and threat of displacement and impedance in the 200-300 seat LCA market

116. In the original proceedings, the panel and the Appellate Body found that the US subsidies caused significant price suppression, significant lost sales, and a threat of displacement and impedance of EU exports with respect to the "200-300 seat LCA market".¹⁰³ The 200-300 seat LCA market, as defined in the original proceedings, included the A330, the Original A350, and the A350XWB-800 LCA.¹⁰⁴ Although the Panel made intermediate findings that were based on a consideration of evidence that related mainly to the A330 and the Original A350, the ultimate *findings* made by the original panel related to *the 200-300 seat LCA market as a whole*.¹⁰⁵
117. Instead of following those findings, the compliance Panel focused on the undisputed – and entirely irrelevant – fact that the A330, the Original A350, and the A350XWB are "different aircraft".¹⁰⁶
118. In circumstances where the Panel's own findings confirmed the continued existence, albeit with a new label, of the same 200-300 seat LCA market – for which the original panel and the Appellate Body made their respective findings of significant price suppression, significant lost sales, and displacement and impedance – the Panel had no basis for deviating from the approach in the original proceedings. Changing its approach, to focus its adverse effects assessment on *separate aircraft models*, therefore, constitutes legal error, and specifically a failure to make an objective assessment of the matter, under Article 11 of the DSU.

B. The Panel erred when applying the relevant legal standard for assessing continuing price suppression on the basis of prices for the A330

119. In assessing the continued existence of price suppression in the market for medium-sized twin-aisle LCA, the Panel was required, but failed, to conduct a counterfactual analysis under Articles 5 and 6.3 of the *SCM Agreement*.
120. The Panel did not conduct such a counterfactual analysis when assessing the price effects of the US subsidies on the A330. Specifically, the Panel did *not* compare actual A330 prices with the appropriate EU benchmark provided by the European Union for the absence of price suppression – *i.e.*, A330 prices "pre-2004 ... when the A330 was the technological market

¹⁰² Panel Report, para. 9.332.

¹⁰³ Panel Report, *US – Large Civil Aircraft*, paras. 7.1791, 7.1794, 7.1797; Appellate Body Report, *US – Large Civil Aircraft*, paras. 1068, 1126, 1350(d)(i)(A)(5).

¹⁰⁴ Panel Report, *US – Large Civil Aircraft*, paras. 7.1670, 7.1672; Appellate Body Report, *US – Large Civil Aircraft*, paras. 897-898.

¹⁰⁵ Panel Report, *US – Large Civil Aircraft*, paras. 7.1670, 7.1672; Appellate Body Report, *US – Large Civil Aircraft*, paras. 897-898.

¹⁰⁶ Panel Report, paras. 9.322 (regarding price suppression), 9.323-9.324 (regarding lost sales), 9.331 (regarding threat of displacement and impedance).

leader".¹⁰⁷ Instead, the Panel compared actual A330 prices with the actual factual situation in which "the 787 and A350XWB have changed the competitive dynamics of this market".¹⁰⁸

121. By failing to conduct a proper counterfactual analysis, the Panel erred in the application of the relevant legal standard, under Articles 5 and 6.3 of the *SCM Agreement*.

C. Request for completion of the analysis

122. The European Union requests the Appellate Body to complete the legal analysis by reinstating the adopted findings from the original proceedings.¹⁰⁹
123. Specifically, the Appellate Body should re-instate the finding that the pre-2007 US aeronautics R&D subsidies cause adverse effects in the market for medium-sized twin-aisle aircraft, in which the 787-8/9 compete, based on the findings by the original panel and the Appellate Body. Nothing in the facts or evidence relating to these adverse effects has changed, and there is *no* basis *not* to find that they continue after the end of the implementation period.
124. Alternatively, the European Union asks the Appellate Body to arrive at the same conclusion, on the basis of the Panel's factual findings and undisputed facts of record.

XIII. REQUEST FOR COMPLETION OF THE ANALYSIS WITH RESPECT TO SIGNIFICANT LOST SALES

125. The European Union requests the Appellate Body to complete the analysis, applying the proper causation standard, for three specific sales campaigns: (i) All Nippon Airways' 2014 order of 20 777-9X aircraft; (ii) GOL's 2012 order for 60 737 MAX aircraft; and, (iii) United Airlines' 2012 and 2013 orders for a total of 100 737 MAX aircraft and 64 737NG aircraft. In completing the legal analysis for these three sales campaigns, the Appellate Body can rely on factual findings by the Panel and uncontested facts of record. Together, these facts establish that the tied B&O tax subsidies, and the resulting subsidy-enabled low pricing by Boeing, were a genuine and substantial cause of significant lost sales in these sales campaigns.
126. In addition, the European Union requests the Appellate Body to complete the analysis for a series of sales campaigns, applying (i) the proper causation standard, and (ii) its conclusions with respect to price effects from the untied subsidies, and technology effects from the pre-2007 US aeronautics R&D subsidies. In completing the legal analysis for these sales campaigns, the Appellate Body can rely on factual findings by the Panel, and uncontested facts of record, regarding the role of delivery positions and pricing in the sales at issue. Together, these facts establish that (i) the technology effects from the pre-2007 US aeronautics R&D subsidies, and (ii) the price effects from (a) the tied B&O tax subsidies and (b) all of the untied subsidies, collectively, were a genuine and substantial cause of significant lost sales in these sales campaigns.
127. The European Union begins with a number of sales of the Boeing 787-8/-9 that took place in 2007, soon after the launch of the A350XWB. This was at a time when Airbus continued to suffer from a significant gap in the delivery positions it could offer for the A350XWB, relative to the delivery positions Boeing could offer for the 787, as accelerated by the pre-2007 US aeronautics R&D subsidies.
128. Next, the European Union addresses several subsequent 787 sales campaigns, (including of the newly launched 787-10) in which Boeing had less of an advantage in terms of delivery timing, but where, in the proper counterfactual absent the aeronautics R&D subsidies, it

¹⁰⁷ Panel Report, para. 9.319.

¹⁰⁸ Panel Report, para. 9.319.

¹⁰⁹ The European Union considers that this approach may not be available to the Appellate Body if it does not reverse the Panel's findings on the basis of the Article 11 error set out above.

would have offered significantly later delivery positions, seriously undermining the competitiveness of the Boeing offer.

129. The European Union also addresses a number of sales of the 777X, where Boeing's offer of the 777X similarly benefited from delivery positions that were earlier than they would have been absent the pre-2007 US aeronautics R&D subsidies.
130. Finally, the European Union addresses a number of 737 MAX / 737NG sales, where Boeing's offer of the 737 MAX similarly benefited from delivery positions that were earlier than they would have been absent the pre-2007 US aeronautics R&D subsidies.
131. In each case, Boeing's subsidy-reduced pricing played at least a genuine role in Boeing winning, and Airbus losing, the sale.
132. The European Union's selection of the various sales campaigns discussed in this submission should not be seen, in any way, as limiting the Appellate Body's authority to complete the legal analysis with respect to other sales discussed by the Panel. In particular, the European Union emphasises that it has selected sales to illustrate the logic underlying a completion of the legal analysis for the categories of sales identified in the previous paragraphs. The Appellate Body may apply the logic behind the European Union's arguments to any other sale at issue in this dispute, as it considers appropriate. The sales discussed in detail are intended to show the degree to which the Panel's legal errors have resulted in an erroneous narrowing of the Panel's adverse effects findings.
133. Since much of the detailed discussion on the sales at issue is HSBI, the European Union does not include that information in this executive summary.

XIV. CONCLUSION

134. For the reasons set out above, the European Union requests the Appellate Body to reverse or modify the legal findings and conclusions appealed by the European Union in this Appellant's Submission, and to complete the analysis where requested to do so.

ANNEX B-2

EXECUTIVE SUMMARY OF THE UNITED STATES' OTHER APPELLANT'S SUBMISSION

1. The compliance Panel in this dispute issued a detailed and high-quality report, finding that the United States met its compliance obligations with respect to all but one of the measures challenged by the European Union ("EU") (*i.e.*, the Washington State B&O tax rate reduction). On appeal, the United States challenges a limited set of Panel findings, many on a conditional basis. If the Appellate Body rejects the EU's claims on appeal, then it only needs to address the U.S. claims in Sections I and II.

2. **Section I** demonstrates that the Panel misinterpreted its terms of reference when it allowed the EU to raise in this proceeding arguments regarding DoD procurement contracts that the original panel rejected in the original proceeding. As the Panel recognized, Article 21.5 does not generally entitle parties to relitigate issues on which they did not prevail in an original proceeding. While there are exceptions to this principle, none of them apply to this situation. Therefore, the United States respectfully requests the Appellate Body to reverse the Panel's finding that its terms of reference included the EU's claims that DoD procurement contracts were financial contributions that conferred a benefit.

3. **Section II** presents an appeal of the Panel's finding that the Washington State B&O tax rate reduction causes adverse effects. The Panel's calculation of a \$1.99 million per-aircraft subsidy magnitude is flawed because it assumes that Boeing would pool B&O tax savings from all LCA sales to lower prices in just three single-aisle sales campaigns. This assumption is inconsistent with the Appellate Body's findings in the original proceeding regarding the nature and operation of tied tax subsidies like the B&O tax rate reduction – findings that were confirmed by the compliance Panel itself. Correctly calculated, the per-aircraft magnitude of the B&O tax rate reduction would be at most \$100,000, an amount so small that it cannot be a genuine and substantial cause of significant lost sales or threat of impedance.

4. Furthermore, under the Panel's counterfactual causation analysis, even if Boeing had increased its prices by the full amount of the alleged subsidy – \$100,000 – Airbus would not have won any additional sales. Thus, there is no basis for finding that the Washington B&O tax rate reduction was a genuine and substantial cause of the adverse effects alleged by the EU under Articles 5 and 6.3 of the SCM Agreement. Moreover, as discussed in greater detail below, even assuming *arguendo* that the Panel's magnitude calculation were correct, the Panel's causation findings suffer from several additional flaws, including a failure to make an objective assessment as called for in Article 11 of the DSU, which require reversal of the Panel's findings that the Washington B&O tax rate reduction is a genuine and substantial cause of significant lost sales and threat of impedance.

5. **Section III.A** presents a conditional appeal: if the Appellate Body reverses the Panel's finding that all or part of the subsidies it grouped in the category of "aeronautics R&D subsidies" did not cause adverse effects, then it should find that the Panel erred in not conducting a holistic analysis and instead confining its benefit evaluation for post-2006 NASA instruments, DoD assistance instruments, and the FAA Boeing CLEEN Agreement to the allocation of patent rights – while disregarding other terms, including the funding commitments, rights to terminate the agreement, rights to manage the project, and requirements to use particular accounting practices. In other words, the Panel did not acknowledge the possibility that the benchmark transactions were not fully comparable to the NASA, DoD, and FAA transactions with respect to non-intellectual-property terms, and that the disregarded terms (including the monetary contribution) of the commercial transactions offset the *more favorable* patent-related rights that commercial commissioning parties would be expected to obtain.

6. In proceeding in this fashion, the Panel incorrectly applied Article 1.1(b) of the SCM Agreement by conducting an evaluation of the benefit without taking account of all of the terms that affected the value to the recipient. Even assuming *arguendo* that the Panel applied Article 1.1(b) correctly in addressing only the patent-related rights, it failed to conduct the objective assessment called for under Article 11 of the DSU by disregarding that these rights included a funding component in most

of the benchmark transactions. The United States accordingly respectfully requests the Appellate Body to reverse the Panel's finding that NASA contracts and cooperative agreements, DoD assistance instruments, and the Boeing CLEEN Agreement conferred a benefit.

7. **Section III.B** presents a conditional appeal: if the Appellate Body finds that DoD research contracts are collaborative R&D arrangements that confer a benefit, then the subsidies found to exist because of NASA, DoD, and FAA R&D instruments are not specific. The Panel analyzed each administrative agency – NASA, DoD, and FAA – separately in determining whether subsidies granted by those agencies were specific. However, if the Appellate Body finds that DoD procurement contracts create the same type of financial contribution as the DoD assistance instruments, NASA instruments, and the FAA's Boeing CLEEN Agreement – as the EU argues that the Appellate Body should do – then the rationale for separate specificity analyses collapses.

8. The Panel stated that the only benefit it found to exist in all three categories of funding instruments was from the allocation of patent rights. As the Appellate Body found in *US – Large Civil Aircraft*, that allocation of rights is common to all U.S. government contracts, cooperative agreements, and assistance instruments that call for research, regardless of the agency, the private signatory of the agreement, or the topic of the research. It is dictated by the same set of authorizing legislation – the Bayh-Dole Act, related legislative instruments, and implementing regulations.¹ In this situation, the Appellate Body's guidance in *US – Large Civil Aircraft* calls for a specificity analysis at the level of "the broader legal framework pursuant to which the particular subsidy is granted and the relevant granting authorities operate."² That analysis establishes that the United States has not limited access to the subsidy to an enterprise or industry or group of enterprises or industries for purposes of Article 2.1 of the SCM Agreement, and the EU has never argued otherwise.

9. **Section IV** presents a conditional appeal: if the Appellate Body reverses the Panel's finding that the State of South Carolina's payment to Boeing of Economic Development Bond and Air Hub Bond proceeds did not cause adverse effects to the EU, then the United States appeals the Panel's finding that these payments confer a benefit to Boeing. The Panel's benefit finding relies on the incorrect premise that, at the time of the agreement, South Carolina and Boeing did not foresee Boeing providing remuneration for the payments.³ In reaching this finding, the Panel disregarded evidence demonstrating that South Carolina did expect Boeing to invest in the project site, thereby offsetting any benefit conferred, at the time of the agreement. Accordingly, the Panel failed to make an objective assessment of the matter before it, as called for by Article 11 of the DSU.

10. **Section V** presents a conditional appeal: if the Appellate Body modifies or reverses any of the Panel's findings with respect to adverse effects of the pre-2007 aeronautics R&D subsidies on the A330, then it should also reverse the Panel's finding that the EU made a *prima facie* case of significant price suppression under Article 6.3(c) of the SCM Agreement. The Appellate Body has explained that in order for a subsidized product to have adverse effects on the complaining Member's product, the two must be in the same market, meaning in actual or potential competition with one another. The EU has consistently asserted that, as of the end of the implementation period, the A330 is in a monopoly market and is not in actual or potential competition with any Boeing LCA. Consequently, the Panel erred in interpreting and applying Article 6.3(c) by refusing to reject the EU's price suppression claim for failure to make a *prima facie* case and in failing to conduct an objective assessment as required under Article 11 of the DSU.

¹ 19 U.S.C. §§ 200-212, (Exhibit EU-220); Executive Order 12591, Facilitating Access to Science and Technology, 10 April 1987 (Exhibit EU-238); Memorandum to the Heads of Executive Departments and Agencies: Government Patent Policy, Public Papers 248, 18 February 1983 (Exhibit EU-1062); 48 CFR § 27.300-27.306 (Exhibit EU-221); *US – Large Civil Aircraft (AB)*, paras. 764-767, 769-773, and 779-780.

² *US – Large Civil Aircraft (AB)*, para. 757.

³ Compliance Panel Report, para. 8.822.

ANNEX B-3

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

1. This dispute began in 2004.¹ The original panel based its findings on evidence covering a period stretching from 1989 to 2006, which after review by the Appellate Body resulted in an ultimate finding that:

- aeronautics research and development subsidies consisting of financial contributions worth approximately USD \$2.6 billion conferred through NASA² procurement contracts and DoD³ assistance instruments caused adverse effects in the market for 200-300 seat aircraft;⁴ and
- FSC/ETI⁵ tax concessions (USD 2.2 billion), the reduction in the Washington state B&O tax rate for aerospace manufacturing and retailing (USD 13.8 million), and tax advantages associated with City of Wichita IRBs (USD 476 million) caused adverse effects in the market for 100-200 seat aircraft.⁶

The Dispute Settlement body ("DSB") adopted the panel report, as modified by the Appellate Body report, and recommended that the United States bring itself into compliance.

2. On September 23, 2012, the United States notified the DSB that it had taken numerous steps to comply with the DSB recommendations and rulings arising out of the original proceedings. The EU disagreed, and commenced a proceeding under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), which not only challenged U.S. compliance with respect to measures found to be WTO inconsistent, but also sought to reopen several findings that were in favor of the United States for several measures, and to add a number of claims regarding U.S. jurisdictions and agencies that it had not previously challenged. In all, it challenged 29 measures and groups of measures.

3. As the EU notes, it prevailed on significant parts of its claims.⁷ But ultimately the EU failed to establish that, with the exception of the Washington B&O tax rate reduction, any of the 29 allegedly unwithdrawn subsidies that it challenged were inconsistent with Articles 5 and 6 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") after the implementation period:⁸

- The financial contribution through NASA procurement contracts was **[BCI]** million for 2007 to 2012, **[BCI]** lower than the amount alleged by the EU, and substantially lower on an annual basis than in the original proceeding.⁹ (The EU does not appeal this finding.)

¹ Section I constitutes the executive summary for this submission. It contains 3,893 words. The remainder of the document contains 106,896 words.

² National Aeronautics and Space Administration.

³ U.S. Department of Defense.

⁴ *US – Large Civil Aircraft (AB)*, para. 1350(d)(i) and (ii); *US – Large Civil Aircraft (Panel)*, para. 7.1433.

⁵ Foreign Sales Corporation/Extraterritorial Income.

⁶ *US – Large Civil Aircraft (AB)*, para. 1350(d)(iii); *US – Large Civil Aircraft (Panel)*, paras. 7.254 and 7.1433. The original panel found that the value of the financial contribution conferred through DoD assistance instruments was "unclear". It stated "if the Panel were to accept the various steps in the European Communities' analysis" (which the panel did not do) it would set an upward bound of \$1.2 billion on the value of the financial contribution through DoD assistance instruments. This figure covered the period from 1992 to 2006. *Ibid.*, para. 7.1209, note 2800.

⁷ EU Appellant Submission, para. 2.

⁸ The compliance Panel rejected the EU's claims under Article 3 of the SCM Agreement and Article III:4 of the GATT 1994. See compliance Panel Report, paras. 11.6, 11.9. The EU does not appeal these findings.

⁹ Compliance Panel Report, paras. 8.243, 8.286.

- The financial contribution through DoD assistance instruments was [BCI] million for 2007 to 2012, much lower than the amount alleged by the EU.¹⁰ (The EU does not appeal this finding.)
- The two largest DoD procurement contracts, which accounted for 84 percent of the value challenged by the EU,¹¹ were outside the Panel's terms of reference. (The EU does not appeal this finding.)
- The EU failed to meet its burden of proof with respect to demonstrating that the remaining DoD procurement contracts were joint ventures analogous to equity infusions that conferred a benefit.
- The Panel found that Boeing did not receive FSC/ETI subsidies after 2006, and that the Wichita IRBs had ceased to confer a specific subsidy by the end of the implementation period.¹²
- The Panel found that five of the challenged South Carolina measures were not received by Boeing, did not confer a financial contribution, or were not specific.¹³ (The EU does not appeal these findings.)
- The acceleration effect of the pre-2007 R&D subsidies, which was the basis for the original panel's finding of adverse effects, had ended by the end of the implementation period.
- Post-2006 R&D subsidies resulting from a financial contribution worth USD [BCI] million did not make a genuine and substantial contribution to any adverse effects through a price effects causal pathway. (The EU conceded that these measures had no technology effects.)
- Specific state and local cash flow subsidies found to be worth USD [BCI] million did not make a genuine and substantial contribution to any adverse effects through a price effects causal pathway.

The Panel ultimately found that only one of the measures challenged by the EU – a reduction of USD 325 million in Boeing's B&O tax payments over the course of three years – was a financial contribution, conferred a benefit, was specific, and was a genuine and substantial cause of adverse effects. The U.S. other appellant submission explains why the EU's arguments on that claim contained fatal flaws, and that the Panel erred in failing to recognize them.

4. The EU's case suffers from several significant and indeed fatal flaws. First, the amounts of the financial contributions found to confer specific subsidies are small in the context of Boeing's annual large civil aircraft revenue of USD 49-60 billion in the 2013-2015 period.¹⁴ They are also significantly smaller than the amounts of the financial contributions found in the pre-2007 period, both in the aggregate and on an annual average basis. Second, the amounts of the financial contributions are substantially lower than those at issue in *EC – Large Civil Aircraft* for the same period. (A comparison of benefits is not possible because both compliance panels found that a quantification of the benefit was not necessary to an analysis of adverse effects.) Third, the EU never alleged, and certainly did not establish, that the post-2006 subsidies, either individually or in combination with previous subsidies, were critical to Boeing's existence, the launch of any Boeing aircraft, or the company's ability to price its products at profit-optimizing levels.

5. The EU does not challenge the Panel's findings regarding the amounts of the subsidies, which are much lower than it had alleged. It does not challenge the validity of many of the Panel's findings that Boeing did not receive subsidies alleged by the EU, or that the measures were not financial contributions, did not confer a benefit, or were not specific. With regard to those findings that it

¹⁰ Compliance Panel Report, para. 8.496.

¹¹ Rumpf Report (Exhibit EU-23), Annex D, p. 2; DOD Subsidies to Boeing's LCA Division, p. 2 (Exhibit EU-37).

¹² Compliance Panel Report, para. 8.611 and 8.637-8.638.

¹³ Compliance Panel Report, para. 8.1077(d), (e), (f), (h), and (i).

¹⁴ See Compliance Panel report, para. 9.392.

appeals, however, the EU has failed to identify any genuine error of interpretation or application of the SCM Agreement, nor any valid basis to question that the Panel conducted an objective assessment for purposes of DSU Article 11.

6. Below, the United States will discuss the Panel's key findings and the EU's claims on appeal, generally following the sequence of arguments raised in the EU's Appellant Submission. Section II demonstrates that the Panel correctly found that DoD procurement contracts were purchases of services, and that the EU failed to make a valid showing that they conferred a benefit. The EU argues that the Panel's assessments of three categories of evidence were not objective, but the EU fails to identify any basis for casting doubt on the Panel's objectivity. In particular, first, the EU alleges that the Panel failed to recognize Boeing's conduct of R&D activities independent of DoD as "contributions" to the contracts (which, in the EU's view, should have led the Panel to find that the transactions at issue were akin to a joint venture rather than purchases of services). However, the Panel addressed the EU assertions and found that the contributions in question did not exist. Second, the EU argues that the Panel failed to consider evidence that, in the EU's view, was contrary to the Panel's findings regarding the allocation of the intellectual property rights arising from the performance of R&D under the contracts. But the evidence in question does not support the conclusions the EU sought to draw, or outweigh the more compelling evidence cited by the Panel in support of its conclusions. Finally, the EU argues that the Panel failed to consider evidence suggesting that, despite the primarily military nature of DoD's research, the agency intended it to result in civil applications for Boeing's large civil aircraft. But this evidence does not support the EU's assertions and, in fact, indicates that (consistent with DoD's military objectives) research under the DoD procurement contracts rarely produces results with civil applicability.

7. Section III shows that the Panel properly focused its analysis on the EU assertion that Boeing received FSC/ETI tax concessions that lowered its income tax payments in the post-2006 period, and correctly rejected those assertions when it found that Boeing did not use those tax benefits in that period. On appeal, the EU argues that the subsidy remains available as a legal matter, and therefore the Panel should have found that the United States has not withdrawn it. However, the Panel correctly focused on the absence of any subsidy *to Boeing*, which has been the focus of the EU's claims since the original dispute, and was the subject of the DSB's recommendations and rulings. The Panel found that after 2006, Boeing did not receive any FSC/ETI benefits. Accordingly, the EU fails to establish that the Panel erred in finding that the United States had withdrawn the FSC/ETI tax concessions.

8. Section IV shows that the Panel properly found that the subsidy provided through Kansas Industrial Revenue Bonds ("IRBs") is no longer specific. The EU argues that the Panel erred in assessing *de facto* specificity on the basis of information that post-dates the implementation period, rather than information from 1979 to the present. However, the Panel's approach enabled it to properly assess the U.S. argument that it achieved compliance by eliminating the IRBs' *de facto* specificity; and also to take into account changes in the structure of Wichita's economy that occurred during the 2007-2013 time period. Accordingly, the Panel properly interpreted and applied Article 2 of the SCM Agreement, contrary to the EU's arguments.

9. Section V shows that the Panel properly found that two South Carolina subsidies – *i.e.*, those provided through Economic Development Bonds ("EDBs") and the Multi-County Industrial Park ("MCIP") job tax credit – are not specific. The Panel found that both subsidies were not *de jure* specific, and the EU does not contest these findings. In addition, the Panel found that South Carolina had authorized the issuance of EDBs for six recipients, only two of which were in the aerospace industry. It appears that all entities eligible for the benefit actually received it. With respect to the MCIP job tax credit, the EU argues that the Panel should have found that the subsidy is specific within the meaning of Article 2.2 of the SCM Agreement. However, the Panel found that the MCIP designation is readily available, based on (among other things) the fact that Charleston County had added property to one MCIP 18 times from 1995 to 2012. Accordingly, the Panel's specificity findings were based on a correct interpretation and application of Article 2 of the SCM Agreement, as well as an objective assessment of the evidence, consistent with DSU Article 11.

10. Section VI shows that the Panel correctly rejected price suppression and lost sales claims in this proceeding with respect to aircraft ordered before the end of the implementation but delivered afterward. The EU alleges that the compliance Panel erred in interpreting Article 7.8 by finding that it does not obligate a complying party to "remove" deliveries resulting from transactions found to have resulted in lost sales or price suppression in the original proceeding. The Appellate Body does

not need to decide this interpretive question to resolve this appeal because the relevant claims were rejected on other grounds that have not been appealed. In any event, the compliance Panel correctly found that the interpretation of Article 7.8 urged by the EU would improperly require the United States to remedy the specific instances of adverse effects found in the original proceeding, which cannot be reconciled with the prospective nature of Article 7.8. The EU also asserted that the Panel applied Article 7.8 incorrectly, but its arguments do not identify a disagreement with the Panel, and are otherwise erroneous and internally inconsistent.

11. Section VII shows that the Panel correctly limited its analysis of serious prejudice to competition within the markets it found to exist. Contrary to the EU's assertion, the Panel did not err in its interpretation of the term "market" in Article 6.3. The Panel correctly found that that product markets must be objectively determined, and that an Article 6.3 breach can only be established if the subsidized product and product(s) alleged to suffer adverse effects are in the same market. The EU's position is meritless for a variety of reasons. First, the EU's position contradicts the Appellate Body's findings that product markets must be objectively determined at the outset, and that an Article 6.3 breach can only be maintained if the subsidized product is *in the same market* as the products alleged to suffer adverse effects. Second, the EU draws a false distinction between the requirements for displacement, impedance, and price undercutting on the one hand, and price depression, price suppression, and lost sales on the other hand, that is unsupported and inconsistent with the Appellate Body's findings. Third, the EU's suggestion that, despite a panel's delineation of product markets, separate attribution factors such as the nature and magnitude of a subsidy can support an Article 6.3 breach when the subsidized product and products alleged to suffer adverse effects are in *different* markets is entirely unsupported and contrary to the Appellate Body's findings. Fourth, the EU's suggestion that the Panel's interpretation of Article 6.3 is contrary to the object and purpose of the SCM Agreement has no merit.

12. Section VIII shows that the Panel performed a proper collective assessment of the effects of the subsidies. The EU argues that the Panel erroneously interpreted Articles 5, 6.3, and 7.8 of the SCM Agreement to make aggregation and cumulation the only two ways of collectively assessing multiple subsidies. It urges the Appellate Body to complete the Panel's analysis by applying a third approach to collective assessment under which all subsidies or groups of subsidies found to be a "genuine cause" of adverse effects would be grouped together without regard to whether they complemented or supplemented each other, or contributed to each other's effects. The EU's arguments do not provide a valid basis for reversing the Panel's findings, or for completing the analysis in the event of a reversal. First of all, the Panel did not make the alleged legal finding that the EU appeals, that aggregation and cumulation are the only permissible forms of collective assessment. Second, this appeal is largely an academic exercise because, except for the Washington B&O tax rate reduction in the single aisle market, the Panel found that none of the other aggregation groups was even a genuine cause of adverse effects. Third, even if the Appellate Body were to find that there are multiple aggregation groups that are a genuine (but not substantial) cause of adverse effects in a product market, the EU's third approach is too undemanding to provide a valid collective assessment of those groups.

13. Section IX shows that the Panel did not find that subsidies must be the sole cause of a lost sale and, therefore, did not err in the interpretation of Articles 5, 6, and 7.8 of the SCM Agreement. The compliance Panel properly assessed whether sales campaigns were price-sensitive on the basis of voluminous evidence, including evidence of the role that price and other non-subsidy factors played in the relevant sales campaigns. The EU asserts the Appellate Body analysis adopted by the Panel was not generally applicable, but was instead a methodology useful only to identify transactions for which the uncontested evidence was sufficient to complete the original panel's analysis regarding causation of significant lost sales. However, the EU misreads the Appellate Body's reasoning, which first identified general conditions of competition in the large civil aircraft industry, and on that basis set out the criteria under which a sales campaign was sufficiently price-sensitive to support an inference that Boeing used tied tax subsidies to lower its prices in that campaign. Furthermore, if the EU's challenge were correct, the Appellate Body would necessarily be unable to complete the analysis in this appeal, as it would find itself in the exact position the EU claims the Panel erroneously placed itself in – which resulted in an absence of adverse effects findings on the basis of the sales campaigns at issue.

14. Section X shows that the Panel did not err in finding that the EU failed to establish that the untied subsidies cause price effects. The Panel correctly interpreted Articles 5 and 6.3 of the SCM Agreement as allowing a finding of serious prejudice only if a causal link exists between the

subsidies and the alleged indicia. The EU asserts two errors with the Panel's findings. First, it contends that the Panel interpreted (or applied) Articles 5 and 6.3 so as to allow a finding of adverse effects only if the complaining party could "trace the dollars" from subsidies to price reductions. But the Panel never did this. It simply examined whether the EU had met its burden to show that the subsidies contributed to the adverse effects, and found that the EU had failed to provide any theory or evidence whatsoever to support its assertion that the subsidies affected Boeing's pricing, which the EU acknowledges¹⁵ was only the first step in the causal pathway it alleged. Second, it asserts that the Panel failed to follow the Appellate Body's guidance that supposedly required a finding of adverse effects as long as there is a "nexus" between the subsidy and Boeing's LCA development, production, or sale, however superficial or divorced from Boeing's pricing. The Panel rejected the EU's argument, which it found overstretched the applicability of the Appellate Body's findings, and followed Appellate Body guidance calling for an evaluation of the extent to which subsidies contribute to the adverse effects alleged by the complaining party.

15. Section XI shows that the compliance Panel carefully considered the evidence and argumentation submitted by the parties, and correctly concluded that the pre-2007 R&D subsidies had no technology effects after the end of the implementation period. Contrary to the EU's claims, the Panel correctly applied Articles 5 and 6.3 of the SCM Agreement when it focused its counterfactual analysis on the date that Boeing would have launched the 787 in the absence of the pre-2007 R&D subsidies, while duly considering deliveries. The EU also errs in its criticism of the benchmarks used by the Panel in assessing how long it would take Boeing to launch the 787 in the absence of subsidies, because the correctly found that the Boeing Report was based on relevant, early-state R&D, and that other evidence conferred the estimate advanced by the United States. The EU's argument that the Boeing Report failed to take account of the sequencing of R&D is based on a mistaken premise, and fails to recognize that the methodology accounted for technology maturation. The EU also asserts that the Panel placed an improperly heavy burden on it, but in actuality, the Panel performed its role by evaluating whether the EU met its burden of making a *prima facie* case and of responding to the evidence and arguments advanced by the United States. Finally, in the event that the Appellate Body reverses any of the Panel's findings, the EU requests completion of the Panel's analysis. However, the findings of the Panel and undisputed facts are insufficient for that purpose.

16. Section XII shows that the compliance Panel correctly found that the EU failed to demonstrate that pre-2007 R&D subsidies had "continuing" adverse effect to the A330 and A350 XWB after the implementation period. The EU's appeal under DSU Article 11 fails because the compliance Panel adhered to the original panel's legal reasoning, and applied it to the facts and arguments in this new proceeding. That this process in some instances produced different outcomes was not an impermissible "deviation," but rather the result of an objective assessment that addressed the relevant new facts and arguments and did not mechanistically replicate the original results. The EU also fails to establish that the Panel erred in applying Articles 5 and 6.3 of the SCM Agreement to the claim that A330 prices are significantly suppressed. The Panel explicitly acknowledged that a price suppression claim under Article 6.3(c) is counterfactual in nature. It carefully examined the evidence and correctly found no basis for the EU's argument that, absent unwithdrawn subsidies, counterfactual A330 prices in the post-implementation period would have been different, let alone that they would have "recovered" to their pre-2004 levels. The EU also asks that, in the event of reversal of the challenged Panel findings, the Appellate Body complete the legal analysis, it puts forward only generalized assertions, unsupported assumptions and a misreading of the original Panel's findings in support of its request.

17. Section XIII shows that the EU's has failed to identify sufficient Panel findings or undisputed facts to support its request for completion of the analysis regarding alleged lost sales. The EU has requested that, in the event that the Appellate Body reverses the compliance Panel's findings concerning the standard for finding whether a measure has resulted in significant lost sales within the meaning of Article 6.3(c) of the SCM Agreement, the Appellate Body complete the analysis, and in particular find the relevant subsidies caused two groups of alleged "additional significant lost sales": (a) sales where the EU alleges additional lost sales caused only by the effects

¹⁵ EU Appellant Submission, para. 646 (stating that "the Appellate Body has held that a complaining Member must establish a 'genuine and substantial relationship of cause and effect' between the subsidies at issue and the adverse effects claimed," and that "{e}stablishing the existence of an effect from the untied subsidies at issue on Boeing's pricing of LCA is one step in that analysis").

of the Washington State B&O tax rate reduction,¹⁶ and (b) lost sales allegedly caused by the technology effects of pre-2007 aeronautics R&D subsidies, the B&O tax rate reduction, and "all of the untied subsidies."¹⁷ In reality, the EU is asking the Appellate Body to discard the Panel's careful analysis of a complex factual record and undertake its own *de novo* analysis based on EU argumentation rather than on the basis of – and often in contradiction to – Panel findings of fact or undisputed facts on the record. This is not the role of the Appellate Body.

¹⁶ EU Appellant Submission, para. 997.

¹⁷ EU Appellant Submission, para. 1036-1038.

ANNEX B-4

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION

I. INTRODUCTION

1. In its Other Appellant's Submission, the United States appeals a number of findings in the Report of the Panel in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union)* ("Panel Report" or "compliance Panel Report"), several of which are appealed only on a conditional basis. The US appeals include meritless challenges to: findings by the compliance Panel (or "Panel") on the scope of compliance proceedings under Article 21.5 of the *SCM Agreement*; the Panel's findings of benefit and specificity with respect to the NASA, DOD, and FAA R&D subsidies; and the Panel's findings on the benefit conferred by South Carolina's bond-funded reimbursements to Boeing for Boeing's expenditures on its own facilities. With respect to adverse effects, the United States fails in its attempts to demonstrate any error in the Panel's finding that the Washington State B&O tax rate reduction subsidy causes adverse effects, or an alleged error in a particular aspect of the Panel's analysis of significant price suppression with respect to A330 aircraft. The European Union requests that the Appellate Body reject the United States' appeal.

II. THE PANEL'S FINDING THAT THE EUROPEAN UNION'S CLAIMS AGAINST PRE-2007 DOD PROCUREMENT CONTRACTS ARE WITHIN THE SCOPE OF THE COMPLIANCE PROCEEDINGS IS NOT IN ERROR

2. The European Union requests that the Appellate Body reject the United States' appeal of the Panel's finding that the pre-2007 DOD procurement contracts are within the scope of the compliance proceedings. The United States fails to demonstrate any error by the Panel in this regard, either in the interpretation or application of Article 21.5 of the DSU.
3. The United States argues that the pre-2007 DOD procurement contracts are not properly within the scope of the compliance proceedings on the basis that the European Union "{c}annot {r}elitigate {a}dopted DSB {r}ecommendations and {r}ulings".¹ But, no such DSB recommendations and rulings about pre-2007 DOD procurement contracts have ever existed, given that the Appellate Body specifically declared "moot" the original panel's findings with respect to DOD procurement contracts.²
4. The United States asserts that "{t}he compliance Panel's errors begin with its statement of what it considered to be the decisive question"– *i.e.*, whether the Appellate Body regarded the DOD procurement contracts to be *before it* on appeal.³ According to the United States, the Panel should have instead considered whether any *issues* were being relitigated. This critique is without basis, as the Panel clearly considered *both* whether the measure was before the Appellate Body *and* whether issues were being relitigated such that the European Union would be "'unfairly' getting a second chance".⁴
5. In the alternative, the United States alleges that the Panel erred in its application of the correct legal standard, as much of the Appellate Body's analysis suggests the DOD procurement contracts were not before it on appeal.⁵ But just because an adjudicator spends *more words* considering one of two possible understandings does not mean that such possibility is the correct one. The Panel's understanding of the Appellate Body's analysis was fully justified and correct.

¹ US Other Appellant's Submission, Heading I(A).

² Appellate Body Report, *US – Large Civil Aircraft*, para. 620 (footnote 1298).

³ US Other Appellant's Submission, para. 15 *citing* Panel Report, para. 7.126.

⁴ Panel Report, para. 7.130.

⁵ US Other Appellant's Submission, para. 17.

6. *Next*, the United States argues that the European Union "{c}annot {r}eligitate {w}hether the DoD {p}rocurement {c}ontracts {c}onfer a {b}enefit"⁶, but this issue was not actually litigated to completion. To recall, the original panel made no factual findings with regard to the "benefit" conferred by the pre-2007 DOD procurement contracts, and the relevant facts remained highly contested. In these circumstances, there is simply no support for the position that the European Union's decision not to request the Appellate Body to complete the analysis on "benefit", in the original proceedings, results in preclusion on demonstrating "benefit" during the compliance proceedings. As the Panel properly understood, the European Union cannot be penalised for refraining from asking the Appellate Body to do something that falls outside of the Appellate Body's competence.
7. In this case, the original panel had *not even begun* an analysis of the highly fact-intensive issues of "benefit" or "adverse effects" with respect to DOD procurement contracts.⁷ Thus, there were no "factual findings" related to DOD procurement contracts with which the Appellate Body could complete the analysis. Nor were there uncontested facts that could have served this purpose, as these were highly contentious issues with many disputed facts. Indeed, as the Appellate Body noted, the United States, itself, did not request completion of the analysis for its own appeals on questions of financial contribution and benefit, because of "the complexity and disputed nature of the facts on the Panel record".⁸
8. *Finally*, the United States erroneously contends that considerations of efficiency and effectiveness of the dispute settlement system – as well as the statement in Article 3.7 of the DSU that "the aim of dispute settlement is to secure a positive solution to a dispute" – are not relevant for evaluating the proper scope of compliance proceedings pursuant to Article 21.5 of the DSU.⁹ Yet, as previous Appellate Body reports have found, efficiency and prompt, positive settlement of disputes are indeed relevant considerations in this context.¹⁰

III. THE APPELLATE BODY SHOULD REJECT THE US APPEAL OF THE PANEL'S FINDING THAT THE WASHINGTON STATE B&O TAX RATE REDUCTION IS A GENUINE AND SUBSTANTIAL CAUSE OF ADVERSE EFFECTS

9. The United States appeals certain elements of the Panel's findings that the Washington State B&O tax rate reduction subsidy is a genuine and substantial cause of significant lost sales, and a threat of impedance in a number of country markets for single-aisle LCA.¹¹ The United States' main contention is that tied tax subsidies, such as the Washington State B&O tax rate reduction, are not only tied in the sense that the government *grants* the subsidy each time a sale is made, but also tied in the sense that Boeing can *use* the subsidy to reduce prices *only* in respect of the specific aircraft for which the subsidy was granted. The United States argues that this finding is inconsistent with Articles 5.3(c) and 6.3 of the *SCM Agreement*, or in the alternative, amounted to a failure to make an objective assessment of the matter under Article 11 of the DSU.¹² The Appellate Body should reject the US arguments.

A. The Panel did not err in its findings regarding the per-aircraft magnitude of the Washington State B&O tax rate reduction

1. The Panel properly interpreted Articles 5(c) and 6.3 of the SCM Agreement

10. The Panel properly exercised its discretion in selecting an appropriate methodology to analyse the price effects of the tied subsidies, and was under no obligation to interpret Articles 5(c) and 6.3 as requiring the US' proposed calculation methodology.¹³ Indeed, it correctly heeded the Appellate Body's warnings against unduly segmenting the analysis and

⁶ US Other Appellant's Submission, Heading I(B).

⁷ Panel Report, *US – Large Civil Aircraft*, paras. 7.1182-7.1188, 7.1701.

⁸ See Appellate Body Report, *US – Large Civil Aircraft*, paras. 130, 163.

⁹ US Other Appellant's Submission, paras. 21-22.

¹⁰ See, e.g., Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 212; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 151.

¹¹ US Other Appellant's Submission, Section II.

¹² US Other Appellant's Submission, para. 69.

¹³ Appellate Body Report, *US – Upland Cotton*, para. 436.

using analytical tools that would preclude finding adverse effects where they do, in fact, exist.¹⁴ The Panel properly interpreted Articles 5(c) and 6.3 of the *SCM Agreement* to permit an assessment of whether tied subsidies may have price effects by being pooled, and deployed strategically, in particularly price-sensitive sales campaigns.

2. The Panel properly applied Articles 5(c) and 6.3 of the *SCM Agreement*

11. In the original proceedings, the Appellate Body found that tied subsidies are *received* based on sales of individual LCA.¹⁵ In considering how a recipient may use the subsidy, the Appellate Body highlighted the competitive conditions in the LCA markets.¹⁶ Specifically, the Appellate Body emphasised that Boeing and Airbus both have the ability and incentive to strategically *use* tied subsidies to lower prices in particularly price-sensitive sales campaigns.¹⁷ Thus, when calculating the per-aircraft subsidy magnitude by focusing on price-sensitive sales and not on all sales of Boeing LCA, the Panel applied Articles 5(c) and 6.3 of the *SCM Agreement* consistently with the adopted findings of the Appellate Body.
12. Moreover, the Panel properly grounded its findings in the facts that it found. The Panel's reasoning, in finding that the tied tax subsidies resulted in lower prices in certain strategically important and price-sensitive sales, builds upon its factual findings regarding the competitive conditions of the LCA markets.¹⁸ Given these conditions of competition, and the resulting incentives to use subsidies, the Panel correctly applied Articles 5(c) and 6.3 to conclude that Boeing would strategically target the use of its tied tax subsidies to particularly price-sensitive sales campaigns.

3. The Panel made an objective assessment under Article 11 of the DSU

13. The United States fails to substantiate its claim under Article 11 of the DSU, separately from its general arguments regarding the interpretation and application of Articles 5(c) and 6.3 of the *SCM Agreement*. Indeed, the US arguments appear to amount to no more than an assertion of disagreement with the Panel's factual findings. The Appellate Body has previously explained that the party raising the claim bears the onus of explaining why the alleged error meets the standard of review under Article 11.¹⁹ In the absence of clearly articulated and substantiated claims, the US appeal under Article 11 of the DSU must fail.
14. In any event, the Panel's findings were properly made. The Panel engaged in a detailed assessment of the evidence submitted by both Parties to come to a reasoned assessment of the per-aircraft subsidy magnitude.²⁰ Moreover, the Panel's findings were consistent with the adopted findings in the original proceedings.²¹ In sum, the Appellate Body should reject the US appeal under Article 11 of the DSU.

B. The US arguments regarding the factors that must be considered "in case the Appellate Body considers that more analysis is appropriate" are unavailing

15. In Section II.E of its Other Appellant's Submission, the United States raises additional assertions that it argues should be considered only "to the extent the Appellate Body considers that further analysis is justified".²² However, the entirety of Section II.E assumes a per-aircraft subsidisation of USD 100,000 to be the correct subsidy magnitude, and compares that number to what the United States claims to be the price differential between Airbus' and Boeing's offers in each of the sales campaigns at issue.²³ As such, if, after

¹⁴ Appellate Body Report, *US – Large Civil Aircraft*, paras. 1284, 1290.

¹⁵ Appellate Body Report, *US – Large Civil Aircraft*, para. 1161.

¹⁶ Appellate Body Report, *US – Large Civil Aircraft*, para. 1260.

¹⁷ Appellate Body Report, *US – Large Civil Aircraft*, paras. 1254, 1255, 1260.

¹⁸ Panel Report, paras. 9.17, 9.19, 9.20, 9.50, 9.54, 9.55, 9.242, 9.247, 9.379, 9.454.

¹⁹ Appellate Body Report, *EC – Seal Products*, para. 5.150.

²⁰ Panel Report, paras. 9.389-9.404.

²¹ See Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103 ("doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record"); Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 158, footnote 309.

²² US Other Appellant's Submission, para. 118. See also US Other Appellant's Submission, para. 30.

²³ See US Other Appellant's Submission, paras. 118, 128, 130, 133, 135, 137, 139, 141.

engaging with the US assertions in Section II.D, the Appellate Body "considers that further analysis is justified",²⁴ the United States' assertions in Section II.E. would fail to offer any additional or alternative reasons to reverse the Panel's findings as the United States requests, since Section II.E is premised on the accuracy of Section II.D.

C. The United States errs in its *arguendo* assertion that, even at a per-aircraft magnitude of USD 1.99 million, the B&O tax rate reduction subsidy should not have been found to constitute a genuine and substantial cause of lost sales

16. *Finally*, the United States asserts that – assuming, *arguendo*, that the correct per-aircraft subsidy magnitude is USD 1.99 million – the Panel still erred in making findings of significant lost sales. For the 2008 Fly Dubai and the 2011 Delta sales campaigns, the United States alleges that the Panel erred in the interpretation or application of Articles 5(c) and 6.3 of the *SCM Agreement*, or alternatively, failed to make an objective assessment under Article 11 of the DSU. For the 2013 Icelandair and 2013 Air Canada campaigns, the US appeal is under Article 11 of the DSU. The United States does not specify the nature of its appeal against the 2014 Fly Dubai campaign.
17. All of these appeals rest on one erroneous premise – that a finding of lost sales would be warranted only in those instances where the per-aircraft magnitude of subsidisation is sufficient to bridge the *entirety* of the *price* differential between Boeing's and Airbus' offers. For several reasons, that premise is untenable.
18. *First*, as a legal matter, a subsidy need not be the *sole* cause of adverse effects; it need not even be the sole genuine and substantial cause of adverse effects. For a finding of adverse effects, a subsidy need only be "a genuine and substantial cause".
19. *Second*, in considering sales campaigns for the purchase of differentiated products such as aircraft, a finding of lost sales can be made where the subsidy magnitude and price differentials in offers from two manufacturers are of comparable levels, even if the former does not exceed the latter. This is because (i) the outcomes of sales campaigns are driven more by differences in the net present value of the offers, for which price differentials are only *one* (albeit important) factor, and (ii) competing offers are made by two sophisticated competitors in the absence of perfect information about the other competitor's offer.
20. The European Union has also responded individually to each of the sales-specific arguments advanced by the United States, with reference to HSBI evidence.

IV. THE UNITED STATES' CONDITIONAL APPEAL OF THE PANEL'S FINDINGS THAT THE NASA, DOD, AND FAA R&D MEASURES CONFER A "BENEFIT" HAS NO MERIT

21. The European Union requests that the Appellate Body reject the United States' conditional appeal of the Panel's findings that the post-2006 NASA procurement contracts and cooperative agreements, DOD assistance instruments, and the FAA Boeing CLEEN Agreement confer a benefit on Boeing. This appeal is conditional upon the Appellate Body finding that any aeronautics R&D subsidy causes adverse effects.²⁵
22. The United States bases its appeal on two grounds. First, the United States alleges that the Panel erred in the application of Article 1.1(b) of the *SCM Agreement*, in confining its benefit analysis to the allocation of patent rights, and failing to take account of other terms of the relevant agreements.²⁶ Second, the United States contends that, assuming *arguendo* that the Panel properly applied Article 1.1(b), the Panel nevertheless failed to conduct an objective assessment under Article 11 of the DSU because it disregarded the monetary component of the allocation of patent rights.²⁷

²⁴ US Other Appellant's Submission, para. 118.

²⁵ US Other Appellant's Submission, para. 176.

²⁶ US Other Appellant's Submission, para. 180.

²⁷ US Other Appellant's Submission, para. 180.

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23. These arguments are unavailing.
24. *First*, the United States attempts to establish that the Panel erred in the application of Article 1.1(b) based on a mischaracterisation of the Panel's analysis. In reality, the Panel identified and applied the correct legal standard for evaluating "benefit" – which is the very same standard identified by the United States, itself – and considered all relevant evidence on the record.
25. As the Panel explained in summarising its own approach to benefit, while its attention – like that of the Appellate Body before it – was focused on the allocation of intellectual property rights, this was only because the Panel had first determined, as a factual matter and after considering all of the terms of the transactions, that this was the defining, distinguishing feature of the NASA, DOD, and FAA R&D instruments at issue, when compared with the market benchmarks. In the words of the Panel, whether focusing on intellectual property rights is appropriate for the benefit analysis of R&D contracts and agreements "concluded between NASA, DOD, or indeed any other U.S. Government agencies":

will depend very much on the programmes in question, and a consideration of all of the terms of the transactions, including those relevant to the characterization of the financial contribution and benefit.²⁸

This is precisely the type of analysis that the United States claims the Panel did not do.

26. The Panel's decision to focus on the intellectual property rights, in the context of the NASA, DOD, and FAA R&D agreements and contracts at issue, was not just in line with the Appellate Body's analysis, but also fully consistent with the United States' own arguments before the compliance Panel. To recall, the United States had argued that it withdrew the benefit found to be conferred by the NASA and DOD measures in question by modifying only one aspect of the allocation of intellectual property rights.²⁹ After examining the US' declared compliance measures, the Panel concluded that such modifications did not bring the affected instruments in line with prevailing market practices for collaborative R&D arrangements in such a way as to remove the benefit.³⁰ Left with no material changes to the relevant instruments and many of the same benchmarks considered by the Appellate Body, the Panel followed the overall logic of the Appellate Body's reasoning, while also considering the new evidence before it.
27. The United States' application appeal is thus based on a mischaracterisation of the Panel's analysis. Contrary to the United States' contentions, the Panel properly followed and incorporated the Appellate Body's analysis. Moreover, the Panel conducted a benefit assessment that took account of all relevant terms of the measures at issue, and compared them to the relevant terms of the benchmark agreements. In particular, the Panel's benefit analysis demonstrates that it looked at, *inter alia*, the relative contributions of the parties to the joint venture, including monetary (e.g., cost-sharing) and non-monetary contributions; relevant characteristics of the measures and benchmarks; and the extent to which the parties had collaborative relationships.³¹ In addition, the Panel considered "new evidence and argumentation", along with the evidence previously before the original panel, dedicating the entirety of Appendix 1 of the Panel Report to a thorough evaluation of all relevant evidence and arguments. Based on this evaluation, the Panel concluded that the new evidence confirms that the aeronautics R&D subsidies confer a benefit.³²
28. *Second*, the United States' appeal under Article 11 of the DSU fails because, contrary to the US' contention, the Panel considered the monetary component of patent rights, to the extent relevant to the "benefit" analysis. The specific US arguments that a greater focus on the "monetary component" could have been determinative of the Panel's "benefit" analysis do not reveal that the Panel exceeded the bounds of its discretion, as the trier of fact, under Article 11. Indeed, these arguments are unsupported by any evidence on the record;

²⁸ Panel Report, para. 8.464. (emphasis added)

²⁹ See Panel Report, para. 8.5.

³⁰ Panel Report, paras. 8.42-8.49, 8.181-8.182, 8.408-8.409.

³¹ See, e.g., Panel Report, paras. 8.189, 8.194 (footnote 1236), 8.421, 8.427-8.433, 8.464, 8.534, 8.539-8.540 and Appendix 1, paras. 21-27.

³² See Panel Report, Appendix 1.

moreover, they involve reframing an argument that the Panel properly considered and rejected.

29. As the United States itself seems to acknowledge, a requirement in the benchmark agreements for the commissioning party to pay royalties in return for IP licencing rights could eliminate the benefit *if and only if* the required royalty payments were greater than or equal to the value of the IP rights.³³ The United States has never provided any evidence that there was even a single contract in which the royalty requirement exceeded, or was equal to, the value of the IP for the commissioning party. Thus, no evidence on the record would have changed the Panel's determination that a "benefit" exists, based on consideration of such royalties.
30. The lack of evidence in this regard is not surprising, as it would be irrational for a commissioning party to enter into an agreement *ex ante* in which it is anticipated that the royalty payment would be greater than, or equal to, the value of the IP.
31. Moreover, looking at the other side of the transaction, the notion advanced by the United States – that the royalties received by a *commissioned* party in the market benchmark agreements would put the commissioned party in a better position than Boeing under the aeronautics R&D measures at issue³⁴ – is illogical and contrary to the evidence.

V. THE UNITED STATES' CONDITIONAL APPEAL OF THE PANEL'S FINDINGS THAT THE NASA, DOD, AND FAA R&D SUBSIDIES ARE "SPECIFIC" HAS NO MERIT

32. The European Union requests that the Appellate Body reject the United States' conditional appeal of the Panel's finding that the NASA, DOD, and FAA R&D subsidies are specific.
33. As an initial matter, it is important to highlight that the United States does not appeal the Panel's *existing* findings that the NASA, DOD, and FAA R&D subsidies are specific, nor does the United States challenge the reasoning underlying those findings. Rather, the United States' position is as follows: If the Appellate Body upholds the Panel's finding that the DOD procurement contracts do not constitute subsidies, then the Panel's findings that the NASA, DOD, and FAA R&D subsidies are specific are *not in error*. If, however, the Appellate Body reverses the Panel's findings on DOD procurement contracts, and finds that they can be characterised in the same way as the other R&D instruments at issue, then there could be no basis to find specificity for any of the NASA, DOD, and FAA R&D subsidies, and any finding of specificity would constitute error.³⁵ According to the United States, reversal of the Panel's subsidy findings with respect to one measure (DOD procurement contracts) somehow converts all US Government R&D subsidies – administered by every US Government agency (even beyond NASA, DOD, and FAA) – into a single "patent rights" subsidy that, considered as a whole, must be held to be non-specific.
34. The US arguments have no merit.
35. *First*, at its core, the US appeal is based on a fundamental misunderstanding and/or mischaracterisation of the Panel's analysis. In reality, the Panel's specificity findings with regard to the NASA, DOD, and FAA R&D subsidies, were not dependent on its ultimate conclusion that one particular type of measure, the DOD procurement contracts, did not constitute subsidies. Rather, the Panel's specificity findings were based on a consideration of each "subsidy" – including a consideration of "financial contribution" and "benefit" – in its particular context. The Panel explained that "the role of the allocation of intellectual property rights in {the} analysis of whether a measure constitutes a subsidy depends upon the particular context", and consequently the focus of the "benefit" analysis, as well as the ultimate finding, can vary despite similarities in the allocation of IP rights provided pursuant to US Government R&D programmes.³⁶

³³ US Other Appellant's Submission, para. 240.

³⁴ US Other Appellant's Submission, para. 237.

³⁵ US Other Appellant's Submission, paras. 243, 255-256, and Heading III(B)(3).

³⁶ Panel Report, paras. 8.228, 8.466, 8.551.

36. *Second*, the US appeal is reminiscent of its failed arguments before the Panel, where the United States attempted to characterise the aeronautics R&D measures at issue as a single "patent rights subsidy". As the Panel correctly explained, lumping together the NASA, DOD, and FAA R&D subsidies in this way would be tantamount to ignoring that determining the proper characterisation of a subsidy requires evaluating not just the "benefit" (or an aspect thereof), but also the "financial contribution".³⁷ It would also be directly contrary to the Appellate Body's guidance in the original proceedings, which cautioned that any specificity findings with respect to the European Union's prior, separate challenge (not pursued in these proceedings) to the US Government's overall regime for allocating government-funded patent rights to Boeing did "not traverse the Panel's {then-unappealed} findings of specificity relating to the payments and other support provided under the NASA/USDOD contracts and agreements".³⁸
37. *Third*, the US' arguments are contrary to Appellate Body guidance, which cautions against "examin{ing} subsidies that are different from those challenged by the complaining Member" and provides "{a} subsidy, access to which is limited to 'certain enterprises', does not become non-specific merely because there are other subsidies that are provided to other enterprises pursuant to the same legislation".³⁹
38. *Finally*, the US appeal relies heavily on a portion of the Appellate Body Report in the original proceedings that the Appellate Body explicitly stated did not apply to the NASA and DOD subsidies at issue.⁴⁰

VI. THE APPELLATE BODY SHOULD REJECT THE UNITED STATES' CONDITIONAL APPEAL OF THE PANEL'S FINDING THAT THE SOUTH CAROLINA PAYMENTS CONFER A SUBSIDY ON BOEING

39. The Appellate Body should reject the United States' conditional appeal of the Panel's finding that a "benefit" is conferred by the direct transfers of funds from South Carolina to Boeing pursuant to the economic development bonds ("EDBs") and air hub bonds, as well as the United States' related challenge to the Panel's valuation of that benefit.
40. The United States alleges, in particular, that the Panel failed to conduct the objective assessment required by Article 11 of the DSU.⁴¹ The United States asserts that the Panel's benefit finding, pursuant to Article 1.1(b) of the *SCM Agreement*, relies on the "incorrect premise" that there was no evidence that Boeing and South Carolina foresaw, *ex ante*, any remuneration to South Carolina for the direct transfers of funds to be provided through the bonds.⁴² According to the United States, there was "significant evidence to that effect", which the Panel did not take into account.⁴³
41. The United States' arguments are unavailing, as the United States fails to point to any evidence of the kind that it charges the Panel with ignoring. The United States asserts the existence of relevant evidence only by mischaracterising both the Panel's analysis and the contents of the evidence of record. The United States focuses on evidence demonstrating that Boeing and South Carolina foresaw, *ex ante*, Boeing's investment of its own funds, in its own facilities, for its own use. The United States does not point to evidence showing that Boeing and South Carolina foresaw Boeing's return of value to South Carolina at the end of its lease, in 2041, when the land and facilities revert back to the State (*i.e.*, "residual value"). Only the latter class of evidence would have been relevant for an assessment of "benefit" under Article 1.1(b) of the *SCM Agreement*, as the Panel correctly found – a finding that the United States does not appeal.
42. Throughout its appeal, the United States mischaracterises the Panel's findings as relating to anticipated investment, not anticipated return of any residual value. What the Panel actually

³⁷ Panel Report, paras. 8.225 (NASA), 8.463 (DOD), 8.549 (FAA).

³⁸ Appellate Body Report, *US – Large Civil Aircraft*, para. 730.

³⁹ Appellate Body Report, *US – Large Civil Aircraft*, para. 751. (emphases added)

⁴⁰ Appellate Body Report, *US – Large Civil Aircraft*, para. 730.

⁴¹ US Other Appellant's Submission, para. 262.

⁴² US Other Appellant's Submission, para. 262.

⁴³ US Other Appellant's Submission, para. 262.

found is that the United States had failed to show – and there was no evidence on the record – that any *residual value* of Boeing's unreimbursed investment was foreseen in the agreement between South Carolina and Boeing, evidence which (if it existed) could be reflected in the *ex ante* analysis of benefit.⁴⁴ The evidence now highlighted by the United States in its Other Appellant's Submission does not relate to any foreseen residual value of the Project Gemini site that would revert to South Carolina in 2041. Thus, the United States lacks any basis to contend that the Panel ignored relevant evidence, and has therefore failed to demonstrate any error in the Panel's assessment of the matter within the meaning of Article 11 of the DSU.

VII. THE PANEL PROPERLY DECLINED TO REJECT THE EUROPEAN UNION'S CLAIM OF SIGNIFICANT PRICE SUPPRESSION FOR THE A330 BASED SOLELY ON CONSIDERATIONS RELATING TO PRODUCT MARKET DELINEATION

43. The European Union rebuts the US appeal of the Panel's alleged "intermediate finding that the EU made a *prima facie* case of significant price suppression under Article 6.3(c) of the SCM Agreement" with respect to the A330.⁴⁵ That appeal is conditional on "the Appellate Body disturb[ing] any of the compliance Panel's findings with respect to the A330".⁴⁶
44. For the reasons set out below, the European Union requests the Appellate Body to reject the US appeal.
45. To begin, the United States' appeal is grounded on a crucial, but erroneous, premise – namely, that significant price suppression under Article 6.3(c) of the *SCM Agreement* can be found only when the subsidised product and the allegedly affected product are in the same product market. While the Panel agreed with the premise grounding the US argument, and the related interpretation of Article 6.3(c),⁴⁷ for the reasons set out in the European Union's own appeal, that interpretation is erroneous.⁴⁸ Accordingly, should the Appellate Body reverse the Panel's finding that the subsidised product and the allegedly affected product must be in the same product market for adverse effects to be found, the very foundation on which the US appeal is built crumbles, and the appeal becomes moot.
46. In any event, the US appeal is baseless for three additional reasons. *First*, the United States appeals an alleged finding that "the EU made a *prima facie* case of significant price suppression under Article 6.3(c) of the SCM Agreement".⁴⁹ However, nowhere in its Report did the Panel actually find that the European Union had made a *prima facie* case of significant price suppression for the A330. As such, the United States' appeal is directed against a non-existent Panel finding, and consequently, falls outside the permissible scope of appellate review. To recall, appellate review is "limited to issues of law covered in the panel report and legal interpretations developed by the panel".⁵⁰ A finding not included in a panel report cannot validly be appealed.
47. *Second*, while the United States alleges error in the interpretation and application of Article 6.3,⁵¹ the United States simply fails to offer any explanation as to the reasons, nature or content of either of these two alleged errors. To the extent that the United States is alleging that the Panel interpreted or applied Article 6.3(c) such that significant price suppression can be found even when the subsidised product and the affected product are in different product markets, the US appeal rests on gross mischaracterisations of the Panel's findings. In any event, the United States' elaboration of its appeal appears to concern matters that fall within the realm of Article 11 of the DSU, rather than interpretation or application of Article 6.3(c).

⁴⁴ Panel Report, para. 8.822.

⁴⁵ US Other Appellant's Submission, para. 271.

⁴⁶ US Other Appellant's Submission, para. 271.

⁴⁷ Panel Report, para. 9.33.

⁴⁸ EU Appellant's Submission, Section VII.

⁴⁹ US Other Appellant's Submission, para. 271.

⁵⁰ DSU, Article 17.6.

⁵¹ US Other Appellant's Submission, paras. 270-279.

48. *Third*, the United States' allegation that the Panel made the case for the European Union is baseless. The Panel made its own objective assessment of the proper delineation of the relevant product markets, as it was required to do. The Panel then based its assessment of the EU's serious prejudice claims on its own product market findings, rather than the position of either Party. This was indeed not only permissible for, but required of, the Panel.
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ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Brazil's third participant's submission	54
Annex C-2	Executive summary of Canada's third participant's submission	55
Annex C-3	Executive summary of China's third participant's submission	56
Annex C-4	Executive summary of Japan's third participant's submission	57

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. Brazil submits that Articles 5 and 6.3 of the SCM Agreement should be interpreted to allow a panel to assess whether tied subsidies have caused adverse effects under the facts specific to each case. There may be situations in which a subsidy recipient could apply tied subsidies received for non-price-sensitive sales to sales campaigns where price sensitivity is a determinative factor. Therefore, nothing should prevent a panel from assessing the practical effects of tied subsidy, including beyond the sales to which subsidies are tied.
2. Brazil also disagrees with the compliance panel's interpretation of Articles 5, 6.3, and 7.8 of the SCM Agreement establishing that cumulation and aggregation are the two only permissible means to assess collectively the effects of multiple subsidies. The Appellate Body should reverse this interpretation and confirm its previous decision in the original proceedings that "a panel enjoys a degree of methodological latitude in selecting its approach to analyzing the collective effects of multiple subsidies for purposes of assessing causation".
3. Moreover, the Panel erred by incorrectly rejecting the interpretation of Article 7.8 of the SCM Agreement that lost or price-suppressed sales for which the final aircraft was undelivered by the end of the implementation period may constitute present adverse effects. As the original panel recognized, the sales and delivery process for LCAs are unique in the marketplace, and the effect on the market of these sales – and therefore, the effect of any subsidy – extend beyond the moment of initial sale due to the size of the sale, the terms of the sale, and the amount of time between initial sale and delivery.
4. In relation to Article 6.3(c) of the SCM Agreement, Brazil considers to be erroneous the Panel's interpretation that it must use a "sole cause" standard in assessing whether subsidies are causing lost sales. The Appellate Body should, thus, reinforce its prior determinations that panels must assess whether there is "a genuine and substantial relationship of cause and effect" between the subsidies at issue and the adverse effects to find causation, but that "a panel need not determine {the subsidy} to be the *sole* cause of that effect, or even that it is the *only* substantial cause of that effect."
5. Finally, Brazil recalls that Article 6.3 of the SCM Agreement focuses on "the effect of the subsidy" and not its actual use and allocation to particular product pricing decisions. In this sense, in order to demonstrate causation in relation to the particular market phenomena under Article 6.3, the Appellate Body should confirm that there is no strict requirement to trace the specific dollars received from untied subsidies to the specific product.

ANNEX C-2

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

1. Canada's submission focuses on the legal framework that should be applied in compliance proceedings for assessing whether a responding Member has removed the adverse effects of actionable subsidies.
2. The existence of the compliance obligation in Article 7.8 of the SCM Agreement is conditional on the continued presence of subsidies in the implementation period. Article 7.8 provides for two distinct compliance options: a Member can either remove the adverse effects of the subsidies or withdraw the subsidies altogether.
3. These features of Article 7.8 have direct implications on the counterfactual analysis conducted in compliance proceedings to determine whether subsidies cause adverse effects. Accordingly, this analysis should: (1) focus exclusively on subsidies that continue to exist in the implementation period, and (2) consider what the situation would be if the existing subsidies had been withdrawn by the end of the implementation period.
4. In this case, the Panel found that, because the 787 would have been launched before the end of the implementation period *in the absence of the pre-2007 aeronautics R&D subsidies*, the adverse effects associated with the 787 cannot be attributed to those subsidies. However, the Panel's legal framework is incorrectly premised and ultimately misleading. In accordance with Article 7.8, the Panel should have assessed the counterfactual situation in which the R&D subsidies are withdrawn by the end of the implementation period, rather than assessing how the development of the 787 would have been impacted if those subsidies had never been provided.
5. The European Union argues that the United States contravened Article 7.8 in failing to remove the adverse effects caused by the pre-2007 aeronautics R&D subsidies because deliveries of Boeing aircraft continued to be made pursuant to the orders that formed the basis of serious prejudice findings in the original proceedings. However, this position cannot be reconciled with the correct counterfactual analysis. If the aircraft deliveries would have still occurred in the absence of the R&D subsidies being maintained in the post-implementation period, then the deliveries of those aircraft, and their resulting impact on Airbus, cannot be found to be caused by those same subsidies.

ANNEX C-3

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. China's Third Participant Submission discusses the following four issues on appeal that China considers to be of systemic importance.

2. **First**, China submits that a correct interpretation of the ordinary meaning of the treaty text of Article 7.8 and in the light of the object and purpose of the SCM Agreement suggests that, subsidies that cease to exist by the end of the implementation period are outside the scope of an implementing Member's obligation under Article 7.8. Therefore, if a Member can establish that subsidies found to have caused a violation of Article 5 are no longer in existence by the end of the implementation period, that Member should be deemed to have fulfilled its implementing obligation by withdrawing the subsidy within the meaning of Article 7.8 of the SCM Agreement.

3. **Second**, China wishes to comment on the technology effect of the pre-2007 aeronautics R&D subsidies from three perspectives.

(1) The obligation of an implementing Member under Article 7.8 concerning the technology effect of R&D subsidies

4. Based on the interpretation of Article 7.8 of the SCM Agreement, China is of the view if the United States withdrew a subsidy, it is not required to remove any lingering effects that the subsidy may have. *Vice versa*, if the United States removed the adverse effects of a subsidy, it is not required to withdraw the subsidy.

(2) Causation assessment under Articles 5(c) and 6.3

5. In this dispute, the compliance Panel conducted a counterfactual analysis to assess the effects of the pre-2007 R&D subsidies. China submits that the proper legal standard for finding causation under Articles 5(c) and 6.3 of *the SCM Agreement* requires a "genuine and substantial" cause analysis between the subsidies and the alleged market phenomenon. In applying a counterfactual analysis, a panel must ensure that the assessment demonstrates that the subsidies are a "*genuine and substantial*" cause of the particular market phenomenon.

(3) counterfactual analysis for technology effects

6. Notwithstanding the analysis in the previous subsection, China submits that to undertake a proper counterfactual analysis in the compliance proceeding, the Panel should require the EU to demonstrate that the situation would have been different in the absence of the non-withdrawn subsidies at the end of the implementation period, rather than analyze what the situation would be if the subsidies were never granted.

7. **Third**, as to determination of product market delineation, China submits that the text of Article 6.3 as well as relevant WTO jurisprudence support the Panel's interpretation that a subsidized product can only cause serious prejudice to another product if the two products in question compete in the same market.

8. **Fourth**, with regard to the untied subsidies (i.e., those that are not tied to the production and sales of the LCA), China submits that serious prejudice will not exist unless there is genuine and substantial relationship between cause and effect. Besides, burden of proof is on the side of the complainant to show such genuine and substantial relationship.

ANNEX C-4

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

I. INTRODUCTION

1. Japan would like to address the following issues: the price effects of subsidies, the alleged technology effects, the continuance of adverse effects, the lost sales, the collective causation analysis and the importance of the existence of a competitive relationship between the products.

II. PRICE EFFECTS

2. Japan submits that the benefit should be the relevant criterion in the adverse effects analysis. The benefit will normally be consumed when the recipient sells its products at a lower price. The assessment of the benefit should thus focus on the projected period or sales amount properly anticipated by a government when the subsidy was granted. It is therefore inappropriate to require complainants to trace money provided by the subsidy and demonstrate how the recipients used or allocated it.

III. TECHNOLOGICAL EFFECTS

3. Japan disagrees with the European Union's claim relating to the "technology causal mechanism". The benefit conferred by the financial contribution allows the recipient to sell the subsidised products at a lower price. Consequently, the proper counterfactual is whether the recipient would have had to offer products using the technology it developed without the subsidy at a higher price.

IV. CONTINUING ADVERSE EFFECTS

4. The discussion between the participants seems to focus on when the adverse effects should be considered removed. From Japan's point of view, which focusses on the price effect of the subsidies, the relevant question is whether the benefit was consumed before the end of the compliance period.

V. LOST SALES

5. Japan agrees with the European Union's appeal that the subsidies must not be the sole cause of a lost sale. Instead, the Appellate Body must take into account different factors and consider whether there is a genuine and substantial cause of adverse effects.

VI. COLLECTIVE CAUSATION ANALYSIS OF EFFECTS OF MULTIPLE SUBSIDIES – THE NATURE OF A SUBSIDY IN THE CONTEXT OF THE FINDING OF ADVERSE EFFECTS

6. Japan requests the Appellate Body to consider the nature, design and operation of the subsidies at issue when it engages in a collective causation analysis. The mere effect of lowering the prices of subsidised products is not sufficient to satisfy the requirement of a "*genuine causal connection*" between the subsidy and the particular effects-related variable.

VII. IMPORTANCE OF THE EXISTENCE OF A COMPETITIVE RELATIONSHIP

7. Japan submits that an assessment of the existence of an actual competitive relationship between the subsidised product and the like product is crucial for the establishment of causality between the subsidies and "*serious prejudice*".

ANNEX D

PROCEDURAL RULINGS

Contents		Page
Annex D-1	Procedural Ruling of 21 July 2017 regarding additional procedures to protect business confidential information (BCI) and highly sensitive business information (HSBI)	59
Annex D-2	Procedural Ruling of 9 August 2017 regarding the United States' request to extend the deadline for objection to the inclusion of any business confidential information (BCI) in the European Union's appellant's submission	67
Annex D-3	Procedural Ruling of 30 August 2017 regarding the United States' request to extend the deadline to file the HSBI Appendix to its other appellant's submission	68
Annex D-4	Procedural Ruling of 12 October 2017 regarding the European Union's request to extend the deadline for objection to the inclusion of any business confidential information (BCI) in the United States' appellee's submission	69
Annex D-5	Procedural Ruling of 18 October 2017 regarding the objection by the European Union to the inclusion of certain highly sensitive business information (HSBI) in the HSBI-redacted version of the United States' appellee's submission	70
Annex D-6	Procedural Ruling of 5 April 2018 regarding the joint request by the European Union and the United States for the oral hearing to be open to public observation	71

ANNEX D-1

PROCEDURAL RULING OF 21 JULY 2017

1. On 29 June 2017, the Chair of the Appellate Body received a letter from the European Union requesting the Appellate Body Division hearing this appeal to adopt additional procedures to protect business confidential information (BCI) and highly sensitive business information (HSBI) in these appellate proceedings. In its letter, the European Union proposed that additional procedures be adopted that track the additional procedures recently adopted by the Appellate Body in the appeal in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*. The European Union argued that, *inter alia*, disclosure of certain sensitive information on the record of the compliance Panel proceedings would be severely prejudicial to the large civil aircraft manufacturers concerned, and possibly to their customers and suppliers.

2. On behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the United States and the third parties to comment in writing on the request by the European Union by 5 p.m. on Wednesday, 5 July 2017. He also informed the participants and the third parties that, pending a final decision on the European Union's request, the Division had decided to provide interim additional protection to all BCI and HSBI transmitted to the Appellate Body in this appeal on the terms set out below:

- a. Only Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may have access to the BCI and HSBI contained in the Panel record pending a final decision on the request by the European Union. Appellate Body Members and Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed, to any person other than those identified in the preceding sentence.
- b. BCI shall be stored in locked cabinets when not in use. When in use by Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal, all necessary precautions will be taken to protect the confidentiality of the BCI.
- c. All HSBI shall be stored in a combination safe in a designated secure location in the offices of the Appellate Body Secretariat. Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may view HSBI only in the designated secure location in the offices of the Appellate Body Secretariat. HSBI shall not be removed from this location.
- d. Pending a decision on the European Union's request for the protection of BCI and HSBI in these proceedings, neither BCI nor HSBI shall be transmitted electronically, whether by e-mail, facsimile, or otherwise.

3. On Wednesday, 5 July 2017, written comments were received from the United States and third parties Australia and Canada. The United States broadly agreed with the European Union's request that the BCI and HSBI procedures adopted in the appeal in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* should serve as the basis for BCI and HSBI procedures in this appeal. It requested, however, a change regarding the deadline for submission of an HSBI appendix to any written submission, suggesting that if an HSBI appendix is sent by an expedited courier service, that it be deemed filed and served on the date it is sent, instead of on the date it is delivered. Australia stated that it did not object to the European Union's request but commented that support of both of the participants would be important in ensuring fairness and orderly procedure in these appellate proceedings. Canada stated that, while it agrees with the European Union's request that additional procedures to protect BCI and HSBI track the procedures adopted in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, it considered that the requirement that note-taking by third participants in the designated reading room be handwritten was unnecessarily burdensome, and requested that the procedures be modified so as to provide for a stand-alone computer and printer to be made available to third participant BCI-approved persons in the designated reading room.

4. On Friday, 7 July 2017, the Chair, on behalf of the Division, invited the participants and third parties to provide any further views on the request by the European Union, taking into account the changes proposed by the United States and Canada, by 5 p.m. on Tuesday, 11 July 2017. Comments were received from the European Union and the United States.

5. The European Union stated that it did not, in principle, object to Canada's proposal to allow taking notes on a computer keyboard in the designated reading room, provided that it can be done in a manner that ensures adequate protection of BCI. The European Union noted that the reason for excluding computers or other electronic devices from the designated reading room was to enhance the security of BCI, and that the risks of disclosure are heightened if computers or other electronic devices are permitted in the designated reading room. The European Union also noted that the participants and their stakeholders agreed to the provision of BCI under the express understanding that computers or electronic devices would not be permitted in the designated reading room. For these reasons, the European Union considered that Canada's proposal would be acceptable only if certain heightened protections were put in place.¹

6. The European Union objected to the United States' proposal that an HSBI appendix sent by expedited courier should be deemed filed the day it is sent. For the European Union, Article 18 of the Working Procedures for Appellate Review (Working Procedures) makes clear that the "filing" of a submission is not a clerical formality, but an event of legal significance, because the very status of the participants to an appeal derives from the act of filing the required documents. For the European Union, the Working Procedures clearly envisage a filing being made in Geneva, under the supervision of the Secretariat, and being completed upon the receipt of the relevant documents by the Secretariat. The European Union also stated that, while it understands that having to transmit an HSBI appendix to Geneva poses certain practical challenges, such challenges are not unique to the United States. The European Union urged that any measures taken to address the United States' concerns should be even-handed, and that it trusts the Appellate Body to do so by setting deadlines such that both participants have adequate time to duly file any HSBI appendices.

7. The United States indicated that it did not favour Canada's request to allow note-taking on a computer with an attached printer. The United States considered that permitting voluminous reproduction of BCI with relative ease increases the risk of disclosure. According to the United States, the relative difficulty of copying large amounts of information, rather than more limited notes to summarize information, is an appropriate feature of the proposed procedures. The United States added that extensive notes on the facts seem particularly unnecessary in the context of this appeal, given that the purpose of access to BCI at this stage is to help participants understand the legal arguments, and not to address the information as such.

8. The Division hereby makes the following ruling having considered the arguments made by the European Union in support of its request, and the comments received from the participants and third parties in this appeal:

9. In this appeal, the European Union proposes, and the United States supports, the adoption of additional procedures that largely track the additional procedures to protect BCI and HSBI recently adopted by the Appellate Body in the appeal in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*. We recall that the Appellate Body adopted similar additional procedures to protect the confidentiality of sensitive information in the appellate proceedings in the underlying disputes in both *EC and certain member States – Large Civil Aircraft* and *US – Large Civil Aircraft (2nd complaint)*. We further note that the participants, and most of the third participants, have been the same in all of the proceedings in these disputes. In the procedural ruling adopted in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Appellate Body explained the considerations relevant to a decision on whether to provide additional protection to certain sensitive information. We believe that those considerations are also relevant to our evaluation of the request

¹ The European Union indicated that the following conditions be observed: (i) the computer is provided by the WTO and remains permanently in the designated reading room; (ii) the settings and configuration of the computer make it technologically impossible to transfer saved files to any external storage or transfer device; (iii) all USB and other transfer ports are permanently disabled, the computer is disconnected from all wired networks, and has no wireless capacities, including Wi-Fi and Bluetooth; (iv) the computer is connected to a printer through a mechanism that does not permit connection of any external storage or transfer device (e.g. the computer should not be connected to the printer through a USB port); (v) the printer has no data storage or scanning facilities; and (vi) the computer is monitored by staff of the WTO Secretariat after each use, to ensure that no files remain on it.

made by the European Union, and supported by the United States, in this appeal, and we briefly recall them before addressing the specific points raised in the responses to the European Union's request.

10. The confidentiality requirements set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct)² are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect the confidentiality of that information. The adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures in a manner that ensures that the proceedings are conducted with fairness and in an orderly manner. To the extent that the arrangements elaborate on the confidentiality requirements of the DSU, the adoption of such arrangements in an "appropriate procedure" must conform to the requirement in Rule 16(1) of the Working Procedures, that any additional "appropriate procedure" not be inconsistent with the DSU, the other covered agreements, and the Working Procedures themselves.

11. The determination of whether particular arrangements are appropriate in a given case essentially involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU, the other covered agreements, or the Working Procedures. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. Participants requesting particularized arrangements have the burden of justifying that such arrangements are necessary in a given case adequately to protect certain information, taking into account the rights and duties recognized in the DSU, the other covered agreements, and the Working Procedures. This burden of justification will increase the more the proposed arrangements affect the exercise by the Appellate Body of its adjudicative duties, the exercise by the participants of their rights to due process and to have the dispute adjudicated, the exercise by the third participants of their participatory rights, and the rights and systemic interests of the WTO membership at large.

12. Additional confidentiality protection implicates the authority of the Appellate Body, and the rights and duties of the participants, third participants, and the membership at large. In prior instances where similar additional procedures were adopted, the Appellate Body considered that it struck an appropriate balance between the risks associated with the disclosure of sensitive information, on the one hand, and the adjudicative authority of the Appellate Body and the rights and duties of the participants, third participants, and the WTO membership at large, on the other hand. Similar considerations are relevant in these appellate proceedings. The European Union, the United States, and the third parties concur that the additional procedures adopted in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* provide an appropriate framework and ask that we adopt a similar framework in this appeal.

13. We recall that it is for the adjudicator to decide whether certain information calls for additional protection of confidentiality. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection. We also note, however, that neither participant has appealed the Panel's decisions regarding the protection of BCI and HSBI, and that there are also issues of practicality to consider. We will therefore proceed on the basis of how the information was treated before the Panel. Nevertheless, we do not exclude revisiting whether a particular piece of information meets the objective criteria justifying additional protection, or the particular degree thereof, should a dispute on the classification of that information arise before us, or should we consider that we need to refer to that information in our report if this is necessary to give a sufficient exposition of our reasoning and findings.

14. Having reaffirmed the relevant considerations that guide our decision, we turn to the modifications requested by the United States and Canada to the additional procedures proposed by the European Union. With regard to the United States' proposal that an HSBI appendix sent by expedited courier should be deemed filed the day it is sent, we recognize the burden undertaken by

² The Rules of Conduct, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the Working Procedures for Appellate Review (WT/AB/WP/6) as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

the participants in this case to deliver by physical means a part of their submission that cannot be delivered electronically together with their full submission on the date that submission is due. At the same time, participants must bear the responsibility for ensuring that their submissions are filed by the specified deadlines with the Appellate Body Secretariat. For this reason, the Division will endeavour to set filing dates for the participants such that the filing date for the HSBI appendix will be set three days following the deadline for the remainder of the submission itself.

15. In addition, we agree to Canada's proposal that third participant BCI-approved persons be allowed to take notes on a stand-alone computer and printer in the designated reading room. While we carefully considered the concerns raised by the European Union and the United States regarding the need to ensure adequate protection of BCI, we have determined, in consultations with WTO technical staff, that such guarantees can be assured while rendering the process less burdensome for third participant BCI-approved persons. Moreover, we do not see that allowing for the typing, as opposed to the handwriting, of notes will fundamentally alter the amount and nature of information that third participant BCI-approved persons will be able to record while in the designated reading room. We have therefore provided that a stand-alone computer and printer, which will permit no external network or other access, will be made available, and we have reflected this change in the additional procedures below.

16. Finally, we note that we will make every effort, as the Appellate Body did in prior proceedings where similar additional procedures were requested and adopted, to draft our report without including sensitive information. The additional procedures that we adopt below foresee that the participants will be provided in advance with a copy of the Appellate Body report intended for circulation to WTO Members and will have an opportunity to request the removal of any sensitive information that is inadvertently included in the report. If we do consider it necessary to include sensitive information in the reasoning in our report, the participants will be given a timely opportunity to comment. We will provide further guidance at a later point in these proceedings as to the modalities and details of such a procedure.

17. For the reasons set out above, we have decided to provide additional confidentiality protection on the terms set out below. Accordingly, we adopt the following additional procedures for the purposes of this appeal:

Additional Procedures to Protect Sensitive Information

General

i. These additional procedures shall apply to information that was treated as business confidential information (BCI) or as highly sensitive business information (HSBI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. The additional procedures apply to written and oral submissions made in the appellate proceedings only to the extent that they incorporate information that was treated as BCI or HSBI in the Panel proceedings.

ii. To the extent that information on the record is submitted to the Appellate Body in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants on the proper treatment of this information, the Appellate Body shall decide after hearing their views.

iii. Each participant may at any time request that information that it has submitted and that was previously treated as BCI or HSBI no longer be treated as such.

iv. The participants and third participants shall file their submissions and executive summaries with the Appellate Body Secretariat in accordance with the Working Schedule drawn up by the Division for this appeal. Where a submission and/or an executive summary contains BCI or HSBI, redacted version(s) of the submission and/or the executive summary (that is, a version without BCI and HSBI) shall be filed simultaneously with the Appellate Body Secretariat. Should an executive summary submitted by a participant or third participant contain BCI or HSBI, the redacted version of the executive summary will be annexed in the addendum to the Appellate Body report. The redacted version shall be sufficient to permit a reasonable understanding of the substance of the relevant document. The Division may take appropriate action to ensure that this obligation is

satisfied. The participants and third participants shall also provide the Appellate Body Secretariat with an electronic version of all submissions, including the redacted versions. The transmittal of participants' submissions to each other and to the third participants, and the transmittal of third participants' submissions to the participants and to the other third participants, are further regulated in the provisions below, which apply *mutatis mutandis* to executive summaries of submissions.

Appellate Body Members and Appellate Body Secretariat staff

v. Only Appellate Body Members, and staff of the Appellate Body Secretariat who have been assigned by the Appellate Body to work on this appeal, may have access to the BCI and HSBI on the Panel record and in the written and oral submissions made in these appellate proceedings. Appellate Body Members and assigned Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed, to any person other than those identified in the preceding sentence or to approved persons of the participants and third participants. Appellate Body Members and assigned Appellate Body Secretariat staff are covered by the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct).³ As provided for in the Rules of Conduct, evidence of breach of these Rules may be submitted to the Appellate Body, which will take appropriate action.

vi. BCI shall be stored in locked cabinets when not in use.

vii. Appellate Body Members who are serving on the Division hearing this appeal may maintain a copy of all relevant documents containing BCI at their places of residence. Appellate Body Members who are not serving on the Division may maintain at their places of residence a copy of the BCI version of the Panel Report, a copy of the BCI version of the submissions made in these appellate proceedings, a copy of the BCI version of the transcripts of any oral hearings, any internal documents containing BCI, and, where necessary, copies of selected BCI exhibits from the Panel record. The documents and materials containing BCI kept by Appellate Body Members at their places of residence shall be stored in locked cabinets when not in use. Documents and materials containing BCI shall only be sent to Appellate Body Members by secure e-mail or courier.

viii. The participants shall provide printed copies of their submissions and other documents containing BCI that are intended for use by Appellate Body Members or assigned Appellate Body Secretariat staff on coloured paper and individually watermarked with "Appellate Body" and numbered consecutively ("Appellate Body No. 1", "Appellate Body No. 2", etc.).

ix. All HSBI shall be stored in a combination safe in a designated secure location on the premises of the Appellate Body Secretariat. Any computer in that room shall be a stand-alone computer, that is, a computer not connected to a network. Appellate Body Members and assigned Appellate Body Secretariat staff may view HSBI only in the designated secure location referred to above. HSBI shall not be removed from this location, except as provided for in paragraph x, or in the form of handwritten notes that may be used only on the Appellate Body Secretariat's premises and shall be destroyed once no longer used.

x. Subject to appropriate precautions, BCI and HSBI may be taken outside of the premises of the Appellate Body Secretariat, in hard copy and electronic form, for purposes of any oral hearings that may be held in connection with this appeal.

xi. Except as provided for in paragraph xii, all documents and electronic files containing BCI and HSBI shall be destroyed or deleted when the Appellate Body report in this appeal has been adopted by the DSB.

xii. The Appellate Body shall retain one hard copy and one electronic version of all documents containing BCI and HSBI as part of the appellate record. Documents and electronic media containing BCI shall be kept in sealed boxes within locked cabinets on the Appellate Body Secretariat's

³ The Rules of Conduct, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the Working Procedures for Appellate Review (WT/AB/WP/6) as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

premises. Documents and electronic media containing HSBI shall be placed in a sealed container that will be kept in a combination safe on the premises referred to above.

Appellate Body report

xiii. The Division will make every effort to draft an Appellate Body report that does not disclose BCI or HSBI by limiting itself to making statements or drawing conclusions that are based on BCI and HSBI. A copy of the Appellate Body report intended for circulation to WTO Members will be provided in advance to the participants, at a date and in a manner to be specified by the Division. The participants will be provided with an opportunity to request the removal of any BCI or HSBI that is inadvertently included in the report. The Division will also indicate to the participants if it has found it necessary to include in the Appellate Body report information that was treated by the Panel as BCI or HSBI and will provide the participants with an opportunity to comment. Comments on the inclusion of information previously treated as BCI or HSBI and requests for removal of BCI or HSBI inadvertently included in the report shall be filed with the Appellate Body Secretariat within a time period to be specified by the Division. No other comments or submissions shall be accepted. In coming to a decision on the need to include BCI or HSBI to ensure that the final report is understandable, the Division will strike an appropriate balance between the rights of the WTO membership at large to obtain a report that gives a sufficient exposition of its reasoning and findings, on the one hand, and the legitimate concerns of the participants to protect sensitive information, on the other hand.

Participants

xiv. The participants shall provide lists of persons who are "BCI-Approved Persons" and who are "HSBI-Approved Persons". These lists shall be provided to the Appellate Body Secretariat by 5 p.m. on Wednesday, 26 July 2017, and shall be served on the other participant and the third participants. Any objection to the designation of an outside advisor as a BCI-Approved Person or HSBI-Approved Person must be filed with the Appellate Body Secretariat and served on the other participant by 5 p.m. on Friday, 28 July 2017. The participants may submit amendments to their list of BCI-Approved Persons or HSBI-Approved Persons by filing an amended list with the Appellate Body Secretariat and serving it on the other participant and the third participants. A participant may object to the designation on an amended list of an outside advisor by another participant. Any objection must be filed with the Appellate Body Secretariat within two days and simultaneously served on the other participant and the third participants. The Division will reject a request for designation of an outside advisor as a BCI-Approved Person or an HSBI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles reflected in the Rules of Conduct and the illustrative list in Annex 2 thereto. BCI-Approved Persons and HSBI-Approved Persons shall not disclose BCI or HSBI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons and HSBI-Approved Persons, and Third Participant BCI-Approved Persons.

xv. Any participant referring in its submissions to any BCI or HSBI shall clearly identify the information as such in those submissions. Each participant shall simultaneously provide a redacted version of its submissions to the other participant. Submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the other participant. The other participant shall have two days to object to the inclusion of any BCI. If there are objections, the Division shall resolve the matter, and instruct, as appropriate, the relevant participant to transmit a correctly redacted version of its submission to the other participant and the third participants, unless the participant concerned agrees to remove the information that was subject to the objection. The electronic copy of the unredacted version of the submission shall be corrected by the participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and the other participant; the Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission, as well as to replace the electronic copies. If there are no objections, the redacted version shall be transmitted the following day to the third participants. If a submission contains HSBI, the HSBI shall be included in an appendix. In that case, the version of the submission that includes the HSBI appendix shall be transmitted only to HSBI-Approved Persons. The HSBI appendix shall not be transmitted via e-mail, but solely on a CD-ROM, labelled with an indication that it contains the HSBI appendix.

Third participants

xvi. Third participants may designate up to eight individuals as "Third Participant BCI-Approved Persons". For this purpose, each third participant shall provide a list of Third Participant BCI-Approved Persons to the Appellate Body Secretariat by 5 p.m. on Wednesday, 26 July 2017. A copy of the list of Third Participant BCI-Approved Persons shall be served on each participant and each other third participant. The participants may object to the designation of an outside advisor as a Third Participant BCI-Approved Person. Objections must be filed with the Appellate Body Secretariat by 5 p.m. on Friday, 28 July 2017. Third participants may submit amendments to their lists of BCI-Approved Persons by filing an amended list to the Appellate Body Secretariat and serving it on the participants and the other third participants. The participants may object to the designation in an amended list of an outside advisor by a third participant. Any objections must be filed with the Appellate Body Secretariat within two days and simultaneously served on the other participant and the third participants. The Division will reject the designation of an outside advisor as a Third Participant BCI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles in the Rules of Conduct and the illustrative list in Annex 2 thereto. Third Participant BCI-Approved Persons shall not disclose BCI, or allow it to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, BCI-Approved Persons, and other Third Participant BCI-Approved Persons.

xvii. The BCI version of all participants' submissions shall be transmitted to the third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room located on the premises of the WTO. Third Participant BCI-Approved Persons shall be allowed to view in the designated reading room the BCI version of the Panel Report and the BCI version of the submissions filed in these appellate proceedings. Third Participant BCI-Approved Persons shall not bring into that room any electronic recording or transmitting devices, nor shall they remove copies of the BCI version of the Panel Report or the BCI version of the submissions from that room. Upon request, each third participant shall be provided with one copy of the Panel Report as circulated to WTO Members and of the redacted version of the submissions for use in the reading room. Such copies will be printed on coloured, individually watermarked paper. Third Participant BCI-Approved Persons may take handwritten notes on the provided copies of the circulated Panel Report and redacted version of the submissions and they may take these copies with them. Third Participant BCI-Approved Persons will also be supplied with additional paper on which they may take handwritten notes, and a stand-alone computer and printer, that is, a computer and printer connected only to each other, and not connected to any network, will be made available on which to type and print out notes. All documents that may reflect handwritten or printed notes shall be supplied on coloured, individually watermarked paper; shall bear the names of the Third Participant BCI-Approved Persons; state that "This document is not to be copied"; and the cover page of each of the documents, and any other individual pages, shall state that any BCI added to the document shall only be discussed or shared with other Third Participant BCI-Approved Persons. The content of any handwritten or printed notes shall not be incorporated, electronically or in handwritten form, into any other copy of the Panel Report or of the submissions. All documents that may reflect handwritten or printed notes taken by the Third Participant BCI-Approved Persons in the reading room shall be locked in a secure container when not in use, and must be returned to the Appellate Body Secretariat at the completion of the final session of the oral hearing held in this appeal.

xviii. Each Third Participant BCI-Approved Person viewing the BCI version of the Panel Report and submissions in the designated reading room shall complete and sign a log. The Appellate Body Secretariat shall keep such log as part of the record of the appeal.

xix. Each third participant shall transmit its submission to the Appellate Body Secretariat and the participants. It shall also be transmitted to the other third participants by providing a copy to the Appellate Body Secretariat. Third participants are requested not to transmit their submission directly to other third participants, regardless of whether the submission contains BCI or not. If a third participant wishes to refer in its third participant's submission to any BCI, it shall clearly identify such information. A third participant referring to BCI shall also simultaneously provide the participants with a redacted version of its submission. Third participants' submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the participants. The participants shall have two days to object to the inclusion of any BCI in a third participant's submission. If there are no objections, the submission or the redacted submission, as the case may be, shall be transmitted the following day to the other third participants. If there are

objections, the Division shall resolve the matter, and instruct, as appropriate, the relevant third participant to transmit a correctly redacted version of its submission to each of the participants and the other third participants, unless the third participant concerned agrees to remove the information that was subject to the objection. The electronic copy of the unredacted version of the submission shall be corrected by the third participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and the participants. The Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission as well as to replace the electronic copies.

Oral hearing

xx. Appropriate procedures shall be adopted to protect BCI and HSBI from unauthorized disclosure at any session of the oral hearing held in this appeal.

ANNEX D-2

PROCEDURAL RULING OF 9 AUGUST 2017

1. On 7 August 2017, the Appellate Body received a communication from the United States requesting that the Division selected to hear this appeal extend the deadline, from 7 August 2017 to 9 August 2017, for the United States to object to the inclusion of any business confidential information (BCI) in the European Union's Appellant's Submission. The United States indicated that, due to the volume of the European Union's submission, it needed two additional days in order to undertake the necessary review regarding BCI.
2. On 8 August 2017, the Chair of the Appellate Body, on behalf of the Division hearing this appeal, invited the European Union and the third participants to provide any comments on the United States' request by 12:00 noon on Wednesday, 9 August 2017. The European Union responded that it had no objections to the request by the United States.
3. Having considered the request by the United States, the Division decides to grant the request of the United States extending by two days the time-period for filing an objection to the inclusion of any BCI, as set out in paragraph xv of the Additional Procedures to Protect Sensitive Information (Additional Procedures), adopted in our Procedural Ruling of 21 July 2017. We note, in particular, that the European Union's Appellant's Submission is over 400 pages, and that reviewing a submission of that length for its treatment of BCI may accordingly be a time-consuming task. We also take note that the United States has itself stated in its request that it could complete the task if it were provided two additional days, and that the European Union has raised no objections to the United States' request. The United States therefore has until 5 p.m. today, Wednesday, 9 August 2017, in which to indicate whether it has any objections to the inclusion of BCI in the European Union's Appellant's Submission. In the interest of fairness, we also extend by two days the time-period set out in paragraph xv of the Additional Procedures for the European Union to file an objection to the inclusion of any BCI in the United States' Other Appellant's Submission, which is due to be filed on 10 August 2017. Finally, the Division urges the participants, in circumstances where they believe they cannot adhere to a deadline, to submit any requests for extensions in a timely manner so as to ensure fairness and orderly procedure in the conduct of appeals. In this regard, we note that the request by the United States was filed very shortly before the expiry of the deadline.

ANNEX D-3

PROCEDURAL RULING OF 30 AUGUST 2017

1. On 14 August 2017, the Appellate Body received a request from the United States to extend the deadline to file the HSBI Appendix to its Other Appellant's Submission from 14 August 2017 to 15 August 2017. The United States explained that on 10 August 2017 it had commenced transfer of the HSBI Appendix to the Appellate Body and European Union via expedited international courier service, with the expectation that it would arrive at the United States' Permanent Mission in Geneva by the deadline of Monday, 14 August 2017. As the shipment had not arrived before the time of expiry of the deadline, the United States sought this extension to complete the transfer of the HSBI Appendix. On 15 August 2017, the United States submitted the HSBI Appendix to the Appellate Body.
2. On 17 August 2017, the Chair of the Appellate Body, on behalf of the Division hearing this appeal, invited the European Union and the third participants to comment on whether the Division should accept the late-filed HSBI Appendix of the United States. On 21 August 2017, the European Union responded that the United States request did not place before the Appellate Body all the information that the Appellate Body would require in order to make a procedural ruling on the matter, and that it would welcome additional explanation and evidence, including proof of the date and time of shipment of the HSBI Appendix.
3. On 24 August 2017, the Division requested that the United States provide relevant documentation relating to the time and date on which the HSBI Appendix was delivered to the courier service for transmission to Geneva. On 28 August 2017, the United States responded by providing a printout of the tracking information for shipment of the HSBI Appendix, together with additional details regarding the shipment. The United States explained that physical delivery of the package to the courier service occurred on 10 August 2017, and that, although the package arrived in Switzerland early in the morning on 14 August 2017, which permitted delivery that same day, unexplained difficulties on the part of the courier service delayed delivery until the following day. The United States further maintained that, while it was unfortunate that the package arrived a day later than expected, a decision to grant its extension request would not result in prejudice.
4. Having considered the request by the United States, the additional information supporting the request, as well as the comments by the European Union, the Division decides to accept the late-filed HSBI Appendix to the United States' Other Appellant's Submission. The Division reminds the participants of the importance of respecting deadlines in these proceedings, and wishes to underscore that it is ultimately the responsibility of each participant to organise the delivery of documents so as to ensure compliance with such deadlines.

ANNEX D-4

PROCEDURAL RULING OF 12 OCTOBER 2017

1. On 11 October 2017, the Appellate Body received a communication from the European Union requesting the Division hearing this appeal to extend, from Thursday, 12 October 2017 to Friday, 13 October 2017, the deadline for the European Union to object to the inclusion of any business confidential information (BCI) in the United States' appellee's submission. Both the European Union and the United States filed their appellee's submissions on Tuesday, 10 October 2017. The European Union indicated that, due to the volume of the United States' submission, it needed one additional day in order to complete the necessary review regarding BCI.
2. On 11 October 2017, the Division invited the United States and the third participants to provide any comments on the European Union's request by 12 noon on Thursday, 12 October 2017. The United States responded that it would have no objection to an extension of the deadline for both participants to object to the inclusion of any BCI in the other participant's appellee's submission. Brazil, China, and Russia also stated that they do not object to the extension request, but Brazil and China indicated that third participants should be granted an extension of the deadline for their submissions.
3. Having considered the request by the European Union and the comments from the United States, Brazil, China, and Russia, the Division decides to grant the request of the European Union, extending by one day the time-period for filing an objection to the inclusion of any BCI, as set out in paragraph xv of the Additional Procedures to Protect Sensitive Information (Additional Procedures), adopted in the Procedural Ruling of 21 July 2017. In the interest of fairness, we also extend by one day the time-period for the United States to file an objection to the inclusion of any BCI in the European Union's appellee's submission. Therefore, the European Union and the United States each have until 5 p.m. tomorrow, Friday, 13 October 2017, to indicate any objections to the inclusion of BCI in the other participant's appellee's submission.
4. Due to the foregoing extension, and absent any objections by participants to the inclusion of BCI in the other participant's appellee's submission, paragraph xv of the Additional Procedures prescribes that third participants will now receive the redacted versions of participants' appellee's submissions on Monday, 16 October 2017. Accordingly, the Division also decides to extend the deadline for the filing of third participants' submissions and executive summaries (and any BCI-redacted versions of such documents), and notifications by third participants under Rule 24(2) of the Working Procedures for Appellate Review, until 5 p.m. on Monday, 30 October 2017.

ANNEX D-5

PROCEDURAL RULING OF 18 OCTOBER 2017

1. On 13 October 2017, the Appellate Body received a communication from the European Union, in which the European Union objected to the inclusion of certain highly sensitive business information (HSBI) in the HSBI-redacted version of the United States' appellee's submission, without proper designation of that information as HSBI. On 13 October 2017, the Division invited the United States to comment on the European Union's request. On 17 October 2017, the United States responded that the relevant information should be treated as HSBI, and requested that it be allowed to submit replacement pages for the BCI versions (HSBI-redacted) and non-BCI versions (BCI- and HSBI-redacted) of its appellee's submission, and a corrected HSBI Appendix.
2. Having considered the request by the European Union and the comments from the United States, the Division decides to grant the United States until 5 p.m. on Monday, 23 October 2017 to submit the replacement pages for the BCI versions (HSBI-redacted) and non-BCI versions (BCI- and HSBI-redacted) of its appellee's submission, and until 5 p.m. on Thursday, 26 October 2017 to submit its corrected HSBI Appendix.
3. Due to the foregoing extensions, it is expected that third participants will now receive the redacted versions of participants' appellee's submissions on Tuesday, 24 October 2017. Accordingly, the Division also decides to extend the deadline for the filing of third participants' submissions and executive summaries (and any BCI-redacted versions of such documents), and notifications by third participants under Rule 24(2) of the Working Procedures for Appellate Review, until 5 p.m. on Tuesday, 7 November 2017. Third participants will shortly be sent a revised schedule for reviewing BCI versions of the Panel Report and the participants' submissions.

ANNEX D-6

PROCEDURAL RULING OF 5 APRIL 2018

1. By letter dated 12 March 2018, the Appellate Body Division hearing the above appeal invited the participants, the European Union and the United States, to clarify whether they request the oral hearing in this appeal to be open to public observation, and to propose specific modalities in this respect, if they so wish, by 5 p.m. Geneva time on Wednesday, 21 March 2018. We also invited the third participants to provide comments on any request the participants might file by 12 noon Geneva time on Friday, 23 March 2018.

2. On Wednesday, 21 March 2018, we received a joint communication from the European Union and the United States. In their letter, they propose additional procedures to protect business confidential information (BCI) and highly sensitive business information (HSBI) during the oral hearing in this appeal and request that we allow observation by the public of the oral hearing.

3. Specifically, the participants propose that we adopt the same additional procedures that the Appellate Body adopted in *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States*, pursuant to the procedural ruling in that appeal dated 19 April 2017. They state that the reasons for their request and proposal in the present appeal are substantially the same as the reasons that were given in their joint letter of 11 April 2017 in the appeal in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, which are summarized as follows:

- Only BCI-Approved Persons are authorized to access BCI, and the participants and third participants have designated a limited number of persons as BCI-Approved. Only HSBI-Approved Persons are authorized to access HSBI, and the participants have designated a limited number of persons as HSBI-Approved. Third participants may not designate HSBI-Approved Persons.
- As regards BCI that might be uttered during a hearing, the participants recall that each of them is precluded from disclosing information designated as BCI by the other to non-BCI-Approved Persons. Similarly, as regards HSBI that might be uttered during a hearing, the participants recall that each of them is precluded from disclosing information designated as HSBI by the other to non-HSBI-Approved Persons. Third participants are precluded from disclosing BCI to non-BCI-Approved Persons.
- Accordingly, the participants consider that, as provided for in the Additional Procedures for the Protection of Sensitive Information set out in the Procedural Ruling dated 21 July 2017, the Division can and should adopt a further Procedural Ruling pursuant to Rule 16(1) of the Working Procedures for Appellate Review¹ (Working Procedures) regulating these matters for the oral hearing in this appeal. This will involve striking a balance between the systemic interest in protecting sensitive information and the systemic interest in transparency, similar to that struck in the Procedural Ruling dated 21 July 2017 in this appeal and the Procedural Ruling dated 19 April 2017 in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*.
- According to the participants, there appear to be two options with respect to HSBI. The first option is that if, during the hearing, one of the participants or a Member of the Division wishes to refer to HSBI, the hearing would be momentarily suspended and the third participants, as well as members of the participants' delegations who are not HSBI-Approved, would be asked to leave the room temporarily. The second option is that the hearing be divided into two parts. The first part would deal with all matters to the greatest extent possible without uttering HSBI. The second part would complete the discussion in a closed segment, to the extent necessary, by addressing HSBI. While acknowledging that neither of these options is ideal in all respects, on balance, the participants prefer the second option. The participants believe that this would

¹ WT/AB/WP/6, 16 August 2010.

limit unnecessary disruption during the hearing. The participants also believe that careful conduct of the first part of the hearing (such as only participants and the Members of the Division having a document before them and discussing it without uttering HSBI) could obviate the need for a second HSBI part of the hearing. In the event that a second closed segment of the hearing would be necessary, it could be organized to take place at the end of each day. The participants note that the Appellate Body followed this second approach during the proceedings in the original dispute and in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, and that it appears to have been effective.

- The participants further suggest that the Appellate Body establish rules regarding a public segment of the hearing. The participants recall that, to date, a participant's or third participant's oral statement and oral answers to questions by the Appellate Body have been made in a public segment only if the participant or third participant so agreed. In the absence of such agreement, it has proved operationally possible and effective to divide the hearing into an open segment (for Members who wish to make their statements public) and a closed segment (for Members who do not wish to make their statements public). The participants are of the view that as much of the hearing as possible should be open to the public. However, they recognize that, in light of the volume of BCI in this dispute and its centrality to many of the issues, it may not be feasible to separate the Appellate Body's questions and the participants' answers into public and BCI segments in the same way as the oral statements. For this reason, the European Union and the United States propose that the same approach be adopted in this appeal that was adopted in the appeal in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*.
- Thus, with regard to the public segment of the hearing, the participants propose that the participants and third participants (subject to their agreement) deliver opening statements that do not contain BCI or HSBI. These would be video-recorded, reviewed if necessary by the participants for confirmation that neither BCI nor HSBI has been uttered, and then transmitted to the public at a later date. The participants also propose that such an approach could be used for the closing statements, or at least that part of them that does not refer to BCI or HSBI.

4. Canada and China submitted comments on the participants' request. Canada expressed its agreement with the joint proposal by the European Union and the United States that the Appellate Body allow observation by the public of the oral hearing. Canada supports increased transparency in WTO dispute settlement proceedings as a means to reinforce the legitimacy of the process. At the same time, Canada acknowledged that suitable protection for BCI is required. China submitted that this appeal raises a number of interpretative issues of systematic importance and that those issues deserve full participation of third participants. In this respect, China noted that Rule 27(3) of the Working Procedures recognizes and protects the rights and abilities of third participants to participate in appeal proceedings, including by responding to questions posed by the Division. China requested that its oral statement and its responses to questions at the oral hearing be treated as confidential. No comments were received from Australia, Brazil, Japan, Korea, or Russia.

5. The request of the participants raises issues similar to those that were before the Appellate Body in *EC and certain member States – Large Civil Aircraft, US – Large Civil Aircraft (2nd complaint)*, and *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*. In this appeal, we have already adopted additional procedures for the protection of sensitive information. Given the amount of information that was treated as BCI and HSBI during the Panel proceedings, we believe that it would be difficult to conduct the oral hearing in these appellate proceedings without referring to sensitive information. In carrying out our adjudicative function, it will be necessary to conduct the oral hearing in a manner that allows us to explore issues that involve sensitive information, while ensuring that this sensitive information is not improperly disclosed.

6. Pursuant to our Procedural Ruling of 21 July 2017, the participants have provided a list of persons who are authorized to have access to BCI and a list with a more limited number of persons who are authorized to have access to HSBI. These limitations on the participants' representatives who would be authorized to discuss BCI and HSBI during the oral hearing are incidental to the participants' request for additional protection for sensitive information. Therefore, only members of the participants' delegations who are BCI-Approved Persons are invited to attend the segments of the oral hearing in which BCI will be discussed, and only members of their delegations who are

HSBI-Approved Persons are invited to attend segments of the oral hearing where HSBI will be discussed.

7. Moreover, under paragraph 17(xvi) of the Procedural Ruling of 21 July 2017, the third participants have been allowed to designate up to eight individuals as Third Participant BCI-Approved Persons. We consider this to be sufficient to allow the third participants to be represented properly at the oral hearing. In view of the need to provide additional protection to BCI, only Third Participant BCI-Approved Persons are invited to attend segments of the oral hearing where BCI may be discussed, including questions and answers.

8. Accordingly, and for reasons similar to those adopted by the Appellate Body in *EC and certain member States – Large Civil Aircraft, US – Large Civil Aircraft (2nd complaint)*, and *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, we have decided to provide additional confidentiality protection for certain sensitive information during the oral hearing to be held in this appeal on the terms set out below. We also authorize the public observation of certain segments of the oral hearing as further indicated below.

Request for additional procedures to protect sensitive information during the oral hearing

9. We are of the view that the additional procedures adopted in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* provided adequate protection for sensitive information, while allowing the Appellate Body to perform its adjudicative function and the third participants to exercise their rights under the Understanding on Rules and Procedures Governing the Settlement of Disputes and the Working Procedures. The participants share this view and request us to adopt similar procedures in these proceedings. Thus, we consider it appropriate to adopt the following arrangements to protect sensitive information during the oral hearing:

- The participants have indicated that they intend to abstain from mentioning BCI or HSBI in their opening statements, and suggest that the third participants may also agree not to mention BCI in their opening statements. In such circumstances, it is unlikely that sensitive information will be uttered in the segments of the oral hearing dedicated to the delivery of the opening statements.
- Accordingly, all members of the participants' and third participants' delegations (including non-BCI Approved Persons) may attend this initial segment of the oral hearing.
- Similarly, to the extent that it is confirmed by the participants, and the third participants also indicate, that no sensitive information will be referred to in the closing statements, all members of the participants' and third participants' delegations may attend this final segment of the oral hearing.
- In accordance with paragraph 17(xiv) and (xvi) of our Procedural Ruling of 21 July 2017, the participants and third participants have each designated BCI-Approved Persons, and the participants have designated HSBI-Approved Persons.
- Only members of the participants' and third participants' delegations who have been authorized to have access to BCI are invited to attend the segments of the oral hearing dedicated to questions and answers.
- Only HSBI-Approved Persons of the participants are invited to attend segments of the oral hearing in which HSBI will be discussed.
- The third participants will have access to the BCI versions of the submissions filed in this appeal and to the BCI version of the Panel Report in the hearing room during the BCI segments. The third participants will be provided with a single, individually watermarked copy of these documents. Access to these documents will be limited to Third Participant BCI-Approved Persons. These documents may not be removed from the hearing room.

10. The participants have proposed two options for addressing HSBI during the oral hearing. The first involves interrupting the BCI segments of the oral hearing each time reference will be made to HSBI; the second involves having dedicated segments of the hearing to discuss HSBI. We believe it

is important that any additional procedures to protect sensitive information should interfere as little as possible with the regular conduct of the oral hearing and allow the Division to structure its questioning by topic. Therefore, to the extent possible, we prefer to focus on HSBI in dedicated segments in order to avoid interrupting the regular flow of the hearing. It may be, however, that the full exploration of an issue will not allow for deferral of the discussion of HSBI. If such circumstance arises, we may decide to interrupt the BCI segment of the hearing to discuss HSBI with the HSBI-Approved Persons.

Request for public observation of the oral hearing

11. Particular issues arise in this appeal, as they did in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, in relation to the public observation of the oral hearing because of the need to avoid the disclosure of BCI and HSBI. We believe that the additional procedures adopted by the Appellate Body in *EC and certain member States – Large Civil Aircraft, US – Large Civil Aircraft (2nd complaint)*, and *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* provided an appropriate means to allow public observation of the hearing, while protecting sensitive information and safeguarding the Appellate Body's adjudicative function and the interests of the third participants.

12. Therefore, and subject to the qualification in paragraph 13 below, we authorize public observation of only the delivery of the opening statements. We will authorize public observation of the closing statements upon indication from the participants and third participants that their closing statements will not include any reference to sensitive information.

13. We authorize observation by the public of the opening statements of only those third participants who will have indicated no objection to such observation. The confidentiality of the closing statements by those third participants that do not wish to make their statements public will be preserved.

14. The participants have proposed that public observation take place by making a video-recording of the relevant segments of the oral hearing and showing it to the public only after the participants have had an opportunity to review the video-recording for any inadvertent utterance of sensitive information. A similar procedure was used in *EC and certain member States – Large Civil Aircraft, US – Large Civil Aircraft (2nd complaint)*, and *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*. We agree with the participants that deferred transmission to the public by video-recording will minimize the risk of inadvertent disclosure of sensitive information, and we will give the participants an opportunity to review the video-recording for this purpose before it is shown to the public.

15. For the reasons set out above, we adopt the following additional procedures for the conduct of all sessions of the oral hearing to be held in this appeal:

Additional Procedures on the Conduct of the Oral Hearing

- i. These Additional Procedures shall apply to all sessions of the oral hearing to be held in this appeal and, in particular, to any information that is referred to during the course of the hearing that was treated as BCI or as HSBI in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. These Additional Procedures complement the Additional Procedures to Protect Sensitive Information that we adopted in our Procedural Ruling of 21 July 2017.
- ii. To the extent that information on the record is presented at the hearing in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants as to the proper treatment and the degree of confidentiality of this information, the Appellate Body shall decide the matter after hearing the views of the participants.
- iii. Appellate Body Members, Secretariat staff assigned by the Appellate Body to work on this appeal, and interpreters and court reporters retained for this appeal may be present throughout the hearing, including segments dedicated to the discussion of BCI and HSBI.

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- iv. BCI shall be disclosed during the oral hearing only to persons indicated in paragraph 15(iii) above, BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons.²
 - v. HSBI shall be disclosed during the oral hearing only to the persons indicated in paragraph 15(iii) above and to HSBI-Approved Persons of the participants.³
 - vi. The hearing segment dedicated to the opening statements of the participants and third participants shall be open to all members of the delegations of the participants and third participants. The participants and third participants shall abstain from referring to BCI or HSBI in their opening statements.
 - vii. In order to protect BCI from unauthorized disclosure, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons are invited to attend the segments of the hearing dedicated to questions and answers.
 - viii. Segments of the hearing may be reserved for questioning on issues that may require reference to HSBI. In order to protect HSBI from unauthorized disclosure, only HSBI-Approved Persons of the participants are invited to attend these segments.
 - ix. To the extent that any participant or third participant indicates that it will make reference to BCI in its closing statement, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons will be invited to attend the closing segment of the hearing.
 - x. If necessary, the Appellate Body Division hearing this appeal may interrupt a BCI segment and hold a segment dedicated to HSBI.
 - xi. During the segments of the hearing dedicated to questions and answers, the BCI version of the Panel Report and the BCI versions of the submissions filed in this appeal, which will be printed and individually watermarked pursuant to paragraph 17(xvii) of our Procedural Ruling of 21 July 2017, shall be made available to each third participant. Only Third Participant BCI-Approved Persons will be allowed to consult these documents. The documents shall not be removed from the hearing room and shall be returned to the Appellate Body Secretariat at the end of each segment addressing BCI.
 - xii. The parts of the transcript of the oral hearing containing BCI and HSBI shall become part of the appellate record in this appeal and shall be kept in accordance with paragraph 17(vi), (vii), and (ix)-(xii) of our Procedural Ruling of 21 July 2017.

Public observation of the oral hearing

- xiii. The first segment of the oral hearing, which will consist of the opening statements by the participants and third participants, shall be open to public observation, subject to paragraph 15(xv) below. The final segment of the oral hearing, which will be reserved for closing statements, shall be open to public observation to the extent that the participants and third participants indicate that their closing statements will not refer to any sensitive information, subject to paragraph 15(xv) below.
- xiv. The segments open to public observation shall be video-recorded. Within two days of the completion of each session of the hearing, either participant may request to review the video-recording to verify that no BCI or HSBI has been included inadvertently or otherwise. Upon such request, staff of the Appellate Body Secretariat shall be present while the participants review the video-recording. If the video-recording contains BCI or HSBI, a redacted version of the video-recording shall be produced in which the BCI or HSBI has been deleted. In case of disagreement between the participants regarding the sensitive nature of any information

² BCI-Approved Persons and Third Participant BCI-Approved Persons are those persons designated as such under paragraph 17(xiv) and (xvi) of our Procedural Ruling of 21 July 2017.

³ HSBI-Approved Persons are those persons designated as such under paragraph 17(xiv) of our Procedural Ruling of 21 July 2017.

referred to during the opening or closing statements, the relevant information will not be subject to public observation.

- xv. The opening and closing statements of third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation. Any third participant that has not already done so may request that its oral statements remain confidential and not be subject to public observation. For the first hearing, such requests must be received by the Appellate Body Secretariat no later than 5 p.m. Geneva time on Wednesday, 11 April 2018.
 - xvi. Notice of the oral hearing will be provided to the general public through the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat. The video-recordings, or if applicable the redacted versions of the video-recordings, shall be screened to WTO delegates and members of the public who have registered to observe the oral hearing once the review process referred to in paragraph 15(xiv) above has, if requested, been completed. The time and location of the video-recording screening and details regarding the registration procedure shall be announced in due course.
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