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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

Request for the Establishment of a Panel

The following communication, dated 30 March 2012, from the delegation of the United States to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

1. On June 1, 2011, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in the dispute *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (DS316) ("*EC – Large Civil Aircraft*"). The DSB ruled that the following are specific subsidies within the meaning of Articles 1 and 2 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") that caused adverse effects to U.S. interests within the meaning of Articles 5(c) and 6.3(a), (b), and (c) of that Agreement:

- grants of launch aid/member State financing ("LA/MSF") by the European Union ("EU") member state governments of France, Germany, Spain, and the United Kingdom to Airbus for the A300, A310, A320, A330, A340, A330-200, A340-500/600, and A380;
- the provision of the Mühlenberger Loch site and the lengthened Bremen Airport Runway;
- grants by authorities in Germany and Spain for the construction of manufacturing and assembly facilities in Nordenham, Germany, and Sevilla, La Rinconada, Toledo, Puerto de Santa Maria, and Puerto Real, Spain, and by the government of Andalusia and Castilla-La Mancha to Airbus in Puerto Real, Sevilla, and Illescas (Toledo);
- the 1989 acquisition by Kreditanstalt für Wiederaufbau ("KfW") of a 20 percent equity interest in Deutsche Airbus and the 1992 transfer by KfW of its 100 percent equity interest in Deutsche Airbus to Messerschmitt-Bölkow-Blohm GmbH ("MBB"); and
- the 1987, 1988, 1992, and 1994 equity infusions to Aérospatiale.

The DSB recommended that the EU and certain member States bring their WTO-inconsistent measures into compliance with their obligations under the SCM Agreement.

2. On December 1, 2011, the EU transmitted a document ("EU Notification") to the United States and the DSB claiming that the EU had brought its measures fully into conformity with the DSB recommendations and rulings. The EU notification included a list of 36 "appropriate steps" taken by the EU to bring its measures into conformity with the EU's WTO obligations. Upon review of the notification, the United States did not agree with the EU's position that the EU had fully complied with the DSB recommendations and rulings. Accordingly, the United States requested consultations on December 9, 2011.¹ The United States and the EU held consultations on January 13, 2012. The consultations failed to resolve the dispute.

3. Article 7.8 of the SCM Agreement provides that a Member found to maintain measures inconsistent with Article 5(c) and 6.3 of the SCM Agreement "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy." The United States considers that the EU has done neither of these with regard to the measures listed in paragraph 1. As there is "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB, the United States respectfully seeks recourse to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") in this matter.²

4. As explained in further detail below, the United States specifically requests that the Article 21.5 panel consider the following matters. With respect to the measures the EU has identified in the EU Notification as the measures taken to comply with the recommendations and rulings of the DSB for purposes of Article 21.5 of the DSU, the United States considers that (i) these measures are insufficient to remove the adverse effects or withdraw the subsidies, and (ii) certain of these measures taken to comply introduce new inconsistencies with the SCM Agreement. In addition, French, German, Spanish, and UK LA/MSF for the A350XWB (i) are measures closely related to the measures the EU has identified as taken to comply and to the EU measures the DSB found to be inconsistent with the SCM Agreement and (ii) replace or continue the LA/MSF for twin-aisle aircraft covered by the recommendations and rulings of the DSB. The United States considers these LA/MSF measures for the A350XWB to be inconsistent with the SCM Agreement.

5. The EU Notification, as well as other available information, indicates that, despite the recommendations and rulings of the DSB, the EU and certain member States have failed to withdraw subsidies with respect to the production and development of large civil aircraft, which subsidies continue to cause adverse effects, and have conferred new specific subsidies that cause adverse effects. These include:

- (a) forgiveness of outstanding obligations to the Governments of France, Germany, Spain, and the United Kingdom under LA/MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, A330/A340 Basic, A330-200, and A340-500/600;
- (b) termination of French, German, and Spanish LA/MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, A330/A340 Basic, A330-200, and A340-500/600 on non-commercial terms or in a manner that did not withdraw the subsidy;

¹ WT/DS316/19. The United States considered consultations could be useful, but made its request without prejudice to its view that consultations are not required under Article 21.5 of the DSU.

² See also item 1 "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding and Article 7 of the SCM Agreement," dated 12 January 2012, circulated in WT/DS316/21 ("The parties note that the United States considers that the situation described in Article 21.5 of the DSU exists").

- (c) French, German, Spanish, and UK LA/MSF for single-aisle large civil aircraft, including the A320 and its derivatives;
 - (d) French, German, Spanish, and UK LA/MSF for twin-aisle large civil aircraft, including the A300, A310, A330, A340, A350XWB, and their derivatives;
 - (e) French, German, Spanish, and UK LA/MSF for large civil aircraft in the very large category, including the A380 and its derivatives;
 - (f) the 1987, 1988, 1992, and 1994 French capital contributions into Aérospatiale;
 - (g) KfW's 1989 capital contribution into Deutsche Airbus GmbH and the 1992 transfer by KfW of its 100 percent equity interest in Deutsche Airbus to MBB;
 - (h) Spanish regional development grants to the EADS/CASA facilities at La Rinconada/San Pablo, Tablada, and Puerto de Santa Maria, Spain, and the Airbus España, S.L. facilities in Illescas and Puerto Real;
 - (i) German regional development grant for an A380-related facility of Airbus Deutschland GmbH in Nordenham, Germany;
 - (j) use by Airbus of the Mühlenberger Loch industrial site subject to the amended lease agreement between Airbus Deutschland GmbH and Projektierungsgesellschaft Finkenwerder mbH & Co. KG;
 - (k) subsequent share transactions and cash transactions and cash extractions involving subsidy recipients; and
 - (l) any amendments, revisions, implementing measures for, or measures related to the subsidies described above.
6. The United States understands the measures giving rise to these subsidies to include:
- (a) the measures identified in the EU Notification, including those identified in steps 1-36 therein;
 - (b) to the extent not covered by subparagraph (a), French, German, Spanish, and UK LA/MSF for single-aisle large civil aircraft, including the A320 and its derivatives;³
 - (c) to the extent not covered by subparagraph (a), French, German, Spanish, and UK LA/MSF for twin-aisle large civil aircraft, including the A300, A310, A330, A340, and A350XWB, and their derivatives;⁴

³ These include the measures cited in the panel and Appellate Body reports in *EC – Large Civil Aircraft*, WT/DS316/R (adopted as modified by the Appellate Body Report, WT/DS316/AB/R, 1 June 2011) ("*EC – Large Civil Aircraft (Panel)*") and *EC – Large Civil Aircraft*, WT/DS316/AB/R (adopted 1 June 2011) ("*EC – Large Civil Aircraft (AB)*").

⁴ These include the measures cited in the Panel and Appellate Body reports in *EC – Large Civil Aircraft (Panel)* and *EC – Large Civil Aircraft (AB)*, and also the Protocole A350 XWB referenced in Avenant no 1 à la convention "recherche dans le domaine de l'aéronautique" du programme d'investissements d'avenir, Spanish Royal Decree 1666/2009 and other measures setting out the conditions under which the French, German, Spanish, or UK government conferred LA/MSF.

- (d) to the extent not covered by subparagraph (a), French, German, Spanish, and UK LA/MSF for large civil aircraft in the very large category, including the A380;⁵ and
- (e) the other measures identified in *EC – Large Civil Aircraft (Panel)* and *EC – Large Civil Aircraft (AB)* through which the EU and certain member States conferred the subsidies that the DSB ruled to be inconsistent with the SCM Agreement.

7. The United States considers that the subsidies referenced in paragraph 5, subparagraphs (c) through (l) continue to exist and cause adverse effects because the steps identified in the EU Notification are insufficient to remove the adverse effects or withdraw the subsidies. The United States considers that the subsidies referenced in paragraph 5, subparagraphs (a), (b), (d), (j), (k) and (l) exist and cause adverse effects because the measures listed in paragraph 6, including the measures identified in steps 1 through 24 of the EU Notification and the measures implementing LA/MSF for the A350XWB, introduced new subsidies.

8. The subsidies listed in paragraph 5 also result in the following inconsistencies with the SCM Agreement:

- (a) French, German, Spanish and UK LA/MSF for the A350XWB and A380 are inconsistent with Article 3.1(a) because they are subsidies contingent in fact upon export performance;
- (b) French, German, Spanish and UK LA/MSF for the A350XWB and A380 are inconsistent with Article 3.1(b) because they are subsidies contingent upon the use of domestic over imported goods;
- (c) all of the subsidies listed in paragraph 5 are inconsistent with Articles 5(c), 6.3(a), 6.3(b), and 6.3(c) because they are specific subsidies within the meaning of Articles 1 and 2, and result in
 - (i) displacement and impedance of imports of large civil aircraft of the United States into the market of the EU within the meaning of Article 6.3(a);
 - (ii) displacement and impedance of exports of large civil aircraft of the United States into third-country markets, including Australia, China, India, Korea, Singapore, and the United Arab Emirates within the meaning of Article 6.3(b); and
 - (iii) significant lost sales in the world market for large civil aircraft within the meaning of Article 6.3(c).

Accordingly, the United States considers that the EU and certain member States did not withdraw the subsidies or remove their adverse effects for purposes of Article 7.8 of the SCM Agreement, and the EU and certain member States have failed to implement the DSB's recommendations and rulings. The United States requests that the DSB refer this matter to the original panel, if possible, as set out in Article 21.5 of the DSU.

⁵ These include the measures cited in the Panel and Appellate Body reports in *EC – Large Civil Aircraft (Panel)* and *EC – Large Civil Aircraft (AB)*