WORLD TRADE ORGANIZATION

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to F to the Report of the Panel to be found in document WT/DS353/RW.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

(amended 3 June 2013)

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The Panel shall conduct its internal deliberations in closed session. The parties to the dispute, and interested third parties, shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its meeting with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting with the parties. The Panel may open the third party session of its substantive meeting to the public, subject to appropriate procedures to be adopted by the Panel after consulting with the parties and third parties.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. The Panel shall adopt additional procedures for the protection of confidential information after consultation with the parties.

5. Before the substantive meeting of the Panel with the parties to the dispute, the parties shall transmit to the Panel written submissions, and subsequently written rebuttals, in which they present the facts of the case and their arguments, and their counter-arguments, respectively. Third parties may transmit to the Panel written submissions after the first written submissions of the parties have been submitted but before the rebuttals of the parties are submitted.

6. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of that session.

7. At its substantive meeting with the parties, the Panel will ask the European Union to present its case. Subsequently, and still at the same meeting, the Panel will ask the United States to present its point of view. The Panel thereafter will ask third parties to present their views at the separate session of the same meeting set aside for that purpose. The parties will then be allowed an opportunity for final statements, with the European Union presenting its statement first.

8. The Panel may at any time put questions to the parties and to the third parties, and ask them for explanations either in the course of the substantive meeting with the parties and/or third parties, or in writing. Written answers to questions shall be submitted by a date to be specified by the Panel.

9. The parties and third parties shall make all submissions in a WTO working language. Where the original language of an exhibit or of text quoted in submissions or responses to questions is not a WTO working language, the submitting party or third party shall submit a translation of the exhibit or text into a WTO working language at the same time as the original language version. The Panel may grant extensions of time for the translation of exhibits or text into a WTO working language upon a showing of good cause. Any objection as to the accuracy of a translation shall be raised in writing and at the earliest possible moment. Any objection shall be accompanied by an explanation of the grounds of objection and, if possible, an alternative translation.

10. A party to the dispute shall make available to the Panel and the other party a written version of its oral statement not later than the first working day following the end of the meeting of the Panel at which the oral statement was presented. Third parties to the dispute shall make available to the Panel, the parties and all other third parties a written version of their oral statements not later than the first working day following the end of the meeting of the Panel at which the oral statement was presented. Parties and third parties are encouraged to provide the Panel and other participants at the meeting with a provisional written version of their oral statements at the time that the statements are made.

11. In the interest of full transparency, oral presentations by a party shall be made in the presence of the other party. Moreover, each party's submissions, including responses to questions put by the Panel, shall be made available to the other party. Submissions by third parties, including responses to questions put by the Panel, shall also be made available to the parties. Third parties shall receive copies of the parties' first written submissions and rebuttals.

12. The parties shall provide the Secretariat with executive summaries of the claims and arguments contained in their written submissions and oral presentations. The executive summaries of the first written submissions and rebuttal written submissions shall be limited to 10 pages each, and the executive summaries of the oral statements at the meetings shall be limited to 5 pages each. Third parties are requested to provide the Panel with executive summaries of their written submissions and oral statements, of no more than 5 pages each. The executive summaries shall not serve in any way as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. Any executive summary shall be submitted to the Secretariat within ten days of the date on which the original submission is submitted or the original oral statement is submitted in written form. Paragraph 20 shall apply to the service of executive summaries.

13. The descriptive part of the Panel's report will include the procedural and factual background of the present dispute. Description of the main arguments of the parties and third parties will consist of the executive summaries referred to in paragraph 12, which will be attached to the report of the Panel as annexes.

14. Parties shall submit any requests for preliminary rulings not later than in their first written submissions to the Panel. Exceptions to this procedure may be granted upon a showing of good cause. The Panel shall establish a deadline for responses to any such requests after consultations with the parties.

15. Parties shall submit all factual evidence to the Panel no later than their first written submissions, other than evidence necessary for purposes of rebuttals and answers to questions. Exceptions to this procedure may be granted upon a showing of good cause. In such a case, the other party shall be accorded a period of time for comment on the newly submitted evidence, as the Panel deems appropriate.

16. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, parties are requested to number their exhibits sequentially throughout the course of the dispute. For example, exhibits submitted by the United States should be numbered USA-1, USA-2, etc., and exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission of the European Union, for example, was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

17. The parties and third parties may submit exhibits, and serve them on each other, as electronic files saved on CD-ROMs. If a party or third party chooses to submit exhibits as electronic files, it shall, in addition, submit three paper copies of such exhibits to the Secretariat, and one paper copy of such exhibits to each party and third party.

18. The parties and third parties to this proceeding have the right to determine the composition of their own delegations. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality

of the proceedings. Each party and third party shall provide a list of the members of its delegation before or at the beginning of the meeting with the Panel to the Secretary of the Panel, Mr. XX.

19. Following the issuance of the interim report, the parties shall submit any written requests to review precise aspects of the interim report within the deadlines established in the timetable. Following receipt of any written request for review, each party shall submit any written comments on the other party's written request for review within the deadlines established in the timetable. Such comments shall be strictly limited to commenting on the other party's written request for review.

20. The following procedures regarding service of documents shall apply:

a. Each party shall serve its submissions directly on the other party. Each party shall, in addition, serve its submissions to the substantive meeting of the panel on the third parties. Each third party shall serve its submissions on the parties and all other third parties. Each party and third party shall confirm in writing that copies have been served as required, at the time it provides each submission to the Panel.

b. The parties and third parties shall provide their submissions to the Secretariat by 5:30 p.m. (Geneva time) on the due dates established by the Panel, unless a different time is set by the Panel.

c. Each party and third party shall provide the Panel with eight (8) paper copies of all documents submitted to the Panel. Where a party or a third party submits exhibits as electronic files on CD-ROMs, it shall provide to the Panel four (4) CD-ROMS containing such files, as well as one (1) paper copies. All of these copies shall be filed with the Dispute Settlement Registrar, Mr. XX (office number xxxx).

d. Each party and third party shall also provide to the Panel an electronic version of all documents at the time that it provides the paper copies, in a format compatible with that used by the Secretariat, either on a CD-ROM or diskette or as an e-mail attachment. E-mail attachments shall be sent to the Dispute Settlement Registry (xxxx@wto.org), with copies to XXXX . If the electronic version is provided by diskette or CD-ROM, four (4) copies shall be delivered to Mr. XX (office number xxxx).

e. The Panel will endeavour to provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

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

(18 December 2012)

I. GENERAL

The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Panel record. These Procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of the *SCM Agreement* and Article 13 of the *DSU*.

II. DEFINITIONS

For the purposes of these Procedures,

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

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

3. **"Conclusion of the Panel Process"** means the earliest to occur of the following events:

   a. pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report;

   b. a Party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU;

   c. pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; or

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

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

   a. for printed information, text that is set off with bold square brackets in a document clearly marked with the notation 'BUSINESS CONFIDENTIAL INFORMATION' and with the name of the Party or Third Party that submitted the information;

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

c. for uttered information, declared by the speaker to be "Business Confidential Information" prior to utterance.[1]

d. in case either Party objects to the designation of information as BCI under paragraphs 4. a-c, the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as BCI, the submitting Party or Third Party may either designate it as non-BCI or withdraw the information. The Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI information previously designated by that Party or Third Party as BCI.

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

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

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

b. for uttered information, declared by the speaker to be "Highly Sensitive Business Information" prior to utterance.[2]

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

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

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

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

i. information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[3], and, except as provided in subparagraph 7. d.i. below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

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

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

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

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

iii. information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, or investment banks with regard to LCA products; or

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

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

c. Each Party and Third Party shall Designate as HSBI any information described in subparagraph 7.a. that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of either of the Parties.

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

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

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

iii. intergovernmental agreements and government decisions, other than information described in subparagraph 7.a.

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

f. In case either Party objects to the designation of information as HSBI under paragraphs 7.a-e, the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as HSBI, the submitting Party or Third Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. The Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party or Third Party as HSBI.

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

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

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

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

c. for HSBI submitted by a Third Party, on the premises of its Geneva Mission to the WTO.

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

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

a. advises a Party or Third Party in the course of the dispute;

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

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

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

12. **"Panel"** means the DS353 compliance panel composed on 30 October 2012.

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

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

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

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

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

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

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

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

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

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

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

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

21. **"Third party"** means a Member having notified its interest in the dispute to the DSB pursuant to DSU Article 10.

22. **"Third Party BCI Approved Person"** means a representative or Outside Advisor of a third party granted access to BCI pursuant to paragraphs 29, 36, 37 and 43.

23. **"WTO Approved Persons "** means the Panel members, PGE members or experts appointed by the Panel who in the opinion of the Panel require access to BCI, and persons employed or appointed by the Secretariat who have been authorized by the Secretariat to work on the dispute (and includes translators and interpreters as well as any transcribers present at Panel meetings involving BCI and/or HSBI).

24. **"WTO Reading Room"** means a room, located on the premises of the WTO, which a Third Party BCI Approved Person may use to access a Party's submission that contains Party BCI.

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

III. SCOPE

26. These procedures apply to all BCI and HSBI received by an Approved Person and by WTO Approved Persons as a result of the Panel process, and to all BCI reviewed, in accordance with these procedures, by a Third Party BCI Approved Person.

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

IV. DESIGNATION OF APPROVED PERSONS

28. At the latest on 12:00 p.m. (noon) on 21 December 2012, each Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and/or Third Parties and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and/or Third Parties and whom it wishes to have designated as HSBI Approved Persons. Each Party may submit amendments to their list of Approved Persons by submitting such amendments to the other Party and Third Parties, and to the Panel.

29. There shall be no Third Party HSBI Approved Persons. The designation of Third Party BCI Approved Persons shall be governed by paragraphs 36 and 37.

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

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

32. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 28 that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days.

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

34. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 30 and to objections for the addition of new Approved Persons in accordance with paragraphs 32 and 33.

V. BCI

35. Only Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons may have access to BCI submitted in this proceeding. Third Party BCI Approved Persons may not have access to Party-BCI other than that included in the submissions. Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons shall use BCI only for the purposes of this dispute. No Approved Person or WTO Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. No Third Party BCI Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. These obligations apply indefinitely.

36. Each Third Party that wants to access Party-BCI contained in the first or rebuttal submission of a Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors (including clerical or support staff) who need access to such BCI and whom it wishes to have designated as Third Party BCI Approved Persons. Each Third Party shall keep the number of Third Party BCI Approved Persons as limited as possible. Each Third Party may designate no more than a total of 5 Representatives and Outside Advisors as Third Party BCI Approved Persons.

37. Unless a Party objects to the designation of an Outside Advisor of a Third Party, the Panel shall designate those persons as Third Party BCI Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 36 above that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

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

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

40. BCI submitted by Approved Persons or by Third Party BCI Approved Persons pursuant to these procedures shall not be copied, distributed, or removed from the Secure site, except as necessary for submission to the Panel.

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

a. Parties may incorporate BCI in submissions to the Panel, marked as indicated in paragraph 4. In exceptional cases, parties may include BCI in an appendix to a submission.

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

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

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

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

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

d. The responding Party may designate the personal offices of up to four of its Approved Persons as additional Secure sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' submissions to the Panel. All of the protections applicable to BCI under these procedures, including the storage rules in Paragraph 45, shall apply to such submissions. BCI exhibits to submissions may not be stored or reviewed at these additional Secure sites. The responding Party shall submit the address (including room number) of each of the additional Secure sites to the Panel and the complaining Party.

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

43. Notwithstanding paragraph 20 of the Working Procedures[4], the following procedures apply to the access by Third Parties to a Party's submission that contains Party-BCI.

a. A Party's Submission containing Party-BCI shall not be serviced to Third Parties unless both Parties agree otherwise.

b. Third Party BCI Approved Persons may view Party-BCI contained in a Party's first written submission only in a Secure site or in the WTO Reading Room. Third Party BCI Approved Persons may not bring into such room any electronic recording or transmitting devices. Third Party BCI Approved Persons may not remove a Party's Submission containing Party-BCI from such room, but may take handwritten notes of the Party-BCI contained therein. Such notes shall be used exclusively for this dispute (that is, DS353). Each person viewing a Party's Submission containing Party-BCI shall complete and sign a log identifying the submission the person reviewed. The Party responsible for maintaining the particular Secure site, and the WTO Secretariat in the case of the WTO Reading Room, shall maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving the room, Outside Advisors who are Third Party BCI Approved Persons may be subject to appropriate controls.

c. If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 43 b. above, that Third Party BCI Approved Person shall store the memo only in a locked security

[4] Concerning service of documents.

container. Such memo shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. The content of such memo shall not be incorporated, electronically or in handwritten form, into the Non-BCI Version, as defined in paragraph 41 b.

d. All Third Parties that have designated Third Party BCI Approved Persons must inform the Parties of the identity of the specific room (including the address and the room number) in which the locked security container, as referred to in subparagraph c. above, is located.

e. If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 43 b.above, such memo shall not be copied in excess of the number of copies required by the Third Party BCI Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies of such memo shall be prohibited.

f. A Third Party may not incorporate into the body of its submission any Party-BCI. If a Third Party wishes to refer to any Party-BCI, the relevant arguments including such BCI should be incorporated into a separate Appendix. Such Appendix shall not be serviced to other Third Parties.

g. On the date determined by the Panel as the deadline to make the Third Party submission, a Third Party shall service its submission only to the Parties and to the Panel. The submission shall be serviced to the other Third Parties only after the Parties have confirmed that the submission does not contain or disclose Party-BCI. A Party shall make this confirmation or otherwise advise of any necessary change to the relevant Third Party within 2 working days of receiving the submissions of Third Parties.

44. A Party or Third Party that wishes to submit or refer to BCI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not Approved Persons, WTO Approved Persons or, as appropriate, Third Party BCI Approved Persons from the meeting for the duration of the submission and discussion of BCI.

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

46. The Panel shall not disclose BCI in its report, but may make statements or draw conclusions that are based on the information drawn from the BCI.

VI. HSBI

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

48. HSBI shall be submitted to the Panel in electronic form, using locked CDs or two Sealed laptop computers connectable to 19" - 21" monitors, or in hard copy form, for access by WTO Approved Persons designated pursuant to paragraph 31 as being additionally authorized to access HSBI. All such HSBI shall be stored in a combination safe in a designated secure location on the premises of the WTO Secretariat. Any computer in that room shall be a Stand-alone computer. WTO Approved Persons designated pursuant to paragraph 31 as being additionally authorized to access HSBI may view HSBI only in the designated secure location referred to above. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on

distinctively colored paper. Such hard copies shall either be stored in a combination safe at the designated secure location referred to above, or destroyed at the end of the relevant working session. HSBI shall not be removed from this designated secure location, except (i) in the form of handwritten notes that may be used only on the WTO Secretariat's premises and which shall be destroyed once no longer in use; and (ii) subject to appropriate precautions, for purposes of meetings of the Panel with the Parties and any internal deliberations of the Panel, as provided for in paragraph 57 j.

49. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the other Party, in the HSBI locations listed in paragraph 9. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

50. If a Third Party submits HSBI, it shall notify the Parties of the fact that such submission has been made. Each Third Party submitting HSBI shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the Parties, in the HSBI location listed in paragraph 9. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

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

52. HSBI Approved Persons may view HSBI on the Sealed laptop computer maintained by the other Party or a Third Party or, in the case of HSBI submitted on Locked CDs on a Stand-alone computer, only in a designated room at one of the HSBI locations indicated in paragraph 9, or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 48, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI location. The designated secure location referred to in paragraph 48 shall be available to HSBI Approved Persons by prior arrangement with the WTO Secretariat. HSBI Approved Persons may not bring into such room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from such room, except in the form of handwritten notes or aggregated information generated on a Stand-alone computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI location or designated secure location referred to in paragraph 48 shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI location within its territory referenced in paragraph 9, maintain such log until one year after the Conclusion of the Panel Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 48, maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

53. No HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 31 as being additionally authorized to access HSBI shall disclose HSBI to any person except another HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 31 as being additionally authorized to access HSBI, and then only for the purpose of this dispute. This obligation applies indefinitely.

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

55. A Party or Third Party that wishes to submit or refer to HSBI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not HSBI Approved Persons or WTO Approved Persons designated pursuant to paragraph 31 as being additionally authorized to access HSBI from the meeting for the duration of the submission and discussion of HSBI.

56. All HSBI shall be stored in a safe at the relevant HSBI location or in accordance with paragraph 48.

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

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

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

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

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

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

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

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

e. The Full HSBI Version Appendix shall be kept in an HSBI location and in the designated secure location referred to in paragraph 48, as appropriate, in the form of a locked CD. If it is not practical to keep the Full HSBI Version Appendix in an HSBI location, the Party may keep it in a locked security container in a Secure site in the form of a locked CD.

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

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

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

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

j. WTO Approved Persons designated pursuant to paragraph 31 as being additionally authorized to access HSBI may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, a Panel meeting with the parties and/or an internal meeting. When not in use, these paper versions shall be stored in a locked container in the designated secure location referred to in paragraph 48. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Panel Process as defined in paragraph 3.

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

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

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

   iii. HSBI-Redacted Version Exhibits may be prepared by an HSBI-Approved person, at an HSBI location, by deleting the HSBI in the exhibit (identified by double brackets) from such exhibit and either printing or photo-copying the resulting document containing no HSBI. The deletion of HSBI from the resulting document shall be verified by a person authorized for this purpose by the Party that submitted the exhibit(s) in question. The resulting document containing no HSBI (but which may contain BCI) will constitute the HSBI-Redacted Version Exhibit of such exhibit, and may be removed from the HSBI location.

   iv. The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI-Approved Person for purposes of the verification provided for in paragraph iii. above. HSBI-Redacted Version Exhibits may be prepared by HSBI-Approved Persons upon request during the times the designated room at the relevant HSBI location is available, as provided for in paragraph 51 of these Procedures.

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

l. The Panel reserves the right, after consulting the parties, to amend the provisions of this paragraph at any time in order to accommodate situations arising during Panel meetings, and the preparation of the interim report and the final report.

58. The Panel shall not disclose HSBI in its report, but may make statements or draw conclusions that are based on the information drawn from the HSBI.

VII. RESPONSIBILITY FOR COMPLIANCE

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

VIII. ADDITIONAL PROCEDURES

60. After consulting with the Parties, the Panel may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures but which the Panel considers may be of assistance in adjudicating the claims before it, including, if necessary, information that the United States internally classifies as "Top Secret", "Secret", "Confidential", or controlled pursuant to the United States' International Traffic in Arms Regulation ("ITAR").

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

IX. RETURN AND DESTRUCTION

62. Except as provided for in paragraph 63, after the Conclusion of the Panel Process as defined in paragraphs 3 a., 3 c. or 3 d, or as contemplated in paragraph 64, within a period to be fixed by the Panel, WTO Approved Persons, the Parties and Third Parties (along with all Approved Persons) shall destroy or return all documents (including electronic material) or other recordings containing BCI to the Party or Third Party that submitted such documents or other recordings. At the same time, WTO Approved Persons and the Parties shall destroy and/or return any electronic material submitted by a Party or Third Party that contains HSBI.

63. The WTO Secretariat shall retain one hard copy and one electronic version of any final report of the Panel containing BCI, and one electronic version of all documents containing BCI submitted to the Panel, recorded on locked CD(s), to be kept in sealed containers in a locked cabinet on the premises of the WTO Secretariat.

64. After the Conclusion of the Panel Process as defined in paragraph 3 b., the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. Following the adoption by the DSB of the Appellate Body report pursuant to Article 17.14 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body Report pursuant to Article 17.14 of the DSU, the provisions of paragraphs 62 and 63 shall apply.

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

ANNEX A-3

PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE MEETING OF THE PANEL

(2 October 2013)

1. The Panel's meeting with the parties will start at 10:00 a.m. on 29 October 2013. The Panel will invite the European Union to first present its full opening oral statement before the floor is given to the United States to present its full opening oral statement. The oral statements will be videotaped for later viewing, as set out in paragraph 6 below. If at any point during its oral statement a party intends to utter BCI or HSBI, it shall request that the videotaping be discontinued for the relevant portion of the oral statement, after which videotaping will be resumed. A party may first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the videotaping to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI.

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

3. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to videotape the proceedings. If at any point during its oral statement a party intends to utter HSBI, those individuals not having HSBI approval shall be asked to exit the room. If at any point a party intends to utter either BCI or HSBI, the team hired by the WTO Secretariat to videotape the proceedings shall be asked to exit the room.

4. After each oral statement has been delivered, the Panel will ask the parties whether they can confirm that no BCI or HSBI was pronounced during the videotaped portion of the oral statement. If both parties so confirm, the showing of the videotape will proceed according to schedule. If either party requests to review the videotape, both parties will be invited to attend that review, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. Therefore, parties should be prepared to advise the technician which portion of the oral presentation presents a concern, and limit review to those portions of the videotape to the maximum extent possible. If either party considers that a specific portion of the videotape must be deleted – because it is BCI or HSBI – the specific portion of the videotape will be deleted.

5. **The third party session will start at 14:00 on 30 October 2013. Third parties shall indicate to the Panel, not later than close of business on 18 October 2013, whether they consent to the videotaping of their oral statements for later viewing**. The Panel will start the third party session with the statements of those third parties so consenting. The Panel shall then proceed to a third party closed session during which the rest of the third parties shall make their statements, and the Panel or any party or third party may pose questions to any third party or make comments concerning these statements. **Should any third party intend to include BCI in its oral statement or otherwise to refer to BCI during the third party session, it is requested to inform the Panel by close of business on 24 October 2013** so that appropriate arrangements can be made to protect the confidentiality of that information.

6. The showing of the videotape of the oral statements of the parties and third parties shall take place on 31 October 2013. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental

organizations, upon presentation of their official badges. The Secretariat will place a notice on the WTO website in due course informing the public of the showing. The notice shall include a link through which members of the public can register directly with the WTO.

ANNEX B

ARGUMENTS OF THE EUROPEAN UNION

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ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION
OF THE EUROPEAN UNION

Contains no BCI or HSBI

I. INTRODUCTION

1. In disregard of the rulings and recommendations of the Dispute Settlement Body ("DSB") – adopted after more than five years of panel proceedings in *US – Large Civil Aircraft* and eleven months of appellate review – the United States ("US") federal, state, and local authorities have not only failed to withdraw the subsidies or remove the adverse effects, but they have actually significantly *increased* those subsidies and *aggravated* the adverse effects caused by those subsidies.

2. In this submission, the European Union ("EU") details why the US measures taken to comply are wholly insufficient to satisfy the requirements of Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"). To the contrary, US federal, state, and local authorities have generally been increasing the value of the subsidies challenged before the original panel, and they have also adopted new closely related measures that constitute undeclared measures taken to comply, within the meaning of Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

3. For the majority of subsidies before the original panel, the United States has admitted that it had taken no affirmative action to withdraw the subsidies, which continue to increase and continue to cause adverse effects. In the few instances in which the United States has taken affirmative action, the actions are, at best, wholly insufficient, and, at worst – in the case of the National Aeronautics and Space Administration ("NASA") and US Department of Defense ("DOD") aeronautics research & development ("R&D") subsidies – a sham transaction that does absolutely nothing to change the continuing subsidies or remove their adverse effects.

4. The subsidies granted or maintained by the United States are contingent in law or in fact upon actual or anticipated export, and thus prohibited by Articles 3.1(a) and 3.2, and footnote 4, of the *SCM Agreement*. They are also contingent in fact upon the use of domestic over imported goods, and thus prohibited by Articles 3.1(b) and 3.2 of the *SCM Agreement*. Further, they are inconsistent, in law or in fact, with Article III of the *General Agreement on Tariffs and Trade* 1994 ("*GATT 1994*").

5. As for the adverse effects resulting from the subsidies before the original panel, those effects persist after the end of the implementation period. The non-withdrawn subsidies before the original panel, and the additional subsidies granted to Boeing more recently, are presently causing adverse effects to the interests of the European Union, with no end in sight. The United States has failed to remove the adverse effects that the original panel and the Appellate Body found to be caused through sales of the Boeing 787 and that aircraft's effect on Airbus' prices and market shares. In particular, the panel and Appellate Body's findings on the R&D subsidies and their adverse effects were confirmed by the President of the United States, himself, in a February 2012 speech at Boeing's Washington State headquarters, where he explained that the Boeing 787 "was first designed virtually using the same technology that was developed by NASA", "Government research helped to create this plane", and that the U.S. Government has "got to support this kind of cutting-edge research ... so that jobs and industries take root" in the United States, not abroad.[1] The effects found by the panel and Appellate Body continue unabated, and are increased through additional significant sales that Airbus lost to Boeing's competing 787, 737 MAX and 737NG aircraft, and significant suppressed prices and displaced and impeded market shares of Airbus' A350XWB, A330, A320neo and A320ceo large civil aircraft ("LCA"), or a threat thereof.

[1] http://www.whitehouse.gov/photos-and-video/video/2012/02/17/president-obama-speaks-promoting-american-manufacturing-and-export#transcript.

6. Accordingly, the United States has failed to achieve compliance with the recommendations and rulings of the DSB. Instead, after the end of the implementation period, the United States has continued to grant and maintain subsidies, and to use those subsidies to cause present adverse effects to EU LCA-related interests, in defiance of the DSB's recommendations and rulings.

II. SUMMARY OF PROCEEDINGS TO DATE

7. The European Union recalls the DSB's adoption, on 23 March 2012, of the reports of the Appellate Body and the original panel (as modified) in *US – Large Civil Aircraft*, which found that US federal, state and local governments provided the following specific subsidies to US producers of large civil aircraft – specifically, Boeing – that cause adverse effects to European Union interests and are inconsistent with US obligations under the *SCM Agreement*:

- Payments and other support under NASA and DOD aeronautics R&D programmes;
- Tax exemptions under Foreign Sales Corporation/Extraterritorial Income ("FSC/ETI") legislation and successor acts;
- Washington State business & occupation ("B&O") tax rate reductions; and,
- Tax exemptions related to Industrial Revenue Bonds ("IRBs") issued by the City of Wichita, Kansas.

The DSB also ruled that the United States provides prohibited subsidies to Boeing.

8. On 23 September 2012, – the day before the end of the implementation period – the United States notified the European Union that it purported to have achieved compliance by, *inter alia*:

- Modifying the parties' rights under certain NASA contracts and DOD cooperative agreements, technology investment agreements, and Other Transactions so as to make them "consistent with commercial practice";
- Terminating or ceasing to fund certain NASA and DOD programmes;
- Enacting legislation terminating the FSC/ETI tax benefits and confirming that Boeing did not use FSC or ETI tax benefits after 2006;
- Applying Washington State B&O tax rates for aerospace manufacturing and retailing consistent with Article 5(c) of the *SCM Agreement*; and
- Applying the City of Wichita IRB programme consistent with Article 5(c) of the *SCM Agreement*.

9. However, as the European Union demonstrates in this submission, the actions and events listed by the United States in its 23 September 2012 notification do not withdraw the subsidies or remove their adverse effects, as required by Articles 4.7 and 7.8 of the *SCM Agreement*, such that the United States has failed to achieve compliance with the recommendations and rulings of the DSB. Accordingly, following consultations with the United States, the European Union requested that a panel be established to review US non-compliance.

10. This compliance Panel was established by the DSB on 23 October 2012. At the DSB meeting, the European Union requested initiation of Annex V procedures for developing information concerning serious prejudice. The United States objected, and continued to object to each subsequent EU effort to move forward with these information gathering procedures. The European Union therefore requested that the Panel make a series of rulings regarding the initiation of Annex V, to which the United States again objected. On 26 November 2012, the compliance Panel, rejecting US arguments to the contrary, found that that "Annex V procedures are available in compliance proceedings" involving serious prejudice claims and that, in this dispute, "the conditions for initiating an Annex V procedure were met". Given the passage of time, however, rather than proceed with the Annex V procedure that had been found to be automatically initiated, the Panel decided to gather information through its powers under Article 13 of the DSU.

11. The compliance Panel issued a series of questions to the United States regarding the measures and claims at issue, with responses to certain questions due by 25 January 2013 and to the remainder by 28 February 2013. At each deadline, however, the United States provided only partial responses. Further, on both occasions, the United States informed the Panel and the European Union that it would provide additional documents and other responsive information at a later date. The latest self-granted US extension lasted until four business days prior to the

deadline for the EU First Written Submission, thus making it impossible for the European Union to utilise in this submission the information belatedly provided. As a direct result of the United States' decision to respond to the Panel's Article 13 questions in the manner described above, the compliance Panel should take the evidence submitted by the European Union with this submission as best information available, sufficient, with reasonable inferences if and where necessary, to support *prima facie* claims.

III. LEGAL FRAMEWORK GOVERNING THESE COMPLIANCE PROCEEDINGS

12. In this section, the European Union sets out its view of the applicable legal framework. It explains the existence of two compliance mechanisms with respect to actionable subsidies – withdrawal of the subsidy or removal of the adverse effects – and the complaining Member's burden to demonstrate present adverse effects.

IV. SCOPE OF THESE COMPLIANCE PROCEEDINGS

13. The European Union recalls the US Preliminary Ruling Requests of 13 November 2012, wherein the United States asserted that several measures and claims in the EU Panel Request were outside the scope of the compliance proceedings. In its response, the European Union explained that the US requests were unfounded, premature and based on a limited understanding of the EU claims. The Panel deferred a decision on these issues until after the Parties' first written submissions.

14. The European Union believes that after reviewing the detailed descriptions of the subsidies and the associated legal claims in this submission, the United States will choose to abandon many, if not all, of its jurisdictional challenges. The European Union will allow the United States the opportunity to do so, before re-engaging on US arguments concerning the proper scope of these proceedings.

V. THE UNITED STATES HAS FAILED TO WITHDRAW THE SUBSIDIES TO THE US LCA INDUSTRY, AND HAS INTRODUCED ADDITIONAL SUBSIDIES WITHIN THE SCOPE OF THESE PROCEEDINGS

15. In this Section, the European Union details the US failure to withdraw the subsidies in a manner consistent with the DSB's rulings and recommendations, as well as the provision by US federal, state, and local authorities of additional subsidies within the scope of the Panel's jurisdiction. The subsidies at issue, and the EU estimates of their minimum values (to the extent possible), are summarised in the table below:

Overview of Post-2006 Subsidies to Boeing's LCA Division
(Millions of Dollars)

Category of Subsidy	Name of Subsidy	Description of Subsidy	Total Amount
NASA Aeronautics R&D	Fundamental Aeronautics	NASA programme with subsonic and supersonic fixed-wing R&D projects	$784.78
	Integrated Systems Research	NASA programme with Environmentally Responsible Aviation project	$172.66
	Aviation Safety	NASA programme with air vehicle-level, system-level, and environmental safety R&D projects	$379.16
	Aeronautics Strategy & Management	NASA programme containing aeronautics R&D cross-programme support and Innovative Concepts for Aviation project	$9.97

Category of Subsidy	Name of Subsidy		Description of Subsidy	Total Amount
	Aeronautics Test Program		NASA programme funding aeronautics ground and flight test infrastructure	$408.49
	Strategic Capabilities Assets Program		NASA programme managing test, flight simulation, and computing infrastructure	$56.18
	High-End Computing Program		NASA programme funding supercomputing resources used for aeronautics R&D	$7.04
Federal Aviation Administration R&D	Continuous Lower Energy, Emissions, and Noise ("CLEEN") Program		FAA programme funding research into near-term LCA energy-, emissions-, and noise-reducing technologies, as well as with demonstrator flights	$27.99
Department of Defense Aeronautics R&D	Research, Development, Test & Evaluation ("RDT&E") Program		DOD programme funding R&D into dual-use aircraft technologies	$2,895.2
FSC/ETI	FSC/ETI Legislation and Successor Acts		Federal income tax exemptions/exclusions on certain LCA produced and sold for use outside the United States	$51.22
State of Kansas	Wichita IRBs		Property and sales tax breaks for LCA component production facilities associated with industrial revenue bonds issued by the City of Wichita	$59.15
State of Washington	State B&O Tax Rate Reduction		Washington State business & occupation ("B&O") tax rate reduction for production and sales of LCA	$3,141.5
	State B&O Tax Credit for Preproduction/Aerospace Product Development		Tax credit for LCA-related R&D	$260.49
	State B&O Tax Credit for Property Taxes		Tax credit for property taxes on LCA production facilities	$18.2
	State B&O Tax Credit for Leasehold Excise Taxes		Tax credit for leasehold excise taxes on LCA production facilities	$11.12
	Sales and Use Tax Exemptions		Exemption from sales and use taxes on computer hardware, software, and peripherals used in developing LCA	$138.78
	City of Everett B&O Tax Rate Reduction		City of Everett B&O tax rate reduction for Boeing LCA	$301.36
	Joint Center for Aerospace Technology Innovation		State office advancing public university research for Boeing LCA	$0.57
State of South Carolina	Project Gemini-Related Subsidies	Project Site Lease	Lease to the site of Boeing's South Carolina 787 production facilities at $1 per year	$150.03
		Project Gemini Facilities & Infrastructure	Provision of facilities and infrastructure for Boeing's 787 final assembly facility at no cost	$400.64
		Sales and Use Tax Exemptions	Exemptions for Boeing from sales and use taxes on aircraft fuel, construction materials, and computer equipment	$49.14

Category of Subsidy	Name of Subsidy		Description of Subsidy	Total Amount
		Income Tax Allocation and Apportionment Agreement	Method of calculating Boeing's state income taxes that excludes revenue from the sales of LCA for export	$275
		Project Gemini MCIP Jobs Tax Credits	Tax credits for hiring due to location in a multi-county industrial park	$19
		Large Cargo Freighter Property Tax Exemption	Property tax exemption for Boeing's "Dreamlifter" Large Cargo Freighters	$102.58
		Workforce Programme	State-run workforce hiring, training, and development programme for Boeing's 787 final assembly facility	$29.16
		Boeing Fee Agreement	Reduction of property taxes on Boeing's 787 final assembly facility under a Fee-in-Lieu-of-Taxes ("FILOT") Agreement	$432.77
	Project Emerald-Related Subsidies	Project Emerald Facilities & Infrastructure	Provision of facilities and infrastructure for Boeing's fuselage fabrication and integration complex at no cost	$138.32
		Project Emerald MCIP Jobs Tax Credits	Tax credits for hiring due to location in a multi-county industrial park	$7.7
		Project Emerald Fee Agreement	Reduction of property taxes on Boeing's 787 fuselage fabrication and integration complex under a FILOT Agreement	$62.34
Total	**All**			**$10,390.54**

16. The European Union shows that each of the measures listed in the figure above is a subsidy under Article 1.1 of the *SCM Agreement* – *i.e.*, a "financial contribution" that confers a "benefit" on its recipients. The European Union also shows that each subsidy is specific under Article 2 of the *SCM Agreement*.

17. *First*, the European Union addresses the failure of the United States to withdraw the aeronautics R&D subsidies from NASA and DOD, as well the additional subsidies within the scope of this dispute provided by NASA, the Federal Aviation Administration ("FAA"), and DOD.

18. NASA has provided, and continues to provide, Boeing with valuable funding and support for aeronautics R&D through NASA programmes challenged before the original panel, as well as successor and other closely related programmes. Together, these programmes have provided Boeing with over $1.8 billion in R&D funding for LCA-related technologies between 2007 and 2012. These technologies – including, for example, composite materials, aerodynamic improvements, and advanced configurations – aim to achieve, *inter alia*, continued improvements in fuel efficiency, noise, and performance of US LCA for the next twenty-five years and beyond.

19. Closely connected to the NASA aeronautics R&D subsidies, the FAA launched in 2010 the Continuous Lower Energy, Emissions, and Noise ("CLEEN") Program to fund research, including by Boeing, into near-term energy-, emissions-, and noise-reduction technologies for LCA. The FAA CLEEN programme also funds Boeing's "ecoDemonstrator" programme to flight test an array of new technologies, certain of which are already appearing on new Boeing LCA models.

20. DOD has also provided, and continues to provide, Boeing with funding and other support for LCA-related aeronautics R&D through the RDT&E Program Elements ("PEs") challenged before the original panel, as well as through additional general aircraft and military aircraft RDT&E PEs, such as those associated with the Boeing 767-derived KC-46 tanker and the Boeing 737-derived P-8A multi-mission maritime aircraft. Through the RDT&E Program, Boeing develops new technologies and gains other knowledge that it applies in the design, development, production, and operation of both current and new models of LCA.

21. For all three groups of the aeronautics R&D subsidies, NASA, FAA, and DOD, the European Union demonstrates that the subsidies continue well after the initial provision of funding, as the US Government continues to provide Boeing with valuable, ongoing rights to the intellectual property developed under the aeronautics R&D subsidy programmes – in particular, patents, data rights, and trade secret protection – for terms of twenty years or longer.

22. Moreover, as the Appellate Body found, the aeronautics R&D subsidies provide a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement*, as the US Government has provided, and continues to provide, Boeing with rights to this intellectual property on more favourable terms than would be available in the commercial market. In this regard, the NASA and DOD "supplemental subject invention and patent license agreements" referenced in the 23 September 2012 US Notification do nothing to withdraw the subsidies. Under these agreements, Boeing grants the US Government non-transferrable licenses to "use, make, offer for sale, sell and import" certain patented technologies "for commercial purposes", without the aid of any non-government entity. As the European Union explains, the US Government does not *and cannot* make use of these license rights for commercial purposes, such as by producing aircraft or aircraft components *itself*.

23. *Second*, the European Union shows that the United States has not taken any steps to withdraw the FSC/ETI and City of Wichita IRB subsidies found to exist in the original proceedings, and that Boeing continues to benefit from the associated tax breaks. In particular, as to FSC/ETI, Boeing can still receive tax benefits today and in the future for income recognised from sales or leases related to certain binding contracts. As to Wichita IRBs, while the most recent IRBs issued for Boeing were in 2007, the property tax exemptions for IRB-funded property extend for a period of ten years and, therefore, Boeing continues to benefit until at least the year 2017.

24. *Third*, the European Union details the US failure to withdraw the subsidies provided by Washington State and its municipalities, as well as the additional Washington State subsidies provided for Boeing LCA. The Washington State and City of Everett B&O tax rate reductions; the B&O tax credit for preproduction/aerospace product development; the B&O tax credit for property taxes; and sales and use tax exemptions for computer hardware, software, and peripherals used in developing LCA – all found to be specific subsidies by the original panel and Appellate Body – continue to be maintained in substantially the same form as during the original proceedings.

25. Furthermore, Washington State provides Boeing with additional specific subsidies within the scope of the Panel's jurisdiction in the form of a B&O tax credit for leasehold excise taxes and the establishment of the Joint Center for Aerospace Technology Innovation, through which Washington provides Boeing with research funding and facilitates other support from the state's public university system.

26. *Finally*, the European Union addresses the massive new subsidies from the State of South Carolina and its political subdivisions for Boeing's 787 final assembly facility (known as "Project Gemini") and fuselage fabrication and integration complex (known as "Project Emerald") located in North Charleston, South Carolina. These subsidies are closely related to, *inter alia*, the Washington State subsidies, as they are part of the incentive package for Boeing that South Carolina used to win the competition with Washington over the location of the 787 final assembly line – Boeing's first LCA final assembly line outside of Washington State in the company's history. The European Union estimates the value of these subsidies to be at least $1.67 billion, beginning in 2009.

27. The South Carolina subsidies include: (i) providing Boeing with a long-term lease of government land for the Project Gemini and Project Emerald facilities at the below-market price of $1 per year; (ii) providing Boeing with custom-built facilities and infrastructure for Project Gemini and Project Emerald funded by State general obligation bonds; (iii) providing Boeing with exemptions from state sales and use taxes for aircraft fuel, computer equipment, and construction materials; (iv) reducing Boeing's corporate income taxes by approving a special income allocation and apportionment agreement, which allows Boeing to exclude income from sales destined for export from the calculation of its taxable income; (v) providing Boeing with tax credits for new jobs as a result of designating Project Gemini and Project Emerald as part of a multi-county industrial park; (vi) exempting Boeing from property taxes on its modified 747-400 "Dreamlifter" Large Cargo Freighters; (vii) providing Boeing-specific workforce training, recruitment, and development programmes for Project Gemini; and (viii) reducing Boeing's property tax liability for

both Project Gemini and Project Emerald through negotiated fee-in-lieu-of-taxes agreements with Charleston County.

28. In sum, as a result of the US failure to withdraw the subsidies pursuant to Article 7.8 of the *SCM Agreement*, as well as the maintenance of additional subsidies within the scope of the Panel's jurisdiction, the United States is providing Boeing with specific subsidies worth more than $10.39 billion during the post-2006 time period.

VI. PROHIBITED SUBSIDIES AND MEASURES INCONSISTENT WITH ARTICLE III OF THE GATT 1994

29. *First*, the European Union recalls its demonstration that the FSC/ETI legislation and successor act subsidies continue, and that these precise measures have already been found to provide prohibited *de jure* export-contingent subsidies to Boeing. *Second*, the European Union demonstrates that South Carolina's special income tax apportionment method for Boeing is also a prohibited *de jure* export-contingent subsidies, as it excludes certain Boeing sales from giving rise to taxable income *on the condition* that they are *destined for export markets outside the United States*.

30. *Third*, the European Union demonstrates that the subsidies described in Section V are contingent in fact on actual and anticipated exportation, and therefore violate Articles 3.1(a) and 3.2 of the *SCM Agreement*. It does so by showing that the ratio of both actual and anticipated Boeing sales are skewed towards exports in a manner not reflective of the conditions of supply and demand that would exist in the absence of the subsidies. Further, the European Union explains that the subsidies are geared to induce or incentivise this skewing; the United States conditions Boeing's behaviour by encouraging and directing Boeing to favour exports, and by rewarding Boeing when it complies. At the same time, Boeing has telegraphed a clear signal back to the United States: keep granting or maintaining subsidies and we will keep exporting. The United States has thus come to associate subsidies with exports, and Boeing has come to associate exports with subsidies.

31. *Fourth*, the European Union demonstrates that the subsidies are also contingent in fact upon the use of domestic over imported goods, and therefore violate Articles 3.1(b) and 3.2 of the *SCM Agreement*. It does so by showing that the subsidies involve conditions that necessarily imply use of US goods. The European Union further shows that the United States favours the use of US domestic goods and labour, and conditions Boeing's behaviour by encouraging and directing Boeing to favour US domestic goods and labour, and by rewarding Boeing when it complies.

32. *Fifth*, and similarly, these same measures are applied so as to afford protection to domestic production of parts and materials capable of use in the production of Boeing LCA, in violation of Article III:4 of the *GATT 1994* because, for the same reasons that the measures are contingent on the use of domestic over imported goods, they afford less favourable treatment to imported like products.

VII. ADVERSE EFFECTS

33. Just as the United States has failed to withdraw the subsidies, it has also failed to remove the adverse effects of those subsidies. Specifically, the United States grants and maintains subsidies to Boeing after the end of the implementation period that cause present adverse effects to EU LCA-related interests, collectively amounting to more than $100 billion in lost revenue to Airbus.

34. In this section, the European Union demonstrates the fallacy of the US assertion, offered without any evidence in its 23 September 2012 notification, that

> {i}n light of the conditions of competition in the market for large civil aircraft and actions taken by the United States, any adverse effects of the subsidies in question have ceased to exist, or a "genuine and substantial relationship of cause and effect" no longer exists between the subsidies subject to the recommendations and rulings of the DSB and any adverse effects.

35. Indeed, none of the steps indicated by the United States relate to the removal of adverse effects. The United States does not identify any changes in the conditions of competition in the LCA markets to support its assertions that there no longer exists a genuine and substantial causal link between the US subsidies and adverse effects, nor does the United States provide any support for its assertion that the "adverse effects ... have ceased to exist".

36. In fact, the significant lost sales and threat of displacement found in the original proceedings continue to exist at present because the aircraft at issue remain undelivered. Similarly, the significant price suppression found in the original proceedings continue to affect present and future deliveries of Airbus LCA. Moreover, the subsidies to Boeing that the United States grants or maintains cause additional present significant lost sales, present significant price suppression, and present displacement or impedance, as well as a threat thereof. In this section, the European Union demonstrates that the significant lost sales, significant price suppression, and the threat of displacement that the panel and the Appellate Body found in the original proceedings have not ceased to exist.

37. After recalling the legal framework for assessing present adverse effects, the European Union explores several threshold issues, notably the key conditions of competition that facilitate the adverse effects presently caused by the US subsidies in the LCA markets. Amongst those conditions of competition are the supply-side Airbus/Boeing duopoly in the LCA industry, the importance of technological innovation to the success of an LCA manufacturer, as well as the price sensitivity of many key sales campaigns between Airbus and Boeing, on the one hand, and airline or leasing company customers for LCA, on the other. The European Union also assesses the different LCA product markets in which competition between Airbus and Boeing over product quality and prices takes place.

38. In assessing the existence of a causal link, the compliance Panel is required to consider the effects of all of the subsidies at issue collectively. The European Union also explains that the compliance Panel should adopt an approach that aggregates the following groups of subsidies for purposes of assessing their adverse effects: (i) the US aeronautics R&D subsidies, consisting of the NASA, FAA and DOD aeronautics R&D subsidies; (ii) the tied tax subsidies, consisting of the FSC/ETI tax exemptions, the Washington State and City of Everett B&O tax rate reductions, and the South Carolina income allocation and apportionment agreement; and (iii) the remaining state and local subsidies that affect Boeing's non-operating cash flow.

39. As the European Union explains, there is a "genuine and substantial relationship of cause and effect" between the subsidies at issue and the present market phenomena enumerated in Article 6.3 of the *SCM Agreement*, through two causal mechanisms.

40. *First*, certain of the non-withdrawn US aeronautics R&D subsidies affect Boeing's technological capabilities. In particular, these subsidies enable technologies that improve the quality and/or accelerate the availability at market of Boeing LCA, including for the 787, the new 787-10 and the new 777X, and the recently-launched 737 MAX. The evidence demonstrates that the US aeronautics R&D subsidies are a genuine and substantial cause of: (i) Boeing's development of innovative technologies for these aircraft; and, (ii) the availability of innovative technologies that improve future Boeing LCA.

41. *Second*, the evidence demonstrates that the US subsidies also enable Boeing to charge lower prices for its LCA. Specifically, (i) certain other of the R&D subsidies, (ii) the tied tax subsidies, and (iii) the remaining state and local subsidies, enable Boeing – without sacrificing profit margins on its 787, 737 MAX and 737NG family LCA sales – to lower prices for those aircraft in sales campaigns in which they are competing with Airbus A350XWB, A320neo and A320ceo family LCA.

42. The European Union then establishes the various forms of present adverse effects caused by the non-withdrawn US subsidies.

43. *First*, the European Union demonstrates the effects of the US subsidies benefiting Boeing's 787 and 777X family LCA on Airbus' A330 and A350XWB family LCA. Through their effects on the technology of the 787, including the new 787-10, and of the upcoming 777X, as well as through their effects on Boeing's prices for these LCA, the US subsidies are a genuine and substantial

cause of: (i) present significant price suppression for Airbus' A330; and, (ii) present significant price suppression, significant lost sales and impedance of Airbus' A350XWB family LCA, as well as a threat thereof.

44. *Second*, the European Union also establishes the effects of the US subsidies benefiting Boeing's 737 MAX family on Airbus' A320neo family LCA. Through their combined effects on the technology and prices of Boeing's 737 MAX family LCA, the US subsidies are a genuine and substantial cause of present significant lost sales, significant price suppression and impedance of Airbus' A320neo family LCA, as well as a threat thereof.

45. *Third*, the European Union demonstrates the effects of the US subsidies benefiting Boeing's 737NG family on Airbus' A320ceo family LCA. Through their effects on Boeing's prices, the US subsidies are a genuine and substantial cause of present significant lost sales, significant price suppression, and displacement or impedance of Airbus' A320ceo family LCA, as well as a threat thereof.

VIII. CONCLUSION AND REQUEST FOR RELIEF

46. For the reasons set out in this submission, the European Union respectfully requests the compliance Panel to find that the United States has failed to implement the DSB's recommendations that it withdraw the subsidies or take appropriate steps to remove the adverse effects, pursuant to Article 7.8 of the *SCM Agreement*, and to make appropriate consequential recommendations.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION
OF THE EUROPEAN UNION

Contains no BCI or HSBI

I. INTRODUCTION

1. As revealed in recent statements by the President of the United States, the United States and Boeing, the sole US large civil aircraft ("LCA") manufacturer, understand that their current success in the LCA markets is the result of lavish support from the US federal government as well as state and local governments. And they understand that this support must continue in order to maintain Boeing's position of strength in the market, and to build upon the prior successes of such government support. And it *is* continuing, despite the rulings and recommendations of the Dispute Settlement Body ("DSB") in this dispute.

2. Indeed, during the same three-month period that the US Government, aided by state and local governments, was preparing its defence in this dispute, a much larger group of US, state, and local government employees was busy devising plans on how to *increase* the subsidies and the effects thereof. For example, in the National Aeronautics and Space Administration's ("NASA") Fiscal Year ("FY") 2014 budget request issued on 10 April 2013, the US Government explained that "NASA's innovative aeronautics research supports the U.S. aviation industry's efforts to maintain competitiveness in a global market". These are not the words of a government that intends to spend billions of dollars in order to develop technology that will benefit Boeing and Airbus equally, in stark contrast to the message of the US First Written Submission. Instead, these are the words of a government that is investing its resources to support Boeing's efforts to compete with Airbus.

3. Moreover, the subsidies at the state and local level are generally *increasing* over time, not decreasing as they should be now, after the time has passed for the US Government to comply with the DSB's rulings and recommendations by withdrawing the subsidies or removing the adverse effects. In South Carolina, for example, state and local officials continue to expand and build upon the measures that they have previously passed, as they continue to compete with Washington State to bring Boeing's production to their state.

4. The United States' disregard for the rulings and recommendations of the DSB is also evident from the centrepiece of its alleged implementation actions for the two largest sets of subsidies (*i.e.*, NASA and US Department of Defense ("DOD") Research & Development ("R&D") programs) – license agreements between Boeing and the US Government, through which Boeing offers to share patent rights with the US Government that, by law, the US Government can not actually share in practice. The United States generally agrees with this assessment in its First Written Submission, but argues that Boeing has assumed the risk that US law and policy might change someday. Thus, in the event that the United States were to abandon the free market and transform the government into a business that develops, produces, markets, and sells its own LCA (without the assistance of any private companies, foreign or domestic), Boeing would be in a worse position than it would otherwise be in the absence of those license agreements. Again, this is not the implementation measure of a Member that is taking its international obligations seriously.

5. As for the US allegations that it has complied through removing the adverse effects, developments over the last three months demonstrate that the exact opposite is true. In June 2013, Boeing launched its new 787-10, facilitated by the US aeronautics R&D subsidies. With its subsidy-enabled advanced technologies and subsidy-enabled low prices, the 787-10 has already secured orders for more than 100 aircraft from a number of leading airlines and leasing companies. The imminent launch of the 777X will further aggravate the degree of adverse effects caused by the US subsidies. Similarly, Boeing continues its subsidy-fuelled aggressively pricing of the 737 MAX, itself benefitting from US R&D subsidies that increase the performance of the aircraft. The evidence before the Panel, therefore, demonstrates that the non-withdrawn US subsidies continue to cause the European Union and its LCA manufacturer to suffer significant lost sales, significantly suppressed prices and displaced or impeded sales volumes and market shares,

as well as a threat thereof. In short, the European Union has demonstrated that the United States has failed to remove the adverse effects.

II. SCOPE OF THESE COMPLIANCE PROCEEDINGS

6. In its First Written Submission, the United States substantially expands its requests that certain matters be ruled outside the scope of these proceedings and reiterates all of its prior (premature) requests. These latest US requests further demonstrate the erroneous legal framework relied on by the United States. This is not a question of jurisdiction or terms of reference, and there are no general WTO rules of *res judicata* or *non liquet*: the Panel must make an objective assessment of all the matters before it. Article 21.5 proceedings include original measures found inconsistent, declared and undeclared measures taken to comply, as well as disagreements as to existence, whether with respect to acts or omissions, and a defending Member cannot assume such measures are consistent. The reasoning in *EC – Bed Linen (Article 21.5 – EC)* (which has not been followed in subsequent cases) does not apply when the law, the measures or the facts or evidence change; nor in cases of non-separability; nor where the Appellate Body has not completed the analysis, irrespective of whether requested to do so.

7. All of the US requests relate to measures within the scope of these proceedings, and to circumstances in which the law, the measures or the facts or evidence have changed, and/or to non-separable measures and/or circumstances in which the Appellate Body did not complete the analysis. The compliance Panel should therefore rule that they are all within the scope of these proceedings. Similar comments apply with respect to the US adverse effects scope requests, particularly because, whatever may or may not have occurred in original proceedings, this does not constrain the *arguments* that a defending Member may raise in compliance proceedings.

III. THE UNITED STATES HAS FAILED TO WITHDRAW THE SUBSIDIES FOUND TO CAUSE ADVERSE EFFECTS AND HAS GRANTED FURTHER SUBSIDIES

8. In this Section, the European Union recalls its *prima facie* case demonstrating the US failure to withdraw the subsidies in a manner consistent with the DSB's rulings and recommendations, as well as the introduction by US federal, state, and local authorities of additional subsidies within the scope of these proceedings. Further, the European Union considers the US arguments to the contrary, and explains why the multitude of factual and legal errors in the US First Written Submission are fatal to the United States' rebuttal. The European Union highlights the many instances in which the United States attempts to rebut the European Union's well documented and supported description of the facts with statements of alleged fact that have no support whatsoever. Moreover, the US First Written Submission repeatedly ignores the findings and relevant guidance of the Appellate Body in *US – Large Civil Aircraft*, and attempts to defend its measures based on erroneous interpretations of the *Subsidies and Countervailing Measures* ("*SCM Agreement*").

9. The European Union begins with the subsidies granted or maintained by the US federal authorities, namely NASA, the Federal Aviation Administration ("FAA"), DOD, and the long-lived Foreign Sales Corporation/Extraterritorial Income ("FSC/ETI") tax scheme. The European Union then turns to the subsidies granted or maintained by the US states and local authorities, focusing first on Wichita, Kansas, followed by Washington State, and concluding with the subsidies from South Carolina. Each of these measures is a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*, and the United States has failed to present legal argument or factual evidence that would lead to any different conclusion.

10. With respect to the R&D subsidies, the European Union begins with a discussion of the factual aspects, including recent developments and a detailed response to the United States' distorted version of the facts. Next, the European Union turns to the legal analysis, explaining why the United States has failed in its attempt to demonstrate that the these measures do not provide specific subsidies to Boeing.

11. With respect to the NASA and FAA R&D subsidies, the European Union considers that the US First Written Submission confirms many of the EU's major points. In particular, the United States confirms that the NASA R&D programmes are funding Boeing R&D into technologies that it can apply in the design, development, production, or modification of its current or future LCA. At the

same time, the United States repeatedly offers tangential, irrelevant, or misleading suggestions about NASA's activities, albeit without providing actual evidence or arguments as to the facts asserted and why they matter. As for the DOD R&D subsidies, the US' primary critique of the EU's evidence is an unsupported blanket attack on the knowledge and background of the EU's expert, who is a former high-ranking DOD official. These attacks are groundless, as already demonstrated in the expert's *curriculum vitae*, and as further demonstrated in a supplemental statement exhibited with this submission. In contrast, the US First Written Submission is filled with assertion after assertion as to technologies' lack of relevance to LCA; however, the United States never identifies whose opinions these are, and what background qualifies such individual(s) to make these judgements. None of these suggestions are backed up by any evidence or expert opinion whatsoever, and should be treated by the Panel accordingly.

12. As for the US' legal arguments that certain of the NASA, FAA, and DOD R&D measures do not provide specific subsidies within the meaning of Articles 1.1(a), 1.1(b), and 2 of the *SCM Agreement*, they suffer from common flaws. With respect to "financial contribution", the United States attempts to distinguish certain of the measures before the compliance Panel from those found by the original panel and Appellate Body to provide financial contributions, based on legally irrelevant, and/or non-existent, alleged factual distinctions. With respect to "benefit", the United States relies on patent licenses between Boeing and the US Government providing the US Government with rights that it cannot lawfully use, and that take nothing of value away from Boeing. It also relies on a comparison of the US Government's R&D contracts/agreements with "Contract D", a contract between Boeing and a not-for-profit university that, even if it were a valid market benchmark, can not demonstrate "benefit". At the same time, the United States ignores all of the other evidence of record demonstrating benefit through actual market benchmarks and other alleged market benchmarks. With respect to specificity, while the European Union generally relies on the unappealed reasoning of the original panel, the US' arguments depend on a mischaracterisation of the challenged R&D subsidies, and on an aspect of the Appellate Body's reasoning that is inapplicable to the measures before the compliance Panel.

13. With respect to the FSC/ETI measures, Boeing continues to derive FSC/ETI tax benefits when it generates revenue from LCA exports, under the conditions specified in the December 2006 Memorandum from the US Internal Revenue Service ("IRS"). In its First Written Submission, the United States does nothing to refute or contest the European Union's understanding of the current state of the FSC/ETI regime, generally, or the proper interpretation of the 2006 IRS Memorandum identified by the European Union. The European Union has also explained that if Boeing desired to legally commit itself to not take FSC/ETI tax benefits going forward, and to clarify the situation in the past, it could provide a simple statement, signed under penalties of perjury. The United States has failed to provide such a statement. Instead, it relies only on a statement from 20 July 2009 that was provided to the original Panel, a statement that obviously can not be considered evidence of what Boeing has actually received *since* 20 July 2009. Thus, it fails to address the key issue before the compliance Panel, whether Boeing continues to receive FSC/ETI benefits today and in the future.

14. As for the Wichita Industrial Revenue Bonds ("IRBs"), the European Union has demonstrated that Boeing continues to receive tax exemptions through the year 2017 on the property associated with the IRBs at issue before the original panel. The United States now appears to argue that the subsidy has been withdrawn because Boeing "no longer receives IRBs". Given that the continuing subsidy constitutes the tax breaks resulting from the IRBs previously issued, this argument does nothing to refute the EU's demonstration that the subsidy continues. As for the specificity analysis under Article 2.1 of the *SCM Agreement*, the United States now argues that "there is no basis to consider that the amount issued to Boeing (*i.e.*, zero) is disproportionately large" because the City of Everett has not issued any new IRBs to Boeing since 2007. The US' proposed specificity analysis is fundamentally flawed for two reasons. *First*, the United States is defining the subsidy as the issuance of IRBs, even though the panel and Appellate Body found that the subsidy constitutes the tax exemptions flowing from IRBs. *Second*, the United States bases its arguments regarding the granting of "disproportionately large amounts of subsidy to certain enterprises" on a five-year time period, thereby ignoring the programme's 34 year history and the requirement in Article 2.1(c) that "account shall be taken of . . . the length of time during which the subsidy programme has been in operation".

15. Turning to Washington State, the state and local authorities have failed to withdraw the subsidies at issue before the original panel. Instead, they have actually *increased* the value of

many of those subsidies and introduced additional closely related subsidy measures. In particular, the following subsidies, which were found by the original panel to be specific subsidies, continue to be granted or maintained: (a) state Business & Occupation ("B&O") tax rate reductions; (b) state B&O tax credits for preproduction development; (c) state B&O tax credits for property taxes; (d) sales and use tax exemptions for computer hardware, software, and peripherals; and (e) City of Everett B&O tax rate reductions. Further, the European Union demonstrated that (a) the State B&O tax credits for leasehold excise taxes and (b) the Joint Center for Aerospace Technology Innovation, are specific subsidies that constitute "measures taken to comply" within the meaning of Article 21.5 of the DSU. In its First Written Submission, the United States generally concedes that the five measures before the original panel continue to provide specific subsidies, but argues that they are outside the scope of these proceedings (other than the state B&O tax rate reduction). With respect to the two additional measures – the B&O tax credit for leasehold excise taxes and the Joint Center for Aerospace Technology Innovation – the United States argues that they do not constitute specific subsidies, and are outside the scope of these proceedings. The European Union explains, in Section II, why the US scope-related objections fail. For the two additional measures, the European Union recalls that its arguments on existence of a specific subsidy are based on evidence and Appellate Body guidance, while the US arguments are based on unsupported assertions and interpretations of the *SCM Agreement* that are contrary to the Appellate Body's interpretations.

16. Finally, the European Union addresses the massive subsidies from the State of South Carolina and its political subdivisions for Boeing's 787 final assembly facility (known as "Project Gemini") and fuselage fabrication and integration complex (known as "Project Emerald"). South Carolina subsidies include: (i) providing Boeing with a long-term lease of government land for these facilities at $1 per year; (ii) providing Boeing with custom-built facilities and infrastructure funded by State general obligation bonds; (iii) providing Boeing with exemptions from state sales and use taxes for aircraft fuel, computer equipment, and construction materials; (iv) reducing Boeing's corporate income taxes by approving a special income allocation and apportionment agreement, allowing Boeing to exclude income from sales destined for export from the calculation of its taxable income; (v) providing Boeing with tax credits for new jobs as a result of designating Project Gemini and Project Emerald as part of a multi-county industrial park; (vi) exempting Boeing from property taxes on its modified 747-400 "Dreamlifter" Large Cargo Freighters; (vii) providing Boeing-specific workforce training, recruitment, and development programmes for Project Gemini; and (viii) reducing Boeing's property tax liability through negotiated fee-in-lieu-of-taxes agreements with Charleston County. The European Union responds to the US arguments, and demonstrates that these measures (as well as each of the recent amendments, extensions, and/or related measures) are each a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*.

17. Since the European Union submitted its First Written Submission, the State of South Carolina has provided additional subsidies for Boeing LCA, each of which constitutes an amendment, supplement, or extension of the South Carolina measures addressed in the EU's panel request and First Written Submission. These "Phase II" incentives, each of which constitutes a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*, are (1) the sale of at-least 320 acres of government property adjacent to Boeing's project site at less-than-market value; (2) funding the acquisition and preparation of land for Boeing with the proceeds of $120 million in state economic development bonds; and (3) the amendment of the Boeing Fee Agreement to provide for the reduction of Boeing's property taxes related to its expansion. With respect to item (1), for example, despite the fact that the Charleston County Aviation Authority ("CCAA") appraised the 320 acre parcel at $27.6 million, and Boeing's consultant appraised the property at $19.9 million, the CCAA ultimately sold that land to Boeing for $12.5 million in April 2013. CCAA Land Sale Committee chairman Tommy Hartnett stated in response that "We sold our only asset at a bargain-basement price", and referred to it as "foolish" to "let the land go at that price".

IV. PROHIBITED SUBSIDIES AND MEASURES INCONSISTENT WITH ARTICLE III OF THE GATT 1994

18. The United States agrees with the legal standards set out by the European Union.

19. First, the European Union recalls its demonstration that the FSC/ETI legislation and successor act subsidies continue, and that these precise measures have already been found to provide prohibited *de jure* export-contingent subsidies to Boeing. The United States submission

that Boeing is not "using" the subsidies conferred upon it is irrelevant and not substantiated by the United States. Second, the European Union demonstrates that South Carolina's special income tax apportionment method for Boeing is also a prohibited *de jure* export-contingent subsidy, as it excludes certain Boeing sales from giving rise to taxable income on the condition that they are destined for export markets outside the United States. The United States contests only the existence of the subsidy, not the export contingency.

20. Third, the European Union demonstrates that the subsidies described in Section III are contingent in fact on actual and anticipated exportation, and therefore violate Articles 3.1(a) and 3.2 of the *SCM Agreement*. It does so by showing that the ratio of both actual and anticipated Boeing sales are skewed towards exports in a manner not reflective of the conditions of supply and demand that would exist in the absence of the subsidies. This is not contested by the United States. Further, the European Union explains that the subsidies are geared to induce or incentivise this skewing; the United States conditions Boeing's behaviour by encouraging and directing Boeing to favour exports, and by rewarding Boeing when it complies. At the same time, Boeing has telegraphed a clear signal back to the United States: keep granting or maintaining subsidies and we will keep exporting. The United States has thus come to associate subsidies with exports, and Boeing has come to associate exports with subsidies. The United States denies that this is happening, but fails to engage with any of the evidence provided by the European Union.

21. Fourth, the European Union demonstrates that the subsidies are also contingent in fact upon the use of domestic over imported goods, and therefore violate Articles 3.1(b) and 3.2 of the *SCM Agreement*. It does so by showing that the subsidies involve conditions that necessarily imply use of US goods. The European Union further shows that the United States favours the use of US domestic goods and labour, and conditions Boeing's behaviour by encouraging and directing Boeing to favour US domestic goods and labour, and by rewarding Boeing when it complies. The United States denies that this happening, but similarly fails to engage with any of the evidence provided by the European Union.

22. Fifth, and similarly, these same measures are applied so as to afford protection to domestic production of parts and materials capable of use in the production of Boeing LCA, in violation of Article III:4 of the *GATT 1994* because, for the same reasons that the measures are contingent on the use of domestic over imported goods, they afford less favourable treatment to imported like products. The United States submits that these matters are outside the scope of these proceedings, but does not contest the substance of the claims.

V. ADVERSE EFFECTS

23. The European Union also demonstrates that, in its First Written Submission, the United States fails to rebut the EU showing of present adverse effects caused by the non-withdrawn US subsidies. In fact, recent evidence shows that the market effects of the US subsidies continue to increase with the subsidy-enabled launch of the 787-10, and with Boeing's continued aggressive pricing strategy for the 737 MAX, 737NG and 787.

24. The US attempt at denying these effects in its First Written Submission is notable for three fundamental flaws: (i) its refusal to accept unconditionally the findings from the original proceedings regarding the technology effects of the US aeronautics R&D subsidies; (ii) its undue segregation of the US subsidies, which results in a US-advocated analysis that obfuscates the actual effects of these subsidies; and, (iii) a failure to engage comprehensively with the EU evidence of significant lost sales, price suppression and displaced or impeded market shares, or threat thereof. Moreover, the US Submission employs baseless scope objections to the EU arguments, and, while ignoring much of the EU evidence, provides little of its own.

25. With respect to the legal framework guiding the Panel's analysis, however, the Parties are largely in agreement. The European Union notes that, contrary to the US position in *EC – Large Civil Aircraft (Article 21.5 – US)*, the United States accepts that Article 7.8 of the *SCM Agreement* requires an analysis of present adverse effects caused by non-withdrawn subsidies. Moreover, the United States generally accepts that this involves demonstrating a "genuine and substantial" causal link between such non-withdrawn US subsidies and present adverse effects. However, in its causation arguments involving all forms of adverse effects demonstrated by the European Union, the United States ignores that the standard requires that the subsidies be *a* genuine and

substantial cause of the adverse effect. It is, therefore, insufficient for the United States merely to point to one or several non-attribution factor(s). Even if it had established that the factor(s) were a substantial cause of the market phenomenon at issue (which the United States often does not even try), this would not preclude a finding that the subsidies are *also* a genuine and substantial cause of adverse effects.

26. The United States agrees that the Panel should assess whether present adverse effects exist after the end of the implementation period, based on data going back to the end of the original reference period. However, the United States inappropriately relies on arguments that the European Union allegedly raised in the original proceedings as limitations on the scope of arguments that it can raise with respect to the new reference period. For reasons stated above, this attempt must fail.

27. Crucially, the United States agrees with the European Union's identification of the key conditions of competition in the LCA markets – conditions that the Appellate Body found to facilitate the causing of adverse effects. In particular, the United States accepts the important role of innovation in the LCA industry, the significance of the Airbus/Boeing duopoly that characterises the competition, as well as the price-sensitive nature of many sales campaigns.

28. With respect to the product markets at issue, the European Union established that there are four product markets that are relevant to these compliance proceedings: (i) the world market for new technology single-aisle aircraft; (ii) the world market for existing technology single-aisle LCA; (iii) the world market for new generation wide-body (or twin-aisle) LCA; and, (iv) the world market for existing technology small wide-body (or twin-aisle) LCA. The United States expresses its disagreement with the EU product market delineation that is substantiated by the evidence. Yet, it does not provide *any* arguments explaining its disagreement, let alone arguments and evidence sufficient to establish an alternative product market delineation. In any event, none of the implications the United States draws from its unsubstantiated criticisms affect the validity of the EU adverse effects arguments. In particular, even if there were only one single-aisle product market, all single-aisle Boeing LCA in that market are subsidised and cause adverse effects. And whether or not the A330 competes in a product market separate from the 787, it is the US subsidies to the 787 that cause prices for the A330 to be significantly suppressed.

29. To avoid the inescapable conclusion that, collectively, the US subsidies cause adverse effects through their impact on Boeing's product development and prices, the United States criticises the European Union for following the Appellate Body's guidance from the original proceedings in this very dispute. The Appellate Body emphasised that, in light of the conditions of competition, including the duopoly nature of the competition, a panel must assess the collective effects of all relevant subsidies on the LCA markets at issue. Contrary to that guidance, the United States advances arguments that segment and atomise the analysis of the US subsidies in precisely the manner that the Appellate Body found to constitute legal error.

30. With respect to the technology causal mechanism of the non-withdrawn US aeronautics R&D subsidies, the EU First Written Submission demonstrated that it enabled Boeing to launch the 787 as and when it did, and that it similarly allowed Boeing to launch its latest LCA developments, the 737 MAX and the 787-10, as and when it did. Rather than accepting these findings, the United States argues that, absent the US R&D subsidies, Boeing would have launched the 787 in 2006, a mere two years later, with promised first deliveries for 2010. In support, the United States submits a report authored by certain Boeing engineers.

31. That report is fundamentally flawed, however, because it asks the wrong question – *i.e.*, how long it would have taken Boeing to "replicate" the research performed in the context of the US R&D subsidies. The relevant question is, instead, how long it would have taken Boeing to research, develop, mature, produce and certify technologies that Boeing did not know existed or were even feasible. Yet, even accepting, *arguendo*, the Boeing engineers' counterfactual, the European Union submits a statement by Airbus engineers demonstrating that the Boeing engineering statement significantly underestimates the time it would take Boeing to replicate even just the research for the narrow subset of NASA- and DOD-facilitated technologies considered therein. Most significantly, however, the Boeing engineers' report is flawed because it ignores the economic disincentives for Boeing to undertake and fund early-stage R&D of the kind funded by the NASA and DOD aeronautics R&D subsidies. The Boeing engineers ignore the financial consequences of undertaking such research at a very late stage, just prior to product development – in particular,

increased development costs, postponed revenues and dramatically increased risks, each of which calls into question the financial viability of the project. An assertion that Boeing could "replicate" the 787 without the US subsidies, but which fails to take account of these financial consequences on the business case for the aircraft, is neither realistic nor credible.

32. Finally, the Airbus engineers also demonstrate that the Boeing engineers have failed to undermine the links identified by the European Union between the US R&D subsidies and technologies Boeing applies on the 787, including the 787-10, the 737 MAX and the 777X.

33. Turning to the price causal mechanism of the US subsidies, the European Union demonstrated, in its First Written Submission, how the structure, operation, design, and magnitude of each of the subsidies at issue confirmed the existence of a "genuine" and substantial causal link; and how the present conditions of competition in the LCA markets reinforce and confirm Boeing's strong incentive to use these subsidies, collectively, to lower its LCA pricing in competitive sales campaigns. The European Union rebuts the US assertion that it is unclear which subsidies should be aggregated for purposes of assessing the price effects on each of the Boeing products at issue. Next, it rebuts the US assertions regarding the magnitude of the subsidies, which are principally driven by (i) the undue segregation of the US analysis; (ii) flawed US calculations; and, (iii) flawed objections as to the scope of the subsidies that can be considered. The European Union also clarifies that it is not double-counting when it argues that *certain* US R&D subsidies impact Boeing's prices under the price causal mechanism, while *others* affect Boeing technological capabilities and, hence, the quality of its products, under the technology causal mechanism.

34. Based on the analytical framework and the evidence establishing the technology and price causal mechanisms, the European Union turns to its arguments establishing that, collectively, the non-withdrawn US subsidies presently cause present adverse effects.

35. With respect to the effects of the US subsidies benefitting Boeing's 787 and 777X, the European Union recalls the evidence establishing how the US subsidies affect the quality of these aircraft and their pricing.

36. As the original panel found, the subsidies benefitting the 787 significantly suppress prices for the A330. The United States does not argue otherwise, but asserts that the European Union is precluded from making this argument, because the 787 and the A330 presently compete in different product markets. This is wrong. Where, as here, the lack of the A330's ability presently to exercise significant competitive constraints on the 787 is attributable to the US subsidies, the Panel must find that the effect of the subsidies is significant price suppression in the same market in which the A330 competes.

37. Similarly, the US subsidies cause prices for the A350XWB to be significantly suppressed. The European Union rebuts the US argument that the conversion of the Original A350 to the A350XWB cannot be attributed to the US subsidies. In any event, the European Union also demonstrates that Airbus' decision to launch the A350XWB mitigated the degree of adverse effects in the market. In addition, the evidence demonstrates that prices for A350XWB LCA sold to all other customers are also significantly suppressed. The US criticism of the EU family-based pricing data is unwarranted, the United States having itself submitted such data, and the US arguments regarding 787 pricing and other factors affecting prices of the A350XWB are flawed and unsubstantiated. The existing significant suppression of A350XWB prices, along with the recent launch of the 787-10 and the imminent launch of the 777X, also demonstrate a threat of significant price suppression for the A350XWB.

38. Moreover, the US subsidies benefiting the 787 cause Airbus to lose significant sales of its A350XWB. The United States has neither removed the adverse effects from those sales already found to be lost in the original proceedings, nor established any valid basis to undermine the EU showing that new sales are lost due to the US subsidies. In fact, the US evidence actually supports the EU arguments that the subsidy-enabled 787's technology, availability and pricing were substantial causes of the lost sales at issue. Moreover, the US scope objections regarding sales left unresolved in the original proceedings fail, and with respect to new sales, the United States cannot substantiate its proposed non-attribution factors, and in any event fails to demonstrate that the US

subsidies are not also a genuine and substantial cause of the lost sales, as required by the applicable causation standard.

39. Nor does the United States undermine the EU showing that the US subsidies cause impedance, or threat thereof, in the US and several third country markets. The United States errs when it denies the relevance of sales campaign evidence to understand the sales volumes and market share trends provided by the European Union. The United States also errs when asserting that it is irrelevant that, with its 787, Boeing, as the subsidised manufacturer, holds significantly more than 50 percent of the market. In fact, this is an indication that subsidies are impeding the A350XWB's market share.

40. Turning to the US subsidies benefitting the 737 MAX, the European Union recalls the evidence establishing how the US subsidies affect the quality of these aircraft and their pricing. Along with evidence of Boeing's sustained and subsidy-enabled aggressive pricing strategy for the 737 MAX, this has resulted in significant lost sales of Airbus' A320 neo LCA. As with its arguments regarding the 787, the United States fails to substantial its proposed non-attribution factors, and in any event fails to demonstrate that the US subsidies are not also a genuine and substantial cause of the lost sales, as required by the applicable causation standard.

41. The US arguments regarding the A320neo's significantly suppressed prices similarly fail, because (i) the US criticism of the EU family-based pricing data is unwarranted, having itself submitted such data, and (ii) the US arguments regarding other factors affecting prices of the A320neo are flawed and unsubstantiated.

42. Nor does the United States undermine the EU showing that the US subsidies cause a threat of impedance in the US and several third country markets. Again, it erroneously denies the relevance of sales campaign evidence and the significance of the fact that Boeing and its subsidised 737 MAX hold a market share significantly higher than 50 percent in large volume markets.

43. Finally, with respect to the US subsidies benefitting the 737NG, the European Union recalls the evidence establishing how these subsidies affect pricing. The result is significant lost sales of Airbus' A320ceo LCA, which the United States fails to undermine by mere reference to unsubstantiated non-attribution factors. With respect to the significant price suppression experienced by the A320ceo, the United States, again, relies on an unfounded criticism of EU-provided family-based pricing information, while the United States itself provided data on a similar basis. And with respect to displacement and impedance, and threat thereof, the United States again fails to recognise the relevance of sales campaign evidence and the sales volume and market share data provide by the European Union.

VI. CONCLUSION AND RELIEF SOUGHT

44. Nothing in the US First Written Submission changes the EU's conclusion and request for relief, as set out in the EU First Written Submission.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT
OF THE EUROPEAN UNION AT THE PANEL MEETING

Contains no BCI or HSBI

I. INTRODUCTION

1. Despite the rulings and recommendations of the Dispute Settlement Body, the situation faced by the European Union and Airbus as a result of the US subsidies has not been remedied, but has instead *worsened*. US federal, state, and local authorities have not only failed to withdraw the subsidies or remove the adverse effects, but they have actually significantly *increased* those subsidies and *worsened* the adverse effects caused by those subsidies. And, new evidence of the United States' disregard for the DSB's rulings and recommendations seems to appear on a regular basis.

II. SCOPE

2. In response to a request from the Panel for further comments on whether procurement contracts funded under the 23 original US Department of Defense ("DOD") Research, Development, Test, & Evaluation ("RDT&E") program elements ("PEs") are within the scope of these compliance proceedings, the European Union recalls that the Appellate Body adopted a different approach from that requested in the EU and US appeals, which rendered both appeals moot. After declaring moot the original panel's finding that DOD procurement contracts are purchases of services and excluded from Article 1.1(a)(1), the Appellate Body did not complete the analysis, observing that *neither* party had requested it to do so. Moreover, the Appellate Body could not have completed the analysis, as it is prohibited from making findings of fact.

3. Accordingly, there is neither a factual basis for the US scope argument that, because the European Union did not request completion of the analysis, the compliance Panel is prohibited from ruling on the substance of the EU claims relating to these measures, nor has the United States provided a basis in the treaty text. The reasoning of *EC – Bed Linen (Article 21.5 – India)* is also inapplicable in these circumstances.

III. SUBSIDY PROGRAMMES

A. NASA, DOD, and Federal Aviation Administration ("FAA") R&D Programmes

4. It is business as usual at NASA and DOD, where NASA still expresses its aeronautics mission as "conducting research that, when transferred to the U.S. aviation industry, can help maintain competiveness in the global market". And DOD continues to provide billions of dollars in R&D funding and support that benefits Boeing's LCA development, after having abandoned its pre-1992 policy of "recover{ing} a *fair share* of its investment in nonrecurring costs related to products, and/or a *fair price* for its contribution to the development of related technology, when the products are sold, and/or when technology is transferred" in order to "assist the U.S. defense industry to be more competitive on a global basis".

5. The central US measures taken to comply, Boeing's donation to the US Government of license rights for a limited number of patents that it knows the US Government can not use, is entirely worthless. The US Government is not in the business of making or selling aircraft-related products for commercial sale, nor does it have Congressional authorisation to establish such a business. Congress could not even do so because it would violate the US Constitution. As the US Supreme Court has explained, "{e}very law enacted by Congress must be based on one or more of those powers" specifically enumerated in Article I of the US Constitution. No power enumerated in Article I authorises the US Government to compete in commercial aviation markets. Under the US Supreme Court's jurisprudence, the US Congress's authority to "regulate" commerce under the Commerce Clause of Article I does not empower the US Government to engage in commerce itself, nor does the Necessary and Proper Clause provide such authority.

6. At the Panel's request, the European Union also addresses the implication for this dispute of the Appellate Body Report in *Canada – Feed-in Tariff Program*. Contrary to the US contention, there is nothing in that Appellate Body Report providing that a panel – after it has already found that a measure affirmatively falls into one or more of the subparagraphs of Article 1.1(a)(1) – should then consider whether a measure may also be classified as a type of transaction that is not listed in Article 1.1(a)(1) (such as a "purchase of service"). Likewise, the brief mention of a "price discovery mechanism" in the benefit analysis of *Canada – Feed-in Tariff Program* fails to undermine the Appellate Body's understanding in this dispute of the relevant market benchmarks for R&D measures. Even if there were a purchase of goods (or services), *Canada – Feed-in Tariff Program* involved a competitive market for the supply of a fungible commodity, which does not exist for NASA, DOD, and FAA R&D contracting.

7. The characteristics of the NASA procurement contracts and DOD assistance instruments before the original panel, as well as the Appellate Body's evidence for completion of analysis on benefit, are highly relevant to the analysis of the other R&D measures, because the principal characteristics, design, and operation are essentially the same.

8. The European Union also submits an expert statement on market benchmarks for R&D contracting, authored by Dr. Richard Razgaitis, who has more than 45 years of experience in the technology and intellectual property licensing fields. In his statement, Dr. Razgaitis confirms that Boeing receives *more* as a party commissioned to do R&D by the US Government than would a commissioned party in a market-based transaction, and that the US Government receives less as a commissioning party than would a commissioning party in a market-based transaction.

9. Finally, the European Union recalls that, while the United States appears to rely on raw assertions to support claims that the DOD RDT&E PEs have no technical relevance to LCA, the US defends itself by noting that its submissions were drafted in consultation with unidentified DOD scientists and other DOD personnel. However, these unidentified "experts" have demonstrated a lack of knowledge about LCA-relevant technologies in, for example, arguing that LCA "seek to avoid cruise" speed above Mach 0.85. Yet, in fact, Boeing had previously offered the Sonic Cruiser LCA model to airlines, which was supposed to travel at speeds of Mach 0.95 to 0.98.

B. Foreign Sales Corporation/Extraterritorial Income ("FSC/ETI") Tax Exemptions

10. The United States has conceded that Boeing is eligible to receive the continuing FSC/ETI benefits, and it is, therefore, reasonable for the Panel to infer that Boeing would take full advantage of the tax breaks for which it is eligible. While the United States asserts that Boeing is not presently using the FSC/ETI subsidy, it has not provided any evidence to support that proposition, nor stated that Boeing has committed not to obtain FSC/ETI benefits in the future.

C. Wichita, Kansas Industrial Revenue Bonds ("IRBs")

11. The US does not contest that the Wichita IRBs continue to provide subsidies to Boeing through the ongoing tax exemptions associated with the IRBs. The United States, however, argues that the Panel should now limit its consideration of specificity to the 2008-2013 period, a period during which Boeing continues to enjoy the tax benefits from previously issued IRBs but has not received any new IRB. This directly contradicts Article 2.1(c) of the *SCM Agreement*, which plainly requires accounting of the "length of time during which the subsidy programme has been in operation", and does not allow for a skewed glimpse at an anomalous period for the longstanding programme.

D. Washington State and Local Subsidies

12. With respect to the Washington State and local subsidies, the European Union has demonstrated that the state and local authorities in Washington State have failed to withdraw the subsidies at issue before the original panel. Instead, they have actually *increased* the value of many of those subsidies and introduced additional closely related subsidy measures, such that the multi-billion dollar stream of past and future expected subsidies has an even greater impact on Boeing LCA. The primary disagreement in on valuation, yet the United States inexplicably refuses to authenticate or explain any of its proposed numbers, which appear to come out of thin air.

E. South Carolina State and Local Subsidies

13. South Carolina is providing Boeing with billions of dollars in subsidies to assist with production and assembly of the 787 in North Charleston, and it is expanding the package of subsidies on a regular basis. These subsidies include a lease of more than 240 acres of public land for up to 30 years, at a cost to Boeing of only *one dollar* per year. On this site, South Carolina is providing Boeing with custom-built facilities and infrastructure worth *hundreds of millions of dollars* for which Boeing pays nothing in return. South Carolina and Charleston County also provide Boeing with tax breaks worth more than $900 million, including a *de jure* export contingent subsidy.

14. The United States, however, would have the Panel believe that these incentives do not involve South Carolina providing anything of value to Boeing, but rather Boeing providing a benefit to the state. It similarly uses using the value provided by one subsidy to obscure the existence of another subsidy. Consider this: South Carolina provides hundreds of acres of land for Boeing at $1 per year; South Carolina uses bond proceeds to prepare the land for Boeing; and the United States argues that there is no subsidy because the land had to be prepared. This simply cannot be correct. Finally, on the tax measures, the United States essentially repeats the same failed arguments it made with respect to the Washington State B&O tax rate reductions in the original proceedings.

IV. PROHIBITED SUBSIDIES AND VIOLATIONS OF ARTICLE III OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE ("GATT") 1994

15. With respect to the EU's "in fact" prohibited subsidy claims, there is no dispute between the Parties as to the legal framework, that skewing towards exports has occurred, that this skewing is greater in the presence of the subsidies, and that there are no relevant non-attribution factors. The US' only defence is that the EU's evidence does not demonstrate encouragement or reward. Thus, the compliance Panel should review the evidence and, unless the Panel finds no indication of encouragement or reward (and remembering that there is no *de minimis* rule for export continent subsidies), should confirm the EU claim.

V. THE US SUBSIDIES CONTINUE TO CAUSE ADVERSE EFFECTS

16. The European Union demonstrated that the United States fails to meet its obligation under the second prong of Article 7.8 of the *SCM Agreement* because the non-withdrawn and new subsidies cause present adverse effects to the European Union and Airbus. *Collectively*, the non-withdrawn and new US subsidies (i) improve Boeing's product offering, and (ii) lower Boeing's prices in a manner that is a genuine and substantial cause of adverse effects. The resulting adverse effects manifest in numerous sales that Airbus lost to Boeing, as well as in suppressed prices and displaced or impeded market shares. These effects will magnify in the coming years with Boeing's recent launches of the 737 MAX, the 787-10, and its imminent launch of the 777X.

17. The US assertion of achieved compliance cannot overcome the EU evidence of present adverse effects because it is flawed in three fundamental ways. *First*, the US arguments ignore most of the subsidies at issue and even contend that *adding* allegedly lower annual amounts of post-2007 R&D subsidies resulted in a *reduction* in subsidies rather than an *increase* of the pool of subsidies. *Second*, the United States asserts that the Panel must ignore the expansion of subsidies and harm based on "scope" objections that the European Union has demonstrated to be without merit. *Third*, the United States challenges the very causal mechanisms found in the original proceedings.

A. Threshold issues

18. The United States has failed to present arguments or evidence rebutting the EU market delineation. In these circumstances, the Panel should proceed to make an objective assessment of the EU arguments and evidence before it, and find that they support the proposed product market delineation. Moreover, even accepting the few unsupported US criticisms would not undermine the EU's adverse effects claim.

B. Causal mechanisms

19. The European Union emphasised that, as in the original proceedings, there are two independent causal mechanisms: first, the US subsidies enable and/or accelerate Boeing's development of innovative technologies for its aircraft ("technology causal mechanism"); and, second, the US subsidies enable Boeing to significantly lower its prices in strategic sales campaigns ("price causal mechanism").

1. Technology causal mechanism

20. At the Panel's request, the European Union addresses the relevance of the original panel's counterfactual findings that the US R&D subsidies accelerated the launch of the 787. This counterfactual applies to the pre-2007 R&D subsidies at issue in the original proceedings but not to the post-2007 R&D subsidies. The US assertions regarding the counterfactual for the pre-2007 R&D subsidies – that Boeing would have needed only two years of additional pre-launch R&D without subsidies – are without merit. They are inconsistent with the original panel's counterfactual findings, and are not credible because, as recognised by Boeing engineers outside this dispute, Boeing would have needed many more years to develop and mature the technologies for actual use on the 787.

2. Price causal mechanism

21. The European Union further demonstrated that the state and local subsidies, as well as certain US R&D subsidies, affect Boeing's prices. Again, the EU arguments and evidence followed the findings in the original proceeding. The US assertion that the European Union should have adopted an entirely different analysis, taking into account (the alleged absence of) capital constraints on Boeing, is without merit. In the original proceedings, the Appellate Body found that certain subsidies caused Boeing to lower its LCA prices, resulting in adverse effects, without considering whether Boeing was or was not capital constrained.

22. The European Union emphasises that it clearly identified the R&D subsidies it considers to affect Boeing's prices. It recalls the original panel's finding on how pre-2007 US R&D subsidies affected Boeing's knowledge base (reducing risks, complementing internal R&D efforts, developing and allowing leverage of knowledge, skills, and technical capabilities), ultimately enabling the launch of the 787. Only a small fraction of post-2006 R&D subsidies has manifested in the form of new technologies appearing on Boeing LCA marketed today and, thus, causes adverse effects through the technology causal mechanism. However, all of these post-2006 R&D subsidies already have an impact on the LCA market through the price causal mechanism.

23. Recalling the finding of the original panel and the Appellate Body that technology development naturally builds upon predecessor technologies, the European Union explains that, when Boeing builds upon NASA- and DOD-funded technologies without paying license fees for the value of that technology, its overall costs are decreased. In much the same way it enjoys cost savings resulting from other subsidies, Boeing can and does pass these savings on to customers for its existing LCA in the form of lower prices. In other words, the post-2006 R&D subsidies that have not yet manifested in the form of new commercialised technologies, cause adverse effects through the price causal mechanism, because they generate valuable early stage technology and knowledge that Boeing may use free of charge, without incurring license fees.

24. The European Union further explains that, in contrast to the US assertions, the present collective magnitude of the non-withdrawn US subsidies available to Boeing for pricing down LCA in strategic, price-sensitive sales campaigns is substantial. Assessing *all* of the US subsidies in three "aggregate" groups is appropriate, in light of their strong similarities in design, structure, and operation, their nexus to subsidised Boeing LCA, and their shared causal mechanism. Moreover, an assessment of the "collective effects" of the three groups of subsidies and the two causal mechanisms is warranted in light of the demonstrated "genuine" causal link between these subsidies and their adverse effects.

C. Specific forms of adverse effects

25. The European Union identified the specific causal mechanisms of the US subsidies benefiting Boeing's 787 and 777X family LCA (enabling lower prices, earlier availability, and the improved technology of those aircraft), Boeing's 737 MAX family LCA (similarly enabling a markedly earlier

availability of that aircraft, with better technology, and at lower prices), and Boeing's 737NGs (enabling lower pricing). In each case, they cause significant lost sales, significant price suppression and displacement/impedance.

ANNEX B-4

EXECUTIVE SUMMARY OF THE CLOSING STATEMENT
OF THE EUROPEAN UNION AT THE PANEL MEETING

Contains no BCI or HSBI

I. INTRODUCTION

1. During the course of this Panel meeting, the United States helped to highlight the strength of the EU arguments and evidence in this compliance phase of the dispute. From the confirmation that the centrepiece of their declared measures taken to comply will never have any impact on Boeing or the US Government, to the continued reliance on the same failed arguments that the United States advanced before the Appellate Body, the United States has clarified that it simply has no basis, either in fact or in law, to rebut the European Union's robust *prima facie* case.

II. R&D SUBSIDY PROGRAMMES

A. The US' alleged compliance measure

2. The European Union recalls its explanation of Boeing's donation to the US Government of "worthless" license rights for a limited number of patents that the US Government cannot use. We further explained that, even if the US Congress wanted to provide NASA and DOD with the ability to use such rights, it could not do so because any such legislation would violate the US Constitution. Because the meaning of domestic law, including of the US Constitution, is a question of fact for a WTO panel, the United States must rebut the EU's interpretation with actual evidence and argument regarding US law.

3. In responding to questions from the Panel, the US has provided even more insight into the nature of the key US declared measure taken to comply. *First*, the United States explained that the US Government did the best it could do in difficult negotiations with Boeing to get some of its IP rights back, but that the "donation" is so limited because Boeing would not give up more. That helps to explain why, as detailed by Dr. Razgaitis, the license from Boeing takes away everything in the second clause that it appears to provide in the first clause. Just as domestic law is no excuse for violations of international law, the bargaining position of the recipient of billions of dollars in massive subsidies is also not an excuse for the US massive non-compliance.

4. *Second*, the United States has now candidly declared that, to the extent the US genuinely believes it has gained any IP rights from the NASA-Boeing and DOD-Boeing license agreements, the US Government "has no intention to exercise that right". In other words, it has no intention of ever even *attempting* to make use of these license agreements.

5. Thus, with respect to the R&D subsidies subject to the rulings and recommendations of the DSB, this settles the issue – the US has not complied with its obligations to withdraw those subsidies.

B. Benefit

6. During the course of this Panel meeting, the parties have discussed the question of whether a finding of "benefit" for the R&D contracts and agreements at issue requires looking beyond the systematically skewed allocation of IP rights in those measures. In particular, the Panel has asked whether one must consider additional terms of the US Government R&D contracts, including inputs by Boeing, before determining whether a benefit exists. As the original panel and Appellate Body have already found "benefit" with respect to the pre-2007 NASA procurement contracts and DOD assistance instruments, this question relates only to the other R&D subsidies.

7. In fact, the Appellate Body in the original proceedings had already considered this question with respect to DOD assistance instruments, rejecting the US Government's arguments that the

funds provided by Boeing towards the joint ventures cancelled out any benefit provided by the systematically skewed IP allocation. Indeed, because the allocation of rights is systematically established by US law, the amount of any *ex ante* contribution by Boeing cannot change the distribution of patent rights under the R&D contracts or eliminate the benefit inherent in the architecture of these measures.

8. In contrast, this is clearly not what happens in market transactions, as Dr. Razgaitis explains in his expert statement. In the market, when the respective inputs from the commissioning and commissioned parties change, the allocation of IP rights also changes. And, in the market, because the outcome of R&D is uncertain, the commissioning party retains *at least* a non-exclusive license to use the resulting patented inventions and a valuable exclusive option for an exclusive license.

9. Under the US Government contracts, regardless of differences in the distribution of inputs and outputs beyond IP, the distribution of IP is always the same, and it is always more favourable to Boeing than it is to any commissioned party in the market, and less favourable to DOD than to any commissioning party in the market. There is no circumstance in the market where the relative input of the commissioning party is so low, and the relative input of the commissioned party so high, that it would produce a distribution of IP rights as skewed in favour of the commissioned party as the US Government R&D contracts are for Boeing.

10. In the market, when a commissioning party simply does not have a commercial interest in using the intellectual property developed through the joint venture, as the United States claims is the case with the US Government, a commissioning party gives up the right to derive value from exploiting the IP only in exchange for obtaining something similarly valuable, such as royalties, from the other party. DOD, by contrast, give up its IP rights for nothing; and Boeing pays nothing for this.

11. As the development of technology and IP is the whole purpose of the R&D contracts, this necessarily leads to a finding that benefit exists, as was well understood by the Appellate Body.

III. THE US SUBSIDIES CONTINUE TO CAUSE ADVERSE EFFECTS

A. Product markets

12. The United States contends that, despite undisputed market changes since the end of the original 2004-2006 reference period, the Panel should, by default, apply a historical market delineation from seven to ten years ago. This position must be rejected because it is legally flawed. During the course of this Panel meeting, the United States did not cite any authority for this proposed "default" rule. Nor does it explain how adopting it could even qualify as an objective assessment of the facts, given that the present markets include aircraft, such as the A320neo, 737 MAX, 777X, and the 787-10, that *did not exist in the original reference period and for which there are no product market findings*. Moreover, the proposed "default" rule is irreconcilable with the US argument in *EC – Large Civil Aircraft*, that current LCA compete in *three* markets: (i) one market for single-aisle aircraft; (ii) one market for wide-body aircraft; and, (iii) one market for very large aircraft (not at issue in these proceedings).

13. Recalling that it has demonstrated a product market delineation based on extensive quantitative and qualitative evidence and rigorous analyses, the European Union emphasises that the US criticisms thereof are without merit and fail to rebut the EU product market delineation. As an example, the US complaint that Mr. Mourey conducts NPV analyses only for aircraft which are similarly sized, but do not closely compete, and not for aircraft which *do* closely compete, ignores the extensive EU evidence and testimony from Mr. Mourey confirming the close competitive relationship between such aircraft – including undisputed evidence of close price-sensitive competition in numerous recent sales campaigns; testimony regarding Airbus' market experience and customer perceptions of the competitive relationships between these aircraft; and evaluations of the physical and performance characteristics of such aircraft.

14. In any event, whether the Panel adopts the US three product market delineation, or the more nuanced EU product market delineation, this would have no impact on the EU adverse effects claims.

B. Technology causal mechanism

15. Recalling the significant differences between the Parties regarding the nature of the counterfactual for the technology causal mechanism, the European Union stresses that the US errs when asserting that the counterfactual can be reduced to a question of simply *accelerating* the launch of the 787. The European Union recalls that the original panel found, and the Appellate Body confirmed, that the counterfactual question is one of both acceleration and enhanced technologies.

16. Regarding the question of acceleration, the European Union emphasises that technology effects do not simply cease once the 787 is launched, but that the important question is when Boeing could promise *delivery* of the aircraft. In other words, the question is at what time Boeing's first 787 delivery would have occurred without the technological leg up from the US R&D subsidies. The timing of product launch varies from programme to programme and can take account of considerations such as the success of competing products. Delivery dates, on the other hand, are crucial for airlines' purchasing decision as demonstrated by the fact that, for airlines, later delivery slots mean higher operating costs (where older aircraft are being replaced), or profits forgone (where aircraft with larger capacity or additional aircraft are ordered).

17. The European Union further demonstrated that the US suggestion that without the R&D subsidies, Boeing would have needed only two additional years of 787 pre-launch R&D, which would have allowed first deliveries at least in 2010, is baffling and implausible. The original panel found that the United States funded R&D that Boeing would not have undertaken absent the US subsidies. Moreover, the United States asserts that, in addition to two years of pre-launch R&D, it would only have taken Boeing engineers another four years (or less) to mature, produce, certify and deliver not just the array of novel, innovative *individual* technologies included on the 787, but also to *combine* those innovations to ensure that they interact optimally. It is implausible that Boeing could have overcome the large economic disincentives and packed all the necessary research and development work in only six years.

18. The implausibility of the US counterfactual is confirmed by a comparison with the timeline for the Airbus A350XWB – a comparison that the United States itself suggested during this Panel meeting. The European Union recalls that it has demonstrated that it will take Airbus much longer than the six-year period asserted by the US, for the 787, to move the A350XWB from pre-launch R&D to first delivery. This is all the more significant since, as benchmarks go, Airbus' experience with the A350XWB is extremely conservative. While offering similar economics, the *technology solutions* on the A350XWB, in particular its four-panel composite fuselage, are considered lower risk and more conventional compared to the innovative full fuselage barrel of the 787. In addition, the A350XWB's systems architecture is more conventional than the 787's more electric systems. This suggests that, in a counterfactual world without subsidies, it would have taken Boeing, for the 787, considerably longer, rather than considerably less time, than it has taken Airbus, for the A350XWB, to progress from pre-launch R&D to first delivery.

C. Price causal mechanism

19. The European Union recalls that, in the Oral Statement of this Panel Meeting and earlier submissions, it not only identified the particular US subsidies operating through a price causal mechanism and the particular Boeing aircraft to which each of these subsidies are linked, but also clarified which of these subsidies should be aggregated and identified the magnitude for each subsidy. Noting that, in terms of financial contribution, the subsidies total many billions of US dollars, the European Union emphasises that – contrary to the repeated US assertions – the annual average amount of the financial contributions has significantly increased, compared to the time period at issue in the original proceedings.

20. During the course of this Panel meeting, the United States complained that EU arguments concerning the subsidies' adverse effects differ from those raised in the original proceedings. The European Union explains that, in general, it is difficult to understand why the United States believes that the European Union is legally bound to prior arguments that do not fully account for the different facts and circumstances presently at hand. Moreover, it is difficult to understand how the European Union could make different arguments in the original proceedings about new post-2006 R&D subsidies that were not even at issue in those proceedings.

21. Additionally, the European Union highlights the important distinction with regard to the timing of the subsidies relative to these proceedings. Whereas for older R&D subsidies, resulting technologies are applied on currently marketed Boeing LCA, for more recent R&D subsidies, the resulting technologies are generally still being matured by Boeing, for application on future LCA. This difference has an impact on the way in which the effects of the R&D subsidies manifest, but does not change anything about the fact that both types of subsidies enhance Boeing's competitiveness by providing Boeing access to technology. Whether the present effect of the subsidy is (i) technology manifesting on Boeing LCA marketed today, or, instead, (ii) cost-free access to technology pending maturation, the prejudice to Airbus' competitive position comes in equally actionable present adverse effects under Article 6.3 of the *SCM Agreement*.

ANNEX C

ARGUMENTS OF THE UNITED STATES

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ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION
OF THE UNITED STATES

INTRODUCTION

1. Much has changed since 2006, the last year covered by the original panel's findings in *US – Large Civil Aircraft*. The National Aeronautics and Space Administration ("NASA") and U.S. Department of Defense ("DoD") have both dramatically reduced the number and value of the types of research transactions with Boeing that were found to be inconsistent with the SCM Agreement – NASA by more than half, and DoD by even more. But even more significantly, NASA has changed the way it conducts research, setting research objectives through an open and transparent process, focusing more on early stage foundational research, eliminating restrictions on the government's data rights, and otherwise committing to make more results available more quickly. NASA and DoD also renegotiated the division of intellectual property rights under the contracts and agreements covered by the original panel and Appellate Body findings so as to make them consistent with commercial transactions. And the City of Wichita has ceased granting Industrial Revenue Bonds to Boeing. Through these actions, the United States has either withdrawn the relevant subsidies or taken appropriate steps to remove their adverse effects. The United States has accordingly complied fully with the recommendations and rulings of the DSB.

2. The EU ignores these new facts. It does not grapple with the changes in how NASA performs research and, accordingly, never makes the legal showing that it considers critical to its *prima facie* case, namely, that NASA's current transactions, as they occur in 2013, are subsidies. Although six and one-half years have passed, the EU starts with the assumption that the old aeronautics R&D subsidies are having exactly the same effects today that they did it 2006, ignores the nature of those effects and important changes that have taken place in the interim, and then proposes that in actuality, those effects actually grew. It gives these supposed developments ominous-sounding epithets – "sleeper" effects and "spillover" effects – but cannot hide that this notion of old technologies becoming more useful with time is at odds with both commercial reality and the original panel's finding that, over time, "the contribution of the NASA-funded research will diminish in relation to other, more recent or revolutionary technological developments that are attributable to other factors."[1] The EU's willful ignorance is particularly disturbing given that the United States spent months of effort to provide more than 22,700 pages of documents that the EU insisted were critical to its case, in response to the Panel's request for information under DSU Article 13. These materials indicate the nature of the research conducted and the terms of the transactions, and disprove the EU's subsidization and adverse effects theories.

3. The EU simply assumes that the accelerated development of technology for the 787 found by the original panel remains relevant today and, therefore, that the 787 today continues to enjoy those advantages. But there is no basis to assume that Boeing would not have developed the 787 over the intervening years, and the EU has not even tried to support that obviously implausible story. As Boeing engineers set out in great detail in a report supplied with this submission, the technology advances identified by the original panel would have been developed by Boeing by 2006, just as Airbus was able to make similar technology advances for its own launch of the A350XWB by 2006 – that is, well before the end of the implementation period. And as the 787 with those technology advances would have been on the market, the EU has no plausible causation story in this proceeding

4. The compliance Panel will have noticed the unprecedented length, complexity, and unfocused nature of the EU's first submission. Such an approach would appear to relate to the lack of any plausible and coherent theory of how subsidies received by Boeing caused adverse effects. The EU does seem to recognize that it cannot make out a *prima facie* case of non-compliance on the basis of the current facts, and so instead it ignores and distorts them, and seeks to rely on a different set of facts by expanding the scope of the proceeding to issues unrelated to U.S. compliance. Indeed, the EU has gone to extraordinary lengths to resurrect claims and arguments

[1] *US – Large Civil Aircraft (Panel)*, para. 7.1758.

that it lost in the original proceeding and to bring new claims with regard to measures that it could have challenged in 2005, but chose not to, or that are otherwise clearly outside the terms of reference of this Panel. Thus, for example, the EU:

- seeks again to challenge alleged benefits derived by Boeing from having access to certain DoD equipment and employees, and which the original panel found were excluded from the EU's original panel request;

- revives claims against program elements under several DoD programs that already existed at the time of the EU panel request in the original panel proceedings, or that continue work under programs that existed at that time, but which the EU did not originally challenge;

- seeks again to challenge DoD procurement contracts – even though that challenge was rejected by the original panel previously (and for which it then specifically asked the Appellate Body *not* to complete the analysis);

- seeks to re-challenge certain Washington State and local measures for which there were no DSB recommendations and rulings;

- raises entirely new claims with regard to environmental programs of the U.S. Federal Aviation Authority; and

- raises entirely new claims with regard to economic development programs in the State of South Carolina that are not measures taken to comply, in particular that have no nexus to any of the U.S. measures taken to comply or the DSB recommendations and rulings

The United States understands the EU's need to grasp at any measure it can identify to try to build up the semblance of support for its missing economic / causation story. But, as the United States indicated in its request for preliminary rulings, these claims and measures have no place in a compliance proceeding. The United States accordingly renews its request for a preliminary ruling that these measures are not within the Panel's terms of reference.

5. In closing this introduction, the United States notes that it has focused this submission on the key points raised in the EU first written submission. Silence with regard to any issue should be understood as silence, rather than agreement with a position we have not addressed.

ALLEGED SUBSIDIES

NASA Contracts and Space Act Agreements ("SAAs")

6. During the original proceedings, the United States put forward evidence showing that NASA contracted private entities, including Boeing, to conduct research to advance NASA's missions to achieve "{t}he expansion of human knowledge of the Earth and of phenomena in the atmosphere and space" and "{t}he improvement of the usefulness, performance, speed, safety, and efficiency of aeronautical and space vehicles."[2] The EU argued that, rather than achieving any public good, NASA research programs were exclusively to develop technology for Boeing to use in its aircraft. The original panel did not adopt either party's views. The original panel found that "it appears that a principal purpose of NASA's aeronautics R&D in general, and of the eight aeronautics programmes at issue, is to transfer technology to U.S. industry with a view to improving U.S. competitiveness vis-à-vis foreign competitors."[3] On the other hand, "the Panel accepts that NASA publicly disseminated the reports that summarized the results of the research conducted under the eight programmes at issue, and that this represents a situation in which Boeing has given up something of value in exchange for the funds and access to facilities, equipment and employees that it receives."[4]

[2] Space Act, § 102(d) (1)-(2) (Exhibit EU-252).
[3] *US – Large Civil Aircraft (Panel)*, para. 7.985.
[4] *US – Large Civil Aircraft (Panel)*, para. 7.1100.

7. As outlined in the U.S. Compliance Notification and discussed in greater detail in the initial U.S. response to the Panel's Article 13 request for information, NASA overhauled its practices for conducting aeronautics research in the intervening period. This process, which was already under way at the end of the period covered by the panel's findings, led to the elimination or modification of many of the aspects of the NASA programs that led to the original panel's findings. NASA lessened contractors' role in choosing research priorities and designing research programs. It framed research objectives to be broadly applicable to the community and thereby stimulate competition among suppliers, introduced neutral peer review of all proposals, and eliminated the fostering of industry competitiveness as an evaluation criterion. NASA eliminated LERD protection of the results of research, and committed to maximum dissemination of the results of its research.

8. NASA also halved its average annual spending on aeronautics research as compared with the period covered by the original panel's findings. The real change in resource commitment is even more stark, as these figures do not account for inflation.

9. With regard particularly to the contracts that the panel and Appellate Body findings found to confer WTO-inconsistent subsidies, NASA modified the terms to bring them in line with a commercial benchmark.

10. These actions brought NASA into compliance with respect to the pre-2007 subsidies identified in the reports of the original panel and the Appellate Body. They also ensured that NASA's post-2006 contracts, cooperative agreements, and SAAs were consistent with WTO rules.

11. The legal issue in this dispute, as framed by the EU, is whether the payments, facilities, equipment, and employees NASA provided to Boeing through the programs identified by the EU, in light of the compliance measures taken by the United States, are subsidies that cause adverse effects in the period after September 23, 2012.[5] To establish the existence of current subsidies in line with the EU argument would require: (1) an evaluation of the efficacy of the compliance measures taken by the United States with respect to the subsidies found to exist; (2) a thorough evaluation of the terms and conditions of any new subsidies alleged by the EU, again in light of U.S. compliance measures, and (3) correct application to those facts of the legal tests for the existence of a financial contribution, conferral of a benefit, and specificity. In spite of a lengthy submission, the EU has done none of these things.

12. Although the United States referenced compliance measures taken by NASA in the U.S. Notification, explained how they ushered in a new approach to its funding of aeronautics research, and provided substantial information on them in the U.S. Article 13 response,[6] the EU has, for the most part, not even attempted to discuss how they affected pre-2007 subsidies, or the contracts, cooperative agreements, and SAAs between NASA and Boeing after 2006.

13. The contracts and SAAs between NASA and Boeing in the FY2007-FY2012 period are the putative financial contributions that the EU challenges. It is their terms, and not generic descriptions of the NASA programs, that will determine whether or not they are subsidies. The evidence shows that these contracts researched topics of public usefulness, which NASA disseminated to the broadest extent possible to the public. Although the United States expended considerable time and effort to make this information available in response to the Panel's Article 13 request, which had been avidly sought by the EU, the EU largely ignored this information, choosing instead to rely on highly generalized discussions of research topics in budget materials, which indicate nothing about the terms of the actual transactions. As these terms must form the basis of any analysis of financial contribution and benefit, the EU's failure to address them is fatal to its arguments. The EU also ignores that the magnitude of any financial contribution is vastly lower than alleged by the EU.

14. On the question of financial contribution, the EU's failure to grapple with the facts leads it to incorrectly identify post-2006 NASA contracts as "akin to a joint venture." In light of changes in NASA's practices, they are properly treated as purchases of services, which are not a financial contribution for purposes of Article 1.1(a) of the SCM Agreement. With respect to pre-2007 contracts, the EU fails to realize the import of the Appellate Body's finding that pre-2007 contracts

[5] EU FWS, para. 49.

[6] U.S. Compliance Notification, paras. 3 and 4; Response of the United States to the Panel's Request for Information Pursuant to Article 13 of the DSU, paras. 12-16 (Feb. 28, 2013).

and SAAs are joint ventures, and accordingly applies benchmarks that do not account for all relevant terms of the transactions. Proper benchmarks, including one endorsed by the EU, demonstrate that NASA funding under these instruments was no more favorable to Boeing than a commercial entity would have provided. (Because the EU incorrectly characterized the post-2006 contracts, its benchmark analysis is completely inapplicable to those transactions.) Finally, when it comes to specificity, the EU incorrectly limits its analysis to NASA, when the Appellate Body has already found that the subsidy the EU alleges – the attribution to Boeing of more intellectual property rights than it would receive under a commercial transaction – must be assessed on a broader level, and is not specific.

DoD Contracts and Agreements

15. It cannot be emphasized enough that the only findings of WTO inconsistency regarding DoD were with respect to cooperative agreements, technology investment agreements ("TIAs"), and Other Transaction Agreements ("OTAs"; collectively "Agreements") funded through the original 23 program elements, and that they formed the basis for the only recommendations and rulings of the DSB applicable to DoD. In light of the EU's failure, after seven years of trying in the original dispute, to obtain a recommendation with regard to other instruments or other program elements, there was no reason for the United States to modify anything beyond the cooperative agreements, TIAs, and OTAs covered by the Appellate Body's findings.

16. DoD's use of these instruments under the original 23 program elements with respect to Boeing has changed dramatically. First of all, the number of cooperative agreements, TIAs, and OTAs between Boeing and DoD under the 23 original program elements has plummeted, from 50 during the 1992-2006 period to three from 2007 to 2012.[7] DoD has also renegotiated the terms of the agreements covered by the original proceedings, based on a commercial benchmark. Thus, these transactions no longer contain any subsidy element. In any event, their amount is too small to have any meaningful impact.

17. However, the EU chose to expand its compliance challenge far beyond the subsidies found to exist by the original panel and the Appellate Body. It did this in two ways, First, beyond the agreements (cooperative agreements, TIAs, and OTAs) funded through the 23 original program elements, the EU has asserted claims on procurement contracts. Second, the EU sought to add a series of new program elements, which it did not originally challenge, to the dispute.

18. As the Panel is aware, the United States objected to this expansion of the dispute, and has sought a preliminary ruling that these additional claims are not properly within the Panel's terms of reference. As the Panel has not yet taken action on the U.S. preliminary ruling request, this first written submission addresses all of the EU claims.

- U.S. measures taken to comply with respect to the agreements funded through the 23 original program elements withdrew the subsidy found to exist, which consisted of terms for the allocation of patent rights more favorable than would have been available under a commercial transaction.

- Procurement contracts funded through the 23 original program elements do not confer subsidies, and are not specific.

- Instruments of all types funded through the new program elements are also not subsidies, and are also not specific.

19. The legal issue in this dispute, as framed by the EU, is whether the payments and facilities DoD provided to Boeing through the programs identified by the EU, in light of the compliance measures taken by the United States, are subsidies that cause adverse effects in the period after September 23, 2012.[8] To establish the existence of current subsidies with respect to agreements funded through the 23 original program elements, the EU's argument would require: (1) an evaluation of the efficacy of the compliance measures taken by the United States with respect to

[7] *See DoD Agreements Listed in Annex B to the U.S. Compliance Notification* (Exhibit USA-107). If the new program elements challenged by the EU are included, the number of agreements rises only slightly, to five. That is still vastly fewer than during the 1992-2006 period.

[8] EU FWS, para. 49.

the subsidies previously found to exist; (2) a thorough evaluation of terms and conditions of any new subsidies alleged by the EU, again in light of U.S. compliance measures, and (3) correct application to those facts of the legal tests for the existence of a financial contribution, conferral of a benefit, and specificity. In spite of a lengthy submission, the EU has done none of these things.

20. DoD made important changes in its use of agreements in its dealings with Boeing. In particular, DoD and Boeing entered into far fewer cooperative agreements, TIAs, and OTAs related to research after 2006 than before, both in general and under the 23 original program elements.

21. The agreements between DoD and Boeing in the FY2007-FY2012 period are the putative financial contributions that the EU challenges, and it is the terms of the relevant instruments that will determine whether or not the transactions are subsidies. The evidence shows that these agreements produced research on topics of military use, and did not have the development of civil technology as an objective. Although the United States went to considerable time and effort to make this information available in response to the Panel's Article 13 request, commenced following the suggestions of the EU, the EU largely ignored it, choosing instead to rely on highly generalized discussions of research topics in budget materials, which indicate nothing about the terms of the actual transactions. As these terms must form the basis of any analysis of financial contribution and benefit, the EU's failure to address them is fatal to its arguments.

22. The EU's methodology for calculating the value of any financial contribution is invalid, and produces an incorrectly inflated figure. The EU also fails to show the existence of a benefit, as it compares the terms of DoD instruments with the wrong benchmarks. Finally, when it comes to specificity, the EU incorrectly limits its analysis to DoD, when the Appellate Body has already found that the subsidy the EU alleges – the attribution to Boeing of more intellectual property rights than it would receive under a commercial transaction – must be assessed on a broader level, and is not specific.

Federal Aviation Administration ("FAA") CLEEN Program

23. The EU's claims regarding the Federal Aviation Administration's CLEEN program are based on unsubstantiated analogies to the NASA measures subject to the DSB's recommendations and rulings. They reflect a fundamental misunderstanding of the nature of the CLEEN program, which is surprising, given that it appears similar to the EU's own Clean Sky Initiative. An accurate depiction of the CLEEN program makes clear that it is outside the terms of reference of this compliance panel and, in any event, is not a specific subsidy to Boeing. The EU appears to be looking for new measures to challenge, even if this comes at the expense of legitimate and non-discriminatory environmental measures such as the FAA CLEEN program.

State of Washington

24. The EU contests seven measures enacted by the State of Washington or its localities.[9] However, only the EU's claim regarding a single measure – the Washington State B&O tax rate– is properly within the terms of reference of this compliance proceeding. The United States complied with the DSB's recommendations and rulings in regard to this measure. The EU's remaining claims concern measures outside the terms of reference of this compliance proceeding: (i) measures challenged in the original proceeding that were not found to cause adverse effects;[10] or (ii) measures that are not measures taken to comply with the recommendations and rulings of the DSB.[11] Moreover, and in any case, the magnitude of these alleged subsidies are all too small to cause adverse effects, when considered in the proper analytical framework.

City of Wichita

25. The City of Wichita is applying its Industrial Revenue Bond ("IRB") program in a manner consistent with the SCM Agreement. Boeing, moreover, no longer receives IRBs, and IRBs are no

[9] EU FWS, paras. 427-541.

[10] This includes the EU claims regarding the Washington State B&O tax credits for preproduction development; Washington State B&O tax credits for property taxes; sales and use tax exemptions for computer hardware, software and peripherals; and the City of Everett B&O tax rate reduction.

[11] This includes the EU claims regarding Washington State B&O tax credits for leasehold excise taxes and the Washington State Joint Center for Aerospace Technology Innovation ("JCATI").

longer causing any adverse effects. The United States has both withdrawn this subsidy and taken appropriate steps to remove its adverse effects.

State of South Carolina

26. Throughout the 1990s and up until today, the U.S. state of South Carolina has been providing a variety of programs to encourage and enable companies to invest in the state and, thus, to stimulate the economic development and well-being of the state at large. These programs are not targeted at any particular enterprise or industry, and they are non-discriminatory in every sense of the word. Indeed, many companies from the EU have taken part in and made use of these programs. South Carolina's economic development measures, moreover, are not declared "measures to comply" and, in terms of their nature and effects, are different from any of the measures that are subject to the DSB's recommendations and rulings.

27. Despite this, the EU has decided to challenge South Carolina's economic development measures and it argues that they are within the terms of reference of this compliance proceeding. The EU's arguments to this effect fail.

28. Project Emerald is outside the terms of reference of this compliance proceeding, as it dates from 2004 and has no close nexus with the DSB's recommendations and rulings in the original panel proceeding. Moreover, Project Emerald and its constitutive parts are not subsidies within the meaning of Article 1 because they do not confer a benefit on Boeing.

29. Project Gemini is outside the terms of reference of the Panel, as it was not the subject of the DSB recommendations and rulings and is not a measure taken to comply, including because it has no close nexus with the measures that were the subject of the DSB recommendations and rulings. Project Gemini is also not a subsidy within the meaning of Article 1 of the SCM Agreement.

30. The Article 2 specificity analysis is only relevant if and when it is determined that a measure is within the terms of reference and constitutes a subsidy. The measures made available through Project Emerald and Project Gemini are generally available to industries meeting neutral criteria and, therefore, are not specific.

Alleged Prohibited Subsidies

31. In the EU's panel request, it claimed that every measure identified was inconsistent with Articles 3.1(a), 3.1(b) and 3.2 of the SCM Agreement.[12] The United States noted in its preliminary ruling request that it was implausible the EU was making all of the claims implied in its panel request. The U.S. skepticism was based, in part, on the fact that the EU had taken the same approach in its original panel request, and yet made only two claims of inconsistency under Article 3.1(a) and no claims under Article 3.1(b) in the original proceeding.[13]

32. The EU's argument in its first written submission bears out the implausibility of its prohibited subsidy claims. However, unlike the EU's approach in the original proceeding, it followed through with an argument applicable to all challenged measures: that although they are not inconsistent with Articles 3.1 and 3.2 of the SCM Agreement when considered individually, they become inconsistent when considered collectively.

33. The EU's claims are precluded and, in any event, fail. Grouping measures does not bring the EU's claims within the terms of reference of this proceeding, nor does it remedy the deficiencies in the EU's substantive arguments.

Adverse Effects

34. The United States demonstrated in the preceding sections that it has withdrawn all subsidies of any significance that were covered by the DSB's recommendations and rulings. To the extent that minor subsidies were not withdrawn, their magnitude is so small – particularly in the context of the LCA industry – that they cannot plausibly cause adverse effects to the EU's interests. The EU

[12] EU Panel Request, paras. 30-31.
[13] Original EU Panel Request, p. 13; *US – Large Civil Aircraft (Panel)*, para. 3.1.

has thus failed to establish its case that "the United States grants and maintains subsidies to Boeing after the end of the implementation period that cause present adverse effects."[14]

35. At its most basic level, EU's adverse effects case is contradicted by developments in the market:

- The EU asserts that U.S. R&D subsidies gave Boeing an enduring technology lead in the twin-aisle market. Yet Airbus was able to quickly catch up with the head-start that the original panel found Boeing enjoyed, and today, according to Airbus,"{o}ur A350 XWB has been out-selling the 787 by better than 2- to-1 over the last five years."[15]

- The EU asserts that the R&D subsidies, combined with a small magnitude of alleged tax and other subsidies, have enabled Boeing to launch and price the 737 MAX as and when it did. Yet it was *Airbus* that launched its re-engined single-aisle aircraft first (nine months before Boeing), and it is Airbus that, as it recently noted, retains a 60 percent market share lead.[16]

- The EU asserts that a small amount of alleged tax and other subsidies have benefitted the 737NG and led to price suppression and significant lost sales of the A320ceo. Yet these alleged subsidies are grossly insufficient to cause the alleged adverse effects.

36. That these market developments look so different from what the EU asserts in its first written submission is no surprise: the EU's adverse effects case rests on shaky legal and factual ground that ignores the actual nature and magnitude of the alleged subsidies and disregards the original panel and Appellate Body findings.

37. First, the EU fundamentally misconstrues the original panel finding with respect to *"technology effects*. The R&D subsidies were found to have accelerated the 2004 launch of the 787, not to have enabled the development of technologies that Boeing would not have otherwise discovered. As a result, the EU fails to even ask when the 787 would have launched in the absence of the subsidies found in the original proceeding, a critical question for determining whether those subsidies continue to cause adverse effects. Based on their real-world experience, Boeing engineers indicate that, had Boeing not participated in the challenged NASA and DoD research, Boeing would have launched the 787 no later than 2006, with promised deliveries no later than 2010. The EU's reliance on a false premise that the 787 would never have come to market absent subsidies results in a failure to establish a genuine and substantial causal link between the alleged subsidies and the corresponding alleged adverse effects.

38. Second, the EU ignores the important changes to NASA and DoD R&D programs since 2006 – such that even if they could be considered to confer a subsidy (which the United States has shown is not the case), they could not be expected to have the same kind of "technology effects" that the panel found to have arisen from the R&D measures in the original proceeding. NASA and DoD have both dramatically reduced the number and value of the research transactions challenged in the original proceeding – NASA by more than half, and DoD by even more. And with respect to their terms and nature, NASA has, among other things, increased access to the results of its research and focused increasingly on foundational research, thus not only removing any subsidy but also dramatically altering any possible effects that the measures could possibly have.

39. Third, with respect to *"price effects"* – the other prong of the EU's adverse effects case – the EU similarly misconstrues the original findings and ignores the small magnitude of the subsidies that could have any conceivable relation to pricing. The EU ignores the original panel's finding that R&D subsidies acting through a technology-based causal mechanism cannot also act through a price-based causal mechanism. The EU fails to assess with any rigor the magnitude of any unwithdrawn subsidies. The EU ignores the Appellate Body finding that the effects of individual smaller subsidies that act through distinct causal mechanisms cannot be cumulated when no individual subsidy or aggregated group of subsidies has a substantial causal relationship with the

[14] EU FWS, para 790.

[15] *Airbus Books Almost US$70 Billion at Paris Air Show 2013*, Press Release, Airbus (June 20, 2013) (Exhibit USA-282).

[16] *Airbus Books Almost US$70 Billion at Paris Air Show 2013*, Press Release, Airbus (June 20, 2013) (Exhibit USA-282).

alleged adverse effects. And the EU fails to demonstrate that non-recurring subsidies untied to the production or development of aircraft affect Boeing's pricing. The EU thus fails to establish a genuine and substantial link between the alleged subsidies acting through a price effects causal mechanism and any adverse effects.

40. The United States demonstrates that these critical errors, coupled with a failure to account for numerous non-attribution factors, lead to the EU's erroneous claims of significant price suppression, significant lost sales, and displacement, impedance, and/or threat thereof. Accordingly, the EU has failed to establish its claims that unwithdrawn subsidies continue to cause adverse effects after the end of the compliance period.

CONCLUSION

41. For the foregoing reasons, the United States respectfully requests the Panel to grant the preliminary rulings requested by the United States, and otherwise find that the EU has failed to make a *prima facie* case of non-compliance with the recommendations and rulings of the DSB in this matter.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

National Aeronautics and Space Administration ("NASA") Research Programs

1. NASA's Aeronautics Research Mission Directorate ("ARMD") took a number of steps in 2006 that significantly changed its research practices. The United States described these in its first written submission – revised contracting practices that lessened contractors' role in shaping objectives, peer review of research proposals, elimination of industry competitiveness as an objective, and the addition of dissemination of results as a source selection criterion, among others. NASA's budget for aeronautics research also continued to fall during the FY2007-FY2012 period, coming to a rest at its lowest levels in 20 years. These changes resulted in a dramatic reduction in research contracting, including with Boeing.

2. In addition, NASA modified the terms of its research contracts with Boeing for the conduct of research relevant to large civil aircraft to bring them in line with the potential benchmarks discussed by the Appellate Body. It took this change not only with respect to the pre-2007 contracts explicitly covered by the recommendations and rulings of the DSB, but also with respect to contracts awarded under the modified post-2006 aeronautics research contracting practices.

3. The EU does not dispute that funding under the challenged programs was drastically lower in the 2007-2013 period. Nonetheless, it asks the Panel to find that the value of NASA payments and provision of facilities, equipment, and employees to Boeing more than *doubled*. The EU's figures are not credible. The United States used the methodology endorsed by the original panel to identify contracts funded by NASA's four aeronautics research centers and then, in line with *the Panel's* request, provided those funded by the programs challenged by the EU. Thus, the United States has responded to the Panel's concerns, while the EU still champions its discredited methodology, which the original panel rejected. The EU does dispute the changes to NASA's research contracting practices, belittling the overhaul in NASA's contracting practices in 2006 as "a disparate set of actions brought together only for the purposes of this dispute." However, the as the U.S. first written submission showed, NASA has shifted away from technology demonstration like the High Speed Research Program and toward more foundational research.

4. In light of these changes, NASA has withdrawn the subsidies determined to exist, both with regard to the pre-2007 contracts covered by the recommendations and rulings of the DSB and with regard to subsequent contracts and agreements. Specifically, the Appellate Body findings in *US – Large Civil Aircraft* identified a small gap between government terms and the market terms for comparable transactions, consisting mainly of the government's failure to obtain certain intellectual property rights for commercialization outside its established government sphere of activities. The NASA Licensing Agreement eliminated that gap, withdrawing the benefit that led to the finding of subsidization.

5. The United States has shown that post-2006 contracts are purchases of services because they involve primarily monetary contributions from the government, and the performance of research services by Boeing. These are not a form of financial contribution. In any event, assuming *arguendo* that they were a financial contribution, these transactions do not confer a benefit, as their terms are consistent with comparable commercial transactions. Furthermore, those terms are consistent with those offered by all U.S. government agencies on research and development contracting, so if there were some element of benefit, any resulting subsidy would not be specific. The same holds true for NASA's SAAs with Boeing.

Department of Defense ("DoD") Assistance Instruments

6. The U.S. first written submission demonstrated that the EU had failed to establish any failure on the part of the United States to comply with the DSB's recommendations and rulings regarding DoD. For assistance instruments funded through the original 23 program elements the difference between DoD's terms and market benchmarks was limited to DoD's right to use any resulting

technologies outside of its established sphere of operation. The DoD Licensing Agreement eliminated that difference.

7. For these instruments, the primary disagreements between the parties are over the value of the post-2006 assistance instruments, the existence of a benefit, and specificity. The parties do not otherwise dispute the basic facts: the assistance instruments awarded to Boeing are "akin to a joint venture," they are financial contributions, and the pre-2006 agreements provide for defense technologies (which is the basis for DoD's funding) with potential civil applications. The parties also agree that DoD assistance instruments operate basically the same today as they did in the period covered by the original panel and Appellate Body findings.

DoD Contracts Funded Through the "General Research" Program Elements

8. The original panel found that DoD procurement contracts and assistance instruments are fundamentally different, and that only the latter conferred a subsidy. Nevertheless, the EU attempts to resuscitate its challenge to DoD procurement contracts by arguing that DoD procurement contracts and assistance instruments work the same way. This is another example of the EU's effort to turn this proceeding into a referendum on the recommendations and rulings of the DSB, rather than whether the United States complied with its WTO obligations.

9. The EU's second written submission indicates many important areas of agreement between the United States and the EU with respect to contracts funded through the "general research" program elements. The EU does not dispute that all of these transactions had military objectives. It also does not dispute that, outside of the DUS&T and ManTech programs, DoD sets its research objectives based exclusively on the potential for providing future technology options for military needs, and evaluates for-profit firms' proposals to perform research exclusively on the extent to which they meet those military objectives. These facts confirm that the resulting transactions were not joint ventures, designed to produce technology useful for both DoD's military objectives and Boeing's civil use. The EU second written submission, in an effort to create the impression that military research had massive civil uses, highlights every reference to civil application under these contracts. However, the rarity of these references only serves to demonstrate further the insignificance of potential civil uses to these transactions.

10. The EU asks the Panel to ignore these critical aspects of the transaction and assume that operation of DoD contracts is indistinguishable from the operation of assistance instruments the Appellate Body found to be actionable subsidies. In fact, the original panel made factual findings, which the EU did not appeal, that "there are significant, substantive differences between DOD's R&D procurement contracts and DOD's R&D assistance instruments with Boeing." The EU explicitly asked the Appellate Body *not* to make any finding with regard to the legal consequences of these substantive differences. Therefore, the question of how to characterize these transactions has not been decided already. In fact, the evidence, as supplemented by the EU second written submission, establishes that, unlike the pre-2007 NASA contracts and DoD assistance instruments, these transactions were purchases of services. The EU has provided no convincing rebuttal to this conclusion, so it has failed to establish that DoD contracts funded through the "general research" program elements were subsidies.

DoD Contracts Funded Through the "Military Aircraft" Program Elements

11. The original panel found that DoD procurement contracts and assistance instruments are fundamentally different, and that only the latter conferred a subsidy. The EU attempts to resuscitate its challenge to DoD procurement contracts by arguing that DoD procurement contracts and assistance instruments work the same way. Just as with the other contracts, this is an example of the EU's effort to turn this proceeding into a referendum on the recommendations and rulings of the DSB, rather than the compliance measures taken by the United States.

12. The Parties agree on most of the critical facts regarding these transactions. The EU does not dispute that the "military aircraft" program elements funded purchases of new weapons systems and upgrades to existing ones. The EU also does not dispute the U.S. descriptions of the relevant transactions, or that these contracts differ from the NASA contracts and contracts funded through the "general research" program elements. Indeed, the difference between "general research" and

"military aircraft" program elements is the primary organizational division among its DoD-related claims.

13. The primary difference between the parties regards the correct legal implications of these facts. The United States has shown that these distinctive characteristics of contracts under the "military aircraft" program elements warrant the conclusion that contracts for the purchase of new weapons systems are a different form of financial contribution, namely, a purchase of goods, and that upgrade contracts are purchases of goods or services, depending on the nature of the upgrade. In spite of recognizing the differences between the "general research" and "military aircraft" program elements, the EU argues that contracts under the different types of program elements should be treated as identical to each other, and identical to assistance instruments, for purposes of the subsidy analysis. The EU provides no valid support for this one-size-fits-all approach.

Federal Aviation Administration ("FAA") CLEEN Program

14. The EU has failed to establish that the CLEEN program confers a specific subsidy to Boeing. The EU proceeds (erroneously) as if the original panel's findings against NASA contracts and DoD assistance instruments creates a presumption of WTO-inconsistency with respect to the FAA, and the EU ignores important differences among them, including Boeing's higher contribution level under the CLEEN OTA. The EU also fails to establish that FAA provided any facilities, equipment or employees to Boeing pursuant to the CLEEN OTA, and the new "evidence" the EU cites in its second written submission is irrelevant. The EU has also failed to demonstrate that the CLEEN program confers a benefit, as the EU does not identify the appropriate benchmark and assess whether the CLEEN OTA was more favorable to Boeing than the benchmark. In particular, the EU did not evaluate whether the "equilibrium" of funding and resources each party contributes "is more favorable to the commissioning party" in a commercial joint venture than in the CLEEN OTA. Finally, the alleged subsidy is not specific because the IP allocation terms, the alleged subsidy, are common to all research contracts with U.S. government agencies.

FSC/ETI

15. Boeing has not used Foreign Sales Corporation and Extraterritorial Income ("FSC/ETI") tax benefits after 2006. The EU's simplistic assumption that the mere availability of a tax break is *prima facie* evidence of its receipt is inconsistent with the original panel's reasoning, the EU's own evidence in the original proceeding, and the statement of Boeing's Vice President of tax. The EU provides no evidence that Boeing has in fact used FSC/ETI and the EU's second written submission attempts to obscure the fact that the EU has failed to establish a *prima facie* case.

Washington Measures

16. The EU's claim concerning the Washington B&O tax rate is the only claim regarding Washington that is properly within the Panel's terms of reference. The United States has complied with the DSB's recommendations and rulings with respect to this measure because Washington applies the B&O tax rate such that the magnitude of any remaining subsidy is too small to cause adverse effects. Also, the EU's estimates of the value of the B&O tax rate reduction to Boeing, which are significantly higher than the Washington Department of Revenue ("DOR") calculations based Boeing's actual tax information, are fundamentally flawed. The EU's estimates are based on the unsupported (and unrealistic) assumption that Boeing's revenue will increase drastically from 2012 to 2013, and then remain constant from 2013 to 2031.

17. The EU's claims regarding the Washington B&O tax credits for preproduction development and for property taxes, Washington State sales and use tax exemptions for computer hardware, software and peripherals, and the City of Everett B&O tax rate are not properly within the Panel's terms of reference. Additionally, the EU's purported concerns regarding the reliability of the DOR calculations and the City of Everett data, which are based on Boeing's actual tax information, are disingenuous and misplaced.

18. The EU's claims regarding the Washington State B&O tax credit for leasehold excise taxes and the Washington State Joint Center for Aerospace Technology Innovation ("JCATI") are not properly within the Panel's terms of reference. In any event, the value of the leasehold excise tax

credit is zero because Boeing does not claim it. With regard to the JCATI, the EU appears to recognize in its second written submission that its initial assertion that Boeing received grant money was incorrect. However, the EU fails to conduct an adjusted benefit analysis to assess whether a subsidy has been conferred and, instead, maintains that Boeing received a benefit in the amount of non-existent grants to Boeing.

Kansas IRBs

19. The United States has both withdrawn the subsidy and taken appropriate steps to remove its adverse effects. The City of Wichita has not provided any Industrial Revenue Bonds ("IRBs") to Boeing since 2007 and there is no longer any basis to consider the amount of IRBs issued to Boeing to be disproportionately large and therefore *de facto* specific under Article 2.1(c). The EU's criticisms that the specificity analysis should not look to the amount of IRBs issued, or consider the absence of IRBs issued after 2007 (as opposed to over the entire life of the program), are misplaced. The original panel and Appellate Body's consideration of specificity was based on the amount of IRBs issued. Moreover, in light of the significant change in the structure of the Wichita economy, it is appropriate to consider the issuance of IRBs over a more recent period.

South Carolina Measures

20. The EU's claims regarding South Carolina are not properly within the terms of reference of this compliance proceeding because those measures are not measures taken to comply.

21. The EU fails to establish that the Project Site Lease and the state bond-funded provision of facilities and infrastructure confer a specific subsidy to Boeing. In regard to the Project Site Lease, there is no financial contribution because Vought, not South Carolina, provided Boeing the right to use the Project Site through 2041. The EU also fails to establish that Boeing's remuneration for the Project Site Lease, even if it were a financial contribution, is inadequate. Similarly, in regard to the bond-funded provision of facilities and infrastructure for Project Emerald, there is no financial contribution because Vought, not South Carolina, provided Boeing the right to use them. There is no benefit with respect to Project Gemini facilities and infrastructure because Boeing adequately remunerated South Carolina through significant investment in the Project Site. In addition, the EU fails to demonstrate that the Project Site Lease or the provision of facilities and infrastructure is specific given that South Carolina does not limit access to the alleged subsidies, either in law or fact.

22. The EU also fails to demonstrate that the Emerald and Boeing fee agreements confer specific subsidies to Boeing. Neither involves revenue foregone that is otherwise due because Boeing receives the same tax treatment as similarly situated taxpayers. Any other industrial taxpayer with a sufficiently high level of investment and employment would qualify for the same assessment rate as Boeing. In addition, FILOT agreements are not specific because the authorizing legislation does not explicitly limit access to FILOT agreements to certain enterprises; there are objective criteria for qualification; and FILOT agreements are routinely made available to companies meeting the statutory criteria.

23. The EU fails to demonstrate that the Boeing apportionment agreement confers a specific subsidy to Boeing. The EU's assertion that the agreement constitutes a financial contribution because it alters the treatment of "sales in this state" for Boeing is premised on a misunderstanding of South Carolina law. South Carolina law provides that "sales in this state" only includes goods, merchandise or property that is received by a purchaser in South Carolina "after all transportation is completed." The EU also fails to demonstrate that apportionment agreements are specific, in light of the fact that such agreements are not explicitly limited by the granting authority or relevant legislation, and are readily available as part of South Carolina's effort to encourage business activity in the state.

24. The EU has also failed to establish a *prima facie* case regarding the other South Carolina measures, including the LCF property tax exemption, the sales and use tax exemptions, readySC workforce training, and MCIP jobs tax credits.

25. The EU's claims regarding "Phase II" are not properly within this compliance Panel's terms of reference, and the EU fails to put forward sufficient evidence to establish a *prima facie* case for any of its claims. Indeed, the EU fails to establish that the challenged measures even exist.

Alleged Prohibited Subsidies and Claims Under Article III of GATT 1994

26. The EU's prohibited subsidy claims are not properly within the Panel's terms of reference and, in any event, the EU fails to make a *prima facie* showing of prohibited export contingency or import substitution under Articles 3.1 and 3.2 of the SCM Agreement. The EU fails to specify with any particularity how the alleged subsidies are in fact contingent on export performance or the use of domestic over imported goods. The EU relies on a collection of unremarkable statements and fails to explain the alleged connection between the statements and the factual or legal conclusions it asks the Panel to draw. The EU's second written submission, which repeats verbatim the entirety of the argument set out in the EU's first written submission, fails to remedy the deficiencies in the EU claims. The EU's bald assertions are insufficient to demonstrate that the granting of an alleged subsidy at issue in this dispute is contingent on exports or the use of domestic over imported goods.

27. In its first and second written submission, the EU makes cursory arguments that all of the measures challenged elsewhere in each submission are also inconsistent with Article III:4 of the GATT 1994. It is impossible to discern the legal or factual basis for the EU's claim because it consists entirely of a cross-reference to the EU's factual and legal arguments concerning Article 3.1(b) of the SCM Agreement, which applies an entirely different legal standard.

28. The United States demonstrated in its first written submission that the EU failed to meet its burden, under Article 7.8 of the SCM Agreement, of proving that the United States did not take appropriate steps to remove the adverse effects of any unwithdrawn subsidies. Where the original panel had found $2.6 billion in financial contributions from NASA in the 1989-2006 period, and drawn linkages to technologies used on the 787, the post-2007 period saw a small fraction of that in NASA financial contributions, and the EU points to no meaningful linkages between recent research and technology on Boeing's large civil aircraft. Thus, *even by the EU's account*, the situation that led to the finding that NASA and DoD subsidies caused adverse effects by accelerating the launch of the technologically sophisticated 787 no longer exists today. Where the Appellate Body found that the tail end of the FSC/ETI program – especially problematic as both an export subsidy and a tied tax subsidy – together with a few other tied tax subsidies, caused a limited number of Airbus lost sales to the 737, FSC has been withdrawn and Boeing no longer uses that benefit. The EU has no credible explanation for why the remaining measures, along with any new measures, are large enough and harmful enough to cause adverse effects.

29. The EU's response to this critique consists primarily of repeating and building upon the errors from the first written submission. It continues to disregard the changes in the subsidies found to exist in the original proceeding – the decrease in the expenditures and change in the nature of NASA research programs, DoD's decreasing use of its only funding instruments found to confer subsidies, and the end to Boeing's use of FSC/ETI benefits. It continues to advocate the implausible theory that it would take Boeing engineers more than a decade to achieve what Airbus engineers achieved in two years – the launch of a sophisticated, primarily composite aircraft. It continues to insist that measures that are not export contingent, and for the most part not tied to sales, will have the same effects as FSC/ETI. And it continues to do all of this with a lack of clarity as to what subsidies have what effects.

Adverse Effects

30. The EU has not indicated which subsidies it alleges to cause technology effects and which subsidies it alleges to cause price effects. In its second written submission, the EU has clarified that it is alleging two distinct, non-overlapping sets of R&D subsidies: one set of R&D subsidies that cause technology effects and another set of R&D subsidies that cause price effects. However, the EU refuses to clearly identify which R&D subsidies it alleges are in each set. At this stage, the EU's refusal to clearly communicate what is being argued puts the United States in the unfair position of not knowing precisely what it is being asked to defend against and constitutes a failure to carry the EU's burden of proof.

31. The United States has objected to the unruly and sprawling case the EU has inappropriately tried to squeeze into this compliance proceeding, including by attempting to re-litigate issues that were already resolved in the original proceeding. U.S. objections to the EU's unauthorized and massive expansion of claims in this compliance proceedings is not an issue of the proper reference period, and no attempts to cast it differently can justify the EU's attempts to re-litigate previously resolved issues or raise claims it could have pursued in the original proceeding but chose not to.

32. It is the EU – not the United States – that is trying to escape from the "previously established finding" with respect to U.S. subsidies that result in Boeing charging lower prices (*i.e.*, through the EU's price effects causal mechanism). Starting from the previously established finding, the United States has not atomized or segmented anything. The United States excluded FSC/ETI – not because it analyzed its effects separately – but because it unquestionably has been withdrawn. Having excluded FSC/ETI on this basis – and again, this was the only subsidy aggregated with the Washington B&O tax rate reduction in the Appellate Body's analysis of the 100-200 seat market – the United States assessed the Washington B&O tax rate reduction on its own. And as the United States has shown, based on the EU's theory of how these subsidies cause effects, the EU has not substantiated and cannot demonstrate that the Washington B&O tax rate reduction alone could be a genuine and substantial cause of significant lost sales (or any other form of serious prejudice).

33. In the first written submission, the United States demonstrated numerous errors in the EU's aggregation arguments, which fail to satisfy the EU's burden based on the standard it acknowledges. Not only has the EU failed to rebut those demonstrations, its clarification of its R&D subsidy allegations has only compounded the errors.

34. The EU gives no further explanation in its second written submission of how the FAA subsidies share a common design, structure, and operation with the NASA and DoD subsidies, choosing instead to rely on the brief discussion in its first written submission, which itself cross-referenced the EU's more general discussion of the alleged subsidies. The United States has already demonstrated that many of the EU's general discussion of the FAA CLEEN program contains numerous inaccuracies. And in any event, the EU's aggregation of all FAA, NASA, and DoD R&D subsidies unquestionably fails as a result of the EU's unelaborated distinction between alleged R&D subsidies that have technology effects and those that have price effects.

35. The EU has confirmed that the aggregated tied tax subsidies group is different for each market, meaning the magnitude for each group is different. In attempting to establish its claims, it is incumbent upon the EU to engage with the particulars in each market rather than generically refer to the U.S. subsidies as if the group is static. With respect to the miscellaneous subsidies, the U.S. position is that it is insufficient to merely allege that the subsidies leave Boeing with more money that it would have in the absence of the subsidies, which is significantly different than requiring the subsidies to be identical.

36. Moreover, the EU is vague about whether it is actually seeking some analysis different from the cumulation analysis previously employed by the Appellate Body. To the extent the EU is seeking a novel form of collective assessment of subsidies, it bears the burden of explaining the mechanics of its proposal, when this form of collective assessment is appropriate, and why it is appropriate in this instance. The EU has done none of this. What is clear, however, is that under the cumulation analysis previously applied by the Appellate Body, including in the original proceeding of this dispute, cumulation is not appropriate where no subsidy or aggregated group of subsidies can be shown to have a genuine and substantial causal relationship with relevant market phenomena. Indeed, it is the EU's position that is contradicted by explicit Appellate Body guidance.

37. The United States in no way contests the Appellate Body's finding that different causal mechanisms does not preclude a panel from even assessing whether *cumulation* is appropriate. The United States notes that subsidies acting through different causal mechanisms cannot be *aggregated* – that is, they cannot be treated as a single subsidy. The United States also points out that, while different causal mechanisms do not act as a bar to any cumulation analysis, the complaining party still must show that the effects of two subsidies (or aggregated groups of subsidies) are appropriately (*i.e.*, *should* be) cumulated. The EU's misrepresentation of the U.S. argument leads it to incorrectly conclude that the United States is asking the Panel "to commit the same legal error as the original panel."

38. In its first written submission, the United States demonstrated that the U.S. aeronautics R&D measures properly within the terms of reference of this Panel do not cause present adverse effects through a technology effects causal mechanism. The U.S. demonstration encompasses both the compliance steps that changed the nature and magnitude of U.S. aeronautics R&D programs related to LCA, and the expiration of the technology effects found in the original proceeding.

39. While the EU disagrees with the United States on many points, its responses confirm that the core technology effects issue before the Panel is when the 787 would have been available absent subsidies. The EU agrees that the technology effects of the NASA and DoD R&D subsidies to the 787 have a finite duration. The EU either agrees or does not contest that, absent those subsidies, Boeing would have launched the 787 at some point after 2004. And the EU agrees that the proper way to determine when that launch would occur is through a counterfactual timing analysis focused on when Boeing could have made the 787 available.

40. Having narrowed the issues in this way, the parties do disagree as to the proper framing of the counterfactual question under such an analysis, the R&D programs subject to the analysis, and the ultimate conclusion. *First,* the U.S. counterfactual question isolates the effect of the relevant subsidies by delaying the 787 launch by the amount of time it would take Boeing engineers, absent any knowledge and experience they gained from participating in the WTO-inconsistent NASA and DoD research contracts and agreements to reach the point of launching the 787. In contrast, the EU counterfactual question would extend this delay by adding more time for (i) work performed under DoD procurement contracts that have not been found to confer specific subsidies, *plus* (ii) R&D actually performed by Boeing and its suppliers even though this would double-count the time taken for such work. *Second,* the U.S. counterfactual analysis estimated two years of additional, counterfactual R&D time by looking to Boeing's real-world experience performing early-stage R&D on the 787 program, which involved technological challenges comparable to those addressed in the NASA and DoD programs. In contrast, the EU, without disputing that the U.S. benchmarks involve early-stage R&D of comparable difficulty, proposes ten-plus years of additional time that is based on a generic rule-of-thumb for all phases of concept-to-commercial technology development. *Third,* the U.S. two-year estimate, when added to Boeing's actual pre-launch R&D time for the 787, is roughly comparable to the one-to-two-year pre-launch development time for Airbus's A350 XWB. In contrast, the EU's 10-plus-year figure implies that it would have taken Boeing five to ten times longer to launch the 787 than it took Airbus to launch the A350 XWB without participating in the NASA and DoD R&D programs.

41. The United States elaborates on these and related issues, demonstrating that the U.S. approach is a reasonable, evidence-based way to answer the 787 counterfactual timing question, while the EU's is not. Having failed to overcome the U.S. demonstration that the 787 would have been launched in 2006, there is very little left to the EU's technology effects arguments. The EU either accepts or does not dispute that a 787 launch in 2006 would have allowed Boeing to develop the 737 MAX and 777X at the time and in the manner it has – even if all of the EU's technology spillover arguments were accepted. This leaves no technology effects allegations of any consequence.

42. With respect to the alleged post-2007 R&D subsidies, the EU concedes that at least some do not cause technology effects, implying that the nature of U.S. R&D contracts and agreements has changed. Meanwhile, its specific technology effects arguments for alleged post-2007 R&D subsidies associated with the 787, 777X, are 737 MAX boil down to an FAA CLEEN program that is outside the Panel's terms of reference. In any event, the CLEEN program did not have any technology effects. Finally, the EU largely does not dispute that the United States reduced substantially the amount of funding and resources provided to Boeing under the challenged R&D programs. Assuming, *arguendo*, that the Panel were to find that any existing U.S. R&D programs conferred subsidies to LCA, such subsidies under those programs would be a fraction of the already much-reduced program values.

43. With respect to price effects, the DSB recommendations and rulings included a finding that an aggregated group of FSC/ETI and the Washington B&O tax rate reduction, when cumulated with the effects of the Wichita IRB's, constituted subsidies to the 737 that were causing price effects leading to serious prejudice in the form of significant lost sales in the 100-200 seat market. The United States has achieved compliance with respect to these measures, the only ones found to cause serious prejudice through a price causal mechanism. The withdrawal of FSC/ETI alone

ensures that U.S. subsidies are no longer causing adverse effects through a price causal mechanism.

44. Unwilling to accept U.S. compliance as a positive result, the EU puts forward a multitude of arguments, including some that appear to be deliberately opaque. This effort includes a contention that some unspecified group of R&D subsidies cause price effects now instead of technology effects. It includes a resuscitated argument that the price effects subsidies should be cumulated with technology effects R&D subsidies. It includes the re-litigation of claims and arguments that were already rejected in the original proceeding. It includes new claims against measures that existed at the time of the original panel request but were not challenged in the original proceeding. And it includes claims against measures that, even if they were subsidies, have no close nexus with the U.S. measures taken to comply. In its second written submission, the EU doubles down on its pursuit of this misguided and unauthorized expansion of its price effects case. The particular flaws of the EU's approach are examined in the four sub-sections below.

45. *First*, the EU has failed to cure the errors identified by the United States in the EU's price causal mechanism arguments, and in some cases, it has compounded earlier errors. The vague and cryptic nature of the EU's arguments, particularly those that relate to R&D subsidies, unfairly place the Panel and the United States at a significant disadvantage in addressing claims of non-compliance. *Second*, consistent with this pattern, the EU still does not engage in a meaningful analysis of the magnitude of subsidies alleged to affect each relevant market, which constitutes a failure to meet its burden as the complaining party. *Third*, as a result of numerous errors, the EU has failed to establish that miscellaneous subsidies not subject to the DSB's recommendations and rulings are capable of and do cause Boeing to lower prices and thereby cause serious prejudice. *Fourth*, and again as a result of numerous errors, the EU has failed to establish that R&D subsidies are capable of and do cause Boeing to lower prices and thereby cause serious prejudice.

46. The United States has also shown that the EU still has failed to demonstrate that alleged subsidies to the 787 and/or the 777X cause adverse effects in the form of significant price suppression, significant lost sales, displacement, impedance, or threat thereof with respect to the A350 XWB. The EU also still has failed to demonstrate that alleged subsidies to the 737 MAX cause adverse effects in the form of significant price suppression, significant lost sales, impedance, or threat of impedance with respect to the A320neo. Finally, the EU has still failed to demonstrate that alleged subsidies to the 737NG cause adverse effects through significant price suppression, significant lost Sales, displacement, impedance, or threat thereof with respect to the A320ceo.

ANNEX C-3

EXECUTIVE SUMMARY OF THE STATEMENT OF
THE UNITED STATES AT THE PANEL MEETING

I. RESEARCH AND DEVELOPMENT MEASURES

A. Financial Contribution

1. The Appellate Body in *US – Large Civil Aircraft* emphasized that the proper analysis starts by looking at *all* of the characteristics of the transactions in question, identifying which are relevant, and then examining whether the transactions fall into any of the categories of financial contribution. In that dispute, and in *Canada – Renewable Energy*, the Appellate Body found that Article 1.1(a)(1) does not "preclude" the possibility of a transaction being more than one of the types of financial contribution. A transaction does not fall into multiple categories under Article 1.1(a)(1) because a single set of facts is susceptible to competing interpretations. Rather, multiple categorization becomes possible only when, after the initial conclusion that the transaction fits in a category, there are additional significant characteristics that establish the existence of an *additional* (rather than an alternative) categorization.

2. The EU views paragraph 611 of *US – Large Civil Aircraft* as setting up a test under which a measure is "akin to a species of joint venture" and a "direct transfer of funds" if it possesses all of those factors, without regard to any other consideration. But it is instead a list the "principal characteristics" of the measures before the Appellate Body, as derived from the facts laid out in paragraphs 593 through 610 of the report. A different set of facts could accordingly result in a different set of "principal characteristics."

3. The first key point is that the various financial contributions alleged by the EU are, for the most part, not separate measures. Rather, the payments, any provisions of facilities, equipment, or employees, and any attribution of intellectual property rights are typically part of a single transaction. The second key point is that each of the relevant groups of transactions operates differently, and has different defining features. Thus, conclusions regarding pre-2007 NASA research contracts and DoD assistance instruments do not apply to DoD general research contracts, contracts under the DoD military aircraft program elements, the FAA CLEEN OTA, or post-2006 NASA contracts. The differing characteristics of these measures lead to different results. In particular:

- As the Appellate Body found, all DoD assistance instruments and the pre-2007 NASA contracts are "akin to a species of joint venture" and, therefore, a "direct transfer of funds" under Article 1.1(a)(i) of the SCM Agreement.

- DoD contracts under the general research program elements, which in our view are outside the Panel's terms of reference, are most accurately described as purchases of services.

- The largest DoD military aircraft program elements, KC-46 and P-8A, are most accurately described as purchases of goods.

- For many other "military aircraft" program elements, DoD purchased upgrades or enhancements that involved services rather than goods. Thus, these types of transactions are best understood as purchases of services.

- NASA's post-2006 contracts are best understood as purchases of services.

B. Benefit

4. The Appellate Body began the analysis in *Canada – Renewable Energy* by referring back to its finding in *Canada – Aircraft* that "whether a benefit has been conferred should be determined by assessing whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market." It confirmed that Article 14 of the SCM Agreement is "relevant context to determine whether a subsidy exists." This is uncontroversial, and applies to the evaluation of the benefit conferred by any financial contribution.

5. The EU has cited nothing that would support its assertion that a private party entering into the "species of joint venture" represented by NASA contracts and DoD assistance instruments would never accept the division of intellectual property rights that NASA and DoD did in the modified transactions.

6. Article 14 of the SCM Agreement indicates that the method for calculating the value of the benefit will depend on the type of financial contribution at issue. Thus, the fact that the other R&D transactions – DoD and NASA procurement contracts – involve purchases of services or purchases of goods means that the analysis of the existence of a benefit will differ from a transaction treated as a "species of joint venture." Specifically, the evaluation will focus on the adequacy of remuneration paid by the government for what it obtained from the contractor. The pricing methodology adopted in the DoD contract and the FAA CLEEN OTA ensured that they provided no more remuneration than was adequate for the work conducted by Boeing, and the EU has never demonstrated otherwise.

C. Specificity

7. The subsidies alleged by the EU consist of entering into transactions akin to joint ventures with intellectual property provisions supposedly more favorable than a market transaction would provide. Those aspects of the transactions are governed by broader U.S. government procurement regulations, which apply over all agencies in all sectors. They are accordingly not specific.

D. Whether Procurement Contracts under the 23 Original DoD Program Elements are within the Panel's Terms of Reference

8. In *US – Large Civil Aircraft*, the Appellate Body describes "the measures before us" or "the dispute before us" as being "NASA procurement contracts and USDOD assistance instruments." The omission of "USDOD procurement contracts" from these descriptions of the matter signals that the Appellate Body did not consider those measures to be "before us." Therefore, the finding of the original panel was adopted by the DSB, and is not subject to re-litigation in this proceeding.

II. OTHER MEASURES

9. The EU's remaining subsidy claims attempt to exaggerate the size of financial contributions that, if they were subsidies, would simply be too small to cause the adverse effects alleged by the EU. The EU also attempts challenging measures that have no relation to the original measures or to the steps the United States has taken to comply with the DSB's recommendations and rulings.

A. Measures Not Within the Terms of Reference of This Compliance Proceeding

1. South Carolina Measures

10. The EU urges this compliance Panel to radically depart from the approach of prior panels and the Appellate Body on close nexus by ignoring the absence of any similarity in terms of the measures' design and architecture, by ignoring the absence of any overlap in their geographical scope, and by ignoring the absence of any link in terms of effects. The implication of the EU's position is that the only connection necessary for a finding of close nexus is the identity of the recipient of the alleged subsidy, but the EU explicitly denies that such a link is sufficient. In any event, the EU fails to establish a *prima facie* case of WTO-inconsistency with respect to the Project Site Lease, the provision of facilities and infrastructure, the FILOT Agreements, and the

apportionment agreement – as well as the other measures addressed in the U.S. written submissions.

2. FAA's CLEEN Program

11. The EU's assertion of a close nexus between the NASA measures and the CLEEN program fail. The EU's claims of "technological and organizational continuity" between these measures refer to common environmental goals and routine government consultation. The EU ignores entirely the structure of the measures, including important differences between the CLEEN program and the NASA procurement contracts subject to the DSB's recommendations and rulings. In any event, there is no evidence that the CLEEN program confers a subsidy, as discussed further in the U.S. written submissions.

3. Other Washington Measures

12. The Washington B&O tax rate reduction is the only Washington measure subject to the DSB's recommendations and rulings. The EU recognizes that the value of that measure is too small to cause any adverse effects, so it attempts to take another bite at the apple with regard to four Washington State measures that the EU unsuccessfully challenged in the original proceeding, and by attempting to expand the dispute to two other Washington measures that were not challenged in the original proceeding and have no bearing on compliance. None of these measures is a "measure taken to comply" and the EU is precluded from re-litigating claims that it raised unsuccessfully in the original dispute.

B. Non-R&D Measures That Have Been Withdrawn

1. FSC/ETI

13. The United States notified the DSB that it had enacted legislation terminating FSC/ETI tax benefits and has confirmed that Boeing has not received FSC/ETI tax benefits after 2006. The EU has presented no evidence that Boeing has actually received FSC/ETI tax benefits after 2006 and has therefore not met its burden.

2. Kansas IRBs

14. The United States has withdrawn the subsidy associated with the City of Wichita's issuance of IRBs because the subsidy is no longer specific. The United States has also taken appropriate steps to remove the subsidy's adverse effects, by ensuring that no further IRBs are issued to Boeing.

C. Prohibited Subsidies

15. The EU alleges that every measure challenged in this compliance dispute is a prohibited export subsidy contingent on export performance, but it has failed to establish a *de facto* tie between subsidies and export sales. The EU has also failed to support its arguments that every single measure being challenged in this compliance dispute is a prohibited import substitution subsidy, and also violates Article III of the GATT 1994.

III. ADVERSE EFFECTS

16. In an effort to obtain a finding of non-compliance, the EU has sought to expand this compliance proceeding to the point where it would become a sprawling, unruly endeavor. We have already detailed how, as part of this effort, the EU attempts to bring in subsidies that existed at the time of the original proceeding but were not challenged. The EU alleges adverse effects from new subsidies allegedly conferred by South Carolina and FAA, neither of which was involved in the original proceeding. The EU even raises numerous arguments that were already rejected in the original proceeding. In addition, the EU argues that the product markets that prevailed during the original reference period have transformed into seven markets, including four monopoly markets, and one "non-market." And nearly all alleged post-2006 R&D subsidies, unlike R&D subsidies in the original proceeding, result in lower licensing fees for Boeing. By the time the EU is done, its compliance case bears almost no resemblance to the case it pursued in the original proceeding.

17. The EU has a well-founded fear that an analysis based on the findings from the original proceeding – which appropriately shaped the U.S. compliance steps – would prove particularly challenging for its claims. The price effects findings in the original proceeding – made only with respect to two sales campaigns in the 100-200 seat market – were driven overwhelmingly by FSC/ETI. There can be no rational disagreement about whether FSC/ETI has been withdrawn. The technology effects findings in the original proceeding – made only with respect to the 200-300 seat market – were driven by NASA subsidies found to have accelerated the launch of the 787. Assuming for the sake of argument that they are to some extent un-withdrawn, it would be extremely difficult to show that adverse effects are being caused by substantially reduced financial contributions on terms even closer to what the market offers. Unsurprisingly, the EU does not attempt to do so. Indeed, despite that NASA subsidies drove the finding in the original proceeding that U.S. R&D subsidies caused technology effects, the EU conceded that it cannot show that any post-2006 NASA programs are causing technology effects.

18. In light of the overwhelming challenges the EU would face in trying to show non-compliance based on the reasoning and findings from the original proceeding, the EU instead, effectively creates a new case that it hopes will allow it to escape those overwhelming challenges. The EU distorts the finding from the original proceeding that NASA and DoD subsidies accelerated the launch and promised delivery date of the 787, and the relevance of this finding to the appropriate counterfactual. The EU also attempts to inflate the amount of potential subsidies by piling additional alleged subsidies on top of those found to be actionable in the original proceeding. These include subsidies that cannot possibly provide an advantage to Boeing in the LCA marketplace, such as the P-8A program and the KC-46 program, as well as subsidies that are not properly raised.

19. The EU criticizes the United States for trying to "atomize" the claims, while it is the EU that deviates from the collective assessment structure in the original proceeding. Moreover, the EU ignores the Appellate Body's guidance that effects caused genuinely but not substantially by a subsidy can only be cumulated with the effects of a subsidy already found to have a genuine and substantial relationship with the relevant market phenomena.

20. The EU argues that the product markets have changed since the original reference period, but it has failed to prove that there are now seven markets and one non-market for LCA. The EU has not explained – because there is no explanation – why, if the EU's markets accurately reflect the contours of LCA competition, no one has ever analyzed the market in this way. Moreover, the EU's sole piece of evidence in support of this market structure – the Mourey Statement – is deeply flawed. There is thus no basis to deviate from the market delineation relied upon by the original panel and the Appellate Body.

21. The Appellate Body upheld the finding that, absent the R&D subsidies, Boeing would have launched the 787 later than 2004. To properly attribute any market phenomena to the subsidies, the appropriate counterfactual inquires as to whether certain market phenomena would exist in the absence of the subsidies. Because the R&D subsidies causing technology effects were found to accelerate the launch and promised first deliveries of the 787, it is important to determine when the 787 would have been launched in the absence of the subsidies. The Boeing engineers' estimate indicates that Boeing could have launched the 787 no later than 2006, which is the year Airbus was eventually able to launch the A350 XWB, following the misstep of pursuing the Original A350. The findings of the original proceeding in no way support that, absent the R&D subsidies, there would have been no advancement in knowledge and experience relevant to the launch of the 787 between the late 1980s and the early 2000s. The EU's contrary assumption leads it to the extreme position that this Panel's report would be issued before the 787 would be launched.

22. In conclusion, the United States emphasizes the need to remember that this is a compliance proceeding. The EU should not be permitted to re-litigate resolved issues or raise unrelated measures and measures that existed at the time of the original proceeding but were not challenged at that time. The EU should not be permitted to ignore the finding in the original proceeding that R&D subsidies *accelerated* the 787 launch, but did not make an otherwise unviable aircraft possible. The EU should not be permitted to assume that subsidies cause adverse effects through price effects when the sole subsidy found to be a genuine and substantial cause of such effects in the original proceeding – FSC/ETI – has unquestionably been withdrawn. The EU should not be permitted to twist the product market delineation despite the absence of any credible evidence that there are seven LCA markets, four of which are monopoly markets, and one non-

market. And the EU certainly should not be permitted to engage in obfuscation to the detriment of the U.S. ability to defend itself through a fair process and the Panel's ability to reach an objective assessment of the matter. A proper analysis will reveal that the United States has complied with the DSB's recommendations and rulings.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

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ANNEX D-1

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF BRAZIL

I. INTRODUCTION

1. Brazil's comments focus on the following issues: (i) the violation of the third parties' rights under Article 10 of the DSU given the untimely access to the parties' requests for preliminary rulings and related documents; (ii) the recourse to the investigative powers of the Panel under Article 13 of the DSU in substitution of the procedures established by Annex V of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") in case of actionable subsidies causing serious prejudice to the interests of another Member; (iii) the jurisdictional scope of the compliance Panel under Article 21.5 of the DSU with respect to re-litigation of claims; (iv) the scope of the obligation under Article 7.8 of the SCM Agreement to take appropriate steps to remove the adverse effects of the subsidy or to withdraw the subsidies; (v) the difference in scope of Article III:4 of the General Agreement on Tariffs and Trade ("GATT") and Article 3.1(b) of the SCM Agreement; (vi) the proper approach to determining the existence of de facto export contingency; and (vii) the analysis of "purchase of services" within the scope of the SCM Agreement.

II. THIRD PARTIES HAVE A RIGHT TO TIMELY ACCESS TO PRELIMINARY RULING REQUESTS AND TO BE HEARD AT THAT STAGE OF THE LEGAL PROCEEDING

2. Brazil reaffirmed the position that third parties should have been granted access to all submissions made by the parties to the dispute and should have been able to express their views in a timely manner in light of Article 10.1 of the DSU, which seeks to ensure that the rights of all "Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process".

3. Article 10 of the DSU grants third parties the right to have access to all submissions until the first meetings of the parties to the dispute and to be heard, as was stated by the Appellate Body in *US – Tax Treatment for "Foreign Sales Corporations" (21.5)*[1] and of the Panel in *Canada — Wheat Exports and Grain Imports*[2].

4. Therefore, Brazil expressed its utmost wish that this lack of access to third parties of the submissions made by the parties does not become a recurring event in the WTO dispute system, as this impairment also hinders the dispute settlement process itself.

III. THE REPLACEMENT OF ANNEX V PROCEDURES OF THE SCM AGREEMENT BY THE PANEL'S INVESTIGATIVE POWERS UNDER ARTICLE 13 OF THE DSU IS A SECOND-BEST SOLUTION

5. Brazil raised serious doubts on whether the authority of panels under Article 13 of the DSU may replace or perform the same functions of the procedures under Annex V of the SCM Agreement without affecting due process.

6. For Brazil, the Annex V procedures and the Panel's Article 13 powers are not interchangeable. The Annex V procedures have been specifically designed to permit the complaining party to gather the necessary information required to "establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product."[3] Brazil contends that the Panel's standard of review of the evidence should take into account the particularities of the case and would like to emphasize the special circumstances of the case which led to the use of Article 13 procedures in substitution of Annex V procedures and insists that this turn of events

[1] Appellate Body Report, *US – Tax Treatment for "Foreign Sales Corporations" (21.5)*, para. 245.
[2] Panel Report, *Canada — Wheat Exports and Grain Imports*, para. 6.6.
[3] SCM Annex V, para. 2.

does not repeat in future disputes considering all the peculiarities and different legal consequences Annex V procedures and Article 13 powers possess and entail.

IV. AN ARTICLE 21.5 PROCEEDING IS NOT A FORUM FOR RETRIAL OR REMAND OF THE PANEL'S FINDINGS

7. Brazil believes compliance proceedings should not be overly formalistic, but nevertheless cannot unfairly give complainants a "second bite of the apple." Only in exceptional instances, in which new facts or evidence become available that were not available at the time of the original proceedings, will it be appropriate to re-examine a measure in a compliance proceeding.

8. Brazil notes that two of the EU's claims do not appear to be properly before this compliance panel. First, in the original proceeding, the EU challenged DoD procurement contracts under 23 programs (the "old" PE numbers), but the original panel found that the research funded under these "old" PE numbers was not a subsidy.[4] As the EU itself declined from requesting the completion of the analysis there is not even a decision by the AB in that regard. Second, and more worryingly, in its panel request, the EU made claims under Article III:4 of GATT 1994 with regard to several of the measures listed, which were not dealt with during the original proceedings, since no arguments regarding those claims were ever presented.[5]

9. Brazil would like therefore to draw a clear distinction between claims relating to a new measure that is closely related to the measure found to be inconsistent with a covered agreement (and, thus, falling more readily within the scope of the compliance proceeding), and new claims relating to a measure for which the original panel rejected the complaining Member's claims of inconsistency with a covered agreement. The latter type of measure should be held to a higher standard to be included in the terms of reference of a compliance panel. Indeed, such measures are to be presumed to be consistent with WTO obligations. To include such a measure within the scope of an Article 21.5 proceeding, the complaining Member would need to demonstrate that the measure has undergone significant changes such that it is a measure taken to comply with the adverse WTO decision.

V. THE OBLIGATION TO "WITHDRAW THE SUBSIDY" OR TO TAKE "APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS" REQUIRES A POSITIVE ACTION THAT REMOVES THE COMPETITIVE ADVANTAGE OR PUTS AN END TO THE SUBSIDY

10. Brazil does not take a position on whether the specific measures taken by the United States were sufficient for purposes of Article 7.8 of the SCM Agreement and Article 19 of the DSU. Brazil wishes to focus on the proper interpretative approach to the important obligation under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" or to "withdraw the subsidy."

11. First, Brazil considers that the use of the terms "shall take appropriate steps" means that a Member is generally expected to take an affirmative, appropriate action and normally cannot be considered as having complied with the obligation of Article 7.8 of the SCM Agreement if it does not actively intervene to remove the adverse effects or to withdraw the subsidy, as provided by the Appellate Body found in *U.S. – Upland Cotton*[6].

12. Second, the focus of Article 7.8 of the SCM Agreement is on remedying the specific problem found to exist that nullified or impaired the benefits accruing under the SCM Agreement to the complaining Member. The focus of Part III of the SCM Agreement on "actionable subsidies" is primarily on the adverse effects caused by the use of a subsidy, not on the existence of the subsidy itself. That is also the focus of Article 7.8 of the SCM Agreement, which requires the implementing Member to withdraw the subsidy or to take appropriate steps to remove its adverse effects. As clarified by the panel and the Appellate Body in the original proceeding, there is no need to demonstrate that the subsidy benefit continues to exist for a finding of adverse effects. Therefore, the fact that a subsidy was granted in the past, that the "benefit" has expired, and that the subsidy no longer exists at the time of implementation does not prevent a finding of adverse effects caused by subsidies granted in the past. The key question in such circumstances concerns

[4] *US – Large Civil Aircraft (Panel)*, paras. 7.1113, 7.1171.
[5] EU Panel Request, p. 13.
[6] Appellate Body report, *U.S. – Upland Cotton (Article 21.5)*, para. 236.

the establishment of a "genuine and substantial" relationship of cause and effect, which may become more difficult, but not impossible, with the passage of time after the expiration of the subsidy.

13. Brazil recalls the position that it espoused in the context of the *U.S. – Upland Cotton* dispute -- if a panel makes a finding of "present" adverse effects, such a finding applies beyond the historical period considered by the panel. Therefore, the Member whose subsidies cause such adverse effects is obligated under Article 7.8 of the SCM Agreement to take appropriate steps to fully withdraw the present, ongoing, and future effects of the subsidies.[7]

14. Brazil considers the present case as an opportunity for the panel to clarify how Members are expected to comply with rulings on adverse effects relating to non-recurring subsidies, which sometimes have been granted many years ago and fully disbursed, but may continue to cause adverse effects in the market. The goal of compliance with the subsidies disciplines is to restore the level playing field. The panel, therefore, must determine, on the one hand, the positive actions required to bring a measure into conformity with WTO obligations, while carefully scrutinizing the causal relationship of past subsidies and the survival of their adverse effects, on the other.

VI. SCM ARTICLE 3.1(b) AND GATT ARTICLE III:4 CLAIMS ARE DIFFERENT IN SCOPE, REQUIRE DISTINCTIVE LEGAL ANALYSIS, AND MUST RELY ON CONCRETE AND CONSISTENT EVIDENCE

15. The EU argues that all of the U.S. measures at issue in this dispute are applied so as to afford protection to domestic production of U.S. like products (namely, parts and materials used in the production of Boeing large civil aircraft) and are, thus, inconsistent in fact with Article 3.1(b) of the SCM Agreement and with GATT Article III:4.[8] By relying on exactly the same evidence of "illustrative statements" in support of its claims under SCM Article 3.1(b) and GATT Article III:4, the EU seems to imply that a finding that the U.S. measures are inconsistent with SCM Article 3.1(b) would automatically result in a finding of inconsistency with GATT Article III:4. This is not necessarily the case.

16. It should be noted that both SCM Article 3.1(b) and GATT Article III:4 address situations involving discriminatory conduct. Yet, albeit related in some cases, these provisions have differences in scope and set out different obligations that are not subject to the same legal analysis as already clarified by the Panel in *Canada – Autos*[9]. In addition, GATT Article III:8(b) explicitly permits Members to limit the provision of subsidies to their domestic producers by excluding such measures from the reach of the national treatment provisions of the GATT.

17. In sum, a violation under SCM Article 3.1(b) does not necessarily and directly imply a violation under GATT Article III:4. Due to differences in scope and obligations, a specific and separate legal analysis for each of these provisions must be carried out.

18. Moreover, Brazil is of the view that claims under SCM Article 3 and GATT Article III:4 must rely on concrete and consistent evidence, which need not be identical. The difference in scope suggests that the threshold of evidence to demonstrate the violation may not be the same for each provision and requires a proper and specific assessment of the evidence on the record. In any case, Brazil is not convinced that relying exclusively on a list of "illustrative statements" of officials and politicians is sufficient to fulfill the different thresholds required by SCM Article 3.1(b) and GATT Article III:4. These "statements" could only constitute meaningful evidence when accompanied by evidence of factors that build a case of *de facto* inconsistency to the aforementioned provisions based on an assessment of the total configuration of the facts.

VII. SALES RATIOS ARE NEITHER DECISIVE NOR NECESSARY FOR THE DEMONSTRATION OF EXPORT CONTINGENCY UNDER SCM ARTICLE 3.1(a)

19. The EU claims that the United States is maintaining subsidies conditioned *in fact* upon actual or anticipated export performance in violation of SCM Article 3.1(a).[10] The EU's evidence of *de*

[7] Appellate Body Report, *U.S. – Upland Cotton*, para. 223.
[8] EU first written submission, paras. 784-788.
[9] *Canada – Autos*, Panel Report, para. 10.215.
[10] EU first written submission, para. 737.

facto export contingency includes actual sales ratios, anticipated sales ratios, and "a series of representative examples of statements" of the United States and Boeing that are "in the nature both of encouragement or direction going forward, and at the same time, of reward for past export performance."[11]

20. Brazil does not wish to take a position on whether Boeing's historical sales ratios, when viewed in light of the anticipated demand trends and the rather broad macroeconomic statements contained in the EU's "series of representative examples of statements" reflect subsidization that is geared to induce the promotion of future export performance by the recipient. Brazil merely takes this opportunity to reiterate its general position that the determination of export contingency should be based on an examination of the total configuration of facts surrounding the granting of a subsidy rather than being based just on an examination of sales ratios.

21. Brazil considers that a review of the Appellate Body's findings in *EC – Large Civil Aircraft* confirms that the evidence for demonstrating *de facto* export contingency does not require, in whole or in part, the reliance on an analysis of sales ratios. In Brazil's view, the ratio approach proposed by the Appellate Body is one possible piece of additional evidence that could provide meaningful information when it involves one of the conditions of the subsidy.

VIII. FUNDING UNDER A GOVERNMENT CONTRACT FOR RESEARCH AND DEVELOPMENT SHOULD NOT BE USED TO SHIELD A MEMBER FROM ITS OBLIGATIONS UNDER THE SCM AGREEMENT SIMPLY BY CHARACTERIZING IT AS A PURCHASE OF SERVICES

22. The United States seeks to characterize its post-2006 NASA and certain DoD contracts as purchases of services in order to exclude them from scrutiny under the SCM Agreement based on the original panel's finding – which was mooted by the Appellate Body – that purchases of services do not qualify as a financial contribution for purposes of Article 1.1(a)(1) of the SCM Agreement.[12]

23. Brazil reaffirms its position already posed to the original[13] panel that an interpretation of Article 1.1(a)(1) that excludes *a priori* government research and development measures that involve purchases of services from the scope of the SCM Agreement would potentially undermine the effectiveness of the SCM Agreement. If the U.S. position were to prevail, Members could provide billions of dollars in payments directly to a manufacturer to conduct research, the results of which are to be shared with the government, and shield this funding from WTO scrutiny by simply providing something of nominal value so that it constitutes a purchase of services. Such an enormous loophole could not have been intended by the drafters.

24. In Brazil's view, monetary contributions clearly fall within the meaning of a direct transfer of funds under Article 1.1(a)(1)(i) of the SCM Agreement. A monetary contribution does not become something else simply because the funds may be repaid at a later date (such as for a loan) or because other consideration may be provided in return (such as equity or intellectual property). Moreover, the drafters of the SCM Agreement expressly contemplated that "assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms" could constitute financial contributions within the meaning of the SCM Agreement, because they defined a certain subset of these types of measures as "non-actionable" subsidies under Article 8.2(a) of the SCM Agreement.

25. In any event, Brazil considers that all of the facts and surrounding circumstances should dictate whether a particular payment of money or monetary contribution to a recipient falls within the scope of Article 1.1(a)(1) of the SCM Agreement. The fact that the government's transfer of money is nominally made within the framework of a services agreement or other type of contract should not, without further examination, be sufficient to determine that this transfer does not amount to a financial contribution within the meaning of the SCM Agreement.

26. Accordingly, in this case, depending on the facts and circumstances surrounding the relevant transactions, the Panel may find that some or all of the monetary payments by the U.S. government to Boeing under a particular research and development contract constitutes a *de facto* grant or other type of "direct transfer of funds" to Boeing or to third party recipients, and,

[11] EU first written submission, para. 757, Exhibit EU-566.
[12] U.S. first written submission, paras. 228-230, 391.
[13] Third Party Written Submission of Brazil, para. 10 (October 1st, 2007).

therefore, such payments could amount to a "financial contribution" under Article 1.1(a)(1)(i) of the SCM Agreement. Whether the funding was provided for adequate remuneration and, thus, benefits Boeing would be relevant to the determination of benefit under Article 1.1(b).

ANNEX D-2

EXECUTIVE SUMMARY OF THE STATEMENT OF BRAZIL
AT THE PANEL MEETING

Contains no BCI

I. INTRODUCTION

1. Brazil's comments address the following three issues: (i) the scope of compliance proceedings under Article 21.5 of the DSU; (ii) the types of measures, including "purchases of services", covered by the definition of financial contribution under Article 1.1(a)(1) of the SCM Agreement; and (iii) the implementing Member's obligations under Article 7.8 of the SCM Agreement to remove the adverse technology effects of R&D subsidies that have not been or cannot be withdrawn.

II. THE SCOPE OF ARTICLE 21.5 OF THE DSU

2. Brazil cautions that compliance panels should not be allowed to be used as a forum for a complaining Member to re-litigate issues relating to measures that were not found to be inconsistent with a covered agreement in the original proceedings or as a forum to "remand" matters that were not taken up by the Appellate Body and where, as a consequence, no recommendations and rulings were issued.

3. Brazil recalls that, in the original proceedings, the European Union appealed the Panel's approach that "purchases of services" were excluded from the disciplines of the SCM Agreement. However, the EU did not request that the Appellate Body complete the analysis to determine whether, if properly examined, the procurement contracts constituted a covered "financial contribution" conferred a benefit, or caused adverse.

4. In our view, the European Union could have chosen to continue to pursue this issue at the Appellate Body proceedings, but instead it decided not to have the Appellate Body complete the analysis. Taking into account the jurisprudence in *EC – Bed Linen*[1], Brazil does not consider that the current Article 21.5 proceeding is the appropriate forum to revive this matter unless the Panel concludes, by thorough scrutiny, that there has been a substantial change in the facts that would effectively turn these 23 DOD procurement contracts into new but sufficiently related "measures taken to comply".

III. THE SCM AGREEMENT AND THE "PURCHASE OF SERVICES"

5. Brazil does not take a position with regard to whether the specific U.S. aeronautics R&D measures – post-2006 NASA and certain USDOD contracts – could be characterized as "purchases of services", although we recall that the Appellate Body negated and declared moot the original Panel's decision which excluded "purchase of services" from the scope of the SCM Agreement.

6. As explained by the Appellate Body in the original proceedings, it is possible that the Panel some measures have multiple features, including features of a purchase of services. That does not mean, however, that those measures cannot fall within the scope of the SCM Agreement.

7. As provide by the Appellate Body in *Canada – Feed-In Tariff Program/Canada – Renewable Energy* "a panel should scrutinize the measure both as to its design and operation and identify its principal characteristics" and that it would be possible that some transactions may be "complex and multifaceted" and need not fall squarely within a single category.[2] The Appellate Body further explained that the fact that there may be some overlap between the types of financial contributions set forth in Article 1.1(a)(1) of the SCM Agreement does not lead to a conclusion that these types are the same, redundant, or otherwise violates the principles of effective treaty interpretation.

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[1] *EC – Bed Linen*, Appellate Body Report (21.5), para. 87.

[2] *Canada – Feed-In Tariff Program/Canada – Renewable Energy*, Appellate Body Report, paras. 5.120-5.121.

8. In this context, Brazil believes that, in the present case, the Panel must also assess the principal characteristics of the measures in light of the terms of Article 1.1(a)(1) to determine whether the measures fall under one or more of the types of financial contribution set out in that provision. That a measure may be characterized as a procurement of services is of limited relevance to the panel's assessment under Article 1.1(a)(1). More importantly, this should not prevent the Panel from finding that the measure also has characteristics of a "direct transfer of funds" (e.g., equity infusion) or procurement of goods, and, consequently, constitutes a financial contribution. With respect to R&D measures, Article 8.2(a) and footnote 28 give additional contextual support to the inclusion of research activities within the scope of the SCM Agreement.

IV. ADVERSE TECHNOLOGY EFFECTS OF THE R&D SUBSIDIES AND THE OBLIGATION UNDER ARTICLE 7.8 OF THE SCM AGREEMENT

9. Brazil address also the obligation contained in Article 7.8 of the SCM Agreement. In the present case, a major issue is to determine, in instances where the United States has not withdrawn the subsidy at issue, whether the adverse effects of the subsidy have or have not been removed by the United States. This is so because this dispute deals with subsidies having lingering technology effects, which are likely to have a competitive impact for a large number of years.

10. As Brazil previously stated in these proceedings, the mere fact that the subsidy has been granted and the benefit of the financial contribution has been fully received is not directly related to the question of continuity of the adverse effects of the relevant subsidies. If the subsidy has not been or cannot be withdrawn, the adverse effects must be removed in order to comply with Article 7.8 of the SCM Agreement. Specifically, in the present case, if the challenged measure has not been or could not be withdrawn, the United States would have no other option pursuant to Article 7.8 than to ensure that the adverse technology effects caused by aeronautics R&D subsidies have been fully removed.

11. It is certainly not an easy task to determine how those adverse effects are to be removed. In order to analyze, however, if the United States has taken appropriate steps to remove the adverse effects, the Panel could take into account the object and purpose of Part III of the SCM Agreement and, more specifically, Articles 5 and 7.8, which could provide some guidance in this regard.

12. As it is well known, subsidies confer on companies an advantage that otherwise they would not have had. In other words, as the Appellate Body has repeatedly explained, a subsidy makes a recipient "better off" than it would be, absent the financial contribution. This advantage allows a company to be more competitive and, in the circumstances described in Articles 5 and 6 of the SCM Agreement, causes adverse effects to competitors. A logical consequence of these principles would be that in order to comply with Article 7.8 – in a situation where the subsidy can no longer be withdrawn – the recipient should somehow be made "worse off", so as to restore the original conditions of competition or compensate for an unfair advantage.

13. Although there may be difficulties in complying with Article 7.8 of the SCM Agreement – especially when it involves non-recurring R&D subsidies that provide a competitive technological advantage and cause adverse effects to other WTO Members – the implementing Member should be required to demonstrate that "appropriate steps" have been taken that have broken the causal link between the non-recurring subsidy and its lingering adverse effects.

ANNEX D-3

EXECUTIVE SUMMARY OF THE WRITTEN
SUBMISSION OF CANADA

I. INTRODUCTION

1. Canada addresses below three issues of systemic importance in these compliance proceedings.

II. PROHIBITED EXPORT SUBSIDIES

2. The European Union failed to demonstrate that subsidies to Boeing constitute a violation of Article 3.1(a) of the SCM Agreement.

3. In the initial proceedings in this dispute, the Appellate Body established the following test to determine whether a subsidy is *de facto* contingent on anticipated exportation: "[…] is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?"

4. The Appellate Body held that the standard for *de facto* export contingency would be met when "[…] the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy". According to the Appellate Body, *de facto* export contingency "[…] must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy".

5. The European Union fails to demonstrate that subsidies to Boeing are in fact tied to anticipated exportation. First, the European Union does not compare data on exports as a percentage of total sales with baseline data. The European Union presents charts showing export sales as a percentage of total sales. The European Union does not provide baseline data demonstrating the extent to which Boeing would be expected to export in the absence of the subsidies. To show, based on the test established by the Appellate Body, that the subsidies are skewed towards exports, the European Union would have had to provide data showing that exports as a percentage of total sales would have been lower in the absence of the subsidies.

6. Second, the European Union does not demonstrate that increased exports as a percentage of total sales are due to subsidies and not merely reflective of a change in market conditions. Evidence submitted by the European Union, Airbus' Global Market Forecast, suggests that other factors may indeed be at play. This evidence suggests that it is more likely a change in market conditions rather than subsidization that accounts for the increase in export sales relative to domestic sales.

7. Finally, the European Union also fails to explain how the factual circumstances surrounding the granting of the subsidies support a finding of *de facto* export contingency. The Appellate Body in *EC and certain member States — Large Civil Aircraft* stated that relevant factors for determining *de facto* export contingency may include "[...] factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation". The public statements attributable to the United States or to Boeing provided by the European Union as evidence do not prove that the subsidies were geared to induce export performance.

III. IMPORT-SUBSTITUTION SUBSIDIES

8. The European Union also claims that U.S. subsidies granted to Boeing are contingent or conditioned in fact upon the use of domestic over imported goods in violation of Article 3.1(b) of the SCM Agreement. The European Union contends that "[...] Boeing is to produce certain goods in the United States, which are thus goods of US origin, and which are destined to be used in the manufacture of Boeing LCA, to the exclusion of imported goods". According to the European Union,

taken as a whole, the evidence provided by it demonstrates a U.S. policy of favouring the use of U.S. domestic goods and labour.

9. The prohibition in Article 3.1(b) of the SCM Agreement covers situations where the granting of a subsidy is contingent on the recipient *purchasing* domestic over imported goods. In Canada's view, the European Union's position improperly expands the scope of Article 3.1(b) to cover subsidies contingent on the recipient *producing* a particular intermediate good.

10. The GATT and the SCM Agreement do not limit a subsidizing Member's ability to define the level of production required for subsidy eligibility purposes. As part of this discretion, a Member may explicitly require the production of an intermediate good. Similarly, a Member may implicitly require the production of an intermediate good by requiring a subsidy recipient to produce a final good or use a particular level of labour in a way that cannot be accomplished without producing an intermediate good. A Member's ability to condition the provision of a subsidy on a production requirement would be significantly curtailed if a Member could not require the production of an intermediate good. A production requirement would then have to be limited to simple assembly operations.

11. Given that most manufacturers produce intermediate goods as part of the production of their final goods, the European Union's position would negate the right of a subsidizing Member to require a subsidy recipient to produce goods, as defined by the subsidizing Member, in its territory in order to receive a subsidy.

12. The Appellate Body decision in *Canada — Autos* demonstrates that the European Union's position is incorrect.

IV. SERIOUS PREJUDICE

13. The European Union's position in these compliance proceedings is that the United States has neither withdrawn the subsidies nor removed their adverse effects. The European Union submits that non-withdrawn and additional U.S. subsidies to Boeing continue to cause adverse effects to the interests of the European Union.

14. In response, the United States argues that it has either withdrawn the relevant subsidies or taken appropriate steps to remove their adverse effects. One of the United States' claims is that if Boeing had not received the subsidies at issue, it would nevertheless have launched the 787, with its technology advances, well before the end of the implementation period.

15. Canada submits that a compliance panel is not required to conduct a counterfactual analysis assessing what the situation would be if the subsidies at issue had never been granted. A compliance panel is required to assess what the situation would be if the subsidizing Member had withdrawn the subsidies at issue by the end of the implementation period.

16. Canada sets out below the legal framework that this Panel should use in assessing whether the United States complies with its obligations under Articles 5, 6 and 7.8 of the SCM Agreement. Canada also makes observations as to how this framework should be applied to the facts of this dispute.

A. The Legal Framework

17. Article 7.8 of the SCM Agreement provides that when a panel or the Appellate Body finds that a subsidy has resulted in adverse effects to the interests of a complaining Member, the subsidizing Member must either withdraw the subsidy or remove its adverse effects. These alternatives provide a logical remedy to a Member's breach of its obligations under Articles 5 and 6. If a Member chooses the first option, there is no longer a subsidy. If a Member chooses the second option, although the subsidy may still be present, it no longer causes adverse effects.

18. Bearing in mind this legal framework, Canada will make observations with respect to positions taken by the Parties on two causation issues. The first issue concerns aircraft deliveries made pursuant to orders placed during the original reference period. The second issue concerns

technology effects of Research & Development (R&D) subsidies. Finally, we recall the importance of considering the magnitude of the relevant subsidies when assessing causation.

B. Deliveries Made Pursuant to Orders Placed During the Original Reference Period

19. In the initial proceedings in this dispute, the Panel made findings of lost sales and price suppression of Airbus aircraft in relation to orders for Boeing 787 made during the original reference period. In these compliance proceedings, the European Union claims that the United States has failed to remove the adverse effects caused by the subsidies because deliveries continue to be made pursuant to these orders. The United States responds that the Panel should not consider this claim given that the aircraft model being delivered by Airbus (A350XWB) is not the one for which the lost sales or price suppression findings were made in the initial proceedings (A330 or Original A350).

20. Even if the Panel decided to consider the European Union's claim, the claim should fail. It is not sufficient for the European Union to establish that current and future deliveries are related to orders placed during the original reference period. The European Union must establish that these Boeing deliveries and their negative effects on Airbus (lost sales, price suppression) are attributable to the presence of subsidies at the end of the implementation period. Pursuant to a proper counterfactual analysis, the European Union should have established that in the absence of the subsidies at the end of the implementation period, the situation would have been different. The European Union did not do so.

C. Technology Effects of R&D Subsidies

21. In the initial proceedings in this dispute, the Panel and the Appellate Body found that aeronautics R&D subsidies provided by the U.S. government had allowed Boeing to launch a technologically-advanced 787 at the time it did and caused lost sales, price suppression and threat of displacement and impedance to Airbus.

22. In these compliance proceedings, the European Union claims that R&D subsidies have similar effects. The United States replies that the R&D subsidies no longer cause adverse effects given that in the absence of these subsidies Boeing would have launched the 787 significantly before the end of the implementation period. Therefore, according to the United States, the effects that the market presence and the pricing of the 787 may have on Airbus aircraft can no longer be attributed to the R&D subsidies.

23. Canada submits that the counterfactual causation analysis used by the United States is not required in compliance proceedings. A proper counterfactual analysis requires the identification of the situation that would prevail in the absence of subsidies at the end of the implementation period. What would be the situation if the subsidies had been withdrawn at the end of the implementation period? If the European Union fails to demonstrate that the situation would be any different, this Panel cannot find that the R&D subsidies cause adverse effects.

24. The United States claims that even if the R&D subsidies had never been provided, the situation would not be different at the end of the implementation period. It could be argued that through such a demonstration the United States would also implicitly demonstrate that the subsidies in existence at the end of the implementation period do not cause adverse effects.

25. Yet, it is important from a systemic point of view that the required test be set out. The counterfactual situation that needs to be identified in a counterfactual analysis is not one where the subsidies have never been granted but rather one where the subsidies at issue have been withdrawn by the end of the implementation period.

26. Therefore, Canada invites the Panel to clearly describe the counterfactual analysis required in compliance proceedings before addressing the Parties' arguments in this dispute.

D. The Relevance of the Magnitude of Subsidies when Assessing Causation

27. Canada wishes to highlight the importance of taking into account the magnitude of subsidies when analysing their effects on prices. In the original proceedings, the Appellate Body found that the panel did not provide a proper legal basis for its finding that price suppression, lost sales and displacement and impedance were the effects of tied tax subsidies.

28. The fact that the effects of the subsidies will likely vary depending on their relative magnitude as compared to prices, production costs, overall size of the market or sales of a company in the market, warrants a careful analysis. This holds true, in particular, in case of a small subsidy. Although a small subsidy may have an effect on prices (depending on its nature, the circumstances of its provision, market structure and conditions of competition), a panel must provide a reasoned and adequate explanation if it so concludes. The Appellate Body confirmed this view in *US — Large Civil Aircraft (2nd complaint)*.

ANNEX D-4

EXECUTIVE SUMMARY OF THE STATEMENT OF CANADA
AT THE PANEL MEETING

I. INTRODUCTION

1. Canada will address the following issues in this statement: the scope of compliance proceedings, certain issues related to prohibited export and import substitution subsidies, and the proper counterfactual analysis to be used in conducting a serious prejudice analysis**.**

II. THE SCOPE OF COMPLIANCE PROCEEDINGS

2. The European Union alleges that all U.S. measures included in its compliance panel request constitute prohibited subsidies under Articles 3.1(a) and 3.1(b) of the *Agreement on Subsidies and Countervailing Measures*. Canada would like to make a few observations regarding the scope of these proceedings in relation to the prohibited subsidy claims advanced by the European Union.

3. Appellate Body jurisprudence sets out a number of principles limiting the scope of compliance proceedings. The Panel should keep those principles in mind in considering the European Union's prohibited subsidy claims.

4. Jurisprudence precludes claims that have been finally decided by a panel or the Appellate Body from being re-litigated before an Article 21.5 panel. This prevents a Member that failed to establish a *prima facie* case regarding an element of a measure in the original proceedings from re-litigating that claim with respect to the same unchanged element in compliance proceedings. Allowing the complainant to make the same claim twice would give it an unfair "second chance" before a compliance panel.

5. This principle applies, for example, to the European Union's request that the Panel find that the Washington State B&O tax rate reductions are subsidies that are *de facto* export contingent and thus prohibited under Article 3.1(a) of the SCM Agreement. The European Union made the same claim in the original proceedings and does not demonstrate here that the Washington State B&O tax rate reductions include new elements that would permit a new claim under Article 3.1(a).

6. Jurisprudence also ordinarily precludes a party from bringing a new claim against an unchanged element of a measure that was before the original panel and that the party could have challenged before that panel.

7. This principle applies to the claim advanced under Article 3.1(b) by the European Union that the Washington State B&O tax is an import substitution subsidy. The European Union failed to make such a claim before the original panel and does not demonstrate in these proceedings that its claim is directed at a changed element of the measure.

8. The United States argues that a number of the European Union's claims are not properly before this Panel. The Panel should carefully consider this issue.

III. PROHIBITED EXPORT SUBSIDIES

9. The European Union claims that all the U.S. measures covered by its compliance panel request are prohibited export subsidies either "in law" or "in fact". Canada believes the European Union has applied improperly the Appellate Body's articulation of one approach to making a *de facto* prohibited export subsidy determination.

10. The Appellate Body in *EC – Aircraft* held that a subsidy is contingent in fact on anticipated export where the granting of the subsidy is geared to induce the promotion of future export performance by the recipient. This standard is met when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy.

11. The European Union appears to rely on one possible method suggested by the Appellate Body to demonstrate the skewing of anticipated sales towards exportation. This method is based on a comparison between the ratio of *anticipated* export and domestic sales of the subsidized product as a consequence of the granting of the subsidy, and the situation in the absence of the subsidy.

12. The European Union, however, does not properly apply the test. First, while the European Union refers to an increase in exports as a percentage of total sales, it does not compare that data with baseline data. Without data showing Boeing's export sales as a percentage of total sales absent the subsidy, a meaningful comparison that could indicate a favouring of exports by the subsidy is not possible. To show, based on the test established by the Appellate Body, that the subsidies are skewed towards exports, the European Union would have had to provide data showing that exports as a percentage of total sales would have been lower in the absence of the subsidies. Second, the European Union does not demonstrate that increased exports as a percentage of total sales are due to subsidies and not merely reflective of a change in market conditions. Evidence submitted by the European Union itself suggests that it is more likely a change in market conditions rather than subsidization that accounts for the increase in export sales relative to domestic sales.

13. Where a party can properly demonstrate, based on the ratio test established by the Appellate Body in *EC – Aircraft*, that anticipated sales of a good are skewed towards exports, this would be a strong indication of *de facto* export contingency of the subsidy at issue. However, since the European Union failed to demonstrate export contingency in that way, other evidence is necessary.

14. The Appellate Body in *EC – Aircraft* indicated that relevant factors for determining *de facto* export contingency include factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.

15. The European Union, however, also fails to explain how the factual circumstances surrounding the granting of the subsidies support a finding of *de facto* export contingency. The European Union refers to broad statements by U.S. government officials testifying to Boeing's success in exporting aircraft. These statements do not prove that the subsidies were geared to induce export performance.

16. The European Union thus failed to provide the evidence necessary to demonstrate that the subsidies are contingent in fact on exportation.

IV. IMPORT SUBSTITUTION SUBSIDIES

17. Canada will comment on one aspect of the European Union's claims regarding import substitution subsidies under Article 3.1(b) of the SCM Agreement.

18. The prohibition in Article 3.1(b) covers situations where the granting of a subsidy is contingent on the recipient *purchasing* domestic over imported goods. In Canada's view, the European Union's position improperly expands the scope of Article 3.1(b) to cover subsidies contingent on the recipient *producing* a particular intermediate good.

19. Canada considers that nothing in the *General Agreement on Tariffs and Trade* or SCM Agreement prohibits a Member from granting subsidies contingent on a recipient producing goods in its territory. In fact, the relevant context of GATT Article III:8(b) demonstrates why such an interpretation should be rejected. That Article explicitly allows Members to provide subsidies only to their domestic producers. A producer of a final good that is required to produce an intermediate good is also a producer of the intermediate good. A Member's ability to condition the provision of a subsidy on a production requirement would be significantly curtailed if a Member could not require the production of an intermediate good. A production requirement would then have to be limited to simple assembly operations.

V. SERIOUS PREJUDICE

20. In commenting on the proper counterfactual analysis to be used in conducting a serious prejudice analysis in compliance proceedings, Canada will consider one of the questions that the Panel asked the Parties to address in their oral statements. The question concerns the original panel's conclusion that, absent the particular aeronautics R&D subsidies identified in those proceedings, Boeing would not have been able to launch an aircraft incorporating all of the technologies that were incorporated on the 787 in 2004, with promised deliveries in 2008.

21. This Panel asked whether the original panel's conclusion about the timing of the launch of the 787 has any relevance for the framing of the appropriate counterfactual question to examine the technology effects of the alleged aeronautics R&D subsidies in these compliance proceedings.

22. As we will demonstrate in the remainder of this statement, the original panel's conclusion about the timing of the launch of the 787 is not directly relevant for the framing of the appropriate counterfactual question in these proceedings. Canada will show that a proper counterfactual analysis is based on a situation where subsidies have been withdrawn by the end of the implementation period. It is not based on a situation where subsidies have never been granted.

23. In the initial proceedings in this dispute, the panel and the Appellate Body found that certain subsidies provided by the United States to Boeing caused adverse effects, in the form of serious prejudice, to the interests of the European Union.

24. Pursuant to Articles 7.8 and 7.9 of the SCM Agreement, the United States had until the end of a six-month implementation period to either withdraw the subsidies or remove their adverse effects.

25. The Parties agree that if the United States withdraws a subsidy, it is not required to remove any lingering effects that the subsidy may have. Similarly, if the United States removes the adverse effects of a subsidy it is not required to withdraw the subsidy.

26. In these proceedings, the Panel must determine whether the U.S. subsidies that have not been withdrawn by the end of the implementation period cause serious prejudice to the interests of the European Union.

27. This determination calls for a counterfactual analysis to assess the situation in the absence of the non-withdrawn subsidies. A comparison between the counterfactual situation, without subsidies, and the actual situation, with subsidies, allows a proper evaluation of the effects of the non-withdrawn subsidies.

28. A Member satisfies its obligation under Article 7.8 if it withdraws subsidies by the end of the implementation period. Accordingly, the proper counterfactual analysis to assess the impact of non-withdrawn subsidies consists in analysing what the situation would be if these subsidies had been withdrawn by the end of the implementation period. There is no requirement to analyse what the situation would be had the subsidies never been granted.

29. Yet, the Parties in these proceedings are arguing about what the situation would have been if the United States had not provided the subsidies that were at issue in the initial proceedings.

30. The use by the European Union of this improper counterfactual analysis to prove its technology effects claims has significant repercussions in these proceedings, which can be illustrated by the following two examples.

31. First, the European Union claims that the United States has failed to remove the adverse effects caused by the subsidies because deliveries continue pursuant to orders made during the reference period of the initial proceedings.

32. It is not sufficient for the European Union to establish that current and future deliveries are related to orders placed during the original reference period. Pursuant to a proper counterfactual analysis, the European Union should have established that in the absence of the non-withdrawn subsidies at the end of the implementation period, the situation would have been different. The

European Union did not do so. It did not provide evidence showing that, had the United States withdrawn these subsidies by the end of the implementation period, deliveries would not be taking place.

33. Second, even with respect to orders placed after the end of the implementation period, such as those placed earlier this year for the Boeing 787-10, the European Union fails to demonstrate that the orders would not be placed if the subsidies had been withdrawn by the United States by the end of the implementation period.

34. More generally, the whole assessment of technology effects is vitiated by the use of an improper counterfactual analysis. The European Union consistently refers to counterfactual situations where the subsidies would never have been provided instead of referring to situations where the remaining subsidies would have been withdrawn by the end of the implementation period.

35. Returning to the Panel's question, Canada has demonstrated that the original panel's finding on the effects of subsidies on the timing of the 787 launch has limited relevance to these proceedings. The crucial question in this matter does not relate to the situation that would prevail if the particular R&D subsidies identified in the initial proceedings had never been granted. Rather, the crucial question concerns the situation that would prevail if the alleged R&D subsidies in these compliance proceedings had been withdrawn by the United States by the end of the implementation period.

ANNEX D-5

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. Japan would like to address four systemic issues relating to the analysis of adverse effects under the WTO Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"), namely, technological effects; the importance of the concept of the nature of a subsidy for the causation analysis; the issue of export contingency of subsidies; and the role of the conditions of competition.

II. TECHNOLOGICAL EFFECTS

2. Regarding the first issue, Japan submits that, in view of the operational mechanism of research and development ("R&D") subsidies, it disagrees with the European Union's argument regarding the technological effects of R&D subsidies.

3. The European Union argues that the adverse effects, which were found to have been caused by R&D subsidies ("pre-2007 R&D subsidies") by the original panel, still exist primarily based on the "*technology causal mechanism*". The European Union argues that Boeing is still able to use technology, knowledge and experience developed and obtained in connection with the pre-2007 R&D subsidies for Boeing's further development of innovative technologies for its current aircraft and future LCA.

4. At the same time, the European Union claims that R&D subsidies cause adverse effects through a "*price causal mechanism*". According to the European Union, through their "*price causal mechanism*" R&D subsidies provide Boeing with additional non-operating cash flow, which enables Boeing to lower prices for its LCA in competitive sales campaigns without harming its profit margins.

5. Japan submits that the price causal mechanism, as described by the European Union, is inherent in any subsidy that has such potential price-related effects. The benefit conferred by the financial contribution allows the recipient to sell the subsidized product at a price which is lower than it would have been in the absence of subsidization. And if the recipient does so, it consumes the "benefit" of subsidies. Once the "benefit" is consumed in full, the recipient will no longer be able to retain its lower prices or further lower them.

6. Even assuming, for the sake of argument, that the contention of the European Union, as to the use of the previously-subsidized technology for the development of new innovative technologies, is factually plausible, this does not mean that the assessment of the adverse effects can be properly based on such a technology causal mechanism.

7. A government provides R&D subsidies because it considers that the recipient has the technological potential to conduct such research activities successfully. The fact that a recipient has invented a particular technology likely reveals that it must have had a technological potential to do so, but merely could not afford to do so commercially in the absence of subsidization. The proper counterfactual in analyzing the adverse effects is whether the recipient would have had to offer products using the technology it developed without a subsidy at a higher price, rather than whether the recipient could not have invented a particular technology.

8. Consequently, whether R&D subsidies are causing adverse effects, in particular whether the "spillover" and "sleeper" technologies and aircrafts incorporating such technologies are still benefiting from the pre-2007 R&D, can be appropriately analyzed from the perspective of price effects caused through the *price causal mechanism*.[1]

[1] Japan notes that the European Union argues that R&D aeronautics subsidies have technology effects and that "*other non-withdrawn aeronautics R&D subsidies*" have price effects. (European Union First Written

9. Finally, it would be more practical to assess whether the adverse effects have been removed from the perspective of the price effects of R&D subsidies rather than through the "*technology causal mechanism*".

III. THE NATURE OF A SUBSIDY IN THE CONTEXT OF THE FINDING OF ADVERSE EFFECTS

10. Regarding the second issue, Japan submits that the choice of a proper methodology for the causation analysis should take account of the nature of R&D subsidies.

11. Pursuant to Articles 5, 6.2 and 6.3 of the *SCM Agreement*, a "*genuine and substantial relationship of cause and effect*" between the subsidization and adverse effects must be demonstrated.[2] The methodology utilized for the establishment of causation should be appropriate to the nature, design and operation of the impugned subsidy. The following two aspects of the nature of R&D subsidies are relevant.

12. First, R&D subsidies have positive externalities and are principally geared towards increasing knowledge, developing technology and facilitating innovation. R&D subsidies, by their nature, can promote outcomes which lead to the development of industry-wide product improvements.

13. Second, R&D subsidies, by their nature, should not provide a competitive advantage to inefficient enterprises and are meaningless unless the recipient has the requisite internal competences to achieve the desired result. Consequently, R&D subsidies should be distinguished from those that provide a competitive advantage to inefficient enterprises.

14. Japan emphasizes that the evaluation of the nature of a subsidy is the key to determining whether the subsidy is "actionable" for the purpose of the SCM Agreement.

IV. *DE FACTO* EXPORT CONTINGENCY

15. Regarding the third issue, Japan would like to emphasize the importance of a rigorous and fact-intensive application of Article 3.1(a) and Footnote 4 of the *SCM Agreement* for the determination of the "*export contingent*" nature of subsidies.

16. The European Union relies on the "*anticipated export ratio*" test to establish that the impugned subsidies constitute prohibited subsidies. The test as applied by the European Union reduces the standard for a finding of *de facto* export contingency to a mere comparison between the anticipated and baseline ratios. As the increase may be caused by certain market developments (*e.g.*, diverging shifts in cross-price elasticity of demand), such an approach may lead to a finding of *de facto* export contingency even in the absence of any incentive to increase the ratio of export to domestic sales.

17. Japan considers that such standard is not the appropriate legal standard for establishing *de facto* export contingency.

18. Whether a subsidy is *de facto* export-contingent must be inferred from the total configuration of the facts constituting and surrounding the granting of a subsidy, and not merely based on a comparison between the anticipated ratio and the baseline ratio. To be indicative of *de facto* export contingency, such a comparison should be supported by evidence showing an incentive to skew anticipated sales towards exports.

19. Further, an endorsement of the "*anticipated export ratio*" test as applied by the European Union may result in three unintended consequences.

Submission, at para. 980). Japan also notes that the European Union refers to NASA R&D programmes (for the list of programmes, *see* European Union First Written Submission, at para. 1007 & ft 2020 thereto) and USDOD RDT&E programmes (for the list of programmes, *see Ibid*., at para. 1007 & ft 2021 thereto) as having caused adverse effects through a *technological causal mechanism*. Further, the European Union refers to the same NASA R&D programmes and USDOD RDT&E programmes as causing adverse effects through a *price causal mechanism*. (*See Ibid*., at para. 1181).

[2] Appellate Body Report, *European Communities and certain Member States – Measures Affecting Trade in Large Civil Aircraft,* WT/DS316/AB/R, adopted 1 June 2011, at para. 1232.

20. First of all, it would contradict the Appellate Body's previous finding that "proving de facto export contingency is a much more difficult task [than proving de jure export contingency]."[3]

21. Second, the defining role of the baseline ratio in determining whether a subsidy is *de facto* export contingent would result in substantial legal uncertainty as to whether or not a given subsidy is *de facto* contingent upon exports. There is a risk that one and the same subsidy could be considered *de facto* export-contingent if the baseline ratio is set in year/period X, whereas it may not be considered *de facto* export-contingent if the baseline ratio is set in year/period Y.

22. Third, the "*anticipated export ratio*" test for establishing *de facto* export contingency may risk arbitrarily discriminating against WTO Members with smaller domestic markets. WTO Members with small domestic markets, for whom changes in baseline ratios from one year or period to another may be more pronounced, may be more vulnerable to a finding of *de facto* export contingency compared to WTO Members with larger domestic markets.

V. IMPORTANCE OF THE EXISTENCE OF A COMPETITIVE RELATIONSHIP

23. Regarding the fourth and last issue, Japan submits that an assessment of the existence of an actual competitive relationship between the subsidized product and the like product is crucial for the establishment of causality between the subsidies and "*serious prejudice*" under Articles 5(c) and 6 of the *SCM Agreement*.

24. Japan notes that the European Union argues that subsidies maintained or granted by the United States to Boeing cause adverse effects in the form of significant price suppression and significant lost sales of A330, A350 XWB family LCA, A320neo family LCA, and A320ceo family LCA, both in situations where a subsidized Boeing LCA "*competes actively*" with the corresponding Airbus LCA, and where Boeing and Airbus LCAs "*no longer actively compete for the same sales*."

25. In Japan's opinion, the existence of an actual competitive relationship between a subsidized product and a like product plays a crucial role in the assessment of a causal link between the subsidies and serious prejudice.

26. In both *EC – Aircraft*[4] and *US – Aircraft*,[5] the Appellate Body noted that an assessment of the competitive relationship between products in the market is required in order to determine whether and to what extent one product may displace another. In *China – X-Ray Equipment*[6] and *China – GOES*,[7] the panel and the Appellate Body emphasized the importance of the existence of actual competition between two products for the purposes of assessing the effects of the imports of certain products on a like domestic product.

[3] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, at para. 167.

[4] Appellate Body Report, *European Communities and certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, at para. 1119.

[5] Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*¸ WT/DS353/AB/R, adopted 23 March 2012, at para. 1071.

[6] *See* Panel Report, *China – Definitive Anti-Dumping Duties On X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, adopted 24 April 2013, at paras. 7.50, 7.88 & 7.92.

[7] *See* Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, at para. 226 & ft 375 thereto.

ANNEX D-6

EXECUTIVE SUMMARY OF THE STATEMENT OF JAPAN
AT THE PANEL MEETING

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I. PURCHASE OF SERVICES – SCOPE OF ARTICLE 1.1(A)(1) OF THE *SCM AGREEMENT*

1. In the context of the United States' claims that its post-2006 NASA procurement contracts[1] and certain DoD contracts[2] should be properly characterized as purchases of services and as such do not constitute a financial contribution, Japan would like to express its views on the *a priori* exclusion of purchases of services from the scope of Article 1.1(a)(1) of the *SCM Agreement*.

2. The Appellate Body explained that the structure of Article 1.1(a)(1) does not preclude a transaction from being covered by more than one subparagraph;[3] a transaction may fall under more than one type of financial contribution and different aspects of a complex and multifaceted transaction may fall under different types of a financial contribution.[4]

3. These observations imply that, for the purposes of the *SCM Agreement*, a complex and multifaceted transaction may be properly characterized both as a purchase of services and, for example, as a direct transfer of funds. The *a priori* exclusion of purchases of services would mean that, so long as a complex and multifaceted transaction has a certain characteristic of a purchase of services, it would be necessarily excluded from the scope of the *SCM Agreement*, regardless of any other characteristic it may have.

4. Should the Panel uphold the United States' argument that government purchases of services are *a priori* excluded from the scope of the *SCM Agreement*, this will create an enormous loophole in the coverage of the *SCM Agreement*. It would also require the Panel to read into the text of Article 1.1(a)(1) an exception it does not contain. Yet, if the drafters had specifically intended to exclude a certain subject matter from the scope of that provision, they would have done so explicitly, as in the case of a government's provision of general infrastructure. Next, given their fragmentary nature, *travaux préparatoires* should be used with caution in the present case to deduce the motivation for the omission of purchases of services from Article 1.1(a)(1). Further, the omission may be due to a precaution so as not to prejudge the outcomes of prospective negotiations on subsidies disciplines per Article XV of the GATS.

5. For the above reasons, the *a priori* exclusion of purchases of services from the scope of Article 1.1(a)(1) of the *SCM Agreement* is incompatible with the Appellate Body's interpretation and textual analysis of that Article, and may risk opening a door for circumvention of the disciplines of the *SCM Agreement*.

II. THE IMPORTANCE OF THE NATURE OF A SUBSIDY FOR THE CAUSATION ANALYSIS – AGGREGATION OF SUBSIDIES

6. The Appellate Body has repeatedly stressed the importance of the nature of a subsidy for the causation analysis, including during the original proceeding in the context of the aggregation of

[1] *See* United States First Written Submission, at paras. 222–226, and United States Second Written Submission, at paras. 214–225.

[2] *See* United States First Written Submission, at paras. 389–390, 419–424, 444–445, 470–471, and United States Second Written Submission, at paras. 366–382.

[3] Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012 [***US – Aircraft***], at para. 613 and ft 1287 thereto. *See* also Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R and WT/DS426/AB/R, adopted 24 May 2013 [***Canada – Renewable Energy***], at para. 5.121.

[4] Appellate Body Reports, *Canada – Renewable Energy*, at para. 5.120.

subsidies. Similarly, both the United States and the European Union support their respective causation analyses by referring to the nature of the impugned subsidies.[5]

7. Japan emphasized in its Third Party Submission that the evaluation of the nature of a subsidy is key to determining whether the effect of a subsidy constitutes any of the market phenomena alleged under Article 6.3 of the *SCM Agreement*, and consequently whether a subsidy is actionable for the purposes of the *SCM Agreement*.[6]

8. The Appellate Body's explanation of the aggregation approach reinforces the importance of the nature of a subsidy in the context of the causation analysis. The analytical framework suggested by the Appellate Body for considering the possibility of aggregating subsidies consists of a number of sequential steps. First, a panel should assess the degree of similarity by examining the nature and design of the subsidies at issue, the implications of that nature and design for the operation of the subsidies, their relationship to the subsidized product, and the structure of the market in which that product competes. Next, a panel should assess whether there is a reasonable likelihood that the examination of the causal relationship between each subsidy and the alleged adverse effects will be largely similar and whether it can be anticipated that the effects of the subsidy measures and their causal relationship to the alleged serious prejudice will be largely the same.[7]

9. This analytical approach elucidates a number of important aspects of the causation analysis. First, the nature and design of a subsidy have important implications for the operation of a subsidy. Second, the effects of the subsidy measures and their causal relationship to the alleged serious prejudice are a function of the nature of a given subsidy. Third, the examination of the causal relationship between a subsidy and alleged adverse effects may be informed by the nature of a subsidy.

10. Thus, the Appellate Body's approach to the issue of aggregation is in line with Japan's emphasis on the importance of the nature of a subsidy for the causation analysis.

III. WITHDRAWAL OF A SUBSIDY AND REMOVAL OF ADVERSE EFFECTS

11. Given the prospective nature of remedies under WTO law, Article 7.8 of the *SCM Agreement* requires that a Member that has granted an actionable subsidy withdraw the remaining subsidy (cease to provide the subsidy at issue) or remove the presently-existing adverse effects.

12. The structure of the *SCM Agreement* demonstrates that the existence of a benefit is crucial for the ability of the subsidy to cause adverse effects. Hence, Article 7.8 of the *SCM Agreement* requires the Member granting a subsidy to "withdraw" it so as to no longer have the benefit conferred, or to remove the presently-existing adverse effect, for example, by removing the remaining benefit conferred by the subsidy.

13. R&D subsidies, like any subsidy, may result in enabling firms to lower production costs through the consumption of the "benefit" of subsidies. R&D subsidies thus have a *price effect*.

14. In this proceeding, the United States argues that, even in the absence of inconsistent R&D subsidies, Boeing would still have successfully researched and developed all of the innovative technologies associated with the 787 and launched the 787 in 2006, no more than two years after its actual launch in 2004.[8] This endorses Japan's view that the examination of R&D subsidies under the *SCM Agreement* should not focus on the effects of the innovations and developed technologies they support. The focus should be on a *price effect* which makes it possible for the recipient to sell certain products at lower prices due to cost reductions.

[5] United States First Written Submission, at paras. 722 and 727 and European Union Second Written Submission, at paras. 1082-1091.

[6] Japan Third Party Submission, at paras. 17–24.

[7] Appellate Body Report, *US – Aircraft*, at para. 1291.

[8] United States First Written Submission, at paras. 705, 709.

IV. *DE FACTO* EXPORT CONTINGENCY

15. The European Union seeks to establish the *de facto* export contingency of the United States' subsidies at issue on the basis of the "*anticipated export ratio*" test.[9]

16. In EC – Aircraft, the Appellate Body explained that the de facto export contingency "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy", such as: (i) the design and structure of the measure granting the subsidy; (ii) the modalities of the operation set out in the measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.[10] Japan respectfully requests that the Panel pay particular attention to this part of the Appellate Body's finding.

17. The European Union relies on certain statements attributable to the United States or Boeing to establish that the subsidies are geared to induce or incentivize exports. Japan wishes to take this opportunity to caution the Panel against ascribing too much importance to these statements. First, statements may be made due to a desire by government officials to appease their constituents. Secondly, to the extent that such statements are taken to demonstrate the policy objectives of the United States Government, their relevance for establishing the export contingency of the subsidies is limited, as *de facto* export contingency must be determined by assessing the subsidy itself.[11]

18. If the European Union contends that such statements demonstrate export contingency, as they actually create an incentive for export sales over domestic ones, [12] the European Union should corroborate it by providing evidence of the existence of such an incentive. Only then, to follow the logic of the European Union, can these statements be treated as valid evidence for establishing *de facto* export contingency in this dispute.

V. LOCAL CONTENT REQUIREMENTS – CLAIMS OF THE EUROPEAN UNION UNDER ARTICLE 3.1(B) OF THE *SCM AGREEMENT* AND ARTICLE III:4 OF THE GATT

19. The European Union submits that the United States grants subsidies contingent upon, and maintains measures favouring the use of, domestic over imported goods in breach of Article 3.1(b) of the *SCM Agreement* and Article III:4 of the GATT.[13] Japan understands that these claims are mainly based on the fact that Boeing's development and production activities are located in the United States. Thus, Boeing will produce goods locally and will further utilize such goods in the manufacturing of Boeing LCA instead of importing substitute goods.

20. Subsidies are normally provided to enterprises located and having their production facilities within the jurisdiction of the granting authority. Further, Article III:8 of the GATT, as confirmed in *EC – Commercial Vessels*, excludes "*payment of subsidies exclusively to domestic producers*" from the scope of Article III of the GATT.[14]

21. Hence, the assumption that a factory is more likely to purchase domestic products because development and production facilities are located in the United States does not demonstrate that such a factory actually receives subsidies inconsistent with Article 3.1(b) of the *SCM Agreement* and Article III:4 of the GATT.

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[9] *See* European Union First Written Submission, at paras. 754–756, and European Union Second Written Submission, at paras. 814–817.

[10] Appellate Body Report, *EC – Aircraft*, at para. 1046. citing Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, at para. 167.

[11] Appellate Body Report, *EC – Aircraft*, at para. 1051.

[12] European Union First Written Submission, at paras.757–759, and European Union Second Written Submission, at paras. 818–821.

[13] European Union First Written Submission, at Sections VI.B and VI.C, and European Union Second Written Submission, at Sections IV.B and IV.C.

[14] Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301/R, adopted 20 June 2005 [***EC – Commercial Vessels***], at para 7.68.

ANNEX D-7

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF THE REPUBLIC OF KOREA

A. The Scope of Article 21.5 Proceedings

1. The United States has objected in its submission to certain claims by the European Union, which, it argues, address issues that the European Union could have raised during the initial Panel proceeding, but chose not to. It appears that the U.S. objection is based on an expansive concept of "claim preclusion" that applies under U.S. domestic law.

2. However, even U.S. legal experts concede that such expansive notions of claim preclusion are inappropriate under systems that do not allow a party broad freedom to amend its initial complaints in light of the evidence obtained and arguments presented during the course of the proceeding.[1] The WTO's dispute settlement procedures (which do not allow "amendments" to the Panel's terms of reference to incorporate issues that were not addressed in the complaining party's consultation and panel requests) do not appear to permit the flexibility that justifies the broad rule of claim preclusion applied in domestic U.S. law.

3. Furthermore, the provisions of the DSU do not support the conclusion that broad rules of claim preclusion should be applied in an Article 21.5 proceeding. Under Article 21.5, a panel may hear claims about "measures taken to comply with … recommendations and rulings…." Once it is determined that a particular measure is an implementation measure — *i.e.,* that the measure has been taken to comply with the rulings and recommendations of the DSB — Article 21.5 imposes *no* limitations on the claims that may be brought.

4. Of course, Article 17.14 of the DSU indicates that Appellate Body reports shall be "unconditionally accepted by the parties to the dispute" (unless the report is rejected by the DSB). Furthermore, Articles 16.4, 19.1, 21.1, 21.3, and 22.1 of the DSU can be read together as indicating that final reports by a panel that are not appealed must be given the same effect.[2] The Appellate Body has taken the position that this requirement of "unconditional acceptance" should be understood to preclude a party from re-litigating issues that were finally decided in an Appellate Body report (or unappealed panel report) in a past dispute.[3]

5. One of the Appellate Body's earlier decisions also suggested these provisions could be read to preclude a party from raising claims in an Article 21.5 proceeding that it could have raised earlier but chose not to.[4] However, the Appellate Body subsequently clarified that the restrictions it had previously identified did not apply to claims about a "measure taken to comply," which it described as being, "in principle, a new and different measure."[5] According to the Appellate Body, claims that had *not* previously been raised *could* be asserted against an implementing measure in an Article 21.5 proceeding "even where such a measure taken to comply incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply." As a practical matter, then, the only claims barred in an Article 21.5 proceeding are those that were already decided in the original proceeding.

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[1] *See, e.g.,* American Law Institute, RESTATEMENT (2D) OF JUDGMENTS, § 24, comment a.

[2] *See. e.g., European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India; Recourse to Article 21.5 of the DSU by India;* Appellate Body Report, WT/DS141/AB/RW, 8 April 2003, para. 93.

[3] *See, e.g., United States – Import Prohibition of Certain Shrimp and Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia;* Appellate Body Report, WT/DS58/AB/RW, 22 October 2001, para. 97.

[4] *See United States – Subsidies on Upland Cotton –Recourse to Article 21.5 of the DSU by Brazil*, Appellate Body Report, WT/DS267/AB/RW, 2 June 2008, para. 211.

[5] *See United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities,* Appellate Body Report, WT/DS294/AB/RW, 14 May 2009, para. 432.

6. This interpretation is consistent with the provisions on which the Appellate Body has relied. The requirement in Article 17.14 that the parties accept Appellate Body (and, by implication, panel) reports unconditionally can only extend as far as the report itself goes. Unconditional acceptance of a report obviously cannot bind the parties with respect to matters that were not actually decided in the report. Consequently, if the panel or Appellate Body addresses only certain aspects of an issue in their reports, the unconditional acceptance of the report can only apply to the aspects that the panel and Appellate Body actually did address. Parties are bound by their unconditional acceptance of the report only with respect to matters that were actually decided in the report. They cannot be bound on matters that were not decided.

B. The Requirements of the SCM Agreement

1. Financial Contribution

7. A subsidy exists under Article 1.1(a)(1) of the SCM Agreement *only* when there is a financial contribution involving one of the four categories listed in that provision.[6] It is not enough, therefore, for a complaining party to identify government actions that confer "benefits" on a recipient. As the Appellate Body has explained, a finding that there has been a government action and that the recipient has benefited from that action is not sufficient, because "the requirement of a financial contribution from the outset was intended by its proponents precisely to ensure that not all government measures that conferred benefits could be deemed to be subsidies." [7]

8. In order to state a claim under the SCM Agreement, then, a complaining party must demonstrate that the government measure at issue fell within one of the categories of "financial contribution" identified in Article 1.1(a)(1). In analyzing such claims, a panel may, of course, look beyond the formal financial structure of a government action to its underlying substance. But, in the end, a transaction may be considered a subsidy only if it is substantively identical to government action that would fall within at least one of the listed categories of "financial contribution" in Article 1.1(a)(1). Transactions that do not fall within one or more of those categories are not subsidies under the SCM Agreement.

9. We understand that the European Union and the United States disagree as to whether certain aspects of the contracts between the U.S. producer and U.S. government agencies constitute a "financial contribution." In assessing those claims, the Panel may look beyond the form to the underlying economic substance of the transactions, to determine what, if anything, the government actually provided to the alleged recipient. But, once the Panel has determined the nature of the government action, it must measure that action against the classifications set forth in Article 1.1(a)(1) of the SCM Agreement, to determine which, if any, of the classifications apply. If a challenged transaction does not fall under one of the categories of "financial contribution" defined in that provision, then it cannot be a subsidy — no matter how much the transaction might have benefitted its recipient.

2. Specificity

10. The European Union has contended that favorable terms concerning intellectual property rights in certain government contracts for research and development should be deemed to be *de jure* "specific," within the meaning of Article 2.1(a) of the SCM Agreement, because the supported research is performed only by a limited number of enterprises.[8] As a legal matter, however, the actual use of such provisions does not determine whether they are *de jure* specific under Article 2.1(a). Instead, a finding of *de jure* specificity requires an assessment of whether there are "explicit" limitations on *access* to the subsidy. Thus, Article 2.1(a) provides that "Where the granting authority, or the legislation pursuant to which the granting authority operates, *explicitly* limits access to a subsidy to certain enterprises, such subsidy shall be specific." If the term "explicit" in Article 2.1(a) is to be given meaning, then an "implicit" limitation that is *not* expressly

[6] Under Article 1.1(a)(2) a subsidy may also exist when "there is any form of income or price support in the sense of Article XVI of GATT 1994."

[7] *See United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, Appellate Body Report, WT/DS257/AB/R, 19 January 2004, para. 52, n.35, *quoting United States – Measures Treating Exports Restraints as Subsidies,* Panel Report, WT/DS194/R, 29 June 2001, para. 8.65.

[8] *See, e.g., First Written Submission of the European Union*, paras. 192 to 193.

stated in the legislation or other granting authority cannot provide a basis for finding specificity under Article 2.1(a).

11. The actual usage of a subsidy is, of course, a factor to be considered in analyzing whether the subsidy is *de facto* specific under the terms of Article 2.1(c). In analyzing that issue, the Panel needs to assess whether there is, in fact, evidence that the subsidy (as properly defined) is disproportionately used by certain enterprises or industries within the meaning of Article 2.1(c), taking into account the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy program has been in operation.

3. Benefit

12. The European Union has contended that the "benefit" of certain alleged contributions (such as alleged contributions that take the form of intellectual property rights) may be many multiples of the underlying financial contribution.[9] The basis for that claim is not entirely clear.

13. Ordinarily, the identification of a "benefit" under Articles 1.1(b) and 14 requires a comparison of the government "financial contribution" with the terms that would have been available in the absence of government action.[10] In other words, the benefit is measured by comparing the (1) the cost incurred by the recipient to obtain the financing with the government support, and (2) the cost the recipient would have incurred to obtain equivalent financing from the market, if there had been no government support. The use of the financing by the recipient has no impact on this calculation. Instead, because the subsidy consists of a financial contribution, the benefit of a subsidy is necessarily equal to the reduction of financing costs caused by the government action.

14. As a conceptual matter, it might theoretically be possible to define "benefit" in a different manner, based on the returns to the recipient on the use of the financial contribution. Under such a theory, a financial contribution that was used to finance investments that had no returns would have no "benefit." By contrast, a financial contribution that was used to finance investments with large returns would have a large "benefit."

15. Such an approach does not appear to have any textual support in the provisions of the SCM Agreement or in the past decisions by panels or the Appellate Body. Furthermore, it is Korea's understanding that the general practice followed by national investigating authorities in countervailing duty cases does not accept such an approach. Before accepting such a theory, the Panel should, at a minimum, require that its proponents demonstrate how it would be consistent with the relevant provisions of the SCM Agreement, as interpreted in accordance with the customary rules of treaty interpretation.

4. Adverse Effects

16. In its first submission, the European Union contends that the "adverse effects" of the U.S. subsidies can be felt through two mechanisms: (1) a technological mechanism, and (2) a price mechanism. It appears that the United States has accepted this two-pronged analysis. It is understandable, then, that the Panel and Appellate Body have considered effects through both mechanisms.[11] Nevertheless, the proposed technological mechanism is difficult to reconcile with the structure of the SCM Agreement and its definition of subsidies. It is doubtful, therefore, that such an analysis can properly be extended to other situations in which the parties have not accepted its use.

[9] *See, e.g.,* First Written Submission of the European Union, para. 191.

[10] *See, e.g, Canada – Measures Affecting the Export of Civilian Aircraft,* Appellate Body Report, WT/DS70/AB/R, 2 August 1999, para. 157.

[11] *See United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, WT/DS353/AB/R, 12 March 2012, para. 1018.

17. Money obtained through improper subsidies can be repaid or else offset through taxes or other levies.[12] As a result, the financial effects of a subsidy are quantifiable and remediable. The alleged technological effects are not. The assessment of adverse effects through a technological mechanism should, therefore, be carefully circumscribed, if not entirely rejected.

[12] In this regard, it is Korea's view that the "withdrawal" of subsidies described in Article 7.8 of the SCM Agreement occurs when the government in question ceases to give any additional subsidies. Notwithstanding the panel decision in the Article 21.5 proceeding in *Australia – Leather*, Korea does not believe that the concept of "withdrawal" imposes an obligation to have the recipient repay the amount of subsidies received in the past. *See Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States,* Panel Report, WT/DS126/RW, 21 January 2000, paras. 6.18 to 6.49.

ANNEX D-8

EXECUTIVE SUMMARY OF THE STATEMENT OF THE REPUBLIC OF KOREA AT THE PANEL MEETING

1. The Republic of Korea ("Korea") would like to briefly offer the following observations with respect to two systemic points: the first, concerning the scope of Article 21.5 proceedings; and the second, concerning the requirements of the SCM Agreement.

2. To begin with, Korea would like to reiterate its position with respect to the scope of Article 21.5 proceedings as stated in the 3rd party session in the *EC – Airbus* dispute held last April. In Korea's view, the issue of a compliance panel's terms of reference has a close bearing with the enforceability of the WTO Agreements.

3. If a compliance panel's terms of reference are overly broad, it may open a back door for measures, which could and should have been included in the original panel proceeding (but were excluded by a complainant), to come to a compliance proceeding. On the other hand, should a compliance panel's terms of reference be overly narrow, an implementing Member may attempt to introduce a new measure which shares the characteristics of the impugned measure in all material respects, thereby effectively avoiding its obligation to comply with the recommendations and rulings of the DSB. A balance should be struck between the two competing considerations.

4. In determining the scope of terms of reference of the present proceeding, therefore, this Panel should carefully examine and apply the WTO jurisprudence on this issue. In Korea's view, the WTO jurisprudence to date offers important guidelines in this regard.

5. As the Panel is aware, Article 21.5 of the DSU applies "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings." Consequently, a complaining party is not permitted in an Article 21.5 proceeding to challenge other measures that were not "taken to comply with … recommendations and rulings" from the initial panel and Appellate Body proceedings in the same dispute. It follows that once it is determined that a particular measure is an implementation measure, that measure is within the terms of reference of an Article 21.5 panel.

6. This interpretation is supported by other provisions of the DSU. As Korea stated in its written submission, Article 17.14 of the DSU indicates that Appellate Body reports shall be "unconditionally accepted by the parties to the dispute" unless the report is rejected by the DSB. Furthermore, Articles 16.4, 19.1, 21.1, 21.3, and 22.1 of the DSU can be read together as indicating that final reports by a panel that are not appealed must be given the same effect that Article 17.14 mandates for final reports by the Appellate Body.[1] This requirement of "unconditional acceptance" should be understood to preclude a party from re-litigating issues that were finally decided in an Appellate Body (or unappealed panel) report in a past dispute.[2]

7. This prohibition does not extend, however, to issues that were not finally decided in the Appellate Body (or unappealed panel) report. Indeed, the Appellate Body in *United States – Zeroing* (DS294) clarified that claims that had not previously been raised could nevertheless be asserted against an implementing measure in an Article 21.5 proceeding "even where such a measure taken to comply incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply."[3]

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[1] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India; Recourse to Article 21.5 of the DSU by India;* Appellate Body Report, WT/DS141/AB/RW, 8 April 2003, para. 93.

[2] *See, e.g., United States – Import prohibition of Certain Shrimp and Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia;* Appellate Body Report, WT/DS58/AB/RW, 22 October 2001, para. 97.

[3] *See United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, Appellate Body Report, WT/DS294/AB/RW, 14 May 2009, para. 432.

8. In short, if the panel or Appellate Body addresses only certain aspects of an issue in their reports, the unconditional acceptance of the report can only apply to the aspects that the panel and Appellate Body actually did address. Parties are bound by their unconditional acceptance of the report only with respect to matters that were actually decided in the report. They cannot be bound on matters that were not decided.

Financial Contribution

9. The next issue Korea would address concerns the requirements of the SCM Agreement. As Korea indicated in its 3rd party submission, the SCM Agreement does not prohibit all forms of governmental support to industries. Instead, only certain types of support that are specifically defined and categorized by the Agreement are regulated. It follows that the agreement must not be read too broadly. According to the negotiating history, a finding that there has been a government action and that the recipient has benefited from that action is not sufficient, because "the requirement of a financial contribution from the outset was intended by its proponents precisely to ensure that not all government measures that conferred benefits could be deemed to be subsidies."[4]

10. Korea understands that the European Union and the United States disagree as to whether certain aspects of the contracts between the US producer and US government agencies constitute a "financial contribution." In assessing those claims, the Panel may look beyond the form to the underlying economic substance of the transactions, to determine what, if any, the government actually provided to the alleged recipient through the transactions at issue. But, once the Panel determines the nature of the government action at issue, it must measure that action against the classifications set forth in Article 1.1(a)(1) of the SCM Agreement, to determine which, if any, of the four classifications of the provision apply. Theoretically speaking, if none of the four enumerated categories apply to the transaction at issue, an argument can be made that the transaction does not constitute the financial contribution under Article 1.1(a)(1) of the SCM Agreement.

Specificity

11. The European Union has contended that favorable terms concerning intellectual property rights in certain government contracts for research and development should be deemed to be *de jure* "specific" within the meaning of Article 2.1(a) of the SCM Agreement, because the supported research is performed only by a limited number of enterprises.[5] As a legal matter, however, the actual use of such provisions does not determine whether they are *de jure* specific under Article 2.1(a). Instead, a finding of *de jure* specificity requires an assessment of whether there are "explicit" statutory or regulatory limitations on *access* to the subsidy. A subsidy that is open to all comers – regardless of their past experience or practical capabilities – is not *de jure* specific, even if, in practice, only established producers in a particular industry actually choose to apply. It should be noted that the concept of *de jure* specificity only looks at the statutory or regulatory scheme to see if it imposes explicit limitations on access to a governmental program at issue, as opposed to the actual utilization of the program by enterprises or industries.

12. Of course, the actual usage of a subsidy may be a factor to be considered in analyzing whether the subsidy is *de facto* specific under Article 2.1(c). In finding *de facto* specificity, the Panel must assess whether there is, in fact, evidence that the subsidy is disproportionately used by certain enterprises or industries within the meaning of Article 2.1(c). The Agreement also requires the Panel to take into account the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy program has been in operation.

[4] *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, Appellate Body Report, WT/DS257/AB/R, 19 January 2004, para. 52, n.35, *quoting United States – Measures Treating Exports Restraints as Subsidies*, Panel Report, WT/DS194/R, 29 June 2001, para. 8.65.

[5] *See, e.g.*, First Written Submission of the European Union, paras. 192-193.

Benefit

13. The European Union has contended that the "benefit" of certain alleged contributions (such as alleged contributions that take the form of intellectual property rights) may be many multiples of the underlying financial contribution.[6] In Korea's view, the basis for that claim is not entirely clear. Normally, the benefit is measured by comparing (1) the cost incurred by the recipient to obtain the financing with the government support, and (2) the cost the recipient would have incurred to obtain equivalent financing from the market, in the absence of such government support. The utilization of the financing by the recipient and the ultimate situation or end products as a result of such utilization have no bearing on this calculation of benefit in accordance with Article 14 of the SCM Agreement which should be equally applicable to the dispute at issue. In fact, Article 14 of the SCM Agreement repudiates such an expansive application of the concept of benefit. Any benefit conferred by a subsidy should necessarily be equal to the reduction of financing costs caused by the government action.

14. In a sense, the EU's "multiple benefit" theory appears to require that financial contributions that are somehow wasted confer no benefit, while financial contributions that happen to generate outsized returns confer a benefit that is multiple times the amount of the actual financial contribution. This approach is premised upon the notion that benefit is an elastic concept which can only be determined by the ultimate outcome or performance of the recipient. Under this approach, the final value of the benefit will fluctuate over time depending on how the recipient of the subsidy will fare in the market. In Korea's view, nowhere in the SCM Agreement can one find a legal basis to support such an approach.

Adverse Effects

15. The European Union contends that the "adverse effects" of the US subsidies can be felt through two mechanisms: (1) a technological mechanism, and (2) a price mechanism. In Korea's view, however, the proposed technological mechanism seems to be difficult to reconcile with the structure of the SCM Agreement and its definition of subsidies. It is doubtful, therefore, whether such an approach can properly be extended to situations in which the parties have not accepted its use.

16. In this connection, Korea would like to offer two observations. First, because the essence of a subsidy is the extra money the recipient obtains, the effects of the subsidy must, in Korea's view, be measured by the effects of that money. The only direct effect of the provision of money to a recipient at a lower-than-market cost is a reduction in the recipient's overall cost of financing. Because money is fungible, a company may take funds received for a specific purpose and instead apply them to a different use, while using funds from other sources to accomplish the purpose for which the subsidy was ostensibly granted. In short, the fact that a subsidy is ostensibly "tied" to a particular investment does not necessarily mean that the subsidy actually caused an investment that would not otherwise have occurred.

17. Second, under the SCM Agreement's definition, a subsidy must lead to the recipient obtaining financing on better terms than it would have in the absence of the subsidy. The financial effects of a subsidy are quantifiable and remediable in that regard. However, the alleged technological effects are not. The assessment of adverse effects through a technological mechanism should, therefore, be carefully circumscribed, if not entirely rejected. Because subsidies are defined by the existence of a financial contribution, the only effects that ordinarily would be cognizable under the SCM Agreement are the effects of whatever financial advantage the subsidy confers.

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[6] *See, e.g.*, First Written Submission of the European Union, para. 191.

ANNEX E

RULINGS OF THE PANEL REGARDING ARTICLE 13 OF THE DSU

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ANNEX E-1

PRELIMINARY RULINGS AND DECISION REGARDING INFORMATION-GATHERING UNDER ARTICLE 13 OF THE DSU DATED 26 NOVEMBER 2012

Introductory considerations

1. In a submission dated 31 October 2012, the European Union makes two requests.[1] First, it asks us to make a series of rulings regarding the interpretation of provisions relating to the initiation of procedures under Annex V of the Agreement on Subsidies and Countervailing Measures ("ASCM"), their applicability to this dispute and certain consequences it considers to arise therefrom.[2] Second, and in light of its observations regarding Annex V, the European Union asks us to seek information under Article 13 of the Understanding on the Rules and Procedures Governing the Settlement Disputes ("DSU") by posing to the United States questions that the European Union had prepared for submission under Annex V.

2. In a submission dated 8 November 2012, the United States disputes the European Union's interpretation of the relevant provisions relating to the initiation of Annex V procedures, and asks the Panel to reject the EU's requests for rulings regarding the initiation of procedures under Annex V.[3] While the United States agrees with the European Union that there are "unique reasons" that would justify us to seek information from the parties at an early point in these proceedings, it disagrees with the European Union regarding the timing, manner and extent to which we should exercise our authority to seek information pursuant to Article 13.[4]

3. We note that the EU's request for rulings regarding Annex V and its request that we seek information under Article 13 are distinct matters. However, the EU's request for an early exercise by the Panel of its authority under Article 13, and its positions regarding the manner in which that authority should be exercised, are premised on the view that it was entitled to an Annex V procedure in this case. Further, the United States agrees that the EU's request for rulings addresses issues critical to the information-gathering process and requests the Panel to resolve them before making any request under Article 13.[5] We agree that clarity on certain matters relating to Annex V may inform our consideration of the possible exercise of our authority under Article 13. Accordingly, we turn first to the EU's request for rulings regarding Annex V.

Request for rulings regarding Annex V

4. By way of background, we note that the EU requested that the Dispute Settlement Body ("DSB") establish a panel in this proceeding pursuant, *inter alia,* to Article 7.4 of the ASCM and Article 21.5 of the DSU.[6] The United States did not seek to block establishment of a panel, but stated its view that the panel was being established only under Article 21.5. As a separate sub-item of the agenda, the EU also requested that the DSB initiate an Annex V procedure, which it considered to be automatic. The US responded that the Panel was established under Article 21.5 *DSU* only and that an Annex V procedure was provided for only where a panel is established under Article 7.4 *ASCM.* The DSB took note of the statements made.

5. The European Union subsequently sent a letter to the DSB Chair, contending that the conditions for initiation of an Annex V procedure had been fulfilled, initiation had thus occurred and an Annex V procedure was currently running, and that the Chair was responsible for discharging the function of Facilitator. It requested the Chair to forward its Annex V questions to the United States and to third Members, and to establish working procedures, including a timetable, as

[1] European Union, Request for a Preliminary Ruling and Request for the Panel to exercise its Authority Pursuant to Article 13 of the DSU, dated 31 October 2012 ("EU Request" or "Request").
[2] EU Request, paras. 12-23.
[3] Reply of the United States to the EU Request for a Preliminary Ruling and the EU Request for the Panel to Request Information under Article 13 of the DSU, dated 8 November 2012 (US Reply" or "Reply").
[4] US Reply, para. 40.
[5] US Reply, para. 5.
[6] WT/DS353/18, para. 3.

well as procedures for the protection of confidential information.[7] The United States responded that no Annex V procedure had been initiated, that the Chair could not act as Facilitator in a procedure that did not exist, and that he should therefore deny the EU's request.[8] After further exchanges of views,[9] the Chair informed the delegations that there were significant differences of view between them on complex legal questions, that it would not be appropriate for him to interpret the covered agreements in order to resolve intricate legal issues unilaterally, and that it would not be appropriate, absent legal clarity on these issues, to take actions requested by the European Union.[10]

6. Two days after the DSB Chairman's response, the EU submitted its request to this Panel. In its Request, the European Union asks us to "rule or confirm" as follows:

- The correct interpretation of the relevant provisions and particularly Article 7.4 and Annex V, paragraph 2 of the *SCM Agreement* is that set out in this submission and in paragraphs 508-533 of the Appellate Body Report in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*: the DSB's initiation of an information-gathering procedure in a serious prejudice dispute occurs automatically provided that a request for such a procedure has been made and a panel established pursuant to Article 7.4 of the *SCM Agreement*.

- In compliance proceedings, the legal analysis leads to the same conclusion.

- In this case the Panel was established pursuant, *inter alia*, to Article 7.4 of the *SCM Agreement* and a request for an Annex V procedure was made.

- Consequently, the two conditions provided for were met, and automatic initiation occurred, or is deemed to have occurred, or should have occurred.

- In any event, through its actions at the DSB meeting on 23 October 2012 and in particular its subsequent actions and inactions in relation to the Annex V procedure initiated on 23 October 2012, the United States has failed to comply with its obligations under Annex V of the *SCM Agreement*, and in particular has failed to cooperate in the development of evidence to be examined by a panel in procedures under paragraph 4 through 6 of Article 7, as required by paragraph 1 of Annex V.

- The European Union is entitled to present its case based on the evidence available to it, pursuant to paragraph 6 of Annex V.

- This Panel may complete the record as necessary relying on best information available.

- In making its determination, this Panel should draw adverse inferences from the non-cooperation of the United States.

- That ordinarily this Panel should not request additional information from the United States to complete the record where the information would support the position of the United States and the absence of that information in the record is the result of the unreasonable failure of the United States to co-operate in the Annex V procedure.[11]

7. With respect to the European Union request that we "rule or confirm" on the "correct interpretation" of Article 7.4 and Annex V, we note that the United States submits that "….the United States and the EU are in agreement that initiation of an Annex V procedure is mandatory if a party requests the procedure and the DSB establishes a panel pursuant to Article 7.4."[12] Indeed, nowhere in its submission does the United States suggest that initiation of an Annex V procedure does not occur automatically where these conditions are met. In any event, we note the Appellate

[7] Letter of the European Union to the Chairman of the DSB, dated 23 October 2012 (Exhibit EU-3).
[8] Letter of the United States to the Chairman of the DSB, dated 24 October 2012 (Exhibit EU-4).
[9] *See* Exhibits EU-5, EU-6 and EU-7.
[10] Letter from the Chairman of the DSB, dated 29 October 2012 (Exhibit EU-8)
[11] EU Request, para. 22.
[12] US Reply, para. 16. *See also* footnote 3 ("In the original proceedings, the United States took the view…that initiation of an Annex V procedure in tandem with establishment of a panel under Article 7.4 of the SCM Agreement required positive consensus of the DSB, and that a Member could block that positive consensus…. That is not the position the United States advances in this proceeding.")

Body's ruling in the original proceedings in this dispute that "…. the first sentence of paragraph 2 to Annex V of the *SCM* Agreement must be understood as requiring the DSB to take action, and that such action occurs automatically when there is a request for initiation of an Annex V procedure and the DSB establishes a panel."[13] The plain meaning could hardly be clearer and, that being so, there is no need for this Panel to issue any further ruling or "confirmation" on this question, not least because it would be redundant.

8. The European Union further requests that we rule that (a) in compliance proceedings, the legal analysis leads to the same conclusion; (b) in this case the Panel was established pursuant, *inter alia*, to Article 7.4 of the SCM Agreement and a request for an Annex V procedure was made; and (c) consequently, the two conditions provided for were met, and automatic initiation occurred, or is deemed to have occurred, or should have occurred.

9. These three requests go to the heart of the matter before us. The European Union considers that compliance panels involving serious prejudice claims are established *inter alia* pursuant to Article 7.4 of the ASCM, and that therefore an Annex V procedure is initiated automatically in such proceedings where a request for initiation is made and a panel is established.[14] The United States by contrast considers that compliance panels are established pursuant to Article 21.5 of the DSU, and not pursuant to Article 7.4 of the ASCM; because in its view Annex V procedures may be initiated only where a panel is established pursuant to Article 7.4, no Annex V procedure is available in compliance panels.[15]

10. Thus, the crux of the question before us is whether Annex V procedures are available in compliance panels involving serious prejudice claims. This question is one facet of a broader issue that has confronted the Membership since the WTO's dispute settlement mechanism was created: how and to what extent do the dispute settlement procedures relating to "original" proceedings apply in the context of compliance proceedings? For example, Members have disagreed as to whether there is an obligation to request and hold consultations prior to requesting a compliance panel,[16] whether a Member is entitled to block the establishment of a compliance panel at the first meeting of the DSB, and whether compliance panels are expected to make recommendations.[17]

11. As a preliminary matter, we note that whether Annex V procedures are available in compliance panels is an issue of first impression. While the Appellate Body provided extensive guidance regarding the initiation of Annex V procedures in the original proceedings in this dispute, it did not specifically address the issue of compliance proceedings, nor does its discussion provide clear guidance by implication.[18] The Appellate Body at some points indicates that an Annex V procedure occurs "…when there is a request for initiation of an Annex V procedure and the DSB establishes a panel…."[19] At other points, however, it emphasizes that one of the conditions for initiation of an Annex V procedure is that the matter be referred to the DSB under Article 7.4 of the ASCM.[20] Given that the Appellate Body has not expressed a view on the legal basis for the establishment of compliance panels, whether relating to serious prejudice claims or otherwise, we cannot rely on express guidance from the Appellate Body Report in that case to resolve the issue at hand.

12. The parties to this dispute seem to have a shared view that whether or not Annex V applies in the context of compliance panels depends upon whether or not such panels are established, *inter alia*, under Article 7.4 of the ASCM. This in turn relates to the broader question whether compliance panels are established pursuant to Article 21.5 of the DSU, or pursuant to the provisions relevant to panel establishment in original proceedings for the claim at issue (whether that be Article 7.4 for adverse effects claims under Part III of the ASCM, Article 4.4 of the ASCM for prohibited subsidy claims under Part II of the ASCM, or Article 6.1 of the DSU for other claims arising under the covered agreements). We note however that the issue before us is limited to

[13] Appellate Body Report, *US – Large Civil Aircraft (2d Complaint)*, para. 524 (footnote omitted).
[14] EU Request, para. 20.
[15] US Reply, paras. 17-18.
[16] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 - US)*, para. 52.
[17] Panel Report, *US – FSC (Article 21.5 - EC II)*, para. 7.39; Appellate Body Report, *US – FSC (Article 21.5 - EC II),* paras. 88-89.
[18] Appellate Body Report, *US – Large Civil Aircraft (2d Complaint)*, paras. 512, 524.
[19] Appellate Body Report, *US – Large Civil Aircraft (2d Complaint)*, para. 524.
[20] *US-Large Civil Aircraft*, para. 511.

whether Annex V is available in compliance proceedings, and we will not rule on the broader issue unless it is necessary to the resolution of the issue at hand.

13. Our starting point is Annex V itself, which is identified in Appendix 2 to the DSU as a special or additional rule or procedure contained in the covered agreements. Paragraph 1 of Annex V provides that "[e]very Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7." Paragraph 2 provides that, [i]n cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information…." Finally, paragraph 5 provides that "[t]he information gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7." Thus, Annex V at three separate points makes reference to panels under Article 7.4.

14. Neither Article 7.4 of the ASCM itself, nor Article 7 more generally, refers to Annex V. However, Article 6 of the ASCM, relating to serious prejudice, refers to Annex V in two paragraphs. Article 6.8 indicates that "{i}n the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V." Perhaps more relevantly, Article 6.6 provides that "{e}ach Member … shall, subject to the provisions of paragraph 3 of Annex V, make available to parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information…." Article 6.6 of the ASCM is also identified in Appendix 2 to the DSU as a special or additional rule or procedure.

15. The plain reading of these provisions is that Annex V is available in the context of disputes involving serious prejudice claims under Article 7 of the ASCM, and more specifically in the context of panels established pursuant to Article 7.4 of that Agreement. Thus, it would appear evident that an Annex V procedure would not be available in a panel relating exclusively to prohibited subsidy claims and established pursuant to Article 4.4 of the ASCM, nor in a panel relating to a countervailing measure and established pursuant to Article 6.1 of the DSU, nor indeed to panels relating to claims under other covered agreements and established pursuant to Article 6.1 of the DSU. That Annex V specifies this limitation is not surprising given that, as previously noted, Article 7 itself makes no reference to Annex V. Consistent with this understanding, no Member has sought initiation of an Annex V procedure where no serious prejudice claim was being pursued.

16. The United States contends in effect that the references to Article 7.4 cited above not only preclude the use of Annex V outside the context of serious prejudice claims but also preclude the application of Annex V in compliance panels even where they do relate to serious prejudice claims. However, we do not believe that any conclusion regarding the availability of Annex V procedures in the latter context can be made without reference to the provisions of the WTO Agreement specifically addressing compliance proceedings. Given that there is no specific reference to compliance proceedings in Article 7 of the ASCM (nor indeed anywhere else in the ASCM), we turn to the relevant provision of the DSU, Article 21.5, with a view to obtaining further clarity on this matter.

17. Article 21.5 of the DSU provides as follows:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings *such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.* The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.(emphasis added).

18. Article 21.5 indicates that disputes regarding compliance "shall be decided through recourse to these dispute settlement procedures". In our view, "these dispute settlement procedures" in their ordinary meaning would appear to be a reference to the procedures provided for in the DSU, including of course any particularities derived explicitly or implicitly from Article 21.5, as well as,

through the operation of Appendix 2 to the DSU, those special and additional rules and procedures found in other WTO agreements.

19. This language therefore suggests that procedures applicable to "regular" or "original" panel proceedings are relevant in compliance panel proceedings, to the extent that this would not be inconsistent with the specific requirements of Article 21.5 or the nature of and function of compliance panels. We note in this respect the specific rules set forth in Article 21.5 - concerning the task of compliance panels, the preference for the original panellists, the shortened time frames - are among the "dispute settlement procedures" applicable in compliance proceedings. As stated by the Appellate Body, these three aspects are "key differences" between compliance panel proceedings and "regular" panel proceedings.[21] However, there may well be other procedures applicable in "original" panel proceedings that are inconsistent with the specific rules of Article 21.5 or the nature and function of compliance proceedings and thus do not apply in compliance panel proceedings.

20. This understanding of Article 21.5 is consistent with Appellate Body jurisprudence. Thus, the Appellate Body has found that "the phrase 'these dispute settlement procedures' [in Article 21.5] does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5", while cautioning that "given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in light of Article 21.5."[22] Similarly, the Appellate Body has found that Article 10.3 of the DSU, regarding third party access to submissions of the parties, required third party access to rebuttal submissions in a compliance panel involving one meeting.[23]

21. We also note that the parties and the adjudicators have often simply proceeded on the basis that various provisions of the DSU or special or additional rules and procedures applicable to "original" panel proceedings apply in the compliance context. In these compliance panel proceedings, for example, both parties have proceeded on the basis that Article 13 regarding requests for information is applicable. Similarly, Members have frequently based appeals, and the Appellate body has repeatedly relied upon, Article 11 of the DSU in compliance proceedings. [24] Another notable example is Article 17 of the DSU regarding appellate review. That the Appellate Body has frequently heard appeals in compliance proceedings implies that Article 17 is one of "these dispute settlement procedures" applicable in the compliance context.

22. Despite these precedents, the United States, citing the Appellate Body Report in *US – Continued Suspension*, appears to suggest that "these dispute settlement procedures" means the procedures in Article 21.5, operating in isolation, such that other provisions of the DSU are inapplicable in compliance proceedings. To the extent this is the US position, we do not consider the United States to have correctly understood the Appellate Body's ruling in that case. In *US – Continued Suspension*, the issue was not the extent to which dispute settlement provisions other than Article 21.5 apply in compliance proceedings. Rather, the question was whether a Member could resort to a normal panel procedure -- i.e., one to which the rules and procedure in Article 21.5 did *not* apply -- when examining a disagreement about the existence or consistency of measures taken to comply with the recommendations and rulings of the DSB. The Appellate Body, in ruling that " 'these dispute settlement procedures' do not refer generally to all proceedings under the DSU, but specifically to the panel proceedings envisaged in Article 21.5…." was clarifying that a Member could not bypass the requirements of Article 21.5 in a case relating to compliance; it was not expressing a view on the extent to which other DSU provisions applied to such compliance proceedings.[25]

23. We recall that the issue before us in this case is limited to whether Annex V procedures are available in compliance panels. We note that nothing in Article 21.5 on its face suggests that Annex V does not or should not apply in the compliance context.

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[21] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 - Canada)*, para. 71.

[22] Appellate Body Report, *US – FSC (Article 21.5 - EC II)*, para. 59.

[23] Appellate Body Report, *US – FSC (Article 21.5 - EC)*, paras. 232-252. The Appellate Body reversed the Panel's ruling that "[w]e do not consider that Article 10 *DSU* requires that third parties receive all pre-meeting submissions of the parties (including rebuttal submissions) in the context of an accelerated proceeding under Article 21.5 *DSU* that involves only one meeting of the parties and third parties with the Panel." *Ibid*, para. 234.

[24] *See, e.g.,* Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 404, 415.

[25] Appellate Body Report, *US – Continued Suspension*, Para. 336.

24. Further, it appears to us that the rationale underlying the need for an Annex V procedure in original panels involving serious prejudice claims is equally applicable in compliance panels involving serious prejudice claims. As the Appellate Body explained in the original proceedings in this dispute:

> Disputes involving claims of serious prejudice are characterized by the need for a complainant to adduce extensive evidence of the market effects of the challenged subsidy, including in third-country markets, as well as by the fact that much of the information relating to the subsidization will be within the sole control of the government of the responding Member or found only in the territories of third-country markets in which the subsidized products are sold….."[26]

25. The Appellate Body has further explained that the Annex V procedure is meant to be completed at an early stage of a panel proceeding:

> The provisions of Annex V also convey the importance of the time at which and within which an Annex V procedure is to be conducted. Paragraph 5 stipulates that the information-gathering procedure should be completed within 60 days of the date of establishment of the panel, and paragraph 4 of Annex V refers to "the timely development of the information necessary". The latter paragraph also refers to the "subsequent multilateral review of the dispute", thereby making clear that the information-gathering is meant to be completed prior to the panel's substantive consideration of the matter.[27]

26. In short, the Appellate Body has concluded that:

> In this way, Annex V sets out a comprehensive scheme designed to collect the kind of information that will need to be relied upon by the parties in a serious prejudice dispute. The scheme aims to foster the cooperative exchange of information at the earliest possible opportunity, and thereby contribute to the prompt resolution of these particularly complex disputes.[footnote omitted].[28]

27. We note that compliance panels regarding serious prejudice are, even if not invariably, at the very least highly likely to share the features that make Annex V procedures necessary in original panel proceedings, such as the need for extensive evidence of the market effects of the challenged subsidy, including in third country markets, as well as the need for evidence of subsidization that is within the sole control of the government of the responding Member. The United States contends that the text of Annex V does not fit well with a compliance proceeding, because much of the information identified in Annex V.5 would already have been established in the original proceeding.[29] We note however that a determination of the consistency of a measure taken to comply will often require the review of amended or even completely new measures,[30] while a consideration as to whether a the responding Member has removed the adverse effects of a measure may well require the review of new data for a more recent reference period.[31]

28. In addition, the United States contends that the text of Annex V does not fit with a compliance proceeding because the Annex V procedure is to be completed within 60 days of referral to the DSB, while under Article 21.5 a compliance panel is to be completed within 90 days of referral of the matter to the panel.[32] We acknowledge that it is unlikely that a compliance panel would be able to complete its work in the thirty-day period remaining after receiving information from the Annex V procedure (indeed, we consider that the 90-day period for compliance panels is unrealistic, particularly in a serious prejudice case), but we note that even in an original serious prejudice proceeding a panel is expected to complete its work within 120 days of the date of composition and establishment of the panel's terms of reference.[33] In any event, the accelerated

[26] Appellate Body Report, *US – Large Civil Aircraft (2d Complaint)*, para. 513.
[27] Appellate Body Report, *US – Large Civil Aircraft (2d Complaint)*, para. 515.
[28] Appellate Body Report, *US – Large Civil Aircraft* (2d *Complaint*), paras. 517.
[29] US Reply, para. 29
[30] *See, e.g., Australia – Salmon (Article 21.5 - Canada*), para. 7.21.
[31] *See, e.g.,* Panel Report, *US – Upland Cotton (Article 21.5 - Brazil)*, paras. 10.15-10.19.
[32] US Reply, para. 29.
[33] ASCM Article 7.5.

time-frame provided for in compliance panels in our view reinforces the need for an effective and early mechanism for the collection of information, rather than weakening it.

29. In short, we consider that the DSU, and the special or additional rules and procedures identified in Appendix 2, set forth the rules governing "original" panel proceedings. Article 21.5 establishes that, except to the extent that it would be inconsistent with the specific requirements of Article 21.5 or the nature of and function of compliance panels, these dispute settlement procedures also apply in compliance panel proceedings. Applying these considerations to the case at hand, we conclude that Annex V procedures are made available in compliance proceedings by operation of the provisions of Article 21.5.

30. We recall that Annex V is a special and additional rule or procedure identified in Appendix 2 of the DSU, and that under Article 1.2 of the DSU, where there is a difference between the rules and procedures of the DSU and those of Appendix 2, the special or additional rule or procedure shall prevail. As the Appellate Body has explained, this means that the rules of procedure of the DSU apply *together* with the special or additional provisions of the covered agreement except that, in the case of a *conflict* between them, the special or additional provision will prevail. [34] In this case, we see no conflict. Annex V provides that its procedures are available in (original) panel proceedings where a panel relating to serious prejudice is established under Article 7.4. Annex V itself does not however speak to the question of its application in compliance panel proceedings; such a determination depends rather upon Article 21.5. We understand Article 21.5 to mean that, except to the extent that it would be inconsistent with the specific requirements of Article 21.5 or the nature of and function of compliance panels, the dispute settlement procedures that apply in original panel proceedings also apply in compliance panel proceedings. There is therefore no question of a conflict between Annex V and Article 21.5. Rather, these two provisions can be read harmoniously to make Annex V available in compliance panel proceedings.

31. The issue we are called on to decide today is limited to whether Annex V is among "these dispute settlement procedures" referred to in Article 21.5. Although we have been required to interpret a number of provisions in order to resolve this question, we need not, and do not, express any opinion about the applicability of Article 7.4 in compliance proceedings, nor indeed about the applicability of any other provision not necessary to the resolution of this dispute. We simply note that there remain important differences of view on such issues as the applicability of Articles 4 and 6 of the DSU in compliance proceedings, that the jurisprudence has not to date resolved these questions, and that our resolution of the issue of Annex V does not prejudge them.[35]

32. Finally, we recall the US' argument that, if the European Union were correct that this Panel was established pursuant to Article 7.4 of the ASCM, the European Union was required to wait 60 days before seeking establishment of a panel, such that the EU request was premature. Further, the United States contends that in this situation, the negative consensus rule for establishment of a panel does not apply and the DSB did not establish this Panel.[36] We note first that the United States is *not* asking us to rule that this Panel was not properly established. Rather, it is merely asserting that if the European Union *were* correct that this Panel was established under

[34] Appellate Body Report, *US – FSC,* para. 159.

[35] In *Mexico – Corn Syrup (Article 21.5 - US),* for example, the Appellate Body was asked to determine whether the compliance panel erred in failing to consider the implications of the failure of the United States to seek consultations. The Appellate Body explained that:

> Mexico and the European Communities seem to argue that the Panel was required to address the issue of consultations because consultations are an indispensable element of proceedings under Article 21.5 of the DSU. They interpret the phrase "these dispute settlement procedures" in Article 21.5 of the DSU as referring to all procedures contained in the DSU, including the provisions concerning consultations under Article 4 of the DSU and the provisions concerning establishment of a panel under Article 6. The United States, on the other hand, believes that the phrase refers to something less than all procedures contained in the DSU and, in particular, that the only prerequisite set forth in Article 21.5 is that there exist a disagreement as to whether a Member has implemented the recommendations and rulings of the DSB. (para. 52).

Ultimately, the Appellate Body found that it did not need to examine these differences of interpretation as Mexico had not raised an objection before the Panel and the Panel was not required to address the issue on its own motion (paras. 53, 75).

[36] US Reply, para. 19.

Article 7.4 - which the United States contests - then the Panel would not have been properly established. As we do not decide whether this Panel was established under Article 7.4, we need not further consider the US argument on this issue.[37]

33. In light of our reasoning above, we find that Annex V procedures are available in compliance proceedings. As it is not disputed that a panel was established in this compliance proceeding to consider, *inter alia*, issues relating to serious prejudice, and that the EU requested the initiation of an Annex V procedure, we conclude that the conditions for initiating an Annex V procedure were met. Recalling the Appellate Body's ruling that "the first sentence of paragraph 2 of Annex V to the *SCM* Agreement must be understood as requiring the DSB to take action, and that such action occurs automatically when there is a request for an Annex V procedure and the DSB establishes a panel….",[38] we find that automatic initiation of an Annex V procedure has occurred.

34. We recall that the European Union makes a series of additional requests for rulings regarding US actions and inactions in respect to Annex V and the evidentiary implications arising therefrom. Specifically, it asks us to rule that: (a) "…the United States has failed to comply with its obligations under Annex V, and in particular has failed to cooperate in the development of evidence…as required by Annex V.1; (b) the European Union is entitled to present its case based on the evidence available to it, pursuant to Annex V.6; (c) we may complete the record as necessary relying on best information available; (d) we should draw adverse inferences from the non-cooperation of the United States; (e) ordinarily we should not request additional information from the United States to complete the record where the information would support the US position and the absence of that information in the record is the result of the unreasonable failure of the United States to co-operate in the Annex V procedure..." At this stage in this proceeding, we do not consider it appropriate to make these additional rulings requested by the European Union. We have received no substantive submissions from the parties, and are in no position to assess whether and to what extent the ability of the European Union to obtain the evidence necessary to present its case will be affected by US actions and inactions in respect of Annex V.[39] Further, the European Union has asked this Panel to seek information under Article 13 of the DSU, a request we take up below, and has acknowledged that rulings on its final four ruling requests might not be necessary.[40] Thus, we consider that it would be premature for us at this stage to pronounce on the evidentiary implications flowing from the fact that information has not been gathered pursuant to the Annex V procedure initiated in this proceeding.

35. Having found that an Annex V procedure has been initiated, the question arises how to proceed in this dispute. One approach would be for the parties to revert to the Annex V procedure in order to gather evidence in this dispute. Although the United States has taken the position that no such procedure was initiated, it has indicated that, if we were to find that an Annex V procedure was initiated, the United States would participate in that procedure.[41] However, we understand that the European Union does not intend to proceed with an Annex V procedure at this stage.[42] Rather, our understanding is that the European Union wants to advance the information-gathering process as expeditiously as possible and to this end has chosen instead to request that we exercise our authority to seek information under Article 13 of the DSU.[43] Nor has the United States

[37] We note that the European Union and the United States entered into a sequencing agreement pursuant to which the European Union would seek consultations and could after a 15-day consultation period seek establishment of a panel "pursuant to Article 21.5 of the DSU". WT/DS/353/14, para. 1. In light of the basis for our conclusions here, we need not further consider what implications, if any, this agreement would have on the US argument regarding a 60-day consultation period.

[38] Appellate Body Report, *US – Large Civil Aircraft*, para. 524.

[39] We note in this regard the Appellate Body's comments in the original proceedings in this dispute: "We fail to see how we can answer questions relating to the extent of the United States' co-operation in the abstract for the entire dispute. Whether there has been a failure to cooperate or a refusal to submit essential information, and whether there is a resulting need to use adverse inferences, are questions that usually refer to specific claims, measures or pieces of evidence." Appellate Body Report, *US – Large Civil Aircraft*, para. 542.

[40] More specifically, the European Union has stated that "If, and only if, all the EU questions are put to the United States in a timely manner, and full and timely responses obtained, might it become unnecessary…." for the Panel to make findings on its final four requests. EU Request, para. 27.

[41] US Reply, para. 32.

[42] Should our understanding be incorrect, we request that the European Union inform us promptly.

[43] Letter of the European Union to the Panel, dated 5 November 2012 ("We further ask [the Panel] to exercise [its] right under Article 13 of the DSU to seek information from the United States, in order to immediately make good, in a timely manner, this gross infringement of the EU's due process rights.").

objected to the resort to information-gathering by the Panel under Article 13. We therefore turn to the EU's request in this regard.

The European Union's request under Article 13 of the DSU

36. The European Union requests that this Panel exercise its right under Article 13 of the DSU to seek information, by sending to the United States the Annex V questions already prepared by it. The European Union further requests that we ask the United States to respond within a time-limit to be set by the Panel, taking into account the 60-day period in Annex V.4, the fact that these are compliance proceedings and should therefore proceed on an accelerated basis, and the time-limit to be fixed for the filing of the EU first written submission.[44] The EU notes that while panels have been reluctant to seek information under Article 13 at an early stage of the proceedings, we should consider the "exceptional circumstances" of this case.[45] The European Union further requests that we apply "the standard … of reasonableness set out in Annex V"…. and "exercise very great caution" when considering whether or not to strike a question of the grounds it is unreasonable.[46]

37. The United States observes that panels have universally declined to seek information under Article 13 at such an early point in the proceedings, but considers that there are "unique reasons" that justify such a departure here.[47] The United States requests that the Panel, in exercising its right to seek information under Article 13: (a) provide that any request is on a firm legal footing, and make clear the reasons that invocation of Article 13 is appropriate in this situation; (b) seek an explanation from *both* parties as to why particular information requests are appropriate or not; (c) provide a period for responding to questions that is consonant with the volume and nature of the information requested and consistent with panels' practice regarding information requests; and (d) address both parties' preliminary ruling requests before seeking information.[48]

38. As always, our starting point is the text of the WTO Agreement, in this case Article 13.1 of the DSU. That Article provides as follows:

> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it seems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

39. Article 13 of the DSU makes a grant of discretionary authority to panels enabling them to seek information from any relevant source, as they deem appropriate in a particular case.[49] The Appellate Body has stated that Article 13.1 imposes no conditions on the exercise of this discretionary authority.[50] Moreover, in *Canada – Aircraft*, the Appellate Body observed that there is nothing in either the DSU or the ASCM to support the assumption that a Member's duty to respond promptly and fully to a panel's request for information arises only after the opposing party to the dispute has established a *prima facie* case that its complaint or defence is meritorious.[51] As the Appellate Body stated:

> To the contrary, a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a

[44] EU Request, para. 24.
[45] *Ibid*, para. 25.
[46] *Id.*, para. 26
[47] The reasons identified by the United States are the agreement of the parties, that the panel and Appellate Body reports in the original proceedings provide a body of information and legal background that will help the Panel to evaluate what information to seek, and that some of the information sought the United States would otherwise have included in its first submission. US Reply, para. 40.
[48] US Reply, para. 39.
[49] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84; Appellate Body Report, *EC – Hormones*, para. 147; Appellate Body Report, *US – Shrimp*, para. 106.
[50] Appellate Body Report, *Canada – Aircraft*, para. 185.
[51] Appellate Body Report, *Canada – Aircraft*, para. 192.

> responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence.[52]

40. Finally, in the original proceedings in this dispute, the Appellate Body explained that in considering whether to exercise its authority under Article 13 of the DSU, particularly where a party has made an explicit request that it do so, a panel should have regard to considerations such as what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s).[53]

41. We note that this Panel has been asked to exercise its right to seek information *under Article 13.1 of the DSU*. We have not been requested by the parties to conduct the Annex V procedure, nor have we been designated by the DSB as facilitator in that procedure. Thus, the question before this Panel is whether, and how, it should exercise its "right to seek information and technical advice from any individual or body which it seems appropriate" under Article 13. Since the authority for an information request by this Panel is derived from Article 13 of the DSU, it follows that our exercise of that authority is also bounded by Article 13, and *not* by Annex V.

42. That said, we believe that in exercising our "ample and extensive discretionary authority" we should take into account the circumstances in which we are considering the exercise of that authority. Thus, the fact that the European Union was entitled to but did not benefit from the procedures in Annex V for developing information is in our view a relevant consideration that we may take into account.[54] More generally, and as noted above,[55] the Appellate Body has explained that serious prejudice cases require extensive evidence, much of which is within the sole control of the responding Member or found only in the territories of third-country markets. These characteristics of serious prejudice cases appear to us to be highly relevant where, as here, that evidence has not been adduced through Annex V procedures.

43. The European Union requests that we make a request for information at the outset of this proceeding, prior to the first submissions of the parties. The United States concurs that it would be appropriate to make such an early request, although for different reasons than those advanced by the European Union.

44. We note that, although it is unusual for a panel to make an Article 13 request this early in the proceeding - indeed, we are aware of no case where a request has been made prior to the parties' first submissions -- we are vested with ample and extensive discretionary authority to determine *when* we need information to resolve a dispute.[56] Further, Annex V allows parties in serious prejudice cases access to information at the "earliest possible opportunity".[57] Indeed, the Annex V procedure is meant to be completed prior to the panel's substantive consideration of the matter.[58] In this case, the European Union should have had such access through an Annex V procedure initiated on 23 October 2012. These considerations are relevant to *why* information was not produced, and whether it is *fair* to request the United States to produce information at this early stage, factors the Appellate Body has considered relevant in determining whether a panel should exercise its authority under Article 13. Under these circumstances, and given that the United States does not contest its appropriateness, we have determined to make a request under Article 13 prior to first submissions.

45. The European Union argues that in determining what questions to pose, this Panel should not at this stage in the process dwell upon the issue of what questions it might *itself* consider

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[52] Appellate Body Report, *Canada – Aircraft*, para. 192 (original emphasis).
[53] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140.
[54] We note that the Appellate Body considered this among other factors in deciding whether the Panel should have exercised its Article 13 authority in the original proceedings. Appellate Body Report, *US – Large Civil Aircraft,* (para. 1142).
[55] *See* paragraph 24.
[56] *See* paragraph 39.
[57] Appellate Body Report, *US – Large Civil Aircraft,* para. 517.
[58] Appellate Body Report, *US – Large Civil Aircraft* para. 515.

necessary and appropriate, but rather apply the standard of "reasonableness" set out in Annex V.[59] The United States responds that this Panel is not free to deviate from the "necessary and appropriate" standard set forth in Article 13 of the DSU, and that we must exercise our own judgement in deciding whether that standard is met.

46. We agree with the United States that in making a request for information under Article 13 of the DSU we must respect the standards set forth in that Article. That said, we recall that whether a request for information is necessary and appropriate is necessarily dependent upon the facts and the context in which the request was made, which includes in a serious prejudice case issues relating to the availability of evidence obtained in an Annex V procedure. We note in any event that the Annex V procedure operates to obtain information "necessary to facilitate expeditious multilateral review of the dispute", and that facilitators have declined to convey questions that they consider did not meet this requirement.[60] Accordingly, while the timing and modality of Annex V procedures may differ from those of requests for information under Article 13 of the DSU, the basic purpose is the same -- to gather information that is required by the Panel to resolve the dispute.

47. The United States has asked us to require the European Union to justify the specific questions that it has asked the Panel to pose to the United States. In the view of the United States, such a justification is required in order to ensure that the questions are "necessary and appropriate."[61] The European Union responds that it declines the US invitation to unjustifiably prolong the process by re-submitting the justifications for its questions.[62] While specific explanations from the European Union regarding its proposed questions to the United States might have been useful to the Panel, we have decided in the circumstances of this case to ask the United States to comment on the questions suggested by the European Union, and the European Union to respond to those comments if it so desires. We consider that this approach should provide us with an adequate basis to decide whether or not each of the questions suggested by the European Union is necessary and appropriate on the facts of this case, without unduly delaying our work.

48. The United States has further requested that we allow it to suggest questions to be posed to the European Union. The European Union has opposed the US request, arguing, *inter alia*, that, unlike Annex V, Article 13 is not a reciprocal process; that allowing such questions at this stage would only risk causing further delay; and that under Annex V.9 a panel should not ordinarily request additional information to complete the record where the absence of such information is the result of unreasonable non-cooperation.[63] The United States responds that there is no basis for a finding of non-cooperation, that under Article 13 either party may suggest that a panel request information, and that a panel has flexibility to decide when and how to evaluate such requests. The United States further suggests that there are efficiencies in considering both parties' suggestions together, and asks that we issue a set of questions to each party simultaneously. The United States has submitted suggested questions to the Panel.[64]

49. We recall that under Article 13 this Panel has a "right to seek information …which it deems appropriate". We further note that the first sentence of Annex V.9 specifies that "nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution of the dispute…." We can envision that there may be circumstances where the Panel may deem information which is in the possession of the European Union to be necessary and appropriate. Indeed, that information from the complaining Member may be required in a serious prejudice case is confirmed by AnnexV.2, which envisions information requests to the complaining Member. Accordingly, we will consider the information request proposed by the United States as expeditiously as possible. While we can see the simultaneous information requests to the two parties might be useful, we are not however convinced that it is necessarily required in this case. In particular, we are not prepared to delay

[59] EU Request, para. 26.

[60] *See, e.g.* Report to the Panel from the Facilitator, 24 February 2006, in Report of the Panel, *EC – Large Civil Aircraft*, Annex C, para. 29.

[61] US Reply, paras. 47-51.

[62] EU letter of 9 November, para.2.

[63] EU letter of 5 November, para. 4.

[64] Request by the United States for the Panel to Request Information from the European Union Pursuant to Article 13 of the DSU, 19 November 2012.

action on the EU's proposed questions pending consideration of those proposed by the United States.

50. Finally, the United States has submitted to the Panel a request for a number of preliminary rulings, including in relation to the scope of the dispute.[65] The United States considers that the Panel should rule on its requests prior to making a request for information under Article 13, as this would avoid the Panel seeking unnecessary information.[66] The European Union responds that the requested rulings go to the heart of many issues at the core of a compliance proceeding, that it requires answers to its "Annex V/Article 13 questions" in order to respond to the US requests, and that it should be allowed to respond to the requests in its first submission. Given their extraordinary breadth, the European Union contends, these requests stand for the proposition that the Panel should, in effect, decide the case before the information gathering foreseen in Annex V.[67]

51. We recall that the European Union has requested that we seek information under Article 13 of the DSU, not under Annex V, and that we must therefore consider whether the information the European Union asks us to seek is necessary and appropriate. The question whether particular measures are within the scope of this dispute may be relevant to whether information regarding those measures is necessary and appropriate. At the same time, we are conscious of the importance of resolving the EU's request that we seek information under Article 13 promptly. We are further aware that information from the information-gathering process is potentially relevant to the resolution of the preliminary ruling requests of the United States. Accordingly, we have requested that the European Union respond to the US request for a preliminary ruling by 23 November. We will take the views of the parties expressed in the US request and the EU response under consideration and on that basis will determine whether, and if so to what extent, the US request for preliminary rulings will affect the scope of our request for information under Article 13.

52. In summary, our intention with respect to information-gathering under Article 13 of the DSU is the following:

a. The Panel has requested the United States to comment on the questions suggested by the European Union by close of business on Tuesday 20 November, and the European Union to respond to those comments by close of business on Friday 23 November. The Panel has requested that the European Union respond to certain aspects of the US request for preliminary rulings by the same date.

b. The Panel will make an information request to the United States under Article 13 of the DSU as soon as possible taking into account the requests and comments made and responses received. At that time, and after consultation with the parties, the Panel will set a deadline for the United States to respond to its request.

c. Once the information request has been made and a deadline for the United States to respond is set, the Panel will propose a timetable to the parties. The proposed timetable will allow the European Union adequate time to prepare its first submission on the basis of the US responses to the information request under Article 13 of the DSU.

d. Regarding the US request for the Panel to request information from the European Union, the European Union commented on those proposed questions on Friday 23 November 2012, and the United States has been requested to respond to any such comments by close of business on Wednesday 28 November 2012.

e. The Panel will make any information request to the European Union under Article 13 of the DSU as soon as possible taking into account the request and any comments received. At that time, and after consultation with the parties, the Panel will set a deadline for the European Union to respond to its request.

[65] US Request for Preliminary Rulings, 13 November 2012.
[66] US Reply, para. 52.
[67] EU letter of 14 November.

ANNEX E-2

COMMUNICATION OF THE PANEL DATED 5 DECEMBER 2012

1. In a submission dated 31 October 2012[1], the European Union requested the Panel to exercise its right to seek information from the United States pursuant to Article 13 of the DSU, by sending to the United States the Annex V questions that had previously been prepared by the European Union and which were attached to the communication from the European Union to the Facilitator dated 25 October 2012.

2. In a communication dated 15 November 2012, the Panel advised the parties that it had decided to exercise its authority under Article 13 of the DSU to seek information from the United States and requested the United States to submit comments on the questions proposed by the European Union by close of business on 20 November 2012. The Panel also requested the European Union to submit any responses to such comments by close of business on 23 November 2012. On 26 November 2012, in its Preliminary Rulings and Decision Regarding Information-Gathering under Article 13 of the DSU, the Panel ruled that it would make an Article 13 request to the United States as soon as possible taking into account the requests and comments made and the responses received.

3. Having now received the comments from the United States on the questions proposed by the European Union and the European Union's responses to those comments, the Panel has decided, in the interest of advancing this proceeding as quickly as possible, to pose the attached questions regarding the NASA and DOD measures to the United States immediately. The Panel is continuing to examine the European Union's requests that it seek information with respect to other matters and expects to make a second request under Article 13 to the United States in the near future.

4. The Panel concludes that the information requested by means of the attached questions is necessary and appropriate, taking into account the fact that such information had not been produced in an Annex V process; that such information is generally not in the public domain and the European Union lacks other reasonable means to procure it; and that such information is likely to be necessary to ensure due process and a proper adjudication of the relevant claims.

5. The Panel has decided not to seek certain information requested by the European Union because such requests seek to elicit argumentation rather than information, or information that the Panel is not satisfied at this time is likely to be necessary. The Panel would be prepared to re-examine the European Union's request that it seek this information on the basis of a reasoned request by the European Union following the first submissions of the parties.

6. The Panel is aware that certain of the information that it requests relates in some cases to measures that the United States considers are not properly within the scope of the compliance proceeding. The Panel's decision to seek such information by means of the attached questions is without prejudice to its ultimate determinations on the scope of the compliance proceeding. The parties are invited to make further submissions regarding the measures that properly fall within the scope of the compliance proceeding as part of their first written submissions if they consider that it would be useful to do so.

7. Having considered the arguments of the parties regarding the deadline for the United States to respond to these questions, the Panel proposes that the United States produce the information sought by means of the attached questions and provide such information to the European Union and to the Panel by close of business on Thursday 28 February 2013. Should the parties wish to comment on this proposed deadline, they are invited to do so by close of business on Friday 7 December 2012.

Questions omitted.

[1] European Union, Request for a Preliminary Ruling and Request for the Panel to exercise its Authority Pursuant to Article 13 of the DSU, dated 31 October 2012.

ANNEX E-3

COMMUNICATION OF THE PANEL DATED 18 DECEMBER 2012

1. The Panel made an initial request to the United States for information under Article 13 *DSU* in a communication dated 5 December 2012. In that communication the Panel indicated that it was continuing to examine the European Union's request that it seek information from the United States with respect to matters other than NASA/DOD measures and that it expected to make a second request to the United States in the near future.

1. Second phase of Article 13 DSU request to the United States

2. Regarding matters other than NASA/DOD measures, the Panel has concluded that the information requested by means of the attached questions (Annex A) is necessary and appropriate, taking into account that such information had not been produced in an Annex V process; that it is generally not in the public domain and that the European Union lacks other reasonable means to procure it; and that it is likely to be necessary to ensure due process and a proper adjudication of the relevant claims.

3. The Panel has decided not to seek certain information requested by the European Union because such information requests seek to elicit argumentation rather than information, or seek information that the Panel is not satisfied at this time is likely to be necessary to ensure due process and a proper adjudication of the relevant claims, or seek information which is in the possession of or otherwise accessible to the European Union. The Panel has also taken into account the breadth of the information requested and the extent it would be reasonable to expect the United States to provide it. The Panel would be prepared to re-examine the European Union's request that it seek the information on the basis of a reasoned request by the European Union following the first submissions of the parties.

4. The Panel is aware that certain of the information it requests relates in some cases to measures that the United States considers are not properly within the scope of this compliance proceeding. The Panel's decision to seek such information by means of the attached questions is without prejudice to its ultimate determinations on the scope of this proceeding. The parties are invited to make further submissions regarding the measures that properly fall within the scope of this proceeding in their first written submissions if they consider that it would be useful to do so. The parties are also requested to provide their submissions relating to the US preliminary ruling requests to third parties to the extent they have not already done so.

2. Article 13 DSU request to the European Union

5. The United States has also requested that we seek information from the European Union pursuant to Article 13 *DSU*. We indicated in our 26 November 2012 Preliminary Rulings and Decision Regarding Information-Gathering under Article 13 of the DSU, that there might be circumstances where it would be necessary and appropriate to seek information from the European Union. Accordingly, we asked the European Union to comment on the questions proposed by the United States and the United States to respond to those comments.

6. The European Union has objected as a general matter to the United States' request that we seek information from the European Union on the grounds that it is premature, that a Panel should not under Annex V.9 of the *SCM Agreement* seek information to complete the record where the information would support a particular party's position and the absence of the information in the record is the result of unreasonable non-co-operation by that party, and that seeking information at this point would cause unreasonable delay in the proceedings.

7. We recall that this Panel has a right under Article 13.1 *DSU* to seek information which it considers "necessary and appropriate". As explained in our 26 November 2012 Rulings and Decision, we have at the request of the European Union decided to exercise this authority at an early stage of the proceeding to seek extensive information from the United States. Our objective has been to ensure that, in the absence of an effective Annex V procedure, the parties and the

panel have early access to the information necessary to a fair and prompt adjudication of this dispute on the merits.

8. Having sought the information requested by the European Union at an early stage of the proceeding, we do not consider that it would be appropriate to deny the United States the possibility also to seek information at an early stage. Nor are we prepared to simply deny the United States' request on the grounds that it has engaged in what the European Union deems to be "unreasonable non-cooperation" in the information-gathering process. Such an approach would belabour past differences rather than seeking to move these proceedings forward. Rather, our intention is to consider the requests of both parties, in a balanced manner, in order to obtain the information that is necessary and appropriate to our consideration of this case. As discussed below, the United States' request will not delay these proceedings.

9. Regarding the specific information the United States has requested the Panel to seek from the European Union, the Panel has concluded that the information requested by means of the attached questions (Annex B) is necessary and appropriate, taking into account that such information had not been produced in an Annex V process; that it is not generally in the public domain and that the United States lacks other reasonable means to procure it; and that such information is likely to be necessary to ensure due process and a proper adjudication of the relevant claims.

10. The Panel has decided not to seek certain information requested by the United States because such information requests seek information that the Panel is not satisfied at this time is likely to be necessary to ensure due process and a proper adjudication of the relevant claims, or which is in the possession of or otherwise accessible to the European Union. The Panel has also taken into account the breadth of the information requested and the extent it would be reasonable to expect the European Union to provide it. The Panel would be prepared to re-examine the US request that it seek the information on the basis of a reasoned request by the United States following the first submissions of the parties.

3. Deadlines for submission of the information requested pursuant to Article 13 DSU

11. When we made our first request, we proposed a deadline of Thursday, 28 February 2013 for the United States to provide the information, and offered the parties an opportunity to comment on the deadline. The United States indicated that while the deadline was extremely ambitious, it would endeavour to respond to the questions as fully as possible, but requested that we deny any European Union request to shorten the period. The European Union, *inter alia*, recalled the 60-day deadline for Annex V procedures, and requested that the United States be asked to respond to certain questions by an earlier deadline in order to allow it to progress in the preparation of certain parts of its first written submission.

12. The Panel is seeking a very substantial volume of information from the United States. While we are fully aware that an Annex V procedure in principle must be completed within 60 days of its initiation, and we are equally conscious that a compliance panel is an accelerated proceeding, it will not advance this proceeding to set an unrealistic deadline that does not allow the United States time to make a satisfactory response to the questions posed, taking into account the extent of the information sought and the need to review that information in light of issues relating to confidentiality.

13. The Panel does however consider that the European Union's proposal for a phased response is a reasonable one. **Accordingly, the Panel requests that the United States respond to questions 1-4, 11, 23-24 and 30 by close of business on Friday, 25 January 2013. The Panel requests that the United States respond to all remaining questions, including those attached as Annex A to this communication, by close of business on Thursday, 28 February 2013**.

14. The Panel requests that the European Union also respond to all questions attached as Annex B by close of business on Thursday, 28 February 2013.

Questions omitted.

ANNEX E-4

COMMUNICATION REGARDING THIRD PARTY RIGHTS DATED 25 JANUARY 2013

1. By letters dated 19, 20 and 21 December 2012, respectively, Brazil, Australia and Canada, third parties to this dispute, expressed concerns regarding third party rights in the present proceeding. Specifically, these third parties note that the third parties were initially not made aware of a request by the European Union for a preliminary ruling regarding the interpretation of provisions relating to the initiation of procedures under Annex V of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and their applicability to this dispute, as well as requests by both the European Union and the United States for the Panel to exercise its right to seek information under Article 13 of the Understanding on the Rules and Procedures governing the Settlement of Disputes ("DSU"). Moreover, it appears that only when the Panel circulated its preliminary ruling of 26 November 2012[1] were the third parties made aware of a request for a preliminary ruling by the United States. In the view of these third parties, these requests and the responses thereto should have been provided to third parties pursuant to Article 10.3 of the DSU.

2. Specifically, Brazil requests that all parties' submissions be made available to third parties and that the Panel revise its timetable to accord third parties the opportunity to make submissions on the issues discussed in the preliminary rulings. Australia does not seek to have the panel revisit its preliminary rulings of 26 November 2012, but requests the Panel to acknowledge the rights and concerns of third parties with respect to due process and incorporate them fully into future procedural arrangements. Canada requests the Panel to instruct the parties to provide to the third parties all submissions relating to the European Union's request for a preliminary ruling, and reserves the right to submit comments at a future date. Finally, Brazil and Australia request the Panel to provide transparency regarding the Article 13 process by informing the third parties of the procedure through which the Article 13 requests were dealt with and to provide the parties' responses to the third parties[2], subject to the protection of BCI and HSBI.

3. A summary of the procedural history may help to clarify the issues before the Panel. This Panel was established by the DSB on 23 October 2012. Eight days later, on 31 October, the European Union requested the Panel to rule "at the earliest opportunity" that an Annex V procedure had been automatically initiated and to "immediately" seek information under Article 13 of the DSU.[3] The United States responded to these requests on 8 November 2012 and also indicated its intention to make its own request that the Panel seek information from the European Union pursuant to Article 13 of the DSU.[4] The United States made its Article 13 request on 19 November 2012.[5] There followed various exchanges between the parties, including comments by each party on the questions proposed by the other.[6] None of these communications was served on the third parties.

4. In addition, on 13 November 2012, the United States made requests for various preliminary rulings regarding the scope of the proceeding, and a number of communications regarding those

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[1] Preliminary Rulings and Decision Regarding Information Gathering under Article 13 of the DSU, dated 26 November 2012.

[2] Brazil requests alternatively that the results of the Article 13 requests be circulated to all Members. However, Article 10.3 of the DSU relates exclusively to the rights of third parties, and Brazil has pointed to no other provision of the DSU in support of this suggestion.

[3] European Union, Request for a Preliminary ruling and Request for the Panel to exercise its Authority Pursuant to Article 13 of the DSU, dated 31 October 2012.

[4] United States, Reply of the United States to the EU Request for a Preliminary Ruling and the EU Request for the Panel to Request Information under Article 13 of the DSU, dated 8 November 2012.

[5] United States, Request by the United States or the Panel to Request Information from the European Union Pursuant to Article 13 of the DSU, dated 19 November 2012.

[6] United States, Comments by the United States on Questions Proposed by the European Union for the Panel to Use to Seek Information Pursuant to Article 13 of the DSU, dated 20 November 2012; European Union, European Union Comments on the United States Comments on the Questions Proposed for the United States Pursuant to Article 13 of the DSU, dated 23 November 2012; European Union, Letter providing comments on the United States' Article 13 Request, dated 23 November 2013; United States, US Comments on EU Comments on the Request by the United States for the Panel to Request Information from the EU Pursuant to Article 13 of the DSU, dated 28 November 2012.

requests followed.[7] On 18 December 2012 the Panel requested that the parties provide their submissions regarding the US preliminary rulings requests to the third parties to the extent they had not already done so.[8] The third parties were advised of this by the Panel on 21 December 2012 and were informed that they would have an opportunity to address the issues in their third party submissions if they so wished.[9] Under these circumstances, the Panel does not consider it necessary to further address third party access to these communications.

5. As noted earlier, on 26 November 2012, the Panel issued preliminary rulings finding, *inter alia*, that an Annex V procedure had been initiated, indicating the Panel's intention to pose questions pursuant to Article 13 of the DSU, and setting forth a procedure for the information gathering under Article 13.[10] This communication was served on the third parties.

6. On 5 December 2012, the Panel made a first information request, pursuant to Article 13 of the DSU, to the United States, and on 18 December 2012, the Panel made additional Article 13 requests to the United States and to the European Union.[11] The Panel did not serve these requests on the third parties. Also on 18 December 2012, the Panel provided its final Working Procedures to the parties and third parties; paragraph 20(a) of those Procedures provides that each party shall "serve its submissions to the substantive meeting of the panel on the third parties".[12]

7. The Panel at the outset acknowledges the important role played by third parties in panel proceedings. As provided by Article 3.2 of the DSU*,* one of the functions of the dispute settlement system is to clarify the provisions of the covered agreements. Thus, third parties have potentially significant systemic interests in the interpretations developed by panels. Third parties may also have a concrete interest in the matter at issue. Further, the views of third parties can be helpful in ensuring that panels have before them all of the elements necessary to assist them in developing robust interpretations of the covered agreements. It is for these reasons that the DSU provides Members having a "substantial interest" in a matter before a panel "an opportunity to be heard by the panel and to make written submissions to the panel".[13] As a necessary corollary of this right of participation, Article 10.3 of the DSU provides that third parties shall "receive the submissions of the parties to the dispute to the first meeting of the panel."

8. The rights of third parties in panel proceedings are limited to the rights granted under Article 10 and Appendix 3 to the DSU.[14] Thus, the right of third parties to be heard by a panel has, consistent with paragraph 6 of the Working Procedures in Appendix 3 to the DSU, typically been provided through a third-party session of the first meeting of the Panel; third parties are not entitled to attend the panel's session with the parties at the first meeting, or to participate in the panel's second meeting. Similarly, the right of third parties to make written submissions has ordinarily been satisfied through submissions made after the first submissions of the parties and prior to the first meeting of the panel; third parties are not typically authorized to make any further subsequent submissions to the panel. Nor, consistent with Article 10.3 of the DSU, have third parties generally received submissions of the parties made after the first meeting of the panel. That said, a panel has the discretion to grant additional participatory rights to third parties in particular cases, provided that those rights are consistent with the provisions of the DSU and

[7] United States, Requests by the United States of America for Preliminary Rulings, dated 13 November 2012; European Union, European Union Response to the United States Requests for Preliminary Rulings, dated 23 November 2012; United States, Letter regarding response to European Union's response to the United States' requests for preliminary rulings, dated 26 November 2012; European Union, Letter regarding the United States' request to comment on the European Union's comments on the United States' Requests for Preliminary Rulings, dated 27 November 2012; United States, Reply of the United States of America to the EU Response to the US Requests for Preliminary Rulings, dated 3 December 2012.

[8] Communication from the Panel to the Parties, dated 18 December 2012.

[9] Communication from the Panel to the Third Parties, dated 21 December 2012.

[10] Preliminary Rulings and Decision Regarding Information Gathering under Article 13 of the DSU, dated 26 November 2012, para. 52.

[11] Communication from the Panel to the Parties, dated 5 December 2012; Communication from the Panel to the Parties, dated 18 December 2012.

[12] As is often the case in implementation proceedings, the Working Procedures in this proceeding envision a single substantive meeting of the panel.

[13] Art. 10.2 of the DSU.

[14] Appellate Body Report, *US – 1916 Act*, para. 143; Appellate Body Report, *US – FSC (Article 21.5 – EC*), para. 243.

the principles of due process[15], and panels have often exercised this discretion where they considered that it was appropriate in the case at hand.[16]

9. In this dispute, Brazil, Australia and Canada contend that they were entitled under Article 10.3 of the DSU to receive the preliminary ruling request of the European Union regarding the interpretation and application of Annex V to the SCM Agreement. Brazil and Australia further request that the third parties receive the communications of the European Union and the United States regarding their respective requests for the Panel to seek information pursuant to Article 13 of the DSU. As noted above, Article 10.3 of the DSU entitles the third parties to receive "the submissions of the parties to the first meeting of the panel." This raises the question whether the preliminary ruling request regarding the interpretation and application of Annex V to the SCM Agreement and the parties' communications regarding their respective requests for this Panel to seek information under Article 13 of the DSU fall within the scope of that Article 10.3 of the DSU such that they should have been provided to the third parties.

10. Brazil argues, relying upon an Appellate Body ruling in *US – FSC (Article 21.5 - EC)* that, under Article 10.3 of the DSU, "third parties must be given all of the submissions that have been made by the parties to the panel up to the first meeting of the panel, irrespective of the number of such submissions which are made…"[17], and that the third parties should have been given access to the requests for preliminary rulings and responses thereto. We note that the Appellate Body's ruling in *US – FSC (Article 21.5 - EC)* was directed to whether a panel is required to provide written rebuttals to third parties in an implementation panel involving a single meeting.[18] The parties in that dispute did not contest that written rebuttals are "submissions" within the meaning of Article 10.3 of the DSU; the only question was whether such rebuttal submissions, which would usually be submitted *after* the first meeting of the panel and hence not provided to third parties, were to be provided to third parties where they were submitted prior to the first meeting. It was in this context that the Appellate Body found that all *submissions* made up to the first meeting of the Panel had to be provided to the third parties.

11. While it is thus clear that all *submissions* made up to the first meeting of the Panel must be provided to third parties, it is less clear whether all communications from the parties can be considered "submissions" for purposes of Article 10.3 of the DSU. The United States agrees with Brazil, Australia and Canada that submissions related to preliminary ruling requests, like those submitted by the United States and the European Union in this compliance proceeding, are among the "submissions" that third parties are entitled to receive. The European Union does not specifically address this issue. We note that the communications relating to the EU preliminary ruling request regarding the interpretation and application of Annex V to the SCM Agreement raise substantial issues of legal interpretation that are both systemically important and have significant implications for this dispute. In our view, such communications can properly be considered "submissions" within the meaning of Article 10.3 of the DSU, and should therefore have been provided to the third parties. The Panel has already served its preliminary rulings regarding the interpretation and application of Annex V on the third parties. **The Panel accordingly requests that the parties serve upon the third parties their submissions relating to the European Union's request for a preliminary ruling in regard to Annex V to the extent that they have not already done so.**

12. It is less clear to us whether communications concerning requests for a panel to seek information pursuant to Article 13 of the DSU, and the parties' responses to those requests, necessarily constitute "submissions" which third parties are entitled to receive pursuant to Article 10.3 of the DSU. In our view, it is difficult to answer such a question in the abstract; much will depend on the nature of the information sought, the context for the request and the stage of the proceeding at which it is made, whether the information involves an elucidation of the parties' arguments or interpretations of the covered agreements, and whether denying third parties access

[15] Appellate Body Report, *US – FSC (Article 21.5 - EC*), para. 243.

[16] *E.g.,* Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-In Tariff Program*, para. 1.11; Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, paras. 2.6-2.8.

[17] Appellate Body Report, *US – FSC (Article 21.5 - EC*), para. 245.

[18] Appellate Body Report, *US – FSC (Article 21.5 - EC*), para. 242:"In this appeal, we must determine whether, in refusing to require that the third parties be given access to the second, 'rebuttal', submissions filed prior to the sole substantive meeting with the Panel, the Panel acted inconsistently with any provision of the DSU."

to the communications and results of the Article 13 requests would, in the circumstances, hamper the ability of third parties to participate in an informed and meaningful manner in the third party session of the meeting with the parties.[19]

13. The European Union observes that not every communication emanating from a party following the establishment of a panel is a "submission" within the meaning of Article 10.3 of the DSU. The European Union notes that material to which third parties are not privy include, for example, communications concerning panel composition, following proposed nominations "to the parties" pursuant to Article 8.6 of the DSU, communications from the parties regarding panel procedures, following consultations with the "parties" pursuant to Article 12.1 of the DSU, communications from the parties concerning confidentiality procedures, following consultations with the "parties" pursuant to Article 12.1 of the DSU and communications from the parties regarding the timetable, also following consultations with the "parties" pursuant to Article 12.1 of the DSU. The European Union submits that Article 13 of the DSU does not provide that a panel's exercise of its discretion to seek information is subject to any prior consultations, but merely provides that, before seeking information from any individual or body within the jurisdiction of a Member, a panel must inform that Member. The European Union considers that it is far from clear that a communication from a party soliciting the exercise by a panel of its authority under Article 13 of the DSU, or comments thereon, are "submissions" within the meaning of Article 10.3, as opposed to communications made in the context of a provision that does not require any consultation with the parties, let alone the third parties. The United States does not consider responses to the questions posed by the Panel pursuant to Article 13 of the DSU to be "submissions" required to be served on third parties. The United States further observes that the third parties will have access to any information referred to in a party's written submission by virtue of its inclusion in such submissions.

14. We would agree that not all communications from the parties can be considered to be "submissions" within the meaning of Article 10.3 of the DSU. We consider that communications regarding a panel's working procedures and timetable, where the DSU requires consultations with the *parties*, but not with third parties, may be examples. Further, other routine communications regarding procedural matters and not reflecting significant issues of legal interpretation of the covered agreements may not rise to the level of "submissions" that must be provided to third parties.[20] The particular context in which the Panel has made the Article 13 requests at issue here includes, as explained in our preliminary rulings of 26 November 2012[21], the fact that the European Union was entitled to but did not benefit from the procedures for developing information in Annex V to the SCM Agreement. Moreover, the Article 13 requests were made at a very early stage in the proceeding, prior to the parties' first written submissions. In these circumstances, it is reasonable to assume that the parties' responses to the Panel's Article 13 requests, to the extent that the information elicited is relevant to the issues in this dispute, will be reflected in the evidence and arguments presented by the parties in their respective submissions. Further, the requests at issue here seek large amounts of strictly factual material, much of which is highly sensitive government or commercial information.[22] In these circumstances, the Panel does not consider that the communications concerning requests for the Panel to seek information pursuant to Article 13 of the DSU, and the parties' responses to those requests, constitute "submissions" which the third parties are entitled to receive pursuant to Article 10.3 of the DSU.

15. However, given that these particular Article 13 requests are so closely linked to issues concerning the interpretation and application of Annex V to the SCM Agreement[23], the Panel considers that it is appropriate in this situation that the communications concerning the Article 13 requests (but not the parties' responses to those requests) be provided to the third parties. The Panel considers that providing the third parties access to these communications will ensure that

[19] See Panel Report, *Canada – Dairy (Article 21.5 - New Zealand and US*), para. 2.34.

[20] For example, past experience in the original proceeding in this dispute would suggest that numerous communications may be submitted to this Panel regarding the treatment of specific pieces of information under the BCI/HSBI procedures.

[21] Preliminary Rulings and Decision Regarding Information Gathering under Article 13 of the DSU, dated 26 November 2012, para. 42.

[22] This situation thus differs substantially from a situation where, for example, a panel seeks scientific or other technical advice from experts under Article 13 of the DSU.

[23] Indeed, the EU preliminary ruling request concerning the interpretation and application of Annex V to the SCM Agreement and its request for the Panel to seek information under Article 13 of the DSU were made in the same document.

the Article 13 process is sufficiently transparent to alleviate the concerns expressed by Brazil and Australia concerning the possible effects of the Panel's exercise of its discretion to seek information pursuant to Article 13 of the DSU on the evidentiary burdens that apply in this proceeding. **Therefore, the Panel will now serve upon the third parties the information requests that we have made to the United States and European Union pursuant to Article 13 of the DSU. (See attachment.) The Panel requests that the parties serve upon the third parties their communications relating to the EU and US requests for the Panel to seek information under Article 13 of the DSU, to the extent they have not already done so.**[24]

16. Finally, we note that, although the third parties did not have an opportunity to comment on the issues presented prior to our preliminary rulings and information requests pursuant to Article 13 of the DSU, Brazil, Australia and Canada have taken the opportunity to express some views on systemic issues relating to Annex V to the SCM Agreement and Article 13 of the DSU in their communications to this Panel. The Panel will take these communications into consideration in its final report. The third parties are also invited to provide any further comments on these issues in their written submissions, should they so desire, or in a separate submission filed prior to that time.

17. Once again, the Panel would like to acknowledge the important role that third parties play in WTO dispute settlement. We believe that the Working Procedures that have been put in place will allow the third parties to participate in a meaningful way in this dispute.

[24] On 7 January 2013, the European Union served its Request for a Preliminary Ruling and Article 13 Request on the third parties, along with certain other documents relating to the Article 13 Request.

ANNEX F

OTHER PROCEDURAL RULINGS OF THE PANEL

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ANNEX F-1

DECISION REGARDING REQUESTS FOR CERTAIN INFORMATION DATED 23 OCTOBER 2013

1 INTRODUCTION

1.1. On 9 September 2013, the European Union sent a letter to the Panel concerning, *inter alia*, the redaction of information from documents provided by the United States in support of its defense, as well as the United States' withholding of documents, data or other information.[1] In paragraph 7 of that letter, the European Union alleges that the United States has withheld, redacted or failed to produce information described in eight specific bullet points. Briefly, that information consists of (a) three categories of NASA and DOD contracts which the United States either allegedly failed to submit in response to the Panel's information request pursuant to Article 13 of the DSU, in some cases because the contracts are classified, or which the United States submitted, but with export-controlled, classified or other restricted information redacted;[2] (b) NASA, DOD and FAA technical reports withheld by the United States on the basis of access restrictions, including export controls, restrictions to government or government contractors, or because they are marked "proprietary";[3] (c) certain sales campaign-related documents;[4] (d) NASA "new technology reports";[5] (e) schedules and exhibits to the Vought-Boeing Asset Purchase Agreement which were not submitted with the Agreement filed as an exhibit to the United States' submission;[6] and (f) redacted portions of a Boeing Board of Directors' slide presentation entitled "Gemini Update".[7]

1.2. The European Union asks the Panel to request the United States to provide the Panel and the European Union with these categories of redacted or withheld information "without delay".[8] The European Union also requests that, should the United States fail to comply with such request, the Panel draw the appropriate inference; namely, that the information redacted or withheld would, if disclosed, contradict any US assertions with respect to measures and claims implicating that information. The Panel should instead rely on argument and evidence provided by the European Union as the best information available.[9]

1.3. The parties make separate arguments concerning the merits of requesting the United States to produce, at this stage of the proceeding, each of the eight categories of information identified by the European Union in paragraph 7 of its letter of 9 September 2013. As we discuss in greater detail below, certain of the requested information was the subject of the Panel's previous Article 13 request to the United States in December 2012. While the European Union has not specifically identified the legal basis on which the Panel should consider the European Union's requests, it appears to us that the European Union is asking the Panel to continue to request the United States to provide that information. It also appears that, with respect to information not previously sought by the Panel, the European Union requests the Panel to make its request to the United States pursuant to our authority under Article 13 of the DSU.[10]

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[1] European Union's letter to the Panel dated 9 September 2013.
[2] European Union's letter to the Panel dated 9 September 2013, para. 7, first, second and third bullet points.
[3] European Union's letter to the Panel dated 9 September 2013, para. 7, fourth bullet point.
[4] European Union's letter to the Panel dated 9 September 2013, para. 7, eighth bullet point.
[5] European Union's letter to the Panel dated 9 September 2013, para. 7, fifth bullet point.
[6] European Union's letter to the Panel dated 9 September 2013, para. 7, sixth bullet point.
[7] European Union's letter to the Panel dated 9 September 2013, para. 7, seventh bullet point.
[8] European Union's letter to the Panel dated 9 September 2013, para. 8.
[9] European Union's letter to the Panel dated 9 September 2013, para. 8.
[10] It is not always clear to us whether the European Union considers its requests with respect to at least some of the information to be justified on the basis that the United States should have provided the information in response to the Panel's earlier Article 13 requests, and did not: For example, in paragraph 7 of the 9 September 2013 letter, the European Union refers to the withholding and redaction by the United States of various categories of information, and then states at paragraph 8 that it "therefore" requests the Panel to ask the United States to provide such information. Moreover, the European Union states that the United States has had many months to provide the information at issue and, if necessary, could have provided it on a rolling basis, including with its first or second written submissions, European Union's comments on the United States' response dated 23 September 2013, para. 2. On the other hand, the European Union suggests at other points

1.4. We first consider the requests pertaining to categories of information previously sought by the Panel pursuant to Article 13 of the DSU in December 2012.

2 REQUESTS FOR INFORMATION COVERED BY THE PANEL'S PREVIOUS ARTICLE 13 REQUEST

2.1 The Article 13 request in December 2012

2.1. We recall that, in a submission dated 31 October 2012,[11] the European Union requested the Panel to exercise its right to seek information from the United States pursuant to Article 13 of the DSU, by sending to the United States the Annex V questions that had previously been prepared by the European Union and which were attached to the communication from the European Union to the Facilitator dated 25 October 2012. On 26 November 2012, in its Preliminary Rulings and Decision Regarding Information-Gathering under Article 13 of the DSU, the Panel ruled that it would make an Article 13 request to the United States as soon as possible taking into account the parties' comments and responses regarding the questions proposed by the European Union. In communications dated 5 December 2012 and 18 December 2012, respectively, the Panel posed a series of questions to the United States, requesting information pursuant to Article 13 of the DSU which the Panel had concluded was necessary and appropriate, taking into account the fact that such information had not been produced in an Annex V process, was generally not in the public domain and the European Union lacked other reasonable means to procure it, and was likely to be necessary to ensure due process and a proper adjudication of the relevant claims. The United States submitted its responses to certain of the questions posed by the Panel on 25 January 2013, its responses to most of the others on 28 February 2013[12] and provided additional materials that were previously unavailable for submission on 22 March 2013.[13]

2.2. In a communication to the Panel dated 6 March 2013, the European Union was critical of what it considered to be the United States' "partial responses" to the Panel's questions. The European Union stated that it would, in due course, "catalogue fully the extensive shortcomings, failures and abuses in the United States' partial responses". Owing to the importance placed by the European Union on maintaining the timetable for this proceeding, including filing its first written submission on 28 March 2013, the European Union advised that it would, for the time being, limit its request to the Panel to one issue not relevant to the present issues before the Panel, and would "address any further responses and documents the United States deigns to provide to the compliance Panel, the full scope of the United States' failings, and the consequences that attach to those failings, at a later point in time." In a communication dated 7 March 2013, the European Union advised that it was still in the process of reviewing and assessing the responses provided to date by the United States to the questions posed by the Panel pursuant to Article 13 of the DSU. It stated further that, to the extent that it wished to make comments on the content or timing of the United States' responses, it would provide them to the United States and the Panel "in due course, once we have had an opportunity to assess the overall process, and consider what the implications may or may not be for these compliance proceedings."

2.3. The United States now argues that the European Union could have sought the information it alleges the United States failed to provide in response to the Panel's Article 13 requests in March 2013, when the European Union described itself as being in the process of reviewing and assessing the United States' responses to the Panel's Article 13 requests.[14] The United States thus

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that the Panel should seek the information because it is necessary in order to enable it to rebut arguments made by the United States in its submission: For example, the European Union introduces its request by referring to the redaction of information from documents provided by the United States in support of its defence, as well as the United States' withholding of documents, data or other information. This is also the tenor of the European Union's conditional request that the Panel draw inferences that the information redacted or withheld would, if disclosed, contradict US assertions with respect to measures and claims implicating that information, European Union's letter to the Panel dated 9 September 2013, paras. 2 and 8.

[11] European Union's request for a preliminary ruling and request for the Panel to exercise its authority pursuant to Article 13 of the DSU dated 31 October 2012.

[12] United States' response to the Panel's request for information pursuant to Article 13 of the DSU, dated 28 February 2013.

[13] Letter from the United States to the Panel dated 22 March 2013.

[14] United States' response dated 16 September 2013, para. 1, referring to the European Union's letters to the Panel dated 6 and 7 March 2013, respectively.

objects to the timeliness of the European Union raising, in September 2013, alleged shortcomings in the United States' response to the Panel's Article 13 requests.[15]

2.4. The European Union disputes the suggestion that it has delayed raising these issues. It contends that it raised many of its concerns in its first and second written submissions in the hope that the United States would rectify the situation in its own submissions.[16] The European Union provided references to its submissions as examples of instances where it had raised concerns with the adequacy of the United States' response to the Panel's Article 13 request. Thus, in its first written submission, the European Union complains of the inadequacy of the United States' response to a request for a list of all technical data developed by Boeing under the relevant NASA R&D programs and DOD RDT&E program elements from FY2006 to present and requests that Panel to adopt inferences that Boeing is developing highly valuable LCA-related data through the challenged NASA R&D programs and DOD RDT&E program elements, maintains rights over such data, and that much of that data is never made public.[17] In its second written submission, the European Union uses the list of NASA technical reports submitted by the United States as evidence of the limited disclosure of NASA research results.[18] The European Union also objects in its second written submission to what it refers to as the United States seeking "reverse adverse inferences" through withholding information and then asking the Panel to infer that such information is favourable to it. The specific context for this objection is the United States' withholding of information pursuant to its export-control laws or other distribution restrictions. The European Union argues that merely because the description of work in a NASA or DOD procurement contract is export-controlled or otherwise restricted, it does not necessarily follow that none of the results of research conducted under that contract could have dual-use applications.[19] Finally, the European Union referred to a section of its second written submission concerning certain sales campaign evidence not provided by the United States.[20]

2.2 Panel's approach to considering the renewed requests for information

2.5. As we said earlier, certain of the categories of information identified by the European Union in its letter of 9 September 2013 were within the scope of the Panel's Article 13 request to the United States in December 2012. Specifically, it appears that our Article 13 request encompassed the following information now the subject of the renewed European Union requests:

a. NASA and DOD contracts withheld, in whole or in part, on the grounds that they are export-controlled or classified;[21]

b. DOD contracts listed in revised Exhibit US-161 but not produced by the United States;[22]

c. DOD contracts that were produced by the United States but portions of which have been redacted;[23]

d. NASA, DOD and FAA technical reports withheld by the United States on the basis of access restrictions, including export controls, restrictions to government or government contractors, or because they are marked "proprietary";[24]

[15] United States' response dated 16 September 2013, para. 1.
[16] European Union's comments on the United States' response dated 23 September 2013, para. 3.
[17] European Union's first written submission, paras. 143-144, 318-319.
[18] European Union's second written submission, para. 196.
[19] European Union's second written submission, paras. 203,405-406.
[20] We note that the European Union also asked the Panel, at para. 680 and footnote 1142 of its second written submission, to draw an appropriate inference based on the alleged failure of the United States to respond adequately to question 160 of the Panel's Article 13 questions with regard to the list of Charleston County ordinances amending MCIP designations for identified projects or companies, but did not provide this example in its comments on the United States' response dated 23 September 2013 or request this information in its letter of 9 September 2013.
[21] European Union's letter to the Panel dated 9 September 2013, para. 7, first bullet point. See also European Union's comments on the United States' response dated 23 September 2013, para. 7 for an express link to the previous Article 13 request.
[22] European Union's letter to the Panel dated 9 September 2013, para. 7, second bullet point. See also European Union's comments on the United States' response dated 23 September 2013, paras. 10-11 for an express link to the previous Article 13 request.
[23] European Union's letter to the Panel dated 9 September 2013, para. 7, third bullet point.

e. NASA new technology reports;[25]

f. Certain sales campaign-related documents.[26]

2.6. In December 2012, we had concluded that it was necessary and appropriate to request the information sought from the United States at that time.[27] However, it is important to bear in mind the unique circumstances of that Article 13 request, in that it was made, with the agreement of the parties, prior to their having filed first written submissions, in light of our finding that the European Union was entitled to but did not benefit from the Annex V procedures for developing information. More specifically, the Panel stated that in exercising its discretionary authority, it would take into account the circumstances in which it was considering the exercise of that authority; namely, the fact that the European Union was entitled to but did not benefit from the procedures in Annex V for developing information, that such information generally was not in the public domain and the European Union lacked other reasonable means to procure it, and was likely to be necessary to ensure due process and a proper adjudication of the relevant claims.[28] The Panel noted the unusual circumstance that it was making the request very early in the proceeding; indeed, prior to the complainant's first written submission, and justified its decision to make the request on the basis that that European Union should have had access to such information through an Annex V procedure which would have been completed prior to the Panel's substantive consideration of the matter, and the fact that the United States did not contest the appropriateness, in the circumstances, of the Panel making the Article 13 request prior to the parties' first written submissions.[29]

2.7. We regard the following factors as relevant to our consideration of whether, and the extent to which, we now pursue the information that was the subject of earlier Article 13 request to the United States. First, the broad character of the requests made in December 2012, which reflect the absence of an Annex V process for developing information and the fact that the request was made prior to the parties' first written submissions. Secondly, the fact that the proceeding is now at a considerably more advanced stage, with the European Union having presented its case, and the United States having responded to that case, through first and second written submissions. The meeting with the Panel will be held in late October. In addition, the Panel expects that it will pose questions to the parties following the meeting, and that the parties will submit written answers to those questions as well as comment on each other's responses to those questions.

2.8. It appears to us that, as regards the Panel's Article 13 request, the United States has in fact produced a significant amount of detailed information within a relatively short time-frame.[30] We do not see any particular utility in pressing the United States to produce information that it has not yet produced simply because it falls within a category of information that was part of the Panel's Article 13 request in December 2012. Rather, at this stage of the proceeding, we intend to further pursue this information where it is clear to us, based on the submissions and evidence submitted thus far, that it is necessary to obtain such information in order for the Panel to discharge its obligations under Article 11 of the DSU, and where it is appropriate to request that information. The question whether a particular request is appropriate includes a consideration of the reasons why the information has not been produced thus far and the difficulty for the United States in producing it at this stage, bearing in mind the importance of the information to ensure due process and a proper adjudication of the relevant claims.

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[24] European Union's letter to the Panel dated 9 September 2013, para. 7, fourth bullet point. See European Union's comments on the United States' response dated 23 September 2013, paras. 15-17 for an express link to the previous Article 13 request.

[25] European Union's letter to the Panel dated 9 September 2013, para. 7, fifth bullet point.

[26] European Union's letter to the Panel dated 9 September 2013, para. 7, eighth bullet point. See European Union's comments on the United States' response dated 23 September 2013, para. 23 for an express link to the previous Article 13 request.

[27] See Communication from the Panel dated 5 December 2012 and Communication from the Panel, dated 18 December 2012, para. 2.

[28] Communication from the Panel dated 26 November 2012, paras. 42, 46. See also Communication from the Panel, dated 5 December 2012; Communication from the Panel dated 18 December 2012, para. 2.

[29] Communication from the Panel dated 26 November 2012, para. 44.

[30] The Panel's Article 13 request to the United States comprised some 96 questions to which the United States produced in excess of 700 documents in response.

2.9. We now turn to consider the European Union's specific requests pertaining to the six categories of information that were part of the Panel's original Article 13 request to the United States.

2.3 NASA and DOD contracts and agreements

2.10. The European Union requests the Panel to ask the United States to provide the European Union and the Panel with (a) NASA and DOD contracts (or portions thereof) that the United States discusses in its submissions but has withheld or redacted on the grounds that they are allegedly export-controlled or classified;[31] (b) a number of DOD contracts which the United States had listed in revised Exhibit US-161 but has withheld without explanation (including the "major RDT&E contract for the P8-A");[32] and (c) redacted substantive portions of a number of DOD contracts, including 25 contracts listed in the third bullet point of paragraph 7 of the European Union's letter dated 9 September 2013.[33]

2.11. The Panel recalls that in its Request to the United States pursuant to Article 13 of the DSU, it requested the United States to provide copies of NASA and DOD contracts with Boeing under certain listed programs or program elements that were entered into or provided funding and support from FY2006 to present.[34] In its response to the Panel's Article 13 request, the United States indicated that it had redacted classified information from the NASA contracts it was providing where a small amount of the material it provided consisted of classified information.[35] It provided additional information responsive to these requests in a subsequent submission on 22 March 2013.[36] With respect to the DOD contracts, it indicated that it had redacted classified information, information subject to distribution limitations, as well as information subject to export controls from the contracts provided.[37] It provided additional information responsive to these requests in a subsequent submission on 22 March 2013.[38]

2.3.1 Export-controlled and classified information in NASA and DOD contracts

2.12. The European Union requests the Panel to ask the United States to provide it and the European Union with NASA and DOD contracts (or portions thereof) that the United States discusses in its submissions but has withheld or redacted on the grounds that they are allegedly export-controlled or classified.[39]

2.13. The United States argues that the European Union has failed to justify its request for export-controlled information and that such information is not necessary to the Panel's evaluation of the issues before it. According to the United States, the export-controlled information identified by the European Union appears in documents which the United States cites primarily for arguments supported by the non-redacted information in those documents. In some cases, the United States cites the documents in support of the statement that the information is export-controlled. Moreover, it is not appropriate to request this information as its exportation is

[31] European Union's letter to the Panel dated 9 September 2013, para. 7, first bullet point. The European Union states that a number of these contracts are identified in the United States' first written submission at paras. 141, 144, 149, 409, 438 and 450.

[32] European Union's letter dated 9 September 2013, para. 7, second bullet point.

[33] European Union's letter dated 9 September 2013, para. 7, third bullet point.

[34] Request to the United States pursuant to Article 13 of the DSU dated 5 December 2012, questions 5, 8, 9, 26, 28.

[35] United States' response to the Panel's request for information pursuant to Article 13 of the DSU dated 28 February 2013, para. 21.

[36] United States' letter to the Panel dated 22 March 2013, providing additional documents with respect to Article 13 questions 9 and 10(a).

[37] United States' response to the Panel's request for information pursuant to Article 13 of the DSU dated 28 February 2013, para. 56.

[38] United States' letter to the Panel dated 22 March 2013, providing additional documents with respect to Article 13 question 28.

[39] European Union's letter to the Panel dated 9 September 2013, para. 7, first bullet point. The European Union states that a number of these contracts are identified in the United States' first written submission at paras. 141, 144, 149, 409, 438 and 450. Information subject to export controls under the ITAR cannot be revealed to foreign nationals without a licence to export such information, see generally 22 U.S.C. § 2778(b)(2). Classified information, on the other hand, cannot be shared with persons lacking the requisite security clearance and a need to use that information for government purposes, United States' second written submission, para. 337.

prohibited by US law.[40] The United States argues that the European Union has similarly provided no basis for considering a request for classified information to be necessary and appropriate. The stringent limitations on use of such information make it difficult to envisage how it could be relevant to the European Union's claims.[41] Moreover, as US law prohibits the provision of classified information to persons who do not have the requisite security clearances (or comparable clearances issued by authorities qualified to issue such clearances) it is not appropriate to request such information. The United States observes further that the personnel working on this dispute have not had access to this information and, depending on its nature, might themselves be prohibited by law from having access to it.[42]

2.14. In its comments on the United States' response, the European Union construes the United States' argument as being that the export-controlled and classified information is not necessary to the Panel's evaluation of the issues before it because such information cannot be helpful or relevant to the European Union's claims.[43] The European Union considers this general assertion to be incorrect and submits that in any event, it is not the place of the United States to unilaterally decide that information requested by the Panel under Article 13 of the DSU is irrelevant to the issues in this proceeding, particularly after the United States has itself cited to such information. In addition, the European Union argues that the United States may not rely on its domestic law to excuse compliance with its WTO obligations or with requests from the Panel. The European Union notes that the Working Procedures for this proceeding contemplate the Panel applying additional procedures for the review of, *inter alia*, "information that the United States internally classifies as 'Top Secret', 'Secret', 'Confidential', or controlled pursuant to the United States' International Traffic in Arms Regulation ('ITAR')".[44] The European Union considers that the issue is not that US law prohibits the submission of export-controlled information, but that the United States should take due and proper steps to make this information available consistent with its law. Finally, the European Union argues that, given the United States' responsibility to "respond promptly and fully" to the Panel's Article 13 requests, it is incumbent on the United States to propose a "satisfactory alternative approach" should it have concerns about providing the requested information.[45] In this regard, the European Union refers to the compliance proceeding in DS316, in which the European Union expressed concerns that the existing BCI/HSBI procedures provided insufficient protection for certain extremely sensitive information. The European Union in that proceeding proposed possible alternative procedures, and expressed its willingness to work with the panel and with the United States to agree on a mutually satisfactory approach.[46]

2.15. The withheld or redacted NASA and DOD contracts to which the European Union refers through its reference to six paragraphs of the United States' first written submission involve the following instruments: (a) a classified statement of work for NASA cooperative agreement NNC10AA02A which provided for research into a large-scale advanced exhaust system;[47] (b) the classified statement of work for NASA contract NNC07CB38C;[48] (c) NASA Space Act Agreement SAA1-588, Annex 27;[49] (d) the statements of work for DOD delivery orders FA8614-08-D-2080, D.O. 21 and FA8614-08-D-2080, D.O. 22 regarding technologies to improve the performance of the C-17, which contain large amounts of text subject to export control;[50] (e) export controls on discussing even the use or objective of the effort under certain of the three DOD procurement contracts and four DOD assistance instruments under the Materials and Biological Technology program element;[51] and (f) "Distribution F" limitations on the statement of work for delivery order 73 under DOD contract F10628-01-D-0016 in regard to the CNS/ATM DRAGON international

[40] United States' response dated 16 September 2013, para. 6.
[41] United States' response dated 16 September 2013, para. 7.
[42] United States' response dated 16 September 2013, para. 6, footnote 7.
[43] European Union's comments on the US response dated 23 September 2013, para. 6.
[44] European Union's comments on the US response dated 23 September 2013, para. 7.
[45] European Union's comments on the US response dated 23 September 2013, para. 7.
[46] European Union's comments on the US response dated 23 September 2013, para. 8 footnote 11.
[47] United States' first written submission, para. 141.
[48] United States' first written submission, para. 144.
[49] United States' first written submission, para. 149. This document is submitted as Exhibit US-54(BCI) so the Panel assumes that the European Union's objection regarding this document is that it is redacted.
[50] United States' first written submission, para. 409.
[51] United States' first written submission, para. 438.

cooperative program with the NATO AEW&C programme management organization for the upgrade of the US and NATO AWACS fleets.[52]

2.16. The purpose of the United States' references in its first written submission to the fact that all or a portion of the above-referenced instruments are export-controlled, classified, or otherwise restricted is to seek to demonstrate that work performed under these instruments cannot be applied to or used to produce large civil aircraft.[53] The European Union has argued in response in its submissions that there is no reason to believe that simply because portions of a NASA or DOD contract or agreement are export-controlled, classified or otherwise restricted, none of the results of the research could be relevant to large civil aircraft.[54] The European Union has not offered any additional rationale as to why the Panel requires the United States to produce any particular export-controlled, classified or otherwise restricted instruments, or portions of those instruments, in order to evaluate the merits of those arguments.

2.17. At this stage of the proceeding, we are not persuaded that it is necessary to require the United States to produce all of the requested export, controlled, classified or otherwise restricted information in the NASA and DOD contracts and agreements in order to evaluate the merits of these competing arguments. We consider that it is more appropriate for the Panel to investigate this issue through questions to the parties seeking to understand the basis for the respective arguments, as opposed to seeking the technical information itself. **We accordingly decline to request this information *at this time* (which does not preclude us from revisiting this request in the future).**

2.18. We would add that we do not rule out the possibility that in certain circumstances, a panel may consider it appropriate to request information from a party, notwithstanding that its provision by a party may be contrary to its own domestic laws. We regard the authority under Article 13 of the DSU to operate independently of the domestic law of a Member. However, a panel should exercise its authority to request such information with some degree of circumspection, taking due account of domestic laws restricting or preventing its production as part of its assessment of the difficulty faced by a Member. This is especially so when domestic laws reflect legitimate government policies of promoting peace and security by restricting opportunities for weapons proliferation.[55] WTO Members are under a duty and an obligation to respond promptly and fully to requests made by panels for information under Article 13.1 of the DSU.[56] The refusal by a party to provide information requested by a panel under Article 13.1 of the DSU will be one of the relevant facts of record, and an important fact, to be taken into account in determining the appropriate inferences on the basis of all of the facts of record relevant to the particular determination to be made.[57] We are not yet faced with determining the appropriate inference to be drawn in circumstances where information is not provided because of domestic legal restrictions on its disclosure.

2.3.2 Certain DOD contracts listed in revised Exhibit US-161 but allegedly withheld

2.19. The European Union requests the Panel to ask the United States to provide it and the European Union with a number of DOD contracts that the United States had listed in revised Exhibit US-161 but has withheld without explanation. This request includes what the European Union describes as the "major RDT&E contract for the P8-A".[58]

2.20. The United States in response states that this request covers six documents, out of a total of 190 listed in Exhibit US-161, the remainder of which were submitted by the United States. The United States explains that it excluded three of those six documents from the information

[52] United States' first written submission, para. 450.

[53] The United States does not assert that NASA Space Act Agreement SAA1-588, Annex 27, filed as Exhibit US-54(BCI) is subject to any distribution restrictions. We have reviewed this Exhibit and note that the only redactions it contains are to Article 5.0, identifying the key Boeing personnel as the principal point of contact between NASA and Boeing in the performance of the agreement and the identity of the Boeing official who executed the Annex. We do not consider these redactions to be unreasonable.

[54] European Union's second written submission, paras. 203, 408.

[55] See 22 U.S.C. §2778(a)(1) and (2).

[56] Appellate Body Report, *Canada – Aircraft*, para. 187, Appellate Body Report, *US – Wheat Gluten*, para. 171.

[57] Appellate Body Report, *US – Wheat Gluten*, paras. 173-174.

[58] European Union's letter dated 9 September 2013, para. 7, second bullet.

gathering process undertaken in response to the Panel's Article 13 request on the grounds that they are DOD contracts dating from 2006 or before.[59] The other three documents are delivery orders under DOD contract FA8650-08-D-3857 relating to a particular programme. The United States says that it has already submitted four delivery orders under this same contract and also relating to that same programme.[60] The United States says that the contract described by the European Union as the "major RDT&E contract for the P8-A" is in fact listed in Exhibit US-273(BCI) but not in Exhibit US-161. The United States argues that the European Union provides no justification whatsoever for its request for the foregoing documents. The first category of documents dates from before 2006 while the second category is "in all likelihood similar to other contracts already before the Panel in this dispute". Thus there is no reason to consider the information necessary to the Panel's evaluation of the matter before it. Finally, the United States argues that it is not appropriate to request such information at this time, given the resources it would require at this stage of the dispute.

2.21. In its comments on the United States' response, the European Union suggests that there are in fact more than six contracts identified in Exhibit US-161 that have not been provided by the United States. It identifies other "missing" documents indicated by Exhibit US-161 as including a further three contracts and two delivery orders.[61] The European Union notes that the Panel's Article 13 request covered contracts "that were entered into or that have provided funding and support from FY2006 – present". According to the European Union, the United States does not attempt to justify its failure to provide contracts with effective dates prior to 2007, providing the example of one withheld DOD contract that, although entered into prior to 2007, allegedly provided funding to Boeing after FY2007.[62] The European Union also expresses concern that there may be additional contracts entered into prior to 2007 that the United States has failed to provide or to list. As to the three delivery orders entered into after 2006, the United States' justification, that such delivery orders are "in all likelihood similar" to other contracts already before the Panel, is an inadequate basis for declining to provide the requested information.[63]

2.22. The Panel's Article 13 request sought a list of all DOD contracts involving Boeing under certain listed RDT&E program elements that were entered into or that have provided funding and support from FY2006 to present.[64] The United States responded on 28 February by providing a list (at document US-13-0007) which it revised with updated information on 22 March 2013.[65] This list was submitted into evidence as Exhibit US-161. The Article 13 request also sought a copy of each contract identified on the list.[66] The United States responded on 28 February 2013 that in order to facilitate the process of gathering such a large amount of material, the Air Force had excluded modifications and distribution orders that were not fully funded by the relevant RDT&E program elements. It provided pre-2007 materials where they were readily available and useful in understanding the materials covered by the question.[67] On 22 March 2013, the United States submitted additional contracts that it had listed but not previously submitted.[68]

2.23. The Panel's Article 13 request sought copies of DOD contracts entered into prior to 2007 *if* they *provided funding and support* from FY2006 to present, even if their effective dates were prior to 2007. We also sought copies of all task/delivery orders under those contracts, regardless of whether or not those delivery orders are likely similar to other contracts provided to the European Union and to the Panel. It appears to us that the United States has produced the vast majority, but not all, of the DOD contracts identified in Exhibit US-161. It has not identified any particular difficulty in producing them, other than the resources that would be required to provide

[59] United States' response dated 16 September 2013, para. 9.
[60] United States' response dated 16 September 2013, para. 9.
[61] European Union's comments on the US response dated 23 September 2013, para. 9, footnote 13. The European Union also disputes that it "mistakenly" identified the major RDT&E contract for the P8-A as one of the missing contracts listed in Exhibit US-161, referring to Exhibit US-161 and to Exhibit US-273, which both list DOD contract N00019-04-C-3146. European Union's comments on the US response dated 23 September 2013, para. 9, footnote 13.
[62] European Union's comments on the US response dated 23 September 2013, para. 10.
[63] European Union's comments on the US response dated 23 September 2013, para. 11.
[64] Request to the United States pursuant to Article 13 of the DSU dated 5 December 2012, question 26.
[65] Letter of the United States to the Panel dated 22 March 2013.
[66] Request to the United States pursuant to Article 13 of the DSU, 5 December 2012, question 28.
[67] United States' response to the Panel's request for information pursuant to Article 13 of the DSU dated 28 February 2013, para. 55.
[68] Letter of the United States to the Panel dated 22 March 2013 submitting documents US-13-548(HSBI) to US-13-646(HSBI).

them "at this stage of the dispute", which we understand to refer to the fact that requesting the documents now would unduly interfere with the United States' preparations for the meeting with the Panel later this month.

2.24. We are mindful of the central importance of the DOD contracts to the parties' arguments concerning the scope of the proceeding, the existence of subsidization and the demonstration of adverse effects. While we are not convinced of the need, at this stage, to review export controlled, classified or otherwise restricted information contained in those contracts, we do consider it necessary for our objective assessment of the matter that we have before us a complete set of DOD contracts responsive to question 28 of the Panel's Article 13 request.

2.25. **We therefore advise that we will seek this information from the United States, through a request pursuant to Article 13 of the DSU, which we intend to make subsequent to the meeting with the parties.**

2.3.3 Redactions in DOD contracts

2.26. The European Union requests the Panel to ask the United States to provide it and the European Union with the redacted substantive portions of a number of DOD contracts, including 25 contracts listed in the third bullet point of paragraph 7 of the European Union's letter dated 9 September 2013. The European Union alleges that the redactions, which include dollar figures, descriptions of work to be performed, and in some instances, the whole contract prior to a certain modification, prevent the European Union from assessing the United States' characterizations of those contracts.[69]

2.27. The United States responds that the European Union's attempt to justify its request is far too vague to support a conclusion that the information is either necessary or appropriate to request. First, the European Union does not specify which redactions in which documents relate to its request, or explain why such redacted material is relevant to the matter before the Panel. Secondly, the European Union does not specify the number of documents it covers. In addition, the United States asserts that neither party discussed any of these DOD contracts in its written submissions, and that none is even cited in the parties' written submissions, other than the KC-46 RDT&E contract (US13-721(HSBI)) which is cited in footnote 551 to the United States' second written submission.[70] Accordingly, there are no relevant US characterizations of these contracts for the European Union to "assess".

2.28. In its comments on the United States' response, the European Union argues that the fact that it did not discuss the redacted contracts in its written submissions is evidence of the fact that the European Union cannot discuss the substance of material that has been withheld from it. It does not excuse the United States from being required to provide the information. Moreover, the United States makes broad assertions about the alleged inapplicability to large civil aircraft of work done under DOD contracts, and argues that this is demonstrated by the contracts. The United States cannot then claim that there is no need for the Panel to assess this characterization. To do so would be seeking a "reverse adverse inference" that the redacted information shows what the United States asserts it would show.[71] As to the United States' criticisms concerning the European Union's failure to provide a comprehensive listing of specific redactions, the European Union notes that the United States does not address the redactions that the European Union did specifically list. The European Union asserts moreover, that the United States has not always clearly indicated when certain information was redacted, and submits that the United States, rather than the European Union, is best positioned to provide a comprehensive listing and explanation of redactions it has made in its HSBI documents.[72]

2.29. The European Union does not dispute that the United States has not referred to any of the contracts listed by the European Union in bullet point 3 of paragraph 7 of its letter of 9 September 2013, other than a reference in footnote 551 of its second written submission to Air force Contract FA8625-11-C-6600 (produced in the Article 13 process as document US13-721 (HSBI)). In its second written submission, the United States asserts that the KC-46 program is

[69] European Union's letter dated 9 September 2013, para. 7, third bullet point.
[70] United States' response dated 16 September 2013, para. 12.
[71] European Union's comments on the US response dated 23 September 2013, para. 14.
[72] European Union's comments on the US response dated 23 September 2013, para. 13.

purchasing new aerial refuelling tankers to replace aging existing equipment, indicating that it is a purchase of goods.[73] In that context, it refers to Air force Contract FA8625-11-C-6600. The European Union has not indicated which redacted portions of this contract the United States should be required to provide in order to enable the European Union and the Panel to assess the United States' characterisation of this contract.

2.30. We have reviewed the version of Air Force Contract FA8625-11-C-6600 submitted in the Article 13 process as document US13-721(HSBI). Based on this review and our understanding of the parties' arguments and evidence presented thus far, we are not convinced that it is necessary or appropriate for the Panel to request the United States to produce the redacted portions of this contract. However, we do not preclude the possibility that, as our examination proceeds, we may conclude that we require access to at least some redacted portions of this contract in order to objectively characterize the DOD procurement contracts funded through the "military aircraft" program elements of the RDT&E program.

2.31. The Panel has reviewed the other instruments identified by the European Union in the third bullet point of paragraph 7 of its letter of 9 September 2013. We are not persuaded that it is necessary and appropriate to request the United States to produce all redacted portions of all of the contracts in order to enable the European Union to assess the "US characterisations of these contracts". Nor has the European Union pointed to the specific parts of the United States' submissions in which the United States purports to characterize DOD contracts or assistance instruments in order to show why, even if the United States did not specifically refer to the contracts at issue, it is nonetheless necessary and appropriate to require the United States to produce all or some of the redacted portions of those contracts. We are therefore unable to conclude that it is necessary and appropriate for the Panel to seek this information from the United States at this time. **The Panel accordingly declines to request this information *at this time* (which does not preclude us from revisiting this request in the future).**

2.4 NASA, DOD and FAA technical reports

2.32. The European Union requests the Panel to ask the United States to provide it and the European Union with a number of NASA, DOD and FAA technical reports which the United States has allegedly withheld on the basis of alleged access restrictions (including export controls), restrictions to government or government contractors, or because they are marked "proprietary".[74]

2.33. The United States disputes that it has withheld the documents now sought by the European Union on the basis of access restrictions. With respect to the NASA and DOD technical reports, the United States refers to the explanation in its Article 13 response of 28 February 2013 that it would not be feasible to review these documents for export-controlled information, in light of their volume and highly complex subject matter. The United States submits that such a process is no more feasible now and that to undertake such a task at this stage of the proceeding would consume significant time and resources and prevent the United States from preparing effectively for the substantive meeting with the parties.[75] The United States notes that while the European Union complained in its submissions that it did not have access to the NASA technical reports, it did not renew its request for these documents or assert that the United States was being uncooperative in not providing them.[76] As to the FAA technical reports, the United States asserts that it provided all 60 of the documents in question on 22 March 2013, and notes that the European Union submitted certain of them as exhibits to its second written submission.

2.34. In its comments on the United States' response, the European Union expresses appreciation for the United States' clarification that it has provided all of the FAA technical reports. However, it notes that the United States attempts to explain withholding NASA and DOD technical reports only on the basis of export controls, and does not offer any explanation or justification for withholding

[73] United States' second written submission, para. 405. See also United States' first written submission, paras. 451-457 for a description of the history of the bidding process for the fleet of refuelling tankers to replace the KC-135s.

[74] European Union's letter to the Panel dated 9 September 2013, para. 7, fourth bullet point. The withheld NASA reports are identified in Exhibit US-23, the withheld DOD reports are identified in document US13-317, and the existence of the withheld FAA reports is indicated in paras. 105-106 of the United States' response to the Panel's request for information pursuant to Article 13 of the DSU dated 28 February 2013.

[75] United States' response dated 16 September 2013, para. 13.

[76] United States' response dated 16 September 2013, para. 13 at footnotes 20, 21.

such reports on the grounds of restriction to government or government contractors, or because they are marked "proprietary". Moreover, while the United States asserts that it was not feasible to review the technical reports for export-controlled information, it does not explain why it continued to review and eventually provide the FAA technical reports after the Panel's original deadline of 28 February 2013, but has not done so for the NASA and DOD reports.[77] Finally, the European Union notes that the Panel has already requested this information in the context of its Article 13 request.[78]

2.35. The Panel recalls that its Article 13 request sought (a) copies of all final scientific and technical reports (*or* the full name and identification number of each report requested) pertaining to the NASA contracts and agreements previously requested,[79] (b) copies of technical reports pertaining to the DOD contracts, task/delivery orders and non-procurement instruments previously requested, and (c) copies of all technical reports pertaining to Boeing's work under the FAA CLEEN program.[80] In its response to the Panel's Article 13 request, the United States provided a list of NASA technical reports (which purported to provide the requested information to the extent that the relevant reports could be identified in the time available).[81] It provided a listing of available DOD technical reports by accession number for obtaining the report from the Defense Technology Information Center, advising that most of the reports contain detailed information about weapons technologies that are export-controlled or otherwise restricted and indicating that it had been impossible for the United States to review them in the time available.[82] The United States also provided internet links to nine DOD technical reports that are not export-controlled.[83] Finally, the United States provided copies of four publicly-available technical reports pertaining to the FAA CLEEN program, and indicated that it would provide additional reports following review of confidential technical reports for BCI/HSBI and export controls.[84] The United States provided additional FAA CLEEN technical reports in a submission on 22 March 2013.[85]

2.36. The Panel's Article 13 request also sought a list describing all technical data developed by Boeing in the course of work performed under the relevant NASA R&D programs and DOD RDT&E program elements, indicating the program or program element, and contract, grant or agreement under which the data was developed as well as applicable data rights policies.[86] In response to these requests, the United States referred to its list of NASA technical reports as identifying reports that describe any data developed under NASA procurement contracts, SAAs or agreements. The United States indicated that each report listed indicates the contract or agreement that funded the work under which new data were developed and referred to a further document setting forth the data rights policies applicable to such data.[87] With regard to DOD, the United States referred to its list of DOD Cooperative Agreements, TIAs and OTAs and its DOD Contract List. It also referred to its list of DOD technical reports as identifying reports that describe data developed under contracts or agreements and notes that in most cases, the entire report is either export controlled or otherwise subject to distribution restrictions. It advises that the

[77] European Union's comments on the US response dated 23 September 2013, para. 16.
[78] European Union's comments on the US response dated 23 September 2013, para. 17.
[79] The request asked for the actual NASA technical reports, or the full name and identification number of each report, rather than a link to a single website that gathers all NASA reports.
[80] Request to the United States pursuant to Article 13 of the DSU dated 5 December 2012, questions. 10(a) and 29; Request to the United States pursuant to Article 13 of the DSU dated 18 December 2012, para. 40.
[81] United States' response to the Panel's request for information pursuant to Article 13 of the DSU dated 28 February 2013, para. 22. The list was submitted as document US13-0312 which was revised on 22 March 2013.
[82] United States' response to the Panel's request for information pursuant to Article 13 of the DSU, dated 28 February 2013, para. 58. See document US13-0317 (revised).
[83] United States' response to the Panel's request for information pursuant to Article 13 of the DSU dated 28 February 2013, paras. 58 and 59.
[84] United States' response to the Panel's request for information pursuant to Article 13 of the DSU dated 28 February 2013, para. 105.
[85] United States' letter to the Panel dated 22 March 2013, regarding submission of additional information with respect to question 40(f) of the Panel's Article 13 request.
[86] Request to the United States pursuant to Article 13 of the DSU dated 5 December 2012, para. 20.
[87] United States' response to the Panel's request for information pursuant to Article 13 of the DSU dated 28 February 2013, paras. 41-42.

research descriptions in the contracts and agreements themselves are the best available description of the technical data developed by Boeing in the course of work performed.[88]

2.37. It appears that the FAA technical reports are no longer at issue as the United States has clarified that it has provided those reports.

2.38. Although the European Union states that the withheld NASA technical reports are identified in Exhibit US-23, this exhibit appears to list NASA contracts and agreements. It is not clear to us how we are to identify, from this exhibit, the NASA technical reports that have allegedly been withheld by the United States. We have consulted document US13-312(revised) which provides a list of NASA technical reports, indicating the report title, report identification number and noting restrictions on distribution. This list identifies approximately 66 technical reports, of which seven are classified or subject to ITAR restrictions, six are considered proprietary or subject to limited distribution, and approximately 13 were in the process of pre-publication internal review. We note that the Panel did not specifically request copies of the NASA technical reports in the Article 13 process, and that the United States appears to have complied with question 10(a) of the Article 13 request by providing a listing of the name and identification number of each report.

2.39. As to the DOD technical reports at issue, we note that document US13-317 lists 140 technical reports by accession number, but that only eight are listed as containing no distribution limitations. The vast majority contain export-controlled information.

2.40. We are aware that technical reports can sometimes be several hundred pages in length[89] and that it could be an extremely time and resource intensive task to undertake the sort of review that would make it possible to produce copies of those reports for the Panel and the European Union within any reasonable time-frame. While we can imagine that the information contained in the technical reports is potentially relevant to the Panel's consideration of the parties' arguments concerning technology effects of the NASA and DOD aeronautics R&D measures in particular, the European Union has not advanced any reasons why it is necessary and appropriate for the Panel to require the United States to produce these at this point in the proceeding, nor has it pointed to any place in its submissions where it has identified a need for such information.[90] We are reluctant to make a request of this volume and complexity at this stage of the proceeding in the absence of a more particularized explanation from the European Union as to why we should request the United States to provide each technical report and how the information in question is likely to be necessary to the Panel's assessment of the matter.

2.41. The Panel does not preclude the possibility that, as its examination of the parties' arguments and evidence proceeds, it may conclude that it requires the United States to provide certain technical reports in order to be able to evaluate the parties' arguments as to the applicability of technologies developed under certain NASA and DOD programmes to large civil aircraft. However, it does not consider it necessary or appropriate to do so at this stage of the proceeding. **The Panel therefore declines to make this request at this time.**

[88] United States' response to the Panel's request for information pursuant to Article 13 of the DSU 28 February 2013, paras. 75-78.

[89] For example, the DOD technical report submitted as document US13-0321 is 531 pages long.

[90] Indeed, the European Union argues in its submissions that, contrary to the United States' assertions that the data developed in the course of Boeing's NASA-supported research is available in NASA technical reports, many of these technical reports are in fact not made public, in whole or in part, European Union's second written submission, paras. 195, 210. The European Union uses the United States' lists of NASA and DOD technical reports provided in response to the Panel's Article 13 request to support its assertion that many NASA and DOD technical reports provide for only limited disclosure, European Union's second written submission, paras. 196 referring to Exhibit EU-214 and European Union's first written submission, paras. 143 and 318, referring to Exhibit EU-354. Moreover, we note that in its first written submission, the European Union requests the Panel to adopt inferences, as appropriate, based on the United States' responses to questions 20 and 35 of the Panel's Article 13 request, that Boeing is developing highly valuable LCA-related data through the challenged NASA R&D programmes and DOD RDT&E programme elements, maintains rights over such data, and that "much of that data never sees the light of day." European Union's first written submission, paras. 144 and 319.

2.5 NASA new technology reports

2.42. The European Union requests the Panel to ask the United States to provide it and the European Union with 25 NASA "new technology reports" which the United States claims in its second written submission to have provided, but which it has not provided.[91]

2.43. The United States argues that the requested information is not necessary to the Panel's assessment of the matter before it, and that it is not appropriate to seek such information at this stage of the proceeding, given the resources that it would require.[92]

2.44. With respect to the NASA new technology reports, the Panel had requested the United States to provide, for each of the NASA contracts, SAAs and other agreements involving Boeing under specifically listed NASA R&D programs "records indicating the new technologies developed in the performance of the work."[93] In response to this request, the United States advised that every NASA contract requires contractors to submit a "New Technology Report" for any new technologies developed in the performance of work under such contracts, and provided a document listing the technologies reported to NASA with respect to the relevant contracts, SAAs and agreements.[94]

2.45. While the parties disagree as to whether the United States claims in its second written submission to have provided the NASA new technology reports,[95] it appears that the parties agree that the United States has not in fact submitted the NASA new technology reports. Our Article 13 request sought "records" indicating new technologies developed under the particular NASA contracts. It is not clear that the United States has fully complied with this request by providing a listing of the technologies reported to NASA under the relevant contracts.

2.46. We note that the European Union does not advance any reason why it is necessary and appropriate to request the United States to provide this information "without delay" beyond its understanding that the United States had represented at paragraph 152 of its second written submission that it had provided those reports, a representation which the United States denies making. In any case, we consider that information concerning new technologies developed by Boeing in the performance of its work for NASA under the relevant contracts and agreements is potentially relevant to the Panel's consideration of the parties' arguments concerning the technology effects of the NASA aeronautics R&D measures and that it is appropriate for us to make this request to the United States subsequent to the meeting with the Panel.

2.47. **Accordingly, we have decided to seek this information from the United States, through a request pursuant to Article 13 of the DSU, which we intend to make subsequent to the meeting with the parties.**

2.6 Sales campaign-related documents

2.48. In an HSBI attachment to its letter of 9 September 2013, the European Union requested the Panel to seek documents concerning eight particular LCA sales campaigns on the basis that such information would have been responsive to elements of question 87 of the Panel's Article 13 request to the United States. The first three categories of LCA sales campaign-related information sought by the European Union involve memoranda of understanding for three LCA sales campaigns that are alleged to pre-date the documents provided in response to question 87(b) of the Panel's Article 13 request. The next four categories seek attachments to the final offer materials provided in respect of four LCA sales campaigns which cover delivery positions and pricing and which the European Union alleges would have been responsive to subparagraphs (b) and (d) of question 87. The final category seeks information regarding the expected delivery dates for LCA orders of a particular airline which was not provided in Exhibit US-547.

[91] European Union's letter to the Panel dated 9 September 2013, para. 7 fifth bullet point.
[92] United States' response dated 16 September 2013, para. 14.
[93] Request to the United States pursuant to Article 13 of the DSU dated 5 December 2012, para. 10(d).
[94] United States' response to the Panel's request for information pursuant to Article 13 of the DSU, para. 25.
[95] European Union's letter to the Panel dated 9 September 2013, para. 7 fifth bullet; United States' response dated 16 September 2013, para. 14.

2.49. Question 87 of the Panel's Article 13 request had sought, among other things, information concerning Boeing's initial and final offers and the terms, conditions, prices and concessions of those offers with respect to LCA ordered (and options, purchase or other rights) in specified LCA sales campaigns.[96] On 22 March 2013, the United States responded to this request by submitting HSBI documents designated US-13-453 through US-13-547.[97]

2.50. The United States argues that none of the information sought by the European Union appears to be necessary for the Panel to assess the matter before it, and that the European Union has "barely discussed" the large volume of sales campaign-related information that the United States has provided in response to the Panel's Article 13 request.[98] The United States considers it highly doubtful that adding similar kinds of documents or additional data points to an already large and mostly undiscussed body of information would assist the Panel in assessing the matter before it.

2.51. In its comments on the United States' response, the European Union disputes the United States' assertion that it has barely discussed the sales campaign-related information previously provided by the United States in response to the Panel's Article 13 request. The European Union does not "ignore" a document when it decides, after careful analysis, that a reference to it is not required.[99] Nor is it for the United States to unilaterally decide that information previously requested by the Panel under Article 13 of the DSU is irrelevant to the issues in these proceedings.[100]

2.52. The Panel notes that the European Union discusses the LCA sales campaigns the subject of this information request in the parts of its submissions dealing with serious prejudice. We consider that the information in question, relating directly to delivery positions, pricing and other terms and conditions of specific LCA sales campaigns at issue in this proceeding is necessary in order for the Panel to assess the European Union's serious prejudice allegations. While we acknowledge the highly commercially sensitive nature of the information in question, we note that the Panel has adopted the HSBI/BCI Procedures precisely in order to protect information of this sort.

2.53. We therefore consider it appropriate that we renew our request that the United States provide this information. Given the proximity of the meeting with the parties, and the concern expressed by the United States that requests for information at this time would interfere with the United States' preparation for the meeting, the Panel has decided that it will make this request subsequent to the meeting with the parties.

3 REQUESTS INVOLVING INFORMATION NOT PREVIOUSLY THE SUBJECT OF THE PANEL'S ARTICLE 13 REQUEST

3.1. We now consider the merits of the European Union's requests that the Panel ask the United States to provide information that was not previously the subject of an Article 13 request by the Panel. Although the parties have not specifically identified which information they consider to be information that has not been previously requested by the Panel pursuant to Article 13 of the DSU, the Panel considers that the United States was not specifically required to produce the following information in the context of the Panel's Article 13 request of December 2012:

a. the Vought-Boeing Asset Purchase Agreement submitted by the United States as Exhibit US-325; and

b. the redacted portions of a Boeing Board of Directors' slide presentation entitled "Gemini Update" submitted by the United States as Exhibit US-323.

[96] Request to the United States pursuant to Article 13 of the DSU dated 18 December 2012, question 87.
[97] United States' letter to the Panel dated 22 March 2013, regarding submission of information with respect to question 87 of the Panel's Article 13 request.
[98] United States' response dated 16 September 2013, paras. 19-20.
[99] European Union's comments on the United States' response dated 23 September 2013, paras. 24-25.
[100] European Union's comments on the United States' response dated 23 September 2013, para. 23.

3.1 The Vought-Boeing Asset Purchase Agreement

3.2. The European Union requests the Panel to ask the United States to provide the European Union and the Panel with the full version of the Vought-Boeing Asset Purchase Agreement in order to enable the European Union and the Panel to assess the United States' claims, such as those made at paragraphs 492 and 501 of its second written submission, as to what the Agreement did and did not do.[101]

3.3. The United States refers to the Vought-Boeing Asset Purchase Agreement in its second written submission in the context of discussing the factual background to Boeing's involvement in Project Emerald.[102] The United States submitted as Exhibit US-325 what appears to be a public filing of the text of the Vought-Boeing Asset Purchase Agreement with the US Securities and Exchange Commission. Accordingly, the public version of the Agreement does not include the various exhibits and disclosure schedules to the Agreement.

3.4. The United States explains that it did not provide the exhibits or schedules to the Agreement because they do not appear to be necessary to understand the issues discussed in the parties' submissions.[103] The United States argues that the European Union has not identified any reason to consider such information necessary to the Panel's evaluation of the issues before it. For example, all of the information in the relevant paragraphs of the United States' second written submission is fully supported by the cited portions of Exhibit US-325, which provides all of the information necessary to evaluate the United States' assertions.

3.5. The European Union argues that the United States' assertions are contradicted by the withheld portions of the Agreement. The European Union identifies one example: While paragraph 492 of the United States' second written submission states that Boeing acquired Vought's interest in all assets, properties and rights of every kind (whether tangible or intangible), including real and personal property, in South Carolina, the Agreement indicates that there were a number of exceptions and exclusions set forth in schedules to the Agreement, along with exhibits that are relevant to understanding what the Agreement "did and did not do".[104]

3.6. The Vought-Boeing Asset Purchase Agreement filed as Exhibit US-325 indicates that the Agreement included 16 exhibits, one appendix and 86 disclosure schedules. It was submitted as evidence to support the United States' assertions, in paragraph 492 of its second written submission outlining "key facts" regarding Project Emerald that Boeing had, through a series of transactions in 2008 and 2009, purchased Vought and Global Aeronautica's South Carolina operations.

3.7. The Panel is not persuaded at this point in the proceeding that it is necessary and appropriate to request the United States to produce the full version of the Vought-Boeing Asset Purchase Agreement, which includes schedules and exhibits which are unlikely to be of relevance to issues before the Panel in this proceeding. **However, we have decided to request the United States to produce certain disclosure schedules and exhibits that do appear to us to be relevant to our assessment. These documents are Schedules 2.2(b)(viii) and 2.2(a)(ii), and Exhibits I and J. We intend to make this request to the United States following the meeting with the parties.**

3.2 The redacted portions of the "Gemini Update" presentation

3.8. The European Union requests the Panel to ask the United States to provide it and the European Union with the redacted portions of a Boeing slide presentation dated 19 October 2009

[101] European Union's letter to the Panel dated 9 September 2013, para. 7 sixth bullet point.
[102] United States' second written submission, paras. 492 and 501.
[103] United States' response dated 16 September 2013, at footnote 25.
[104] European Union's comments on the United States response dated 23 September 2013, para. 20. The European Union provides as examples, Section 2.2(a)(vii) (which refers to Schedule 2.2(b)(viii) concerning governmental authorizations that were not part of the purchased assets), Section 2.2(b) (dealing with excluded assets which refers to Schedule 2.2(b)(viii) as well as Schedule 2.2(a)(ii) concerning tangible personal property of Vought that would not be retained by Vought), and Section 9.1(e) (which provides for Vought to deliver a number of documents as a condition to closing and in that regard refers to the forms of those documents set forth in 15 exhibits).

entitled "Gemini Update" (Exhibit US-323). The European Union considers that the redacted slides in Exhibit US-323 likely contain evidence as to the existence and value of the alleged South Carolina subsidies.[105]

3.9. The United States referred to page 6 of this exhibit in its second written submission in support of its assertion that factors other than the existence of Project Gemini influenced Boeing's decision to locate its second 787 assembly line in South Carolina.[106] The United States says that, while it cited only to page 6 of the document in its second written submission, it submitted the rest of the document for the sake of completeness.[107] The United States argues that none of the information in the remainder of Exhibit US-323 is necessary for the Panel to assess the matter before it, which it considers is supported by the European Union's own conduct. The United States alleges that, before initiating this compliance proceeding, the European Union apparently accessed the document online, and identified the portion that appeared relevant; namely, slide NLRB-004283 and asked the Panel to request an unredacted copy of this slide from the United States. The United States previously complied with this request by submitting this slide as US13-0658(BCI) in the context of its response to the Panel's Article 13 request.[108] According to the United States, the fact that the European Union initially requested only one other slide in the document indicates that it does not consider the other information to be necessary to the Panel's analysis.

3.10. In its comments on the United States' response, the European Union takes issue with the suggestion that the fact that the European Union initially requested only one other slide in this document in the Annex V/Article 13 process demonstrates that the European Union does not consider the other information to be relevant. The European Union argues that, at the time of the Annex V/Article 13 process, it had only sought those documents that it expected to be relevant *at the time*, and of which *it was aware*.[109] The European Union further alleges that, while the version of the document provided by the United States is one which was released publicly by a Boeing labor union, its source from the slide titles "NLRB" appears to be the National Labor Relations Board, a US government agency and that it is therefore likely that the United States is in possession of an unredacted copy of the document that it could have provided to the Panel. This is further supported by the fact that the United States was previously able to make an unredacted version of one slide available to the Panel and to the European Union.[110]

3.11. Exhibit US-323 is a slide presentation that consists of nine pages in total. Pages 1, 8 and 9 are merely title and discussion/conclusion pages which do not contain any substantive information. Pages 2, 6, 7 do not appear to have been redacted. Page 3 is redacted, however, the European Union has been provided this slide as document US13-0658(BCI) in response to the Panel's Article 13 request and we see no reason to ask the United States to provide a document it has already provided. Pages 4 and 5 are also redacted. They appear to present Boeing's estimate of the cash impact of a Charleston second assembly line compared with an interim assembly line in Everett and an estimate of labor-related expenditures, in both cases, tied back to estimated impacts on NPV. It appears to us that the information on pages 4 and 5 of Exhibit US-323 are potentially relevant to assessing the subsequent discussion of the "pros and cons" of locating a second assembly line in South Carolina and the United States' argument that factors other than the existence of Project Gemini influenced Boeing's decision in that regard. **Accordingly, the Panel intends to request the United States to produce pages 4 and 5 of Exhibit US-323 following the meeting with the parties.**

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[105] European Union's letter to the Panel dated 9 September 2013, para. 7 seventh bullet point.
[106] United States' second written submission, para. 91.
[107] United States' response dated 16 September 2013, para. 16.
[108] United States' response dated 16 September 2013, para. 17. See also Letter of the United States to the Panel dated 22 March 2013, regarding document US-13-0658(BCI).
[109] European Union's comments on the US response dated 23 September 2013, para. 20 footnote 36.
[110] European Union's comments on the US response dated 23 September 2013, para. 22.