EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT:

Recourse to Article 22.6 of the DSU by the European Union

ORAL STATEMENT OF THE UNITED STATES

February 11, 2019

1. Following the original proceeding in this dispute, the DSB adopted reports finding that the EU had subsidized every single Airbus large civil aircraft ("LCA") program from the inception of Airbus up through the A380, resulting in massive adverse effects to the U.S. LCA industry. Six months after the adoption of those reports, the EU declared that it had complied. But it had done the opposite. As the United States demonstrated, and as the compliance panel found, the EU's alleged compliance "steps" regarding Launch Aid/Member State Financing ("LA/MSF") were "not 'actions' relating to the ongoing (or even past subsidization) of Airbus LCA, but rather merely the *assertion of facts* or *presentation of arguments* . . . ."[1]

2. Further, the compliance panel found that, other than two "steps" unrelated to LA/MSF and not at issue in the compliance proceeding, "the European Union's affirmation of compliance is not grounded in any specific conduct on the part of the European Union and certain member States with respect to the subsidies provided to Airbus or the adverse effects those subsidies were found to have caused in the original proceeding."[2] To add insult to injury – or more accurately to add injury to injury – the EU granted a new round of LA/MSF – indeed, the largest-ever subsidized LA/MSF package – to the newest Airbus program, the A350 XWB. The compliance findings confirmed that this latest round of LA/MSF, like each and every prior instance of LA/MSF, constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and causes adverse effects to the United States.

3. To be sure, the appellate report in the compliance proceeding also found that Article 7.8 of the SCM Agreement does not provide a remedy for the continuing adverse effects of the oldest LA/MSF subsidies. But it affirmed that the EU breached its WTO obligations by failing to withdraw or take appropriate steps to remove the adverse effects of the most recent LA/MSF subsidies – those that financed the A380 and A350 XWB LCA programs.

4. As of today, it has been almost 14 years since the United States launched this dispute, and nearly a decade already since the DSB adopted reports finding that LA/MSF and other subsidies breached the EU's WTO obligations. In the face of the EU's recalcitrance, the United States is left with no choice but to pursue authorization to take countermeasures in the hope that this will

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[1] Compliance Panel Report, para. 6.42 (emphasis original).

[2] Compliance Panel Report, para. 6.42.

finally incentivize the EU to seek a positive solution for its unabated, WTO-inconsistent behavior and the massive harm it causes. As the U.S. industry has entered what is now at least the 20th year of harm suffered as a result of EU LA/MSF subsidies (not counting the years prior to the first reference period in the present dispute), the United States has done everything it can to achieve what will hopefully be a speedy conclusion to this arbitration, to address as soon as possible the ongoing harm it continues to suffer. In particular, the United States put forward a straightforward and conservative methodology, which minimizes the number and complexity of disagreements between the parties. This is also consistent with the short timeline envisioned by the DSU and the parties' joint sequencing agreement.

5. Yet, despite the limited scope of this proceeding, the EU has done everything it can to avoid responsibility for its WTO-inconsistent behavior. To avoid the consequences of failing to achieve compliance – consequences until now borne solely by the United States – the EU tries to require the United States to re-prove its case anew, attempts to re-litigate the findings in the adopted reports ("adopted findings") in the case it lost, and mischaracterizes the findings against it from the compliance proceeding. None of this is the proper subject of this Article 22.6 arbitration. The EU can neither change nor erase the findings in the reports that the DSB adopted, and the proper role of an Article 22.6 arbitration is not to provide a forum for relitigation and further delay, but rather to come to a swift conclusion on the level of countermeasures that the original complainant should be authorized to impose.

6. By its very nature, an Article 22.6 proceeding related to so-called "actionable subsidies" is limited in scope. Pursuant to Article 7 of the SCM Agreement, where a Member concerned has failed to comply by the end of the reasonable period of time, and that Member objects to the level of countermeasures proposed by the original complainant, the Member concerned can request arbitration to determine whether the proposed countermeasures are not commensurate with "the degree and nature of the adverse effects determined to exist." If the Member concerned can prove that one or more aspects of the complaining Member's methodology mean that the proposed countermeasures are not commensurate with the degree and nature of the adverse effects determined to exist, the arbitrator can adjust that aspect of the methodology so that it results in countermeasures that would be commensurate. Anything outside of this limited scope is not properly an issue for a proceeding under Article 22 of the DSU and Article 7 of the SCM Agreement. The purpose is not to re-assess the degree and nature of adverse effects determined to exist, nor to re-adjudicate compliance or require the original complainant to prove WTO inconsistencies anew.

EU Efforts to Improperly Expand the Scope of this Article 22.6 Proceeding

EU Arguments the United States Must Prove Its Case Anew

7. *First*, the EU attempts to argue the United States must prove the WTO inconsistency of A380 and A350 XWB LA/MSF anew, which both misunderstands the purpose and scope of this proceeding and improperly shifts the EU's burden to the United States. At its most blunt, the EU says of the noncompliance findings in the reports adopted by the DSB only nine months ago,

"those findings do not relate to, much less demonstrate, the presence of adverse effects today, in 2018, or in the future."[3] Further to the point, the EU faults the United States for relying on "stale data that is at least six to eight years old."[4]

8. This is all a way of arguing that, to sustain the countermeasures to which it is entitled, the United States must prove adverse effects, including causation, anew – in essence, replacing "the adverse effects determined to exist" with a new determination of adverse effects. The EU suggests that the Arbitrator is required to have recourse to the most recent data, "that is, the fresh data pertaining to a new reference period fixed by the Arbitrator."[5] According to the EU, annual countermeasures cannot be approved unless the United States makes a new showing that the subsidies are causing adverse effects presently (based on more recent data) and will continue to do so in the future.[6] Indeed, under the EU's logic, a complaining Member would effectively have to prove the existence of a subsidy and the continued presence of adverse effects over and over again — before the original panel, in the compliance proceeding the parties agreed to, and then again before the Article 22.6 arbitrator — without ever quite being able to catch up to the most current situation.

9. It is the EU that errs as a matter of WTO law. The finding of present, ongoing adverse effects in the compliance proceeding is a multilateral determination adopted by the DSB. That finding has not been superseded by any WTO finding to the contrary. Under Article 7.9 of the SCM Agreement, that determination of adverse effects provides the basis of the countermeasures that are the subject of this arbitration. When a determination is made of present adverse effects, that breach is understood to exist going forward, and prospective WTO remedies are appropriate if compliance is not achieved. Under the EU's theory, where adopted findings of present adverse effects are assumed to be limited solely to the instances of adverse effects identified from a past period, there would be no basis for prospective relief. (Also, there would be no basis for a recommendation that a Member bring its measures into compliance, since according to the EU there are no findings that a Member's measure would cause adverse effects in the future, that is, at any point after the period covered by a panel's findings.)

10. This is plainly incorrect. The EU attempts to cover the untenable consequences of its theory by referring erroneously to the lag time in the LCA industry between orders and deliveries. Thus, the EU argues that the future adverse effects for which countermeasures are appropriate consist of the undelivered aircraft associated with significant lost sales found during

[3] EU First Set of Responses to the Arbitrator's Questions ("RAQ"), para. 31.

[4] EU First Set of RAQ, para. 21.

[5] EU First Set of RAQ, para. 21.

[6] *See* EU First Set of RAQ, para. 49.

the compliance reference period. As we have pointed out, the compliance panel explicitly rejected the theory that these are the adverse effects at issue in this dispute.[7]

11. There are additional problems. If the EU were correct, no remedy would exist for a finding of displacement or impedance based on deliveries that have already been made. The same would be true in an industry in which deliveries were contemporaneous or close in time to the order.

12. Under the EU's theory, in essence, the findings from compliance reports that the DSB adopts are immediately stale. In fact, they were stale when the DSB adopted them since time necessarily elapses between the end of a compliance panel's reference period and the issuance of its report, not to mention any time taken for an appeal. Thus, in the vast majority of scenarios, an Article 22.6 arbitration that follows a compliance proceeding could not rely on the adopted findings from that earlier proceeding.

13. The EU has it exactly backwards. The arbitration here specifically must rely on those adopted findings – which serve as the basis for the countermeasures subject to arbitration. This is reflected unambiguously in Article 7.9 of the SCM Agreement, which states that countermeasures must be commensurate with the degree and nature of the adverse effects determined to exist. The United States already established the existence, degree, and nature of adverse effects that the EU's existing LA/MSF subsidies cause. The EU bears the burden of establishing that the countermeasures proposed by the United States are not commensurate with the degree and nature of those adverse effects. The EU errs when it charges the United States with the burden of proving its case anew.

EU Attempts to Re-Litigate the Case it Lost

14. *Second*, when not attempting to require the United States to prove a new case, the EU in essence attempts to "appeal" the case it already lost. The EU repeatedly attempts to re-litigate issues of compliance that were the proper subject of the compliance proceeding.

15. For example, the EU puts forward arguments about alleged counterfactual production capacity constraints that Boeing would have faced during the compliance panel's review period. The EU argues that, due to production capacity constraints, Boeing would not have made certain sales or deliveries even absent the LA/MSF subsidies. But these are collateral attacks on the adopted findings. Whether the subsidies caused the U.S. LCA industry to lose certain sales or deliveries was the subject of the compliance proceeding.

16. Another example is the EU argument that the Arbitrator should ignore the Transaero orders, where deliveries were ultimately cancelled after the reference period. But this contradicts the adopted findings that those four A380 orders represent lost sales to the U.S. LCA industry.

[7] *See* Compliance Panel Report, para. 6.1112.

Thus, the EU is not arguing that the U.S. proposed countermeasures are not commensurate with the degree and nature of the adverse effects determined to exist; it is arguing that the adverse effects determined to exist should be amended based on a new factual record.

17. But the SCM Agreement states: "In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist."[8] It does not state that the Arbitrator should re-examine the degree and nature of the adverse effects determined to exist and replace the adopted findings with new findings based on any additional evidence put before it.

18. This arbitration regarding the level of countermeasures does not provide a forum for the EU to re-litigate issues from the compliance proceeding. This proceeding is distinct from the compliance proceeding, not an appeal of it.

EU Mischaracterizations of Adopted Findings

19. *Third*, when the EU is not attempting to reverse findings from the compliance proceeding, it mischaracterizes them. For example, the EU contends that, with respect to significant lost sales, the adverse effect manifests itself in the year in which Boeing would counterfactually have delivered the aircraft at issue.[9] This contradicts the adopted findings. The compliance proceeding found significant lost sales that manifested in the December 2011 – 2013 period based on ***orders*** during that period, not based on counterfactual deliveries during that period.

20. As another example, the EU states:

> {T}he first compliance panel found, and the Appellate Body upheld, that the subsidised element of A380 MSF loans and A350XWB MSF loans accelerated the launch of the A380 and the A350XWB, in 2000 and 2006, respectively. Specifically, both the first compliance panel and the Appellate Body found that, without the subsidised element of those MSF loans, the A380 and the A350XWB would still have been launched, albeit with a delay.[10]

But neither the original panel nor the compliance panel ever found that Airbus would have launched the A380 or A350 XWB in the absence of LA/MSF, nor did either find the conclusion

[8] SCM Agreement, Art. 7.10.

[9] EU RAQ 16, para. 324.

[10] EU RAQ 56, para. 48 (citations omitted).

the EU draws from this mischaracterization – that the effects of LA/MSF were the *acceleration* of the launch of these aircraft.[11]

21. The compliance appellate report already rejected the EU's attempt to read the original and compliance panel findings as establishing that A380 LA/MSF was not critical to the very existence of the A380.[12] As the compliance panel report recalled, "the original panel also found that the A380 business case suggested, '***but by no means demonstrates***', that as a stand-alone proposition, the A380 ***might*** have been economically viable even without the A380 LA/MSF."[13] Thus, as the compliance appellate report stated, "although the original panel acknowledged that the A380 business case predicted a positive NPV in the absence of LA/MSF, it was 'not persuaded that the A380 business case alone demonstrates that Airbus would have launched the A380 even in the absence of LA/MSF'."[14]

22. The compliance appellate report further noted that "findings from the original proceedings reveal that, without A380 LA/MSF, Airbus would have been unable to fund the timely launch of the A380 programme relying exclusively on its own financial resources and outside financing."[15] In other words, even if the business case predicted a positive NPV, Airbus could not have funded the project as outlined in that business case. The business case itself assumed access to funds that Airbus did not have in the absence of LA/MSF. The compliance appellate report recalled these findings in concluding that "we have some difficulty in accepting the European Union's reading of the Panel Report."[16]

23. Indeed, the EU has a history of mischaracterizing acceleration effects and product creation effects. In *United States – Large Civil Aircraft*, the EU attempted to characterize what truly were acceleration effects as product creation effects. It is significant that the compliance panel in *United States – Large Civil Aircraft* specifically disagreed with the EU's mischaracterizations, and in so doing contrasted the acceleration effects of U.S. subsidies in that dispute with the product creation effects of EU LA/MSF subsidies found in this dispute. It explained:

> The findings of the panel in the original proceeding regarding the nature and effects of the aeronautics R&D subsidies (i.e. an acceleration effect providing a time to market advantage) can be contrasted with certain of the findings in *EC and certain member States - Large Civil Aircraft* regarding the nature and effects of certain of the subsidies at issue in that dispute. In *EC and certain member*

[11] *See* EU RAQ 56, para. 58.

[12] *See* Compliance Appellate Report, paras. 5.600-5.605.

[13] Compliance Panel Report, note 2597 (quoting Original Panel Report, para. 7.1948) (emphasis added).

[14] Compliance Appellate Report, note 1679 (quoting Original Panel Report, para. 7.1944).

[15] Compliance Appellate Report, para. 5.605.

[16] Compliance Appellate Report, para. 5.603.

> *States - Large Civil Aircraft*, the panel concluded, among other things, that Airbus would have been unable to bring to market the LCA that it launched but for certain of the subsidies in question. In other words, certain of the subsidies in question in that dispute enabled the creation and market presence of products that would not otherwise exist. (See Panel Report, EC and certain member States - Large Civil Aircraft, paras. 7.1949 and 7.1984; and Appellate Body Report, EC and certain member States - Large Civil Aircraft, paras. 1261, 1264-1270, and 1300). See also Panel Report, EC and certain member States - Large Civil Aircraft (Article 21.5 - US), paras. 6.1464-6.1477.[17]

That panel thus further shows that the EU mischaracterizes the adopted findings in this dispute regarding LA/MSF as being limited to acceleration effects.[18] (This also exposes the false equivalence the EU attempts to draw between the two proceedings.)[19]

Objections to the U.S. Methodology that Properly Fall within the Scope of this Proceeding but Are Nonetheless Erroneous

24. The issues that are properly the subject of this Article 22.6 proceeding are what the EU alleges to be "technical errors."[20] But the formula proposed by the United States is not erroneous; it results, for a given year, in countermeasures commensurate with the degree and nature of the adverse effects determined to exist.

The U.S. Methodology

25. It is undisputed that the compliance panel assessed evidence of adverse effects from a 25-month period starting at the end of the EU's reasonable period of time to comply ("RPT"). Within that period, existing LA/MSF subsidies caused both significant lost sales and impedance. Specifically, the compliance proceeding found that 20 A350 XWB-900 orders, 30 A350 XWB-1000 orders, and 54 A380 orders "represent significant lost sales to the US LCA industry."[21]

26. The U.S. methodology calculates the value of the closest competing Boeing model for each of those orders that represent significant lost sales. Because the adopted lost sales findings are based on lost orders, and because prices in the industry are determined based on a contractual formula causing the price of a particular airplane to depend on the month of delivery, the United

[17] *United States – Large Civil Aircraft (21.5) (Panel)*, note 2849.

[18] See EU RAQ 56, para. 56.

[19] See EU RAQ 4, para. 115.

[20] *See* EU RAQ 16, para. 320.

[21] Compliance Appellate Report, paras. 5.716, 5.731, Table 10; Compliance Panel Report, Table 19.

States discounts each airplane's delivery year value to the order year. This allows for the calculation of a significant lost sales value for December 2011, 2012, and 2013.

27. For impedance, the compliance findings were based on deliveries during the reference period. Accordingly, the possibility of discounting does not arise. The U.S. methodology simply values the deliveries in each year of the closest Boeing model, and then repeats the same steps as with lost sales to arrive at impedance values for December 2011, 2012, and 2013.

28. Then, for December 2011, 2012, and 2013 separately, the U.S. methodology sums the significant lost sales and impedance values. The methodology next adjusts the December 2011 value and the 2012 value to 2013 dollars, so that all such adverse effects values share a common basis. The United States then adds those totals together to arrive at an overall valuation of adverse effects covering the entire 25-month period of $21.2 billion, in 2013 dollars. The United States then divides this sum by 25/12 to calculate an annual valuation of adverse effects of $10.2 billion, again stated in 2013 dollars, which according to the U.S. formula would rise to $10.8 billion in 2017 dollars – that is, for countermeasures that would have been applied in 2018.[22] (These numbers are further revised, as explained below, due to additional information the EU has placed on the record.)

29. This is an eminently straightforward and logical way to approach the calculation. Accordingly, the EU has not shown that any aspect of this calculation would render the resulting countermeasures not commensurate with the degree and nature of the adverse effects determined to exist.

Counterfactual Airplane Prices

30. The EU has also faulted the United States for the prices it used for calculating significant lost sales and impedance values. With respect to lost sales, the EU objects to the United States' use of somewhat contemporaneous orders (for all but one of the customers) by the same customer of the relevant Boeing model. The EU's allegations fail to prove that the U.S. approach would render the countermeasures not commensurate.

31. The EU's criticisms typically take the form of pointing out some way in which these comparator orders are not identical to the counterfactual order. For example, in some instances, the number of aircraft ordered is not exactly the same. But the EU's burden requires more than demonstrating that the proxies the United States chose are imperfect. Of course, they are. They are proxies. There is no actual information available; it's a ***counterfactual*** order. The proxies the United States chose are eminently reasonable, and therefore, do not result in countermeasures that are not commensurate.

[22] Revised Aggregation of Adverse Effects Determined to Exist by Year (Exhibit USA-28(HSBI)).

Counterfactual Delivery Schedules

32. The EU also objects to the delivery schedules the United States incorporated into its calculation. As the United States explained, we had Boeing estimate the contracted delivery schedules between Airbus and its customers because we did not have access to the actual contractual delivery schedules. The EU provided those schedules in response to the second set of questions from the Arbitrator. As expressed in response to questioning from the Arbitrator, the United States considers that these schedules provide better information. Therefore, in future calculations the United States will replace the estimated delivery years with those reported by the EU. As a result, the countermeasures for 2018 (*i.e.*, reflecting the adverse effects in 2017 dollars) – which we will use for the sake of continuity even though the calendar has turned to 2019 – would increase slightly from $10.800 billion to $10.813 billion.

Annual Countermeasures and the EU's Burden regarding Use of Data from the Compliance Reference Period

33. The EU has consistently argued that the Arbitrator cannot approve annual (or "recurring") countermeasures, but this is plainly incorrect. The EU principally relies on *US – Upland Cotton (22.6 II)*, but that report does not support the EU's arguments. That report makes clear that it is the EU's burden to show "not only that there may be alternatives to the choice of {} the period of reference, but rather that the use of {the proposed} period of reference would lead to countermeasures that would not be 'commensurate' within the meaning of Article 7.9."[23] Furthermore, that report found that the period following the moment at which the original respondent was required to have come into compliance is "in principle legitimate."[24] Thus, the United States' reliance on the period immediately following the end of the RPT is in principle legitimate. The EU can only succeed by showing that some data associated with that period is "unrepresentative."[25]

34. The EU has done nothing of the sort. Notably, the EU cannot pursue what is, in essence, an appeal of the adopted findings. As discussed a moment ago, Article 7.10 of the SCM Agreement requires that "the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist," not reconsider them anew.[26] Therefore, EU objections to the U.S. methodology must be directed at aspects of that methodology that were not relevant to the adopted findings.

35. For example, the U.S. methodology requires assigning a value to each aircraft, which we have equated with its price. The specific prices of the relevant Boeing models were not relevant

[23] *US – Upland Cotton (22.6 II)*, para. 4.116.

[24] *US – Upland Cotton (22.6 II)*, para. 4.118.

[25] *See US – Upland Cotton (22.6 II)*, para. 4.118.

[26] SCM Agreement, Art. 7.10.

to the adopted findings. Therefore, the EU is not precluded from arguing that the prices assigned to the relevant Boeing aircraft are "unrepresentative" for some reason. In fact, the EU put forward an objection to certain prices used in the U.S. methodology. Specifically, the U.S. methodology used an average price to calculate a value for impedance and that average included the prices of so-called VIP aircraft. Although including those LCA in the average was defensible, the United States voluntarily removed them from its calculation.

36. However, the EU has alleged no anomaly with the compliance reference period – December 2011 – 2013 – in terms of LCA prices or other inputs into the U.S. methodology that were not germane to the adopted compliance findings. Thus, the EU has failed to prove than any such data utilized by the U.S. methodology are "unrepresentative." The EU's arguments in this respect therefore fail.

37. The fact is that the adverse effects flow from the product effects caused by the LA/MSF subsidies. Those product effects continue to result in significant lost sales and impedance. The subsidies are in no way specific to certain sales or deliveries. Thus, because the DSB adopted findings that, following the end of the RPT, the causal chain remained intact, there is no basis to treat the instances of adverse effects that manifested in the December 2011 – 2013 period as the full extent of the adverse effects. Rather, as the compliance panel observed, the adverse effects of LA/MSF are "profound and long-lasting."[27]

38. The EU alleges that the United States mischaracterizes the causal pathway "to turn adverse effects findings based on a temporally-limited acceleration effect into findings of adverse effects that apply in perpetuity."[28] According to the EU, "the first compliance panel found, and the Appellate Body upheld, that the subsidised element of A380 MSF loans and A350XWB MSF loans accelerated the launch of the A380 and the A350XWB."[29]

39. But the EU is flatly wrong. As we already discussed, the compliance panel in *US – Large Civil Aircraft* specifically contrasted the acceleration effects in that dispute with the product creation effects found by the original and compliance panels in this dispute.[30] Indeed, the EU itself has stated in this proceeding:

> Where the market presence of a model of aircraft, at the time of a sales campaign, was attributable to the direct effects and indirect effects from subsidies, this served as the basis for findings of significant lost sales, on the notion that, ***absent the subsidies, the Airbus product would not have competed in the sales campaign***, and Boeing would instead have won the sale. Similarly, ***these***

[27] Compliance Panel Report, para. 6.1528.

[28] EU RAQ 56, para. 48.

[29] EU RAQ 56, para. 48.

[30] *See United States – Large Civil Aircraft (21.5) (Panel)*, para. 9.127, note 2849.

> ***findings relating to the market presence of Airbus' models also served as the eventual basis for findings of other forms of volume effects*** (and specifically, impedance).[31]

Thus, although it repeatedly fights the conclusion, at least once in this proceeding the EU has specifically and concisely acknowledged that both the significant lost sales findings and the impedance findings were based on the unavailability of the Airbus LCA in the absence of LA/MSF. This adopted multilateral finding – including the causal pathway by which the presence of Airbus LCA continually causes Boeing to lose sales and deliveries it would otherwise obtain – remains in effect and cannot be disturbed. Accordingly, contrary to the EU's assertions, the U.S. methodology results in annual countermeasures commensurate with the degree and nature of the adverse effects determined to exist.

Conclusion

40. Such countermeasures are the last remaining hope to force the EU to reckon with the pernicious effects its LA/MSF subsidies cause, and hopefully achieve a solution to this longstanding failure to comply with its WTO obligations. For the United States, as with the DSU, these countermeasures are not the preferred option. But after 14 years of litigation, and ten years since the original panel findings against the EU, without a single, meaningful step by the EU to reform LA/MSF – and, in fact, a period in which the EU reinforced its WTO-inconsistent behavior by providing the latest and largest tranche of subsidized LA/MSF to date (and with no guarantee that it will not once again do the same) – this option is all that remains.

41. The EU's efforts to greatly expand the limited scope of this proceeding to evade the consequences of its WTO-inconsistent behavior for longer still, represent an attack on the very utility of dispute settlement at the WTO. Despite that the EU has provided these WTO-inconsistent LA/MSF subsidies to every single Airbus LCA program, and that the EU has taken zero meaningful steps to address these subsidies or the effects they cause, the EU seeks to avoid countermeasures commensurate with the degree and nature of the adverse effects determined by the WTO to exist. The EU tries to guarantee itself the right to continue its course of unabated, WTO-inconsistent subsidies with limited and ineffectual, if any, consequences. The EU therefore, in effect, seeks to have the Arbitrator declare that the WTO rules and dispute settlement system simply cannot deal effectively with the EU's massive subsidization of Airbus, or with subsidies of this nature in general.

42. But the EU is wrong. The DSB adopted reports twice, making clear that the EU's LA/MSF subsidies breach the EU's WTO obligations by causing massive adverse effects to the United States. The SCM Agreement and the DSU explicitly provide for the United States now to obtain authorization to impose countermeasures commensurate with the degree and nature of those adverse effects. To deny the United States that right would be to cement in perpetuity the

[31] Exhibit A to EU Preliminary Ruling Request, para. 41 (citing Compliance Panel Report, paras. 6.1785-6.1789, 6.1806-6.1817) (emphasis added).

imbalance imposed by the EU's subsidies. It is long past the appropriate time for the EU to argue about whether, or the extent to which, its subsidies cause adverse effects.

43. We look forward to addressing questions about disagreements between the parties of the various elements of the U.S. methodology, so-called alleged "technical errors." But we must distinguish between these issues, and the EU's broader attempt to draw out and expand this proceeding far beyond its intended purpose. The EU may not like the potential consequences of the requested countermeasures. But they are unfortunately necessary to induce the EU to finally confront the economic pain its subsidies have caused for at least two decades – a burden the United States alone has shouldered for the duration of this long dispute. We stand ready to answer any questions of interest to the Arbitrator, in the hope that, consistent with the DSU and the parties' joint sequencing agreement, the "technical" disagreements can be adjudicated relatively quickly, so that the balance of concessions can be restored and the EU is given appropriate additional incentive to pursue in earnest a lasting solution.