

World Trade Organization

United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (DS353) – Recourse to Article 21.5 of the DSU by the European Union

Request for Panel Establishment

1. On 25 September 2012, the European Union requested consultations with the United States (US) with respect to dispute WT/DS353, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (US – Large Civil Aircraft)*. The request was circulated in document WT/DS353/16 on 2 October 2012. The European Union requested these consultations pursuant to Articles 4 and 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*; Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994 (GATT 1994)*; Articles 4.1, 7.1 and 30 of the *Agreement on Subsidies and Countervailing Measures (SCM Agreement)*, to the extent that Article 30 incorporates Article XXIII of the *GATT 1994*; and the “Agreed Procedures under Articles 21 and 22 of the *Dispute Settlement Understanding* and Article 7 of the *SCM Agreement*” concluded by the European Union and the United States with respect to this dispute on 12 January 2012 (Sequencing Agreement).¹
2. Consultations were held on 10 October 2012, pursuant to each of the above-referenced provisions, with a view to reaching a mutually satisfactory solution. The consultations failed to settle the dispute.
3. Accordingly, “there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the Dispute Settlement Body (DSB), within the meaning of Article 21.5 of the *DSU*. The European Union hereby requests the establishment of a panel, pursuant to Articles 6 and 21.5 of the *DSU*, Article XXIII:2 of the *GATT 1994*; Articles 4.4, 7.4 and 30 of the *Agreement on Subsidies and Countervailing Measures (SCM Agreement)*, to the extent that Article 30 incorporates Article XXIII of the *GATT 1994*; and the Sequencing Agreement.
4. On 23 March 2012, the DSB adopted the Appellate Body Report and the Panel Report (as modified) in *US – Large Civil Aircraft*, which found that US federal, state and local governments provide subsidies to US producers of large civil aircraft (LCA) – specifically, the Boeing Company (Boeing) – that are inconsistent with US obligations under the *SCM Agreement*. In particular, the DSB ruled that the following are specific subsidies, within the meaning of Articles 1 and 2 of the *SCM Agreement*, that cause adverse effects, in the form of serious prejudice, or threat thereof, to European Union (EU) interests, within the meaning of Articles 5(c) and 6.3(b) and (c) of that same *Agreement*:

¹ WT/DS353/14, 27 April 2012, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Understanding between the European Union and the United States Regarding Procedures under Articles 21 and 22 of the *DSU*, concluded 12 January 2012.

- Payments and access to government facilities, equipment, and employees under National Aeronautics and Space Administration (NASA) aeronautics research & development (R&D) programs;
- Payments and access to facilities under US Department of Defense (DoD) aeronautics R&D programs;
- Tax exemptions under Foreign Sales Corporation/Extraterritorial Income (FSC/ETI) legislation and successor acts;
- Washington State business and occupation (B&O) tax rate reductions; and,
- Tax exemptions related to Industrial Revenue Bonds (IRBs) issued by the City of Wichita, Kansas.

5. The DSB recommended that the United States take appropriate steps to remove the adverse effects or withdraw the subsidies.² Under Article 7.9 of the *SCM Agreement*, the United States had until 24 September 2012 to comply with the DSB’s recommendations. The DSB also ruled that the United States provides subsidies to Boeing that are prohibited by the *SCM Agreement*, and recalled that prior recommendations of the DSB with respect to this matter continue to be operative.³

6. By communication dated 23 September 2012, the United States notified the European Union that the United States has taken a number of actions allegedly withdrawing the subsidies or removing their adverse effects (23 September 2012 notification). 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*. Instead, after the end of the implementation period on 24 September 2012, the United States maintains specific subsidies that cause present adverse effects to EU interests, that are prohibited subsidies contingent on export performance or on the use of domestic over imported goods, and that are inconsistent with the United States’ national treatment obligations, as detailed below in Section II. Accordingly, in the view of the European Union, the United States has failed to achieve compliance with the recommendations and rulings of the DSB.

I. Measures

7. The 23 September 2012 notification, as well as other available information, indicates that, after the end of the implementation period on 24 September 2012, the United States maintains billions of dollars of subsidies, within the meaning of Article 1.1 of the *SCM Agreement*, including both those subsidies that the DSB ruled to be specific subsidies causing adverse effects, as well as additional subsidies that constitute “measures taken to comply”, within the meaning of Article 21.5 of the *DSU*. These subsidies, listed below, cause present adverse effects, in the form of serious prejudice, and a threat thereof, are prohibited, and are inconsistent with national treatment obligations, as detailed further in Section II below.⁴

² Minutes, DSB Meeting of 23 March 2012, WT/DSB/M/313, para. 79.

³ Panel Report, *US – Large Civil Aircraft (Second Complaint)*, particularly Section VIII.

⁴ The NASA and DoD programs and program elements listed below should be understood to include all NASA or DoD R&D programs and program elements included within the meanings of such terms as used by the European Union before the Original Panel in DS353, regardless of any prior or subsequent changes in titles, budgetary codes, or organizational structure.

A. NASA R&D Subsidies

8. Through the following programs (as reflected in NASA's annual Budget Estimates for Fiscal Years 1989 through 2013),⁵ as well as through contracts, assistance instruments, and other agreements (as modified) entered into under these programs, NASA maintains subsidies that presently benefit US LCA producers by providing Boeing with funding and access to government facilities, equipment, and employees for R&D applicable to the development, design, and production of LCA, as well as by providing Boeing with royalty-free use of the technologies developed with such funding and support or use of such technologies on preferential terms:

- Advanced Composites Technology;
- High Speed Research;
- Advanced Subsonic Technology;
- High Performance Computing and Communications;
- Aviation Safety Program;
- Quiet Aircraft Technology;
- Vehicle Systems;
- Research and Technology Base;
- Fundamental Aeronautics;
- Integrated Systems Research Program;
- Aeronautics Strategy and Management;
- Aeronautics Test Program;
- High-End Computing Program;⁶ and,
- Strategic Capabilities Assets Program.⁷

9. To the extent that they were not entered into pursuant to the programs listed above, NASA also maintains its subsidies by entering into and following the terms of the contracts and other agreements (as modified) with Boeing listed in Annex A of the United States' 23 September 2012 notification. Annex A of the 23 September 2012 notification is attached to this request, and the contracts listed therein are incorporated into this request.

10. Through these NASA programs, contracts, and other agreements, the US Government provides financial contributions within the meaning of Article 1.1(a)(1)(i)-(iii) on terms more favourable than would be available on the commercial market, which provide a benefit within the meaning of Article 1.1(b). These subsidies are specific within the meaning of Articles 1.2, 2.1, and 2.3 of the *SCM Agreement*.

⁵ See <http://www.nasa.gov/news/budget/index.html>; see also Panel Report, *US – Large Civil Aircraft (Second Complaint)*, Section VII.D.5.

⁶ See <http://www.hec.nasa.gov/index.html> (including the High-End Computing Capability project, see <http://www.nas.nasa.gov/hecc/>); see also, e.g., NASA Budget Estimates for FY 2013, at ES-2, 6 (Earth Sciences Account, Computing and Management Program).

⁷ See, e.g., NASA Budget Estimates for FY 2013, at CAS-28 (Cross-Agency Support Account); <http://scap.hq.nasa.gov/>.

B. Department of Defense R&D Subsidies

11. Through the DoD Research, Development, Test, and Evaluation (RDT&E) Program, as well as through contracts, assistance instruments, and other agreements (as modified) entered into under this program, the US DoD maintains subsidies that presently benefit US LCA producers by providing Boeing with funding and access to government facilities, equipment, and employees for R&D applicable to the development, design, and production of LCA on terms more favourable than would be available on the commercial market, as well as by providing Boeing with royalty-free use of the technologies developed with such funding and support or use of such technologies on preferential terms. The RDT&E Program, and the content thereof, is reflected in the annual DOD RDT&E Program Budget Justifications (Exhibits R-2) for Fiscal Years 1991 through 2013.⁸

12. In addition, through the following US Air Force, Navy, Army, and Defense-Wide program elements (PEs) of the RDT&E Program, as well as through contracts, assistance instruments, and other agreements (as modified) entered into under these PEs, the US DoD maintains subsidies that presently benefit US LCA producers by providing Boeing with funding and access to government facilities, equipment, and employees for R&D applicable to the development, design, and production of LCA on terms more favourable than would be available on the commercial market, as well as by providing Boeing with royalty-free use of the technologies developed with such funding and support or use of such technologies on preferential terms:

- A-6 Squadrons (PE 0204134N);
- Advanced Materials for Weapons Systems (PE 0603112F);
- Aerospace Avionics/Aerospace Sensors (PE 0602204F);
- Aerospace Flight Dynamics/Aerospace Vehicle Technologies (PE 0602201F);
- Aerospace Propulsion (PE 0602203F);
- Aerospace Propulsion and Power Technology (PE 0603216F);
- Aerospace Structures/Aerospace Technology Dev/Demo (PE 0603211F);
- Airborne Warning and Control System (AWACS) (PE 0207417F);
- Aviation Safety Technologies (PE 0606301D8Z);
- Aviation Survivability (PE 0603216N);
- AV-8B Aircraft (PE 0604214N);
- B-2 Advanced Technology Bomber (PE 0604240F);
- C-17 (PE 0401130F and PE 0604231F);
- Comanche (PE 0604223A);
- CV-22 (PE 0401318F);
- Defense Research Sciences (PE 0601102F);
- Dual Use Applications/Dual Use Science & Technology Program (PE 0602805F);
- F/A-18 Squadrons (PE 0204136N);

⁸ See <http://www.saffm.hq.af.mil/budget/> (Air Force); <http://www.finance.hq.navy.mil/FMB/13pres/BOOKS.htm> (Navy); <http://asafm.army.mil/offices/BU/BudgetMat.aspx> (Army); http://comptroller.defense.gov/defbudget/fy2013/budget_justification/index.html (Defense Wide); see also Panel Report, *US – Large Civil Aircraft (Second Complaint)*, Section VII.D.6.

- F-22 (PE 0604239F);
- Flight Vehicle Technology (PE 0603205F);
- Flight Vehicle Technology Integration (PE 0603245F);
- KC-10S (PE 0401219F);
- KC-46, Next Generation Aerial Refueling Aircraft (PE 0605221F);
- Joint Strike Fighter (PE 0603800F, PE 0603800N, PE 0603800E, PE 0604800F, and PE 0604800N);
- Long Range Strike Bomber (PE 0604015F);
- Manufacturing Technology/Industrial Preparedness Program⁹ (Air Force (PE 0603771F and PE 0708011F); Navy (PE 0708011N); Defense Logistics Agency (PE 0708011S); Defense Wide Manufacturing Science and Technology (PE 0603680D8Z))
- Materials (PE 0602102F);
- Materials and Biological Technology (PE 0602715E);
- Multi-Mission Maritime Aircraft (P-8A) (PE 0605500N);
- RDT&E for Aging Aircraft (PE 0605011F);
- Sustainment Science & Technology (PE 0603199F);
- Technology Transfer (PE 0604317F);
- Technology Transition (PE 0604858F); and
- V-22 (PE 0604262N).

13. To the extent that they were not entered into pursuant to the programs listed above, DoD also maintains its subsidies to US LCA producers by entering into and following the terms of the contracts and other agreements (as modified) with Boeing listed in Annex B of the United States' 23 September 2012 notification. Annex B of the 23 September 2012 notification is attached to this request, and the contracts listed therein are incorporated into this request.

14. Through these DoD programs, contracts, and other agreements, the US Government provides financial contributions within the meaning of Article 1.1(a)(1)(i)-(iii) on terms more favourable than would be available on the commercial market, which provide a benefit within the meaning of Article 1.1(b). These subsidies are specific within the meaning of Articles 1.2, 2.1, and 2.3 of the *SCM Agreement*.

C. Federal Aviation Administration R&D Subsidies

15. Through the Continuous Lower Emissions, Energy, and Noise (CLEEN) program,¹⁰ the US Federal Aviation Administration (FAA), in collaboration with NASA, maintains subsidies that presently benefit US LCA producers. Specifically, through the CLEEN program, the FAA provides Boeing with funding and access to government facilities, equipment, and employees for R&D applicable to the development, design, and production of LCA, as well as by providing Boeing with royalty-free use of the technologies developed with such funding and support, or

⁹ Established pursuant to 10 U.S.C. § 2521. All statutory citations herein refer to the provisions in force as of the date of this request in order to assist in identifying the precise measure, but are not intended to narrow the scope of the challenged measure as described by excluding earlier amended and other related statutory provisions.

¹⁰ See http://www.faa.gov/about/office_org/headquarters_offices/apl/research/aircraft_technology/cleen/.

use of such technologies on preferential terms. Such R&D support is authorized by 49 U.S.C. §§ 44501-44517, 48102, and periodic reauthorization legislation.

16. Through the CLEEN program, the US Government provides financial contributions within the meaning of Article 1.1(a)(1)(i)-(iii) on terms more favourable than would be available on the commercial market, which provide a benefit within the meaning of Article 1.1(b). These subsidies are specific within the meaning of Articles 1.2, 2.1, and 2.3 of the *SCM Agreement*.

D. Washington State and Local Subsidies

17. The State of Washington and its political subdivisions maintain the following subsidies presently benefiting Boeing:

- State B&O tax rate reduction for manufacturers of commercial aircraft, codified at Revised Code of Washington (RCW) 82.04.260(11);
- State B&O tax credits for preproduction/aerospace product development and property taxes, codified at RCW 82.04.4461, 4463;
- State sales and use tax exemptions for computer hardware, peripherals, and software, codified at RCW 82.08.975 and 82.12.975;
- City of Everett B&O tax reductions, codified at Everett Municipal Code 3.24.50, and;
- State B&O tax credits for leasehold excise taxes on covered buildings and land, pursuant to RCW 82.04.4463, as amended by Section 10 of House Bill 2466, 2006 Wash. Sess. Laws 787.

Through these measures, the State of Washington and its political subdivisions provide financial contributions within the meaning of Article 1.1(a)(1)(i)-(ii) of the *SCM Agreement*, that confer a benefit to Boeing within the meaning of Article 1.1(b) of the *SCM Agreement*. These subsidies are specific within the meaning of Articles 1.2, 2.1, and 2.3 of the *SCM Agreement*.

18. In addition, the State of Washington and its political subdivisions maintain the following subsidies presently benefiting Boeing through the:

- Establishment of a “Dreamlifter Operations Center” at Paine Field by Snohomish County, Washington, as reflected in Snohomish County Council Motion 12-062; and,
- Establishment of the “Joint Center for Aerospace Technology Innovation” to *inter alia* provide aerospace R&D-related funding, coordination, and training, codified at RCW Chapter 28B.155.

Through these measures, the State of Washington and its political subdivisions provide financial contributions within the meaning of Article 1.1(a)(1)(i)-(iii) of the *SCM Agreement*, that confer a benefit to Boeing within the meaning of Article 1.1(b) of the *SCM Agreement*. These subsidies are specific within the meaning of Articles 1.2, 2.1, and 2.3 of the *SCM Agreement*.

E. FSC/ETI Legislation and Successor Acts

19. The United States maintains tax exemptions and tax exclusions under FSC/ETI legislation and successor legislation presently benefiting Boeing, specifically, the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 § 5, Pub. L. No. 106-519, 114 Stat. 2423; the American Jobs Creation Act of 2004 § 101, Pub. L. No. 108-357, 118 Stat. 1418; and the Tax Increase Prevention and Reconciliation Act of 2005 § 513, Pub. L. No. 109-222, 120 Stat. 345. The United States maintains such tax exemptions and exclusions in accordance with Internal Revenue Service Office of the Chief Counsel Memorandum No. AM 2007-001, “Qualification for FSC benefits and ETI Exclusions”, dated 26 December 2006.

20. Through these measures, the United States provides financial contributions within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*, that confer a benefit to Boeing within the meaning of Article 1.1(b) of the *SCM Agreement*. These subsidies are specific within the meaning of Articles 1.2 and 2.3 of the *SCM Agreement*.

F. State of Kansas and City of Wichita Subsidies

21. The State of Kansas and the City of Wichita maintain state and local property and sales tax abatements, pursuant to K.S.A. §§ 79-201a, 79-3606(d), and 79-3640, that presently benefit Boeing in relation to the issuance of IRBs, pursuant to K.S.A. § 12-1741, by the City of Wichita.

22. Through these measures, the State of Kansas and the City of Wichita provide financial contributions within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*, that confer a benefit to Boeing within the meaning of Article 1.1(b) of the *SCM Agreement*. These subsidies are specific within the meaning of Articles 1.2, 2.1, and 2.3 of the *SCM Agreement*.

G. South Carolina State and Local Subsidies

23. The State of South Carolina and its political subdivisions, including the County of Charleston, maintain various subsidies for Boeing related to the production of LCA and LCA components at facilities in North Charleston, South Carolina, through two sets of incentives: (i) “Project Gemini” incentives, related primarily to the location, establishment, and operation of an additional final assembly line for the 787 at the Charleston International Airport; and (ii) “Project Emerald” incentives, related to the location, establishment, and operation of manufacturing facilities for 787 fuselage components on the same site.

i. Project Gemini-Related Subsidies

24. South Carolina and its political subdivisions maintain several subsidies related to Project Gemini presently benefitting Boeing:

- Provision of a long-term lease of government-owned land at preferential rates, pursuant to a ground lease agreement between the Charleston County Aviation Authority and South Carolina Public Railways, as amended, and a ground sublease agreement between South Carolina Public Railways and Boeing, as amended, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(ii)-(iii) of the *SCM Agreement*;

- Provision of facilities and infrastructure at the Charleston International Airport site, as provided for in the Project Gemini Agreement between Boeing and the State of South Carolina, dated 1 January 2010, funded through state general obligation bonds issued pursuant to Title 11, Chapter 41 of the S.C. Code, as amended by Section 5 of H3130, Act No. 124, 2009 S.C. Acts 1092 (H3130), and S.C. Code § 55-11-520, at no cost to Boeing, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(i) and (iii) of the *SCM Agreement*;
- Exemptions from state sales and use taxes for aircraft fuel, computer equipment, and construction materials, established by Sections 2, 3, and 4 of H3130, respectively, and codified at S.C. Code § 12-36-2120(9)(e) and (f), (65)(b), and (67), thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*;
- Reductions of state corporate income taxes through an income allocation and apportionment agreement, entered into pursuant to S.C. Code § 12-6-2320(B), as amended by Section 1 of H3130, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*;
- The provision of corporate income tax credits, as provided for in S.C. Code § 12-6-3360(E)(1), by virtue of designating the Boeing site in North Charleston as part of a business/industrial park jointly established and developed by Charleston County and Colleton County, South Carolina, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(i)-(ii) of the *SCM Agreement*;
- Property tax exemptions for Boeing's Large Cargo Freighters, pursuant to S.C. Code § 12-37-220(B)(33), as amended by Section 1 of H3482, Act No. 45, 2009 S.C. Acts 763, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*;
- Establishment of workforce recruitment, training and development programs for Boeing, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(i) and (iii) of the *SCM Agreement*; and,
- Property tax reductions under a fee-in-lieu-of taxes agreement between Charleston County and Boeing, dated 1 December 2009, as authorized by Title 12, Chapter 44 of the S.C. Code, including the provision of special source credits as provided for in such agreement, and authorized by S.C. Code § 4-1-175, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(i)-(ii) of the *SCM Agreement*.

ii. Project Emerald-Related Subsidies

25. South Carolina and its political subdivisions maintain the following subsidies related to Project Emerald presently benefitting Boeing:

- Provision of a long-term lease of government-owned land at below-market rates, pursuant to a ground lease agreement between the Charleston County Aviation Authority and South Carolina Public Railways, as amended, and a ground sublease agreement between South Carolina Public Railways and Boeing, as

amended, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(ii)-(iii) of the *SCM Agreement*;

- Provision of facilities and infrastructure at the Charleston International Airport site, as provided for in the Project Emerald Confidential Site Development Agreement, funded through state general obligation bonds issued pursuant to Title 11, Chapter 41 of the S.C. Code, at no cost to Boeing, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(i) and (iii) of the *SCM Agreement*;
- The provision of corporate income tax credits, as provided for in S.C. Code § 12-6-3360(E)(1), by virtue of designating the Project Emerald site at Charleston International Airport as part of a business/industrial park jointly established and developed by Charleston County and Colleton County, South Carolina, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(i)-(ii) of the *SCM Agreement*; and,
- Property tax reductions under a fee-in-lieu-of taxes agreement between Charleston County and Vought Aircraft Industries, Global Aeronautica, and Boeing, dated 19 December 2006, and assigned to Boeing on or about 10 February 2010, as authorized by Title 12, Chapter 44 of the S.C. Code, and provided for in the Project Emerald Confidential Site Development Agreement, including the provision of infrastructure credits as provided for in such agreement, and authorized by S.C. Code § 12-44-70, thereby providing a financial contribution within the meaning of Article 1.1(a)(1)(i)-(ii) of the *SCM Agreement*.

26. Through all of these Project Gemini-related measures and Project Emerald-related measures, the United States provides financial contributions within the meaning of Article 1.1(a)(1) of the *SCM Agreement*, that confer a benefit to Boeing within the meaning of Article 1.1(b) of the *SCM Agreement*. These subsidies are specific within the meaning of Articles 1.2, 2.1, 2.2, and 2.3 of the *SCM Agreement*.

27. In addition to the measures specifically listed above in Section I of this request, the European Union also considers that any amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures constitute specific subsidies.

II. Legal Basis

28. The European Union considers that, after the end of the implementation period, the United States maintains a series of subsidies, within the meaning of Article 1.1 of the *SCM Agreement* through each of the measures listed in Section I, above. Each of those measures provides a financial contribution within the meaning of Article 1.1(a)(1), as detailed further in Section I, and confers a “benefit” within the meaning of Article 1.1(b) by providing the financial contribution on terms more favourable than would be available on the commercial market. Those subsidies are specific, within the meaning of Articles 1.2 and 2 of the *SCM Agreement*, as detailed further in Section I.

29. Those specific subsidies presently benefit the development, production and sale of Boeing’s 737NG, 737 Max, 747, 767, 777 and 787 families of LCA, as well as any other future

derivatives of these LCA families, including of the 777. Collectively, and under the conditions of competition present in the LCA markets, the subsidies listed in items I.A to I.G cause present adverse effects, in the form of serious prejudice, and threat thereof, to EU interests, inconsistently with Articles 5(c), 6.3(a), 6.3(b) and 6.3(c), including Articles 6.4 and 6.5, of the *SCM Agreement*. The effects of those subsidies adversely impact sales, market shares and prices of Airbus' A320, A320neo, A330, A350XWB and A380 families of LCA. Specifically, the subsidies cause present serious prejudice, or threat thereof, to EU interests, in the form of: (i) displacement and impedance of EU imports into the United States, within the meaning of Article 6.3(a) of the *SCM Agreement*; (ii) displacement and impedance of EU exports to other third country markets, within the meaning of Article 6.3(b) of the *SCM Agreement* (including on the basis of Article 6.4 of the *SCM Agreement*); and, (iii) significant price undercutting, price suppression, price depression, and lost sales, within the meaning of Article 6.3(c) of the *SCM Agreement* (including on the basis of Article 6.5 of the *SCM Agreement*).

30. In addition, the subsidies provided through the measures listed in items I.A to I.G are contingent, in law or in fact, on actual or anticipated export performance, and accordingly, are inconsistent with Articles 3.1(a) (including footnote 4) and 3.2 of the *SCM Agreement*

31. Moreover, the subsidy measures listed in items I.A to I.G are contingent, in law or in fact, on the use of domestic over imported goods, such that they are, accordingly, inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.

32. Through those same measures listed in items I.A to I.G above, the United States accords treatment less favourable to imported products than that accorded to like products of US origin, in law or in fact, inconsistently with Articles III:4 of the *GATT 1994*, and maintains internal quantitative regulations that require, directly or indirectly, that specified amounts or proportions of products be supplied from domestic sources, in law or in fact, inconsistent with Article III:5 of the *GATT 1994*. Moreover, the United States otherwise applies such regulations in a manner contrary to the principles set forth in paragraph 1 of Article III, including the principle that such laws, regulations and requirements and internal quantitative regulations should not be applied to imported or domestic products so as to afford protection to domestic production.

* * *

33. The European Union asks that this request for the establishment of a panel be placed on the agenda for the next meeting of the DSB, which is scheduled to take place on 23 October 2012.

34. The European Union requests that the Panel be established in accordance with Articles 4.4 and 7.4 of the *SCM Agreement* and Article 21.5 of the *DSU*, and with the standard terms of reference set out in Article 7 of the *DSU*. The European Union recalls that Article 21.5 of the *DSU* provides that this matter shall be decided through recourse to the *DSU*, including wherever possible resort to the original panel.

35. The European Union further requests that the DSB, together with the establishment of the Panel, initiate the procedures provided in Annex V of the *SCM Agreement*, as required by paragraph 2 of that Annex. The European Union recalls that the DSB "shall" initiate these

procedures, as required by paragraph 2 of Annex V, and that such DSB action occurs automatically when there is a request for initiation of an Annex V procedure and the DSB establishes a panel, as clarified by the Appellate Body in *US – Large Civil Aircraft*.¹¹

36. The European Union would like to indicate, in conformity with paragraphs 1 and 3 of Annex V, that the market considered relevant by the European Union is a world market. In order to obtain sufficiently representative data to resolve this dispute while at the same time avoiding unnecessary burdens on other WTO Members, the European Union intends to address questions under the Annex V procedure to the United States and the following third-country Members:

Australia; Bahrain; Brazil; Canada; China; Chile; Egypt; Ethiopia; Hong Kong; Iceland; India; Indonesia; Japan; Jordan; Kenya; South Korea; Malaysia; Morocco; Mexico; New Zealand; Nigeria; Norway; Oman; Panama; Qatar; Russian Federation; Saudi Arabia; Singapore; Turkey; Ukraine; United Arab Emirates

37. The European Union is initiating consultations with the United States concerning the designation of a facilitator (other than the Chairman of the DSB) pursuant to paragraph 4 of Annex V of the *SCM Agreement*. The European Union considers that there would not be any reason to object to a proposal to have resort to the original facilitator in DS316 and DS317, if available. On the date of circulation of this Request for Panel Establishment and Initiation of an Annex V Procedure, there is no agreement concerning the identity of a facilitator other than the Chairman of the DSB. Should such agreement be forthcoming prior to the DSB meeting at which the Panel is established and the Annex V procedure initiated, the European Union intends to request that the DSB designate the agreed person as the Facilitator. In the absence of such agreement, and if no other person is designated, the European Union recalls that, as the representative of the DSB, the Chairman is responsible for discharging the function of facilitating an Annex V procedure until such time as that function is delegated through the DSB's designation of another individual as the Facilitator pursuant to paragraph 4 of Annex V.¹²

¹¹ Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, paras. 508-549, particularly paras. 524, 532 and 549 ("... 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 initiation of an Annex V procedure and the DSB establishes a panel."), ("The function assigned to the DSB under paragraph 2 of Annex V is executory in nature, and is automatically discharged by it once the two specified conditions precedent are fulfilled."), ("... we have interpreted paragraph 2 of Annex V to the *SCM Agreement* to mean that 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.").

¹² Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 521: ("... as the representative of the DSB, the Chairman is in principle responsible for discharging the function of facilitating an Annex V procedure until such time as that function is delegated through the DSB's designation of another individual as a facilitator pursuant to paragraph 4 of Annex V.").

Annex A

NAS1-11668	NAS1-20341	E3104D	NNC10CA40C
NAS1-15148	NAS1-20342	L70828D	NNC10CA40C
NAS1-18862	NAS1-99150	L71159D	NNC11CA12C
NAS1-18889	NAS2-10955	L71310D	NNC11CA20C
NAS1-20546	NAS2-11250	L71543D	NNC11QA17P
NAS1-20090	NAS2-11485	NAS1-00106	NNC11VA99P
NAS1-20103	NAS2-11966	NAS1-01057	NNC12CA05C
NAS1-20267	NAS2-12393	NAS2-12468	NAS4-00041
NAS1-20268	NAS2-12876	NCC1-287	NND07AA08B
NAS1-97040	NAS2-12913	NCC1-343	NND08AA66C
NAS3-25965	NAS2-13070	NNL05AA36C	NND11AG03C
NAS3-27018	NAS2-13312	NNL06AA63T	NND11AQ73C
NAS3-27238	NAS2-13625	NAS1-00092	NNL09AB50T
NAS1-15325	NAS2-14181	NAS1-99070	NNL10AC38T
NAS1-17145	NAS3-25421	NAS3-25447	NNL06AA04B
NAS1-17147	NAS3-25454	NNL04AA29C	NNL06AG30P
NAS1-18027	NAS3-25796	NNL04AA30C	NNL07AA03A
NAS1-18028	NNA06BC41C	NNL04AA36C	NNL07AA44C
NAS1-18037	NAS2-14096	NNL05AB29T	NNL07AA48C
NAS1-18377	NAS2-14090	NNA06BC41C	NNL07AA54C
NAS1-18378	NAS2-14091	NNA08BA33C	NNL08AA02B
NAS1-18574	NCC1-388	NNA09DA56C	NNL08AA16B
NAS1-18586	NAS1-19245	NNC07CB38C	NNL10AA00B
NAS1-18762	NAS1-19345	NNC07CB76C	NNL10AA05B
NAS1-18763	NAS1-19349	NNC08CA47C	NAS2-01064
NAS1-18954	NAS1-19360	NNC08CA70C	NND08AA04P
NAS1-19060	NAS1-19568	NNC08CA81C	NNL10AA05B
NAS1-19184	NAS1-20013	NNC08CA88C	
NAS1-19703	NAS1-20220	NNC08CA93C	
NAS1-20014	NAS3-25446	NNC09CA32C	
NAS1-20095	NAS3-25963	NNC10AA02A	
NAS1-20096	NAS1-00086	NNC10AA03A	
NAS1-20275	NNL04AA11B	NNC10BA05B	

Annex B

F33615-95-2-5562	F33615-00-2-5203	F33615-03-2-1403
F33615-96-2-5618	F33615-00-2-5208	F33615-03-2-2306
N00019-96-H-0118	F33615-00-2-5900	F33615-03-2-3300
F33615-97-2-3220	F49620-00-2-0384	F33615-03-2-3304
F33615-97-2-3400	MDA972-00-3-0007	F33615-03-2-5201
F33615-97-2-3407	N00014-00-3-0004	F33615-03-2-5202
F33615-97-2-3805	N00014-00-3-0019	F33615-03-2-6316
F33615-97-2-5153	N00421-00-3-0123	F33615-03-2-6318
DAAH10-98-2-0003	DAAH10-01-2-0005	MDA972-03-2-0003
F33615-98-2-5113	F29601-01-2-0042	FA8650-04-2-3449
F33615-98-3-5103	F29601-01-2-0045	FA8650-04-2-5000
F33615-98-3-5104	F33615-01-2-3101	W911NF-04-2-0039
N00014-98-3-0022	F33615-01-2-3110	FA8650-05-2-3503
DAAH10-99-2-0003	F33615-01-2-3152	FA9550-05-2-0001
F29601-99-2-0149	F33615-01-2-5204	W911W6-05-2-0006
F33615-99-2-5100	F33615-01-2-5206	FA8650-08-2-3834
F33615-99-2-5501	F33615-01-2-5213	N00173-08-2-C009
N00014-99-3-0011	N00421-01-3-0098	W991W6-08-2-0014
N00014-99-3-0012	F04611-02-2-0003	HR0011-10-2-0001
N00014-99-3-0017	F33615-02-2-3220	FA8650-11-2-1187
F33615-00-2-1717	F33615-02-2-3251	FA8650-11-2-213
F33615-00-2-3000	F33615-02-2-6037	
F33615-00-2-3002	DAAH10-03-2-0002	

