World Trade Organization

AS DELIVERED

United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)

Recourse to Article 21.5 of the DSU by the European Union

(DS353)

Oral Statement of the European Union

Geneva
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I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, in September 2007 – that was six years ago – we first appeared before you to explain that the United States ("US") Government had provided billions of dollars in subsidies to the US large civil aircraft ("LCA") industry through a series of measures carefully designed to enhance Boeing's competitiveness, and in turn, to harm Airbus. You agreed. And the Appellate Body generally upheld these findings, although with some significant differences in legal interpretation and analysis. In several instances, the Appellate Body's legal interpretation expanded the group of US subsidies that were considered, or should be considered, to cause adverse effects to Airbus, including through its findings on the collective assessment of the effects of the subsidies, and on the proper approach to analysing "financial contribution" under Article 1.1 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*").

2. We also explained that these subsidies have, to a large extent, been responsible for the success of Boeing LCA programmes, most notably the launch of the 787. Again, you agreed, finding that "the aeronautics {research & development ("R&D")} subsidies contributed in a genuine and substantial way to Boeing's development of technologies for the 787 and that, in light of the conditions of competition in the LCA industry, these subsidies conferred a competitive advantage on Boeing".[1] Similarly, you found that "absent the aeronautics R&D subsidies, Boeing would not have been able to launch an aircraft incorporating all of the technologies that are incorporated on the 787 in 2004, with promised deliveries commencing in 2008".[2] Again, the Appellate Body upheld these findings in the face of multiple challenges from the United States.[3] Likewise, both you and the Appellate Body found, although on different reasoning, that other US subsidies enabled Boeing to price its LCA lower than it otherwise would, absent those subsidies, and in doing so, cause adverse effects with respect to closely

[1] Panel Report, *US – Large Civil Aircraft*, para. 7.1773.

[2] Panel Report, *US – Large Civil Aircaft*, para. 7.1775

[3] Appellate Body Report, *US – Large Civil Aircaft*, paras. 1012, 1036, 1040, and 1350.

competing Airbus LCA.[4] Unfortunately, despite the rulings and recommendations of the Dispute Settlement Body ("DSB"), the situation faced by the European Union ("EU") and Airbus as a result of the US subsidies has not been remedied, but has instead *worsened*.

3. Before proceeding any further, let me first thank the Panel and the Secretariat for their time and effort in helping to resolve the compliance phase of this highly complex dispute. Because we have already detailed our evidence and legal arguments in over 1,400 pages of written submissions and over 1,000 exhibits, and given that the US Second Written Submission was largely repetitive of its First Written Submission, we will not now endeavour to provide a lengthy exposition of what has already been said. Instead, we will highlight key affirmative points, and respond to certain new legal and factual arguments appearing for the first time in the US Second Written Submission. The fact that we do not address certain points raised by the United States today does not signify acceptance, but instead the goal of allowing the Panel to ask the questions that you believe are most important.

4. In our written submissions, we have explained that the 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. Between 2007 and 2012, the US measures at issue have provided nearly $6 billion for Boeing's LCA division,[5] and that is in addition to the at least $5.3 billion that the United States provided between 1989 and 2006.[6]

5. And, Mr. Chairman, new evidence of the United States' disregard for the DSB's rulings and recommendations seems to appear on a regular basis. For example, in April *2013*, the National Aeronautics and Space Administration ("NASA") budget request announced that "NASA's innovative research supports the U.S. aviation industry's efforts to *maintain competitiveness in a global market*",[7] or in other

[4] Panel Report, *US – Large Civil Aircraft*, paras. 7.1818-7.1823, 8.3(a)(ii)-(iii); Appellate Body Report, *US – Large Civil Aircraft*, para. 1260, 1274, 1347-1348, 1350(d)(iii)-(iv).

[5] *See* Summary of Subsidies to Boeing's LCA Division (exhibit EU-35).

[6] *See* Panel Report, *US – Large Civil Aircraft*, para. 7.1433.

[7] NASA Programme Budgets for FY 2014, pp. SUM-3, SUM-8 to -9 (exhibit EU-1015) (emphasis added).

words to help Boeing compete with Airbus. And, earlier this month, rather than announcing a plan to *terminate* the Washington State Business & Occupation ("B&O") tax rate reductions that have already been found by this panel and the Appellate Body to be specific subsidies causing adverse effects, Governor Jay Inslee announced his desire to *extend this incentive*, which is currently set to expire in 2024, until the year 2040 in order to expand the benefits of this "proven incentive" through the life of the Boeing 777X.[8] Again, these are not the actions of a World Trade Organization ("WTO") Member taking its international obligations seriously.

6. Our statement now discusses, first, an outstanding issue relating to the scope of these proceedings, pursuant to the Panel's inquiry. Then, we address several important issues related to the European Union's demonstration that the federal, state, and local measures at issue continue to provide "specific subsidies" within the meaning of Articles 1 and 2 of the *SCM Agreement*, followed by a brief discussion of the European Union's prohibited subsidy claims pursuant to Part II of the *SCM Agreement*. We conclude by returning to our previous showing that the non-withdrawn and additional subsidies to Boeing continue to cause adverse effects to the interests of the European Union, a showing which the United States has failed to refute.

II. SCOPE

7. We now turn to the question of "scope". The Panel has requested that the Parties discuss certain issues in their oral statements, including the scope of these compliance proceedings. Specifically, the Panel has requested 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, particularly in view of the Appellate Body Report in the original proceedings.[9]

[8] *See* Remarks by Governor Jay Inslee, Governor's Aerospace Conference, 2 October 2013, p. 12, *available at* http://www.governor.wa.gov/news/speeches/20131002_aerospace.pdf (exhibit EU-1258).

[9] Communication from the Panel dated 25 September 2013 ("List of pre-meeting issues for the parties"), at first bullet point.

8. To recall what happened in the original proceedings, the 23 DOD PEs and the instruments funded under them were all before the original panel. The original panel considered that purchases of services are not financial contributions within the meaning of Article 1.1(a) of the *SCM Agreement*.[10] It considered contracts where the US government is the principal beneficiary and user to be purchases of services.[11] On this basis, the panel found NASA procurement contracts and DOD assistance instruments to be financial contributions, but DOD procurement contracts to be purchases of services.[12] Thus, with respect to the DOD procurement contracts, the original panel made no additional findings under Part I of the *SCM Agreement*; and no findings concerning adverse effects, including causation.[13] Furthermore, before the original panel, the United States contested each one of these elements.[14]

9. The European Union appealed the finding that purchases of services are not financial contributions, whilst the United States appealed the finding that NASA procurement contracts and DOD assistance instruments are financial contributions.[15] As we know, the Appellate Body adopted a different approach. It characterised the relevant measures as akin to a species of joint venture providing transfers of funds analogous to equity infusions, together with goods and services, and thus caught by Article 1.1(a)(1) of the *SCM Agreement*.[16] It stated that this rendered both appeals moot.[17] It also declared moot the original panel's finding that DOD procurement contracts are purchases of services and excluded from

[10] Panel Report, *US – Large Civil Aircraft*, paras. 7.953-7.970.

[11] Panel Report, *US – Large Civil Aircraft*, para. 7.978.

[12] Panel Report, *US – Large Civil Aircraft*, paras. 7.979-7.1027 and 7.1136-7.1171.

[13] *See, e.g.*, Panel Report, *US – Large Civil Aircraft*, para. 7.1186; Section VII.F (adverse effects and causation).

[14] Panel Report, *US – Large Civil Aircraft*, paras. 7.1177-7.1181 and 7.1191-7.1192 (subsidy issues); Section VII.F, paras. 7.1624-7.1642 (adverse effects and causation).

[15] Appellate Body Report, *US – Large Civil Aircraft*, paras. 54-61 and 130-148.

[16] Appellate Body Report, *US – Large Civil Aircraft*, paras. 597, 609 and 612-620.

[17] Appellate Body Report, *US – Large Civil Aircraft*, para. 590.

Article 1.1(a)(1).[18] However, the Appellate Body did not complete the analysis, observing that *neither* party had requested it to do so.[19]

10. To also recall the US scope argument, according to the United States, there is a legal principle that complaining Members are generally precluded from raising claims in compliance proceedings that could have been pursued in the original proceedings, but were not. On this basis, the United States argues 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.[20]

11. In developing its latest arguments, the United States specifically refers to Article 4.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), which relates to consultations.[21] Article 4.3 of the DSU contains certain conditions in which a panel request may be made. If the conditions are not satisfied, the matter will still be within the terms of reference within the meaning of Article 7 of the DSU (because it will be in the panel request), but a panel may find that, because of the procedural defect, it does not have the authority to rule on the substance. The United States also refers to Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (that is the "*Anti-Dumping Agreement*"), which is a special or additional rule also relating to terms of reference in the field of anti-dumping.[22] Finally, the United States refers to Article 21.5 of the DSU, which includes the phrase "as to the existence".[23] However, in doing so, the United States seeks to obscure and ignore the fact that Article 21.5 captures two types of existence disputes: disputes about whether or not a measure (whether act or omission) exists; and disputes about whether or not a particular measure *should* exist.[24] In this case,

[18] Appellate Body Report, *US – Large Civil Aircraft*, footnote 1298.

[19] Appellate Body Report, *US – Large Civil Aircraft*, footnote 1298.

[20] First Written Submission of the United States ("US FWS"), paras. 64-66; Second Written Submission of the United States ("US SWS"), para. 55.

[21] US SWS, para. 11.

[22] US SWS, para. 11.

[23] US SWS, para. 11.

[24] Second Written Submission of the European Union ("EU SWS"), paras. 31-32.

there is clearly a dispute between the European Union and the United States about whether or not compliance measures *should* exist with respect to the DOD procurement contracts. This matter therefore falls squarely within the scope of these compliance proceedings. Thus, the US reference to these other provisions, Article 4.3 of the DSU and Article 17 of the *Anti-Dumping Agreement*, *only serves to make the point for the European Union*: what is the source, *in the text of the covered agreements*, for the alleged US legal principle and its application in this case? Because it is certainly not Article 17 of the *Anti-Dumping Agreement*, nor Article 4.3 or 21.5 of the DSU.

12. Through a process of elimination, we have demonstrated that the issue is not one of general jurisdiction or terms of reference within the meaning of Article 7 of the DSU, and that there is no general doctrine of *res judicata* or *non liquet* in WTO law.[25] The United States has not disagreed with that showing.[26] Rather, the US arguments flow from the *EC – Bed Linen (Article 21.5 – India)* case.[27] The European Union does not take issue with the findings in that case. If, as in that case, all of the four relevant variables are held constant (that is, the law and its clarification; the measure; the facts and the evidence; and the separability of the measure from other measures within the scope of the compliance proceedings) then there is effectively no scope in practice for fruitful dispute settlement, unless the relevant WTO adjudicatory body is going to reverse the existing case law.

13. However, we have also explained that if one or more of these four conditions is not satisfied, the reasoning in *EC – Bed Linen (Article 21.5 – India)* does not apply.[28] That is the case here, because the relevant law was clarified by the original Appellate Body Report, and the measures are inseparable from other measures that the US does not contest are within the scope of these compliance proceedings.[29] Furthermore, we point out that *EC – Bed Linen (Article 21.5 – India)* was

[25] EU SWS, paras. 15-26.

[26] US SWS, Section I.A.

[27] EU SWS, paras. 33-40; US SWS, Section I.A.

[28] EU SWS, paras. 33-40.

[29] EU SWS, paras. 117 and 15-50.

distinguished in each and every one of the relevant cases that followed.[30] Most importantly, the Appellate Body has ruled that *it does not capture situations where the Appellate Body was unable to complete the analysis*.[31]

14. Finally, the European Union has further explained why the US submission, apart from being inconsistent with the Appellate Body's case law on this matter, is incorrect. The completion of the analysis is an inherent power of the Appellate Body that need not be included in notices of appeal or requested by a party. Furthermore, *the Appellate Body cannot make findings of fact.*[32] We challenged the United States to point to where, in the record of the original proceedings, there are findings with respect to DOD procurement contracts, either under Part I of the *SCM Agreement*, or with respect to adverse effects, including causation[33] – a challenge we were happy to issue because, evidently, there are no such findings, *and any such findings as were made were expressly stated by the Appellate Body to be moot*.[34] The only US response is the puff that the European Union has not engaged with the US arguments,[35] when clearly we have, at some considerable length.

15. In these circumstances, the European Union fully understands the compliance Panel's perplexity and its invitation to the United States to clarify its position. The response is a simple one (or at least should be): the European Union pursued this matter before the Appellate Body to the greatest extent possible, and the original panel's findings were vacated, that is, declared moot. If the US were to prevail on this ground, such a distinction between DOD procurement contracts and assistance instruments *would be anything but moot – it would be determinative* of a large

[30] EU SWS, paras. 39-40 and 48-50.

[31] EU SWS, para. 39. Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210 ("Brazil's claims … were not resolved on the merits in the original proceedings, because the Appellate Body was unable to complete the analysis … Thus allowing Brazil's claims in this case would not raise the due process concerns identified by the United States. Brazil is not unfairly getting a "second chance" to make a case that it failed to make out in the original proceedings …").

[32] EU SWS, paras. 41-47.

[33] EU SWS, paras. 41-47.

[34] Appellate Body Report, *US – Large Civil Aircraft*, para. 590 and footnote 1298.

[35] US SWS, para. 65.

portion of the EU claims against the US DOD RDT&E Program, involving billions of dollars in subsidies to Boeing.

16. In concluding on this point, it is important to recall the circumstances that substantially determined the quality of the factual and evidential record before the original panel. Specifically, the United States unlawfully failed to co-operate in the original Annex V proceedings,[36] as it again failed to co-operate in the Annex V proceedings associated with these compliance proceedings.[37] This was a point that the European Union had occasion to make many times during the appeal proceedings. Having deprived the original panel of facts and evidence, the United States then sought to raise on appeal a series of issues that were Article 11 DSU claims in disguise. The European Union explained that this behaviour of seeking to profit from its own failure to co-operate was completely unacceptable.[38] The point was not lost on the Appellate Body, which dismissed substantially all of the US appeals. The same point applies with equal force here. Having unlawfully denied the original panel the facts and evidence necessary to make the findings that would have permitted the Appellate Body to complete the analysis, the United States cannot fault the European Union for something that resulted from the US' own unlawful actions. And in any event, this US complaint, as well as being unfounded, simply fails to connect with *any* legal basis in *any* covered agreement capable of supporting the US assertion that the compliance Panel is prohibited from addressing the substance of the EU claims relating to these DOD procurement contracts.

17. Of course, we have not yet heard the US oral statement. However, we fully expect more of the same and nothing new. In these circumstances, we request the compliance Panel to reject the US request, and proceed to rule on the substance of the claims and arguments that have been placed before it. And my colleague will now continue.

[36] Appellate Body Report, *US – Large Civil Aircraft*, Section V.

[37] Procedural Ruling of the Compliance Panel dated 26 November 2012.

[38] For example, Appellate Body Report, *US – Large Civil Aircraft*, para. 545.

III. SUBSIDY PROGRAMMES

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

18. Moving to the subsidy programmes, we will start our discussion with the NASA, DOD and FAA R&D programmes. The European Union has demonstrated in great detail how it is "business as usual" at NASA and DOD, where the R&D programmes continue to provide billions of dollars of funding and support to Boeing in exchange for very little. And the FAA now works through its Continuous Lower Energy, Emissions, and Noise (known as "CLEEN") programme, in conjunction with NASA and Boeing, to develop even nearer term LCA technologies that Boeing can even more quickly bring to market.

19. Despite the US assertions that NASA has "overhaul{ed}" its practices for conducting aeronautics R&D and increased public dissemination of the results,[39] the European Union has demonstrated, with the help of NASA, itself, that this is simply not the case. 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",[40] and continues to undertake new efforts intended to "boost American industry and help maintain a U.S. global leadership in the field of composite materials and aircraft manufacturing".[41] It has not changed its policy of providing patent rights to Boeing for valuable LCA technologies, and it allows Boeing to limit access to the results of the R&D through various restrictions and delays on dissemination.

20. The DOD continues to provide billions of dollars in R&D funding and support that benefits Boeing's LCA development, and has abandoned its (apparently unsuccessful)[42] 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

[39] US SWS, para. 93.

[40] NASA Programme Budgets for FY 2014, p. SUM-3, SUM-8 to -9 (exhibit EU-1015).

[41] NASA Programme Budgets for FY 2014, p. SUM-9 (exhibit EU-1015).

[42] US SWS, para. 325.

technology is transferred";[43] it did so in order to "assist the U.S. defense industry to be more competitive on a global basis".[44]

21. As for the centrepiece of the United States' declared measures taken to comply, Boeing has donated a license right to the US Government for a limited number of patents that it knows the US Government can not use; and the US Government has received an "unconditional donation{} of intangible property"[45] that is entirely worthless to the US Government. That is because the US Government simply does not "use, make, offer for sale, sell, and import" technologies and products "for a commercial purpose".[46] In other words, the US Government is not in the business of making or selling aircraft-related products for commercial sale. Moreover, for the US Government to make use of these license rights by going into the business of producing commercial aircraft and components, it would require an Act of the US Congress authorising such an endeavour and an appropriation of funds for the necessary costs of "starting up" a new business. Such Congressional statutory authorisation is not part of the US implementation measure.

22. Even if it wished to, the US Congress could not authorise the US Government to commercially manufacture, distribute, or sell aviation products, as it would violate the US Constitution. According to the US Supreme Court, "the Federal {G}overnment is acknowledged by all to be one of enumerated powers".[47] This "means that {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.[48] No power enumerated in Article I authorises the US Government to compete incommercial aviation markets. Under the Commerce Clause of Article I,

[43] 48 C.F.R. § 271.002(a) (1989) (emphases added) (exhibit EU-275).

[44] Final Rule, Recoupment of Nonrecurring Costs on Sales of US Items, 58 FR 16497, 29 March 1993 (exhibit EU-279).

[45] NASA-Boeing Subject Invention and Patent License Agreement (exhibit EU-251) (BCI), p. 1 (first "Whereas" clause). *See also* DOD-Boeing Supplemental Subject Invention and Patent License Agreement (exhibit EU-401) (BCI).

[46] NASA-Boeing Subject Invention and Patent License Agreement, Section 2(a) (exhibit EU-251) (BCI), Section 2(a); DOD-Boeing Supplemental Subject Invention and Patent License Agreement, Section 1(a) (exhibit EU-401) (BCI) (underlining added).

[47] *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819)) (internal quotations omitted) (exhibit EU-1259).

[48] *Id*. (quoting *United States v. Morrison*, 529 U.S. 598, 607 (2000)) (internal quotations omitted).

Congress has broad authority "{t}o *regulate* Commerce with foreign Nations, and among the several States, and with the Indian Tribes".[49] But, as the Supreme Court has held on multiple occasions, including as recently as last year, Congress's authority to "regulate" commerce does not empower the US Government to engage in commerce itself. The Commerce Power is simply "the power to *prescribe the rule* by which commerce is to be governed".[50] That "power to *regulate* commerce presupposes the existence of commercial activity to be regulated", and does not "include the power to create" or engage in commercial activities.[51]

23. No other constitutional provision vests the US Government with the authority to manufacture, distribute, or sell aviation products for commercial gain. Congress has the ancillary authority under the Necessary and Proper Clause of Article I of the Constitution to enact legislation "necessary and proper for carrying into Execution" the powers specifically enumerated in the Constitution.[52] But, as the Supreme Court has explained, any law authorised by this Clause must be "reasonably adapted" and "rationally related to the implementation of a constitutionally enumerated power".[53] In other words, the Clause simply authorises Congress to pass laws necessary for "execut{ing}" its enumerated powers;[54] a federal law cannot be constitutional if the "links between {it} and an enumerated Article I power" are "too attenuated".[55] Here, there is no conceivable "link" between the US Government's participation in the commercial aviation market and any Article I power.

24. Before addressing other R&D subsidy-related issues, we recall the Panel's request that we address the implication for this dispute of the Appellate Body Report in

[49] U.S. CONST., art. I, § 8, cl. 3 (emphasis added) (exhibit EU-1260).

[50] *Nat'l Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2586 n.4 (2012) (opinion of Roberts, C.J.) (emphasis added, internal quotations omitted) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 196 (1824)) (exhibit EU-1261).

[51] *Id.* at 2586.

[52] U.S. CONST. art. I, § 8, cl. 18 (exhibit EU-1260).

[53] *Comstock*, 130 S. Ct. at 1956 (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004)) (internal quotations omitted) (exhibit EU-1259).

[54] *Nat'l Federation*, 132 S. Ct. at 2591 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960)) (internal quotations omitted) (exhibit EU-1261).

[55] *Comstock*, 130 S. Ct. at 1963 (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)) (exhibit EU-1259).

Canada – Feed-in Tariff Program, concerning the analysis of "financial contribution" and "benefit".[56] With respect to financial contribution, the Appellate Body Report in *Canada – Feed-in Tariff Program* is fully consistent with the Appellate Body Report in the present dispute, as both found that a panel "must assess whether the measure may fall within any of the types of financial contributions set out in" Article 1.1(a)(1).[57] In *Canada – Feed-in Tariff Program*, the Appellate Body also explained that "different aspects of the same transaction may fall under different types of financial contribution",[58] which is consistent with the Appellate Body's finding in this dispute that the same transaction (*i.e.*, R&D contracts and agreements) involved *both* "direct transfer of funds" and "provision of goods and services".[59] Despite the US contentions to the contrary,[60] there is nothing in the *Canada – Feed-in Tariff Program* 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"). Indeed, the Appellate Body Report in this dispute stands for precisely the *opposite position* – that this is simply not a relevant consideration.[61] Thus, once this Panel properly finds that the challenged R&D measures fall within the scope of Article 1.1(a)(1)(i) and (iii), the analysis of "financial contribution" can end.

25. With respect to benefit, the Appellate Body Report in *Canada – Feed-in Tariff Program* is likewise fully consistent with the approach taken by the Appellate Body in this dispute, as well as with the European Union's own "benefit" analysis. There is no need to consider whether a "purchase of services" confers a "benefit", when a measure is found to qualify as a "direct transfer of funds" and a provision of "goods and services". As the Appellate Body stated in *Canada – Feed-in Tariff*

[56] List of pre-meeting issues for the parties, at second, third, and fourth bullet points.

[57] Appellate Body Report, *Canada – Feed-in Tariff Program*, para. 5.120. *See also* Appellate Body Report, *US – Large Civil Aircraft*, para. 589.

[58] Appellate Body Report, *Canada – Feed-in Tariff Program*, para. 5.120.

[59] Appellate Body Report, *US – Large Civil Aircraft*, paras. 624-625.

[60] US SWS, para. 216.

[61] Appellate Body Report, *US – Large Civil Aircraft*, paras. 588-589, 620.

Program, "the characterization of a transaction under Article 1.1(a) of the SCM Agreement may have implications for the manner in which the assessment of whether a benefit is conferred is to be conducted".[62] Here, as the R&D measures at issue are properly characterised under Article 1.1(a)(1)(i) and (iii), the US contentions about how a "benefit" analysis should be performed if the measure were also characterised as a purchase of services, are simply irrelevant.

26. Additionally, the US reliance on the Appellate Body's brief mention of "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.[63] Unlike the scenario considered in *Canada – Feed-in Tariff Program*, there is no purchase of goods resulting from the R&D contracts or agreements. Even if there were a purchase of goods (or services), the Appellate Body in this dispute has already rejected the US reliance on "competitive bidding" as something that eliminates the benefit in the context of R&D contracts or agreements commissioned by the US Government.[64] Moreover, although the Appellate Body, in *Canada – Feed-in Tariff Program*, references a possible "price-discovery mechanism" that may ensure a market outcome,[65] this involved consideration of a competitive market for the supply of a fungible commodity. Such a competitive market does not exist here, in the context of NASA, DOD, and FAA R&D contracting.

27. Next, the Panel has asked us to address the relevance of the characteristics of the NASA procurement contracts and DOD assistance instruments identified by the Appellate Body for evaluating financial contribution for additional R&D measures.[66] In this regard, the Appellate Body has explained that a panel must scrutinize the measures at issue, with respect to design, operation, and the principal characteristics.[67] Here, the characteristics of the NASA procurement contracts and

[62] Appellate Body Report, *Canada – Feed-in Tariff Program*, para. 5.130.

[63] Appellate Body Report, *Canada – Feed-in Tariff Program*, para. 5.228; *cf.* US SWS, paras. 236-237.

[64] Appellate Body Report, *US – Large Civil Aircraft*, paras. 665-666.

[65] Appellate Body Report, *Canada – Feed-in Tariff Program*, para. 5.228.

[66] List of pre-meeting issues for the parties, at third bullet point.

[67] Appellate Body Report, *Canada – Feed-in Tariff Program*, para. 5.120; Appellate Body Report, *US – Large Civil Aircraft*, para. 589.

DOD assistance instruments before the original panel are highly relevant to the analysis of the R&D measures before this Panel, because the principal characteristics, design, and operation are essentially the same, as detailed in the EU's written submissions.[68] As such, the findings that they constitute financial contributions within the meaning of Article 1.1(a)(1)(i) and (iii) flow directly from the Appellate Body's analysis of the NASA procurement and DOD assistance instruments. While there are *some* differences, they are not material to the overall analysis, and do not change the design, operation, and principal characteristics. Notably, the Appellate Body also found differences between the NASA procurement contracts and DOD assistance instruments *that it considered*, but nevertheless found that both types of arrangements were "akin to a species of joint venture" involving equity infusions.[69]

28. With respect to the Panel's inquiry as to the relevance of the evidence relied upon by the Appellate Body in completing the analysis of "benefit" for the R&D subsidies,[70] the answer is similar. The Appellate Body's evidence for completion of analysis is highly relevant, because the other aeronautics R&D measures before this compliance Panel have the same principal characteristics and confer a benefit in the same way as the NASA procurement contracts and DOD assistance instruments. In turn, the market-based comparison performed by the Appellate Body is relevant. That said, this Panel may consider additional evidence provided to establish a market benchmark for the additional R&D subsidies, and such evidence has indeed been submitted by both parties.

29. In particular, the United States has now attempted to support its "benefit" arguments with a new statement by Louis Berneman, submitted with its Second Written Submission.[71] Surprisingly, the "new" R&D agreements that Berneman introduces in considering the market benchmark are from the years 1986 through

[68] *See* EU SWS, paras. 444-449, 455-458.

[69] *See* Appellate Body Report, *US – Large Civil Aircraft*, paras. 611,623. *Compare id.*, paras. 593-597 (NASA procurement contracts), *with id*., paras. 602-609 (DOD assistance instruments).

[70] List of pre-meeting issues for the parties, at fourth bullet point.

[71] Declaration of Louis P. Berneman, Ed.D., DLP (22 August 2013) ("Berneman Report") (exhibit USA-322) (BCI).

2000, which raises questions as to the representative nature of the contracts, particularly given that the database he used includes contracts through 2013.[72]

30. In response, the European Union submits an expert statement on "benefit" and market benchmarks for R&D contracting, authored by Dr. Richard Razgaitis.[73] Dr. Razgaitis, who has more than 45 years of experience in the invention, R&D, and commercialisation or use of technology, performs a comprehensive review of the R&D contracts of record, as well as recent R&D contracts available on the same database relied upon by Mr. Berneman.[74] He confirms the continued correctness of the Appellate Body's finding 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.[75] Dr. Raizgaitis explains that "this is particularly notable given the tremendous potential bargaining power of NASA and DoD in negotiating R&D contracts, given their unusual position in the market as an entity willing to spend hundreds of millions or billions of dollars on high-risk, early-stage R&D".[76] Dr. Razgaitis's report and a newly submitted Airbus R&D contract also support the EU's position that, with respect to the existence of "benefit" to Boeing from the FAA CLEEN programme, the fact that Boeing may contribute more than FAA to the project does not alter the conclusion that there is a benefit, particularly in view of the commercial benefits Boeing receives from the CLEEN programme.[77]

31. The European Union notes that the United States now challenges as incorrect the Appellate Body's understanding of the impact of joint inventorship on the distribution of IP rights under US Government contracts, which was an important

[72] Berneman Report (Exhibit USA-322 (BCI)), paras. 20-48.

[73] Declaration of Richard A. Razgaitis, Sr., Ph.D., CLP, 23 October 2013 ("Razgaitis Report") (exhibit EU-1262) (BCI).

[74] *See* Razgaitis Report, Sections IV-V (exhibit EU-1262) (BCI).

[75] Razgaitis Report, paras. 113-121 (exhibit EU-1262) (BCI).

[76] Razgaitis Report, para. 60 (exhibit EU-1262) (BCI).

[77] Razgaitis Report, para. 112 and Attachment D (exhibit EU-1262) (BCI). *See also* US SWS, paras. 438-439; EU SWS, paras. 354-357

aspect of the Appellate Body's analysis of "benefit".[78] It is the United States, however, and not the Appellate Body, that presents a flawed description of US law. Under US law, joint inventorship by US Government and Boeing employees effectively leads to the same situation as inventorship by a Boeing employee, alone, as the US Government agrees to waive any additional rights acquired through joint inventorship to Boeing "if it finds that it would expedite the development of the invention".[79]

32. With respect to specificity of the challenged NASA, DOD, and FAA programmes, the European Union has demonstrated that they are specific within the meaning of Article 2.1 of the *SCM Agreement*, based on the same basic analysis and principles upon which the original panel found that the challenged R&D programmes were specific – findings that the US did not appeal. The US attempt to refute specificity is based on a mischaracterisation of the challenged measures and a misreading of Article 2.1 of the *SCM Agreement* – which considers specificity of a "subsidy", not of a single aspect of the "benefit" from the challenged measure.[80] Here, the subsidies are not "patent rights subsidies", as the United States contends, but rather (as understood by the original panel and the Appellate Body) a challenge to the payments and other support that NASA, DOD, and FAA provide to Boeing through R&D contracts and agreements entered into with Boeing under the challenged programmes.[81]

33. After wholly failing to minimise its important admissions that Boeing develops valuable LCA-related patents from the challenged NASA and DOD R&D programmes,[82] the United States then expends significant effort in its Second

[78] US SWS, paras. 195-196, 201.

[79] *See* 35 U.S.C. § 202(e) ("In any case when a Federal employee is a coinventor of any invention made with a nonprofit organization, a small business firm, or a non-Federal inventor, the Federal agency employing such coinventor may, *for the purpose of consolidating rights in the invention and if it finds that it would expedite the development of the invention—(1) license or assign whatever rights it may acquire in the subject invention to the nonprofit organization, small business firm, or non-Federal inventor in accordance with the provisions of this chapter*; or (2) acquire any rights in the subject invention from the nonprofit organization, small business firm, or non-Federal inventor, but only to the extent the party from whom the rights are acquired voluntarily enters into the transaction and no other transaction under this chapter is conditioned on such acquisition") (emphasis added) (exhibit EU-220)

[80] *See* EU SWS, paras. 318-331, 358-369, 521-533.

[81] *See, e.g.*, Appellate Body Report, *US – Large Civil Aircraft*, para. 432.

[82] US SWS, paras. 144-155, 300-308.

Written Submission to challenge the EU's statements about the creation of trade secrets for Boeing pursuant to the challenged NASA and DOD R&D programmes.[83] Yet, not only is the US explanation filled with counter-examples of instances in which trade secret and data protection for Boeing are in fact possible, the United States also misses the larger point.[84] Whether the US-Government-funded LCA-relevant data and knowledge are protected formally as "trade secrets" or otherwise, it is not disputed that a significant portion of the knowledge gained from the R&D programmes never leaves the confines of Boeing or the US Government, and, when there is some disclosure, that disclosure is often delayed.[85] As such, whether the knowledge and data is protected formally as a trade secret, or for other reasons, makes no material difference to Boeing's competitive position relative to Airbus.

34. With respect to the DOD RDT&E PEs, the United States spends a great deal of effort emphasising the military purpose of potentially LCA-relevant R&D programmes. But, what is the "military purpose" of allowing Boeing to own the patents developed with DOD funding and support, and to use such intellectual property rights for commercial purposes? And, what was the military purpose of abandoning a policy intended to "recover a *fair share* of {DOD's} investment in nonrecurring costs related to products, and/or a *fair price* for its contribution to the development of related technology"?[86] There is certainly no military purpose for those aspects of the measures.

35. Our final point on the R&D subsidies relates to the United States' response to a detailed expert statement on LCA-relevant RDT&E PEs by Mr. Richard Rumpf.[87] Rather than seriously engage with the content of Mr. Rumpf's report, the United States persists with a groundless challenge to his credentials. Mr. Rumpf is a

[83] US SWS, paras. 156-158, paras. 309-312.

[84] US SWS, footnote 220 & paras. 310-312.

[85] *See* First Written Submission of the European Union ("EU FWS"), paras. 143, 318; EU SWS, paras. 188-197; US SWS, paras. 138, 310-312; Panel Report, *US – Large Civil Aircraft*, para. 7.1296-7.1304.

[86] 48 C.F.R. § 271.002(a) (1989) (emphases added) (exhibit EU-275).

[87] *See* Richard L. Rumpf and Robert J. Levinson, *United States Department of Defense Research, Development, Test & Evaluation ("RDT&E") Funding for the Boeing Company Applicable to Large Civil Aircraft: 2007-2012 Estimates*, 12 March 2013 ("2013 Rumpf Report") (exhibit EU-23). *See also* Statement of Richard L. Rumpf, M.S.A.E., 18 July 2013 (exhibit EU-1013).

former high-ranking DOD official who managed precisely the same types of DOD RDT&E PEs at issue in the dispute; he is a respected aerospace engineer whose training is equally relevant to both civil and military LCA; and he continues to advise DOD on various advisory boards, including recently co-chairing a 2009 DOD study on Jet Engine Noise Reduction.[88]

36. In response to our statement that the United States relies solely on legal argument and raw assertions to support claims that the DOD RDT&E PEs have no technical relevance to LCA,[89] the United States has announced that the US submissions, themselves, should effectively be considered expert reports because they were drafted "in consultation with DOD scientists" and other DOD personnel.[90] Unfortunately, the United States does not reveal who these unnamed experts are, or whether they have any relevant experience to opine on these issues of LCA relevance.

37. Indeed, the US' unidentified "scientists" have demonstrated a *lack* of knowledge about LCA-relevant technologies. For example, in attempting to argue that a DOD RDT&E contract is not LCA relevant, the US' unidentified experts get it wrong when they argue that LCA "seek to avoid cruise" speed above Mach 0.85.[91] As the Appellate Body has even pointed out in this dispute, Boeing had previously offered the Sonic Cruiser LCA model to airlines.[92] According to Boeing, the Sonic Cruiser was supposed to travel at speeds of Mach 0.95 to 0.98, and was expected to enter into service in 2008, as shown in Boeing's own illustration, reproduced in paragraph 37 of the written version of this statement.[93]

[88] 2013 Rumpf Report, Annex E (exhibit EU-23); Statement of Richard L. Rumpf, M.S.A.E., 18 July 2013 (exhibit EU-1013).

[89] EU SWS, para. 392.

[90] US SWS, para. 322.

[91] US SWS, para. 287.

[92] Appellate Body Report, *US – Large Civil Aircraft*, para. 969 and footnote 2003.

[93] Lori Gunter, *Boeing's Sonic Cruiser Team Focuses on the Future*, Boeing Frontiers, July 2002, p. 2, *available at* http://www.boeing.com/news/frontiers/archive/2002/july/i_ca2.html (exhibit EU-1263).

SONIC STATS
SPEED: Mach 0.95 to 0.98 (15 to 20 percent faster than today's airplanes)
TIME SAVINGS: About one hour for every 3,000 miles traveled
CAPACITY: 200 to 250 passengers
RANGE: 6,500 to 9,000 nautical miles (7,500 to 10,350 statute miles)
FUEL EFFICIENCY: Comparable to today's best-performing widebody twin jets
NOISE: No sonic boom; will meet all anticipated Chapter 4 community noise requirements
SIZE: As long as a Boeing 747
ENTRY INTO SERVICE: 2008
All of the above is contingent on ongoing development work and subject to change.

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

38. Turning to the longstanding FSC/ETI regime, the European Union demonstrated that Boeing continues to receive FSC/ETI benefits after 2006, despite the fact that the FSC/ETI measures have repeatedly been found to constitute WTO-incompatible actionable and export-contingent subsidies, including in the reports of the original panel and the Appellate Body in this dispute.[94] Indeed, the United States has conceded that Boeing is eligible to receive the continuing FSC/ETI benefits,[95] and the European Union has explained that it is reasonable to infer that a company like Boeing would be expected by its shareholders to take full advantage of any federal tax break that it is eligible for. While the United States continues to assert 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.[96] And it is undisputed that the US Government, itself, has not taken any affirmative steps to terminate the

[94] EU FWS, paras. 390-407.

[95] 28 February 2013 US Narrative Response to Panel's Article 13 Questions, para. 116.

[96] EU SWS, paras. 540-541.

grandfathering identified by the original panel report,[97] or to otherwise terminate Boeing's eligibility for the continuing subsidy.

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

39. Moving on to Kansas, as clarified in its Second Written Submission, the US does not contest that the Wichita IRBs continue to provide subsidies to Boeing through the ongoing tax exemptions associated with the IRBs, nor does it contest the European Union's valuation of those exemptions.[98] The only dispute now appears to be related to specificity. The United States argues that – despite the fact that Wichita has been providing IRBs since 1975, and despite the fact that the original panel and Appellate Body reports each found that it was appropriate to consider the subsidies provided throughout the history of the programme – this 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.[99]

D. Washington State and Local Subsidies

40. 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.[100]

41. The United States generally agrees, concentrating its attention on trying to exclude the measures on the basis of its scope-related arguments. The Parties disagree regarding the value of the subsidies, with the United States attempting to rebut the

[97] Panel Report, *US – Large Civil Aircraft*, para. 7.1421.

[98] US SWS, paras. 482-486.

[99] *See* EU SWS, paras. 552-560.

[100] EU FWS, Sections V(G)(2)-(4), (6), (7); EU SWS, paras 561-611.

European Union's well-documented numbers with wholly un-authenticated and un-explained numbers that appear to come out of thin air, and are often inconsistent with publicly available information. In response, the United States inexplicably stands by its position that it need not authenticate or explain any of its proposed numbers.[101] In the interest of time, the European Union refers the Panel to the submissions on these issues.

E. South Carolina State and Local Subsidies

42. As detailed in our written submissions, 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.[102] Making use of evidence acquired through years of research and public records requests, the European Union has demonstrated, for example, that South Carolina is providing Boeing with a lease of more than 240 acres of public land for up to 30 years, and charging a price of only *one dollar* per year.[103] On this site, South Carolina is providing Boeing with custom-built facilities and infrastructure worth *hundreds of millions of dollars*, funded out of special state bond proceeds, for which Boeing pays nothing in return.[104] Finally, South Carolina and Charleston County provide Boeing with tax breaks worth more than $900 million, including one that is a *de jure* export contingent subsidy.[105]

43. The US responds by repeatedly making bald, and often demonstrably false, assertions. For example, the US denied that Charleston County actually agreed to additional property tax breaks for Boeing in May of this year. Yet, the European Union has recently obtained directly from the local government a copy of the precise agreement that the United States sought to deny.[106]

[101] US SWS, para. 459 and footnote 647.

[102] *See* EU FWS, Section VI.H; EU SWS, Section III.H.

[103] *See* EU FWS, paras. 551-566; EU SWS, paras. 614-632.

[104] *See* EU FWS, paras. 567-577, 697-699; EU SWS, paras. 633-642.

[105] *See* EU FWS, paras. 587-656, 670-692, 709-733; EU SWS, paras. 643-698, 704-721, 733-740.

[106] *See* First Amendment to Fee Agreement by and between Charleston County, South Carolina and the Boeing Company, 1 May 2013 (exhibit EU-1264).

44. The United States would have the Panel believe that South Carolina is providing Boeing with incentives that do not involve the state providing anything of value to Boeing, but rather Boeing providing a benefit to the state. The US contention that Boeing intends to donate buildings to South Carolina at the end of the site lease that will be worth more – after 30 or 40 years – than the enormous value of the facilities and infrastructure provided by South Carolina runs contrary to any rational concept of commercial real estate valuation.

45. Moreover, the United States is 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. In other words, one subsidy plus one subsidy equals no subsidy. Such arithmetic simply cannot be correct.

46. Finally, with respect to the tax measures, the US arguments on specificity and on the proper benchmark for "revenue otherwise due foregone" appear to be taken right out of the US' repeated failed attempts to show that the Washington State B&O tax rate reductions did not constitute a specific subsidy, based on unsupported assertions about the structure of, and principles underlying, the South Carolina tax code.

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

47. We now turn to the subject of prohibited subsidies and violations of Article III of the GATT 1994, and would like to say a few words about the substance of our claims.[107] We need only a few words, because there is almost nothing in dispute between the Parties. The position with respect to the in law claims is clear, we think, and with respect to the in fact claims, all that remains is for the compliance Panel to weigh the evidence that the European Union has provided with respect to the requisite link.

48. We deal first with our export subsidy claims, in law and in fact.

[107] EU SWS, Section IV.

49. In law, with respect to the FSC/ETI regime, the position is now clear. The European Union has explained that demonstrating a breach of Article 3.1(a) of the *SCM Agreement* does not require the complaining Member to demonstrate that the beneficiary has "used" the subsidy. Part III of the *SCM Agreement* is about how beneficiaries use subsidies, that is, the adverse effects that are produced when the subsidies are used. Part II, on the other hand, simply prohibits subsidies that are found to exist within the meaning of Article 1.[108] The only US defence to the EU claim in this instance is not that the subsidy does not exist, but merely that Boeing has not used it recently.[109] Evidently, we say that is not enough. Thus, the United States must concede this claim, and may only hope to prolong the discussion if it actually adduces evidence to support its assertion, notably a sworn statement from Boeing's auditors, which it would be so easy to obtain if the US assertion would be true, and the absence of which from the record speaks so loudly.

50. Also in law, with respect to the South Carolina income tax apportionment agreement with Boeing, the United States first recognises that what it must address is not the question of subsidy, but rather the question of export contingency;[110] but then immediately cross-refers back to an alleged misunderstanding that relates to the former issue.[111] Thus, the position is very simple. The Boeing income tax apportionment agreement expressly provides that Boeing's sales of aircraft received by purchasers in South Carolina are deemed not to be sales in South Carolina if the customer is foreign. This – to use the words of the United States – is not a "bald assertion".[112] It is a *de jure* export subsidy.[113]

51. Turning to the in fact claims, the United States complains that the EU Second Written Submission is repetitive.[114] That is true. We have taken the trouble in our Second Written Submission to re-state the matter as it stands, precisely because we wanted to draw the compliance Panel's specific and close attention to the almost

[108] EU SWS, paras. 793-802.

[109] US SWS, para. 637.

[110] US SWS, para. 635.

[111] US SWS, para. 636.

[112] US SWS, para. 636.

[113] EU SWS, paras. 803-809.

[114] US SWS, para. 628.

complete lack of substance in the US First Written Submission on this matter. There is no rule in WTO dispute settlement that penalises repetition. There is however a rule in WTO dispute settlement that penalises a complete failure by the defending Member to contest any aspect of the legal standard or any of the facts and evidence adduced. It means that they must lose the point. This being the case, the European Union is content being repetitive, as long as the United States is laconic.

52. Specifically, with respect to Article 3.1(a), there is no dispute between the Parties concerning the correct legal framework, which is provided by the text of the treaty as clarified by the Appellate Body, and which the European Union has closely followed.[115] Furthermore, there is no dispute between the Parties that skewing towards exports has occurred, both on an actual basis[116] and on an anticipated basis.[117] There is also no dispute between the Parties that, given the accelerating effect of the US subsidies that has already been found to exist in the original proceedings, the skewing is greater in the presence of the subsidies than in their absence.[118] Finally, there is no dispute between the Parties about any possible non-attribution factor, that is, something other than the US subsidies that might be linked to the skewing that the US does not contest has occurred. The United States has referred to no such non-attribution factors. Thus, the only defence offered by the United States is that the evidence adduced by the European Union does not demonstrate encouragement or reward[119] – although the United States adduces *no evidence* to the contrary.

53. The European Union is now content that the compliance Panel should adjudicate this matter. We are happy for the compliance Panel to review the evidence that we have adduced. If the compliance Panel really believes that it does *not* indicate any encouragement or reward (and remembering that there is no *de minimis* rule for export continent subsidies), then you should reject the EU claim. We are

[115] EU SWS, para. 787-792.

[116] EU SWS, paras. 811-813.

[117] EU SWS, paras. 814-817.

[118] EU SWS, paras. 830-832.

[119] US SWS, paras. 627-630.

confident that an objective assessment of the evidence can lead only to the contrary conclusion.

54. The position is analogous with respect to our claims under Article 3.1(b) of the *SCM Agreement*[120] and Article III:4 of the GATT,[121] except that, in the latter case, it is not even necessary for the evidence to rise to the level of demonstrating contingency, but merely enough if discrimination is apparent, which we believe is certainly the case.

55. For these reasons, we respectfully request the compliance Panel to confirm the EU claims.

V. THE US SUBSIDIES CONTINUE TO CAUSE ADVERSE EFFECTS

56. We turn now, Mr. Chairman, to the question of adverse effects. The non-withdrawn and new subsidies described a moment ago also cause present adverse effects to European Union and Airbus. In these circumstances, the United States has, therefore, also failed to meet its obligation under the second prong of Article 7.8 of the *SCM Agreement*, to remove the adverse effects.

57. In the original proceedings, the panel found, and the Appellate Body affirmed, that the US R&D subsidies enabled the availability and advanced technology of the 787, resulting in adverse effects relating to Airbus' A330 and Original A350.[122] Moreover, other US subsidies enabled Boeing to lower prices of its 737NG, resulting in adverse effects relating to Airbus' A320.[123]

58. These very same subsidies and additional, closely related subsidies, exist at present and cause present, significant competitive harm to the EU's LCA-related interests. As in the original reference period, the competitive conditions in the LCA markets amplify both the incentives for Boeing to use the subsidies to cause competitive harm to Airbus, and the effects themselves. The evidence accordingly establishes that, <u>*collectively*</u>, these US subsidies (i) improve Boeing's product offering, and (ii)

[120] EU SWS, paras. 835-850.

[121] EU SWS, paras. 851-864.

[122] Panel Report, *US – Large Civil Aircraft*, para. 7.1773-7.1775, 7.1797; Appellate Body Report, *US – Large Civil Aircraft*, paras. 1012, 1036, 1040, 1350(d)(i).

[123] Panel Report, *US – Large Civil Aircraft*, paras. 7.1818-7.1823, 8.3(a)(ii)-(iii); Appellate Body Report, *US – Large Civil Aircraft*, para. 1260, 1274, 1347-1348, 1350(d)(iii)-(iv).

lower Boeing's prices in a manner that is a genuine and substantial cause of adverse effects. That causal relationship is confirmed by Boeing's competitive behaviour, including its aggressive launch of new products and aggressive pricing in strategic sales campaigns. 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.

59. Before turning to certain more specific aspects of the arguments and evidence, it is important to consider the core of the flawed US assertion that it achieved compliance, despite its continuation and expansion of lavish subsidies to Boeing, and absent any steps to remove the adverse effects. The United States employs a three-pronged approach.

60. *First*, the US arguments ignore most of the subsidies at issue. Although none of the US subsidies at issue in the original proceedings has been withdrawn, the United States contends that *adding* allegedly lower annual amounts of post-2007 R&D subsidies resulted in a *reduction* in subsidies.[124] This is evidently false. Adding new subsidies to the earlier set of massive non-withdrawn subsidies, even at a lower rate, *increases* the pool of subsidies. In turn, the adverse effects are also growing.

61. *Second*, and related, the United States asserts that the Panel must ignore the expansion of subsidies and harm, because the European Union is allegedly precluded from challenging (i) effects of subsidies for which there were no adverse effects finding in the original proceeding, (ii) adverse effects of all new and additional subsidies, and (iii) several forms of present adverse effects. Having erroneously excluded the bulk of US subsidies and related harm, the United States then argues that the remaining subsidies, viewed individually, are of insufficient magnitude to significantly impact Boeing's LCA prices.[125] As explained in our written submissions, the US "scope" objections are without merit.[126] And the US

[124] US SWS, para. 641.

[125] *See* US FWS, paras. 719-721, 818-823, 995-1000, 1066-1067.

[126] EU SWS, paras. 111-152.

magnitude arguments depend on the very approach of "atomising" the subsidy – a subsidy analysis that the Appellate Body rejected.[127]

62. *Third*, the United States challenges the very causal mechanisms found in the original proceedings. It argues that the effects of the US R&D subsidies have expired with the end of the original reference period, even when such technologies are applied today to new Boeing aircraft.[128] With respect to the same subsidies that the original panel found to enable Boeing's aggressive pricing, the United States asserts that they have no meaningful effect on Boeing's pricing today.[129] None of these baseless assertions overcomes the evidence that, collectively, the US subsidies continue to cause adverse effects, and that the United States has failed to comply with the requirement in Article 7.8 of the *SCM Agreement* to remove the adverse effects.

A. Threshold issues

63. We turn now to certain threshold issues, and focus on the issue of proper identification of the product markets in which the US subsidies cause adverse effects. The European Union has established the existence, at present, of several distinct product markets for passenger LCA, on the basis of evidence and analysis consistent with the Appellate Body's guidance in *EC – Large Civil Aircraft*.[130]

64. In response, the United States states that it "does not agree", but, as the Panel observed, the United States "does not advance arguments or evidence in support of that position".[131] Indeed, the United States has not even indicated with which portion of the EU's market delineation it disagrees, let alone offered any arguments or evidence in support.[132] In these circumstances, the Panel should objectively assess the EU's extensive quantitative and qualitative evidence, and on that basis

[127] *See* EU SWS, paras. 925-953.

[128] US FWS, para. 709 (asserting that, absent the US R&D subsidies, Boeing would have launched the 787 "no later than 2006", before the end of the 2004-2006 reference period).

[129] *See, e.g.*, US SWS, para. 852.

[130] EU FWS, paras. 870-930.

[131] List of pre-meeting issues for the parties, at fifth bullet point.

[132] *See* US FWS, paras. 692-695; US SWS, paras. 647-652.

find that the markets identified by the European Union are a proper basis for conducting the adverse effects analysis.

65. Nevertheless, the European Union has also shown that the US disagreement is of no practical consequence. Even accepting the few unsupported US criticisms would not undermine the EU's adverse effects claim.[133]

B. Causal mechanisms

66. We now address the causal mechanisms that establish a "genuine and substantial relationship of cause and effect" between the US subsidies and present adverse effects.[134] 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 (this is what we refer to as "technology causal mechanism"); and, second, the US subsidies enable Boeing to significantly lower its prices in strategic sales campaigns (the "price causal mechanism").

1. Technology causal mechanism

67. Beginning with the technology causal mechanism, we note your request to address the relevance of the original panel's counterfactual findings that the US R&D subsidies accelerated the launch of the 787.[135] Our view is that this counterfactual applies to the pre-2007 R&D subsidies at issue in the original proceedings. It does not apply to the post-2007 R&D subsidies, which we address further below.

68. With that qualification in mind, the original panel's counterfactual for the pre-2007 R&D subsidies remains of crucial importance to these proceedings. Importantly, the United States agrees with this proposition, stating that the appropriate counterfactual should now be "how much additional time it would have taken

[133] *See* EU SWS, paras. 905-923. *See* also EU FWS, footnotes 2326, 2354, 2397, 2457, 2972, 3319, 3358, 3406.

[134] Appellate Body Report, *US – Upland Cotton*, para. 438; Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374; Appellate Body Report, *EC – Large Civil Aircraft*, para. 1232; Appellate Body Report, *US – Large Civil Aircraft*, para. 913.

[135] List of pre-meeting issues for the parties, at seventh bullet point.

{Boeing} to launch the 787 if Boeing had not participated in the subsidized R&D at issue".[136]

69. However, based on a statement by Boeing engineers, the United States makes the implausible assertion that it would have taken Boeing a mere "additional {two years in} 787 pre-launch R&D"[137] in order to "obtain the knowledge and experience generated by the NASA and DoD R&D"[138] subsidies to be able to "launch{} the 787 by April 2006, if not earlier"[139] and to "promise{} deliveries starting in 2010, if not earlier".[140]

70. These assertions are unsupported by the facts and ultimately go against the findings in the original proceedings.[141] In fact, the US counterfactual ignores both the need for maturing of the 787 technologies, and the impact that the original panel found the subsidies to have had on such maturation. In particular, the original panel found that the aeronautics R&D subsidies accelerated the technology development process,[142] *and* that the subsidies helped Boeing mature "higher risk technologies"[143] for the 787 up to a Technology Readiness Level ("TRL")-6, which equals the stage of prototype demonstration.[144]

71. Indeed, the United States admits that "{a} proper counterfactual analysis assesses how long it would take Boeing to attain … {the} knowledge and experience so that it could proceed with the development of technologies used on the 787".[145] Nonetheless, the US counterfactual, which involves only an "additional 2 years",[146] *ignores* the need for subsequent maturation of these technologies.

[136] US SWS, para. 824.

[137] *See* Second Boeing Engineers Statement, para. 22 (exhibit USA-359) (BCI).

[138] US SWS, para. 787.

[139] Boeing Engineers Statement, para. 3 exhibit US-283 (BCI) (emphasis added).

[140] Boeing Engineers Statement, para. 3 exhibit US-283 (BCI) (emphasis added).

[141] US SWS, paras. 743-749.

[142] Panel Report, *US – Large Civil Aircraft*, para. 980.

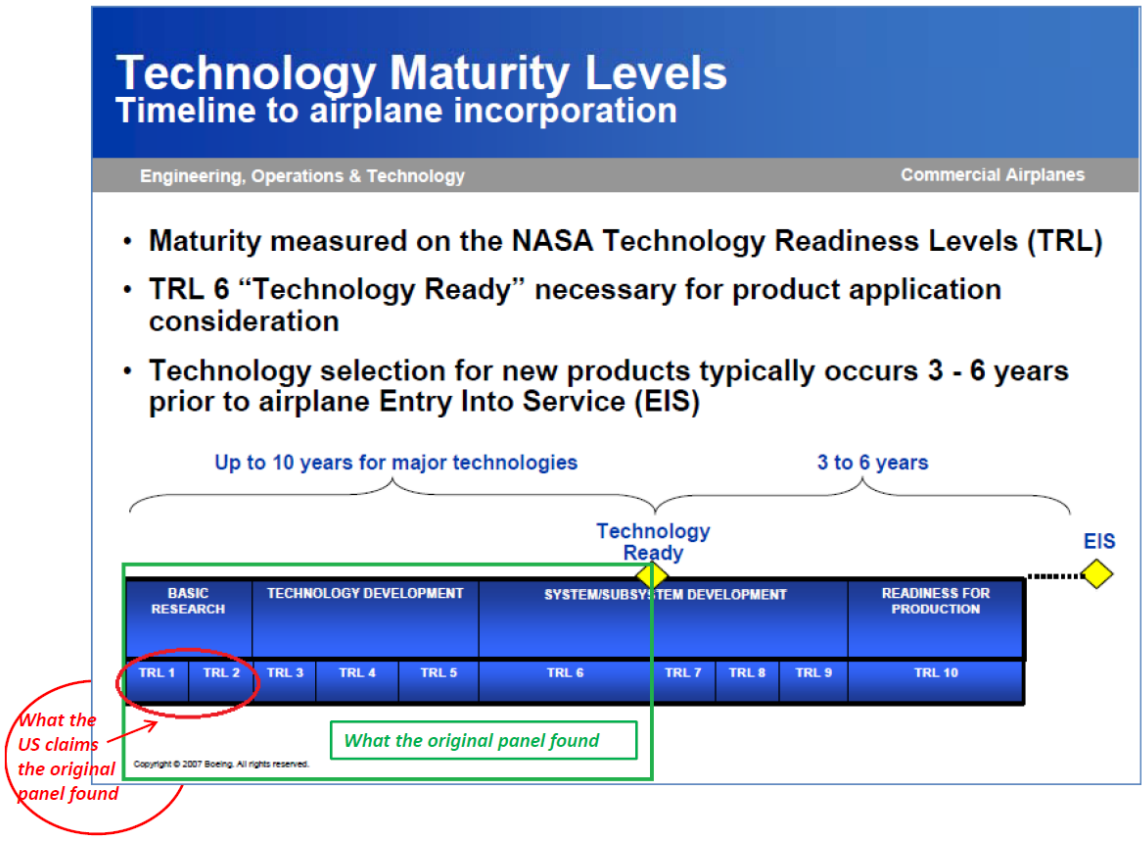
[143] Panel Report, *US – Large Civil Aircraft*, para. 7.1748.

[144] Panel Report, *US – Large Civil Aircraft*, para. 7.1748. *See also* Appellate Body Report, *US – Large Civil Aircraft*, paras. 974-981.

[145] US SWS, para. 831 (emphasis added).

[146] US SWS, para. 796.

Indeed, Boeing engineers internally contradict themselves when they, first, claim that the two years of additional time relate to "additional R&D necessary to develop, launch and produce"[147] the 787,[148] but then, second, focus on the replication of *only* the fundamental R&D, to the exclusion of the subsequent time necessary to mature technologies for launch and production of the 787. The discrepancies between what the original panel and the Appellate Body found, and what the United States argues in these proceedings, is best explained in a picture. Paragraph 71 of the written version of this statement contains a slide, taken from a Boeing presentation, which demonstrates that the US assertion is false:[149]



72. This Boeing engineering slide shows the "Technology Maturity Levels" and the "Timeline to airplane incorporation". It includes three bullet points. The first

[147] Boeing Engineers Statement, para. 3 (exhibit USA-283) (BCI).

[148] Boeing Engineers Statement, paras. 33 ("developing … prototypes"), 27 ("construction and testing"), 26 ("fabricating and assembling"), 25 (exhibit USA-283 (BCI).

[149] Craig Wilsey, Robert Stoker, "*Continuous Lower Energy, Emissions and Noise (CLEEN) Technologies Development – Boeing Program Overview*", CLEEN Consortium Public Session, 27 October 2010, p. 4 (exhibit EU-665) (green box, red circle and corresponding textual descriptions added).

bullet point refers to the NASA TRL, as already discussed. The second bullet point refers to the TRL necessary for product application consideration (TRL 6), and the third bullet point reminds us that the technology selection typically occurs three to six years before the aircraft's entry into service ("EIS"). The diagram then shows the findings of the original panel, in green, and we have identified in red what the US is now arguing. Thus, in this slide, Boeing engineers confirm that it takes "{u}p to 10 years for major technologies" to reach a TRL-6, and an additional "3 to 6 years" until entry into service of an aircraft with these technologies. As I have indicated, the green rectangle in the annotated slide illustrates your findings – namely, that the subsidies helped Boeing mature technologies for the 787 up to TRL-6. For major technological innovations, like those on the 787, this takes place over an approximately ten-year period. Yet, the United States would have you find that Boeing engineers could have "replicated in less than two years"[150] what the original panel found the subsidies achieved in ten years, namely maturing technologies to TRL-6.

73. But even assuming that, starting in 2004, Boeing could have undertaken in two years the 15 or more years of fundamental research performed with NASA and DOD support, Boeing would then need many more years to mature the technologies for actual use on the 787. Thus, the time for technology maturation that is necessary for a manufacturer to confidently launch – and produce – an LCA like the 787 would significantly postpone the alleged 2006 launch date and alleged 2010 delivery date. In light of this explanation, and all the other evidence contained in our written submissions,[151] it is our submission that the US counterfactual is just not credible.

2. Price causal mechanism

74. We turn now to the price causal mechanism. The European Union has 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 follow

[150] Boeing Engineers Statement, para. 13 (exhibit USA-283) (BCI) (emphasis added).

[151] EU SWS, paras. 955-1057.

the findings in the original proceeding that US subsidies led Boeing to lower its prices in price-sensitive and strategic sales campaigns.

75. The Appellate Body held that an adverse effects assessment should consider "the design, structure, magnitude, and operation of the subsidy, as well as the nexus between the subsidy and the subsidized product", in light of the competitive conditions in markets.[152] The Appellate Body relied on the original panel's findings regarding these factors and regarding the competitive conditions in the LCA markets – including the Airbus-Boeing duopoly,[153] Boeing's "exercise{} {of} market power",[154] the price sensitivity of sales campaigns,[155] and the role of incumbency and switching costs[156] – to find that certain subsidies led Boeing to lower its prices. Specifically, these factors, first of all, incentivise and enable Boeing to lower prices through use of the US subsidies tied to individual sales of Boeing LCA, as well as of a US subsidy that reduces Boeing's costs, and, secondly, amplify the effects on Airbus.[157]

76. In these compliance proceedings, the European Union structured its argument and evidence on that same basis.[158] Nonetheless, the United States complains that the European Union should have adopted an entirely different analysis, taking into account (the alleged absence of) capital constraints on Boeing.[159] While the United States may consider this to be one possible approach, the Appellate Body did not find it a necessary basis for a finding of such effects. Indeed, although the Parties had advanced arguments as to whether Boeing was capital constrained,[160] the

[152] Appellate Body Report, *US – Large Civil Aircraft*, paras. 1292, 1320, 1328, footnote 1865.

[153] Appellate Body Report, *US – Large Civil Aircraft*, paras. 902, 1257; Panel Report, *US – Large Civil Aircraft*, para. 7.1688.

[154] Appellate Body Report, *US – Large Civil Aircraft*, para. 1293.

[155] Appellate Body Report, *US – Large Civil Aircraft*, paras. 907, 1258; Panel Report, *US – Large Civil Aircraft*, paras. 7.1694, 7.1820. *See also* Panel Report, *EC – Large Civil Aircraft*, paras. 7.1721-7.1724.

[156] Appellate Body Report, *US – Large Civil Aircraft*, para. 907; Panel Report, *US – Large Civil Aircraft*, para. 7.1818.

[157] *See* Appellate Body Report, *US – Large Civil Aircraft*, paras. 1256-1260, 1274, 1347-1348.

[158] *See* EU FWS, paras. 1112-1192.

[159] *See, e.g.*, US SWS, paras. 867-871 (arguing that the "EU has failed to demonstrate that the miscellaneous {cash flow} subsidies ... cause{} price effects" in light of the "economic logic" that Boeing would only use subsidies if it suffered from "capital constraints").

[160] *See* Appellate Body Report, *US – Large Civil Aircraft*, paras. 332-333, 1202-1203.

Appellate Body found that subsidies cause Boeing to lower its LCA prices, resulting in LCA-related adverse effects, without recourse to these arguments, and thus regardless of whether Boeing was or was not capital constrained.[161]

77. The United States also asserts that the EU arguments "lack clarity" and amount to "obfuscation".[162] Initially, the United States asserted that the European Union has failed to clarify *which* subsidies impacted the pricing of which Boeing LCA.[163] The US error is revealed by a simple review of the EU's First Written Submission, and by numerous subsequent US references to the very information that it is alleging did not exist.[164] Nevertheless, the United States has persisted in declaring its confusion about the EU position.[165] While the European Union has provided extensive discussions of the nature of these subsidies and their causal links,[166] in light of the Panel's request,[167] we now elaborate further on the US R&D subsidies that presently lower Boeing's prices.

78. As already noted, the original panel found, and the Appellate Body affirmed, that pre-2007 US R&D subsidies affected the availability and advanced technology of the 787.[168] The original panel found that these subsidies are part of a decades' long support programme for Boeing, and assessed the "cumulative effects" of that support.[169] The panel detailed how these subsidies reduce Boeing's risk;[170] complement Boeing's own internal R&D efforts;[171] develop Boeing's knowledge, skills, and technical capabilities; allow Boeing to leverage those skills and that

[161] *See* Appellate Body Report, *US – Large Civil Aircraft*, paras. 1256-1260, 1274, 1347-1348.

[162] US FWS, paras. 712-714; US SWS, paras. 655-672.

[163] *See* US FWS, paras. 712-714.

[164] EU SWS, paras. 1062-1073.

[165] *See* US SWS, paras. 655-672.

[166] EU FWS, paras. 58-389 (nature), 978-1111 (technology causal mechanism), 1180-1191 (price causal mechanism); EU SWS, paras. 163-533 (nature), 955-1057 (technology causal mechanism), 1097-1101 (price causal mechanism).

[167] List of pre-meeting issues for the parties, at sixth bullet point.

[168] Panel Report, *US – Large Civil Aircraft*, para. 7.1773-7.1775, 7.1797; Appellate Body Report, *US – Large Civil Aircraft*, paras. 1012, 1036, 1040, 1350(d)(i).

[169] Panel Report, *US – Large Civil Aircraft*, para. 7.1756 (citations omitted).

[170] Panel Report, *US – Large Civil Aircraft*, para. 7.1747 (citations omitted).

[171] Panel Report, *US – Large Civil Aircraft*, paras. 7.1741 (citation omitted), 7.1746.

knowledge;[172] and *ultimately* enable commercialised technologies that improve the quality and/or accelerate the availability of Boeing LCA, thereby multiplying the commercial harm.[173]

79. The pre-2007 US R&D subsidies were found to cause adverse effects by enabling the launch and advanced technology of the 787. In these proceedings, the European Union similarly argues that the pre-2007 R&D subsidies continue to cause present adverse effects through the application of subsidised technologies on the 787 itself, including the 787-10, and on the 737 MAX and 777X.

80. As for the post-2006 R&D subsidies, given how little time has passed since the R&D has been performed, only a small fraction has manifested in the form of new technologies appearing on Boeing LCA marketed today. These instances have been discussed in the EU submissions,[174] and are specified in exhibit EU-1265.

81. For the remainder of the post-2006 R&D subsidies, the valuable technology developed with the US R&D subsidies has not yet reached a state where it is applied on Boeing LCA marketed today. That is not to say, however, that these R&D subsidies have no present impact on the LCA markets. As the original panel and the Appellate Body explained, during any technology development process, one technology naturally builds upon predecessor technologies. A company must have access to that predecessor technology, which often requires licensing such technology from another entity. When Boeing builds upon NASA- and DOD-funded technologies without paying license fees for the value of that technology, its overall costs are decreased. This occurs even before any new technology actually appears on a Boeing LCA. During this period, in much the same way it enjoys cost savings resulting from other subsidies, Boeing can and does pass savings from not having to pay license fees on to customers for its existing LCA in the form of lower prices.

82. Consequently, the subsidised availability of technology and knowledge developed with this subset of post-2006 R&D subsidies presently affects LCA markets

[172] Panel Report, *US – Large Civil Aircraft*, para. 7.1756 and footnote 3684 (other citations omitted).

[173] Panel Report, *US – Large Civil Aircraft*, para. 7.1760.

[174] EU FWS, paras. 1088-1110.

through a price causal mechanism. These effects arise from the fact that the US Government-funded R&D has led to the creation of early stage technology that would not otherwise exist, and from the fact that Boeing may use this technology in conducting further R&D without paying license fees to the US Government.

83. In short, the US R&D subsidies can be distinguished based on the distinct ways in which they presently cause adverse effects, and the period of time in which they are considered. First, pre-2007 R&D subsidies were all found by the original panel to operate through a "technology causal mechanism". Second, for the post-2006 R&D subsidies, only a small fraction is presently operating through the same mechanism, and technologies linked to existing Boeing LCA.[175] The remainder of the post-2006 R&D subsidies also generate valuable early stage technology and knowledge that Boeing may use free of charge, without incurring license fees. These subsidies presently affect LCA markets through a "price causal mechanism", in the manner just explained. As noted, exhibit EU-1265 details the division between the post-2006 R&D subsidies that manifest themselves today through technology and price causal mechanisms.

84. Despite the EU's analytical division of R&D subsidies for the purposes of identifying the requisite causal link, it is important to recall that the end result of all of the R&D subsidies is the same: that is, they improve Boeing's competitive position at Airbus' expense in ways enumerated in Article 6.3 of the *SCM Agreement*. Whether conceived of as a better Boeing product (that is, the technology causal mechanism) or as a much cheaper price for a product that Boeing could have developed with extra resources (that is, the price causal mechanism), the impact on Airbus is the same.

85. Finally, we emphasise that the present magnitude of the non-withdrawn US subsidies available to Boeing for pricing down LCA in strategic, price-sensitive sales campaigns is substantial,[176] and not insignificantly small, as the United States suggests.

[175] *See* EU FWS, paras. 1088-1110; Allocation of Post-2006 R&D Subsidies between Technology and Price Causal Mechanisms (exhibit EU-1265).

[176] EU FWS, para. 56 (Figure 1) (summarising the amounts of financial contributions involved, which understate the amount of benefit from the R&D subsidies); Allocation of Post-2006 R&D Subsidies between

86. Indeed, the only way in which the United States is able to assert relatively small subsidy magnitudes is by disregarding all but one of the subsidies at issue, and allocating that subsidy over an inflated basis.[177] Yet, 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.[178] 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 adverse effects. That assessment reveals that, collectively, the US subsidies are a "substantial" cause of adverse effects.[179]

C. Specific forms of adverse effects

87. Building on the evidence of the causal mechanism through which the US subsidies affect the LCA markets, the European Union has also demonstrated specific forms of present adverse effects caused by these subsidies. In particular, the US subsidies benefiting Boeing's 787 and 777X family LCA have enabled lower prices, earlier availability, and the improved technology of those aircraft.[180] The US subsidies benefiting Boeing's 737 MAX family LCA have similarly enabled a markedly earlier availability of that aircraft, with better technology, and at lower prices than would otherwise be possible.[181] Finally, the US subsidies benefiting Boeing's 737NGs have enabled lower pricing of those aircraft.[182]

88. In each case, sales campaign evidence then establishes that the US subsidy-enhanced pricing, technology, and/or availability of Boeing LCA is a genuine and

Technology and Price Causal Mechanisms (exhibit EU-1265); EU FWS, paras. 1112-1192; EU SWS, para. 1072 (identification of Boeing products benefiting from each of the subsidies at issue). Post-2006 Subsidies With a Present Price Causal Mechanism – Total Financial Contribution (2007-2012) and Allocation to Boeing Aircraft Programmes (exhibit EU-1266) (summarising the information).

[177] *See* EU SWS, paras. 1078, 1149-1157, 1611-1619, 1881-1889 (citations omitted) (explaining that the US magnitude arguments are based on subsidy magnitudes for only the Washington B&O tied tax subsidies alone – and in a few places, the Wichita IRBs – and are plagued with methodological errors).

[178] EU FWS, paras. 954-977; EU SWS, paras. 931-942.

[179] EU FWS, paras. 931-953, 1193-1196; EU SWS, paras. 943-947.

[180] EU FWS, paras. 978-1192, 1197-1225; EU SWS, paras. 1116-1158.

[181] EU FWS, paras. 978-1192, 1614-1629; EU SWS, paras. 1595-1620.

[182] EU FWS, paras. 1112-1192, 1839-1942; EU SWS, paras. 1868-1961.

substantial cause of numerous sales that Airbus lost to Boeing. The sales campaign evidence also reveals the important role that those factors play in significantly suppressing Airbus' LCA prices – a conclusion that is also supported by pricing trends, along with expert testimony, public statements from Boeing and Airbus executives, and statements by airlines. Finally, evidence of developments in Airbus' and Boeing's market shares and delivery volumes in various product and geographic markets demonstrates present displacement, impedance, or a threat thereof.[183]

89. While the United States has raised several alleged non-attribution factors allegedly affecting sales, prices and market shares, it has failed to establish any degree to which they allegedly contributed to the adverse effects. In any event, those assertions do not undermine the EU evidence demonstrating the substantial role that the US subsidies have played and are playing in causing adverse effects.

VI. CONCLUSION

90. Mr. Chairman, Members of the Panel, this concludes our statement and we, of course, look forward to answering any questions you may have.

[183] EU FWS, paras. 1179-1613, 1614-1838, 1839-1932; EU SWS, paras. 1104-1584, 1585-1867, 1868-1961.

LIST OF EXHIBITS

Exhibit No.	Title	Confidentiality
EU-1258	Remarks by Governor Jay Inslee, Governor's Aerospace Conference, 2 October 2013	Non-BCI
EU-1259	*United States v. Comstock*, 130 S. Ct. 1949 (2010) (excerpts)	Non-BCI
EU-1260	United States Constitution	Non-BCI
EU-1261	*Nat'l Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (excerpts)	Non-BCI
EU-1262	Declaration of Richard A. Razgaitis, Sr., Ph.D., CLP, 23 October 2013	BCI
EU-1263	Lori Gunter, *Boeing's Sonic Cruiser Team Focuses on the Future*, Boeing Frontiers, July 2002	Non-BCI
EU-1264	First Amendment to Fee Agreement by and between Charleston County, South Carolina and the Boeing Company, 1 May 2013	Non-BCI
EU-1265	Allocation of Post-2006 R&D Subsidies between Technology and Price Causal Mechanisms	Non-BCI
EU-1266	Post-2006 Subsidies With a Present Price Causal Mechanism – Total Financial Contribution (2007-2012) and Allocation to Boeing Aircraft Programmes	Non-BCI