

*United States – Measures Affecting Trade in Large Civil Aircraft*  
*(Second Complaint)*  
**(DS353)**

**EXECUTIVE SUMMARY OF THE  
SECOND WRITTEN SUBMISSION OF THE UNITED STATES**

November 29, 2007

## INTRODUCTION

1. The Second Written Submission of the United States demonstrates that the EC has yet to make *prima facie* case that the measures it challenges constitute financial contributions, confer a benefit, or are specific as those terms are defined under the SCM Agreement. Moreover, the EC has not demonstrated that any of the measures are contingent on export performance. Finally, the EC has not demonstrated that Airbus is experiencing any "adverse effects" as a result of any of the measures. In fact, Airbus is not experiencing any adverse effects as that term is defined under the SCM Agreement. The difficulties of which it complains are the result of Airbus's own commercial choices.

### **I. THE COMPLAINING PARTY BEARS THE BURDEN OF PROOF WITH REGARD TO EACH ELEMENT OF ANY ASSERTED INCONSISTENCY WITH WTO RULES.**

2. As an initial matter, the United States would note that at several places the EC either misstates or attempts to shift the burden of proof. For example, in its first oral statement, the EC asks, "{i}t reasonable to assume, as the United States would like you to do, that such subsidies could have *no* effect on Boeing's competitive behavior? We think not." The United States raises this as an initial matter because it is well established that in WTO dispute settlement, "the burden of proof rests on the party that asserts the affirmative of a claim or defense" to put forward "adequate legal arguments and evidence" to "establish{} a *prima facie* case." A *prima facie* case is, in turn, one "which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party." The Appellate Body recently observed that these principles "imply that a responding party's measure will be treated as WTO-consistent unless proven otherwise."

3. The EC recognizes in its first written submission that "the initial burden of proving a violation is on the complaining party, which must establish a *prima facie* case." However, much of its subsequent argumentation is inconsistent with this principle.

4. The point of the burden of proof, however, is that it is not for a panel "to assume" anything at all about a Member's measures. To the contrary, the burden of *proof* requires the complaining party to furnish *proof* of the assertions it makes in support of its claim. To proceed otherwise improperly shifts the burden of proof to the responding party.

### **II. A MEASURE IS ACTIONABLE UNDER ARTICLE 6.3 ONLY IF IT IS A FINANCIAL CONTRIBUTION THAT CONFERS A BENEFIT, IS SPECIFIC, AND CAUSES SERIOUS PREJUDICE.**

#### **A. A Financial Contribution Exists Only if a Government or Public Body Performs One of the Actions Listed in Article 1.1(a).**

5. The EC at the first Panel meeting appeared to take the position that Article 1.1(a) should be interpreted expansively so as to cover all potential government contributions and to eliminate "loopholes." This view is at odds with the Appellate Body's recognition, based on the negotiating history of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), that "the requirement of a financial contribution from the outset was intended by its proponents precisely to ensure that not all government measures that conferred benefits could be deemed to be subsidies." The EC's view is also at odds with the structure of Article 1.1, which states that a subsidy exists if there is a "financial contribution," and which provides a list (preceded by "*i.e.*," meaning "*id est*" or "that is") of actions that are financial contributions. This structure, the omission of a residual (or "all others") category, and the absence of any indication that the listed items are "examples" rather than definitions, indicates that the financial contributions defined in Article 1.1 are a closed list. Therefore, to make a *prima facie* case of

subsidization, the complaining party must establish that the alleged subsidy falls into one of the four enumerated categories of financial contribution.

**B. Articles 1 and 2 Require an Individualized Assessment of Each Alleged Financial Contribution.**

6. Articles 1 and 2 set out a series of steps for establishing the existence of a specific subsidy. These provisions clearly require that this analysis occur separately with regard to each financial contribution, rather than grouped together. The EC, however, attempts to dispense with this individualized treatment by grouping together different alleged financial contributions provided by different government entities and treating them as if they were the same type of contribution. In so doing, it fails to provide a *prima facie* case with regard to any of the alleged subsidies.

7. This combination of multiple different financial contributions and disregard for the distinct standards for determining a benefit for each appears over and over again in the EC submission. It is also not the analysis required by the SCM Agreement. Article 1 is drafted in the singular. Article 1.1(a) provides that “a subsidy shall be deemed to exist if: there is a financial contribution . . . .” Article 1.1(b) then specifies that “a subsidy” exists with regard to “a financial contribution” if “a benefit is thereby conferred.” Article 1.2 then specifies that “a subsidy” is subject to Part III only if “such a subsidy is specific in accordance with the provisions of Article 2.” This drafting clearly envisages a separate analysis of each alleged financial contribution.

8. Nevertheless, as the cited sections of the EC first written submission show, that is exactly what the EC tries to do. This approach is completely at odds with the structure of Article 1.1 and the guidance for determination of a benefit provided under Article 14, which presupposes a precise identification of the type of financial contribution at issue. The discussion below of the individual alleged subsidies will address this problem in more detail but, as a general matter, a party fails to establish the existence of a subsidy if it does not establish the existence of a benefit and specificity separately with regard to each type of alleged financial contribution.

**C. A Generally Applicable Law Does Not Confer a Specific Subsidy Simply Because One of the Government Authorities Enforcing the Law has a Limited Scope.**

9. Article 2.1(a) and (b) frame the *de jure* specificity analysis in terms of whether the granting authority or the legislation pursuant to which that authority operates explicitly limits access to certain enterprises. The EC does not dispute that the laws and regulations governing U.S. government contracting, treatment of independent research and development and bid and proposal expenses, and attribution of rights in patents are applicable to contracting in all sectors of the economy. However, it argues that when applied by NASA or DoD, those measures are specific as to the “research-based defense and aerospace industries” because only companies capable of meeting the procurement needs of those agencies sell to those agencies. This argument disregards the text of the SCM Agreement and would render the specificity requirement a nullity when a number of specialized agencies administer generally available laws or programs. In other words, the EC would pre-ordain its desired conclusion by arbitrarily confining its specificity analysis to the group of enterprises that forms the focus of its complaint.

10. Article 2.1(a) applies only when an authority or legislation “explicitly limits access to a subsidy to certain enterprises.” The ordinary meaning of “limit” is “{c}onfine within limits, set bounds to; restrict.” The ordinary meaning of “access” is “{a}dmittance (to the presence or use of); {a} way or means of approach or entrance.” Thus, an authority or its legislation limits access to a subsidy within the

meaning of Article 2.1(a) when it restricts admittance to the subsidy to “certain enterprises.” Performing this evaluation will involve identifying which types of enterprise have access to a subsidy, and evaluating whether that group is sufficiently discrete to meet the definition of certain enterprises, which the chapeau of Article 2.1 defines as “an enterprise or industry or group of enterprises or industries.” Where legislation provides for multiple authorities to grant payments under a program, the fact that an enterprise or industry is eligible for payments from one authority would indicate that it has “access” to the alleged subsidy within the meaning of Article 2.1. The fact that the same enterprise was *ineligible* to receive such payments from a second granting authority would not change the fact of its access through the first granting authority. Therefore, the second authority’s rules should not, absent other considerations, be considered to “limit access” to the alleged subsidy by the enterprise.

**D. The “Baseline” for an Evaluation of Disproportionality Is Defined by the Alleged Subsidy, and Not by the Jurisdiction of Challenged Authorities.**

11. The United States and the EC apparently agree that determining whether an apparently non-specific subsidy is, in fact, granted to certain enterprises “in disproportionately large amounts” requires a comparison of users of the alleged subsidy against some baseline. However, we disagree on what the baseline is. The text of Article 2.1(c) calls for a comparison between use of a subsidy by enterprises as to which the subsidy is alleged to be specific and the position of subsidy users within the baseline group of all enterprises that have “access” to the alleged subsidy. If the actual usage by “certain enterprises” is out of proportion to their size relative to the baseline group of all enterprises that receive the alleged subsidy, that would be one “other factor” indicating specificity with respect to the certain enterprises.

12. The EC, however, asserts that the proper comparison is between the “certain enterprises” and the overall U.S. economy. It notes that the chapeau of Article 2.1 states that subparagraphs (a), (b), and (c) are principles for determining whether a subsidy is specific to “certain enterprises . . . within the jurisdiction of the granting authority.” The EC divines from this passage that the *de facto* specificity analysis must take as its baseline the “jurisdiction” of the granting authorities, and in the EC’s view, for DoD and NASA, this covers the entire United States.

13. The text does not support this interpretation. The phrase “within the jurisdiction of the granting authority” in the chapeau of Article 2.1 acts to delimit the enterprises that are potentially subject to the specificity inquiry, making clear that enterprises outside the jurisdiction are not relevant. Nothing in the phrase suggests, as the EC seems to believe, an additional meaning that the specificity inquiry must invariably be based on *all* enterprises within the jurisdiction. In fact, several of the factors for consideration narrow the class of enterprises subject to consideration. To read “within the jurisdiction of the granting authority” as expanding the inquiry to all enterprises in the jurisdiction would deprive the subsequent factors of their ordinary meaning.

14. Moreover, the interpretation advanced by the EC would effectively nullify the *de jure* specificity factors under Article 2.1(a) and (b). Both of these subparagraphs create standards under which a subsidy would not be specific even if *some* enterprises in the jurisdiction of the granting authority had no access. But if the EC were correct, the “amount” of alleged subsidies granted to classes of subsidy recipients found nonspecific under Article 2.1(a) and (b) would always be found disproportionate, because the subsidy recipients would represent 100 percent of the amount of the subsidy granted, but less (and often far less) than 100 percent of the overall economy.

**III. DOD RESEARCH CONTRACTS**

**A The EC Has Failed to Establish the Existence of a Financial Contribution.**

15. The United States showed in its first written submission that all of DoD’s Research, Development, Testing, and Evaluation (“RDT&E”) contracts with Boeing had a military objective, and that in exchange for payments, Boeing employees performed research work to government specifications and delivered the results to DoD. The EC does not dispute that DoD received “some value” under these contracts. In short, despite its rhetoric, the EC is forced to admit that the RDT&E contracts represented an exchange of value between DoD and Boeing, which would make them a purchase. That should end the inquiry, as the contracts make clear that what DoD purchased was Boeing’s RDT&E services, a transaction that is not a financial contribution within the meaning of Article 1.1 of the SCM Agreement.

16. However, the EC attempts to avoid this consequence by asserting that the military purpose is “irrelevant” because the “issue in this dispute” is “the portion of DoD RDT&E support that benefits Boeing’s commercial division.” This assertion is wrong on two levels. In the first place, the EC’s theory mixes two concepts that are separate under the SCM Agreement – financial contribution and benefit. The identification of a financial contribution under Article 1.1(a)(1) depends on the type of the transaction that allegedly confers a subsidy. The question of whether there is a benefit comes only *after* the establishment of a financial contribution. Thus, the EC’s assertion that technologies researched under some contracts have civil application is irrelevant to a determination of whether the contracts convey a financial contribution in the first place.

17. Second, the United States recalls that the EC is challenging R&D services that it believes result in “dual use” technologies. It is not challenging two distinct transactions. The research performed (and, for that matter, any technologies generated) cannot be artificially divided into a portion done for military purposes and a portion done for civil purposes. Accordingly, the EC cannot challenge any alleged civil portion of the research contract as something that DoD separately conveys to Boeing, discrete from the military portion of the research contract, and that the Panel can analyze in isolation from its military applicability.

**B. The EC Has Not Established the Existence of a Benefit.**

18. Even if the Panel were to find that the RDT&E contracts gave rise to a financial contribution, the contracts confer no benefit because Boeing performed valuable research and delivered valuable results to DoD, and DoD paid only for the work directed to its own objectives. Thus, any payment to Boeing was no more than adequate remuneration for what Boeing did, which, under the analysis provided in Article 14(d), establishes that the payments do not confer a benefit.<sup>1</sup> The EC does not dispute that the agency received “some value” under these contracts. However, it does not address whether that “value” was worth less than what DoD paid. That, by itself, represents a failure on the part of the EC to meet its burden of proof, and requires rejection of its assertion that a benefit exists.

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<sup>1</sup> Thus far, the only theories so far that the EC has put forward for treating the purchases of services as a financial contribution are (1) that their omission from Article 1.1(a)(1)(iii) means that they are a “direct transfer of funds” under Article 1.1(a)(1)(i), and (2) that the DoD contracts are really purchases of a good. In either case, the existence of a “purchase” would make Article 14 important context for the evaluation of the payments that conferred a benefit. In fact, the Appellate Body has noted as a general matter that “{a} ‘subsidy’ involves a transfer of economic resources from the grantor to the recipient for less than full consideration.” *US – DRAMs (AB)*, para. 125, n. 212, quoting *Canada – Dairy (AB)*, para. 87.

19. The EC asserts that the larger part of the value of each contract was a “benefit to Boeing’s LCA division” because “Boeing ultimately used a significant portion of those funds for its own benefit.” To be clear, the EC provided absolutely no evidence for this assertion in its first written submission or in its first oral statement. Moreover, the United States provided evidence that the opposite is true. Each contract specifically describes DoD’s goal, and lays out the work that the contractor will perform to achieve that goal. Boeing has no latitude to change the work itself. Rather, modifications must be agreed to by DoD, subject to negotiations and revisions in the amount of the payment. Where the parties agree that the work carries some benefit to Boeing, DoD uses a vehicle (such as a cooperative agreement, other transaction, or technology investment agreement) that requires Boeing to make its own monetary contribution to the project, and provides no allowance for a profit. The U.S. government maintains detailed and voluminous regulations designed to ensure that contractors charge only for expenses related to performance of their contracts. Thus, the evidence shows that DoD defined the work for Boeing to perform and paid only for what Boeing actually did.

**C. The EC Failed to Establish that the Alleged Subsidies Are Specific.**

20. If the Panel finds that the RDT&E contracts are a financial contribution, the United States has made a contingent argument that the subsidies alleged by the EC are not specific. However, the EC has little of substance to say about specificity. It argues, without any supporting information, that “entities capable of carrying out the types of activities enumerated in DoD’s regulations” constitute a “group of entities or industries.” However, the U.S. first written submission demonstrated that DoD contracts for RDT&E on a large variety of topics, with thousands of enterprises, in a large number of industries. The EC has provided no information or argument to support a conclusion that this diversity of enterprises and industries is sufficiently discrete so as to be considered “specific.”

**D. The EC Has Failed to Support Its Calculation of the Amount of the Alleged Financial Contribution.**

21. In tandem with its subsidy analysis, the EC attempts to estimate the amount spent on research into so-called “dual-use technologies” that it considers to be a financial contribution. It then treats this amount as equal to the magnitude of the alleged benefit. In its first written submission, the United States demonstrated that the EC’s calculations were superficial, self-contradictory, and contrary to the evidence. They were superficial in that the evidence of “dual use” was based on nothing more than mere references to generic scientific terms that indicated nothing about whether the research in question had a civil use. They were self-contradictory in that the very evidence on which the EC relied proved that the estimated value of the programs in question were inflated by *at least* five to seven times, and probably by a greater amount. They were contrary to the evidence in that DoD research into “dual use technologies” aims to convert civil technologies to military use, and not the other way around, as the EC claims.

**E. The EC’s Allegations that Boeing “Used” DoD-Funded Technology in Large Civil Aircraft Are Unproven And Irrelevant to a Finding as to Whether There Was a Financial Contribution, a Benefit, or Specificity.**

22. The EC has devoted much of its presentation on DoD RDT&E to assertions that Boeing “used” technology funded under DoD contracts on large civil aircraft, and that Boeing developed “knowledge, experience, and confidence” working on DoD projects. The United States pointed out in its first written submission that these assertions are irrelevant to a determination whether RDT&E contracts are a specific subsidy. The contention regarding “use” of DoD technologies in large civil aircraft is not true, a point to which we will return later. Even if it were true, the existence of synergies between different divisions of

an enterprise would be completely commercial in nature. Such synergies are one of the primary reasons that enterprises combine with other enterprises. The development of “knowledge, experience, and confidence” by employees (and enterprises) is also the result of any commercial transaction. Therefore, the fact that Boeing employees added to their professional skills while working under DoD contracts (or the EC allegations that large civil aircraft used DoD-funded technologies) proves nothing about whether the contracts themselves were more advantageous to Boeing than the market would provide. To the contrary, these are completely normal commercial outcomes, and when arising in connection with a payment that is not otherwise a subsidy, do not transform the payment into a subsidy.

#### **IV. NASA RESEARCH CONTRACTS**

##### **A. The EC Has Failed to Establish the Existence of a Financial Contribution.**

23. The EC relies on rhetoric, rather than evidence, to support its contention that NASA research contracts with Boeing were really grants and, accordingly, has failed to carry its burden of proof. This is not because the United States is hiding evidence, as the EC claims. The United States submitted copies of all of the relevant contracts as part of the Annex V process in DS317, and NASA provided a number of contracts directly to the EC in response to requests under the U.S. Freedom of Information Act. Rather, as the United States has shown, the evidence demonstrates that these payments were not grants, but instead were for purchases of services, a type of transaction that is not a financial contribution within the meaning of Article 1.1(a)(1). Thus, the EC has not met its burden of proof, and the United States has fully rebutted the unsupported arguments the EC did make.

24. With regard to the EC’s assertions, it is true that NASA does not acquire or produce large civil aircraft. However, NASA does acquire, produce, and disseminate knowledge. And, accordingly, the “true purpose” of the NASA programs is to develop and disseminate the greatest amount of information to the broadest group in the shortest amount of time possible, and not to “convey resources to Boeing.” NASA’s contracts with Boeing and its actions provide evidence that this is the case, and that the challenged measures are purchases of services – not just in name, but in substance. NASA formulates its own goals, based on consultations with a wide variety of stakeholders. NASA seeks proposals from contractors on how to meet those goals, and accepts the bid that presents the best value. NASA and its contractor negotiate over the terms of the contract. The contractor must then carry out all of the terms of the contract in return for payment by NASA. This process, documented by the citations to U.S. procurement regulations, the numerous examples of individual contracts and modifications, and the huge volume of publicly disseminated literature generated by these programs, demonstrates that NASA’s contracts with Boeing are not, as the EC would have the Panel believe, a “sham.”

25. As for the “true purpose” of NASA’s programs, it is not – as the EC intimates – an elaborately staged effort “to convey resources to Boeing.” Rather, the United States has demonstrated that the “true purpose” of NASA’s programs is to use and disseminate the results of research that will advance its broad, overarching goals, including a safer and more efficient commercial aerospace system. That research is used both within government, by U.S. government agencies, such as the Federal Aviation Administration (“FAA”) and DoD, and airport authorities, and outside of government by industry and academia

##### **B. The EC Has Failed to Support its Assertions as to the Benefit Associated with the NASA-Boeing Transactions.**

26. The EC's assertions that NASA payments conferred a benefit on Boeing follow the same theme as its arguments regarding the existence of a financial contribution – that NASA received nothing in return for the money it paid. This is manifestly incorrect. In its first written submission and oral statement, the United States demonstrated that the U.S. government receives a commensurate value in exchange for the money NASA pays Boeing. The United States receives the labor of Boeing scientists and engineers directed to the objectives of the U.S. government. The United States can and does disseminate the knowledge they generate for the public benefit. By purchasing the research, the government receives intellectual property rights with regard to inventions and data that it would not otherwise hold.

27. The EC attempts to minimize the significance of these results of the research contracts, stating:

it goes without saying that no commercial entity would ever pay another entity to conduct R&D primarily for the other entity's benefit, receiving only nominal research reports to disseminate to the public and license rights it never plans to utilize in return.

Each element of this assertion is wrong.

28. First, the research reports are not “nominal.” NASA's server has thousands of reports generated by NASA scientists and employees of Boeing and other enterprises working pursuant to contracts with their employers. This represents a huge database of knowledge for the world aeronautics research community. Second, the EC provides no evidence that the U.S. government “never plans to use” the patent and license acquired under the research contracts. The rights in question are *government* rights, so that Boeing would be barred from charging any U.S. government agency for use of any patents or data rights generated under one of the research contracts, including by the FAA, DoD, or by NASA itself in subsequent research. Third, the EC provides no evidence that the R&D conducted at NASA's request is “primarily for {Boeing's} benefit.” In fact, the research challenged by the EC is for the broader public good, including public users of air transportation, airlines, and the academic community, as well as the aeronautics industry, including the suppliers of aircraft components and Airbus itself. And, finally, the EC provides no support for the assertion that a commercial entity would not pay another entity to conduct services that also provide benefit to that other entity. Commercial transactions routinely provide benefits to both sides.

**C. The EC Has Failed to Support Its Calculation of the Amount of the Financial Contribution.**

29. In tandem with its subsidy analysis, the EC attempts to estimate the value of the NASA's research payments to Boeing that it considers to be a financial contribution, which it considers to be identical to the magnitude of the alleged benefit. In its first written submission, the United States demonstrated that this calculation was invalid because it was based on several erroneous assumptions, including that the value of NASA's contracts with Boeing for aeronautics research was proportionate to the company's share of U.S. civil aviation production, and that a share of NASA's spending on its own salaries and other expenses was a grant to Boeing. There is no evidence to support these assumptions, and the EC cited none in its written submission. These errors led the EC to estimate NASA's payments to Boeing as \$7.3 billion, when the actual figure was less than \$750 million.

30. The EC oral statement simply repeated the allegation that the EC's consultants had “meticulously examined the NASA budgets to extrapolate funding provided to the US civil aircraft industry for LCA-related R&D . . . and apportioned this funding to Boeing's LCA division based on its share of the US civil aircraft industry.” This statement only serves to demonstrate one of the fundamental errors of the EC



estimates – they assume that NASA “apportions” funding to Boeing’s large civil aircraft division based on its share of the U.S. civil aircraft industry. There is no support for this assertion. Moreover, the very data that the EC consultants “meticulously examined” further demonstrates the error of their underlying assumption – NASA did not allot its funding according to market share, and the amounts that they assert it spent on aeronautics research contracts with Boeing are greater than the total amount NASA spent on aeronautics research – a mathematical impossibility. Finally, the United States submitted data from NASA’s disbursement records indicating that the agency’s contracts with NASA were worth far less than the EC’s consultants alleged.

**V. INDEPENDENT RESEARCH AND DEVELOPMENT (“IR&D”) AND BID AND PROPOSAL (“B&P”) REIMBURSEMENTS ARE NOT A SUBSIDY TO LARGE CIVIL AIRCRAFT.**

**A. The EC Has Failed to Establish That DoD or NASA IR&D or B&P Reimbursements Covered Research for Large Civil Aircraft.**

31. The EC has provided no credible evidence that NASA or DoD actually included research related to large civil aircraft research in IR&D and B&P reimbursements. Its assertion that the agencies conveyed “financial contributions worth \$3.1 billion to Boeing’s LCA division” rests instead on another assertion, that there are “several examples of such dual-use technologies developed by Boeing, for which Boeing *likely* received reimbursement in whole or in part through the US Government’s IR&D/B&P Program.” These examples, in turn, rest on the conclusion by the EC’s consultants that the relevant rules *would allow* IR&D/B&P reimbursements for large civil aircraft research, and that Boeing engaged in projects that *could* have qualified *if* Boeing in fact sought reimbursement.

32. The United States, however, showed in its first written submission that the rules and regulations related to IR&D and B&P reimbursements and commercial competitiveness considerations prevent Boeing from treating large civil aircraft research as an IR&D or B&P expenses. In fact, Boeing’s own accounting rules require that research expenses be separated into separate accounts for research on IDS products only, research on BCA products (that is, large civil aircraft) only, and research applicable to the products of multiple units (known as the “common enterprise overhead” account). The expenses of any true dual use IR&D projects would go into the common enterprise account, which Boeing informs us was worth only [[HSBI]] in 2003. They are then allocated to each segment (including BCA), with DoD reimbursing only the costs that are allocated to IDS and subsequently to IDS’s cost-based contracts with DoD. The EC concedes that such treatment would ensure that DoD did not pay for dual-use IR&D related to large civil aircraft.

33. The EC attempts to support its contention that IR&D reimbursements cover large civil aircraft research costs by noting that DoD changed its IR&D eligibility standard in 1991, with the result that, in the word of one report, “military relevance is no longer demanded.” However, the EC neglected to quote certain critical findings in that report. One such finding goes to the motive for the changes:

critics argued that there was no need to have government imposed IR&D ceilings. In their view, IR&D spending would be self-limiting. If a firm put too much money into IR&D . . . then the firm’s overhead would rise and it would become non-competitive.

Thus, the goal was to lessen DoD control over contractors’ IR&D decisions, and use competition to control IR&D spending, not to make IR&D reimbursements available for research into topics of civil interest. The report, which was issued in 1997, also made findings about how contractors reacted to the IR&D reform. It demonstrates that what the EC characterizes as a “relaxation” of controls on the type of

research eligible for IR&D projects had no such effect. To the contrary, contractors focused on research of immediate interest to DoD, and away from long-term projects with broader potential benefits. Contractors did not use the new standard to add non-defense or dual-use technologies to their claims for IR&D or B&P reimbursement (as the EC asserts) but “are generally working in the same technical areas as before the changes.” In fact, not only is IR&D focused more on military projects, the total value of IR&D reimbursements decreased markedly after the 1992 introduction of the new standard.

**B. The Inclusion of IR&D and B&P Reimbursements in U.S. Government Payments for Goods and Services Does Not Convey a Benefit, Because the Reimbursements Reflect Costs Routinely Included in Market Prices Paid by Commercial Customers.**

34. In its oral statement, the EC did not dispute that companies routinely factor R&D costs and selling expenses into their prices. Nor did it dispute that IR&D and B&P costs reflect such expenses. Instead, the EC asserted that

an entity operating pursuant to market considerations would *not* agree, and would certainly *not* actively seek, to reimburse independently incurred costs of companies because those costs “{e}nhance the industrial competitiveness of the United States’ or ‘{s}trengthen{} the . . . technology base of the United States.

35. This statement contains two fallacies. First, the EC overstates the importance of the “enhance the industrial competitiveness” and “strengthen the technology base” objectives. The IR&D report cited by the EC indicates that more immediate and concrete objectives are the focus of IR&D projects. Second, Boeing’s large civil aircraft division routinely engages in research that enhances the industrial competitiveness of the United States and strengthens the technology base of the United States. Its commercial customers, both U.S. and foreign, know that this cost is built into the price they pay for large civil aircraft, and that BCA could not continue to develop new products if it could not recover these costs.

**C. The EC’s Observation That the Generally Applicable IR&D and B&P Rules Were Applied by DoD and NASA Does Not Mean That IR&D and B&P Reimbursements Are Specific.**

36. The EC simply asserts, without explanation, that the United States “failed to rebut” its arguments because of an “erroneous understanding of Article 2.1(a)” and “ignoring of the granting authorit{ies} issue.” Section II.C., above, explains the overarching error with the EC theory – that by focusing on two granting authorities – DoD and NASA – without regard to the activities of other agencies, the EC attempts to create an appearance of limited access where there is none. Application of the relevant provisions of the SCM Agreement to IR&D/B&P payments further demonstrates the error of the EC arguments.

**VI. THE ALLOCATION OF INTELLECTUAL PROPERTY RIGHTS UNDER U.S. GOVERNMENT CONTRACTS IS NOT A SPECIFIC SUBSIDY.**

**A. The Allocation of Intellectual Property Rights Under U.S. Government Contracts Cannot Be Analyzed Independently of the Contracts That Generate Those Rights.**

37. The EC attempts to treat the disposition of intellectual property rights under NASA and DoD contracts as autonomous acts – “waivers” or “transfers” by those agencies – ignoring the fact that the treatment it challenges occurs only through a contract, as part of an overall exchange of value between the government and private parties. By taking one element – the retention of patent rights by the private

party – out of the context of the overall exchange, the EC attempts to create the impression that the government has bestowed something on the private party for free, when in fact the government pays for rights that it obtains from its contractor.

**B. The EC Assertion That the Government Conveyed Intellectual Property Rights to Boeing Reverses What Actually Occurred – That Boeing Conveyed Intellectual Property Rights to the Government.**

38. The allocation of patent rights under U.S. government contracts is not a financial contribution at all, because there is nothing for the government to contribute – under U.S. law, any rights in a patent belong in the first instance to the inventor. Therefore, the only transfer of rights under a government contract is the license that the contractor grants to the government. There simply is no transfer of patent rights from the government to the contractor. In its oral statement, the EC did not dispute that the general rule under U.S. law is that the inventor has the first right to any patents he or she makes. Instead it simply ignored this rule, and focused on other laws and regulations that do not tell the whole story.

39. With regard to DoD, the EC argues that 35 U.S.C. § 202(a) (part of the “Bayh-Dole Act”), as applied to medium and large businesses pursuant to a 1983 Presidential Memorandum, “provides that it is DoD that ultimately decides who will own a patent.” This statement is wrong. Section 202(a) sets out a general rule (which can be called the “Bayh-Dole” rule) explicitly apportioning rights to patents for inventions made under government contracts – the contractor may retain title to the patent, while the government receives a “government use” license to use those inventions free of charge. This standard applies to all contractors, without regard to size or status as a university or other nonprofit entity. Thus, it is the acquisition rules and general patent law, rather than any agency, that “ultimately decides” who owns a patent made under a government contract by a contractor employee.

40. With regard to NASA, the EC quotes section 305(a) of the Space Act, which acts as an exception to the general rule under U.S. patent law that an invention is owned by, and a patent issued to, the inventor or assignee of the inventor. As the U.S. Court of Customs and Patent Appeals ruled, “Section 305 clearly treats an invention as property, the right to which is in the inventor or his assignee unless the invention was made (conception or first actual reduction to practice) in the performance of a work under a NASA contract.” The Section 305 exception to the issuance of a patent to the inventor or his assignee is limited, in that the NASA Administrator has discretion not to assert (or to “waive”) patent rights that might accrue to the government. As noted in the U.S. first written submission, in accordance to the 1983 Memorandum, NASA issued regulations that have resulted in the waiver of its patent rights every time a contractor has requested. Through this mechanism, NASA allocates patent rights between agency and contractors in a manner substantively identical to what DoD and other agencies do.

**C. The EC Has Provided No Support For Its Assertion That the Allocation of Patent Rights Under U.S. Government Contracts Is More Advantageous Than Is Available in the Market.**

41. In its first written submission, the United States demonstrated that the standard government patent rights clauses form part of a bargain struck at arm’s length between an agency and a contractor. The EC has provided no evidence to suggest that the transaction was not at arm’s length, or otherwise inconsistent with market practices. Therefore, it has failed to make a *prima facie* case of the existence of a benefit.

42. Nonetheless, in its oral statement, the EC contended that this treatment is “contrary to what market participants would have negotiated at arms-length according to relevant market benchmarks.” The EC has provided no support for this assertion.

**D. The EC’s Observation That the Generally Applicable Rules for Allocating Patent Rights Under Government Contracts Were Applied by DoD and NASA Does Not Mean That Those Rules Are Specific.**

43. In its first written submission, the United States demonstrated that the application of the Bayh-Dole rule to government contracts is *de jure* non-specific because the government employs objective criteria to determine eligibility: whether a contract involves experimental, developmental, or research work, which any enterprise in any industry may perform. Similarly, the rules are not specific under Article 2.1(a), because both the law and the 1983 Presidential Memorandum make access to this treatment available to *all* government R&D contractors, without limitation to a specific enterprise or industry or group of enterprises or industries.

44. The EC does not take issue with any of these points. Instead, it simply asserts that, because the EC is challenging only NASA and DoD contracts, the generally applicable Bayh-Dole rules under 35 U.S.C. § 202(a) are “irrelevant to the analysis required under Article 2.1.” Section II.C, above, explains the overarching error with the EC theory – that by focusing on two granting authorities – DoD and NASA – without regard to the activities of other agencies, the EC attempts to create an appearance of limited access where there is none.

45. The EC also alleges that Boeing and the five top U.S. defense contractors receive “disproportionately large amounts” of intellectual property rights. The term “disproportionately” suggests a comparison with some larger group, which both the United States and the EC term the “baseline group.” The EC asserts that the proper comparison for disproportionality is the entire U.S. economy. Section II.D, above, explained why the EC’s interpretation of disproportionality is incorrect as a legal matter.

**VII. THE DEPARTMENT OF COMMERCE ADVANCED TECHNOLOGY PROGRAM IS NOT SPECIFIC AND THUS IS NOT AN ACTIONABLE SUBSIDY.**

46. With respect to the U.S. Department of Commerce (“DOC”) Advanced Technology Program (“ATP”), the EC has failed to establish that any alleged subsidy is “specific” within the meaning of Article 2 of the SCM Agreement. The EC argues that ATP is specific because ATP funding is limited to those companies that perform research into ‘high-risk, high pay-off, emerging and enabling technologies’. However, such a limitation does not amount to a limitation to a “group of enterprises or industries” within the meaning of Article 2.1 of the SCM Agreement. If “certain enterprises” in Article 2.1 captured as broad a range of companies as those that could conduct “high-risk, high pay-off, emerging and enabling technologies,” then it is difficult to conceive of eligibility criteria for R&D funding that a Member could devise that would be non-specific. In addition, the broad range of sectors that have received ATP funding demonstrates that ATP is not specific. Specifically, ATP has funded 768 projects that cover a range of sectors that includes advanced materials and chemicals, biotechnology, electronics, computer hardware and communications, information technology, and various types of manufacturing. Because ATP funding is not specific under the SCM Agreement, it is not an actionable subsidy.

**VIII. THE B&O TAX ADJUSTMENT FOR AEROSPACE MANUFACTURING DOES NOT CONFER A WTO-INCONSISTENT SUBSIDY ON BOEING.**

47. The EC has failed to establish that the Washington State Business & Occupation (“B&O”) tax adjustment at issue in this dispute results in revenue foregone to the State of Washington. In asserting this argument, the EC errs in classifying the B&O tax rate for aerospace manufacturing as an exception to a general rule of taxation in Washington State. The baseline for the Panel’s analysis of revenue foregone in this dispute is the Washington State B&O tax regime, which consists of a range of different individual rates to different business activities. In light of the multi-rate tax system established by the State, the adjustment of the B&O tax rate to a rate that is comfortably within the range of all B&O tax rates is consistent with the treatment of legitimately comparable income in Washington. In addition, there is no rational basis for using the .484 percent B&O tax rate for manufacturers as the benchmark for analyzing revenue foregone rather than the multi-rate system because the .484 percent rate is just one rate in a multi-rate system. In the context of the Washington State B&O tax system, applying an individual tax rate for a particular business activity is comparable to treatment of other legitimately comparable income.

48. As the United States detailed in its first written submission, the implications of the tax adjustment on the effective rate for aerospace also demonstrates that the B&O tax rate for aerospace is consistent with the tax treatment afforded to comparable income by Washington State and therefore does not result in revenue foregone. The adjustment of the nominal B&O tax rate served to bring the effective tax rate for aerospace manufacturing within the range of effective tax rates for other business activities in the State. This further supports the conclusion that the adjusted rate does not constitute revenue foregone under Article 1.1(a)(1)(ii).

49. Even aside from the fact that the B&O tax adjustment does not result in revenue foregone, the B&O tax adjustment is not specific. The EC’s argument that the B&O tax adjustment is specific because the measure that should be analyzed is HB 2294, rather than the overall B&O tax system, is fundamentally flawed. As noted above, the adjustment of the aerospace B&O tax rates fits into the State’s overall multi-rate tax regime in which individual rates are moved independently of each other. Washington has provided such adjustments to several other business activities in the State such as: biofuels manufacturing, timber products manufacturing, nuclear fuel assembly manufacturing, wholesaling and retailing, flour and oil manufacturing, dried pea and meat processors, and stevedoring.

**IX. THE EC HAS FAILED TO ESTABLISH THAT ANY OF THE ROAD AND PORT IMPROVEMENTS UNDERTAKEN BY THE STATE OF WASHINGTON ARE OTHER THAN GENERAL INFRASTRUCTURE.**

50. In this dispute, the EC has challenged several infrastructure projects of the State of Washington as subsidies. However, these projects in fact amount to general infrastructure, which is not a financial contribution – and thus, not a subsidy – under the SCM Agreement. The improvements to I-5 and SR-527 constitute general infrastructure because they are major roads serving countless businesses, tourists, and commuters. In addition, these improvements – which were identified by the State well before the signing of the Project Olympus Master Site Agreement – were completed as part of a state-wide package to improve infrastructure throughout the State. The rail barge transfer facility similarly constitutes general infrastructure and thus is not a financial contribution within the meaning of Article 1 of the SCM Agreement. The project was undertaken to alleviate congestion on the BNSF freight railroad mainline and the facility is open to all users. Thus, it constitutes general infrastructure.

**X. THE EC HAS FAILED TO ESTABLISH THAT THE INDUSTRIAL REVENUE BONDS ISSUED BY THE STATE OF KANSAS ARE ACTIONABLE SUBSIDIES UNDER THE SCM AGREEMENT.**

51. The EC's challenge to the Industrial Revenue Bonds ("IRBs") provided by the City of Wichita and the State of Kansas as WTO-inconsistent subsidies is without merit. As shown in the U.S. first written submission, much of the property at issue is no longer subject to tax in Kansas, such that no revenue is foregone with respect to such property as a result of the IRB program.<sup>2</sup> More fundamentally, the EC has failed to establish that the IRBs are specific. As the United States stated in its first written submission, this is unsurprising in light of the economy of Wichita and is not a sign of specificity. Aircraft production is the core industry of Wichita, and Boeing's Wichita facility was not only the largest private sector employer in Wichita, but also *the largest private sector employer for the entire State of Kansas* prior to its sale to Spirit. Accordingly, the amount of IRBs received by Boeing does not support a finding of specificity. The EC failed to respond to this in its oral statement at the first panel meeting and merely stated that "Boeing's receipt of IRBs is disproportionate to its economic position in the City of Wichita." The EC falls far short of its burden in demonstrating specificity.

**XI. THE EC HAS FAILED TO ESTABLISH THAT THE PROVISIONS OF HB 2294 ARE SUBSIDIES OR THAT THEY ARE TIED TO EXPORT PERFORMANCE.**

52. With respect to the tax measures in HB 2294, nothing the EC has said changes the simple fact that the EC has failed to meet the standard for demonstrating *de facto* export contingency under the SCM Agreement. As a threshold matter, the EC has failed to establish that HB 2294 constitutes a subsidy within the meaning of Article 1 of the SCM Agreement. Therefore, it cannot be a subsidy contingent on export performance.

53. Even if HB 2294 were a subsidy, it is not a prohibited export subsidy under the SCM Agreement. The EC's claim of export contingency is based primarily on the fact that HB 2294 requires the construction of an assembly facility with the capacity to produce 36 superefficient airplanes annually. The EC seems to assume that a tie to the establishment of production capacity is equivalent to a tie to actual or anticipated exports. However, it provides no evidence to support this equation. The EC merely incorrectly asserts that the U.S. market cannot absorb 36 superefficient airplanes per year, stresses that Boeing is export oriented, and relies on what it calls a "correlation" between exports and HB 2294. But, these assertions fail to establish export contingency.

**XII. THE EC HAS FAILED TO MAKE A *PRIMA FACIE* CASE THAT THE ALLEGED SUBSIDIES HAVE CAUSED SERIOUS PREJUDICE TO ITS INTERESTS**

**A. Introduction**

54. The EC's serious prejudice arguments fail, at a fundamental level, to explain how Boeing could have lost 14 percentage points of market share during the 2000-2006 period if the programs challenged by the EC were conferring the advantages that the EC claims they were. Just last week, Airbus placed its "largest ever order in terms of value" – 70 A350XWBs and 11 A380s ordered by Emirates Airlines. Airbus projects that it will deliver more aircraft than Boeing for the fifth straight year and break its 2005 record for aircraft orders.

55. To the extent that the EC asserts that Airbus' competitive performance could have been even better during the relevant period, the United States has submitted evidence showing that the alleged

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<sup>2</sup> The IRBs will also be less attractive since an IRB is not required in order to be eligible for a tax exemption on personal property.

subsidies are not the cause, in general, or with regard to the particular aircraft orders that the EC alleges as evidence of serious prejudice. The EC has failed to respond to the substance of this argument in any way.

56. Our previous submissions have discussed this issue at length. To summarize:

- The alleged suppression of prices for the A330 and A350, the sales lost by these aircraft to Boeing's 787, and any loss in market share (whether measured by deliveries or orders), are the direct consequence of Airbus' decision to focus on the A380 while Boeing chose to focus on developing a smaller aircraft. Because of its product development choices, Airbus had no aircraft that could compete effectively with the 787 and did not have the engineering and monetary resources to design one, until it unveiled the A350 XWB. Nor can there be any realistic claim of price suppression, because market prices for currently offered mid-sized aircraft were set by reference to existing pricing on mid-sized aircraft.
- Any suppression of prices for the A320 about which the EC complains is the result of, and is directly traceable to, a series of sales campaigns in which Airbus deliberately undercut Boeing's prices in order to capture key Boeing accounts.
- Because of its four-engine design, the A340 is fuel inefficient, a significant disadvantage in a time of very high fuel costs. Additional performance problems associated with this particular aircraft have added to the problem, forcing Airbus to lower the A340 prices to compensate, [BCI]. Thus, any suppression of A340 prices, lost sales, and any loss in market share (whether measured by deliveries or orders) is the result of Airbus' design decisions, which have nothing to do with alleged subsidies to Boeing.

57. The EC essentially ignores the evidence of these non-attribution factors and their role in determining sales and prices for Airbus aircraft, arguing that they are relevant only to an analysis of the company's financial performance for purposes of assessing a claim of material injury, a claim that the EC has not made. However, as the *US – Cotton Subsidies* panel found:

the condition of a causal link requires us to ensure that the significant price suppression *is* “the effect of the subsidy” within the meaning of Article 6.3(c). This necessarily calls for an examination of United States subsidies, within the context of other possible causal factors, to ensure an appropriate attribution of causality.

The EC's failure to address these other causes for the alleged indicia of serious prejudice means that its causation argument fails, and along with it, the serious prejudice claims that rest upon that argument.

58. As the EC dismisses out of hand the possibility that anything other than the alleged subsidies could have caused Airbus' aircraft sales and prices to be at the level they were, it focuses instead on trying to build a case that the alleged subsidies are to blame. That case rests on four pillars:

- *First*, that the U.S. government has subsidized Boeing “to the tune of almost \$24 billion.”
- *Second*, that the magnitude of the alleged subsidies is, in and of itself, sufficient to prove the causal link between them and Boeing's reference period pricing.

- *Third*, that all these alleged subsidies, which include funds paid to enterprises other than Boeing and a portion of NASA’s and DOD’s funding of government employee salaries and administrative expenses, are the equivalent of “free” cash to Boeing, and that BCA, Boeing’s commercial aircraft division, used this “free cash” to “price down” its 737, 777 and 787 aircraft in a way that it otherwise could not have done.
- *Fourth*, that the R&D work done for NASA and DOD gave Boeing the “knowledge, experience, and confidence” necessary for it to bring the 787 to market when it did.

As the EC is the complaining party, it bears the burden of proof for each of these points. However, even on these topics, it is silent on critical issues. Where it is not silent, it relies on assertions that either have no supporting evidence or are contrary to the evidence before the Panel. Such assertions do not establish that the alleged subsidies caused serious prejudice and, therefore, do not make a *prima facie* case that the alleged subsidies caused serious prejudice.

59. To begin, the evidence shows that Boeing actually received a tiny fraction of the \$24 billion that the EC alleges. Instead, almost all of this amount took the form of (1) payments to enterprises other than Boeing that supplied research and development services to the government; (2) government administrative expenses or the salaries of government employees; (3) state tax reductions that Boeing will realize in relatively small amounts over the next 20 years; or (4) FSC/ETI tax benefits that the United States has discontinued. The EC never provides a convincing reason as to why these payments would have any effect on Boeing’s commercial aircraft operations, much less its aircraft product development or pricing.

60. With regard to the payments that Boeing actually received, the EC has greatly overstated the amounts, relying on estimates provided by its consultants that contradict the very documents they are supposed to have “meticulously examined.” The \$24 billion figure also includes alleged subsidies that, under the EC’s analysis, are attributable to the Boeing aircraft that the EC views as not competing with the A320, A330, A340, A350 Original, or A350XWB; namely the Boeing 717, 757, 767, 747, MD-11, MD-80, and MD-90. As the EC has conceded that such alleged subsidies have “no such *present* {adverse} effects in the LCA markets,” it is difficult to understand why the EC persists in including them in its overall number. The EC has also disregarded the great weight of evidence proving that none of the payments to Boeing – with the exception of the relatively small amount of FSC benefits that the United States has already discontinued – was either a subsidy or specific.

61. Thus, the EC’s assertion that the alleged \$24 billion in subsidies is large enough in and of itself to have caused serious prejudice rests entirely on rhetoric. But mere assertions are insufficient to meet the burden of proof. Indeed, once account is taken of the \$9.6 billion in NASA payments to Boeing alleged by the EC that never occurred, the billions more in DoD payments that had nothing to do with Boeing or its large civil aircraft, the \$7.5 billion in alleged subsidies that the EC concedes are not causing serious prejudice, and the FSC/ETI benefits that have been discontinued, it becomes clear that any remaining payments, dispersed as they are over the 35-year period stretching from 1989 through 2024, are too small to be causing serious prejudice to the EC.

62. The EC devotes further attention to its assertion that the alleged subsidies are the equivalent of “free” cash that allow Boeing to “price down” aircraft for competitive transactions. However, the EC’s efforts here come no closer to meeting its burden of proof. More than half of the alleged subsidies, by value, consists of payments by NASA and DoD for services provided to the U.S. government on projects devised by the government to achieve government objectives. The evidence shows that these payments to



Boeing were reimbursements for the cost of work performed for the U.S. government and, thus, were not in any sense “additional nonoperating cash flow” to Boeing, much less “free” or “unencumbered” cash to Boeing’s commercial aircraft division, BCA. Even if one were to assume, *arguendo*, that the programs challenged by the EC did confer subsidies, and that they did provide free nonoperating cash flow, the EC has provided no plausible reason to conclude that but for the alleged subsidies, Boeing would have priced its large civil aircraft any differently. Throughout the relevant period, BCA had ample cash flow to finance its R&D, and Boeing had unconstrained access to capital markets. It did not need the alleged subsidies to fund its commercial operations.

63. The final pillar of the EC’s adverse effects case is the claim that NASA and DoD programs enabled Boeing to launch the 787 sooner and more quickly than Airbus could launch its competing product, the A350XWB. However, the evidence disproves this theory. First, Boeing was able to bring the 787 to market sooner than Airbus was able to offer a competitive version of the A350 because it started earlier, based on its reading of customer demand. The alleged subsidies had nothing to do with its decision to move forward with the 787 when it did or its ability to execute its plans. Airbus started later because it thought the market demanded a much larger aircraft – the superjumbo A380 – and the company was so focused on that aircraft (and correcting production errors discovered late in the project) that it had insufficient resources to devote to another project. And as for how quickly Boeing developed the 787, when the development periods for the 787 and A350XWB are laid side by side, it is clear that the projected development time is almost the same. Second, the affidavit of Michael Bair, the general manager of Boeing’s 787 program, describes the many reasons that DoD and NASA technology gave Boeing no competitive advantage. In fact, there is no meaningful technology gap. Airbus itself recently acknowledged what it has been saying for the last decade: “{n}obody has more experience working with composites than Airbus. We know this stuff well.” To the extent that Boeing may have moved ahead of Airbus in industrializing some technologies for the 787, it is because of self-funded research. Airbus, on the other hand, has concentrated on other areas, and moved ahead of Boeing in those.

64. The EC itself contends that Airbus engineers have found that NASA’s published reports provide little in the way of information useful for production of large civil aircraft. They assume that this is because the reports omit results or proprietary data funded by NASA. However, NASA does not fund the development of proprietary information, and Boeing is prohibited from treating NASA-funded results as proprietary. As for the utility of the data for developing or producing aircraft, NASA funds primarily foundational research, conducted in the laboratory, which has little applicability to the actual development or production process. The Airbus engineers’ purported inability to derive production information from the NASA reports merely confirms the point the United States has been making all along – that NASA work does not translate from the laboratory to the factory, as the Bair affidavit documents.

65. These are the points that the United States and the EC both view as the “core” of the dispute. It is telling that at this stage, the EC has yet to put forward credible arguments in support of any one of these critical points, let alone all of them. In fact, as we have shown, the EC has failed to meet its burden of proof to establish that the alleged subsidies are “free cash” or grants to Boeing, that the amount of the alleged subsidies is \$24 billion, or that but for the alleged subsidies, Boeing’s pricing would have been different or its development of the 787 delayed to the point that serious prejudice did not occur. Therefore, it has failed to establish that the alleged subsidies caused serious prejudice to EC interests.

**B. The Evidence Shows That Most of the \$24 Billion that the EC Alleges as Subsidies to Boeing was Either Never Paid to Boeing, or Is Funding That the EC Concedes Is Not Causing Serious Prejudice.**

66. The U.S. first written submission demonstrated that the EC greatly overestimated the amount paid under the programs it challenges, and that the very documents on which the EC’s consultants relied confirm the error of their estimates. Thus, the \$24 billion figure that the EC references so frequently as the amount of the alleged subsidies received by Boeing includes \$9.6 billion that NASA paid to enterprises and individuals with no relation to Boeing. The Panel should discount that figure accordingly. This is not the only amount improperly included in the \$24 billion figure. In its oral statement, the EC stated “{w}e do not challenge any *present* adverse effects from US subsidies that historically benefited the 717, 757, and 767 because there are no such *present* effects in the LCA markets.” This is a significant point. The EC, as part of its causation argument, attributes the alleged subsidies to particular aircraft models. Under this methodology, \$7.5 billion of the subsidies that the EC alleges during the 1989-2006 period is attributable to the 717, 747, 757, 767, MD-11, MD-80, and MD-90 – all aircraft that the EC said in its oral statement were *not* causing adverse effects to EC interests. (In fact, by defining the subsidized like products as being the 737, 777, and 787, the EC has failed even to make a claim that any of the alleged subsidies related to the other Boeing aircraft are causing serious prejudice.) If those alleged subsidies do not cause serious prejudice, they should play no role in the Panel’s analysis. The Panel should discount the EC’s analysis accordingly.

**C. The EC’s Arguments That the Alleged Magnitude of the Subsidies Is by Itself Sufficient to Cause Serious Prejudice Contradict Arguments Made Elsewhere by the EC and Finds No Support in the Evidence.**

67. The EC asserts that its inflated \$24 billion subsidy estimate is sufficient evidence by itself to establish that the challenged payments caused serious prejudice, but its arguments are self-contradictory and contrary to the evidence before the Panel. They are self-contradictory in that they rely on assumptions contrary to other assumptions the EC asks the Panel to make. They are contrary to the evidence in that the proper comparisons indicate that the amounts in question did not have any meaningful effect.

**D. The EC Has Failed to Rehabilitate Its Flawed Economic Analysis, Which Is the Only Basis the EC Put Forward in Support of Its Assertion That the Alleged Subsidies Affected Boeing’s Pricing.**

68. In its first written submission, the EC based its contention that the alleged subsidies affected Boeing’s prices on an economic analysis grounded on a series of assertions about how subsidies would affect a company like Boeing and a modeling exercise conducted by Professor Luis Cabral. The U.S. first written submission demonstrated that the assertions were wrong, and that the assumptions underlying Prof. Cabral’s model invalidated its results. In its oral statement, the EC attempted to restore the credibility of its analysis, but it has not identified any flaw in the U.S. criticisms of the EC’s reasoning or provided any evidence that validates the many assumptions necessary to reach the conclusion it asks the Panel to reach.

69. In fact, the U.S. first written submission and oral statement demonstrated that the evidence before the Panel provides no support for any of these assumptions and, in many instances, disproves them. The EC’s oral statement did nothing more than present additional assertions that were either without support or were directly contrary to the evidence.

70. In response to the U.S. observation that Boeing prices its large civil aircraft based on its read of the market, the EC argued that if “Boeing did not have access to subsidies, it would not have been able to sacrifice current margins in order to increase market share and extract more value from its customers in the future.” This is nothing more than an unsubstantiated conclusion. The EC presents no evidence suggesting that Boeing’s prices would have been any different “but for” the alleged subsidies. The EC also argues that “the U.S. assertions” regarding Boeing’s use of cash “conflict with the available data” because “the data reveals that there is no statistically significant correlation between subsidies and dividends plus share repurchases” but do show “a clear correlation between firm value and dividends plus share repurchases.” However, the absence of any correlation between the alleged subsidies and Boeing’s payments to shareholders is perfectly consistent with the U.S. argument. The point the United States is making is that the programs at issue are not subsidies and do not give Boeing “free cash flow.” The United States would not expect any correlation between subsidies that do not actually exist and Boeing’s payments to shareholders and, if it proves anything, the fact that there is none proves the U.S. point. And the fact that there is a correlation “between firm value and dividends plus share repurchases” should surprise no one. A firm’s stock price and, therefore, its value tend to rise as a firm’s returns to shareholders rise. This phenomenon has nothing to do with the alleged subsidies.

**E. The Alleged Subsidies Are Not Responsible for Boeing’s Ability to Bring the 787 Into Commercial Service Ahead of the EC’s Competing Aircraft.**

71. The EC’s arguments on “technology effects” ask the Panel to conclude that in the absence of the alleged subsidies, Boeing would have had to take more time to offer a product superior to the A330, or would have had to settle for offering an immediate competitor that was as good, but not better. That is the only conclusion possible from its argument that the alleged subsidies – and not Boeing’s own efforts – are responsible for the design and timing of the 787. But such a conclusion is contrary to both the evidence and economic rationality. In the period under consideration, Airbus engineers were developing *two* new aircraft – the A380 and the A400M. The EC never claims, let alone proves, that Boeing’s engineers are less competent than Airbus’ engineers. It also never claims, nor proves, that BCA had insufficient funds to cover all of the R&D expenditures that it needed to make. It provides no basis to conclude that Boeing, with this capability and the financial resources to make full use of it, would do nothing except cede market share while Airbus moved ahead with its projects. Rather, the economic incentive, the financial resources, and the engineering capability existed to produce a new aircraft. In short, whatever the *financial* effect of the alleged subsidies, there is no basis to conclude that they changed the *technological* outcome.

72. The EC concedes as much. In its summary of the “nature” of the group of subsidies that includes the DoD and NASA research that allegedly had technology effects, the EC states, “this second group of subsidies increases Boeing’s non-operating cash flow by paying for certain R&D activities that Boeing would otherwise have to finance itself.” In other words, the EC’s causation analysis rests on the proposition that if the alleged subsidies funded research relevant to large civil aircraft, in their absence Boeing would have paid its own money to conduct the same research. Moreover, because the EC treats each alleged subsidy as having a cash effect in the year of receipt, it assumes that Boeing would have conducted that research at the same time that it actually did.

73. The United States demonstrated in Section XII.D, above, that the EC’s analysis of the economic effect of the alleged subsidies is wrong. However, the EC is correct in recognizing that Boeing’s large civil aircraft technology development agenda would have proceeded without regard to the availability of government funding.

74. In short, the EC's technology effects arguments rest on the assumption that Boeing would not have performed all of the research relevant to the 787 in the absence of the alleged subsidies – an assertion that even the EC itself finds to be untrue. Therefore, the EC has failed to make a *prima facie* case that the alleged subsidies affected Boeing's ability to bring the 787 to commercial use in advance of a competitive product from Airbus.

### **XIII. CONCLUSION**

75. For the foregoing reasons,<sup>3</sup> the United States requests the Panel to find that the United States has acted consistently with its obligations under the SCM Agreement and to deny the relief requested by the EC.

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<sup>3</sup> In this submission, the United States has focused on addressing the key points raised in the EC's first oral statement rather than revisiting arguments already before the Panel. This does not mean, however, that the any points not specifically addressed herein are of lesser importance. The remaining points have been addressed fully in the U.S. first written submission and first oral statement.