***UNITED STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT (SECOND COMPLAINT): RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION* (DS353)**

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE PANEL'S MEETING WITH THE PARTIES

November 8, 2013

I. RESEARCH AND DEVELOPMENT MEASURES

A. Financial Contribution

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

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

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

- As the Appellate Body found, all DoD assistance instruments and the pre-2007 NASA contracts are "akin to a species of joint venture" and, therefore, a "direct transfer of funds" under Article 1.1(a)(i) of the SCM Agreement.
- DoD contracts under the general research program elements, which in our view are outside the Panel's terms of reference, are most accurately described as purchases of services.
- The largest DoD military aircraft program elements, KC-46 and P-8A, are most accurately described as purchases of goods.
- For many other "military aircraft" program elements, DoD purchased upgrades or enhancements that involved services rather than goods. Thus, these types of transactions are best understood as purchases of services.
- NASA's post-2006 contracts are best understood as purchases of services.

B. Benefit

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

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

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

C. Specificity

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

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

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

II. OTHER MEASURES

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

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

1. South Carolina Measures

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

2. FAA's CLEEN Program

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

3. Other Washington Measures

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

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

1. FSC/ETI

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

2. Kansas IRBs

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

C. Prohibited Subsidies

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

III. ADVERSE EFFECTS

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

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

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

19. The EU criticizes the United States for trying to "atomize" the claims, while it is the EU that deviates from the collective assessment structure in the original proceeding. Moreover, the EU ignores the Appellate Body's guidance that effects caused genuinely but not substantially by a subsidy can only

be cumulated with the effects of a subsidy already found to have a genuine and substantial relationship with the relevant market phenomena.

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

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

22. In conclusion, the United States emphasizes the need to remember that this is a compliance proceeding. The EU should not be permitted to re-litigate resolved issues or raise unrelated measures and measures that existed at the time of the original proceeding but were not challenged at that time. The EU should not be permitted to ignore the finding in the original proceeding that R&D subsidies *accelerated* the 787 launch, but did not make an otherwise unviable aircraft possible. The EU should not be permitted to assume that subsidies cause adverse effects through price effects when the sole subsidy found to be a genuine and substantial cause of such effects in the original proceeding – FSC/ETI – has unquestionably been withdrawn. The EU should not be permitted to twist the product market delineation despite the absence of any credible evidence that there are seven LCA markets, four of which are monopoly markets, and one non-market. And the EU certainly should not be permitted to engage in obfuscation to the detriment of the U.S. ability to defend itself through a fair process and the Panel's ability to reach an objective assessment of the matter. A proper analysis will reveal that the United States has complied with the DSB's recommendations and rulings.