US – LARGE CIVIL AIRCRAFT (2ND COMPLAINT)[1]
(DS353)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*European Communities*	*ASCM Arts. 1, 2, 3.1(a), 4.7, 5(c) and 6.3; Annex V* *DSU Arts. 6.2 and 11*	Establishment of Panel	*17 February 2006*
			Circulation of Panel Report	*31 March 2011*
Respondent	*United States*		Circulation of AB Report	*12 March 2012*
			Adoption	*23 March 2012*

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Subsidies allegedly granted by US federal, state and local governments to Boeing large civil aircraft, including among others (i) payments, access to government facilities, equipment and employees, allocation of intellectual property rights, and reimbursement of independent research and development (R&D) costs under R&D contracts and agreements between Boeing and the National Aeronautics and Space Administration (NASA), the United States Department of Defence (USDOD) and the Department of Commerce; (ii) various federal, state and local tax measures; and (iii) infrastructure-related measures.

- **Product at issue:** Large civil aircraft developed, produced and sold by Boeing.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Art. 3.1(a) (prohibited subsidies – export subsidies):** The Panel upheld the EC claim that FSC-related subsidies provided to Boeing were inconsistent with Art. 3.1(a), but rejected the EC claim that certain Washington State tax measures were contingent upon export performance. These findings were not appealed.

- **ASCM Arts. 5(c) and 6.3 (serious prejudice – displacement, lost sales and price suppression):** The Appellate Body agreed with the Panel, although for different reasons, that the NASA and USDOD measures enabled Boeing to launch its technologically advanced 787 in 2004, thereby causing significant lost sales in sales campaigns in Australia, Iceland, Kenya and Ethiopia; threat of displacement and impedance in Australia; and significant price suppression. With respect to the tied tax subsidies, the Appellate Body reversed the Panel's findings of serious prejudice and completed the analysis to make a more limited finding that these measures caused significant lost sales to Airbus in two sales campaigns in the 100-200 seat LCA market. The Appellate Body further conducted a collective assessment of two groups of subsidies namely, the "remaining subsidies" and tied tax subsidies. The Appellate Body found that the price effects of the industrial revenue bonds issued by the City of Wichita (one of the remaining subsides) complemented and supplemented the price effects of the tied tax subsidies, thereby causing serious prejudice within the meaning of Art. 6.3(c) in the 100-200 seat LCA market.

- **ACSM Arts. 4.7 (recommendation to withdraw a prohibited subsidy) and 7.8 (remedies – to remove adverse effects or withdraw the subsidy):** Having found that the recommendations in prior related cases (see *US – Tax Treatment for "Foreign Sales Corporations"*) remained operative, the Panel refrained from making any new recommendation under Art. 4.7 in respect of the FSC-related subsidies provided to Boeing. The Appellate Body took note of this, and stated that to the extent it upheld the Panel's findings with respect to actionable subsidies that caused adverse effects or such findings had not been appealed, the Panel's recommendation pursuant to Art. 7.8 stands. Art. 7.8 provides in relevant part that "the Member granting each subsidy found to have resulted in such adverse effects, 'take appropriate steps to remove the adverse effects or … withdraw the subsidy'".

3. OTHER ISSUES[2]

- **The initiation of procedures under ASCM Annex V:** The Appellate Body interpreted para. 2 of Annex V to mean that the DSB's initiation of the information-gathering process in a serious prejudice dispute occurs automatically when there is a request for its initiation and the DSB establishes a panel; there is no requirement of positive consensus to initiate such a procedure.

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2 Other issues addressed: existence of a financial contribution (ASCM Art. 1.1(a)(1)); existence of a benefit (ASCM Art. 1.1(b)); specificity of subsidies (ASCM Art. 2); enhanced third party rights (DSU Art. 10); failure to identify measures in the panel request (DSU Art. 6.2); open Panel meetings and Appellate Body hearings; additional procedures to protect confidential information at the panel and appellate stage; Working Procedures for Appellate Review (sufficiency of Notice of Other Appeal, time-frame for submissions, written questions to participants and withdrawal of Point of Appeal); DSU Art. 17.5 (timing and circulation of Report); Panel's use of an arguendo assumption; duty of a panel to seek further information in certain circumstances (DSU Art. 13); appeals on issues involving application of the law to the facts; objective assessment of the matter (DSU Art. 11).

US – LARGE CIVIL AIRCRAFT (2ND COMPLAINT) (ARTICLE 21.5 – EU)[1] (DS353)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*European Union*	*ASCM Agreement Arts. 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 5, 6.3 and 7.8* *DSU Art. 11*	Referred to the Original Panel	*23 October 2012*
			Circulation of Panel Report	*9 June 2017*
Respondent	*United States*		Circulation of AB Report	*28 March 2019*
			Adoption	*11 April 2019*

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- US federal, state and local governments' alleged subsidies to its large civil aircraft industry through, *inter alia*: (i) NASA aeronautics research and development (R&D) measures (ii) Foreign sales corporation/extraterritorial income (FSC/ETI) tax concessions; (iii) measures applied by the State of Washington and its municipalities; (iv) measures applied by the State of South Carolina and its municipalities; and (v) City of Wichita's industrial revenue bonds (IRBs).

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Art. 1.1(a)(1) (definition of a subsidy – financial contribution)**: The Appellate Body found that the Panel acted inconsistently with DSU Art. 11 and reversed its finding that, assuming *arguendo* the payments and access to USDOD facilities, equipment, and employees provided to Boeing through the USDOD procurement contracts were to involve financial contributions, the European Union had not established that they conferred a benefit on Boeing.

- **ASCM Art. 1.1(a)(1)(ii) (revenue foregone – FSC/ETI tax concessions)**: The Appellate Body found that the Panel erred in its assessment of revenue forgone since its determination focused on the use of tax concessions by eligible taxpayers rather than on whether the government relinquished an entitlement to raise revenue. It completed the legal analysis to conclude that, to the extent Boeing remained entitled to tax concessions in the postimplementation period, the US had not withdrawn the FSC/ETI subsidies for Boeing.

- **ASCM Art. 2.1(c) (specificity – City of Wichita IRBs)**: The Appellate Body found that the Panel erred in finding that no disparity existed between the expected and actual distribution of the subsidy and reversed the Panel's finding that the European Union had failed to establish that the tax abatements provided through IRBs involved specific subsidies.

- **ASCM Art. 2.1(c), second sentence (specificity – South Carolina economic development bonds(EDBs))**: The Appellate Body found that the Panel: (i) did not implicitly interpret the term "limited number" as "one" or "fewer than three", but rather considered that the European Union had not met its burden of proof as to whether the EDBs had been used by only a "limited number" of certain enterprises; erred by taking into account three specific entities in its analysis without having established that they constitute "certain enterprises"; (ii) and (iii) erred by excluding evidence potentially relevant to the assessment of the existence of "predominant use" on the basis that it was more relevant to the assessment of another factor under Art. 2.1(c), second sentence.

- **ASCM Art. 2.2 (specificity – South Carolina multi-country industrial park (MCIP) job tax credits)**: The Appellate Body concluded that the availability of the subsidy only to enterprises located within an MCIP constituted a limitation on access to subsidies within the meaning of ASCM Art. 2.2, irrespective of whether enterprises not currently located in an MCIP may become part of it in the future and qualify for the subsidy. Therefore, it reversed the Panel's finding and completed the analysis to find that the subsidy provided was "specific".

- **ASCM Arts. 5, 6.3, 7.8 (continuing adverse effects)**: The Appellate Body clarified that the time period for assessing the removal of adverse effects may include developments subsequent to the time of order, including through the point of delivery and consequently reversed the Panel on this point. Despite reversing the Panel's interpretation of ASCM Art. 7.8, it upheld the Panel's finding that the European Union had failed to establish that the original adverse effects of the pre-2007 aeronautics R&D subsidies continued into the post-implementation period as present serious prejudice.

- **ASCM Arts. 5, 6.3, 7.8 (adverse effects through technology effects)**: The Appellate Body reversed the Panel's rejection of the European Union's claim on ASCM Arts. 5, 6.3 and 7.8, but was unable to complete the legal analysis as to whether there remain acceleration effects of the pre-2007 aeronautics R&D subsidies in the postimplementation period.

- **ASCM Arts. 5, 6.3, 7.8 (price effects of Washington "tied tax" subsidies)**: According to the Appellate Body, the Panel did not err in its calculation of tied tax subsidies or by failing to establish that the peraircraft amount of the subsidies exceeds the differentials in the net prices offered by Airbus and Boeing in five particularly price-sensitive sales campaigns in the single-aisle LCA market.. Therefore, the Appellate Body upheld the Panel's finding that the tied tax subsidies caused significant lost sales and a threat of impedance with respect to the aforesaid campaigns in the single-aisle LCA market, as well as its rejection of any such effects in sales campaigns that were not particularly price-sensitive in the single-aisle and twin-aisle LCA markets.

- **ASCM Arts. 5, 6.3, 7.8 (Price effects of "untied" cash flow subsidies)**: The Appellate Body reversed the Panel's finding that the European Union was required to demonstrate that the untied subsidies actually led to price reductions of Boeing LCA sales in order to establish the adverse effects of these subsidies through the lowering of Boeing LCA prices. It clarified that the legal standard for causation does not require this. However, the Appellate Body was unable to complete the legal analysis to find that these subsidies complemented and supplemented the effects of the tied tax subsidies by contributing to such adverse effects in the singleaisle LCA market.

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