

**UNITED STATES – MEASURES AFFECTING TRADE
IN LARGE CIVIL AIRCRAFT**

Request for Consultations by the European Communities

The following communication, dated 6 October 2004, from the delegation of the European Communities to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

The European Communities hereby requests consultations with the Government of the United States pursuant to Articles 4.1, 7.1 and 30 of the Agreement on Subsidies and Countervailing Measures (*SCM Agreement*), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

The measures that are the subject of this request are prohibited and actionable subsidies provided to US producers of large civil aircraft (LCA) and in particular the BOEING company, as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies, grants, and any other assistance to the US producers (US LCA industry). The measures include the following:

1. State and Local Subsidies

- a. State of Washington
 - i. Tax benefit/incentive package for production of Boeing 7E7
– *Washington House Bill No. 2294* (2003);
- b. State of Kansas
 - i. Financial incentive package, including preferential bond financing, for Boeing 7E7
– *Kansas Senate Bill No. 281* (2003);
- c. State of Illinois/City of Chicago
 - i. Tax incentives, relocation assistance, development grant, rental-free headquarters for Boeing corporate relocation.

2. NASA Research & Development Subsidies

- a. High Speed Research Program
 - *Basis of NASA FY 1993-FY 2001 Funding Requirement*
 - *National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, As Amended;*

- b. Advanced Subsonic Technology Program
 - *Basis of NASA FY 1994-FY 2001 Funding Requirement*
 - *National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, As Amended;*
- c. Aviation Safety Program
 - *Basis of NASA FY 2000 – FY 2004 Funding Requirement*
 - *National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, As Amended;*
- d. Quiet Aircraft Technology Program
 - *Basis of NASA FY 2001 – FY 2004 Funding Requirement*
 - *National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, As Amended;*
- e. NASA High Performance Computing and Communications Program
 - *Basis of NASA FY 2001 – FY 2003 Funding Requirement*
 - *National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, As Amended;*
- f. NASA Research & Technology Base Program
 - *Basis of NASA FY 2001 – FY 2004 Funding Requirement*
 - *National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, As Amended;*
- g. NASA Patent Waiver Program
 - *National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, As Amended*
 - *14 CFR § 1245 et. Seq;*
- h. NASA Personnel Dedicated to Boeing R&D.

3. Department of Defense Research & Development Subsidies

- a. Independent Research & Development, and Bid & Proposal Reimbursements
 - *10 U.S.C. § 2372*
 - *48 CFR § 31.205-18*
 - *48 CFR § 231.205-18*
 - *Department of Defense Directive Regarding IR&D, Number 3204.1;*
- b. Research, Development, Testing and Evaluation Programs
 - *Individual Budgets for DOD Project Related Elements of US Airforce.*

4. National Institute of Standards & Technology (Department of Commerce) Subsidies

- a. Advanced Technology Program;
 - *Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, As Amended.*
 - *American Technology Preeminence Act of 1991, Pub. L. No. 102-245*
 - *15 CFR §295.1 et seq.*

5. FSC/ETI Subsidies¹

¹ Such measures have already been declared to be a prohibited export subsidy in panel and Appellate Body reports adopted by the Dispute Settlement Body. The current retaliatory measures applied by the EC do not cover trade in LCAs and the EC reserves all rights to take appropriate action in this respect.

- a. Sections 921-927 of the Internal Revenue Code and related measures establishing special tax treatment for "Foreign Sales Corporations" ("FSCs") including individual applications;
- b. FSC Repeal and Extraterritorial Income Exclusion Act of 2000, including individual applications and any successor legislation.

6. Research & Experimentation Tax Credits

7. NASA Procurement Contracts

8. Other Subsidies

Any other support not included in paragraphs 1-6 above which involves a financial contribution by US, State, or Local entities or entities controlled by US government entities pursuant to any laws, regulations, administrative procedures, administrative practices and any other present measures, amendments thereto, or future measures which benefit the US LCA Industry.

The European Communities considers that these measures are inconsistent with the obligations of the United States under the following provisions:

- (1) Articles 3.1 (a) and (b) and 3.2 of the *SCM Agreement*;
- (2) Article 5 (a) and (c) of the *SCM Agreement*;
- (3) Article 6.3(a), (b), and (c) of the *SCM Agreement*;
- (4) Article III:4 of the GATT 1994.

The European Communities is of the view that the US, State and Local statutes, regulations, and administrative procedures listed above are inconsistent with these provisions as such and as applied.

The measures listed above are subsidies because in each instance there is a financial contribution by the US, State or Local government, or an income or price support in the sense of Article XVI of GATT 1994, and a benefit is thereby conferred within the meaning of Article 1.1(a) and (b) of the *SCM Agreement*. Each of the listed subsidies is specific to the US LCA industry within the meaning of Article 2 of the *SCM Agreement*.

The use of these measures causes adverse effects, *i.e.* serious prejudice or a threat of serious prejudice to the interests of the European Communities and material injury or threat of material injury to the European Communities LCA industry:

- The effect of the measures is significant price depression and price suppression in the markets for LCA products in the European Communities and elsewhere or a threat thereof in violation of Articles 5(c) and 6.3(c) of the *SCM Agreement*.
- The effect of the measures is significant lost sales in the markets for LCA products or a threat thereof in violation of Articles 5(c) and 6.3(c) of the *SCM Agreement*.
- The effect of the measures is to displace or impede exports of European Community LCA products in the US market or a threat thereof in violation of Articles 5(c) and 6.3(a) of the *SCM Agreement*.

- The effect of the measures is to displace or impede exports of European Community LCA products in third country markets or a threat thereof in violation of Articles 5(c) and 6.3(b) of the *SCM Agreement*.
- The effect of the measures led or threatens to lead to significantly lower revenues received by the European Communities' LCA industry and is to cause material injury or threat thereof in violation of Article 5(a) of the *SCM Agreement*.

Articles 4.2 and 7.2 of the *SCM Agreement* together require that this request for consultations includes a statement of available evidence (1) with regard to the existence and nature of the subsidies in question and (2) the adverse effects to the interests of the European Communities. This letter identifies the existence and nature of the subsidies, and further evidence is provided in the Annex to this letter.

The European Communities reserves the right to request the United States to produce information and documents regarding the measures in question and their effect on the interests of the European Communities, during the consultation process. The European Communities also reserves the right to address additional measures and claims under other WTO provisions during the course of the consultations.

My authorities look forward to receiving in due course a reply from the United States to this request. The European Communities is ready to consider with the United States mutually convenient dates to hold consultations in Geneva.

ANNEX

STATEMENT OF AVAILABLE EVIDENCE

The evidence set out below is evidence available to the EC at this time regarding the existence and nature of the subsidies set out in the Request for Consultations, dated 6 October 2004, and the adverse effects caused by them to the interests of the EC. It reflects the presently available evidence regarding the claims reflected in the EC's Request for Consultations and is supported by documents that are listed below. It is further supported by business confidential internal Airbus documents that are summarized below. The EC reserves the right to supplement or alter this list in the future, as required.

(a) Existence and Nature of the Subsidization

The evidence currently available to the EC includes the following documents. The EC's request for consultations describes in more detail the nature of these subsidies.

Letter from NASA Glenn Research Center

Contract No. NAS1-20267

19 CFR § 351.524(b) (1998)

Internal Revenue Service, Revenue Procedure 87-56 (1987)

US Federal Reserve Bank, Yields on 10-year T-Bills 1962-2002

Foreign Sales Corporation Tax Benefits to Boeing and McDonnell Douglas

Basis of NASA HSR FY 1993- FY 2001 Funding Requirement

NASA Langley Research Center, High-Speed Research Program: Technology Transfer Control Handbook (April 1998)

National Research Council, Committee on High Speed Research, US Supersonic Commercial Aircraft: Assessing NASA's High Speed Research Program (1997)

James Schultz, "HSR Leaves Legacy of Spinoffs," Aerospace America at 28, September 1999

United States notification to the WTO Committee on Subsidies and Countervailing Measures, G/SCM/N/3/USA/Suppl.1 (19 November 1998)

United States Updating and New and Full Notification to the WTO Committee on Subsidies and Countervailing Measures, G/SCM/N/48/USA (2 July 2002)

Total Allocation of Subsidies to Boeing & McDonnell Douglas LCA Division

The 1958 Space Act, 42 U.S.C. § 2451

Basis of NASA AST FY 1994- FY 2001 Funding Requirement

Aviation Systems Analysis Capability, Executive Assistant Development, NASA/CR-1999-209119, Logistics Management Institute, March 1999

Testimony to the Subcommittee on Technology, Environment, and Aviation of the US House of Representatives, February 10, 1994, Federal Document Clearing House, 1994 W.L. 214062

Advanced Subsonic Technology Program, Technology Transfer Control Handbook (Aug. 1998)

Federal News Service, Hearing of the Science, Technology and Space Subcommittee of the Senate Commerce, Science and Transportation Committee, April 24, 1997

Basis of ASP FY 2000 – FY 2004 Funding Requirement

Flight International, 11 August 1999

Basis of NASA QAT FY 2001 – FY 2004 Funding Requirement

The National Aeronautics and Space Administration's (NASA) High Performance Computing and Communications (HPCC) Program

Basis of NASA HPCC FY 1991-FY 2003 Funding Requirement

NASA HPCC, Status of Ames Sponsored HPCC NASA Research Announcements

NASA HPCC, Computational Aerospace Sciences (CAS) Project Description

NASA HPCC, Computational Aerospace Sciences NASA HPCC 1999 Brochure

NASA HPCC, Mission Description

CAS as a Portion of HPCC Program

Basis of NASA R&T Base FY 1993 - FY 2004 Funding Requirement

Civil Aircraft Related Portion of R&T Base Program (Including Engines)

Civil Aircraft Related Portion of R&T Base Program (Excluding Engines)

NASA Budget Estimates for FY 1993- FY 2003, NASA Mission Support, Research and Program Management

NASA News, Boeing Names New Airplane Wing Composites Development Center

NASA Salaries for NASA Employees Assisting Boeing & McDonnell Douglas LCA Division

35 U.S.C. §§ 154, 271

NASA Property Rights in Inventions, 42 USC § 2457 et. seq.

NASA Patent Waiver Regulations, 14 CFR § 1245 et. seq.

Evidence from Patents and Patent Citations on the Impact of NASA and other Federal Labs on Commercial Innovation, National Bureau of Economic Research (May 1997)

General Information Concerning Patents, published by USPTO

Sylvia K. Kraemer, NASA's Director of Policy Development Office of Policy and Plans, Monopolies, and the Cold War: The Origins and Consequences of NASA Patent Policy, 1958-1998 (October 1999)

NASA Office of Policy and Plans, Value of Patent Rights Waived by NASA

US Patent No. 6,497,389

US Patent No. 6,126,110

US Patent No. 6,053,050

US Patent No. 6,014,606

US Patent No. 5,971,252

US Patent No. 6,138,895

US Patent No. 5,953,231

US Patent No. 5,931,107

US Patent No. 5,902,535

US Patent No. 5,242,523

US Patent No. 5,893, 535

US Patent No. 5,909,858

US Patent No. 5,899,413

US Patent No. 5,740,984

US Patent No. 5,681,013

Independent Research and Development and Bid and Proposal Costs: Payments to Contractors, 10 U.S.C. § 2372

Independent Research and Development and Bid and Proposal Cost Federal Acquisition Rule, 48 CFR § 31.205-18

Independent Research and Development and Bid and Proposal Cost Defense Acquisition Rule, 48 CFR § 231.205-18

Department of Defense Directive Regarding IR&D Number 3204.1

Internal Revenue Service National Office Technical Advice Memorandum, Private Ruling 8633004 (unpublished), 1986 PLR LEXIS 2296 (May 9, 1986)

Defense Contract Audit Agency Contract Audit Manual, DCAAM 7640.1, January 2001

DOD Independent Research & Development, Program Report (May 2002)

Assessing the Impact of Regulatory and Legislative Changes to the Independent Research and Development Program, Prepared for Office of the Director, Defense Research & Engineering Acquisition and Technology, DOD (14 March 1997)

Michael E. Davey & Dahlia Stein, Congressional Research Service Report For Congress: DOD's Independent Research and Development Program: Changes and Issues (Dec. 17, 1993)

Statute Defining 'Covered' Contracts, 10 USC § 2324(l)(1) (version in effect from FY 1995 – FY 2001)

IR&D Statute – FY91/92 Version, 10 USC § 2372(5)

10 USC § 2306a (version in effect FY 1991 – FY 1992)

IR&D/B&P Statute – FY 93/94 Version, 10 USC § 2372(i)(1)

Statute Defining 'Covered' Contracts – FY 93/94 Version, 10 USC § 2324(m)

Federal Acquisition Rules Relating To Types Of Contracts, 48 CFR § 16.301-3(a)(1)

Federal Acquisition Rules Relating to Commercial Items, 48 CFR § 12.207

Federal Acquisition Rules Relating to Service Contracting, 48 CFR § 37.602-4, et. seq.

Federal Acquisition Rules Relating to Construction Contracts, 48 CFR § 36.207(a)

Defense Acquisition Rules Relating To Types Of Contracts, 48 CFR § 216.104-70(b)(2), (c), (d)(2)

Defense Acquisition Rules Relating To Research And Development Contracting, 48 CFR § 235.006(b)(i)

Federal Acquisition Rules Relating to Research and Development Contracting, 48 CFR § 35.006(c)

Defense Contract Audit Agency, Independent Research and Development and Bid and Proposal Costs Incurred by Major Defense Contractors (Multiple Reports for Fiscal Years 1989 through 2001)

GSA Database (CD-Rom)

Database with IR&D-eligible Contracts (CD-Rom)

IR&D Program: Chart I. Estimated Total DOD IR&D and B&P Subsidies to Boeing & McDonnell Douglas; Chart II: DOD IR&D-Eligible Contracts of 8 Aerospace Contractors as a Percentage of All DOD IR&D-Eligible Contracts FY 1991 – FY 2001

Congressional Office of Technology Assessment, Competing Economies: Government Support of Large Civil Aircraft Industries of Japan, Europe and the United States (Washington, 1991)

DOD RDT&E US Civil Aircraft Related Project Elements

Air Systems & Advanced Technology Budgets for FY 2000 – FY 2001 (PE# 0603217N)

Aircraft Engine Component Improvement Plan Budgets for FY 1997 – FY 2001 (PE# 0207268F/0604268F)

Aircraft Propulsion System Integration Budgets for FY 1996 – FY 2001 (PE# 0603202F)

Defense Research Sciences Budgets for FY 1996 – FY 2001 (PE# 601102F)

Materials Budgets for FY 1996 – FY 2001 (PE# 602102F)

Dual Use Technology 1995 Report

Aerospace Flight Dynamics Budgets for FY 1996 – FY 2001 (PE# 0602201F)

Aerospace Propulsion Budgets for FY 1996 – FY 2001 (PE# 0602203F)

Advanced Materials for Weapons Systems Budgets for FY 1996 – FY 2001 (PE# 0603112F)

Flight Vehicle Technology Budgets for FY 1996 – 2001 (PE# 0603205F)

Aerospace Structures Budgets for FY 1997 – FY 2001 (PE# 0603211F)

C-17 Budgets for FY 1996 – FY 2001 (PE# 0604321F)

BC-17X Background Information

Aerospace Avionics/Aerospace Sensors Budgets for FY 1996 – FY 2001 (PE# 0602204F)

Aerospace Propulsion and Power Technology Budgets for FY 1996 – FY 2001 (PE# 0603216F)

US Department of Defense News Release: Technology Reinvestment Project Announces FY 94 Selections, October 25, 1994

Commerce Business Daily, "Technology Reinvestment Project Program Announcement," 21 October 1994

Anne Kellogg, "Clinton Administration to Diversify Defense Under Attack," The Hartford Courant, 11 May 1996, p. A9

Richard Burnett, "Defense Conversion Faces Own War; The Program Has Come Under Attack by Congress as Lawmakers Search for Prime Budget Cuts," Orlando Sentinel, 15 October 1995, p. H1

Potomac Institute for Policy Studies, A Review of the Technology Reinvestment Project, 30 January 1999

National Defense Authorization Act for Fiscal Year 1997, 10 U.S.C. §2511

RDT&E Item Justification Sheets for Fiscal Years 1997-2003: PE #0603805E (Defensewide – FY 1999), PE #0603805S (Defensewide – FY 1999 – FY 2001), PE# 0602805A (Army – FY 1999- FY 2001), PE# 0602805N (Navy – FY 1999- FY 2001), PE# 0602805F (Airforce – FY 1999 – FY 2001)

Defense Acquisition Reform: Hearing before the Subcommittee on Acquisition and Technology of the Senate Committee on Armed Services, 105th Congress, 19 March 1997 (Statement of Hon. Paul G. Kaminski, Under Secretary of Defense for Acquisition and Technology)

Dual Use Science and Technology Program Web Site, at Fact Sheet hyperlink

FY02 Air Force Dual Use Science & Technology Annual Competition: Updated FY 02 Solicitation Schedule

Department of Defense, Report to Congress on the Activities of the DOD Office of Technology Transition, January 1998

Department of Defense, Dual Use Science & Technology Report to Congress, March 1999, Appendix C

DOD Research & Development Contracting Definitions, 48 CFR Part 235

Omnibus Trade and Competitiveness Act of 1988 ("OTCA"), Pub. L. No. 100-418, codified at 15 U.S.C. § 278n

American Technology Preeminence Act of 1991 ("ATPA"), Pub. L. No. 102-245

National Institute of Standards & Technology Rules ("NIST Rules"), 15 C.F.R. § 295.1 et seq

NISTIR-6099, Connie K.N. Chang, ATP Eligibility Criteria for US Subsidiaries of Foreign-owned Companies: Legislation, Implementation and Results, Chapter 1

NISTIR-5896, Rosalie Ruegg, Guidelines For Proposing Economic Evaluation Studies to The Advanced Technology Program (ATP), Chapter 1.4

Slides By Marc G. Stanley, Acting Director of ATP, at Slide 12 (ATP Awards to Date by Technology Area (1990-2001))

US Secretary of Commerce, A Progress Report on the Impacts of an Industry-Government Technology Partnership

NISTIR-6491, Jeanne W. Powell and Karen L. Lellock, Development, Commercialization, and Diffusion of Enabling Technologies: Progress Report (2000)

Slides About the ATP Proposers' Conference, Slide 52 (1999)

Replies to Questions Posed by Chile, the European Community, Mexico and Poland Regarding the New and Full Notification of the United States, G/SCM/Q2/USA/20 (7 April 1999)

NIST Overview of the Advanced Technology Program
Statements of US Senators Danforth and Hollings Regarding ATP Program, 140 Cong. Rec. S2851 (11 March 1994), Cong. Rec. S2763 (March 10, 1994)

Historical Statistics on Awards/Winners (1990 – 5 September 2002)

ATP Project Briefs, Projects 93-01-0089 (CVD Diamond-Coated Rotating Tools for Machining Advanced Composite Materials), 95-12-0024 (An Agent-Based Framework for Integrated Intelligent Planning – Execution), 95-01-0108 (Precision Optoelectronics Assembly), 91-01-0267 (PREAMP – Pre-competitive Advanced Manufacturing of Electrical Products), and 97-05-0020 (EECOMS: Extended Enterprise Coalition for Integrated Collaborative Manufacturing Systems)

(b) Serious Prejudice to the Interests of the European Communities

The European Communities has voluminous evidence that the subsidies granted to the US large civil aircraft industry has caused and is continuing to cause adverse effects through significant price suppression or depression of prices of large civil aircraft worldwide, significant price undercutting and significant lost sales by the EC industry in the market for large civil aircraft.

The evidence available includes the following materials:

- Airbus Industrie, The 100-seater widebody - Comparing the A318 with the 717 and 737-600
- Airbus Industrie, Maintaining the lead – A320 Family versus 737NG maintenance cost
- Airbus Industrie, A320 Family The world's most profitable single-aisle family – ever
- Airbus Industrie, THE RIGHT CHOICE FOR THE 21ST CENTURY – The A330-200 against the 767-300ER
- Airbus Industrie, A330-200 – The Economic Powerhouse
- Airbus Industrie, THE DAWN OF A NEW AGE – The A340-600 against the 747-400
- Airbus Industrie, A340 The World Ranger Uniquely matched to the new competitive environment – Comparing the A340 and the 777
- Airbus Industrie, A330-300 The most efficient air transport vehicle yet designed by man – Comparing the A330 and the 777
- www.boeing.com/commercial/overview.html
- "Bouncing Boeing," The Economist, 13 June 1998
- Single Aisle Airbus and Boeing Aircraft, Range and Seats
- Widebody Mid-Range Airbus and Boeing Aircraft, Range and Seats
- Widebody Long Range Airbus and Boeing Aircraft, Range and Seats
- "Airbus Eclipses Boeing, Sets Order Book Record," Aviation Week and Space Technology, 10 January 2000
- "Boeing increases base price for commercial aircraft by 5 percent," Seattle Times, 10 July 1998
- R. Baldwin and P. Krugman, "Industrial Policy and International Competition in Wide-bodied Aircraft," in NBER Conference Report Series: Trade Policy Issues and Empirical Analysis (R. Baldwin, Ed., University of Chicago Press, 1988)
- Richard Diamond, "Economic Foundations of Countervailing Duty Law," 29 VA J Int'l Law, p. 767

- Cumulative Deliveries for the Boeing 737 Family since 1974
 - "Airbus bets the company," The Economist, 18 March 2000
 - "Boeing, Banking on a big bird," The Economist, 12 March 1994
 - "Wall Street frets over Boeing," Airline Business, August 1998
 - "Just in time, not just in case; Boeing's push for production casts," Air Transport World, April 1994
 - "Boeing hit by 737 problems," Financial Times, 23 April 1998
 - "Airbus, Boeing in costs dogfight," Financial Times, 12 July 1994
 - Airbus delivery data
 - "USA: Strong gains expected from Boeing commercial unit," The Seattle Times, 14 January 2000
 - "USA: Software City starts to find major bugs in reality," Independent, 5 December 1998
 - "USA: City – what's bugging Boeing," Sunday Telegraph, 6 September 1998
 - Boeing web site, "Order Summary by Year – as of January 2001"
 - "USA: Boeing sold below cost, study suggests," The Seattle Times, 4 March 1999
 - "Fearful Boeing," The Economist, 27 February 1999
 - "Boeing to Revive Plans for Larger Super Jumbo," Seattle Times, 9 September 1998
 - "Medium Residual Values of 747 Buoyed by A3XX Delay," Aircraft Value News, 13 April 1998
 - "A340-500/600 Nears Go-Ahead," Aviation Week and Space Technology, 11 August 1997
 - "Too Big to Fly?," Washington Post, 4 May 1997
 - Commission Decision of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement, OJ L 336/16 (8 December 1997)
 - Moody's Investors Service, Global Aerospace/Defense – Industry Outlook January 2002
 - Society General, Aerospace and Defense Industry Report, June 2002
 - Aircraft Value News, 11 February 2002
 - Society of British Aerospace Companies, Has the Business model for commercial aviation changed permanently post September 11th?
 - US International Trade Commission, Investigation no. 332-414, Publication 3433, June 2001
 - Statement by Airbus that it has also gathered substantial evidence of a business confidential nature (e.g. internal memoranda, letters to and from (actual and potential) clients, campaign progress reports), which confirms the existence of price suppression, depression and undercutting as well as of lost sales.
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