

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

Request for the Establishment of a Panel by the European Communities

The following communication, dated 20 January 2006, from the delegation of the European Communities to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 6 October 2004 the European Communities ("EC") requested consultations in the above matter with the United States ("US") 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").<sup>1</sup> Consultations were held on 5 November 2004 but failed to resolve the dispute.

At the meeting of the Dispute Settlement Body ("DSB") on 13 June concerning the request for establishment of the panel in the above case<sup>2</sup> the US asserted without any explanation that 13 of the 28 subsidy programs referenced in the panel request were not listed in the consultation request of 6 October 2004 and could not be the subject of panel proceedings. The EC did not agree with this unfounded contention but expressed its readiness to continue consultations in order to clarify and resolve the issues, it being understood that this was without prejudice to the EC's legal position and rights. Accordingly, the EC on 27 June 2005 requested a continuation of the consultations held on 5 November 2004.<sup>3</sup>

The requested continued consultations were held on 3 August 2005 but failed to resolve the dispute.

Regrettably, the US decided to use its unfounded procedural objections further to undermine the Annex V proceeding initiated in this matter by the DSB on 23 September 2005. In particular, the US decided not to provide answers on measures that the US unilaterally determined to be outside the scope of the dispute. In addition, the US repeatedly blocked endeavours by the EC to have the Panel rule authoritatively on the scope of the dispute.

As a result, the EC has been deprived of its rights under the *SCM Agreement* to obtain the necessary information with respect to approximately half of the measures involved. This has seriously undermined the due process rights of the EC and its ability to prepare its case against the US.

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<sup>1</sup> Circulated as document WT/DS317/1 on 12 October 2004.

<sup>2</sup> Circulated as document WT/DS317/2 on 3 June 2005.

<sup>3</sup> Circulated as document WT/DS317/1/Add.1 on 1 July 2005.

To resolve this situation, the EC, in good faith and in an effort to resolve the dispute efficiently, hereby requests that a panel be established pursuant to Article 6 of the DSU; Article XXIII:2 of GATT 1994; and Articles 4, 7, and 30 of the *SCM Agreement* (to the extent that Article 30 incorporates by reference Article XXIII of GATT 1994) to consider the matter described below. This request is without prejudice to the EC's position that all the measures described below are already properly before the Panel that was established on 20 July 2005. The EC has already contacted the US in order to discuss how most efficiently to follow up on this request in the light of the developments described above and is prepared to continue these discussions with a view to ensuring a prompt and positive solution to this dispute.

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This dispute concerns prohibited and actionable subsidies provided to and benefiting the US producers of large civil aircraft<sup>4</sup> (the "US LCA industry"), including, in particular, the Boeing Company ("Boeing") and McDonnell Douglas Corporation prior to its merger with Boeing. The measures are currently reflected in and derive from the following:

# **1. State and Local Subsidies**

US States and local authorities, where research, development, production and headquarter facilities of the US LCA industry are located, transfer in various ways economic resources to the US LCA industry.

These economic resources include numerous financial incentives and other advantages effectuated, for example, through tax breaks, bond financing, fee waivers, lease arrangements, corporate headquarters relocation assistance, research funding, infrastructure measures and other benefits.

Such States and local authorities include, but are not limited to the States of Washington, Kansas and Illinois and local authorities therein.

## **a. State of Washington**

Governmental authorities in the State of Washington, including municipalities and public bodies therein, such as Snohomish County, the Port of Everett, and the City of Everett, provide to the US LCA industry an incentive package of measures benefiting the development, production and sales of US LCA. These incentives include but are not limited to tax and other advantages reflected in or pursuant to, *inter alia*:

- Washington House Bill No. 2294 (2003);
- Memorandum of Agreement for Project Olympus between Boeing and the State of Washington of 19 December 2003;

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<sup>4</sup> In accordance with the *1992 Agreement between the European Communities and the Government of the United States of America concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft*, large civil aircraft ("LCA") includes all aircraft as defined in Article 1 of the GATT Agreement on Trade in Civil Aircraft, except engines as defined in Article 1.1(b) thereof, that are designed for passenger or cargo transportation and have 100 or more passenger seats or its equivalent in cargo configuration. Boeing produces or markets the following families of LCA: 717, 737, 747, 757, 767, 777, and 787.

- The Master Site Development and Location Agreement between Boeing and the State of Washington of 19 December 2003;
- The First Amendment to the Master Site Development and Location Agreement of 2 February 2004, and any subsequent amendments; and
- City of Everett Ordinance 2759-04 (2004), amending Chapter 3.24 of the Everett Municipal Code.

b. State of Kansas

Governmental authorities in the State of Kansas, including municipalities and public bodies therein, such as Sedgwick County, the City of Wichita, and local school districts, provide incentives, including bond financing, tax benefits and other advantages, to the US LCA industry, *inter alia*, through the following:

- Bond financing and payments pursuant to the Economic Revitalization and Reinvestment Act – Kansas Senate Bill No. 281 (2003), codified at K.S.A. §§ 74-50,136 *et seq.* (2004), as reflected in, *inter alia*:
  - A Resolution of the Kansas Development Finance Authority Declaring an Intent to Issue its Revenue Bonds to Finance a Project on behalf of Mid-Western Aircraft Systems, Inc., adopted 9 June 2005;
  - Incentive Agreement Between the Kansas Department of Commerce and Spirit Aerosystems Inc., dated as of 30 June 2005, signed by Spirit Aerosystems Inc. on 7 October 2005 and 10 October 2005, signed by the Kansas Department of Commerce on 11 October 2005;
  - State of Kansas, State Finance Council Resolution No. 05-544, 18 October 2005; and
  - Bond Resolution No. 222 Authorizing the Kansas Development Finance Authority To Issue Its Kansas Development Finance Authority Revenue Bonds (Spirit AeroSystems, Inc. Project) (adopted 5 December 2005).
- Property and sales tax abatements pursuant to K.S.A. § 79-201a, as amended, K.S.A. § 79-3606, as amended, and K.S.A. § 79-3640, as amended, associated with Industrial Revenue Bonds ("IRBs") issued for the financing of US LCA industry projects by the City of Wichita pursuant to K.S.A. §§ 12-1740 *et seq.*, as amended, including, but not limited to, those authorized by the following Ordinances of the Wichita City Council:
  - Wichita City Council Ordinance No. 46-818 authorizing \$80 million in IRBs for Spirit Aerosystems, Inc., dated 15 November 2005;
  - Wichita City Council Ordinance No. 46-817 authorizing \$29 million in IRBs for Boeing, dated 15 November 2005;

- Wichita City Council Ordinance No. 46-401 authorizing \$67 million in IRBs for Boeing, dated 16 November 2004;
- Wichita City Council Ordinance No. 45-914 authorizing \$60 million in IRBs for Boeing, dated 18 November 2003;
- Wichita City Council Ordinance No. 45-495 authorizing \$96 million in IRBs for Boeing, dated 19 November 2002;
- Wichita City Council Ordinance No. 45-133 authorizing \$84 million in IRBs for Boeing, dated 20 November 2001;
- Wichita City Council Ordinance No. 44-811 authorizing \$41 million in IRBs for Boeing, dated 21 November 2000;
- Wichita City Council Ordinance No. 44-428 authorizing \$155 million in IRBs for Boeing, dated 23 November 1999;
- Wichita City Council Ordinance No. 44-102 authorizing \$350 million in IRBs for Boeing, dated 8 December 1998;
- Wichita City Council Ordinance No. 43-642 authorizing \$340 million in IRBs for Boeing, dated 25 November 1997;
- Wichita City Council Ordinance No. 43-325 authorizing \$194 million in IRBs for Boeing, dated 26 November 1996;
- Wichita City Council Ordinance No. 42-949 authorizing \$201 million in IRBs for Boeing, dated 14 November 1995;
- Wichita City Council Ordinance No. 42-553 authorizing \$280 million in IRBs for Boeing, dated 15 November 1994;
- Wichita City Council Ordinance No. 42-228 authorizing \$292 million in IRBs for Boeing, dated 30 November 1993;
- Wichita City Council Ordinance No. 41-916 authorizing \$274 million in IRBs for Boeing, dated 8 December 1992; and
- Wichita City Council Ordinance No. 41-592 authorizing \$206 million in IRBs for Boeing, dated 26 November 1991.

Letters of intent for IRBs for the US LCA industry, including, but not limited to, those issued pursuant to actions of the Wichita City Council taken on 17 May 2005, 13 July 2004, 9 November 1999, 13 February 1996, 24 March 1992, 5 December 1989, 21 December 1982, 9 June 1981, and 23 October 1979.

- Funding provided by the State of Kansas, Kansas Technology Enterprise Corporation ("KTEC"), and the Federal Government to the National Institute for Aviation Research at Wichita State University for collaborations with the US LCA industry.

c. State of Illinois

Governmental authorities in the State of Illinois, including municipalities and public bodies therein, such as Cook County and the City of Chicago, provide incentives, including tax incentives, relocation assistance and other advantages, to the US LCA industry, including but not limited to:

- Tax credits from the State of Illinois pursuant to the Economic Development for a Growing Economy Tax Credit Act, Public Act 91-0476, as amended, 35 Ill. Comp. Stat. §§ 5/211 *et seq.*, and 35 Ill. Comp. Stat. § 10/5-45;
- Reimbursement of relocation expenses and other benefits from the State of Illinois pursuant to the Corporate Headquarters Relocation Act, Public Act 92-0207;
- Payments from the State of Illinois pursuant to the Illinois Large Business Development Act, Ill. Rev. Stat. 1989, ch. 127, paras. 2710-1 *et seq.*, and 14 Ill. Admin. Code §§ 590.10 *et seq.*
- Payments from the State of Illinois pursuant to the Illinois Industrial Training Program, 20 Ill. Comp. Stat. § 605/605-800, and 56 Ill. Admin. Code § 2650.10 *et seq.*
- Payments from the State of Illinois pursuant to the Technology Challenge Grant Program, 20 Ill. Comp. Stat. §§ 700/2001 *et seq.*, and 14 Ill. Admin. Code §§ 545.110 *et seq.*
- Property tax abatements from Cook County pursuant to § 920 of the above-mentioned Corporate Headquarters Relocation Act, Public Act 92-0207, § 18 of the Property Tax Code, 35 Ill. Comp. Stat. §§ 200/1 *et seq.*, as amended, and an Ordinance of the County of Cook, Illinois Approving Execution of a Tax Reimbursement Payment Agreement with the Boeing Company (2001);
- Property tax abatements from the City of Chicago pursuant to § 920 of the above-mentioned Corporate Headquarters Relocation Act, Public Act 92-0207, § 18 of the Property Tax Code, 35 Ill. Comp. Stat. §§ 200/1 *et seq.*, as amended, and an Ordinance of the City of Chicago, Illinois Approving Execution of a Tax Reimbursement Payment Agreement with the Boeing Company (2001); and
- Payments by the City of Chicago pursuant to the Lease Termination Compensation Agreement between 100 North Riverside, LLC, and the City of Chicago, 13 January 2001.

**2. NASA Subsidies**

The National Aeronautics and Space Administration ("NASA"), acting on the basis of the National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, as amended, transfers economic resources on terms more favourable than available on the market or not at arm's length to the US LCA industry, *inter alia*, by:

- a. allowing the US LCA industry to participate in research programmes, making payments to the US LCA industry under those programmes, or enabling the US LCA industry to exploit the results thereof by means including but not limited to the foregoing or waiving of valuable patent rights, the granting of limited exclusive rights data ("LERD") or otherwise exclusive or early access to data, trade secrets and other knowledge resulting from government funded research. The following are examples of such NASA programmes:
- (i) High Speed Research Program
- NASA Budget Requests for FY 1990 – FY 2001;
  - NASA Appropriations Acts, Pub. L. No. 101-144 (FY 1990); Pub. L. No. 101-507 (FY 1991); Pub. L. No. 102-139 (FY 1992); Pub. L. No. 102-389 (FY 1993); Pub. L. No. 103-124 (FY 1994); Pub. L. No. 103-327 (FY 1995); Pub. L. No. 104-134 (FY 1996); Pub. L. No. 104-204 (FY 1997); Pub. L. No. 105-65 (FY 1998); Pub. L. No. 105-276 (FY 1999);
  - High Speed Research Program Technology Transfer Control Handbook, April 1998.
- (ii) Advanced Subsonic Technology Program
- NASA Budget Requests for FY 1992 – FY 2001;
  - NASA Appropriations Acts, Pub. L. No. 102-139 (FY 1992); Pub. L. No. 102-389 (FY 1993); Pub. L. No. 103-124 (FY 1994); Pub. L. No. 103-327 (FY 1995); Pub. L. No. 104-134 (FY 1996); Pub. L. No. 104-204 (FY 1997); Pub. L. No. 105-65 (FY 1998); Pub. L. No. 105-276 (FY 1999);
  - Advanced Subsonic Technology Program Technology Transfer Control Handbook, August 1998.
- (iii) Aviation Safety Program/Aviation Safety & Security Program/Aviation Security & Safety Program
- NASA Budget Requests for FY 2000 – FY 2007;
  - NASA Appropriations and Authorization Acts, Pub. L. No. 106-74 (FY 2000); Pub. L. No. 106-377 (FY 2001); Pub. L. No. 107-73 & Pub. L. No. 107-117 (FY 2002); Pub. L. No. 108-7 (FY 2003); Pub. L. No. 108-199 (FY 2004); Pub. L. No. 108-447 (FY 2005); Pub. L. No. 109-108 (FY 2006); Pub. L. No. 109-155 (FY 2007 – FY 2008).
- (iv) Quiet Aircraft Technology Program
- NASA Budget Requests for FY 2000 – FY 2007;
  - NASA Appropriations and Authorization Acts, Pub. L. No. 106-74 (FY 2000); Pub. L. No. 106-377 (FY 2001); Pub. L. No. 107-73 & Pub. L. No. 107-117 (FY 2002); Pub. L. No. 108-7 (FY 2003); Pub. L. No. 108-199 (FY 2004); Pub. L. No. 108-447 (FY 2005); Pub. L. No. 109-108 (FY 2006); Pub. L. No. 109-155 (FY 2007 – FY 2008).

(v) High Performance Computing and Communications Program

- NASA Budget Requests for FY 1991 – FY 2003;
- NASA Appropriations Acts, Pub. L. No. 101-507 (FY 1991); Pub. L. No. 102-139 (FY 1992); Pub. L. No. 102-389 (FY 1993); Pub. L. No. 103-124 (FY 1994); Pub. L. No. 103-327 (FY 1995); Pub. L. No. 104-134 (FY 1996); Pub. L. No. 104-204 (FY 1997); Pub. L. No. 105-65 (FY 1998); Pub. L. No. 105-276 (FY 1999); Pub. L. No. 106-74 (FY 2000); Pub. L. No. 106-377 (FY 2001).

(vi) Research & Technology Base Program

- NASA Budget Requests for FY 1991 – FY 2004;
- NASA Appropriations Acts, Pub. L. No. 101-507 (FY 1991); Pub. L. No. 102-139 (FY 1992); Pub. L. No. 102-389 (FY 1993); Pub. L. No. 103-124 (FY 1994); Pub. L. No. 103-327 (FY 1995); Pub. L. No. 104-134 (FY 1996); Pub. L. No. 104-204 (FY 1997); Pub. L. No. 105-65 (FY 1998); Pub. L. No. 105-276 (FY 1999); Pub. L. No. 106-74 (FY 2000); Pub. L. No. 106-377 (FY 2001); Pub. L. No. 107-73 & Pub. L. No. 107-117 (FY 2002).

(vii) Advanced Composites Technology Program

- NASA Budget Requests for FY 1994 – FY 1997;
- NASA Appropriations Acts, Pub. L. No. 103-124 (FY 1994); Pub. L. No. 103-327 (FY 1995).

(viii) Vehicle Systems Program

- NASA Budget Requests for FY 2003 – FY 2007;
- NASA Appropriations and Authorization Acts, Pub. L. No. 108-7 (FY 2003); Pub. L. No. 108-199 (FY 2004); Pub. L. No. 108-447 (FY 2005); Pub. L. No. 109-108 (FY 2006); Pub. L. No. 109-155 (FY 2007 – FY 2008).

(ix) Materials and Structures Systems Technology Program, including advanced composites materials and structures research

- NASA Budget Requests for FY 1988 – FY 1995;
- NASA Appropriations Acts, Pub. L. No. 100-202 (FY 1988); Pub. L. No. 100-404 (FY 1989); Pub. L. No. 101-144 (FY 1990); Pub. L. No. 101-507 (FY 1991); Pub. L. No. 102-139 (FY 1992); Pub. L. No. 102-389 (FY 1993).

(x) Aircraft Energy Efficiency Program, including Composite Primary Aircraft Structures, Transport Aircraft Systems Technology, and Advanced Composite Structures Technology Programs

- NASA Budget Requests for FY 1976 – FY 1987;

- NASA Appropriations Acts, Pub. L. No. 94-116 (FY 1976); Pub. L. No. 94-378 (FY 1977); Pub. L. No. 95-119 (FY 1978); Pub. L. No. 95-392 (FY 1979); Pub. L. No. 96-103 (FY 1980); Pub. L. No. 96-526 (FY 1981); Pub. L. No. 97-101 (FY 1982); Pub. L. No. 97-272 (FY 1983); Pub. L. No. 98-45 (FY 1984); Pub. L. No. 98-371 (FY 1985).
- b. providing the services of NASA employees, facilities, and equipment to support the R&D programmes listed above and paying salaries, personnel costs, and other institutional support, thereby providing valuable services to the US LCA industry on terms more favourable than available on the market or not at arm's length:
- NASA Budget Requests for FY 1976 – FY 2007;
- NASA Appropriations and Authorization Acts, Pub. L. No. 94-116 (FY 1976); Pub. L. No. 94-378 (FY 1977); Pub. L. No. 95-119 (FY 1978); Pub. L. No. 95-392 (FY 1979); Pub. L. No. 96-103 (FY 1980); Pub. L. No. 96-526 (FY 1981); Pub. L. No. 97-101 (FY 1982); Pub. L. No. 97-272 (FY 1983); Pub. L. No. 98-45 (FY 1984); Pub. L. No. 98-371 (FY 1985); Pub. L. No. 99-160 (FY 1986); Pub. L. No. 99-500 & Pub. L. No. 99-591 (FY 1987); Pub. L. No. 100-202 (FY 1988); Pub. L. No. 100-404 (FY 1989); Pub. L. No. 101-144 (FY 1990); Pub. L. No. 101-507 (FY 1991); Pub. L. No. 102-139 (FY 1992); Pub. L. No. 102-389 (FY 1993); Pub. L. No. 103-124 (FY 1994); Pub. L. No. 103-327 (FY 1995); Pub. L. No. 104-134 (FY 1996); Pub. L. No. 104-204 (FY 1997); Pub. L. No. 105-65 (FY 1998); Pub. L. No. 105-276 (FY 1999); Pub. L. No. 106-74 (FY 2000); Pub. L. No. 106-377 (FY 2001); Pub. L. No. 107-73 & Pub. L. No. 107-117 (FY 2002); Pub. L. No. 108-7 (FY 2003); Pub. L. No. 108-199 (FY 2004); Pub. L. No. 108-447 (FY 2005); Pub. L. No. 109-108 (FY 2006); Pub. L. No. 109-155 (FY 2007 – FY 2008).
- c. providing NASA Independent Research & Development, and Bid & Proposal Reimbursements:
  - 48 CFR § 31.205-18;
  - 14 CFR § 1274.204(g);
  - 48 CFR §§ 9904.420 *et seq.*
- d. allowing the US LCA industry to use the research, test and evaluation facilities owned by the US Government, including NASA wind tunnels, in particular the Langley Research Center.
- e. entering into procurement contracts with the US LCA industry for more than adequate remuneration.
- f. granting the US LCA industry exclusive or early access to data, trade secrets, and other knowledge resulting from government funded research pursuant, *inter alia*, to:
  - Requirements for Documentation, Approval, and Dissemination of NASA Scientific and Technical Information, section 4.5.7.1 (NPG 2200.2A);
  - 48 CFR §§ 27.400 *et seq.*



- g. allowing the US LCA industry to exploit the results of government funded research, including, but not limited to, the foregoing or waiving of valuable patent rights or rights in data as such, pursuant, *inter alia*, to:
  - 35 U.S.C. §§ 200 *et seq.*;
  - 48 CFR §§ 27.300 *et seq.*;
  - Memorandum to the Heads of Executive Departments and Agencies: Government Patent Policy, Pub. Papers 248 (18 February 1983);
  - Executive Order 12591 (10 April 1987);
  - 14 CFR §§ 1245.100 *et seq.*;
  - 14 CFR §§ 1274.911 - 1274.914;
  - 48 CFR §§ 1827.301 *et seq.*;
  - 48 CFR §§ 27.400 *et seq.*

### 3. Department of Defense Subsidies

The Department of Defense ("DOD") transfers economic resources to the US LCA industry on terms more favourable than available on the market or not at arm's length, *inter alia*, by:

- a. allowing the US LCA industry to participate in DOD-funded research, making payments to the US LCA industry for such research, or enabling the US LCA industry to exploit the results of such research, by means including but not limited to the foregoing or waiving of valuable patent rights, and the granting of exclusive or early access to data, trade secrets and other knowledge resulting from government funded research, through, for example:
  - (i) A number of Research, Development, Test, and Evaluation ("RDT&E") Programs of the US Air Force, Navy, Army, and the Defense Advanced Research Projects Agency ("DARPA") including, but not limited to:
    - Defense Research Sciences (PE# 0601102F)
    - Materials (PE# 0602102F)
    - Aerospace Flight Dynamics and Aerospace Vehicle Technologies (PE# 0602201F)
    - Aerospace Propulsion (PE# 0602203F)
    - Aerospace Sensors (PE# 0602204F)
    - Dual Use Applications and Dual Use Science & Technology (PE# 0602805F)
    - Advanced Materials for Weapon Systems (PE# 0603112F)
    - Flight Vehicle Technology (PE# 0603205F)
    - Aerospace Structures and Aerospace Technology Dev/Demo (PE# 0603211F)
    - Aerospace Propulsion & Power Technology (PE# 0603216F)
    - Flight Vehicle Technology Integration (PE# 0603245F)
    - RDT&E For Aging Aircraft (PE# 0605011F)
    - Manufacturing Technology/Industrial Preparedness (PE# 0603771F/0708011F/0708011N)

- C-17 (PE# 0401130F/0604231F)
- CV-22 (PE# 0401318F)
- Joint Strike Fighter (PE#0603800F/0603800N/0603800E/0604800F/0604800N)
- AV-8B Aircraft (PE# 0604214N)
- Comanche (PE# 0604223A)
- F-22 (PE# 0604239F)
- B-2 Advanced Technology Bomber (PE# 0604240F)
- V-22 (PE# 0604262N)
- A-6 Squadrons (PE# 0204134N)
- F/A-18 Squadrons (PE# 0204136N)
- Dual Use Applications Program (including its predecessor, the Technology Reinvestment Project).

These Programmes are currently reflected in, *inter alia*:

- DOD RDT&E Budget Item Justification, Exhibits R-2, FY 1991 – FY 2007;
  - DOD FY 1991 – FY 2007 Budgets for RDT&E Programs (Exhibit R-1), DOD Component Summary;
  - 10 U.S.C. § 2521 (statutory basis for Manufacturing Technology Program);
  - 10 U.S.C. § 2511 (statutory basis for Dual Use Programs);
  - DOD Appropriations Acts, Pub. L. No. 101-511 (FY 1991); Pub. L. No. 102-172 (FY 1992); Pub. L. No. 102-396 (FY 1993); Pub. L. No. 103-139 (FY 1994); Pub. L. No. 103-335 (FY 1995); Pub. L. No. 104-61 (FY 1996); Pub. L. No. 104-208 (FY 1997); Pub. L. No. 105-56 (FY 1998); Pub. L. No. 105-262 (FY 1999); Pub. L. No. 106-79 (FY 2000); Pub. L. No. 106-259 (FY 2001); Pub. L. No. 107-117 (FY 2002); Pub. L. No. 107-248 (FY 2003); Pub. L. No. 108-87 (FY 2004); Pub. L. No. 108-287 (FY 2005); Pub. L. No. 109-148 (FY 2006).
- (ii) providing Independent Research & Development, and Bid & Proposal Reimbursements.
- 10 U.S.C. § 2372;
  - 48 CFR § 31.205-18;
  - 48 CFR § 231.205-18;
  - 48 CFR §§ 9904.420 *et seq.*;
  - Department of Defense Directive Regarding IR&D, Number 3204.1 (10 May 1999);
  - DOD Appropriations Acts, Pub. L. No. 101-511 (FY 1991); Pub. L. No. 102-172 (FY 1992); Pub. L. No. 102-396 (FY 1993); Pub. L. No. 103-139 (FY 1994); Pub. L. No. 103-335 (FY 1995); Pub. L. No. 104-61 (FY 1996); Pub. L. No. 104-208 (FY 1997); Pub. L. No. 105-56 (FY 1998); Pub. L. No. 105-262 (FY 1999); Pub. L. No. 106-79 (FY 2000); Pub. L. No. 106-259 (FY 2001); Pub. L. No. 107-117 (FY 2002); Pub. L.

No. 107-248 (FY 2003); Pub. L. No. 108-87 (FY 2004); Pub. L. No. 108-287 (FY 2005); Pub. L. No. 109-148 (FY 2006).

- b. allowing the US LCA industry to use research, test and evaluation facilities owned by the US Government, including the Major Range Test Facility Bases.
- c. entering into procurement contracts, including those for the purchase of goods, from the US LCA industry for more than adequate remuneration, including in particular but not limited to the US Air Force contract with Boeing for the purchase of certain spare parts for its Airborne Warning and Control System (AWACS) aircraft, the National Polar-orbiting Operational Environmental Satellite System-Conical Microwave Imager Sensor, the C-22 Replacement Program (C-40), the KC-135 Programmed Depot Maintenance, the C-40 Lease and Purchase Program, the C-130 avionics modernisation upgrade program, the C-17 H22 contract (Boeing BC-17X), the US Navy contract with Boeing for the production and maintenance of 108 civil B-737 and their conversion into long-range submarine hunter Multi-Mission Aircraft, the Missile Defense Agency's Airborne Laser (ABL) Program, and the Army's Comanche Program.
- d. by allowing the US LCA industry to exploit the results of government funded research, including, but not limited to, the foregoing or waiving of valuable patent rights or rights in data as such, pursuant, *inter alia*, to:
  - 35 U.S.C. §§ 200 *et seq.*;
  - 48 CFR §§ 27.300 *et seq.*;
  - Memorandum to the Heads of Executive Departments and Agencies: Government Patent Policy, Pub. Papers 248 (18 February 1983);
  - Executive Order 12591 (10 April 1987);
  - 48 CFR §§ 227.303 *et seq.*;
  - 48 CFR §§ 27.400 *et seq.*;
  - 48 CFR §§ 227.7100 *et seq.*

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

The US Department of Commerce ("DOC") transfers economic resources to the US LCA industry on terms more favourable than available on the market or not at arm's length, through the Advanced Technology Program operated pursuant to the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, as amended, and the American Technology Preeminence Act of 1991, Pub. L. No. 102-245 and 15 CFR §§ 295.1 *et seq.*, by allowing the US LCA industry to participate in this programme, making payments to the US LCA industry under this programme, or allowing the US LCA industry to exploit the results of this programme, including but not limited to the foregoing or waiving of valuable patent rights, and the granting of exclusive or early access to data, trade secrets and other knowledge resulting from government funded research. In particular, economic resources are transferred to the US LCA industry through a number of projects, including, but not limited to, the following:

- Project 93-01-0089 (CVD Diamond-Coated Rotating Tools for Machining Advanced Composite Materials);
- Project 95-12-0024 (An Agent-Based Framework for Integrated Intelligent Planning – Execution);
- Project 95-01-0108 (Precision Optoelectronics Assembly);
- Project 91-01-0267 (Pre-competitive Advanced Manufacturing of Electrical Products);
- Project 97-05-0020 (Extended Enterprise Coalition for Integrated Collaborative Manufacturing Systems);
- Project 98-01-0168 (Hot Metal Gas Forming);
- Project 90-01-0126 (Solid-State Laser Technology for Point Source X-Ray Lithography);
- Project 95-02-0036 (Plasma-Based Processing of Lightweight Materials for Motor-Vehicle Components and Manufacturing Applications).

## **5. US Department of Labor**

The US Department of Labor transfers economic resources to the US LCA industry on terms more favourable than available on the market or not at arm's length, through the Aerospace Industry Initiative, an element of the President's High Growth Training Initiative, under the authority of the Workforce Investment Act, Pub. L. No. 105-220 (1998), by granting to Edmonds Community College in the State of Washington funds for the training of aerospace industry workers associated with the Boeing 787.

## **6. Federal tax incentives**

The US Government transfers economic resources to the US LCA industry through the federal tax system, and in particular through the following tax measures:

- a. Sections 921-927 of the Internal Revenue Code (prior to repeal) and related measures establishing special tax treatment for "Foreign Sales Corporations" ("FSCs");
- b. FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519; and
- c. American Jobs Creation Act of 2004, Pub. L. No. 108-357.

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The European Communities considers that the above measures are inconsistent with the obligations of the US under the following provisions:

- (1) Articles 3.1(a), 3.1(b) and 3.2 of the *SCM Agreement*;
- (2) Article 5(a) of the *SCM Agreement*;

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

The European Communities is of the view that the above measures, reflected in the US, State, and local statutes, regulations, administrative procedures, and other programmes and policies as listed above, including any relevant subsequent amendments thereof or successory acts, 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, and a benefit is thereby conferred within the meaning of Article 1.1(a)(1) and (b) of the *SCM Agreement*. They benefit and will continue to benefit in the future the development, production, sale, and export of each of the individual subsidised LCA products of the US LCA industry. Each of the listed subsidies is specific to the US LCA industry within the meaning of Article 2 of the *SCM Agreement*.

The subsidies listed above are *de jure* or *de facto* export contingent, and contingent on the use of domestic over imported goods.

The use of these measures causes adverse effects – *i.e.*, material injury or threat of material injury to the European Community LCA industry – and serious prejudice including threat of serious prejudice to the interests of the European Communities within the meaning of Article 5(a) and (c) of the *SCM Agreement*, because, *inter alia*:

- The effect of the measures is material injury, or a threat thereof, in violation of Article 5(a) of the *SCM Agreement*;
- The effect of the measures is a significant price undercutting by subsidised products of the US LCA industry as compared with the price of competing European Community LCA products in the world, European Community, US, and third country markets where US and Community producers compete, 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 depression and suppression of the prices of competing European Community LCA products in the world, European Community, US, and third country markets where US and Community producers compete, 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 of competing European Community LCA products in the world, European Community, US, and third country markets where US and Community producers compete, 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 competing 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 competing 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 above measures are neither justified under any provision of a covered agreement, including the *Agreement on Trade in Civil Aircraft*, nor under the 1992 *Agreement between the European Communities and the Government of the United States of America concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft*.

The European Communities requests that a panel be established with standard terms of reference, in accordance with Articles 4.4 and 7.4 of the *SCM Agreement* and Article 7 of the DSU.

The European Communities asks that a special meeting of the Dispute Settlement Body be convened on Thursday 2 February 2006 and that this request for the establishment of a panel be placed on the agenda of that meeting.

Finally, the European Communities requests that the DSB, together with the establishment of the panel, initiate the procedures for developing information concerning serious prejudice under Annex V of the *SCM Agreement*. This request is without prejudice to the EC's position that all the measures described above are already properly before the Panel that was established on 20 July 2005 and therefore were covered by the Annex V proceeding initiated by the DSB on 23 September 2005. The EC is prepared to discuss together with the Representative designated by the DSB to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the *SCM Agreement*, Mr. Mateo Diego-Fernandez, and with the US, how the Annex V process can be pursued most efficiently.

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