

**UNITED STATES – MEASURES AFFECTING TRADE
IN LARGE CIVIL AIRCRAFT
(SECOND COMPLAINT)**

Notification of an Other Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 28 April 2011, from the Delegation of the United States, is being circulated to Members.

Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the Panel in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (WT/DS353/R) ("Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's finding that payments made by the U.S. National Aeronautics and Space Administration ("NASA") to The Boeing Company ("Boeing") under contracts for the performance of aeronautics research were a financial contribution.¹ This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Article 1.1(a)(1)(i) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). The United States also requests the Appellate Body to find that the Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as required by Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") by disregarding evidence that research under the NASA-Boeing contracts was of benefit and use to the U.S. government and unrelated third parties.² The United States also requests the Appellate Body to modify the Panel's erroneous approach to the legal issue of the scope of the term "services".³

2. The United States seeks review by the Appellate Body of the Panel's finding that access to NASA facilities, equipment, and employees provided to Boeing through research contracts and agreements at issue constituted a provision of goods and services. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Article 1.1(a)(1)(iii) of the SCM Agreement. The United States also requests the

¹Panel Report, para. 7.981.

²Panel Report, paras. 7.1027 and 8.3.

³Panel Report, para. 7.978.

Appellate Body to find that the Panel failed to "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes" as required by Article 12.7 of the DSU by providing no explanation for the findings referenced in this paragraph.⁴

3. The United States seeks review by the Appellate Body of the Panel's finding that payments made by NASA to Boeing under contracts for the performance of aeronautics research and facilities, equipment, and employees provided to Boeing through research contracts and agreements at issue conferred a benefit. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Article 1.1(b) of the SCM Agreement.⁵

4. The United States seeks review by the Appellate Body of the Panel's finding that payments made by the U.S. Department of Defense ("DoD") under certain agreements were a financial contribution. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Article 1.1(a)(1)(i) of the SCM Agreement.⁶

5. The United States seeks review by the Appellate Body of the Panel's finding that access to DoD facilities provided to Boeing under certain agreements constitutes a provision of goods or services. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Article 1.1(a)(1)(iii) of the SCM Agreement.⁷

6. The United States seeks review by the Appellate Body of the Panel's finding that payments and access to facilities under certain agreements provided a benefit. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Article 1.1(b) of the SCM Agreement.⁸ The United States also requests the Appellate Body to find that the Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as required by Article 11 of the DSU by concluding, without a basis in the evidence contained in the panel record, it "does not consider it credible that less than 1 per cent of the \$45 billion in aeronautics R&D funding that DOD provided to Boeing over the period 1991-2005 had any potential relevance to LCA."⁹

7. The United States seeks review by the Appellate Body of the Panel's finding that reductions by the state of Washington in the rates of business and occupancy tax ("B&O tax") applicable to the manufacture or making of sales, at retail or wholesale, of commercial aircraft were a financial contribution. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Article 1.1(a)(1)(ii) of the SCM Agreement.¹⁰

8. The United States seeks review by the Appellate Body of the Panel's finding that the B&O tax reductions granted to the aerospace industry by the state of Washington was specific. This finding is

⁴Panel Report, paras. 7.1027 and 8.3.

⁵Panel Report, paras. 7.1037-7.1040 and 8.3.

⁶Panel Report, paras. 7.1171 and 8.3.

⁷Panel Report, paras. 7.1171 and 8.3.

⁸Panel Report, paras. 7.1185, 7.1187, and 8.3.

⁹Panel Report, para. 7.1205.

¹⁰Panel Report, paras. 7.133, 7.138, and 8.3.

in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Article 2.1(a) of the SCM Agreement.¹¹

9. The United States seeks review by the Appellate Body of the Panel's finding that Boeing and Spirit Aero Systems were granted a disproportionately large amount of tax abatements available through industrial revenue bonds issued by the City of Wichita. This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Article 2.1(c) of the SCM Agreement.¹²

10. The United States seeks review by the Appellate Body of the Panel's finding that the effect of the aeronautics research and development subsidies conferred by NASA and DoD, as described in the Panel Report, is a threat of displacement or impedance of exports of the European Union ("EU")¹³ from third country markets, significant lost sales, and price suppression with respect to the 200-300 seat wide-body large civil aircraft product market.¹⁴ In particular, the Panel erroneously found that an effect of the aeronautics research and development subsidies is:

- (a) significant lost sales within the meaning of Article 6.3(c) of the A330 at Qantas, Ethiopian Airlines, Icelandair, and Kenya Airways¹⁵;
- (b) displacement or impedance within the meaning of Article 6.3(b) of the A330 from the markets of Australia, Ethiopia, Iceland, and Kenya¹⁶;
- (c) significant lost sales within the meaning of Article 6.3(c) of the Original A350 at Ethiopian Airlines, Icelandair, and Kenya Airways¹⁷;
- (d) displacement or impedance within the meaning of Article 6.3(b) of the Original A350 from the markets of Ethiopia, Iceland, and Kenya¹⁸;
- (e) significant price suppression with regard to the A330 in the world market¹⁹;
- (f) significant price suppression with regard to the Original A350 in the world market²⁰; and
- (g) significant price suppression with regard to Airbus 200-300 seat large civil aircraft in the world market.²¹

These findings are in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Articles 5(c) and 6.3(b) and (c) of the SCM Agreement.²² The United States also requests the Appellate Body to find that the Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts

¹¹Panel Report, para. 7.205 and 8.3.

¹²Panel Report, paras. 7.770, 7.779, and 8.3.

¹³In this proceeding, the United States treats the term "European Union" as synonymous with the term "European Communities".

¹⁴Panel Report, para. 7.1797.

¹⁵Panel Report, paras. 7.1787 and 7.1794.

¹⁶Panel Report, para. 7.1791.

¹⁷Panel Report, paras. 7.1787-7.1788.

¹⁸Panel Report, para. 7.1791.

¹⁹Panel Report, para. 7.1792.

²⁰Panel Report, para. 7.1792.

²¹Panel Report, para. 7.1797 and 7.1799.

²²Panel Report, paras. 7.1773, 7.1780, 7.1785-7.1788, 7.1791-7.1797, and 8.3.

of the case and the applicability of and conformity with the relevant covered agreements" as required by Article 11 of the DSU by concluding, without a basis in the evidence contained in the panel record, that "the ability to define and manage the complex interaction of design processes, organization and tools so as to enable the robust development and manufacturing of an aircraft at minimum time and cost ... is a challenge that Boeing can meet thanks in large part to NASA and DOD funding and support".²³

11. The United States seeks review by the Appellate Body of the Panel's findings:

- (a) that the effect of the Foreign Sales Corporation/Extraterritorial Income subsidies and the Washington state B&O tax subsidies in the 100-200 seat large civil aircraft product market were (i) to significantly suppress Airbus' prices and to cause Airbus to lose significant sales; and (ii) to displace and impede EU exports from third country markets;
- (b) that the effect of the Foreign Sales Corporation/Extraterritorial Income subsidies, the Washington state B&O tax subsidies, and the City of Everett B&O tax subsidies in the 300-400 seat large civil aircraft product market were (i) to significantly suppress Airbus' prices and to cause Airbus to lose significant sales; and (ii) to displace and impede EU exports from third country markets.

These findings are in error and are based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Articles 5(c) and 6.3(b) and (c) of the SCM Agreement.²⁴ The United States also requests the Appellate Body to find that the Panel failed to "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes" as required by Article 12.7 of the DSU by issuing generic findings of displacement or impedance "from third country markets" and "significant lost sales", without stating which country markets or which sales.²⁵

²³Panel Report, para. 7.1772.

²⁴Panel Report, paras. 7.1823, 7.1854(b)-(c), and 8.3.

²⁵Panel Report, paras. 7.1817-7.1818 and 7.1822-7.1823.