

**EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES –
MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT**

Recourse to Article 21.5 of the DSU by the United States

Request for Consultations

The following communication, dated 9 December 2011, from the delegation of the United States to the delegation of the European Union, France, Germany, Spain and the United Kingdom and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 21.5 of the DSU.

My authorities have instructed me to request consultations with the European Union ("EU") and with the Governments of France, Germany, Spain, and the United Kingdom ("certain member States") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994*, and Articles 4, 7 and 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), to the extent that Article 30 incorporates Article XXIII of the GATT 1994, with regard to measures affecting trade in large civil aircraft. The United States considers that such consultations will be useful in the current situation and makes this request without prejudice to its view that consultations are not required under Article 21.5 of the DSU.

For more than 40 years, the EU and certain member States have provided subsidies for the development and production of large civil aircraft. While there is disagreement on the precise amount of total subsidization, there is no dispute that it runs to billions of dollars.

On June 1, 2011, the WTO Dispute Settlement Body ("DSB") adopted its recommendations and rulings in the dispute *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* ("EC – Large Civil Aircraft")¹ and found that the EU and certain member States provided subsidies for the development and production of large civil aircraft that are inconsistent with their obligations under the SCM Agreement. Moreover, the DSB found that under the most likely scenarios, Airbus, the EU large civil aircraft producer, would not have existed without the subsidies, and there would be no Airbus aircraft on the market.

Specifically, the DSB ruled that the following are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement that caused adverse effects to US interests within the meaning of Articles 5(c) and 6.3(a), (b), and (c) of that Agreement:

¹ Dispute Settlement Body, Minutes of 1 June 2011, Meeting, WT/DSB/M/237, para. 28.

- each grant of launch aid/member State financing ("LA/MSF") to Airbus prior to 2006;
- the provision of the Mühlenberger Loch site and the lengthened Bremen Airport Runway;
- grants by authorities in Germany and Spain for the construction of manufacturing and assembly facilities in Nordenham Germany and Sevilla, La Rinconada, Toledo, Puerto de Santa Maria and Puerto Real, Spain, and by the government of Andalusia and Castilla-La Mancha to Airbus in Puerto Real, Sevilla, and Illescas (Toledo);
- the 1989 acquisition by Kreditanstalt für Wiederaufbau ("KfW") of a 20 percent equity interest in Deutsche Airbus and the 1992 transfer by KfW of its 100 percent equity interest in Deutsche Airbus to Messerschmitt-Bölkow-Blohm GmbH ("MBB"); and
- the 1987, 1988, 1992, and 1994 equity infusions to Aérospatiale.

The DSB recommended that the European Union and certain member States granting each of these subsidies take appropriate steps to remove the adverse effects or withdraw the subsidy.² Under Article 7.9 of the SCM Agreement, the EU and certain member States had six months from 1 June 2011, to take such steps or withdraw the subsidy.

On 1 December 2011, the EU transmitted a document ("EU Notification") to the United States purporting to explain how the EU has complied with the recommendations and rulings of the DSB.³ The United States has carefully reviewed the notification and considers that the actions and instances of inaction set out therein failed to withdraw the subsidies or remove their adverse effects. In addition, US review of the EU Notification indicates that the EU and certain member States are providing subsidies with respect to the production and development of large civil aircraft that are inconsistent with the SCM Agreement. In particular, the following subsidies are being accorded by the EU and certain member States:

- forgiveness of outstanding obligations to the Governments of France, Germany, Spain, and the United Kingdom under LA/MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, A330/A340 Basic, A330-200, and A340-500/600;
- termination of French, German, Spanish, and UK LA/MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, A330/A340 Basic, A330-200, and A340-500/600 on non-commercial terms or in a manner that did not withdraw the subsidy;
- French, German, Spanish, and UK LA/MSF agreements for the A380;
- French, German, Spanish, and UK LA/MSF for double-aisle large civil aircraft, including the A350XWB;
- the 1987, 1988, 1992, and 1994 French capital contributions into Aérospatiale;

² *Ibid*; EC – Large Civil Aircraft, WT/DS316/R, para. 8.7, as modified by EC – Large Civil Aircraft, WT/DS316/AB/R.

³ Communication from the European Union, EC – Large Civil Aircraft, WT/DS316/17.

- KfW's 1989 capital contribution into Deutsche Airbus GmbH and the 1992 transfer by KfW of its 100 percent equity interest in Deutsche Airbus to MBB;
- Spanish regional development grants to the EADS/CASA facilities at La Rinconada/San Pablo, Tablada, and Puerto de Santa Maria, Spain, and the Airbus España, S.L. facilities in Illescas and Puerto Real;
- German regional development grant for an A380-related facility of Airbus Deutschland GmbH in Nordenham, Germany;
- use of the runway extensions at Bremen Airport under the amended taking off and landing fee schedule;
- use by Airbus of the Mühlenberger Loch industrial site subject to the amended lease agreement between Airbus Deutschland GmbH and Projektierungsgesellschaft Finkenwerder mbH & Co. KG;
- subsequent share transactions and cash transactions and cash extractions involving subsidy recipients;
- subsequent investments in Airbus A320 and A330 large civil aircraft programs; and
- any amendments, revisions, implementing or related measures to the subsidies described above.

The United States considers that the actions and events listed in the EU Notification do not withdraw the subsidies or remove their adverse effects for purposes of Article 7.8 of the SCM Agreement and that the EU has therefore failed to implement the DSB's recommendations and rulings. The United States further considers that the EU subsidies listed above are inconsistent with Articles 3.1(a), 3.1(b), 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement.

In light of the particular circumstances of this dispute, the United States considers that consultations could facilitate subsequent steps to resolve this dispute. Although the United States considers that consultations are not mandatory for recourse to expedited panel procedures under Article 21.5, they are also not precluded. Should the EU consider that information relevant to these consultations requires protection from release, the United States is prepared to agree to application of procedures for the protection of business confidential information similar to those applied by the original panel in this dispute.

Attached please find the statement of available evidence, pursuant to Articles 4 and 7 of the SCM Agreement.

We look forward to receiving your reply to this request and to fixing a mutually acceptable date for consultations.

Statement of Available Evidence

Panel Report, *European Communities and Certain Members States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted as modified by the Appellate Body Report, WT/DS316/AB/R, June 1, 2011

Appellate Body Report, *European Communities and Certain Members States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted June 1, 2011

European Communities and Certain Members States – Measures Affecting Trade in Large Civil Aircraft, Exhibits EC-1 through EC-767 (excluding any BCI and HSBI exhibits)

European Communities and Certain Members States – Measures Affecting Trade in Large Civil Aircraft, Exhibits US-1 through US-691(excluding any BCI and HSBI exhibits)

EADS Financial Statements 2009

EADS Financial Statements 2010

Communication from the European Union, *European Communities and Certain Members States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/17

Kevin Done and Peggy Hollinger, "Airbus set to gain aid for A350," *Financial Times* (June 15, 2009)

Geneviève Fioraso, Avis, No 1969, Assemblée Nationale, *Tome II: Écologie, développement et aménagement durables: industrie et énergie* (Oct. 14, 2009)

Avenant no 1 à la convention "recherche dans le domaine de l'aéronautique" du programme d'investissements d'avenir, JORF no 0119 (May 22, 2011), NOR: PRMX1113852X.

Real Decreto 1666/2009, de 6 de noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350 XWB, BOLETÍN OFICIAL DEL ESTADO DE ESPAÑA, Num. 270, Sec. 1, Pag. 93091 (Nov. 9, 2009)

UK Department for Business, Innovation & Skills, *UK Strategic Investment Fund Interim Report*, p. 15 (Oct. 2009)

Deutscher Bundestag, 16. Wahlperiode, Drucksache 16/4388, of 27 February, 2007
