

BCI deleted, as indicated [***]

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 In light of the findings set out in the foregoing sections of our Report, we conclude that the United States *has established* the following concerning the existence of subsidies:

- (a) concerning the provision of LA/MSF;
 - (i) that each of the challenged LA/MSF measures constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and
 - (ii) that the German, Spanish and UK A380 LA/MSF measures are subsidies contingent in fact upon anticipated export performance, and therefore prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.
- (b) concerning the provision of infrastructure and infrastructure-related grants;
 - (i) that the provision of the Mühlenberger Loch site constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement,
 - (ii) that the provision of the lengthened Bremen Airport Runway constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement,
 - (iii) that the provision of the ZAC Aéroconstellation site and associated EIG facilities constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and
 - (iv) that challenged grants provided 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 governments of Andalusia and Castilla-La Mancha to Airbus in Puerto Real, Sevilla, and Illescas (Toledo) are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.
- (c) concerning the German government's transfer of its ownership share in Deutsche Airbus to the Daimler Group;
 - (i) that the 1989 acquisition by KfW of a 20 percent equity interest in Deutsche Airbus is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and
 - (ii) that the 1992 transfer by KfW of its 20 percent equity interest in Deutsche Airbus to MBB is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.
- (d) concerning the equity infusions that the French government and Crédit Lyonnais provided to Aérospatiale;

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- (i) that the 1987, 1988, 1992 and 1994 equity infusions to Aérospatiale are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement, and
 - (ii) that the 1998 transfer by the French government of its 45.76 percent interest in Dassault Aviation to Aérospatiale is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.
- (e) concerning the research and technological development funding provided by the European Communities and certain EC member States;
- (i) that grants under the Second, Third, Fourth, Fifth and Sixth EC Framework Programmes identified in Annexes I.1, I.2, I.3, I.4 and I.5 are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,
 - (ii) that French government grants amounting to a maximum of EUR 391 million between 1986 and 1993 and EUR [***] between 1994 and 2005 are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,
 - (iii) that German Federal government grants under the LuFo I, LuFo II and LuFo III programmes amounting to EUR [***] are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,
 - (iv) that German sub-Federal government grants amounting to EUR [***] from the Bavarian authorities under the OZB and Bayerisches Luftfahrtforschungsprogramm, EUR 11 million from the Bremen authorities under the AMST programmes, and EUR [***] from the Hamburg authorities under the Luftfahrtforschungsprogramm are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,
 - (v) that loans under the Spanish government PROFIT and PTA programmes amounting to, respectively, EUR 62.2 million and EUR [***], are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement, and
 - (vi) that UK government grants under the CARAD and ARP programmes amounting to GBP [***] are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

8.2 Furthermore, in light of the findings set out in the foregoing sections of our Report, we conclude that the United States *has established* the following with respect to adverse effects:

- (a) that the effect of the subsidies is to displace the imports of a like product of the United States into the European market within the meaning of Article 6.3(a) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement,
- (b) that the effect of the subsidies is to displace the exports of a like product of the United States from the markets of Australia, Brazil, China, Chinese Taipei, Korea, Mexico, and Singapore within the meaning of Article 6.3(b) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement,

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- (c) that the effect of the subsidies is likely displacement of exports of a like product of the United States from the market of India within the meaning of Article 6.3(b) of the SCM Agreement, constituting a threat of serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement, and
- (d) that the effect of the subsidies is significant lost sales in the same market within the meaning of Article 6.3(c) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement.

8.3 On the other hand, in light of the findings set out in the foregoing sections of our Report, we conclude that the United States *has not established* the following concerning the existence of subsidies:

- (a) concerning the provision of LA/MSF;
 - (i) the existence, as of July 2005, of a LA/MSF commitment measure for the A350 constituting a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement,
 - (ii) that the French A380, French A340-500/600, Spanish A340-500/600 and French A330-200 LA/MSF measures are subsidies contingent in fact upon anticipated export performance within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement,
 - (iii) that the French A380, German A380, Spanish A380, UK A380, French A340-500/600, Spanish A340-500/600 and French A330-200 LA/MSF measures are subsidies contingent in law upon anticipated export performance within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement, and
 - (iv) the existence of an unwritten LA/MSF Programme measure constituting a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.
- (b) concerning the challenged EIB Loans;
 - (i) that each of the challenged loans and the 2002 credit facility for the A380 constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.
- (c) concerning the provision of infrastructure and infrastructure-related grants;
 - (i) that the road improvements by French authorities constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement,
 - (ii) that the GBP 19.5 million provided to Airbus UK in respect of its operations in Broughton, Wales, is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and

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- (iii) that the grant provided by the government of Andalusia to Airbus in Puerto Santa Maria is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.
- (d) that the 1998 settlement by the German government of Deutsche Airbus' government debt constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.
- (e) concerning the research and technological development funding provided by the European Communities and certain EC member States;
 - (i) that the German Federal government's commitment to provide Airbus with EUR [***] under the LuFo III programme is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and
 - (ii) that the challenged grants under the UK Technology Programme are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

8.4 Furthermore, in light of the findings set out in the foregoing sections of our Report, we conclude that the United States *has not established* the following with respect to adverse effects;

- (a) that the effect of the subsidies is significant price undercutting by the subsidized product as compared with the price of a like product of the United States in the same market within the meaning of Article 6.3(c) of the SCM Agreement,
- (b) that the effect of the subsidies is significant price suppression within the meaning of Article 6.3(c) of the SCM Agreement,
- (c) that the effect of the subsidies is significant price depression within the meaning of Article 6.3(c) of the SCM Agreement, and
- (d) that, through the use of the subsidies, the European Communities and certain EC member States cause injury to the United States' domestic industry within the meaning of Article 5(a) of the SCM Agreement.

B. RECOMMENDATIONS

8.5 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the European Communities, France, Germany, Spain and the United Kingdom have acted inconsistently with the SCM Agreement, they have nullified or impaired benefits accruing to the United States under that Agreement.

8.6 Article 4.7 of the SCM Agreement provides that, having found a measure in dispute to be a prohibited subsidy, a panel "**shall** recommend that the subsidizing Member withdraw the subsidy without delay" (emphasis added). Furthermore, that provision provides that a panel "**shall** specify in its recommendation the time-period within which the measure must be withdrawn" (emphasis added). Accordingly, taking into account the nature of the prohibited subsidies we have found in this dispute, we recommend that the subsidizing Member granting each subsidy found to be prohibited withdraw it without delay and specify that this be done within 90 days.

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8.7 Article 7.8 of the SCM Agreement provides that "{w}here a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy". Accordingly, in light of our conclusions with respect to adverse effects set out in paragraph 8.2 above, we recommend that, upon adoption of this report, or of an Appellate Body report in this dispute determining that any subsidy has resulted in adverse effects to the interests of the United States, 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".

8.8 Finally, we note that the special and additional rules applicable under Parts II and III of the SCM Agreement do not require a panel to specify how the implementation of recommendations under Articles 4.7 and 7.8 should be effected by the subsidizing Member(s). In this context, we recall that the second sentence of Article 19.1 of the DSU provides that a panel "may" suggest ways in which a recommendation could be implemented. Assuming that this provision also applies to recommendations under Articles 4.7 and 7.8 of the SCM Agreement, we note the observation of the panel in *US – Hot Rolled Steel* that the means of implementation is, pursuant to Article 21.3 of the DSU, for the Member concerned, in the first instance.⁶⁰⁸² Further, the Appellate Body has made clear that the second sentence of Article 19.1 "does not oblige panels to make ... a suggestion".⁶⁰⁸³ In this case, it is possible to speculate as to the approaches that might be used to implement our recommendations. However, in the absence of any requirement to do so, and given that the United States has not even requested that we do so, we do not make any suggestions concerning steps that might be taken to implement those recommendations.

⁶⁰⁸² Panel Report, *US – Hot-Rolled Steel*, para. 8.11.

⁶⁰⁸³ Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 189.