

XI. Findings and Conclusions

1350. For the reasons set out in this Report, the Appellate Body:

- (a) with respect to the Panel's preliminary ruling regarding the absence of an information-gathering procedure under Annex V to the *SCM Agreement* in this dispute:
 - (i) finds that the Panel erred, and failed to resolve adequately the legal issues presented, in denying the various requests made by the European Communities with respect to an Annex V procedure;
 - (ii) finds that, in accordance with paragraph 2 of Annex V to the *SCM Agreement*, the DSB's initiation of an information-gathering procedure in a serious prejudice dispute occurs automatically when there is a request for initiation of such a procedure and the DSB establishes a panel; and
 - (iii) declines to find that all of the conditions for the initiation of an Annex V procedure were fulfilled in this dispute, and makes no finding as to whether the United States failed to comply with its obligations under the first sentence of paragraph 1 of Annex V to the *SCM Agreement*, whether the European Communities was entitled to present its serious prejudice case based on the evidence available to it, whether the Panel was entitled to complete the record as necessary relying on best information otherwise available, or whether the Panel was entitled to draw adverse inferences;
- (b) with respect to the Panel's findings regarding financial contribution and benefit:
 - (i) declares moot and of no legal effect the Panel's interpretation of Article 1.1(a)(1)(i) of the *SCM Agreement* and its finding, in paragraph 7.970 of the Panel Report, that "transactions *properly characterized* as purchases of services" are excluded from the scope of that provision;
 - (ii) in relation to the measures under the eight NASA R&D programmes at issue:
 - (A) finds that the payments and access to facilities, equipment, and employees provided to Boeing pursuant to NASA procurement contracts constitute direct transfers of funds and the provision of goods or services, and therefore financial contributions within the

meaning of Article 1.1(a)(1)(i) and (iii) of the *SCM Agreement*, and finds that there is no basis to address the related claim of the United States under Article 11 of the DSU;

- (B) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.1040 of the Panel Report, that the payments and access to facilities, equipment, and employees provided under the NASA procurement contracts conferred a benefit on Boeing within the meaning of Article 1.1(b) of the *SCM Agreement*; and
 - (C) rejects the United States' claim that the Panel erred in estimating the amount of the subsidy provided to Boeing pursuant to the NASA contracts and agreements under the eight R&D programmes at issue and, consequently, upholds the Panel's findings, in paragraphs 7.1081 and 7.1109 of the Panel Report, that the estimated amount of payments to Boeing through the NASA procurement contracts was \$1.05 billion; and upholds the Panel's finding, in paragraphs 7.1099 and 7.1109 of the Panel Report, that the estimated value of the free access to facilities, equipment, and employees provided to Boeing through NASA procurement contracts and agreements was \$1.55 billion;
- (iii) in relation to the measures under the 23 USDOD RDT&E programmes at issue:
- (A) finds that the payments and access to facilities provided to Boeing pursuant to USDOD assistance instruments constitute direct transfers of funds and the provision of goods or services, and therefore financial contributions within the meaning of Article 1.1(a)(1)(i) and (iii) of the *SCM Agreement*;
 - (B) upholds, albeit for different reasons, the Panel's finding, in the first sentence of paragraph 7.1187 of the Panel Report, that payments and access to facilities provided under the USDOD assistance instruments conferred a benefit on Boeing within the meaning of Article 1.1(b) of the *SCM Agreement*; and

- (C) finds that the Panel did not act inconsistently with Article 11 of the DSU when it stated, in paragraph 7.1205 of the Panel Report, that it "{did} not consider it credible that less than 1 per cent of the \$45 billion in aeronautics R&D funding that {US}DOD provided to Boeing over the period 1991-2005 had any potential relevance to LCA"; and
- (iv) in relation to the Washington State B&O tax rate reduction:
- (A) upholds the Panel's finding, in paragraph 7.133 of the Panel Report, that the reduction in the Washington State B&O tax rate applicable to commercial aircraft and component manufacturers constitutes the foregoing of revenue otherwise due, and therefore a financial contribution, within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*;
- (c) with respect to the Panel's findings regarding specificity:
- (i) in relation to the allocation of patent rights under contracts and agreements between NASA/USDOD and Boeing, and on the assumption that such allocation is a self-standing subsidy:
- (A) finds that such subsidy is not explicitly limited to certain enterprises within the meaning of Article 2.1(a) of the *SCM Agreement*;
- (B) finds that the Panel erred by failing to examine the European Communities' arguments that such allocation is "in fact" specific under Article 2.1(c) of the *SCM Agreement* and, therefore, finds that the Panel's overall finding under Article 2.1 cannot be sustained; and
- (C) declines to find that such allocation is specific within the meaning of Article 2.1(c) of the *SCM Agreement*; and

- (ii) in relation to the Washington State B&O tax rate reduction and the IRB subsidies provided by the City of Wichita, Kansas:
 - (A) upholds the Panel's finding, in paragraph 7.205 of the Panel Report, that the Washington State B&O tax rate reduction is a subsidy that is specific within the meaning of Article 2.1(a) of the *SCM Agreement*; and
 - (B) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.779 of the Panel Report, that the IRB subsidies provided by the City of Wichita to Boeing and Spirit are specific within the meaning of Article 2.1(c) of the *SCM Agreement*; and
- (d) with respect to the Panel's findings regarding adverse effects:
 - (i) in relation to technology effects:
 - (A) modifies and upholds the Panel's overall conclusion, in paragraphs 7.1797, 7.1854(a), and 8.3(a)(i) of the Panel Report, that the aeronautics R&D subsidies caused serious prejudice to the interests of the European Communities within the meaning of Article 5(c) and Article 6.3(b) and (c) of the *SCM Agreement* with respect to the 200-300 seat LCA market; and in particular:
 - (1) finds that the Panel did not err by finding, in paragraph 7.1773 of the Panel Report, that "the aeronautics R&D subsidies contributed in a genuine and substantial way to Boeing's development of technologies for the 787" in 2004;
 - (2) finds that the Panel did not act inconsistently with Article 11 of the DSU in making, or lack a factual basis for, its statement in paragraph 7.1772 of the Panel Report 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 {USDOD} funding";

- (3) finds that the Panel did not err in its counterfactual analysis;
 - (4) upholds the Panel's finding, in paragraphs 7.1797, 7.1854(a), and 8.3(a)(i) of the Panel Report, that the effect of the aeronautics R&D subsidies is significant lost sales within the meaning of Article 6.3(c) of the *SCM Agreement* with respect to the 200-300 seat LCA market;
 - (5) reverses the Panel's finding, in paragraphs 7.1797, 7.1854(a), and 8.3(a)(i) of the Panel Report, to the extent that it relates to Kenya, Iceland, and Ethiopia (but not with respect to Australia), that the effect of the aeronautics R&D subsidies is a threat of displacement and impedance of EC exports in third-country markets within the meaning of Article 6.3(b) of the *SCM Agreement* with respect to the 200-300 seat LCA market; and
 - (6) upholds the Panel's finding, in paragraphs 7.1797, 7.1854(a), and 8.3(a)(i) of the Panel Report, that the effect of the aeronautics R&D subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* with respect to the 200-300 seat LCA market;
- (ii) finds, with respect to the Panel's treatment of the effects of the USDOD RDT&E programmes, that the Panel acted inconsistently with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it in finding, in paragraph 7.1701 of the Panel Report, that there was "insufficient evidence on the record that {the 21 USDOD RDT&E programmes other than ManTech and DUS&T} funded predominantly assistance instruments, as opposed to procurement contracts, or a mixture of assistance instruments and procurement contracts" without having exercised its authority to seek out relevant information regarding the use of assistance instruments under all of the USDOD programmes;

- (iii) in relation to price effects:
- (A) reverses the Panel's findings, in paragraphs 7.1823, 7.1833, 7.1854(b) and (c), and 8.3(a)(ii) and (iii) of the Panel Report, that the FSC/ETI subsidies and the B&O tax rate reductions caused serious prejudice to the interests of the European Communities within the meaning of Article 5(c) and Article 6.3(b) and (c) of the *SCM Agreement* with respect to the 100-200 seat and 300-400 seat LCA markets, and finds it unnecessary to rule on the United States' additional claim under Article 12.7 of the DSU; and
 - (B) completes the analysis and finds that the FSC/ETI subsidies and the Washington State B&O tax rate reduction caused serious prejudice within the meaning of Article 5(c) and Article 6.3(c) of the *SCM Agreement* with respect to the 100-200 seat LCA market; and in particular, finds that, in two sales campaigns, the FSC/ETI subsidies and the Washington State B&O tax rate reduction caused, through their effects on Boeing's prices for the 737NG, significant lost sales within the meaning of Article 6.3(c) of the *SCM Agreement*; and
- (iv) in relation to the collective assessment of the subsidies and their effects:
- (A) finds that the Panel erred in failing to consider whether the price effects of the B&O tax rate reductions complement and supplement the technology effects of the aeronautics R&D subsidies in causing significant lost sales and significant price suppression, and a threat of displacement and impedance, in the 200-300 seat LCA market;
 - (B) reverses the Panel's finding, in paragraphs 7.1828 and 7.1855 of the Panel Report, that the remaining subsidies had not been shown to have affected Boeing's prices in a manner giving rise to serious prejudice with respect to the 100-200 seat and 300-400 seat LCA markets; and

- (C) completes the analysis and finds that the effects of the City of Wichita IRBs complemented and supplemented the price effects of the FSC/ETI subsidies and the State of Washington B&O tax rate reduction, thereby causing serious prejudice, in the form of significant lost sales, within the meaning of Article 5(c) and Article 6.3(c) of the *SCM Agreement*, in the 100-200 seat LCA market.

1351. We realize that, after more than five years of panel proceedings and eleven months of appellate review, a number of issues remain unresolved in this dispute. Some may consider that this is not an entirely satisfactory outcome. Our mandate under Article 17 of the DSU does not permit us to engage in fact-finding. However, wherever we have found that there are sufficient factual findings by the Panel or undisputed facts to complete the analysis, we have done so with a view to fostering the prompt settlement of this dispute in accordance with Article 3.3 of the DSU.

1352. The Appellate Body recommends that the DSB request the United States to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *SCM Agreement*, into conformity with its obligations under that Agreement. More specifically, having regard to the recommendation made by the Panel in paragraph 8.9 of its Report and the provisions of Article 7.8 of the *SCM Agreement*, the Appellate Body recommends that the United States take appropriate steps to remove the adverse effects found to have been caused by its use of subsidies, or to withdraw those subsidies.²⁷¹⁶

²⁷¹⁶The Appellate Body notes the Panel's finding that, to the extent that the United States has not already withdrawn the FSC/ETI export subsidies to Boeing, the recommendation made by the panel in *US – FSC* under Article 4.7 of the *SCM Agreement* continues to be "operative". (Panel Report, para. 8.7 (referring to Panel Report, *US – FSC (Article 21.5 – EC II)*, para. 8.2; and to Appellate Body Report, *US – FSC (Article 21.5 – EC II)*))

Signed in the original in Geneva this 27th day of January 2012 by:

Lilia R. Bautista
Presiding Member

David Unterhalter
Member

Yuejiao Zhang
Member