BCI deleted, as indicated **[***]**

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 We recall that in this dispute, the claims of the European Communities with respect to the challenged measures fall into two categories. First, the European Communities claims that two of the alleged subsidies, namely the tax breaks provided by the U.S. Federal Government pursuant to legislation concerning foreign sales corporations and exclusion of extraterritorial income and the tax incentives provided by the State of Washington under the legislation adopted in 2003, are prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement. Second, the European Communities claims that all of the alleged subsidies are actionable under the SCM Agreement and that by using these subsidies the United States causes adverse effects to the interests of the European Communities, in violation of Article 5(c) of the SCM Agreement.

8.2 With respect to the European Communities' prohibited subsidy claims under Articles 3.1(a) and 3.2 of the SCM Agreement, we conclude that:

(a) the FSC/ETI measures that have been challenged by the European Communities and that were in force at the time of the Panel's establishment are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement;

(b) the European Communities has not demonstrated that the Washington State tax measures provided for in HB 2294 are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

8.3 With respect to the European Communities' adverse effects claims under Article 5(c) of the SCM Agreement:

(a) we conclude that the United States causes serious prejudice to the interests of the European Communities within the meaning of Articles 5(c) and 6.3(b) and 6.3(c) of the SCM Agreement in that:

(i) the effects of the NASA and DOD aeronautics R&D subsidies are significant price suppression, significant lost sales and threat of displacement and impedance of exports from third country markets, with respect to the 200 – 300 seat wide-body LCA product market;

(ii) the effects of the FSC/ETI subsidies and the B&O tax subsidies provided by the State of Washington under HB 2294 are significant price suppression, significant lost sales and displacement and impedance of exports from third country markets, with respect to the 100-200 seat single-aisle LCA product market;

(iii) the effects of the FSC/ETI subsidies and the B&O tax subsidies provided by the State of Washington under HB 2294 and by the City of Everett are significant price suppression, significant lost sales and displacement and impedance of exports from third country markets, with respect to the 300-400 seat wide-body LCA product market;

(b) we exercise judicial economy with respect to the European Communities' claim that violation of the 1992 Agreement constitutes serious prejudice to the European Communities' interests within the meaning of Article 5(c) of the SCM Agreement.

BCI deleted, as indicated **[***]**

8.4 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 United States has acted inconsistently with the SCM Agreement, it has nullified or impaired benefits accruing to the European Communities under that Agreement.

B. RECOMMENDATION

8.5 Article 4.7 of the SCM Agreement provides that, having found a measure in dispute to be a prohibited subsidy:

> "the Panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn."

8.6 The Panel has found that the European Communities has demonstrated that FSC/ETI and successor act subsidies to Boeing are export subsidies that are prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement. As to whether the Panel should make a recommendation under Article 4.7 of the SCM Agreement with regard to the subsidies which it has found to be prohibited under Article 3, there are two basic considerations that the Panel needs to take into account. First, the FSC/ETI measure in force at the time of the Panel's establishment has been substantially changed during the course of the present proceedings and indeed it appears that the measure is no longer in force with respect to Boeing.[4265] The Panel considers that it is well established in WTO dispute settlement practice that when a measure has expired, it is appropriate for a panel to refrain from making a recommendation with respect to such a measure.[4266] Second, to the extent that FSC/ETI tax benefits remained applicable to Boeing at the time of the establishment of this Panel, pursuant to the transition and grandfather clauses of the AJCA, the Panel notes that the panel and Appellate Body reports in *US – FSC (Article 21.5 – ECII)* concluded that the recommendation made by the panel in *US – FSC* remained operative. The Panel considers it important not to disturb this recommendation. A new recommendation under Article 4.7 of the SCM Agreement would not add to the legal force of the existing recommendation. The findings made in prior cases regarding the legal provisions as such necessarily imply that the application of these provisions in individual cases was also inconsistent with Article 3. The obligation of the United States to withdraw the prohibited subsidies at issue thus also entails an obligation to cease applying the measures in individual cases. If anything, a new recommendation could detract from the legal force of the existing obligation insofar as it would give rise to a new period for implementation.[4267]

[4265] We note that the European Communities argues that there has been no "final resolution" as to whether FSC/ETI benefits will continue. We also note, however, that this issue is limited to certain transactions that are authorized under the TIPRA provisions as interpreted in the December 2006 memorandum of the Internal Revenue Service and that the European Communities has not provided sufficient evidence that Boeing has actually made use of those provisions.

[4266] See, for example, Appellate Body Report, *US – Certain EC Products*, paras. 81-82. The panel in *EC – Approval and Marketing of Biotech Products* concluded that "WTO jurisprudence supports the inference that panels are to avoid making recommendations which would apply to measures that are no longer in existence or have been amended." Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1316.

[4267] A recommendation by this Panel under Article 4.7 of the SCM Agreement would provide the United States with a new period within which to withdraw the subsidy provided to Boeing. The implication would be that while the United States has since November 2000 been under an obligation to withdraw the FSC measures at issue, with respect to the application of those measures to Boeing, the obligation to withdraw the subsidy would come into existence only upon completion of the present proceeding. Such a result would be fundamentally illogical.

BCI deleted, as indicated **[***]**

8.7 In the light of the foregoing, the Panel refrains from making a recommendation under Article 4.7 of the SCM Agreement. To the extent that the United States has not already withdrawn the FSC/ETI export subsidies to Boeing, the Panel notes the conclusion of the Panel in *US - FSC (Article 21.5 – ECII)*, which was upheld by the Appellate Body, that the recommendation made by the Panel in the dispute in *US – FSC* continued to be "operative".[4268]

8.8 Article 7.8 of the SCM Agreement provides that:

> "Where 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."

8.9 Accordingly, in the light of our conclusions with respect to adverse effects set out 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 European Communities, the United States "take appropriate steps to remove the adverse effects or ... withdraw the subsidy".

8.10 Article 19.1 of the DSU provides that a panel "may" suggest ways in which a recommendation could be implemented. It is well established that Article 19.1 does not oblige panels to make a suggestion. In this case, neither party has requested that the Panel make any such suggestion. Accordingly, we make no suggestions concerning the steps that might be taken to implement this recommendation.

[4268] See, for example, Panel Report, *US – FSC (Article 21.5 – ECII)*, para. 8.2.