

were correct, would warrant a finding of inconsistency with Article III:4 of the GATT 1994.

10.5 Conclusion

10.47. We conclude that:

- a. To the extent that we have ruled that the European Union's claims under Articles 3.1(a), 3.1(b) and Article 3.2 of the SCM Agreement are within the scope of this proceeding, these claims are unfounded because: (i) certain measures challenged by the European Union are not subsidies provided to Boeing after the end of the implementation period; and (ii) where we find that the measures at issue are subsidies provided to Boeing after the end of the implementation period, the European Union has failed to establish that any of these subsidies is contingent in fact upon export performance or upon the use of domestic over imported goods.
- b. To the extent that we have ruled that the European Union's claims under Article III:4 of the GATT 1994 are within the scope of this proceeding, the European Union has failed to establish that any of the measures at issue is inconsistent with Article III:4 of the GATT 1994.

11 CONCLUSIONS AND RECOMMENDATIONS

11.1. We recall that our task in this proceeding under Article 21.5 of the DSU is to resolve a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. The European Union claims that the United States has failed to implement the DSB recommendations in *US – Large Civil Aircraft (2nd complaint)* to withdraw the subsidies or take appropriate steps to remove the adverse effects, pursuant to Article 7.8 of the SCM Agreement. The European Union also claims that the measures at issue in this proceeding are inconsistent with Articles 3.1(a), 3.1(b), and 3.2 of the SCM Agreement and Article III:4 of the GATT 1994. The United States maintains that it has complied fully with the DSB recommendations and rulings by either withdrawing the relevant subsidies or taking appropriate steps to remove their adverse effects.

11.2. In this Section of the Report, we provide a summary of the conclusions we have reached in the preceding Sections and formulate our overall conclusion as to whether the United States has failed to comply with the DSB recommendations and rulings.

Rulings on the terms of reference and scope of the proceeding

11.3. In Section 7 of this Report, the Panel has considered a large number of questions arising out of a request of the United States that the Panel rule that certain measures, and claims of the European Union with regard to certain measures, are outside the Panel's terms of reference because the European Union's panel request does not satisfy the requirements of *Article 6.2 of the DSU*; and that certain measures, and claims of the European Union with regard to certain measures, are outside *the scope of this compliance proceeding*.³⁵²⁴

11.4. In respect of whether certain measures, and claims with respect to certain measures, are outside our terms of reference for purposes of Article 6.2 of the DSU, we have made the following rulings:

- a. the European Union's claims under Articles 3.1(a), 3.1(b), and 3.2 of the SCM Agreement, and under Article III:4 of the GATT 1994, are within the Panel's terms of reference³⁵²⁵;

³⁵²⁴ See para. 7.1 above.

³⁵²⁵ The Panel's ruling that the European Union's claims under Articles 3.1(a), 3.1(b), and 3.2 of the SCM Agreement, and under Article III of the GATT 1994, are within its terms of reference is without prejudice to its further rulings, in para. 11.6 below, as to whether these claims in respect of certain measures are nevertheless outside the scope of this compliance proceeding.

- b. the South Carolina Phase II measures are outside the Panel's terms of reference, owing to the failure of the European Union's panel request to meet the requirements of Article 6.2 of the DSU in respect of such measures; and
- c. the Washington State tax measures, as amended by SSB 5952, are outside the Panel's terms of reference, owing to the failure of the European Union's panel request to meet the requirements of Article 6.2 of the DSU in respect of such measures.

11.5. In respect of whether certain measures are outside the scope of this compliance proceeding, we have made the following rulings:

- a. the following measures are within the scope of this compliance proceeding:
 - i. the Washington State B&O tax credits for preproduction/aerospace product development³⁵²⁶; the Washington State B&O tax credit for property taxes and leasehold excise taxes³⁵²⁷; the Washington State sales and use tax exemptions for computer software, hardware, and peripherals; and the City of Everett B&O tax rate reduction;
 - ii. DOD procurement contracts funded under the 23 original RDT&E program elements;
 - iii. DOD procurement contracts HR0011-06-C-0073 and HR-0011-08-C-0044 SOW and assistance instruments HR0011-06-2-0008, FA8650-07-2-7716, and HR0011-10-2-0001 funded under the Materials Processing Technology Project of the Materials and Biological Technology program element;
 - iv. the provision of access to DOD equipment and employees through the post-2006 DOD procurement contracts and assistance instruments funded under the 23 original RDT&E program elements and the "additional" program elements that we have found to be within the scope of this proceeding;
 - v. the FAA aeronautics R&D measure; and
 - vi. the South Carolina Project Gemini measures and the Project Emerald measures.
- b. the following measures are outside the scope of this compliance proceeding:
 - i. the Washington State JCATI measure;
 - ii. Air Force Contract F19628-01-D-0016 funded under the DRAGON Project of the Airborne Warning and Control System (AWACS) (PE 0207417F) program element; Air Force Contract FA8625-11-C-6600 funded under the KC-46, Next Generation Aerial Refueling Aircraft (PE 0605221F) program element; and measures funded under the Multi-Mission Maritime Aircraft (P-8A) (PE 0605500N) program element, including Navy contracts N00019-04-C-3146, N00019-09-C-0022, and N00019-12-C-0112³⁵²⁸; and
 - iii. the provision of access to DOD equipment and employees through the pre-2007 procurement contracts and assistance instruments funded under the 23 original RDT&E program elements.

11.6. In addition to the above, with respect to whether claims of the European Union with regard to certain measures are outside the scope of this compliance proceeding, we have made the following rulings:

³⁵²⁶ Including amendments thereto pursuant to SSB 6828.

³⁵²⁷ Including amendments thereto pursuant to HB 2466.

³⁵²⁸ The Panel has also ruled that claims concerning the Technology Transfer program element, the IP ManTech program element and the Long Range Strike Bomber program element are not further considered in this proceeding because the Panel is not satisfied of the existence of any procurement contracts or assistance instruments with Boeing which the European Union identifies as relevant to its claims which are funded through these program elements.

- a. the European Union is precluded from bringing claims under Articles 3.1(a) and 3.2 of the SCM Agreement against the following four original Washington State tax measures enacted under HB 2294: the Washington State B&O tax rate reduction; the Washington State B&O tax credits for preproduction/aerospace product development³⁵²⁹; the Washington State B&O tax credit for property taxes³⁵³⁰; and the Washington State sales and use tax exemptions for computer hardware, peripherals, and software.
- b. the European Union is precluded from bringing claims under Articles 3.1(b) and 3.2 of the SCM Agreement, and under Article III:4 of the GATT 1994, in respect of the following four original Washington State tax measures enacted under HB 2294: the Washington State B&O tax rate reduction; the Washington State B&O tax credits for preproduction/aerospace product development³⁵³¹; the Washington State B&O tax credit for property taxes³⁵³²; and the Washington State sales and use tax exemptions for computer hardware, peripherals, and software; as well as the FSC/ETI measures.
- c. the European Union is precluded from bringing claims under Articles 3.1(a), 3.1(b), and 3.2 of the SCM Agreement and under Article III:4 of the GATT 1994 in respect of:
 - i. the City of Everett B&O tax rate reduction, the tax abatements related to the City of Wichita IRBs, and the pre-2007 NASA Space Act Agreements and DOD procurement contracts at issue in the original proceeding; and
 - ii. the pre-2007 NASA procurement contracts and DOD assistance instruments at issue in the original proceeding, as amended by the respective Boeing Patent Licence Agreements.

Conclusions with respect to whether the United States has failed to withdraw the subsidy within the meaning of Article 7.8 of the SCM Agreement

11.7. With respect to the European Union's claim that the United States has failed to withdraw the subsidy within the meaning of Article 7.8 of the SCM Agreement, the Panel concludes as follows in Section 8 of this Report:

- a. with regard to pre-2007 NASA and DOD aeronautics R&D subsidies that were the subject of the DSB recommendations and rulings, the European Union has established that the modifications made by the United States through the Boeing Patent Licence Agreements to the terms of the pre-2007 NASA procurement contracts and DOD assistance instruments do not constitute a withdrawal of the subsidy within the meaning of Article 7.8 of the SCM Agreement and that the United States, having taken no action in respect of pre-2007 Space Act Agreements, has failed to withdraw the subsidy within the meaning of Article 7.8 of the SCM Agreement.
- b. with regard to the post-2006 measures of the United States challenged in this proceeding, the European Union has established that the following measures involve specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement, and that by granting or maintaining these specific subsidies after the end of the implementation period, the United States has failed to withdraw the subsidy within the meaning of Article 7.8 of the SCM Agreement:
 - i. certain transactions between NASA and Boeing pursuant to post-2006 NASA procurement contracts, cooperative agreements, and Space Act Agreements, with respect to which we are unable to estimate the amount of the subsidy on the basis of the evidence on the record, but consider the United States' estimate of the amount of the financial contribution at [***] between 2007 and 2012 to be a credible estimate;

³⁵²⁹ Including amendments thereto pursuant to SSB 6828.

³⁵³⁰ Including amendments thereto pursuant to HB 2466.

³⁵³¹ Including amendments thereto pursuant to SSB 6828.

³⁵³² Including amendments thereto pursuant to HB 2466.

- ii. certain transactions between DOD and Boeing pursuant to post-2006 DOD assistance instruments, with respect to which we are unable to estimate the amount of the subsidy on the basis of the evidence on the record, but consider the United States' estimate of the amount of the financial contribution at [***] between 2007 and 2012 to be a credible estimate;
 - iii. transactions pursuant to the Boeing CLEEN Agreement with respect to which we are unable to estimate the amount of the subsidy on the basis of the evidence on the record, but consider the European Union's estimate of the amount of the financial contribution at USD 27.99 million between 2010 and 2014 to be a credible estimate;
 - iv. Washington State B&O tax rate reduction for the aerospace industry, in the amount of USD 325 million between 2013 and 2015;
 - v. Washington State B&O tax credits for preproduction/aerospace product development, as amended by section 7 of SSB 6828, in the amount of [***] between 2013 and 2015;
 - vi. Washington State B&O tax credit for property taxes, as amended by HB 2466 to include leasehold excise taxes, in the amount of [***] between 2013 and 2015;
 - vii. Washington State sales and use tax exemptions for computer software, hardware, and peripherals, in the amount of [***] between 2013 and 2015;
 - viii. City of Everett B&O tax rate reduction, in the amount of USD 54.1 million between 2013 and 2015;
 - ix. payments made by South Carolina pursuant to commitments made in the Project Gemini Agreement to compensate Boeing for a portion of the costs incurred by Boeing in respect of the construction of the Gemini facilities and infrastructure through air hub bond proceeds, in the amount of USD 50 million;
 - x. South Carolina property tax exemption for Boeing's large cargo freighters, in the amount of USD 25.82 million between 2013 and 2015; and
 - xi. South Carolina sales and use tax exemptions for aircraft fuel, computer equipment, and construction materials, in the amount of USD 2.25 million between 2013 and 2015;
- c. the European Union has failed to establish that the following measures involve specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement, and has therefore failed to establish that by granting or maintaining these specific subsidies after the end of the implementation period, the United States has failed to withdraw the subsidy within the meaning of Article 7.8 of the SCM Agreement:
- i. certain transactions between DOD and Boeing pursuant to pre-2007 and post-2006 DOD procurement contracts, on the grounds that, assuming *arguendo* that these measures were to involve financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement, they do not confer a benefit on Boeing within the meaning of Article 1.1(b) of the SCM Agreement;
 - ii. tax exemptions and exclusions under FSC/ETI legislation and successor legislation, on the grounds that the European Union has failed to establish that Boeing actually received the FSC/ETI tax benefits after 2006, and that the measure therefore involves a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement;
 - iii. tax abatements provided through IRBs issued by the City of Wichita, on the grounds that these tax abatements are no longer specific within the meaning of Article 2.1(c) of the SCM Agreement and, as a result, the measure is no longer subject to the provisions of the SCM Agreement on actionable subsidies;

- iv. South Carolina sublease of the Project Site, on the grounds that the European Union has failed to establish that the sublease involves a subsidy to Boeing;
- v. South Carolina provision of Gemini and Emerald facilities and infrastructure, on the grounds that the European Union has failed to establish that these measures involve financial contributions within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement;
- vi. South Carolina fee-in-lieu-of taxes arrangements set forth in the Boeing FILOT Agreement and Project Emerald FILOT Agreement, on the grounds that these arrangements are not specific within the meaning of Article 2 of the SCM Agreement;
- vii. South Carolina corporate income tax credits in connection with the designation of the Project Gemini and Project Emerald portions of the Project Site as part of the same multi-county industrial park, on the grounds that the tax credits are not specific within the meaning of Article 2 of the SCM Agreement;
- viii. South Carolina Income Allocation and Apportionment Agreement, on the grounds that the European Union has failed to establish that the agreement involves a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement; and
- ix. South Carolina workforce recruitment, training and development programme, on the grounds that the programme is not specific within the meaning of Article 2 of the SCM Agreement.

Conclusions with respect to whether the United States has failed to take appropriate steps to remove the adverse effects within the meaning of Article 7.8 of the SCM Agreement

11.8. With respect to the European Union's claim that the United States has failed to comply with its obligation to take appropriate steps to remove the adverse effects within the meaning of Article 7.8 of the SCM Agreement, the Panel concludes as follows in Section 9 of this Report:

- a. the European Union has failed to establish that the effects of certain aeronautics R&D subsidies and other subsidies are a genuine and substantial cause of significant lost sales, significant price suppression, impedance of imports to the United States market or impedance of exports to various third country markets, or threats of any of the foregoing, within the meaning of Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement in respect of the A350XWB in the post-implementation period;
- b. the European Union has failed to establish that the original adverse effects of the pre-2007 aeronautics R&D subsidies in respect of the A330 and Original A350 continue in the post-implementation period as significant price suppression of the A330 and A350XWB, significant lost sales of the A350XWB, or a threat of impedance of exports of the A350XWB in the twin-aisle LCA market, within the meaning of Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement in the post-implementation period;
- c. the European Union has established that the effects of the Washington State B&O tax rate reduction are a genuine and substantial cause of significant lost sales within the meaning of Articles 5(c) and 6.3(c) of the SCM Agreement of A320neo and A320ceo families of LCA in the single-aisle LCA market, in respect of the sales campaigns for Fly Dubai in 2014, Air Canada in 2013, and Icelandair in 2013, in the post-implementation period;
- d. the European Union has established that the effects of the Washington State B&O tax rate reduction are a genuine and substantial cause of a threat of impedance of imports of the A320ceo to the United States single-aisle market, and a threat of impedance of exports of Airbus single-aisle LCA in the United Arab Emirates third country market, within the meaning of Articles 5(c) and 6.3(a) and (b) of the SCM Agreement in the post-implementation period; and

- e. the European Union has failed to establish that the effects of the pre-2007 aeronautics R&D subsidies and the post-2006 subsidies are a genuine and substantial cause of significant price suppression of the A320neo or A320ceo, impedance of imports of the A320neo or A320ceo to the United States market, or displacement and impedance of exports of the A320neo or A320ceo to the third country markets of Australia, Brazil, Canada, Iceland, Indonesia, Malaysia, Mexico, Norway, Russia, and Singapore, within the meaning of Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement, or threats of any of the foregoing, in the post-implementation period.

Conclusions with respect to whether the United States acts inconsistently with Articles 3.1 and 3.2 of the SCM Agreement and Article III:4 of the GATT 1994

11.9. With respect to the European Union's claims under Articles 3.1 and 3.2 of the SCM Agreement and Article III:4 of the GATT 1994, the Panel concludes as follows in Section 10 of this Report:

- a. to the extent that the Panel has found that the claims are within the scope of this proceeding, and that the measures at issue are subsidies within the meaning of Article 1 of the SCM Agreement, the European Union has not established that the subsidies are inconsistent with Articles 3.1(a) and 3.2 or 3.1(b) and 3.2 of the SCM Agreement; and
- b. to the extent that the Panel has found that the claims are within the scope of the proceeding, the European Union has not established that the measures at issue are inconsistent with Article III:4 of the GATT 1994.

Conclusion with respect to whether the United States has complied with the DSB recommendations and rulings

11.10. In light of the foregoing, we conclude that by continuing to be in violation of Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement, the United States has failed to comply with the DSB recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects or ... withdraw the subsidy".

11.11. 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 measures at issue are inconsistent with the SCM Agreement, they have nullified or impaired the benefits accruing to the European Union under that Agreement.

11.12. We therefore conclude that the United States has failed to implement the DSB recommendations and rulings to bring its measures into conformity with its obligations under the SCM Agreement. To the extent that the United States has failed to comply with the DSB recommendations and rulings in the original dispute, those recommendations and rulings remain operative.