

US – LARGE CIVIL AIRCRAFT (2ND COMPLAINT)¹ (DS353)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	European Communities	ASCM Arts. 1, 2, 3.1(a), 4.7, 5(c), 6.3 and Annex V DSU Arts. 6.2 and 11	Establishment of Panel	17 February 2006
			Circulation of Panel Report	31 March 2011
Respondent	United States		Circulation of AB Report	12 March 2012
			Adoption	23 March 2012

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Subsidies allegedly granted by US federal, state and local governments to Boeing large civil aircraft, including among others (i) payments, access to government facilities, equipment and employees, allocation of intellectual property rights, and reimbursement of independent research and development (“R&D”) costs under R&D contracts and agreements between Boeing and the National Aeronautics and Space Administration (“NASA”), the United States Department of Defence (“USDOD”) and the Department of Commerce; (ii) various federal, state and local tax measures; and (iii) infrastructure-related measures.
- **Product at issue:** Large civil aircraft developed, produced and sold by Boeing.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Art. 3.1(a) (prohibited subsidies – export subsidies):** The Panel upheld the EC claim that FSC-related subsidies provided to Boeing were inconsistent with Art. 3.1(a), but rejected the EC claim that certain Washington State tax measures were contingent upon export performance. These findings were not appealed.
- **ASCM Arts. 5(c) and 6.3 (serious prejudice – displacement, lost sales and price suppression):** The Appellate Body agreed with the Panel, although for different reasons, that the NASA and USDOD measures enabled Boeing to launch its technologically advanced 787 in 2004, thereby causing significant lost sales in sales campaigns in Australia, Iceland, Kenya and Ethiopia; threat of displacement and impedance in Australia; and significant price suppression. With respect to the tied tax subsidies, the Appellate Body reversed the Panel’s findings of serious prejudice and completed the analysis to make a more limited finding that these measures caused significant lost sales to Airbus in two sales campaigns in the 100-200 seat LCA market. The Appellate Body further conducted a collective assessment of two groups of subsidies namely, the “remaining subsidies” and tied tax subsidies. The Appellate Body found that the price effects of the industrial revenue bonds issued by the City of Wichita (one of the remaining subsidies) complemented and supplemented the price effects of the tied tax subsidies, thereby causing serious prejudice within the meaning of Art. 6.3(c) in the 100-200 seat LCA market.
- **ASCM Arts. 4.7 (recommendation to withdraw a prohibited subsidy) and 7.8 (remedies – to remove adverse effects or withdraw the subsidy):** Having found that the recommendations in prior related cases (see *US – Tax Treatment for “Foreign Sales Corporations”*) remained operative, the Panel refrained from making any new recommendation under Art. 4.7 in respect of the FSC-related subsidies provided to Boeing. The Appellate Body took note of this, and stated that to the extent it upheld the Panel’s findings with respect to actionable subsidies that caused adverse effects or such findings had not been appealed, the Panel’s recommendation pursuant to Art. 7.8 stands. Art. 7.8 provides in relevant part that “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’”.

3. OTHER ISSUES²

- **The initiation of procedures under ASCM Annex V:** The Appellate Body interpreted para. 2 of Annex V to mean that the DSB’s initiation of the information-gathering process in a serious prejudice dispute occurs automatically when there is a request for its initiation and the DSB establishes a panel; there is no requirement of positive consensus to initiate such a procedure.

¹ *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint*

² Other issues addressed: existence of a financial contribution (ASCM Art. 1.1(a)(1)); existence of a benefit (ASCM Art. 1.1(b)); specificity of subsidies (ASCM Art. 2); enhanced third party rights (DSU Art. 10); failure to identify measures in the panel request (DSU Art. 6.2); open Panel meetings and Appellate Body hearings; additional procedures to protect confidential information at the panel and appellate stage; Working Procedures for Appellate Review (sufficiency of Notice of Other Appeal, time-frame for submissions, written questions to participants and withdrawal of Point of Appeal); DSU Art. 17.5 (timing and circulation of Report); Panel’s use of an *arguendo* assumption; duty of a panel to seek further information in certain circumstances (DSU Art. 13); appeals on issues involving application of the law to the facts; objective assessment of the matter (DSU Art. 11).