

**UNITED STATES – MEASURES AFFECTING TRADE  
IN LARGE CIVIL AIRCRAFT  
(SECOND COMPLAINT)**

Notification of an Appeal by the European Union  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 1 April 2011, from the Delegation of the European Union, is being circulated to Members.

Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (WT/DS353). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report, and where indicated to complete the analysis<sup>1</sup>:

**I. Preliminary Issue: *SCM Agreement Annex V Procedure***

1. The Panel erred in its interpretation and application of the *SCM Agreement*, Article 7.4 and Annex V, paragraphs 1, 2 and/or 6 to 9, and/or failed to make an objective assessment pursuant to Article 11 of the *DSU*, and/or falsely exercised judicial economy, when it rejected the EU claims and arguments to the effect that an Annex V procedure is initiated by negative consensus, that the conditions for such a procedure were fulfilled in this case, and that non-cooperation by the United States entailed the consequences in paragraphs 6 to 9 of Annex V of the *SCM Agreement*.<sup>2</sup> The European Union requests the Appellate Body to complete the analysis.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review* this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Panel Report, paras. 7.19-7.22, particularly 7.22, first and final sentences.

## II. Subsidies

2. The Panel erred in its interpretation and application of Article 2.1 of the *SCM Agreement* when it found that the European Union had not demonstrated that any subsidy involved in the allocation of patent rights under NASA and DOD R&D contracts and agreements with Boeing is specific within the meaning of Article 2 of the *SCM Agreement*.<sup>3</sup>

3. The Panel erred in its interpretation of Article 1.1(a)(1) of the *SCM Agreement* when it found that transactions properly characterized as purchases of services are excluded from the scope of Article 1.1(a)(1) of the *SCM Agreement*.<sup>4</sup>

## III. Subsidies Contingent/Conditional in Fact upon Export

4. The Panel erred in its interpretation and application of Article 3.1(a) and footnote 4 of the *SCM Agreement*, and/or failed to make an objective assessment, including an objective assessment of the facts, pursuant to Article 11 of the *DSU*, when it found that the European Union had not demonstrated that HB 2994 and the B&O tax rate reductions and instances of application are subsidies contingent/conditional in fact upon export.<sup>5</sup> The European Union requests the Appellate Body to complete the analysis.

## IV. Adverse Effects

5. The Panel erred in its interpretation and application of Articles 5 and 6.3 of the *SCM Agreement* when it found that it was not appropriate to aggregate the effects of the B&O tax subsidies and the effects of the aeronautics R&D subsidies in assessing whether serious prejudice was caused to the European Union in the 200-300 seat LCA market.<sup>6</sup>

6. The Panel erred in its interpretation and application of Articles 5 and 6.3 of the *SCM Agreement* when it failed to analyse the effects of the US aeronautics R&D subsidies, the FSC/ETI subsidies, the B&O tax subsidies *and the remaining subsidies* on an aggregate basis, but rather assessed the *remaining subsidies* separately, concluding that they have not affected Boeing's market behaviour and/or prices in a manner giving rise to serious prejudice to the interests of the European Union.<sup>7</sup>

7. The Panel acted inconsistently with the principle of due process, the principle that reasonable inferences can and should be drawn from instances of non-cooperation, Article 11 of the *DSU* and paragraphs 6 to 9 of Annex V of the *SCM Agreement* when, without providing the Parties with a further opportunity to comment, without putting further questions to the United States pursuant to Article 13 of the *DSU* or otherwise, and without drawing appropriate inferences from US non-cooperation, it excluded from its assessment of adverse effects the effects of assistance instruments funded through the RDT&E programmes other than in relation to the ManTech and DUS&T programmes.<sup>8</sup>

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<sup>3</sup> Panel Report, paras 7.1276-7.1294, particularly para. 7.1294.

<sup>4</sup> Panel Report, paras. 7.953-7.970 and para. 7.1136, particularly para. 7.970, final sentence.

<sup>5</sup> Panel Report, paras. 7.1513-7.1590, particularly paras. 7.1543, 7.1583, 7.1589, 7.1590, and 8.2(b).

<sup>6</sup> Panel Report, para. 7.1824, final sentence.

<sup>7</sup> Panel Report, paras. 7.1825-7.1828, particularly para. 7.1828, penultimate and final sentences.

<sup>8</sup> Panel Report, para. 7.1701, particularly sixth and ninth to eleventh sentences.