

***** As Delivered *****

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

(AB-2011-3/DS353)

**OPENING STATEMENT OF THE UNITED STATES
AT THE FIRST ORAL HEARING**

August 16, 2011

TABLE OF CONTENTS

INTRODUCTION AND OVERVIEW1

DETAILED DISCUSSION6

I. THE PANEL’S ERRONEOUS APPLICATION OF THE “PRINCIPALLY FOR THE BENEFIT AND USE” TEST6

A. U.S. Appeal of the application of Article 1.1(a)(1) of the SCM Agreement to NASA research contracts7

B. U.S. appeal under Article 11 of the DSU with regard to the Panel’s analysis of NASA’s research contracts with Boeing11

C. U.S. appeal of the application of Article 1.1(a)(1) of the SCM Agreement to DoD cooperative agreements, TIAs, and OTAs15

II. THE PANEL’S ERRONEOUS FINDINGS THAT NASA RESEARCH CONTRACTS AND DoD RESEARCH AGREEMENTS CONFERRED A BENEFIT20

A. The Panel’s finding of a benefit with regard to contracts that were not part of the financial contribution challenged by the EU.20

B. The Panel’s erroneous finding that DoD R&D agreements conferred a benefit22

III. WASHINGTON STATE B&O TAX REDUCTION24

A. U.S. appeal of the Panel’s interpretation of the legal test to be applied under Article 1.1(a)(1)(ii) of the SCM Agreement25

B. U.S. appeal of the Panel’s application of the legal test under Article 1.1(a)(1)(ii) of the SCM Agreement26

C. U.S. appeal of the Panel’s finding that the Washington State B&O tax reduction is a specific subsidy30

IV. CITY OF WICHITA INDUSTRIAL REVENUE BONDS33

CONCLUSION36

1. Madame Chair and members of the Division: Thank you for coming here today to help us resolve the issues raised in the appeals in this proceeding. Our oral statement today will address the issues the Division has identified as the subject of this first hearing – financial contribution, benefit, and specificity. We will focus our remarks on the EU’s appellee submission, as our own appellee submission already addresses the EU’s appeal in detail.

INTRODUCTION AND OVERVIEW

2. The Appellate Body has repeatedly observed that the SCM Agreement “reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures.”¹ The Panel, for the most part, respected that balance in its statements as to the legal obligations imposed under Articles 1 and 2 of the Agreement. Our appeal focuses on a limited number of areas in which the Panel upset that balance either by misapprehending the obligations of the SCM Agreement or – although stating the law correctly – by erring in application of the law to the facts.

3. Although limited in number, these are errors of law. Before I address these errors, I will first explain why they are not just of interest legally – they have significant, real world implications. For example, NASA was able to use research contracts to engage Boeing and other companies to leverage their privately developed expertise to increase public knowledge of aeronautics science. The Panel recognized that when NASA disseminates the results of research conducted under one of these contracts, “this represents a situation in which Boeing has given up something of value in exchange for the funds and access to facilities, equipment and employees that it receives.”² But the Panel nonetheless treated these activities as a subsidy to Boeing, and made no allowance for the recognized fact that these programs yielded important benefits to the broader community. The effect of the Panel’s approach is to threaten an important conduit of aeronautics knowledge to the scientific community and the public at large. This will not change Boeing’s or Airbus’s ability to conduct research. It will just make the public poorer by reducing

¹ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 301, quoting *Japan – DRAMs (AB)*, para. 115.

² Panel Report, para. 7.1100.

governments' abilities to engage the private sector to advance technologies that benefit the public at large.

4. On the DoD side, the Panel recognized that procurement contracts for research services obtained something of value primarily for the government. However, it found that research funded through other instruments – cooperative agreements, technology investment agreements (“TIAs”), and Other Transaction agreements (“OTAs”) – was a subsidy because it was primarily for the benefit and use of Boeing. In fact, in the situations of research into “dual use” technologies that the EU emphasized, these agreements allowed a collaborative process in which both the government and the private party contributed and both benefited. It is our understanding that many Members use this type of arrangement to obtain a private contribution when government research involves a joint government and private gain. Under the Panel’s reasoning, these vehicles would become a *per se* subsidy, and difficult for Members to use, once again reducing governments’ abilities to leverage specific private sector expertise in the broader public interest.

5. With the Washington state tax measures, there is no debate that the aerospace sector used to pay one of the highest tax rates of any sector in the state, and that the tax reduction moved it into the middle range of rates. The Panel’s conclusion that the aerospace adjustment in particular was a subsidy puts Members in a position where they cannot modify their tax systems to eliminate disparities. This surely puts a straitjacket on any Member that operates a variable rate tax system.

6. Having looked at the real world impact of the Panel’s errors, we now move to the errors themselves. These are mostly legal in nature, and with the exception of three appeals under Article 11 of the DSU, the United States does not dispute the Panel’s findings of fact. The focus of our appeals regarding the incorrect application of Articles 1 and 2 of the SCM Agreement is that in certain instances the Panel erred in concluding that the facts, as it found them to exist, met the *legal* definition of a financial contribution, a benefit, or a specific subsidy.

7. This is the case with our appeals of the Panel’s findings that NASA research contracts and DoD cooperative agreements, TIAs, and OTAs were financial contributions for purposes of Article 1.1(a)(1) of the SCM Agreement. The Panel correctly articulated a useful test for

evaluating whether a transaction is a genuine purchase of services – namely, whether “the R&D that Boeing was required to conduct was principally for its own benefit and use, or whether it was principally for the benefit and use of the U.S. Government (or unrelated third parties).”³

This test requires a comparison of the benefit and use of research activities to the U.S. Government or unrelated third parties, on the one hand, and the benefit and use to Boeing, on the other hand. The EU does not dispute that this test is appropriate for identifying genuine purchases of services, or that it requires the comparison that we have outlined.

8. The Panel, however, did not conduct that comparison. For example, its discussion of whether “NASA has any demonstrable use for the R&D performed under the eight aeronautics programmes at issue”⁴ addresses exclusively the use of the research to *Boeing*, and not to NASA. In failing to compare the benefit and use of research for Boeing *with* the benefit and use for the U.S. Government, the Panel failed to conduct the legal analysis necessary to conclude that NASA research was a financial contribution. In analyzing DoD cooperative agreements, TIAs, and OTAs, the Panel failed to address the evidence that it identified as critical to the question of benefit and use – “the nature of the work that Boeing was required to perform *under the contracts*.”⁵ It also failed to address other factors that, according to its own findings of fact, lessened the benefit and use of DoD research to Boeing large civil aircraft. In this, the Panel again failed to conduct the legal analysis necessary to reach a conclusion as to whether research under DoD cooperative agreements, TIAs, and OTAs was principally for the benefit and use of Boeing or of the U.S. Government.

9. The Panel also failed to correctly apply law to facts in its analysis of whether any financial contributions conferred a benefit. Under Article 1.1(b) of the SCM Agreement, a benefit exists if the government confers a financial contribution “on terms more favourable than those available to the recipient in the market.”⁶ In this dispute, the financial contribution that the EU challenged was research into technology related to the production and development of large civil aircraft. But in evaluating the benefit of this financial contribution, the Panel mistakenly

³ Panel Report, para. 7.978.

⁴ Panel Report, para. 7.985.

⁵ Panel Report, para. 7.1137.

⁶ *Canada – Aircraft (AB)*, para. 157.

included research into air traffic management, hypersonic flight, and other areas that the EU had not challenged as subsidies. As they were not part of the financial contribution at issue, any ostensible “benefit” they conferred was irrelevant to the proceeding.

10. In evaluating research under the DoD cooperative agreements, TIAs, and OTAs, the Panel made a different error. It recognized that under these agreements, Boeing and DoD *both* contributed resources to research toward a common objective.⁷ However, when analyzing whether these transactions conferred a benefit, the Panel made no allowance for Boeing’s contribution. In so doing, it made a finding of benefit relating to a theoretical transaction that did not occur, and its conclusion does not apply to the transactions before it.

11. The United States has also identified two limited instances in which the Panel simply got the law wrong. First, in analyzing whether the Washington B&O tax adjustment constituted a financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement, the Panel incorrectly stated that, where possible, a panel may use a “but for” test, and *in other situations*, a panel must compare the fiscal treatment of legitimately comparable income. This is contrary to Appellate Body guidance in prior reports. The Appellate Body has indicated that a panel *must always* compare the fiscal treatment of legitimately comparable income. A “but for” test is just one method of doing so.

12. Second, in assessing whether the Wichita industrial revenue bonds constituted *de facto* specific subsidies, the Panel incorrectly analyzed whether Boeing received “disproportionately large amounts” of the subsidy. The Panel’s simple comparison of Boeing’s employment level with the employment level of the entire Wichita manufacturing sector told the Panel nothing about whether Boeing received disproportionately large amounts of the subsidy, and the test that the Panel applied artificially makes it more likely that specificity will be found in virtually all situations.

13. In short, the United States took this appeal to see that the respect for the delicate balance between the interests of complaining and responding Members that the Panel evinces in its explication of the law is properly carried over in the application of the law to the facts. In the

⁷ Panel Report, para. 7.1149.

instances of the Washington B&O tax adjustment and the Wichita industrial revenue bonds, where the Panel misunderstood the requirements of the SCM Agreement, the United States appeals to restore the rights laid out in the Agreement.

14. The EU, however, seeks to upset this delicate balance in its appeal. Again and again, it argues for an interpretation of the SCM Agreement that considers only the interests of complaining Members challenging alleged subsidies. This error appears most clearly in the EU's objection to the Panel's finding that government purchases of services, such as research and development services supplied by a private contractor, are not a financial contribution for purposes of the SCM Agreement. The Panel based this conclusion on the indisputable fact that the SCM Agreement explicitly defines government purchases of goods, provisions of goods, and provisions of services as financial contributions, but omits purchases of services from the list. The EU objects to this finding, but it provides no plausible reason for interpreting "financial contribution" to include a type of transaction that it manifestly does not reference. Instead, the EU argues that this interpretation must be rejected out of hand because it would allegedly create a "considerable gap" or "loophole" in the SCM Agreement.⁸ However, the EU fails to recognize that if the Members of the WTO leave something out of the scope of an agreement, the most basic rules of treaty interpretation require that that something remain outside the scope. Any other result, however forcefully it advances the interests of the complaining party, would upset the balance of rights and obligations that forms the basis for the covered agreements.

15. The EU shows a similar disregard for the balance reflected in the text of the SCM Agreement when it argues that the U.S. government-wide treatment of intellectual property rights in inventions developed during work on government contracts is specific to NASA and DoD. The specificity element of the SCM Agreement reflects the conclusion of WTO Members that Parts III and V of the SCM Agreement should not apply to subsidies that are widely available throughout a Member's economy. There is no dispute that the treatment of patent rights challenged by the EU is available under U.S. government contracts in all sectors. The EU's efforts to obscure this fact by analyzing specificity on an agency-by-agency basis ignore

⁸ EU Appellee Submission, paras. 119-120.

the ordinary meaning of the terms of Article 2 of the SCM Agreement and the object and purpose of the Agreement itself.

16. We will now address some of the issues raised in the U.S. appeal in greater detail. Before doing that, we would like to emphasize that we are focusing on the issues that would most benefit from oral explication at this time. We have left out several contentious issues that are either too technical or too complex for a 90-minute opening statement, but have been fully covered by the written submissions. Accordingly, any omissions do not indicate the relative importance of an issue, and certainly do not reflect agreement with the EU.

DETAILED DISCUSSION

I. THE PANEL’S ERRONEOUS APPLICATION OF THE “PRINCIPALLY FOR THE BENEFIT AND USE” TEST

17. We will begin with the Panel’s application of its “principally for the benefit and use test” for determining whether government payments are a purchase of services. This analysis led to the Panel’s largest subsidy finding, and gave rise to the majority of subsidy issues raised by the participants in this proceeding. As a general matter, there appears to be agreement on some key points. Although the EU has appealed the Panel’s finding that purchases of services are not financial contributions for purposes of the SCM Agreement, it has not challenged the use of the “principally for the benefit and use” test to identify when a transaction is simply a direct transfer under Article 1.1(a)(1)(i), or is instead a purchase of research services. The EU also appears to accept that application of this test requires a comparison of the benefit and use of the research to the recipient against the benefit and use to the government or unrelated third parties.

18. Our presentation today focuses on three issues related to this test. The first is our appeal under Article 1.1(a)(1) of the SCM Agreement that the Panel failed to conduct the comparative analysis it identified as necessary to evaluate whether NASA research contracts were purchases of services. Throughout its analysis, the Panel reached conclusions about the benefit and use of NASA research to Boeing without taking the necessary next step of comparing that conclusion with conclusions about the benefit and use to the government or unrelated third parties. Therefore, the Panel’s analysis does not comport with Article 1.1(a)(1).

19. The second issue is our appeal under Article 11 of the DSU, which identifies a separate and additional error – that the Panel failed to consider evidence necessary for its analysis. To put the point another way, assuming *arguendo* that the Panel compared the benefit and use of the research to Boeing and to the government, it systematically failed to address evidence that contradicted its conclusions and, therefore, did not make the objective assessment of the facts referenced in Article 11 of the DSU.

20. The third issue is our appeal under Article 1.1(a)(1) that the Panel failed to consider factors necessary to apply its legal test, and misapplied the test to those factors it did consider. There are several of these errors. In the most glaring, the Panel stated that “the nature of the work performed under Boeing’s R&D contracts and agreements with DOD” formed “the core terms of the transactions”⁹ but then conducted an analysis that did not address the work performed under the R&D agreements. The analysis that the Panel did perform did not support the conclusion it reached. Therefore, the Panel erred in concluding that the R&D agreements were a financial contribution.

A. U.S. Appeal of the application of Article 1.1(a)(1) of the SCM Agreement to NASA research contracts

21. The U.S. appeal under Article 1.1(a)(1) of the SCM Agreement with regard to the NASA research contracts focuses on the Panel’s failure to conduct the comparison necessary to apply its “primarily for the benefit and use” test. As we noted in our submissions, and will discuss later in this presentation, the United States put forward extensive evidence that research conducted under the NASA contracts had a significant benefit to the U.S. government and the broader public. The Panel did not compare this benefit and use to the U.S. government with the benefit and use to Boeing. Without such a comparison, it was impossible for the Panel to reach a valid conclusion as to whether the facts met the test for being a purchase of services.

22. The EU first attempts to avoid the issue entirely by arguing that the U.S. appeal addresses “how the Panel reasoned over disputed facts” and, therefore, must be brought under Article 11 of the DSU, rather than the substantive legal rules of Article 1 of the SCM Agreement. It is worth

⁹ Panel Report, para. 7.1137.

discussing this assertion in some detail, as the EU erroneously raises similar arguments with regard to almost every one of the U.S. appeals.

23. Article 17.13 of the DSU authorizes the Appellate Body to “uphold, modify or reverse the legal findings and conclusions of the panel.” The Appellate Body has always emphasized that “the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue.”¹⁰ This principle extends to how a panel applies the legal test under the WTO Agreement to the facts before it. In *Canada – Periodicals*, the Appellate Body concluded that the panel’s finding under Article III:2 of the GATT 1994 was erroneous because the Panel identified criteria for evaluating the issue of “like product” and “the Panel failed to analyze these criteria in relation to imported split-run periodicals and domestic non-split-run periodicals.”¹¹ In appeals over whether a panel has properly found a violation of Article III of the GATT 1994,¹² or causation under Article 4.2(b) of the *Agreement on Safeguards*,¹³ or the existence of a financial contribution or benefit under Article 1.1 of the SCM Agreement,¹⁴ the Appellate Body routinely considers the facts found by the panel and whether they support a finding of inconsistency with the relevant agreement, and the Appellate Body does so without recourse to Article 11 of the DSU.

24. This is the vein in which the United States brings its appeals under Articles 1 and 2 of the SCM Agreement – that in various ways, the facts found by the Panel do not add up to the inconsistency with the Agreement that the Panel found. These appeals fall squarely within the

¹⁰ *EC – Hormones (AB)*, para. 132; *US – Upland Cotton (AB)*, para. 399; *Canada – Autos (AB)*, para. 181.

¹¹ *Canada – Periodicals (AB)*, p. 21. See also *ibid.*, p. 22 (“as a result of the lack of proper legal reasoning based on inadequate factual analysis . . . the Panel could not logically arrive at the conclusion that imported split-run periodicals and domestic non-split-run periodicals are like products”).

¹² E.g., *EC – Asbestos (AB)*, paras. 125-126 (“we find this insufficient to justify the conclusion that the chrysotile asbestos and PCG fibres are ‘like products’ and we, therefore, reverse the Panel’s conclusion ‘that chrysotile fibres, on the one hand, and PVA, cellulose and glass fibres, on the other, are ‘like products’ within the meaning of Article III:4 of the GATT 1994.’”); *DR – Cigarettes (AB)*, paras. 93-99 (Appellate Body examines bonding measures to evaluate whether the Panel correctly found that they were consistent with GATT 1994 Article III:4).

¹³ *US – Wheat Gluten (AB)*, para. 91.

¹⁴ E.g., *US – FSC (AB)* (“we must compare the way the United States taxes the portion of the income covered by the measure, which it treats as foreign-source, with the way it taxes other foreign-source income under its own rules of taxation”); *US – Softwood Lumber IV (AB)*, paras. 74-75 (analyzing whether conveying rights to harvest trees constitutes a provision of goods); *Japan – DRAMs (AB)*, para. 174 (the facts cited by the panel demonstrate that it failed to assess the benefit properly for purposes of Article 1.1(b) of the SCM Agreement).

Appellate Body’s authority to reverse, modify, or uphold panel findings for consistency with the substantive provisions of the covered agreements. In the particular instance of the NASA contracts, the Panel’s discussion demonstrates that it did not conduct the comparison necessary for the legal test it enunciated. That means that its analysis did not support its legal conclusion that research under NASA’s contracts with Boeing was primarily for the benefit and use of Boeing and, therefore, a financial contribution.

25. The EU argues that in *EC – Large Civil Aircraft*, the Appellate Body narrowed the scope of review under the substantive provisions of the covered agreements. In the EU’s view, the Appellate Body “clarified” that “how the Panel reasoned over disputed facts . . . appear to us to be claims about the objectivity of the Panel’s assessment of the facts and thus are more in the nature of claims made under Article 11 of the DSU.”¹⁵ Read in its totality, what the Appellate Body found was that:

The European Union’s allegations concern how the Panel reasoned over disputed facts. These allegations appear to us to be claims about the objectivity of the Panel’s assessment of the facts and thus are more in the nature of claims made under Article 11 of the DSU.¹⁶

Thus, the Appellate Body was addressing specific allegations made by the EU based on the facts of that dispute. It was not, to use the EU’s words, “clarifying” a general rule applicable whenever Panels have “reasoned over disputed facts”. Moreover, nothing in the Appellate Body’s analysis suggests that it was reversing its longstanding jurisprudence establishing that application of law to facts falls within an appeal of the substantive provisions of the covered agreements, and does not require recourse to Article 11 of the DSU. Therefore, the EU has provided no basis to conclude that the Appellate Body lacks jurisdiction to address the U.S. appeal under Article 1.1(a)(1).

26. The EU next attempts to defend the Panel’s failure to conduct the requisite comparison with the benefit and use of NASA research to the government by arguing that the Panel’s

¹⁵ EU Appellee Submission, para. 33, quoting *EC – Large Civil Aircraft (AB)*, para. 880 (ellipsis in the EU quotation).

¹⁶ *EC – Large Civil Aircraft (AB)*, para. 880.

statement that it “considered the evidence ‘in its totality’”¹⁷ made such a discussion unnecessary. This is another argument that appears again and again in the EU appellee submission. However, nowhere does it raise a relevant legal point. The Appellate Body may consider that a panel has considered all of the evidence before it. However, that does not lead automatically to a finding that the panel applied the legal test correctly to that evidence, or that it drew the appropriate legal conclusions. Such a finding requires a consideration of the facts that the panel identified in its reasoning, whether the panel applied the legal test correctly to those facts, and whether they support the ultimate finding. In this instance, the Panel makes no comparison of the benefit and use of NASA contracts to the U.S. government with its findings as to the benefit and use to Boeing. Therefore, even assuming that the Panel considered all the evidence, it did not perform the comparative analysis it identified as necessary.

27. The EU’s final attempt to defend the Panel’s silence on the benefit and use of NASA research to the government is to argue that the Panel was not, in fact, silent. The EU extracts seven sentences or parts of sentences from the Panel’s 38-paragraph discussion of “whether NASA has any demonstrable use for the R&D performed under the eight aeronautics programmes at issue.”¹⁸ It then asserts that these sentences or parts of sentences represent an analysis of benefits to the U.S. government.¹⁹ They do no such thing. They consist of a few isolated mentions of governmental agencies (the Federal Aviation Administration four times and DoD three times) in broader passages discussing the benefits of research *to Boeing*. Neither the passages nor the Panel’s own analysis explains how or to what extent these agencies used the research and compares that use to Boeing’s use. Therefore, these statements only drive home the point made by the United States – that the Panel did not factor the use and benefit to the U.S. government into its analysis of whether the primary benefit and use of the research was to Boeing.

28. Thus, the Panel’s reasoning demonstrates that it failed to apply the correct legal analysis in addressing the facts before it. That is a legal error in the application of Article 1.1(a)(1) of the

¹⁷ EU Appellee Submission, para. 41, *quoting* Panel Report, para. 7.981.

¹⁸ Panel Report, para. 7.985.

¹⁹ EU Appellee Submission, para. 46.

SCM Agreement and, as such, properly subject to review by the Appellate Body under Article 17.13 of the DSU. None of the EU's arguments proves otherwise.

B. U.S. appeal under Article 11 of the DSU with regard to the Panel's analysis of NASA's research contracts with Boeing

29. The United States raises a separate appeal relative to the Panel's analysis of NASA's research contracts with Boeing – that the Panel failed to meet the standard laid out in Article 11 of the DSU by disregarding evidence necessary to the resolution of the legal question before it. This appeal, in effect, assumes *arguendo* that the Panel conducted some sort of comparison, but did so in a one-sided manner that addresses evidence related to Boeing's use for NASA research and ignored evidence related to the government's use.

30. In substantiating this appeal, the United States identified some of the many pieces of evidence demonstrating the benefit and use that the government took from NASA research. First, the United States pointed to evidence in the form of statements by NASA officials and NASA descriptions of its programs that detailed the usefulness of the research to the government and third parties unrelated to Boeing. The United States identified this evidence to the Panel. However, the Panel's analysis noted only the statements cited by the EU. It did not evaluate the contrary evidence or explain why it relied on the EU evidence.

31. Second, the United States pointed to objective evidence of the usefulness of NASA research in the form of articles published by NASA scientists and published reports generated by Boeing under NASA contracts, along with the number of references to those documents in other scientific literature.²⁰ The EU based its financial contribution arguments exclusively on subjective statements from NASA and Boeing officials that in the EU's view exposed the intent or purpose of NASA research. The United States advanced the evidence of actual use to show that, whatever points the EU sought to make based on subjective statements, the reality was that the results of NASA research projects were quickly made public, and widely used by scientists in the United States and in Europe. The Panel did not reference this evidence at all, or explain in general why it found the subjective evidence more persuasive than the objective evidence.

²⁰ *List of publications based on work performed in the Integrated Wing Design ("IWD") project* (Exhibit US-1140 (revised)); *Reports and articles published by Boeing/McDonnell Douglas personnel pursuant to aeronautics research contracts* (Exhibit US-1253).

32. These omissions are especially problematic because the usefulness of NASA research to the U.S. government was a heavily contested issue central to the Panel’s conclusion regarding the largest subsidies alleged by the EU.

33. The EU first tries to defend the Panel’s omissions by noting the Panel’s statement that it would discuss only “some” of the evidence it considered. The EU also points to the Appellate Body’s statement in *US – Upland Cotton* that:

It would not amount to an error in the application of Article 6.3(c) to the facts of this case for the Panel not to address specifically in its Report every item of evidence provided and to refer explicitly to every argument made by the parties, if the Panel considered certain items or arguments less significant for its reasoning than others.²¹

34. The legal point is not in dispute. The United States explicitly referred to a similar Appellate Body finding in its other appellant submission.²² But the Appellate Body has also recognized that “the panel's discretion as the trier of facts, however, finds its limitations in the applicable standard of review of Article 11 of the DSU.”²³ In paragraph 225 of the *Australia – Apples* report, the Appellate Body addressed a panel’s consideration of the views of various experts, and explained in detail how this process works. First, the Appellate Body noted the general rule that:

Article 11 requires a panel, in its reasoning on a given issue, to weigh and balance all the relevant evidence, including testimony by the experts.

It then emphasized that merely reciting evidence does not mean that the panel “weighed and balanced” that evidence:

A panel may reproduce the relevant statements by the experts, but still fail to make an objective assessment of the facts under Article 11 if it then fails to properly assess the significance of these statements in its reasoning, as the Appellate Body found in *US/Canada – Continued Suspension*.

²¹ *US – Upland Cotton (AB)*, para. 446.

²² U.S. Appellant Submission, para. 42.

²³ *Australia – Apples (AB)*, para. 272.

The Appellate Body then specified that, even if the Panel does not quote a piece of evidence in its report, other factors may show that the panel weighed and balanced that evidence:

Conversely, a panel that does not expressly reproduce certain statements of its appointed experts may still act consistently with Article 11, especially when the panel's reasoning reveals that it has nevertheless assessed the significance of these statements or that these statements are manifestly not relevant to the panel's objective assessment of the facts and issues before it.²⁴

35. The U.S. other appellant submission cited the Appellate Body's framework for evaluating Article 11 appeals in *Australia – Apples*, and the EU has indicated nothing that prevents application of that framework in this situation. Therefore, the EU's invocation of a panel's discretion as trier of fact is simply irrelevant to the point made by the United States – that this Panel exceeded the limits of that discretion by conducting a one-sided analysis.

36. The EU then asserts that the Panel's omission of the evidence in question comported with the principles laid out in Article 11. The EU attempts to minimize the statements regarding governmental usage by citing that they do not "detract from" the evidence cited by the Panel.²⁵ However, as the EU itself observes, for each of the individual statements highlighted by the parties and the Panel, the record in this proceeding contains "mountains of similar evidence."²⁶ There is great disagreement among the participants as to the significance and weight of this evidence. By failing to address this evidence as a whole, the Panel acted inconsistently with Article 11.

37. The EU also observes that the Panel "specifically mentioned" environmental, military, and noise abatement applications for research under some NASA programs.²⁷ But the Panel "mentioned" these points only as tangential observations following long block quotations that, in the Panel's view, showed a benefit and use to Boeing. The Panel never presented or discussed

²⁴ *Australia – Apples (AB)*, para. 275.

²⁵ EU Appellee Submission, para. 66; *see also* paras. 68 ("this does nothing to counter the evidence"), 70 ("focusing on discrete aspects of research that are not relevant . . . rather than on evidence that might refute the Panel's understanding"), and 71 ("this does not take away from the fact . . .").

²⁶ EU Appellee Submission, para. 46.

²⁷ EU Appellee Submission, para. 65; *see also* paras. 71 ("this is a point that the Panel explicitly and repeatedly noted") and 72 ("the Panel noted . . . technologies that would 'increase the quality of life for our citizens', 'protect{ } the Earth's environment and enable science missions'").

the evidence of use, which consisted of quotations explaining the advantage to the government. Nor did it weigh the two bodies of evidence against each other. Thus, the few isolated references highlighted by the EU only serve to drive home the point made by the United States – that the Panel failed to “weigh and balance all the relevant evidence,” as the Appellate Body has found is required under Article 11.

38. The EU takes a different tack with regard to the evidence that NASA published detailed materials on its research and required Boeing to publish reports, all of which was widely cited in the worldwide scientific community. While conceding that the Panel never referenced this evidence, it argues that the Panel addressed NASA’s public dissemination of knowledge based on other evidence.²⁸ The EU then moves on to posit alternative bases that the Panel might have cited, but did not, for concluding that dissemination “was not enough to tip the balance toward a conclusion that the US Government was the principal beneficiary.”²⁹

39. There are three problems with this attempted rebuttal. First, the evidence of publication and citations in scientific literature was uniquely probative in that it offered objective evidence of use by the U.S. government, rather than subjective impressions. It provided a real-world test of the EU theory that NASA conducted aeronautics research in order to help Boeing. The EU theory failed that test, because widespread dissemination and use of research results by the scientific community is fundamentally inconsistent with the notion that NASA sought only to benefit Boeing or the broader U.S. aerospace industry. Second, the EU’s argument that evidence of actual use of NASA research results does not “tip the balance”³⁰ erroneously matches that evidence in isolation against statements that the EU views as supporting the EU arguments. The Appellate Body has been clear that panels must evaluate evidence in its totality.³¹ Finally, the EU’s rebuttal disregards the Appellate Body’s finding in *Australia – Apples* that “{w}hether a panel reproduces and discusses certain testimony in the report depends on factors such as the relevance of the testimony to the panel’s reasoning and objective assessment on a given issue,

²⁸ EU Appellee Submission, paras. 73-75.

²⁹ EU Appellee Submission, paras. 76-80.

³⁰ EU Appellee Submission, para. 76.

³¹ *US – Continued Zeroing (AB)*, paras. 337-339.

the context in which the statement was made, as well as the importance attached by the parties to the testimony.”³² The United States attached great importance to this particular evidence.³³

40. In short, the EU provides no basis to rebut the U.S. observation that the Panel’s one-sided presentation of the evidence on the benefit and use of NASA research was inconsistent with Article 11 of the DSU.

C. U.S. appeal of the application of Article 1.1(a)(1) of the SCM Agreement to DoD cooperative agreements, TIAs, and OTAs

41. The final U.S. appeal in this area concerns the application of the Panel’s “primarily for the benefit and use” test to DoD cooperative agreements, TIAs, and OTAs. We identified three ways in which the Panel erred. First, the Panel found that the nature of the work performed under the agreements at issue was “central to understanding the transaction,”³⁴ but its reasoning then does not look to the evidence on that point submitted by the United States and the EU. Second, although the Panel found that U.S. export control laws “restrict Boeing’s ability to use certain R&D performed under DOD contracts,”³⁵ it failed to factor that finding into the analysis of the benefit and use of DoD research to Boeing. Third, the factors that the Panel did consider in that analysis do not support the conclusion that research under DoD cooperative agreements, TIAs, and OTAs was principally for the benefit and use of Boeing

42. As with the NASA contracts, the EU argues that the United States cannot appeal these issues under Article 1 because they are really about “how the panel reasoned over disputed facts.”³⁶ As we explained earlier, the EU has a flawed understanding of Article 11 of the DSU. In particular, the United States has appealed the Panel’s failure to address factors necessary for

³² *Australia – Apples (AB)*, para. 276.

³³ *E.g.*, US SWS, para. 64, n. 103, para. 67, n. 115; US RPQ 186, para. 209; US Comment on EC RPQ 158, para. 220, n. 322; US Comment on EC RPQ 163(c), para. 237, nn. 351 and 252; US Comment on EC RPQ 163(d), para. 238, n. 357; US Comment on EC RPQ 163(f), para. 243, n. 363; US Comment on EC RQP 163(h), para. 254, n. 417; US Comment on EC RPQ 275, para. 486, n. 755; US RPQ 370(c), para. 242, n. 319; US Comment on EC RPQ 319(a), para. 21, n. 38; US Comment on EC RPQ 324, para. 51, n. 96; US Comment on EC RPQ 335(g), para. 132, n. 239; US Comment on EC RPQ 347, para. 146, n. 274.

³⁴ Panel Report, para. 7.1137.

³⁵ Panel Report, para. 7.1160.

³⁶ EU Appellee Submission, para. 136.

its legal analysis, and shown that the set of facts before the Panel did not indicate a financial contribution subject to the relevant treaty provisions.

43. The EU concedes that the Panel did not consider the terms of the individual agreements at issue, but puts forward a number of spurious justifications for the omission. It asserts that the set of agreements was not “comprehensive” because the United States used a “subjective process” to identify relevant materials and observes that the United States redacted information related to controlled military technologies. In the EU’s view, this was “surely” why the Panel gave the actual terms of the agreements “limited evidentiary value.”³⁷ There is no substance to this argument. The EU’s speculations regarding the Panel’s reasons are meaningless. They are not the reasons advanced by the Panel. Indeed, the fact that the EU resorts to speculation about how the Panel *may* have reasoned serves to underscore the extent to which the Panel failed to address what the Panel acknowledged were the “core term” of the transactions.

44. In addition, the reasons hypothesized by the EU would not serve to justify the Panel’s failure to address the agreements themselves, a factor the Panel considered critical to its legal analysis. The set of agreements was comprehensive, in that the United States used the EU’s descriptions to identify all of the transactions potentially covered by the EU claim. It is true that the EU’s description was vague and contradictory, but the United States made every effort to apply the EU criteria objectively in the process. As for the redactions, they involved controlled military technologies. The fact that U.S. law prohibited the export of these materials, while it allowed the release of commercially sensitive information as HSBI, was itself evidence of the seriousness of these controls and their effect on the usability of controlled technology on internationally traded goods. In any event, the United States provided summaries of the research under each instrument that excluded references to controlled military technologies. Thus, the EU has done nothing to excuse the Panel’s failure to address the research described in the agreements before it.

45. Similarly unavailing are the EU’s attempts to justify the Panel’s failure to consider the implications of its own finding that “the ITAR {(“International Traffic in Arms Regulations”)}

³⁷ EU Appellee Submission, paras. 148-149.

restrict Boeing’s ability to use certain R&D performed for DOD towards its civil aircraft.”³⁸ The EU tries to remedy the problem by noting that the Panel also found that “the United States has failed to substantiate its assertion that the {ITAR} make it effectively impossible for Boeing to utilize any of the R&D performed under DOD R&D contracts and agreements towards LCA.”³⁹ Now, let’s stop for a moment. This is not a rebuttal. Evidence that civil use of military technology is “not impossible” under the ITAR does not change or modify the finding that the ITAR “restrict” use of military technology in civil applications. Taken together, these findings signify that, while the ITAR do not *always* prevent the use of military funded technology toward large civil aircraft, they sometimes (and perhaps often) prevent use. That second point, which the Panel never addressed, would lessen the benefit and use in civil applications that Boeing could take from military research – a critical consideration in any complete evaluation of the overall benefit and use to Boeing’s civil aircraft. By failing to factor this concept into its conclusion regarding the benefit and use of DoD funding, the Panel reached an incorrect legal conclusion.

46. The final point in the U.S. appeal on this issue is that the factors that the Panel did address do not support the conclusion it reached. The Panel identified five of these:

- (1) “the legislation authorizing the programmes at issue,”
- (2) “the types of instruments entered into between DOD and Boeing,”
- (3) “whether DOD has any demonstrable use for the R&D performed under these programmes,”
- (4) “the allocation of intellectual property rights under these transactions,” and
- (5) “whether the transactions at issue had the typical elements of a ‘purchase of services.’”⁴⁰

In applying these factors to cooperative agreements, TIAs, and OTAs, the Panel’s analysis was insufficient to support its conclusion that research under the agreements was primarily for the use of Boeing.

³⁸ Panel Report, para. 7.1160.

³⁹ EU Appellee Submission, para. 153, *quoting* Panel Report, para. 7.1160.

⁴⁰ Panel Report, para. 7.1138.

47. For the first factor, formal distinctions between procurement contracts and “assistance instruments” under U.S. law could not justify the conclusion reached by the Panel.⁴¹ The EU itself asserts that the Panel did not rely on such distinctions.⁴² Therefore, this factor cannot have supported the Panel’s finding.

48. For the second factor, the formal characteristics of research agreements do not justify treating them as primarily for the benefit and use of Boeing. The United States noted in particular that U.S. law requires that research under cooperative agreements, TIAs, and OTAs relate to weapons systems or military needs or is in the potential interest of DoD.⁴³ The EU attempts to avoid this limitation by arguing that aircraft can be “weapons systems,”⁴⁴ but that is true only of military aircraft, such as fighters, bombers, and military transports, and not for the large *civil* aircraft made by Boeing’s civil division. The EU also notes that some DoD programs aim to strengthen the U.S. technology base or enhance U.S. competitiveness. This was a focus only for the Manufacturing Technology (“ManTech”) Program. Thus, the EU’s argument is irrelevant to the vast majority of the DoD research it challenges, and cannot have supported the Panel’s general finding that research agreements funded through the 23 PE numbers challenged by the EU were a financial contribution.

49. For the third factor, the Panel found that “the purpose of these programmes was to conduct R&D aimed at designing more advanced weapons or other defense systems, or to reduce the cost of such systems.”⁴⁵ This consideration points toward a benefit and use principally to the government. The EU attempts to counter this finding by quoting the Panel’s statement that, out of 13 PE numbers calling for general-purpose research, “at least two had the explicit objective of developing ‘dual use’ R&D.”⁴⁶ But this statement applies only to a subset of a subset of the PE numbers challenged by the EU, and accordingly does not negate the Panel’s findings regarding the general purpose of the research DoD paid Boeing to conduct. Therefore, this factor cannot

⁴¹ US Other Appellant Submission, para. 103.

⁴² EU Appellee Submission, para. 162.

⁴³ US Other Appellant Submission, paras. 104-105.

⁴⁴ EU Appellee Submission, para. 164.

⁴⁵ Panel Report, para. 7.1147.

⁴⁶ EU Appellee Submission, para. 165, *quoting* Panel Report, para. 7.1148.

have supported the Panel’s general finding that research agreements were a financial contribution.

50. For the fourth factor, the Panel found that research agreements accord the private party greater data rights than do procurement contracts, a difference the Panel attributed to the commitment of resources required of the private party in these transactions.⁴⁷ This finding suggests the existence of mutually beneficial exchange characteristic of a purchase. The EU attempts to rebut this point by arguing that the ascription of patent rights to U.S. government contractors weighs in favor of a finding that assistance instruments are not a purchase of services.⁴⁸ This does not actually address the point, as patent rights are different from data rights. Moreover, the EU’s argument fails to account for the Panel’s finding that the treatment of patent rights under the agreements at issue in this dispute is the same as under procurement contracts,⁴⁹ which the Panel found to be purchases of services. Therefore, this factor cannot have supported the Panel’s general finding that research agreements were a financial contribution.

51. The fifth factor looked to whether the transaction had the typical elements of a purchase of services. However, the Panel looked at only one factor – profit. The Panel did not look at any other element, even to consider whether it was relevant. The EU tries to defend this highly circumscribed inquiry by arguing that the Panel did, in fact, look at other elements typical of a purchase of services in its examination of the other factors.⁵⁰ However, it never points to where the Panel did this, or explains why the Panel would lay out a separate factor for something it understood as covered by the other factors. As the Panel did not conduct the inquiry it identified as necessary – of the typical elements of a purchase of services – its analysis of profitability outside the context of other elements does not support the general finding that research agreements were a financial contribution.

⁴⁷ Panel Report, para. 7.1149.

⁴⁸ EU Appellee Submission, para. 165.

⁴⁹ Panel Report, para. 7.1149.

⁵⁰ EU Appellee Submission, para. 167.

52. In sum, the EU’s discussion of the factors that the Panel did address does nothing to change the U.S. demonstration that they do not constitute a set of facts that is inconsistent with the SCM Agreement. The Panel’s failure to address other relevant factors leads to the same conclusion. Therefore, the Appellate Body should reverse the Panel’s finding.

II. THE PANEL’S ERRONEOUS FINDINGS THAT NASA RESEARCH CONTRACTS AND DoD RESEARCH AGREEMENTS CONFERRED A BENEFIT

53. We now turn to the question of whether the Panel correctly evaluated the benefit associated with the financial contributions it found to exist. Today we will focus on two of the errors in the Panel’s benefit analysis. In evaluating NASA contracts, the Panel erroneously included contracts for research into topics that were not part of the EU claim. In evaluating DoD cooperative agreements, TIAs, and OTAs, the Panel based its conclusions on a hypothetical transaction that did not reflect the terms in DoD agreements. In both these instances, the Panel’s errors mean that the facts do not support its findings as to the existence of a benefit for purposes of Article 1.1(b) of the SCM Agreement.

A. The Panel’s finding of a benefit with regard to contracts that were not part of the financial contribution challenged by the EU.

54. The Panel valued the benefit of the payments to Boeing at \$1.05 billion, which represented the total value of all contracts between Boeing and the four NASA centers that performed aeronautics research. One of the problems with this finding is that among these contracts were contracts for services that were not subject to the EU’s complaint against the United States. The EU challenged only “government-supported R&D” that “benefited all of Boeing’s LCA models.”⁵¹ It emphasized before the Panel, and again in its appellee submission, that it did not challenge research irrelevant to the production and development of large civil aircraft. Those excluded topics included air traffic safety, air traffic management, engines, and hypersonic flight.⁵² The United States demonstrated before the Panel that some of the contracts covered by that \$1.05 billion figure involved those and other excluded topics. Nevertheless, the Panel used the \$1.05 billion figure as the value for the benefit conferred by the research contracts

⁵¹ EC FWS, para. 458.

⁵² US Other Appellant Submission, para. 70 and notes 132-134; EU Appellee Submission, para. 64.

challenged by the EU. In doing so, it found a benefit with regard to transactions it had not found to be financial contributions, in contravention of Article 1.1(b) of the SCM Agreement.

55. The EU attempts to evade this appeal by arguing that the U.S. Notice of Other Appeal did not explicitly reference the value of the benefit as an issue on appeal, and that inclusion of the issue in the U.S. other appellant submission was inconsistent with EU due process.⁵³ However, the United States clearly referenced the issue of whether the financial contributions in question conferred a benefit. The amount of the benefit derives from the same process for identifying the existence of the benefit; if a benefit does not exist, it cannot be included in a valuation. In this instance, the Panel’s discussion of the value of the benefit is also evidence of which transactions were included in its finding as to the existence of a benefit, an issue that the EU recognizes as within the scope of the U.S. appeal. Therefore, there is no basis for the EU argument that the U.S. appeal “lacks legal foundation.”⁵⁴

56. The EU also argues that a Member may not challenge the valuation of the benefit under Article 1.1 because that provision covers only the existence of a benefit, and not its value.⁵⁵ Again, the EU is wrong. The Appellate Body has found that a precise quantification of the amount of a subsidy is not required in proceedings under Articles 5 and 6 of the SCM Agreement. However, that does not mean that valuation is entirely outside the purview of Article 1.1(b). For example, any valuation exercise must comport with the requirement under Article 1.1(b) to find a subsidy only when a benefit exists.

57. The EU also asserts that the Panel “found no adequate basis” to reduce the \$1.05 billion figure to \$775 million to account for the non-subject research, and posits four reasons that the Panel could have cited.⁵⁶ But the Panel made no finding on that point. The reasons advanced by the EU were either not referenced by the Panel, or are irrelevant, or both. For example, the Panel never found that the United States conducted a “subjective review” to derive the \$775 million

⁵³ EU Appellee Submission, paras. 96-97.

⁵⁴ EU Appellee Submission, para. 95.

⁵⁵ EU Appellee Submission, para. 97.

⁵⁶ EU Appellee Submission, para. 106.

figure⁵⁷ or criticized the documentation for that figure. Similarly, the EU’s rationale based on the argument that it contested the \$1.05 billion figure less than the \$775 million figure⁵⁸ is irrelevant. No WTO panel has accepted the number and relative length of a party’s arguments as proxies for the probative value of the underlying evidence.

58. Finally, the EU asserts that the Panel “understood the \$1.05 billion figure” as an “estimate” that “may be an overestimate or an underestimate.”⁵⁹ This is not the case. The only further calculation step that the Panel considered was to *reduce* the value of the benefit to reflect the value of NASA research to the U.S. Government.⁶⁰ The EU argues that the Panel’s finding in its adverse effects analysis that this type of subsidy “is intended to multiply the benefit from a given expenditure”⁶¹ signifies that the benefit could be more than the \$1.05 billion. The Appellate Body has been clear that the “benefit” is the difference between the terms of the government financial contribution and the terms the market would impose for the same transaction. The EU never argued to the Panel that the benefit to Boeing of NASA research was greater than the sum of the values of the relevant contracts, plus facilities, equipment, and employees, or presented any evidence that this was the case. Therefore, whatever the significance of the Panel’s statement about “multiply{ing} the benefit” in the adverse effects context, which we will address further in October, it does not, and should not, affect the evaluation of the benefit for purposes of Article 1.1(b) of the SCM Agreement.

59. In conclusion, the Panel clearly erred when it included in the benefit research into topics that the EU excluded from its claims against NASA. None of the arguments in the EU appellee submission indicate otherwise.

B. The Panel’s erroneous finding that DoD R&D agreements conferred a benefit

60. We now move to the Panel’s conclusion that cooperative agreements, TIAs, and OTAs conferred a benefit. Its analysis, though concise and clear, is flawed. The Panel found that the

⁵⁷ EU Appellee Submission, para. 106, first bullet.

⁵⁸ EU Appellee Submission, para. 106, fourth bullet.

⁵⁹ Panel Report, para. 107.

⁶⁰ Panel Report, para. 7.1100-7.1101.

⁶¹ Panel Report, para. 7.1760, *quoted in*, EU Appellee Submission, para. 107.

“question” before it was “whether, in a ‘commercial transaction’, one entity would pay another entity to conduct R&D . . . on the term that the entity receiving the financial contributions conduct R&D that is principally for the benefit and use of the entity receiving the payment.”⁶² It concluded that no commercial entity would do this unless “some form of royalties or repayment would be required.”⁶³ The Panel accordingly found that if DoD agreements conferred payments for research that was principally for the benefit and use of Boeing, there was a *prima facie* case of inconsistency with Article 1.1(b). The problem with this reasoning is that the payments by NASA and research conducted by Boeing were not the only terms of these transactions. Boeing also made contributions, and for the most part, quite sizable ones. Since the Panel did not factor those contributions into the hypothetical transaction on which it based its finding of a benefit, its conclusion had no bearing on the dispute before it.

61. The EU does not dispute that Boeing contributed to the costs of the research under these agreements, or that the government received a benefit from the research. Rather, it argues that these facts are fully consistent with the Panel’s finding that there were no “royalties or repayment” because Boeing’s contributions did not “entail any payments by Boeing to DoD.”⁶⁴ This argument elevates form over substance. Whether DoD receives contributions from Boeing over the course of a research project, as opposed to “repayments” after completion of the research is a matter of timing. It does not change the fact that the Panel’s analysis of the terms of the transaction left out a critical term – Boeing’s contribution of resources toward research that the EU concedes “is of some benefit and use to DOD.”⁶⁵ Thus, the Panel’s conclusion based on a transaction that does not provide cost sharing is simply irrelevant to the facts of this dispute.

62. The EU also argues that if the Panel failed to take account of relevant factors, there is enough evidence on the record for the Appellate Body to complete the analysis.⁶⁶ First, the EU asserts that the Panel’s “focus” on whether Boeing’s work under the agreements was principally for the benefit and use of Boeing itself “does not ignore other terms, such as the cost

⁶² Panel Report, para. 7.1184.

⁶³ Panel Report, para. 7.1184.

⁶⁴ EU Appellee Submission, para. 177.

⁶⁵ Panel Report, para. 7.1148.

⁶⁶ EU Appellee Submission, para. 179.

contributions by Boeing and any benefits retained by DoD.”⁶⁷ This is wrong. The Panel’s financial contribution analysis, on which its evaluation of the benefit relies, addressed whether the *research* was principally for the benefit and use of Boeing. It did not take into account whether Boeing made its own contributions.

63. The EU also argues that the facts show the existence of a benefit because the Panel found that the research was principally for the benefit and use of Boeing, but that Boeing’s cost contribution was 50 percent or, in a few cases, less. The EU asserts that such a transaction is economically irrational.⁶⁸ However, the EU provides no evidence, economic or otherwise, in support of this argument. In fact, the “principally for the benefit and use” test that the Panel applied to analyze the existence of a financial contribution addressed only one term of the transaction, and not its entirety, as the evaluation of benefit under Article 1.1(b) must do.

64. A further response to the EU argument is that it is inconsistent with the uncontested evidence showing that DoD opened each of the cooperative agreements, TIAs, and OTAs to competitive bidding. If Boeing were seeking non-market terms for its participation in the research, one of DoD’s other suppliers of aeronautics research would have bid less. Therefore, the Panel’s conclusion as to which party had the greater “benefit and use” from the research does not translate into a finding as to how the market would apportion costs in a joint endeavor to conduct that research.

65. Thus, there is no basis for a presumption that it is economically irrational for two parties to split the cost of research primarily for the benefit of one of them. Therefore, the evidence cited by the EU does not support its argument that the Appellate Body can complete the Panel’s analysis on this point.

III. WASHINGTON STATE B&O TAX REDUCTION

66. The United States appeals the Panel’s findings that the Washington State Business and Occupation (B&O) tax reduction constituted a financial contribution, that it was a specific

⁶⁷ EU Appellee Submission, para. 180.

⁶⁸ EU Appellee Submission, para. 181.

subsidy, and that it caused adverse effects to EU interests. Today, we will address only the Panel’s financial contribution and specificity findings.

A. U.S. appeal of the Panel’s interpretation of the legal test to be applied under Article 1.1(a)(1)(ii) of the SCM Agreement

67. The root of the problem with the Panel’s financial contribution finding is the Panel’s failure to apply the proper legal test. The Panel found that the Washington State B&O tax reductions constituted “revenue foregone” within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. Despite surveying prior Appellate Body reports discussing the “revenue foregone” test, and even noting the Appellate Body’s warnings about the risks inherent in using a simple “but for” test, the Panel misconstrued the legal test to be applied.

68. The Panel described the legal test in the following terms:

{T}he Appellate Body’s analysis suggests that where it is possible to identify a general rule of taxation applied by the Member in question, a “but for” test can be applied. *In other situations*, the challenged taxation measure should be compared to the treatment applied to comparable income, for taxpayers in comparable circumstances in the jurisdiction in issue.⁶⁹

69. The Panel’s description of the legal test is wrong. Contrary to the Panel’s conclusion, the Appellate Body has explained that, *in all cases*, “panels should seek to compare the fiscal treatment of legitimately comparable income to determine whether the contested measure involves the foregoing of revenue which is ‘otherwise due’, in relation to the income in question.”⁷⁰ Such a comparison is not something to be done “{i}n other situations” where a “but for” test cannot be applied. Rather, the “but for” test is a tool that can be used – in certain, limited circumstances – to make the required comparison.

70. The EU responds to this U.S. argument simply by asserting that the Panel did not misinterpret the legal test. However, the EU’s own explanation of the Panel’s reasoning demonstrates the Panel’s error. The EU explains that:

⁶⁹ Panel Report, para. 7.120 (emphasis added).

⁷⁰ *US – FSC (Article 21.5 – EC) (AB)*, paras. 91 and 92 (citations omitted) (emphasis added).

The Panel further understood that in circumstances where it is not possible to apply a “but for” test, “Panels should seek to compare the fiscal treatment of legitimately comparable income to determine whether the contested measure involves the foregoing of revenue which is ‘otherwise due’, in relation to the income in question.”⁷¹

71. The United States agrees with the EU that this was the Panel’s understanding. But as we have explained, the Panel’s understanding was incorrect and inconsistent with Appellate Body guidance in prior reports on the correct interpretation of Article 1.1(a)(1)(ii) of the SCM Agreement, because it relegated fiscal treatment of legitimately comparable income to a secondary factor.

72. The EU also considers it “notabl{e}” that “the Panel stated that a ‘but for’ test *can* be applied, not *must* be applied, where it is possible to identify a general rule of taxation; and otherwise, legitimately comparable income *should* be compared.”⁷² The relevance of the distinction between a finding that the “but for” test “can be applied” versus a finding that it “must be applied” is unclear. The Panel’s error, and the EU’s, is the suggestion that “legitimately comparable income should be compared” only in situations where a “but for” test cannot be applied. Legitimately comparable income *must always* be compared. A “but for” test is just one means of making that comparison; one which, the Appellate Body has warned, has limited applicability.

73. Accordingly, the United States respectfully requests that the Appellate Body reverse the Panel’s erroneous interpretation of Article 1.1(a)(1)(ii) of the SCM Agreement and the legal test to be applied under that provision.

B. U.S. appeal of the Panel’s application of the legal test under Article 1.1(a)(1)(ii) of the SCM Agreement

74. After arriving at a flawed interpretation of Article 1.1(a)(1)(ii) of the SCM Agreement, the Panel proceeded to apply that flawed interpretation to the evidence before it. It follows that, because the Panel applied the wrong legal test, its finding that the Washington State B&O tax

⁷¹ EU Other Appellee Submission, para. 213.

⁷² EU Other Appellee Submission, para. 214 (emphasis in original).

reductions constituted “revenue foregone” is without legal foundation and should also be reversed. Beyond this failing, though, the Panel made certain other specific legal errors in its application of Article 1.1(a)(1)(ii).

75. First, the Panel erred in applying a “but for” test in a situation where such a test was inappropriate and unworkable. After recognizing that there are “36 possible activity classifications” under the Washington State B&O tax system,⁷³ the Panel nevertheless concluded that it was “*not difficult* to identify a general rule of taxation and exceptions to it”⁷⁴ This conclusion is surprising, in light of the complexity of the Washington State B&O tax system.

76. As the Appellate Body has explained, the analysis of revenue foregone should “depend on the rules of taxation” that the State of Washington “establishes for itself.”⁷⁵ Washington State has established a multi-rate taxation system in which the State assesses individual B&O tax rates on different categories of business activities. There is, therefore, no uniform or “general” rate. As the Appellate Body has explained, it will “usually be very difficult to isolate a ‘general’ rule of taxation and ‘exceptions’ to that ‘general’ rule.”⁷⁶ This was not one of the *unusual* situations where it was appropriate for the Panel to apply a “but for” test.

77. Second, the Panel erred by identifying as the “normative benchmark” for the “but for” test that it applied, not the Washington State B&O tax system as a whole, but a subset of that tax system, *i.e.*, the tax rates applied to “manufacturing,” “retailing,” and “wholesaling.”⁷⁷ The Appellate Body has clarified that the “normative benchmark” for determining whether “revenue foregone” is “otherwise due” is the Member’s own tax rules, *i.e.*, “the comparison under Article 1.1(a)(1)(ii) of the *SCM Agreement* must necessarily be between the rules of taxation contained in the contested measure and other rules of taxation of the Member in question.”⁷⁸ The Appellate Body has further clarified that it is the “prevailing domestic standard”⁷⁹ reflected in a

⁷³ Panel Report, para. 7.129.

⁷⁴ Panel Report, para. 7.133 (emphasis added).

⁷⁵ *US – FSC (Article 21.5 – EC) (AB)*, para. 87, citing *US – FSC (AB)*, para. 90.

⁷⁶ *US – FSC (Article 21.5 – EC) (AB)*, para. 91.

⁷⁷ Panel Report, para. 7.133.

⁷⁸ *US – FSC (Article 21.5 – EC) (AB)*, para. 89.

⁷⁹ *US – FSC (AB)*, para. 90.

Member’s tax laws that provides the reference point for determining whether “revenue foregone” is “otherwise due” under the SCM Agreement, and also for identifying the fiscal treatment of the relevant income for taxpayers in comparable situations.⁸⁰

78. Following the Appellate Body’s guidance, the Panel should have looked to the Washington State B&O tax system as a whole, *i.e.*, the “rules of taxation,” as the normative benchmark. The tax rates applied to all 36 categories of business activities that are individually identified in the tax code, taken together, reflect “the fiscal treatment of . . . relevant income for taxpayers in comparable situations.”⁸¹ The Panel erred by looking at the tax rates applied to “manufacturing,” “retailing,” and “wholesaling” in isolation from the tax rates applied to other activities. These tax rates do not, on their own, reflect the “prevailing domestic standard” of the Washington State B&O tax system.

79. The Appellate Body has also clarified that “there must be a rational basis for comparing the fiscal treatment of the income subject to the contested measure and the fiscal treatment of certain other income.”⁸⁰ Washington State has multiple rates for taxing comparable income. It is the range of B&O tax rates applied to all business activities in the State that serves as the appropriate normative benchmark.

80. Nothing in the SCM Agreement or any WTO agreement requires Washington State to tax aerospace at a higher rate than other business activities. Because the adjustment moves the B&O tax rate for aerospace within the range of the B&O tax rates for all business activities in the State, Washington State is not foregoing any revenue that is *otherwise due* under its own law.

81. Third, the Panel erred by failing to meaningfully address the evidence before it relating to effective tax rates. Contrary to the Panel’s dismissal of this evidence as not relevant, evidence of the average effective rate of taxation is highly relevant to the determination of whether a financial contribution was provided as a result of lowering the nominal tax rate for aerospace manufacturing and selling. As we have explained, while the effective tax rate applied to aerospace manufacturing and selling is now lower than it was before, it remains higher than the

⁸⁰ US – FSC (Article 21.5 – EC) (AB), para. 91.

⁸¹ US – FSC (Article 21.5 – EC) (AB), para. 92; *see also id.*, para. 98.

⁸⁰ US – FSC (Article 21.5 – EC) (AB), para. 90.

average effective rate of taxation, and is without question at a level similar to that applied to legitimately comparable income. That similarity demonstrates that the State of Washington has not forgone any revenue that is “otherwise due,” and the tax rate applied to aerospace manufacturing and selling does not constitute a “financial contribution.”

82. In response to these arguments, the EU again suggests that the United States should have alleged errors under Article 11 of the DSU. As we have explained, this U.S. appeal relates to “the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision,” and that is “a legal characterization issue.”⁸²

83. The EU also argues that the Panel did not err in identifying as a benchmark the B&O tax rates applied to manufacturing, wholesaling, and retailing, rather than the full range of 36 B&O tax rates established in the Washington State tax code. The EU suggests that the Panel was rightly concerned about circumvention of the disciplines of Article 1.1(a)(1)(ii) in a case where the lower bound of the range could be zero percent and thus “every tax rate falls within the range and it is never possible for a tax reduction to constitute a financial contribution.”⁸³

84. However, the implication of the Panel’s analysis and the EU’s argument is that a Member with a multi-rate taxation system would effectively be precluded from adjusting any of the individual rates within its tax regime (except, arguably upwards) even if doing so were consistent with the treatment of legitimately comparable income under the Member’s tax regime. A further implication may be that Members simply are precluded from applying multi-rate taxation systems at all. These are untenable results.

85. The EU also suggests that the “range” of B&O tax rates is neither “defined” nor “normative,” because it may shift. This argument offers no support to the EU position. All tax rates applied by all Members “may shift.” Nothing in the SCM Agreement prohibits Members from modifying their taxation policies. The “defined normative benchmark,” as the Appellate Body has explained, is the taxation rules applied by a Member alleged to have provided a financial contribution by foregoing revenue *otherwise due*. In this case, Washington State

⁸² *EC – Hormones (AB)*, para. 132; *US – Upland Cotton (AB)*, para. 399; *Canada – Autos (AB)*, para. 181.

⁸³ EU Other Appellee Submission, para. 222 (*quoting* Panel Report, footnote 1224).

applies a “range” of rates to a variety of activities. Nothing in Washington State law requires aerospace to be taxed at a rate of 0.484 or 0.471 percent, and the determination to tax aerospace activities at a lower rate does not amount to foregoing revenue that is *otherwise due*.

86. Lastly, the EU emphasizes that the United States “conceded” that the average effective B&O tax rate is not a normative benchmark, and suggests that this concession justified the Panel’s finding that the average effective B&O tax rate was not relevant to its analysis. This statement is not a “concession,” but part of the necessary analysis of the facts in this dispute under the legal test set out in Article 1.1(a)(1)(ii). An average of applied rates is not a “defined normative benchmark.” The tax law itself is the defined normative benchmark, and the average effective B&O tax rate is simply the mathematical result of the application of the Washington State B&O tax law. The EU is also wrong in asserting that the fact that the average is not itself the benchmark would justify the Panel’s finding that the average effective B&O tax rate was not relevant to its analysis. To the contrary, the average was highly relevant evidence of the fiscal treatment of legitimately comparable income, and as such must be taken into account when determining whether the fiscal treatment of the aerospace sector is comparable to that of other legitimately comparable income. The proper analysis just is not as simplistic as the EU would make it out to be.

87. For these reasons, the United States respectfully requests that the Appellate Body reverse the Panel’s finding that the Washington State B&O tax adjustment constituted a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

C. U.S. appeal of the Panel’s finding that the Washington State B&O tax reduction is a specific subsidy

88. The Panel also erred by finding that the Washington State B&O tax adjustment was a specific subsidy within the meaning of Article 2.1(a) of the SCM Agreement. Here, the Panel set forth the proper legal test, but then incorrectly applied the legal test to the facts before it.

89. Any analysis of the specificity of a subsidy must address the specificity of the subsidy that has been found to exist; not some other subsidy, and not merely a part of the subsidy found to exist. Here, the Panel identified a “standard rate” of taxation and found that the application of a tax rate lower than the standard rate constitutes a subsidy. Accordingly, in analyzing whether

that subsidy is *de jure* specific under Article 2.1(a), the Panel was required to assess whether and how Washington state tax law “explicitly limits” access to that subsidy to “certain enterprises.” The Panel failed to make such an assessment.

90. Instead of attempting to ascertain whether access to the subsidy that it had found to exist was limited to “certain enterprises,” the Panel examined whether access to only a part of that subsidy was so limited. That is, the Panel analyzed whether the “B&O tax *reduction for aircraft manufacturing*,”⁸⁴ which it had found “constitutes a subsidy,”⁸⁵ was specific. In so doing, the Panel prejudged the outcome of its analysis by doing precisely what it found it should not do – assess specificity at the level of the *amending legislation* that created the alleged subsidy, *i.e.*, the “reduction.” It is unsurprising that the Panel would find that a tax reduction limited in its application to aircraft manufacturing is specific to the aircraft manufacturing industry. But the exceptions or differentiated rules that the Panel found to exist are not limited to the aircraft manufacturing industry. The Panel itself discussed the wide range of activities that are identified in the Washington State tax code, many of which are assigned a tax rate lower than the so-called general or standard rates.

91. The Panel’s concern about the lack of evidence establishing that the various tax rates were established at the same time or for the same purpose is misplaced. The Panel identified the different tax rates uniformly as “exceptions” to the “general rates” for manufacturing, wholesaling, and retailing.⁸⁶ That is, they are all part of the same subsidy that the Panel found to exist: revenue foregone that is otherwise due that confers a benefit. The fact that the tax rates applied to other activities differ from the rate applied to aerospace manufacturing and selling, and the fact that they differ among one another would, at most, be relevant to the measurement of the benefit conferred to any particular recipient of the financial contribution. That question is separate from that of whether the subsidy is *de jure* specific. *De jure* specificity is determined by evaluating whether “access” to a subsidy is “explicitly limit{ed}” to “certain enterprises.” This must be discerned, as the Panel itself explained, by evaluating “the face of the legislation or . . .

⁸⁴ Panel Report, para. 7.199 (italics in original).

⁸⁵ Panel Report, para. 7.199.

⁸⁶ Panel Report, paras. 7.204-205.

other statements or means by which the granting authority expresses its will”⁸⁷ The “purpose” of the subsidy, or the “purpose” of limiting the subsidy, or the timing of the granting of the subsidy, is not relevant to the specificity analysis under Article 2.1(a).

92. The Panel should have examined whether the subsidy that it found to exist, *i.e.*, the application of a preferential taxation rate lower than the general rate, was explicitly limited to “certain enterprises.” The Panel stated that the “differential rates” under the Washington State tax code were all “explicitly limited.”⁸⁸ However, the Panel failed to analyze whether, taking all of the differential rates together, access to the “subsidy” was limited to “certain enterprises” or whether access was “sufficiently broadly available throughout an economy”⁸⁹ so as to indicate that the subsidy was not specific. Because the Panel did not even attempt to ascertain whether access to the subsidy was limited to “certain enterprises,” its finding with respect to specificity is without legal foundation.

93. Once again, the EU argues that the United States is attacking the Panel’s factual findings, and that the United States must advance its arguments under Article 11 of the DSU.⁹⁰ Once again, the EU is incorrect. The United States is challenging the Panel’s legal conclusions drawn from the facts and its finding that the subsidy in question is specific within the meaning of Article 2.1(a) of the SCM Agreement.

94. The EU asserts that the United States is challenging the Panel’s determination that the “tax rate exceptions” constitute a “single programme”. The United States notes that the word “programme,” or the phrase “subsidy programme,” does not appear in Article 2.1(a) of the SCM Agreement or in the chapeau of Article 2.1. Rather, these provisions refer to the specificity of a “subsidy.” So, there is some question about the relevance of the Panel’s consideration of whether a subsidy is part of one programme or another programme, or whether subsidies are part of the same programme. The relevant question is whether access to the “subsidy” is limited to “certain enterprises.”

⁸⁷ Panel Report, para. 7.192.

⁸⁸ Panel Report, para. 7.204.

⁸⁹ Panel Report, para. 7.192.

⁹⁰ EU Appellee Submission, para. 239.

95. There is no question that the subsidy that the Panel found to exist was government revenue foregone that was otherwise due, and which conferred a benefit. Specifically, the Panel found the State of Washington to have forgone government revenue otherwise due under its B&O tax law by virtue of applying “exception{al}” tax rates that were below the “standard” or “general” rates. The evidence does not support the conclusion that exceptional tax rates applied to activities other than aircraft manufacturing and selling are a subsidy that is in any way different from the subsidy that the Panel found to exist, except perhaps for the amount of the benefit conferred. The Panel accordingly erred by examining the subsidy to the aerospace sector in isolation.

96. For these reasons, the United States respectfully requests that the Appellate Body reverse the Panel’s finding that the Washington State B&O tax reduction was a specific subsidy.

IV. CITY OF WICHITA INDUSTRIAL REVENUE BONDS

97. Finally, the United States appeals the Panel’s finding that the city of Wichita industrial revenue bonds (IRBs) constituted *de facto* specific subsidies under Article 2.1(c) of the SCM Agreement.

98. As the Panel found, the IRBs are not *de jure* specific, because nothing in the relevant statutory provisions limits access to the subsidy to “certain enterprises.” The question under Article 2.1(c) of the SCM Agreement, then, is whether, despite the appearance of non-specificity, the subsidy is, in fact, specific. The Panel analyzed all four of the factors set forth in Article 2.1(c), but found that only one of those factors suggested specificity. In particular, the Panel found that Boeing received disproportionately large amounts of the subsidy, such that the subsidy is specific. The Panel’s finding is legally flawed and without foundation.

99. IRBs are widely available, but they are not available to all companies, or even to all companies in the manufacturing sector. Rather, the IRBs are available only to companies that funded, constructed or improved industrial and/or commercial property during the relevant time period.⁹¹ In order to determine whether, among such companies, Boeing received “disproportionately large amounts” of the subsidy, it is necessary to determine that the

⁹¹ See, e.g., Panel Report, para. 7.658; 7.651 through 7.657.

proportion of the subsidy that Boeing received is not only different from some other ratio, but different in a way that indicates that an apparently non-specific subsidy in fact applies to a narrower class.

100. The Panel and the EU compared Boeing's proportion of the subsidy to Boeing's proportion of employment in the entire Wichita manufacturing sector.⁹² Such a comparison is deeply flawed.

101. Firstly, the relevance of Boeing's *share of economic activity* to the disproportionality analysis is unclear, regardless of the baseline group used for determining Boeing's share of economic activity of any particular group. Where there is a subsidy for construction or improvement of industrial and/or commercial property and that subsidy is granted to virtually all applicants in amounts in proportion to the construction and improvement activity for which the subsidy is sought, then it cannot be said that a company that receives more of the subsidy because it engages in more eligible activity has received disproportionately large amounts of the subsidy.

102. For example, consider a scenario in which the total amount of a construction subsidy available is \$100 million. Company 1 accounts for 25 percent of employment in the granting authority's jurisdiction, while companies 2 through 10 account for an additional 25 percent of employment. Each of the companies builds a facility in year X, with Company 1 incurring \$1 billion in construction costs on its own and the rest of the companies incurring another \$1 billion in construction costs all together – in equal amounts. Company 1 receives a \$50 million subsidy and the rest of the companies receive the remaining \$50 million. Thus, Company 1 would have received 50 percent of the subsidy, even though it has a 25 percent share of employment. Under the Panel's disproportionality analysis, this would be specific even though the amount that Company 1 received was in direct proportion to the cost of its construction activity. That is, Company 1 incurred 50% of the construction costs subsidized by the granting authority and it received 50% of the subsidy payments made by the granting authority. This hypothetical demonstrates how divorcing disproportionality from statistics that reflect the operation of the subsidy will lead to incongruous results.

⁹² Panel Report, paras 7.768-7.769. *See also* Panel Report, para 7.759.

103. Secondly, even assuming *arguendo* that Boeing’s “share of economic activity” is relevant to the determination of whether Boeing received disproportionately large amounts of the subsidy, as Australia points out in its third participant written submission, Boeing’s *employment level* may not reflect its share of economic activity.⁹³ This is because different industries, even within the manufacturing sector, will have different employment levels for a variety of reasons, including, for instance, mechanization or simply the different natures of the commercial activity. A company’s level of employment actually may tell one very little about that company’s place within the goods sector of the economy. Indeed, no single indicator may be capable of doing so alone. Therefore, if a panel is to evaluate a company’s position in the economy, the complaining party must put before the panel evidence that will allow a full evaluation of that point – for example, evidence of employment, output, and revenue. Here, the Panel erred in basing its conclusion solely on employment levels after the EU failed to put before it all of the evidence necessary to reach a meaningful conclusion regarding Boeing’s place in the Wichita economy.

104. Lastly, it is unclear why Boeing’s share of total economic activity *in the manufacturing sector* would be relevant to the Panel’s assessment of whether Boeing received disproportionately large amounts of the subsidy. As Canada points out in its third participant submission, the Panel’s approach “provides no meaningful guidance to determining whether certain enterprises received disproportionately large amounts of the subsidy.”⁹⁴ This is because, as Canada explains, “an approach that compares a given recipient’s portion of the subsidy against the baseline of its relative economic importance *in the economy as a whole*” “would always allow disproportionality, and by extension, specificity to be found.”⁹⁵ The comparison the Panel made is meaningless.

105. Accordingly, the Panel’s approach, by focusing on a single numerical ratio, and using the total level of manufacturing *employment* within the jurisdiction of the granting authority as its baseline, is legally insufficient. It results in a finding of *de facto* specificity whenever discrepancies exist between a company’s relative level of employment within an economy as a

⁹³ Australia Third Participant Submission, paras. 92-94.

⁹⁴ Canada Third Participant Submission, para. 44.

⁹⁵ Canada Third Participant Submission, para. 44 (emphasis in original).

whole and the amount of subsidy the company receives. Such an approach simply is not consistent with Article 2.1(c) of the SCM Agreement.

106. For these reasons, the United States respectfully requests that the Appellate Body reverse the Panel’s finding that the city of Wichita IRBs are *de facto* specific.

CONCLUSION

107. Thank you for your attention today. We look forward to responding to your questions.

TABLE OF REPORTS AND OTHER DOCUMENTS

Short Form	Full Citation
<i>Panel Report</i>	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/R, circulated on 31 March 2011
<i>Australia – Apples (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999
<i>Canada – Autos (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
<i>Canada – Periodicals (AB)</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997
<i>DR - Cigarettes (AB)</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EC – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>European Communities And Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, adopted 1 June 2011
<i>Japan – DRAMS (AB)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr. 1, adopted 17 December 2007
<i>US – Antidumping and Countervailing Duties (China) (AB)</i>	Appellate Body Report, <i>United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted on 25 March 2011
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – FSC (AB)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations”</i> , WT/DS108/AB/R, adopted 20 March 2000

<i>US – FSC (Article 21.5 – EC)(AB)</i>	<i>Appellate Body Report, United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW, adopted 29 January 2002</i>
<i>US – Softwood Lumber IV (AB)</i>	<i>Appellate Body Report, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R, adopted 17 February 2004</i>
<i>US – Upland Cotton (AB)</i>	<i>Appellate Body Report, United States – Subsidies on Upland Cotton, WT/DS267/AB/R, adopted 21 March 2005</i>
<i>US – Wheat Gluten (AB)</i>	<i>Report of the Appellate Body, United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities, WT/DS166/AB/R, adopted 19 January 2001</i>

TABLE OF ABBREVIATIONS

DoD	U.S. Department of Defense
DUS&T Program	DoD Dual Use Science and Technology Program
EC FCOS	First Confidential Oral Statement of the European Communities, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> (DS353) (26 September 2007)
EC FWS	First Written Submission of the European Communities
HSR Program	NASA High Speed Research Program
ManTech Program	DoD Manufacturing Technology Program
R&T Base Program	NASA Research and Technology Base Program
US Comment on EC RPQ XXX	Comments of the United States on the Response of the European Communities to the Questions from the Panel Includes: Comments of the United States on the Response of the European Communities to the First Set of Questions from the Panel to the Parties (5 December 2007) and; Comments of the United States on the Response of the European Communities to the Second Set of Questions from the Panel to the Parties (5 May 2008) and; Comments of the United States on the Response of the European Communities to the Third Set of Questions from the Panel to the Parties (21 August 2009)
US SWS	Second Written Submission of the United States
US RPQ	Response of the United States to the Questions from the Panel