

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

**(AB-2011-3/DS353)**

**APPELLEE SUBMISSION OF THE UNITED STATES**

**June 15, 2011**



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**TABLE OF REPORTS AND OTHER DOCUMENTS**

<b>Short Form</b>	<b>Full Citation</b>
Panel Report	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/R, circulated on 31 March 2011
<i>Brazil – Aircraft (Panel)</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R
<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 – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
<i>China – Audiovisual Services (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
DSU	<i>Understanding Regarding the Rules and Procedures Governing the Settlement of Disputes</i>
<i>EC – Computer Equipment (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Bed Linen (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001
<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 (Panel)</i>	Panel Report, <i>European Communities And Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, adopted 1 June 2011, as modified by the Appellate Body Report, WT/DS316/AB/R



<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>EC – Poultry (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998
<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>Guatemala – Cement I (AB)</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998
<i>India – Patents (US) (AB)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
<i>India – Quantitative Restrictions (AB)</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/AB/R, adopted 22 September 1999
<i>Japan – DRAMs (Korea) (Panel)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS336/AB/R
<i>Japan – DRAMs (Korea) (AB)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R, adopted 17 December 2007
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000
SCM Agreement	<i>Agreement on Subsidies and Countervailing Measures</i>
<i>New Shorter Oxford English Dictionary</i>	<i>New Shorter Oxford English Dictionary</i> , 5th Ed. (1993)
<i>US – Anti-Dumping 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 25 March 2011

<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002.
<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 – Countervailing Duty Investigation on DRAMs (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Export Restraints</i>	Panel Report, <i>United States – Measures Treating Export Restraints as Subsidies</i> , WT/DS194/R, adopted 23 August 2001.
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005
<i>US – Line Pipe (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002
<i>US – Steel Safeguards (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, and Corr.1, adopted 10 December 2003
<i>US – Softwood Lumber IV (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004
<i>US – Softwood Lumber VI (21.5) (AB)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber From Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr. 1
<i>US – Sonar Mapping</i>	GATT Panel Report, <i>United States – Procurement of a Sonar Mapping System</i> , GPR.DS1/R, 23 April 1992, unadopted
<i>US – Upland Cotton (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R

<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 – Upland Cotton (21.5) (AB)</i>	<i>Appellate Body Report, United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil, WT/DS267/AB/RW, adopted 20 June 2008</i>
<i>US – Wheat Gluten (AB)</i>	<i>Appellate Body Report, 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

ACT Program	NASA Advanced Composite Technology Program
AST Program	NASA Advanced Subsonic Technology Program
DSB	Dispute Settlement Body
DUS&T Program	DoD Dual Use Science and Technology Program
EU FWS	First Written Submission by the European Communities, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> (DS353) (11 July 2007)
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 RPQ	Response of the European Communities to the Panel’s Questions  Includes:  Response of the European Communities to the First Set of Questions from the Panel to the Parties (12 May 2007) and;  Response of the European Communities to the Second Set of Questions from the Panel to the Parties (14 April 2008) and;  Response of the European Communities to the Third Set of Questions from the Panel to the Parties (31 July 2009) and
EC SWS	Second Written Submission by the European Communities, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> (DS353) (19 November 2007)
HPCC	High Performance Computing and Communication Program
HSR Program	NASA High Speed Research Program
ManTech Program	DoD Manufacturing Technology Program
QAT Program	NASA Quiet Aircraft 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 FWS	First Written Submission by the United States, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (DS353)</i> (13 July 2007)
US Response to EC Preliminary Ruling Request	Response of the United States to the Request for Preliminary Rulings of the European Communities (March 22, 2007).
US SWS	Second Written Submission by the United States, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (DS353)</i> (9 February 2007)
VSP	NASA Vehicle Systems Program

## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The Appellate Body has repeatedly noted 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.”<sup>1</sup> The European Union<sup>2</sup> ignores these recent views of the Appellate Body and relies instead on a 12-year-old panel report characterizing the object and purpose of the SCM Agreement as to “impose multilateral disciplines on subsidies which distort internal trade.”<sup>3</sup> While that is clearly *part* of the object and purpose of the SCM Agreement, to consider only part of a “delicate balance” is to imbalance the entire analysis. That is what each of the EU appeals does. Reading the SCM Agreement as devoted exclusively to the interests of Members alleging WTO-inconsistent subsidies, the EU advocates interpretations that would negate elements of the agreement that protect the interests of Members defending against those claims.

2. The EU commences its appeal with a procedural argument arising from the DSB’s failure to initiate an information gathering procedure under Annex V of the SCM Agreement. The EU does not challenge the Panel finding that “it is clear . . . that the DSB never took any action to initiate an Annex V procedure, or to designate a DSB representative pursuant to paragraph 4 of Annex V.”<sup>4</sup> Rather, it asks the Appellate Body to declare that “as a matter of law” either the procedure “was initiated” – without indicating by whom, or was “deemed to have been initiated,” or “should have been initiated.”<sup>5</sup> The EU argues that because the United States did not participate in this procedure – which the DSB never actually initiated – the United States “refus{ed} to cooperate in the information-gathering process.” The EU then asks for a finding that the Panel should have allowed the EU to “complete the record . . . based on best information otherwise available” and taken adverse inferences against the United States.<sup>6</sup>

3. The EU’s argument fails at every level. On a factual basis, the United States did not “refus{e} to co-operate in the information gathering process.”<sup>7</sup> The United States submitted massive amounts of information related to the programs challenged by the EU and responded to every question posed by the Panel. In spite of constant requests by the EU to declare the United States uncooperative, the Panel never did so. As a legal matter, the Panel considered and

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

<sup>2</sup> For purposes of consistency, this submission will use the term “European Union” or “EU” to refer to actions taken by the European Communities or EC during all parts of the underlying dispute. However, where “European Communities” or “EC” appears in the title of a document or in a quoted passage, this submission leaves the reference unchanged.

<sup>3</sup> *Brazil – Aircraft (Panel)*, para. 7.27, quoted in EU Appellant Submission, para. 118. The EU also cites paragraph 4.4 of *Brazil – Aircraft (21.5)* as support for this view, but the cited paragraph does not discuss the object and purpose of the SCM Agreement.

<sup>4</sup> Panel Report, para. 7.20.

<sup>5</sup> EU Appellant Submission, para. 52.

<sup>6</sup> EU Appellant Submission, para. 52.

<sup>7</sup> EU Appellant Submission, para. 52.

correctly rejected the EU argument that the Annex V procedure could have been initiated automatically without a decision by the DSB.<sup>8</sup> The EU argues on appeal that initiation of such a procedure is an “action” to be taken by “negative consensus,” which automatically endorses the rules set by the complaining party and the DSB representative selected by the party. Nothing in the DSU or the SCM Agreement creates such a one-sided process, which would allow the complaining party to completely disregard the interests of the responding party. Moreover, the EU approach would negate the rule enshrined in the DSB and in the WTO Agreement that the DSB proceeds by consensus except where otherwise indicated. It would also put panels in the position of “ruling” on the conduct of the DSB, an authority that the DSU nowhere gives them.

4. As a matter of remedies, even if the Appellate Body were to grant the EU’s request for a finding that an Annex V procedure “was”/“was deemed”/“should have been” initiated, that would not justify the use of best information otherwise available or adverse inferences against the United States. At the time, *all* of the relevant authorities – the DSB, the DSB chair, the EU’s own nominee as representative of the DSB, and the Panel – agreed that no Annex V procedure had been initiated. There is no basis in the DSU or the SCM Agreement to lighten the EU’s evidentiary burden or to penalize the United States for relying on those authorities.

5. In its appeal of the Panel’s finding regarding the allocation of patent rights under NASA and DoD government contracts, the EU seeks to unbalance the specificity analysis under Article 2.1 of the SCM Agreement by arguing that it must take place on an agency-by-agency basis. Under this approach, even if all agencies provide the same treatment, it becomes specific when granted by a specialized agency. The SCM Agreement does not support this interpretation. Article 2.1(a) of the SCM Agreement frames specificity in terms of whether the granting authority or legislation “explicitly limits access to a subsidy to certain enterprises.” NASA and DoD do no such thing. The Panel found that “it is clear that the allocation of patent rights is uniform under all U.S. government R&D contracts, agreements, and grants, for all enterprises in all sectors.”<sup>9</sup> As enterprises can obtain the same allocation of rights in contracts with other agencies, NASA and DoD (and their relevant statutes) do not “limit access” to the alleged subsidy in any way. They are simply two instrumentalities providing the same generally available treatment to a broad group of enterprises.

6. In its appeal of the Panel’s finding that purchases of services are not financial contributions, the EU advocates an interpretation that would negate the omission of purchases of services from the text of the Agreement. Article 1.1(a)(1)(iii) of the SCM Agreement specifies that a financial contribution exists when “a government provides goods or services other than

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<sup>8</sup> Panel Report, para. 7.21. In its appeal of the Panel’s decision regarding the Annex V procedure, as elsewhere in its Appellant Submission, the EU purports to provide a “Summary of the Panel Report.” EU Appellant Submission, paras. 16-17. The United States does not consider that this purported “summary”, or any of the others in the EU Appellant Submission, accurately states the Panel’s findings. Except as otherwise indicated, the United States does not agree with these “summaries”. The EU also purports to summarize the U.S. arguments in sections entitled “Summary of the Claims and Arguments before the Panel.” *E.g.*, EU Appellant Submission, para. 14. The United States would direct the Appellate Body to its own submissions for a correct and complete statement of U.S. views.

<sup>9</sup> Panel Report, para. 7.1276.

general infrastructure, or purchases goods,” a description that, by omitting purchases of services, acts to exclude them from the definition. The Panel found that all of the relevant rules of treaty interpretation supported this conclusion. The EU argues for interpreting other clauses of the definition of financial contribution to capture purchases of services so as to achieve the supposedly anti-subsidy object and purpose of the SCM Agreement and avoid creating a “loophole” in coverage of the SCM Agreement. However, the “delicate balance” that the Appellate Body has identified as part of the object and purpose of the SCM Agreement supports the conclusion that omissions like the omission of “purchases services” from Article 1.1(a)(iii) reflect the substance of the agreement that Members reached about what measures should be subject to the SCM Agreement. As for the EU’s circumvention argument, measures that legitimately fall within an omitted category are not exploiting “loopholes.” They are simply not measures subject to disciplines. The Panel recognized that Members may seek illegitimately to exclude genuine financial contributions in the guise of purchases of services, but expressed confidence that panels “will be able to detect transactions that are not properly characterized as purchases of services.”<sup>10</sup> The EU has provided no basis to question that confidence.

7. In its appeal of the Panel’s adverse effects findings, the EU proposes that Articles 5 and 6.3 of the SCM Agreement should be interpreted as establishing an extremely broad rule requiring a cumulative assessment of the adverse effects of multiple subsidies in all cases. The EU’s proposed interpretation is not supported by the text of those provisions, and it is inconsistent with the Appellate Body’s prior findings that panels enjoy a “certain degree of discretion in selecting an appropriate methodology”<sup>11</sup> for the adverse effects analysis and that “[t]he appropriateness of a particular method may have to be determined on a case-specific basis, depending on a number of factors and factual circumstances such as the nature, design, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products, among others.”<sup>12</sup> In this dispute, the Panel was right to separately analyze the adverse effects of the aeronautics R&D subsidies, the FSC/ETI and B&O tax subsidies, and the other remaining subsidies, in light of their different nature, design, and operation, and the different impact each was alleged to have on Boeing. The EU also alleges that the Panel acted inconsistently with the principle of due process required by Article 11 of the DSU, but the EU has failed to substantiate this claim. The Panel gave the EU every opportunity to present argument and evidence in support of its case, including posing over three hundred questions to the parties and seeking and receiving further documentation from them. The Panel then made an objective assessment on the basis of the argument and evidence before it. If the Panel lacked argument and evidence to support a finding sought by the EU, the fault lies solely with the EU.

8. In its communication of April 20, 2011, the Appellate Body invited participants and third participants “to address the implications for the legal issues in this appeal arising from the Appellate Body Report in *European Communities and Certain Members States – Measures*

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<sup>10</sup> Panel Report, para. 7.960.

<sup>11</sup> *US – Upland Cotton (AB)*, para. 436.

<sup>12</sup> *EC – Large Civil Aircraft (AB)*, para. 1376 (citations omitted).



*Affecting Trade in Large Civil Aircraft.*<sup>13</sup> The United States addresses those implications directly in sections II to IV of this submission, which respond to points raised by the EU in its Appellant Submission. In addition, section VI of the submission addresses implications of the Appellate Body report in *EC – Large Civil Aircraft* for arguments raised in the U.S. Other Appellant Submission.

9. A more detailed summary of U.S. arguments appears at the beginning of each section that follows.

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<sup>13</sup> Letter from Appellate Body Secretariat Director, Werner Zdouc, to the Parties re: the Working Schedule for the appeal, dated April 20, 2011, p. 2.

## II. INFORMATION GATHERING RELATED TO THE EU CLAIMS

### A. Introduction and Executive Summary

10. The EU’s argument with regard to Annex V of the SCM Agreement (“Annex V”) is unprecedented and unjustified in every regard. Its request for the relief, in the form of a “request for completion of the analysis and other consequences,”<sup>14</sup> illustrates many of the errors in its approach. It first asks the Appellate Body to declare that the DSB took an action that it manifestly never took, initiation of the Annex V information-gathering procedure with regard to *US – Large Civil Aircraft (Second Complaint)*.<sup>15</sup> It then asks the Appellate Body to declare that the United States refused to cooperate with this procedure (which never began) and as a result, to construe the mass of evidence that the United States submitted in the manner least favorable to the United States. There is no basis in the covered agreements for the Appellate Body to declare that other WTO bodies took actions they did not take, to make fictitious findings about actions of the parties, or to take adverse inferences against parties that have complied with the decisions and rulings of the relevant authorities at every step.

11. In addition to these unprecedented “consequences,” the EU asks the Appellate Body to “bear in mind” the supposed “US refusal to cooperate in the Annex V procedure” and, “[i]n case of doubt or evidentiary conflict or equipoise, the Appellate Body should rule in favour of the European Union.”<sup>16</sup> Leaving aside the unjustified reversal of the normal burden of proof in a WTO dispute, there is also no factual basis for the assertion that the United States failed to cooperate with gathering information for this dispute. The record, consisting of thousands of documents, is enormous by any measure. Most of it came from the U.S. government in the form of published documents, documents provided by the U.S. Government to the EU on request, or documents submitted by the United States directly to the Panel. Moreover, at each stage of the process, the United States has complied with the relevant decisions and rulings, first from the Dispute Settlement Body (“DSB”), then from the representative of the DSB in the information-gathering process under Annex V of the SCM Agreement in *US – Large Civil Aircraft (First Complaint)*, and finally from the Panel in *US – Large Civil Aircraft (Second Complaint)*. It has documented each statement of fact in its submissions, and responded to the best of its ability to every one of the Panel’s requests for information. In short, the United States has “cooperated” in every way that the DSU and the SCM Agreement require.

12. This dispute, and the parties’ disagreements about information-gathering, originate in the earlier *US – Large Civil Aircraft (First Complaint)* dispute. The EU requested establishment of a panel with regard to a large number of measures over which there had been no consultations and, although repeatedly advised of the problem by the United States, failed to correct it in a timely manner. Even so, it sought and obtained initiation by the DSB of an information-gathering

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<sup>14</sup> EU Appellant Submission, para. 52.

<sup>15</sup> The EU alternatively asks the Appellate Body to “deem” that the DSB initiated the Annex V procedure or that the procedure “should have been” initiated. EU Appellant Submission, para. 52. The EU’s indecision as to the actual situation illustrates the tenuousness of its arguments. It also generates confusion, because, as the United States demonstrates below, in Section II.G, each of the alternatives has different consequences for the analysis.

<sup>16</sup> EU Appellant Submission, para. 53.

procedure under Annex V with regard to the defective panel request. The United States provided more than 40,000 pages of information with regard to the measures properly included in the panel request.<sup>17</sup> Neither the representative of the DSB nor the Panel had any criticism for the level of U.S. cooperation with the information-gathering procedure.

13. Only after the end of the Annex V process did the EU seek to remedy the procedural flaw with its Panel Request in *US – Large Civil Aircraft (First Complaint)*. When it filed a new request, which for the most part paralleled a second set of consultations, the EU was quite clear that it sought to remedy “procedural imbroglios” in *US – Large Civil Aircraft (First Complaint)*.<sup>18</sup> Even though, as a result of extensive consultations between the parties on numerous procedural matters, the Annex V procedure had already been extended 30 days beyond the 60-day limit under the SCM Agreement, the EU sought to reopen the completed procedure. When the United States refused this unprecedented request, the EU took the position that it was entitled to a second information-gathering procedure. It sought the creation of an entirely new panel, and refused U.S. efforts to allow this new panel access to the information gathered in the Annex V procedure in *US – Large Civil Aircraft (First Complaint)*.

14. The EU instead moved forward with its new panel and new dispute, now labeled *US – Large Civil Aircraft (Second Complaint)*. Its very first submission to the Panel was a request for a preliminary ruling proclaiming that the DSB had initiated an Annex V procedure, requiring the United States to ask questions drafted by the EU, and appointing an individual named by the EU as the representative of the DSB for purposes of that procedure. The Panel declined to do so. When the EU filed its first written submission, its very first request was that the panel draw adverse inferences against the United States for allegedly refusing to provide information relevant to the dispute.<sup>19</sup> That has been the EU’s refrain ever since, regardless of the quantity of information the United States supplied – that it was not sufficient and that the Panel had to ignore the information in favor of less accurate, less probative information cited by the EU. The Panel, however, concluded that it did not need to make findings as to whether the United States “cooperated” with the Annex V procedure, but could make findings by applying the normal burden of proof in WTO dispute settlement to the evidence and arguments submitted by the parties.<sup>20</sup>

15. The EU now asks the Appellate Body to do what the Panel would not do, and goes further in seeking to penalize the United States for conforming its behavior to the rulings of the Panel and the DSB in this matter. There is no legal support for the EU’s arguments that the Panel was wrong, and certainly not for the harsh penalties that it proposes for the United States.

16. The central legal problem is the one recognized by the Panel – that the EU’s request hinges on a finding that the DSB initiated an Annex V procedure in *US – Large Civil Aircraft (Second Complaint)*. The Panel, however, found that even if initiation could occur without

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<sup>17</sup> WT/DSB/M/206, para. 17 (DSB meeting of 14 March 2011).

<sup>18</sup> WT/DSB/M/204, para. 2 (DSB meeting of 2 February 2006).

<sup>19</sup> EC FWS, para. 62.

<sup>20</sup> Panel Report, paras. 7-37-7.38.

positive consensus of the DSB, that would not mean that it occurred automatically, without some action or agreement by the DSB.<sup>21</sup> As the Panel observed, the DSB did not take any such step to initiate the Annex V procedure, as is manifest in the DSB minutes.<sup>22</sup> The EU does not claim otherwise. Thus, for the Panel to rule, as the EU requested, that “the Annex V procedure requested by the EC . . . has been initiated”<sup>23</sup> would be to make a finding directly contrary to the facts as established by the DSB, which would manifestly fail to afford the “objective assessment” called for under Article 11 of the DSU.

17. Once the Panel rejected the EU request, it did not go on to address the numerous other legal flaws identified by the United States. However, should the Appellate Body reverse the Panel’s conclusion rejecting the EU request because the DSB did not initiate an Annex V procedure, any one of these other flaws would still preclude the remedy the EU seeks.

18. Most importantly, the DSU and SCM Agreement do not allow initiation of an Annex V procedure or designation of a representative of the DSB by implication or by fiat of a Member. They require a decision of the DSB. Article 2.4 states unambiguously that “{w}here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.” The DSU provides for some exceptions from this rule, but in each case, it states explicitly that a different rule applies. As Annex V makes no such exception, the consensus rule applies to the decisions to initiate an Annex V procedure and appoint a DSB representative. And, in case there was any doubt on this score, the WTO Agreement makes clear that the General Council, when acting as the DSB, operates by consensus: “Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.”<sup>24</sup> As there was no such consensus with regard to the EU request at any DSB meeting, no Annex V procedure could begin by any mechanism.

19. Applying a negative consensus rule to initiation of an Annex V procedure and designation of a DSB representative, as the EU advocates, is not only inconsistent with the DSU, but also with the context provided by Annex V itself. The Annex envisages a collaborative process related to, but separate from, the proceedings before the Panel. It creates no framework of procedures to move forward absent consensus of at least the parties to the dispute. Thus, application of the positive consensus rule to initiation and designation of a DSB representative reflects the collaborative approach embodied in Annex V itself. The EU also errs in arguing that a negative consensus rule is necessary to avoid making the information-gathering procedure “wholly ineffective.” Initiation of the Annex V procedure, like other DSB consensus-based decisions, has operated effectively in the past. Moreover, the DSU gives panels the tools to

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<sup>21</sup> Panel Report, para. 7.21.

<sup>22</sup> Panel Report, para. 7.20 and note 1029 (noting that, each time the EU’s request to initiate the Annex V procedure and designate a DSB representative was put before the DSB, “the DSB merely ‘took note’ of the statements made by Members at those meetings.”).

<sup>23</sup> EC Preliminary Ruling Request, para. 58.

<sup>24</sup> WTO Agreement, Article IX:1, note 3 (emphasis added).

gather information that they consider necessary and appropriate to resolve the dispute even where there is no Annex V procedure.

20. A negative consensus rule is also unworkable as a practical matter. If a procedure were initiated without the consensus of Members, there would be no way to appoint a representative of the DSB, determine the questions to ask, or establish procedures for responding. The EU seeks to solve these problems by arguing that the party requesting an Annex V procedure has the right to dictate all of these choices in the absence of agreement with the other party. Nothing in the DSU or Annex V supports such a principle. The EU’s own actions demonstrate that it is not willing to abide by such a “principle” when it is a responding party.

21. It is also significant that nothing in the DSU or elsewhere in the covered agreements gives panels the authority to “rule” on the conduct of the DSB. No provision of the WTO agreements allows panels to describe the duties the DSB must perform, define the procedures it must follow in performing those duties, or evaluate whether it has done so properly. Neither Annex V nor the rest of the SCM Agreement allows panels to either inform the DSB of what it must do to initiate an Annex V process, instruct it to do so, or “rule” that it has done so when it has not.

22. Even if the EU were to prevail on its arguments that “as a matter of law” the Annex V procedure “was initiated and/or is deemed to have been initiated and/or should have been initiated,”<sup>25</sup> that would not justify the application of adverse inferences against the United States. In the first place, adverse inferences are available only if a party has failed to cooperate – a factual question based to significant extent on the observations of the decision maker. Since there is disagreement about the facts and the Appellate Body cannot duplicate, at this remove, the Panel’s experience with the parties, completing the analysis as to whether to deem the United States noncooperative is impossible.

23. In addition, none of the alternative arguments laid out by the EU justifies drawing any adverse inferences. First, if the Appellate Body were to find that the Annex V procedure actually had been initiated, in spite of the absence of any formal action by the DSB to do so, the United States can scarcely be faulted for failing to participate in this process when the DSB, the DSB Chair, the DSB “representative” that the EU sought to appoint, and the Panel all agreed that it had not been initiated. Second, if the Appellate Body were to find that the Annex V procedure is “deemed” to have been initiated, then in light of the extensive U.S. cooperation with questions posed by the Panel, the United States should be “deemed” to have cooperated with that procedure. Third, if the Appellate Body were to find that the Annex V procedure “*should* have been initiated,” that would only serve to confirm that the procedure was not actually initiated. Once again, in light of the widespread view at that time that initiation is a positive consensus

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<sup>25</sup> The United States notes that in its preliminary ruling request, the only ruling the EU requested with regard to the DSB was that the Panel “rule that the Annex V procedure requested by the EC . . . has been initiated.” EC Preliminary Ruling Request, para. 58. Thus, in requesting the Appellate Body to find, in the alternative, that the Annex V procedure “is deemed to have been initiated” or “should have been initiated,” the EU is asking the Appellate Body to reverse the Panel for failing to make a finding that the EU never requested.

decision, and that the DSB had not initiated an Annex V procedure, there is no ground to penalize the United States for conforming its actions to that view.

24. Finally, the remedy sought by the EU is inappropriate. There is no basis in law for drawing adverse inferences in this situation. The EU’s request that the Appellate Body “bear in mind” the EU’s characterizations of U.S. actions and “[i]n case of doubt or evidentiary conflict . . . rule in favor of the EU”<sup>26</sup> would reverse the normal burden of proof in WTO dispute settlement, and has no support under the DSU or Annex V.

## **B. Relevant facts**

25. The United States agrees with the EU that the relevant facts are not in dispute. However, the EU’s one-paragraph synopsis<sup>27</sup> omits almost all of those facts.

26. This dispute has its origins in a consultation request submitted by the EU on October 6, 2004 (“First Consultation Request”),<sup>28</sup> which covered 17 measures that the EU alleged to be subsidies. The WTO Secretariat assigned this request the number DS317, and later assigned it the title *United States – Measures Affecting Trade in Large Civil Aircraft (First Complaint)* (“*US – Large Civil Aircraft (First Complaint)*”). At consultations, held on November 5, 2004, the EU raised concerns about a number of additional measures. The United States noted that these measures did not appear in the First Consultation Request and, accordingly, were not subject to consultations. The EU did nothing to address the omissions.

27. More than six months later, on May 31, 2005, the EU requested establishment of a panel with regard to both the measures covered in the First Consultation Request and additional measures (“First Panel Request”).<sup>29</sup> At the June 13, 2005, DSB meeting, the United States pointed out that the additional measures had not been subject to consultations.<sup>30</sup> In response to the U.S. statement, the EU filed a new consultation request on June 27, 2005 (“Second Consultation Request”) that specifically referenced the additional measures and requested a “continuation of those {consultations} held on 5 November 2004.”<sup>31</sup> However, before the parties could hold consultations with respect to the Second Consultation Request, the EU placed

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<sup>26</sup> EU Appellant Submission, para. 53.

<sup>27</sup> EU Appellant Submission, para. 12.

<sup>28</sup> Request for consultations by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft (First Complaint)*, WT/DS317/1 (12 October 2004). That this first dispute gave rise to the current dispute is not simply an assertion of the United States – the EU itself opened its description of the procedural background for its first written submission with the title “Introduction – The Unsatisfactory Results of the Annex V Procedure in the DS317 Case Led to DS353.” EC FWS, para. 51, title.

<sup>29</sup> Request for the Establishment of a Panel by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/2 (3 June 2005).

<sup>30</sup> WT/DSB/M/191, para. 14 (DSB meeting of 13 June 2005).

<sup>31</sup> Request for Consultations by the European Communities: Addendum, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/1/Add.1 (1 July 2005).

the First Panel Request on the DSB agenda for a second time, leading to the establishment of a panel in DS317 on July 20, 2005 (“First Panel”).<sup>32</sup>

28. The EU and the United States held consultations regarding the Second Consultation Request on August 3, 2005. Following those consultations, however, the EU took no steps to bring the additional measures properly before the First Panel. It instead sought the initiation of an information-gathering procedure under Annex V of the SCM Agreement with regard to the First Panel Request. On September 23, 2005, the United States consented to this request, stating that:

the US joining the consensus to commence Annex V proceedings in the DS317 dispute extended only to the programs and measures that were properly included in the EC’s panel request, namely, those consulted upon pursuant to their inclusion in the EC’s consultation request.<sup>33</sup>

The DSB initiated an Annex V procedure and appointed Mr. Mateo Diego-Fernández as its representative under paragraph 4 of Annex V. The United States and the EU consulted extensively on procedures to be used, including procedures to protect BCI and HSBI and an extension of the period from 60 to 90 days, and put forward draft procedures to the DSB representative.

29. On September 23, the EU also proposed that the DSB representative pose 325 questions to the United States regarding alleged subsidies, including measures not covered by the First Consultation Request.<sup>34</sup> In comments to the DSB representative on September 29, 2005, the United States again pointed out that alleged subsidies that had not been subject to consultations prior to the establishment of the First Panel were not properly within that Panel’s terms of reference. Therefore, it was inappropriate to gather information relating to those alleged subsidies in an Annex V procedure related to the First Panel Request.<sup>35</sup> On October 7, 2005, after reviewing the parties’ comments regarding each other’s proposed questions, the DSB representative posed 318 questions to the United States.<sup>36</sup>

30. By the end of the Annex V process on December 22, 2005, U.S. officials had spent thousands of hours collecting and assembling more than 40,000 pages of documents with regard to the alleged subsidies identified in the First Panel Request that had been subject to

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<sup>32</sup> WT/DSB/M/194.

<sup>33</sup> WT/DSB/M/197.

<sup>34</sup> US Response to EC Preliminary Ruling Request, para. 11, *citing* The European Communities’ Questions for the United States Pursuant to Annex V of the *Agreement on Subsidies and Countervailing Measures* (23 September 2005).

<sup>35</sup> US Response to EC Preliminary Ruling Request, para. 11, *citing* Letter from the United States to Mateo Diego-Fernández, General Comment 3 (Sept. 29, 2005).

<sup>36</sup> US Response to EC Preliminary Ruling Request, para. 12, *citing* Questions for the United States Pursuant to Annex V of the *Agreement on Subsidies and Countervailing Measures* (7 October 2005).

consultations under the First Consultation Request.<sup>37</sup> The EU did nothing during the 90-day extended Annex V process to remedy the flaws in the First Panel Request. At no point did the DSB representative or the First Panel find that the U.S. actions constituted a failure to cooperate in those proceedings.

31. The EU waited until January 20, 2006, one month after the end of the Annex V procedure with regard to the First Panel Request, to seek establishment of a new panel (“Second Panel Request”) with regard to the Second Consultation Request.<sup>38</sup> The Second Panel Request had the same title as the First Panel Request; both also described the matter generally as alleged “subsidies provided to and benefiting the US producers of large civil aircraft.”<sup>39</sup> The EU described its request as intended to “prepare the ground for resolving a number of procedural imbroglios.”<sup>40</sup> At the DSB meeting on February 2, 2006, the United States noted the overlap between some of the measures before the First Panel and those in the 2006 Panel Request and expressed its willingness to work with the EU to simplify procedural issues.<sup>41</sup>

32. The EU, however, immediately placed the 2006 Panel Request before the DSB for a second time at the meeting on February 17, 2006.<sup>42</sup> The United States expressed its regret for this action and stated its preference to reach agreement first on the relationship between the Second Panel Request and the existing First Panel, and its willingness to discuss the issue further with the EU.<sup>43</sup> Nevertheless, the EU immediately requested the initiation of a new Annex V procedure with respect to the Second Panel Request.<sup>44</sup> All of the claims in the First Panel Request were repeated in the Second Panel Request, so this new Annex V procedure would have entailed a substantial duplication of the recently completed Annex V procedure. In light of the fact that the United States had just finished a lengthy Annex V procedure regarding the EU claims, and the lack of agreement on procedures for an additional process, the United States was unable to agree to the EU request.<sup>45</sup> The United States suggested that the parties agree on a way to formalize the relationship between the two disputes, and stated its willingness to discuss how to achieve this with the EU.<sup>46</sup> The DSB agreed to establish a panel, but “with regard to the issue of the procedures for developing information concerning serious prejudice under Annex V,” the DSB Chair “proposed that the DSB take note of the statements made by the parties to the dispute

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<sup>37</sup> Even the EU recognized that the “administration burden” of such an effort was “considerable”. WT/DSB/M/206 (4 April 2006).

<sup>38</sup> Request for the Establishment of a Panel by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS31/5 (23 January 2006.)

<sup>39</sup> Second Panel Request, p. 2.

<sup>40</sup> WT/DSB/M/204, para. 2.

<sup>41</sup> WT/DSB/M/204, paras. 4-5.

<sup>42</sup> WT/DSB/M/205, para. 69.

<sup>43</sup> WT/DSB/M/205, para. 70.

<sup>44</sup> WT/DSB/M/205, para. 69.

<sup>45</sup> WT/DSB/M/205, para. 71.

<sup>46</sup> WT/DSB/M/205, para. 70.



regarding this matter.” The DSB minutes record that “{t}he DSB took note of the statements.” Thus, the DSB did *not* agree to initiate an information-gathering procedure under Annex V.<sup>47</sup>

33. The EU asked again for initiation of an Annex V process at two succeeding DSB meetings,<sup>48</sup> but the DSB declined to do so; each time the DSB minutes record that “{t}he DSB took note of the statements.”<sup>49</sup> On March 20, 2006, the EU asked the DSB representative with regard to the First Panel Request to unilaterally recommence the Annex V procedure after the expiration of the 90-day period agreed upon by the parties, and resubmit certain questions to the United States.<sup>50</sup> The DSB representative declined to do so.<sup>51</sup> The EU again sought initiation of an Annex V process by the DSB, which again declined.<sup>52</sup> On May 23, 2006, the EU submitted another letter to Mr. Diego-Fernández, addressing him as the “Facilitator” in the *US – Large Civil Aircraft (Second Complaint)*<sup>53</sup> process. The letter asserted that pursuant to the EU’s request at the DSB meeting of April 21<sup>st</sup> and confirmed at the meeting of May 17<sup>th</sup>, an Annex V procedure was initiated (without specifying by whom). The EU asked that Mr. Diego-Fernández request the United States to respond to 343 questions.<sup>54</sup> He responded that, because the DSB had taken no decision to commence an Annex V process or to designate him as its representative, he could “not possibly serve as a DSB representative pursuant to Annex V in respect of DS317bis.”<sup>55</sup> He returned the letter to the EU.<sup>56</sup>

34. On November 24, 2006, the EU made a preliminary ruling request asking the Panel established with regard to the Second Panel Request (which had not yet been composed) to rule: (1) that an Annex V process “has been initiated”; (2) that the United States had an obligation to answer the questions framed by the EU; (3) that Mr. Diego-Fernández “was effectively designated by the DSB” to be its representative for purposes of Annex V; and (4) to adopt working procedures that would complete an Annex V process before the deadline for the EU first

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<sup>47</sup> WT/DSB/M/205, paras. 73 and 75-76.

<sup>48</sup> EU Appellant Submission, para. 12.

<sup>49</sup> WT/DSB/M/206, para. 26 (DSB meeting of 14 March 2006); WT/DSB/M/207, para. 101 (DSB meeting of 17 March 2006).

<sup>50</sup> US Response to EC Preliminary Ruling Request, para. 16, *citing* Letter from the EC to the Facilitator (20 March 2006).

<sup>51</sup> US Response to EC Preliminary Ruling Request, para. 16, *citing* Communication of the Facilitator (28 March 2006).

<sup>52</sup> WT/DSB/M/210, para. 104 (DSB meeting of 21 April 2006); WT/DSB/M/212, para. 71 (17 May 2006).

<sup>53</sup> In the communication, the EU referred to this proceeding as DS317bis, the number that had been assigned to the dispute later numbered DS353.

<sup>54</sup> US Response to EC Preliminary Ruling Request, para. 17, *citing* Letter from the EC to Mateo Diego-Fernández (23 May 2006).

<sup>55</sup> Letter from Mateo Diego-Fernández to the EC (6 June 2006) (Exhibit EC-2). At this point in the process, the WTO Secretariat, the United States, and the EU were referring to the Second Consultation Request and Second Panel Request (which later led to this proceeding) as “DS317bis”.

<sup>56</sup> Letter from Mateo Diego-Fernández to the EC (6 June 2006) (Exhibit EC-2).

written submission. In the alternative, it asked the Panel to ask the same questions pursuant to its authority under Article 13 of the DSU.

35. On November 26, 2006, the Deputy Director-General composed the Panel whose report is currently on appeal.<sup>57</sup> At the organizational meeting of the Panel, the United States offered to eliminate the difficulties caused by having two panels addressing overlapping claims by affording the Panel (and the parties) the same access to the results of the DS317 Annex V process that the DS317 panel (and the parties) enjoyed in that proceeding. The United States proposed a decision of the DSB to achieve this result.<sup>58</sup> The EU opposed this approach, but provided no reasoned explanation. It proposed instead that the parties authorize each other to use information exchanged during DS317, and that the Panel and Secretariat would have access to the full set of DS317 HSBI materials in the WTO HSBI facility upon approval of the DS317 Panel. However, the EU's proposal could not work, as two of the members of the DS317 Panel had by that point resigned without replacements.

36. On March 5, 2007, the EU announced that in light of the parties' inability to decide how to make the DS317 Annex V information available to the Panel, the EU would file its first written submission based on available information on the U.S. measures at issue.<sup>59</sup> The United States offered again to seek a decision of the DSB in this regard.<sup>60</sup> The EU did not respond to this offer. In the very first request in its first submission, the EU asked the panel to take adverse inferences against the United States for allegedly refusing to provide information relevant to the dispute.<sup>61</sup> The United States submitted the materials from the DS317 Annex V process as exhibits to its first written submission.<sup>62</sup>

37. On July 30, 2007, the Panel issued its preliminary ruling. It found that “the DSB never took any action to initiate an Annex V procedure, or to designate a DSB representative pursuant to paragraph 4 of Annex V. Rather, the DSB merely ‘took note’ of the statements made by Members at those meetings.”<sup>63</sup> The Panel further rejected the EU's argument that initiation of an Annex V procedure “‘occurs automatically’ in the absence of any action by the DSB to initiate the procedure” as “having no basis . . . in the text of paragraph 2 of Annex V.”<sup>64</sup> The Panel

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<sup>57</sup> WT/DS353/3.

<sup>58</sup> Letter from the United States to the EU (Jan. 14, 2007).

<sup>59</sup> Letter from the EC to the Panel, p. 2 (March 5, 2007).

<sup>60</sup> Letter from the United States to the Panel, p. 3 (March 7, 2007).

<sup>61</sup> EC FWS, para. 62.

<sup>62</sup> *E.g.*, Exhibits US-31, US-34, US-70, US-81–US-82, US-84, US-96, US-109, US-111–US-113, US-122, US-149, US-151–US-156, US-168, US-400–US-706. The EU submitted some of the documents it received in the DS317 Annex V process as exhibits to its first written submission. See Exhibits EC-345, EC-346, EC-347, EC-369, and EC-401 (the “UNITED STATES” and “redacted” labels are those generated for the responses in the Annex V process, and are not otherwise used by NASA).

<sup>63</sup> Panel Report, para. 7.20.

<sup>64</sup> Panel Report, para. 7.21.

further decided not to pose questions pursuant to Article 13 of the DSU at that time because a panel

will . . . usually not be in a position to exercise its authority under Article 13 of the DSU to request information “the panel considers necessary and appropriate”, prior to having carefully reviewed the parties’ first written submissions. This is especially true where, as in the present case, one party requests a panel to transmit hundreds of questions to another party relating to a range of measures.

The Panel specifically noted that:

having taken into account the particular circumstances and procedural history of this dispute, the Panel does not consider it necessary or appropriate to use its discretion under Article 13 of the DSU to remedy the parties’ inability to reach agreement on the initiation of an Annex V procedure, or to remedy the parties’ inability to reach agreement on a means for transferring the information obtained during the DS317 Annex V procedure to the present Panel.<sup>65</sup>

38. Over the course of the proceeding, the Panel vigorously exercised its right to request further information from the parties, posing three sets of written questions, with 394 questions in total. The United States provided voluminous responses to these questions, including new information responsive to the Panel’s questions and references to existing information already submitted to the Panel. The EU repeatedly accused the United States of failing to cooperate with the Annex V procedure. However, the Panel concluded that it did not need to rule on the question of whether the United States “cooperated” with the Annex V information-gathering process to resolve the substantive questions before it:

If the Panel were to consider the evidence and/or arguments advanced by the United States to be insufficient to rebut the evidence and arguments presented by the European Communities, then the Panel would accept the European Communities’ estimate. In such a situation, the Panel would accept the European Communities’ estimate not by virtue of United States “non-cooperation”, and not as a matter of drawing “adverse inferences”, but simply by virtue of the operation of the normal principles regarding the burden of proof in WTO dispute settlement proceedings. Likewise, if the Panel were to consider the evidence and/or arguments advanced by the United States to be sufficient to rebut the evidence and arguments presented by the European Communities, then the Panel would accept the United States’ estimate not by virtue of United States “cooperation”, but simply by virtue of the operation of the normal principles regarding the burden of proof in WTO dispute settlement proceedings.<sup>66</sup>

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<sup>65</sup> Panel Report, para. 7.23.

<sup>66</sup> Panel Report, para. 7.38.

**C. The Panel correctly found that the DSB did not initiate an Annex V information-gathering procedure or designate a DSB representative.**

39. The Panel found that “{i}t is clear from the minutes of the DSB meetings where this matter was discussed that the DSB never took any action to initiate an Annex V procedure, or to designate a DSB representative pursuant to paragraph 4 of Annex V.”<sup>67</sup> The EU does not appear to disagree with this reading of the DSB minutes as a matter of fact. Its appeal appears to be grounded in an argument that, despite the DSB’s inaction, a procedure was initiated “as a matter of law.”<sup>68</sup>

40. That the DSB did not initiate an Annex V procedure in this dispute, and did not consider that it had initiated such a procedure, is clear from a comparison with the DSB’s actions when it has initiated such a procedure in other disputes. At the DSB meeting of September 23, 2005, when the DSB initiated a procedure with regard to *US – Large Civil Aircraft (First Complaint)*, the minutes state:

16. The Chairman proposed that the DSB take note of the statements made and agree, as requested by the European Communities in document WT/DS317/2, to initiate the procedures for developing information concerning serious prejudice under Annex V of the SCM Agreement, pursuant to paragraph 2 of Annex V of the SCM Agreement.

17. The DSB took note of the statements and so agreed.<sup>69</sup>

41. In contrast, in response to the EU request for an Annex V procedure in *US – Large Civil Aircraft (Second Complaint)*, the minutes for the DSB meetings of February 17, March 14, March 17, and April 21, 2006, state only that:

The DSB took note of the statements.<sup>70</sup>

At the DSB meeting of May 17, 2006, when the EU considers that it “confirmed” its request for an Annex V procedure, the minutes indicate the following:

70. The Chairman proposed that the DSB take note of the statements made and agree to suspend the consideration of this agenda item in order to allow consultations with a view to finding a way forward. He further proposed to revert to this item when he would consider it appropriate.<sup>2</sup>

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<sup>67</sup> Panel Report, para. 7.20. The minutes constitute the “{r}ecords of the discussions” of the DSB. General Council Rules of Procedure, Rule 36 (“Records of the discussions of the General Council shall be in the form of minutes.” (footnote omitted)).

<sup>68</sup> EU Appellant Submission, para. 52.

<sup>69</sup> WT/DSB/M/197, paras. 16-17.

<sup>70</sup> WT/DSB/M/205, para. 76 (DSB meeting of 17 February 2006); WT/DSB/M/206, para. 26 (DSB meeting of 14 March 2006); WT/DSB/M/207 (DSB meeting of 17 March 2006), para. 101; WT/DSB/M/210, para. 104 (DSB meeting of 21 April 2006).

71. The DSB took note of the statements and agreed to the Chairman’s proposal.

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<sup>2</sup> Subsequently, on 23 May 2006, the Chairman sent out a fax informing Members that, following consultations between the parties to the dispute, an agreement had been reached that it was not necessary to revert to this matter and that the consideration of this agenda item did not need to be suspended.<sup>71</sup>

Thus, on all of the occasions when the DSB considered an Annex V procedure in *US – Large Civil Aircraft (Second Complaint)*, the DSB did *not* “agree . . . to initiate the procedures for developing information,” as it did in *US – Large Civil Aircraft (First Complaint)*. The only action, other than taking note of Members statements, to which the DSB agreed was to suspend the agenda item concerning the Annex V procedure to permit the Chair to conduct consultations with the parties.

42. Thus, reflected multiple times in the DSB’s own minutes, the DSB did not initiate an Annex V procedure in *US – Large Civil Aircraft (Second Complaint)*.

**D. The Panel correctly found that initiation of an Annex V information-gathering procedure and designation of a DSB representative do not occur automatically.**

43. The Panel rejected the EU request to declare that the DSB initiated an Annex V procedure because the Panel found that even if initiation could occur without positive consensus of the DSB, that would not mean that it occurred automatically, without some action or agreement by the DSB.<sup>72</sup> As noted above in section II.C, the DSB manifestly did not take any such step to initiate the Annex V procedure.<sup>73</sup> The EU does not claim otherwise. Thus, for the Panel to have found, as the EU requested, that “the Annex V procedure requested by the EC . . . has been initiated”<sup>74</sup> would have been to make a finding directly contrary to fact, which would be inconsistent with the “objective assessment” called for under Article 11 of the DSU.

44. The Panel’s conclusion is fully consistent with the text of Annex V and of the DSU. Annex V calls for the DSB to take two steps to commence information-gathering: under paragraph 2, “the DSB shall, upon request, initiate the procedure. . . .” and then, under paragraph 4, “{t}he DSB shall designate a representative to serve the function of facilitating the information-gathering process.” In each sentence, “the DSB” is the grammatical subject, while the “procedure” and the “representative” are the grammatical objects of, respectively, the verbs “initiate” and “designate,” which are in the active voice. Thus, there cannot be a procedure or a representative unless the DSB does something to “initiate” or “designate”. Denominating that something as an “act” or a “decision” does not change the conclusion – it cannot occur unless the

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<sup>71</sup> WT/DSB/M/212, paras. 70-71.

<sup>72</sup> Panel Report, para. 7.21.

<sup>73</sup> Panel Report, para. 7.20.

<sup>74</sup> EC Preliminary Ruling Request, para. 58.

DSB does it. Interpreting paragraph 2 as the EU suggests simply reads “the DSB” out of the agreement.

45. The context of the DSU confirms that initiation of the Annex V process and designation of a representative cannot occur unless the DSB takes some formal step. Article 2.1 of the DSU provides that the DSB “is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements.” The relevant meaning of “administer” is “execute or dispense (justice).”<sup>75</sup> Thus, the DSB does not play the passive role of merely witnessing or commenting on dispute settlement. The DSU envisages an active role of administering those rules and procedures. That role means that a procedural step charged to the authority of the DSB can take place only if that body has actually taken (“executed”) the relevant step. Interpreting an authority of the DSB as occurring without DSB action would be fundamentally inconsistent with the active role envisaged by the DSU.

46. Additional context comes from other DSU provisions calling for entities to take procedural steps. For example, the DSU provides that:

“{T}he Secretariat shall propose nominations for the panel to the parties to the dispute.” (Article 8.6)

“The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.” (Article 8.7)

“{T}he panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions.” (Article 15.2)

“{T}he report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.” (Article 16.4)

“Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.” (Article 17.9)

In each of these examples, it is clear that the relevant procedural step occurs only after the entity charged with that step has formally taken it. The SCM Agreement frames the provisions related to initiation of Annex V procedures and designation of a DSB representative in the same way, with the “Dispute Settlement Body” as the subject, a “shall,” and then a procedural step to take. Thus, they likewise occur only when the DSB takes the step in question.

47. The dispute settlement provisions that do not require positive consensus of or other action by the DSB provide additional context. In these instances, the DSU makes clear what will

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<sup>75</sup> *New Shorter Oxford English Dictionary*, p. 28.

happen, what person or entity will be responsible, and how, if needed, to choose the persons. Thus, where the DSU provides for establishment of a panel by the DSB subject to negative consensus under Article 6.1, it specifies under Articles 8 and 11.15 how to select panelists and the rules to follow. Similarly, where the DSU provides for referral of a matter to arbitration under Article 22.6, it specifies in Article 22.6 and 22.7 who will be that arbitrator and how the arbitrator shall conduct its work. As a practical matter, this is the only way to ensure that the procedure can move forward in the absence of a DSB consensus decision on these additional necessary elements.

48. Annex V of the SCM Agreement establishes no mechanism to make the process work in the absence of consensus from the DSB. It does not set rules for the information-gathering procedure, other than to indicate that the process “may include” written questions to the parties. Moreover, while paragraph 4 of Annex V calls for designation of a representative of the DSB “to serve the function of facilitating the information-gathering process,” it does not indicate how to choose the representative in the absence of action by the DSB. This silence contrasts markedly with explicit provisions for appointing panelists or an arbitrator.

49. Thus, the DSU supports the Panel’s finding that even if the initiation of an Annex V procedure were subject to negative consensus, it “does not ‘occur automatically’ upon request, in the absence of any action by the DSB to initiate the procedure.”<sup>76</sup> The EU’s extended discussion as to whether initiation of an Annex V procedure is by negative or positive consensus is, therefore, beside the point. The Panel found that, even if the EU were correct, it did not matter because, in the absence of a formal step to initiate an Annex V procedure, there was no basis to conclude, as the EU requested, that “the Annex V procedure requested by the EC at the DSB meeting of 21 April 2006 and confirmed at the DSB meeting of 17 May 2006 has been initiated.”<sup>77</sup>

50. The EU does not address the substance of the Panel’s findings. Instead, it accuses the Panel of “erroneously restating *part* of the EU complaint as a request for a ruling on a narrow *factual* proposition: that the DSB has initiated an Annex V procedure by action by negative consensus.”<sup>78</sup> The EU is wrong. The Panel correctly understood the EU preliminary ruling request, which states:

The EC therefore respectfully requests the Panel:

- to rule that the Annex V procedure requested by the EC at the DSB meeting of 21 April 2006 and confirmed at the DSB meeting of 17 May 2006 has been initiated;

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<sup>76</sup> Panel Report, para. 7.21.

<sup>77</sup> Panel Report, para. 7.22, *quoting* EC Preliminary Ruling Request, para. 58.

<sup>78</sup> EU Appellant Submission, para. 50.

- to rule that the US is under an obligation to cooperate and answer the questions that have been put to it in the EC’s letter to the Facilitator dated 23 May 2006;
- to rule that Mr. Mateo Diego-Fernández was effectively designated as a facilitator in that procedure, and in the event the Panel does not make this ruling, nevertheless to provide the relief set forth in the preceding and following points; and
- to adopt such working procedures that would allow the completion of the Annex V procedure in due time before the deadline for the filing of the EC first written submission.<sup>79</sup>

The words of the first bullet point in the EU request, which the EU does not mention in its analysis on appeal, show that the Panel correctly perceived it as a request to “rule” on the “factual proposition” that a particular event occurred at two DSB meetings.

51. The EU also criticizes the Panel for rejecting the requests in the remaining bullet points as “dependant” on the first.<sup>80</sup> Again, the Panel was clearly correct. The remaining requests are nonsensical in the absence of the first. The United States could not have an obligation to “cooperate” with a procedure that had not been initiated, Mr. Diego-Fernández could not “facilitate” the non-existent procedure, and revising working procedures to accommodate the procedure that had not begun would be pointless. Thus, the second, third, and fourth requests were dependent on the first in the sense that they assumed it had been granted, and would be operationally impossible to perform in the absence of a grant of the first request. Therefore, the Panel was fully justified in rejecting the EU requests.

52. In sum, the Panel found correctly that initiation of an Annex V information-gathering procedure requires an affirmative act or decision by the DSB, irrespective of whether by positive or negative consensus. The Panel also found correctly that, according to the DSB’s own minutes, the DSB took no such step. Therefore, the Appellate Body should reject the EU’s appeal on this issue.

53. If the Appellate Body upholds the Panel’s finding with regard to Annex V, the analysis can stop here. The United States makes the following submissions in this section as contingent defenses in the event that the Appellant Body addresses additional arguments raised by the EU.

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<sup>79</sup> EC Preliminary Ruling Request, para. 58. The paragraph continues on to make as alternative request in the event the Panel does not declare the initiation of Annex V procedures, and to request the adoption of procedures to protect BCI and HSBI. The EU does not appeal the Panel’s rejection of its alternative request or the Panel’s actions regarding BCI and HSBI.

<sup>80</sup> EU Appellant Submission, para. 50.



**E. Initiation of an Annex V procedure and designation of a DSB representative require positive consensus of the DSB.**

54. DSU Article 2.4 states unambiguously that “{w}here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.” Article IX of the Marrakesh Agreement provides that “{t}he WTO shall continue the practice of decision-making by consensus followed under GATT 1947.” However, while Article IX contemplates the possibility of decision-making by the Ministerial Conference and General Council by voting, it also makes clear that the General Council when acting as the DSB operates by consensus: “Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.” Appendix 2 of the DSU lists Annex V in its entirety as “special or additional rules and procedures” that, pursuant to DSU Article 1.2, add to or modify those in the DSU. Paragraphs 2 and 4 of Annex V provide, respectively, for the DSB to “initiate” Annex V procedures and “designate” a representative of the DSB to facilitate the process. Neither of these can occur without the DSB reaching a “decision,” which is defined as “{t}he action of coming to a determination or resolution with regard to any point or course of action; a resolution or conclusion arrived at.”<sup>81</sup> Therefore, by operation of DSU Article 2.4 and note 3 to Article IX:1 of the WTO Agreement, they require the consensus of the DSB.

55. The context of the DSU confirms this conclusion because Articles 6.1, 16.4, 17.14, 22.6, and 22.7, all provide for the DSB to take specified procedural steps “unless the DSB decides by consensus not to” take that procedural step, a decision-making rule commonly called “negative consensus”. The equivalent SCM Agreement provisions on DSB decisions to establish a panel (Articles 4.4 and 7.4), adopt a report (Articles 4.8, 4.9, 7.6 and 7.7), and grant authorization to take countermeasures (Articles 4.10 and 7.9) all expressly refer to a decision “unless the DSB decides by consensus not to”. The establishment in the DSU and WTO Agreement of a general rule requiring positive consensus for DSB decisions, and the specific provision for decision by negative consensus in a limited set of instances indicates that where the DSU is silent, positive consensus is the rule. The EU concedes that Annex V does not specify a particular decision-making rule.<sup>82</sup> Therefore, the applicable rule is the general rule of positive consensus.

56. This understanding is not simply the position of the United States in this appeal. It reflects the practice of the DSB, which has in all past cases initiated Annex V procedures and designated DSB representatives in those procedures by positive consensus.<sup>83</sup> In fact, the EU has itself vigorously advocated the view that initiation of an Annex V process is subject to positive consensus. For example, on July 20, 2005, when the DSB sought a panel in *EC – Large Civil Aircraft*, the United States sought initiation of Annex V, but the EU refused to concur.<sup>84</sup> The DSB accordingly established the Panel, but merely “took note of the statements” regarding

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<sup>81</sup> *New Shorter Oxford English Dictionary*, p. 608.

<sup>82</sup> EU Appellant Submission, para. 21.

<sup>83</sup> *E.g.*, WT/DSB/M/153, paras. 36-38; (*Korea – Commercial Vessels*); WT/DSB/M/197, paras. 6-9 (*EC – Large Civil Aircraft*); WT/DSB/M/197, paras. 16-19 (*US – Large Civil Aircraft (First Complaint)*).

<sup>84</sup> WT/DSB/M/194, para. 52.

Annex V and did not initiate a new information-gathering process in that dispute.<sup>85</sup> At a subsequent meeting on August 31, 2005, the EU explained that “consistent with WTO jurisprudence, an Annex V procedure could not be initiated by only one party to a dispute, but required a meeting of the minds; an actual agreement between the parties.”<sup>86</sup> As the facts outlined above in section II.B demonstrate, that “meeting of the minds” occurred with regard to *US – Large Civil Aircraft (First Complaint)*, but not with regard to *US – Large Civil Aircraft (Second Complaint)*. Therefore, under the EU’s own standard, there was never any basis for the DSB to initiate the Annex V process.

57. It is difficult to see how the DSU could be more clear that the general rule for taking decisions is by consensus. As paragraphs 2 and 4 of Annex V call for the DSB to take steps that cannot proceed without some sort of a “resolution” or “conclusion,” and do not provide for an exception to the general decision-making rule, that should end the analysis. Initiation of a procedure and designation of a DSB representative are actions within the ordinary meaning of “decision,” so they require the consensus of the DSB under Article 2.4 of the DSU and Article IX:1 of the WTO Agreement.

58. However, sometime after its defense of the positive consensus rule for Annex V on August 31, 2005, the EU reversed its position. Eight months later, on April 21, 2006, the EU announced to the DSB that “{t}he terms of the SCM Agreement were quite unambiguous. It provided for an automatic initiation of the Annex V procedure at the request of either party, together with the designation of a Facilitator.”<sup>87</sup> The Panel rejected this new position. The EU now seeks to overturn the Panel’s ruling by arguing that “the overall framework” of the DSU differentiates between “decisions” subject to the consensus rule under Article 2.4, and “actions” subject to negative consensus. (The EU provides no citation for this latter rule, deriving it by analogy to exceptional decision-making rules applicable to some classes of decisions.) The EU then makes ten enumerated points that in its view support the conclusion that initiation of an Annex V procedure and designation of a DSB representative are “actions” subject to negative consensus, rather than decisions.

59. There is no support in the “overall framework” of the DSU for the distinction the EU seeks to draw between “decisions” and “actions” of the DSB, or the different decision-making rules the EU would assign to each. The ten enumerated points laid out by the EU are just different variations of three basic arguments, all of which are wrong:

- (1) The EU argues that the Annex V procedure is subject to negative consensus because it is an integral part of establishing a panel to consider claims under Part III of the SCM Agreement, which proceeds by negative consensus.<sup>88</sup> The EU is

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<sup>85</sup> WT/DSB/M/194, para. 57.

<sup>86</sup> WT/DSB/M/196, para. 45.

<sup>87</sup> WT/DSB/M/210, para. 100. In a DSB meeting on April 15, 2003, the EU espoused yet a third position – that “{p}aragraphs 2 and 4 of Annex V did not specify that the DSB shall designate a representative by consensus. Rather a simple majority would be necessary.” WT/DSB/M/147, para. 71.

<sup>88</sup> EU first, fourth, and seventh enumerated points. EU Appellant Submission, paras. 32, 35-36, and 39. The EU also makes observations related to its “first” point in paragraph 21.

wrong because Annex V operates differently from a panel proceeding. It calls for a collaborative information-gathering procedure independent of the panel proceedings and operating under different rules. There is no reason to conclude that it is initiated or administered in the same way by the DSB.

- (2) The EU asserts that purported textual linkages between Annex V and provisions of the SCM Agreement indicate a negative consensus rule for decisions related to Annex V.<sup>89</sup> The EU is wrong because the textual linkages asserted by the EU are coincidental usages of common words like “request” or “procedure,” and do not signal application to an Annex V procedure of a decision-making rule different from the one applied under Article 2.4 of the DSU and Article IX:1 of the WTO Agreement. Moreover, the EU never explains how its view that it was unnecessary to set out the negative consensus rule expressly in Annex V does not render inutile the phrase “unless the DSB decides by consensus not to” in 13 DSU and SCM Agreement provisions.
- (3) The EU contends that application of a negative consensus rule would render Annex V “wholly ineffective.”<sup>90</sup> Again, the EU is wrong. A positive consensus rule comports more with the collaborative nature of initiating an Annex V procedure and designating a representative of the DSB. In fact, given the structure of Annex V, a negative consensus rule would be unworkable.

60. Before addressing the flaws in these EU arguments in more detail, the United States notes that at one point the EU asserts that the Panel’s statement that “it may well be that the initiation of an Annex V procedure is not a ‘decision’ that is subject to consensus” meant that the Panel “agree{d} with the European Union.”<sup>91</sup> The EU knows this is not correct. In a letter on August 2, 2007, the EU cited that sentence and asked the Panel to “clarify how such a decision can be taken.”<sup>92</sup> The Panel responded by stating that “we considered it unnecessary to rule in the abstract on the issue of whether the initiation of an Annex V procedure is a ‘decision’ that is subject to consensus within the meaning of Article 2.4 of the DSU.”<sup>93</sup> Thus, the Panel explicitly declined to take a position on applicability of the positive consensus rule.

### *Overall framework of the DSU*

61. The “overall framework” of the DSU calls for the DSB to do a number of different things, among them: establish panels; adopt panel and Appellate Body reports; maintain surveillance of implementation of rulings and recommendations; authorize suspension of concessions and other obligations under the covered agreements; authorize the DSB chair to

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<sup>89</sup> EU third and fifth enumerated points. EU Appellant Submission, paras. 34 and 37.

<sup>90</sup> EU second, sixth, eighth, ninth, and tenth enumerated points. EU Appellant Submission, paras. 33, 38, and 40-42.

<sup>91</sup> EU Appellant Submission, para. 16, *citing* Panel Report, para. 7.21.

<sup>92</sup> Letter from the EC to the Panel, p. 1 (Aug. 2, 2007).

<sup>93</sup> Panel Communication of 30 August 2007, p. 1.

draft terms of reference for a panel; approve the addition of names to the Indicative List; make recommendations and rulings; establish the Appellate Body and appoint its members; approve reasonable periods of time for compliance with recommendations and rulings of the DSB; and consider whether to take further action when a compliance matter involves a developing country Member. Contrary to the EU argument, the DSU does not divide these functions into “actions” and “decisions.”

62. In fact, the DSU uses the word “act” or “action” in connection with the DSB only three times, in Articles 2.1, 21.7, and 21.8. The EU bases its proposed division of DSU activities into “actions” and “decisions” from the first of those references, which states that “[w]here the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.” This provision is not a framing principle.<sup>94</sup> It merely states a special rule identifying which Members may participate in dispute settlement matters for a subset of the agreements entrusted to the administration of the DSB. Articles 21.7 and 21.8 provide for the DSB to consider “action” it “might” take with regard to compliance disputes involving developing country Members. They do not indicate how the DSB would choose what “action” to take or indicate a form for the “action”. Thus, none of the uses of the term “action” in the DSU indicate the existence of the action/decision dichotomy posited by the EU, or apply a negative consensus rule to “actions.”

63. The EU also attempts to justify its division of DSB functions into “actions” and “decisions” by noting that Article 6.1 provides that “a panel shall be established . . . unless at that meeting the DSB decides by consensus not to establish a panel.” The EU argues that, because the Article frames the “decision” in terms of whether “not” to establish a panel, if the DSB actually does establish a panel, it cannot be seen as having taken a “decision” because it acted without the consensus of the Members that Article 2.4 requires for a “decision”.<sup>95</sup> The EU contends that the same holds true for adoption of a panel report under Article 16.4, adoption of an Appellate Body report under Article 17.14, or authorization of suspension of concessions under Article 22.6 or 22.7. This reading rests on a misperception of the nature of a decision. The ordinary meaning of that term is “[t]he action of coming to a determination or resolution with regard to any point or course of action; a resolution or conclusion arrived at.”<sup>96</sup> Under this

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<sup>94</sup> Even if Article 2.1 of the DSU could be interpreted as dividing DSB activities between the categories of “actions” and “decisions”, that would not mean that initiation of Annex V procedures or designation of a DSB representative was an “action.” Rather, the ordinary meanings of “action” and “decision” would need to be considered together to determine how to distinguish between them. The relevant meanings of “action” have a broad reach: “**2** The process or condition of acting or doing; the exertion of energy or influence; working, agency, operation . . . **3** A thing done, a deed, an act (usu. viewed as occupying some time in doing); (in *pl.*) freq. habitual or ordinary deeds, conduct.” *New Shorter Oxford English Dictionary*, p. 22. The relevant meaning of “decision” is “[t]he action of coming to a determination or resolution with regard to any point or course of action; a resolution or conclusion arrived at.” *New Shorter Oxford English Dictionary*, p. 608. As “decision” is one type of “action,” the term “action” in Article 2.1 can only signify those “actions” of the DSB that are not “decisions.” As explained above, initiating an Annex V procedure and designating a representative of the DSB are “decisions,” so they cannot be “actions” for purposes of Article 2.1.

<sup>95</sup> EU Appellant Submission, para. 27.

<sup>96</sup> *New Shorter Oxford English Dictionary*, p. 608.

definition, if an “action” “determines” or “resolves” a point or course of action, it is a “decision” regardless of whether it resolves in favor of or against taking the action. Thus, regardless of whether there is a consensus “not to establish a panel” or a panel is established because there is no such consensus, the DSB has still taken a decision with regard to establishment of a panel. The same holds true for the other examples cited by the EU.

64. Article 20 of the DSU confirms this conclusion. It bears the title “Time-frame for DSB Decisions,” and provides that

{u}nless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed.

The text does not mention the decision by negative consensus under Article 7.4, making clear that the result of the DSB “consider{ing} the panel or appellate report for adoption,” which it does mention, is the “decision” of the DSB referenced in the title. More generally, this categorization establishes that, contrary to the EU’s reasoning, a DSB function that occurs because the DSB failed to reach a negative consensus to block that action remains a “decision.” The DSB itself takes that view. When it establishes a panel, it declares that it “agreed to establish a panel”<sup>97</sup> and when it adopts a panel report, it states affirmatively that it “adopts” the report.<sup>98</sup> In both cases, the statements indicate that the DSB considered the question and reached a conclusion to move forward. In other words, when an action occurs after operation of the negative consensus rule, the DSB is not a passive spectator. It takes a decision with regard to that action.

65. Thus, to the extent that the “overall framework” is relevant to the decision rule for the Annex V process, it indicates that the DSB, acts by consensus pursuant to express language in the DSU and WTO Agreement, whereas other WTO bodies may act by consensus as a continuation of past practice. DSB decisions by negative consensus are the explicit exceptions that, together with the express language of Article 2.4 of the DSB prove the applicability of that rule in other situations. No such exceptions apply to initiation of Annex V procedures and the designation of a DSB representative.

### ***Relationship of Annex V procedures to panel proceedings***

66. Annex V creates an information-gathering procedure related to, but separate from, review by a panel of claims under Article 6 of the SCM Agreement. The Annex signals the separation

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<sup>97</sup> E.g., WT/DSB/M/194, paras. 54 and 61 (DSB meeting of 20 July 2005) (“The DSB took note of the statements and agreed to establish a panel”); WT/DSB/M/205, para. 73 (DSB meeting 17 February 2006) (“The DSB took note of the statements and agreed to establish a panel”); WT/DSB/M/292, para. 11 (“The DSB took note of the statements and agreed to establish a single panel”).

<sup>98</sup> E.g., WT/DSB/M/287, para. 76 (DSB meeting of 21 September 2010) (“The DSB took note of the statements and adopted the Panel Reports”); WT/DSB/M/288, para. 74 (25 October 2010) (“The DSB took note of the statements and adopted the Panel Report.”).

several ways. First, the information-gathering procedure is completely optional – either a complaining or responding party may request initiation, or neither may. The panel has no role in the process; only the DSB does. As the EU has noted, the process must end within 60 days of initiation,<sup>99</sup> which means that for a substantial part of the time, the panel will not have been composed. The Annex V procedure works differently, too. There is none of the detailed guidance on procedures that Articles 3, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of the DSU give to panels. Nor are there model procedures. There is not even clarity on *how* to gather the information – under Annex V, “{t}his process *may* include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member.”<sup>100</sup> The text does not indicate who would draft questions or who would evaluate whether they are “appropriate.” The DSB representative also has none of the authority of a panel – Annex V emphasizes that “{t}he *sole* purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious *subsequent* multilateral review of the dispute.”<sup>101</sup> This provision also highlights the separation from multilateral review by the panel, which is “subsequent” to the Annex V process. In short, the Annex V procedure is distinct from panel proceedings, and there is no basis to transpose procedural rules applicable to panels into the Annex V procedure.

67. The first, fourth, and seventh enumerated points made by the EU (paragraphs 21, 32, 35-36, and 39 of its appellant submission) all argue the opposite – that the Annex V process and a panel’s review of claims under Article 6 of the SCM Agreement are so “closely bound together”<sup>102</sup> that the same DSB decision-making rule must apply to both. This is a *non sequitur*. The relationship between two proceedings has nothing to do with the procedures applicable to their initiation or administration. DSB functions related to disputes may be taken by negative consensus, like establishment of a panel under Article 6.1, and others may be by positive consensus, like authorizing the Chair of the DSB to draft non-standard terms of reference under Article 7.3. Some steps, like requesting consultations, becoming a third party to a dispute under Article 10 or referring a matter to arbitration under Article 22.6, do not require any action by the DSB, whether by positive or negative consensus. The DSB’s application of different decision-making models for different steps of a dispute means that one cannot assume application of negative consensus simply because a procedure is related to a dispute.

68. Thus, contrary to the assertions in the EU’s first enumerated point,<sup>103</sup> the reference in Annex V, paragraph 2, to Article 7.4 of the SCM Agreement does not import the negative consensus decision-making process for establishing a panel under that Article into Annex V. Rather, the introductory phrase “{i}n cases where matters are referred to the DSB under paragraph 4 of Article 7,” merely sets a precondition – referral to the DSB – for the following clause, “the DSB shall, upon request, initiate the procedure . . . .” In fact, the express provision

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<sup>99</sup> EU Appellant Submission, para. 39.

<sup>100</sup> SCM Agreement, Annex V, para. 2 (emphasis added).

<sup>101</sup> SCM Agreement, Annex V, para. 4 (emphasis added).

<sup>102</sup> EU Appellant Submission, para. 39.

<sup>103</sup> EU Appellant Submission, para. 32. The EU makes the same point in paragraph 21.

for establishment of a panel by negative consensus in Article 7.4 and absence of any such rule for subsequent initiation of Annex V procedures indicates that negative consensus does not apply to initiation.

69. The EU’s fourth enumerated point also relates to the introductory phrase of Annex V, paragraph 2, but focuses on its allowance of the initiation of information-gathering procedures “{i}n cases where matters are referred to the DSB under paragraph 4 of Article 7.”<sup>104</sup> The EU is correct that “under” means “covered by” or “subject to the authority of,” but it misreads “under paragraph 4 of Article 7” when it asserts that the phrase signifies that the “cases” or “matters” in question are “subject to” the decision-making rule mentioned in Article 7.4.<sup>105</sup> “Under paragraph 4 of Article 7” is, in fact, an adverbial phrase modifying “referred” – not “cases” or “matters.” It serves merely to specify the provision pursuant to which the matter is “referred,” thereby making clear that Annex V is unavailable when a panel is established under some different provision, such as Article 4.4 or 30 of the SCM Agreement. It does not suggest that Article 7.4 governs subsequent procedural steps in the dispute, such as “initiation” of an Annex V process or “designation” of a DSB representative.

70. The EU makes a similar error in arguing that the use of the words “cases” and “matters” means that the Annex V procedure “does not constitute a separate case or matter” from the one referred to the DSB.<sup>106</sup> The DSU does not use “case” in its sense of “a legal action or suit”<sup>107</sup> to refer to proceedings before a panel. Therefore, in Annex V, paragraph 2, “case” has its alternative meaning of “[a] thing that befalls or happens, an event, occurrence, chance, hazard.”<sup>108</sup> The phrase “in cases where” serves a function similar to “in instances where” or “in the event that” as text signaling a situation that will have certain consequences.<sup>109</sup> The EU also forgets that that the Appellate Body has found that the “matter referred to the DSB” under Article 6.2 of the DSU, which is the analog of Article 7.4 of the SCM Agreement, “consists of two elements: the specific measures at issue and the legal basis of the complaint (or the claims).”<sup>110</sup> The Annex V procedure is neither “a measure at issue” nor the “legal basis for a complaint” – it is one procedural step that may occur in the process of addressing a matter. Thus, it is nonsensical to characterize it as a “case” or “matter.” If the EU’s point is that an Annex V procedure relates to the same substantive “matter” as subsequent proceedings before a panel, that observation is irrelevant. The fact that two legal procedures relate to the same claim does not mean that they follow the same rules.

71. The EU also notes (in its seventh enumerated point) that the 60-day deadline for completing an Annex V procedure starts upon establishment of a panel, and argues that this

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<sup>104</sup> EU Appellant Submission, paras. 35-36.

<sup>105</sup> EU Appellant Submission, para. 36.

<sup>106</sup> EU Appellant Submission, para. 36.

<sup>107</sup> *New Shorter Oxford English Dictionary*, p. 345.

<sup>108</sup> *New Shorter Oxford English Dictionary*, p. 345.

<sup>109</sup> In a sense, it is the textual equivalent of the “if” in a logical “if X then Y” statement.

<sup>110</sup> *Guatemala – Cement I (AB)*, para. 72 (emphasis in original).

reflects an assumption that initiation of an information-gathering procedure will occur upon establishment.<sup>111</sup> To the contrary, Annex V, paragraph 5, requires that the process “be completed within 60 dates of the date on which the matter has been referred to the DSB.” Thus, it sets an outer limit for completing the process without regard for the date of initiation. A party expecting a lengthy process might have an incentive to request initiation at the earliest opportunity, but Annex V in general and paragraph 5 in particular impose no obligation to do so. As for the information-gathering procedure having a “close link” to the panel request,<sup>112</sup> that is a truism. All steps of resolving a matter referred to the DSB are closely linked to the panel request because that is what defines the “matter.” It does not mean that the rules for establishing a panel (such as negative consensus) apply to subsequent steps in the process.

### *Purported textual linkages*

72. The EU’s third and fifth enumerated points argue that the use in Annex V of the terms “request” and “procedure,” which also appear in the DSU, signals that a negative consensus rule applies to initiation of an information-gathering procedure.<sup>113</sup> The terms carry no such significance. “Request” and “procedure” are commonplace words and appear throughout the DSU. The EU notes that the “request” of a Member triggers a decision by negative consensus under Articles 22.6, first sentence, and 22.7, final sentence, of the DSU. However, in many situations under the DSU, a Member’s request leads to a decision by positive consensus, such as a request under Article 6.2 of the DSU that a panel use other than standard terms of reference. In fact, although the EU points to the use of “request” in Article 6.1 of the DSU as supporting the view that any “request” is subject to negative consensus, a Member’s request to establish a panel is, in the first instance, subject to DSB decision-making by positive consensus. It is only at the second meeting at which the request appears on the agenda that the express language of Article 6.1 applies a negative consensus rule.<sup>114</sup> Thus, use of the word “request” in Annex V, paragraph 2, does not indicate application of negative consensus decision-making.

73. The word “procedure” in Annex V, paragraph 2, does link to the “rules and procedures” administered by the DSB under Article 2.1 and Appendix 2 of the DSU. However, that does not support the conclusion the EU seeks to draw. The DSB administers many procedures through positive consensus, including decisions establishing a single panel or modifying procedures for particular disputes. Thus, use of the word “procedures” to describe information-gathering under Annex V does not signal decision-making by negative consensus, either.

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<sup>111</sup> EU Appellant Submission, para. 7.

<sup>112</sup> EU Appellant, paragraphs 34 and 37.

<sup>113</sup> EU Appellant Submission, paras. 34 and 37.

<sup>114</sup> Were a Member’s “request” not first subject to positive consensus, the EU could not have blocked the establishment of the panel in *EC – Large Civil Aircraft*, at the first DSB meeting at which the request was considered. WT/DSB/M/191, para 8 (DSB meeting of 13 June 2005) (“Finally, he said that the EC objected to the establishment of a panel at the present meeting.”).



### *The effectiveness of Annex V*

74. As noted above, Annex V establishes a collaborative process. It specifies almost none of the details as to how to conduct information gathering. There are no default procedures in place, and no method for designating a DSB representative if the parties cannot agree. That representative has no authority beyond “ensur[ing] the timely development of the information necessary to facilitate expeditious subsequent multilateral review.”<sup>115</sup> It is also significant that the panel can conduct any of the activities provided under Annex V, and has the authority to ask parties for information. Requiring a positive consensus is consistent with the collaborative nature of this basically supplemental exercise. This is especially true because Annex V envisages the procedure including questions to any Member that potentially has relevant information, even if that Member is not a party or third party to the dispute.

75. However, the EU’s second, sixth, eighth, ninth, and tenth points<sup>116</sup> argue that reading Annex V to require a positive consensus for initiation of an information-gathering procedure and designation of a DSB representative would render Annex V “wholly ineffective.”<sup>117</sup> To begin, nothing in the 16-year history of the DSB warrants the EU’s alarmism. The DSB has used positive consensus for many decisions related to disputes without becoming “wholly ineffective.” For example, the DSB selects its Chair and also handles extension of deadlines related to disputes by consensus.<sup>118</sup> Moreover, the DSB has always operated under a positive consensus rule for initiation of Annex V procedures, and was able to successfully initiate two Annex V procedures only eight months before the EU’s unsuccessful request.<sup>119</sup>

76. The EU notes in its second enumerated point that Annex V, paragraph 2, frames initiation of an information-gathering procedure as something “the DSB shall” do, and contends that this formulation is not used in any dispute settlement procedure that operates by positive consensus.<sup>120</sup> However, the EU fails to note that in each of the instances it cites, the DSU explicitly provides for negative consensus. If the DSU imposed negative consensus on all dispute-related issues, it certainly would not incorporate a general rule of positive consensus, and then specifically invoke a negative consensus rule for some procedures, and remain silent for others. Thus, the absence of an explicit application of negative consensus for initiation of an Annex V procedure or designation of a DSB representative means that the standard positive consensus rule prevails. The EU argues that Members would not have required the DSB to act by providing that it “shall initiate” a procedure, but then have given one Member the opportunity to block action. However, Article 2.4 is equally mandatory, stating that “{w}here the rules and

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<sup>115</sup> SCM Agreement, Annex V, para. 4.

<sup>116</sup> EU Appellant Submission, paras. 33, 38, and 40-42.

<sup>117</sup> EU Appellant Submission, para. 33.

<sup>118</sup> DSB/M/280, para. 1 (appointment of DSB chair) and DSB/M/292, paras. 17-18; DSB/M/291, paras. 83-84; DSBM/M/290, paras. 57-58 (extensions of time limits for commencing appeals).

<sup>119</sup> DSB/M/197, paras. 6-7 and 16-17.

<sup>120</sup> EU Appellant Submission, para. 33.

procedures of this Understanding provide for the DSB to take a decision, it *shall* do so by consensus.”<sup>121</sup>

77. These two mandates reflect a balance in the system – there are many instances where the DSB is expected to act, but it must do so by consensus. Experience shows that Members have taken those provisions seriously, but where there is disagreement on the precise decision to be taken, the consensus rule requires that Members work together to find consensus solutions. That work can be hard, but the rule ensures that when the DSB reaches a solution, it reflects the collective interests of all Members. In this case, the United States emphasized its willingness to work with the EU to find a constructive way forward, and made proposals about how to do so. The EU, however, declined.

78. The EU also observes in its sixth enumerated point<sup>122</sup> that Annex V, paragraph 1, provides that “{e}very Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7.” This provision creates a generalized obligation, applicable to “every” Member throughout the course of a panel’s deliberations. Thus, it covers the provision of information sought by the panel under Article 13 of the DSU, the submission by parties of information in support of their arguments, and any other procedure that “develops” information. The EU argues that reading DSB initiation of Annex V procedures as a positive consensus decision would create “a conflict that cannot be resolved” between “an obligation to cooperate, but a right to do nothing.”<sup>123</sup> It does not. Annex V, paragraph 1, applies to the act of developing evidence, and does not require Members (or panels) to use any particular procedural mechanism to do so. It is an obligation separate and independent from the procedure that may be established under paragraph 2. This is only affirmed by the fact that the obligation applies even if there is no request under paragraph 2 for an Annex V procedure. Therefore, recognizing Annex V, paragraph 2, as requiring a positive consensus to initiate information-gathering procedures would not allow Members “to do nothing.” They would remain obligated to cooperate in all phases of the panel’s deliberations.<sup>124</sup>

79. The EU’s eighth enumerated point asserts that Annex V, paragraphs 6 through 9, provides consequences “in the event the defending Member fails to cooperate,” and that allowing Members to block initiation of the information-gathering procedure would be inconsistent with this framework.<sup>125</sup> In fact, Annex V recognizes the potential that complaining parties will fail to cooperate, and authorizes panels to use the best information available or draw adverse inferences

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<sup>121</sup> Emphasis added. Similarly, Article IX:1 of the WTO Agreement provides that “{d}ecisions by the General Council when convened as the Dispute Settlement Body shall be taken *only* in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understand.” (emphasis added).

<sup>122</sup> EU Appellant Submission, para. 38.

<sup>123</sup> EU Appellant Submission, para. 38.

<sup>124</sup> It is also noteworthy that the obligation under Annex V, paragraph 1, to cooperate applies equally to Members asking the Panel to gather information, and would preclude overly burdensome requests, or requests for irrelevant information.

<sup>125</sup> EU Appellant Submission, para. 8.

with regard to *any* party.<sup>126</sup> It explicitly requires panels to take account of the advice of the DSB representative as to “the reasonableness of any requests for information.”<sup>127</sup> But the more important point is that the consequences of failing to cooperate with an Annex V procedure are essentially the same as those of failing to cooperate with proceedings before the panel itself. Thus, blocking Annex V would not relieve a Member from responding to requests for information, or shield the Member from the consequences of failing to do so.

80. The EU’s ninth enumerated point observes that if a responding government in a domestic countervailing duty investigation fails to cooperate, the investigating authority may rely on the best information available, and argues for interpreting Annex V to give panels the same authority.<sup>128</sup> However, the EU’s analogy proves the opposite point. Article 12.7 of the SCM Agreement allows use of best information available if a party fails to provide necessary information *during the investigation by the authorities*. Such a proceeding may begin only if the authorities have evaluated the application of the complaining industry and determined under Article 11.3 that “the evidence provided in the application” is “sufficient to justify the initiation of an investigation.” Thus, the authorities’ requests for information are analogous to a panel’s requests for information under Article 13 of the DSU. As noted above, panels may use the best information available if a party fails to provide necessary information at this stage.

81. In contrast, Annex V creates an information-gathering process with no analog in a domestic countervailing duty proceeding, as it occurs before the complaining party has explained in detail why it is entitled to relief. This stage corresponds to the period preceding the filing of an application, a time when the complaining party bears the burden of establishing the factual and legal basis for commencing a proceeding, and the investigating authorities have no right to ask the potential responding party for information to help with that process. The comparison underscores that panels during their proceedings have ample capabilities to perform a robust review of allegations of subsidization even if there is no Annex V process, and that their capabilities are no less than those of domestic investigating authorities.

82. The EU’s tenth enumerated point cites the Appellate Body’s finding that the authority “to draw adverse inferences from a Member’s refusal to provide information . . . seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement.”<sup>129</sup> That is just the point. The presence of an Annex V procedure does not alter a panel’s information-gathering capabilities. Thus, there is no foundation to the EU’s arguments that the Panel’s interpretation of Annex V, paragraph 2 will prevent future panels from gathering the information they need.

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<sup>126</sup> SCM Agreement, Annex V, paras. 7-8.

<sup>127</sup> SCM Agreement, Annex V, para. 8.

<sup>128</sup> EU Appellant Submission, para. 9.

<sup>129</sup> EU Appellant Submission, para. 42, note 58, *quoting Canada – Aircraft*, para. 202.

### *Additional considerations*

83. The Appellate Body has found that the object and purpose of the SCM Agreement “is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions.”<sup>130</sup> Initiation by positive consensus conforms with this object and purpose by requiring a collaborative approach that balances the needs and sensitivities of the complaining party and the responding party. The EU’s discussion of the object and purpose makes no reference to this often repeated view from the Appellate Body. Instead, it argues that “the overall balance and effectiveness of the *SCM Agreement* would be severely hampered” if initiation of an Annex V procedure required positive consensus of the DSB.<sup>131</sup> The opposite is the case, as the EU’s actions demonstrate. Under its approach, a negative consensus decision-making process for initiating Annex V would allow the complaining party to dictate the procedural rules.

84. In addition, the EU goes even further to argue that not only does the DSB designate a representative by negative consensus, but the complaining party unilaterally chooses the candidate for the post.<sup>132</sup> Neither the SCM Agreement nor the DSU specifies how to select a candidate for designation as DSB representative, and the view that the complaining party unilaterally has this right highlights the degree to which the EU appeal on this issue relies on creating rules and procedures that appear nowhere in the text. Needless to say, under the EU approach, the complaining party would have no incentive to reach agreement with the responding party, as the complaining party would be able to impose its will by fiat if the responding party did not capitulate to every demand. This one-sided result is directly contrary to the object and purpose of the SCM Agreement, which creates a “delicate balance” between the interests of complaining and responding parties.<sup>133</sup>

85. The EU also asserts that “it remains clear” from the negotiating history that “the linked Annex V procedure would follow the same procedure” as Article 7.4 of the SCM Agreement.<sup>134</sup> The EU never explains what that history is, or how it makes the asserted conclusion “clear.” Therefore, the Appellate Body should give no weight to this EU assertion.

86. The EU ends its discussion by quoting at length from a proposal made by the United States that inspired the provisions of Annex V in the SCM Agreement.<sup>135</sup> However, the EU fails to recognize that the United States premised its proposal on the then-existing subsidy code’s lack

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<sup>130</sup> *US – Softwood Lumber IV (AB)*, para. 64, citing *US – Carbon Steel (AB)*, paras. 73-74.

<sup>131</sup> EU Appellant Submission, para. 45.

<sup>132</sup> EC Request for Preliminary Rulings, para. 44; EU Appellant Submission, para. 52. The United States notes that, under the EU approach, nothing would prevent the complaining party from naming one of its own nationals as the DSB representative. The DSB would have no authority to reject that choice.

<sup>133</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 301, quoting *US – Softwood Lumber IV (AB)*, para. 64 and *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 115.

<sup>134</sup> EU Appellant Submission, para. 45.

<sup>135</sup> EU Appellant Submission, para. 46, quoting MTN.GNG/NG10/W/40, pp. 2-3.

of “an information-gathering mechanism or a means for assuring the co-operation of the party in possession of information necessary to demonstrate adverse effects.”<sup>136</sup> The situation is different under the DSU. As the Appellate Body has observed, “the authority to draw adverse inferences from a Member’s refusal to provide information . . . seems to us an ordinary aspect of the task to all panels to determine the relevant facts of any dispute involving any covered agreement.”<sup>137</sup> The potential that a panel will draw inferences unfavorable to a party’s interests provides a strong incentive for cooperation. Thus, whatever motive Members had for adding Annex V to the SCM Agreement, it cannot have been the U.S. concern that the dispute settlement system had no “commitment to cooperate” with a panel’s information-gathering process.

87. Finally, with respect to the EU’s frequent assertions of U.S. “noncooperation,” it is useful to recall that the EU was, in reality, requesting an unprecedented *second* Annex V procedure with regard to claims that had just been subject to such a procedure. When the DSB established the panel in the dispute that would be designated *EC – Large Civil Aircraft (Second Dispute)*, the EU stated that it sought initiation of the information-gathering procedure “and the DSB had *already* designated, pursuant to paragraph 4 of Annex V of the SCM Agreement, Mr. Diego-Fernández to serve as a facilitator in the information-gathering proces.”<sup>138</sup> A month later, the EU explained its position further, stating that “{t}here was no reason not to resume the Annex V procedure immediately” because “there was a facilitator as well as agreed confidentiality rules” from the procedure in *EC – Large Civil Aircraft (First Complaint)*.<sup>139</sup> At another meeting, the EU added that “it was merely proposing a way to allow the facilitator to complete the existing factual record.”<sup>140</sup> It was only after this effort failed that the EU sought to characterize its request as a “new” Annex V procedure.

88. Nothing in Annex V allows a party to obtain such a procedure, whether viewed as a unilateral resumption of the earlier information-gathering procedure or a new information-gathering procedure covering much of the same ground. As the EU has noted, the process must end within 60 days of establishment of a panel. The panel plays no role in the information-gathering procedure, and the recourse for a party dissatisfied with another party’s cooperation is to seek a panel finding of noncooperation based on the advice of the DSB representative under Annex V, paragraph 5, as to the “reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.” There is no provision for extension, and in particular not for a unilateral request for extension.

89. Yet that is exactly what the EU has sought, first from the DSB, then from the Panel, and now from the Appellate Body. If the EU considered that the United States failed to cooperate with the information-gathering procedure in *US – Large Civil Aircraft (First Complaint)*, paragraph 8 of Annex V is clear as to the remedy – obtain advice from the DSB representative with a view to seeking a finding of non-cooperation from the panel. The EU has never claimed

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<sup>136</sup> MTN.GNG/NG10/W/40, p. 2.

<sup>137</sup> *Canada – Aircraft (AB)*, para. 202.

<sup>138</sup> WT/DSB/M/205, para. 69 (emphasis added).

<sup>139</sup> WT/DSB/M/206, para. 19.

<sup>140</sup> WT/DSB/M/207, para. 93.

to have sought such advice, and neither the DSB representative or the panel in *US – Large Civil Aircraft (First Complaint)* found that the United States failed to cooperate.

90. It is also important to note that the Panel did not consider it necessary to reach this issue, as it concluded that, regardless of the applicability of a negative consensus rule, the demonstrable absence of any action by the DSB to initiate the Annex V procedure meant that it had not been initiated. If the Appellate Body affirms the Panel’s finding on these grounds, it will not need to address the decision-making rule, either.

**F. The Panel did not have the authority to rule that an Annex V process had been initiated, that the DSB had appointed a representative, or that the U.S. had an obligation to answer the questions formulated by the EU.**

91. There is nothing in the DSU or elsewhere in the covered agreements that gives panels the authority to “rule” on the conduct of the DSB. No provision of the WTO agreements allows panels to describe the duties the DSB must perform, define the procedures it must follow in performing those duties, or evaluate whether it has done so properly. In fact, Article 2.1 of the DSU provides that it is the DSB itself that is “established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements.” The DSU does not allow a Member to request dispute settlement consultations with the DSB, or seek establishment of a panel to review the DSB’s compliance with its obligations under the covered agreements. Neither Annex V nor the rest of the SCM Agreement provides a panel the authority to “rule” on whether the DSB has acted properly.

92. Furthermore, a panel’s terms of reference limit the scope of its authority. In this case, the Panel had the standard terms of reference to examine the EU’s claims that certain U.S. federal, state, and local measures provide subsidies to U.S. large civil aircraft producers that are inconsistent with the SCM Agreement.<sup>141</sup> Those terms of reference do not allow the Panel to determine whether the DSB, or any other WTO body, has properly carried out its duties. The DSB’s decision on whether to initiate the Annex V procedure is not a “measure” subject to dispute settlement, nor was it (nor could it have been) in the terms of reference of the Panel.

93. The EU argues that the DSU itself authorizes panels to settle disputes regarding the interpretation of the DSU.<sup>142</sup> This statement is far too broad and vague. The DSU is a covered agreement, and a Member may bring a claim that another Member’s measure is inconsistent with the DSU. However, in this instance, the EU’s claim does not go to the WTO-consistency of the measure of a Member – it goes to the question of whether the DSB exercised its duties in a manner consistent with the DSU. The DSU does not authorize Members to bring a dispute with regard to the conduct of a WTO body. And, that is exactly what the EU seeks to do in this dispute – have a panel find that the DSB has violated the DSU by failing to initiate an Annex V procedure.

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<sup>141</sup> Request for the Establishment of a Panel by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/2, pp. 12-13 (23 January 2006).

<sup>142</sup> EU Appellant Submission, para. 55.

94. The EU is a Member of the DSB. If the EU had concerns about how the DSB was implementing its responsibilities, the EU had recourse to the DSB, which has handled many issues concerning its operations, and has its own tools, traditions, and procedures for resolving those issues. The EU did start along that path. It noted that the DSB had not actually initiated an Annex V procedure, and sought to change that result by raising the issue again.<sup>143</sup> But the EU's effort failed in that the DSB Chair proposed, and the DSB agreed, only to take note of the statements. The Chair also proposed, and the DSB agreed, to suspend consideration of the item "in order to allow consultations with a view to finding a way forward."<sup>144</sup> The EU cannot circumvent the DSB's procedures and launch a collateral attack on that body's actions (or decisions) by means of seeking a panel finding.

95. The EU also contends that the Panel had "the implied or inherent power, and indeed the obligation, to consider the matter raised by the EU."<sup>145</sup> If the point is that the Panel could "consider" the issue, the EU's conclusion is correct, albeit for the wrong reason. Article 11 of the DSU instructs panels to make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and to make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." The standard terms of reference under Article 7 of the DSU, which were reflected in the Panel's terms of reference, contain the same authorization. Thus, the Panel had explicit authority (rather than "implied or inherent power") to "assess" the issue of whether it had the competence to grant the relief requested by the EU.

96. However, the Panel did not have the authority to "rule" that the DSB took a decision it manifestly did not take, or to find that the DSB violated the DSU by failing to take that decision. Article 11 of the DSU makes this point clear when it states that "{t}he function of panels is to assist the DSB in discharging its responsibilities under this Understanding" and "assist" the DSB in making recommendations and rulings provided for in the covered agreements.<sup>146</sup> The standard terms of reference in Article 7 of the DSU, which applied to the Panel, similarly charge a panel "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." The ordinary meaning of "assist" is "{h}elp (a person *in, to do, with*, etc.; a person in necessity; an action process or result); support, further, promote."<sup>147</sup> To rule that the DSB took a decision it manifestly did not take, or that the DSB violated the DSU, would go far beyond "assisting" the DSB, and move into "opposing" or "supplanting" it, or reviewing its actions.

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<sup>143</sup> WT/DSB/M/212, para. 67 ("Th{e} EC considered that this decision should have been automatically adopted at the previous DSB meeting. . . . The EC had asked for this item to be included on the agenda again so that there could be no doubt as to its position and insisted that the decision be reflected in the minutes of the present meeting. The Annex V procedure was initiated and Mr. Mateo Diego-Fernández was the facilitator." (italics added))

<sup>144</sup> WT/DSB/M/212, paras. 70-71.

<sup>145</sup> EU Appellant Submission, para. 55.

<sup>146</sup> Emphasis added.

<sup>147</sup> *New Shorter Oxford English Dictionary*, p. 132.

97. Article 19 of the DSU confirms that panels cannot make findings with regard to the DSB’s actions. It provides that “{w}here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the *Member* concerned bring the *measure* into conformity with that agreement.”<sup>148</sup> As the DSB is not a “Member” and its decisions are not “measures,” this provision makes clear that panels may not recommend that the DSB take particular decisions. Moreover, reading the power to review the actions of WTO bodies into the DSU would raise substantial systemic issues

98. The EU notes that panels frequently address procedural issues that arise during the course of disputes, even though the terms of reference do not cover the affected provisions of the DSU. This observation misses the point. Panels addressing those issues are exercising their authority to manage their own proceedings. Here, the issue is different. The Annex V procedure is separate from the panel’s proceeding. A panel has no authority to manage that procedure. Furthermore, those other panels referenced were not addressing the procedural conduct of other WTO bodies.

**G. There is no legal justification for the EU request that the Appellate Body take adverse inferences against the United States.**

99. The EU has cited no valid legal authority for taking adverse inferences in the situation it has outlined, and there are, in fact, none. It asks the Appellate Body to find “as a matter of law” that the Annex V procedure “was initiated and/or is deemed to have been initiated and/or should have been initiated.”<sup>149</sup> It then argues that by making the “DSB statements referenced above” and “refus{ing} to answer the questions set out in the European Union’s letters,” the United States “failed to comply with its obligations under Annex V, paragraph 1” and, therefore, paragraphs 6 through 9 of Annex V authorize the taking of adverse inferences.<sup>150</sup> Nothing in this chain of reasoning triggers the adverse inferences pursuant to paragraphs 6 through 9 of Annex V.

100. As an initial point, “making DSB statements” cannot represent “noncooperation” with a Member’s obligations. Members are generally free to make any statements they consider appropriate in a meeting of a WTO body. The DSU mentions parties’ interventions at DSB meetings only twice, in Articles 16.4 and 17.14 and then solely to clarify that application of the negative consensus rule “is without prejudice to the right of Members to express their views” on a panel or Appellate Body report. Thus, Members may make any intervention they consider appropriate, even if it involves raising concerns with the legal reasoning in a report. While the EU may disagree with the U.S. interventions, nothing in the covered agreements prevented the

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<sup>148</sup> Emphasis added.

<sup>149</sup> The United States notes that in its preliminary ruling request, the only ruling the EU requested with regard to the DSB was that the Panel “rule that the Annex V procedure requested by the EC . . . has been initiated.” EC Preliminary Ruling Request, para. 58. Thus, in requesting the Appellate Body to find, in the alternative, that the Annex V procedure “is deemed to have been initiated” or “should have been initiated,” the EU is asking the Appellate Body to reverse the Panel for failing to make a finding that the EU never requested and, therefore, the Panel never examined.

<sup>150</sup> EU Appellant Submission, para. 52.



United States from making these statements, or creates any negative consequence for having done so.

101. As the EU recognizes, Annex V, paragraph 7, authorizes a Panel to take adverse inferences only if there has been an Annex V procedure and there are “instances of non-cooperation by any party.” Before taking an adverse inference, Annex V, paragraph 8, *requires* the Panel to consider “the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.”

102. The EU attempts to elide these requirements by asserting U.S. noncooperation and consequent adverse inferences as a foregone conclusion of an Appellate Body finding that the Annex V procedure “was initiated and/or is deemed to have been initiated and/or should have been initiated.” It also assumes that the information requests were “reasonable” – a view that the United States disputed vigorously throughout the proceedings, and a finding that the Panel never made. The DSU and SCM Agreement do not permit this approach. Drawing adverse inferences is a serious matter, and the EU’s reasoning – crammed into space of two bullet points in one paragraph – is too sparse and does not support the result it seeks. A more detailed consideration of the arguments reveals that the three alternative arguments the EU posits in the small space of two bullet points in a single paragraph do not justify adverse inferences under Annex V, paragraphs 6 through 9.

***Alternative 1: Finding that an Annex V procedure “was initiated”***

103. This alternative involves a finding that, by operation of law, the EU’s request for initiation of an Annex V procedure resulted in initiation without any formal action by the DSB. In this instance, however, the DSU and SCM Agreement do not allow a conclusion that the U.S. actions constituted “non-cooperation” or that Annex V, paragraph 7, allowed the taking of adverse inferences.

104. First, the question of whether a party cooperated is a question of fact. The parties disagree vehemently about the facts of the situation, and the Panel did not make findings to resolve those disagreements. Moreover, Annex V, paragraph 8 *requires* a panel evaluating a party’s cooperation to first consider whether the party acted in a “timely and cooperative *manner*.” The Panel, as the trier of fact, was uniquely positioned to observe and evaluate the manner in which the parties approached information gathering. Annex V, paragraph 8, also *requires* consideration of the advice of the DSB representative. As there was no such advice, and the Appellate Body cannot duplicate the Panel’s experience with the manner in which parties participated in information gathering, a conclusion under paragraph 7 is legally impossible.

105. Should the Appellate Body conclude that the Annex V process was initiated and consider whether it may stand in the shoes of the Panel and make a finding that “information is unavailable due to non-cooperation,” and whether it “may complete the record” or “draw adverse inferences from instances of noncooperation,” several facts are noteworthy:

- If the Appellate Body finds that the Annex V procedure began in spite of the U.S. DSB statements, they cannot be a form of “noncooperation” because they will not have stopped anything from happening.
- At that point, the Chair of the DSB, Mr. Diego-Fernández, and the Panel all took the position that no Annex V procedure had begun. The U.S. reliance on these authorities in taking the view that it had no obligation to answer the questions was clearly reasonable, and thus its acts could not constitute “non-cooperation.”
- The United States submitted a mass of information to the Panel addressing questions posed by the Panel and the arguments raised by the EU.
- In spite of repeated EU requests to find that the United States had refused to cooperate in the information-gathering process, the Panel did not make any such finding.

Thus, the United States did not engage in “noncooperation”, and taking into account the timeliness and cooperativeness of the U.S. submission of information would preclude any use of adverse inferences.

***Alternative 2: Finding that an Annex V procedure “is deemed to have been initiated”***

106. This alternative is essentially backward-looking. “Deeming” the initiation of the Annex V process implies that the process was not actually initiated in the past, but that the adjudicator will view the past as if the Annex V process had been initiated. This alternative poses a different question than alternative 1, namely, whether the United States can be “deemed” to have failed to cooperate if the Annex V procedure is “deemed” to have been initiated. However, the result is the same – nothing in the DSU and SCM Agreement allows a conclusion that the U.S. actions constituted “non-cooperation” or that Annex V, paragraph 7, allowed the taking of adverse inferences.

107. The critical point is that, whether posed as a matter of actions in the past or as a matter of retrospective “deeming,” the question of cooperation is a matter of fact based to significant extent on the observations of the decision maker. Since there is disagreement about the facts and the Appellate Body cannot duplicate, at this remove, the Panel’s experience with the parties, completing the analysis as to whether to deem the United States non-cooperative is impossible.

108. Should the Appellate Body consider that it can undertake an analysis of whether the United States failed to cooperate, the facts noted with regard to alternative 1 are equally relevant here. In particular, the extensive evidence submitted by the United States establishes that it should be “deemed” to have cooperated.

***Alternative 3: Finding that an Annex V procedure “should have been initiated”***

109. This alternative recognizes that initiation did not occur, and does not pretend to find otherwise by operation of law. Instead, it treats non-initiation as an error that resulted from the view – endorsed by DSB practice, the DSB chair, the EU’s proposed facilitator, Mr. Diego-

Fernández, and the EU itself at a prior DSB meeting – that initiation of an Annex V procedure is by positive consensus. If the Appellate Body were to find that the United States erred in adhering to that widely shared view, nothing in the DSU or the SCM Agreement justifies the drawing of adverse inferences. Annex V, paragraph 7, only allows adverse inferences “from instances of non-cooperation by any party involved in the information-gathering process.” In this alternative, there would have been no “party involved in the information-gathering process” because there would have been (however mistakenly) no “information-gathering process.”

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110. In sum, even if the Appellate Body were to find that the Annex V procedure “was initiated and/or is deemed to have been initiated and/or should have been initiated,” such a finding would not support the follow-on conclusions the EU seeks to draw, that the United States failed to cooperate or that Annex V, paragraph 7, authorizes adverse inferences.

#### **H. The rulings requested by the EU are improper.**

111. Aside from the fact that the EU’s legal arguments are meritless, the remedies that the EU seeks are manifestly improper. As noted in the preceding section, the United States in this process has relied in good faith on: the lack of a decision by the DSB to initiate procedures under Annex V in *EC – Large Civil Aircraft (Second Complaint)*, Mr. Diego-Fernández’s conclusion that he could not agree to the EU request that he serve as DSB representative, and the Panel’s preliminary ruling and ultimate finding that no such procedure had begun. It has responded fully and completely to every request for information made by the Panel. There is, therefore, no basis in fact to grant the EU’s request for a finding that the United States “refus{ed} to co-operate in the information-gathering process” or “failed to comply with its obligations under Annex V, paragraph 1, first sentence.”<sup>151</sup> There is accordingly no basis the EU argument that paragraphs 6 through 9 of Annex V justify a finding that the Panel should have used “adverse inferences” and the best information otherwise available to make its findings.<sup>152</sup>

112. The EU also asks, “independent of its requests for reversal and completion of the analysis,” that the Appellate Body “bear in mind” the EU’s characterizations of U.S. actions and “{i}n case of doubt or evidentiary conflict . . . rule in favor of the EU”<sup>153</sup> The EU cites no basis under the DSU or Annex V for this request, and there is none. In fact, the Appellate Body has rejected past EU efforts to obtain this sort of punitive approach to evaluation of the evidence:

As we emphasized in *Canada – Aircraft*, under Article 11 of the DSU, a panel must draw inferences on the basis of all of the facts of record relevant to the particular determination to be made. Where a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will

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<sup>151</sup> EU Appellant Submission, para. 52, third bullet point.

<sup>152</sup> EU Appellant Submission, para. 52, fourth bullet point. The EU also asserts that the Panel was justified to “complete the record as necessary relying on best information otherwise available.” The United States considers that, except as indicated in the U.S. Other Appellant Submission, the Panel used the best information on the record before it throughout the report, and that in most cases, that was the information supplied by the United States.

<sup>153</sup> EU Appellant Submission, para. 53.

be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn. However, if a panel were to ignore or disregard other relevant facts, it would fail to make an “objective assessment” under Article 11 of the DSU.<sup>154</sup>

Of course, such an analysis would have to consider *why* particular information was unavailable. Much of the information that the EU requested was unavailable because so much time (in some cases, 20 years) had passed, or because the EU refused to identify the information with sufficient specificity, or because the information simply did not exist.<sup>155</sup> In such cases, a party’s inability to provide information, despite its best efforts, nonetheless reflects *full* cooperation.

113. It is also useful to bear in mind that the EU made numerous requests that the Panel exercise its right under Article 13 of the DSU to ask the United States to submit huge volumes of information of no possible relevance to the inquiry.<sup>156</sup> The Panel indicated that it would “give careful consideration to whether such information is necessary to resolve the matter before the Panel.”<sup>157</sup> The Panel asked many questions over the course of the dispute, using a few of the questions suggested by the EU, modifying some, and excluding others. The EU did not appeal that aspect of the Panel’s deliberations. Thus, any information related to questions the Panel did not ask was not, in the Panel’s view, “necessary to resolve the matter before the Panel.” With regard to the questions the Panel did ask, it never found that the United States failed to cooperate. The United States cannot be criticized for “non-cooperation” with regard to information that the Panel did not consider necessary, or for information that it submitted and the Panel considered to be responsive. Based on the EU’s acceptance of the Panel’s exercise of its rights under Article 13, this is true of *all* the information before the Panel, which demonstrates that the assertions of “non-cooperation” had no effect on the outcome of the dispute.

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<sup>154</sup> *US – Wheat Gluten (AB)*, para. 174, citing *Canada – Aircraft (AB)*, paras. 204-205.

<sup>155</sup> *E.g.*, US FWS, para. 212, note 305; US Comment on EC RPQ 2(a), paras. 7-8; US Comment on EC RPQ 109, para. 8; US Comment on EC RPQ 171, paras. 292, 294, 296; US Comment on EC RPQ 196(i), para. 333; US Comment on EC RPQ 316(a), para. 4; US Comment on EC RPQ 317, para. 13; US Comment on EC RPQ 330, paras. 78-80.

<sup>156</sup> *E.g.*, US Comment on EC RPQ 171, paras. 292, 294, 296; The European Communities’ Questions for the United States Pursuant to Annex V of the Agreement on Subsidies and Countervailing Measures, questions 75(d), (h), (k), (l), (o), (p), 78, 95(b) (regarding reimbursable Space Act Agreements), 99 (regarding reimbursable Space Act Agreements), 114, 130 (h), (k), (l), (o), (p), and 165 (May 23, 2006).

<sup>157</sup> Communication from the Panel, p. 2 (30 August 2007).

### III. ALLOCATION OF PATENT RIGHTS UNDER U.S. GOVERNMENT CONTRACTS

#### A. Introduction and Executive Summary

114. The Panel stated its reasoning succinctly: “it is clear that the allocation of patent rights under NASA and DOD contracts and agreements is not specific” because “the allocation of patent rights is uniform under all U.S. government R&D contracts, agreements, and grants, in respect of all U.S. government departments and agencies, for all enterprises in all sectors.”<sup>158</sup> The EU does not dispute the finding regarding the uniformity of allocation of patent rights under U.S. government contracts. That should be the end of the analysis for purposes of Article 2.1(a) of the SCM Agreement. If all companies, in all sectors, receive the same treatment (assuming, *arguendo*, that the treatment is a subsidy), then it cannot be said that “the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises.”

115. However, the EU argues that the uniform treatment becomes specific when individual government agencies, among them NASA and DoD, accord the treatment through contracts and other agreements subject to agency-specific procedural rules. Nothing in the SCM Agreement supports this argument, and recent Appellate Body reports indicate that it is wrong.<sup>159</sup> Article 2.1(a) provides that specificity exists when the relevant granting authority or legislation “explicitly limits access to a subsidy to certain enterprises.” The Appellate Body has emphasized that analyzing specificity under Article 2.1(a) of the SCM Agreement involves considering all of the relevant laws at all levels of government. With regard to the allocation of patent rights for inventions conceived under U.S. government contracts, a combination of general and agency-specific measures apply the same substantive treatment to all U.S. government contracts. Thus, the Panel was correct in finding that there were no limitations on access to the alleged subsidy – the retention of the right of contractors to inventions conceived by their employees while working on government-funded research.

116. The EU argues that NASA and DoD were the “granting authorities” with regard to allocation of patent rights under their agency contracts and, therefore, that only laws and regulations specific to those agencies are relevant. It contends that the Panel should have disregarded any generally applicable measures. However, nothing in the SCM Agreement constrains a panel in this way. If the granting authority operates “pursuant to” generally applicable measures in its conferral of an alleged subsidy, those measures form a part of the legislation to consider in the specificity analysis. Therefore, as the Bayh-Dole Act, the Presidential Memorandum, and the 1987 Executive Order applied to all agencies, the Panel properly considered them in addressing specificity.

117. The EU devotes particular attention to agency-specific laws and regulations that NASA uses to achieve the same allocation of patent rights as other agencies. The EU argues that because these measures apply only to NASA contracts and contractors, they must be specific.

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<sup>158</sup> Panel Report, para. 7.1276.

<sup>159</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 368 and 400; *EC – Large Civil Aircraft (AB)*, para. 943.

However, general measures affecting the attribution of patent rights under U.S. government contracts are also part of the “legislation pursuant to which {NASA} operates,” which makes them a valid factor in evaluating specificity for the alleged subsidy. As contractors have “access” to the subsidy alleged by the EU – “transfer” of “valuable patent rights”<sup>160</sup> – through any U.S. government agency that contracts for research services, NASA’s entry into contracts that provide for allocation of patent rights does not “limit access” to that alleged subsidy in any way.

118. The EU makes similar arguments with regard to DoD, but they too are infirm. DoD does not have agency-specific rules on allocation of patent rights under government contracts – it follows the general measures applicable to all agencies. The EU argues that DoD has complete discretion with regard to allocation of patent rights, but the full text of the measure in question indicates that this discretion applies to all agencies (including DoD) only in “exceptional circumstances.”<sup>161</sup> The norm is, accordingly, the standard rule that the government does not take title to patents in inventions conceived by contractors’ employees, but leaves title with the contractors and retains a government-purpose license.

## **B. Relevant facts**

119. Neither the EU nor the United States disputes the Panel’s statement of the facts in paragraphs 7.1277 through 7.1292. The Appellate Body should rely on that statement, and not the characterization of the Panel’s findings of fact in paragraphs 63 through 66 of the EU Appellant Submission, which is wrong in crucial respects.

120. To begin, the EU is wrong in asserting that “{t}he United States did not dispute much of the EU’s factual description of the US law and practice.”<sup>162</sup> In fact, the United States demonstrated that the EU incorrectly characterized the operation of U.S. law regarding the allocation of patent rights under U.S. government contracts.<sup>163</sup>

121. At the most basic, the EU is incorrect in asserting that NASA and DoD “transferred valuable patent rights to Boeing.” Under U.S. law, absent some other contractual or statutory provision, the right to seek a patent for an invention belongs exclusively to the person who is the inventor.<sup>164</sup> Thus, if a contractor’s employee conceives of an invention while working for the contractor under a government contract, the question is not one of “transferring” patent rights from the government to the contractor, but of whether the government would take any of the employee’s rights with regard to the invention.<sup>165</sup> In the case of NASA, the Space Act provides

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<sup>160</sup> EU Appellant Submission, para. 63.

<sup>161</sup> 35 U.S.C. § 202(a).

<sup>162</sup> EU Appellant Submission, para. 64 (emphasis in original).

<sup>163</sup> US FWS, paras. 318-323, 327-330.

<sup>164</sup> US FWS, para. 318.

<sup>165</sup> US FWS, para. 318. The employee’s conditions of employment may provide for assignment to the contractor of rights to any patents conceived while working for contractor. In that case, the question under U.S. law

that the U.S. government takes title to any inventions made while working under a contract, but gives the NASA administrator the authority to waive title.<sup>166</sup> In this situation, too, the government is not transferring anything to the contractor – it is deciding not to exercise (waiving) its authority to take for itself rights that would otherwise accrue to the inventor.<sup>167</sup> On this basis, the United States submitted that there was no financial contribution because the patent rights belonged to the contractor’s employee in the first place.<sup>168</sup> The Panel declined to address this argument, as it concluded that the EU had failed to establish specificity.<sup>169</sup>

122. The Panel’s description of how this legal treatment evolved is correct, and the EU does not argue otherwise. The U.S. Congress first passed the Bayh-Dole Act, which provided that in any government contract with a non-profit organization or small business, the contractor would own any patents resulting from inventions conceived during work under the contract if the contractor elected to retain title.<sup>170</sup> The President subsequently issued a memorandum instructing agencies to use their authority to grant the same treatment to all other contractors, a group that can be described as medium- and large-sized businesses.<sup>171</sup> This treatment was formalized in an executive order in 1987, and integrated into general government contracting rules covering DoD and other agencies. NASA modified its own agency contracting regulations to comply with the new rules.<sup>172</sup>

**C. The Panel’s analysis comports with recent Appellate Body guidance by considering all of the legal instruments regarding allocation of patent rights under NASA and DoD contracts.**

123. The Panel conducted an analysis under Article 2.1(a) of the SCM Agreement that meets all of the criteria laid out by the Appellate Body. It evaluated all of the relevant legal instruments, at all of the relevant levels of the U.S. government. It focused on the eligibility requirements for the alleged subsidy – allocation to government contractors of the title to any inventions conceived by their employees while working on government-funded research. It considered variations in NASA procedures and rules associated with this issue, and concluded that “NASA’s agency-specific regulations for implementing this U.S. Government-wide policy cannot, for the purposes of Article 2 of the SCM Agreement, be analysed in isolation from the

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would be one of whether the government took rights that would otherwise accrue indirectly to the contractor by reason of the terms of employment.

<sup>166</sup> US FWS, para. 322. The EU occasionally refers incorrectly to “DoD patent waivers.” *E.g.*, EU Appellant Submission, para. 65. NASA’s patent waiver regulations do not apply to DoD, and the EU has never identified any U.S. law or regulation that provides for the “waiver” of patent rights by DoD.

<sup>167</sup> US FWS, para. 322.

<sup>168</sup> US FWS, para. 324.

<sup>169</sup> Panel Report, para. 7.1276.

<sup>170</sup> Panel Report, para. 7.1278.

<sup>171</sup> Panel Report, para. 7.1278.

<sup>172</sup> Panel Report, para. 7.1278.

broader policy and legal framework that they implement.”<sup>173</sup> As a result of this analysis, the Panel found that “the allocation of patent rights is uniform under all U.S. government R&D contracts, agreements, and grants, in respect of all U.S. government departments and agencies, for all enterprises in all sectors.”<sup>174</sup> The Panel accordingly concluded that “the allocation of patent rights under NASA and DoD contracts and agreements is not specific to a ‘group of enterprises or industries’ within the meaning of Article 2 of the SCM Agreement.”<sup>175</sup>

124. Although the Panel reached its conclusions before the Appellate Body issued *US – Anti-Dumping and Countervailing Duties (China)* and *EC – Large Civil Aircraft*, the Panel’s analysis follows the lines laid out in those reports. The Appellate Body considered the text of Article 2.1, and found that “the use of the term ‘principles’ – instead of, for instance, ‘rules’ – suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle.”<sup>176</sup> The Appellate Body characterized this exercise as follows:

a proper understanding of specificity under Article 2.1 must allow for the concurrent application of these principles to the various legal and factual aspects of the subsidy in any given case. Yet, we recognize that there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article 2.1 may be unnecessary.<sup>177</sup>

125. The Appellate Body observed with regard to Article 2.1(a) and (b) that

the reference in both provisions to “the granting authority, or the legislation pursuant to which the granting authority operates” was viewed as critical because it situates the analysis for assessing any limitations on eligibility in the particular legal instrument or governmental conduct effecting such limitations.<sup>178</sup>

The Appellate Body stated in *US – Anti-Dumping and Countervailing Duties (China)* that this evaluation is based on the totality of the evidence before it:

despite the Panel’s apparent understanding that central-government documents were the relevant basis for the USDOC’s specificity determination, we note that,

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<sup>173</sup> Panel Report, para. 7.1293.

<sup>174</sup> Panel Report, para. 7.1276.

<sup>175</sup> Panel Report, para. 7.1276.

<sup>176</sup> *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 366; *EC – Large Civil Aircraft* (AB), para. 942.

<sup>177</sup> *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 371; *EC – Large Civil Aircraft* (AB), para. 945.

<sup>178</sup> *EC – Large Civil Aircraft* (AB), para. 943; *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 368.



ultimately, the Panel conducted a proper factual analysis based on the totality of evidence, at all levels of government, on which the USDOC supported its specificity determination.<sup>179</sup>

126. The Panel did all of this. In evaluating the EU’s allegations regarding allocation of patent rights under NASA and DoD contracts, the Panel considered all of the legal instruments at the levels of the U.S. Congress, the U.S. President, and the various agencies directly responsible for implementing the rules. These included the Bayh-Dole Act, the Presidential Memorandum, the Executive Order, general federal regulations, and NASA-specific regulations.<sup>180</sup> The Panel conducted a detailed evaluation, looking at each instrument individually and considering each as part of a broader “framework.”<sup>181</sup> It examined whether either the legislation or the authorities imposed limitations on access to the alleged subsidy, and found that they did not. Although the Panel did not use the precise words that the Appellate Body had not yet published, the situation justified the conclusion that “evidence under consideration unequivocally indicates . . . non-specificity by reason of law” under Article 2.1(a), rendering further analysis unnecessary.<sup>182</sup>

**D. The EU errs in arguing that the SCM Agreement requires isolation of NASA and DoD from each other and from other agencies in evaluating whether their allocation of patent rights is specific for purposes of Article 2.1 of the SCM Agreement.**

127. The EU does not dispute the Panel’s finding that “the allocation of patent rights is uniform under all U.S. government R&D contracts, agreements, and grants, in respect of all U.S. government departments and agencies, for all enterprises in all sectors.”<sup>183</sup> Instead, it argues with regard to this uniform treatment that “the activities of these other authorities are not relevant” to an analysis of the treatment accorded by NASA.<sup>184</sup> It makes a similar point with regard to DoD.<sup>185</sup> As the Appellate Body found in *US – Anti-Dumping and Countervailing Duties (China)*, the Panel’s task is not to engage in the isolated consideration of one of several legal instruments related to a subsidy. Rather, “a proper factual analysis” is “based on the totality of evidence, at all levels of government.”<sup>186</sup> As section II.C of this submission explains, the Panel performed such an analysis. This section addresses each of the EU’s criticisms of the Panel, and shows that they present no valid reason to reverse the finding that the allocation of patent rights under U.S. government contracts is not specific.

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<sup>179</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 400.

<sup>180</sup> Panel Report, paras. 7.1278-7.1291.

<sup>181</sup> Panel Report, para. 7.1293.

<sup>182</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371; *EC – Large Civil Aircraft (AB)*, para. 945.

<sup>183</sup> Panel Report, para. 7.1276.

<sup>184</sup> EU Appellant Submission, para. 86.

<sup>185</sup> EU Appellant Submission, para. 90 (“it is also not the US Government as a whole that waives/transfers the patent rights deriving from the same {DoD} contracts”).

<sup>186</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 400.

**1. The EU misinterprets Article 2.1 of the SCM Agreement in calling for an analysis based on a subset of the U.S. legislation related to the challenged financial contributions.**

128. The fundamental flaw in the EU approach is its insistence that under Article 2.1(a), the only “granting authority” for purposes of the specificity analysis is the entity that directly conferred the alleged financial contribution to the alleged recipient. As a legal matter, Article 2.1(a) contains no such restriction. It provides that a subsidy is specific “{w}here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises.” If multiple “authorities” participate in the process of “granting” the subsidy, nothing in this text prevents a panel from considering all of them to be part of “the granting authority.” The EU also errs in accusing the Panel of wrongly treating “the US Government, as a whole” as the granting authority, when in fact the Panel considered only those authorities that issued the measures that provided the alleged subsidy. Finally, the EU errs because it fails to recognize that Article 2.1(a) does not restrict the analysis to the granting authority *or* the legislation. It allows a consideration of both, as appropriate.

129. The EU is correct in observing that the “granting authority” is the “authority” that “grants” a subsidy, and that “grant” means “agree to, promise, undertake;” “concede as an indulgence; to bestow as a favour, allow (a person) to have.” Another meaning is “{g}ive or confer (a possession, a right, etc.) formally; transfer (property) legally.”<sup>187</sup> But the EU draws the wrong conclusion in arguing that “granting authority” means only the governmental entity that executed the document conferring the financial contribution underlying the alleged subsidy, in this case, NASA and DoD. The EU makes this error because it addresses only part of the relevant definition of “authority.” The full definition provides that the term means “{t}hose in power or control (treated as *sing.* (abstract) or *pl.*); the governing body; a body exercising power in a particular sphere.”<sup>188</sup> Thus, the “granting authority” may be *one or more* of “{t}hose in power or control” of the alleged subsidy. The Appellate Body reached essentially the same conclusion, albeit through different reasoning, when it found in *US – Anti-Dumping and Countervailing Duties (China)* that in considering specificity under Article 2.1(a), “a proper factual analysis” is “based on the totality of evidence, *at all levels of government.*”<sup>189</sup> Thus, nothing in the SCM Agreement prevented the Panel from considering together actions taken by the U.S. President, the U.S. Congress, NASA, and DoD that resulted in the grant of the alleged subsidy.

130. The context provided by Article 1.1(a)(1) of the SCM Agreement confirms this conclusion. In defining a financial contribution, the chapeau of that Article provides that “a subsidy shall be deemed to exist if . . . there is a financial contribution by a government or any public body . . . .” Under the EU’s approach, the phrase “government or any public body” refers to “the entity within the government that actually provided the subsidy.”<sup>190</sup> However, Article 2.1

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<sup>187</sup> EU Appellant Submission, para. 72; *New Shorter Oxford English Dictionary*, p. 1131.

<sup>188</sup> *New Shorter Oxford English Dictionary*, p. 151.

<sup>189</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 400 (emphasis added).

<sup>190</sup> EU Appellant Submission, para. 73.

of the SCM Agreement frames the specificity analysis under Article 2.1(a) and (b) in different terms. Rather than referring to the “government” or “public body” that made the financial contribution, it addresses the “granting authority.” This change in terminology moves the focus of the analysis to the “authority” responsible for granting the subsidy and away from the mechanical act of making the contribution.

131. The full definition of “authority” also makes clear that the critical attribute is the “power or control” over a subsidy, which could reside in one or more levels of government, including those removed from the actual act of conferring the financial contribution. Although the EU is wrong in contending that the Panel treated the United States as a “Member” as the granting authority,<sup>191</sup> there is nothing in the text preventing that conclusion if the “power or control” over the grant of a subsidy resides at the level of the Member. The EU argues that a “Member” cannot be a “granting authority” because the SCM Agreement uses the term “Member” in some contexts and “authority” in others. However, the usage of different terms does not signify that the two terms have nothing in common. In fact, the critical “distinction” is that “authority” is conceptually broader – it can cover one entity or multiple entities at a variety of levels, whereas “Member” refers exclusively to the Member as a whole. Thus, the use of “authority” in Article 2.1 allows a consideration of any and all of the entities responsible for “granting” a subsidy that may have “limited” access to the subsidy in some way.

132. This focus on identifying a single “granting authority” leads the EU to another error – its statement that “specificity can be analysed from either of these two perspectives – from the point of view of the ‘granting authority’ or the ‘legislation.’”<sup>192</sup> As the Appellate Body has emphasized, “the use of the term ‘principles’ – instead of, for instance, ‘rules’” in the chapeau of Article 2.1 “suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle.”<sup>193</sup> Thus, the phrase “granting authority, or the legislation pursuant to which the granting authority operates” does not create a binary, one-or-the-other choice. It calls for an examination, as appropriate, of the authority, the legislation, or both.

133. The EU also accuses the Panel of basing its conclusion of non-specificity on “an overall ‘policy’ related to intellectual property rights in government contracts,” and asserts that this reasoning would allow Members to avoid subsidy disciplines by “obscuring the specificity of measures” in “government-wide policy statements.”<sup>194</sup> The EU has the facts wrong, and its fears

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<sup>191</sup> EU Appellant Submission, para. 74. As a Member of the WTO, the United States encompasses federal, state, and local governments. The Panel addressed measures by only four of the many authorities covered by that description: the U.S. President, the U.S. Congress, NASA, and DoD. It did not include authorities in the judicial branch of government, any independent agencies, or state or local governments. The Panel also addressed 48 CFR §§ 27.300-27.306. These are part of the Federal Acquisition Regulations applicable to all agencies, including DoD. They are issued by the Defense Acquisition Council and Civilian Agency Acquisition Council, acting in consensus. 48 CFR § 1.201-1. However, the EU does not object to the Panel’s consideration of the work of these entities.

<sup>192</sup> EU Appellant Submission, para. 77.

<sup>193</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366; *EC – Large Civil Aircraft (AB)*, para. 942.

<sup>194</sup> EU Appellant Submission, para. 70.

of circumvention are unfounded. The Panel referred to U.S. government “policy” to explain the evolution and operation of the U.S. legislation providing for attribution of patent rights arising from private persons’ work under government contracts. Thus, the Presidential Memorandum framed the issue as agencies’ “policy with respect to the disposition of any invention made in the performance of a federally-funded research and development contract, grant or cooperative agreement.”<sup>195</sup> However, the other measures went beyond policy to actually require action. The Bayh-Dole Act *required* agencies to allow small businesses and non-profit enterprises to retain title to any patent for an invention conceived by that business’s or enterprise’s employees while working on a government contract.<sup>196</sup> The 1987 Executive Order *required* agencies to grant the Bayh-Dole rule “to all contractors, regardless of size.”<sup>197</sup> The NASA and DoD regulations cited by the Panel merely implemented this requirement through regulation. Thus, the Panel based its conclusion on legal requirements, and not simply the underlying policy.

134. The EU’s fears of laying out a “road map” for circumventing subsidies disciplines are misplaced. In the Panel Report, an integrated and mutually reinforcing body of legal requirements and policy statements together established “uniform” treatment throughout the U.S. government. The Panel accordingly found that treatment to be non-specific. Nothing in the Panel’s reasoning suggests that a Member could rely, as the EU fears, on a general policy “to support all industries” to defeat specificity for differential treatment among sectors.<sup>198</sup> In those cases, the absence of common treatment *across* sectors would prevent a conclusion that treatment was “uniform,” which was critical to the Panel’s analysis.

135. Thus, the EU’s arguments regarding interpretation of Article 2.1(a) present no valid reason for the Appellate Body to reverse the Panel’s conclusions that it was free to consider all relevant information at all levels of government in the specificity analysis.

**2. *NASA’s separate mechanism for implementing the government-wide standard allocation of patent rights does not support a finding of specificity.***

136. The EU’s more specific arguments regarding NASA fail for many of the same reasons. In particular, they depend on the mistaken view that Article 2.1(a) of the SCM Agreement requires the consideration in isolation of the government agency that actually conferred a financial contribution. The previous section, Section III.D.1, explained why that view is incorrect. However, some of the EU assertions in its NASA-specific section demonstrate further flaws in its reasoning, and warrant comment on that basis.

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<sup>195</sup> Presidential Memorandum (Exhibit EC-560).

<sup>196</sup> 35 U.S.C., §202(a) (Exhibit EC-558).

<sup>197</sup> 1987 Executive Order, § 1(b)(4) (“The head of each Executive department and agency shall, within overall funding allocations and to the extent permitted by law: . . . (4) promote the commercialization, in accord with my Memorandum to the Heads of Executive Departments and Agencies of February 18, 1983, of patentable results of federally funded research by granting to all contractors, regardless of size, the title to patents made in whole or in part with Federal Funds, in exchange for royalty-free use by or on behalf of the government.”).

<sup>198</sup> EU Appellant Submission, paras. 70 and 76.

137. The EU argues that “the Space Act and its implementing regulations constitute ‘the legislation pursuant to which the granting authority operates’, within the meaning of Article 2.1(a)” and criticizes the Panel for “failing to consider” this point.<sup>199</sup> The United States has never disputed that the Space Act and its implementing regulations were legislation pursuant to which NASA operates, and the Panel discussed them as such,<sup>200</sup> so the EU’s criticism is invalid. If the EU means to suggest that the Space Act and its implementing regulations are the *only* legislation pursuant to which NASA operates, it is wrong. The “implementing regulations” cited by the EU make clear that NASA operates pursuant to additional measures – the Bayh-Dole Act, the Presidential Memorandum, and the Executive Order – when it comes to allocation of patent rights under government contracts.<sup>201</sup> Thus, these instruments form part of the “legislation” that can indicate specificity or non-specificity for purposes of Article 2.1(a).<sup>202</sup> The Panel recognized this point, and discussed all of the measures in its analysis of the “legislation” pursuant to which NASA operates. The EU identifies nothing in the SCM Agreement that precludes consideration of the full spectrum of measures affecting an authority’s grant of a subsidy. Therefore, the Panel did not err in addressing the Space Act, NASA-specific regulations, the Bayh-Dole Act, the Presidential Memorandum, and the Executive Order.

138. The EU makes a number of other observations regarding NASA and its governing statutes: that the Panel found that “the Space Act explicitly limits the scope of NASA’s aeronautics R&D activities (i.e. to aeronautics and space);”<sup>203</sup> that NASA enters into the contracts that contain clauses regulating allocation of patent rights,<sup>204</sup> and that NASA issues the

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<sup>199</sup> EU Appellant Submission, paras. 81 and 85.

<sup>200</sup> *E.g.*, Panel Report, paras. 7.1278(e), 7.1287-7.1290.

<sup>201</sup> 48 C.F.R. § 1827.302 (“NASA policy with respect to any invention, discovery, improvement, or innovation made in the performance of work under any NASA contract or subcontract with other than a small business firm or a nonprofit organization and the allocation of related property rights is based upon Section 305 of the {Space Act}; and, to the extent consistent with this statute, the Presidential Memorandum on Government Patent Policy to the Heads of Executive Departments and Agencies, dated February 18, 1983, and Section 1(b)(4) of Executive Order 12591”) (Exhibit US-141); 14 C.F.R. § 1245.103(a) (“In implementing the provisions of section 305(f) of the {Space Act} and in determining when the interests of the United States would be served by waiver of all or any part of the rights of the United States in inventions made in the performance of work under NASA contracts, the Administrator will be guided by the objectives set forth in the {Space Act} and by the basic policy of the Presidential Memorandum and Statement of Government Patent Policy to the Heads of the Executive Departments and agencies dated February 18, 1983.”) (Exhibit EC-572).

<sup>202</sup> In fact, before the Panel, the EU itself treated the Presidential Memorandum, the Executive Order, and the Bayh-Dole Act (35 U.S.C. §§ 200-212) as relevant to an understanding of NASA’s rules regarding allocation of patent rights. EC FWS, paras. 808-818.

<sup>203</sup> EU Appellant Submission, para. 68, *quoting* Panel Report, para. 7.1045.

<sup>204</sup> EU Appellant Submission, para. 82. In connection with this observation, the EU quotes the U.S. statement that “[t]he allocation of intellectual property rights under U.S. Government contracts cannot be analyzed independently of the contracts that generate those rights.” EU Appellant Submission, para. 82, *quoting* US SWS, p. 40. As the EU is aware, this statement came from a heading to the section addressing the benefit associated with the financial contribution alleged by the EU. The U.S. point was that:

The EC attempts to treat the disposition of intellectual property rights under NASA and DoD contracts as autonomous acts – “waivers” or “transfers” by those agencies – ignoring the fact that the treatment it challenges occurs only through a contract, as part of an overall exchange of value

documents that formally waive the government’s right to take title to any inventions conceived by contractors’ employees during government-funded research.<sup>205</sup> By themselves, these observations do nothing to resolve the question posed by Article 2.1(a) of the SCM Agreement – whether “the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy.” NASA, like most government agencies in most Members, has both a defined scope of substantive activity and a responsibility to obey measures of universal applicability while functioning within its substantive area. The mere fact that NASA, or any agency, affords particular treatment is not by itself determinative as to whether that treatment is universal (and therefore non-specific) or limited to the agency’s area of responsibility (and potentially specific to that area). Further information is necessary.

139. These arguments reveal another flaw in the EU’s approach – that it focuses on the “granting authority” as opposed to the subsidy and limitations on access to the subsidy. Article 2.1 frames specificity in terms of the whether the *subsidy* (and not the granting authority itself) is specific. As the Appellate Body has noted, the reference to “the granting authority, or the legislation pursuant to which the granting authority operates” in Articles 2.1(a) and (b) “was viewed as critical because it situates the analysis for assessing any limitations on eligibility in the particular legal instrument or governmental conduct effecting such limitations.”<sup>206</sup> In this part of the EU appeal, the subsidy alleged by the EU is its assertion, which the Panel accepted *arguendo*, that “NASA and DOD transferred valuable patent rights to Boeing.”<sup>207</sup> NASA contracts and waiver instruments do not “limit access” to the alleged subsidy of “transfer” of “valuable patent rights” to Boeing or the aerospace industry. Other enterprises in other industries can have “access” to the same rights through contracts with other agencies.

140. If the EU’s point is that the Panel could only address NASA and DoD because the alleged subsidy identified by the EU was only the allocation of patent rights under those agencies’ R&D contracts, the Appellate Body has already addressed and rejected that view. In *EC – Large Civil Aircraft*, the Appellate Body found that when the complaining party defined the subsidized product one way, and the responding party advocated a different approach, the panel abdicated its duty under Article 11 of the DSU when it deferred to the complaining party’s approach without performing an “independent assessment”.<sup>208</sup> On the patent issue in this dispute, the EU

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between the government and private parties. By taking one element – the retention of patent rights by the private party – out of the context of the overall exchange, the EC attempts to create the impression that the government has bestowed something on the private party for free, when in fact the government pays for rights that it obtains from its contractor.

US SWS, para. 97. Thus, the heading in question made only the point that the “benefit” must be evaluated in the context of the transaction that conferred the alleged subsidy. It did not suggest that the contract was the only document relevant to an evaluation of the allocation of patent rights under U.S. government contracts.

<sup>205</sup> EU Appellant Submission, para. 83.

<sup>206</sup> *EC – Large Civil Aircraft (AB)*, para. 943; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368.

<sup>207</sup> EU Appellant Submission, para. 63.

<sup>208</sup> *EC – Large Civil Aircraft (AB)*, 1128 (“{T}he Panel committed legal error by failing to adjudicate properly the United States’ subsidized product allegations and refusing to make its own independent assessment of whether all Airbus LCA compete in the same market or not. . . . {I}n its analysis, the Panel deferred to the United

challenged only the treatment of patent rights by NASA and DoD. The United States objected that the treatment provided by those agencies reflected treatment throughout the U.S. government. The mere fact that the EU addressed two agencies does not preclude the Panel from addressing the availability of identical treatment throughout the U.S. government.

141. Therefore, the EU’s arguments regarding NASA and its governing statute and regulations present no valid reason for the Appellate Body to reverse the Panel’s conclusion that the uniform allocation of patent rights under all government contracts, in all sectors, by all agencies is not specific when applied by NASA.

**3. DoD’s application of the government-wide standard allocation of patent rights does not support a finding of specificity.**

142. The EU’s attempts to paint the allocation of patent rights under DoD contracts as specific are even more invalid than its arguments regarding NASA because DoD does not even have its own laws and regulations in this area. It follows the general regulations applicable to all agencies under 48 CFR §§ 27.300-27.306. That should end the inquiry. However, in the interest of thoroughness, the United States will address each of the EU’s DoD-specific arguments.

143. The EU observes, as it did with NASA, that DoD is the entity that grants R&D contracts containing patent allocation clauses. Just as with NASA, that argument fails because DoD’s role in entering into contracts does not mean that it is the sole granting authority, or that it limits access to the alleged subsidy – allocation of patent rights under government contracts – from other agencies in other sectors. It also does not alter the fact that the legislation pursuant to which the patent rights allocation occurs is non-specific.

144. As part of its argument on this point, the EU contends that “it is uncontested that, as the entity that grants the R&D contracts, DOD need not waive or grant rights in favour of a contractor to inventions arising from DOD-funded contracts.”<sup>209</sup> In fact, the United States vigorously objected to this argument before the Panel.<sup>210</sup> In this appeal, the only support the EU provides for its contention is to quote section 202(a)(ii) of the Bayh-Dole Act, which when read together with the Executive Order provides that any government contractor:

*may, within a reasonable time after disclosure as required by paragraph (c)(1) of this section, elect to retain title to any subject invention: Provided, however, That a funding agreement may provide otherwise . . . (ii) in exceptional circumstances, when it is determined by the agency that restriction or elimination of the right to*

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States’ subsidized product allegations rather than making its own independent assessment of whether all Airbus LCA should be treated as a single subsidized product. In so doing, the Panel failed to make an objective assessment of the matter, including the ‘applicability of and conformity with the relevant covered agreements’, as required under Article 11 of the DSU.” ( citations omitted)).

<sup>209</sup> EU Appellant Submission, para. 88.

<sup>210</sup> US SWS, paras. 100-101 and 103

retain title to any subject invention will better promote the policy and objectives of this chapter.<sup>211</sup>

When read in full (the EU omits the italicized language) this quotation demonstrates the opposite of the point the EU is trying to advance: like all agencies, DoD *is required* to allow its contractors to “retain” title to inventions their employees conceive while working on government-funded research. It may do otherwise only “in exceptional circumstances.”<sup>212</sup> The exception does not change the analysis under Article 2.1(a), as *all* agencies have the same authority.

145. The reference in the full quotation to contractors’ ability to “retain” title to inventions also underscores the error in the EU assertion that DoD “waives” patent rights. As there is no statutory provision giving the U.S. government title to patents conceived by contractors under DoD contracts, there is nothing for DoD to waive. The statute simply ensures that contractors “retain” the rights they would otherwise have.

146. Finally, the EU asserts that, having found that payment and access to facilities under DoD R&D contracts were specific under Article 2.1(c) because funding went predominantly to the defense industry, the Panel should have found that DoD’s allocation of patent rights was similarly specific.<sup>213</sup> However, the EU cites no submission where it argued that the allocation of patent rights under DoD contracts was specific because it was used predominantly by the defense industry, and the United States is aware of no point at which the EU made such an argument. The EU cannot now claim that the Panel erred in not considering an argument that the EU did not make, nor could the EU have met its burden of proof with an argument it never articulated.

## **E. Conclusion**

147. As there is no dispute that all government contracts with all agencies provide for contractors to retain the right to patent inventions conceived by their employees during government-funded research, the allocation of patent rights on that basis is not specific. The EU arguments provide no support for considering specificity in isolation for each agency and, therefore, no basis for the Appellate Body to reverse the Panel’s findings on specificity.

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<sup>211</sup> 35 USC § 202(a) (emphasis added) (Exhibit US-137).

<sup>212</sup> Section 202(a) contains three other exceptions, but none are relevant in the specificity analysis in this dispute. Section 202(a)(i) applies to contractors located outside the United States or controlled by foreign governments. Exclusion of such entities does not fall within the definition of specificity. Section 202(a)(iii) and (iv) apply, respectively, to intelligence operations and Department of Energy facilities dedicated to nuclear propulsion or weapons activities. (Exhibit US-137).

<sup>213</sup> EU Appellant Submission, para. 91.



#### **IV. EXCLUSION OF PURCHASES OF SERVICES FROM ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT**

##### **A. Introduction and Executive Summary**

148. Article 1.1(a)(1) contains a list of transactions that are “financial contributions,” and purchases of services are not on that list. The Panel’s finding that purchases of services are not a financial contribution should therefore be beyond reproach. The exact wording of the list makes the point clear – it specifies that a financial contribution exists when “a government provides goods or services other than general infrastructure, or purchases goods.” The absence of “or services” at the end of the clause announces, even without recourse to the principles reflected in the Vienna Convention or the legal concept of a “negative pregnant,” that purchases of services *are not there*.

149. Of course, aware of its obligations under Article 3.2 of the DSU, the Panel applied all of the relevant rules of international law for treaty interpretation, as explicated by the Appellate Body, to confirm that the omission of “purchases of services” meant that those transactions are not a financial contribution. In particular, the Panel recognized that the rules of interpretation “neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.” On appeal, the EU provides no valid reason to reverse the Panel’s well-reasoned conclusion. It has abandoned many of the arguments it made earlier, and focused on restating four of them. The new formulations do not make them any more persuasive.

150. First, the EU argues that because a government act may fit into more than one of the categories of financial contribution, the Panel was wrong to find that the exclusion of purchases of services from Article 1.1(a)(1), clause (iii), meant they were also excluded from clause (i), which covers “a direct transfer of funds.” In fact, the Panel expressly recognized that overlap among the clauses was possible, but concluded that the principles of treaty interpretation precluded a finding that the Agreement visibly omitted purchases of services from clause (iii) while silently including them in clause (i).

151. Second, although the EU recognizes that its interpretation creates “redundancy” by reading purchases of goods into clause (i) when clause (iii) already covers them explicitly, it argues that this does not render “purchases goods” inutile in clause (iii) because the phrase is necessary to capture non-monetary purchases. This argument fails on two counts: the barter transactions hypothesized by the EU are so implausible that it is difficult to conclude that the SCM Agreement would provide separately for them, and if they did occur, there are other clauses of Article 1.1(a)(1) to cover them.

152. Third, the EU argues that the object and purpose of the SCM Agreement supports its interpretation. However, the EU ignores the Appellate Body’s findings as to the object and purpose of the SCM Agreement, which support the Panel’s conclusion.

153. Finally, the EU opines that the exclusion of purchases of services from the SCM Agreement would create a “loophole” that “would make circumvention of obligations by

Members too easy.”<sup>214</sup> However, the loophole is imaginary. Some of the hypothetical transactions outlined by the EU could be genuine purchases of services. The remainder are obviously not purchases of services, and would not mislead a panel into concluding that they were. Thus, there is no danger that the Panel’s findings would facilitate circumvention.

**B. A proper interpretation of the SCM Agreement gives meaning to all of its terms and does not insert words and concepts that are not there.**

154. The most basic principle of treaty interpretation is the one reflected in Article 31.1 of the Vienna Convention – “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The Appellate Body has found, in a passage panels and the Appellate Body have cited repeatedly, that this process requires due regard for both the words that appear in the treaty, and those that do not:

The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.<sup>215</sup>

The Panel cited this finding as part of its analysis.<sup>216</sup>

155. The Appellate Body has also emphasized that a proper analysis considers all of the relevant interpretative tools collectively:

we note that the purpose of the interpretative exercise is to narrow the range of possible meanings of the treaty term to be interpreted, not to generate multiple meanings or to confirm the ambiguity and inconclusiveness of treaty obligations. Rather, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical

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<sup>214</sup> EU Appellant Submission, paras. 120-121, quoting *Canada – Autos (AB)*, para. 142.

<sup>215</sup> *India – Patents (US) (AB)*, para. 45; cited in *India – Quantitative Restrictions (AB)*, para. 94 (“To interpret the sentence as proposed by India would require us to read into the text words which are simply not there. Neither a panel nor the Appellate Body is allowed to do so.”); *EC – Hormones (AB)*, para. 181; *US – Line Pipe (AB)*, para. 250 (“And, as we have said more than once, words must not be read into the Agreement that are not there.”). See also, *US – Steel Safeguards (AB)*, para. 471; *EC – Bed Linen (AB)*, para. 83; *EC – Computer Equipment (AB)*, para. 83; *EC – Poultry (AB)*, para. 146 (“The Panel interprets this phrase to mean ‘that the market entry price is something that has to be constructed using the c.i.f. price as one of the parameters.’ We disagree. . . . to read the inclusion of customs duties into the definition of the c.i.f. import price in Article 5.1(b) would require us to read words into the text of that provision that simply are not there.”); *EC – Selected Customs Matters (AB)*, para. 297 (“In our view, the interpretation proposed by the United States would mean reading words into the treaty text that are not there. . . . Therefore, we are not convinced that the reference to ‘agencies’ in the plural implies that first instance review decisions must govern the practice of ‘all agencies’ of a WTO Member.”).

<sup>216</sup> Panel Report, para. 7.970, note 2453.

progression provides a framework for proper interpretative analysis, bearing in mind that treaty interpretation is an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.<sup>217</sup>

Critically, the “holistic exercise” is the process of applying the relevant interpretative rules to derive the meaning of the terms of a treaty so as to enforce the intentions of the parties. The EU, however, cites similar language from the Appellate Body report in *US – Continued Zeroing* as requiring a substantively holistic result, rejecting any interpretation that “excessively narrows the meaning of a term in a manner that frustrates the object and purpose of the treaty.”<sup>218</sup> This is not the approach adopted by the Appellate Body, as it elevates one interpretative tool – the object and purpose – over others. The EU’s approach also ignores the reality that the object and purpose of a treaty expresses issues at a high level of generality, without directly addressing the other interests parties may seek to protect. Exceptions provide the most obvious example of how a treaty’s individual terms may be designed to “frustrate” the general object and purpose in the sense of limiting the reach of disciplines. Attempting to read such provisions so as to advance “holistic” goals divined from the object and purpose of the treaty would do great violence to the principles of treaty interpretation.

156. The Appellate Body’s understanding of the object and purpose of the SCM Agreement, which it reiterated recently in *US – Anti-Dumping and Countervailing Duties (China)*, demonstrates the error of the EU approach to holistic interpretation:

We note, first, that the *SCM Agreement* does not contain a preamble or an explicit indication of its object and purpose. However, the Appellate Body has stated that the object and purpose of the *SCM Agreement* is “to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures”. Furthermore, in *US – Softwood Lumber IV*, the Appellate Body noted that the object and purpose of the *SCM Agreement* is to “strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions”. Finally, we note that, with respect to the object and purpose of the *SCM Agreement*, the Appellate Body stated in *US – Countervailing Duty Investigation on DRAMS* 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”.<sup>219</sup>

Thus, when application of the principles of interpretation “narrows the meaning of a term” it does not, as the EU argues, necessarily “frustrate the object and purpose” of the SCM

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<sup>217</sup> *China – Audiovisual Services (AB)*, para. 399, citing *US – Continued Zeroing (AB)*, paras. 268 and 273.

<sup>218</sup> EU Appellant Submission, para. 112.

<sup>219</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 301, quoting *US – Softwood Lumber IV (AB)*, para. 64 and *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 115.

Agreement. Rather, it reflects the “delicate balance” at the heart of the agreement. To give a term an expansive meaning to achieve a “holistic” result would accordingly negate the principles of treaty interpretation.

**C. The EU’s criticisms of the Panel’s analysis provide no basis to insert purchases of services into Article 1.1(a)(1) of the SCM Agreement when they manifestly are not there.**

**1. *The Panel correctly applied the principles of treaty interpretation in concluding that legitimate purchases of services are not financial contributions for purposes of Article 1.1(a)(1) of the SCM Agreement***

157. In its evaluation of Article 1.1(a)(1), the Panel performed the “holistic exercise” described by the Appellate Body: applying interpretative rules and principles as connected and mutually reinforcing components of an integrated operation. It looked at the problem from every angle – text, context, object and purpose, and supplementary means of interpretation – and concluded that they collectively led to and confirmed the conclusion that genuine purchases of services are not financial contributions. The United States sees no need to summarize the analysis, which speaks for itself, but would like to highlight a few points.

158. The Panel recognized that the principles of interpretation do not permit an isolated analysis of Article 1.1(a)(1), clause (i), which in the EU view covered NASA and DoD payments for research services supplied by Boeing. Although the Panel considered that clause (i), which covers “a government practice {that} involves a direct transfer of funds” could be broad enough when read alone to include payments in exchange for services rendered, that did not end the inquiry.<sup>220</sup> In particular, the Panel considered the framing of the definition of “financial contribution” under Article 1.1(a)(1) as a closed list of transactions. It concluded that, in that context, the separate category under clause (iii) for transactions where “a government provides goods or services other than general infrastructure, or purchases goods,” indicates that clause (i) does not cover provisions and purchases of goods and services. Thus the omission of “purchases of services” from clause (iii) indicates that they are not a financial contribution for purposes of Article 1.1(a)(1). The Panel noted that if clause (i) covered purchases of services, it must also cover purchases of goods – a conclusion that would render the inclusion of “purchases of goods” inutile. The Panel also addressed arguments, which the EU has abandoned, regarding the context provided by Article 8.2(a) of the SCM Agreement. This careful consideration of all text and context, including how each provision informed the scope of the others, provided the holistic analysis endorsed by the Appellate Body.

159. The Panel carefully considered these findings in light of the object and purpose of the SCM Agreement. In addition to noting the Appellate Body’s observation that the SCM Agreement “reflects a delicate balance” between Members seeking disciplines on subsidies and Members seeking disciplines on countervailing duties, the Panel quoted the findings of the *US – Export Restraints* panel that:

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<sup>220</sup> Panel Report, para. 7.954.

we do not see any contradiction between the said object and purpose of the SCM Agreement and the fact that certain measures that might be commonly understood to be subsidies that distort trade might in fact be *excluded* from the scope of the Agreement. Indeed, while the object and purpose of the Agreement clearly is to discipline subsidies that distort trade, this object and purpose can only be in respect of “subsidies” *as defined* in the Agreement. This definition, which incorporates the notions of “financial contribution”, “benefit”, and “specificity”, was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the coverage of the Agreement.<sup>221</sup>

160. The Appellate Body has cited the reasoning of the *US – Export Restraints* panel in this area with approval, noting that:

not all government measures capable of conferring benefits would necessarily fall within Article 1.1(a). If that were the case, there would be no need for Article 1.1(a), because all government measures conferring benefits, *per se*, would be subsidies. In this regard, we find informative the discussion of the negotiating history of the SCM Agreement contained in the panel report in *US – Export Restraints*, which was not appealed. That panel, at paragraph 8.65 of the panel report, said that the:

. . . negotiating history demonstrates . . . that the requirement of a financial contribution from the outset was intended by its proponents precisely to ensure that not all government measures that conferred benefits could be deemed to be subsidies. This point was extensively discussed during the negotiations, with many participants consistently maintaining that only government actions constituting financial contributions should be subject to the multilateral rules on subsidies and countervailing measures.  
(footnote omitted)<sup>222</sup>

161. The Panel did not stop with the ordinary meaning, context, and object and purposes of the SCM Agreement. It also considered whether supplementary means of interpretation confirmed its conclusion based on the other tools of interpretation. It evaluated the preparatory work for the SCM Agreement, the circumstances of conclusion of the SCM Agreement, ongoing panel proceedings at the time of the Uruguay Round negotiations, and issues raised in other negotiations.<sup>223</sup> It concluded that:

When the omission of “purchases” of “services” is read against this historical background, it becomes clear that the drafters could not have removed the express reference to “purchases” of “services” in Article 1.1(a)(1)(iii) on the

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<sup>221</sup> Panel Report, para. 7.959, quoting *US – Export Restraints*, para. 8.63 (emphasis in original).

<sup>222</sup> *US – Softwood Lumber IV (AB)*, para. 52, note 35.

<sup>223</sup> Panel Report, paras. 7.962-7.968.

understanding that the reference was superfluous, and that it would be understood and intended that such transactions were implicitly covered by Article 1.1(a)(1)(i). Rather, the exclusion of “purchases” of “services” from Article 1 can only be seen as a deliberate choice.<sup>224</sup>

Thus, the EU errs in asserting that “the Panel failed to consider in a holistic manner the ‘ordinary meaning’ of the terms of Article 1.1(a)(1), in their context, and in light of the ‘object and purpose.’”<sup>225</sup> The Panel applied all of the relevant tools that customary international law provides for the interpretation of treaties, in a manner consistent with the Appellate Body’s guidance.

**2. *The Panel correctly understood Article 1.1(a)(1) as a closed list of categories, each of which informed the meaning of the others.***

162. The Panel properly concluded that the framing of Article 1.1(a)(1) as “an exhaustive, closed list of the kinds of transaction covered by the SCM Agreement” give a particular significance to any omissions.<sup>226</sup> A comparison with the definitions of “benefit” under Article 1.1(b) and subsidies contingent on . . . export performance” under Article 3.1(a) underscores this point. In the case of “benefit,” the SCM Agreement frames one of the elements of the definition of a subsidy in general, conceptual terms, relying on its ordinary meaning and the non-exhaustive examples in Article 14 to inform the breadth or narrowness of the term. In the case of subsidies contingent on export performance, the SCM Agreement takes a similar approach, linking disciplines to a broad term and explicitly listing some measures as examples, while leaving open the possibility that other, non-listed measures might also qualify. The definition of “financial contribution” operates differently. It is a closed list, structured so that a transaction that does not fall within one of the listed categories is not covered by the Agreement, regardless of the benefit it might convey, its specificity, or any adverse effects or material injury it might cause for purposes of Parts III and V of the SCM Agreement. In this context, the categories in Article 1.1(a)(1) act as a threshold requirement for a party seeking to invoke the SCM Agreement or an investigating authority considering whether to impose countervailing duties.

163. The EU accuses the Panel of “failing to appreciate, as pointed out by the panel in *Japan – DRAMs*, that ‘certain . . . transactions might be covered simultaneously by different subparagraphs of Article 1.1(a)(1).’”<sup>227</sup> The EU misplaces its reliance on the statement from *Japan – DRAMs CVDs*, which is clearly *obiter dicta* – that panel stated immediately afterward that “[t]he issue before us, though, is not whether the modification of loan repayment terms and debt-to-equity swaps might also be treated, for example, as government revenue foregone.”<sup>228</sup> In any event, the Panel in this dispute did not “fail to appreciate” the possibility raised by the EU. It specifically referenced *Japan – DRAMs CVDs* and stated that “[w]e do not exclude the

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<sup>224</sup> Panel Report, para. 7.969.

<sup>225</sup> EU Appellant Submission, para. 103.

<sup>226</sup> Panel Report, para. 7.955.

<sup>227</sup> EU Appellant Submission, para. 115, quoting *Japan – DRAMs (Korea) (Panel)*, para. 7.439.

<sup>228</sup> *Japan – DRAMs (Korea) (Panel)*, para. 7.439.

possibility that certain transactions ‘might be covered simultaneously by different subparagraphs of Article 1.1(a)(1)’.<sup>229</sup>

164. Whatever the status of the musings of the *Japan DRAMs CVDs* panel, it is the U.S. view that the context of the SCM Agreement does not support an interpretation that allows imprecision as to the clause of Article 1.1(a)(1) that covers a particular contribution. Identifying the proper clause has implications throughout the remainder of the analysis. Most particularly, it dictates which “guideline” under Article 14 of the SCM Agreement to use in determining the benefit, and beyond that, what type of transaction to use as the basis for evaluating under Article 1.2(b) whether “the recipient has received a ‘financial contribution’ on terms more favourable than those available to the recipient in the market.”<sup>230</sup> In addition, recognizing a contribution as subject to clause (iv) will require application of the criteria for entrustment and direction.

165. In any event, the Panel specifically remained open to the possibility that the clauses of Article 1.1(a)(1) might in some cases overlap. It simply concluded that such an overlap did not exist in the case of purchases of goods. Specifically, the Panel found that the text of Article 1.1(a)(1), in its context and in light of the object and purpose of the SCM Agreement, did not support an interpretation that placed purchases of goods, as a general rule, in both clauses (i) and (iii). As the EU’s argument regarding purchases of services necessarily implied such an overlap (an implication the EU does not dispute) that interpretation could not stand.

166. Thus, the EU argument that equity infusions offer an example of a transaction that can be portrayed as satisfying both clause (i) and clause (iii)<sup>231</sup> is simply irrelevant. The Panel never disputed that such a result was *possible*. It simply found that the text of Article 1.1(a)(1) did not support an argument placing *purchases of goods* in both categories.

167. Even if such examples were relevant, the EU argument would still fail because equity infusions do not qualify as both a purchase of goods under clause (iii) and a direct transfer of funds under clause (i). The categorization in clause (i) is uncontroversial, as the text lists equity infusion as one example of a direct transfer of funds. However, the EU fails to demonstrate that equity infusions are also purchases of goods. It argues that the Appellate Body’s reasoning in *US – Softwood Lumber IV* establishes that “ownership rights can be considered ‘goods’”.<sup>232</sup> The only support the EU provides for this proposition is to cite, without explanation, a 30-paragraph segment of the report that, in fact, says nothing of the sort. Rather the Appellate Body focused on the fact that the “rights” conveyed “tangible items of property, like trees” to the recipient.<sup>233</sup> The Appellate Body subsequently explained that:

what matters, for purposes of determining whether a government “provides goods” in the sense of Article 1.1(a)(1)(iii), is the consequence of the transaction.

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<sup>229</sup> Panel Report, para. 7.953, note 2419.

<sup>230</sup> *Canada – Aircraft (AB)*, para 157.

<sup>231</sup> EU Appellant Submission, para. 116.

<sup>232</sup> EU Appellant Submission, para. 116, citing *US – Softwood Lumber IV (AB)*, paras. 46-76.

<sup>233</sup> *US – Softwood Lumber IV (AB)*, para. 59.

Rights over felled trees or logs crystallize as a natural and inevitable consequence of the harvesters' exercise of their harvesting rights. Indeed, as the Panel indicated, the evidence suggests that making available timber is the *raison d'être* of the stumpage arrangements. Accordingly, like the Panel, we believe that, by granting a right to harvest standing timber, governments provide that standing timber to timber harvesters.<sup>234</sup>

Thus, the Appellate Body did *not* find that “ownership rights” were goods in and of themselves. Rather, it found that the *timber* was a good, and that conveying the right to harvest that good was a way to *provide* the timber. To express the transaction in a one-to-one correspondence with the terms of clause (iii) of Article 1.1(a)(1), the “timber” was the *good* and “grant the right to harvest” how it was *provided*. Thus, contrary to the EU’s assertion, the Appellate Body’s finding simply does not state that ownership rights can be considered goods.

168. Nor is the question necessary to the resolution of this dispute. Article 14 of the SCM Agreement provides further evidence that the provision of equity capital would not qualify as the purchase of goods under clause (iii). The fact that Article 14 provides separate and distinct guidelines for calculating the amount of a subsidy for the “government provision of equity capital” (paragraph (a)) and “purchase of goods by a government” (paragraph (d)) demonstrates that the meanings of these two terms are clearly distinct in the context of the SCM Agreement. Thus, rather than provide an example of how a transaction “may fall under more than one subparagraph” of Article 1.1(a)(1), the example of an equity infusion demonstrates that careful application of the text of the treaty places the transaction in a single category.

**3. *The Panel correctly found that placing purchases of goods in clause (i) of Article 1.1(a)(1) of the SCM Agreement would render inutile the explicit reference in clause (iii) to when the government “purchases goods.”***

169. As noted above, the Panel found that if it were to read “a direct transfer of funds” in clause (i) of Article 1.1(a)(1) to encompass purchases of services, that clause would have to encompass “purchases of goods” as well, thereby rendering that term “redundant and inutile” as it appears in clause (iii).<sup>235</sup> The Panel noted that the principles of treaty interpretation do not permit such an outcome, which was one reason why it rejected the conclusion that clause (i) covered purchases of services.

170. The EU has never disputed the Panel’s conclusion that it could not adopt an interpretation of Article 1.1(a)(1) “that would result in reducing key terms of that provision to “redundancy or inutility.”<sup>236</sup> Rather, it now seeks to avoid the conclusion of inutility by positing that the reference to “purchase of goods” remains necessary to bring into the definition of “financial contribution” transactions that would otherwise fall outside of it. The only examples it gives are of transactions in which the government “promise{s} to exercise government discretion in

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<sup>234</sup> *US – Softwood Lumber IV (AB)*, para. 75 (citations omitted).

<sup>235</sup> Panel Report, para. 7.956.

<sup>236</sup> Panel Report, para. 7.956.



enforcing regulations in a certain way” or “provide{s} preferential treatment in competitions for future government contracts” in exchange for a private company providing goods.<sup>237</sup> It is difficult to see this “transaction” as a “purchase” of anything. The EU also provides no evidence that such transactions actually occur, let alone that they so preoccupied the negotiators of the SCM Agreement as to warrant separate reference in the definition of financial contribution.

171. The EU examples also fail in that they provide insufficient detail to conclude that the reference to “purchase of goods” in clause (iii) of Article 1.1(a)(1) was necessary to capture them. The transaction in which the government commits to enforce regulations “in a certain way” could easily result in a finding that the government had foregone revenue otherwise due, conferred a grant, or supplied a service. (Even assuming, *arguendo*, that the EU’s example is a financial contribution, the preferential regulatory treatment could itself violate the Member’s national treatment commitments under Article III of GATT 1994. Similarly, the provision of “preferential treatment in future government contracts” could easily be a subsidy as to future government purchases of goods.)

172. In short, the EU argument provides no basis to conclude that the phrase “purchases of goods” in clause (iii) of Article 1.1(a)(i) has independent meaning if “direct transfer of funds” in clause (i) is interpreted to include “purchases of goods.”

**4. *The EU’s interpretation of Article 1.1(a)(i) fails to take account of the object and purpose of the SCM Agreement as articulated by the Appellate Body.***

173. As noted above, the Appellate Body has found 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.”<sup>238</sup> This guidance informed the Panel’s analysis of Article 1.1(a)(1).<sup>239</sup> However, in lieu of this jurisprudence, which the Appellate Body recently reaffirmed, the EU focuses on two older panel reports that described the object and purpose of the SCM Agreement simply to “impose multilateral disciplines on subsidies which distort international trade.”<sup>240</sup> A comparison with the Appellate Body findings highlights the error of the EU approach – it would result in a one-sided evaluation of disciplines on subsidies that would disregard or minimize provisions that, in the Appellate Body’s words, “recogniz{e} . . . the right of Members to impose such measures under certain conditions”.<sup>241</sup>

174. The EU also seeks to defend its position by noting that GATS Article XV addresses subsidies that distort trade in services, and asserts that the Appellate Body found in *EU –*

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<sup>237</sup> EU Appellant Submission, para. 117.

<sup>238</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 301, quoting *Japan – DRAMs (Korea) (AB)*, para. 115.

<sup>239</sup> Panel Report, para. 7.959.

<sup>240</sup> EU Appellant Submission, para. 118, quoting *Brazil – Aircraft (Panel)*, para. 7.26.

<sup>241</sup> *US – Anti-Dumping and Countervailing Duties (China) (AD)*, para. 301, quoting *US – Softwood Lumber IV (AB)*, para. 64.

*Bananas III* that ““measures that involve a service relating to a particular good’ properly fall with the scope of the {GATS}.”<sup>242</sup> The EU misunderstands the Appellate Body’s finding, which was that

There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. . . . Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.<sup>243</sup>

Thus, the Appellate Body did not make a normative statement that measures affecting both goods and services always fall within the scope of both the GATT 1994 and the GATS. Rather, it found that they “could be scrutinized” under one or both agreements, depending on the measure in question. This highly contingent observation does not in any way support the conclusion the EU would draw, that “purchases of services that nonetheless relate to a particular good should not fall outside the scope of the *SCM Agreement*.”<sup>244</sup>

**5. *The Panel’s analysis does not create the “loopholes” envisaged by the EU.***

175. The Panel was alive to the possibility that an overly broad treatment of purchases of services excluded from the definition of “financial contribution” could prompt Members to recharacterize financial contributions as “purchases of services” to evade the disciplines of the SCM Agreement. It accordingly emphasized that its finding applied only to “transactions *properly characterized* as purchases of services.” It expressed confidence that “WTO panels and national investigating authorities will be able to detect transactions that are not properly characterized as purchases of services.”<sup>245</sup>

176. The EU nevertheless posits a series of “loopholes” supposedly created by the Panel’s finding. None of them raises a legitimate concern. In particular, as the Panel observed, panels and national investigating authorities would be able to recognize and deal with the obvious attempts outlined by the EU to evade the disciplines of the SCM Agreement.

177. By way of legal analysis, the EU observes that in *Canada – Autos* and *US – Countervailing Duty Measures on Certain EC Products*, the Appellate Body has cited concerns about circumvention as support for reaching particular legal conclusions. The United States

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<sup>242</sup> EU Appellant Submission, para. 118.

<sup>243</sup> *EC – Bananas III (AB)*, para. 221.

<sup>244</sup> EU Appellant Submission, para. 118.

<sup>245</sup> Panel Report, para. 7.960.

shares these concerns, which is why it emphasized early in the dispute that the definition of financial contribution excluded only transactions “properly characterized as purchases of services”.<sup>246</sup> By focusing on “transactions properly characterized as purchases of services,” the legal test devised by the Panel ensures that circumvention will not occur.

178. The EU argues that the Panel’s analysis would “allow a Member to entirely avoid the *SCM Agreement* simply by asking for some type of service from a goods producer . . . in exchange for . . . a transfer of funds, foregoing of government revenue otherwise due, or provision of goods and services.”<sup>247</sup> However, the scenarios the EU lays out do not present any such threat.

179. In the first scenario outlined by the EU – provision of a service in exchange for a transfer of funds – the EU is not clear as to whether the “transfer” is a cash payment, loan, or equity infusion. If the “funds” consist of cash or some cash-equivalent, the transaction would be a straightforward purchase of services. There would be no concern about circumvention because, under the Panel’s reasoning, purchases of services are not financial transactions, so there is no discipline to “circumvent.”

180. The EU attempts to fill this hole in its argument by positing a more detailed scenario of DoD paying Boeing \$2 billion for a plane flight to Geneva. This is a red herring. Panels and investigating authorities routinely face transactions that contain a number of elements, such as the service and grant elements in the EU scenario. An equity investor or a lender may provide the service of restructuring advice along with its funds.<sup>248</sup> A purchaser may agree to build roads and provide silviculture services when the government provides goods.<sup>249</sup> The supplier of research services may give the government use of a scientific vessel.<sup>250</sup> The government may provide access to government facilities in return for the user providing technical data, services, or goods.<sup>251</sup> In each of these instances – all real rather than hypothetical – nothing prevented the

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<sup>246</sup> US Comment on EC RPQ15(a), para. 53.

<sup>247</sup> EU Appellant Submission, para. 119.

<sup>248</sup> *E.g., Korea – Commercial Vessels*, para. 7.340 (“The SHI/Halla corporate reorganization plan was crafted by creditors under the Corporate Reorganization Act, after a court confirmed the report by Rothschild, a consulting firm retained by Halla, that the going concern value of Halla exceeded its liquidation value. The reorganization plan (based on a proposal from Rothschild) comprised four elements: (i) debt forgiveness; (ii) a debt-for equity swap; (iii) interest forgiveness; (iv) a conversion of short-term debt.”)

<sup>249</sup> *E.g., US – Softwood Lumber IV (Panel)*, para. 7.15 (“The price to be paid for the timber, in addition to the volumetric stumpage charge for the trees harvested, consists of various forest management obligations and other in-kind costs relating to road-building or silviculture for example. In return, the tenure holders receive ownership rights over the trees during the period of the tenure.”).

<sup>250</sup> *E.g., US – Sonar Mapping*, para. 2.2 (“The contract between the NSF and ASA, referred to as DPP89-22832, is a multi-year contract for an amount of US\$251 million. It covers a wide range of activities, including the construction, maintenance and operation of research, housing, logistical and transport facilities and the provision of all manner of logistical support. . . . As part of the contract between the NSF and ASA, ASA is also required to procure, equip, and operate a research vessel with ice-breaking capability and equipped with the advanced oceanographic equipment needed to perform its research functions.”).

<sup>251</sup> Panel Report, para. 7.945, note 2410 (“NASA uses non-reimbursable Space Act Agreements where it works with ‘one or more Agreement Partners in a mutually beneficial activity that furthers the Agency’s missions’.

panel or the investigating authorities from examining the transaction as a whole and reaching a conclusion as to the type of transaction it was. There is no reason to believe that the presence of a service element, which exists in many commercial transactions that are not “purchases of services,”<sup>252</sup> would distract a panel or investigating authority from the correct conclusion. In the example posited by the EU, a panel would doubtlessly (and correctly) conclude that the transaction was a grant with an incidental supply of air transportation services.<sup>253</sup>

181. The EU’s first scenario could also be understood as including the possibility of the goods provider supplying a service in exchange for a government loan or an equity infusion. The example of an equity infusion in exchange for the supply of goods is commercially nonsensical. An equity infusion is a payment in exchange for a commensurate share in the ownership of a juridical person. If the producer of goods provided services in exchange for an equity infusion, it would have to both supply the service and give the government an ownership interest in itself, that would result in a net transfer of value to the government.<sup>254</sup> A loan is a loan because it contains an obligation to repay. If the goods producer were supplying a service in exchange for receiving a government loan, it would have to repay the money and supply the service. That would simply return the analysis to the question of whether the transaction was a loan with incidental services involved, or a supply of services with an incidental financing component.

182. In short, the supply of services in exchange for a direct transfer of funds could not circumvent the SCM Agreement because the resulting transaction would be (1) properly characterized as a purchase of services, in which case it would not be a financial contribution; (2) in actuality some other type of financial contribution, such as a grant with incidental services; or (3) a net transfer of funds to the government, which is not a concern of the SCM Agreement. The outcome would depend on a detailed consideration of the facts, such as the Panel performed in this dispute. It is impossible to reach a conclusion in the abstract.

183. The EU’s second scenario, a supply of services in exchange for foregoing of government revenue otherwise due, fails for similar reasons. If the government were really reducing an enterprise’s tax burden as a payment for the service in question, there would be a transaction properly characterized as a purchase of services. If the service was incidental, as in the EU’s example of the \$2 billion plane flight, the transaction would be a financial contribution in the form of the foregoing of revenue otherwise due, with an incidental service. The outcome would depend on a detailed consideration of the fact, such as the Panel performed in this dispute. It is impossible to reach a conclusion in the abstract.

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In these situations, ‘each party bears the cost of its participation and there is no exchange of funds between the parties.’”).

<sup>252</sup> Examples would include financing arrangements or delivery services associated with the purchase of goods.

<sup>253</sup> For the sake of completeness, the United States notes that the transaction outlined by the EU would be illegal under U.S. law. Procurement rules require government agencies to pay the commercial value of a service, where that information is available, or the cost of supplying the service plus a fee.

<sup>254</sup> If the EU’s point is that the provision of services in these examples would replace the cash repayment normally expected in the case of a loan or the ownership interest in the case of an equity infusion, the transactions in question would cease to meet the definition of loans or equity infusions.

184. The EU’s third scenario, the supply of services by a producer of goods in exchange for the government provision of goods and services, would result in a similar analysis. However, unlike the second scenario, there is a real world example – NASA nonreimbursable and partially reimbursable Space Act Agreements. In these transactions, NASA makes a contribution in kind, usually in the form of facilities, equipment, or employees, and another entity makes its own, matching in-kind contribution to NASA. Contrary to the EU’s prediction, these transactions did not open “a considerable gap in the coverage of the *SCM Agreement*.”<sup>255</sup> Rather, the United States and the EU agreed that the Space Act Agreements were a provision of services, rather than a purchase of services.<sup>256</sup> This concrete example illustrates that the EU’s concerns about circumvention are not realistic.

185. Thus, the potential for circumvention outlined in the EU Appellant Submission is entirely illusory. All of the hypothetical transactions are either properly characterized as purchases of services, in which case there is no circumvention, or they would fall properly into one of the categories of financial contribution.

#### **D. Conclusion**

186. In this situation, the common-sense conclusion is also the conclusion produced by the rules for interpreting treaties – the exclusion of purchases of services from Article 1.1(a)(1), clause (iii), of the *SCM Agreement* means they are excluded from the definition of a financial contribution. The Panel correctly disposed of the EU’s various efforts to insert purchases of services into clause (i) as a direct transfer of funds, and the EU’s arguments on appeal to not support a different result. Therefore, the Panel should reject the EU’s appeal.

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<sup>255</sup> EU Appellant Submission, para. 119.

<sup>256</sup> Panel Report, para. 7.977.

## V. ADVERSE EFFECTS

### A. Introduction and Executive Summary

187. The EU alleges that the Panel committed three errors in connection with its adverse effects analysis. In the subsections that follow, the United States responds in detail to each of the EU’s arguments and demonstrates that all of them lack merit.

188. First, the Panel did not err when it declined to aggregate the effects from the B&O tax subsidies with the aeronautics R&D subsidies that the Panel found benefitted the 787. The Panel’s approach to the analysis of the alleged adverse effects of the aeronautics R&D subsidies and the B&O tax subsidies is permissible under Articles 5 and 6.3 of the SCM Agreement and consistent with Appellate Body’s findings regarding those provisions. As the Appellate Body has explained, panels have a “certain degree of discretion in selecting an appropriate methodology”<sup>257</sup> for the adverse effects analysis and “{t}he appropriateness of a particular method may have to be determined on a case-specific basis, depending on a number of factors and factual circumstances such as the nature, design, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products, among others.”<sup>258</sup>

189. The Panel selected an appropriate methodology based on “the nature, design, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products.”<sup>259</sup> Given the argumentation and evidence concerning the fundamentally different natures of the aeronautics R&D subsidies and the B&O tax subsidies, the Panel properly assessed their effects on the 787 separately.

190. The EU proposes an extremely broad interpretation of Articles 5 and 6.3 of the SCM Agreement, arguing that a cumulative assessment is required *in all cases*. The EU’s attempt to read these provisions as imposing a one-size-fits-all analytical approach is inconsistent with the text of those provisions and is at odds with prior findings by the Appellate Body interpreting them.

191. Second, the Panel did not err when it declined to aggregate the effects of the tax subsidies with the effects of the so-called “Remaining Subsidies” (*i.e.*, Washington State and Everett tax subsidies other than the B&O tax measures; Kansas industrial revenue bond subsidies; Illinois subsidies). There is no basis for the EU’s assertions that the “Remaining Subsidies” have a “sufficient nexus with the subsidized product” and that they impact the same “effects-related variable” as the tax subsidies – *i.e.*, price – in a way that would require an aggregate analysis.<sup>260</sup>

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<sup>257</sup> *US – Upland Cotton (AB)*, para. 436.

<sup>258</sup> *EC – Large Civil Aircraft (AB)*, para. 1376 (citations omitted).

<sup>259</sup> *Cf. EC – Large Civil Aircraft (AB)*, para. 1376.

<sup>260</sup> EU Appellant Submission, para. 229.

The mere fact that the “Remaining Subsidies” “were received by Boeing’s LCA division”<sup>261</sup> says very little about the existence of any nexus between the subsidies and any of the three groups of subsidized products under analysis. Moreover, the Panel *never agreed* with the EU’s contention that the Remaining Subsidies confer the equivalent of additional cash flow. The evidence before the Panel was insufficient to support the EU’s *allegation* that the “Remaining Subsidies” had an impact on the price of any subsidized product. Similar to the Appellate Body’s finding in *EC – Large Civil Aircraft*, the EU’s general *allegation* that the “Remaining Subsidies” “constitute the functional equivalent of additional cash flow available to Boeing’s LCA division”<sup>262</sup> – which the Panel did not accept – could not provide a sufficient basis to determine that those subsidies “complemented and supplemented” the “product effect” of the tax subsidies in enabling Boeing to reduce the price of each aircraft it manufactured and sold. Accordingly, the Panel was correct to decline to aggregate the tax subsidies and the “Remaining Subsidies.”

192. Third, the Panel did not fail to satisfy any due process rights under Article 11 of the DSU when it found that it was unable to determine that certain DoD RDT&E subsidies caused adverse effects. The EU had all the opportunities that it needed, and all the opportunities to which it was entitled under the DSU, to present arguments and evidence to the Panel in support of its claims. Additionally, contrary to the EU’s assertions, the approach taken by the Panel was hardly “unexpected”<sup>263</sup> or “surprising,”<sup>264</sup> and the Panel’s finding did not change from the interim to the final Panel report. Finally, the Panel did not fail to request necessary information and the United States did not fail to provide necessary information. To the extent that the Panel lacked information necessary to make serious prejudice findings with respect to assistance instruments other than those funded under the ManTech and DUS&T programs, the fault for this lies with the EU, because the EU failed to advance “sufficient argument or evidence regarding the effects of assistance instruments”<sup>265</sup> funded through the other programs to permit the Panel to determine that they caused serious prejudice.

**B. The Panel Did Not Err When It Declined to Aggregate the Effects from the B&O Tax Subsidies with the Aeronautics R&D Subsidies Benefitting the 787**

193. The EU argues that “[t]he Panel erred in its interpretation and application of Articles 5 and 6.3 of the *SCM Agreement* when it declined to assess the cumulative effects of two groups of subsidies benefiting Boeing’s LCA in the 200-300 seat LCA market,”<sup>266</sup> the B&O tax subsidies and the aeronautics R&D subsidies. For the reasons given below, the EU’s arguments are without merit.

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<sup>261</sup> EU Appellant Submission, para. 228.

<sup>262</sup> EU Appellant Submission, para. 228.

<sup>263</sup> EU Appellant Submission, para. 244.

<sup>264</sup> EU Appellant Submission, para. 247.

<sup>265</sup> Panel Report, para. 7.1701.

<sup>266</sup> EU Appellant Submission, para. 199.

**1. The Panel properly assessed the effects of the aeronautics R&D subsidies separately from the B&O tax subsidies**

194. The Panel’s approach to the analysis of the alleged adverse effects of the aeronautics R&D subsidies and the B&O tax subsidies is permissible under Articles 5 and 6.3 of the SCM Agreement and consistent with Appellate Body’s interpretation of those provisions. In *EC – Large Civil Aircraft*, the Appellate Body affirmed that, when analyzing whether a “genuine and substantial” causal link exists between the subsidies and the alleged market phenomena:

“a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the ‘effect’ of a subsidy is significant price suppression under Article 6.3(c).” The appropriateness of a particular method may have to be determined on a case-specific basis, depending on a number of factors and factual circumstances such as the nature, design, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products, among others.<sup>267</sup>

195. Following this statement, the Appellate Body cited to paragraph 7.1194 of the panel report in *US – Upland Cotton*, in which the panel stated that:

To the extent a sufficient nexus exists between certain subsidies and any suppression of prices of the subsidized product, we aggregate these subsidies and their effects.<sup>268</sup>

In the *US – Upland Cotton* panel report, to which the EU cites repeatedly,<sup>269</sup> the panel declined to aggregate non-price-contingent subsidies with the price-contingent subsidies at issue because the former were “of a different nature, and thus effect.”<sup>270</sup>

196. Under the circumstances of this dispute, the Panel selected an appropriate methodology based on “the nature, design, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products.”<sup>271</sup> The Panel structured its adverse effects analysis in light of the EU’s allegations about the nature of the various subsidies and their effects on Boeing’s commercial behavior.<sup>272</sup>

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<sup>267</sup> *EC – Large Civil Aircraft (AB)*, para. 1376 (citations omitted; quoting *US – Upland Cotton (AB)*, para. 436).

<sup>268</sup> *US – Upland Cotton (Panel)*, para. 7.1194, cited in *EC – Large Civil Aircraft (AB)*, para. 1376 n. 3003.

<sup>269</sup> See EU Appellant Submission, paras. 202, 206, 227-230.

<sup>270</sup> *US – Upland Cotton (Panel)*, para. 7.1307.

<sup>271</sup> Cf. *EC – Large Civil Aircraft (AB)*, para. 1376.

<sup>272</sup> See Panel Report, paras. 7.1696 (“The Panel considers that it is necessary to structure its analysis in a manner that takes into account the fact that, based on the nature of the subsidies at issue, the European Communities makes a distinction as to the effects of the subsidies on Boeing’s commercial behaviour between the 787, on the one hand, and the 737NG and the 777, on the other.”). The Panel explained that:



With respect to the 787, the EU argued that different groups of subsidies affected Boeing’s commercial behavior in different ways.<sup>273</sup> As the Panel recalled, the aeronautics R&D subsidies “have had what the European Communities terms ‘technology effects’ in that they ‘have helped Boeing develop, launch and produce a technologically-advanced 200-300 seat LCA much more quickly than it could have on its own.’”<sup>274</sup>

197. The EU did not allege that the B&O tax subsidies had such a “technology” effect. Rather, the EU alleged that the B&O tax subsidies had “price effects” because they “reduce{ } Boeing’s marginal unit costs for its 787 family LCA.”<sup>275</sup> As the United States observed to the Panel, the EU and its economic consultants made a categorical distinction between subsidies alleged to reduce Boeing’s marginal unit costs and all other subsidies in this dispute.<sup>276</sup> The EU alleged “price effects based on the nature of the US subsidy at issue,”<sup>277</sup> whereby the nature of the B&O tax subsidies was alleged to cause price effects differently than the aeronautics R&D subsidies and other subsidies.<sup>278</sup> The EU never alleged that the B&O tax subsidies had any effect on Boeing’s ability to launch the 787 in 2004.

198. Given the argumentation and evidence concerning the fundamentally different natures of these categories of subsidies, the Panel properly assessed the effects of the B&O tax subsidies on the 787 separately from aeronautics R&D subsidies:

We recall that we have previously found that the aeronautics R&D subsidies, through their effects on Boeing’s development of technologies for the 787, gave rise to serious prejudice in that product market. However, owing to the very

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In sum, whereas for all three aircraft at issue the European Communities argues that the subsidies have caused serious prejudice through their impact on Boeing’s ability to charge lower prices for its aircraft (price effects), it is only with respect to the 787 that the European Communities argues that certain subsidies at issue also cause serious prejudice through their impact on Boeing’s development of technologies (technology effects). The Panel first examines, in subsection (c)(i) below, whether the *aeronautics R&D subsidies* at issue have caused serious prejudice to the interests of the European Communities by reason of their effects on Boeing’s development of technologies for the 787. The Panel then examines, in subsection (c)(ii), *with respect to all three aircraft at issue*, whether *all of the subsidies* at issue have caused serious prejudice to the interests of the European Communities in that they have had price effects either by reducing Boeing’s marginal unit costs for particular aircraft or by increasing Boeing’s non-operating cash flow.).

Panel Report, para. 7.1699.

<sup>273</sup> Panel Report, para. 7.1697.

<sup>274</sup> Panel Report, para. 7.1697 (*quoting* EC FWS, para. 1343; *citing* EC FWS, paras. 1335,1345).

<sup>275</sup> Panel Report, para. 7.1697 (*quoting* EC FWS, para. 1340); *see also* EC FWS, para. 1306.

<sup>276</sup> US Comments on EC Response to Panel Question 372, para. 234 (*citing* EC FWS, paras. 1306-1311; ITR Magnitude Report, Appendix A, p. 1 (Exhibit EC-13); Cabral Report, p. 1, para. 2 (Exhibit EC-4)); *see also* US SNCOS, paras. 139-140. As is evident from the cited U.S. submissions, the EU was mistaken in its assertion that “the United States did not address the issue of aggregation of the effects from these two groups of subsidies.” EU Appellant Submission, para. 195.

<sup>277</sup> EC FWS, para. 1302.

<sup>278</sup> *Compare* EC FWS, para. 1306, *with id.* at para. 1309.

different way in which the aeronautics R&D subsidies operate, we do not consider that it is appropriate to aggregate the effects of the B&O tax subsidies on Boeing's pricing of the 787 with the effects of the aeronautics R&D subsidies on Boeing's development of technologies applied to the 787, as it is clear that the two groups of subsidies operate through entirely distinct causal mechanisms.<sup>279</sup>

199. In analyzing the effects of subsidies alleged to affect Boeing's launch of the 787 separately from subsidies that were not alleged to have done so, the Panel's approach accords with the views of the Appellate Body in *EC – Large Civil Aircraft*. In that dispute, the Appellate Body identified two methodologies that seek to account for the combined effects of multiple subsidies. The first is an "aggregate" assessment, in which the effects of multiple subsidies are assessed collectively and simultaneously. While observing that the *EC – Large Civil Aircraft* panel did not actually conduct such an assessment, the Appellate Body explained that, in a truly aggregate assessment:

the Panel would have sought to determine from the outset whether the collective effect of LA/MSF and non-LA/MSF subsidies was to enable the launch of particular models of LCA.<sup>280</sup>

200. The other methodology, which the *EC – Large Civil Aircraft* panel did conduct, involves analyzing the effects of one group of very similar subsidies and then, if that first group of subsidies has a "genuine and substantial" causal relationship with the alleged market phenomena, discerning whether a second group of subsidies has a "genuine causal connection" with the same market phenomena, such that the second group "complements or supplements" the first. The Appellate Body endorsed the *EC – Large Civil Aircraft* panel's application of this methodology, but stressed the need to establish a "genuine causal connection" for each subsidy:

Given that the Panel had determined that LA/MSF subsidies were a substantial cause of the alleged market phenomena, it was permissible and sufficient for the Panel to assess whether a genuine causal connection between non-LA/MSF subsidies and the same market phenomena existed such that these non-LA/MSF subsidies complemented or supplemented the effects of LA/MSF. Contrary to the European Union's submission, the Panel was not required, in those circumstances, to establish that non-LA/MSF subsidies were themselves a substantial cause or "necessary to enable a launch decision at a particular point in time."

As we observed above, the Panel's approach to the analysis of causation did not absolve it from establishing a genuine causal link between the different categories of non-LA/MSF subsidies and Airbus' ability to launch and bring to the market its LCA models, thereby similarly causing the displacement and significant lost sales of Boeing LCA during the reference period. The fact that LA/MSF measures enabled certain product launches, and therefore were a genuine and substantial cause of displacement and lost sales during the reference period, *does not in and*

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<sup>279</sup> Panel Report, para. 7.1824.

<sup>280</sup> *EC – Large Civil Aircraft (AB)*, para. 1372.

*of itself establish that non-LA/MSF subsidies had similar effects. Instead, the Panel had to establish that non-LA/MSF subsidies had a genuine causal connection with Airbus’ ability to launch and bring to the market its models of LCA, thus contributing to the adverse effects of LA/MSF measures.*<sup>281</sup>

201. Thus, the Appellate Body considered that both “aggregate” and “complementary” methodologies for assessing the effects of multiple subsidies should focus on discerning whether the various subsidies operate through the same causal mechanism – in that case, “Airbus’ ability to launch and bring to market its models of LCA” – to cause adverse effects. Moreover, in identifying the requirement that complementary/supplementary subsidies have a “genuine causal connection” to the causal mechanism, the Appellate Body recognized the importance of ensuring that subsidies with little or no causal relationship are not improperly found to cause adverse effects simply because they were grouped together with subsidies that do have a genuine and substantial causal connection with the alleged effects.

202. Here, the Panel aggregated all subsidies alleged to operate through the causal mechanism of enhancing Boeing’s ability to launch and bring to market the 787, *i.e.*, the aeronautics R&D subsidies. The Panel *did not find* that the aeronautics R&D subsidies had “price effects” by enabling or causing Boeing to reduce the sales price of the 787.<sup>282</sup> Because the B&O tax subsidies, by their nature, design, and operation, did not, and were not alleged to, affect Boeing’s launch of the 787, the Panel properly did not include them in its analysis of the effects of the aeronautics R&D subsidies. The EU argues that the Panel should have, or was required to adopt a different approach to the adverse effects analysis. As demonstrated below, though, there is no basis in the text of the SCM Agreement to require a Panel to adopt the EU’s preferred approach.

**2. The EU’s proposed interpretation of Articles 5 and 6.3 of the SCM Agreement is not supported by the text and is inconsistent with the Appellate Body’s interpretation of those provisions**

203. In its appellant submission, the EU proposes an extremely broad interpretation of Articles 5 and 6.3 of the SCM Agreement, arguing that these provisions require a cumulative assessment *in all cases*. In the EU’s view:

{T}he broad language of Articles 5 and 6.3, in particular the use of the terms “any subsidy” and “subsidized product”, suggests that these provisions discipline the *collective impact of any and all* subsidies benefiting the subsidised product in the market at issue.<sup>283</sup>

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<sup>281</sup> *EC – Large Civil Aircraft (AB)*, para. 7.1378-7.1379 (emphasis added; citations omitted).

<sup>282</sup> The Panel declined to assess the price effects of the aeronautics R&D subsidies, citing its concern about over-counting their effects and the EU’s agreement that over-counting should be avoided. Panel Report, para. 7.1826. The Panel also rejected the primary bases of the EU’s price effects causation theory: arguments about Boeing’s “economic viability” absent the subsidies, and the price effects “model” prepared by Professor Luis Cabral. Panel Report, paras. 7.1829-7.1832. The EU has not appealed those findings.

<sup>283</sup> EU Appellant Submission, para. 205.

The EU goes on to argue that:

{W}here two subsidies support the same subsidised product and negatively impact competition in the market at issue, then a panel must consider the effects of these subsidies collectively in determining whether they amount to any form of adverse effect.<sup>284</sup>

Such a broad cumulation or aggregation rule is not supported by the text of Articles 5 and 6.3, and is inconsistent with the Appellate Body’s interpretation of these provisions in prior reports.<sup>285</sup>

204. The reference in Article 5 of the SCM Agreement to “any subsidy” and the references in each of the subparagraphs of Article 6.3 of the SCM Agreement to “the effect of the subsidy” are in the singular form. Thus, rather than “suggest{ing} that these provisions discipline the *collective* impact of *any and all* subsidies benefiting the subsidised product in the market at issue,” as the EU posits,<sup>286</sup> the text of Articles 5 and 6.3 reflects the requirement that there must be established a “genuine and substantial relationship of cause and effect” or a “genuine causal connection” between any particular subsidy found to exist and any adverse effect found to exist.<sup>287</sup>

205. In this connection, the United States recalls the relevant views of the Appellate Body in *EC – Large Civil Aircraft*:

{T}he Appellate Body has interpreted Article 6.3 of the SCM Agreement as requiring the establishment of a “*genuine and substantial relationship of cause and effect*” between the subsidies and the alleged market phenomena under that provision, and that such relationship is not diluted by the effects of other factors. The Appellate Body has further explained that *the particular market phenomena alleged under Article 6.3(c) must “result from a chain of causation that is linked to the impugned subsidy”* and the effects of other factors must not be attributed to the challenged subsidies. We have explained earlier in this Report that the interpretative guidance provided by the Appellate Body under Article 6.3(c) is equally relevant to the causation analysis under subparagraphs (a) and (b) of that provision. We also recall the Appellate Body’s view that “*a panel has a certain degree of discretion in selecting an appropriate methodology for determining*

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<sup>284</sup> EU Appellant Submission, para. 206.

<sup>285</sup> The EU’s proposed interpretation is also inconsistent with the EU’s prior statements to the Appellate Body concerning the legal standard for a combined assessment of the effects of subsidies. See *EC – Large Civil Aircraft*, EU Appellant Submission, para. 646 (“It is only legitimate to combine the assessment of the effects of subsidies where ‘the nature of the subsidy, the way in the subsidy operates, {and} the extent to which the subsidy is provided in respect of a particular product or products’ is identical or similar. In the context of a product launch causation theory, that is the case where each of the subsidies is necessary to bring about the product launch at issue.”) (*quoting Korea – Commercial Vessels*, para. 7.560).

<sup>286</sup> EU Appellant Submission, para. 205.

<sup>287</sup> See *US – Upland Cotton (AB)*, para. 438; *EC – Large Civil Aircraft (AB)*, paras. 1376, 1378.

*whether the ‘effect’ of a subsidy is significant price suppression under Article 6.3(c).” The appropriateness of a particular method may have to be determined on a case-specific basis, depending on a number of factors and factual circumstances such as the nature, design, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products, among others.*<sup>288</sup>

206. As discussed in the preceding section, the Appellate Body noted that the *EC – Large Civil Aircraft* panel “did not aggregate the challenged subsidies with a view to discerning their effects under Article 6.3 of the *SCM Agreement*.”<sup>289</sup> The Appellate Body nevertheless “consider{ed} that the approach used by the Panel is permissible under Article 6.3 of the *SCM Agreement*, provided that a genuine causal link between the . . . subsidies and the market phenomena alleged under Article 6.3 is established.”<sup>290</sup> The EU’s proposed interpretation of Articles 5 and 6.3 of the *SCM Agreement*, *i.e.*, that aggregation or cumulation of subsidies is required for “*any and all* subsidies benefiting the subsidised product in the market at issue,”<sup>291</sup> is at odds with this Appellate Body finding.

207. In support of its argument that the Panel erred, the EU points out that “{t}he text of { Articles 5 and 6.3 of the *SCM Agreement* } does not even refer to any ‘mechanism’ or manner in which subsidies cause adverse effects.”<sup>292</sup> However, it is equally true that the text of Articles 5 and 6.3 does not refer to subsidies that “complement and supplement” the “product effect” of other subsidies. Nevertheless, in *EC – Large Civil Aircraft*, the Appellate Body found that it was permissible for the panel to examine whether multiple subsidies “complement and supplement” a particular “product effect” in its analysis of adverse effects, and the Appellate Body applied such an approach in its review of the panel’s findings with respect to the subsidies it had found to exist.<sup>293</sup> As the Appellate Body has explained, “Article 6.3(c) requires the establishment of a causal link between the subsidies and the particular market situations being claimed under that provision.”<sup>294</sup> However, the precise methodology to be used to establish such a causal link is not specified in the *SCM Agreement*.

208. The EU’s proposed interpretation would undermine the “methodological discretion” of panels in the analysis of adverse effects.<sup>295</sup> After briefly referencing the Appellate Body’s prior finding that panels have a certain degree of discretion in selecting an appropriate methodology for determining whether the effect of a subsidy amounts to adverse effects, the EU proceeds to set forth a detailed analytical process that it asserts all panels are obligated to follow in

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<sup>288</sup> *EC – Large Civil Aircraft (AB)*, para. 1376 (citations omitted; emphasis added).

<sup>289</sup> *EC – Large Civil Aircraft (AB)*, para. 1374 (emphasis in original).

<sup>290</sup> *EC – Large Civil Aircraft (AB)*, para. 1378.

<sup>291</sup> EU Appellant Submission, para. 205.

<sup>292</sup> EU Appellant Submission, para. 207.

<sup>293</sup> See *EC – Large Civil Aircraft (AB)*, paras. 1378, 1381-1409.

<sup>294</sup> *EC – Large Civil Aircraft (AB)*, para. 1231.

<sup>295</sup> *EC – Large Civil Aircraft (AB)*, para. 1376.

evaluating adverse effects. The EU argues that the text of Articles 5 and 6.3 of the SCM Agreement requires the particular analysis it describes. To the contrary, a panel’s evaluation in any particular case will necessarily depend “on a number of factors and factual circumstances such as the nature, design, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products, among others,” and the permissibility of any particular analytical approach adopted by a panel must be evaluated “on a case-specific basis.”<sup>296</sup>

209. The EU’s proposed approach is also flawed in its substance. According to the EU, a panel “must” conduct a cumulative assessment of two or more subsidies that “support the same subsidised product and negatively impact competition in the market at issue.”<sup>297</sup> However, the Appellate Body has explained that the appropriateness of any analysis – and logically this would include the determination to conduct a cumulative assessment – “depend{s} on a number of factors and factual circumstances such as the nature, design, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products, among others.”<sup>298</sup>

210. In *EC – Large Civil Aircraft*, the Appellate Body found that the panel was required to find more than simply that two or more subsidies “support{ed} the same subsidised product and negatively impact{ed} competition in the market at issue”<sup>299</sup> before the effects of non-LA/MSF subsidies could be considered to “complement and supplement” the effects of LA/MSF. Specifically, the Appellate Body explained that the *EC – Large Civil Aircraft* panel was required to establish that the non-LA/MSF subsidies had a “genuine causal link” with the same causal mechanism through which LA/MSF operated, *i.e.*, “Airbus’ ability to launch and bring to market its LCA models,” so as to cause the alleged adverse effects in a way *similar to* the LA/MSF subsidies:

{T}he Panel’s approach to the analysis of causation did not absolve it from establishing a genuine causal link between the different categories of non-LA/MSF subsidies and Airbus’ ability to launch and bring to market its LCA models, thereby *similarly causing* the displacement and significant lost sales of Boeing LCA during the reference period.<sup>300</sup>

211. In sum, the EU’s attempt to read Articles 5 and 6.3 of the SCM Agreement as imposing a one-size-fits-all analytical approach in which aggregation or cumulation is required in all cases is inconsistent with the text of those provisions and is at odds with prior findings by the Appellate Body interpreting them. Consequently, the Appellate Body should reject the EU’s proposed interpretation and the EU’s arguments on appeal that rely on it.

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<sup>296</sup> *EC – Large Civil Aircraft (AB)*, para. 1376.

<sup>297</sup> EU Appellant Submission, para. 206.

<sup>298</sup> *EC – Large Civil Aircraft (AB)*, para. 1376 (citations omitted; quoting *US – Upland Cotton (AB)*, para. 436).

<sup>299</sup> EU Appellant Submission, para. 206.

<sup>300</sup> *EC – Large Civil Aircraft (AB)*, para. 1379 (emphasis added).

### C. The Panel Did Not Err When It Declined to Aggregate the Effects of the Tax Subsidies with the Effects of the Remaining Subsidies

212. The Panel found that the “tax subsidies” (*i.e.*, FSC/ETI and the Washington State and City of Everett B&O tax subsidies) caused serious prejudice in the single-aisle (737 v. A320) and 300-400 seat (777 v. A340) product markets.<sup>301</sup> In a separate analysis, it found that the so-called “Remaining Subsidies” (*i.e.*, Washington State and Everett tax subsidies other than the B&O tax measures; Kansas industrial revenue bond subsidies; Illinois subsidies) did not cause serious prejudice to the EU’s interests.<sup>302</sup> The EU argues that “{t}he Panel . . . erred in its interpretation and application of Articles 5 and 6.3 of the *SCM Agreement*, by failing, at paragraph 7.1828, to aggregate with the Tax Subsidies the approximately \$550 million in Remaining Subsidies.”<sup>303</sup> The EU advances two principal arguments in support of its appeal, neither of which withstands scrutiny.

213. The EU’s first argument relies on the panel reports in *US – Upland Cotton* and *EC – Large Civil Aircraft*. With regard to *US – Upland Cotton*, the EU observes that the panel in that dispute found that “an ‘integrated examination of effects of any subsidies’ was permitted in circumstances where subsidies had ‘a sufficient nexus’ with (i) ‘the subsidized product’; and (ii) ‘the particular effects-related variable under examination’.”<sup>304</sup> The EU asserts that “{t}he Remaining Subsidies in this dispute fulfil these requirements.”<sup>305</sup> The EU is incorrect.

214. First, the EU has no basis for asserting that the “Remaining Subsidies” have a “sufficient nexus with the subsidized product” because they “were received by Boeing’s LCA division for its benefit, and constitute the functional equivalent of additional cash flow to Boeing’s LCA division.”<sup>306</sup> The Panel, in fact, identified three separate groups of subsidized products and separately analyzed three “product markets.”<sup>307</sup> The Panel explained that it did so because “{t}he European Communities has chosen to organize its serious prejudice arguments in this way and the Panel considers that it is reasonable to examine those arguments on that basis.”<sup>308</sup> Critically, the Panel found that the Remaining Subsidies “unlike the FSC/ETI subsidies and B&O tax subsidies . . . are not directly related to Boeing’s production or sale of LCA.”<sup>309</sup> Indeed, the EU itself concedes that “{t}he Remaining Subsidies are not tied to the production of individual, or particular families of, Boeing LCA.”<sup>310</sup> Nevertheless, the EU asserts that the

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<sup>301</sup> Panel Report, paras. 7.1773, 7.1780.

<sup>302</sup> Panel Report, paras. 7.1827-7.1828.

<sup>303</sup> EU Appellant Submission, para. 219.

<sup>304</sup> EU Appellant Submission, para. 227 (*citing US – Upland Cotton (Panel)*, para. 7.1191).

<sup>305</sup> EU Appellant Submission, para. 228.

<sup>306</sup> EU Appellant Submission, para. 228.

<sup>307</sup> Panel Report, para. 7.1672.

<sup>308</sup> Panel Report, para. 7.1672.

<sup>309</sup> Panel Report, para. 7.1827.

<sup>310</sup> EU Appellant Submission, para. 228.

subsidies “were received by Boeing’s LCA division for its benefit, and constitute the functional equivalent of additional cash flow available to Boeing’s LCA division.”<sup>311</sup> However, the fact that the “Remaining Subsidies” “were received by Boeing’s LCA division” says very little about the existence of any nexus between the subsidies and any of the three groups of subsidized products under analysis, and the EU offers no other explanation or argument in support of its contention that there is a “sufficient nexus” between the “Remaining Subsidies” and the “subsidized product.” As the Panel noted in a footnote, the United States argued that:

Because the bulk of the alleged subsidies in this dispute are, by the EC’s own admission, ‘untied’ to the development, production or sale of any Boeing large civil aircraft, the evidence cited by the EC regarding the ways in which Boeing supposedly used the alleged subsidies is critical to its causation arguments. Yet, that ‘evidence’ is essentially non-existent . . .<sup>312</sup>

Furthermore, the Panel never *agreed* with the EU’s contention that the Remaining Subsidies confer the equivalent of additional cash flow. The Panel’s references to the EU’s “cash flow” assertion indicate that it remained nothing more than an allegation.<sup>313</sup>

215. Second, the “Remaining Subsidies” do not impact the same “‘effects-related variable,’ as the Tax Subsidies – *i.e.*, price.”<sup>314</sup> The EU explains that “the Remaining Subsidies were all *alleged* to have ‘some effect on’ Boeing’s ability to charge lower prices for its LCA, and thus ‘contribute to price suppression’, lost sales, and displacement and impedance.”<sup>315</sup> However, the EU failed to demonstrate a causal link between the Remaining Subsidies and Boeing’s pricing. The Panel rejected both bases underpinning the EU’s causation theory for the price effects of the Remaining Subsidies and other non-recurring subsidies: (a) the Cabral price effects model<sup>316</sup> and (b) arguments that Boeing would not have been economically viable without subsidies.<sup>317</sup> Thus, there is no foundation for the EU’s contention that the Remaining Subsidies affect Boeing’s prices, much less that they have a sufficient nexus with prices to *require* an analysis of their effects together with the tax subsidies.

216. The Panel correctly took into account its findings on the nature and magnitude of the Remaining Subsidies in assessing their effects:

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<sup>311</sup> EU Appellant Submission, para. 228.

<sup>312</sup> Panel Report, para. 7.1828, note 3786 (*citing* United States’ comments on the EC response to question 301, paras. 601-602).

<sup>313</sup> *See* Panel Report, para. 7.1825 (“the category of subsidies *identified by the European Communities* as operating to increase Boeing’s non-operating cash flow, thereby *allegedly* giving Boeing the ability to engage in ‘aggressive pricing’ . . .”) (emphasis added); *id.* at para. 7.1827 (“this category of subsidies *that are said to operate by increasing Boeing’s non-operating cash flow*”) (emphasis added).

<sup>314</sup> EU Appellant Submission, para. 229.

<sup>315</sup> EU Appellant Submission, para. 230 (emphasis added).

<sup>316</sup> Panel Report, para. 7.1832.

<sup>317</sup> Panel Report, para. 7.1831.



When the aeronautics R&D subsidies are subtracted from this category of subsidies that are said to operate by increasing Boeing’s non-operating cash flow, the amount remaining is comparatively small, being approximately \$550 million. As importantly, the subsidies in this category, unlike the FSC/ETI subsidies and B&O tax subsidies discussed above, are not directly related to Boeing’s production or sale of LCA.<sup>318</sup>

Ultimately, the Panel was not “persuaded that subsidies of this nature and of this amount have affected Boeing’s prices in a manner that could be said to give rise to serious prejudice to the European Communities’ interests.”<sup>319</sup> The evidence before the Panel was simply insufficient to support the EU’s *allegation* that the “Remaining Subsidies” had an impact on the price of any subsidized product.

217. The EU also refers to “a finding by the panel in *EC and Certain Member States – Large Civil Aircraft . . .*”<sup>320</sup> The EU explains that:

That panel held that it is appropriate, for purposes of a panel’s adverse effects analysis, to aggregate subsidies that “complement{ } and supplement{ }” each other in circumstances where the subsidies have a “sufficient nexus with the subsidized product . . . {and} they also have a sufficient nexus with ‘the particular effects-related variable{s} under examination’”.<sup>321</sup>

From this, the EU goes on to argue that:

Should the Appellate Body uphold that panel’s analysis, it follows that . . . a panel must not segregate its adverse effects analysis so that it cannot take account of the combined market effect of subsidies that collectively enhance Boeing’s cash flow and its ability to price down LCA.<sup>322</sup>

218. No such thing follows. The Panel did not find that the Remaining Subsidies *or* the tax subsidies “enhance Boeing’s cash flow,” much less that they did so “collectively.” The Panel also rejected every argument, theory, and expert report offered by the EU for the proposition that the Remaining Subsidies and other untied subsidies “enhance” Boeing’s “ability to price down LCA.”<sup>323</sup> This contrasts sharply with the factual situation in *EC – Large Civil Aircraft*, where the Appellate Body reviewed (and upheld most of) that panel’s findings that non-LA/MSF subsidies “complemented and supplemented” the effects of LA/MSF. Where the Appellate Body reversed the panel in *EC – Large Civil Aircraft*, it did so because “a general finding that they enabled Airbus to develop ‘features and aspects’ of its LCA on a schedule that otherwise it

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<sup>318</sup> Panel Report, para. 7.1827.

<sup>319</sup> Panel Report, para. 7.1828.

<sup>320</sup> EU Appellant Submission, para. 225.

<sup>321</sup> EU Appellant Submission, para. 225.

<sup>322</sup> EU Appellant Submission, para. 226.

<sup>323</sup> Panel Report, paras. 7.1829-7.1832.

would have been unable to accomplish does not provide a sufficient basis to determine that R&TD subsidies ‘complemented and supplemented’ the ‘product effect’ of LA/MSF in enabling Airbus to launch particular models of LCA.”<sup>324</sup> Similarly, here, the EU’s general *allegation* that the “Remaining Subsidies” “constitute the functional equivalent of additional cash flow available to Boeing’s LCA division”<sup>325</sup> – which the Panel did not accept – could not provide a sufficient basis to determine that those subsidies “complemented and supplemented” the “product effect” of the tax subsidies in enabling Boeing to reduce the price of each aircraft it manufactured and sold. Applying the approach taken by the Appellate Body in *EC – Large Civil Aircraft*, the Panel was correct to decline to aggregate the tax subsidies and the “Remaining Subsidies.”

219. The EU’s second argument incorporates by reference its flawed interpretation of the text of Articles 5 and 6.3 of the SCM Agreement,<sup>326</sup> *i.e.*, that these provisions establish a broad rule requiring the collective assessment of “*any and all* subsidies benefiting the subsidised product in the market at issue,”<sup>327</sup> and the EU asks that the Remaining Subsidies be assessed collectively with the tax subsidies *and* the aeronautics R&D subsidies.<sup>328</sup> For the reasons given above in section V.B.2 of this submission, the EU’s proposed interpretation of Articles 5 and 6.3 is incorrect and the EU’s argument that the Panel erred by not applying such an interpretation is without merit.

220. Therefore, the Panel did not err in declining to aggregate the “Remaining Subsidies” and the tax subsidies in its analysis of adverse effects. Accordingly, the Appellate Body should reject the EU’s request to reverse the Panel’s finding that the “Remaining Subsidies” do not cause adverse effects and its further request for a finding that “aggregated with the Tax Subsidies (or the aeronautics R&D subsidies and the Tax Subsidies) that were found to cause adverse effects, the Remaining Subsidies also cause adverse effects.”<sup>329</sup>

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<sup>324</sup> *EC – Large Civil Aircraft (AB)*, para. 1407.

<sup>325</sup> EU Appellant Submission, para. 228.

<sup>326</sup> EU Appellant Submission, para. 233.

<sup>327</sup> EU Appellant Submission, para. 205.

<sup>328</sup> EU Appellant Submission, para. 233.

<sup>329</sup> EU Appellant Submission, para. 234. With respect to its appeal of the Panel’s determination not to aggregate the aeronautics R&D subsidies and the B&O subsidies, the EU states that it “recognises that the Panel did not undertake the necessary factual analysis to assess the joint effects of US aeronautical R&D and B&O tax subsidies” and “[a]ccordingly . . . does not consider that there is a basis for the Appellate Body to complete the analysis.” EU Appellant Submission, note 267. Here, however, the EU requests that the Appellate Body, after reversing the Panel’s finding that the “Remaining Subsidies” did not cause adverse effects, go on to find affirmatively that they caused adverse effects. Implicit in this request is a request that the Appellate Body find that the “Remaining Subsidies” led Boeing to offer particular price reductions for particular subsidized products. The EU does not describe any factual findings made by the Panel or any undisputed facts that would support such a finding. Accordingly, were the Appellate Body to reverse the Panel’s finding that the “Remaining Subsidies” did not cause adverse effects, the United States does not consider that there is a basis for the Appellate Body to complete the analysis and make the finding that the EU requests. The United States also notes that the EU’s Notice of Appeal requests that the Appellate Body complete the analysis with respect to its appeal of a number of Panel findings, conclusions, and recommendations “where indicated.” EU Notice of Appeal, second chapeau paragraph. However,

**D. The Panel Did Not Fail to Satisfy the Due Process Rights Required by Article 11 of the DSU when It Found that It Was Unable to Determine that Certain DoD RDT&E Subsidies Caused Adverse Effects**

221. The EU argues that the “Panel acted inconsistently with the principle of due process required by Article 11 of the DSU” because it “failed to provide the European Union with an opportunity to respond to the Panel’s unexpected approach to its adverse effects analysis, or to seek the necessary information from the United States.”<sup>330</sup> As explained below, each of these contentions is without merit. The EU had all the opportunities to make its case that it was entitled to under the DSU, but the EU failed to use those opportunities to provide the Panel argument and evidence to support a finding that assistance instruments other than those funded by the ManTech and DUS&T programs cause adverse effects.

**1. The EU was not entitled to an opportunity to comment on the Panel’s revisions to the interim Panel report**

222. As an initial matter, the EU’s reliance on Article 11 of the DSU is misplaced. The aspect of the panel’s proceedings at issue is covered by Article 15 of the DSU, which describes the “Interim Review Stage” of a dispute settlement panel proceeding and provides to disputing parties a limited right to “submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members.”<sup>331</sup> Additionally, it establishes that “[a]t the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments.”<sup>332</sup>

223. Article 15 clearly contemplates that a panel may alter the content of its report between the interim report and the final report. However, the EU’s complaint suggests that a panel is not permitted to modify the substance of the interim report in response to comments it receives from the parties unless the panel provides further opportunity to comment. This would either convert the interim review stage into a potentially indefinite cycle of comments and changes and further comments, or else call into question the purpose of the interim review stage, potentially reducing it to a proof reading exercise.<sup>333</sup>

224. In any event, the Panel provided each party with the opportunity to submit a written request for review as contemplated under Article 15.2 of the DSU, as well as the opportunity to comment on the written request of the other party. The Panel discussed the requests and comments of the parties in the final Panel report, and its responses to them, as required by

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the EU’s Notice of Appeal does not indicate that the EU requested that the Appellate Body complete the analysis with respect to this finding. See EU Notice of Appeal, para. 6.

<sup>330</sup> EU Appellant Submission, para. 244.

<sup>331</sup> DSU, Article 15.2.

<sup>332</sup> DSU, Article 15.2. Neither party requested such a meeting in this dispute.

<sup>333</sup> The EU’s argument potentially would also raise implications for appeal proceedings. The EU’s approach would appear to require that the Appellate Body provide parties an opportunity to comment on the Appellate Body’s report or else the Appellate Body would fail make an objective assessment of the issues on appeal.

Article 15.3 of the DSU. The Panel fulfilled its obligations under Article 15, and the additional comment opportunity the EU seeks simply is not contemplated under the DSU. That the Panel did not provide the EU a comment opportunity to which it was not entitled under the DSU does not constitute a violation of the EU’s “due process rights.”

225. Furthermore, had the Panel taken up the EU’s proposal to “expand its adverse effects analysis,”<sup>334</sup> that would have been contrary to the Appellate Body’s admonition against addressing an argument raised at such a late stage of the panel proceedings that the other party has no meaningful opportunity to respond.<sup>335</sup> As the United States explained in response to the EU’s comment on paragraph 7.1701 of the interim Panel report, which included an annex attached to the EU’s comments:

{T}he European Union in this annex presents new argumentation, based on evidence that has been on the record for years, attempting to establish for the first time that certain assistance agreements funded “dual-use” research. The EU had an opportunity to make its *prima facie* case on this during the regular panel proceedings. The EU is now seeking to have the Panel make additional findings based on argumentation not previously presented. The interim review stage is not the time for a party to attempt for the first time to meet its burden of making a *prima facie* case. Accordingly, the EU’s request that the panel consider extensive new arguments on these factual issues goes beyond the scope of the interim review contemplated by Article 15.2, which is limited to review of “precise aspects” of the interim report.<sup>336</sup>

226. The EU had all the opportunities that it needed, and all the opportunities to which it was entitled, to present arguments and evidence to the Panel in support of its claims. The Panel did not violate the EU’s “due process rights” by failing to give the EU still more chances to make its case at the very end of the proceeding.

## ***2. The Panel’s approach was not “unexpected” or “surprising”***

227. Additionally, contrary to the EU’s assertions, the approach taken by the Panel was hardly “unexpected”<sup>337</sup> or “surprising”<sup>338</sup> in light of the applicable legal standard, the Parties’ arguments, and the Panel’s questions. The EU had early and clear notice that the DoD program elements it challenged funded different categories of contracting instruments that could be treated differently for the purpose of the subsidy analysis under Article 1 of the SCM Agreement. The contract and contract-related evidence that the United States and the EU provided with the first and subsequent U.S. and EU submissions reflected multiple types of instruments and the arguments of the parties – while aimed at convincing the Panel to treat all instruments the same

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<sup>334</sup> EU Appellant Submission, para. 246.

<sup>335</sup> See *US – Gambling (AB)*, para. 273.

<sup>336</sup> U.S. Comments on the EU Requests for Review of the Interim Report, para. 30.

<sup>337</sup> EU Appellant Submission, para. 244.

<sup>338</sup> EU Appellant Submission, para. 247.

for the purpose of the subsidy analysis under Article 1 of the SCM Agreement – reflected the fact that there were differences among the instruments.

228. Moreover, as the EU acknowledges, the Panel was not bound by the arguments of the parties.<sup>339</sup> On the contrary, a panel is obligated to make an objective assessment of the matter before it. In addition, as the EU also acknowledges, the Panel’s questions to the parties in this dispute specifically indicated that it was considering the legal implication of the differences between the categories of contracting instruments.<sup>340</sup> Under these circumstances, it can hardly be considered unexpected or surprising that the Panel’s Article 1 subsidy findings could result in a situation in which the Panel would need to consider whether the requirements of Article 5 and 6.3 had been satisfied for a subset of the measures that the EU had challenged.

229. This is all that the analysis the EU calls the “predominance standard” reflects. The Panel simply concluded, based on its objective assessment of the argument and evidence submitted by the parties, that even in the absence of direct argument and evidence connecting particular assistance instruments or assistance agreements funded through particular project elements to adverse effects, the requirements of Articles 5 of 6.3 nevertheless were met with respect to assistance instruments funded under the ManTech and DUS&T programs. The Panel was unable to make similar findings with respect to other project elements because it had no evidence as to whether those programs funded assistance agreements to such an extent that the effects ascribed generally to research funded through those programs could be attributed to assistance agreements. The EU’s assertion that the Panel’s finding was unexpected or surprising is, in this sense, without foundation and simply not credible.

230. Furthermore, the EU’s assertion that the basis of the Panel’s finding in paragraph 7.1701 of the final Panel report was unexpected or surprising, as compared to the same paragraph in the interim Panel report, is equally without foundation, and reflects the EU’s continued misunderstanding of the Panel’s finding in paragraph 7.1701 of the Panel report.

231. The Panel explained in the interim (and final) Panel report that:

The scope of the European Communities’ claim relating to DOD R&D measures is clear: it challenges the payments (and access to facilities) provided to Boeing through R&D contracts and agreements entered into under the 23 programmes identified in the European Communities’ panel request. The scope of the European Communities claim is relatively narrow in several respects.

First, the European Communities does not challenge the RDT&E Program as a whole. Rather, it challenges only certain funding provided to Boeing under the 23 RDT&E programmes at issue. In addition, the European Communities does not challenge all of the funding that Boeing received under these 23 programmes.

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<sup>339</sup> EU Appellant Submission, para. 243.

<sup>340</sup> See EU Appellant Submission, para. 250.

Rather, it challenges only the subset of funding that is, in the European Communities’ view, related to “dual use” technologies.<sup>341</sup>

The EU did not comment on this description in the interim Panel report of the scope of its claim, and the text of these paragraphs remained unchanged in the final Panel report, except for the paragraph numbers.<sup>342</sup>

232. In light of the “relatively narrow” scope of the EU’s claim, the Panel made findings with respect to financial contribution and benefit on the basis of the “contracts” and “agreements” on the record before the Panel, rather than on the basis of the broader “programmes.”<sup>343</sup> Specifically, the Panel found that “procurement contracts” were not specific subsidies, but “assistance instruments” were. The EU did not comment on these findings in the interim Panel report and they remained unchanged in the final Panel report.<sup>344</sup>

233. Having found that the “assistance instruments” were specific subsidies, the Panel sought to evaluate whether they caused serious prejudice to the interests of the EU. The Panel noted that it “need{ed} to ensure that it considers the effects only of those DOD measures that it has found constitute specific subsidies.”<sup>345</sup> The Panel found that the “assistance instruments” funded through the DoD ManTech and DUS&T programmes caused serious prejudice, but found that it was unable to determine whether assistance instruments funded under other programmes did so. This finding did not change from the interim Panel report to the final Panel report.<sup>346</sup>

234. In response to a comment from the EU on paragraph 7.1701 of the interim Panel report, the Panel sought to clarify the reason for its finding in the final Panel report. As the Panel explained in the context of its discussion of the interim review:

The European Communities’ comment appears to rest on one or both of the following premises; namely (i) that the Panel erroneously concluded that only the ManTech and DUS&T programmes under the RDT&E Program funded assistance instruments with Boeing; and (ii) that there is insufficient evidence on the record to enable the Panel to determine which transactions between DOD and Boeing under the RDT&E programmes are procurement contracts and which are assistance instruments. However, *the Panel is aware that assistance instruments were funded through RDT&E programmes other than ManTech and DUS&T, and of the evidence on record linking the assistance instruments on record to the RDT&E programmes that funded them.* The Panel has revised paragraph 7.1701 of the Interim Report (now paragraph 7.1701) to further clarify that its serious

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<sup>341</sup> Interim Panel Report, paras. 7.1115-1116; *see also* Final Panel Report, paras. 7.1116-1117.

<sup>342</sup> *Compare* Interim Panel Report, paras. 7.1115-1116 *and* Final Panel Report, paras. 7.1116-1117.

<sup>343</sup> *See* Panel Report, paras. 7.1116-1117, 7.1171, 7.1187.

<sup>344</sup> The EU noted a typographical error in paragraph 7.1171 of the interim Panel report, but otherwise did not comment on either paragraph 7.1171 or 7.1187. *See* EU Comments on the Panel’s Interim Report, p. 15.

<sup>345</sup> Panel Report, para. 7.1701.

<sup>346</sup> *See* Interim Panel Report, para. 7.1701, and Panel Report, para. 7.1701.

prejudice evaluation includes assistance instruments funded under the ManTech and DUS&T programmes *as well as under the 21 other programmes under the RDT&E Program*. The revisions also further clarify that, as part of our evaluation, *the European Communities has not advanced sufficient argument and evidence that would enable the Panel to assess the effects of assistance instruments funded by programmes other than the ManTech and DUS&T programmes, as distinct from the effects of those RDT&E programmes as a whole* (which involve funding in the form of both procurement contracts and assistance instruments).<sup>347</sup>

235. In paragraph 7.1701 of the final Panel report itself, the Panel explained that:

The European Communities has, for the most part, presented its serious prejudice arguments regarding the effects of the DOD measures on the basis of the specific DOD “project elements” or programmes under the RDT&E Program, without distinguishing between effects which are attributable to procurement contracts under those programmes and those which are attributable to assistance instruments. While there is evidence on the record linking specific assistance instruments to funding provided through particular RTD&E programmes, there is insufficient evidence of the effects of those assistance instruments as distinct from the effects of the RDT&E programmes (including the effects of procurement contracts funded under those programmes) more generally.

236. In suggesting on appeal that the Panel “limit{ed} its findings of adverse effects to those DoD programmes that ‘funded predominantly assistance instruments, as opposed to procurement contracts, or a mixture of assistance instruments and procurement contracts’,” the EU demonstrates that it misunderstands the Panel’s finding. The Panel did not evaluate adverse effects on the basis of “programmes,” and it did not limit its findings of adverse effects to particular programmes. Rather, the Panel expressly stated that its “serious prejudice evaluation includes assistance instruments funded under the ManTech and DUS&T programmes *as well as under the 21 other programmes under the RDT&E Program*.”<sup>348</sup> However, because the EU chose to advance its adverse effects arguments primarily on the basis of the R&D “programmes,” rather than on the basis of individual transactions for which information was on the record, the Panel found that the EU failed to “advance{ } sufficient argument or evidence regarding the effects of *assistance instruments* funded through RTD&E programmes other than in relation to the ManTech and DUS&T programmes.”<sup>349</sup> That is, in the Panel’s view, the EU’s arguments and evidence supported findings only with respect to the effects of assistance instruments funded under the ManTech and DUS&T programmes, which the Panel found were “predominantly funded through cooperative agreements or other assistance instruments.”<sup>350</sup>

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<sup>347</sup> Panel Report, para. 6.124 (emphasis added).

<sup>348</sup> Panel Report, para. 6.124 (emphasis added).

<sup>349</sup> Panel Report, para. 7.1701 (emphasis added).

<sup>350</sup> Panel Report, para. 7.1701. The United States notes that it has not appealed this finding.

237. The Panel’s finding in paragraph 7.1701, and the basis for that finding, did not change from the interim to the final Panel report, and cannot credibly be considered “unexpected” or “surprising.”

**3. *The Panel did not fail to request necessary information and the United States did not fail to provide necessary information***

238. The EU asserts that the Panel failed to request and that the United States failed to provide necessary information. Neither assertion has any merit.

239. As an initial matter, a panel has no obligation to develop information on behalf of the complaining party. A panel’s authority under Article 13 of the DSU is discretionary and is not to be used to make the case for either party. Accordingly, there is no basis for the EU’s complaint regarding the Panel’s requests for information. Nor does the responding party have any obligation to provide information to help the complaining party satisfy its burden of proof. The EU failed to meet its burden of proof and now seeks to blame everyone in the process but itself for this failure.

240. Furthermore, as explained further in section II of this submission, the EU’s argument that the United States failed to cooperate with the information-gathering process in this dispute is baseless. At each stage of the process, the United States has complied with the relevant decisions and rulings of the DSB, the representative of the DSB in the information-gathering process under Annex V of the SCM Agreement in *US – Large Civil Aircraft (First Complaint)*, and the Panel in *US – Large Civil Aircraft (Second Complaint)*. Indeed, the United States has gone to great lengths to identify, assemble, and provide as many responsive documents as possible.<sup>351</sup> The United States also discussed individual contracts and assistance instruments at length, and cited them as evidence to support its legal arguments.<sup>352</sup> Despite the EU’s assertions, the Panel made no finding that the United States failed to provide necessary information or cooperate during the proceeding.

241. The Panel likewise did not fail to request necessary information from the United States. The Panel asked numerous questions about the contracts and assistance instruments submitted by the United States.<sup>353</sup> The Panel inquired, in particular, regarding differences between contracts and assistance instruments.<sup>354</sup> The Panel considered EU arguments that the United States had

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<sup>351</sup> See U.S. Response to Panel Question 210 (describing the “sources and methodology” used to identify 41 DoD general aeronautics research contracts and assistance instruments that the United States submitted to the Panel).

<sup>352</sup> US FWS, paras. 91-94, 97, note 100, 107-102; US SWS, para. 42, note 52; US RPQ 20(a), paras. 52, 55, and 60; US Comment on EC RPQ 15(a), para. 65; US RPQ 136(b), paras. 97-98; US RPQ 194, paras. 240-241, 195, and 251; US RPQ 208, paras. 274, 284-285, 290, and 317-318; US RPQ 211(b), para. 330; US RPQ 213, para. 341.

<sup>353</sup> E.g., Panel Questions 131, 190-192, 194-195, 205, 210, 212-213, 321, and 360.

<sup>354</sup> E.g., Panel Questions 20, 190-192, and 195. The EU asserts that the United States took the “position” that “the type of contract used by DOD makes no difference to the evaluation of whether or not those contracts provided financial contributions to Boeing, within the meaning of Article 1.1(a)(1) of the SCM Agreement.” EU



failed to submit materials that the Panel needed for its analysis, and asked the EU to justify its request for additional information.<sup>355</sup> The Panel sought some additional information based on assertions made by the EU,<sup>356</sup> but for the most part declined to grant the EU requests.

242. The EU nevertheless complains that:

{T}he Panel in this dispute required evidence that the RDT&E programmes funded “predominantly assistance instruments, as opposed to procurement contracts, or a mixture of assistance instruments and procurement contracts”, before it was willing to find that those RDT&E programmes caused adverse effects. Yet, neither party was ever asked to provide this information.<sup>357</sup>

The EU further argues that “it was imperative for the Panel to request the contract information from the United States that the European Union had been seeking to enable it to make the assessment it considered necessary to resolve the dispute.”<sup>358</sup>

243. As explained in the preceding section, the EU misunderstands the Panel’s adverse effects finding. The Panel did not need more contracts to be placed on the record in order to permit it to make findings with respect to more programmes. Rather, the Panel needed argument and evidence from the EU relating to the effects of the assistance instruments that the United States had placed on the record years earlier. However, the EU “for the most part, presented its serious prejudice arguments regarding the effects of the DOD measures on the basis of the specific DOD ‘project elements’ or programmes under the RDT&E Program, without distinguishing between effects which are attributable to procurement contracts under those programmes and those which are attributable to assistance instruments.”<sup>359</sup> Consequently, the Panel found that the EU had failed to advance “sufficient argument or evidence regarding the effects of assistance instruments” funded through the other programs to permit the Panel to determine that they caused serious prejudice. To the extent that the Panel lacked information necessary to make serious prejudice findings with respect to assistance instruments other than those funded under the ManTech and DUS&T programs, the fault lies with the EU.

244. Accordingly, for the reasons given above, the EU’s argument that the Panel acted inconsistently with the principle of due process required by Article 11 of the DSU in making its

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Appellant Submission, para. 237. The EU misstates the U.S. position. The United States stated that “the substance must guide the analysis of whether it provides a financial contribution and, if so, what kind. However the EC fails to recognize that the type of vehicle (that is, cooperative agreement procurement contract, or Other Transaction) used will determine some of the substantive features of the contract.” US RPQ 20(a), para. 76; *accord* US RPQ 191(a) (“the characterization of an instrument as a ‘purchase’ or ‘acquisition’ contract as opposed to an ‘assistance agreement’ may be relevant, but is not determinative.”).

<sup>355</sup> Panel Question 205.

<sup>356</sup> *E.g.*, Panel Question 213.

<sup>357</sup> EU Appellant Submission, para. 249 (citations omitted).

<sup>358</sup> EU Appellant Submission, para. 251.

<sup>359</sup> Panel Report, para. 7.1701.

adverse effects findings with respect to DoD assistance programs should be rejected, and the United States respectfully requests that the Appellate Body decline the EU's request to reverse the Panel's finding in paragraph 7.1701 of the Panel report.

## **VI. IMPLICATIONS ARISING FROM THE APPELLATE BODY REPORT IN *EC – LARGE CIVIL AIRCRAFT***

### **A. Introduction and Executive Summary**

245. The United States thanks the Appellate Body for its invitation to address in the appellee submission the implications for the legal issues in this appeal that arise from the Appellate Body Report in *EC – Large Civil Aircraft*,<sup>360</sup> and we will now take the opportunity to do so.

246. The Appellate Body’s findings in *EC – Large Civil Aircraft* support the U.S. argument that the Panel failed to conduct an objective assessment under Article 11 of the DSU in three instances. First, the Panel failed to conduct the “objective assessment” called for under Article 11 by disregarding evidence that the research conducted by Boeing was principally for the benefit and use of the government or unrelated third parties. The Appellate Body’s findings drive home the point that, when a panel fails to engage with the arguments and evidence before it, it does not make an objective assessment consistent with Article 11.

247. Second, the Appellate Body’s findings in *EC – Large Civil Aircraft* underscore that the Panel’s unsupported statement regarding the portion of DoD-funded research that had potential relevance to large civil aircraft does not provide an objective assessment of the facts for purposes of Article 11. In particular, by citing no evidence, the Panel “fail{ed} to provide a sufficient evidentiary basis for its finding.”<sup>361</sup>

248. Third, the Panel failed to make an objective assessment under Article 11 of the DSU in finding that Boeing’s ability to use other companies’ commercially available technologies was due to knowledge and experience obtained while working on the NASA programs challenged by the EU. The Panel had “no evidentiary basis for its finding”<sup>362</sup> and also failed to “provide a ‘reasoned and adequate’ explanation for its findings and coherent reasoning.”<sup>363</sup>

249. The Appellate Body’s findings in *EC – Large Civil Aircraft* support the U.S. argument that the Panel erred in finding that the aeronautics R&D subsidies caused adverse effects under Articles 5.3(c) and 6.3 of the SCM Agreement. The Appellate Body stressed the importance of establishing a “genuine and substantial relationship of cause and effect” and of considering all of the factors affecting one of the Article 6.3 market phenomena before reaching a conclusion as to serious prejudice. The Panel’s findings regarding the aeronautics R&D subsidies failed to provide what the Appellate Body in *EC – Large Civil Aircraft* found to be crucial – a consideration of all the factors that potentially “account for” the lost sales, market displacement and impedance, and price suppression that the EU alleged to be the result of the subsidies.

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<sup>360</sup> See Letter from Appellate Body Secretariat Director, Werner Zdouc, to the Parties re: the Working Schedule for the appeal, dated April 20, 2011, p. 2.

<sup>361</sup> *EC – Large Civil Aircraft (AB)*, para. 1408.

<sup>362</sup> *EC – Large Civil Aircraft (AB)*, para. 1408.

<sup>363</sup> *EC – Large Civil Aircraft (AB)*, para. 881, quoting *Korea – Dairy (AB)*, para. 137; *US – Wheat Gluten (AB)*, para. 151; *US – Softwood Lumber VI (Article 21.5) (AB)*, para. 97; *US – Upland Cotton (21.5) (AB)*, paras. 292, 293, footnote 618, and para. 294; *US – Continued Zeroing (AB)*, para. 338.

250. In addition, the Appellate Body’s discussion of counterfactual analyses in *EC – Large Civil Aircraft* confirms that the Panel’s counterfactual analysis in this dispute was insufficient to establish that the subsidies caused adverse effects for purposes of Articles 5 and 6.3 of the SCM Agreement. In contrast to *EC – Large Civil Aircraft*, the Panel failed to take account of factors indicating that, in the absence of subsidies, Boeing would have followed the same course it actually did: investigating in the same areas, at the same pace, and aiming for the same goal – a technologically advanced aircraft commercially competitive with the A330. In line with the Appellate Body’s description of a proper counterfactual analysis, the Panel needed to consider “what the market would look like” in a scenario where Boeing launched a technologically superior 767 replacement (albeit not so advanced as the 787) in 2004.<sup>364</sup> The Panel never did so.

251. The Appellate Body’s report in *EC – Large Civil Aircraft* also underscores errors in the second stage of the Panel’s analysis, which examined whether the effects of the aeronautics R&D subsidies on Boeing’s pricing and product offerings had follow-on effects on Airbus’ prices and sales that constituted serious prejudice. First, the Panel erred in finding lost sales with respect to the A330 and making the resulting findings of displacement and impedance. The Appellate Body explained that “a sale that is ‘lost’ is one that a supplier ‘failed to obtain’.”<sup>365</sup> Airbus cannot have “failed to obtain” sales of the A330 for the simple reason that none of these campaigns involved a potential order for the Original A350 *and* the A330.

252. Second, the Panel failed to take into account customer-specific situations showing that Boeing’s victory in certain sales campaigns was not the effect of the aeronautics R&D subsidies.<sup>366</sup> Therefore, its analysis does not support the ultimate conclusion that the lost sales were “the result of” the aeronautics R&D subsidies. The analysis of individual sales transactions in *EC – Large Civil Aircraft* confirms that the Panel erred.

253. Third, the Panel erred in finding displacement of Airbus 200-300 seat LCA by failing to establish that relevant “markets” existed in those countries within the meaning of Article 6.3(b) of the SCM Agreement. The Appellate Body’s report in *EC – Large Civil Aircraft* confirms that panels may not simply assume the existence of a market, but must independently evaluate the existence and contours of the market posited by a complaining party. The Panel erred in simply assuming, rather than making an “objective determination,”<sup>367</sup> that the countries identified by the EU constituted “third country markets” for purposes of Article 6.3(b). In *EC – Large Civil Aircraft*, the Appellate Body found that such an error required reversal of all of the panel’s displacement findings, even though the EU had conceded that some displacement had occurred.

254. Finally, the Appellate Body’s findings in *EC – Large Civil Aircraft* support the U.S. argument that the Panel did not satisfy the requirements of Articles 5 and 6.3 of the SCM Agreement for establishing that the tax subsidies caused adverse effects in the 100-200 seat and

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<sup>364</sup> *EC – Large Civil Aircraft* (AB), para. 1110.

<sup>365</sup> *EC – Large Civil Aircraft* (AB), para. 1214 (emphasis added), quoting *New Shorter Oxford English Dictionary*, p. 1632.

<sup>366</sup> US Other Appellant Submission, Section VI.B.3.b.

<sup>367</sup> *EC – Large Civil Aircraft* (AB), para. 1174.

300-400 seat product markets. First, the Panel gave only cursory consideration to critical elements of the evaluation of whether there was a causal link between the tax subsidies and the adverse effects alleged by the EU. While a panel has discretion in its evaluation of adverse effects, the Appellate Body’s finding makes clear that a panel must perform some sort of “exercise” to evaluate how the market would behave in the absence of subsidies. This Panel failed that test. Its counterfactual inquiry with regard to the tax subsidies was strikingly brief, and the Panel never made factual findings that could support the proposition that Boeing’s pricing of the 737 and 777 would not have been economically justifiable absent the tax subsidies. Indeed, the Panel’s relevant findings contradict it. The Appellate Body also stressed in *EC – Large Civil Aircraft* that “a panel’s methodological discretion does not absolve it . . . from ensuring that such causal link is not diluted by the effects of other factors.”<sup>368</sup> However, the Panel failed to conduct a proper non-attribution analysis.<sup>369</sup> Accordingly, the Appellate Body’s *EC – Large Civil Aircraft* report confirms that the Panel failed to conduct the necessary analyses to establish a genuine and substantial relationship of cause and effect between the tax subsidies and their alleged adverse effects.

255. Second, the Panel failed to identify the particular sales and third-country markets in which it found significant lost sales and displacement or impedance with regard to Airbus 100-200 seat and 300-400 seat aircraft. Again, the Panel failed to establish that Airbus “failed to obtain”<sup>370</sup> the alleged lost sales as a result of the tax subsidies. In addition, the Panel failed to make findings establishing that the tax subsidies caused the specific phenomena of displacement and impedance under Article 6.3(b), which is contrary to the Appellate Body’s elaboration of those concepts in *EC – Large Civil Aircraft*.<sup>371</sup>

256. Third, the Panel erred in finding displacement of Airbus 100-200 and 300-400 seat LCA in certain third countries. In *EC – Large Civil Aircraft*, the Appellate Body found that panels considering a claim of displacement or impedance have an “obligation to assess the relevant market under Articles 6.3(a) and 6.3(b).”<sup>372</sup> This determination must be based on the particular facts of the dispute.<sup>373</sup> Without a determination as to the existence of third country markets, the Panel lacked a proper basis for any of its displacement/impedance findings that could be interpreted as pertaining to the third country markets of Indonesia, Japan, or Singapore for 100-200 seat aircraft, or Hong Kong, New Zealand, or Singapore for 300-400 seat aircraft. Additionally, according to the criteria described by the Appellate Body in *EC – Large Civil Aircraft*, the data before the Panel are plainly incapable of showing trends, much less the “clearly discernible trends” needed for finding displacement or impedance of the A320 or A340 over the 2004-2006 reference period selected by the EU.

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<sup>368</sup> *EC – Large Civil Aircraft (AB)*, para. 1376 (citations omitted).

<sup>369</sup> US Other Appellant Submission, Section VI.C.1.d.

<sup>370</sup> *EC – Large Civil Aircraft (AB)*, para. 1214.

<sup>371</sup> *EC – Large Civil Aircraft*, paras. 1160-61.

<sup>372</sup> *EC – Large Civil Aircraft (AB)*, para. 1131.

<sup>373</sup> *EC – Large Civil Aircraft (AB)*, paras. 1117, 1123, 1129.

257. Accordingly, and for the reasons given in detail below, the Appellate Body’s findings in *EC – Large Civil Aircraft* provide further support for the U.S. appeals of the Panel’s findings.

**B. The Appellate Body’s findings in *EC – Large Civil Aircraft* support the U.S. appeal that the Panel failed to conduct an objective assessment under Article 11 of the DSU in three instances.**

258. In *EC – Large Civil Aircraft*, the Appellate Body reaffirmed and expanded on its previous conclusions regarding review of whether a panel has made an objective assessment consistent with Article 11 of the DSU. To begin, it reiterated the principles it had derived in the past from the text of Article 11 regarding review of a panel’s factfinding:

Pursuant to Article 11 of the DSU, “a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings”. The Appellate Body has repeatedly stated that it will not “interfere lightly” with the panel’s fact-finding authority, and has also emphasized that it “cannot base a finding of inconsistency under Article 11 simply on the conclusion that {it} might have reached a different factual finding from the one the panel reached”. Instead, for a claim under Article 11 to succeed, we must be satisfied that the panel has exceeded its authority as the trier of facts. As an initial trier of facts, a panel must provide a “reasoned and adequate” explanation for its findings and coherent reasoning. It has to base its findings on a sufficient evidentiary basis on the record, may not apply a double standard of proof, and a panel’s treatment of the evidence must not lack “even-handedness”.<sup>374</sup>

259. The Appellate Body noted its longstanding finding that “panels are not required to address every argument made by a party.”<sup>375</sup> However, it found that panels do have an obligation to engage in a robust analysis of arguments “central” to the matter under consideration. It made this point most clearly in *EC – Large Civil Aircraft* when explaining the inadequacy of the panel’s conclusions regarding the report of Professor Whitelaw, which dealt with the proper risk premium to use in calculating the benchmark interest rate for LA/MSF:

we note that the Panel also had an obligation to do more than to simply summarize Professor Whitelaw’s testimony and refer to the contract in a footnote. The Panel was under an obligation to engage with the evidence provided by Professor Whitelaw, which was clearly of central importance, and explain why it did not consider that evidence persuasive, even if it only referred to this evidence in abstract terms.

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<sup>374</sup> *EC – Large Civil Aircraft* (AB), para. 881, quoting *Korea – Dairy* (AB), para. 137; *US – Wheat Gluten* (AB), para. 151; *US – Softwood Lumber VI (Article 21.5)* (AB), para. 97; *US – Upland Cotton (Article 21.5)* (AB), paras. 292, 293, footnote 618, and para. 294; *US – Continued Zeroing* (AB), para. 338.

<sup>375</sup> *EC – Large Civil Aircraft* (AB), para. 893.

The Panel summarized the European Communities’ rebuttal arguments and evidence, but did not engage with them. Nor did the Panel explain how it reconciled its conclusion with the rebuttal arguments and evidence. This type of reasoning is not consistent with the Panel’s duty to make an objective assessment of the facts under Article 11 of the DSU.<sup>376</sup>

260. The Appellate Body also reiterated its findings in past reports that a panel acts inconsistently with Article 11 when it makes a finding that contradicts other findings made by the panel:

The Panel dismissed venture capital financing as a source from which to derive the project risk of the projects financed with LA/MSF because it considered venture capital financing to be “inherently more risky than LA/MSF”. At the same time, the Panel used the project-specific risk premium proposed by the United States – which had been derived by Dr. Ellis from the returns of venture capital financing – as a boundary for the ranges of project-specific risk premia that it established for the three groupings of LCA projects. . . . There are thus clear inconsistencies in the Panel’s reasoning. This type of internally inconsistent reasoning cannot be reconciled with the Panel’s duty to make an objective assessment of the facts under Article 11 of the DSU. The Panel also failed to comply with its duties under Article 11 of the DSU by not engaging with the European Communities’ argument as to the inconsistency between the project-specific risk premium proposed by the United States and the discount rate used in the Dorman Report.<sup>377</sup>

261. The Appellate Body also emphasized that a finding lacking support in the evidence does not provide the objective assessment of the facts required under Article 11:

In failing to provide a sufficient evidentiary basis for its finding that the effect of non-LA/MSF subsidies was the displacement of Boeing LCA from the EC and relevant third country markets and significant lost sales under Article 6.3(a), (b), and (c) of the SCM Agreement, the Panel failed to conduct an objective assessment of the matter, including an objective assessment of the facts, as required by Article 11 of the DSU.<sup>378</sup>

262. These findings provide further support for the U.S. submission that the Panel acted inconsistently with Article 11 with regard to three of its findings.

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<sup>376</sup> *EC – Large Civil Aircraft (AB)*, para. 917-918, citing *US – Upland Cotton (21.5) (AB)*, para. 292.

<sup>377</sup> *EC – Large Civil Aircraft (AB)*, para. 894, citing *US – Upland Cotton (21.5) (AB)*, paras. 292 and 295.

<sup>378</sup> *EC – Large Civil Aircraft (AB)*, para. 1408.

**1. The Panel failed to conduct the “objective assessment” required by Article 11 of the DSU by disregarding evidence that the research conducted by Boeing was principally for the benefit and use of the government or unrelated third parties.**

263. In Section II.B. of its Other Appellant Submission, the United States demonstrated that the Panel’s analysis of whether the research in question principally benefited Boeing or the government and unrelated third parties was inconsistent with Article 11. Specifically, the United States showed that the Panel conducted a – literally – one-sided analysis that addressed only information showing purported benefits to Boeing. The Panel did not consider voluminous materials describing how government-funded research conducted by Boeing advanced the government goal of expanding and disseminating knowledge related to aeronautics. The Panel also disregarded data showing widespread use of NASA’s knowledge in the broader scientific community in the United States and throughout the world.<sup>379</sup> The Appellate Body’s findings drive home the point that this type of analysis does not provide an objective assessment consistent with Article 11.

264. The question of who benefited from Boeing’s government-funded research was the central issue with regard to the NASA programs challenged by the EU, which were in turn the largest subsidy the EU alleged to exist. Both parties made extensive arguments and cited to evidence that in their view supported their positions. In *EC – Large Civil Aircraft*, the Appellate Body reversed the Panel because it:

summarized the European Communities’ rebuttal arguments and evidence, but did not engage with them. Nor did the Panel explain how it reconciled its conclusion with the rebuttal arguments and evidence. This type of reasoning is not consistent with the Panel’s duty to make an objective assessment of the facts under Article 11 of the DSU.<sup>380</sup>

In this dispute, the Panel did not even do that much. Its sole reference to the evidence cited by the United States is a statement to the effect that the U.S. arguments were “documented by the citations to U.S. procurement regulations, the numerous examples of individual contracts and modifications, and the huge volume of publicly disseminated literature generated by these programs.”<sup>381</sup> While the Panel quoted at length from portions of documents cited by the EU in its analysis of whether NASA had “demonstrable use” for research funded under its programs,<sup>382</sup> it made no reference to the evidence on which the United States relied. Needless to say, having made no mention of evidence supporting the U.S. position, the Panel did nothing to “engage with the evidence” or “reconcile { } its conclusion with the rebuttal arguments and evidence.”

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<sup>379</sup> US Other Appellant Submission, paras. 41-58.

<sup>380</sup> *EC – Large Civil Aircraft (AB)*, para. 918, citing *US – Upland Cotton (21.5) (AB)*, para. 292.

<sup>381</sup> US Other Appellant Submission, para. 7.975.

<sup>382</sup> Panel Report, paras. 7.985-7.1023.



265. Thus, the reasoning adopted by the Appellate Body in *EC – Large Civil Aircraft* confirms the demonstration in the U.S. Other Appellant Submission that the Panel failed to conduct the objective assessment called for Article 11 of the DSU.

**2. *The Panel’s statement regarding the portion of DoD-funded research that had potential relevance to large civil aircraft is inconsistent with Article 11 of the DSU.***

266. In Section III.C of its Other Appellant Submission, the United States demonstrated that the Panel made a statement, without any supporting evidence or reasoning, that “the Panel does not consider it credible that less than 11 per cent of the \$45 billion in aeronautics R&D funding that DOD provided to Boeing over the period 1991-2005 had any potential relevance to LCA.”<sup>383</sup> The Appellate Body’s findings in *EC – Large Civil Aircraft* underscore that this unsupported statement does not provide an objective assessment of the facts for purposes of Article 11 of the DSU.

267. In particular, by citing no evidence, the Panel “fail{ed} to provide a sufficient evidentiary basis for its finding.”<sup>384</sup> By including no explanation for reaching its conclusion, the Panel failed to provide a “‘reasoned and adequate’ explanation for its findings and coherent reasoning.”<sup>385</sup> Thus, the reasoning adopted by the Appellate Body in *EC – Large Civil Aircraft* confirms the demonstration in the U.S. Other Appellant Submission that the Panel failed to conduct the objective assessment called for Article 11 of the DSU.

**3. *The Panel failed to make an objective assessment under Article 11 of the DSU in finding that Boeing’s ability to use other companies’ commercially available technologies was due to knowledge and experience obtained while working on the NASA programs challenged by the EU.***

268. In Section VI.B.1.d of its Other Appellant Submission, the United States showed that there is no evidentiary support for the Panel’s conclusion that Boeing’s work on NASA aeronautics research was responsible for its ability to “integrate” other company’s commercially available technologies into production of the 787. Boeing’s extensive use of technologies that suppliers developed independent of NASA demonstrated that the subsidies were not responsible for the company’s ability to launch a technologically advanced 787 in 2004 with deliveries available in 2009. The Panel concluded, based on its finding regarding NASA’s responsibility for Boeing’s integration skills, that subsidies were, in effect, indirectly responsible for use of non-subsidized technology. In fact, the evidence showed that any integration capabilities Boeing developed came from its prior work on other commercial aircraft unrelated to the NASA

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<sup>383</sup> US Other Appellant Submission, paras. 123-125, *citing* Panel Report, para. 7.1205.

<sup>384</sup> *EC – Large Civil Aircraft (AB)*, para. 1408.

<sup>385</sup> *EC – Large Civil Aircraft (AB)*, para. 881, *quoting* *Korea – Dairy (AB)*, para. 137; *US – Wheat Gluten (AB)*, para. 151; *US – Softwood Lumber VI (Article 21.5) (AB)*, para. 97; *US – Upland Cotton (21.5) (AB)*, paras. 292, 293, footnote 618, and para. 294; *US – Continued Zeroing (AB)*, para. 338.

programs that the EU challenged, and that the NASA research did not involve the type of integration necessary to manufacture an aircraft.<sup>386</sup>

269. In *EC – Large Civil Aircraft*, the Appellate Body found that “[i]n failing to provide a sufficient evidentiary basis for its finding . . . the Panel failed to conduct an objective assessment of the matter, including an objective assessment of the facts, as required by Article 11 of the DSU.<sup>387</sup> In that instance, the missing evidence consisted of examples of “technologies incorporated in models of LCA actually launched by Airbus, or in technologies that make the production process of those LCA more efficient,” which the Appellate Body considered necessary to link research subsidies to adverse effects. In this Panel’s analysis of Boeing’s integration capabilities, the missing evidence consists of examples of “knowledge and experience that Boeing obtained pursuant to the aeronautics R&D subsidies as an integrator of the various technologies.”<sup>388</sup> Any information to that effect would be critical to the Panel’s conclusion that NASA was responsible for Boeing’s ability to use unsubsidized technology, but the Panel cites no such information. Thus, it has “no evidentiary basis for its finding,” which under the reasoning adopted in *EC – Large Civil Aircraft* means that the Panel failed to conduct an objective assessment for purposes of Article 11 of the DSU.

270. Moreover, on this point, the Panel also failed to “provide a ‘reasoned and adequate’ explanation for its findings and coherent reasoning.”<sup>389</sup> Its only reasoning consists of an extended quotation from the EU’s confidential oral statement at the first oral hearing, which itself cites no evidence. The statement notes that the ability to integrate technologies from multiple suppliers is “the true challenge” for both large civil aircraft manufacturers – itself a noncontroversial point – but does nothing to connect Boeing’s capability in this area to the subsidies challenged by the EU. Thus, there is no basis to conclude that Boeing’s extensive use of commercially available technology on the 787 is a result of the alleged subsidies, and the evidence demonstrates that the alleged subsidies were not responsible for the launch of the 787 in 2004.

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<sup>386</sup> US Other Appellant Submission, paras. 238-248.

<sup>387</sup> *EC – Large Civil Aircraft* (AB), para. 1408.

<sup>388</sup> Panel Report, para. 7.1772.

<sup>389</sup> *EC – Large Civil Aircraft* (AB), para. 881, quoting *Korea – Dairy* (AB), para. 137; *US – Wheat Gluten* (AB), para. 151; *US – Softwood Lumber IVI (21.5)* (AB), para. 97; *US – Upland Cotton (21.5)* (AB), paras. 292, 293, footnote 618, and para. 294; *US – Continued Zeroing* (AB), para. 338.

**C. The Appellate Body’s findings in *EC – Large Civil Aircraft* support the U.S. appeal that the Panel erred in finding that the aeronautics R&D subsidies caused adverse effects under Articles 5.3(c) and 6.3 of the SCM Agreement.**

**1. *The Panel erred in concluding that there was a genuine and substantial relationship of cause and effect between the U.S. aeronautics R&D subsidies and the technologies used on the 787.***

271. Section VI.B.1 of the U.S. Other Appellant Submission describes how the Panel’s own findings establish that any link between the aeronautics research subsidies and Boeing’s ability to launch a technologically advanced 787 in 2004 is too attenuated to establish a genuine and substantial relationship of cause and effect.<sup>390</sup> The findings in *EC – Large Civil Aircraft* with regard to the causation analysis under Article 6.3 of the SCM Agreement reinforce this conclusion. In particular, the Appellate Body stressed the importance of establishing a “genuine and substantial relationship of cause and effect” and of considering all of the factors affecting one of the Article 6.3 market phenomena before reaching a conclusion as to serious prejudice. The Panel failed to do these things and, therefore, failed to establish that the aeronautics R&D subsidies caused serious prejudice.

272. The Appellate Body provided the following overarching guidance regarding the analysis of causation under Article 6.3:

{T}he Appellate Body has interpreted Article 6.3 of the *SCM Agreement* as requiring the establishment of a “genuine and substantial relationship of cause and effect” between the subsidies and the alleged market phenomena under that provision, and that such relationship is not diluted by the effects of other factors. The Appellate Body has further explained that the particular market phenomena alleged under Article 6.3(c) must “result from a chain of causation that is linked to the impugned subsidy” and the effects of other factors must not be attributed to the challenged subsidies. . . . {A} panel’s methodological discretion does not absolve it from having to establish a “genuine and substantial relationship of cause and effect” between the impugned subsidies and the alleged market phenomena under Article 6.3, and from ensuring that such causal link is not diluted by the effects of other factors.<sup>391</sup>

273. Elaborating on the genuine and substantial relationship of cause and effect test, the Appellate Body confirmed that a “but for” approach to causation may be appropriate in assessing causation.<sup>392</sup> In this regard, the Appellate Body observed that:

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<sup>390</sup> US Other Appellant Submission, paras. 217-257.

<sup>391</sup> *EC – Large Civil Aircraft (AB)*, para. 1376 (citations omitted).

<sup>392</sup> *EC – Large Civil Aircraft (AB)*, para. 1233 (“The Appellate Body has said furthermore that it may be possible to assess whether the particular market phenomena are the effect of the subsidies by recourse to a ‘but for’ approach. Thus, one possible approach to the assessment of causation is an inquiry that seeks to identify what would have occurred ‘but for’ the subsidies.”).

In some circumstances, a determination that the market phenomena captured by Article 6.3 of the SCM Agreement would not have occurred “but for” the challenged subsidies will suffice to establish causation. This is because, in some circumstances, the “but for” analysis will show that the subsidy is both a necessary cause of the market phenomenon and a substantial cause. It is not required that the “but for” analysis establish that the challenged subsidies are a sufficient cause of the market phenomenon provided that it shows a genuine and substantial relationship of cause and effect. However, there are circumstances in which a “but for” approach does not suffice. For example, where a necessary cause is too remote and other intervening causes substantially account for the market phenomenon. This example underscores the importance of carrying out a proper non-attribution analysis.<sup>393</sup>

Thus, a “but for” approach that does not consider all of the factors affecting the market phenomenon in question, including other potential causes of that phenomenon, may erroneously indicate a causal connection where there is none.

274. The Appellate Body also observed that the “genuine and substantial relationship of cause and effect” test applies to claims of displacement or impedance under Article 6.3(b) of the SCM Agreement, as well as to claims of significant lost sales and price suppression under Article 6.3(c).<sup>394</sup> Thus, the Appellate Body’s discussion of the genuine and substantial standard applies to all of the adverse effects findings made by the Panel.

275. The most important point for analysis of the alleged technology effects of the aeronautics R&D subsidies is the Appellate Body’s emphasis on the need to consider the “remote{ness}” of the alleged subsidy from the market phenomenon in question, along with other potential causes of the phenomenon. That is exactly the point of the U.S. observation that “any link between the NASA and DoD research and Boeing’s ability to launch a technologically innovative aircraft like the 787 in 2004 is so attenuated that it does not rise to the level of a genuine and substantial relationship of cause and effect.”<sup>395</sup> In fact, the United States demonstrated several causes independent of the alleged subsidies that allowed Boeing to launch the 787 as it did in 2004, particularly Boeing’s self-funded research and commercial technologies available from other companies. It also observed that factors that the Panel did not consider lessened the significance of any perceived causal link, particularly the fact that NASA projects focused primarily on research at relatively low levels of technological maturity, and in many cases on topics that conferred no competitive advantage, such as safety or supersonic flight.

276. Thus, the Panel’s findings regarding the aeronautics R&D subsidies failed to provide what the Appellate Body in *EC – Large Civil Aircraft* found to be crucial – a consideration of all the factors that potentially “account for” the lost sales, market displacement and impedance, and price suppression that the EU alleged to be the result of the subsidies. Consequently, the

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<sup>393</sup> *EC – Large Civil Aircraft (AB)*, para. 1233.

<sup>394</sup> *EC – Large Civil Aircraft (AB)*, para. 1232.

<sup>395</sup> US Other Appellant Submission, para. 217.

Appellate Body’s reasoning leads to the conclusion advanced in the U.S. Other Appellant Submission – namely, that the Panel did not establish the existence of serious prejudice for purposes of Article 6.3.

**2. *The Panel’s counterfactual analysis was insufficient to demonstrate that but for the aeronautics R&D subsidies, Boeing would not have been able to launch the 787 in 2004.***

277. Section VI.B.2 of the U.S. Other Appellant Submission explains that the Panel’s own findings show that if Boeing had not received the aeronautics R&D subsidies, it would have launched the 787 when it did, and with the same level of technological innovation. This counterfactual conclusion establishes that those subsidies did not cause the launch of the 787 and, therefore, cannot have caused the various adverse effects that, in the Panel’s view, were the result of that aircraft. The Appellate Body’s discussion of counterfactual analyses in *EC – Large Civil Aircraft* confirms that the Panel’s counterfactual analysis in this dispute was insufficient to establish that the subsidies caused adverse effects for purposes of Articles 5 and 6.3 of the SCM Agreement.

278. In *EC – Large Civil Aircraft*, the Appellate Body provided the following guidance with regard to counterfactual analysis:

The use of a counterfactual analysis provides an adjudicator with a useful analytical framework to isolate and properly identify the effects of the challenged subsidies. In general terms, the counterfactual analysis entails comparing the actual market situation that is before the adjudicator with the market situation that would have existed in the absence of the challenged subsidies. *This requires the adjudicator to undertake a modeling exercise as to what the market would look like in the absence of the subsidies. Such an exercise is a necessary part of the counterfactual approach.* As with other factual assessments, panels clearly have a margin of discretion in conducting the counterfactual analysis.<sup>396</sup>

279. In *EC – Large Civil Aircraft*, the panel performed the analysis outlined by the Appellate Body by relying on the Dorman model, which the United States provided to show how launch aid makes the recipient more likely to launch aircraft programs.<sup>397</sup> The panel supplemented its findings regarding the Dorman model with a detailed analysis and specific factual findings concerning Airbus’ inability, absent the subsidies, to launch each aircraft program at issue.<sup>398</sup> That modeling exercise, and the specific findings for each Airbus aircraft program’s launch, led the *EC – Large Civil Aircraft* panel to find that the only plausible counterfactual scenarios (“scenarios 1 and 2”) entailed the absence of Airbus aircraft from the market and a consequent

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<sup>396</sup> *EC – Large Civil Aircraft (AB)*, para. 1110 (emphasis added).

<sup>397</sup> *EC – Large Civil Aircraft (Panel)*, paras. 7.1882-7.1912; see also *EC – Large Civil Aircraft (AB)*, paras. 1245-1254.

<sup>398</sup> *EC – Large Civil Aircraft (Panel)*, paras. 7.1912-7.1949; see also *EC – Large Civil Aircraft (AB)*, paras. 1255-1257.

increase in sales for the U.S. industry.<sup>399</sup> The Appellate Body upheld the “chain of reasoning” laid out by the panel:

Under scenarios 1 and 2, there was no need for the Panel to proceed further in its counterfactual analysis. Without the subsidies, Airbus would not have existed under these scenarios and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred. As Boeing (or the other US manufacturer envisaged by the Panel) would be the only supplier(s) of LCA, it (or they) would have made the sales instead. Thus, the conclusion under scenarios 1 and 2 satisfies, without more, the “genuine and substantial relationship” standard articulated by the Appellate Body in *US – Upland Cotton*. This chain of reasoning establishes that the subsidies are a sufficient cause of the lost sales and the displacement.<sup>400</sup>

280. This reasoning implies that the counterfactual analysis would have had to proceed further had the panel’s findings indicated that an unsubsidized Airbus would have sufficient product offerings to compete with Boeing. Indeed, the Appellate Body observed that “the Panel could have provided a fuller analysis under” counterfactual scenarios 3 and 4, the unlikely scenarios that involved the existence of an unsubsidized Airbus.<sup>401</sup> The Appellate Body carefully analyzed the European Union’s arguments about those scenarios.<sup>402</sup> Another important aspect of the approach adopted by the Appellate Body was that it did not look at the counterfactual exercise in a vacuum. It noted that “{t}he Panel’s findings that, during the reference period, a non-subsidized Airbus would be a ‘much weaker LCA manufacturer’ and would have had ‘at best a more limited offering of LCA models’, are consistent with the Panel’s findings concerning the considerable barriers to entry into the LCA industry.”<sup>403</sup>

281. The Panel in this dispute purported to engage in a counterfactual analysis of the aeronautics R&D subsidies.<sup>404</sup> In doing so, it faced a situation analogous to scenarios 3 and 4 in *EC – Large Civil Aircraft*, in that it had found that Boeing would exist absent the subsidies, and needed to evaluate whether, absent the aeronautics R&D subsidies, the company would have launched the 787 as it did in 2004, with promised deliveries starting in 2009. The similarities quickly break down, however. The panel in *EC – Large Civil Aircraft* found that, without subsidies, Airbus would be “a much weaker LCA manufacturer during the period we examined.”<sup>405</sup> The Panel in this dispute found the opposite: that in light of the facts, “the

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<sup>399</sup> *EC – Large Civil Aircraft (Panel)*, para. 7.1984; see also *EC – Large Civil Aircraft (AB)*, para. 1261.

<sup>400</sup> *EC – Large Civil Aircraft (AB)*, para. 1264.

<sup>401</sup> *EC – Large Civil Aircraft (AB)*, para. 1267.

<sup>402</sup> *EC – Large Civil Aircraft (AB)*, paras. 1273-1299.

<sup>403</sup> *EC – Large Civil Aircraft (AB)*, para. 1269.

<sup>404</sup> Panel Report, para. 7.1659 (“The Panel proposes to adopt a counterfactual approach to determining whether the ‘effects’ of the subsidies at issue in this dispute are displacement or impedance, significant lost sales or significant price suppression.”).

<sup>405</sup> *EC – Large Civil Aircraft (AB)*, para. 1260, quoting *EC – Large Civil Aircraft (Panel)*, para. 7.1993.

argument that Boeing’s LCA division would not have been ‘economically viable’ in the absence of the subsidies unless it altered its prices or product development behaviour becomes untenable.”<sup>406</sup> The panel in *EC – Large Civil Aircraft* also dealt with subsidies critical to the launch of every single aircraft in Airbus’ repertoire, where the Panel in this dispute dealt with subsidies alleged to affect the launch of a single aircraft among many other products produced by the company.

282. The similarities also break down when it comes to the analysis undertaken. The Panel in this dispute did not conduct the modeling exercise that the Appellate Body considered critical to counterfactual analysis, either in the first stage of its analysis (the effects of subsidies on Boeing’s product offerings and prices) or in the second (the effects on Airbus’ prices and sales). Instead of the detailed consideration of the counterfactual posed by the complaining party like the Appellate Body in *EC – Large Civil Aircraft* conducted,<sup>407</sup> this Panel provided a two-paragraph discussion that amounts to the following conclusion and little else:

We consider that two scenarios are most likely: Boeing would have developed a 767-replacement that incorporated all of the technologies that are incorporated on the 787, but its launch would have been significantly later than 2004 and it would not have been able to promise first deliveries for 2008, or Boeing would have launched a 767-replacement in 2004 that was technologically superior to the 767, but did not offer the degree of technological innovation of the 787. We do not have to reach any definitive view on which of these outcomes would have occurred. What is clear to us is that, absent the aeronautics R&D subsidies, Boeing would not have been able to launch an aircraft incorporating all of the technologies that are incorporated on the 787 in 2004, with promised deliveries commencing in 2008.<sup>408</sup>

The Panel offers no factual findings to support this conclusory statement.

283. In fact, the Panel’s conclusion is inconsistent with its own findings concerning the conditions of competition and the circumstances of the 787’s development. These findings support the conclusion that, absent the subsidies, Boeing’s incentives, research efforts, and resources would have led it to launch the 787 exactly as it did:

- “The essence of the intense competition between Boeing and Airbus is to design and build better airplanes;”<sup>409</sup>

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<sup>406</sup> Panel Report, para. 7.1831.

<sup>407</sup> *EC – Large Civil Aircraft*, paras. 1258-1299.

<sup>408</sup> Panel Report, para. 7.1775.

<sup>409</sup> Panel Report, para. 7.1765; *see also* 7.1768 (stressing “the importance of competition through technological development.”); U.S. Other Appellant Submission, para. 263.

- “Boeing needed to develop an LCA to replace the 767 in the 200-300 seat wide-body product market, and . . . it would have done so in the early- to mid-2000s;”<sup>410</sup>
- in the Panel’s view, Boeing knew what research needed to be done, knew that it would result in a competitive advantage, could formulate a plan for the deployment of resources to meet those objectives,<sup>411</sup> and was self-funding research on the same topics – including composite materials research – as NASA;<sup>412</sup>
- “we are not persuaded that the European Communities has demonstrated that Boeing inherently lacked the financial means to . . . develop its LCA in the manner in which it did.”<sup>413</sup>
- the Panel found that the “at least \$2.6 billion” in aeronautics R&D subsidies “may not appear significant when compared to Boeing’s consolidated revenues or R&D expenditures over 1989-2006.”<sup>414</sup>

Thus, in contrast to *EC – Large Civil Aircraft*, the Panel failed to take account of factors indicating that, in the absence of subsidies, Boeing would have followed the same course it actually did: investigating in the same areas, at the same pace, and aiming for the same goal – a technologically advanced aircraft commercially competitive with the A330.

284. It is also significant that the Panel recognized that in one of the “most likely” counterfactual scenarios, “Boeing would have launched a 767-replacement in 2004 that was technologically superior to the 767, but did not offer the degree of technological innovation of the 787.”<sup>415</sup> Thus, unlike *EC – Large Civil Aircraft*, this dispute did not present “likely” counterfactual scenarios involving the complete absence of the subsidy recipient’s aircraft from the market.<sup>416</sup> In line with the Appellate Body’s description of a proper counterfactual analysis, to address this scenario, the Panel needed to consider “what the market would look like” in a

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<sup>410</sup> Panel Report, para. 7.1774.

<sup>411</sup> Panel Report, paras. 7.1740, 7.1745 (“the definition of the scope and programme of research was arrived at in collaboration with industry”); 7.1742 (emphasizing that the government-funded work was “precisely focused on those areas which, from a commercial perspective, are considered to be the most crucial to the LCA industry in the sense that they carry the greatest prospect of creating significant competitive advantage”); *see also* U.S. Other Appellant Submission, para. 264.

<sup>412</sup> Panel Report, para. 7.1746.

<sup>413</sup> Panel Report, para. 7.1759; *see also id.* at para. 7.1831.

<sup>414</sup> Panel Report, para. 7.1760.

<sup>415</sup> Panel Report, para. 7.1775.

<sup>416</sup> *Cf. EC – Large Civil Aircraft (AB)*, para. 1264.



scenario where Boeing launched a technologically superior 767 replacement (albeit not so advanced as the 787) in 2004.<sup>417</sup>

285. The Panel never did so. It made absolutely no findings as to how a Boeing 767 replacement (other than the 787) launched in 2004 would have competed against the older Airbus A330. It never considered whether the Original A350 would have been launched at all, given that it was a response to the 787.<sup>418</sup> The Panel’s examination of price suppression – in addition to its other flaws<sup>419</sup> – looked only at the 787’s impact on A330 and Original A350 prices, not at what price impact would result from a different, but still technologically advanced 767 replacement.<sup>420</sup> For lost sales and displacement/impedance, the Panel assumed that Qantas, Ethiopian Airlines, Icelandair, and Kenya Airways would necessarily have ordered from Airbus because the 787 would not have been available.<sup>421</sup> It failed to consider its own “likely” counterfactual scenario in which Boeing would have offered these airlines a different 767 replacement.

286. Thus, even if one sets aside the Panel’s failure to take account of factors indicating that Boeing would have had the 787 exactly when it did absent the subsidies, the Panel’s counterfactual analysis still failed to properly examine “what the market would look like” absent the aeronautics R&D subsidies. Accordingly, the reasoning in *EC – Large Civil Aircraft* demonstrates the validity of the U.S. view that the Panel failed to establish the existence of a genuine and substantial relationship between the aeronautics R&D subsidies and the alleged serious prejudice.

**3. *The Panel incorrectly analyzed the effects of the aeronautics R&D subsidies on prices and sales of the A330 and Original A350.***

287. The Appellate Body’s report in *EC – Large Civil Aircraft* also underscores errors in the second stage of the Panel’s analysis, which examined whether the effects of the aeronautics R&D subsidies on Boeing’s pricing and product offerings had follow-on effects on Airbus’ prices and sales that constituted serious prejudice.

- a. *The Panel erred in finding lost sales with respect to the A330 and making the resulting findings of displacement and impedance.*

288. As Section VI.B.3 of the U.S. Other Appellant Submission explained, the Panel erred in finding that Airbus “suffered significant lost sales” of both the A330 and the Original A350 in individual sales campaigns.<sup>422</sup> In each instance, the customer chose the 787 over the Original A350. In none of them did an airline consider buying both the Original A350 and the A330.

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<sup>417</sup> *EC – Large Civil Aircraft (AB)*, para. 1110.

<sup>418</sup> Panel Report, para. 7.1777.

<sup>419</sup> U.S. Other Appellant Submission, Section VI.B.3.d.

<sup>420</sup> Panel Report, paras. 7.1780-7.1786, 7.1792, 7.1794.

<sup>421</sup> Panel Report, paras. 7.1787-7.1791, 7.1794.

<sup>422</sup> Panel Report, para. 7.1794; *see also* U.S. Other Appellant Submission, Section VI.B.3.a.

Thus, to the extent that any of these transactions resulted in a lost sale of the A350, it cannot also be a lost sale (or consequent displacement/impedance) of the A330. Airbus cannot lose the same sale twice.

289. The reasoning in *EC – Large Civil Aircraft* confirms this conclusion. The Appellate Body explained what constitutes a “lost” sale within the meaning of Article 6.3(c) of the SCM Agreement:

We consider that a sale that is “lost” is one that *a supplier “failed to obtain”*. We further understand lost sales to be a relational concept that includes *consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales.*<sup>423</sup>

290. The transactions in question were the Qantas, Ethiopia Airlines, Icelandair, and Kenya Airways campaigns. In each instance, Airbus cannot have “failed to obtain” sales of the A330 for the simple reason that none of these campaigns involved a potential order for the Original A350 *and* the A330. In each of the lost sales found by the Panel, Airbus either did not bid any aircraft,<sup>424</sup> removed the A330 from consideration in favor of the Original A350,<sup>425</sup> or offered only the Original A350 against the 787.<sup>426</sup> Accordingly, the Panel erred in finding that the effect of the aeronautics R&D subsidies was lost sales of the A330. This error in the lost sales analysis also negates the findings of a threat of displacement or impedance in the third country markets of Australia, Ethiopia, Iceland, and Kenya with respect to the A330, which the Panel based entirely on the existence of lost sales.<sup>427</sup>

b. *The Panel’s findings under Articles 5 and 6.3(b)-(c) of the SCM Agreement that the aeronautics R&D subsidies caused lost sales for the Original A350 and A330 at Ethiopian Airlines, Icelandair, and Kenya Airways, and the consequent findings of impedance in Ethiopia, Iceland, and Kenya, were incorrect.*

291. Section VI.B.3.b of the U.S. Other Appellant Submission demonstrated that the Panel failed to take into account customer-specific situations showing that Boeing’s victory in certain sales campaigns was not the effect of the aeronautics R&D subsidies.<sup>428</sup> Therefore, its analysis does not support the ultimate conclusion that the lost sales were “the result of” the aeronautics R&D subsidies. The analysis of individual sales transactions in *EC – Large Civil Aircraft* confirms that the Panel erred.

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<sup>423</sup> *EC – Large Civil Aircraft (AB)*, para. 1214 (emphasis added), quoting *New Shorter Oxford English Dictionary*, p. 1632.

<sup>424</sup> EC FWS, Annex D, para. 42.

<sup>425</sup> EC FWS, Annex D, para. 22.

<sup>426</sup> EC FWS, Annex D, paras. 49, 60.

<sup>427</sup> U.S. Other Appellant Submission, para. 285.

<sup>428</sup> U.S. Other Appellant Submission, Section VI.B.3.b.

292. As noted above, the Appellate Body in *EC – Large Civil Aircraft* described lost sales as “a relational concept that includes *consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales.*”<sup>429</sup> After making this finding, the Appellate Body looked carefully at the factors influencing the decision by Emirates Airlines to buy an Airbus A380 instead of any Boeing aircraft before affirming the Panel’s finding that the transaction resulted in a lost sale to Boeing.

293. This finding and the example of the Panel’s scrutiny of the Emirates Airlines transaction show the centrality of the facts of each transaction in evaluating whether a lost sale has occurred. The Panel appeared to have the same understanding, as it addressed transaction-specific factors in evaluating alleged lost sales at All Nippon Airways, Japan Airlines, Continental Airlines, Northwest, Air Canada, and Royal Air Maroc.<sup>430</sup> However, when it came to addressing the sales to Ethiopian Airlines, Icelandair, and Kenya Airways, the Panel provided no such analysis. The Appellate Body’s reasoning in *EC – Large Civil Aircraft* establishes that this type of evaluation is insufficient to justify a finding of lost sales under Article 6.3(c) of the SCM Agreement. Therefore, the Appellate Body should reverse the Panel’s findings in this regard.

c. *The Panel erred in finding displacement of Airbus 200-300 seat LCA by failing to establish that relevant “markets” existed in those countries within the meaning of Article 6.3(b) of the SCM Agreement.*

294. Section VI.B.3.c of the U.S. Other Appellant Submission explained that the Panel erred in its analysis of the threat of displacement or impedance in Ethiopia, Kenya, and Iceland because it declined to assess whether these countries constituted “third country markets” within the meaning of Article 6.3(b).<sup>431</sup> The Appellate Body’s report in *EC – Large Civil Aircraft* confirms that panels may not simply assume the existence of a market, but must independently evaluate the existence and contours of the market posited by a complaining party.

295. In *EC – Large Civil Aircraft*, the Appellate Body found that panels considering a claim of displacement or impedance have an “obligation to assess the relevant market under Articles 6.3(a) and 6.3(b).”<sup>432</sup> It made clear that the existence and geographic dimension of a “third country market” depend on a variety of factors:

Subparagraphs (a) and (b) each concerns the effect of a subsidy in a particular “market”. They refer respectively to: “the market of the subsidizing Member”; and “a third country market”. A plain reading of Articles 6.3(a) and 6.3(b) therefore reveals that an analysis of displacement or impedance under those provisions is limited to the territory of the “subsidizing Member” or the territory of any third country at issue. The manner in which the geographic dimension of a

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<sup>429</sup> *EC – Large Civil Aircraft (AB)*, para. 1214 (emphasis added), quoting *New Shorter Oxford English Dictionary*, p. 1632.

<sup>430</sup> Panel Report, para. 7.1786, note 3725.

<sup>431</sup> Panel Report, para. 7.1674; see also U.S. Other Appellant Submission, Section VI.B.3.c.

<sup>432</sup> *EC – Large Civil Aircraft (AB)*, para. 1131.

market is determined will depend on a number of factors: in some cases, the geographic market may extend to cover the entire country concerned; in others, an analysis of the conditions of competition for sales of the product in question may provide an appropriate foundation for a finding that a geographic market exists *within* that area, for example, a region. There may also be cases where the geographic dimension of a particular market exceeds national boundaries or could be the world market, even though Articles 6.3(a) and 6.3(b) would focus the analysis of displacement and impedance on the territory of the subsidizing Member or third countries involved.<sup>433</sup>

The Appellate Body also emphasized that “the scope of a ‘market’ to be examined for purposes of Articles 6.3(a) and 6.3(b) is likely to vary from case to case depending upon the particular factual circumstances, including the nature of the products at issue, as well as demand-side and supply-side factors.”<sup>434</sup>

296. The Panel drew the entirely opposite conclusion from the text of Article 6.3(b):

The Panel recalls that Article 6.3(a) and Article 6.3(b) expressly direct us to conduct our examination of displacement and impedance on the basis of national markets; either the market of the subsidizing Member for purposes of Article 6.3(a), or third country markets for purposes of Article 6.3(b). In so doing, *the Panel is not required to consider whether the European Communities has established the existence of such country markets*. Rather, the question for the Panel is whether, based on evidence of sales occurring in those countries, the Panel is satisfied that there has been displacement and impedance of imports or exports within the meaning of Article 6.3(a) and 6.3(b), respectively in any of the three LCA product markets in the particular country market.<sup>435</sup>

297. Thus, the Panel erred in simply assuming, rather than making an “objective determination,”<sup>436</sup> that the countries identified by the European Union constituted “third country markets” for purposes of Article 6.3(b). It did so despite the concerns expressed by the United States early in the dispute that “markets” may transcend political borders, and that many of the European Union’s displacement/impedance claims had failed to identify markets “large enough to discern changes in relative shares that demonstrate clear trends.”<sup>437</sup> The Panel’s error is compounded by the fact that many of the “markets” were so small that they saw only one transaction over the course of the period covered by the EU claims. By treating these countries as “markets” the Panel contradicted its own finding that a single transaction does not constitute a

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<sup>433</sup> *EC – Large Civil Aircraft (AB)*, para. 1117.

<sup>434</sup> *EC – Large Civil Aircraft (AB)*, para. 1123; *see also EC – Large Civil Aircraft (AB)*, para. 1129 (“a careful scrutiny of the competitive conditions in the market is required in order to draw conclusions as to whether the effect of the subsidy is displacement of competing products in a particular market.”).

<sup>435</sup> Panel Report, para. 7.1674 (emphasis added).

<sup>436</sup> *EC – Large Civil Aircraft (AB)*, para. 1174.

<sup>437</sup> US FWS, paras. 907-908.

“market.” Specifically, the Panel rejected the EU argument that a market exists whenever a buyer and seller come together to consummate a transaction because “such a definition would hold true for almost every transaction in the world, and would reduce the concept of a ‘market’ to a nullity.”<sup>438</sup> It accordingly “decline[d] to examine the European Communities’ serious prejudice arguments on the basis that an individual LCA sales campaign can itself constitute a relevant ‘market’ for purposes of Article 6.3 of the SCM Agreement.”<sup>439</sup> That, however, is exactly what the Panel did when it found displacement and impedance based on a single transaction each for Ethiopia, Iceland, and Kenya.

298. Without a determination as to the existence of third country markets, the Panel lacked a proper basis for any of its findings of a threat of displacement or impedance for 200-300 seat aircraft. The Appellate Body confronted a similar situation in *EC – Large Civil Aircraft* when the panel neglected “to assess independently the ‘subsidized product’ and the relevant product market”:

In the absence of such a determination, the Panel did not have a proper basis for assessing whether the alleged subsidized product and like products compete in the same market or multiple markets, which is a prerequisite for assessing whether displacement within the meaning of Articles 6.3(a) and 6.3(b) could be found to exist as alleged by the United States.<sup>440</sup>

The Appellate Body found that this error required reversal of all of the panel’s displacement findings, even though the European Union had conceded that some displacement had occurred.<sup>441</sup> For similar reasons, the Appellate Body should reverse the Panel’s findings of a threat of displacement or impedance of Airbus 200-300 seat aircraft in Ethiopia, Iceland, and Kenya.

299. The United States notes that, by any measure, sales in Ethiopia, Iceland, and Kenya were minuscule. This is readily apparent from the data provided by the European Union:

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<sup>438</sup> Panel Report, para. 7.1675.

<sup>439</sup> Panel Report, para. 7.1675.

<sup>440</sup> *EC – Large Civil Aircraft (AB)*, para. 1128.

<sup>441</sup> *EC – Large Civil Aircraft (AB)*, paras. 1137, 1414(k).

**Table 1: 200-300 Seat Third Country “Market” Share, by Orders (2004-2006)<sup>442</sup>**

Country/ Manufacturer	2004		2005		2006	
	units	share	units	share	units	share
<b>Australia</b>						
Airbus	6	100%	0	-	6	12%
Boeing	0	0%	0	-	45	88%
<b>Iceland</b>						
Airbus	0	-	0	0%	0	0%
Boeing	0	-	2	100%	2	100%
<b>Ethiopia</b>						
Airbus	0	-	0	0%	0	-
Boeing	0	-	10	100%	0	-
<b>Kenya</b>						
Airbus	0	-	0	-	0	0%
Boeing	0	-	0	-	9	100%

300. In each country, all orders for Boeing aircraft arose from a single sales campaign, such that there is no “trend” of Airbus exports being threatened with displacement or impedance, and there was at least one year in which neither manufacturer had any orders or market share.

301. Later in the Panel proceedings, the European Union reconfigured the order data into the “projected future deliveries” data referenced by the Panel. By showing projected future Boeing deliveries scattered over a seven-year time horizon, these data only highlight the fact that the sales in Ethiopia, Iceland, and Kenya are too small for each to constitute a “market.”<sup>443</sup>

**Table 2: 200-300 Seat Third Country “Market” Share, by Projected Future Deliveries (2007-2013)<sup>444</sup>**

Country/ Mfr.	2007		2008		2009		2010		2011		2012		2013	
	units	share	units	share	units	share	units	share	units	share	units	share	units	share
<b>Australia</b>														
Airbus	4	100%	4	50%	3	27%	1	10%	0	0%	0	0%	0	0%
Boeing	0	0%	4	50%	8	73%	9	90%	7	100%	14	100%	3	100%
<b>Ethiopia</b>														
Airbus	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Boeing	0	0%	1	100%	1	100%	3	100%	2	100%	3	100%	0	0%
<b>Iceland</b>														
Airbus	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Boeing	0	0%	0	0%	0	0%	2	100%	0	0%	2	100%	0	0%
<b>Kenya</b>														
Airbus	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Boeing	0	0%	0	0%	0	0%	2	100%	4	100%	3	100%	0	0%

<sup>442</sup> EC FWS, para. 1440 (citing Airclaims data, Exhibit EC-3).

<sup>443</sup> EC – Large Civil Aircraft (AB), para. 1171.

<sup>444</sup> Panel Report, para. 7.1790 (citing Exhibit EC-1173).

302. Thus, the Panel’s failure to evaluate whether Ethiopia, Iceland, and Kenya were “markets,” as alleged by the EU, fatally undermined its analysis of displacement and impedance. The data confirm that, with a single sale each and small sales volumes, these countries did not represent distinct markets.

**D. The Appellate Body’s findings in *EC – Large Civil Aircraft* support the U.S. appeal that the Panel did not satisfy the requirements of Articles 5 and 6.3 of the SCM Agreement for establishing that the tax subsidies caused adverse effects.**

303. As the United States explained in its Other Appellant Submission, the Panel conducted a manifestly inadequate analysis of the effects of the tax subsidies (*i.e.*, FSC/ETI and the Washington state and City of Everett B&O tax reductions) to the 737 and 777 on competition in the 100-200 seat and 300-400 seat product markets.<sup>445</sup> In the Panel’s assessment, many of the well-established elements of a proper adverse effects analysis are missing altogether, and those issues actually discussed by the Panel are treated in cursory fashion. As discussed below, the Appellate Body’s report in *EC – Large Civil Aircraft* confirms that the Panel’s findings of serious prejudice from the tax subsidies must be reversed in their entirety.

**1. *The Panel gave only cursory consideration to critical elements of the evaluation of whether there was a causal link between the tax subsidies and the adverse effects alleged by the EU.***

304. In Section VI.C.1, the United States explained that in evaluating whether the tax subsidies caused adverse effects, the Panel impermissibly dispensed with requisite elements of the causation analysis. It purported to conduct a counterfactual analysis, but never considered whether Boeing’s prices would have been higher in the absence of the tax subsidies – a critical element both of the EU case and of any proper counterfactual analysis of the effects of subsidies. The Panel also failed to assess the magnitude of the subsidies, and disregarded the lack of correlation between changes in the value of the subsidies and changes in Boeing’s prices and profitability. It ended by conducting a nonattribution analysis too brief to establish that the observed market phenomenon were the effect of the alleged subsidies, and not some other factor.<sup>446</sup>

305. Several of the findings in *EC – Large Civil Aircraft* cast light on the errors in the Panel’s approach. The Appellate Body reiterated that “a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the ‘effect’ of a subsidy is significant price suppression under Article 6.3(c).”<sup>447</sup> However, it cautioned that

a panel’s methodological discretion does not absolve it from having to establish a “genuine and substantial relationship of cause and effect” between the impugned

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<sup>445</sup> US Other Appellant Submission, Section VI.C.

<sup>446</sup> US Other Appellant Submission, paras. 319-337.

<sup>447</sup> *EC – Large Civil Aircraft* (AB), para. 1376 quoting *US – Upland Cotton* (AB), para. 436.

subsidies and the alleged market phenomena under Article 6.3, and from ensuring that such causal link is not diluted by the effects of other factors.<sup>448</sup>

The Appellate Body’s analysis highlights several ways in which the Panel failed this test.

306. The Panel did not explicitly use the words “counterfactual analysis” in assessing the tax subsidies. However, it set out its reasoning in a basically counterfactual framework: “{w}e have no doubt that the availability of the FSC/ETI subsidies, in combination with the B&O tax subsidies, enabled Boeing to lower its prices beyond the level that would otherwise have been economically justifiable, and that in some cases, this led to it securing sales that it would not otherwise have made, while in other cases, it led to Airbus being able to secure the sale only at a reduced price.”<sup>449</sup> As noted above, the Appellate Body found that:

In general terms, the counterfactual analysis entails comparing the actual market situation that is before the adjudicator with the market situation would have existed in the absence of the challenged subsidies. This requires the adjudicator to undertake a modeling exercise as to what the market would look like in the absence of the subsidies. Such an exercise is a necessary part of the counterfactual approach.<sup>450</sup>

To be clear, a panel’s methodological discretion would extend to any modeling exercise that addressed the relevant factors with regard to the product in question: economic modeling, econometric modeling, something like Dr. Dorman’s industry-specific model in *EC – Large Civil Aircraft*, or even less formal approaches.

307. However much discretion a panel may have, the Appellate Body’s finding makes clear that a panel must perform some sort of “exercise” to evaluate how the market would behave in the absence of subsidies. This Panel failed that test. Its counterfactual inquiry with regard to the tax subsidies was strikingly brief:

We have no doubt that the availability of the FSC/ETI subsidies, in combination with the B&O tax subsidies, enabled Boeing to lower its prices beyond the level that would otherwise have been economically justifiable, and that in some cases, this led to it securing sales that it would not otherwise have made, while in other cases, it led to Airbus being able to secure the sale only at a reduced price.<sup>451</sup>

Nowhere does the Panel make specific factual findings that could support the proposition that Boeing’s pricing of the 737 and 777 would not have been economically justifiable absent the tax subsidies. Indeed, the Panel’s relevant findings contradict it: “we are not persuaded that the

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<sup>448</sup> *EC – Large Civil Aircraft (AB)*, para. 1376 (citations omitted).

<sup>449</sup> Panel Report, para. 7.1818.

<sup>450</sup> *EC – Large Civil Aircraft (AB)*, para. 1110.

<sup>451</sup> Panel Report, para. 7.1818.



European Communities has demonstrated that Boeing inherently lacked the financial means to price and develop its LCA in the manner in which it did.”<sup>452</sup>

308. The EU attempted to address the question of how the market would behave in the absence of subsidies with a model provided by Professor Cabral. The Panel properly rejected this model, a finding that the EU does not appeal. It based its conclusion on a number of criticisms that could apply equally to its own assessment of the tax subsidies’ effects:

- “the very suggestion that Boeing could suddenly decide to change its policy and become more aggressive on price in 2004/2005 (using the subsidies to do so) appears to contradict Professor Cabral’s theory about how Boeing would optimally be applying additional dollars of subsidies to ‘investments’ in aggressive pricing, unless it were possible to show that from 2004/2005 onwards, the amount of subsidies paid to Boeing increased significantly (which it did not).”<sup>453</sup>
- “To the extent that Professor Cabral’s analysis purports to demonstrate . . . that Boeing *actually did* use the subsidies to lower the prices of its LCA, we would expect that the implications of Professor Cabral’s theory about how Boeing would behave in the LCA markets would, at least to some degree, be borne out by events that occurred in those markets. . . . {W}e do not consider that his model and its predicted outcomes are consistent with the evidence as to pricing behaviour and market share in the LCA industry between 2000 and 2006.”<sup>454</sup>

309. As with the Cabral model’s predictions, the Panel’s view of the effects of the tax subsidies on the prices of Boeing and Airbus aircraft should find confirmation in a discernible correlation between the level of subsidies and the evolution of the prices and sales for large civil aircraft. Yet, as the United States explained in its Other Appellant Submission, Boeing’s price levels and market share moved in directions opposite from what would be expected if they were influenced by the tax measures.<sup>455</sup>

310. The Appellate Body also stressed in *EC – Large Civil Aircraft* that “a panel’s methodological discretion does not absolve it . . . from ensuring that such causal link is not diluted by the effects of other factors.”<sup>456</sup> However, the Panel failed to conduct a proper non-

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<sup>452</sup> Panel Report, para. 7.1759; Panel Report, para. 7.1831 (“once the amount of the subsidies received by Boeing between 1989 and 2006 is reduced from \$19.1 billion to our own estimate of the total amount of the subsidies {i.e., ‘at least \$5.3 billion,’ para. 7.1433}, the argument that Boeing’s LCA division would not have been ‘economically viable’ in the absence of the subsidies unless it altered its prices or product development behaviour becomes untenable, whichever basis for assessing economic viability is used.”); U.S. Other Appellant Submission, Section VI.C.1.a.

<sup>453</sup> Panel Report, Appendix VII.F.2, para. 68.

<sup>454</sup> Panel Report, Appendix VII.F.2, para. 72.

<sup>455</sup> US Other Appellant Submission, Section VI.C.1.c.

<sup>456</sup> *EC – Large Civil Aircraft (AB)*, para. 1376 (citations omitted).

attribution analysis.<sup>457</sup> The Panel had before it an extensive evidentiary record concerning non-subsidy factors, such as Airbus’ strategy of cutting prices to take market share for the A320, the A340’s operating cost disadvantage in a high-fuel cost environment, and the specific circumstances of individual sales campaigns. These factors explain competitive developments in the single-aisle and 300-400 seat product markets, something the tax subsidies cannot do.<sup>458</sup> The Panel, however, never examined these non-subsidy factors, other than to dismiss them in a single sentence that merely restates the non-attribution test articulated by the Appellate Body in *US – Upland Cotton*.<sup>459</sup> Such a non-substantive analysis does nothing to ensure that other factors do not dilute the causal link between the subsidies and their putative adverse effects.

311. Accordingly, the Appellate Body’s *EC – Large Civil Aircraft* report confirms that the Panel failed to conduct the necessary analyses to establish a genuine and substantial relationship of cause and effect between the tax subsidies and their alleged adverse effects. The United States respectfully requests the Appellate Body to reverse the Panel’s findings under Articles 5(c) and 6(b)-(c) of the SCM Agreement.

312. The United States considers that the errors in the Panel’s analysis of the tax subsidies are so fundamental and widespread that the Appellate Body would be unable to complete the analysis. In *EC – Large Civil Aircraft*, the Appellate Body recalled that “it can complete the analysis only if the factual findings by the panel, or the undisputed facts on the record, provide a sufficient basis . . . to do so.”<sup>460</sup> Here, the core flaws in the Panel’s causation analysis – an absence of sufficient findings concerning the market situation in the absence of the tax subsidies – preclude reliance on the Panel’s findings.

**2. *The Panel’s failure to identify third country markets in which the tax subsidies caused displacement and impedance and campaigns in which the tax subsidies caused significant lost sales is inconsistent with Articles 6.3(b) and (c) of the SCM Agreement and Article 12.7 of the DSU.***

313. Section VI.C.3 of the U.S. Other Appellant Submission laid out a number of errors in the Panel’s failure to identify the particular sales and third-country markets in which it found significant lost sales and displacement or impedance with regard to Airbus 100-200 seat and 300-400 seat aircraft.<sup>461</sup> As the United States has explained, when the Panel ended its analysis by stating that “the effects of the subsidies” were “significant lost sales” and “displacement and impedance of exports from third country markets” without any further detail, it did not make findings sufficient to establish that serious prejudice existed for purposes of Articles 6.3(b) and (c), and it erred under Article 12.7 of the DSU. The Appellate Body’s discussion of the relevant legal standards in *EC – Large Civil Aircraft* confirms that the Panel erred.

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<sup>457</sup> US Other Appellant Submission, Section VI.C.1.d.

<sup>458</sup> US Other Appellant Submission, Section VI.C.1.d.

<sup>459</sup> Panel Report, para. 7.1819; US Other Appellant Submission, paras. 334-335.

<sup>460</sup> *EC – Large Civil Aircraft (AB)*, para. 1140.

<sup>461</sup> US Other Appellant Submission, Section VI.C.3.

314. There, the Appellate Body explained what constitutes a “lost” sale within the meaning of Article 6.3(c) of the SCM Agreement:

We consider that a sale that is “lost” is one that a supplier “failed to obtain”. We further understand lost sales to be a relational concept that includes consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales.<sup>462</sup>

Thus, to establish that the tax subsidies cause significant lost sales, the Panel had to make findings concerning the behavior of both Boeing and Airbus in the specific sales campaigns identified by the European Union, matters on which the parties submitted extensive evidence and argumentation.<sup>463</sup> Without such findings, the Panel failed to establish that Airbus “failed to obtain” the alleged lost sales as a result of the tax subsidies.

315. The Appellate Body also articulated the meaning of displacement and impedance under Article 6.3(b):

- we understand the term displacement to connote that there is a substitution effect between the subsidized product and the like product of the complaining Member . . . . {U}nder subparagraph (b), displacement arises where exports of the like product of the complaining Member are substituted in a third-country market by exports of the subsidized product.<sup>464</sup>
- {Impedance} refers to situations where the exports or imports of the like product of the complaining Member would have expanded had they not been “obstructed” or “hindered” by the subsidized product. It could also refer to a situation where the exports or imports of the like product of the complaining Member did not materialize at all because production was held back by the subsidized product.<sup>465</sup>

Thus, displacement and impedance under Article 6.3(b) are specific market phenomena that require findings from a panel establishing that the subsidies caused those phenomena in the particular third country markets at issue in the dispute. The Panel failed to make such findings. Therefore, it failed to perform an analysis that satisfies Articles 5(c) and 6.3.

**3. *The Panel erred in finding displacement of Airbus 100-200 and 300-400 seat LCA in certain third countries by failing to establish that relevant “markets” existed in those countries.***

316. In Section VI.C.5 of its Other Appellant Submission, the United States explained that the Panel erred in failing to consider whether the third countries in which the EU alleged

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<sup>462</sup> EC – Large Civil Aircraft (AB), para. 1214.

<sup>463</sup> E.g., EC FWS, Annexes E and F; EC SWS, HSBI Appendix, pp. 27-71; US FWS, Campaign Annex, paras. 78-169; US SWS, HSBI Appendix, paras. 36-74.

<sup>464</sup> EC – Large Civil Aircraft (AB), para. 1160.

<sup>465</sup> EC – Large Civil Aircraft (AB), para. 1161.

displacement or impedance were in fact “markets” within the meaning of Article 6.3(b) of the SCM Agreement.<sup>466</sup> The findings regarding Article 6.3(b) in *EC – Large Civil Aircraft* underscore the error of the Panel’s approach. The Appellate Body found that panels considering a claim of displacement or impedance have an “obligation to assess the relevant market under Articles 6.3(a) and 6.3(b).”<sup>467</sup> This determination must be based on the particular facts of the dispute.<sup>468</sup> Without a determination as to the existence of third country markets, the Panel lacked a proper basis for any of its displacement/impedance findings that could be interpreted as pertaining to the third country markets of Indonesia, Japan, or Singapore for 100-200 seat aircraft, or Hong Kong, New Zealand, or Singapore for 300-400 seat aircraft. Therefore, the United States respectfully requests the Appellate Body to reverse any findings the Panel made with regard to displacement or impedance of these products in the indicated markets.

**4. *The Panel erred in applying Article 6.3(b)’s displacement and impedance standards to the EU’s claims of displacement or impedance in certain markets.***

317. In Section VI.C.4 of its Other Appellant Submission, the United States explained that the Panel incorrectly failed to examine the evolution of market share and delivery volume data in reaching its conclusions regarding displacement and impedance. The United States also considers that the reasoning in *EC – Large Civil Aircraft* establishes that there was simply no basis for a finding of displacement or impedance with regard to any of the third country markets at issue.<sup>469</sup> The Appellate Body made the following findings regarding the meaning of those terms:

we understand the term displacement to connote that there is a substitution effect between the subsidized product and the like product of the complaining Member. . . . {U}nder subparagraph (b), displacement arises where exports of the like product of the complaining Member are substituted in a third-country market by exports of the subsidized product.<sup>470</sup>

and

{Impedance} refers to situations where the exports or imports of the like product of the complaining Member would have expanded had they not been “obstructed” or “hindered” by the subsidized product. It could also refer to a situation where

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<sup>466</sup> US Other Appellant Submission, para. 366.

<sup>467</sup> *EC – Large Civil Aircraft (AB)*, para. 1131.

<sup>468</sup> *EC – Large Civil Aircraft (AB)*, paras. 1117, 1123, 1129.

<sup>469</sup> The United States recalls that it has separately appealed the Panel’s findings of displacement and impedance in the single-aisle “markets” of Singapore and Indonesia, as well as the Panel’s findings of displacement in the 300-400 seat “markets” of New Zealand and Hong Kong. US Other Appellant Submission, Section VI.C.4.

<sup>470</sup> *EC – Large Civil Aircraft (AB)*, para. 1160.

the exports or imports of the like product of the complaining Member did not materialize at all because production was held back by the subsidized product.<sup>471</sup>

318. Although “there also could be situations where displacement and impedance overlap,” the Appellate Body observed that “in light of the principle of effective treaty interpretation, a distinction needs to be made as to the concepts covered by each term.”<sup>472</sup> This observation is particularly relevant because the principle of effective treaty interpretation requires a distinction between not only displacement and impedance, but also between impedance and lost sales. To apply “impedance” under Article 6.3(b) of the SCM Agreement as identical to “significant lost sales” under Article 6.3(c), as the Panel did,<sup>473</sup> is to deprive “impedance” of its particular meaning. More is required for a finding of impedance than lost sales, as explained below.

319. Elaborating on the requirements of Article 6.3(b), the Appellate Body drew on the context provided by Article 6.4 of the SCM Agreement.<sup>474</sup> Article 6.4 provides that for the purposes of paragraph 3(b), the displacement or impeding of exports shall include any case in which a change in relative market shares is demonstrated “over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned.”<sup>475</sup> The Appellate Body recalled its observation in *US – Upland Cotton* that Article 6.4 requires that “displacement or impeding of exports be demonstrated ‘over an appropriately representative period’ . . . so that ‘clear trends’ in changes in market share can be demonstrated.”<sup>476</sup> On the basis of these considerations and its safeguards jurisprudence, the Appellate Body concluded that “a panel assessing a claim of displacement would have to look at clearly discernible trends during the reference period.”<sup>477</sup>

320. The Appellate Body also examined whether Article 6.3(b) contains “a minimum threshold requirement for the establishment of displacement or impedance.”<sup>478</sup> To quote the Appellate Body:

While Article 6.3(a) and (b) does not expressly state that displacement must be significant, we agree with the European Union that the displacement must be discernible. Otherwise, we do not see how displacement could be clearly

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<sup>471</sup> *EC – Large Civil Aircraft (AB)*, para. 1161.

<sup>472</sup> *EC – Large Civil Aircraft (AB)*, para. 1161 n. 2548.

<sup>473</sup> Panel Report, para. 7.1822 (“It is thus inescapable to also arrive at the conclusion that in law the effects of the subsidies on Airbus’ prices and sales constitute significant lost sales and significant price suppression, within the meaning of Article 6.3(c) of the SCM Agreement, as well as displacement and impedance of exports from third country markets, within the meaning of Article 6.3(b).”)

<sup>474</sup> *EC – Large Civil Aircraft (AB)*, para. 1166.

<sup>475</sup> SCM Agreement, Art. 6.4.

<sup>476</sup> *EC – Large Civil Aircraft (AB)*, para. 1166 (quoting *US – Upland Cotton (AB)*, para. 478).

<sup>477</sup> *EC – Large Civil Aircraft (AB)*, para. 1166.

<sup>478</sup> *EC – Large Civil Aircraft (AB)*, para. 1169.

identified and amount to “serious prejudice” within the meaning of Articles 5(c) and 6.3 of the SCM Agreement.<sup>479</sup>

321. The Appellate Body was not reviewing a finding of impedance in *EC – Large Civil Aircraft*. Nevertheless, if “displacement must be discernible,”<sup>480</sup> it follows from the Appellate Body’s reasoning that impedance must also be discernible. As noted above, the primary sources for the Appellate Body’s view of the requirements for displacement – *i.e.*, Article 6.4 of the SCM Agreement, its *US – Upland Cotton* report, and Articles 5(c) and 6.3 of the SCM Agreement – either refer to displacement *and* impedance, or in the case of Article 5(c), to serious prejudice in all its forms.

322. Although impedance “connotes a broader array of situations than the term ‘displace,’”<sup>481</sup> Article 6.4 of the SCM Agreement clearly contemplates Article 6.4 that the “impeding of exports,” just like displacement, could be demonstrated by “clear trends.”<sup>482</sup> Furthermore, the Appellate Body’s view that a “discernibility” requirement is necessary to ensure that the displacement will “amount to ‘serious prejudice’”<sup>483</sup> implies that the same concerns apply to impedance, so that impedance findings are not made where the prejudice is insignificant.

323. As applied to impedance, a “discernibility” requirement demands evidence of clear trends or other comparable data showing that the complaining Member’s exports “would have expanded had they not been ‘obstructed’ or ‘hindered’ by the subsidized product.”<sup>484</sup> Accordingly, it would be insufficient to show impedance by referring to a single transaction involving multiple orders won by the subsidizing Member to the disadvantage of the complaining Member. Otherwise, “impedance” would collapse into mere “lost sales,” contrary to the principle of effectiveness in treaty interpretation, under which “a distinction needs to be made as to the concepts covered by each term.”<sup>485</sup>

324. Thus, under the Appellate Body’s reasoning in *EC – Large Civil Aircraft*, the following elements are necessary for a finding of displacement *or* impedance of Airbus’ A320 or A340 aircraft under Article 6.3(b):

- (1) evidence showing the existence of a third country “market”;<sup>486</sup> and

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<sup>479</sup> *EC – Large Civil Aircraft (AB)*, para. 1169.

<sup>480</sup> *EC – Large Civil Aircraft (AB)*, para. 1170.

<sup>481</sup> *EC – Large Civil Aircraft (AB)*, para. 1161.

<sup>482</sup> SCM Agreement, Art. 6.4.

<sup>483</sup> *EC – Large Civil Aircraft (AB)*, para. 1169.

<sup>484</sup> *EC – Large Civil Aircraft (AB)*, para. 1161. Other data that would demonstrate impedance would include evidence that “exports . . . of the like product of the complaining Member did not materialize at all because production was held back by the subsidized product.” *EC – Large Civil Aircraft (AB)*, para. 1161.

<sup>485</sup> *EC – Large Civil Aircraft (AB)*, para. 1161 note 2548.

<sup>486</sup> *EC – Large Civil Aircraft (AB)*, paras. 1117, 1131.

- (2) clearly discernible trends during the reference period (or comparable evidence)<sup>487</sup> showing either
- (a) the substitution of exports of the complaining Member’s like product by the subsidized product in the relevant third country market (*i.e.*, displacement),<sup>488</sup> or
  - (b) the obstruction or hindrance of exports of the complaining Member’s like product by the subsidized product, such that the complaining Member’s exports would otherwise have expanded in the relevant third country market (*i.e.*, impedance).<sup>489</sup>

325. According to these criteria, the data before the Panel – shown below – are plainly incapable of showing trends, much less the “clearly discernible trends” needed for finding displacement or impedance of the A320 or A340 over the 2004-2006 reference period selected by the European Union.

**Table 3: 100-200 Seat Third Country “Market” Share, by Deliveries (2004-2006)<sup>490</sup>**

Country/ Manufacturer	2004		2005		2006	
	units	share	units	share	units	share
<b>Japan</b>						
Airbus	0	-	1	33%	2	15%
Boeing	0	-	2	67%	11	85%
<b>Indonesia</b>						
Airbus	0	-	0	-	2	100%
Boeing	0	-	0	-	0	0%
<b>Singapore</b>						
Airbus	8	100%	11	100%	6	100%
Boeing	0	0%	0	0%	0	0%

<sup>487</sup> EC – Large Civil Aircraft (AB), para. 1166.

<sup>488</sup> EC – Large Civil Aircraft (AB), para. 1160.

<sup>489</sup> EC – Large Civil Aircraft (AB), para. 1161.

<sup>490</sup> Source: Airclaims data (Exhibit EC-3); see also Exhibit US-1117 (BCI).

**Table 4: 300-400 Seat Third Country “Market” Share, by Deliveries (2004-2006)<sup>491</sup>**

Country/ Manufacturer	2004		2005		2006	
	units	share	units	share	units	share
<b>Hong Kong</b>						
Airbus	0	0%	0	0%	0	0%
Boeing	1	100%	1	100%	1	100%
<b>New Zealand</b>						
Airbus	0	-	0	0%	0	0%
Boeing	0	-	2	100%	5	100%
<b>Singapore</b>						
Airbus	0	0%	0	0%	0	0%
Boeing	4	100%	3	100%	6	100%

326. In Table 4, the data for the Indonesia and Singapore 100-200 seat “markets” give a clear indication of the Panel’s failure to conduct any meaningful analysis of the European Union’s displacement/impedance claims. In both cases, Boeing never had *any* exports or market share, which necessarily precludes a finding of displacement or impedance.<sup>492</sup> The data for the other countries are little better.

327. In the Japanese 100-200 seat “market”, neither manufacturer had any exports in 2004, and Airbus’ market share loss over only two years is insufficient to show a trend of displacement or impedance.<sup>493</sup>

328. In the Hong Kong 300-400 seat “market,” there are scarcely any exports and no discernible trend: Boeing had only three exports during the three-year period, one per year. The Appellate Body has expressed skepticism that a 100 percent market share level based on a single order can be proof of displacement.<sup>494</sup> In New Zealand, neither manufacturer had any exports in 2004, and Boeing’s market position over the ensuing two years is insufficient to show a trend of displacement or impedance.<sup>495</sup> Finally, in the Singapore 300-400 seat “market”, the data show only a handful of exports, and therefore no clearly discernible trends of displacement or impedance.

329. Accordingly, there was no evidentiary base on which the Panel could have made a finding of displacement and impedance consistent there is no basis from which to complete the

<sup>491</sup> Source: Airclaims data (Exhibit EC-3); *see also* Exhibit US-1117 (BCI).

<sup>492</sup> The United States recalls that it has separately appealed the Panel’s findings of displacement and impedance in these single-aisle “markets.” *See* US Other Appellant Submission, Section VI.C.4.

<sup>493</sup> *EC – Large Civil Aircraft (AB)*, para. 1200 (“The decline in market share in a period of only two years does not provide a sufficient basis for a finding of threat of displacement.”).

<sup>494</sup> *EC – Large Civil Aircraft (AB)*, para. 1200 (“Boeing won 100% of the market in 2003, but this was with a single order.”).

<sup>495</sup> *EC – Large Civil Aircraft (AB)*, para. 1200 (“The decline in market share in a period of only two years does not provide a sufficient basis for a finding of threat of displacement.”).



analysis to find that the tax subsidies cause any displacement or impedance under Article 6.3(b) of the SCM Agreement.

**E. Conclusion**

330. For the reasons outlined above, the Appellate Body's findings in *EC – Large Civil Aircraft* provide further support for the U.S. appeals of the Panel's findings. The United States respectfully requests the Appellate Body to take these observations into account in its analysis of the Panel's findings.