Before the Appellate Body
of the World Trade Organisation

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

(AB-2011-3 / DS353)

Opening Statement of the European Union at the First Hearing

Contains no BCI or HSBI

– As delivered –

Geneva
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I. INTRODUCTION

1. Members of the Appellate Body, representatives of the United States and the Third Participants, and members of the Secretariat, it is a pleasure to appear here today. As directed by the Division’s procedural rulings, our opening statement this morning will briefly introduce the issues on appeal and respond to selected US arguments. While our focus today will be on the subsidy-related issues of financial contribution, benefit, and specificity that the Appellate Body intends to concentrate on this week, we will also briefly preview some of the key issues related to adverse effects that will be detailed further in the October hearings.¹

II. SUBSIDIES

2. We first turn to the appeals related to the Panel’s findings that US federal, state, and local authorities provided billions of dollars worth of “specific” “subsidies” to Boeing and its LCA division.

3. As we have explained in our Other Appellee Submission, the Panel performed a detailed and comprehensive review of the enormous record developed during the many months of written and oral submissions.² Among its multiple findings of subsidisation, the Panel properly found that NASA, DOD, and the state and local governments in Washington State and Kansas provided “financial contributions” that conferred a “benefit” on Boeing’s LCA division, and that such subsidies were “specific” within the meaning of Article 2.1 of the SCM Agreement.

4. Despite this careful review and analysis of the evidence, however, the Panel committed a critical error of law in its analysis of the NASA and DOD R&D measures, by interpreting Article 1.1(a)(1) in a manner that excludes “direct transfer{s} of funds” and “provi{sions}{of} goods or services” that take place as part of a transaction properly characterised as a purchase of services. On that

¹ We will reserve all comments on the appeal related to the Annex V proceedings until the October statement and hearings.

² We will reserve all comments on the appeal related to the Annex V proceedings until the October statement and hearings.
basis, the Panel found some of the DOD R&D transactions at issue (namely, 
DOD procurement contracts) were not “financial contributions” – a finding that 
should therefore be reversed. And, as we will discuss again in a few moments, 
the implications of this error are not limited to the confines of the present 
dispute. To the contrary, affirmance of this interpretation would provide a road 
map for Members to subsidise in the future without discipline, by using a slight 
of hand to package together purchases of services with grants or other types of 
financial contributions.

5. To be clear, neither the European Union nor the United States alleges error in the 
Panel’s adoption of the principal beneficiary and user test – i.e., its standard for 
evaluating whether or not the transactions are purchases of service. Rather, the 
question is whether a panel should even consider as relevant whether a “direct 
transfer of funds” or other type of actions specifically listed in Article 1.1(a)(1) 
is in exchange for a purchased service.

6. As further explained in the EU Appellant Submission, the Panel committed a 
second error of legal interpretation and application in its finding that the NASA 
and DOD patent waivers/transfers to Boeing were not “specific” within the 
meaning of Article 2.1 of the SCM Agreement. While the United States properly 
points to the recent Appellate Body guidance on the need to evaluate 
subparagraphs (a)-(c) as principles “to be considered within an analytical 
framework that recognizes and accords appropriate weight to each principle”,
the Panel’s erroneous interpretation of “granting authority” led to an evaluation 
that completely overlooked some of those principles.

7. The US Other Appellant Submission, by contrast, generally focuses its attention 
on the Panel’s review and evaluation of the facts. With respect to the US appeal 
of the Panel’s findings that NASA and DOD R&D programmes provide financial 
contributions that confer benefits on Boeing, the EU Other Appellee Submission

\[\text{\textsuperscript{2}}\text{ See, e.g., EU Other Appellee Submission, paras. 3-6.}\]

\[\text{\textsuperscript{3}}\text{ US Appellee Submission, para. 124, quoting Appellate Body Report, } US - \textit{Antidumping and Countervailing Duties (China)}, \text{para. 366.}\]
details why those appeals must all fail. The Panel properly understood that, as the top NASA officials themselves pointed out on numerous occasions, “the reason that there is a NASA Langley and the other NASA aeronautics centers is to contribute technology to assure the pre-eminence of US aeronautics”, and that NASA supported programmes aimed at “provid{ing} U.S. industry with a competitive edge to recapture market share, maintain a strongly positive balance of trade, and increase U.S. jobs.” Transfers of funds and provisions of goods and services pursuant to such programmes cannot properly be considered purchases of services, as the principal beneficiary and user of the R&D was Boeing, not the Government or third parties. As for DOD R&D subsidies, the Panel found that some of the DOD R&D funding and support at issue is for the principal benefit and use of Boeing, and that among the DOD R&D programmes at issue are those that have “the explicit objective of developing ‘dual use’ R&D”.

8. With respect to the state and local measures, the United States has appealed the Panel’s findings that the Washington State HB 2294 B&O tax rate reductions provide financial contributions within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, and that they are specific within the meaning of Article 2.1(a) of the SCM Agreement. The United States has also appealed the Panel’s finding that the subsidies provided through the City of Wichita Industrial Revenue Bonds (“IRBs”) are de facto specific within the meaning of Article 2.1(c) of the SCM Agreement. Our Other Appellee Submission details the reasons why the Panel’s findings should withstand the scrutiny of the Appellate Body, particularly in view of the flaws of the US arguments. We will not repeat our detailed response again, but will instead highlight a number of the key problems.

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4 EU Other Appellee Submission, Sections II(A)-(B).
5 Panel Report, para. 7.990 (emphasis omitted), quoting Video Clip of Langley Director Dr. J. F. Creedon (Exhibit EC-287).
6 Panel Report, para. 7.989 (emphasis omitted), quoting Statement of Wesley L. Harris, NASA Associate Administrator for Aeronautics, before the House Subcommittee on Technology, Environment, and Aviation (Exhibit EC-359), p. 4.
7 Panel Report, para. 7.1171.
8 Panel Report, para. 7.1148.
with the US arguments, and address several related points raised by the Third Participants.

9. We will now proceed to summarise the key points in our own appeal of the Panel’s findings, and to address several of the points made in the US Appellee Submission to defend the Panel’s legal interpretations and applications. Then, we will turn to the United States’ appeal, with a focus on some of the new arguments raised by the Third Participants that the European Union has not previously had a chance to discuss.

A. The Panel Erred by Excluding Transactions Properly Characterised as Purchases of Services from the SCM Agreement

10. As detailed in our Appellant Submission, the Panel erred by adopting an interpretation of Article 1.1(a)(1) of the SCM Agreement that excludes from its scope transactions properly characterised as a “purchase of services” by a government – even if those transactions include “direct transfers of funds”, “provisions of goods”, or other activities specifically covered by Article 1.1(a)(1).9 As a result, the Panel found that such transactions would be excluded entirely from the scope of the SCM Agreement.

11. As the EU has explained, the Panel failed to properly apply the customary rules of treaty interpretation, and in doing so created a loophole in the coverage of the SCM Agreement that will frustrate its object and purpose. Based on this erroneous interpretation, the Panel came to the conclusion that much of the provision of funding and other support pursuant to the DOD RDT&E Program is excluded from the scope of the SCM Agreement.10 The ramifications for future disputes are even greater, as Members will be able to exploit the loophole in this new standard to entirely escape the disciplines of the SCM Agreement, including those involving both prohibited subsidies and actionable subsidies.

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9 EU Appellant Submission, paras. 102-127; Panel Report, paras. 7.953-7.970.
12. As an initial matter, the EU recalls the aspects of Article 1.1(a)(1) that are not disputed. First, the Panel and both Parties agree that the meaning of the phrase “a government practice involves a direct transfer of funds”, at least in isolation, is broad enough to cover payments in exchange for purchased services. Similarly, the phrase “a government provides goods or services” is broad enough to cover the provision of goods or services in exchange for services. Second, it is clear that there is no explicit exception in the definition of “financial contribution” for transactions involving purchases of services (or any elements of such transaction). Third, all agree that one aspect of the object and purpose of the SCM Agreement is to discipline subsidies that affect trade in goods.

13. As we have explained, although the Panel went through the formal steps of a Vienna Convention analysis of the disputed treaty provision, the Panel’s error stems from its singular emphasis on the “context” of Article 1.1(a)(1), and in particular the omission of the phrase “purchase of services” from Articles 1.1(a)(1)(iii) and 14(d) of the SCM Agreement. The Panel assumed that the drafters intended to exclude purchases of services from the definition of financial contribution in Article 1.1(a)(1), even if those services are purchased in a manner that would be separately covered by other elements of the “financial contribution” definition, despite the lack of an explicit exception to that effect. The Panel reached this conclusion in large part because of its concern that interpreting other provisions of Article 1.1(a)(1) to encompass elements of purchases of services, would render inute the term “purchase of goods” in Article 1.1(a)(1)(iii). The Panel reasoned that this would be the case because all other aspects of a “purchase of goods” would be covered by the other paragraphs of Article 1.1(a)(1).

14. The European Union has explained why the Panel’s concern about inutility fails on its own terms. An interpretation that would allow purchases of goods to be covered by multiple paragraphs of Article 1.1(a)(1) is neither unexpected nor

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11 Panel Report, para. 7.954; US Appellee Submission, para. 158.
12 Panel Report, para. 7.955.
13 Panel Report, para. 7.956.
somehow discouraged, and there is no need to attempt to re-interpret the ordinary meaning in order to avoid that result. The US does not dispute this possibility of overlap and notes that the Panel did not dispute it either. Rather, the US simply recalls that the Panel decided that “such an overlap did not exist in the case of purchases of goods”.

15. The EU further provided several examples of situations in which purchases of goods would be covered only by Article 1.1(a)(1)(iii), and not by any of the other types of financial contributions listed in Article 1.1(a)(1), which therefore removes the Panel’s concern over redundancy. These include a government’s purchase of goods in exchange for something other than one of the types of financial contributions specifically listed in Article 1.1(a)(1), such as a promise to provide preferential treatment in future enforcement of regulations or in awarding of future government contracts. The US criticises these examples, erroneously asserting that they are not a “‘purchase’ of anything”. Yet, the ordinary meaning of “purchase” is broad enough to encompass “{t}ransmission of property from one person to another by voluntary act and agreement, founded on valuable consideration” or “acquisition ... by any legal means other than inheritance”, and therefore the acquisition of goods in exchange for a valuable legal commitment is indeed a “purchase”. The US also argues that the EU “provides no evidence that such transactions actually occur”, but no such evidence is necessary in a theoretical enquiry into the alleged redundancy of a treaty term. The fact that a government could take a certain course of action is sufficient to demonstrate that the treaty term has independent meaning.

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14 EU Appellant Submission, paras. 115-116.
15 US Appellee Submission, para. 165.
16 US Appellee Submission, para. 165.
17 EU Appellant Submission, para. 117.
18 US Appellee Submission, para. 170.
21 US Appellee Submission, para. 170.
16. More fundamentally, in finding that the ordinary meaning of “direct transfer of funds” in its context excludes such transfers when they occur pursuant to purchases of services, the Panel, in the words of the Appellate Body, failed to “narrow the range of possible meanings of the treaty term” by having “recourse to context and object and purpose to elucidate the relevant meaning of the ... term”. As such, the Panel did not properly “ascertain the common intention of the parties to” the treaty. Instead, it came to this conclusion while putting aside the concerns over ordinary meaning and object and purpose, finding that there is “every reason to believe” that future panels will somehow be able to effectively deal with the enormous loophole potentially created by the interpretation.

17. As we have explained, and Australia has also argued, the Appellate Body faced a similar situation in Canada – Autos, where ordinary meaning and object and purpose led to one interpretation, while a singular emphasis on context could have led to a very different interpretation. There, the Appellate Body considered that Article 3.1(a) of the SCM Agreement specifically indicates that “subsidies contingent, in law or in fact ... upon export performance” are prohibited, while Article 3.1(b) omits the phrase “in law or in fact” in providing that “subsidies contingent ... upon the use of domestic over imported goods” are also prohibited. The Appellate Body found that Article 3.1(b) nevertheless covers de facto contingency on the use of domestic over imported goods, despite the omission; it reasoned that the alternative finding “would be contrary to the object and purpose of the SCM Agreement because it would make circumvention of obligations by Members too easy”.

18. The United States ignores this decision, focusing instead on the panel’s unremarkable statement in US – Export Restraints that “not all government

22 Appellate Body Report, China – Publications and Audiovisual Products, para. 399 (emphasis added).
24 Panel Report, para. 7.960.
25 EU Appellant Submission, paras. 120-121; Australia Third Participant Submission, paras. 16-17.
26 Emphasis added.
27 Appellate Body Report, Canada – Autos, paras. 142-143.
measures that conferred benefits could be deemed subsidies”. 28 In that dispute, however, the United States had attempted to characterise as a “financial contribution” actions that did not involve the “direct transfers of funds”, “provision of goods”, or any of the other actions specifically defined as financial contributions under Article 1.1(a)(1). 29 In stark contrast, the Panel and the United States now advance an interpretation that would exclude from the scope of Article 1.1(a)(1) transactions that indisputably involve types of financial contributions explicitly mentioned in Article 1.1(a)(1).

19. The United States also looks to the Appellate Body Report in US – Anti-Dumping and Countervailing Duties (China) in order to downplay the importance of teleological interpretation. 30 Yet, it fails to recall that in that case, the Appellate Body criticised the Panel’s emphasis on the object and purpose in interpreting the term “public body” in Article 1.1(a)(1) because “the question of whether an entity constitutes a public body is not tantamount to the question of whether measures taken by that entity fall within the ambit of the SCM Agreement”. 31 By contrast, adopting the Panel’s narrow interpretation of “direct transfer of funds”, “provision of goods or services”, and “revenue otherwise due foregone” in this dispute is, of course, clearly “tantamount to the question of whether measures ... fall within the ambit of the SCM Agreement”.

20. The United States understandably prefers a statement of the object and purpose that emphasises 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”, 32 as opposed to a statement focused solely on the disciplining of subsidies. The EU does not object to that variation on the object and purpose. It is, of course, true that there

28 US Appellee Submission, para. 160.
30 US Appellee Submission, para. 173.
are limits on the types of measures that are disciplined by the *SCM Agreement*. That said, there is nothing “delicate” about an interpretation of “direct transfer of funds” or the other specifically listed forms of financial contributions in Article 1.1(a)(1) that provides a roadmap for complete avoidance of the disciplines of the *SCM Agreement*. Essentially, the US argumentation opens up the possibility that a government’s large grant of free money to a goods producer would be considered non-actionable under the *SCM Agreement*.

21. The EU presented an example to highlight the tremendous loophole created by the “purchase of services” exclusion. To recall, the Panel’s test – a test that neither party has appealed – asks whether the activity that “Boeing was required to conduct was principally for its own benefit and use, or whether it was principally for the benefit and use of the U.S. Government (or unrelated third parties)”. The example involves a scenario where the Secretary of the US DOD pays Boeing $2 billion to fly him on a company jet from Washington, DC to a conference in Geneva, Switzerland. Following the Panel’s test, there is no doubt that such a transaction was properly characterised as a purchase of services by the Government, as the *service* was for the principal benefit and use of an agent of the US Government. Consequently, the direct transfer of $2 billion in funds for a service worth not more than $100,000 would escape the disciplines of the *SCM Agreement*.

22. This example highlights that the Panel’s (unappealed) test allows Members to design transactions such that they: (1) are properly characterised as a purchase of services (whether or not for market value), while at the same time (2) they contain an enormous direct transfer of funds which is in reality a grant but claimed to be the consideration for the service. Under the Panel’s interpretation, such grants would be shielded from all disciplines of the *SCM Agreement*, allowing Members to frustrate the object and purpose of the *Agreement*.

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33 EU Appellant Submission, paras. 123-124.
34 Panel Report, para. 7.1137.
23. The United States responds to this example by arguing that “a panel would doubtlessly (and correctly) conclude that the transaction was a grant with an incidental supply of air transportation services”.\(^{35}\) This response highlights, rather than disproves, the loophole that has been created through the exclusion of purchases of services. As an initial matter, in order to discipline a transaction that both parties apparently agree should be covered by the SCM Agreement, the United States now puts aside the Panel’s principal beneficiary/user test in favour of an additional test. In the example at issue, there is no dispute that the service (i.e., the plane flight), itself, is indeed for the principal benefit and use of the Government, and that, together with the payment made in exchange for this service, it would therefore be considered a purchase of services under the Panel’s test.

24. In order to avoid the loophole, the United States appears to be advancing an additional or alternative test – a test that enquires whether a single transaction includes more than one type of financial contribution, and then asks whether one type of financial contribution is “incidental” to another. But this new test is unworkable, and easily amenable to manipulation by a subsidising Member in a manner that would create the same type of loophole as the Panel’s test. A panel would be unable to distinguish between, on the one hand (i) a purchase of services for greater than market value (which, under the US theory, would be excluded from the SCM Agreement), and, on the other hand (ii) a grant with an incidental purchase of service (which, under the US theory, would constitute a subsidy within the meaning of the SCM Agreement). Simply stated, these are two ways of looking at exactly the same transaction. A Member attempting to avoid the disciplines of the SCM Agreement would easily combine these two different types of financial contributions, and actively emphasise the “purchase of service” aspect in order to avoid a finding that the service is “incidental”.

25. Implicit in the US statement that “a panel would doubtlessly (and correctly) conclude that the transaction was a grant with an incidental supply of air transportation services”.

\(^{35}\) US Appellee Submission, para. 180 (emphasis added).
transportation services”\textsuperscript{36} is that the non-market benefit in the $2 billion airplane ride example was simply too large. In other words, there is some undefined threshold of non-market benefit that would mark the difference between (i) a purchase of services for greater than market value, and (ii) a grant with an incidental purchase of service. Yet, even if it were possible to make such a distinction in a given case, this would essentially require a panel to determine the existence and size of a non-market “benefit” in a manner that very clearly would import the benefit analysis into the financial contribution analysis. This approach would directly conflict with the guidance of the Appellate Body in Brazil – Aircraft, which found that a panel made a “mistake” by “import[ing] the notion of a ‘benefit’ into the definition of a ‘financial contribution’”\textsuperscript{37}. As the Appellate Body explained, “\{w\}e see the issues – and the respective definitions – of a ‘financial contribution’ and a ‘benefit’ as two separate legal elements in Article 1.1 of the SCM Agreement”\textsuperscript{38}.

26. A single transaction combining both a government’s purchase of goods and purchase of services further illustrates the enormous loophole established by the US approach. Consider a single transaction wherein a government purchases goods and services together for a single price, at far more than the market value of the combined goods and services. A defending Member would naturally attempt to emphasise the service portion of the transaction so that the overall transaction would be excluded from the SCM Agreement. To the extent there is greater-than-market-value payment by the Member, the Member could argue that such overpayment relates to the service, and that the good was purchased for precisely its market value. Again, the subsidising Member can manipulate the terms of the transaction to render the purchase of service the dominant aspect of the transaction, and the purchase of goods as, to use the US phrase; “incidental”.

27. The United States refers to the unadopted decision of the GATT panel in US – Sonar Mapping to support the proposition that panels are capable of

\textsuperscript{36} US Appellee Submission, para. 180 (emphasis added).

\textsuperscript{37} Appellate Body Report, Brazil – Aircraft, para. 157.

\textsuperscript{38} Appellate Body Report, Brazil – Aircraft, para. 157.
distinguishing individual elements of a single transaction. Yet, the US neglects to recall that the *US – Sonar Mapping* panel actually rejected a framework similar to what the United States is now advocating in the present dispute. There, the United States argued that the purchase of goods at issue was simply “incidental” to a larger purchase of services contract, and therefore excluded from the disciplines of the Tokyo Round *Government Procurement Code* because “service contracts *per se*” were excluded. (Incidentally, in stark contrast to the *SCM Agreement*, the *Government Procurement Code* includes an explicit exception for “service contracts *per se*”.) The GATT panel rejected the US proposed standard on the grounds that, if accepted, it could also open up a large loophole in the agreement, reasoning as follows:

> It would very often be within the power of covered entities to determine the extent of their legal obligations under the Agreement, simply by choosing a legal form under which procurements were grouped in the desired proportions.

Similarly, if a subsidising Member were able to group, e.g., a purchase of a good with a purchase of a service, and the purchase of a service were significantly larger than the purchase of a good, then it could presumably escape the disciplines of the *SCM Agreement* under the United States’ proposed “incidental” test.

28. Moreover, the United States had argued that the *US – Sonar Mapping* panel needed to adopt its proposed interpretation given the context of the *Government Procurement Code*, because the alternative interpretation would render “redundant” the phrase “contracts *per se*” in the explicit exclusion of “service

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40 Although unadopted panel reports “have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members”, the Appellate Body has stated that that “a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.” Appellate Body Report, *Japan –Alcoholic Beverages II*, pages 14-15.


contracts *per se*". 43 Similarly, the core erroneous reasoning of the Panel here resulted from concerns over the alleged redundancy of the phrase “purchase of goods” under the EU interpretation. The GATT panel’s reasoning is instructive, and I quote:

> The interpretation proposed by the United States is … potentially a very large derogation from the principle that “any procurement of products” is covered; in the Panel’s view, if such an important exception were intended, it would be stated explicitly . … The Panel found it more difficult to accept that these anomalies were consistent with the intent of the text than to imagine that it included a redundant phrase. 44

29. Curiously, the United States points out that the NASA Space Act Agreements – pursuant to which there is a *provision of goods and services* by NASA in exchange for an alleged *purchase of service* by NASA from Boeing – represents an example of a complex transaction that both parties agree constitutes a financial contribution, despite consisting of *both* a provision of services and an alleged purchase of services. 45 The United States fails to point out, however, that it had originally argued before the Panel that Space Act Agreements were *not* financial contributions because they involved purchases of services, but then unilaterally changed its position without any explanation. 46 A unilateral decision by the United States not to challenge the EU’s characterisation of a transaction, which was unreviewed by the Panel, 47 by no means generates confidence in the Panel’s interpretation of Article 1.1(a)(1), as the United States alleges. Rather, by conceding that a financial contribution exists for agreements that can plausibly be characterised as both (a) a purchase of services and (b) a

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45 US Appellee Submission, para. 184.

46 *Compare* US FWS, para. 235 (“The fact is that NASA generally uses non-reimbursable Space Act Agreements not to provide its R&D services to other entities, but as an alternative means of inducing other entities to commit their resources to advance NASA’s objectives. Thus, non-reimbursable Space Act Agreements are most accurately classified as mechanisms for the government purchase of services in exchange for in-kind remuneration. As discussed above, the purchase of services is outside the scope of the SCM Agreement.”), with US Response to Panel Question 18, para. 39 (“The main thrust of the U.S. discussion of the SAAs was that Boeing-NASA SAAs related to the programs challenged by the EC constituted the provision of a good or service. That is, in fact, the most accurate characterization”).

47 Panel Report, para. 7.977.
“provision of goods or services,” yet maintaining that no financial contribution arises for agreements that plausibly be characterised as both (a) a purchase of services and (b) an instrument “involving a direct transfer of funds”, the United States highlights the inconsistency and artificial distinctions resulting from its interpretation.

30. The EU requests that the Appellate Body fully take into account the fact that the loophole occurs at the “financial contribution” stage, and therefore allows Members to escape the disciplines related to both actionable subsidies and prohibited subsidies. For example, if a Member hides a grant within a purchase of service by successfully characterising the “grant” as an overpayment for a service, then it can avoid the disciplines of Part II of the SCM Agreement, even if that Member unquestionably makes that purchase of service (and associated “grant”) contingent on the export of goods within the meaning of Article 3.1 of the SCM Agreement. For example, imagine that DOD hires Boeing to perform a service at a highly inflated price that is many times greater than its market value, on the condition that Boeing exports 20% more aircraft next year than in the previous year. Assume that the “service” was for the primary use and benefit of the DOD, thereby qualifying as a genuine purchase of service under the Panel’s test. As for the United States’ second test, further suppose that it was not possible to easily value the service, and that it therefore was not possible to distinguish between the reality that this was a grant with a so-called “incidental” purchase of service, or the likely attempt to defend it as a purchase of service for greater than fair market value. The stakes are too high for an export subsidy finding to rise or fall based on such gamesmanship.

31. Thus, the European Union respectfully requests the Appellate Body to reverse the Panel’s legal interpretation of Article 1.1(a)(1), based on a holistic interpretation that takes into account all of the relevant principles of treaty interpretation. Not only has the Panel’s flawed interpretation led to an erroneous finding about some of the DOD R&D funding at issue in this dispute, but it will also have wide ranging implications for panels and investigating authorities in the future. In particular, if the Panel’s interpretation is upheld, subsidising Members will have free rein to take advantage of the resulting loophole – a
loophole that no test can reliably fill. The Appellate Body should correct the legal interpretation, and thereby close this dangerous loophole and its potential for defeating the object and purpose of the *SCM Agreement* going forward.

**B. The Panel Erred in Its Interpretation and Application of Article 2.1 of the *SCM Agreement* in Its Analysis of NASA/DOD Patent Transfers/Waivers**

32. As detailed in our Appellant Submission, the Panel erred in its interpretation and application of Article 2.1 of the *SCM Agreement* when it found that the NASA and DOD patent waivers and transfers at issue are not “specific”.\(^{48}\) As an initial matter, the EU recalls that the Panel considered specificity only after assuming *arguendo* that the patent waivers and transfers are subsidies.\(^{49}\) Thus, the EU will not address the US contentions that NASA and DOD do not “transfer” patent rights to Boeing or provide a financial contribution.\(^{50}\)

33. The Panel’s error under Article 2.1 appears to stem from its decision to set its sights on the actions of the US Government, as a whole, as the “granting authority” in question, and its resulting failure to consider the limitations placed by the authorities that actually exercised their discretion to grant the patent rights – namely, NASA and DOD. Notably, while the United States emphasises that the discretion of NASA and DOD to refuse to provide patents is limited, it does not deny that NASA and DOD have some degree of discretion.\(^{51}\)

34. In evaluating specificity of the NASA and DOD patent waivers/transfers, the Panel implicitly interpreted “granting authority” as encompassing not the authority that directly granted the subsidies at issue, but rather the highest authority of the US Government that could somehow be linked to the granting of the subsidy. As the EU has explained, rather than properly interpreting granting authority in view of its ordinary meaning in Article 2.1 of the *SCM Agreement*,

\(^{48}\) EU Appellant Submission, paras. 70-92.

\(^{49}\) Panel Report, paras. 7.1276, 7.1294.

\(^{50}\) US Appellee Submission, para. 121.

\(^{51}\) US Appellee Submission, para. 144.
as the “body or persons exercising power” that “bestow{s} or confer{s}” a subsidy “as a favour, or in answer to a request”, the Panel erroneously equated the term as being limited to the actions of the “Member”. 52 Consequently, the actions and legislation of the authorities that actually exercised their discretion to grant the waivers and transfers, played a minimal part in the Panel’s evaluation of specificity of NASA and DOD patent waivers and transfers. This was especially evident from the Panel’s complete failure to even address the EU arguments that NASA and DOD patent waivers and transfers are specific within the meaning of Article 2.1(c).

35. The United States refers to the Appellate Body’s consideration, in US – Anti-Dumping and Countervailing Duties (China), of “the totality of evidence at all levels of government” in evaluating specificity under Article 2.1(a) of the SCM Agreement. 53 But the US fails to explain why it was appropriate for the Panel to ignore the evidence of de facto specificity under Article 2.1(c) at the “level{} of government” where the final decision is made as to whether or not to waive or transfer a patent on technology created with NASA or DOD R&D funding.

36. As the EU has also explained, the Panel’s specificity analysis for the NASA and DOD patent waivers and transfers failed to comport with Appellate Body guidance on Article 2.1. 54 As the Appellate Body has recently emphasised, Article 2.1 refers to paragraphs (a) through (c) thereof as “principles”, and explains that these principles “are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle.” 55 Consequently, as the Appellate Body has clarified, “the application of one of the subparagraphs of Article 2.1 may not by itself be determinative in arriving at a conclusion that a particular subsidy is or is not specific”. 56 Yet, the Panel

52 EU Appellant Submission, paras. 72-75.
54 EU Appellant Submission, para. 78.
55 Appellate Body Report, US – Anti-Dumping and Countervailing Duties (China), para. 366; see also Appellate Body Report, EC and certain member States – Large Civil Aircraft, paras. 942-945.
limited its analysis to Article 2.1(a), and ignored the EU’s arguments and supporting evidence that the NASA and DOD patent waivers and transfers were de facto specific pursuant to the principles in Article 2.1(c). The United States appears to support this approach of ignoring arguments under Article 2.1(c) under certain circumstances, arguing that the Panel concluded that “evidence under consideration unequivocally indicates ... non-specificity by reason of law’ under Article 2.1(a), rendering further analysis unnecessary.”

37. To recall, the European Union had argued before the Panel that the NASA and DOD patent waivers and transfers were specific, based on both Articles 2.1(a) and 2.1(c) of the SCM Agreement. In advancing arguments pursuant to both paragraphs (a) and (c), the EU focused on NASA and DOD, as opposed to any other US Government agencies, or the US Government as a whole. With respect to Article 2.1(a), the EU considered the explicit limitations in the types of R&D that NASA and DOD could fund, and consequently the enterprises that could benefit from the patent waivers and transfers for inventions deriving from that R&D. With respect to Article 2.1(c), the EU argued that Boeing, alone, received a disproportionate amount of NASA and DOD R&D funding, which in turn serves as a proxy for the value of the associated patent waivers/transfers. Further, the EU argued that Boeing, along with four other companies, received up to 45% of the total DOD R&D funding, which also supports a finding of disproportionality. As for NASA, the EU further presented evidence regarding “the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy”, another Article 2.1(c) factor.

38. Yet, the Panel did not consider any of the EU’s evidence and argument regarding Article 2.1(c), presumably because such evidence was focused on the actions of...

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58 See, e.g., EU FWS, paras. 852-856; EU SWS, paras. 568-582.
59 EU FWS, paras. 852-856.
60 EU FWS, paras. 854-855; EU SWS, paras. 578-582.
61 EU FWS, para. 855.
62 EU FWS, para. 854; EU SWS, para. 582.
NASA and DOD, as individual agencies, rather than on the entirety of the US Government, as a whole. However, even if the Appellate Body agrees that the US Government, as a whole, is a “granting authority” within the meaning of the SCM Agreement, there is no basis to find that NASA and DOD are not also individual granting authorities that are relevant to the specificity analysis. Not even the United States takes this position, as it argues that “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”.

39. Consequently, as the EU has argued, and as Australia also points out, the Panel erred by failing to evaluate the EU’s arguments of de facto specificity under Article 2.1(c). This cannot possibly constitute an evaluation “within an analytical framework that recognizes and accords appropriate weight to each principle”, as the third set of principles in Article 2.1(c) was completely ignored.

40. The Panel’s approach of neglecting to consider the actions of the authorities that exercise the discretion to grant a subsidy creates an important gap in the subsidy disciplines. In instances where there is a centralized policy or legislation that does not appear to be specific after considering the principles in Article 2.1(a) or 2.1(b), the individual granting authorities could exercise their discretion to actually provide subsidies to “certain enterprises” without consequence. In this case, NASA and DOD had some discretion in deciding whether to waive/transfer the patents, and whether to enter into the R&D contracts in the first place. This means that even if there is no de jure specificity under Article 2.1(a), there is, at a minimum, the considerable potential for Article 2.1(c) de facto specificity based on how those authorities actually implement the legislation or policy. If,

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63 US Appellee Submission, para. 131.
64 EU Appellant Submission, paras. 77-78.
65 Australia Third Participant Submission, paras. 75-80.
66 Appellate Body Report, US – Anti-Dumping and Countervailing Duties (China), para. 366; see also Appellate Body Report, EC and certain member States – Large Civil Aircraft, paras. 942-945.
for example, the facts demonstrated that NASA provided 100% of its patent waivers to only one company, this should certainly be considered as evidence of specificity under Article 2.1(c) even if there is no evidence of record on how other government agencies might be implementing the same centralized policy or legislation. Article 2.1 requires that such evidence be considered and evaluated.

41. The United States takes issue with the EU’s statement that specificity can be analysed from either the perspective of the granting authority or the legislation pursuant to which the granting authority operates.\(^{67}\) To be clear, the EU agrees with the US that a proper and holistic interpretation of Article 2.1 would allow a panel to consider evidence and argument regarding both the “granting authority” and the relevant “legislation”. Such an interpretation would consider both the principles in Article 2.1(a) and Article 2.1(b). In particular, Article 2.1(a) explicitly allows for a complaining Member to argue that “the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises”.\(^{68}\) If at least one of those two options is demonstrated, then the principle of Article 2.1(a) may be satisfied.

42. But the analysis should not end there, and this is where the Panel’s analysis went astray.

43. The responding party next has the opportunity to defend their measure against a finding of specificity pursuant to Article 2.1(b), and can do so based on the perspective of either “the granting authority, or the legislation pursuant to which the granting authority operates”,\(^{69}\) or, if they so choose, from both perspectives. Even if the complaining party chooses to focus on “granting authority” in its Article 2.1(a) analysis, there is nothing preventing the responding party from then focusing its Article 2.1(b) defence on the “legislation”. In this way, by considering the principles under both Article 2.1(a) and 2.1(b), the Panel may

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\(^{67}\) US Appellee Submission, para. 132, citing EU Appellant Submission, para. 77.

\(^{68}\) Emphasis added.

\(^{69}\) Emphasis added.
indeed consider arguments about both the granting authority and the relevant legislation. In this sense, the European Union agrees that the Panel need not limit its overall Article 2.1 analysis to one or the other, but it can consider both perspectives.

44. As we have pointed out, however, and the United States has failed to refute, the United States “did not properly present a developed defence under the terms of Article 2.1(b)”; likewise, the Panel did not evaluate the US arguments according to the terms of Article 2.1(b). Nor did the Panel consider the EU arguments under Article 2.1(c), including the evidence regarding the practices of NASA and DOD – authorities that even the United States does not deny are relevant to the analysis. Rather, the Panel came to a sudden and unexpected halt after considering the arguments under Article 2.1(a). It therefore failed to provide the holistic interpretation and application of Article 2.1 required by the SCM Agreement.

C. NASA and DOD Aeronautics R&D Subsidies

45. Turning now to the United States’ appeals of the Panel’s findings that NASA and DOD provided specific subsidies through the aeronautics R&D programmes at issue, the European Union has already provided a detailed response to each of the US arguments in its Other Appellee Submission. We will take this opportunity to briefly highlight several of the key flaws in the US arguments, and to recall why there is no basis for the Appellate Body to reverse the Panel’s carefully reasoned findings of subsidisation by NASA and DOD.

46. The United States appeals the Panel’s findings regarding the existence and amount of the financial contribution and benefit conferred to Boeing by the NASA and DOD R&D Programmes. Although the United States fully agrees with the Panel’s test to determine whether a transaction was a “purchase of

70 EU Appellant Submission, para. 77.
71 EU Appellant Submission, paras. 77-78; US Appellee Submission, para. 129.
72 EU Other Appellee Submission, Sections II(A)-(B).
service” (i.e., the principal beneficiary and user test), and the Panel’s view that purchases of services are excluded from Article 1.1(a)(1), the United States nevertheless argues that the Panel erred when assessing the relevant evidence of record. With respect to NASA, the United States argues that the Panel conducted a one-sided analysis of the evidence that failed to consider the benefit and use of the R&D contracts to the US Government and third parties, and therefore came to the wrong conclusion. It frames its appeal as one based on both erroneous application of Article 1.1(a)(1) of the SCM Agreement and a violation of Article 11 of the DSU (at least for certain aspects), but these allegations focus on the Panel’s fact-finding and therefore do not state a proper claim under Article 1.1(a)(1). With respect to the Article 11 claims, the US finds no support for its allegations that the Panel failed to make an objective assessment of the facts of the case.

47. In particular, as the EU has detailed, the US arguments rely entirely on an erroneous characterisation of the Panel Report. Based on the Panel’s “consider{ation} in its totality” of the evidence, “some of which {it} individually discussed”, the Panel used its discretion as the trier of fact to conclude that the R&D at issue was for the principal benefit and use of Boeing. The US attempt to reargue the facts does not succeed under any standard of appellate review. Indeed, the evidence that the US Government received some benefit from the NASA R&D – evidence that the Panel considered – does nothing to contradict the ultimate finding that Boeing was the “principal” beneficiary and user of the R&D, as supported by thousands of pages of argument and evidence about the true nature and actual results of the NASA R&D programmes at issue.

48. With respect to the “benefit” conferred by the NASA R&D contracts, the United States alleges that the Panel erroneously applied Article 1.1(b) of the SCM Agreement by making the same mistakes in that context as it did in its financial

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73 US Other Appellant Submission, Sections II(A)-(B).
74 EU Other Appellee Submission, paras. 31-36.
75 Panel Report, para. 7.981.
contribution analysis. These arguments fail for the same reasons as the US arguments related to financial contribution. The United States further alleges that the Panel erred under Article 1.1(b) by estimating too high a value for the benefit conferred from the NASA R&D financial contributions. But this claim is not covered by the US Notice of Other Appeal. Further, this US claim is not properly brought under Article 1.1(b) of the SCM Agreement, which relates to the existence of a benefit, and contains no disciplines pertaining to the precise quantification of the benefit. As for the actual estimate, the Panel made its factual determination based on adequate reasoning and a careful review of the facts, and the US has provided no basis to overturn it.

49. Returning to the DOD aeronautics R&D subsidies, the United States appeals the Panel’s findings regarding the existence and amount of the financial contribution and benefit conferred to Boeing. With respect to “financial contribution”, the United States argues that the Panel failed to consider and correctly weigh certain facts when it evaluated whether the DOD aeronautics R&D assistance instruments at issue are properly considered to be purchases of services. While the US appeal is essentially an argument under Article 11 of the DSU that the Panel improperly weighed the facts, the United States has not pursued an appeal in this regard under Article 11 of the DSU. The Appellate Body therefore lacks jurisdiction to consider such a claim. Moreover, a review of the Panel Report reveals that the Panel clearly considered the evidence that the US alleges was not considered. As for the Panel’s discussion of the five factors that the US concedes the Panel did consider, the Panel evaluated all of the factual arguments repeated now by the United States, and properly used its discretion as the trier of fact to conclude that the DOD aeronautics R&D

76 US Other Appellant Submission, para. 66.
77 See Appellate Body Report, EC and certain member States – Large Civil Aircraft, para. 880.
78 See US Notice of Other Appeal, paras. 4-5.
79 EU Other Appellee Submission, paras. 141-158.
assistance instruments were not purchases of services. Now is not the time to reargue the facts.

50. As the EU has demonstrated, the US failed to show that the Panel erred in concluding that the DOD assistance instruments conferred a benefit. Contrary to the US argument, the Panel correctly characterised the assistance instruments as “payment for research principally for the benefit and use of Boeing without some form of royalty or repayment”. Moreover, the EU demonstrates that the Panel’s benefit finding is not affected when one explicitly takes into account the elements of the transactions that the United States alleges the Panel ignored, including the partial contribution of Boeing and the possible benefit to DOD. As for the US appeal of the Panel’s passing statement about the amount of the subsidy from the DOD RDT&E Program, this statement had no bearing on the Panel’s legal, or even factual, conclusions, and in any event, it is supported by ample evidence of record.

51. We will now briefly address the US appeals of the Panel’s findings related to two of the state and local measures.

D. Washington State B&O Tax Rate Reductions

52. In our Other Appellee Submission, the EU has detailed why the Appellate Body should reject the US appeal of the Panel’s findings that the Washington State HB 2294 B&O tax rate reductions provide financial contributions within the

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80 EU Other Appellee Submission, paras. 159-168.
81 US Other Appellant Submission, paras. 116-122.
82 EU Other Appellee Submission, paras. 169-184.
83 US Other Appellant Submission, para. 116.
84 EU Other Appellee Submission, paras. 172-178.
85 US Other Appellant Submission, para. 118; EU Other Appellee Submission, paras. 179-184.
86 EU Other Appellee Submission, paras. 185-190.
53. With respect to the Panel’s financial contribution analysis, the United States has argued that the Panel improperly elevated the “but for” test to the status of a general rule for assessing whether revenue otherwise due is foregone under Article 1.1(a)(1)(ii). As the EU demonstrates, the Panel did no such thing, but instead interpreted and applied Article 1.1(a)(1)(ii) exactly as the Appellate Body had done before it. While the Panel properly understood that “the challenged taxation measure should be compared to the treatment applied to comparable income, for taxpayers in comparable circumstances”, it explained that “a ‘but for’ test can be applied” “where it is possible to identify a general rule of taxation applied by the Member in question”. Indeed, in those cases where the defined, normative benchmark is clearly identified in a Member’s rules of taxation, by definition, the income subject to such a general rule becomes “legitimately comparable” to income subject to an exception to that rule.

54. The United States also has argued that the Panel erred by: (i) applying a “but for” test; (ii) not treating the “range” of 36 B&O tax rates as the “defined, normative benchmark” for its test; and (iii) not considering the average effective B&O tax rate in its analysis. The EU has detailed why each of these arguments must fail, and Australia’s Third Participant Submission further supports the Panel’s findings. First, the Panel properly chose to apply a “but for” test based on its factual findings about the B&O tax system, “where it is not difficult to identify a general rule of taxation and exceptions to it”. We note that the US has not challenged these factual findings under Article 11 of the DSU, and they

87 EU Other Appellee Submission, paras. 210-245.
88 See US Other Appellant Submission, paras. 130-143.
89 EU Other Appellee Submission, paras. 212-216.
90 Panel Report, para. 7.120 (emphases added).
91 See US Other Appellant Submission, paras. 144-162.
92 EU Other Appellee Submission, paras. 217-234; Australia Third Participant Submission, para. 50-56.
are therefore not subject to Appellate Body review.\(^94\) Second, the Panel properly rejected the “range” of 36 B&O tax rates as a “defined, normative benchmark” because use of such a benchmark is not consistent with Washington State law;\(^95\) could lead to absurd results;\(^96\) and would result in the comparison of income that is not “legitimately comparable”.\(^97\) As for the failure to consider the so-called “average effective rate”, even the US conceded that this was not a normative benchmark;\(^98\) it is not grounded in the “rules of taxation of the Member in question”;\(^99\) and it would likewise lead to comparison of income that is not “legitimately comparable”.\(^100\)

55. Furthermore, the EU has detailed why the Appellate Body should reject the US appeal of the Panel’s finding that the HB 2294 B&O tax rate reductions are specific within the meaning of Article 2.1(a).\(^101\) The US alleges that the Panel erred in failing to consider all the B&O tax rate exceptions contained in the Washington State tax code “together” in its specificity analysis as a single “subsidy”.\(^102\) But the US argument fails, as it provides no basis to overturn the Panel’s underlying factual findings that the B&O tax rate exceptions should not be considered a “common subsidy programme” in view of the evidence of record about the various tax exceptions and the overall B&O tax system.\(^103\) Again, we recall that the US has not advanced a claim under Article 11 of the DSU with respect to these factual findings and, thus, the Appellate Body may also reject the US appeal on this basis.

\(^93\) See Panel Report, paras. 7.121-7.133; EU Other Appellee Submission, paras. 218-220.
\(^94\) See EU Other Appellee Submission, para. 211.
\(^95\) Panel Report, para. 7.136.
\(^96\) Panel Report, para. 7.135 and footnote 1224.
\(^98\) Panel Report, para. 7.137.
\(^101\) EU Other Appellee Submission, paras. 235-244.
\(^102\) See US Other Appellant Submission, paras. 163-179.
\(^103\) Panel Report, paras. 7.201, 7.204-7.205.
E. City of Wichita Industrial Revenue Bonds

56. We now turn to the US appeal of the Panel’s finding that the subsidies provided through the City of Wichita Industrial Revenue Bonds are *de facto* specific within the meaning of Article 2.1(c) of the *SCM Agreement*. As the EU has detailed in its Other Appellee Submission, the United States failed to demonstrate any error in the Panel’s “disproportionality” analysis, nor in the Panel’s consideration of “the extent of diversification of economic activities within the jurisdiction of” Wichita.104

57. As the EU has demonstrated, the Panel’s approach on *de facto* specificity is consistent with recent Appellate Body guidance regarding the proper interpretation of Article 2.1 of the *SCM Agreement*, and particularly the recognition that “subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle”.105 The United States offers no objection in this regard, but rather appeals the underlying reasoning with respect to the Panel’s choice of a baseline for the disproportionality analysis.

58. In the circumstances of this case, the Panel properly concluded that a baseline comparing Boeing and Spirit’s share of the IRB subsidy amount to their share of economic activity within the jurisdiction of Wichita (as evidenced by employment figures) was appropriate for assessing “disproportionality”.106 That conclusion is demonstrably consistent with the requirements of Article 2.1, considered as a whole, and amply supported by the evidence of record. The Panel’s interpretation took into account the requirement in the *chapeau* of Article 2.1 that specificity must be based on the situation “within the *jurisdiction* of the granting authority”, and adopted a methodology for evaluating disproportionality that factors in “the diversification of economic activities”, as

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104 EU Other Appellee Submission, paras. 266-296.
106 See, e.g., Panel Report, paras. 7.768-7.770.
explicitly required by Article 2.1(c), final sentence. And, as the Appellate Body has recognized, the *chapeau* of Article 2.1 “offers interpretive guidance with regard to the scope and meaning of the subparagraphs that follow” and “frames the central inquiry as a determination as to whether a subsidy is specific to ‘certain enterprises’ within the jurisdiction of the granting authority ...”. Thus, it follows that the Panel determined whether “disproportionately large amounts of subsidy” have been granted to certain enterprises based on the position of those certain enterprises “within the jurisdiction of the granting authority”.

59. In applying that baseline to the facts, the Panel found that the EU had provided evidence amounting to a “prima facie case” of specificity, and that the United States failed to rebut that evidence. Notably, the US recourse to hypothetical factual situations that might exist in other disputes – and therefore that might lead to an adoption of different baselines for adjudging disproportionality – fails to undermine the Panel’s baseline on the facts presented in *this* dispute. And, while the Panel relied on employment figures as an indicator of economic activity, the fact that there may be situations in which a different economic indicator would be more appropriate does not undermine the utility of the employment indicator on the facts presented in *this* dispute, where the United States failed to advance evidence that would put into question the relationship between employment and economic activity in Wichita. In fact, the US position is untenable since it was precisely the United States that first referred to employment as a relevant factor for adjudging disproportionality. In any event, the US failed to raise any claim under Article 11 of the *DSU* with respect to the Panel’s specificity finding for Wichita IRBs, and the Panel’s weighing of the evidence is therefore not before the Appellate Body.

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107 *See* Panel Report, paras. 7.752, 7.760, 7.769; EU Other Appellee Submission, paras. 291-296.
109 *See* Panel Report, para. 7.769.
110 EU Other Appellee Submission, paras. 276-277.
60. As for the US endorsement of two alternative baselines, they fail to undermine the validity of the baseline that the Panel selected, particularly since neither baseline takes into account the economic diversification within the jurisdiction of the granting authority, as required by the final sentence of Article 2.1(c). These proposed US baselines limit their enquiry to economic distinctions among the actual or potential subsidy recipients, and thereby fail to provide information sufficient to evaluate specificity in view of the object and purpose of Article 2.1 of the SCM Agreement. In other words, considering the economic activities of the actual or potential subsidy recipients cannot provide an adequate basis to determine whether the subsidy is “sufficiently broadly available” throughout the economy of the granting authority as not to benefit certain enterprises. Moreover, it cannot be sufficient to determine whether “the conduct … of the granting authority discriminate[s] or not”.

61. We note that China and Canada have each introduced an example that they assert may discredit the Panel’s baseline for disproportionality. Both envision a situation where a subsidy is available de jure on the basis of objective criteria, i.e., the number of employees, thereby satisfying the terms of Article 2.1(b) as a subsidy for which “specificity shall not exist”. In these examples, they emphasise the tension between Article 2.1(b) and 2.1(c). Yet, these hypothetical examples were anticipated and addressed by the Panel, and have no merit in discrediting the Panel’s analysis in the present case, where the US never even presented an argument under Article 2.1(b). In any event, even if eligibility for a subsidy were governed by “objective criteria or conditions” within the meaning of Article 2.1(b), this would not end the specificity enquiry. To the contrary, the

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111 US FWS, para. 613 (“{Boeing’s} share and impact on the economy of the city in which it was sited was even more dramatic. In the 1990s, Boeing’s employment levels in Wichita exceeded 20,000 in some years with a payroll of approximately $1 billion”).


114 China Third Participant Submission, paras. 13-14; Canada Third Participant Submission, para. 54.

115 Panel Report, paras. 7.761-7.762 and 7.768 (“…the problem that any limit on the availability of the subsidy leads to a finding of disproportionality may be overcome somewhat if disproportion is interpreted to mean a significant disparity between the two relevant ratios, rather than any discrepancy, however small. This does not seem an unreasonable way to read Article 2.1(c)...”).
principles in Article 2.1(c) must be considered, as explicitly stated in Article 2.1(c), “notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)”.

62. Moreover, Canada’s example explicitly assumes “that the subsidy is not used by a limited number of certain enterprises and that no recipient receives a predominant share”. Yet, on the facts of the present dispute, the Panel made no finding on “predominant use” and did not find that the evidence about the “number of certain enterprises” or any other evidence in the record outweighed the evidence supporting its conclusion of de facto specificity based on disproportionality. Moreover, the US does not appeal any of these factual findings pursuant to Article 11 of the DSU.

63. We also note Canada’s focus on the distinction between the “access” to a subsidy considered by Article 2.1(a) and (b), and the “use” of a subsidy considered by Article 2.1(c). Canada wrongly asserts that Article 2.1(a) and the first factor in Article 2.1(c) already ensure an examination of the breadth in the access to, and use of, a subsidy throughout an economy. This, however, ignores the fact that the chapeau of Article 2.1 and the final sentence in Article 2.1(c) apply holistically to all the factors included in Article 2.1(c).

64. Finally, on the facts of this case, we recall that the Panel found that a focus on “eligibility” (as Australia had suggested to the Panel) makes no significant difference, explaining, and I quote: “in the circumstances of this case, given that the pool of eligibility for the IRBs is very wide, employing the Australian approach is unlikely significantly to alter the second statistic regarding the position of Boeing and Spirit in the overall economy”. In other words, the Panel explicitly noted that using data from the pool of potential subsidy recipients as the baseline was not likely to change the outcome in this case,

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116 Canada Third Participant Submission, para. 54.
117 Panel Report, para. 7.752.
118 Canada Third Participant Submission, paras. 47-51.
119 Panel Report, para. 7.768, final sentence, citing City of Wichita/Sedgwick County Economic Development Incentives Policy (Exhibit EC-190) (outlining the eligibility for IRBs).
where the eligibility for IRBs was quite wide, because the employment statistics for eligible companies would be similar to those for the entire Wichita economy. Thus, there is no need for the Appellate Body to accept the invitations of China and Canada to engage in theoretical enquiries that would make no difference to the Panel’s ultimate finding of specificity.

III. ADVERSE EFFECTS

65. Although this week’s hearing does not address issues related to adverse effects, we would like to take the opportunity to briefly highlight certain key issues. We will address these and the other adverse effects-related issues in more detail at the October hearing.

66. First, the US adverse effects arguments urge the Appellate Body to reject the Panel’s serious prejudice findings in toto, on the basis that strategically focused subsidies granted to the US LCA industry over a period of more than 30 years caused no serious prejudice to Boeing’s sole competitor, Airbus. The US allegations ignore reality. NASA, DOD and Boeing repeatedly admitted (especially outside the context of this dispute) that the policy objectives, design and impact of these aeronautics R&D subsidies was to create cutting-edge technologies for the US aeronautics industry in order to give it a significant competitive edge over its European rival, Airbus. The latest success story of this strategy is the launch, production, and aggressive marketing of the Boeing 787 Dreamliner. We will discuss at the October hearing how decades of Boeing’s participation in aeronautics R&D programmes provided Boeing engineers with the necessary knowledge, experience and confidence to design and launch the 787 as and when it did. Unsurprisingly, this is precisely what the Panel found.

120 Panel Report, para. 7.1754 (the US aeronautics R&D subsidies have “contributed in a genuine and substantial way to Boeing’s development of technologies for the 787”).

121 Panel Report, paras. 7.1764, 7.1773, 7.1780, 7.1797, 8.3(a)(i).
67. The Panel carefully weighed numerous admissions from Boeing and US Government officials that confirmed the existence and success of this strategy. For example, the US Congressional Budget Office acknowledged that NASA funds the development of technology and systems intended for use in commercial airliners ... with the explicit objective of preserving the U.S. share of the current and future world airliner market.

68. Many of the US arguments take issue with the weight the Panel ascribed to this evidence. Yet, the Panel’s careful weighing of the evidence was well within the bounds of its discretion as the trier of fact. In any event, the Appellate Body should reject the US attempt to use this appeal as an opportunity to advance again the largely fact-based arguments that it had previously raised before the Panel. This is particularly true given that the United States failed to articulate Article 11 of the DSU as the basis for its appeal.

69. Second, the United States challenges the alleged “insufficiency” of the detail in the Panel’s counterfactual analysis. In so doing, the United States would demand a causation analysis with a level of evidentiary and analytical precision that is simply not required under Articles 5(c) and 6.3 of the SCM Agreement, as interpreted by the Appellate Body. The Panel’s causation findings were more than adequate, and reflect a thorough analysis and careful weighing of a huge

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124 See EU Other Appellee Submission, paras. 323-335. See, in particular, EU Other Appellee Submission, para. 326, summarizing the fact-based arguments advanced by the United States in this appeal and comparing them to the factual assertions made by the US before the Panel.

125 Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 274 (“i]t is well settled that an Article 11 claim ... must be clearly discernible in a Notice of Appeal and explicitly articulated in an appellant’s written submission”).

126 US Other Appellant Submission, para. 215; see also US Appellee Submission, paras. 250, 277-286.

evidentiary record that fully supported its counterfactual findings and conclusions.

70. Third, the United States seeks reversal of the Panel’s serious prejudice findings because of the allegedly small magnitude of the US aeronautics R&D subsidies.\textsuperscript{128} The Panel correctly found that the design, operation and effect of the aeronautics R&D subsidies significantly exceed their relative magnitude.\textsuperscript{129} In any event, an amount of “at least $2.6 billion”\textsuperscript{130} in US aeronautics R&D subsidies that the Panel found existed is hardly insignificant. The US argument is also built on an incorrect characterisation of how US Government-supported R&D reduces Boeing’s risks from product development. In particular, the US argument ignores that US aeronautics R&D subsidies reduce and overcome relevant technological and financial risks.\textsuperscript{131}

71. Lastly, the Panel correctly found that the B&O and FSC tax subsidies caused serious prejudice in the 100-200 seat and 300-400 seat LCA markets. The US again asserts that these subsidies, which are tied to each sale of a Boeing LCA in these markets, had no impact on Airbus’ prices, sales, or market share. The Panel correctly rejected these arguments, which run contrary to the evidence as well as the express intent of the subsidies.

72. With respect to our own adverse effects appeals, we explained that the Panel erred in failing to assess collectively (i) the effects of the B&O tax subsidies with the effects of the aeronautics R&D subsidies and (ii) the effects of the

\textsuperscript{128} See US Other Appellant Submission, heading. II.B.1.f.

\textsuperscript{129} Panel Report, para. 7.1760 (“The aeronautics R&D subsidies in question amount to at least $2.6 billion, a considerable amount of money from the perspective of a government agency. The Panel is aware, however, that this amount perhaps may not appear significant when compared to Boeing’s consolidated revenues or R&D expenditures over 1989 - 2006. … However, this sort of numerical comparison presupposes that the effects of the aeronautics R&D subsidies can essentially be reduced to their cash value, a proposition that we do not accept. As can be seen from the analysis above, the value to Boeing of the particular aeronautics R&D programmes in question is essentially a function of the technological advancements that those programmes provide. Precisely because the nature of this kind of subsidy is that it is intended to multiply the benefit from a given expenditure, the Panel considers it unlikely that the effects of such expenditure (to the extent that it was successfully deployed) would be reducible to its face amount.”)

\textsuperscript{130} Panel Report, para. 7.1760.

\textsuperscript{131} See, e.g., EU Other Appellee Submission, paras. 389-395; see also HSBI Appendix, paras. 389-395.
FSC/ETI and B&O tax subsidies and the “Remaining Subsidies”. In each instance, cumulation was necessary because both of these groups of subsidies contributed to the same form of adverse effects (e.g., significant price suppression, significant lost sales, and/or displacement or impedance). Yet, in both instances, the Panel improperly isolated its assessment of the effects of the two groups of subsidies.

73. In its Appellee Submission, the United States mis-characterises the findings of the Appellate Body on the issue of cumulation. In particular, the United States fails to appreciate that the Appellate Body’s guidance thus far has not addressed the issue of a cumulative assessment of the effects of subsidies that operate through distinct causal mechanisms, as is the case with the US aeronautics R&D subsidies that caused the existence of a product and the US tax subsidies that enabled lower prices. In both US – Upland Cotton and EC and certain member States – Large Civil Aircraft, the Appellate Body merely addressed the cumulation of subsidies that were alleged to cause adverse effects through the same causal mechanism – the increased supply of goods into the markets at issue.

74. We look forward to addressing the adverse effects-related issues in detail at the October hearing.

IV. CONCLUSION

75. This concludes our opening statement. We look forward to responding to your questions.

132 See EU Appellant Submission, paras. 194-234. See also Panel Report, para. 7.1824 (regarding the first EU appeal) and para. 7.1828 (regarding the second EU appeal).

133 EU Appellant Submission, paras. 194-218.

134 US Appellee Submission, paras. 194-220.