Intellectual Property as a Financial Contribution Under the WTO Subsidies Agreement

Miguel Ángel Elizalde Carranza

Abstract This chapter has been drafted in honor of Pedro Roffe, for whom I have admiration and gratitude. His work at the United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Trade and Sustainable Development (ICTSD) on the multiple dimensions of the relationship between intellectual property and development has guided policy-makers and scholars around the world. I have had the chance to collaborate with Pedro in trainings organized by the Interamerican Bank, where I have witnessed not only his influence but also Pedro's generosity. This chapter argues that intellectual property rights (IPRs) that government transfer to private entities could be considered as financial contributions in form of the "provision of goods" under Article 1.1(a)(1)(iii) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Following a brief introduction in this section, a general overview of the disciplines of the SCM Agreement is provided in Sect. 2, including a description of the elements of the definition of "subsidy". Section 3 addresses the question of whether IPRs can properly be characterized as "goods". It is hold that IPRs are neither tangible goods nor intangible services, and that the term "goods" should be interpreted in the context of "financial contributions". Based on the foregoing, it is argued that IPRs are "intangible goods" within the meaning of the term "goods". In Sect. 4 it is argued that the Appellate Body (AB) findings in *US—Softwood Lumber IV* case do not exclude the possibility of accepting intangible goods within the scope of application of this provision. In Sect. 5, we observe that when existing IPRs are transferred by a government to a private entity, it is not problematic to consider that goods have been "provided" in the context of a financial contribution.

M. Á. Elizalde Carranza (✉)
CEI International Affairs, Barcelona, Spain
e-mail: miguelangel.elizalde@ceibcn.com

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1 Introduction

The European Communities (EC)—now the European Union (EU)—and the United States (US) have pointed fingers to each other for providing unfair government subsidies to their civil aircraft industries, Airbus and Boeing respectively. Both parties have resorted to the World Trade Organization (WTO) with reciprocal accusations of violations of the Agreement on Subsidies and Countervailing Measures. These disputes are considered the largest disputes in the world of the trade system ever.[1]

The case brought by the EC, subsequently replaced by the EU,[2] against the US is known as the *U.S.-Measures Affecting Trade in Large Civil Aircraft—Second Complaint* case (hereinafter *2nd US-LCA* case). In this case, the EC argued, as part of the subsidy claims, that the National Aeronautics and Space Administration (NASA) and the US Department of Defense (DoD) provided financial contributions to Boeing pursuant to research and development (R&D) contracts and agreements concluded in the context of some specific R&D programmes. The financial contributions alleged by the EC included: (a) payments (direct R&D funding); (b) granting free access to NASA/DoD facilities, equipment and employees; (c) transfers or waivers of valuable IPRs. Relevant to IPRs issues is that the EC divided in two parts its subsidy claims. IPRs transfers/waivers were presented as a self-standing claim independent from payments/access. The EC justified this separation indicating that it was challenging as specific subsidy "the provision of *all* patents to Boeing by NASA and DOD pursuant to *all* NASA and DOD contracts, *even if they derive from programmes that were not specifically challenged*."[3]

The question on whether IPRs transfers/waivers constituted a financial contribution in form of the "provision of goods" under Article 1.1(a)(1)(iii) of the SCM Agreement remained unanswered for eleven years. The Panel in the original proceeding omitted to address this question, *inter alia*, saying that it was "a potential difficult one". Instead, the Panel examined certain aspects of the US measures that were "more straightforward" to conclude that IPRs allocations were not covered by the SCM Agreement.[4] The Appellate Body criticized the Panel's method of analysis, but did not address the question either, arguing—in a somewhat disappointing way—that this specific issue was not raised in the appeal.[5] The first findings on this question were made in the context of the compliance proceeding initiated by the EU, pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), as a result of its disappointment with the measures adopted by the US to implement the findings of the original proceeding.[6]

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[1] Lee (2006–2007), pp. 115–158.

[2] The European Union succeeded the European Communities in 2007 while the controversy was still ongoing before the Dispute Settlement Body of the WTO.

[3] WTO (2011), para. 7.1263 (emphasis in original).

[4] WTO (2011), para. 7.1294.

[5] WTO (2012), paras. 729, 740.

[6] WTO (2017). In general, the compliance proceeding under Article 21.5 of the DSU should be limited to an analysis of implementation of Panel and AB findings in the original proceeding,

These findings could influence future decisions, and deserve to be studied with attention. Suffice is to say that the SCM Agreement is the second source of consultation requests in the WTO dispute settlement system, right after the General Agreement on Tariffs and Trade (GATT).[7]

This chapter addresses the question of whether IPRs transfers made by a government to a private entity could be regarded as a financial contribution in form of the "provision of goods" under the SCM Agreement. We will do this in light of the findings of the Panel in the compliance proceedings of the *2nd US-LCA* case. To be subject to the disciplines of the SCM Agreement it is not enough that a measure is considered a financial contribution (Article 1.1(a)(1)), it is also necessary that the measure confers a benefit (Article 1.1(b)), and meets the condition of being specific (Article 2). However, given space constraints, the comments of this chapter focus exclusively on the "financial contribution" requirement, in its specific form of "provision of goods".[8]

The structure of this chapter is as follows. Section 2 provides an overview of the SCM Agreement, including a description of the elements of the definition of subsidy. Section 3 analyzes whether IPRs transfers may be considered a financial contribution, in the generic sense of the expression, and it further examines whether IPRs transfers are excluded from the scope of Article 1.1(a)(1)(iii) of the SCM Agreement, as the Panel in the compliance proceeding in *2nd US-LCA* case concluded. Section 4 analyzes the case-law that led the Panel to conclude that IPRs, being intangible, were not "goods" under the SCM Agreement. Section 5 covers the "provision" part of the requirement "provision of goods". Section 6 summarizes the conclusions of the chapter.

2 The SCM Agreement and the Definition of "Subsidy"

Subsidies are defined as "[m]oney or a sum of money granted by the state or a public body to help keep down the price of a commodity or service, or to support something held to be in the public interest."[9] Therefore, subsidies are a policy tool used by governments to achieve various legitimate public policy goals, such a facilitating access

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and does not permit re-litigation of unsuccessful claims. However, under certain circumstances this proceeding allows to reassert claims which were left unresolved in the original proceeding without responsibility of the complaining party. In the original proceeding, there were no findings as to whether the DOD procurement contracts constituted financial contribution. Thus, the Panel accepted to include in the scope of the proceeding under Article 21.5 of the DSU EU claims concerning DoD R&D procurement contracts.

[7] Seuba (2017), p. 143.

[8] A financial contribution confers a "benefit" within the meaning of Article 1.1(b) if its terms are more favourable than the terms available in the market. For its part, a subsidy is considered "specific" if it is provided on selectivity basis to an enterprise or industry or group of enterprises or industries (Article 2.1 of the SCM Agreement).

[9] Oxford English Dictionary Online (2017).

to medicines for the poor, for instance, covering part of the costs with public funds. However, subsidies are sometimes used to provide an artificial financial advantage to domestic producers, distorting international trade and affecting foreign competitors.[10] For instance, a government who desires to improve the competitiveness of national manufacturers could provide financial assistance to help them reduce production costs, allowing the industry to sell their products at a lower price without reducing the margin of profit. Foreign manufacturers, whose production costs are not artificially cut, will lose their competitive capacity *versus* subsidized products.

Foreign subsidies that result in injury or cause prejudice to the industry of another WTO Member, nullify or impair the benefits under WTO law, are characterized as "actionable subsidies" subject to the disciplines of the SCM Agreement.[11] WTO Members must take appropriate steps to remove the adverse effects or withdraw measures found to constitute an actionable subsidy. If a Member fails to do this within six months, and no compensation agreement is concluded, the affected Member would be authorized to adopt countervailing measures. The latter should be proportional to the adverse effects of the foreign subsidy, and are defined in the SCM Agreement as "a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise."[12]

Although subsidies have been regulated since 1947 in GATT, and after that by the Tokyo Round Subsidies Code, the term "subsidy" was first defined in Article 1 of the SCM Agreement. This definition is one of the most important achievements of the Uruguay Round in the subsidies discipline.[13] The negotiating history of Article 1 shows that with this definition the drafters intended to limit the *kinds* of government actions that could fall within the scope of the SCM Agreement.[14] In this regard, it was considered necessary to distinguish subsidies from incentives. A subsidy involves the concurrence of three requirements: (a) the existence of a financial contribution; (b) made by a government or any public body within the territory of a Member; (c) confer a benefit.[15] The financial contribution requirement could be substituted by any form of income or price support.

Before the adoption of the SCM Agreement, the US treated as an actionable subsidy (i.e. subject to countervailing duties) all government measures that conferred a benefit, regardless of the nature of such measures. However, most States considered that focus on benefit alone was not adequate. Instead, they favored the inclusion of the financial contribution requirement in the definition of actionable subsidy.[16] The determination of the existence of a financial contribution requires analyzing *the*

[10] Lester (2011), p. 347.

[11] Article 7. The SCM Agreement also governs a different category of subsidies characterized as "prohibited" (Articles 3 and 4), which are not relevant for this chapter, and identifies "non-actionable subsidies" (Article 8).

[12] Footnote 36.

[13] WTO (1999a), para. 7.80.

[14] WTO (2001), para. 8.69.

[15] Article 1.1.

[16] WTO (2001), footnote 155.

nature of the transaction through which something of economic value is transferred by a government.[17] In Article 1, the SCM Agreement provides a list of three practices that fall within the definition of "financial contribution". The first and perhaps most obvious one is the direct transfer of funds (e.g. grants, loans and equity infusion). This category also includes potential direct transfers of funds or liabilities, such as loans guarantees. The second refers to government revenue, otherwise due, that is foregone or not collected. For example, when the government forgoes the collection of a tax owed by a company. The third type of practice listed as example of a financial contribution is the *provision of goods* and services by the government, other than general infrastructure, or purchases goods. The SCM Agreement states that there will be a financial contribution if the government incurs in any of the above-mentioned practices indirectly; that is, when the government makes payments to a funding mechanism, or entrust or directs a private body to carry out such practices.

In the *2nd US-LCA* case, the EC alleged that IPRs transfers/waivers constituted financial contributions in form of the provision of "goods".

3 Whether IPRs Can Properly Be Characterized as "Goods"

The compliance Panel in the *2nd US-LCA* case began its analysis of the term "goods" in Article 1.1(a)(1)(iii) of the SC Agreement saying that, although there are different potential interpretations, the term is employed typically to refer to tangible products, as distinguished from intangible services.[18] The Panel further observed that this distinction is made in *context* of trade law and trade policy. The Panel quoted the following Oxford English Dictionary definition of "goods": "[t]hings that are produced for sale; commodities and manufactured items to be bought and sold; merchandise, wares … Now also (Econ.): economic assets which have a tangible, physical form (contrasted with services)."[19]

Therefore, in the Panel's opinion, the term "goods" covers only "tangible goods", but not intangible services. One problem with the Panel's approach is that the differentiation between tangible goods and intangible services is of little use when there is need to evaluate whether IPRs can constitute a financial contribution in form of the "provision of goods". This is because IPRs are neither a tangible goods nor intangible services, and yet they still have relevant characteristics to be considered as a financial contribution.

[17] WTO (2004), para. 52.

[18] WTO (2017), para. 8.382.

[19] WTO (2017), footnote 1517.

3.1 IPRs Are Neither a Tangible Goods Nor Intangible Services

The economic definition of the term "goods" referred to by the Panel is composed of two elements: (a) goods are economic assets; (b) which have a tangible, physical form. Tangible is defined as the capability of being touched. IPRs "establish property protection over intangible things such as ideas, inventions, signs, and information."[20] In other words, IPRs are economic assets, but lack tangible, physical form. IPRs, on the other hand, rarely ever have a connection with intangible services.[21] The common definition of a service is: "an act of serving; a duty or piece of work done for a master or superior."[22] Taken to the economic sphere, a service is provided for a remuneration.[23] IPRs do not meet any of the characteristics to be considered services.

Thus, if we adhere to the Panel's interpretation, IPRs are neither included (because they are not "tangible goods") nor clearly excluded (because they are not "services") from the scope of Article 1.1(a)(1)(iii) of the SCM Agreement. This would not be relevant if IPRs had no connection with the context in which the term "goods" is being interpreted. For example, in an analysis to determine if an animal is a "dog" or a "wolf" exclusion of cats would be uncontroversial, because they have no relation with the context of the analysis, but ignoring a wolfdog (a hybrid of a dog and a wolf) would be more problematic. It is relevant, therefore, to clarify whether IPRs transfers bear some connection with the context for interpretation of the term "goods", because if they do, the approach of the Panel would be clearly unsatisfactory.

3.2 Right Context to Interpret the Term "Good"

The general rule of interpretation of treaties, codified in Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT), states that a treaty must "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms." But that is not all, the ordinary meaning of the terms to be considered is that corresponding to its specific context, taking account of the object and purpose of the treaty. Therefore, it is necessary to identify which is the proper context of the ordinary meaning to be attributed to the term "good" in Article 1.1(a)(1)(iii) of the SCM Agreement.

The Panel in the *2nd US-LCA* case interpreted the term "good" referring to the distinction between tangible goods and intangible services made in *context* of trade law and trade policy.[24] Thus, for the Panel, the relevant context for the interpretation

[20] Bently and Sherman (2009), pp. 1–2.

[21] One of such rare examples are streaming platforms.

[22] Oxford English Dictionary Online (2017).

[23] European Commission (2016), pp. 8–15. EU case law has held consistently that services are ordinarily provided for remuneration.

[24] WTO (2017), para. 8.382.

of the term "good" includes: (a) trade law, and (b) trade policy. Nevertheless, as we will see, trade law and trade policy are not part of the context of the term "goods".

According to the VCLT, the context for interpretation purposes includes the text, the preamble and annexes *of the treaty which contains the term* or provision in question.[25] It also comprises other agreements concluded *in connection with the treaty under interpretation*. Clearly, trade law and trade policy are not part of the text, the preamble or the annexes of the SCM Agreement, and were not concluded or elaborated in connection with this agreement. Therefore, trade law and trade policy do not qualify as "context" for the interpretation of the term "goods". Trade law, but not trade policy, could be considered in the interpretation of Article 1.1(a)(1)(iii) as element within the category of "relevant rules of international law applicable in the relations between the parties" mentioned in the VCLT.[26] However, as the International Court of Justice stated in the *Territorial Dispute case*, "[i]nterpretation must be based above all upon the text of the treaty."[27] Along the same lines, the AB in the *Shrimp* case observed that a "treaty interpreter must begin with, and focus upon, the text."[28] Thus, the interpretation must begin with the text of the treaty which contains the provision in question.

The phrase which contains the word "goods" appears in subparagraph (iii) of Article 1.1(a)(1) of the SCM Agreement. Hence, Article 1.1(a)(1), which reads "there is a financial contribution … where", is the immediate context for interpretative purposes of its subparagraph (iii). The relation between these provisions is that subparagraph (iii), which refers in one of its parts to *provision of goods*, gives an example of what financial contributions are. Therefore, what is needed here is to give meaning to the term "goods" in the context of a financial contribution, and not in the context of trade law and trade policy as the Panel did in the *2nd US-LCA* case.

3.3 Interpretation of "Goods" in the Context of a "Financial Contribution"

The AB has observed that the existence of a financial contribution requires analyzing "the nature of the transaction through which something of economic value is transferred by a government."[29] The focus of the analysis is the nature of the transaction because it contains the information that is needed to determine whether the two elements that define a financial contribution are present: (a) value, (b) which is transferred (by the government). Both qualities, value and transferability, are present in IPRs. As abovementioned, IPRs are often characterized as economic assets, thus, have value. In fact, the existence of IPRs regimes rest on the need to protect the

[25] Article 31.2.

[26] Article 31.3(c).

[27] ICJ (1994), para. 41.

[28] WTO (1998), para. 114.

[29] WTO (2004), para. 52.

economic value of intangible ideas. IPRs, on the other hand, may also be transmitted. IPRs "give rise to a form of property that can be dealt with just as with any other property, and which can be assigned [transferred], mortgaged and licensed."[30]

That is not to deny the academic debate regarding the differences between IPRs and property over tangible assets, which puts emphasis on the fact that IPRs may not be possessed.[31] However, the value in IPRs rests on the right to exclude others from using the intangible asset that they guarantee. This value is not diminished by the fact that they cannot be reduced to a physical possession. In the context of a financial contribution, therefore, what matters is that the holder of IPRs may transfer this exclusive right, and with it its economic value, to another person or enterprise. Dimitri Konstantas and Jean-Henry Morin observed that "certain number of intangible goods, like copyright of an intellectual work … are traded as if they were tangible goods."[32] In the words of Richard Epstein concerning IPRs, "the inability of an owner to take physical possession of what he owns does not make it impossible for one person to have rights of exclusive use and disposition of the property in question."[33]

It would seem plausible, therefore, to hold that IPRs transfers have the potential to be a financial contribution, understood this term in a generic sense. However, this is not sufficient to be a financial contribution under the SCM Agreement.

3.4 IPRs as "Intangible Goods" Within the Meaning of Article 1.1(a)(1)(iii) of the SCM Agreement

Intangible goods, such as downloadable music, e-books, mobile apps, online games etc. are now fully integrated in modern societies' economic and social life. There is indeed a "highly varied nature of intangible goods", which would include patents.[34] Although it is difficult to capture all aspects of intangible goods in one definition, which would have to be long and cumbersome to do justice to the existing diversity in the field, some authors observe that "[t]he core of every good [including intangible goods] is the use it has for its buyer, the need it can satisfy, in other words its potential or perceived value."[35] A study focused on IPRs as intangible goods refers to IPRs granted by a government as "incorporeal chattel", reflecting the two qualities abovementioned: value and tradability.[36] The owner of IPRs can license the right to use the IP in exchange for royalties or receive a one-time payment.

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[30] Bainbridge (2012), p. 10.

[31] Cornish et al. (2010), p. 39.

[32] Konstantas and Morin (2000), p. 1.

[33] Epstein (2010), p. 458.

[34] Koppius (1999), p. 2.

[35] Koppius (1999), p. 2.

[36] Günter and Gisler (2000), p. 3.

Intangible goods are not necessarily the same as intangible services.[37] A service is a work performed for the benefit of a third person in exchange for a remuneration. In the case of the licensing of IPRs, the licensor does not perform any work for the licensee; instead there is a transmission of property rights similar to the case of sale of tangible goods. Seen from this perspective, there is nothing radical or new about treating IPRs as intangible goods. Therefore, IPRs allocations made by governments could be considered a financial contribution in form of the "provision of goods", insofar the term "good" is given a broad interpretation to cover both tangible and intangible goods.

The AB has maintained a relatively open stance towards the meaning of financial contribution. For instance, the AB in the original proceeding of the *2nd US-LCA* complaint case gave a broad interpretation to one of the transactions mentioned as an example of financial contribution. The AB interpreted that collaborative arrangements or joint ventures, two types of transactions not expressly mentioned in the SCM Agreement, constituted a financial contribution because they were akin to "equity infusions", an example of a financial contribution in form of a "direct transfer of funds" which is expressly mentioned in the Agreement.[38] The AB observed that collaborative arrangements and equity infusion have analogous characteristics: both provide funding with the expectation of some kind or return, and both entail the risk of not succeeding. Along the same lines of reasoning, IPRs have analogue characteristics to tangible goods when these are the subject matter of financial contributions. Richard Epstein, for instance, holds that "rules that deal with tangible property, namely those that concern exclusion, use, and disposition, can be carried over [by IPRs] without difficulty."[39] So, when tangible goods are provided in form a financial contribution, ownership is transferred along with the value of the goods. IPRs allocations entail also analogous characteristics of transfer of value and ownership.

Now, there is a difference between interpreting the expression "equity infusion" and the term "goods". Equity infusion is one of the examples of the general category of transactions considered as "direct transfer of funds". The term "goods", on the other hand, appears in the expression "provision of goods", which is not an example but a general category of financial contributions in the SCM Agreement. Consequently, transactions similar to equity infusions could also be considered a "direct transfer of funds".[40] By contrast, "provision of goods" cannot be substituted by other similar transactions, because it is a general category of financial contributions and not merely an example of what is included in one of these general categories. However, the interpretation of "goods" which includes intangible goods, such as IPRs, would not require the introduction as a financial contribution of a type of legal transaction that is not mentioned in the text of the SCM Agreement, as the AB did when it treated collaborative arrangements as equity infusions. Instead, it would only be needed to

[37] Koppius (1999), p. 2.

[38] WTO (2012), para. 624.

[39] Epstein (2010), p. 459.

[40] WTO (2007), para. 251.

give a broad interpretation to term "good", which is already present in the text of this treaty.

Furthermore, this interpretation finds additional support in the object and purpose of the SCM Agreement. The SCM Agreement does not have a specific provision identifying its object and purpose. The Panel in the *Brazil—Aircraft* case said that the object and purpose of the SCM Agreement is to impose multilateral disciplines to subsidies that distort trade.[41] Given that IPRs help business "to gain and retain its innovation-based advantage"[42] and to strengthen their competitiveness in global markets,[43] we could say they have the potential to distort international trade—as otherwise recognized in the Preamble of the TRIPS Agreement.[44] Therefore, the object and purpose of the SCM Agreement seem to support an interpretation that would include IPRs allocations among the government practices it covers.

Moreover, the Panel in the *US-Softwood Lumber IV* case, citing the *Black's Law Dictionary*, observed that the term "goods" includes "tangible or movable personal property other than money."[45] IPRs are not tangible but are tradable, and in that sense, are moveable property.[46] The AB observed that "the *Shorter Oxford English Dictionary* offers a more general definition of the term 'goods' as including 'property or possessions' especially—but not exclusively—'movable property'."[47] IPRs are property which may be sold.

The proposed inclusion of "intangible goods" within the meaning of the term "goods" finds support in the evolutionary interpretative approach to WTO law followed by the AB in previous cases. In the *Shrimp* case, the AB expanded the scope of application of GATT Article XX(g) to include renewable natural resources within the terms "exhaustible natural resources."[48] In this context, the AB affirmed that the terms "natural resources" in Article XX(g) were not static in their content but rather "by definition, evolutionary."[49] The AB also observed that these terms were written more than 50 years ago, and no longer reflected the international contemporary concerns about environmental protection.[50] Similarly, at the time when the terms of the SCM Agreement were drafted, 23 years ago, intangible goods, such as software, were not part of everyday life, as they are now. Intangible goods, which increase

[41] WTO (1999b), para. 7.26.

[42] Kalanje (2006).

[43] Pham (2010), p. 14.

[44] The first paragraph of the Preamble of the TRIPS Agreement announces the desire "to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.".

[45] WTO (2003), paras. VII.474–VII.475.

[46] Günter and Gisler (2000), p. 3.

[47] WTO (2004), para. 58.

[48] WTO (1998), para. 128.

[49] WTO (1998), para. 130.

[50] WTO (1998), para. 129.

in number every day driven by internet, have become a contemporary reality.[51] The appearance of "intangible goods" is a clear example that the term "goods", traditionally limited to tangible goods, does not have a static content and, therefore, admits an evolutionary interpretation.

4 Did the AB Findings in the *US—Softwood Lumber IV* Case Really Limit the Term "Goods" to "Intangible Goods"?

The compliance Panel in the *2nd US-LCA* case, to support its interpretation that Article 1.1(a)(1)(iii) covers only tangible goods, as opposed to intangible services, referred to the findings of the AB in *the US—Softwood Lumber IV* case. The Panel pointed out that, specifically with respect to this provision, the AB observed that the ordinary meaning of the term "goods" includes items that are tangible and capable of being possessed" and that "goods are tangible items."[52] However, a closer and more comprehensive look may lead to the conclusion that a broader interpretation of term "goods" is not excluded. The Panel quoted just one part of the findings of the AB. Next, some parts of the AB report in that case, which were omitted by the Panel, are reproduced:

> These definitions [contained in dictionaries] offer a useful starting point for discerning the ordinary meaning of the word "goods". In particular, we agree with the Panel that the ordinary meaning of the term "goods", as used in Article 1.1(a)(1)(iii), includes items that are tangible and capable of being possessed. We note, however, as we have done on previous occasions, that dictionary definitions have their limitations in revealing the ordinary meaning of a term. … The ordinary meanings of these terms include a wide range of property, including immovable property. As such, they correspond more closely to a broad definition of "goods" that includes "property or possessions" generally, than with the more limited definition adopted by the Panel. … With this in mind, we find that the ordinary meaning of the term "goods" in the English version of Article 1.1(a)(1)(iii) of the SCM Agreement should not be read so as to exclude tangible items of property, like trees, that are severable from land.[53]

The AB approached the interpretation of the term "goods" accepting that dictionary definitions are a starting point, but a broader view should not be excluded given that dictionary definitions have their limitations. So, if some dictionaries limit the definition of "goods" to tangible goods, a broader interpretation that includes "intangible goods" is not necessarily excluded if the context of the term under analysis favors a broader interpretation. The AB also observed that the definition of the term "goods" includes "property". IPRs, as we mentioned before, are property.

Importantly, to identify the real message behind the finding of the AB where it stated that the term "goods" should not be read so as to exclude "tangible property",

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[51] Fournier (2012), p. 1.

[52] WTO (2017), para. 8.382.

[53] WTO (2004), para. 59.

we need to understand the context in which these words were written. In the case, Canada claimed that standing trees (with roots underground; i.e. not harvested) were not "goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement, because this term is limited to "tradable items with an actual or potential tariff classification." Canada further contended than all that was provided in this case was *an intangible right* to harvest. The AB disagreed with Canada's submission that the "granting of an intangible right to harvest standing timber cannot be equated with the act of providing that standing timber."[54] In short, the AB admitted an intangible right to harvest within the definition of "provision of goods". Therefore, the words of the AB stating that term "goods" should not be read so as to exclude "tangible property" need to be interpreted as an indication that all tangible goods are included. Nevertheless, that is not the same as saying that all intangible goods are excluded, because in that case an intangible right to harvest was equated with the "provision of goods". It would make sense to exclude intangible services, because clearly these are not goods. However, excluding "intangible goods" just because the AB said that "tangible goods" are not excluded is to remove the AB's reasoning from the context, and unjustifiably limits the meaning of the word "goods".

5 The "Provision" Part of the Term "Provision of Goods"

To be considered as a financial contribution under of the SCM Agreement, in addition to be accepted as "goods", IPRs need to be "provided" by the government to an enterprise, enterprises or industrial sector. The AB has interpreted the term "provide" in this provision as "supply", "make available" or "put at the disposal of."[55]

Assuming that intangible goods are covered by the term goods, it seems uncontroversial to include within this interpretation of "provision" transfers of existing IPRs made by the government to private entities. For example, if the Department of Defence of a given State is the holder of a patent over an invention, and then decides to transfer ownership of these IPRs to a private enterprise, there will be a financial contribution in form of the provision of "goods".

More controversial is the case where a government transfers a right to claim title to IPRs over future, not yet existing, inventions. This possibility was studied by the compliance Panel in the *2nd US-LCA* complaint case in connection to DoD procurement contracts.[56] Pursuant to US law, private contractors with the US government are entitled to claim ownership over inventions and resulting rights (patents) conceived in the course of the research funded by US government. In other words, in the context of a government R&D contract, the US legislation cedes patent rights to private contractors before the invention is created. To resolve on this point, the Panel in the compliance proceeding relied again on the findings of the AB in *the*

[54] WTO (2004), para. 75.
[55] WTO (2004), para. 73.
[56] WTO (2017).

US—Softwood Lumber IV case. In that case the US claimed that Canada "provided goods" to lumber producers by conferring a right to harvest timber through stumpage programs. Canada defended that stumpage contracts did not "provide" timber, and added that all that was provided by these contracts was an *intangible right to harvest*. In Canada's opinion, at best, this intangible right "made available" standing timer. However, Canada suggested that "making available" was not a correct form to read the term "provides" goods or services in this context, because:

> [T]o "*make available* services" … would include any circumstance in which a government action makes possible a later receipt of services and to 'make available goods' would capture every property law in a jurisdiction.[57]

The transfer of an "intangible right to harvest timber" closely resembles the transfer of the right to claim title over IPRs in connection to inventions yet to exist. Both government actions transfer intangible rights (right to harvest/right to take title) that may be exercised in connection to goods (timber/IPRs) in the future. The AB in *the US—Softwood Lumber IV* case observed that "making available" or "putting at the disposal of" requires two things. First, "there must be a *reasonably proximate relationship* between the action of the government providing the good or service … and the use or enjoyment of the good or service by the recipient."[58] The "reasonable proximate relationship" test suggested by the AB seems to come down to probability calculations, e.g. to speculate on the chances that an invention will be created so the IPRs could subsequently be claimed. Importantly, the evaluation of these probabilities should be reasonable; i.e. based on logic, common sense, fairness and with due consideration of the specific context and nature of the relationship (government action—type of provision of goods) under study. Second, "a government must have control over the *availability* of a specific thing being 'made available'."[59] The second part of the test, concerning "government control over the availability of the good/service provided", points to a very high threshold of probability, if not to absolute certainty. In the case, the AB expressed doubts that the expressions "making available" or "putting at the disposal of" encompassed the type of government actions referred to by Canada—i.e. government actions that make possible a later receipt of goods or services. In the AB's opinion, such actions would be too far removed from these expressions concerning "provision" of goods or services.

In line with these AB's findings, the compliance Panel in the *2nd US-LCA* complaint case concluded that there was no "provision" of patents to Boeing actually held by the US government because, at the time of the contract, no such IPRs existed that could be owned by the Government and then transferred to Boeing. The Panel further said:

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[57] WTO (2004), para. 70 (emphasis in original).

[58] WTO (2004), para. 71 (emphasis added).

[59] WTO (2004), para. 71 (emphasis in original).

> The European Union does not explain how the interpretation of "provide" can encompass situations where a law merely defines the conditions under which a "right to take title" can be acquired in the future, in the event that a patentable invention, yet to exist, is subsequently developed, and in particular does not explain how its reading is consistent with these [*US—Softwood Lumber IV*] Appellate Body pronouncements.[60]

Requiring explanations consistent with AB interpretations is something close to recognizing law-creating powers to the AB in line with the *stare decisis* principle commonly found in *anglo saxon* legal systems. However, the *stare decisis* principle is not generally applied in international law. The function of the AB, and of the Panel as well, is limited to interpretation of existing WTO rules, not to increase or diminish rights, thus judicial activism is not permitted. Therefore, the only obligation for the EU was to explain how the interpretation of "provide" could have encompassed situations where a law merely defines the conditions under which a "right to take title" can be acquired in the future, if a patentable invention, yet to exist, is subsequently developed.

Based on the foregoing interpretations, it seems that, to be "provided" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement, transfers must refer to existing IPRs. Transfers of potential IPRs are likely to be considered not sufficiently proximate to reality to be accepted as being "provided, made available or put at the disposal of."

6 Conclusion

The terms "provision of goods" in Article 1.1(a)(1)(iii) of the SCM Agreement must be interpreted in their context. This context is neither trade law nor trade policy in general. Instead, the term "provision of goods" should be interpreted in the context of a "financial contribution" in Article 1.1(a)(1) of the SCM Agreement. IPRs are economic assets which may also be characterized as intangible goods. In the context of financial contributions in form of the provision of tangible goods, the core elements transferred are ownership and value. In a similar way, IPRs gather the basic requirements to be subject of a financial contribution: value and tradability. Therefore, in the context of a financial contribution the term "goods" should not exclude "intangible goods", such as IPRs. This interpretation finds support in the object and purpose of the SCM Agreement.

The differentiation between tangible goods and intangible services, referred to by the Panel in the compliance proceeding in the *2nd US-LCA* case to limit the scope of the term "goods" to tangible goods, is not adequate to address potential financial contributions in form of IPRs transfers. The case-law in which this Panel based its restrictive interpretation of the term "goods" seems to be open to accept that intangible goods could be covered as "provision of goods" under the SCM Agreement.

[60] WTO (2017), para. 8.389.

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