United States – Conditional Tax Incentives for Large Civil Aircraft

(DS487)

Responses of the United States
to the Panel's First Set of Questions for the Parties

March 9, 2017

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Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and 4
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US – Large Civil Aircraft (Panel)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R

TABLE OF ABBREVIATIONS AND ACRONYMS

ACRONYM/SHORT FORM	FULL PHRASE
B&O	Business & Occupation
DOR	Washington State Department of Revenue
ESSB 5952	Washington State Engrossed Substitute Senate Bill 5952
EU FWS	First Written Submission of the European Union (Dec 9, 2015)
HB 2294	Washington State House Bill 2294
HB 2466	Washington State House Bill 2466
LCA	Large Civil Aircraft
RCW	Revised Code of Washington
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TRIMS	Agreement on Trade-Related Investment Measures
US FWS	First Written Submission of the United States (Jan 19, 2016)

Question 1 (European Union/United States)

In its panel request, the European Union identified the measure at issue in this dispute as tax incentives for civil aircraft provided by the State of Washington as amended by ESSB 5952. Specifically, the European Union has referred to seven tax incentives.[1] For the purpose of the examination of the European Union's claim, does this constitute a single measure or seven separate measures?

1. The EU has framed its claims in terms of multiple measures. The EU itself refers to the seven alleged tax incentives as "measures."[2] Indeed, in its panel request, the EU states that "{t}he *measures* that are the subject of this request are tax incentives for civil aircraft provided by the State of Washington, as amended by Substitute Senate Bill 5952 (Chapter 2, Laws of 2013 3rd Special Session, 2014 Wash. Sess. Laws 2)." It then repeatedly uses the plural "measures" throughout the panel request. It is also apparent on the face of the measures that they are distinct, dealing with distinct subject matters, ranging from manufacturing to software to services and leaseholds. Accordingly, the measures should be treated as distinct, and the EU bears the burden of establishing that each challenged measure individually is a "subsidy" and that it is in breach of Article 3.1(b).

Question 2 (United States)

The United States submits that "[t]he tax treatment in all of the challenged measures would have been available to Boeing and all other eligible companies in Washington State through July 1, 2024, in the absence of ESSB 5952 and the conditions therein that the EU cites as the basis for its claims."[3] Please clarify this statement and its relevance to the Panel's assessment. In particular, would the Boeing 777X program have qualified for pre-existing tax incentives established under HB 2294, including pursuant to the siting provisions of Section 17 of HB 2294?

2. In the footnote quoted by the Panel, the United States described the principal effect of the First Siting Provision[4] and the Second Siting Provision in ESSB 5952 – which are the basis of the EU's import-substitution contingency allegations – as the *extension* of the alleged tax

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[1] *(footnote to the Panel's question) (a) A reduced Business & Occupation tax rate with respect to the manufacture or sale of commercial airplanes; (b) a Business & Occupation tax credit for aerospace pre-production development; (c) a Business & Occupation tax credit for property taxes on commercial airplane manufacturing facilities; (d) a sales tax and use tax exemption for certain computer hardware, software, and peripherals; (e) a sales tax and use tax exemption for certain construction services and materials; (f) a leasehold excise tax exemption on port district facilities used to manufacture superefficient airplanes; and, (g) a property tax exemption for the personal property of port district lessees used to manufacture superefficient airplanes.*

[2] EU FWS, para. 62.

[3] *(footnote to the Panel's question) United States' first written submission, footnote 144; see also ibid. footnote 148.*

[4] The United States previously used the shorthand terms "Initial Siting Provision" and "Future Siting Provision." For ease of reference and consistency, the United States will adopt the Panel's nomenclature – "First Siting Provision" and "Second Siting Provision" in this and future submissions.

incentives through 2040. Prior to ESSB 5952, this tax treatment was set to expire in 2024 (pursuant to HB 2294).[5]

3. The availability of the alleged tax incentives prior to July 1, 2024, is relevant to the Panel's assessment of the EU's arguments that the alleged subsidies are contingent on the use of domestic over imported goods. The EU has the burden to demonstrate that this relation of contingency obtains specifically with respect to the alleged subsidy conferred from July 1, 2024, to June 30, 2040. Absent ESSB 5952, aerospace activity through 2024 subject to the B&O tax, the sales and use tax, the property excise tax, and the leasehold excise tax would have qualified under HB 2294 for the 0.2904 percent B&O tax rate, B&O tax credits, sales and use tax exemptions, property tax exemption, and leasehold tax exemption identified by the EU. Accordingly, the treatment prior to 2024 under any of these measures, even if the measure were determined to be a subsidy, is *a priori* not contingent on any conditions introduced by ESSB 5952.

4. In addition, as the United States has noted, the EU must establish, *inter alia*, that each challenged measure involves a financial contribution and that a benefit is thereby conferred. The EU has been evasive on this topic. However, it has the burden of explaining how revenue it alleges will be foregone a decade from now supposedly constitutes a financial contribution that existed as of the time of the Panel's establishment. The EU also fails to address how it can meet its burden of demonstrating a financial contribution (and benefit) for each challenged measure when it has challenged measures the exercise of which, by law, are mutually exclusive.[6]

5. It is also not clear under this set of facts what the alleged benefit is. It would seem to be a potential future benefit that would be enjoyed, if at all, 10 years from now. The EU, however, has not explained what it believes to be such a future financial contribution and benefit and, therefore, has failed to make a *prima facie* case. Indeed, the only attempt by the EU to explain its benefit argument at any level of detail is a generic reference to the panel report in *US – Large Civil Aircraft*. However, that panel declined to address whether revenue to be foregone in the future can constitute a financial contribution and did not address the question of future benefit.[7]

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[5] *See* ESSB 5952 §§ 5(11)(e)(i), 6(11)(e)(i), 8(3)(a), 9(8), 10(6), 11(4), 12(3), 13(3), 14(5) (Exhibit EU-3); HB 2294 (Exhibit EU-21).

[6] *See* RCW § 82.29A.137(1) (Exhibit EU-29) (stating that a person taking a B&O tax credit for property and leasehold excise taxes is not eligible for the leasehold excise tax exemption); RCW § 84.36.655 (Exhibit EU-30) (stating that a person taking a B&O tax credit for property and leasehold excise taxes is not eligible for the property tax exemption).

[7] *See US – Large Civil Aircraft*, para. 7.158.

6. The statement quoted in the question also indicates that the alleged tax incentives are available not only to Boeing but also to any eligible taxpayers. Indeed, such taxpayers can use the alleged tax incentives regardless of their nationality, the location of their headquarters, or the domestic or imported character of the goods they use. The EU does not even allege that any taxpayers other than Boeing are required to use domestic over imported goods in order to utilize the tax incentives.

7. For this reason, the United States was under the impression that the EU was challenging the measures specifically as they are applied to Boeing. At the first meeting of the Panel with the parties, the EU seemed to cast doubt on that impression, insisting that its claims are "as such."[8] But given that all taxpayers that did not fulfill the First Siting Provision – that is, all taxpayers other than Boeing – did not even have production decision requirements to meet, and never will have any conditions to meet, including under the Second Siting Provision, they clearly have never been, are not, and never will be required to use domestic over imported goods. The EU fails to engage with this inconvenient fact, which further underscores that this measure has nothing to do with import substitution.

8. The question also alludes to similarities between Section 17 of HB 2294 – which was previously found not to confer prohibited subsidies – and the First and Second Siting Provisions in ESSB 5952. Section 17 provided that HB 2294 would come into effect following the signing of a memorandum of agreement between Washington's governor and a manufacturer of commercial airplanes, "regarding an affirmative final decision to site a significant commercial airplane final assembly facility in Washington state." In turn, "significant commercial airplane final assembly facility" is defined as "a location with the capacity to produce at least thirty-six superefficient airplanes a year."[9] In *US – Large Civil Aircraft*, the EU challenged HB 2294 under Article 3.1(a) of the SCM Agreement, arguing that Section 17 was tantamount to a condition to export aircraft, given that "Boeing could not sell 36 superefficient airplanes in the United States market alone and so must export the excess."[10] The panel rejected the EU's arguments, stating:

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[8] *See, e.g.*, EU FOS, para. 14; *see also United States – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 173 ("We would . . . urge complaining parties to be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible.") (emphasis original). The EU panel request and first written submission do not state that the EU is challenging the relevant measures "as such."

[9] HB 2294, Section 17(2)(d) (Exhibit EU-21).

[10] *US – Large Civil Aircraft (Panel)*, para. 7.1552.

> On a generous view of the European Communities' evidence it is possible to conclude that fulfilment of the capacity condition created an expectation of exports. . . . Nevertheless, . . . in our view the condition is not sufficient to establish the required "tie". A link between the capacity condition, upon which the grant of the subsidy depended, and expected exports is not explicit within the legislation or anywhere else.[11]

Furthermore, the panel found that there was "clear and convincing evidence indicating that the subsidies were granted because of the State's desire to attract the 787 assembly to the Washington economy in order to boost employment," rather than to boost exports.[12] Accordingly, the panel rejected the EU's claims under Article 3.1(a). The EU also challenged this measure under Article 3.1(b) but the panel did not reach this claim because the EU had abandoned it prior to its first written submission.

9. In this dispute, the EU is again attempting to read requirements into the text of Washington legislation that simply are not there in order to create an inconsistency with Article 3 of the SCM Agreement. However, just as in *US – Large Civil Aircraft*, the relevant conditions relate to the location of manufacturing activity rather than boosting exports or import-substitution. Accordingly, there is no inconsistency with Article 3.1(b) of the SCM Agreement.

Question 3 (European Union/United States)

What are the implications, if any, of the different coverage of goods under the various tax incentives identified by the European Union?

10. The alleged tax incentives have the following coverage:

- *B&O tax rate of 0.2904 percent*: the B&O tax rate applies to the manufacturing of commercial airplanes, or components of such airplanes, or making sales, at retail or wholesale, of commercial airplanes or components of such airplanes manufactured by the seller; and manufacturing tooling specifically designed for use in manufacturing commercial airplanes or components of such airplanes, or making sales, at retail or wholesale, of such tooling manufactured by the seller.[13]

[11] *US – Large Civil Aircraft (Panel)*, para. 7.1577.

[12] *US – Large Civil Aircraft (Panel)*, para. 7.1582

[13] RCW § 82.04.260(11) (Exhibit EU-22).

- *B&O Credit for Aerospace Product Development*: credits accrue through expenditures on aerospace product development, which is defined as: "research, design, and engineering activities performed in relation to the development of an aerospace product or of a product line, model, or model derivative of an aerospace product, including prototype development, testing, and certification. The term includes the discovery of technological information, the translating of technological information into new or improved products, processes, techniques, formulas, or inventions, and the adaptation of existing products and models into new products or new models, or derivatives of products or models. The term does not include manufacturing activities or other production-oriented activities, however the term does include tool design and engineering design for the manufacturing process. The term does not include surveys and studies, social science and humanities research, market research or testing, quality control, sale promotion and service, computer software developed for internal use, and research in areas such as improved style, taste, and seasonal design."[14]
- *B&O Credits for Property and Leasehold Excise Taxes*: credits accrue through expenditures on property taxes and leasehold excise taxes paid on property used, *inter alia*, to manufacture commercial airplanes or components of such airplanes, to manufacture tooling for such airplanes or their components, provide aerospace services, and to conduct aerospace product development.[15]
- *Computer Sales & Use Exemptions*: the exemption applies to "sales of computer hardware, computer peripherals, or software, . . . used primarily in the development, design, and engineering of aerospace products or in providing aerospace services, or to sales or charges made for labor and services rendered in respect to installing the computer hardware, computer peripherals or software."[16]
- *Construction Sales & Use Exemptions*: the exemption applies to charges for labor and services for the construction of new buildings related to the construction of commercial airplanes, as well as sales of tangible personal property that will be incorporated as an ingredient or component into such buildings, and charges for labor and services rendered in respect to installing building fixtures.[17]

[14] RCW § 82.04.4461(5)(b) (Exhibit EU-23).

[15] RCW § 82.04.4463(a) (Exhibit EU-24).

[16] RCW § 82.08.975 (Exhibit EU-25).

[17] RCW § 82.08.980 (Exhibit EU-27).

- *Leasehold Excise Tax Exemption*: the exemption applies to leasehold excise taxes paid on leasehold interests in port district facilities eligible for the construction-related sales & use tax exemptions under RCW §§ 82.08.980 and 82.12.980 and "used by a manufacturer engaged in the manufacturing of superefficient airplanes, as defined in RCW 82.32.550."[18]
- *Property Tax Exemption*: the exemption applies to property taxes paid on "all buildings, machinery, equipment, and other personal property of a lessee of a port district eligible under RCW 82.08.980 and 82.12.980 {*i.e.*, the construction sales & use tax exemptions}, used exclusively in manufacturing superefficient airplanes."[19]

11. Thus, the alleged tax incentives pertain to particular types of activities, such as manufacturing, retailing, wholesaling, labor and services, aerospace product development, and so on. And while they all generally are linked to aerospace activity, their coverage differs to some degree. The varying coverage of these measures reinforces that each measure must be assessed individually.

Question 4 (United States)

Please explain how the B&O tax is assessed in Washington State for entities that engage in multiple taxable activities, e.g. manufacturing and sales. Is the B&O tax liability cumulatively assessed against all activities in which an entity engages? For example, would an entity that both manufactures and sells a good incur separate B&O tax liabilities for both the manufacturing and the sale of that good?

12. The B&O tax is imposed on the privilege of engaging in certain business activities in Washington, including manufacturing, retailing, or wholesaling. Persons engaged in such activities are taxable under each provision applicable to those activities.[20] However, under RCW § 82.04.440, a credit exists for persons taxable under the B&O tax on making retail and wholesale sales of the items they manufacture. This is sometimes referred to as a Multiple Activities Tax Credit ("MATC"). Pursuant to the MATC provision, taxes paid on manufacturing of products sold in Washington can be credited against Washington retailing or wholesaling B&O tax liability on the items manufactured.[21] Therefore, an entity that both manufactures and sells a good would be able to credit its B&O taxes on manufacturing against its B&O tax liability

[18] RCW § 82.29A.137 (Exhibit EU-29).

[19] RCW § 84.36.655 (Exhibit EU-30).

[20] *See* RCW § 82.04.240 (Exhibit EU-36); RCW § 82.04.250 (Exhibit EU-38); RCW § 82.04.270 (Exhibit EU-39).

[21] The MATC applies also to gross receipts taxes paid to taxing jurisdictions outside of the state. *See* RCW § 82.04.440(4), (5)(b) (Exhibit USA-31).

for the sale of that good. There is no MATC credit for activities of related entities. The same entity must conduct the manufacturing activity and the retailing or wholesaling of the good it manufactured.

Question 5 (United States)

For an entity that is eligible for the B&O tax rate reduction, does the reduced rate of 0.2904% apply to: (a) all of its revenue, regardless of the activity that generated the revenue; (b) only that part of its revenue gained from manufacturing and sales of products; or, (c) some other measure of revenue?

13. To clarify, the B&O tax is applied to certain business activities in Washington. It is, strictly speaking, not a tax on revenues. However, the basis for the manufacturing B&O tax, for example, is the value of the manufactured product, which is generally determined by the gross proceeds derived from the sale of the manufactured product.[22] Therefore, it is effectively the same in terms of amount as would be a tax on revenues generated by the manufacturing of the product (assuming that too was based on revenues derived from the sale of the product so manufactured).

14. The 0.2904 B&O tax rate set out in RCW § 82.04.260(11) applies to three different activities that are subject to B&O taxation: manufacturing, retailing, and wholesaling.[23] The tax is assessed on the specific activity. So any *manufacturing* of commercial airplanes, components thereof, or tooling therefor, would be taxable at 0.2904 percent.[24] Subject to the MATC discussed above, any *retailing* of commercial airplanes, components thereof, or tooling therefor, would be taxable at 0.2904 percent.[25] And also subject to the MATC discussed above, any *wholesaling* of commercial airplanes, components thereof, or tooling therefor, would be taxable at 0.2904 percent.[26] Activities under other B&O tax classifications would not be subject to the 0.2904 percent tax rate.

[22] *See* RCW § 82.04.220 (Exhibit EU-32); RCW § 82.04.450 (Exhibit EU-37).

[23] RCW § 82.04.260(11) (Exhibit EU-22).

[24] RCW § 82.04.260(11) (Exhibit EU-22).

[25] RCW § 82.04.260(11) (Exhibit EU-22).

[26] RCW § 82.04.260(11) (Exhibit EU-22).

Question 7 (European Union/United States)

With respect to the reference in the Second Siting Provision to "any final assembly or wing assembly", would the 0.2904% B&O tax rate no longer apply if there were a single instance of such assembly outside the State of Washington?

15. At the outset, it is important to note that there is no realistic scenario in which only a single instance of final assembly or wing assembly would take place outside of Washington. These are complex manufacturing activities that require large investments in sophisticated facilities and tools, a trained workforce, and integration into the larger production process. And as the United States has explained, the wing assembly for the 777X is only completed as part of the final assembly of the finished airplane. However assuming for the sake of argument that there was an isolated instance of final assembly or wing assembly outside Washington, such isolated assembly may not be a siting outside the state that would trigger the Second Siting Provision.

16. The Second Siting Provision refers to a determination by DOR that any final assembly or wing assembly "has been *sited* outside the state of Washington."[27] The word "sited," particularly in conjunction with a process like "assembly," connotes a decision not associated with a one-off exception. In essence, there is no such thing as a siting of a one-time final assembly or wing assembly. Thus, if such an exception did occur in a single instance, it is unlikely DOR would determine that Boeing had *sited* any final assembly or wing assembly outside of Washington. Accordingly, the 0.2904 percent B&O tax rate would continue to apply.

Question 8 (European Union/United States)

With respect to the reference in the Second Siting Provision to "any final assembly or wing assembly", would movement of any assembly of the fuselage outside of the State of Washington lead to removal of the tax incentive?

17. The Second Siting Provision does not mention fuselage assembly. In a situation where some fuselage assembly activity were moved outside Washington, DOR would have to examine the relevant facts and determine whether such activity constituted "final assembly" or "wing assembly." Moving all 777X fuselage assembly activity outside Washington would be tantamount to moving final assembly outside the state, as final assembly of the fuselage for the 777X only occurs "as the assembly of the finished aircraft itself is completed."[28] However, it is

[27] RCW § 82.04.260(11)(e)(ii) (Exhibit EU-22) (emphasis added).

[28] Boeing Expert Statement, para. 67 (Exhibit USA-1(BCI)); *ibid.*, para. 52(m), (o).

not clear that movement of some, but not all, aspects of fuselage assembly outside Washington would be covered by the reference to "final assembly" in the Second Siting Provision.

Question 9 (United States)

Please explain any differences in the operation of the B&O property tax credit, on the one hand, and the exemptions for leasehold excise taxes and leaseholder property taxes, on the other. Please explain how these tax incentives are interrelated?

18. The B&O property tax credit enables a taxpayer to claim a credit which is equal to a fraction of property taxes and leasehold excise taxes due on certain types of property with certain types of uses related to commercial airplane, airplane components, aerospace services, and aerospace product development.[29] The credit offsets the B&O tax that is due in a given year. By contrast, the tax exemptions for property taxes and leasehold excise taxes eliminate the requirement to pay property and leasehold excise taxes, as opposed to offsetting another type of tax (*i.e.*, the B&O tax).[30] In this respect, the exemptions operate differently from the credit.

19. With respect to the interrelation between these measures, it is noteworthy that a taxpayer claiming the B&O tax credit cannot also claim the property tax exemption or the leasehold excise tax exemption, and *vice versa*.[31] Thus, neither Boeing nor any other taxpayer can use all three of these measures for the same property. Indeed, the EU does not even allege that Boeing has used or ever plans to use either of the two exemptions.[32]

Question 10 (United States)

The Panel notes the reference to a "significant commercial airplane manufacturing program" in the First Siting Provision and the Second Siting Provision, and as defined in Section 2(2)(c) of ESSB 5952, and to the determination by the Department of Revenue of the State of Washington "that the contingency requirements in Engrossed Substitute Senate Bill (ESSB) 5952 … have been satisfied"[33] In that regard please provide a copy of that program as it was filed with the Department of Revenue to the Panel.

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[29] *See* US FWS, para. 63.

[30] *See* US FWS, paras. 69-72.

[31] RCW § 82.29A.137(1) (Exhibit EU-29); RCW § 84.36.655 (Exhibit EU-30).

[32] *Compare* EU FWS, paras. 34-39 *with ibid.*, paras. 21, 24, 27, 30.

[33] *(footnote to the Panel's question) See Exhibit EU-61.*

20. **[BCI]**. The United States provides this letter in Exhibit USA-32(BCI), and the attachments thereto in Exhibits USA-33, USA-34, and USA-35.

21. The letter is consistent with and reinforces ESSB 5952's focus on the decision to site certain production activities in Washington, rather than the use of domestic over imported goods. In particular, it states:

> **[BCI]**.[34]

Thus, **[BCI]**. And DOR ultimately did determine that the First Siting Provision had been fulfilled on that basis.[35] Accordingly, and given that the EU conceded at the first substantive meeting of the Panel with the parties that production subsidies are not inconsistent with Article 3.1(b) of the SCM Agreement, the EU's claims fail even if the measures here were determined to be subsidies.

Question 11 (European Union/United States)

The Panel notes the reference to a "significant commercial airplane manufacturing program" in the First Siting Provision and the Second Siting Provision, and as defined in Section 2(2)(c) of ESSB 5952, and to the determination by the Department of Revenue of the State of Washington "that the contingency requirements in Engrossed Substitute Senate Bill (ESSB) 5952 … have been satisfied".[36] In that regard:

a. Should the "significant commercial airplane manufacturing program" that was the subject of the determination by the Department of Revenue be considered part of the measure at issue?

22. The "significant commercial airplane manufacturing program" is not itself a measure at issue. The EU panel request makes clear that the seven tax incentives, as amended by ESSB 5952, are the only challenged measures. In particular, in a section entitled "Measures at Issue," the EU panel request states:

> The measures that are the subject of this request are tax incentives for civil aircraft provided by the State of Washington, as amended by Substitute Senate Bill 5952 (Chapter 2, Laws of 2013 3rd. Special Session, 2014 Wash. Sess. Laws 2). Specifically, the tax incentives are currently contained in the following sections of the Revised Code of

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[34] Letter to **[BCI]** (July 9, 2014), Exhibit USA-32 (BCI).

[35] Notification Letter from Carol K. Nelson, Director, Washington State Department of Revenue, to Kyle Thiessen, Washington State Code Reviser (July 10, 2014) (Exhibit EU-61).

[36] *(footnote to the Panel's question) See Exhibit EU-61.*

Washington ("RCW"): 82.04.260(11) (preferential Business & Occupation tax rate with respect to the manufacture or sale of commercial airplanes); 82.04.4463 (tax credits for property taxes and leasehold excise taxes on commercial airplane manufacturing facilities); 82.04.4461 (tax credits for aerospace product development); 82.08.975 (sales tax exemption for computer hardware, software, and peripherals); 82.08.980 (sales tax exemption for construction services and materials); 82.12.975 (use tax exemption for computer hardware, software, and peripherals); 82.12.980 (use tax exemption for construction services and materials); 82.29A.137 (leasehold excise tax exemption); and 84.36.655 (leaseholder property tax exemption). Moreover, the availability of the tax incentives is subject to the conditions in Sections 2, 5, and 6 of Substitute Senate Bill 5952 (as codified at RCW 82.32.850 and 82.04.260(11)(e)(ii)), which are also covered by this request.[37]

23. Thus, there is no challenge to the significant commercial airplane manufacturing program itself. Moreover, this commercial airplane manufacturing program is one pursued by a private company. Therefore, it would not be challengeable under the SCM Agreement as a U.S. measure.[38]

24. However, it could be conceived of as "part of a measure" in the sense that the Second Siting Provision – an alleged import-substitution contingency of the 0.2904 percent B&O tax rate – "only applies to the manufacturing or sale of commercial airplanes that are the basis of a siting of a significant commercial airplane manufacturing program in the state under {the First Siting Provision}." Thus, it can now be understood to apply to the manufacturing or sale of 777X airplanes. The same is true of the elements of the Second Siting Provision, which can now be understood as referring specifically to 777X final assembly and wing assembly.

b. If neither the European Union nor the United States takes the view that the "significant commercial airplane manufacturing program" that was the subject of the determination by the Department of Revenue should be considered part of the measure at issue, but the Panel takes a contrary view, what would be the implications for the Panel's examination of the matter?

25. If neither party considers that a (private) program is part of a measure, then the program would not be a subject of the complaining party's claims. If a panel nonetheless considers that

[37] EU Panel Request, WT/DS487/2.

[38] *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81 ("In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.").

the program is part of the measure at issue, the panel could take that program into account in evaluating the parties' evidence and arguments with regard to those elements of the measure that are the subject of the complaining party's claims. However, the panel could not make findings on the consistency of that program with a covered agreement since that would at a minimum be making the case for the complaining party.

Question 12 (United States)

Independently of the activation of the Second Siting Provision, could the determination of the fulfilment of the First Siting Provision be revoked, and if so in what circumstances?

26. No. The First Siting Provision only required a one-time decision to site a significant commercial airplane manufacturing program in Washington. Once fulfilled, ESSB 5952 took effect according to its own terms.[39] In other words, when DOR determined that a significant commercial airplane manufacturing program had been sited in Washington as of July 9, 2014, the expiration date for the tax treatment challenged in this dispute was extended until 2040 for all eligible taxpayers, and there is no legal mechanism in Washington law to undo that determination.

Question 13 (United States)

Is there a legal obligation on Boeing to maintain a "significant commercial airplane manufacturing program" based on the fact that the Second Siting Provision only applies "to the manufacturing or sale of commercial airplanes that are the basis of a siting of a significant commercial airplane manufacturing program under" the First Siting Provision?

27. No. Boeing is under no legal obligation to maintain a significant commercial airplane manufacturing program based on the quoted language in the Second Siting Provision or otherwise. For example, if Boeing were to make a decision in 2017 not to produce the 777X at all, the First Siting Provision would not be affected because, as discussed in response to Question 12, it has already been fulfilled and contains no legal mechanism to affect tax treatment following that one-time determination. In addition, the Second Siting Provision would not be triggered because Boeing would not have sited any 777X final assembly or wing assembly outside Washington.

[39] ESSB 5952 § 2(1) (Exhibit EU-3).

Question 14 (United States)

The United States submits that "[t]he term 'manufacture' is not defined in ESSB 5952".[40] Does this term signify something distinct from "assembly"? Are there any relevant indications or administrative practices under Washington State law as to the meaning of the term "manufacture", including under the B&O tax system?

28. Chapter § 82.04 of the RCW governs application of the B&O tax within Washington. RCW § 82.04.010 provides that "{u}nless the context clearly requires otherwise, the definitions set forth in the sections preceding RCW 82.04.220 apply throughout this chapter."[41] RCW § 82.04.120 defines the term "to manufacture" as follows:

> (1) "To manufacture" embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful substance or article of tangible personal property is produced for sale or commercial or industrial use, and includes:
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> (a) The production or fabrication of special made or custom made articles;
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> (b) The production or fabrication of dental appliances, devices, restorations, substitutes, or other dental laboratory products by a dental laboratory or dental technician;
>
> (c) Cutting, delimbing, and measuring of felled, cut, or taken trees;
>
> (d) Crushing and/or blending of rock, sand, stone, gravel, or ore; and
>
> (e) The production of compressed natural gas or liquefied natural gas for use as a transportation fuel as defined in RCW 82.16.310.
>
> (2) "To manufacture" does not include:
>
> (a) Conditioning of seed for use in planting; cubing hay or alfalfa;
>
> (b) Activities which consist of cutting, grading, or ice glazing seafood which has been cooked, frozen, or canned outside this state;
>
> (c) The growing, harvesting, or producing of agricultural products;

[40] *(footnote to the Panel's question) United States' first written submission, para. 78.*

[41] RCW § 82.04.010 (Exhibit USA-36).

> (d) Packing of agricultural products, including sorting, washing, rinsing, grading, waxing, treating with fungicide, packaging, chilling, or placing in controlled atmospheric storage;
>
> (e) The production of digital goods;
>
> (f) The production of computer software if the computer software is delivered from the seller to the purchaser by means other than tangible storage media, including the delivery by use of a tangible storage media where the tangible storage media is not physically transferred to the purchaser; and
>
> (g) Except as provided in subsection (1)(e) of this section, any activity that is integral to any public service business as defined in RCW 82.16.010 and with respect to which the gross income associated with such activity: (i) Is subject to tax under chapter 82.16 RCW; or (ii) would be subject to tax under chapter 82.16 RCW if such activity were conducted in this state or if not for an exemption or deduction.[42]

DOR considers that this definition would apply in the interpretation of ESSB 5952.

29. Chapter 82.04 does not contain a definition of "assemble." Under Washington law,

> In giving meaning to an undefined term, we "consider the statute as a whole and provide such meaning to the term as is in harmony with other statutory provisions." Though undefined terms in a statute are given their common law or ordinary meanings, . . . the words "must be read in the context of the statute in which they appear, not in isolation or subject to all possible meanings found in a dictionary." . . . "Ultimately, in resolving a question of statutory construction, this court will adopt the interpretation which best advances the legislative purpose."[43]

[42] RCW § 82.04.120 (Exhibit USA-37) (omitting definition of "to manufacture" specific to wastewater treatment facilities).

[43] *Citizens Alliance for Property Rights Legal Fund v. San Juan Country*, 184 Wn.2d 429, 437 (Washington Supreme Court 2015) (citations omitted) (Exhibit USA-38, frame 5/16).

In this analysis, Washington authorities consult dictionaries commonly used in the United States, such as Webster's Third International Dictionary or, where appropriate, Black's Law Dictionary.[44] The authorities may also consider whether a word is a term of art in the relevant sector of the economy.[45]

30. Webster's Third International Dictionary defines "assembly" as "the act or process of building up a complete unit (as a motor vehicle) using parts already in themselves finished manufactured products {to work on the … line} . . . a collection of parts so assembled as to form a complete machine, structure, or unit of a machine {a hub…}."[46] Black's Law Dictionary does not contain a relevant definition of "assemble" or "assembly." Thus, assembly is a subset of manufacturing.

31. This is confirmed by Washington's administrative practice. Specifically, Washington Administrative Code 458-20-136 states:

> (7) Combining and/or assembly of products to achieve a special purpose as manufacturing. The physical assembly of products from various components is manufacturing because it results in a "new, different, or useful" product, even if the cost of the assembly activity is minimal when compared with the cost of the components. For example, the bolting of a motor to a pump, whether bolted directly or by using a coupling, is a manufacturing activity. Once physically joined, the resulting product is capable of performing a pumping function that the separate components cannot.
>
> > (a) In some cases the assembly may consist solely of combining parts from various suppliers to create an entirely different product that is sold as a kit for assembly by the purchaser. In these situations, the manufacturing B&O tax applies even if the person combining the parts does not completely assemble the components, but sells them as a package. For example, a person who purchases component parts from various suppliers to create a wheelbarrow, which will be sold in a "kit" or "knock-down" condition with some assembly required by purchaser, is a manufacturer. The purchaser of the wheelbarrow kit

[44] *Citizens Alliance for Property Rights Legal Fund v. San Juan Country*, 184 Wn.2d 429,439 and 442 (Washington Supreme Court 2015) (Exhibit USA-38, frame 6&8/16).

[45] *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37 (Wash. Supreme Ct. 201) (Exhibit USA-39, frame 4/11) ("Dictionaries are an appropriate source of plain meaning when the ordinary definition furthers the statute's purpose. But the ordinary definition of a term is not dispositive of a statute's plain meaning when the term is also a term of art.").

[46] Webster's Third International Dictionary, p. 131 (2002) (Exhibit USA-40).

> is not a manufacturer, however, even though the purchaser must attach the handles and wheel.
>
> (b) The department considers various factors in determining if a person combining various items into a single package is engaged in a manufacturing activity. Any single one of the following factors is not considered conclusive evidence of a manufacturing activity, though the presence of one or more of these factors raises a presumption that a manufacturing activity is being performed:
>
> > (i) The ingredients are purchased from various suppliers;
> >
> > (ii) The person combining the ingredients attaches his or her own label to the resulting product;
> >
> > (iii) The ingredients are purchased in bulk and broken down to smaller sizes;
> >
> > (iv) The combined product is marketed at a substantially different value from the selling price of the individual components; and
> >
> > (v) The person combining the items does not sell the individual items except within the package.[47]

32. Importantly, "manufacturing" and "assembly" in the First Siting Provision and the Second Siting Provision refer to production activities, not the use of goods. The EU acknowledged at the first substantive meeting of the Panel with the parties that production subsidies are not, by their very nature, inconsistent with Article 3.1(b). Thus, the language in ESSB 5952 provides further evidence that the tax treatment in question is not contingent upon the use of domestic over imported goods as is prohibited by Article 3.1(b).

Question 15 (United States)

Does Boeing procure wings in the production of any model or variant of any of its airplanes?

33. No. Boeing does not procure wings for any of the aircraft that it currently produces or that are in post-launch development. The wings of Boeing's aircraft comprise numerous parts fabricated by suppliers or by Boeing itself. Boeing's purchase of such wing parts varies

[47] Washington Administrative Code, § 458-20-136 (Exhibit USA-41).

depending on the aircraft program. In no case does Boeing purchase (or otherwise "procure") complete wings from a supplier.

Question 16 (United States)

Please provide a description of the process of importation, manufacture, and assembly of the wing or wing parts of the 787. In this context, please clarify the assertion that Boeing does not import 787 wings from Japan.

34. The 787's wings, like those of all Boeing large civil aircraft, consist of numerous individual parts, including those that make up fixed wing structures (*e.g.*, the spars, ribs, and panels that comprise the main wing box; the fixed leading and trailing edges; and the center wing box) and the movable wing elements that enable controlled flight operations (*e.g.*, moveable leading and trailing edges). Boeing imports multiple wing-related structures from Japan. It does not import complete 787 wings from Japan. Boeing must therefore conduct further wing assembly activity in the United States to produce a finished 787 with complete wings, as explained further below.

35. Several different suppliers, as well as Boeing itself, fabricate particular 787 parts, in locations around the world. The parts are transported and assembled as follows:

- Mitsubishi Heavy Industries of Japan ("Mitsubishi") fabricates the constituent parts of the main wing box (*i.e.*, spars, inspar ribs, and panels) and assembles these parts into the "main wing box."[48]

- Spirit AeroSystems ("Spirit") in Malaysia, fabricates the fixed leading edge and then ships it to Mitsubishi in Japan.[49]

- Kawasaki Heavy Industries ("Kawasaki") fabricates the fixed trailing edge in Japan and then ships it to Mitsubishi.[50]

- In addition to assembling the constituent parts of the main wing box, Mitsubishi joins these parts with the fixed leading and trailing edges provided by Spirit and Kawasaki. A

[48] *See Boeing 787*, Mitsubishi Heavy Industries website (Exhibit USA-42). For a visual overview of the various 787 structures, see *Boeing 787-8 Cutaway Diagram*, Flightglobal.com (Exhibit USA-55).

[49] *See Spirit Moving 787 Composite Wing Work to Malaysia*¸ Composites World (Dec. 19, 2011) (Exhibit USA-43).

[50] *See Boeing 787 Dreamliner*, Kawasaki Heavy Industries website (Exhibit USA-44).

right-hand and left-hand partial wing structure resulting from this activity are then shipped together to a Boeing 787 assembly facility in the United States (either Everett, Washington or North Charleston, South Carolina) on Boeing's Dreamlifter aircraft.[51]

- Boeing fabricates the moveable trailing edges and the inboard flaps in Australia and then ships them to one of Boeing's U.S. assembly facilities.[52]

- Spirit fabricates the moveable leading edges, or slats, in Oklahoma and then ships them to one of Boeing's U.S. assembly facilities.[53]

- Spirit fabricates the engine struts in Kansas and then ships them to one of Boeing's U.S. assembly facilities.[54]

- FACC fabricates the spoilers in Austria and then ships them to one of Boeing's U.S. assembly facilities.[55]

- Korean Air Aerospace Division, or KAL-ASD, fabricates the flap support fairings in Korea and then ships them to one of Boeing's U.S. assembly facilities.[56]

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[51] *See* Boeing Expert Statement, para. 43 & note 6 (Exhibit USA-1(BCI)).

[52] *See* Boeing Australia website, *Boeing Aerostructures Australia: Innovative Design and Manufacture in Australia* (Exhibit USA-45); Boeing Expert Statement, para. 43& note 6 (Exhibit USA-1(BCI)).

[53] *See Spirit AeroSystems, Inc., Completes First Developmental Section for 787 Dreamliner*, Press Release, Spirit Aerosystems (Aug. 25, 2005) (Exhibit USA-46); Boeing Expert Statement, para. 43 & note 6 (Exhibit USA-1(BCI)).

[54] *See Spirit AeroSystems, Inc., Completes First Developmental Section for 787 Dreamliner*, Press Release, Spirit Aerosystems (Aug. 25, 2005) (Exhibit USA-46); Boeing Expert Statement, para. 43 & note 6 (Exhibit USA-1(BCI)).

[55] *See FACC Delivers 100th Shipset of Boeing 787 Spoiler*, Press Release, FACC AG (Nov. 29, 2012) (Exhibit USA-47); Boeing Expert Statement, para. 43 & note 6 (Exhibit USA-1(BCI)).

[56] *See Korean Air Expands Aerospace Business*, Korea Times (Nov. 12, 2015) (Exhibit USA-48); Boeing Expert Statement, para. 43 & note 6 (Exhibit USA-1(BCI)).

- Boeing fabricates the aft pylon fairings in Canada and then ships them to its U.S. assembly facilities.[57]

- Fuji Heavy Industries of Japan fabricates the 787 center wing box and ships it to North Charleston. There, Boeing joins it with the midfuselage section, which either remains on site (for aircraft being produced in South Carolina) or is flown to Everett (for aircraft being produced in Washington).[58]

- Boeing then joins all of these various structures together in Everett or North Charleston as part of the process of manufacturing the 787 aircraft.[59] As part of this final assembly process, incomplete 787 external wing structures are joined to the center wing box and wing-body fairings that are incorporated into an incomplete fuselage (comprising the forward and center fuselage sections, but not the aft section). **[BCI]**.

36. Thus, Boeing does not import complete 787 wings from Japan.[60] Numerous wing structures, including those from Japan, must be assembled together in the United States for the wings, and the aircraft itself, to be produced. Notably, the partial wing structure shipped from Mitsubishi – to which the United States understands the EU to be referring when it suggests that Boeing imports 787 wings[61] – could not perform the functions for which airplane wings exist. In other words, an airplane could not fly with just the structures sent by Mitsubishi as its wings.

Question 18 (European Union/United States)

Can a de jure claim be refuted by factual evidence, other than evidence relating to the text of the measure? To what extent can facts be considered to be part of a de jure analysis, such as for example to appreciate the operation of the measure and to affect the way in which the measure is interpreted?

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[57] *See Backgrounder*, Boeing Canada website (Exhibit USA-49); Boeing Expert Statement, para. 43 & note 6 (Exhibit USA-1(BCI)).

[58] *See FHI Starts Third Production Lin e for the 787 "Center Wing Box" Assembly*, Press Release, Fuji Heavy Industries (July 11, 2012) (Exhibit USA-50).

[59] Boeing Expert Statement, para. 43 & note 6 (Exhibit USA-1(BCI)).

[60] *See* Boeing Expert Statement, para. 43 note 6 (Exhibit USA-1(BCI)).

[61] *See* EU FWS, para. 78.

37. Factual evidence other than the text of the measure may play many roles in interpreting, and potentially refuting, a claim that a measure is *de jure* contingent on the use of domestic over imported goods.

38. To begin, the EU's claims in this dispute rest of Article 3.1(b) of the SCM Agreement. As that provision addresses "subsidies contingent . . . upon the use of domestic over imported *good*," the EU as the complaining party must identify the "goods" at issue in its claim. Even in a *de jure* claim, the analysis then requires an evaluation of whether the measure in question actually applies to those goods. The EU cannot make a *prima facie* case based on "goods" as an abstract concept, but must address particular goods, which is a factual issue. The EU has explained that it considers two goods to be relevant: fuselages and wings.

39. But as the United States has explained, the measures at issue do not require the use of "goods." Neither a "fuselage" nor a "wing" exists as a "good" apart from the finished 777X aircraft.

40. Furthermore, as the EU has recognized, the evaluation of a Member's measures must take account of the applicable rules of interpretation and construction applied by that Member.[62] Thus, if a Member's legal system calls for the use of evidence beyond the text of a measure to interpret the measure, that same evidence will necessarily play a role in a Panel's appreciation of the measure. Examples may include the texts of judicial opinions interpreting the statute or defining the terms of the measure in other relevant contexts, legislative or regulatory history elucidating the purpose of the measure, or evidence of industry practices.

41. Evidence of how a Member actually applied a measure could also confirm or refute an interpretation. Most obviously, if the parties disputed whether a measure covered a particular situation, and the respondent could show that in practice it applied the measure to the situation, that would be strong evidence as to the proper interpretation of the measure. Moreover, statements made or documents issued by administering authorities in conjunction with the application of a measure could assist in understanding it.

42. And evidence of the application of a measure could help a panel to understand its proper interpretation. As discussed in response Question 46, in *Canada – Autos*, the Appellate Body found that it was legally necessary for the panel's *de jure* analysis under SCM Agreement Article 3.1(b) to consider facts outside the text of the measure at issue. In that proceeding, the EU, as well as Japan, challenged Canada's domestic value added requirements as being contingent on the use of domestic over imported goods, and Canada argued that it was possible

[62] *E.g.*, EU FOS, para. 57, *citing State of Washington v. J.P.*, 149 Wash. 2d 44, 450 (Supreme Court of Washington 2003) (Exhibit EU-72).

for manufacturers to qualify without using any domestic goods. The Appellate Body faulted the panel's evaluation of these arguments, stating:

> In our view, the Panel's examination of the CVA requirements for specific manufacturers was insufficient for a reasoned determination of whether contingency "in law" on the use of domestic over imported goods exists. For the MVTO 1998 manufacturers and most SRO manufacturers, the Panel did not make findings as to what the actual CVA requirements are and how they operate for individual manufacturers. Without this vital information, we do not believe the Panel knew enough about the measure to determine whether the CVA requirements were contingent "in law" upon the use of domestic over imported goods. We recall that the Panel did make a finding as to the level of the CVA requirements for one company, CAMI. The Panel stated that the CVA requirements for CAMI are 60 per cent of the cost of sales of vehicles sold in Canada. At this level, it may well be that the CVA requirements operate as a condition for using domestic over imported goods. However, the Panel did *not* examine how the CVA requirements would actually operate at a level of 60 per cent.
>
> The Panel's failure to examine fully the legal instruments at issue here and their implications for individual manufacturers vitiates its conclusion that the CVA requirements do not make the import duty exemption contingent "in law" upon the use of domestic over imported goods. In the absence of an examination of the operation of the applicable CVA requirements for individual manufacturers, the Panel simply did not have a sufficient basis for its finding on the issue of "in law" contingency. Thus, we conclude that the Panel erred in conducting its "in law" contingency analysis.[63]

The relevance of any particular piece of factual evidence will differ depending on the measure and the probative value of the evidence itself. However, as these findings by the Appellate Body indicate, sometimes factual evidence outside the body of the measure can be important to evaluation of a *de jure* claim.

43. This case provides a good example of how factual evidence can be useful in properly interpreting a measure and its structure and application. The EU argues, based on its use of the word "products," the First Siting Provision should be understood to require that fuselages and wings be manufactured as stand-alone "goods," and then "used" as inputs in the production of the finished airplane.[64] However, as a factual matter, the 777X program will not involve the use

[63] *Canada – Autos (AB)*, para. 131 (emphasis original).

[64] *See* EU First Opening Statement, paras. 51-52.

of fuselages and wings as inputs into the production process.[65] Despite this fact, DOR determined that the decision to site the 777X program in Washington satisfied the First Siting Provision. This conclusively disproves the EU's suggestion that the First Siting Provision should be interpreted as requiring the manufacture of fuselages and wings as separate, stand-alone "goods," and the subsequent "use" of those goods in downstream production. Accordingly, this set of facts disproves the EU's *de jure* claims (as well as its *de facto* claims).

Question 19 (European Union/United States)

Should the elements in the definition of a subsidy under Article 1 of the SCM Agreement be assessed in any special way in the case of alleged prohibited subsidies, or should the assessment be the same irrespective of whether the claim involves prohibited or actionable subsidies?

44. There is nothing in the text of Article 1 of the SCM Agreement that would have the definition of a subsidy depend on the type of subsidy that is being claimed. As a result, the assessment of the elements of SCM Agreement Article 1 should be the same for prohibited and actionable subsidies. The texts of Articles 3 and 5 refer respectively to "subsidies, within the meaning of Article 1" and "any subsidy referred to in paragraphs 1 and 2 of Article 1." In each instance, the provision takes Article 1 as defining, without anything more, what *is* a subsidy, and applies obligations based on other characteristics of the subsidy in question – certain contingencies in the case of Article 3 and the effects of the subsidy in the case of Article 5. Identification of a subsidy in both instances is separate from and, as an analytical matter, prior to the application of Article 3 or 5. Thus, Article 1 creates a single standard for identifying a subsidy in all cases under the SCM Agreement.

Question 20 (European Union/United States)

Is the reference under Article 3.2 of the SCM Agreement to subsidies being "granted or maintained" in any way relevant for the assessment of the elements in the definition of a subsidy under Article 1 of the SCM Agreement?

45. As discussed in response to question 19, Article 1 creates a single standard for identifying a financial contribution and benefit. However, the provisions of the subsequent disciplines on such subsidies provide context for interpreting Article 1.[66] Thus, the reference in SCM Agreement Article 3.2 to subsidies being "granted or maintained" is relevant to the interpretation of Article 1. However, as expressed at the first meeting of the Panel with the

[65] *See, e.g.*, US FWS, para. 113.

[66] *E.g.*, *Canada – Aircraft (AB)*, para. 155 ("our view is that Article 14, nonetheless constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b).").

parties, the United States does not see the phrase "granted or maintained" in Article 3.2 as clarifying any of the issues in dispute in this proceeding.

Question 21 (European Union/United States)

In order for there to be a financial contribution under Article 1.1(a)(1)(ii), is it necessary that government revenue actually be foregone (e.g. through the actual use or exercise of a fiscal incentive)?

46. The United States considers that, where an allegation is specific to a particular recipient of an alleged subsidy, it is normally necessary for that recipient to have actually used or exercised that fiscal incentive. Perhaps, in an unusual circumstance, a complaining party could show that use of the incentive in the coming year was inevitable despite the absence of such use in years past, although the United States will not speculate as to what type of evidence might be sufficient for such a showing.

47. This is consistent with the panel's report in *US – Large Civil Aircraft*. There, where there was no evidence Boeing had used certain challenged measures, the panel found that there was no financial contribution and, therefore, no subsidy.[67] The panel stated:

> Therefore, in the Panel's view, the European Communities' argument is not that a financial contribution exists in the abstract, by virtue of the existence of legislation providing for a tax abatement that has in fact never been used. Rather, the European Communities' case is that there is a financial contribution to a specific entity, namely *to Boeing*. For these reasons, in circumstances where the sales and use tax exemption for construction services and equipment, the leasehold excise tax exemption and the property tax exemption have never been claimed by Boeing, and in fact Boeing has taken steps that suggest that it will not claim the exemptions, the Panel finds that there is no financial contribution to Boeing in relation to these three measures.[68]

48. At the first meeting of the Panel with the parties, the EU sought to distinguish its arguments in the present dispute, suggesting that this time the EU is alleging that a financial contribution exists in the abstract, or is making its claim "as such."[69] This reinforces the continued insistence by the United States that the EU address each element of its claims, as is required to meet its burden. Neither the EU panel request, nor its first written submission state

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[67] *US – Large Civil Aircraft (Panel)*, para. 7.151.

[68] *US – Large Civil Aircraft (Panel)*, para. 7.151.

[69] *See, e.g.*, EU First Opening Statement, para. 14. It elaborated on this at the first Panel meeting specifically with respect to financial contribution.

that the EU is challenging the relevant measures "as such." The Appellate Body has "urge{d} complaining parties to be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible."[70] Yet, the EU's submissions to date have focused on Boeing and have not explained how its claims cover other taxpayers, if at all. Indeed, the EU ignores the fact that no recipient other than Boeing has had or will have to meet conditions of any kind, under either the First Siting Provision or the Second Siting Provision.

49. On the other hand, if the EU's allegations are specific to Boeing, then the absence of any actual use by Boeing would mean, as it did in *US – Large Civil Aircraft*, that no financial contribution exists. For some of the measures, the EU does not even allege use by Boeing.[71] Therefore, with respect to these measures, the EU's claims necessarily fail.

50. Moreover, the EU's allegations of financial contribution seemingly pertain to the time period from July 1, 2024 to June 30, 2040.[72] There is no evidence that Boeing actually received any of the alleged tax incentives with respect to this time period, as it is nearly a decade into the future. The EU has not explained why it views such potential receipt (or actual use) in the distant future to be a financial contribution within the meaning of Article 1. Accordingly, the EU fails to make a *prima facie* case that a financial contribution exists with respect to any of the challenged measures.

Question 22 (European Union/United States)

Assuming that it is found that revenue is foregone under Article 1.1(a)(1)(ii), what distinct and/or additional considerations are relevant to an analysis of whether a benefit is thereby conferred?

51. Financial contribution and benefit are distinct concepts, as reflected by the text of Article 1 of the SCM Agreement. The EU has the burden to establish the existence of both a financial contribution and benefit thereby conferred with respect to each of the challenged measures. However, it has not done so for any of the challenged measures.

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[70] *United States – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 173 (emphasis original).

[71] *Compare* EU FWS, paras. 34-39 *with ibid.*, paras. 21, 24, 27, 30.

[72] *See* EU First Opening Statement, para. 26 & note 35. The EU stated: "Washington State has actually calculated for the Panel the difference between what Boeing would owe pursuant to the normative benchmarks, and what it owes as a result of the challenged measures." *Ibid.* The footnote accompanying this statement refers to DOR's estimate of the budgetary impact of ESSB 5952 for the time period from FY 2024 to FY 2040, which totaled $8.7179 billion. *See ibid.*, para. 26 & fn. 35.

52. To establish the existence of a financial contribution in the form of revenue foregone that is otherwise due, a complainant must undertake a three-step process: (i) "identify the tax treatment that applies to the income of the alleged recipients," (ii) "identify the benchmark for comparison – that is, the tax treatment of comparable income of comparably situated taxpayers," and (iii) "compare the reasons for the challenged tax treatment with the benchmark tax treatment . . . after scrutinizing a Member's tax regime."[73] By contrast, to establish the existence of a benefit conferred by a financial contribution, a complainant must establish whether the recipient is "'better off' than it would otherwise have been, absent {the relevant financial} contribution."[74] The proper basis for this comparison is "whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[75] In other words, "the marketplace provides {the} appropriate basis for comparison."[76]

53. As the panel in *US – Large Civil Aircraft* noted, the concept of financial contribution in the form of revenue foregone that is otherwise due often overlaps with the concept of benefit.[77] However, this is not necessarily the case. Whether the existence of a benefit readily follows from a finding of revenue foregone that was otherwise due will necessarily depend on the facts. The EU has not identified with sufficient clarity what the benefit is that it is alleging, much less provided evidence that the two concepts fully overlap in the present case.

Question 23 (European Union/United States)

With respect to the leasehold excise tax exemption on port district facilities and the property tax exemption for the personal property of port district lessees, the United States has noted that the European Union has not alleged that Boeing has used or will ever use these exemptions. Please explain how this fact is relevant in assessing whether these exemptions constitute subsidies according to the definition in Article 1 of the SCM Agreement.

54. As discussed above in response to Question 21, and as the panel found in *US – Large Civil Aircraft*, actual use is required in order for a financial contribution to exist under Article 1.1(a)(1)(ii) where the argument is that a financial contribution exists with respect to a particular

[73] *US – Large Civil Aircraft (AB)*, paras. 812-814.

[74] *Canada – Aircraft (AB)*, para. 157.

[75] *Canada – Aircraft (AB)*, para. 157.

[76] *Canada – Aircraft (AB)*, para. 157.

[77] *See, e.g.*, *US – Large Civil Aircraft*, para. 7.169.

recipient like Boeing. Thus, where the EU does not even allege use – and therefore obviously also could not show a benefit – its associated claims necessarily fail.

Question 25 (European Union/United States)

With respect to the State of Washington's sales and use taxes, property taxes, and leasehold excise taxes, are the applicable tax rates the same for all industries and sectors (ignoring the tax exemptions that are here under consideration)?

55. The general state sales and use tax rate on the selling price of sales of retail services, digital products, extended warranties, and tangible personal property is 6.5 percent, but there are exception for motor vehicles and brokered natural gas. The local sales and use tax rate on the same taxable base generally varies between 1 percent and 3 percent depending on the locality. The leasehold excise tax is initially equal to 12.84 percent of taxable rent on the act or privilege of occupying or using publicly owned real or personal property or real or personal property of a community center through a leasehold interest. Property tax on real and personal property is generally assessed at 100 percent market value, although there are exceptions. The law sets maximum tax rates for the state and local property taxes, but usually the taxing district's budget creates limitations on total property taxes. For this reason, Washington's property tax system is a budget-based property tax system and not a rate-based property tax system. In 2015, the average statewide rate with respect to the state property tax levy was $2.15 per $1,000 of fair market value. There are numerous product-based, entity-based, use-based, and other similar tax adjustments that may reduce the sales or use tax, leasehold excise tax, or property tax due to zero when applicable.

56. The EU has failed to identify, let alone justify, what it believes are the relevant normative benchmarks for each of the challenged tax incentives that operate through the challenged tax measures implicated in the Panel's question – *i.e.*, the B&O credits for property and leasehold excise taxes, the computer sales & use tax exemptions, the construction sales & use tax exemptions, the leasehold excise tax exemption, and the property tax exemption. The EU has also failed to assess what the benefit would be, including whether taxpayers that use these tax incentives would be eligible for other exemptions or reductions in the absence of the challenged measures. Accordingly, the EU has failed to make a *prima facie* case.

Question 27 (United States)

Please comment on the sources and accuracy of the information submitted by the European Union regarding the value of certain tax incentives.[78]

57. The EU relies almost exclusively on a fiscal note. The United States has verified that the EU exhibit is an accurate copy of the fiscal note. The fiscal note seeks to estimate, as of November 7, 2013 (*i.e.*, before the first reading of ESSB 5952), the expected state and local revenue impact from the extension of the tax incentives challenged by the EU. Notably, it distinguishes between impacts from "current incentives" and those from "proposed extensions."

58. The EU totals the estimated impact of the current incentives and the impact from the proposed extensions for each measure – that is, the total impact from 2014 to 2040.[79] However, the "current incentives" were those in place prior to ESSB 5952. By including the impact of "current incentives" in the figures it cites, the EU seemingly suggests that it is challenging the measures from 2014 – 2040, including purported revenue foregone pursuant to "current incentives," *i.e.*, not conditioned on the First Siting Provision and Second Siting Provision in ESSB 5952. Of course, the EU's prohibited subsidy claims are based entirely on the alleged contingencies in ESSB 5952. If the EU is challenging measures in place prior to ESSB 5952, such measures (even if shown to be subsidies) have no relationship whatsoever to the provisions in ESSB 5952 that allegedly make subsidies contingent upon the use of domestic over imported goods. If, on the other hand, the EU is not challenging all measures from 2014 – 2040, its calculation would greatly exaggerate the value of the alleged import-substitution subsidies that the EU is challenging.

59. Moreover, the fiscal note's budget projections do not, as the EU has mistakenly suggested,[80] relate exclusively to Boeing. Rather, the fiscal note estimates the overall budget impact expected at the time. It does not provide any information that is specific to Boeing, and it is not based on the actual use of the challenged tax incentives.

60. The only other evidence the EU cites with respect to the B&O tax rate, the B&O tax credits, and the computer sales and use tax exemptions is an economic impact study from the Washington Aerospace Partnership. The EU relies on this evidence in asserting that "Boeing

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[78] *(footnote to the Panel's question) See, e.g. European Union's first written submission, paras. 21, 24, 27, 30, and 33.*

[79] *See* EU FWS, paras. 21, 24, 30, 33; Exhibit EU-5.

[80] *See* EU FOS, para. 26 & fn. 35.

will be the principal beneficiary" of each of these measures."[81] The United States is not in a position to verify the accuracy of the figures in this document. But it is notable that this document only seeks to summarize the 2004 – 2012 period. It does not even attempt to address any period after 2012, much less after 2024.[82]

61. With respect to the construction sales and use exemptions, the EU cites two newspaper articles. For the most part, these documents speak for themselves, and the United States has no comments on them or the accuracy of their characterizations. The United States observes, however, the conspicuous absence of any similar evidence submitted by the EU with respect to the other challenged measures.

62. In fact, with respect to the leasehold tax exemption and property tax exemption, the EU not only fails to provide evidence, it does not even allege that "Boeing will be the principal beneficiary."[83] It does not allege that Boeing has ever used or will ever use such exemptions. As the United States explains in response to Questions 21 and 23, the EU's claims with respect to these measures necessarily fail as a result of this failure to allege a *prima facie* case.

Question 28 (United States)

The United States provides examples of property tax exemptions under the law of the State of Washington (see, e.g. Exhibits USA-22 and USA-23). Please explain the relevance of these exemptions to the Panel's consideration of whether there is a financial contribution under Article 1 of the SCM Agreement.

63. The exemptions are relevant to the identification of a defined normative benchmark. As the Appellate Body stated: "Identifying a benchmark involves an examination of the structure of the domestic tax regime and its organizing principles."[84] The particular exemptions identified at USA-22 and USA-23 – which include exemptions for property valued at less than $500, churches and cemeteries, business inventory, and property owned by federal, state, and local governments – are all features of the domestic tax regime which must be taken into account in the determination of the appropriate benchmark under Article 1 of the SCM Agreement. They are especially relevant to the challenged measures that are directly related to the Washington

[81] EU FWS, paras. 21, 24, 27, 30.

[82] *See* Exhibit EU-12.

[83] *Compare* EU FWS, paras. 34-39 *with ibid.*, paras. 21, 24, 27, 30.

[84] *US – Large Civil Aircraft (AB)*, para. 813.

property tax – *i.e.*, the B&O tax credits for property and leasehold excise taxes and the property tax exemption.

64. However, it is not possible to determine precisely how these exemptions should figure in the Panel's analysis, because the EU has not yet explained what it believes are the relevant normative benchmarks to establish that the challenged measures result in the conferral of a financial contributions.[85] In addition, the EU has not yet identified the relevant market benchmarks to establish that these measures result in the conferral of benefits.[86] Furthermore, in *US – Large Civil Aircraft* – which the EU cites in support of its financial contribution and benefit arguments[87] – the panel found that the property tax exemption, the leasehold excise tax exemption, and the sales and use tax exemptions for construction services and materials all did *not* confer subsidies to Boeing.[88] Accordingly, there is no basis to find that the measures challenged in this dispute are subsidies within the meaning of Article 1 of the SCM Agreement.

Question 30 (European Union/United States)

Is the appropriate standard for the purpose of a claim under Article 3.1(b) of the SCM Agreement, whether the measure in question is "geared to induce" the use of domestic over imported goods?

65. The appropriate standard for a claim under Article 3.1(b) of the SCM Agreement is that set forth in the provision itself. That is, a complaining Member must demonstrate that a challenged subsidy is "contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."[89] This standard contains several elements, and a complaining Member must establish each of them with respect to each measure challenged under Article 3.1(b).[90]

66. The "geared to induce" concept, in and of itself, is not, nor does it represent, the relevant legal standard. Rather, it is one analytical tool that can be helpful in conducting an analysis. The Appellate Body in *Canada – Aircraft* observed that "the ordinary connotation of 'contingent' is

[85] The only possible exception is for the 0.2904 B&O tax rate. *See* EU FWS, para. 59.

[86] The only possible exception is for the 0.2904 B&O tax rate. *See* EU FWS, para. 59.

[87] *See, e.g.*, EU FWS, paras. 63, 35, 68.

[88] *US – Large Civil Aircraft (Panel)*, para. 7.212.

[89] SCM Agreement, Art. 3.1(b).

[90] US FWS, paras. 103-105, 109, note 162.

'conditional' or 'dependent for its existence on something else.'"[91] The Appellate Body has endorsed a "geared to induce" analysis to determine whether this legal standard under Article 3.1(a) has been met. As such, it may be relevant in the context of Article 3.1(b) as well.

67. The United States notes, however, that while the EU invokes the "geared to induce" analysis in the context of its Article 3.1(b) claims in this dispute, it has not provided a framework for how that analysis should proceed, much less shown with evidence that the application of such an analysis in the present dispute would establish the requisite contingency. For example, the Appellate Body has endorsed a "ratios" analysis as one tool for assessing whether a subsidy was geared to induce exportation in a way that would make the subsidy contingent upon export, yet the EU never mentions such an analysis in its submissions, and at the Panel meeting made clear it will not make an argument based on such an analysis. It is not clear how the EU considers the "geared to induce" analysis would otherwise proceed in the context of Article 3.1(b) in a way that the Appellate Body might consider useful and appropriate in this respect. But perhaps the EU's failure to develop this line of argument should not be surprising in light of the facts in this dispute, which contradict any contention that the alleged subsidies result in import substitution.

Question 32 (European Union/United States)

Please explain whether the ordinary meaning of the term "over", including by reference to dictionary definitions (see, e.g. Exhibit USA-15), provides relevant guidance with respect to the scope of the prohibition in Article 3.1(b) of the SCM Agreement.

68. The *Shorter Oxford English Dictionary* defines "over" as "{a}bove in degree, quality, or action; in preference to; more than."[92] In addition, the French and Spanish texts use the phrases "*de préférence à*" and "*con preferencia a*" in place of the English word "over." Thus, a subsidy that is inconsistent with Article 3.1(b) requires the use of domestic goods "in preference to," *i.e.*, instead of, imported goods. For this reason, Article 3.1(b) is often referred to as relating to "import substitution subsidies."[93] It does not cover measures simply because they involve some sort of domestic activity, but rather it is focused specifically on subsidies that depend on the substitution of domestic over imported goods.

69. The reasoning of the panel in *Indonesia – Autos* illustrates this point. The panel found that Indonesia had acted inconsistently with Article 3.1(b) in granting import duty and luxury sales tax exemptions on automobiles and auto parts, with the value of the exemptions increasing

[91] *Canada – Aircraft (AB)*, para. 166.

[92] Shorter Oxford English Dictionary (6th ed.), p. 2048 (Exhibit USA-51).

[93] *See, e.g.*, *Canada – Renewable Energy (AB)*, para. 5.6.

depending on the level of domestically produced auto parts used in the production of automobiles.[94] Thus, using more imported auto parts resulted in reduced subsidies, and using more domestic auto parts resulted in increased subsidies, incentivizing a one-for-one substitution of imported parts with domestic parts.[95]

70. By contrast, in this case, no import substitution exists. The value of the alleged subsidies does not change depending on whether the inputs for the 777X are foreign or domestic. Indeed, as shown in Exhibit USA-30(BCI), many of Boeing's inputs are sourced from outside Washington or outside the United States, without any effect on the availability of the alleged subsidies. To further demonstrate this point, every single part that is assembled into a wing or a fuselage could be imported, with the only domestic value added being the work of assembly, without affecting the availability of the alleged subsidies. And all taxpayers other than Boeing will be eligible for the ESSB 5952And all taxpayers other than Boeing will be eligible for the ESSB 5952 tax treatment from 2024 – 2040 without meeting any conditions.[96] Accordingly, the challenged measures are not contingent on the use of domestic *over* imported goods.

Question 33 (European Union/United States)

If fuselages or wings could in the future be produced as separate intermediate products (e.g. due to changes in technology or other factors), what relevance and implications, if any, could this have for the concept of "goods" under Article 3.1(b) of the SCM Agreement in relation to fuselages and wings?

71. As an initial matter, any such change in technology would be irrelevant to the First Siting Provision since the conditions for that provision have already been fulfilled.

72. A potential change in technology or other similar factors that may permit 777X wings and fuselages to be produced as separate intermediate objects in the future should not inform the Panel's determination of whether these items are "goods" for purposes of the present dispute. Article 3.1(b) presents the obligation in the present tense, and not the future, the conditional, or

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[94] *See Indonesia – Autos (Panel)*, paras. 14.155.

[95] Indeed, the panel found that the measures at issue were inconsistent with Article 2.1 of the TRIMs Agreement, which entails an inconsistency with Article III:4 of the GATT. *See Indonesia – Autos (Panel)*, para. 14.92.

[96] Moreover, with respect to the fuselage and the wings in particular – which are the subject of the EU's claims, even though they are not inputs into the 777X production process – they would have been assembled in the United States even in the absence of the alleged subsidies, as confirmed by the history of Boeing's multi-state site search. *See* US FWS, paras. 27-30. Furthermore, **[BCI]**. *See* US FWS, paras. 23-26.

the subjunctive. Thus, it addresses subsidies that *are* contingent on the use of domestic over imported goods, and not subsidies that will, would, or might be so contingent, for example, pending a change in technology. If an existing measure applied in its contemporaneous factual context is not contingent on use of domestic goods, the theoretical possibility that the situation might change in a way as to create such a contingency is not relevant.[97]

73. Whether changes in technology or other similar factors will occur in the future is a speculative question that does not pertain to current conditions of competition, and therefore should not influence the determination of whether the challenged measures are inconsistent with Article 3.1(b). Furthermore, even if 777X fuselages or wings *could be* produced as separate intermediate products – whether now or in the future – and even if these products were found to be "goods," this would not, by itself, establish contingency on the use of domestic over imported goods within the meaning of Article 3.1(b).

74. Among other things,[98] the technical *possibility* of producing fuselages or wings as separate intermediate products does not mean that a producer will do so, in which case the "use" criterion of Article 3.1(b) would not be met. If an entity has two or more possible means of satisfying the Second Siting Provisions, one of which does not entail the use of domestic over imported goods, then the use of domestic over imported goods is not a condition.[99] While the EU has failed to establish that the production of fuselages or wings is even possible, the United States has demonstrated that it is *not necessary* – Boeing has satisfied the First and Second Siting Provisions without producing fuselages or wings as separate intermediate products that are then "used" to produce the 777X. The EU's Article 3.1(b) claims therefore fail.

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[97] A similar principle applies in the Article III:4 context. For example, in *Canada – Autos*, Canada argued: "No Panel Report . . . has ever found a violation of Article III:4 based on discrimination that might exist after a change in circumstances that could occur at some unspecified time in the future." *Canada – Autos (Panel)*, para. 6.336. The panel did not disagree with Canada on this point (although it found that the discrimination at issue pertained to "current circumstances"). *Ibid.*, para. 10.84. The Appellate Body did not review this finding. Accordingly, Canada was correct that a finding of inconsistency with Article III:4 cannot be based on discrimination that might exist after a change in circumstances at some unspecified time in the future.

[98] One such other thing is that a change in technology would not alter the fact that every particle of the 777X wing and fuselage could still be imported without affecting the tax treatment at issue.

[99] *See Canada – Autos (AB)*, para. 130. *See also infra*, US RPQ 46.

Question 34 (European Union/United States)

The First Siting Provision refers to "fuselage" and "wings" as "products". Of what relevance is this reference for the purpose of determining whether fuselages and wings can be considered to be goods in the sense of Article 3.1(b) of the SCM Agreement?

75. The reference to "products" is of little relevance to whether fuselages and wings can be considered "goods" in the sense of Article 3.1(b). The Appellate Body has clarified that the term "goods," as it is used in the context of Article 3.1(b), has a certain meaning that may differ from the use of that same term in other contexts.[100] In the same report, the Appellate Body found that "'{g}oods' as used in Article 1.1(a)(1)(iii) of the *SCM Agreement* and 'products' in Article II of the GATT 1994 are different words that need not necessarily bear the same meanings in the different contexts in which they are used."[101] Thus, characterization of an item as "product" by a Member in the context of its domestic legal system, even if it informed whether the item was a "product" for purposes of a provision of a covered agreement (which it may not necessarily do), provides limited guidance as to whether it is a "good" for purposes of a different provision of the covered agreements.

76. The context in which ESSB 5952 uses the term "products" is markedly different from the context of the term "goods" in Article 3.1(b). The former is meant to define, for Washington tax law, the term "significant commercial airplane manufacturing program." The latter defines what is within the scope of a subsidy contingent upon the use of domestic over imported goods. As the Appellate Body found in *US – Softwood Lumber CVDs*, the term "goods" in Article 3.1(b) is specific to the context of that provision – import substitution.

77. By contrast, the Washington bill uses "products" not as a term of art with the specialized meaning assigned to it under a particular provision of the covered agreements, nor to communicate a requirement regarding a specific type of manufacturing process, but rather as a textual device linking the chapeau to the list that follows in order to describe the production operations that would constitute "significant commercial aircraft manufacturing." The bill could have used "items," "articles," or the noun "manufactures" instead of "products" without losing any meaning.

[100] *See US – Softwood Lumber CVDs (AB)*, para. 62.

[101] *US – Softwood Lumber CVDs (AB)*, para. 63.

78. Thus, the EU errs when it asserts that "the word 'goods' is synonymous with the word 'products'."[102] It errs further in assuming that, if they are "products," "fuselages" and "wings" are "inputs" or "*goods* that must be *used* in the process of making airplanes."[103]

79. Indeed, the facts contradict the EU's interpretation, which is reflected in its assertion that "{t}hese inputs" – namely, fuselages and wings" – "are for use in the new model (or a version or variant of an existing model) that must also commence manufacture in Washington State."[104] If that were the case, the 777X program would only have fulfilled the First Siting Provision if it produced completed fuselages and wings as "goods" or "inputs" and then used them in the manufacture of a finished airplane. That is not what happened. Fuselages and wings are not manufactured as separate inputs that are used in the subsequent manufacture of the finished 777X. Nevertheless, after reviewing the 777X program, DOR determined that a process that did not produce separate "fuselages" and "wings" as inputs qualified as a "significant commercial aircraft manufacturing program." Thus, the use of the word "products" in the chapeau of the First Siting Condition cannot be read as signifying a conclusion that "fuselages" and "wings" are "goods" that are "used" for purposes of Article 3.1(b) of SCM Agreement.

Question 35 (European Union/United States)

Do the wings or fuselage become a separate and identifiable product at any time in the production process of: (a) any commercial airplane; (b) a commercial airplane manufactured under the "significant commercial airplane manufacturing program" referred to in the First Siting Provision?

80. The answer to item (a) is yes – in the case of Boeing 737NG and 737 MAX single-aisle aircraft, Boeing purchases complete fuselages from Spirit AeroSystems in Wichita, Kansas.[105] These fuselages are transported by rail to Boeing's 737 manufacturing facility in Renton, Washington, for aircraft final assembly. [106]

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[102] EU FOS, para. 51.

[103] EU FOS, paras. 52-53.

[104] EU FOS, para. 53.

[105] *See Sprit Celebrates Completion of First Boeing 737 MAX Fuselage*, Press Release, Spirit AeroSystems (Exhibit USA-52).

[106] *See Sprit Celebrates Completion of First Boeing 737 MAX Fuselage*, Press Release, Spirit AeroSystems (Exhibit USA-52).

81. With regard to item (b), the answer is no. 777X airplanes are the only commercial airplanes that will be manufactured under the "significant commercial airplane manufacturing program" referred to in the First Siting Provision of ESSB 5952. Neither the 777X's wings nor its fuselage will exist as separate and identifiable products at any time in the production process.[107] As Boeing experts have explained, these structures never exist as complete, standalone articles separate from other aircraft structures.[108] Rather, the 777X "fuselage and wings are completed only as the assembly of the finished aircraft itself is completed."[109]

82. One reason for the different answers to items (a) and (b) is the difference in the sizes of the aircraft structures at issue. The fuselages of single-aisle 737 family aircraft are much smaller than those of the twin-aisle 777X. Whereas long distance transport of complete 737 fuselages is both logistically possible and economically efficient, **[BCI]**.[110]

Question 36 (European Union/United States)

What are the characteristics of a fully produced or "finally assembled" wing? More specifically, how is it different from parts and components of a wing?

83. A "fully produced" or "finally assembled" wing is one that does not lack any of its parts or components and is therefore capable of performing the functions of a wing during aircraft operations. In the case of commercial aircraft produced by Boeing and Airbus, these wing functions include producing lift; helping to control and maneuver the aircraft; bearing aerodynamic loads; and carrying fuel and engines.

84. Each wing part or component is designed to meet very precise specifications and to perform unique functions. Short of a fully produced wing, no wing part, component, or subassembly, individually or in combination, is capable of performing all the functions of a wing. For instance, a main wing box makes up a relatively large part of a wing's surface area and contains numerous parts (such as spars, ribs, and skins), but it can neither provide sufficient lift for the aircraft (since lift is also provided by other parts, including fixed and moving wing edges), nor can it control and maneuver the aircraft (since it has no moving surfaces, such as the ailerons that enable the aircraft to roll).

[107] Boeing Expert Statement, paras. 64-67 (Exhibit USA-1(BCI)).

[108] Boeing Expert Statement, paras. 64-67 (Exhibit USA-1(BCI)).

[109] Boeing Expert Statement, para. 67 (Exhibit USA-1(BCI)).

[110] Boeing Expert Statement, para. 58 (Exhibit USA-1(BCI)).

85. In sum, without a fully produced wing, a manufacturer is not finished assembling the wing (or the aircraft), and would not have a structure capable of performing the functions of a wing.

Question 37 (European Union/United States)

Which HS tariff lines correspond to wings and fuselages, respectively? Do the General Rules or any Explanatory Notes assist the Panel in understanding whether an imported product or products is a wing or a fuselage?

86. The HS, including its General Rules and Explanatory Notes, is not helpful for understanding whether an imported product or products is a wing or fuselage. The HS does not provide definitions of wings or fuselages, and its purpose is not to aid in an assessment of whether an item is a "good" or is a "product" distinct from other products for purposes of applying the covered agreements.[111] Rather, its purpose is to establish a hierarchical system of classifications and rules designed to assign any imported product to one, and only one, classification for purposes of assessing duties and otherwise applying customs laws and other formalities surrounding importation.

87. In any event, where a wing or fuselage can be produced as a separate, stand-alone article and imported on its own, it likely would properly be assigned to HS 8803.30. The same would be true for wing parts, or otherwise unfinished or incomplete wing structures.

88. Heading 88.02 covers "{o}ther aircraft (for example, helicopters, aeroplanes); spacecraft (including satellites) and suborbital and spacecraft launch vehicles." HS heading 8803 covers:

Parts of goods of heading 88.01 or 88.02.

8803.10	Propellers and rotors and parts thereof
8803.20	Under carriages and parts thereof
8803.30	Other parts of aeroplanes or helicopters

[111] The Appellate Body has found that "{a} uniform tariff classification of products can be relevant in determining what are 'like products.'" *Japan – Alcoholic Beverages II (AB)*, p. 21. The GATT 1947 working party on *Border Tax Adjustments* noted with regard to interpreting "like or similar products" that "Some criteria were suggested for determining, on a case-by-case basis, whether a product is 'similar': the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality." *Border Tax Adjustments*, L/3464, para. 18 (adopted 2 December 1970).

8803.90 Other[112]

The HS Explanatory Note to heading 88.03 gives as examples of "parts of aircraft:"

> (1) Fuselages and hulls; fuselage or hull sections; also their internal or external parts (radomes, tail cones, fairings, panels, partitions, luggage compartments, floors, instrument panels, frames, doors, escape chutes and slides, windows, port holes, etc.);
>
> (2) Wings and their components (spars, ribs, cross members).

89. General Rule 2(a) specifies that incomplete, unfinished, or disassembled goods are properly classified in the heading applicable to the complete, finished, or assembled good. Therefore, the importation of a wing and fuselage as part of a kit, for example, could potentially be treated as an incomplete, unfinished, or disassembled aircraft and classified as such, *i.e.*, under HS 8802.

90. More fundamentally, however, the definitions of the terms in the measures at issue are not based on or otherwise linked to the HS. Under Washington's principles of statutory interpretation, discussed in response to Question 17, the HS has no relevance for evaluating the operation of ESSB 5952, as it is not dictionary definitions and does not define terms of art as used in the aeronautics sector. As noted above, the HS was not designed to address the questions posed by the EU's claim under SCM Agreement Article 3.1(b), including whether the wings and fuselages referred to in ESSB 5952 are goods within the meaning of Article 3.1(b), or are used in the production of the finished 777X airplane.

Question 38 (United States)

The First Siting Provision seems to require that the same "commercial manufacturing program" includes the manufacture of aircraft as well as that of fuselage and wings. Does this mean that, under the relevant provision, the same company would have to manufacture the aircraft, the fuselage, and the wings?

91. The statutory scheme contemplates that a single company would perform the manufacturing activity necessary to fulfill the First Siting Provision. The First Siting Provision refers to "a final decision . . . by *a manufacturer* to locate a significant commercial airplane manufacturing program in Washington state."[113] It also states that the relevant "significant commercial airplane manufacturing program" would involve manufacturing activities "at *a* new

[112] Harmonized Schedule (HS), Chapter 88 (Exhibit USA-53).

[113] ESSB 5952, § 2(2)(d) (Exhibit EU-3) (emphasis added).

or existing *location* within Washington state."[114] This indicates the expectation that a single manufacturer would be doing the manufacturing for the related "significant commercial airplane manufacturing program" at a single location.

92. Washington officials did not consider the hypothetical scenario in which multiple companies would collaborate on the significant commercial airplane manufacturing program. Rather, consistent with the textual provisions discussed in the preceding paragraph, their assumption was that the manufacturer, presumably Boeing, would be conducting the relevant manufacturing activity itself. Their expectation in this regard was based on a sound understanding of the industry, including the fact that for the 777-300ER (the aircraft on which the 777X is based), Boeing itself manufactures the wings and fuselages from structures fabricated in numerous locations in the United States and other countries.[115] In fact, the First Siting Provision was fulfilled based on a single company performing the necessary manufacturing activity.

Question 39 (United States)

Would an entity that "commenced manufacture" within the meaning of the First Siting Provision lose its eligibility for any of the tax incentives if it continued manufacturing fuselages and wings, but also imported some fuselages and wings (assuming, for argument's sake, that it was possible to import fuselages and wings)?

93. As alluded to in the Panel's question, it is not possible for Boeing to import completed fuselages and wings for use in the production of the 777X. However, assuming for the sake of argument that 777X fuselages and wings could be and would be completed as separate, stand-alone articles and transported in their completed state, that would imply that they had been assembled as part of a production program sited outside Washington.[116] The siting of this production activity would trigger the Second Siting Provision, causing Boeing to lose its eligibility for the 0.2904 percent B&O tax rate on 777X manufacturing and sales.

94. But of course, that is not the case presented in this dispute, and therefore conclusively demonstrates that the measures at issue do not *de jure* make any alleged subsidy contingent on the use of domestic over imported goods. Similarly the facts of this dispute conclusively

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[114] ESSB 5952, § 2(2)(c) (Exhibit EU-3) (emphasis added).

[115] *See* Boeing Expert Statement, paras. 38, 42 (Exhibit USA-1(BCI)).

[116] As discussed above in response to question 7, production of wings outside Washington would require Boeing to site a full-fledged production program outside Washington. The same is true with respect to fuselages and aircraft.

demonstrate that the measures at issue do not *de facto* make any alleged subsidy contingent on the use of domestic over imported goods.

95. It may also be helpful to note that Boeing would not lose its eligibility for the 0.2904 percent B&O tax rate on other unrelated commercial airplane manufacturing activity (or other activities subject to the B&O tax). No other taxpayers would lose eligibility for the 0.2904 percent B&O tax rate on their otherwise eligible commercial airplane or airplane component activities that are subject to the B&O tax. Neither Boeing nor any other taxpayer would lose eligibility for any of the other six tax incentives challenged by the EU, including their applicability from 2025 – 2040.

Question 40 (United States)

Under the First Siting Provision and the Second Siting Provision, both separately and in combination, would Boeing remain eligible for the tax incentives if, in addition to manufacturing aircraft, fuselages, and wings itself, it also purchased fuselages and wings (assuming for argument's sake that it were possible to do so) from another manufacturer sited in the State of Washington?

96. As alluded to in the Panel's question, and as noted elsewhere, it is not possible for Boeing to purchase completed 777X fuselages and wings. However, assuming *arguendo* that this was not the case, the wording of the question – in particular, the focus on Boeing rather than all taxpayers, and on Boeing "remain{ing} eligible" rather than becoming eligible – assumes that Boeing already fulfilled the First Siting Provision. Once that provision is fulfilled, it contains no legal mechanism for reversing course or otherwise affecting the tax treatment provided for in ESSB 5952. Therefore, assuming *arguendo* that Boeing could purchase completed 777X fuselages and wings, the First Siting Provision still would have no relevance to a decision by Boeing to make such purchases.

97. Continuing with this same *arguendo* assumption, to determine whether the Second Siting Provision was triggered, DOR would have to evaluate whether Boeing had sited any wing assembly or final assembly outside Washington. The question implies that no such siting outside Washington would have taken place. Therefore, DOR likely would not determine that the Second Siting Provision had been triggered. This is no different than if Boeing cancelled the 777X program altogether. In short, unless DOR determines that 777X final assembly or wing assembly has been sited outside Washington, the Second Siting Provision is not triggered.

Question 41 (European Union/United States)

What are the implications, if any, of the different coverage of goods, and application to tax incentives, of the First Siting Provision and the Second Siting Provision?

98. As an initial matter, the United States notes that the First and Second Siting Provisions do not cover goods. Rather, they cover specific manufacturing activities. In particular, the First Siting Provision addresses a decision about the siting of a program in which a commercial airplane, including its fuselages and wings, will "commence manufacture . . . within Washington state." In addition, the Second Siting Provision addresses a situation in which DOR "makes a determination that any final assembly or wing assembly" of the commercial airplane that is the basis of the First Siting Provision "has been sited outside the state of Washington." The operative language in these provisions is "commence manufacture" and "final assembly or wing assembly" – *i.e.*, phrases describing certain types of manufacturing activity, rather than the use of particular goods.

99. The First and Second Siting Provisions have different coverage in that the First Siting Provision only addresses a DOR determination regarding a decision to commence manufacture of commercial airplanes, including their fuselages and wings, in Washington. In other words, the First Siting Provision pertains only to the decision to begin manufacturing activities related to a commercial airplane manufacturing program. By contrast, the Second Siting Provision addresses future decisions related to the siting of wing assembly or final assembly. Thus, the temporal scope of the Second Siting Provision is broader than that of the First Siting Provision. As explained below in response to Question 42, the addition of a second final assembly facility outside Washington would trigger the Second Siting Provision. By contrast, the First Siting Provision has no legal mechanism for altering any tax treatment after its initial fulfillment in 2013 causing ESSB 5952 to take effect.

100. With respect to the application to tax incentives, the First and Second Siting Provisions differ in that the First Siting Provision pertains to all the challenged measures, whereas the Second Siting Provision pertains only to the 0.2904 percent B&O tax rate for the manufacturing or sale of commercial airplanes that are the basis of the siting decision covered by the First Siting Provision. Thus, under the Second Siting Provision, the 0.2904 percent B&O tax rate will not apply to the manufacturing or sale of 777Xs if DOR determines any final assembly or wing assembly of the 777X has been sited outside of Washington.[117]

101. However, the Second Siting Provision has no effect on the eligibility of Boeing or other taxpayers for any of the six challenged measures other than the 0.2904 percent B&O tax rate. It has no effect on the eligibility of Boeing or other taxpayers for the 0.2904 B&O tax rate on manufacturing or sales of commercial airplanes other than the 777X, components thereof, or tooling for those airplanes or airplane components. In fact, the Second Siting Provision can have

[117] RCW § 82.04.260(11)(e)(ii) (Exhibit EU-22).

no effect on the eligibility of taxpayers other than Boeing for any of the challenged measures, including the 0.2904 B&O tax rate on other commercial airplanes and components thereof.

Question 42 (United States)

The Second Siting Provision refers to the possibility that wing assembly is in the future sited outside the State of Washington. How is this possibility compatible with the United States' argument that wings cannot be assembled separately, but only as part of the final assembly process of the aircraft?

102. Such a possibility is entirely consistent with the U.S. argument. First, though, the United States would like to clarify that its argument is not that, as a general matter, it is impossible to assemble any aircraft wings separate from the final assembly of any aircraft. Rather, the U.S. argument in this respect is that the 777X's wings are only completed as part of the output of the process of producing the aircraft itself – *i.e.*, the 777X wings never exist as separate and identifiable goods that are then used to make an aircraft.

103. That said, the Second Siting Provision would apply to a situation in which Boeing undertook to site a second 777X production facility in another U.S. state, effectively duplicating the activities now sited in Washington (*e.g.*, to increase 777X production in response to increased demand). In such a scenario, the 777X production process would remain unchanged, and it would remain the case that the 777X wings never exist as separate and identifiable goods that are then used to make an aircraft. This is essentially what took place with the production of the 787, where a final assembly facility was first sited in Washington, and then an additional final assembly facility was sited in South Carolina.

Question 44 (European Union/United States)

Please clarify the meaning of the term "use" in Article 3.1(b) of the SCM Agreement, including by reference to relevant context in the covered agreements (e.g. footnote 29, and paragraphs (d) and (h) of Annex I of the SCM Agreement; paragraph 1(a) of the Annex to the TRIMs Agreement; and paragraph 2 of the Annex to the Agreement on Trade in Civil Aircraft), as well as prior panel and Appellate Body reports.

104. The term "use" refers to either the act of using an input to produce a downstream good, or the use of a finished good by the end-user. Boeing does not use fuselages or wings for the 777X in either sense of the term "use."

105. The OED defines the term "use" as "{t}he act of putting something to work, or employing or applying a thing, for any (esp. a beneficial or productive) purpose."[118] In the

[118] *The Oxford English Dictionary Online*, OED Online, Oxford University Press (Exhibit USA-54).

covered agreements, the term "use" appears in numerous instances in relation to the consumption of goods or services in an industrial process. One important source of context in this regard is Annex II of the SCM Agreement, which sets out "Guidelines on Consumption of Inputs in the Production Process[61]." Footnote 61 states: "Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil *used* in the production process and catalysts which are consumed in the course of their *use* to obtain the exported product."[119] Thus, Annex II makes clear that "use" means the consumption of goods (and in this case – as in Article 3.1(b) – not services) as inputs into a production process.

106. This interpretation is confirmed by several other provisions in the covered agreements, which also use the term "use" to refer to the consumption of goods or services in a production process. Often, the term "use" is distinguished from sale or purchase, which are ways to dispose of goods or services that do not involve consuming them. For example:

- Paragraph (d) of Annex I of the SCM Agreement identifies one example of an export subsidy as: "The provision by governments . . . of imported or domestic products or services for *use* in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for *use* in the production of goods for domestic consumption."[120]

- Paragraph (h) of Annex I of the SCM Agreement identifies another example of export subsidy as: "The exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services *used* in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services *used* in the production of like products when sold for domestic consumption . . . . This item shall be interpreted in accordance with the guidelines on consumption of *inputs* in the production process contained in Annex II."[121]

- Footnote 58 of the SCM Agreement states: "'Prior-stage' indirect taxes are those levied on goods or services *used* directly or indirectly in making the product; 'Cumulative' indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if

[119] Emphasis added.

[120] Emphasis added.

[121] Emphasis added.

the goods or services subject to tax at one stage of production are *used* in a succeeding stage of production."[122]

- Footnote 29 of the SCM Agreement refers to the development of "new, modified or improved products, processes or services whether intended for sale or *use*."[123]
- Paragraph 1(a) of the Annex to the TRIMS Agreement refers to TRIMS that require "the purchase or *use* by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production."[124]
- Paragraph 2 of the Annex to the Agreement on Trade in Civil Aircraft states: "Signatories agree that products covered by the descriptions listed below and properly classified under the Harmonized System headings and subheadings shown alongside shall be accorded duty-free or duty-exempt treatment, if such products are for *use* in civil aircraft or ground flying trainers and for incorporation therein, in the course of their manufacture, repair, maintenance, rebuilding, modification or conversion."[125]

In all these instances, the term "use" refers to consumption of goods or services as inputs into a production process. This should inform the interpretation of the term "use" in Article 3.1(b) of the SCM Agreement.

107. In this case, the challenged measures do not require that domestic fuselages or wings be put to work, employed, or applied for any purpose. In addition, the challenged measures do not require that wings and fuselages be consumed as inputs into the aircraft production process. Rather, the measures allow the recipient of the alleged subsidies to establish a commercial airplane manufacturing process, in which wings and fuselages are not inputs into the production process but rather are elements of the output. In other words, the alleged subsidies do not require Boeing to put to work, employ, or apply wings and fuselages for any purpose. Accordingly, the challenged measures do not require the *use* of wings or fuselages, let alone the use of domestic over imported fuselages or wings – and for this reason, among others, the challenged measures are consistent with Article 3.1(b).

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[122] Emphasis added.

[123] Emphasis added.

[124] Emphasis added.

[125] Emphasis added; footnote omitted.

108. The other potential "use" covered by Article 3.1(b) is the use of a finished good by an end-user. However, the fuselages and wings of 777X airplanes are never manufactured as separate, stand-alone articles, but rather only come into existence once the finished airplanes themselves come into existence. 777X fuselages and wings are not finished goods except as elements of finished airplanes. Accordingly, the 777X program does not involve "use" in this second sense of the word, either.

Question 45 (European Union/United States)

Canada submits that "Although Boeing may, in fact, 'use' fuselages and wings produced in Washington State to receive the tax subsidies, the company would be required to manufacture and/or assemble those fuselages and wings itself."[126] What is the relevance under Article 3.1(b) of the SCM Agreement that a subsidy would be contingent on a recipient incorporating a good that it is required to make itself?

109. Boeing does *not*, in fact, "use" fuselages and wings produced in Washington to receive the alleged tax subsidies.

110. Aside from that point, Canada correctly identifies an important distinction. Even the EU has acknowledged that production subsidies are distinct from import-substitution subsidies, and the former are not prohibited under Article 3.1(b). Import-substitution subsidies normally involve situations where the entities are different, because the point of the subsidy is to induce the subsidy recipient to source inputs from domestic rather than foreign suppliers. On the other hand, if the subsidy recipient is one manufacturer that produces both the purported input and the finished good, this reinforces the conclusion that a measure is a production subsidy that merely defines the scope of the production activity required to occur in the grantor's territory, not a subsidy contingent upon the use of domestic over imported goods.

111. In this case, as explained in response to Question 38, the First Siting Provision contemplates that a single manufacturer will manufacture the relevant commercial airplane, including its fuselage and wings. And in fact, DOR determined that the First Siting Provision was fulfilled based on a plan by Boeing to do just that. This is yet another indication that the challenged measures are not import-substitution subsidies. Finally, the United States notes again that the challenged measures only require the act of manufacturing in Washington, not the use of any particular domestic over imported good.

[126] *(footnote to the Panel's question) Canada's third-party written submission, para. 5.*

Question 46 (European Union/United States)

In paragraph 16 of its third-party written submission, Brazil cites to Canada – Autos and submits that "the Appellate Body indicated that a detailed examination of a particular manufacturer's ability to satisfy the requirements of a measure without using domestic goods in its production is required to determine a program's consistency with Article 3.1(b)". Please comment on whether this approach applies to a de jure analysis, a de facto analysis, or both.

112. The referenced Appellate Body guidance from *Canada – Autos* is relevant both to the *de jure* and *de facto* analyses in this dispute. It also helps to confirm that the alleged Washington subsidies are not contingent on the use of domestic over imported goods.

113. To recall, the panel in *Canada – Autos* found that the challenged measures were not *de jure* inconsistent with Article 3.1(b) because the Canadian Value Added ("CVA") requirements at issue might possibly be satisfied "without using any domestic goods whatsoever."[127] The Appellate Body found that the panel erred in its *de jure* analysis by considering the CVA requirements "*in the abstract* as opposed to the actual CVA requirements for the . . . manufacturer beneficiaries."[128] It also considered that the possibilities for complying with CVA requirements without using domestic goods depended "very much on the *level* of the applicable CVA requirements,"[129] yet the panel did not make findings as to the specific CVA requirements applicable to any manufacturers except one. For that one manufacturer, which had a specific CVA requirement of 60 percent, the panel "did *not* examine how the CVA requirements would actually operate at a level of 60 percent."[130] The Appellate Body therefore found that the panel "simply did not have a sufficient basis for its finding on the issue of 'in law' contingency."[131] Notably, the Appellate Body found it was unable to complete the *de jure* analysis – even though, as noted, the panel found that at least one manufacturer had a 60 percent CVA requirement. This implies that the manufacturer would not receive the subsidy if it used imported goods amounting to more than 40 percent of the cost of sales of its vehicles.[132]

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[127] *Canada – Autos (Panel)*, para. 10.216; *Canada – Autos (AB)*, para. 129.

[128] *Canada – Autos (AB)*, para. 128 (emphasis original).

[129] *Canada – Autos (AB)*, para. 130 (emphasis original).

[130] *Canada – Autos (AB)*, para. 131 (emphasis original).

[131] *Canada – Autos (AB)*, para. 132.

[132] *See Canada – Autos (AB)*, paras. 127, 131-133.

114. Turning to the *de facto* analysis, the Appellate Body reversed the panel's legal conclusion that Article 3.1(b) is limited to *de jure* contingency and does not permit *de facto* claims.[133] The Appellate Body then concluded it could not complete the analysis, in part because, as discussed in its review of the *de jure* claims, "the Panel's incomplete analysis of the operation of the CVA requirements leaves us with an insufficient basis on which to examine how the CVA requirements function."[134]

115. The Appellate Body's approach to Article 3.1(b) in *Canada – Autos* provides useful guidance for the Panel in two key respects.

116. First, the Appellate Body made clear that, even under a *de jure* analysis, a panel must make sufficient findings as to how the alleged contingency operates, which may require findings as to how the contingency applies to actual subsidy recipients.[135] This confirms the EU's error in asserting that the factual evidence cited by the United States is irrelevant to its *de jure* claim.

117. ESSB 5952's First and Second Siting Provisions contemplate that they would apply to one manufacturer's commercial aircraft program, which was expected to be Boeing's 777X program.[136] The EU's *de jure* claim rests on the premises that ESSB 5952's provisions expressly require the use of domestic over imported goods, and that this requirement can be established through abstract reasoning, without resorting to factual inquiry. The United States, in turn, has refuted these premises: the First and Second Siting Provisions do not explicitly state that the use of domestic goods is required, and the facts surrounding Boeing's 777X production process further disprove the EU's assertion that these provisions require the use of domestic over imported goods.

118. In this light, and consistent with the Appellate Body's guidance in *Canada – Autos*, the Panel's *de jure* analysis would be incomplete if it did not encompass the evidence cited by the United States as to how the First and Second Siting Provisions operate. Just as the *Canada – Autos* panel erred in finding no inconsistency with Article 3.1(b) where it had failed to make a thorough inquiry into the operation of the requirements at issue, it would be erroneous here to find that ESSB 5952's provisions require the use of domestic over imported goods when they state no such thing, and the facts refute such an interpretation. Moreover, considering that an

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[133] *Canada – Autos (AB)*, para. 143.

[134] *Canada – Autos (AB)*, para. 145.

[135] *Canada – Autos (AB)*, paras. 131-132.

[136] *See, e.g.*, *Washington state set to build Boeing 777X*, Alwyn Scott & Bill Rigby, Reuters (Nov. 5, 2013) (Exhibit EU-17).

examination of how the alleged contingency operates with respect to actual manufacturers may be necessary under a *de jure* analysis, it follows *a fortiori* that such an approach would be required in assessing a *de facto* claim.

119. Second, the Appellate Body confirmed in *Canada – Autos* that a finding of inconsistency under Article 3.1(b) may not rest merely on abstract speculation as to how a manufacturer could fail to comply with a contingency if it used imported goods in a single, hypothetical situation. If there is a range of "*possibilities* for compliance" with a contingency, at least one of which does not require the use of domestic over imported goods, then there is not an inconsistency with Article 3.1(b); the subsidy is not contingent upon the use of domestic over imported goods. In other words, there would be no basis for finding that "the use of domestic goods {is} a necessity and thus . . ., in practice, required as a *condition* for eligibility for" the subsidy.[137]

120. The Appellate Body illustrated this in its treatment of the one Canadian manufacturer for which the panel identified a specific CVA requirement - *i.e.,* 60 percent. Despite this finding, and despite the ease with which one could posit a scenario in which the manufacturer would fail to comply with the 60 percent requirement by using imported goods instead of domestic goods (*e.g.*, by using imported goods amounting to more than 40 percent of relevant value), the Appellate Body nonetheless found it could not complete the analysis, since there was an insufficient basis from which to conclude that the 60 percent CVA requirement necessitated the use of domestic over imported goods.

121. In this dispute, the fact that the First Siting Provision and the Second Siting Provision do not mandate a particular production process that requires using any particular intermediate goods, including fuselages or wings, demonstrates that the alleged subsidies are not contingent upon the use of domestic over imported fuselages or wings. And, in fact, Boeing does not use fuselages or wings to produce the 777X. Boeing does not have to substitute domestic over imported goods to receive the alleged subsidies, and there is no evidence that Boeing actually engages in such import-substitution. Accordingly, the challenged measures are consistent with Article 3.1(b).

122. In sum, the Appellate Body's report in *Canada – Autos* underscores the importance, for both *de jure* and *de facto* claims, of conducting a thorough analysis of how an alleged contingency actually operates. In cases such as this, the analysis must encompass an alleged contingency's application to specific manufacturers. Moreover, this analysis should carefully distinguish between what is required for compliance, and what are merely possible ways of complying. It is not enough that a manufacturer *could possibly* satisfy an alleged contingency by using domestic goods, or that a manufacturer *could possibly* fail to comply if it used imported

[137] *Canada – Autos (AB),* para. 130 (emphasis original).

goods. Rather, the measure must require the use of domestic over imported goods. Where, as here, a challenged measure on its face does not necessarily require the use of domestic over imported goods, no finding of *de jure* inconsistency with Article 3.1(b) is permissible. And where, as here, the facts show that a manufacturer can, and has, satisfied the alleged contingency without using the putative domestic goods at issue, both *de jure* and *de facto* claims fail.