U.S. Business Confidential Information (BCI) Redacted

United States – Conditional Tax Incentives for Large Civil Aircraft

(DS487)

OPENING ORAL STATEMENT OF THE UNITED STATES
AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

April 5, 2016

U.S. Business Confidential Information (BCI) Redacted

Introduction

1. Mr. Chairman, members of the Panel. Thank you for the opportunity to speak to you again today. As we did during the first meeting, the United States will try to be brief to allow as much time as possible to answer any questions you may have.

2. You will recall that during the first meeting, the United States described how the EU is trying to fit a square peg into a round hole. This is just as true today as it was then.

3. Even if the challenged measures were found to be subsidies, they would be production subsidies, which even the EU acknowledges are not, in and of themselves, prohibited. They are simply not contingent on the use of domestic over imported goods. The EU attempts to stretch the scope of Article 3.1(b) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and reads meaning into ESSB 5952 that simply is not there.

4. The United States will focus in this statement on the following five issues.

5. First, the EU's interpretation of the terms in Article 3.1(b) of the SCM Agreement would effectively turn production subsidies into prohibited import substitution subsidies. This result demonstrates that its interpretation of Article 3.1(b) is erroneous.

6. Second, the EU is wrong in asserting that it is a "fact" that airplanes "use" fuselages as "goods" within the meaning of Article 3.1(b). If the EU means that airplanes "use" fuselages and wings as "goods" by virtue of the fact that airplanes have fuselages and wings, this is a misinterpretation of the term "use." If, on the other hand, the EU means that, as a factual matter, a manufacturer must first produce fuselages and wings as separate goods and then use them as inputs to produce the finished airplanes, this is incorrect. As the 777X program demonstrates, a manufacturer need not assemble completed fuselages and wings prior to assembling the finished airplane.

7. Third, the EU misinterprets ESSB 5952. The two Siting Conditions themselves do not require any production process in particular, nor do they address the domestic or imported character of inputs. The definition of "significant commercial airplane manufacturing program" – like any definition – simply provides greater clarity and concreteness. It does not, as the EU suggests, communicate a separate substantive requirement to use domestic over imported inputs. Furthermore, the intent of ESSB 5952 is clear – to ensure the siting of a manufacturing program that is important to the state's workforce. The EU's efforts to characterize it as having the "cardinal purpose" of import substitution is implausible, particularly given the significant use of imports in the 777X, and the ability of taxpayers other than Boeing to receive the tax treatment at issue without meeting any conditions, meaning they could not possibly be required to use domestic over imported goods.

8. Fourth, the EU is incorrect that the factual circumstances of the 777X program are irrelevant. As the United States has shown, they have a proper, and even necessary, role in

evaluating *de jure* contingency, and are obviously critical to an evaluation of *de facto* contingency.

9. And fifth, and finally, we will briefly explain today that the EU's financial contribution arguments undermine its benefit and contingency arguments.

1. The EU's Interpretation of Article 3.1(b) of the SCM Agreement Would Effectively Turn Production Subsidies into Prohibited Import Substitution Subsidies.

10. The EU professes full agreement with the United States and the third parties that "production subsidies, in and of themselves, do not violate Article 3.1(b)."[1] However, the EU's expansive interpretation of the terms in Article 3.1(b) would effectively turn production subsidies into prohibited import substitution subsidies. This is because the EU's approach precludes the eligibility to receive a production subsidy from turning on the extent or significance of the production activity performed.

11. Most modern production processes include multiple production steps, and Members granting production subsidies, as they are permitted to do, will want to ensure that recipients actually engage in the production the authorities seek to promote. They will also want to be certain that the production activity is substantive, and not a trivial operation that adds nothing to the economy. Whether clarified explicitly in the legislation or left implied, Members typically would not be interested in subsidizing a producer that completes only a single, perhaps minimal, production step. But the EU's interpretation of Article 3.1(b) would preclude a Member from requiring any production activity more substantial than the final production step.

12. A review of the EU's interpretation of the terms in Article 3.1(b) will expose this mismatch between the EU's nominal recognition that the SCM Agreement does not prohibit production subsidies as such, and the effect of its legal arguments. The EU has argued that "goods," as used in Article 3.1(b) and modified by "imported," should not be limited to tradable items or otherwise cabined.[2] It has also argued for an expansive understanding of the word "use" and has stated that it is irrelevant if the manufacturer of the finished good also produced the intermediate good allegedly used.[3] Taken together, these positions suggest every object, article, or structure that exists throughout any manufacturing process is a "good" that is "used" within the meaning of Article 3.1(b) when the manufacturer takes the next production step – regardless of whether the result of that next step is an article that is unfinished, intermediate, or untradeable.

13. Furthermore, the EU has abstained from any detailed analysis of what would make a good "domestic" for purposes of Article 3.1(b). Rather, it appears that the EU assumes that a "good" is "domestic," at least for purposes of Article 3.1(b), if an article was modified in any way in the grantor's territory, irrespective of whether it was produced from foreign parts or how much value is attributable to the production or assembly step. Therefore, in any production

[1] EU SWS, para. 59.
[2] EU FOS, para. 47.
[3] EU RPQ 45, para. 120.

process that involves more than one step, the first step will result in a "domestic good," and the second step necessarily will involve the use of that domestic good. Accordingly, under the EU's theory, a requirement that more than one production step be performed in the grantor's territory would make a subsidy contingent on the use of a domestic over an imported good.

14. For example, suppose a manufacturer produces a product – call it a "screwbox" – that consists of a box with eight screws, and the manufacturer's process of producing a screwbox is to screw in one screw at a time. After the manufacturer screwed in the first screw, it would have a "box with one screw," which the EU would consider a "good" even though no market exists for "boxes with one screw." And it would be a domestic good by virtue of the fact that the "box with one screw" was produced in the grantor's territory, even if both the screwless box and the screw were imported. Under the EU's theory, the manufacturer would then "use" that domestic "box with one screw" to notionally produce a "box with two screws." In screwing in the third screw, the manufacturer would, according to the EU, "use" the domestic "box with two screws" to produce a "box with three screws," and so on until it would produce the finished box by screwing in the last screw.

15. Thus, under the EU's theory, if a Member sought to subsidize screwbox production, it could not require the producer to do more than screw in the eighth and final screw. If the Member required that the producer screw in at least the last two screws, the measure would breach Article 3.1(b) of the SCM Agreement on the grounds that it required the use of domestic "boxes with seven screws" over imported "boxes with seven screws." Put differently, as the EU sometimes frames it, the ineligibility of the producer that only performs the last assembly step, coupled with the eligibility of the producer that performs more significant assembly operations, creates a penalty/reward structure that amounts to a prohibited subsidy.

16. Consequently, under the EU interpretation, Members are faced with a choice: either refrain from providing any production subsidies, or provide production subsidies with effectively meaningless conditionality that could be satisfied by "producers" that complete only one minor production step. Such a restrictive approach cannot be reconciled with the apparent consensus that production subsidies, in and of themselves, are not prohibited, as underscored by the latitude to provide "subsidies exclusively to domestic producers" that is explicitly set forth in Article III:8(b) of the GATT.

17. Furthermore, under the EU's flawed theory, if a Member cannot require any production activity beyond the final production step, a measure that explicitly clarified the requisite extent or significance of production activity as being something more than the last production step – or even an implicit requirement to that effect – would, by necessary implication, breach Article 3.1(b).

2. It is Not a Fact, as the EU Suggests, that Production of Airplanes Necessarily Requires the Use of Fuselages and Wings as Goods within the Meaning of Article 3.1(b) of the SCM Agreement.

18. The EU's case is based on its assertion that the alleged subsidies are contingent on the use of domestic over imported fuselages and wings. It is important to reiterate that under the applicable legal standard, the EU must show that ESSB 5952 requires the "use" of domestic fuselages and wings. It is not enough to show that one possibility exists in which the conditions could be fulfilled through the use of domestic goods. If there is a means of fulfilling the conditions in ESSB 5952 that does not use domestic fuselages and wings, then the EU's claims fail. This is consistent with the finding of the Appellate Body in *Canada – Autos* that, if the use of domestic over imported goods is "only one possible means (means which might not, in fact, be utilized)" to satisfy the conditions for receiving an alleged subsidy, then there is no contingency on the use of domestic over imported goods.[4]

19. The EU states that "it is a fact that aircraft 'use' wings and fuselages: without those inputs, the aircraft could not be produced."[5] This is either a misinterpretation of the terms "use" and "goods," a factual inaccuracy, or both. On the one hand, this statement could be taken to mean that aircraft use fuselages and wings – even if those elements are not inputs in the production of the finished airplane – simply by virtue of the fact that airplanes have fuselages and wings. The EU appeared to take this position at the first Panel meeting. On the other hand, the word "inputs" in the EU's statement (*i.e.*, "without those inputs, the aircraft could not be produced") suggests an argument that, as a factual matter, airplanes cannot be built without first producing fuselages and wings and using them as inputs. The former misapplies the terms "use" and "goods" in Article 3.1(b), and the latter is incorrect as a factual matter.

20. If the EU is suggesting that fuselages and wings are "used" as "goods" within the meaning of Article 3.1(b) merely because airplanes have fuselages and wings, the EU is mistaken. A manufacturer does not "use" every element of a finished good that one can point to and describe with a name. "Use" in the context of a manufacturing process refers to what goes into the process, and not the features of the product at the end of the process. Those are elements of the output, and not "goods" that are "used" themselves, but elements of a distinct finished good. The United States does not contend, as the EU implies, that use only occurs when an input "disappears" and is no longer identifiable in the output.[6] But, whether identifiable in the finished good or not, to be "used" in the sense of Article 3.1(b), a domestic good must be an input into the production process (or an instrumentality in that process, *e.g.*, the machinery or equipment used to make the finished good). To take an example, one can quite easily point to a finished building's façade, but the builder does not "use" the façade as a good within the meaning of Article 3.1(b). Likewise, just because one can point to a finished airplane's fuselage and wings

[4] *Canada – Autos (AB)*, paras. 130-131.
[5] EU RPQ 18, para. 26.
[6] EU SWS, para. 56.

does not mean that the manufacturer "used" the fuselage and wings as goods within the meaning of Article 3.1(b).

21. If the EU is suggesting that, as a factual matter, airplanes cannot be produced without first producing fuselages and wings as separate goods and then using them as inputs, this is inaccurate. The fuselage and wings of an airplane effectively make up the airframe and, as such, are functionally important elements of an airplane, but there is no definitional or physical reason why they would have to be produced as separate goods that are used as inputs. It is certainly feasible for an airplane to be assembled without first assembling a completed fuselage and wings as separate goods. Rather, fuselages and wings can be – and in the case of the 777X will be – completed only during and as part of the final assembly of the finished airplane.

22. Therefore, the EU is wrong when it suggests that "it is a fact that aircraft use wings and fuselages" within the meaning of Article 3.1(b).

3. The Definition of "Significant Commercial Airplane Manufacturing Program" in ESSB 5952 is About Clarifying the Meaning of that Term, Not Introducing a Substantive Requirement to Use Domestic Over Imported Goods.

23. As just discussed, to the extent fuselages and wings are elements of a finished airplane but are not inputs into the production of the airplane, they are not "goods" that are "used" by Boeing within the meaning of Article 3.1(b). Therefore, the EU must show, at minimum, that the Siting Provisions require that fuselages and wings be produced as goods that are then used as inputs in the production of finished airplanes. If the Siting Provisions do not require this, then the conditions can be fulfilled without fuselages or wings being used as goods within the meaning of Article 3.1(b), and the EU's claims fail. (This is without respect to other requirements such as "domestic" and "over imported.")

24. The EU has not made such a showing and cannot do so because ESSB 5952 does *not* require fuselages and wings to be produced as goods that are then used as inputs in the production of the finished airplane. The EU relies on three arguments to show otherwise, but all are wrong.

25. The EU first argues that the legislation "expressly states" that the recipient of the ESSB 5952 tax treatment must use domestic over imported fuselages and wings. However, in actuality it simply identifies the production activity that constitutes a "significant commercial airplane manufacturing program," and says nothing about domestic or imported goods.

26. The EU also argues that the United States seeks to read the statute as if the words "wings" and "fuselages" did not exist, and thereby renders critical parts of ESSB 5952 meaningless and extraneous. This is not the case. As the United States has explained, the words "wings" and "fuselages" appear in a definition that serves the meaningful function of specifying the extent or significance of production necessary for an operation to qualify as a "significant commercial airplane manufacturing program."

27. Finally, the EU argues that statements from state officials reveal that the "cardinal purpose" of ESSB 5952 is to ensure the use of domestic over imported goods. But the statements say no such thing, and the nature and operation of the legislation belies any intent to achieve import substitution.

28. The EU continues to allege that ESSB 5952 "expressly states that the subsidies at hand are contingent on the use of domestically manufactured 'products' (*i.e.*, fuselages and wings) on the subsidized aircraft, and expressly creates multi-billion dollar penalties if the 'products' in question are instead imported."[7] But repeating this assertion does not make it true.

29. It is useful first to look at the conditions themselves. The First Siting Provision states that ESSB 5952 "takes effect contingent upon the siting of a significant commercial airplane manufacturing program in the state of Washington. If a significant commercial airplane manufacturing program is not sited in the state of Washington by June 30, 2017, {ESSB 5952} does not take effect." It does not expressly state that any production process with particular sequencing must be implemented or that domestic inputs must be used over imported inputs.

30. The Second Siting Provision states that the 0.2904 percent B&O tax rate does not apply to the commercial airplanes of the program that fulfilled the First Siting Provision if DOR "makes a determination that any final assembly or wing assembly of {that} commercial airplane {} has been sited outside the state of Washington." Again, there is no express requirement that fuselages or wings be produced as goods and used as inputs or that domestic over imported goods be used.

31. Notably, "wing assembly" and "final assembly" are types of production activity, not types of inputs, and there is no requirement that they be sequential. As a factual matter, with respect to the 777X, the wing is not assembled into a completed wing until and as part of final assembly of the finished airplane, and there is no point at which a completed wing exists separate and apart from other elements of the airplane.

32. The EU seeks to buttress its "expressly states" argument by pointing out that the word "products" appears in the definition of "significant commercial airplane manufacturing program." But this does not, as the EU argues, represent a legislative finding that the words that follow are "products" for the purposes of applying the covered agreements. As the United States has explained previously, the term "products" is not a term of art with a specialized meaning, nor is it meant to communicate a requirement regarding the sequencing or other details of a production process.

33. "Products" appears in the chapeau of the definition, which states that "significant commercial airplane manufacturing program" means "an airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date." The definition then presents two clauses: (i) the new model, or any version or variant of an existing model, of a commercial

[7] EU SWS, para. 3.

airplane; and (ii) fuselages and wings of a new model, or any version or variant of an existing model, of a commercial airplane. "Products" does not signify a legal (or factual) conclusion. It simply acts as a textual device linking the chapeau to the list that follows in order to describe the production operations that would constitute a "significant commercial airplane manufacturing program." The bill could have used "items," "articles," or the noun "manufactures" instead of "products" without losing any meaning. It would be erroneous to interpret the use of this generic modifier in the chapeau of a definition as creating a substantive obligation to produce fuselages and wings as separate inputs that are then used in producing the finished airplane.

34. The EU also asserts that its interpretation is necessary to give meaning to the words "fuselages" and "wings" as they appear in the definition of "significant commercial manufacturing program." It contends that the U.S. description of the operation of ESSB 5952, by contrast, would render those words meaningless and superfluous.[8] This is nonsense. The words in question (*i.e.*, "fuselages" and "wings") appear within the definition of a defined term (*i.e.*, "significant commercial airplane manufacturing program"). They do what the words of any definition do – add clarity and concreteness to a term used elsewhere in the measure.

35. In this case, the terms "siting" and "significant commercial airplane manufacturing program" form the condition that must be met for the legislation to take effect. In isolation, these terms would leave uncertainty. Washington had an obvious interest in ensuring textual clarity, including to avoid needless litigation and to ensure that the challenged tax treatment is not activated by the siting of trivial production activity. Similarly, it had an interest in ensuring that the "significant commercial airplane manufacturing program" in question was indeed "significant." Washington accomplished these goals by defining the terms "siting" and "significant commercial airplane manufacturing decision." And, it is logical that it clarified the meaning and ensured the desired level of significance for this commercial airplane manufacturing program in terms of the principal elements of the structural airframe, the fuselage and wings.

36. The EU also seeks to support its interpretation of ESSB 5952 by asserting that the "cardinal purpose" of ESSB 5952 was "making the importation of wings and fuselages of the 777X prohibitively expensive so as to ensure the use of domestic wings and fuselages over imported wings and fuselages."[9] But a consideration of the structure and operation of ESSB 5952 reveals the folly of the EU's assertions as to the "cardinal purpose," as well as the further assertion that ESSB 5952 "is a classic example of a local content contingency."[10]

37. The EU's story is that Washington used ESSB 5952 to induce Boeing to use domestic, made-in-Washington goods in the production of the 777X. However, Washington decided not to require such use or otherwise define minimum local content (which, by the way, is the actual classic example of a local content contingency). Furthermore, under the EU's theory, Washington chose to effect the local content requirement not through the conditions themselves,

[8] EU FOS, para. 57; EU SWS, para. 72.
[9] EU SWS, paras. 75, 93-94.
[10] EU SWS, paras. 71, 94.

but rather in the definitions section. According to the EU, Washington chose to focus on elements of an airplane that result from **[BCI]**, but ignore Boeing's sourcing of all of the various parts it purchases, a significant portion of which are actually to be imported and a significant portion of which are brought in from other U.S. states.[11] And Washington also chose to ignore whether the goods used by all taxpayers other than Boeing were domestic or imported, while nonetheless providing the identical tax treatment made available to Boeing.

38. So, in the EU's telling, Washington pursued its supposed goal of import substitution by adopting a scheme that gave Boeing and other companies free rein to use imports in their production processes. In other words, their grand plan was to adopt a poorly designed set of complex legal conditions that had no effect on the significant level of imported and out-of-state content in the 777X or the use of imported or out-of-state goods by taxpayers other than Boeing. And Washington exhibited such ineptitude despite that this was one of the most significant industrial projects in the state's history – one that was a significant concern for high-ranking state officials, and which would affect the livelihoods of thousands of Washington workers.

39. The EU's view is implausible. The text of ESSB 5952, as well as the surrounding facts, make it very clear that the point of ESSB 5952 was to ensure that a significant manufacturing program was sited in the state, in order to maintain and grow Washington's aerospace industry workforce.[12] That is one thing the legislature *did* state "expressly," noting in ESSB 5952 § 1(2) that "the legislature's specific public policy objective is to maintain and grow Washington's aerospace industry workforce."[13] Rather than risk uncertainty about what a "significant commercial airplane manufacturing program" entails, Washington chose to provide greater clarity by defining the term. And it did just that; it did not have as its "cardinal purpose," nor did it actually require, the use of domestic over imported goods.[14]

40. The EU raises the specter of circumvention in an attempt to create doubt about what consequences might follow if the U.S. views are accepted. However, in truth, there is no reason to think that allowing Members to define what constitutes sufficiently significant "production" of a good would give them free rein to disguise import substitution subsidies. Nothing in the U.S. position prevents Members from establishing that contingency exists *de facto*, even if the text of a measure is drafted in a manner intended to circumvent Article 3.1(b)'s prohibition of making subsidies contingent on the use of domestic over imported goods. So the EU's arguments regarding circumvention are an unnecessary distraction, which should not prevent the application of Article 3.1(b) in this case in accordance with customary rules of interpretation.

---

[11] Boeing Expert Statement, paras. 53, 57 (Exhibit USA-1(BCI)); Sources of Content for the 777X (Exhibit USA-30(BCI)).
[12] ESSB 5952 § 1 (Exhibit EU-3).
[13] ESSB 5952 § 1 (Exhibit EU-3).
[14] EU SWS, para. 94 ("{T}he cardinal purpose for which SSB {sic} 5952 was enacted {was} making the importation of wings and fuselages of the 777X prohibitively expensive so as to ensure the use of domestic wings and fuselages over imported wings and fuselages.").

41. We close this segment of our presentation by recalling that in *United States – Large Civil Aircraft*, the panel observed,

> in our view, the 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, in comparison to the paucity of evidence suggesting a tie between the grant of the subsidy and anticipated exportation, reinforces our conclusion that the European Communities has not made its case under Article 3.1(a).

42. The evidence is equally clear and convincing here that Washington sought and structured the relevant conditions to target assembly to maintain or expand employment, and an identical paucity of evidence exists to support the EU's implausible suggestion that Washington sought to and did require import substitution. Again, the EU is simply reading new text or additional meaning into ESSB 5952 – an additional meaning that, as we have explained, is simply not there.

4. The Factual Circumstances of the 777X Program – Which Were Determined to Fulfill the First Siting Provision and Have Not Been Determined to Trigger the Second Siting Provision – Are Not, as the EU Suggests, "Irrelevant and Extraneous," But Rather Are Highly Probative of What Those Conditions Require.

43. The EU asserts that the details of the 777X production process – including the manner in which the wings and fuselages are produced – are "entirely irrelevant and extraneous to the claim of *de jure* contingency."[15] However, this is incorrect. As the United States has explained, even for a *de jure* claim, the EU must establish what are the domestic "goods" that are to be used over imported "goods." The details of the production process are relevant to whether wings and fuselages are goods that are used for purposes of the EU's claim. But the EU has failed to establish this.

44. Moreover, the EU acknowledges that factual evidence can be relevant to a *de jure* claim to the extent it is relevant to the text of the measure.[16] This is precisely the case here.

45. As I discussed a moment ago, the EU must show that ESSB 5952 requires that fuselages and wings be produced as separate (domestic) goods and used as inputs in producing the finished airplane. Otherwise, the conditions can be fulfilled without the use of fuselages and wings as goods, whether domestic or imported, and the EU's claim fails.

46. The 777X manufacturing program is the only one considered by DOR and determined to fulfill the First Siting Provision. It also has, since that determination, not been determined to trigger the Second Siting Provision. Therefore, it certainly is the most reliable evidence of the proper interpretation of ESSB 5952.

[15] EU SWS, para. 97.
[16] *See* EU RPQ 18, para. 24.

47. And the 777X program will not include the production of completed fuselages and wings as separate goods that will then be used to produce the finished airplane. We direct the Panel's attention to the image we have distributed, Exhibit USA-61(BCI), which shows the many articles that enter the 777X final assembly process. None of these is a complete fuselage or wing; the completed fuselage and wings will only come into existence as elements of the airplane itself. Because fuselages or wings – whether domestic or imported goods – are not produced as separate "goods" and then "used" as inputs in producing the finished 777X, and the program nevertheless was determined to satisfy the First Siting Provision and has not been found to trigger the Second Siting Provision, those Siting Provisions necessarily do not require the "use" of fuselages and wings as "goods" within the meaning of Article 3.1(b), much less require the use of *domestic* over imported fuselages and wings.

48. Thus, this factual evidence is not just relevant to the EU's *de jure* claim, it proves that the EU cannot establish that the alleged subsidies are contingent on the use of domestic over imported fuselages and wings. Where, as here, factual evidence refutes the complaining Member's *de jure* arguments, the proper course is not to ignore the factual evidence, but to reject the *de jure* claim.

5. The EU's Current Financial Contribution Arguments Further Undermine its Benefit and Contingency Arguments.

49. Finally, the United States would like to briefly address the fact that the EU's latest financial contribution arguments further undermine its benefit and contingency arguments.

50. In this respect, the EU's arguments regarding financial contribution and benefit have evolved considerably over the course of this dispute. At first, the EU argued that "the various tax incentives relevant to the 'financial contribution' and 'benefit' analyses ha{d} not changed relative to the measures considered in *US – Large Civil Aircraft*."[17] The EU did not even specify what it believed were the relevant normative benchmarks for each of the challenged measures. However, the EU has gradually revealed that its subsidy arguments are in fact quite different than those considered by the panel in *US – Large Civil Aircraft*.

51. In particular, the EU alleges in the instant case that the measures at issue confer financial contributions in the form of "entitlement{s} to a tax reduction," which the EU is challenging "as such," [18] "in the abstract."[19] As the EU acknowledges, the panel in *US – Large Civil Aircraft* was clear that it was addressing allegations about receipt by Boeing in particular, not receipt of subsidies in the abstract.[20] Furthermore, the panel in *US – Large Civil Aircraft* addressed revenue foregone in the past, and the panel was clear that it was not resolving whether projected foregoing of revenue in the distant future – what the EU now characterizes as entitlements –

[17] EU FWS, para. 54; *see also, e.g.*, EU FOS, para. 21.
[18] EU RPQ 6, para. 7; EU SWS, para. 12.
[19] EU RPQ 23, para. 45; EU SWS, para. 34.
[20] *See* EU RPQ 6, para. 7.

could constitute a financial contribution under Article 1.[21] In addition, the EU has clarified that it is challenging all of the measures at issue in this dispute from November 2013 to June 2040[22] – even though, prior to the adoption of ESSB 5952, the tax treatment provided for in the alleged subsidies would already have been available until July 1, 2024. The panel report in *US – Large Civil Aircraft* provides no relief for this flaw, as that dispute was not focused on the *extension* of tax treatment.

52. Not only do these clarifications reinforce the point that the EU's reliance on *US – Large Civil Aircraft* was misplaced, but they also further undermine the EU's claims in this proceeding in two respects.

53. First, the EU's entitlement theory of financial contribution highlights the insufficiency of the EU's cursory benefit argument. The EU has argued that it has discharged its burden merely by stating that revenue (to be) forgone is a gift, and the gift would be unavailable in the market. As an initial matter, under Article 1 of the SCM Agreement, a subsidy is deemed to exist when a financial contribution occurs and "a benefit *is* thereby conferred."[23] The present tense verb "is" indicates that the benefit must actually exist as of the present time – and cannot merely be a speculative possibility at some point in the future. As the Appellate Body in *Canada – Aircraft* stated:

> A "benefit" does not exist in the abstract, but must be received and enjoyed by a beneficiary or recipient. . . . The use of the past participle "conferred" in the passive form, in conjunction with the word "thereby", naturally calls for an inquiry into *what was conferred on the recipient*.[24]

Thus, to assess the existence of a benefit, a panel should ask "what *was* conferred on the recipient," not what *might* be conferred. This is also confirmed by Part V of the SCM Agreement, which provides relevant context for Article 1.[25] For example, Article 19.5 states that the levying of countervailing duties should not "exce{ed} the amount of the subsidy found to exist{}." Thus, countervailing duties must countervail subsidies that exist as of the present, rather than subsidies that might perhaps exist at some point in the future. Otherwise, the limitations on the level of countervailing duties would be meaningless.

54. But this also shows why the EU's cursory benefit argument is insufficient. It is possible that an abstract entitlement exists, but no one uses it. As the EU itself states: "it is not necessary for any . . . actual foregoing to take place in order to qualify as a financial contribution."[26] But if this were the case, there would be no benefit. In other words, this would be one of the situations in which the existence of a benefit does not readily follow from a finding of revenue forgone that was otherwise due. Moreover, while the EU might argue that the supposed entitlements have in

[21] *US – Large Civil Aircraft (Panel)*, para. 7.154.
[22] EU SWS, para. 18.
[23] Emphasis added.
[24] *Canada – Aircraft (AB)*, para. 154 (emphasis original).
[25] *See EC – Large Civil Aircraft (AB)*, para. 833.
[26] EU RPQ 21, para. 33.

fact actually been used by particular taxpayers, such evidence is seemingly off-limits for the EU's avowedly "as such" and "abstract" arguments. Accordingly, as a result of the particular way that the EU has opted to frame its financial contribution arguments, it clearly has not met its burden to establish the existence of a benefit.

55. Second, the EU's current financial contribution argument undermines its contingency arguments – *i.e.*, that the First and Second Siting Provisions, "whether considered individually or together," supposedly establish a contingency on the use of domestic over imported goods.[27] In *US – Upland Cotton*, the Appellate Body found that the term "contingent" means that the alleged subsidies are "dependent for their existence" on the fulfillment of the relevant contingency.[28] Thus, in the context of Article 3.1(b) of the SCM Agreement, a relation of contingency exists only where the "use of domestic over imported goods" is required to receive the alleged subsidy.

56. However, in this case, the tax treatment provided for by the alleged subsidies would still have been available until July 1, 2024, even if the supposed contingencies had never been met. This is because, as already noted, July 1, 2024, was the expiration date for the relevant tax treatment prior to the adoption of ESSB 5952. Accordingly, even on the EU's own theory, the alleged subsidies are not "dependent for their existence" on the use of domestic over imported goods. On the contrary, the relevant tax rate, credits, and exemptions would have been available even if the 777X had been sited outside Washington, or had never been sited anywhere at all.

Conclusion

57. Consistent with the Panel's request, we have avoided repeating at length all of the issues raised in our previous submissions. However, the United States would be pleased to answer any questions the Panel may have about any aspect of that submission, the issues just addressed in this statement, or any other issues related to the EU's claims.

58. Thank you for your time and attention.

[27] *See* EU FWS, para. 73.
[28] *US – Upland Cotton (AB)*, para. 572.