# *United States – Conditional Tax Incentives for Large Civil Aircraft*

# (DS487)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 18, 2016

**TABLE OF CONTENTS**

**TABLE OF REPORTS**

| Short Title | Full Case Title and Citation |
|---|---|
| *Canada – Aircraft (AB)* | Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377 |
| *China – Autos (AB)* | Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS340/AB/R. |
| *Canada – Autos (AB)* | Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000 |
| *Colombia – Ports of Entry (Panel)* | Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, 2535 |
| *EC – Large Civil Aircraft (AB)* | Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011 |
| *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 |
| *Japan – Alcoholic Beverages II (AB)* | Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 |
| *Korea – Alcoholic Beverages (Panel)* | Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44 |
| *US – 1916 Act (AB)* | Appellate Body Report, *United States – Anti Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793 |
| *US – Corrosion Resistant Steel Sunset Review* | Appellate Body Report, *United States – Sunset Review of Anti Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3 |
| *US – FSC (AB)* | Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000 |
| *US – Poultry (China) (Panel)* | Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000:VIII, 3769 |

| Short Title | Full Case Title and Citation |
|---|---|
| *US – Upland Cotton (AB)* | Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3 |
| *US – Upland Cotton (P)* | Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299 |

**TABLE OF ABBREVIATIONS AND ACRONYMS**

| ACRONYM/SHORT FORM | FULL PHRASE |
|---|---|
| BCI/HSBI Procedures | Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information |
| B&O | Business & Occupation |
| CFRP | Carbon Fiber Reinforced Plastic |
| DOR | Washington State Department of Revenue |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| ESSB 5952 | Washington State Engrossed Substitute Senate Bill 5952 |
| EU FOS | Oral Statement of the European Union (24 Feb. 2016) |
| EU FWS | First Written Submission of the European Union (Dec. 9, 2015) |
| EU RPQ ## | Responses by the European Union to Questions following the Panel's First Substantive Meeting with the Parties, response to Question XX (9 Mar. 2016) |
| GATT 1994 | General Agreement on Tariffs and Trade 1994 |
| HB 2294 | Washington State House Bill 2294 |
| HB 2466 | Washington State House Bill 2466 |
| IAM | International Association of Machinists |
| LCA | Large Civil Aircraft |
| RCW | Revised Code of Washington |
| R&D | Research and development |
| RPF | Request for Proposal |
| SCM Agreement | Agreement on Subsidies and Countervailing Measures |
| SSB 6828 | Washington State Substitute Senate Bill 6828 |
| US FOS | Opening Oral Statement of the United States at the First Substantive Meeting of the Panel with the Parties (Feb. 24, 2016) |
| US RPQ ## | Responses of the United States to the Panel's First Set of Questions for the Parties, response to Question ## (Mar. 9, 2016) |

## I. INTRODUCTION

1. This dispute, ultimately, will turn on the Panel's answer to a simple question: whether a measure that allows a manufacturer to receive certain tax treatment while still being able to import *all* of the parts used in the production of the product at issue, can nonetheless be considered a subsidy that is "contingent on the use of domestic over imported goods." In the U.S. view, it is obvious that it cannot. The structure, design, and actual operation of ESSB 5952 lend no support to the EU's allegations of import-substitution contingencies. Boeing's decision to site the 777X manufacturing program in Washington led to the fulfillment of the First and Second Siting Provisions,[1] even though Boeing plans to use a wide range of imported components for the 777X, including on its fuselage and wings.[2] Furthermore, even if *all* the parts used to manufacture the 777X were fabricated outside the United States, Boeing could still satisfy the two Siting Provisions.[3] Companies other than Boeing are eligible for the alleged subsidies without having to fulfill any conditions at all. Thus, if ESSB 5952 were an import-substitution policy instrument – which is not the case – it would be a demonstrable failure.

2. This latter point should come as no surprise. In reality, ESSB 5952 was designed and structured to encourage certain manufacturing activities to take place within the territory of Washington, rather than to require the use of Washington-origin goods instead of goods made elsewhere. In other words, assuming *arguendo* that the challenged measures are subsidies, ESSB 5952 establishes the conditions for a domestic *production* contingency, rather than an *import-substitution* contingency inconsistent with Article 3.1(b) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). As such, the measures at issue in this dispute, if found to be subsidies, might be actionable under Part III of the SCM Agreement, but are not prohibited under Part II.

3. Third parties have expressed strong reservations with the EU's view that a measure contingent on the production of a finished good, including its major structural elements, should be treated as contingent on the use of domestic over imported goods for purposes of Article 3.1(b). As they have noted, this approach appears to result in all or virtually all production subsidies being treated as prohibited import substitution subsidies.[4]

---

[1] In this submission, the United States uses the phrase "satisfy the two Siting Provisions" and similar phrases as a shorthand for triggering the First Siting Provision and avoiding triggering the Second Siting Provision.

[2] Sources of Content for the 777X (Exhibit USA-30(BCI)).

[3] US FOS, para. 22.

[4] *See, e.g.*, Canada's third party submission, para. 3 ("Canada considers that the European Union's suggested interpretation of Article 3.1(b) would improperly extend the provision to cover situations where subsidy recipients are required to *produce* goods.") (emphasis original); *see also* Brazil's third party submission, para. 14 ("The fact that subsidies are granted to domestic producers does not, for that reason alone, mean that there is import substitution conditionality."); Australia's Third Party Submission, para. 17 ("The Panel therefore also needs to assess whether the distinction made in the Washington legislation is between domestic and international goods, as claimed by the EU, or whether it is the geographical scope of a tax incentive to a business activity conducted within the geographic region of the jurisdictional authority."); Japan's third party submission, para. 26 ("the requirement to locate Boeing's production of the wings and fuselage, as well as final assembly in Washington State

4. The EU now acknowledges that "{p}roduction subsidies, which the United States defines as 'the payment of subsidies to domestic producers for engaging in production activities in the grantor's territory', are *not* prohibited by Article 3.1(b) of the *SCM Agreement*."[5] However, the EU tries to walk a tightrope between production subsidies and import-substitution subsidies by arguing that ESSB 5952 would be fully consistent with Article 3.1(b), were it not for the combination of specific references to finished aircraft and fuselages and wings in the definition of a "significant commercial aircraft manufacturing program," used in the First Siting Provision and the reference to "wing assembly" in the Second Siting Provision.[6] According to the EU, this combination alone converts what would otherwise be a production subsidy into a prohibited local content contingency.[7]

5. The EU's position, however, precludes Members providing production subsidies that define the scope of required domestic production activity in terms of specific elements of the output. Under this approach, a production subsidy would only be permitted to define the eligible recipients by requiring a producer to perform the very last production step (perhaps by turning the very last screw) and nothing more.

6. It is not just legal principles that disprove the EU's arguments, but the actual facts of Boeing's 777X program. As the Boeing Expert Statement explains, fuselages and wings are "elements of the output of the production process" – not inputs used in the production of airplanes.[8] The ordinary meaning of the word "airplane," as expressed in dictionaries and regulatory practice, confirms that a fuselage and fixed wings are fundamental to what makes an airplane an airplane. As the Appellate Body found in *Canada – Autos*, if the use of domestic over imported goods is only "one possible means" of satisfying the requirements for obtaining a subsidy, that would be "insufficient for a reasoned determination of whether a contingency 'in law' on the use of domestic over imported goods exists."[9] In this case, the 777X program demonstrates that there is at least indeed one such means for satisfying the two Siting Provisions,

---

is not exactly tantamount to a requirement to use inputs produced or assembled in Washington State."); *ibid.*, para. 30; China's third party submission, para. 7 ("The 'Programme-Siting Condition' does not explicitly or implicitly indicate LCA must purchase any products which are produced in Washington State. Hence, there seems no sufficient evidence to demonstrate the "Programme-Siting Condition" would constitute a *de jure* prohibited subsidy.").

[5] EU FOS, para. 3 (emphasis original).

[6] EU RPQ 49, paras. 130-131.

[7] EU FOS, para. 6. The EU has also clarified that it is challenging the measures at issue on an exclusively *as such* basis. EU RPQ 6, para. 7.

[8] Boeing Expert Statement, para. 64 (Exhibit USA-1(BCI)). The EU does not contest this description of the 777X manufacturing process.

[9] *Canada – Autos (AB)*, paras. 130-131.

which shows definitively that the use of domestic over imported goods is not required, in law or in fact, by ESSB 5952.

7. In its *de jure* arguments, the EU attempts to brush this evidence aside – even though the Appellate Body in *Canada – Autos* criticized an analysis of *de jure* contingency that ignored real-world evidence regarding the actual operation of the measures.[10] In its *de facto* arguments, the EU never discusses the elements of such a *de facto* analysis as described by the Appellate Body. Instead, the EU merely asserts that ESSB 5952 "rewards" the use of domestic over imported goods and "penalizes" the failure to do so. But this argument fails because it assumes that the alleged subsidies are contingent on the use of domestic over imported goods, which is the conclusion it is supposedly designed to prove. The EU also omits a numerical analysis analogous to what the Appellate Body considered to be potentially relevant under a "geared to induce" approach. Conducting such a numerical analysis confirms that the challenged measures are not contingent on the use of domestic over imported goods.

8. This U.S. rebuttal submission proceeds as follows:

- Section II addresses the relevant legal standard, explaining that a contingency under Article 3.1(b) of the SCM Agreement is only prohibited if it *requires* the use of domestic over imported goods in order to receive the subsidy at issue;
- Section III explains that the EU fails to establish that the challenged measures are *de jure* inconsistent with Article 3.1(b), because the references in ESSB 5952 to fuselages and wings do not create a requirement to use domestic over imported goods. In fact, as noted above, unrebutted factual evidence confirms that the EU bases its *de jure* arguments on an interpretation of the two Siting Provisions that is inaccurate;
- Section IV explains that the EU fails to establish that the challenged measures are *de facto* inconsistent with Article 3.1(b). In fact, ample evidence demonstrates that the alleged subsidies did not influence Boeing's decisions at all with respect to the use of domestic over imported goods; and
- Finally, Section V addresses the EU's continuing failure to establish that the challenged measures constitute subsidies within the meaning of Article 1 of the SCM Agreement.

## II. LEGAL STANDARD: A CONTINGENCY IS PROHIBITED UNDER ARTICLE 3.1(B) ONLY IF IT REQUIRES THE USE OF DOMESTIC OVER IMPORTED GOODS

9. The first major error in the EU's case is its incorrect interpretation of Article 3.1(b) of the SCM Agreement. Article 3.1(b) prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods." The parties agree that this obligation does not prohibit subsidies contingent on the production of goods in the territory

[10] *Canada – Autos (AB)*, paras. 130-131.

of a Member.[11] In this regard, the United States has explained that, in the context of Article 3.1(b), "use" refers to the employment of a good as an input or instrumentality in a productive process, or enjoyment of a product for its intended purpose by an end user. The output of the process, however, is not something "used" by the producer.[12] The context of Article III:8(b) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") confirms this understanding by exempting "the payment of subsidies exclusively to domestic producers" from the disciplines of Article III of the GATT 1994 – an exemption which would be meaningless if Article 3.1(b) covered all subsidies to domestic producers.

10. Where the parties disagree, by contrast, with respect to the legal standard, is whether the fact that a taxpayer can meet a condition without resorting to the use of domestic over imported goods is sufficient to demonstrate that the underlying measure is *not* a prohibited import-substitution subsidy. The parties also disagree about the extent to which factual evidence can play a role in confirming such an interpretation of the relevant measures.

11. A proper interpretation of Article 3.1(b) establishes that a subsidy is contingent on the use of domestic over imported goods only if the recipient is *required* to use domestic over imported goods. That analysis must take into account *all* sources that elucidate the meaning of the words used in the measure in question, including relevant factual information regarding the application of the measure.

## A. The Individual Elements of Article 3.1(b)

### *1. A subsidy is "contingent" on a condition only if satisfying that condition is necessary for receipt of the subsidy.*

12. The *Shorter Oxford English Dictionary* defines "contingent" as "{d}ependent for its occurrence or character *on* or *upon* some prior occurrence or condition."[13] In *Canada – Aircraft*, the Appellate Body found that "the ordinary connotation of 'contingent' is 'conditional or dependent on something else'."[14] 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.[15] Thus, in the context of Article 3.1(b) of the SCM

[11] EU RPQ 48, para. 128.

[12] US RPQ 44, paras. 104-105. The U.S. answer to Question 44 refers extensively to the production of goods, which is the situation in this proceeding.

[13] *The Oxford English Dictionary Online*, OED Online, Oxford University Press.

[14] *Canada – Aircraft (AB)*, para. 166. The Appellate Body's statement in *Canada – Aircraft* was made in the context of an analysis of Article 3.1(a). The panel in *US – Upland Cotton* applied the same definition to Article 3.1(b). *See US – Upland Cotton (Panel)*, para. 7.1081.

[15] *US – Upland Cotton (AB)*, para. 572.

Agreement, a relation of contingency exists only where the "use of domestic over imported goods" is required to receive the alleged subsidy.

13. In *Canada – Autos*, the Appellate Body applied this principle in the context of Article 3.1(b), stating:

> In our discussion of Article 3.1(a) in Section VI of this Report, we recalled that in *Canada – Aircraft* we stated that "the ordinary connotation of 'contingent' is 'conditional' or 'dependent for its existence on something else'." Thus, a subsidy is prohibited under Article 3.1(a) if it is "conditional" upon export performance, that is, if it is "dependent for its existence on" export performance. In addition, in *Canada – Aircraft*, we stated that contingency "in law" is demonstrated "on the basis of the *words* of the relevant legislation, regulation or other legal instrument." (emphasis added) As we have already explained, such conditionality can be derived by necessary implication from the words actually used in the measure. We believe that this legal standard applies not only to "contingency" under Article 3.1(a), but also to "contingency" under Article 3.1(b) of the *SCM Agreement*.[16]

14. With respect to the particular *de jure* claims presented in that dispute, the Appellate Body stated:

> The precise issue under Article 3.1(b) is whether the use of domestic over imported goods is a "condition" for satisfying the CVA requirements, and, therefore, for receiving the import duty exemption.[17]

Thus, according to the Appellate Body, the key question for panels to resolve in handling *de jure* claims under Article 3.1(b) is whether the use of domestic over imported goods is a condition for satisfying the alleged contingency requirements and receiving the alleged subsidy.

15. The Appellate Body considered that the panel in *Canada – Autos* had found that the use of domestic over imported goods was merely one possible way to satisfy the alleged import-substitution contingency, but not the only way. In particular, the Appellate Body found:

> It seems to us that whether or not a particular manufacturer is able to satisfy its specific CVA requirements without using any Canadian parts and materials in its production depends very much on the *level* of the applicable CVA requirements. For example, if the level of the CVA requirements is very high, we can see that the use of domestic goods may well be a necessity and thus be, in practice, required as a *condition* for eligibility for the import duty exemption. By contrast, if the level of the CVA requirements is very low, it would be much easier to satisfy those requirements *without* actually using

[16] *Canada – Autos (AB)*, para. 123.

[17] *Canada – Autos (AB)*, para. 126.

> domestic goods . . . . The multiplicity of *possibilities* for compliance with the CVA requirements, when these requirements are set at low levels, may, depending on the specific level applicable to a particular manufacturer, make the use of domestic goods **only one possible means** (means which might not, in fact, be utilized) of satisfying the CVA requirements.
>
> 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**.[18]

Thus, if there is a "multiplicity of possibilities for compliance" with a subsidy's "condition{s} for eligibility," only some of which involve the use of domestic over imported goods, then the subsidy is consistent (at least *de jure*) with Article 3.1(b).[19]

16. The EU attempts to resist this conclusion regarding its burden of proof by arguing that the reasoning in *Canada – Autos* applied exclusively to value-added requirements.[20] However, the SCM Agreement does not grant a privileged status to import-substitution subsidies that take the form of domestic value added requirements. Rather, Article 3.1(b) treats all subsidies alike: they are prohibited only if contingent on the use of domestic over imported goods. Accordingly, and contrary to the EU's arguments, the fact that the alleged local content requirements in *Canada – Autos* and this dispute take different forms under domestic law does not alter the analytic approach under Article 3.1(b).

17. The Appellate Body found that two categories of evidence may be used to establish a *de jure* claim of inconsistency with Article 3. First: "The simplest, and hence, perhaps, the uncommon, case is one in which the condition {*i.e.*, the relevant contingency} . . . is set out expressly, in so many words, on the face of the law, regulation or other legal instrument."[21] The Appellate Body also described this situation as one in which the "underlying legal instrument . . . provide{s} *expressis verbis* that the subsidy is available only upon fulfillment of the condition . . . ."[22] Second, the Appellate Body said that *de jure* contingency "can also be derived by

---

[18] *Canada – Autos (AB)*, paras. 130-131 (boldface added; italics in original).

[19] The Appellate Body's conclusion in *Canada – Autos* is consistent with the mandatory/discretionary distinction recognized by GATT panels. *See US – 1916 Act (AB)*, para. 88. However, the Appellate Body has refrained from expressing a general view as to the applicability of the mandatory/discretionary doctrine under WTO rules. *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 93.

[20] *See* EU RPQ 46, para. 123 ("In the European Union's view, however, the Appellate Body's specific statement in *Canada – Autos* about the need to consider 'whether or not a particular manufacturer is able to satisfy its specific {value-added} requirements' is relevant only to claims (whether *de facto* or *de jure*) concerning measures that involve a 'value-added requirement', such as the measure at issue in *Canada – Autos*.").

[21] *Canada – Autos (AB)*, para. 100.

[22] *Canada – Autos (AB)*, para. 100.

necessary implication from the words actually used in the measure."[23] The EU itself has acknowledged that the *de jure* analysis can take into account evidence that "relate{s} to the{} very words of the relevant legislation."[24] Indeed, as illustrated below, factual evidence can be useful for demonstrating that a proposed interpretation of a domestic legal instrument is invalid.

### *2. "Use" signifies consumption of a good as an input or employment as an instrumentality.*

18. The United States and the EU also disagree on the meaning of the word "use" in Article 3.1(b) of the SCM Agreement. The parties quote different editions of the Oxford English Dictionary to define the ordinary meaning of "use," but they mean essentially the same thing:

> United States: "the act of putting something to work, or employing or applying a thing, for any (esp. a beneficial or productive) purpose."[25]
>
> EU: "the action of using something; the fact or state of being used; application or conversion to some purpose."[26]

Although the words are different, the definitions are substantively equivalent in identifying use in terms of employing or applying a thing, including through its conversion, to achieve some purpose.

19. The United States and the EU also cite largely the same provisions of the SCM Agreement as context.[27] The EU additionally cites paragraph 2 of the Annex to the Civil Aircraft Agreement and paragraph 1(a) of the Annex to the TRIMs Agreement.[28] The United States shares the understanding that these sources signify that "use" can involve consumption of a product as an input, employment as an instrumentality (*e.g.*, equipment) in production, or for repair, maintenance, rebuilding, modification, or conversion.[29]

20. However, the EU errs in two important ways. First, it fails to recognize the relevance of the context provided by GATT 1994 Article III:8(b). An interpretation of "use" that resulted in making production subsidies "prohibited" would tend to render Article III:8(b) inutile, contrary to the principle of effectiveness.[30] Second, the EU seeks to characterize the meaning of "use" in

---

[23] *Canada – Autos (AB)*, para. 100.

[24] *Canada – Autos (AB)*, para. 126 & note 127. The Appellate Body clarified that these two categories of evidence can be used in either the context of Article 3.1(a) or 3.1(b). *Ibid.*, para. 126.

[25] US RPQ 44, para. 105, *quoting* OED Online (Exhibit USA-54).

[26] EU RPQ 44, para. 105, *quoting* Shorter Oxford English Dictionary, p. 3484 (2007).

[27] *Compare* US RPQ 44, para. 106 *with* EU RPQ 44, paras. 112-114.

[28] EU RPQ 44, paras. 110-111 and 116-117.

[29] EU RPQ 44, para. 111.

[30] *Japan – Alcoholic Beverages II*, p. 12 ("One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter

Article 3.1(b) as either "broad"[31] or "very broad."[32] This is a subjective characterization based on the EU's judgment, rather than the text of the SCM Agreement, and is accordingly not useful for purposes of interpretation.

21. The EU also misses an important aspect of the definitions and examples that it cites: all connect "use" with a process for achieving a purpose, which is distinct from the process itself. To take an example on which the parties agree: subsidies contingent on "use" of domestic goods as inputs for a particular production process would be prohibited, while subsidies contingent on siting that production process in the grantor's territory would not be prohibited. To use the non-production examples cited by the EU, subsidies contingent on the repair, maintenance of modification of merchandise in a party's territory would not be prohibited, but requiring the use of domestic goods in those processes would be prohibited.

### *3. "Imported goods" indicates that the goods in question must be capable of being imported.*

22. The parties have also debated the meaning of the term "goods" as it appears in Article 3.1(b) of the SCM Agreement. In particular, the United States has observed that the term itself, and particularly when modified by "imported" in Article 3.1(b), signifies something that is salable or tradable.[33] The United States has demonstrated that the fuselages and wings for the 777X are not tradable in the sense necessary for Article 3.1(b).[34] Accordingly, the EU has failed to establish the existence of the domestic and imported "goods" that it claims are the subject of the measures at issue.

23. The EU argues that an item need not be imported, salable, or tradable to be a "good" for purposes of Article 3.1(b) because the covered agreements protect competitive opportunities as well as actual trade.[35] The United States does not dispute, as a legal matter, that the covered agreements protect competitive opportunities. However, that protection does not extend to strictly theoretical opportunities. The reports cited by the EU support this conclusion. In *Korea – Alcohol*, the panel observed that Article III of the GATT 1994 addresses "potentiality to compete."[36] However, the panel also emphasized that "we are not putting a burden of proving the negative on Korea," and "the evidence is that there are current and potential overlapping end-

---

is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".)

[31] EU RPQ 44, paras. 102, 108, and 118.

[32] EU RPQ 44, para. 113.

[33] US FWS, paras. 126-128.

[34] US FOS, para. 11; US FWS, paras. 129-131.

[35] EU RPQ 47, para. 127.

[36] *Korea – Alcohol (Panel)*, para. 10.81.

uses."[37] Thus, it was not the case that theoretical or speculative trade opportunities were sufficient. The EU also cites to the panel's use of "hypothetical imports" of textile, apparel, and footwear products" in *Colombia – Ports of Entry*, but that was because Panama did not, at that time, produce such goods for export to Colombia.[38] There was no suggestion that it was technically or logistically impossible to produce those goods in Panama or to export them to Colombia.[39]

***4. "Domestic . . . goods" signifies that the goods subject to the contingency must be domestic.***

24. As Article 3.1(b) of the SCM Agreement prohibits subsidies contingent on the use of "domestic over imported goods," the contingency must apply to "domestic . . . goods." Thus, to make a *prima facie* case of inconsistency with Article 3.1(b), the complaining party must establish that the goods on the use of which the subsidy is allegedly contingent are or would be domestic. The EU has done nothing to meet this burden. This omission is particularly glaring, as the United States has shown that ESSB 5952 does not require the use of any domestic parts in assembly of the fuselage or wings. In other words, Boeing is free to import 100 percent of the parts as long as assembly occurs in Washington. The EU has not even argued, let alone proven, that a wing or fuselage manufactured in this fashion – even if a discrete wing or fuselage existed at some point in the production process – would qualify as "domestic goods."

***5. "Over" indicates use of domestic goods in place of imported goods.***

25. The dictionary definition of the word "over" is "{a}bove in degree, quality, or action; in preference to; more than."[40] Along with the ordinary meanings of its counterparts "*de préférence à*" and "*con preferencia a*" in the French and Spanish texts of Article 3.1(b) of the SCM Agreement, this definition indicates an ordinary meaning of "in preference to" or "instead

[37] *Korea – Alcohol (Panel)*, para. 10.82.

[38] *Colombia – Ports of Entry*, para. 7.356. The EU also cites to the panel's statement in *Indonesia – Autos* that there was a "possibility" to use "hypothetical imports" to evaluate a claim under Article III:2 of GATT 1994. *Indonesia – Autos*, para. 14.113. However, that panel observed (in the same paragraph) that "{s}uch vehicles certainly can exist (and, as demonstrated above, do in fact exist)," so it clearly did not endorse the use of hypothetical imports that do not exist and, at the present time, cannot exist, as the EU advocates in this dispute.

[39] The EU also cites to the panel report *US – Poultry (China)* and the Appellate Body report in *Canada -- Periodicals*, but the cited findings address situations in which a hypothetical analysis of like product is necessary because of origin-based discrimination or an import ban. *US – Poultry (China)*, para. 7.426. As the EU has alleged neither a ban on imported wings and fuselages nor origin-based discrimination in the other 51 jurisdictions in the customs territory of the United States, those concerns do not apply in this dispute.

[40] Shorter Oxford English Dictionary, p. 2048 (Exhibit USA-51).

of."[41] Read together with the other relevant terms in the Article, "over" signifies that the prohibited contingency is one that requires the use of domestic goods instead of imported goods.

26. The EU's arguments regarding this term ignore the Spanish and French texts. They do cite the dictionary entry referenced by the United States and Japan, but argue that the relevant meaning is "more than" or "in excess of."[42] This position cannot be reconciled with the context of Article 3.1(b) and is contrary to interpretations of the term in past panel and Appellate Body reports.

27. If "over" in Article 3.1(b) meant "in excess of," the prohibition would apply to subsidies contingent on the use of domestic goods *in excess of* imported goods – using a greater quantity of domestic goods than imported goods (*e.g.*, 51 percent domestic goods). Conversely, a Member would be free to require the use of *some* domestic goods, as long as the quantity was lower than the amount of imports. The Appellate Body evinced a different understanding in *Canada – Autos*, finding that the relevant inquiry was whether the criteria for obtaining the subsidy allowed the recipient to "satisfy those requirements without actually using domestic goods."[43] In short, the relevant conditionality was not whether the measure required more domestic than imported goods. Thus, the EU misreads Article 3.1(b) when it equates "over" with "more than" or "in excess of."

28. The EU commits a further error in arguing, based on the erroneous view that "over" means "in excess of," that "there is no *de minimis* discrimination that would be acceptable under the prohibitions in Article 3.1(b)."[44] In the first place, as the EU has misidentified the ordinary meaning of "over," any conclusion it derives from that meaning is also erroneous. Second, the assertion is irrelevant. The United States has not asked the Panel to disregard *de minimis* discrimination – its position is that ESSB 5952 does not require any use of domestic over imported goods. The EU has not argued for a *de minimis* standard, either. Thus, the Panel does not need to address the question of whether or not Article 3.1(b) has a *de minimis* exception.[45]

### B. The Evidence for an Analysis Under Article 3.1(b) May Extend Beyond the Text of the Challenged Measures, For Both *De Jure* and *De Facto* Analysis

29. The Appellate Body found in *Canada – Autos* that under Article 3.1(b), "contingency 'in law' is demonstrated 'on the basis of the *words* of the relevant legislation, regulation or other legal instrument."[46] It explained further that "such conditionality can be derived by necessary

---

[41] US RPQ 32, para. 68.

[42] EU RPQ 32, paras. 72-73.

[43] *Canada – Autos*, para. 130.

[44] EU RPQ 32, para. 73.

[45] The United States reserves its right to revisit this issue if the EU makes a *de minimis* argument.

[46] *Canada – Autos (AB)*, para. 123, *quoting Canada – Aircraft (AB)*, para. 167.

implication from the words actually used in the measure."[47] The panel consulted multiple legal instruments to evaluate the contingency at issue, but the Appellate Body found that a still broader inquiry was necessary to determine how the subsidy operated.[48]

30. As an initial matter, where a complaining party brings a *de jure* challenge under Article 3.1(b) of the SCM Agreement, the complaining party has the burden of establishing what is the "domestic" and what is the "imported" good for purposes of Article 3.1(b) that are affected by the measure at issue. This the EU has failed to do. Instead, the EU appears to believe that by characterizing its claim as "*de jure*," it is excused from having to address this key threshold issue. That is not the case.

31. The EU is claiming that the measures at issue are, on their face, contingent on the use of domestic over imported goods. Thus, the EU needs to establish as part of any *de jure* claim what is the domestic and what is the imported good for each of the measures at issue. And in determining what, if anything, is the relevant "good," it is not appropriate to suggest to a panel that it ignore or blind itself to relevant facts. Yet that appears to be what the EU is suggesting here.

32. Furthermore, as *Canada – Autos* makes clear, while a *de jure* analysis is based on the words of the measure, it does not evaluate them in a vacuum. A single clause in a piece of legislation typically takes meaning from the surrounding clauses in the legislation. If the measure in question amends previously enacted legislation or codified laws, provisions in that legislation will also affect the meaning of the words in the measure at issue. And, finally, the tools that a Member's legal system uses to interpret the words in that measure will also play a necessary role in understanding the "words" for purposes of a *de jure* analysis.

33. ESSB 5952 points directly to a number of sources that define its terms. The legislation itself contains definitions, which also cross-reference the definitions applicable generally to administration of the B&O tax.[49] The B&O tax definitions, most notably the definition of "commercial airplane," refer to the regulatory definitions used by the Federal Aviation Administration, and to "ordinary meaning," which under Washington law may involve reference to dictionaries or sector-specific meanings.[50] In addition, under Washington law, "{g}reat weight is generally accorded to the interpretation of a statute by the administrative agency which is charged with its administration."[51] Thus, DOR's interpretation of ESSB 5952 would also factor into the overall analysis of its meaning under Washington law.

---

[47] *Canada – Autos (AB)*, para. 123, *quoting Canada – Aircraft (AB)*, para. 100.

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

[49] ESSB 5592, sec 2(2) (Exhibit EU-3).

[50] US RPQ 14, para. 29; RCW § 82.32.550 (Exhibit EU-82).

[51] *Kaiser Aluminum & Chemical Corp. v. Department of Ecology*, 32 Wash. App. 399, 404-05, 647 P.2d 551, 555 (1982) (Exhibit USA-056). The court also observed that "This is particularly true when a so-called "special law"

34. The EU, in fact, acknowledges that a *de jure* analysis may involve evidence beyond the text of a legal instrument that is the subject of a complaining Member's claims, provided that such evidence relates to the text of the legal instrument.[52] However, the EU overstates its case in arguing that, as a general matter, such evidence "must necessarily relate to these very words of the relevant legislation."[53] In fact, as *Canada – Autos* shows, evidence outside the scope of any "legislation," which pertains to the actual operation of a measure, may – and sometimes must – be included in a *de jure* analysis.

35. As discussed below, that is the case in this dispute: Boeing does not use wings or fuselages, domestic or imported, to produce the 777X, even though Boeing's 777X siting decisions satisfied the First Siting Provision, and have avoided triggering the Second Siting Provision. As an indication of DOR's interpretation of ESSB 5952, a statute that DOR is charged to administer, this evidence has a role in the analysis of *de jure* contingency, consistent with the approach taken by the Appellate Body in *Canada – Autos*.

36. In addition, to the extent that the EU argues that the Panel must complete its *de jure* analysis based solely on the language used in the First and Second Siting Provisions, without using any other interpretive tools,[54] the EU is incorrect. It cites no legal support for this position, and the only factual basis it advances is that "there is no need to examine 'a particular manufacturer's ability to satisfy the requirements of a measure without using domestic goods', because the two conditions require the use of specific domestic goods: fuselages and wings."[55] The EU's argument in this regard is transparently circular and does not reflect the objective approach that panels are to take. In fact, it is only by reference to all of the tools for interpreting ESSB 5952 that the Panel can evaluate the EU's arguments in a meaningful way.

## III. THE EU FAILS TO ESTABLISH THAT THE ALLEGED SUBSIDIES ARE *DE JURE* CONTINGENT ON THE USE OF DOMESTIC OVER IMPORTED GOODS

37. As explained above, to establish that the challenged measures are *de jure* inconsistent with Article 3.1(b) of the SCM Agreement, it is not enough for the EU to assert that the use of domestic over imported goods is one possible way to receive the alleged subsidies. Rather, the EU must demonstrate that receipt of the alleged subsidies is "*contingent*" on the use of domestic over imported goods in the sense of being "dependent for their existence." The EU fails in this

---

field is concerned," and cautioned that "the primary consideration in construing these provisions is to effectuate the legislative intent underlying their enactment." *Ibid.*

[52] EU RPQ 18, para. 24.

[53] EU RPQ 18, para. 24.

[54] *See, e.g.*, EU RPQ 46, para. 124.

[55] EU RPQ 46, para. 124.

regard, and in fact the evidence shows that it is possible to satisfy the two Siting Provisions while using *only* imported parts.

38. The EU argues that the references to manufacturing or assembly of fuselages and wings in the Siting Provisions "convert what would otherwise be a production subsidy into a prohibited local content contingency,"[56] but in reality these terms merely define the scope of production activity required to use the tax treatment covered by ESSB 5952. As the United States has explained before, as the two main structural elements of the airframe, wings and a fuselage together are the essence of the airplane. And, at least in the case of the 777X, they are not parts of that airplane that are "used" in its production, but rather are the output of that production process, as we will discuss in further detail below.

A. The EU Fails to Show that the Text of ESSB 5952 Makes the Use of Fuselages and Wings as Inputs a "Condition" for Receiving the Alleged Subsidies

39. The EU argues that the alleged inconsistency with Article 3.1(b) of the SCM Agreement results exclusively from the combination of specific references to finished airplanes and fuselages and wings in the definition of a "significant commercial aircraft manufacturing program," used in the First Siting Provision and the reference to "wing assembly" in the Second Siting Provision.[57] This combination, according to the EU, "convert{s} what would otherwise be a production subsidy into a prohibited local content contingency,"[58] and represents the "express conditioning of the grant of a subsidy on use of domestic over imported inputs."[59]

40. However, the EU's conclusion cannot be derived from the words of ESSB 5952, which merely require that both the aircraft itself, as well as specific elements of the aircraft – *i.e.*, the fuselage and wings – undergo manufacturing in Washington. Even aside from the question of whether the measures at issue are subsidies, Article 3.1(b) does not prohibit defining production subsidies in a way that requires the domestic siting of manufacturing activity on both the finished product and its defining elements. Indeed, such a definition could be useful for excluding manufacturers engaged in minimal productive activities – including those who would seek to circumvent the production requirement – from eligibility for domestic production subsidies. Thus, defining production in terms of the integral elements of the finished product is not, as the EU argues, tantamount to treating the elements as domestic inputs that must be used instead of imported inputs. For these reasons, the EU's *de jure* arguments fail.

---

[56] EU FOS, para. 6. The EU has also clarified that it is challenging the measures at issue on an exclusively *as such* basis. EU RPQ 6, para. 7.

[57] EU RPQ 49, paras. 130-131.

[58] EU FOS, para. 6. The EU has also clarified that it is challenging the measures at issue on an exclusively *as such* basis. EU RPQ 6, para. 7.

[59] EU RPQ 46, para. 121; *see also* EU FOS, header before para. 36 ("The Contingency In SSB 5952 Is Clear and Express.").

41. Assuming, *arguendo*, that the challenged incentives are subsidies, ESSB 5952 comes into effect following a determination by DOR that "the siting of a significant commercial airplane manufacturing program in the state of Washington" has occurred. In turn, "significant commercial airplane manufacturing program" is defined as "an airplane program in which the following products, including final assembly, will commence manufacture" in Washington: "(i) The new model, or any version or variant of an existing model, of a commercial airplane; and (ii) Fuselages and wings of a new model, or any version or variant of an existing model, of a commercial airplane."

42. ESSB 5952 further states: "{t}he definitions in this subsection {*i.e.*, RCW 82.32} apply throughout this section unless the context clearly requires otherwise." With respect to the term "commercial airplane," RCW 82.32.550 states: "'Commercial airplane' has its ordinary meaning, which is an airplane certified by the federal aviation administration for transporting persons or property, and any military derivative of such an airplane."[60] Under the Federal Aviation Administration regulations, "{a}irplane means an engine-driven fixed-wing aircraft heavier than air, that is supported in flight by the dynamic reaction of the air against its wings."[61] Webster's Third International Dictionary, which Washington courts often consult in their evaluation of ordinary meaning, defines "airplane" as "a fixed-wing aircraft heavier than air that is driven by a screw propeller or a high-velocity jet supported by the dynamic reaction of the air against its wings."[62]

43. RCW 82.32 does not contain specific definitions of "fuselage" or "wing," but Webster's Third International Dictionary defines "fuselage" as "the central body portion of an airplane designed to accommodate the crew and the passengers or cargo"[63] and "wing" as "one of the airfoils that develops a major part of the lift which supports a heavier-than-air airplane."[64] The OED, which the EU cites,[65] defines "fuselage" as "{t}he central body portion of an aeroplane, to which the wings and tail unit are attached and which (in modern aircraft) contains the crew and the passengers or cargo,"[66] and "wing" as "one of the planes of an aeroplane."[67]

---

[60] Exhibit EU-82.

[61] 14 CFR § 1.1 (Exhibit USA -057).

[62] Webster's Third International Dictionary, p. 46 (2002) (Exhibit USA-058).

[63] Webster's Third International Dictionary, p. 131 (2002) (Exhibit USA-058).

[64] Webster's Third International Dictionary, p. 925 (2002) (Exhibit USA-058).

[65] EU FOS, para. 7 & fn. 9.

[66] Exhibit EU-68.

[67] Oxford English Dictionary, "wing," http://www.oed.com/view/Entry/229324?rskey=bycMlv&result=1&print (Exhibit USA-60). The EU also cites the Oxford Learner's Dictionary, which defines "fuselage" as "the main part of an aircraft in which passengers and goods are carried," and "wing" as "one of the large flat parts that stick out from the side of a plane and help to

44. Thus, by their ordinary meanings, "fuselages" and "wings" are what makes a vehicle an "airplane" – the one houses the passengers and cargo and the other provides the lift that allows the airplane to fly. The ordinary meanings of "fuselage" and "wing" in particular indicate their status as functional elements of the finished aircraft, and not as inputs in the aircraft production process. Accordingly, the references to fuselages and wings in the First Siting Provision reflect the definitional elements of an airplane as a means of identifying what constitutes the manufacture of an airplane in Washington to trigger application of ESSB 5952. These references do not entail an import-substitution requirement, either by their express terms or necessary implications.[68]

45. The analysis is similar for the Second Siting Provision, which states that the 0.2904 percent B&O tax rate

> does not apply on or after July 1st of the year in which {DOR} makes a determination that any final assembly or wing assembly of any version or variant of a commercial airplane that is the basis of a siting of a significant commercial airplane manufacturing program in the state under {the First Siting Provision} has been sited outside the state of Washington.

Thus, by requiring that wing assembly and final assembly occur in Washington for the 0.2904 percent B&O tax rate to continue to apply to the relevant commercial aircraft manufacturing program, the Second Siting Provision stipulates that assembly of the whole (*i.e.*, the airplane) as well as one of the definitional elements of the whole (*i.e.*, the wing) must occur in Washington. Neither the reference to "wing assembly" nor any other terms in the Second Siting Provision indicate that a wing (or fuselage) is an input into the airplane production process.

46. One reason that the terms "fuselage" and "wing" might appear in the text of ESSB 5952 – even though they are by definition elements of an airplane, which is also referenced in the text of ESSB 5952 – is that Washington decided not to allow a minimal manufacturing operation to satisfy the two Siting Provisions. If, counterfactually, ESSB 5952 did not contain the terms "fuselage" and "wing," then a commercial airplane manufacturer could have brought ESSB 5952 into effect by deciding to conduct only a very small level of manufacturing activity within Washington, such as drilling the final rivet for each airplane in Washington. The presence of the

---

keep it in the air when it is flying." Oxford Learner's Dictionary, "fuselage," http://www.oxfordlearnersdictionaries.com/us/definition/english/fuselage?q=fuselage (Exhibit USA-059); Oxford Learner's Dictionary, "wing," http://www.oxfordlearnersdictionaries.com/us/definition/english/wing_1?q=wing (Exhibit USA-059).

[68] *Cf.* China's third party submission, para. 7 ("The 'Programme-Siting Condition' does not explicitly or implicitly indicate LCA must purchase any products which are produced in Washington State. Hence, there seems no sufficient evidence to demonstrate the "Programme-Siting Condition" would constitute a *de jure* prohibited subsidy."); Japan's third party submission, para. 26 ("the requirement to locate Boeing's production of the wings and fuselage, as well as final assembly in Washington State is not exactly tantamount to a requirement to use inputs produced or assembled in Washington State.").

terms "fuselage" and "wing" ensure that such a minimal operation cannot satisfy the two Siting Provisions. Thus, the EU is incorrect to argue that the U.S. interpretation would render ESSB 5952's references to fuselages and wings superfluous.[69] Rather, under the U.S. view, the references to "fuselage" and "wing" each have distinct meanings, which serve to indicate with precision the degree of manufacturing activity necessary to fulfill the Siting Conditions.[70]

47. Indeed, it is the EU's interpretation that is flawed, because it implies that the class of WTO-consistent production subsidies is limited to those that permit minimal finishing operations. According to the EU, subsidies for the domestic production of a final product are permissible, but subsidies for the domestic production of a final product immediately "convert" into prohibited import-substitution subsidies when the legislator defines the production process to include anything more than turning the final screw. This view has no basis in the text of the covered agreements, and indeed is inconsistent with the statement in Article III:8(b) of the GATT 1994 that "the payment of subsidies exclusively to domestic producers" is generally permitted. This provision would be effectively meaningless if its application were limited only to subsidies that permitted insubstantial production activities.

**B. The EU Fails to Show that** ESSB 5952 Requires that Fuselages and Wings Be "Domestic"

48. In addition to the fundamental flaws in the EU's efforts to distinguish an airplane from its wings and fuselage, the EU also fails to meet its burden of establishing that the First and Second Siting Provisions require that the referenced "fuselages" and "wings" be domestic. Otherwise, ESSB 5952 does not require the use of *domestic* over imported goods. This omission provides yet another, independent, reason why the EU has failed to make a *prima facie* case.

49. Although ESSB 5952 identifies certain production activities that must be sited within Washington to satisfy the two Siting Provisions, ESSB 5952 does not draw any distinction between domestic and imported fuselages and wings. In addition, as noted above, a taxpayer could satisfy the First and Second Siting Provisions by using 100 percent imported parts, as long as those parts (including parts of fuselages and wings) were assembled into an airplane in Washington. Accordingly, even if, for the sake of argument, one were to consider fuselages and wings to be "inputs" or "goods used" in the production of an airplane, ESSB 5952 imposes no *de jure* requirement that such fuselages or wings be "domestic" within the meaning of Article 3.1(b) to satisfy the two Siting Provisions.

50. This hole in the EU's argument is all the more obvious because, for the 777X, **[ BCI ]**.[71] And, as the United States previously noted, even if all the components of the 777X were

---

[69] EU FOS, para. 57.

[70] The EU's extensive arguments that manufacture of an airplane does not entail production of the fuselage and wings provide a vivid example of why a legislative body would seek to be particularly precise – perhaps even redundantly so – in defining exactly what triggers application of a revenue measure.

[71] Sources of Content for the 777X (Exhibit USA-30(BCI)); *see also* US FOS, para. 22.

fabricated outside the United States (*i.e.*, even if all the components displayed in Exhibit USA-30 were "orange"), Boeing would be able to satisfy the two Siting Provisions simply by assembling all of the imported goods into the finished aircraft, which would include its fuselage and wings.[72] The EU has proposed that "domestic" means anything not imported.[73] As a result, even under the EU's approach, which is novel, wings and fuselages made up completely of imported parts would not appear to be domestic goods. Thus, it could not be assumed that the First and Second Siting Provisions require that 777X fuselages and wings themselves – even if they ever existed as separate goods – be domestic.

### C. **The EU Fails to Rebut Factual Evidence Establishing that** the Text of ESSB 5952 Does Not Condition the Alleged Subsidies on the "Use of Domestic over Imported Goods"

51. Sections III.A and III.B discussed some of the reasons why the EU has still failed to make even a *prima facie* case of import-substitution contingency. Moreover, as discussed in Section II, if there is a "multiplicity of possibilities" for compliance with a subsidy's "condition{s} for eligibility," only some of which involve the use of domestic over imported goods, then the subsidy is consistent with Article 3.1(b) of the SCM Agreement. In this particular case, the United States has shown that there is at least one very obvious means of satisfying the First and Second Siting Provision that does not involve the use of fuselages and wings as inputs into the airplane production process: the 777X manufacturing program. This fact by itself demonstrates that the EU's *de jure* interpretation of ESSB 5952 is at odds with the actual operation of the alleged contingencies. This is strong evidence that the EU misunderstands the legislation.

52. As explained above, the term "use" in Article 3.1(b) refers to the employment of a domestic good as an input or instrumentality in a productive process, or enjoyment of a good for its intended purpose by an end user. In fact, throughout the SCM Agreement and the covered agreements in general, the term "use" refers to the consumption of goods or services in a production process.[74] Thus, Article 3.1(b) covers subsidies that are granted contingent on the employment of a good as an input or instrumentality in a productive process. However, Article 3.1(b) does not cover subsidies contingent on the creation of the output of such a productive process.

53. In this dispute, the EU alleges that the First and Second Siting Provisions require Boeing to use fuselages and wings as "inputs" into the aircraft production process.[75] The EU further alleges that by requiring fuselages and wings to be manufactured in Washington, the two Siting

---

[72] US FOS, para. 22.

[73] EU FCS, para. 12.

[74] *See* US RPQ 44, para. 106.

[75] *See, e.g.*, EU RPQ 18, para. 26.

Provisions prevent the importation of fuselages and wings that could otherwise occur in the absence of the challenged subsidies.[76]

54. However, these allegations cannot be reconciled with the factual evidence before the Panel. For example, the Boeing Expert Statement states:

> {T}he 777X's fuselages and wings never exist as complete, standalone articles, and it would be inaccurate to describe them as inputs into the finished aircraft. Rather, the manufacture of the fuselage and wing continues through the final assembly process, and the fuselage and wings are completed only as the assembly of the finished aircraft itself is complete.[77]

In other words, fuselages and wings are "elements of the output of the production process" – not inputs.[78] And because they are not inputs, they are not "goods" that are "use{d}" to produce the very airplanes that are the subject of the First Siting Provision. Furthermore, the Boeing Expert Statement explains that **[ BCI ]**.[79]

55. Accordingly, the EU fails to demonstrate that ESSB 5952 conditions receipt of the alleged subsidies on the use of fuselages and wings as inputs into the aircraft production process. Rather, the facts show that no such use is required.

56. Furthermore, the EU's examples of airplanes other than the 777X that it views as being produced by using complete fuselages and wings as inputs in the final assembly process are all

---

[76] *See, e.g.*, EU RPQ 33, para. 85.

[77] Boeing Expert Statement, para. 67 (Exhibit USA-1(BCI)). Up through its answers to the Panel's first set of questions, the EU has responded to the information in the Boeing Expert Statement by asserting that it is "irrelevant." EU FOS, paras. 62-64. But, in its response to Question 35, the EU inserts a footnote referring to a "Technical Support Document" prepared by Washington's Department of Ecology that, in its view, "calls into question the accuracy of the assertions made by the United States about the assembly process of the 777X." EU RPQ 35, para. 90 note 113, *citing* Washington State Department of Ecology, *Technical Support Document for the Boeing Company; Boeing Everett 777X Project* (Sept. 9, 2014) ("Technical Support Document") (Exhibit EU-105)). The EU's assertions are wrong. Both the Technical Support Document and the Boeing Expert Statement describe the 777X production operations in Everett as including wing and fuselage manufacturing operations that precede the final assembly process,[77] and both discuss final assembly operations as including, in the words of the Technical Support Document, "assembly of the body sections and wings into a completed structure." *Compare* Technical Support Document, p. 9 (Exhibit EU-105)*, with* Boeing Expert Statement, para. 52. The Technical Support Document never states that complete fuselages or wings enter the final assembly process, while it does refer to "body sections" and "certain portions of the wing stub and wing stub join areas," as it describes "airplane assembly operations." *See* Technical Support Document, pp. 10-11 (Exhibit EU-105).

[78] Boeing Expert Statement, para. 64 (Exhibit USA-1(BCI)).

[79] Boeing Expert Statement, para. 43 (Exhibit USA-1(BCI)).

beside the point.[80] The United States does not deny that the production processes for some types of aircraft could result in complete assembly of the fuselage and/or wings prior to the commencement of final assembly. However, the EU's examples are insufficient to support its assertion that "aircraft *could* not be produced" without using fuselages and wings as inputs.[81] Again, the actual evidence of the 777X production process shows that they can be and, in fact, that in the case of the 777X, this is precisely what happens.

### D. Conclusion

57. To make its case that ESSB 5952 is *de jure* contingent on the use of domestic over imported goods, the EU would have to show that the measure, by its terms, *requires* the use of domestic over imported goods. However, the EU has failed to do so. Indeed, the express terms of ESSB 5952 indicate that a fuselage and fixed wings are definitional to what makes an airplane an airplane, and not simply inputs to be used in the airplane production process. Nor does the legislation require that such fuselages and wings be "domestic". Boeing itself will not use fuselages or wings as inputs in the production process for the 777X, which is the very aircraft program that has satisfied the First and Second Siting Provisions. In fact, Boeing will use a wide array of parts for the fuselage and wings that originate outside Washington, and in many cases outside the United States. Thus, the tax treatment provided by ESSB 5952 is not *de jure* contingent on the use of domestic over imported goods.

## IV. THE EU'S *DE FACTO* ARTICLE 3.1(B) CLAIMS ARE UNSUPPORTED AND CONTRADICTED BY THE EVIDENCE

58. As demonstrated above in the *de jure* analysis, evidence regarding the 777X program demonstrates conclusively that the First Siting Provision has been fulfilled, and the Second Siting Provision has been avoided, without any use of domestic over imported goods. No further factual information is needed to refute the EU's claims, whether *de jure* or *de facto*, because a claim under Article 3.1(b) fails if the complaining party does not show, *inter alia*, that "the use of domestic goods {is} a necessity and thus . . .required as a condition for eligibility for" the alleged subsidy.[82] However, should the Panel consider it useful to further address the EU's arguments regarding *de facto* contingency, this section addresses the many other errors made by the EU.

---

[80] For example, the EU asserts that wings (but not fuselages) are used as components in the manufacture of the Airbus A350; that fuselages (but not wings) are used as components in the manufacture of the Airbus A320; and that there is a patent for the assembly of panelized aircraft fuselages. EU FOS, para. 66; EU RPQ 33, para. 83; EU RPQ 33, para. 82.

[81] EU RPQ 18, para. 26 (emphasis added).

[82] *Canada – Autos (AB)*, para. 130 (emphasis original). *See also* US RPQ 46, para. 119.

## A. Boeing Has Complied with the First and Second Siting Provisions – All Without Engaging In Import-Substitution.

59. As discussed above, the Appellate Body in *Canada – Autos* made clear that a panel assessing a claim under Article 3.1(b) must thoroughly understand the ways in which the challenged measure operates. It also confirmed that a measure does not breach Article 3.1(b) if there is a "multiplicity of possibilities for compliance" that make "the use of domestic goods only one possible means"[83] to obtain a subsidy. Such a situation exists here, notwithstanding the EU's assertion to the contrary.[84] The EU contends that the First and Second Siting Provisions "*require* the use of specific domestic goods."[85] Yet, it has no coherent explanation for why this is the case, and the evidence discussed below shows the EU's contention to be baseless.

### *1. Boeing has become eligible for the challenged tax treatment even though it does not "use" and has no plans to "use" domestic fuselages and wings.*

60. The EU has largely ignored – and asked the Panel to disregard[86] – the facts of the 777X production process,[87] even though this is the most probative evidence as to what airplane production activities may satisfy the First Siting Provision and avoid triggering the Second Siting Provision. The United States considers these facts relevant to the *de jure* analysis, and has explained in section III.A that Boeing assembles wings and fuselage as integral elements of the 777X, and does not "use" wings and a fuselage on the airplane. In fact, it completes the assembly of the wings and fuselage as part of the final assembly of the finished airplane.[88] These facts are equally compelling evidence that there is no *de facto* contingency, and the United States incorporates the analysis in section III.A by reference.

61. There is no justification to consider these *facts* to be irrelevant to the *de facto* analysis. The key legal issue here is whether the alleged subsidies may be obtained without the use of domestic over imported goods. If that is the case, then the alleged subsidies are not "contingent" on the use of domestic over imported goods within the meaning of Article 3.1(b). The facts of the 777X production process show that, with respect to the putative "goods" (wings and fuselages) identified by the EU, Boeing did not propose to use, and has no plans to use, domestic over imported goods in the 777X program, and the DOR determination establishes that the program nonetheless satisfied the First Siting Provision. Thus, the First Siting Provision did not

---

[83] *Canada – Autos (AB)*, para. 130.

[84] *Cf.* EU RPQ 46, para. 124.

[85] EU RPQ 46, para. 124 (emphasis added).

[86] *See* EU RPQ 35, para. 90 note 113; EU FOS, paras. 62-64.

[87] *See* Boeing Expert Statement (Exhibit USA-1(BCI)).

[88] Boeing Expert Statement, paras. 53, 64-67 (Exhibit USA-1(BCI)).

make eligibility for the ESSB 5952 tax incentives contingent on the use of domestic over imported goods.

62. It is therefore unavailing for the EU to contend that the facts of the 777X production process do "not provide information about the *competitive opportunities* that have been lost for foreign wing and foreign fuselage producers, as a result of the contingencies in SSB 5952."[89] Assuming, *arguendo*, that foreign suppliers might have lost competitive opportunities as a matter of fact if Boeing had proposed a different airplane program to satisfy the First Siting Provision,[90] or if Airbus had proposed to site the A350 XWB in Washington state, the existence of such a scenario does not establish contingency because it does not establish a *requirement* to use domestic over imported goods. In contrast, the facts of the 777X production process address the contingency question directly, by establishing that fuselages and wings may not be domestic goods that are used in order to comply with ESSB 5952. The EU's reference to "competitive opportunities" fails to rebut that demonstration – indeed, it is beside the point.

### *2. The EU has failed entirely to show that ESSB 5952 conditions the alleged subsidies on the use of "domestic" goods.*

63. The EU has not even attempted to meet its burden of showing that the goods allegedly subject to the contingency must be "domestic." There is no basis to assume as much. ESSB 5952 concerns production of an airplane, including its fuselage and wings. Boeing's airplane production activities in Everett related to fuselages and wings – which "are completed only as part of the final assembly process" – each account for **[ BCI ]** the corresponding total costs.[91] Indeed, even if Boeing were to use 100 percent imported individual parts in manufacturing the 777X, it would still be able to comply with the First and Second Siting Provisions. The United States considers these facts relevant to the *de jure* analysis, and has explained in section III.B that the EU has not demonstrated that fuselage and wings assembled in accordance with ESSB 5952 would necessarily be considered "domestic." The EU's silence on this issue is itself evidence that there is no *de facto* contingency on the use of *domestic* goods, and the United States incorporates the analysis in section III.B by reference.

### *3. There have never been any actual or potential imported substitutes for the 777X's fuselage and wings.*

64. By its own terms, Article 3.1(b) of the SCM Agreement prohibits subsidies only when they are contingent upon "the use of domestic *over imported goods*." As noted in section II.A.5, "over imported goods" requires that the contingency at issue condition subsidies on the use of

---

[89] *See* EU FOS, para. 63 (emphasis in original).

[90] In fact, no actual or potential competitive opportunities for imported fuselages or wings were lost through Boeing's satisfaction of the First and Second Siting Provisions, as shown below in Section IV.A.3.

[91] Boeing Expert Statement, paras. 55-56 (Exhibit USA-1(BCI)).

domestic goods *in preference to* imported goods.[92] The EU asserts that ESSB 5952 has distorted competitive opportunities for imported 777X fuselages and wings,[93] but the evidence shows this allegation to be baseless. Boeing could comply with the First and Second Siting Provisions, and receive the challenged tax treatment, even if every individual part of the 777X were imported. Moreover, the histories of the 777X program and ESSB 5952 demonstrate that the challenged measures did nothing to distort competitive opportunities for imported goods, whether actual or potential.

65. The United States in its first written submission recounted the development of the 777X and the program's production planning decisions, with details drawn from the Boeing Expert Statement.[94] This evidence establishes that, regardless of ESSB 5952, there were no actual or potential imported substitutes for the 777X manufacturing activity Boeing sited in Everett, Washington.

66. First, Boeing's major in-house 777X manufacturing operations were **[ BCI ]** in the United States, regardless of ESSB 5952. As Boeing experts have explained, **[ BCI ]**.[95] Therefore, a decision by Boeing to conduct a major commercial aircraft manufacturing activity **[ BCI ]** the United States. In addition, as discussed below, in the case of the 777X, a decision to manufacture the aircraft in the United States was tantamount to a decision to **[ BCI ]**.

67. Second, Boeing's key make/buy and supplier selection decisions were made well in advance of ESSB 5952 and, thus, were not influenced by ESSB 5952. By **[ BCI ]** – well before ESSB 5952 was signed into law on November 11, 2013 – "Boeing had made high-level make/buy decisions for the 777X," including purchasing all primary fuselage structures from suppliers outside Washington (mostly from Japan), and **[ BCI ]**.[96] Boeing did this to **[ BCI ]**.[97] Unlike the fuselage, the 777X's wings would be a new, primarily composite, or CFRP, design – the largest of any twin-engine commercial aircraft.[98] As Boeing engineers explained:

> **[ BCI ]**[99]

68. Notably, ESSB 5952 places no conditions on the location of fuselage or wing structure fabrication, or on the origin of individual airplane parts. Yet, even as it **[ BCI ]**, Boeing **[ BCI ]**,

---

[92] *See* US RPQ 32, paras. 68-70.

[93] *See* EU RPQ 33, para. 85; EU RPQ 29, para. 67.

[94] *See* US FWS, paras. 23-31.

[95] Boeing Expert Statement, para. 61 (Exhibit USA-1(BCI)).

[96] Boeing Expert Statement, paras. 41-42 (Exhibit USA-1(BCI)).

[97] Boeing Expert Statement, para. 42 (Exhibit USA-1(BCI)).

[98] Boeing Expert Statement, para. 39 (Exhibit USA-1(BCI)).

[99] Boeing Expert Statement, para. 43 (Exhibit USA-1(BCI)).

as doing so would have been contrary to its strategy for the program. This explains the observed sourcing pattern for 777X structures: **[ BCI ]**:

**[ BCI ]**

To speak in terms of the colors indicated in the above drawing, the 777X wing and fuselage structures show **[ BCI ]** gray, and Boeing would still qualify for the challenged tax treatment even if the entire image were orange, as long as assembly occurred in Washington. To put it mildly, ESSB 5952 is not structured to effect import substitution.

69. Everett, Washington **[ BCI ]**, long before ESSB 5952. Also by **[ BCI ]**, Boeing had selected Everett as the **[ BCI ]**.[100] Moreover, **[ BCI ]**.[101]

70. Finally, passage of ESSB 5952 had no effect on Boeing's willingness to use imported goods or to site fuselage and wing assembly outside the United States. The circumstances surrounding the passage of ESSB 5952 and subsequent events provide the Panel with a natural experiment that disproves the EU's assertions regarding competitive opportunities for imported 777X wings and fuselages. As just described, Boeing had **[ BCI ]** the 777X's major wing box structure fabrication and aircraft assembly operations –well before Boeing could have had any knowledge of the terms of ESSB 5952. With ESSB 5952 being signed into law on November 11, 2013, however, Boeing did not immediately **[ BCI ]** into a final siting decision. Rather, Boeing still needed to conclude a new labor agreement with IAM local chapter 751, a labor union representing Boeing's production workers in Washington. When the union voted to reject the proposed agreement on November 13, 2013, Boeing decided to conduct a site selection process encompassing locations outside Washington. In other words, with the supposed "rewards" of ESSB 5952 already available to it, Boeing nonetheless proceeded to consider numerous alternative sites where it would not receive such "rewards." Tellingly, **[ BCI ]** of these alternative sites were in the United States. Boeing **[ BCI ]** the structures it had planned to produce in the United States. Once the IAM local chapter 751 approved a revised labor contract in January 2014, Boeing immediately ceased its site selection process and reverted to its original plan to produce the 777X in Everett.

71. In sum, the 777X production activities ultimately sited in Everett **[ BCI ]** conducted *by Boeing*, and **[ BCI ]** conducted *in the United States*. Accordingly, and setting aside the fact that Boeing does not use domestic fuselages and wings to produce the 777X, the EU has no basis for asserting that ESSB 5952 distorted the competitive opportunities available to imported fuselages and wings, or that the challenged measures are "geared to induce" the use of domestic over imported goods. Indeed, the evidence above shows that Boeing's determination to site 777X manufacturing operations in the United States was driven by commercial considerations independent of ESSB 5952, as were its decisions to source parts from suppliers.

---

[100] Boeing Expert Statement, para. 42 (Exhibit USA-1(BCI)).

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

## B. The EU Fails to Establish that the Challenged Measures are "Geared to Induce" the Use of Domestic Over Imported Goods.

72. Compared to the evidence discussed above, which disproves the EU's claims, the EU's *de facto* arguments are noticeably thin on actual facts. The EU contends that the Panel should use a "geared to induce" analysis in assessing its *de facto* claims under Article 3.1(b),[102] based on the Appellate Body's use of the "geared to induce" analysis to evaluate prohibited export subsidies in *EC – Large Civil Aircraft*.[103] Yet, the EU never discusses – let alone applies – the specific elements of the "geared to induce" analysis that the Appellate Body identified. It has also declined to engage with much of the relevant factual evidence. In fact, a proper "geared-to-induce" analysis would confirm that the alleged subsidies did not induce Boeing to engage in import substitution.

### *1. The EU fails to support its proposed "geared to induce" analysis with factual evidence.*

73. The Panel asked the EU to explain what it is "about the factual operation of the measures that suggests they are geared to induce the use of domestic over imported goods."[104] The EU's response is as circular as it is brief: "{E}SSB 5952 creates specific multi-billion dollar *penalties* for use of imported wings or fuselages, and multi-billion dollar *rewards* for use of domestic wings and fuselages."[105] While it may be true generally that rewards incentivize activities and penalties deter them, the EU's assertion is based on a false premise – *i.e.*, that ESSB 5952 conditions the challenged tax treatment on the use of domestic fuselages and wings. This is not evidence, factual or otherwise, but is instead simply assertion. The EU never attempts to *demonstrate* that ESSB 5952 conditions the alleged subsidies on the use of domestic over foreign goods, other than to repeat the position it takes in its *de jure* arguments, which the United States has shown to be unsupported and contrary to the evidence.[106]

74. Relying entirely on its conclusory "rewards"/"penalties" assertion – which, again, assumes rather than demonstrates the conclusion it supposedly proves – the EU fails to identify any factual evidence to support the *de facto* analysis it invokes. It declines to address the factors that the Appellate Body identified as relevant to a "geared to induce" analysis. That is, the EU does not address the "design," "structure," and "modalities of operation" of the challenged measures, or engage with the total configuration of the facts.[107] As discussed below, such an

---

[102] *See* EU RPQ 30, paras. 68-69; EU FOS, paras. 70-74.

[103] *See* EU RPQ 30, para. 68 (citing *EC – Large Civil Aircraft (AB)*, paras. 1051-1052).

[104] EU RPQ 31.

[105] EU RPQ 31, para. 70.

[106] *See* EU RPQ 29, para. 67; EU RPQ 31, para. 70.

[107] *EC – Large Civil Aircraft (AB)*, para. 1046.

inquiry would confirm that ESSB 5952 concerns only the location of production activity. The legislation does nothing to induce the use of domestic over imported goods.

***2. A proper "geared to induce" analysis would confirm that the challenged measures are not prohibited import substitution subsidies.***

75. As noted, ESSB 5952 does not condition the challenged tax treatment on the use of domestic over imported goods, as demonstrated by the determination that Boeing's 777X program satisfied the conditions set forth in ESSB 5952 while incorporating significant imported content and without "using" wings or fuselage as inputs. Thus, even if a "geared to induce" analysis were appropriate, the evidence shows that ESSB 5952, by its design, structure, and operation, does not condition Boeing's input sourcing decisions. To the contrary, provided it conducts the requisite assembly activity in Washington, Boeing would satisfy the First and Second Siting Provisions even if it imported every single part of the 777X, and its tax treatment in that scenario would be no different. Boeing therefore receives no "rewards" for increasing the use of domestic inputs on the 777X, nor is it "penalized" for increasing the use of imported inputs. Moreover, all other aerospace activities (including Boeing's other aircraft production operations) are eligible for the challenged tax treatment irrespective of any conditions whatsoever.

76. In this regard, the United States recalls that the Appellate Body, in the context of Article 3.1(a), endorsed a numerical analysis to identify *de facto* prohibited export subsidies – *i.e.*, subsidies that are "granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[108] The Appellate Body described the analysis as follows:

> {W}here relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of *anticipated* export and domestic sales of the subsidized product that would come about in consequence of granting the subsidy, and, on the other hand, the situation in the absence of the subsidy.[109]

77. In the context of Article 3.1(b), such an analysis would compare (i) the ratio of domestic and imported fuselages and wings used in consequence of granting the alleged subsidies, with (ii) the situation in the absence of the alleged subsidies. The EU has declined to engage in this exercise, even as it has otherwise invoked a "geared to induce" analysis of its claims under Article 3.1(b).[110] In fact, under a proper understanding of the term "use of domestic over imported goods" in Article 3.1(b), the ratios would be 0:0 and 0:0, because Boeing is not required to, and does not, "use" fuselages and wings in producing the 777X. Assuming

---

[108] *EC – Large Civil Aircraft (AB)*, paras. 1045.

[109] *EC – Large Civil Aircraft (AB)*, para. 1047.

[110] *See* EU FOS, paras. 70-71.

*arguendo* that Boeing does use fuselages and wings, then the ratios would still be identical to each other: the evidence discussed above in Section III.C establishes that there is no plausible situation absent the alleged subsidies in which Boeing could have, and would have, imported 777X fuselages or wings. This evidence is highly probative, as it includes the facts concerning Boeing's production planning long before the terms of ESSB 5952 were known, as well as Boeing's consideration of production sites outside of Washington after the passage of ESSB 5952, when Boeing was prepared to do without the challenged tax treatment and yet still **[ BCI ]**.

### C. None of the Factual Evidence Cited By the EU Supports Its *De Facto* Arguments.

78. In its first set of written questions, the Panel asked the EU to identify the factual evidence supporting its Article 3.1(b) claims. In response, the EU lists five "facts."[111] With one exception, the EU declines to explain why they might be relevant, or to link them to the "geared to induce" analysis it would have the Panel apply to its *de facto* claims.[112] Most importantly, none supports the EU's *de facto* arguments.

79. ***"The text of SSB 5952."*** The EU's reference to the First and Second Siting Provisions does nothing to remedy the core flaw in both its *de jure* and *de facto* claims: neither provision requires a specific production process, let alone one that necessarily involves the use of fuselages and wings in the production of a commercial airplane. It may be the case that Airbus manufactures a "completed, joined fuselage" of the A320 as an "intermediate good{}" before final assembly,[113] or that the A350 XWB's "wings, in their fully assembled form" enter final assembly.[114] However, it does not follow that Boeing does the same with the 777X, or that ESSB 5952 requires it to do so to be eligible for the challenged tax treatment. In fact, Boeing manufactures the 777X without using fuselages and wings as inputs, and the reason it nevertheless complies with ESSB 5952 is that the statute's conditions pertain only to production, not to the use of inputs. Accordingly, the EU errs when it asserts in response to another Panel question that "the product of that 'wing assembly' {described in the Second Siting Provision} – which obviously is a 'wing' – must be used in the 'final assembly' of that same aircraft."[115] To the contrary, the EU itself admits to "diverging views on when exactly, and upon the assembly of which components, a 'wing' becomes a 'wing,'" and to its ignorance as to what Washington's legislature meant by the term "wing" in ESSB 5952.[116] And while some 777X wing assembly precedes final assembly, the 777X's wings "never exist as complete, standalone articles," and are

[111] *See* EU RPQ 29, para.67.

[112] *Compare* EU RPQ 29, para. 67, *with* EU RPQ 31, paras. 70-71.

[113] *See* EU RPQ 33, para. 83.

[114] *See* EU RPQ 17, para. 18.

[115] *See* EU RPQ 50, para. 133.

[116] *See* EU RPQ 36, paras. 94-95.

completed only during final assembly "as the assembly of the finished aircraft itself is completed."[117]

80. ***Statement of Washington's Governor.*** The EU cites a statement by Governor Inslee "indicating that the 'legislation includes strong contingency language.'"[118] In the first place, a political statement is not direct evidence of what a measure actually requires.[119] That aside, the statement itself begs the question of *what* is conditioned by the "contingency language;" it says nothing about the challenged tax treatment being contingent on the use of domestic over imported goods.

81. ***Boeing's importation of "wings for its 787 from Japan."***[120] This is both incorrect and irrelevant. In fact, Boeing does not import complete 787 wings from Japan.[121] Rather, Boeing imports multiple wing-related structures from Japan and must therefore conduct further wing assembly activity in the United States to produce a finished 787 with complete wings.[122] Even if Boeing could or did import complete 787 wings from Japan, it would not follow that ESSB 5952 requires Boeing to "use" domestic wings on the 777X program, or that Boeing would consider importing 777X wings absent ESSB 5952. Quite the opposite: **[ BCI ]**.[123]

82. ***Boeing's supposed "active{} consider{ation}" of importing 777X wings from Japan.*** The EU asserts that "Boeing actively considered the possibility of importing the 777X wings from Japan prior to the enactment of SSB 5952, and formally decided against that option once SSB 5952 was enacted."[124] This is incorrect in several respects, reflecting the EU's refusal to engage with the evidence. First, the EU bases its assertion on a news reporter's characterization rather than a direct quote from a Boeing employee.[125] Second, the news report never stated or implied that, prior to the passage of ESSB 5952, Boeing "actively considered the possibility of

---

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

[118] *See* EU RPQ 29, para. 67.

[119] *See, e.g., Argentina – Import Measures (Panel)*, para. 6.80 (noting that the International Court of Justice has found that "account must be taken as to the manner in which the statements {by public officials} are made, including the medium in which they are made public, but also whether the statements are unambiguous and, in the case of plural statements, whether they are consistent and repeated over time."); *see also ibid.,* para. 6.78 ("In the Panel's view, caution is warranted when assessing the probative value of any statement, including those made by public officials.").

[120] EU RPQ 29, para. 67.

[121] US RPQ 16, para. 34.

[122] US RPQ 16, para. 34.

[123] Boeing Expert Statement, paras. 42-43, 61-62 (Exhibit USA-1(BCI)).

[124] EU RPQ 29, para. 67.

[125] *Cf. Boeing Hopeful of 777X Deal, May Build Wings in Japan if Rejected*, Chicago Tribune (Nov. 11, 2013) (Exhibit EU-83).

importing the 777X wings from Japan" – indeed, the report concerns the period *after* passage of ESSB 5952 but before the outcome of the vote by IAM 751. Third, the facts directly contradict the EU's assertion that Boeing "formally decided against" importing 777X wings "once SSB 5952 was enacted":

- Importing complete 777X wings from Japan **[ BCI ]**, and Boeing does not even import complete 787 wings, which are significantly smaller.
- Boeing's **[ BCI ]** to assemble the aircraft (including its wings) in Everett.
- When the union voted on November 13, 2013, to reject a new labor contract, Boeing considered it necessary to open the site selection process to locations outside Washington. Despite seriously considering many alternative sites that would make it ineligible for the tax treatment provided by ESSB 5952, Boeing **[ BCI ]**.[126]

83. ***"Rewards" and "penalties."*** As discussed above, the EU's sole argument in relation to its proposed "geared to induce" analysis is that ESSB 5952 penalizes "use of imported wings or fuselages" and rewards "use of domestic wings or fuselages."[127] This "rewards"/"penalties" formulation merely imports from the EU's *de jure* arguments the baseless assumption that the First and Second Siting Conditions require the use of domestic fuselages and wings. It therefore does nothing to support the EU's *de facto* claims. Instead, it only serves to highlight the fact that ESSB 5952, by its design, structure, and operation, has a close relationship with production activity, but an exceedingly attenuated connection to the use of goods. After all, a measure that permits a product to be manufactured entirely from imported parts is hardly one that is "geared to induce" the use of domestic over imported goods.

**D. Conclusion**

84. For all of these and other reasons, therefore, the First and Second Siting Provisions would be very poor instruments for requiring import substitution. As the factual evidence shows, they allow Boeing to use exclusively imported parts to meet the First Siting Provision, and to avoid triggering the Second Siting Provision. They impose no contingency whatsoever on receipt of the challenged treatment by other aerospace manufacturing activities in Washington, whether conducted by Boeing or any other manufacturer. The total configuration of the facts also reveals that there were no potential import opportunities for ESSB 5952 to operate against; the production activities at issue were **[ BCI ]** the United States.[128]

[126] Boeing Expert Statement, para. 62 (Exhibit USA-1(BCI)).

[127] *See* EU RPQ 29, para. 67.

[128] See section IV.C.

## V. THE EU FAILS TO ESTABLISH THAT THE CHALLENGED MEASURES CONFER A FINANCIAL CONTRIBUTION OR A BENEFIT

### A. The EU Fails to Establish that the Challenged Measures Confer a Financial Contribution

85. As the United States previously explained, where a Member challenges the alleged grant of a subsidy to a particular recipient of an alleged subsidy, that Member normally must establish actual receipt of that subsidy.[129] That may not be the case where a Member asserts "that a financial contribution exists in the abstract," which the EU has now clarified is its argument in this proceeding.[130] However, a challenge "in the abstract" does not excuse the complaining Member of its burden to establish all elements of the existence of a subsidy as of the time of the proceeding.

86. Article 1.1(a)(1)(ii) defines a financial contribution to include "where . . . government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)." By virtue of the present tense verb "is," this provision covers revenue foregone or not collected *in the present*. Thus, Article 1.1(a)(1)(ii) deals with tax liabilities that exist in the present, and government actions with respect to those liabilities.

87. The EU advances several legal arguments to evade the implication of the present tense drafting of Article 1.1(a)(1)(ii). None are valid.

88. For example, the EU argues that the term "maintain" in Article 3.2 of the SCM Agreement refers to any situation in which a subsidy measure is in existence, while the "grant" takes place at some later date that the EU never specifies.[131] The ordinary meanings of these terms show that the EU is mistaken. "Grant" means "{g}ive or confer (a possession, a right, etc.) formally; transfer (property) legally,"[132] while "maintain" means "{c}ause to continue (a state of affairs, a condition, an activity, etc.); keep vigorous, effective, or unimpaired; guard from loss or deterioration."[133] When juxtaposed in Article 3.2, these terms refer to the two types of action a government may take to effectuate a subsidy – bringing the subsidy into effect by "granting" it and then, once granted, "maintaining" the subsidy by allowing it to continue in effect. Both situations refer to present actions with respect to the subsidy, and there is no reason to consider, as the EU does, that "maintain" applies to the present and "grant" to the future.

89. The EU also asserts that "is . . . not collected" in Article 1.1(a)(1)(ii) refers to revenue due after the tax liability accrues, whereas "is foregone" relates to revenue "in respect of which a

---

[129] US RPQ 21, para. 46.

[130] EU RPQ 23, para. 45.

[131] EU RPQ 20, para. 32.

[132] New Shorter Oxford English Dictionary, p. 1131 (1993).

[133] New Shorter Oxford English Dictionary, p. 1669 (1993).

liability to pay may or may not have already arisen in the past."[134] The EU provides no rationale for this distinction, and there is none. "Is . . . not collected" and "is foregone" are both in the present passive, so there is no basis to attach a backward-looking perspective to one and a future orientation to the other. Instead, the two verbs describe different ways that the government may obtain tax income – by assessing taxes and then collecting them directly from the tax payer or by requiring the taxpayer to calculate taxes and pay the calculated amount.

90. The EU quotes part of the Appellate Body's reasoning in *US – FSC*: "the word 'foregone' suggests that the government has given up an entitlement to raise revenue that it could 'otherwise' have raised."[135] However, the EU omits the caution that the Appellate Body expressed immediately afterward: "This cannot, however, be an entitlement in the abstract, because governments, in theory, could tax all revenues. There must, therefore, be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'."[136] Thus, the application of Article 1.1(a)(1)(ii) depends not on theoretical entitlements, but on an essentially counterfactual comparison.

91. Finally, the EU contends that applying Article 1.1(a)(1)(ii) exclusively to existing tax liabilities would leave Members with impunity to impose prohibited contingencies in the present in exchange for tax breaks in the distant future.[137] Its concern is misplaced. The farther in the future a tax advantage exists, the less certainty the taxpayer will have that it will continue to be advantageous, and the less likely it is to influence current conduct.

92. In this instance, there is no question that Boeing's 777X program would have qualified for the 0.2904 percent B&O tax rate established under HB 2294 through 2024 if Washington had not enacted ESSB 5952. Thus, its eligibility for that rate during the 2014-2024 does not represent revenue foregone.

### B. The EU Errs in Arguing that a "Benefit" Automatically Exists Whenever Revenue Is Foregone

93. While the concepts of revenue foregone and benefit may overlap to some extent, benefit remains an independent element in the definition of a subsidy that a complaining party must satisfy to make a *prima facie* case. In this dispute, the EU argues that a finding of benefit proceeds automatically from a finding that revenue is foregone.[138] But that is not the case. Revenue is "foregone" for purposes of Article 1.1(a)(1)(ii) when the authorities provide tax

---

[134] EU RPQ 21, para. 34.

[135] EU RPQ 21, para. 35, *quoting US – FSC (AB)*, para. 90.

[136] *US – FSC (AB)*, para. 90.

[137] EU RPQ 21, para. 36.

[138] EU RPQ 22, para. 40.

treatment more advantageous to the taxpayer than under the "normative benchmark" of the Member's tax system. In contrast, a benefit exists when a financial contribution provides the recipient more advantageous terms than the market would provide.[139] The EU's approach treats these measurements as identical when they are, in fact, different. To take one example, it might be the case that, by not taking the challenged tax treatment, the taxpayer qualified instead for another equal or better tax treatment. Then, there would be not benefit. The EU bears the burden of showing in each instance that the treatment under ESSB 5952 is better than available on the market, and has not done so.

## IV. CONCLUSION

94. For the reasons discussed in this and previous submissions, the United States respectfully requests that the Panel reject the EU's claims.

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