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UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

REPORT OF THE PANEL

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Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, p. 1221
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
Canada – Aircraft Credits and Guarantees	Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, p. 849
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
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Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
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EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
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Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805

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US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
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, p. 3
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US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755

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US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

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Japan – Alcoholic Beverages I	GATT Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216, adopted 10 November 1987, BISD 34S/83
US – Section 337 Tariff Act	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, BISD 34S/136

EXHIBITS REFERRED TO IN THIS REPORT

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EU-3	Engrossed Substitute Senate Bill 5952, Chapter 2, Laws of 2013 3rd Special Session, 2014 Wash. Sess. Laws 2	ESSB 5952
EU-4	Final Bill Report ESSB 5952	ESSB 5952 Final Bill Report
EU-5	Department of Revenue Fiscal Note (5952 SB)	ESSB 5952 Fiscal Note
EU-21	House Bill 2294, 2003 Wash. Sess. Laws 2767	HB 2294
EU-22	RCW 82.04.260: Tax on manufacturers and processors of various foods and by-products − Research and development organizations − Travel agents − Certain international activities − Stevedoring and associated activities − Low-level waste disposers − Insurance producers, surplus line brokers, and title insurance agents − Hospitals − Commercial airplane activities − Timber product activities − Canned salmon processors. (Effective until July 1, 2015.)	RCW Section 82.04.260
EU-23	RCW 82.04.4461: Credit − Preproduction development expenditures. (Expires July 1, 2040.)	RCW Section 82.04.4461
EU-24	RCW 82.04.4463: Credit − Property and leasehold taxes paid on property used for manufacture of commercial airplanes. (Expires July 1, 2040.)	RCW Section 82.04.4463
EU-25	RCW 82.08.975: Exemptions − Computer parts and software related to the manufacture of commercial airplanes. (Expires July 1, 2040.)	RCW Section 82.08.975
EU-26	RCW 82.12.975: Computer parts and software related to the manufacture of commercial airplanes. (Expires July 1, 2040.)	RCW Section 82.12.975
EU-27	RCW 82.08.980: Exemptions − Labor, services, and personal property related to the manufacture of commercial airplanes. (Expires July 1, 2040.)	RCW Section 82.08.980
EU-28	RCW 82.12.980: Exemptions − Labor, services, and personal property related to the manufacture of commercial airplanes. (Expires July 1, 2040.)	RCW Section 82.12.980
EU-29	RCW 82.29A.137: Exemptions − Certain leasehold interests related to the manufacture of superefficient airplanes. (Expires July 1, 2040.)	RCW Section 82.29A.137
EU-30	RCW 84.36.655: Property related to the manufacture of superefficient airplanes. (Expires July 1, 2040.)	RCW Section 84.36.655
EU-32	RCW 82.04.220: Business and occupation tax imposed.	RCW Section 82.04.220
EU-33	Department of Revenue, Washington State, Business & occupation tax	B&O Tax Explanation, Washington State Department of Revenue
EU-35	House Bill 2466, 2006 Wash. Sess. Laws 787	HB 2466
EU-36	RCW 82.04.240: Tax on manufacturers. (Contingent expiration date.)	RCW Section 82.04.240
EU-37	RCW 82.04.450: Value of products, how determined.	RCW Section 82.04.450
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EU-40	RCW 82.04.070: "Gross proceeds of sales".	RCW Section 82.04.070
EU-41	WAC 458-20-19301: Multiple activities tax credits.	WAC Section 458-20-19301
EU-42	Substitute Senate Bill 6828, 2008 Wash. Sess. Laws 365	SSB 6828
EU-44	Snohomish County Council, Executive/Council Approval Form, 25 July 2012	Snohomish County Council, Lease Approval
EU-45	Paine Field Community Council, Meeting Minutes, November 12, 2013	Paine Field Community Council, Minutes of Meeting of 12 November 2013
EU-48	The Seattle Times, "State gave Boeing a free pass on $19.5M in sales tax", by Jim Brunner, originally published November 29, 2015 / Updated November 30, 2015	The Seattle Times, "State gave Boeing a free pass on $19.5M in sales tax", 30 November 2015
EU-49	Department of Revenue, Washington State, Leasehold excise tax	Leasehold Excise Tax, Washington State Department of Revenue
EU-50	WAC 458-29A-100: Leasehold excise tax − Overview and definitions.	WAC Section 458-29A-100

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EU-51	Washington State Department of Revenue, Personal Property Tax, December 2012	Personal Property Tax, Washington State Department of Revenue
EU-58	RCW 82.32.850: Significant commercial airplane manufacturing − Tax preference − Contingent effective date.	RCW Section 82.32.850
EU-59	Office of Washington Governor − Jay Inslee, "Legislature approves key elements of 777X incentive package", 10 November 2013	Office of Washington Governor, "Legislature approves key elements of 777X incentive package", 10 November 2013
EU-61	Notification Letter from Carol K. Nelson, Director, Washington State Department of Revenue, to Kyle Thiessen, Washington State Code Reviser, 10 July 2014	Letter from the Director of the Washington State Department of Revenue to the Code Reviser, 10 July 2014
EU-62	Department of Revenue, Washington State, Tax Classifications for Common Business Activities	Tax Classifications for Common Business Activities, Washington State Department of Revenue
EU-65	Reuters, "Boeing seen in advanced talks to make 777X near Seattle", by Tim Hepher and Alwyn Scott, 4 November 2013	Reuters, "Boeing seen in advanced talks to make 777X near Seattle", 4 November 2013
EU-78	Boeing Presentation, "Introducing the 787", by Tom Dodt, September 2011	Boeing Presentation, "Introducing the 787", September 2011
EU-79	Boeing, "Randy's Journal: Arrivals", posted on 22 May 2007	Boeingblogs, "Randy's Journal: Arrivals", 22 May 2007
EU-82	RCW 82.32.550: "Commercial airplane," "component," and "superefficient airplane" − Definitions.	RCW Section 82.32.550(3)
EU-83	Reuters, "Boeing hopeful of 777X deal, may build wings in Japan if rejected", 11 November 2013	Reuters, "Boeing hopeful of 777X deal, may build wings in Japan if rejected", 11 November 2013
EU-84	Airbus, "How is an aircraft built? Production"	Airbus, "How is an aircraft built? Production"
EU-86	Airbus, "How is an aircraft built? Final assembly and tests"	Airbus, "How is an aircraft built? Final assembly and tests"
EU-87	Airbus Video, "The A350 XWB Final Assembly Line: efficiency in motion", 23 October 2012	Airbus Video, "The A350 XWB Final Assembly Line: efficiency in motion", 23 October 2012
EU-88	Airbus Video, "A350 XWB final assembly: a step-by-step overview", 23 October 2012	Airbus Video, "A350 XWB final assembly: a step-by-step overview", 23 October 2012
EU-91	BBC Documentary, "How to Build A Super Jumbo Wing", 24 August 2013	BBC Documentary, "How to Build A Super Jumbo Wing", 24 August 2013
EU-92	RCW 82.08.020: Tax imposed − Retail sales − Retail car rental. (Contingent expiration date.)	RCW Section 82.08.020
EU-95	Department of Revenue, Washington State, 2016 Tax Exemption Study: A Study of Tax Exemptions, Exclusions or Deductions From the Base of a Tax; a Credit Against a Tax; a Deferral of a Tax; or a Preferential Tax Rate: As Authorized by RCW 43.06.400	2016 Tax Exemption Study, Washington State Department of Revenue
EU-97	Boeing Video, "Boeing 747 Dreamlifter", 17 January 2009	Boeing Video, "Boeing 747 Dreamlifter", 17 January 2009
EU-104	Airbus Video, "A380 from dream to reality: Final assembly", 18 October 2007	Airbus Video, "A380 from dream to reality: Final assembly", 18 October 2007
EU-110	Washington State House Finance Committee, Video, "Testimony of Governor Inslee before House Finance Committee", 7 November 2013	Washington State House Finance Committee, Video, "Testimony of Governor Inslee before House Finance Committee", 7 November 2013
EU-121	The Seattle Times, "Boeing must disclose tax-break savings, state Department of Revenue rules", by Jim Brunner, originally published January 7, 2016 / Updated January 8, 2016	The Seattle Times, "Boeing must disclose tax-break savings, state Department of Revenue rules", 8 January 2016
EU-122	Boeing Frontiers, "Supersize! The 747-700 will be transformed into an even larger freighter to save significant time and costs in transporting 787 assemblies", by Tom Koehler, June 2005	Boeing Frontiers, "The 747-700 will be transformed into an even larger freighter", June 2005

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USA-1	**[[BCI]]**	Boeing expert statement (BCI)
USA-2	**[[BCI]]**	Boeing, Make/Buy Model 777-300ER, July 2007 (BCI)
USA-6	Boeing Backgrounder, "The Boeing 777 Family: Preferred by Passengers and Airlines around the World", April 2015	Boeing 777 Backgrounder
USA-8	**[[BCI]]**	Boeing, 777X Make/Buy, All Commodities, Status as of 17 December 2014 (BCI)
USA-11	Department of Revenue, Washington State, Question: What are the major B&O tax classifications?	Question: What are the major B&O tax classifications?, Washington State Department of Revenue
USA-12	Department of Revenue, Washington State, Retail Sales Tax	Retail Sales Tax Explanation, Washington State Department of Revenue
USA-13	Department of Revenue, Washington State, Services subject to sales tax	Services Subject to Sales Tax, Washington State Department of Revenue
USA-14	Department of Revenue, Washington State, Digital Products including Digital Goods	Digital Products including Digital Goods, Washington State Department of Revenue
USA-15	*Shorter Oxford English Dictionary on Historical Principles*, 5th edition, Volume 2, p. 2044	*Shorter Oxford English Dictionary*, 5th edition, Volume 2, p. 2044
USA-16	Department of Revenue, Washington State, Local Sales, Use Tax Rates and Changes (Effective January 1 – March 31, 2016)	Local Sales, Use Tax Rates and Changes, Washington State Department of Revenue
USA-17	RCW 82.12.020: Use tax imposed. (*Effective until January 1, 2016.*)	RCW Section 82.12.020
USA-18	RCW 82.12.035: Credit for retail sales or use taxes paid to other jurisdictions with respect to property used. (*Effective until January 1, 2016.*)	RCW Section 82.12.035
USA-19	Department of Revenue, Washington State, Use Tax	Use Tax Explanation, Washington State Department of Revenue
USA-20	RCW 84.36.005: Property subject to taxation	RCW Section 84.36.005
USA-21	RCW 84.36.010: Public, certain public-private and tribal property exempt. (*Effective until January 1, 2022.*)	RCW Section 84.36.010
USA-22	RCW 84.36.020: Cemeteries, churches, parsonages, convents, and grounds. (*Effective until December 31, 2020.*)	RCW Section 84.36.020
USA-23	RCW 84.36.477: Business inventories.	RCW Section 84.36.477
USA-25	Department of Revenue, Washington State, Leasehold excise tax	Leasehold Excise Tax Explanation, Washington State Department of Revenue
USA-26	RCW 82.29A.030: Tax imposed—Credit—Additional tax imposed. (*Effective until January 1, 2019.*)	RCW Section 82.29A.030
USA-28	*Le Nouveau Petit Robert*, 2009, pp. 2034-2035	*Le Nouveau Petit Robert*, 2009, pp. 2034-2035
USA-29	*Diccionario de la Lengua Española*, 2001, pp. 1839-1840	*Diccionario de la Lengua Española*, 2001, pp. 1839-1840
USA-30	Boeing, 777X Content Sources, Major Structures & Propulsion, Status as of 27 October 2015	Boeing, 777X Content Sources, Major Structures & Propulsion, Status as of 27 October 2015 (BCI)
USA-31	RCW 82.04.440: Credit – Persons taxable on multiple activities.	RCW Section 82.04.440
USA-32	**[[BCI]]**	Boeing letter to the Director of the Washington State Department of Revenue (BCI), 9 July 2014

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USA-33	Collective Bargaining Agreement between Boeing and the International Association of Machinists and Aerospace Workers, AFL-CIO, of 2 November 2008, including Contract Extension and Modification Agreements of 7 December 2011 and 3 January 2014	Collective Bargaining Agreement between Boeing and the International Association of Machinists and Aerospace Workers, 2 November 2008, including Contract Extension and Modification Agreements, 7 December 2011 and 3 January 2014
USA-34	**[[BCI]]**	Addendum No. 14 to the 1991 Boeing Everett Mitigation Decision Document SEPA #14-009, 27 March 2014 (BCI)
USA-35	**[[BCI]]**	Addendum No. 15 to the 1991 Boeing Everett Mitigation Decision Document SEPA #14-011 – Composite Wing Manufacturing Facility, 30 May 2014 (BCI)
USA-37	RCW 82.04.120: "To manufacture".	RCW Section 82.04.120
USA-38	Supreme Court of Washington, Citizens Alliance for Property Rights Legal Fund v. San Juan County et al. (2015)	Supreme Court of Washington, Citizens Alliance for Property Rights Legal Fund v. San Juan County et al. (2015)
USA-42	Mitsubishi Heavy Industries, Boeing 787	Mitsubishi Heavy Industries, Boeing 787
USA-51	*Shorter Oxford English Dictionary*, 6th edition, pp. 2044-2045	*Shorter Oxford English Dictionary*, 6th edition, pp. 2044-2045
USA-52	Spirit AeroSystems, "Spirit celebrates completion of first Boeing 737 MAX fuselage	Spirit AeroSystems, "Spirit celebrates completion of first Boeing 737 MAX fuselage
USA-63	Chapter 1.04 RCW	Chapter 1.04 RCW
USA-64	Chapter 82.08 RCW: Retail Sales Tax	RCW Chapter 82.08
USA-65	Department of Revenue, Washington State, 2016 Tax Exemption Study, Introduction and Summary of Findings	2016 Tax Exemption Study, Introduction and Summary of Findings, Washington State Department of Revenue
USA-67	**[[BCI]]**	Boeing 787 customs invoice and related shipment documentation (BCI)
USA-68	Boeing Frontiers, "Wings around the world", by Adam Morgan, March 2006	Boeing Frontiers, "Wings around the world", March 2006
USA-73	**[[BCI]]**	Email from Erik Zahn, Boeing Commercial Airplanes, 15 April 2016 (BCI)
USA-84	Washington Court of Appeals, Nationscapital Mortgage Corporation et al. v. Department of Financial Institutions, 133 Wn. App. 723, 737-738 (Wash. Ct. App. 2006), June 2006	Washington Court of Appeals, Nationscapital Mortgage Corporation et al. v. Department of Financial Institutions, June 2006

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
B&O tax	Business and occupation tax
BCI	Business Confidential Information
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ESSB 5952	Washington State Legislature Engrossed Substitute Senate Bill 5952
GATT 1994	General Agreement on Tariffs and Trade 1994
HB 2294	Washington State Legislature House Bill 2294
HB 2466	Washington State Legislature House Bill 2466
HSBI	Highly Sensitive Business Information
RCW	Revised Code of Washington (Washington State)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SSB 6828	Washington State Substitute Senate Bill 6828
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WAC	Washington Administrative Code (Washington State)
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the European Union

1.1. On 19 December 2014, the European Union requested consultations with the United States pursuant to Articles 4.1 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement); Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), to the extent incorporated by Article 30 of the SCM Agreement; and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 2 February 2015. These consultations did not lead to a mutually satisfactory solution.[2]

1.2 Panel establishment and composition

1.3. On 12 February 2015, the European Union requested the establishment of a panel pursuant to Articles 4.4 and 30 of the SCM Agreement, Article XXIII:2 of the GATT 1994 (to the extent incorporated by Article 30 of the SCM Agreement), and Article 6 of the DSU (as modified by Article 4.4 of the SCM Agreement, and in light of Article 1.2 and Appendix 2 to the DSU), with standard terms of reference.[3] At its meeting on 23 February 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the European Union, in accordance with the provisions of Article 4.4 of the SCM Agreement and Article 6 of the DSU, with standard terms of reference.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS487/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 13 April 2015, the European Union requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 22 April 2015, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Daniel Moulis
Members:	Mr Terry Collins-Williams Mr Wilhelm Meier

1.6. Australia; Brazil; Canada; China; India; Japan; the Republic of Korea (Korea); and the Russian Federation (Russia) notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. The commencement of the Panel's work was delayed as a result of a lack of available resources in the World Trade Organization (WTO) Secretariat.[6] The parties were notified of this circumstance. The Panel held its organizational meeting with the parties on 4 December 2015.

[1] See Request for Consultations by the European Union, WT/DS487/1, 23 December 2014.
[2] See Request for the Establishment of a Panel by the European Union, WT/DS487/2, 13 February 2015.
[3] Ibid.
[4] See Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 23 February 2015, WT/DSB/M/357, 17 April 2015, pp. 14-15.
[5] Constitution of the Panel Established at the Request of the European Union – Note by the Secretariat, WT/DS487/3, 23 April 2015.
[6] Communication from the Panel to the DSB, WT/DS487/4, 30 September 2015.

After consultation with the parties, the Panel adopted its Working Procedures on 7 December 2015[7], its timetable on 16 December 2015, and a revised timetable on 19 April 2016.

1.8. The European Union filed its first written submission on 9 December 2015. The United States filed its first written submission on 19 January 2016. Third-party submissions were received on 26 January 2016 from Australia, Brazil, Canada, China, and Japan.

1.9. The Panel held a first substantive meeting with the parties on 24 and 25 February 2016. A session with the third parties took place on 25 February 2016, in which oral statements were made by Australia, Brazil, China, and Japan. Written responses to questions posed by the Panel were received on 9 March 2016 from the European Union, the United States, Australia, Brazil, Canada, China, and Japan.

1.10. The parties filed their second written submissions on 18 March 2016.

1.11. The Panel held a second substantive meeting with the parties on 5 April 2016. Written responses to questions posed by the Panel were received on 18 April 2016. Comments by the parties on each other's responses to questions were received on 25 April 2016.

1.12. On 9 May 2016, the Panel issued the descriptive sections of its draft report to the parties. Parties provided comments to the descriptive sections of the Panel report on 17 May 2016.

1.13. The Panel issued its Interim Report to the parties on 6 July 2016. On 15 July 2016, the European Union and the United States each submitted written requests for review of precise aspects of the interim report. Neither party requested an interim review meeting. On 20 July 2016, each of the parties submitted comments on the other's requests for review. The Panel issued its Final Report to the parties on 29 July 2016.

1.3.2 Changes to the timetable

1.14. On 5 January 2016, the United States requested an adjustment to the timetable so that the deadline for the second written submission was set no earlier than 25 March 2016 (one week later than originally scheduled). The European Union commented on the United States' request on 7 January 2016. On 15 January 2016, the Panel informed the parties that it had declined the United States' request for an extension of the deadline for the second written submissions.[8]

1.15. In the course of the second meeting with the parties on 5 April 2016, the Panel informed the parties that in order to have sufficient time to assess the legal and factual issues in the dispute, the timetable would have to be adjusted so that the interim report was issued to parties on 15 June 2016 and all subsequent dates were similarly adjusted. The parties had no comments to this proposal. On 19 April 2016, the Panel issued the revised timetable.

1.16. On 28 April 2016, the United States requested an opportunity to comment on certain factual evidence and arguments that were submitted by the European Union with its comments on the United States' responses to Panel questions. The European Union commented on the United States' request on 2 May 2016. On 4 May 2016, the Panel informed the parties that it had declined the United States' request.[9]

1.17. On 13 June 2016, the Panel informed the parties that it intended to issue the interim report to parties on 6 July 2016 and to adjust all subsequent dates similarly. The European Union submitted comments to this notice on 14 June. On 15 June 2016, the Panel issued a revised timetable.

1.18. On 12 July 2016, the United States requested a two-day extension for parties to request the review of precise aspects of the interim report. On the same date, the European Union communicated its agreement to the United States' request, under the understanding that subsequent dates on the schedule would not change. On 13 July 2016, the Panel informed the

[7] See the Panel's Working Procedures in Annex A-1.
[8] See letter from the Panel in Annex D-1.
[9] Ibid.

parties that it had extended by two days the deadline for parties to request the review of precise aspects of the interim report, and that subsequent deadlines had not been revised. The Panel issued a revised timetable to the parties.

1.3.3 Additional Working Procedures for the Protection of Business Confidential Information (BCI) and Highly Sensitive Business Information (HSBI)

1.19. At the request of the United States, and having considered comments from the European Union, the Panel adopted Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information (BCI/HSBI Procedures) on 13 January 2016.[10]

1.3.4 Additional Working Procedures for the Partial Opening to the Public of the Meetings of the Panel

1.20. On 22 February 2016 and 23 March 2016, at the request of the United States, and noting the European Union's agreement, the Panel adopted additional working procedures for the partial opening to the public of the meetings of the Panel. These procedures provided for public viewing of a video-recording of non-confidential portions of each meeting by means of delayed broadcast. Closed sessions were foreseen for the parties to address BCI or HSBI and for those third parties that had requested not to make their statements in the video-recorded session for public viewing.[11] The public screening of the video-recording of the non-confidential portions of the Panel meetings took place on 17 and 18 May 2016.

2 FACTUAL ASPECTS

2.1. The claims brought by the European Union concern tax-related provisions for civil aircraft provided by the state of Washington in the United States, as amended by Engrossed Substitute Senate Bill 5952 (ESSB 5952), Chapter 2, Laws of 2013 3rd Special Session, 2014 Wash. Sess. Laws 2. Specifically, this dispute concerns the following tax-related provisions contained in the Revised Code of Washington (RCW):

a. a 0.2904% business and occupation tax rate with respect to the manufacture or sale of commercial airplanes, contained in RCW Section 82.04.260(11);

b. tax credits for property taxes and leasehold excise taxes on commercial airplane manufacturing facilities, contained in RCW Section 82.04.4463;

c. tax credits for aerospace product development, contained in RCW Section 82.04.4461;

d. sales tax exemption for computer hardware, software, and peripherals, contained in RCW Section 82.08.975;

e. sales tax exemption for construction services and materials, contained in RCW Section 82.08.980;

f. use tax exemption for computer hardware, software, and peripherals, contained in RCW Section 82.12.975;

g. use tax exemption for construction services and materials, contained in RCW Section 82.12.980;

h. leasehold excise tax exemption, contained in RCW Section 82.29A.137; and

i. leaseholder property tax exemption, contained in RCW Section 84.36.655.

[10] See the Additional Working Procedures for the Protection of BCI/HSBI in Annex A-2.
[11] See the Additional Working Procedures for the partial opening to the public of the meetings of the Panel in Annexes A-3 and A-4.

2.2. The European Union claims that the availability of the above tax incentives is subject to the conditions in Sections 2, 5, and 6 of ESSB 5952 (as codified at RCW Sections 82.32.850 and 82.04.260(11)(e)(ii)). These conditions relate to a decision on the initial siting of a "significant commercial airplane manufacturing program" (as defined in the relevant legislation[12]) in the state of Washington, as well as to the future siting outside the state of Washington of "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".[13]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests that the Panel find that each of the challenged Washington State tax incentives, as amended and extended by ESSB 5952, constitutes a subsidy that is prohibited pursuant to Articles 3.1(b) and 3.2 of the SCM Agreement due to being contingent on the use of domestic over imported goods. The European Union further requests, pursuant to Article 4.7 of the SCM Agreement, that the Panel recommend that the United States withdraw the subsidies without delay.

3.2. The United States requests that the Panel reject the European Union's claims in this dispute and find that the challenged measures are not inconsistent with the United States' obligations under Articles 3.1(b) and 3.2 of the SCM Agreement.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, China, and Japan are reflected in their executive summaries, provided in accordance with paragraph 21 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, and C-5). India, Korea, and Russia did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 6 July 2016, the Panel issued its Interim Report to the parties. On 15 July 2016, the European Union and the United States each submitted written requests for review of precise aspects of the Interim Report. Neither party requested an interim review meeting. On 20 July 2016, each of the parties submitted comments on the other's requests for review.

6.2. In accordance with Article 15.3 of the DSU, this section sets out the Panel's response to the parties' requests for review of precise aspects of the Report made at the interim review stage. The parties' requests for substantive modifications are discussed below, generally in sequence according to the paragraphs to which the requests pertain.

6.3. The numbering of some of the paragraphs and footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Interim Report and, where it differs, includes the corresponding numbering in the Final Report.

6.4. The United States notes that **paragraph 7.4** summarizes the requests of the United States "but omits an issue raised by the United States for the Panel's consideration regarding the Panel's terms of reference". In particular, the United States requests inclusion of a reference to its opening

[12] In turn, "significant commercial airplane manufacturing program" is defined as: "[A]n airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section: (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." ESSB 5952 Sections 2(2)(c) and (d), codified at RCW Sections 82.32.850(2)(c) and (d) (Exhibits EU-3 and EU-58).

[13] ESSB 5952 Sections 5(11)(e)(ii) and 6(11)(e)(ii), codified at RCW Section 82.04.260(11)(e)(ii) (Exhibits EU-3 and EU-22).

statement at the first meeting of the Panel, in which the United States noted that, prior to the establishment of this Panel, the European Union had maintained that the measures at issue in this dispute were properly within the terms of reference of the compliance panel in the proceeding under Article 21.5 of the DSU in *US – Large Civil Aircraft (2nd complaint)*.[14] The United States identifies **paragraph 7.41** of the Interim Report (paragraph 7.39 of this Report) as "a logical place for the Panel to address the terms of reference issue identified by the United States".[15] The European Union considers that this is an inappropriate request for review of an interim report and that it should be rejected by the Panel. The European Union requests that, to the extent that the Panel elects to include a discussion on the United States' statements related to terms of reference, the Panel reflect "the United States' repeated statements that it did not consider any of the measures to be outside the [Panel's] terms of reference".[16] The Panel declines the United States' request for inclusion of a reference to this issue in the Panel's findings. In its statement to the Panel, the United States explicitly clarified that "the United States does not itself consider that any of the measures at issue are outside the Panel's terms of reference".[17] Although the Panel recognizes that the vesting of jurisdiction is a fundamental issue that may need to be considered even in the absence of any objection by a party, the Panel does not find any reason to question the vesting of its jurisdiction in the present case. Moreover, apart from any potential relevance of statements by a party made in another dispute, it is an uncontested fact that the measures at issue in this dispute are not presently being considered in any other dispute. The Panel addresses the legislative background and scope of the measures within its terms of reference in Section 7.3.3, and does not consider any additional discussion of the issue raised by the United States to be necessary.

6.5. The United States proposes an addition at the end of the second sentence of **paragraph 7.7** to "elaborate the function of the Panel" in examining municipal law, which according to the United States is "to determine the proper factual predicate against which WTO-consistency will be judged".[18] The European Union considers that the addition proposed by the United States is not necessary, as the current formulation is an accurate description of the existing jurisprudence on the matter.[19] The United States also requests a revision to **paragraph 7.8** to "avoid implying that an analysis of the meaning of a Member's municipal law could disregard the interpretive rules of a Member's domestic legal system".[20] The European Union considers that the modification proposed by the United States is not necessary, as the current formulation is an accurate and succinct description of the existing jurisprudence relating to the identification of the meaning and content of domestic law.[21] The Panel considers that paragraphs 7.7 and 7.8 adequately refer to Appellate Body reports and consequently does not consider the elaboration of the issue requested by the United States to be necessary.

6.6. The European Union proposes to consolidate the discussions in **paragraphs 7.7-7.8 and 7.15-7.16** on a panel's role in examining the meaning of municipal law.[22] The United States recalls its comments on paragraphs 7.7-7.8 and requests that the Panel take those comments into account in making any modifications in response to the European Union's request.[23] The Panel has consolidated this discussion to avoid duplication by deleting paragraphs 7.15 and 7.16 of the Interim Report.

6.7. The European Union requests changes to **paragraphs 7.17, 7.40, 7.81-7.84, and 7.245** of the Interim Report (paragraphs 7.15, 7.38, 7.79-7.82, and 7.243 of this Report), to "reflect the uncontested fact that the challenged aerospace tax incentives existed in Washington State prior to

[14] United States' request for review of the Panel's Interim Report, paras. 2-3.
[15] Ibid. para. 12.
[16] European Union's comments on United States' request for review of the Panel's Interim Report, para. 1.
[17] United States' opening statement at the first meeting of the Panel, para. 34.
[18] United States' request for review of the Panel's Interim Report, paras. 4-5.
[19] European Union's comments on United States' request for review of the Panel's Interim Report, para. 2.
[20] United States' request for review of the Panel's Interim Report, para. 6.
[21] European Union's comments on United States' request for review of the Panel's Interim Report, para. 3.
[22] European Union's request for review of the Panel's Interim Report, para. 5.
[23] United States' comments on European Union's request for review of the Panel's Interim Report, para. 6.

ESSB 5952, which amended the terms of those incentives".[24] The United States has no objection to the revisions requested by the European Union.[25] The Panel has revised the paragraphs identified by the European Union to refer to the measures "as amended and extended by" ESSB 5952.

6.8. The United States requests revisions to **paragraph 7.36** of the Interim Report (paragraph 7.34 of this Report) to reflect its view of the legislative history of the measures at issue in this dispute and the measures at issue in *US – Large Civil Aircraft (2nd complaint)*.[26] The European Union requests that the Panel reject the United States' request for modification, which in its view "is predicated on a series of erroneous factual premises".[27] In the light of the parties' comments, the Panel has made minor adjustments to the paragraph.

6.9. Both the European Union and the United States suggest changes to **paragraphs 7.39 and 7.42** of the Interim Report (paragraphs 7.37 and 7.40 of this Report) to provide a more accurate characterization of legislation in Washington State.[28] The Panel has made consequential revisions to paragraphs 7.39 and 7.42 of the Interim Report in the light of the parties' comments.

6.10. The United States requests the elimination of a sentence in **paragraph 7.55** of the Interim Report (paragraph 7.53 of this Report), which states that an entitlement granted by virtue of the relevant legislation "could only be re-established through further legislation revoking or amending the previous legislation". The United States notes that "revoking or amending the particular legislation at issue are not the only alternatives" and revenue may no longer be foregone, for example, if the measure providing for the benchmark tax were changed.[29] The European Union considers that the sentence, as currently worded, is correct.[30] In the light of the parties' comments, the Panel has removed the word "only" from the sentence identified by the United States.

6.11. The European Union requests in **paragraphs 7.89, 7.104, 7.117, 7.113, 7.139, and 7.148** of the Interim Report (paragraphs 7.87, 7.102, 7.115, 7.131, 7.137, and 7.146 of this Report) the addition of a reference to the objectives of HB 2294 (along with the existing reference to ESSB 5952) in discussing the "objective reasons" for the relevant tax treatment of each aerospace tax measure.[31] The United States does not agree with the European Union's request, and considers that it is unclear what relevance the European Union ascribes to the objectives of HB 2294 in the context of the relevant paragraphs. As part of its comments on the European Union's request, the United States requests a modification of **paragraph 7.65** of the Interim Report (paragraph 7.63 of this Report), as legislation such as ESSB 5952 does not amend or extend previous legislation but rather amends or extends tax treatment provided for in the Revised Code of Washington, which itself reflects earlier legislation.[32] The Panel does not consider the additional references requested by the European Union to be necessary. The paragraphs identified by the European Union clarify the "objective reasons" for each of the aerospace tax measures with supporting cross-references to the more extensive discussion in the context of the B&O aerospace tax rate, including reference to the objectives of prior legislation. The Panel has made the change requested by the United States in paragraph 7.63 of this Report.

6.12. The United States requests a revision of the first sentence of **paragraph 7.142** of the Interim Report (paragraph 7.140 of this Report) to reflect that, as noted in the remainder of the paragraph, the leasehold excise tax is an excise tax, and not a property tax.[33] The European Union

[24] European Union's request for review of the Panel's Interim Report, para. 6.
[25] United States' comments on European Union's request for review of the Panel's Interim Report, para. 7.
[26] United States' request for review of the Panel's Interim Report, para. 8.
[27] European Union's comments on United States' request for review of the Panel's Interim Report, para. 4.
[28] European Union's request for review of the Panel's Interim Report, paras. 8-10; United States' request for review of the Panel's Interim Report, paras. 10-11 and 13.
[29] United States' request for review of the Panel's Interim Report, para. 14.
[30] European Union's comments on United States' request for review of the Panel's Interim Report, para. 6.
[31] European Union's request for review of the Panel's Interim Report, para. 11.
[32] United States' comments on European Union's request for review of the Panel's Interim Report, paras. 11-12.
[33] United States' request for review of the Panel's Interim Report, para. 15.

requests that the Panel reject the United States' proposed modification and retain the current language. In the European Union's view, the leasehold excise tax is functionally a property tax. To the extent that the United States wishes to clarify that the leasehold excise tax is not formally a "property tax" within the specific meaning of the Revised Code of Washington, the European Union considers that the Panel could replace the phrase "property tax" in the sentence at issue with the phrase "tax on property", when referring to the leasehold excise tax.[34] The Panel has partially modified the first sentence of paragraph 7.142 of the Interim Report to accommodate the United States' request. However, the Panel has used the word "supplements" instead of "complements" (which was the word suggested by the United States) to describe the relationship of the "leasehold excise tax" to the "property taxes".

6.13. The European Union requests in **footnote 263 to paragraph 7.143** of the Interim Report (footnote 300 to paragraph 7.141 of this Report), in relation to the reference to the parties' arguments on the quantitative coverage of property tax exemptions, clarification of the cross-reference to the discussion of the parties' arguments concerning sales and use tax exemptions.[35] The United States has no comment on the European Union's request.[36] The Panel has made the requested clarification to footnote 263 of the Interim Report. The Panel has also provided a supplemental reference to the parties' arguments in a footnote to the last sentence of paragraph 7.121 of this Report.

6.14. The European Union requests a revision of **paragraph 7.176** of the Interim Report (paragraph 7.174 of this Report) to refer to "wing assembly", rather than "final assembly of a wing", in the description of its argument as to the potential triggering of the Second Siting Provision.[37] The United States has no objection to the European Union's request.[38] The Panel has made the requested correction to paragraph 7.176 of the Interim Report.

6.15. The United States requests a revision of **paragraph 7.187** of the Interim Report (paragraph 7.185 of this Report) to better capture the substance of the United States' argument in rejecting the European Union's interpretation of the word "use" in Article 3.1(b) of the SCM Agreement.[39] The European Union makes no comment on the United States' request. The Panel has made the requested change.

6.16. The European Union requests rephrasing **paragraph 7.231** of the Interim Report (paragraph 7.229 of this Report), specifically by removing the word "challenged" before "aerospace tax measures", so as not to inaccurately convey that the measures challenged by the European Union are the aerospace tax incentives as they stood before the amendments and extensions effected by ESSB 5952.[40] The United States agrees with the European Union's explanation and considers further that the first sentence in paragraph 7.231 of the Interim Report should be revised as explained in the United States' comments on paragraph 7.36 of the Interim Report discussed above.[41] The Panel has made the modification requested by the European Union. The Panel has added a footnote to the first sentence of paragraph 7.229 of this Report referring to the earlier discussion of the legislative background of ESSB 5952, but declines to make the additional changes to the sentence requested by the United States.

6.17. The European Union requests a change in **paragraph 7.231** of the Interim Report of the phrase "the entry into force of the amended and extended aerospace tax measures was contingent" to instead state "the entry into force of the amendment and extension of the aerospace tax measures was contingent". According to the European Union, this change would clarify that it was only the amendment and extension of the tax measures that were conditional upon fulfilment of the First Siting Provision, rather than the entirety of the aerospace tax

[34] European Union's comments on United States' request for review of the Panel's Interim Report, para. 7.
[35] European Union's request for review of the Panel's Interim Report, para. 13.
[36] United States' comments on European Union's request for review of the Panel's Interim Report, para. 14.
[37] European Union's request for review of the Panel's Interim Report, para. 14.
[38] United States' comments on European Union's request for review of the Panel's Interim Report, para. 14.
[39] United States' request for review of the Panel's Interim Report, para. 16.
[40] European Union's request for review of the Panel's Interim Report, para. 16.
[41] United States' comments on European Union's request for review of the Panel's Interim Report, para. 17.

measures. The European Union requests similar changes to **paragraphs 7.289 and 7.315(a)** of the Interim Report to refer to the entry into force of the amendment and extension by ESSB 5952 of the aerospace tax measures.[42] The United States has no objection to the European Union's requests.[43] The Panel has made the requested modifications to paragraphs 7.231, 7.289, and 7.315(a) of the Interim Report (paragraphs 7.229, 7.287, and 7.313(a) of this Report).

6.18. The European Union requests an additional citation in **footnote 450 to paragraph 7.243** of the Interim Report (footnote 488 to paragraph 7.241 of this Report) to its submissions on the point that the measures at issue do not place any conditions on the use of elements or components of commercial airplanes, other than wings and fuselages.[44] The United States has no objection to the European Union's request.[45] The Panel has made the requested addition to the footnote.

6.19. The European Union requests a modification of **paragraph 7.289** of the Interim Report (paragraph 7.287 of this Report) to reflect that only wings *or* fuselages, not both, are required to be made of carbon fibre as noted elsewhere by the Panel.[46] The United States has no objection to the European Union's request.[47] The Panel has made the requested modification.

6.20. The European Union requests inclusion in **paragraph 7.352** of the Interim Report (paragraph 7.350 of this Report) of references to its submissions and exhibits that, in addition to evidence related to the 777X aircraft programme, "would support the more general proposition in relation to the aerospace industry" regarding the variety of aircraft manufacturing processes, as well as continuing innovation within the aerospace industry.[48] The United States does not consider that adding the requested citations would provide additional clarity to the report, as they are not "illustrative for the purposes of the Panel's sentence".[49] The Panel does consider them to be illustrative of the statements made in the paragraph and therefore has included the references identified by the European Union.

6.21. The United States requests a revision of **paragraph 7.358** of the Interim Report (paragraph 7.356 of this Report) as, in its view, the word "coincident" used in the paragraph "does not accurately capture the sequence of events" of Boeing's decision to site the 777X aircraft programme in Washington State. The United States also considers the same sentence "problematic in its reference to 'certain wing structures that the same manufacturer had previously imported for other commercial airplane manufacturing programmes'."[50] The European Union requests that the Panel reject the United States' request for modification. In the European Union's view, the statement at issue is a "factual finding … based on an objective assessment of the evidence that the Parties placed before the Panel, and should not be rewritten based on the United States' own view of the evidence".[51] In the light of the parties' comments, the Panel has made modifications and clarifications to the sentence in question.

6.22. The European Union requests in **paragraph 7.368** of the Interim Report (paragraph 7.366 of this Report) an adjustment of the left parenthesis in the phrase "(outside Washington State, including overseas)" as the current formulation "could potentially be misunderstood to indicate that the reference to Washington State is not an essential aspect of the explanation".[52] The

[42] European Union's request for review of the Panel's Interim Report, para. 17.
[43] United States' comments on European Union's request for review of the Panel's Interim Report, para. 18.
[44] European Union's request for review of the Panel's Interim Report, para. 19.
[45] United States' comments on European Union's request for review of the Panel's Interim Report, para. 20.
[46] European Union's request for review of the Panel's Interim Report, para. 21.
[47] United States' comments on European Union's request for review of the Panel's Interim Report, para. 22.
[48] European Union's request for review of the Panel's Interim Report, para. 22.
[49] United States' comments on European Union's request for review of the Panel's Interim Report, para. 23.
[50] United States' request for review of the Panel's Interim Report, paras. 18-20.
[51] European Union's comments on United States' request for review of the Panel's Interim Report, para. 8.
[52] European Union's request for review of the Panel's Interim Report, para. 23.

United States has no comment on the European Union's request.[53] The Panel has made the requested modification.

6.23. In addition to the requests discussed above, the Panel has made corrections for typographical and other non-substantive errors in the Interim Report, including those identified by the parties.

7 FINDINGS

7.1 Introduction

7.1. In this dispute, the European Union claims that the United States is acting inconsistently with the SCM Agreement by providing prohibited subsidies to the aerospace industry in the state of Washington. The European Union argues that these subsidies are provided by the state of Washington in the United States.

7.2. More specifically, the European Union challenges seven aerospace tax measures[54], namely: (i) a reduced business and occupation (B&O) tax rate for the manufacture and sale of commercial airplanes; (ii) a credit for the B&O tax for pre-production development of commercial airplanes and components; (iii) a credit for the B&O tax for property taxes on commercial airplane manufacturing facilities; (iv) an exemption from sales and use taxes for certain computer hardware, software, and peripherals; (v) an exemption from sales and use taxes for certain construction services and materials; (vi) an exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes; and (vii) an exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes.

7.3. The European Union claims that the alleged subsidies are prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement as subsidies that are contingent on the use of domestic over imported goods. According to the European Union this contingency results from two siting provisions − a First Siting Provision and a Second Siting Provision − contained in Engrossed Substitute Senate Bill 5952 (ESSB 5952). The European Union requests that the Panel recommend that the United States withdraw the subsidies without delay, on the basis that they are prohibited subsidies, as required by Article 4.7 of the SCM Agreement.

7.4. The United States requests the Panel to find that the United States has acted consistently with its obligations under the SCM Agreement and to deny the relief requested by the European Union.

7.5. This Report is organized as follows. Section 7.2 sets out the relevant principles regarding the Panel's function, the burden of proof, and treaty interpretation. Section 7.3 provides a description and background of the measures at issue. In section 7.4, the Panel examines whether the measures challenged by the European Union constitute subsidies within the meaning of Article 1 of the SCM Agreement. In section 7.5 the Panel turns to an examination of whether the challenged measures are prohibited under Article 3 of the SCM Agreement. The Panel sets forth its conclusions and recommendation in section 8.

7.2 Function of the Panel, Burden of Proof, and Treaty Interpretation

7.2.1 Function of the Panel

7.6. According to Article 11 of the DSU:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the

[53] United States' comments on European Union's request for review of the Panel's Interim Report, para. 24.

[54] These seven aerospace tax measures correspond to the nine tax-related provisions cited in para. 2.1 above. In the articulation of its claims, the European Union groups the sales and use tax exemptions for computer hardware, software, and peripherals in subparagraphs 2.1(d) and (f); and the sales tax exemptions for construction services and materials in subparagraphs 2.1(e) and (g).

> facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

7.7. The Panel has been required to examine municipal law in the course of exercising its functions under Article 11 of the DSU in this dispute. In this regard, the Appellate Body has explained that, "[a]lthough it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law".[55] The Appellate Body has added that:

> As part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and content of the municipal law at issue in order to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the covered agreements. This obligation under Article 11 means that panels must conduct their own objective and independent assessment of the meaning of municipal law, instead of deferring to a party's characterization of such law.[56]

7.8. In respect of the types and threshold of evidence that may be required to prove the WTO-inconsistency of municipal law, the Appellate Body has explained that "[i]f the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning … is not evident on its face, further examination is required."[57] The nature and the extent of the evidence required to satisfy the burden of proof will vary from case to case.[58] In some cases, the text of the relevant legislation may be sufficient to clarify the content and the meaning of the relevant legal instruments. In other cases, the parties will also need to support their understanding of the content and meaning of such legal instruments with evidence beyond the text of the instrument, such as evidence of consistent application of such laws, pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts, and the writings of recognized scholars.[59] The task of a panel may be facilitated by agreement between the parties about the meaning of the law and its interpretation, being an interpretation that it is open for the panel to itself adopt. The Appellate Body has added that, "in ascertaining the meaning of municipal law, a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies" as well as "legal interpretation[s] given by a domestic court or by a domestic administering agency as to the meaning of municipal law with respect to the measure being reviewed for consistency with the covered agreements".[60]

7.2.2 Burden of proof

7.9. The general rule in WTO dispute settlement is that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[61] Following this principle, the Appellate Body has explained that the complaining party in any given dispute should establish a *prima facie* case of inconsistency of a measure with a provision of the WTO covered agreements, before the burden of showing consistency with that provision or defending it under an exception must be assumed by the defending party.[62] In other words, "a

[55] Appellate Body Report, *US – Hot-Rolled Steel*, para. 200. See also Appellate Body Report, *US – Carbon Steel (India)*, p. 4.445.
[56] Appellate Body Report, *US – Carbon Steel (India)*, p. 4.445 (citing Appellate Body Report, *India – Patents (US)*, para. 66).
[57] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.
[58] Appellate Body Report, *US – Carbon Steel*, para. 157. See also Appellate Body Report, *US – Carbon Steel (India)*, p. 4.446.
[59] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.100; *US – Carbon Steel*, para. 157; *US – Carbon Steel (India)*, para. 4.446.
[60] Appellate Body Report, *US – Countervailing and Anti-Dumping Duties (China)*, para. 4.101. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.446.
[61] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323 at p. 335.
[62] Appellate Body Report, *EC – Hormones*, para. 104.

party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."[63]

7.10. A *prima facie* case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[64] To establish a *prima facie* case, the party asserting a particular claim must adduce evidence sufficient to raise a presumption that what is claimed is true. If the complaining party "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[65] In this regard, the Appellate Body has stated that:

> [P]recisely how much and precisely what kind of evidence will be required to establish such … [presumptions] will necessarily vary from measure to measure, provision to provision, and case to case.[66]

7.11. The Appellate Body has also stated that "[a] complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments".[67]

7.12. In this dispute, the European Union bears the burden of establishing a *prima facie* case that the disputed measures are prohibited subsidies inconsistent with Article 3 of the SCM Agreement. In addition, if the Panel finds that the European Union has made out its *prima facie* case, it is for the United States to provide rebuttal arguments and evidence that is needed to support that rebuttal.

7.2.3 Treaty interpretation

7.13. Article 3.2 of the DSU provides that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is well established that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention")[68] are such customary rules of interpretation of public international law.[69] They provide as follows:

> ARTICLE 31
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account together with the context:

[63] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 323 at p. 337.
[64] Appellate Body Report, *EC – Hormones*, para. 104.
[65] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323 at p. 335. (footnote omitted)
[66] Ibid.
[67] Appellate Body Report, *US – Gambling*, para. 140.
[68] Done at Vienna, 23 May 1969, 1155 United Nations Treaty Series 331 (1980); 8 *International Legal Materials* 679 (1969).
[69] See, e.g. Appellate Body Report, *US - Shrimp*, para. 114.

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

7.14. There is a considerable body of WTO case law dealing with the application of these provisions. It is clear that interpretation must be based above all on the text of the treaty[70], but that the context of the treaty also plays a role. It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[71] Furthermore, panels "must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement."[72]

7.3 Description and background of the measures at issue

7.3.1 Aerospace tax measures

7.15. The European Union challenges seven separate tax measures for civil aircraft provided by the state of Washington (aerospace tax measures) as amended and extended by ESSB 5952[73]:

(a) reduced business and occupation (B&O) tax rate for the manufacture and sale of commercial airplanes (B&O aerospace tax rate)[74];

[70] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 11, DSR 1996:I, 97, at p. 105.
[71] Appellate Body Report, *India – Patents (US)*, para. 45.
[72] Ibid. para. 46.
[73] Engrossed Substitute Senate Bill 5952, Chapter 2, Laws of 2013 3rd Special Session, 2014 Wash. Sess. Laws 2, (ESSB 5952) (Exhibit EU-3). See European Union's first written submission, para. 15. Throughout these proceedings, the European Union has consistently referred to this legislation as "SSB 5952", rather than "ESSB 5952", explaining that it "omitted the 'Engrossed' and the 'E', in an effort to abbreviate the name". European Union's response to Panel question No. 52, para. 4. The United States has noted that the bill enacting the relevant legislation and conditions was *Engrossed* Substitute Senate Bill 5952, rather than Substitute Senate Bill 5952. United States' first written submission, fn 1. The United States has also clarified the legislative process beginning with Senate Bill 5952 as well as the series of amendments that led to the "Substitute" bill and subsequently the "Engrossed" bill that was passed by the Washington State legislature and approved by the Governor. United States' response to Panel question No. 52, paras. 1-5. The United States also confirmed that the citation in the European Union's panel request corresponds to ESSB 5952, and that the United States does not take the position that ESSB 5952 is outside the Panel's terms of reference. United States' response to Panel question No. 52, paras. 6-8. In light of this clarification and confirmation by the United States, the Panel refers to the legislation cited in the European Union's panel request as Engrossed Substitute Senate Bill 5952 (ESSB 5952) throughout this Report.
[74] ESSB 5952 (Exhibit EU-3), Sections 5-6, codified at RCW Section 82.04.260 (Exhibit EU-22).

(b) B&O tax credit for pre-production development for commercial airplanes and components (B&O tax credit for aerospace product development)[75];

(c) B&O tax credit for property taxes on commercial airplane manufacturing facilities (B&O tax credit for property and leasehold excise taxes)[76];

(d) exemption from sales and use taxes for certain computer hardware, software, and peripherals (computer sales and use tax exemptions)[77];

(e) exemption from sales and use taxes for certain construction services and materials (construction sales and use tax exemptions)[78];

(f) exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes (leasehold excise tax exemption)[79]; and

(g) exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes (leaseholder property tax exemption)[80].

7.16. A person claiming the B&O tax credit for property and leasehold excise taxes, listed above as (c), is not eligible for either the leasehold excise tax exemption or the leaseholder property tax exemption, listed above as (f) and (g), respectively.

7.3.1.1 Measures related to the B&O tax

7.17. The first three aerospace tax measures listed above pertain to the business and occupation (B&O) tax, which is the state of Washington's "major business tax"[81], in that the state of Washington "relies primarily on a B&O tax − rather than a corporate tax or an income tax − for purposes of business taxation".[82] The B&O tax is imposed "for the act or privilege of engaging in business activities" and "is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of the business, as the case may be".[83] The B&O tax applies to distinct business activities (such as retailing, manufacturing, wholesaling, extracting, and services). A business may have more than one B&O tax rate, depending on the types of activities conducted.[84]

7.18. The first tax measure above (B&O aerospace tax rate) provides for a B&O tax rate of 0.2904% for specified business activities.[85] The other two B&O tax-related measures (B&O tax credits for aerospace product development and for property and leasehold excise taxes) provide credits against B&O tax liability based on specified expenditures or other tax payments made by the taxpayer concerned.[86] The rules regarding the calculation of B&O tax liability for different types of activities as well as the amount of B&O tax credits are discussed below in connection with whether there is a financial contribution in the sense of Article 1 of the SCM Agreement.

[75] ESSB 5952 (Exhibit EU-3), Section 9, codified at RCW Section 82.04.4461 (Exhibit EU-23).
[76] ESSB 5952 (Exhibit EU-3), Section 10, codified at RCW Section 82.04.4463 (Exhibit EU-24).
[77] ESSB 5952 (Exhibit EU-3), Sections 11-12, codified at RCW Section 82.08.975 (Exhibit EU-25) and RCW Section 82.12.975 (Exhibit EU-26).
[78] ESSB 5952 (Exhibit EU-3), Sections 3-4, codified at RCW Section 82.08.980 (Exhibit EU-27) and RCW Section 82.12.980 (Exhibit EU-28).
[79] ESSB 5952 (Exhibit EU-3), Section 13, codified at RCW Section 82.29A.137 (Exhibit EU-29).
[80] ESSB 5952 (Exhibit EU-3), Section 14, codified at RCW Section 84.36.655 (Exhibit EU-30).
[81] See Final Bill Report, Engrossed Substitute Senate Bill 5952, (ESSB 5952 Final Bill Report) (Exhibit EU-4), p. 1.
[82] United States' first written submission, para. 39.
[83] RCW Section 82.04.220(1) (Exhibit EU-32). See also United States' first written submission, paras. 39-41.
[84] See ESSB 5952 Final Bill Report (Exhibit EU-4), p. 1. See para. 7.77 below regarding B&O taxation of multiple business activities.
[85] See ESSB 5952 (Exhibit EU-3), Sections 5-6; RCW Section 82.04.260(11) (Exhibit EU-22); ESSB 5952 Final Bill Report (Exhibit EU-4), p. 3.
[86] See RCW Section 82.04.4461(2) (Exhibit EU-23).

7.3.1.2 Exemptions from sales and use taxes

7.19. The next two aerospace tax measures in the above list are exemptions from the state of Washington's retail sales and use taxes. The retail sales tax is Washington State's principal source of tax revenue (including business and non-business tax revenue)[87], and is collected from customers by businesses making retail sales in Washington State. The retail sales tax is generally imposed on the sale of tangible personal property[88] and digital products[89], as well as certain services[90], to the final consumer or end user of such property, digital product, or service.[91] The use tax is a tax on the use of goods or certain services in the state of Washington when sales tax has not been paid.[92] Goods used in Washington State are subject to either sales or use tax, but not to both; thus, the use tax compensates when the sales tax has not been paid.[93]

7.20. The computer sales and use tax exemptions relate to sales or use "of computer hardware, computer peripherals, or software … used primarily in the development, design, and engineering of aerospace products or in providing aerospace services".[94] These exemptions also relate to sales or use of "labor and services rendered in respect to installing the computer hardware, computer peripherals, or software".[95]

7.21. The construction sales and use tax exemptions concern labour, services, and personal property used to construct new buildings for the manufacture of commercial airplanes or the fuselages and wings of commercial airplanes. More specifically, the sales tax exemption applies to retail sales taxes on "[c]harges, for labor and services rendered in respect to the constructing of new buildings, made to a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes".[96] Sales and use tax exemptions apply to the sales and use of "tangible personal property that will be incorporated as an ingredient or component"[97] in constructing such buildings. These construction sales and use tax exemptions also apply to charges for construction labour and services made to, and tangible personal property used in constructing new buildings for, "a port district, political subdivision, or municipal corporation, to be leased to a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes".[98]

7.22. The applicable tax rates and coverage of retail sales and use taxes in Washington State are considered in greater detail below in connection with whether these exemptions constitute a financial contribution in the sense of Article 1 of the SCM Agreement.

[87] United States' first written submission, para. 42; Retail Sales Tax Explanation, Washington State Department of Revenue (Exhibit USA-12).
[88] Retail Sales Tax Explanation, Washington State Department of Revenue (Exhibit USA-12).
[89] Digital Products including Digital Goods, Washington State Department of Revenue (Exhibit USA-14).
[90] Services Subject to Sales Tax, Washington State Department of Revenue (Exhibit USA-13).
[91] See ESSB 5952 Final Bill Report (Exhibit EU-4), p.1.
[92] Use Tax Explanation, Washington State Department of Revenue (Exhibit USA-19). See also ESSB 5952 Final Bill Report (Exhibit EU-4), p.1; United States' first written submission, para. 44. For example, the use tax is owed if goods are purchased in another state that does not have a sales tax or a state with a sales tax lower than that of the state of Washington, and then used in the state of Washington. The use tax would also be owed if goods are purchased from someone who is not authorized to collect sales tax (e.g. purchases of furniture from an individual through a newspaper classified ad or a purchase of artwork from an individual collector), or if personal property is acquired with the purchase of real property.
[93] Use Tax Explanation, Washington State Department of Revenue (Exhibit USA-19).
[94] RCW Section 82.08.975 (Exhibit EU-25); RCW Section 82.12.975 (Exhibit EU-26); ESSB 5952 (Exhibit EU-3), Sections 11-12.
[95] RCW Section 82.08.975 (Exhibit EU-25); RCW Section 82.12.975 (Exhibit EU-26); ESSB 5952 (Exhibit EU-3), Sections 11-12.
[96] RCW Section 82.08.980 (Exhibit EU-27); ESSB 5952 (Exhibit EU-3), Section 3.
[97] RCW Section 82.08.980 (Exhibit EU-27); RCW Section 82.12.980 (Exhibit EU-28); ESSB 5952 (Exhibit EU-3), Sections 3-4. The United States explains that the "use tax is not due on construction services", which "accounts for why the language of the statute on its face appears to have a more limited scope when compared with the language for the exemption for the retail sales tax". United States' first written submission, fn 118.
[98] RCW Section 82.08.980(1)(a)(ii) (Exhibit EU-27); RCW Section 82.12.980(1)(a)(ii) (Exhibit EU-28).

7.3.1.3 Exemptions from taxes imposed on certain leaseholds

7.23. The final two aerospace tax measures concern property taxes imposed on certain leaseholds in Washington State. Real and personal property in Washington State is generally subject to property taxes based on its value, unless a specific exemption is provided by law.[99] For example, all property owned by federal, state, and local governments is exempt from the Washington State property tax.[100]

7.24. The leasehold excise tax exemption relates to the Washington State leasehold excise tax, which is imposed in lieu of a property tax on the use of public property by a private party.[101] More specifically, Washington State imposes "a leasehold excise tax on the act or privilege of occupying or using publicly owned real or personal property … through a leasehold interest".[102] The leasehold excise tax exemption applies to "[a]ll leasehold interests in port district facilities exempt from tax under [the construction sales and use tax exemptions] and used by a manufacturer engaged in the manufacturing of superefficient airplanes".[103]

7.25. Under the leaseholder property tax exemption, Washington State also exempts from property taxation "all buildings, machinery, equipment, and other personal property of a lessee of a port district eligible [for the construction sales and use tax exemptions], used exclusively in manufacturing superefficient airplanes".[104]

7.26. Neither the leasehold excise tax exemption nor the leaseholder property tax exemption is available to a person claiming the B&O tax credit for property and leasehold excise taxes.[105]

7.3.2 Siting provisions

7.27. The European Union identifies two "siting" provisions that govern the availability of the above aerospace tax measures, namely a First Siting Provision[106] relating to all of the aerospace tax measures, and a Second Siting Provision[107] relating only to the B&O aerospace tax rate.[108]

7.3.2.1 First Siting Provision

7.28. Each of the above aerospace tax measures is extended, and certain others are also amended, by ESSB 5952, which, according to the First Siting Provision in Section 2 of ESSB 5952, "takes effect contingent upon the siting of a significant commercial airplane manufacturing program in the state of Washington". Alternatively, "[i]f a significant commercial airplane manufacturing program is not sited in the state of Washington by June 30, 2017, … [this act] does not take effect".[109]

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[99] See ESSB 5952 Final Bill Report (Exhibit EU-4), p. 1; RCW Section 84.36.005 (Exhibit USA-20); United States' first written submission, para. 46.

[100] RCW Section 84.36.010 (Exhibit USA-21). See also ESSB 5952 Final Bill Report (Exhibit EU-4), pp. 1-2; United States' first written submission, para. 46.

[101] Leasehold Excise Tax Explanation, Washington State Department of Revenue (Exhibit USA-25).

[102] RCW Section 82.29A.030 (Exhibit USA-26).

[103] RCW Section 82.29A.137 (Exhibit EU-29). Under Washington State law, "superefficient airplane" is defined as "a twin aisle airplane that carries between two hundred and three hundred fifty passengers, with a range of more than seven thousand two hundred nautical miles, a cruising speed of approximately mach .85, and that uses fifteen to twenty percent less fuel than other similar airplanes on the market". RCW Section 82.32.550(3) (Exhibit EU-82).

[104] RCW Section 84.36.655 (Exhibit EU-30).

[105] RCW 82.29A.137(1) (Exhibit EU-29); RCW 84.36.655(1) (Exhibit EU-30). These refer to measures (f), (g), and (c), respectively, in the list in para. 7.15 above.

[106] The European Union refers to this as the "Programme-Siting Condition". See European Union's first written submission, paras. 42-45. The United States refers to this as the "Initial Siting Provision". United States' first written submission, paras. 74-78.

[107] The European Union refers to this as the "Exclusive-Production Condition". European Union's first written submission, paras. 46-52. The United States refers to this as the "Future Siting Provision". See United States' first written submission, paras. 55-56, 79-80.

[108] See Request for the Establishment of a Panel by the European Union, WT/DS487/2, 13 February 2015, p. 2.

[109] ESSB 5952 (Exhibit EU-3), Section 2, codified at RCW Section 82.32.850 (Exhibit EU-58).

7.29. The First Siting Provision defines "siting" to mean "a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington State". In turn, "significant commercial airplane manufacturing program" is defined as:

> [A]n airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section:
>
> (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.[110]

7.30. The First Siting Provision additionally defines "new model, or any version or variant of an existing model, of a commercial airplane" to mean "a commercial airplane manufactured with a carbon fiber composite fuselage or carbon fiber composite wings or both".[111]

7.31. Both parties agree that the First Siting Provision has been fulfilled and, as a result, the measures set out in ESSB 5952 are in effect.[112]

7.3.2.2 Second Siting Provision

7.32. ESSB 5952 also contains a Second Siting Provision, relating only to the B&O aerospace tax rate[113], which provides as follows:

> With respect to the manufacturing of commercial airplanes or making sales, at retail or wholesale, of commercial airplanes, this subsection (11) [i.e. the B&O aerospace tax rate] does not apply on and after July 1st of the year in which the department [i.e. the Department of Revenue] 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 section 2 of this act [i.e. the First Siting Provision] has been sited outside the state of Washington. This subsection (11)(e)(ii) [i.e. the Second Siting Provision] only applies to the manufacturing or sale of commercial airplanes that are the basis of a siting of a significant commercial airplane manufacturing program in the state under section 2 of this act.

7.33. The Second Siting Provision thus concerns the continued availability of the B&O aerospace tax rate for the version or variant of the commercial airplane that is the basis of the First Siting Provision. The Second Siting Provision specifically pertains to the siting of "any final assembly or wing assembly" of that commercial airplane. As agreed by the parties, and as explained more fully below, the Boeing 777X is the relevant version or variant of commercial airplane that served as the basis for fulfilment of the First Siting Provision.[114]

[110] ESSB 5952 (Exhibit EU-3), Section 2(2)(c) and (d), codified at RCW 82.32.850(2)(c) and (d) (Exhibit EU-58).
[111] ESSB 5952 (Exhibit EU-3), Section 2(2)(b), codified at RCW 82.32.850(2)(b) (Exhibit EU-58).
[112] Notification Letter from Carol K. Nelson, Director, Washington State Department of Revenue, to Kyle Thiessen, Washington State Code Reviser, 10 July 2014 (Exhibit EU-61). United States' first written submission, para. 78. See para. 7.273 below regarding the details of fulfilment of the First Siting Provision.
[113] ESSB 5952 (Exhibit EU-3), Sections 5-6(11)(e)(ii), codified at RCW 82.04.260(e)(ii) (Exhibit EU-22).
[114] See European Union's first written submission, para. 46; United States' first written submission, para. 56.

7.3.3 Legislative background and scope of the measures at issue

7.34. ESSB 5952 amends and extends certain tax measures established in 2003 under Washington State Legislature House Bill 2294 (HB 2294)[115], which were measures at issue in the dispute *US – Large Civil Aircraft (2nd complaint)*.[116]

7.35. The parties have raised different views as to the temporal scope of the measures at issue and the applicability of the contingencies introduced by ESSB 5952. For example, with reference to pre-existing tax measures in Washington State, the United States submits that "[a]bsent ESSB 5952, aerospace activity through 2024 subject to the B&O tax, the sales and use tax, the property excise tax, and the leasehold excise tax would have qualified under HB 2294 and for the [aerospace tax measures] identified by the European Union", and thus contends that "the treatment prior to 2024 under any of these measures, even if the measure were determined to be a subsidy, is *a priori* not contingent on any conditions introduced by ESSB 5952".[117] By contrast, the European Union asserts that its challenge is not limited to the *extended* tax treatment from 2024 to 2040 effected by ESSB 5952, but rather that "the European Union is challenging the subsidies at issue from the point in time that they became contingent on satisfaction of the [First Siting Provision] conditions in SSB 5952, i.e., November 2013. The European Union challenges the existence of a financial contribution for the whole period from November 2013 through June 2040."[118]

7.36. In light of these differing assertions, the Panel first reviews the legislative background and scope of the measures at issue before turning to the claims raised in this dispute. The tax measures adopted by the Washington State Legislature in 2003 under HB 2294 included a reduction in the B&O tax rate[119]; a B&O tax credit for pre-production development expenditures[120]; a B&O tax credit for computer software and hardware[121]; and a B&O tax credit for property taxes paid on property used in the manufacture of commercial airplanes and airplane components.[122] Also included were sales and use tax exemptions for computer equipment and software, and their installation, as well as construction services and equipment, used primarily in the development of commercial airplanes and components.[123] A leasehold excise tax exemption and property tax exemption for port district facilities was also available to manufacturers of superefficient airplanes that were not using the B&O tax credit for property taxes.[124] These measures were scheduled to end in 2024.[125]

7.37. ESSB 5952 extended the availability of these tax measures to 2040 upon fulfilment of the First Siting Provision through the siting of the Boeing 777X programme. ESSB 5952 also provided that the B&O aerospace tax rate would no longer apply to that programme if the conditions foreseen in the Second Siting Provision occurred. At the same time, the aerospace tax measures reflect substantive amendments made by ESSB 5952 as well as other legislative changes made to the tax measures in the intervening period between HB 2294 and ESSB 5952. For example, with regard to the B&O aerospace tax rate, in 2006, Washington State Legislature House Bill 2466 (HB 2466) also extended the reduced B&O tax rate to certain certified repair stations[126], and consolidated the B&O aerospace tax rates for the manufacture of commercial airplanes and

[115] House Bill 2294, 2003 Wash. Sess. Laws 2767, (HB 2294) (Exhibit EU-21).
[116] See Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.39.
[117] United States' response to Panel question No. 2, para. 3. See also United States' response to Panel question Nos. 53, 54, and 58.
[118] European Union's second written submission, para. 18. See also European Union's response to Panel question No. 6, para. 8.
[119] HB 2294 (Exhibit EU-21), Sections 3-4; Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.47-7.49.
[120] HB 2294 (Exhibit EU-21), Section 7; Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.51-7.52.
[121] HB 2294 (Exhibit EU-21), Section 8; Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.53-7.54.
[122] HB 2294 (Exhibit EU-21), Section 15; Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.55-7.56.
[123] HB 2294 (Exhibit EU-21), Sections 9-12; Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.59-7.62.
[124] HB 2294 (Exhibit EU-21), Sections 13-14; Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.64-7.68.
[125] HB 2294 (Exhibit EU-21); ESSB 5952 Final Bill Report (Exhibit EU-4), p. 2.
[126] House Bill 2466, 2006 Wash. Sess. Laws 787, (HB 2466) (Exhibit EU-35), Section 5.

components, and for the sales of commercial airplanes and components, into a single provision covering both manufacture and sales.[127] In addition, Substitute Senate Bill 6828 (SSB 6828) of 2008 extended the reduced B&O tax rate to the manufacture and retailing of tooling used in the manufacture of commercial airplanes and components of airplanes.[128] The B&O tax credit for aerospace product development reflects an extension of the credit to non-manufacturing firms under HB 2466 of 2006.[129] It further reflects the extension under SSB 6828 of the credit for preproduction development to "aerospace product development", which was subsequently carried over in the provisions extended by ESSB 5952.[130] The B&O tax credit for property and leasehold excise taxes amended by ESSB 5952 reflects the prior 2006 amendment under HB 2466 to include leasehold excise taxes in addition to property taxes as part of this B&O tax credit.[131] The computer sales and use tax exemptions amended by ESSB 5952 reflect prior changes made under HB 2466 of 2006 and under SSB 6828 of 2008.[132] Further, ESSB 5952 amends the construction sales and use tax exemptions originally established in HB 2294 by changing their application to "the manufacturing of commercial airplanes or the fuselages and wings of commercial airplanes" rather than to "manufacturing of superefficient airplanes".[133]

7.38. ESSB 5952 was enacted in November 2013 by the Washington State legislature. Pursuant to the First Siting Provision, the aerospace tax measures, as amended and extended by ESSB 5952, were to take effect upon the determination by the Department of Revenue of Washington State that the First Siting Provision had been satisfied, based on the "siting" of a "significant commercial airplane manufacturing program" as defined in that provision. On 9 July 2014, Boeing submitted a letter to the Department of Revenue of Washington State providing formal notification that Boeing had made a final decision to manufacture the 777X in Washington State, and describing how the 777X satisfied the requirements of the First Siting Provision.[134] The Department of Revenue of Washington State provided written notice on 10 July 2014 of its determination that the First Siting Provision had been fulfilled and that ESSB 5952 had taken effect on 9 July 2014.[135] The Boeing 777X was the model of commercial airplane that served as the basis for determining that the First Siting Provision had been fulfilled.[136]

7.39. For the purposes of this dispute, the measures that are within the Panel's terms of reference are those identified by the European Union in its request for the establishment of a panel.[137] These measures are the aerospace tax measures, as presently codified in the RCW provisions cited in the European Union's panel request.[138] The aerospace tax measures as codified[139] reflect the substantive amendments made under ESSB 5952 as well as other legislative amendments

[127] HB 2466 (Exhibit EU-35), Section 4.
[128] Substitute Senate Bill 6828, 2008 Wash. Sess. Laws 365, (SSB 6828) (Exhibit EU-42), Section 4.
[129] HB 2466 (Exhibit EU-35), Section 3; ESSB 5952 Final Bill Report (Exhibit EU-4), p. 2; United States' first written submission, para. 62.
[130] SSB 6828 (Exhibit EU-42), Section 7; United States' first written submission, para. 62 (noting that this "broadened the B&O tax credit for aerospace product development to include expenditures in developing aerospace products, such as machinery for maintaining and repairing commercial airplanes and tooling equipment").
[131] See HB 2466 (Exhibit EU-35), Section 10.
[132] Thus, the currently codified provisions of these exemptions omit the limitation to manufacturers or processors for hire of commercial airplanes or components of such airplanes that originally existed under HB 2294. See HB 2294 (Exhibit EU-21), Sections 9-10; ESSB 5952 (Exhibit EU-3), Sections 11-12.
[133] See HB 2294 (Exhibit EU-21), Sections 11-12; ESSB 5952 (Exhibit EU-3), Sections 3-4.
[134] Letter from Boeing to Carol K. Nelson, Director, Washington State Department of Revenue, regarding decision to site 777X programme, 9 July 2014 (Exhibit USA-32) (BCI).
[135] Letter from the Director of the Washington State Department of Revenue to the Code Reviser, 10 July 2014 (Exhibit EU-61).
[136] United States' first written submission, para. 56.
[137] See Constitution of the Panel Established at the Request of the European Union − Note by the Secretariat, WT/DS487/3, 23 April 2015.
[138] The Panel notes that the United States has focused upon the enacted results of ESSB 5952, rather than the legislative bill itself, stating that "ESSB 5952 is not itself a measure challenged by the EU." United States' first written submission, fn 99. As further explained by the United States, "provisions of legislation like HB 2294 or ESSB 5952 operate as law to the extent they are codified in the RCW, and any provision so codified will continue to do so until it is amended, rescinded, or expires." United States' comments the European Union's response to Panel question No. 54, para. 10.
[139] In this connection, RCW Section 1.04.020 states that "[a]ny section of the Revised Code of Washington … expressly amended by the legislature, including the entire context set out, shall, as so amended, constitute the law and the ultimate declaration of legislative intent." RCW Section 1.04.020 in Chapter 1.04 RCW (Exhibit USA-63).

subsequent to the enactment of HB 2294 in 2003, and are presently in effect until 2040. The aerospace tax measures are further subject to the First and Second Siting Provisions, which were introduced by ESSB 5952.

7.40. Recalling the parties' different views as to the temporal scope of the measures at issue and the applicability of the contingencies introduced by ESSB 5952, the Panel considers that the measures at issue are not limited to tax treatment for the period of extension from 2024 to 2040. Rather, given the Panel's terms of reference as well as the various substantive amendments effected by ESSB 5952 and prior to its passage, the aerospace tax measures and Siting Provisions at issue are those that are in effect pursuant to codified provisions of Washington State law following the enactment and entry into force of ESSB 5952.

7.4 Existence of a subsidy under Article 1 of the SCM Agreement

7.4.1 Arguments of the parties

7.41. The European Union contends that the aerospace tax measures are subsidies within the meaning of Article 1 of the SCM Agreement.[140] According to the European Union, each of the aerospace tax measures at issue constitutes a financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement because "government revenue that is otherwise due is foregone or not collected". In support of its contention, the European Union proposes various benchmarks for comparison for the aerospace tax measures and contends that, in relation to these benchmarks, government revenue that would otherwise be due is foregone. The European Union also draws upon findings in *US – Large Civil Aircraft (2nd complaint)* and contends that similar considerations apply in respect of measures that are analogous to those that were found to constitute financial contributions in that dispute. At the same time, the European Union distinguishes its claim from that made in *US – Large Civil Aircraft (2nd complaint)* as it argues in the present case "that a financial contribution exists in the abstract" rather than being entity-specific.[141] The European Union contends that government revenue does not need to have been *actually* foregone for there to be a financial contribution, but rather that it is the foregoing of the government's *entitlement* to collect revenue that is determinative of a financial contribution.[142] Further, the European Union argues that the conferral of a benefit is a natural consequence of the foregoing of government revenue in comparison to "market" conditions.[143]

7.42. The United States asserts that the European Union fails to make a *prima facie* case that any of the challenged measures constitutes a financial contribution. The United States also disputes the European Union's reliance on findings made in respect of contested measures in *US – Large Civil Aircraft (2nd complaint)* to demonstrate a financial contribution in this dispute.[144] While acknowledging the European Union's clarification as to a financial contribution existing "in the abstract", the United States contends that the present tense drafting of Article 1.1(a)(ii) means that "this provision covers revenue foregone or not collected *in the present*".[145] In addition, the United States disagrees with various legal interpretations advanced by the European Union, including that the term "maintain" in Article 3.2 refers to the continuation of a subsidy that has been "granted"[146], as well as the European Union's distinction between the terms "not collected" and "foregone", arguing that both are in the present passive tense, and that "the two verbs describe different ways that the government may obtain tax income".[147] With respect to the

[140] European Union's first written submission, para. 53; second written submission, para. 9; opening statement at the first meeting of the Panel, para. 15; opening statement at the second meeting of the Panel, para. 12.
[141] European Union's response to Panel question No. 23, para. 45 (quoting Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.151). See also European Union's second written submission, para. 34.
[142] See European Union's second written submission, para. 21; opening statement at the second meeting of the Panel, paras. 15-16.
[143] European Union's first written submission, paras. 67-68; second written submission, paras. 36-37; opening statement at the first meeting of the Panel, para. 35; opening statement at the second meeting of the Panel, para. 23.
[144] United States' first written submission, para. 94-99.
[145] United States' second written submission, para. 86. (emphasis original) The United States further submits that the European Union's legal arguments do not overcome "the implication of the present tense drafting of Article 1.1(a)(ii)". United States' second written submission, para. 87.
[146] United States' second written submission, para. 88.
[147] United States' second written submission, para. 89.

benefit allegedly conferred, the United States agrees with the European Union that "the concept of financial contribution in the form of revenue foregone that is otherwise due often overlaps with the concept of benefit", but contends that "[t]he European Union has not identified with sufficient clarity what the benefit is that it is alleging, much less provided evidence that the two concepts fully overlap in the present case."[148] The United States further contends that the European Union erroneously argues that a finding of benefit proceeds automatically from a finding that revenue is foregone.[149]

7.4.2 Third-party views

7.43. Australia submits "that by the very nature of the type of transaction relating to the foregoing or non-collection of government revenue, the actual use or exercise of the fiscal incentive by a beneficiary/recipient may not necessarily be determinative in establishing the existence of a financial contribution".[150] Accordingly, Australia frames the question as "whether, but for the tax incentive, the beneficiary of the tax measure would owe revenue payable as a debt, but expect it to be forgone or not collected".[151] With regard to the benefit conferred, Australia refers to the standard of a measure making a recipient "better off" in comparison to the marketplace, and that, "[i]n this instance, the marketplace would be made up of other companies facing the usual tax rates set by Washington State, without provision of the discounts offered to companies that qualified for the tax exemption/discount".[152]

7.4.3 Whether there is a financial contribution as "government revenue that is otherwise due is foregone or not collected"

7.44. Article 1.1(a)(1)(ii) of the SCM Agreement provides in relevant part:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government … , i.e. where:
>
> > (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (footnote omitted)

7.45. With regard to the legal standard under Article 1.1(a)(1)(ii) of the SCM Agreement, the Appellate Body has set out the following considerations:

> In our view, the "*foregoing*" of revenue "*otherwise* due" implies that less revenue has been raised by the government than would have been raised in a different situation, or, that is, "otherwise". Moreover, the word "foregone" suggests that the government has given up an entitlement to raise revenue that it could "otherwise" have raised. 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".[153] (emphasis original)

7.46. The Appellate Body therefore considered that "the term 'otherwise due' implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation", and that "the basis of comparison must be the tax rules applied by the Member in question".[154] The Appellate Body further stated that, "[i]n identifying the appropriate benchmark for comparison, panels must obviously ensure that they identify and examine fiscal situations which it is legitimate to compare. In other words, there must be a

[148] United States' response to Panel question No. 22, para. 53.
[149] United States' second written submission, para. 93.
[150] Australia's response to Panel question No. 1.
[151] Ibid.
[152] Australia's response to Panel question No. 2.
[153] Appellate Body Report, *US – FSC*, para. 90.
[154] Ibid. The Appellate Body further noted that a "WTO Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes" and that "[w]hat is 'otherwise due', therefore, depends on the rules of taxation that each Member, by its own choice, establishes for itself."

rational basis for comparing the fiscal treatment of the income subject to the contested measure and the fiscal treatment of certain other income."[155]

7.47. The Appellate Body considered that there may be situations where the measures at issue might be described as an "exception" to a general rule of taxation, and that in such situations it may be possible to apply a "but for" test to examine the fiscal treatment of income absent the contested measure. At the same time, given the variety and complexity of domestic tax systems, the Appellate Body did not consider that "Article 1.1(a)(1)(ii) always *requires* panels to identify, with respect to any particular income, the 'general' rule of taxation prevailing in a Member".[156] Instead, the Appellate Body explained "that panels should seek to compare the fiscal treatment of legitimately comparable income to determine whether the contested measure involves the foregoing of revenue which is 'otherwise due', in relation to the income in question".[157]

7.48. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body reiterated the principle that it is necessary to identify "legitimately comparable" situations of taxation in order to determine whether government revenue is foregone.[158] The Appellate Body further articulated three analytical steps for a panel examining a claim under Article 1.1(a)(1)(ii) of the SCM Agreement.

7.49. First, a panel should "identify the tax treatment that applies to the income of the alleged recipients", which "will entail consideration of the objective reasons behind that treatment and, where it involves a change in a Member's tax rules, an assessment of the reasons underlying that change".[159]

7.50. Second, "the panel should identify a benchmark for comparison − that is, the tax treatment of comparable income of comparably situated taxpayers", which "involves an examination of the structure of the domestic tax regime and its organizing principles".[160] The Appellate Body noted the potential difficulty of this exercise given that such principles may "be unique to the particular domestic regime" or "that disparate tax measures, implemented over time, do not easily offer up coherent principles serving as a benchmark".[161] Nevertheless, "the task of the panel is to develop an understanding of the tax structure and principles that best explains that Member's tax regime, and to provide a reasoned basis for identifying what constitutes comparable income of comparably situated taxpayers".[162]

7.51. Third, "the panel should compare the reasons for the challenged tax treatment with the benchmark tax treatment it has identified after scrutinizing a Member's tax regime".[163] According to the Appellate Body, this "comparison will enable a panel to determine whether, in the light of the treatment of the comparable income of comparably situated taxpayers, the government is foregoing revenue that is otherwise due in relation to the income of the alleged recipients."[164]

7.52. Before proceeding to the analysis of each aerospace tax measure under Article 1.1(a)(1)(ii) of the SCM Agreement, the Panel will address the United States' argument that aerospace activity until 1 July 2024 would have qualified for certain tax treatment under legislation pre-dating ESSB 5952, and that the extent of any financial contribution in this dispute would be limited to revenue foregone at some point in the future.[165] The Panel recalls that the European Union has argued that, unlike in a past dispute under another provision of the SCM Agreement, in this case the European Union is advancing its claim in the abstract, on the basis of the pertinent legislation as such, and that it considers that Article 1.1(a)(1)(ii) covers not only the foregoing of actual revenue in the present, but also the foregoing of an entitlement to future revenue.[166]

[155] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 90.
[156] Ibid. para. 91. (emphasis original)
[157] Ibid.
[158] See Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 810-812.
[159] Ibid. para. 812.
[160] Ibid. para. 813.
[161] Ibid.
[162] Ibid.
[163] Ibid. para. 814.
[164] Ibid.
[165] United States' response to Panel question Nos. 2 and 21; second written submission, paras. 85-92.
[166] European Union's response to Panel question Nos. 6 and 21.

7.53. In respect of the measures at issue, the Panel agrees with the European Union that Article 1.1(a)(1)(ii) of the SCM Agreement encompasses the foregoing of revenue in the future.[167] In the particular context of tax-based measures, the underlying legislation may be effective over a period defined in the legislation itself, or indefinitely. Where such legislation gives rise to a financial contribution in the form of revenue foregone, the fact of a government having forgone such revenue is true for the entire period during which the legislation is in force. Even if the effective start date of a period defined in the legislation is subsequent to the date on which the legislation enters into force, as of the date of entry into force the government would have, by virtue of the legislation, already given up its entitlement to the future tax revenue during the defined future period.[168] That entitlement could be re-established through further legislation revoking or amending the previous legislation. This principle is implicit in past cases involving financial contributions from tax-based measures. Where the rulings in those cases have been based on the underlying legislation as such, they have not only concerned particular revenue streams foregone in particular periods, but instead have concerned all of the implicit future revenue streams that would be foregone pursuant to the underlying legislation.[169]

7.54. In this connection, the present tense of the verb "is" in Article 1.1(a)(1)(ii) relates to a government presently foregoing an entitlement to collect revenue either now or in the future.[170] It is this government action taken with respect to otherwise applicable tax liabilities that is the focus of the analysis under Article 1.1(a)(1)(ii), particularly where the measures are challenged as such rather than "against the application … during any given point in time or in any specific instance".[171] In this dispute, the Panel has determined that the aerospace tax measures at issue are those that are presently in effect pursuant to codified provisions of Washington State law following the enactment and entry into force of ESSB 5952.[172] A finding that the aerospace tax measures result in government revenue being foregone, or that they cause government revenue to be foregone, be it currently or in the future, applies to the measures themselves. This foregoing of revenue would apply to taxpayers at any time during the entire period in which the measures are in force. The foregoing of revenue is constituted by the government's promise to do so, and not only by particular instances of it being done.

7.55. Having addressed the threshold issue of revenue foregone in the future, the Panel now examines each of the challenged aerospace tax measures, as such, on the basis of the analytical framework outlined above, to assess whether any of them involves a financial contribution in the form of government revenue foregone within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

7.4.3.1 B&O aerospace tax rate

7.56. The legislation for the B&O aerospace tax rate provides in relevant part:

> (11)(a) Beginning October 1, 2005, upon every person engaging within this state in the business of manufacturing commercial airplanes, or components of such airplanes, or making sales, at retail or wholesale, of commercial airplanes or components of such airplanes, manufactured by the seller, as to such persons the amount of tax with respect to such business is, in the case of manufacturers, equal to the value of the product manufactured and the gross proceeds of sales of the product manufactured,

[167] The Panel notes that the United States does not categorically reject the possibility that a financial contribution may occur in the future.

[168] This is consistent with the Appellate Body's characterization of a government having "given up an entitlement to raise revenue that it could 'otherwise' have raised". Appellate Body Report, *US – FSC*, para. 90.

[169] See, e.g. Panel Report, *US – FSC*, paras. 7.98-7.101. In that dispute, the panel examined the "FSC scheme" as a whole, and noted *inter alia* that for any given fiscal year, a corporation was free to elect whether or not to have the status of a FSC. Thus, it was the existence and operation of the scheme itself, which was of indefinite duration under the US tax laws, that gave rise to the finding of revenue foregone, rather than individual instances of application of the scheme by particular corporations, or instances of application of the scheme during any particular period. This aspect of the panel report was not appealed.

[170] See United States' second written submission, para. 86 ("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."). (emphasis added)

[171] European Union's response to Panel question No. 6, para. 7.

[172] See para. 7.41 above.

or in the case of processors for hire, equal to the gross income of the business, multiplied by the rate of:

(i) 0.4235 percent from October 1, 2005, through June 30, 2007; and

(ii) 0.2904 percent beginning July 1, 2007.

(b) Beginning July 1, 2008, upon every person who is not eligible to report under the provisions of (a) of this subsection (11) and is engaging within this state in the business of manufacturing tooling specifically designed for use in manufacturing commercial airplanes or components of such airplanes, or making sales, at retail or wholesale, of such tooling manufactured by the seller, as to such persons the amount of tax with respect to such business is, in the case of manufacturers, equal to the value of the product manufactured and the gross proceeds of sales of the product manufactured, or in the case of processors for hire, be equal to the gross income of the business, multiplied by the rate of 0.2904 percent.[173]

7.4.3.1.1 First step: applicable tax treatment

7.57. Based on the available evidence, the Panel will first identify the applicable tax treatment under the B&O aerospace tax rate, including consideration of the objective reasons behind that treatment. As provided for in the relevant legislation, the B&O aerospace tax rate applies to "every person engaging within [the state of Washington] in the business of manufacturing commercial airplanes, or components of such airplanes, or making sales, at retail or wholesale, of commercial airplanes or components of such airplanes, manufactured by the seller".[174] The B&O aerospace tax rate also applies to those persons "engaging within [the state of Washington] in the business of manufacturing tooling specifically designed for use in manufacturing commercial airplanes or components of such airplanes, or making sales, at retail or wholesale, of such tooling manufactured by the seller".[175]

7.58. Thus, the B&O aerospace tax rate applies to the following activities within the state of Washington: (i) the *manufacture* of commercial airplanes (and components thereof); (ii) *sales* of commercial airplanes (and components thereof) by such manufacturers; and (iii) the manufacture and sales of *tooling* for use in manufacturing commercial airplanes or components of such airplanes.

7.59. The B&O aerospace tax rate is a specific rate of taxation applicable to these activities. For the manufacture and sales of commercial airplanes and components thereof, this specific rate was implemented in two stages: first, a rate of 0.4235% from 1 October 2005 through 30 June 2007; and second, a rate of 0.2904% beginning 1 July 2007.[176] For the manufacture and sales of tooling for use in manufacturing commercial airplanes or components of such airplanes, the applicable rate as of 1 July 2008 is 0.2904%. As a result of the enactment of ESSB 5952, the B&O aerospace tax rate expires on 1 July 2040.[177]

7.60. Thus, the relevant tax treatment at present and until the expiration of the B&O aerospace tax rate in 2040 is the tax rate of 0.2904%. This rate is multiplied by, "in the case of manufacturers … the value of the product manufactured and the gross proceeds of sales of the product manufactured, or in the case of processors for hire … the gross income of the business".[178]

[173] RCW Section 82.04.260(11) (Exhibit EU-22).
[174] RCW Section 82.04.260(11)(a) (Exhibit EU-22). Under Washington State law, the term "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". RCW Section 82.32.550(1) (Exhibit EU-82). Further, the term "component" "means a part or system certified by the federal aviation administration for installation or assembly into a commercial airplane". RCW Section 82.32.550(2) (Exhibit EU-82).
[175] RCW Section 82.04.260(11)(b) (Exhibit EU-22).
[176] ESSB 5952 (Exhibit EU-3), Sections 5-6; RCW 82.04.260(11)(a) (Exhibit EU-22).
[177] ESSB 5952 (Exhibit EU-3), Sections 5-6.
[178] RCW Section 82.04.260(11) (Exhibit EU-22).

7.61. With regard to the "objective reasons" behind this tax treatment[179], the Panel notes that the underlying legislation itself repeatedly refers to tax "incentives" and "preferences" to encourage the aerospace industry (as such) to remain in Washington State and to expand its presence there. For instance, ESSB 5952 is entitled "Aerospace Industry – *Tax Preferences* – Tax Exemption".[180] The published Session Laws of Washington State containing ESSB 5952 characterize the act as "[r]elating to *incentivizing* a long term commitment to maintain and grow jobs in the aerospace industry in Washington state by extending the expiration date of aerospace *tax preferences*".[181]

7.62. In the text of the legislation itself, the Washington State legislature explicitly set out the reasons for enacting the aerospace tax measures in ESSB 5952:

> The legislature finds that the people of Washington have benefited enormously from the presence of the aerospace industry in Washington state. The legislature further finds that the industry continues to provide good wages and benefits for the thousands of engineers, mechanics, and support staff working directly in the industry throughout the state. The legislature further finds that suppliers and vendors that support the aerospace industry in turn provide a range of well-paying jobs. In 2003, and again in 2006, and 2007, the legislature determined it was in the public interest to encourage the continued presence of the aerospace industry through the provision of tax incentives. To this end, and in recognition of the continuing extreme importance of the aerospace industry in Washington, it is the legislature's intent to reaffirm and build upon prior aerospace tax incentive legislation in a fiscally prudent manner.
>
> ...
>
> It is the legislature's specific public policy objective to maintain and grow Washington's aerospace industry workforce. To help achieve this public policy objective, it is the legislature's intent to conditionally extend aerospace industry tax preferences until July 1, 2040, in recognition of intent by the state's aerospace industry sector to maintain and grow its workforce within the state.[182]

7.63. These references make clear that the purpose of the legislation is to provide favourable tax treatment for the aerospace industry, in order to encourage the industry to remain in Washington State and to grow its workforce. As stated in the Final Bill Report of ESSB 5952, "[t]he explicitly described public policy objective of the act is to maintain and grow Washington [State]'s aerospace industry workforce."[183] This language is similar to that of the prior legislation in HB 2294. In HB 2294 the Washington State legislature "declare[d] that it is in the public interest to encourage the continued presence of [the aerospace] industry through the provision of tax incentives. The *comprehensive tax incentives* in this act address the cost of doing business in Washington state compared to locations in other states."[184] The mechanism for achieving the objective of encouraging the aerospace industry is, in the words of both pieces of legislation, the provision of tax "preferences", "exemptions", and "incentives".

7.4.3.1.2 Second step: benchmark for comparison

7.64. Having identified the relevant tax treatment and its objective reasons, the next step of this analysis is the identification of an appropriate "benchmark for comparison" within the Washington State tax regime to determine whether this tax treatment constitutes revenue foregone by the Washington State government that would otherwise be due. This benchmark must be ascertained with regard for "the structure of the domestic tax regime and its organizing principles".[185]

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[179] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 812.
[180] ESSB 5952 (Exhibit EU-3), p. 2. (emphasis added)
[181] Ibid. (emphasis added)
[182] ESSB 5952 (Exhibit EU-3), Section 1(1) and (3).
[183] ESSB 5952 Final Bill Report (Exhibit EU-4), p. 3.
[184] HB 2294 (Exhibit EU-21), Section 1. (emphasis added) See also SSB 6828 (Exhibit EU-42), Section 1.
[185] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 813.

7.65. The European Union submits that the benchmarks for comparison are the "general B&O tax rate for manufacturing and wholesaling activities" of 0.484% and that of 0.471% otherwise applicable to retailing.[186] The United States generally contends that the European Union has not met its burden to identify the benchmark for each aerospace tax measure. With specific respect to the B&O aerospace tax rate, the United States submits that Washington State's unique B&O tax system results in a pyramiding effect and thus "the industry in which a taxpayer sits may impact whether it is comparably situated to a taxpayer in the aerospace industry".[187] The United States also submits that "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", and contends on this basis that "[Boeing's] eligibility for that rate during the 2014-2024 does not represent revenue foregone".[188]

7.66. As a threshold matter, the Panel notes that the parties' arguments on the benchmark for examining the B&O aerospace tax rate relate specifically to the B&O tax regime, as distinguished from other types of taxation that exist in Washington State. Given that the B&O tax is the primary business tax in Washington State, and noting the parties' argumentation based on particular features of that regime, the Panel frames its assessment of "legitimately comparable" tax situations in the light of the specific structure and organizing principles of the B&O tax regime.

7.67. The Washington State B&O tax is imposed "for the act or privilege of engaging in business activities" and "is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of the business, as the case may be".[189] In general, the B&O tax rate varies by activity, according to the following "major B&O tax classifications": (i) manufacturing; (ii) wholesaling; (iii) retailing; and (iv) services and other activities.[190]

7.68. Because the B&O aerospace tax rate applies to manufacturing, wholesaling, and retailing activities for commercial airplanes (as well as their components and tooling), these are the B&O tax classifications that are pertinent to the benchmark for comparison. The provisions of Washington State law governing these three categories of B&O tax are set out below:

> Manufacturing: *Upon every person* engaging within this state in business as a manufacturer, *except* persons taxable as manufacturers under other provisions of this chapter; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of 0.484 percent.[191] (emphasis added)
>
> Wholesale: *Upon every person* engaging within this state in the business of making sales at wholesale, *except* persons taxable as wholesalers under other provisions of this chapter; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of 0.484 percent.[192] (emphasis added)

[186] See European Union's response to Panel question No. 24, para. 48; first written submission, paras. 17-21, 59.
[187] United States' response to Panel question No. 56, para. 20.
[188] United States' second written submission, para. 92.
[189] RCW Section 82.04.220(1) (Exhibit EU-32). See also United States' first written submission, paras. 39-41. As further explained by the Washington State Department of Revenue, "Washington, unlike many other states, does not have an income tax. Washington's B&O tax is calculated on the gross income from activities. This means there are no deductions from the B&O tax for labor, materials, taxes, or other costs of doing business." Business & Occupation Tax Explanation, Washington State Department of Revenue (Exhibit EU-33). See also ESSB 5952 Final Bill Report (Exhibit EU-4), p. 1.
[190] Question: What are the major B&O tax classifications?, Washington State Department of Revenue (Exhibit USA-11); United States' first written submission, para. 41.
[191] RCW Section 82.04.240 (Exhibit EU-36). Further, the "value of products, including by-products, extracted or manufactured shall be determined by the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail". RCW Section 82.04.450(1) (Exhibit EU-37).
[192] RCW Section 82.04.270 (Exhibit EU-39). Further, the "'[g]ross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property, digital goods, digital codes, digital automated services, and/or for other services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses." RCW Section 82.04.070 (Exhibit EU-40).

> Retail: *Upon every person* engaging within this state in the business of making sales at retail, *except* persons taxable as retailers under other provisions of this chapter, as to such persons, the amount of tax with respect to such business is equal to the gross proceeds of sales of the business, multiplied by the rate of 0.471 percent.[193] (emphasis added)

7.69. The Panel considers that these general rates, as set out in these provisions and identified by the European Union, properly serve as the "normative benchmark"[194] for comparison within the Washington State B&O tax system. The express wording of the relevant statutes contemplates a general rate of B&O taxation applicable to "every person" engaging in the relevant activity, "except" where such persons are taxable "under other provisions" of the same chapter.

7.70. Moreover, other documents produced by Washington State addressing the B&O aerospace tax rate support the understanding that, in the absence of an explicit provision for a different tax treatment, B&O taxation would generally operate according to these major activity classifications and the corresponding rates of taxation. The Final Bill Report to ESSB 5952 describes the B&O tax and explains that "[m]ajor tax rates are 0.471 per cent for *retailing*; 0.484 per cent for *manufacturing*, *wholesaling*, and extracting; and 1.5 per cent for services, and activities not classified elsewhere".[195] The Department of Revenue Fiscal Note in relation to ESSB 5952 provides a "narrative explanation" of the measures having a fiscal impact, which refers to "[r]educed business and occupation (B&O) tax rates of 0.2904% for manufacturers of commercial airplanes (instead of the *general manufacturing rate* of 0.484%)".[196] Further, the Washington State Administrative Code refers to the RCW Section containing the B&O aerospace tax rate as "provid[ing] several *special B&O tax rates/classifications* for manufacturers engaging in certain manufacturing activities".[197] Finally, a 2016 Tax Exemption Study by the Washington State Department of Revenue characterizes the B&O aerospace tax rate as a "preferential rate".[198]

7.71. The Panel notes the United States' description of the B&O tax as a "pyramiding tax". According to the United States:

> [G]oods and services are taxed multiple times as they move through the production chain, with a successively greater effective tax rate for each business in the chain. As a result, industries with multiple steps, such as the aerospace industry, have higher effective tax rates. In part to address this "pyramiding", Washington has introduced a number of industry-specific B&O tax rates.[199]

7.72. The Panel also observes that the United States further suggests that because "Washington's unique B&O tax system results in a pyramiding effect", "the industry in which a taxpayer sits may impact whether it is comparably situated to a taxpayer in the aerospace industry".[200]

7.73. Arguments related to the "pyramiding" effect of the B&O tax were examined previously by the panel and the Appellate Body in *US – Large Civil Aircraft (2nd complaint)* in relation to similar (though subsequently amended and extended) measures under HB 2294. Reviewing arguments on average effective tax rates based on the panel record in that dispute, the Appellate Body saw "no indication … that adjusting tax rates to approximate the average effective tax rate reflects a principle under the Washington State B&O tax regime. Rather, it appears to be more in the nature of an *ex post* explanation regarding the relationship of these rates to one another."[201] The Appellate Body further considered that the panel record in that dispute did "not support the

[193] RCW Section 82.04.250 (Exhibit EU-38).
[194] See Appellate Body Report, *US – FSC*, para. 90.
[195] ESSB 5952 Final Bill Report (Exhibit EU-4), p. 1. (emphasis added)
[196] ESSB 5952 Fiscal Note (Exhibit EU-5), p. 2. (emphasis added)
[197] WAC Section 458-20-136(5) (Exhibit USA-41).
[198] 2016 Tax Exemption Study, Washington State Department of Revenue (Exhibit EU-95), Appendix B, p. B-1.
[199] United States' first written submission, para. 41 (citing Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.98).
[200] United States' Response to Panel question No. 56, para. 20.
[201] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 829.

contention that Washington State implemented House Bill 2294 alone, or as part of a broader regulatory scheme, to counteract the effects of pyramiding".[202]

7.74. In the present dispute, the evidence before the Panel demonstrates that the B&O tax system is organized based on major activity classifications with statutorily prescribed rates of taxation corresponding to each activity. Within the framework of those major activity classifications, the B&O tax system contemplates different rates of taxation for certain businesses.[203] The B&O aerospace tax rate itself is one such case, as it is explicitly framed according to these major activity classifications (i.e. manufacturing, wholesaling, and retailing), and for such aerospace activities it establishes a specific B&O tax rate due to policy reasons tied to the maintenance and growth of Washington State's aerospace industry workforce.[204]

7.75. In this context, the counteraction of higher effective tax rates from "pyramiding" due to multiple business activities does not appear to amount to an "organizing principle" of the domestic tax regime in question. Other features of the B&O tax system may reflect a concern for preventing double B&O taxation, namely the provision for a Multiple Activities Tax Credit for persons taxable under the B&O tax on making retail and wholesale sales of the items they manufacture, such that taxes paid on manufacturing of products sold in Washington State can be credited against retailing or wholesaling B&O tax liability on the items manufactured.[205] However, this feature of the B&O tax system reinforces an understanding of the B&O tax structure built on core activity classifications of manufacturing, wholesaling, and retailing for the purposes of identifying comparably situated taxpayers in Washington State.[206] It is these activity classifications, rather than the effective tax rates of specific industries or sectors, that appear to form the "organizing principle" underlying the B&O tax system.

7.76. Finally, the Panel is not persuaded that any possible qualification for pre-existing tax incentives, in particular those established under HB 2294, is relevant to establishing the benchmark in this case. The fact that the applicable tax treatment may have been available previously by virtue of earlier measures does not automatically render that tax treatment its own normative benchmark, particularly as the earlier application of the tax treatment in question may itself be a departure from the organizing principles of the domestic tax regime. The United States has not articulated why a B&O aerospace tax rate of 0.2904% should be understood as a "defined, normative benchmark" reflective of "organizing principles" of the B&O tax regime. The assertion that "[Boeing's] eligibility for that rate during the [period] 2014-2024 does not represent revenue foregone"[207] would seem to apply a strict "but for" test, without accounting for the organizing principles of the B&O tax regime described above. Such an approach could amount to "identifying a benchmark solely by reference to historical rates"[208], contrary to the reservations expressed by the Appellate Body[209] as to the identification of a benchmark without proper regard for the complexities of a Member's domestic rules of taxation.[210] In this case, the benchmark for comparison is not determined simply by historical tax treatment, but rather is based on the government revenue that would be otherwise due from comparably situated taxpayers in light of the structure and organizing principles of the Washington State B&O tax regime.

7.77. On the basis of the evidence and arguments on the record, the Panel considers that taxpayers in Washington State engaged in the major business activities of manufacturing, wholesaling, and retailing are comparably situated to their counterparts in the aerospace industry engaged in such activities, as "every" taxpayer in the state engaged in those activities is subject to

[202] Ibid. para. 830.
[203] For example, the RCW provisions codifying the B&O aerospace tax rate include special B&O tax rates for other businesses, including *inter alia* the manufacturing of seafood and dairy products, as well as the manufacturing and wholesaling of "fruits or vegetables by canning, preserving, freezing, processing, or dehydrating fresh fruits or vegetables". See RCW Section 82.04.260(1) (Exhibit EU-22).
[204] ESSB 5952 (Exhibit EU-3), Section 1(3).
[205] RCW Section 82.04.440(4) (Exhibit USA-31). See also WAC Section 458-20-19301(3) (Exhibit EU-41) (explaining that "[t]his integrated tax credits system is intended to assure that gross receipts from sales or the value of products determined by such gross receipts are taxed only one time, whether the activities occur entirely within this state or both within and outside this state").
[206] See Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 813.
[207] United States' second written submission, para. 92.
[208] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 815.
[209] Appellate Body Report, *US – FSC*, para. 91.
[210] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, fn 66.

the B&O tax. Accordingly, the appropriate normative benchmarks with regard to the B&O aerospace tax rate are the general B&O tax rates of 0.484% for manufacturing and wholesaling activities, and 0.471% for retailing activities.

7.4.3.1.3 Third step: comparison of applicable tax treatment with benchmark

7.78. Having established the relevant tax treatment provided to alleged beneficiaries of the B&O aerospace tax rate, as well as the reasons for that treatment, the Panel turns to the comparison of the B&O aerospace tax rate with the identified benchmarks.

7.79. For taxpayers engaged in the business of manufacturing commercial airplanes, or manufacturing components of such airplanes, the B&O aerospace tax rate provides for a B&O tax rate of 0.2904%. This is to be compared with the taxation of comparably situated taxpayers, namely the B&O tax rate of 0.484% generally applicable to other entities engaged in manufacturing activities in Washington State. Pursuant to the Washington State tax code, as amended by ESSB 5952, the rate applicable to manufacturing commercial airplanes (or components of such airplanes) is lower than that generally applied to other manufacturing activities. There is no evidence that this difference is reflective of any organizing principle of the B&O tax system. Rather, the difference is for the express reason of incentivizing the maintenance and growth of Washington State's aerospace industry. For these reasons, the Panel finds that the Washington State government is foregoing revenue that is otherwise due in relation to manufacturing beneficiaries of the B&O aerospace tax rate.

7.80. For taxpayers engaged in the business of making sales at wholesale of commercial airplanes, or making sales at wholesale of components of such airplanes, the B&O aerospace tax rate provides for a B&O tax rate of 0.2904%. This is to be compared with the taxation of comparably situated taxpayers, namely the B&O tax rate of 0.484% generally applicable to other entities engaged in wholesaling activities in Washington State. Pursuant to the Washington State tax code, as amended by ESSB 5952, the rate applicable to wholesale sales of commercial airplanes (or components of such airplanes) is lower than that generally applied to wholesaling activities. There is no evidence that this difference is reflective of any organizing principle of the B&O tax system. Rather, the difference is for the express reason of incentivizing the maintenance and growth of Washington State's aerospace industry. For these reasons, the Panel finds that the Washington State government is foregoing revenue that is otherwise due in relation to wholesaling beneficiaries of the B&O aerospace tax rate.

7.81. For taxpayers engaged in the business of making sales at retail of commercial airplanes, or making sales at retail of components of such airplanes, the B&O aerospace tax rate provides for a B&O tax rate of 0.2904%. This is to be compared with the taxation of comparably situated taxpayers, namely the B&O tax rate of 0.471% generally applicable to other entities engaged in retailing activities in Washington State. Pursuant to the Washington State tax code, as amended by ESSB 5952, the rate applicable to retail sales of commercial airplanes (or components of such airplanes) is lower than that generally applied to retailing activities. There is no evidence that this difference is reflective of any organizing principle of the B&O tax system. Rather, the difference is for the express reason of incentivizing the maintenance and growth of Washington State's aerospace industry. For these reasons, the Panel finds that the Washington State government is foregoing revenue that is otherwise due in relation to retailing beneficiaries of the B&O aerospace tax rate.

7.82. Finally, for taxpayers engaged in the manufacture and sales, at both wholesale and retail levels, of *tooling* for use in manufacturing commercial airplanes or components of such airplanes, the B&O aerospace tax rate provides for a B&O tax rate of 0.2904%. This is to be compared with the taxation of comparably situated taxpayers, namely the B&O tax rate of 0.484% generally applicable to other entities engaged in manufacturing and wholesaling activities in Washington State, and the B&O tax rate of 0.471% generally applicable to other entities engaged in retailing activities in Washington State. Pursuant to the Washington State tax code, as amended by ESSB 5952, the rate applicable to manufacturing, wholesaling, and retailing of tooling for use in manufacturing commercial airplanes (or components of such airplanes) is lower than that generally applied to such activities. There is no evidence that this difference is reflective of any organizing principle of the B&O tax system. Rather, the difference is for the express reason of incentivizing the maintenance and growth of Washington State's aerospace industry. For these reasons, the Panel finds that the Washington State government is foregoing revenue that is otherwise due in

relation to tooling beneficiaries (manufacturers, wholesalers, and retailers) of the B&O aerospace tax rate.

7.83. Accordingly, the Panel finds that the B&O aerospace tax rate, in respect of all of the types of activities that it covers, constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

7.4.3.2 B&O tax credit for aerospace product development

7.84. The legislation for the B&O tax credit for aerospace product development provides in relevant part:

> (1)(a)(i) In computing the tax imposed under this chapter [the B&O tax], a credit is allowed for each person for qualified aerospace product development. For a person who is a manufacturer or processor for hire of commercial airplanes or components of such airplanes, credit may be earned for expenditures occurring after December 1, 2003. For all other persons, credit may be earned only for expenditures occurring after June 30, 2008.
>
> ...
>
> (2) The credit is equal to the amount of qualified aerospace product development expenditures of a person, multiplied by the rate of 1.5 percent.
>
> ...
>
> (5) The definitions in this subsection apply throughout this section.
>
> ...
>
> (b) "Aerospace product development" means research, design, and engineering activities performed in relation to the development of an aerospace product or of a product line, model, or model derivative of an aerospace product, including prototype development, testing, and certification. ...
>
> (c) "Qualified aerospace product development" means aerospace product development performed within this state.
>
> (d) "Qualified aerospace product development expenditures" means operating expenses, including wages, compensation of a proprietor or a partner in a partnership as determined by the department, benefits, supplies, and computer expenses, directly incurred in qualified aerospace product development by a person claiming the credit provided in this section. ... [211]

7.4.3.2.1 First step: applicable tax treatment

7.85. Based on the available evidence, the Panel will first identify the applicable tax treatment under the B&O tax credit for aerospace product development, including consideration of the objective reasons behind that treatment. As provided for in the relevant legislation, Washington State provides a credit against B&O tax liability "equal to the amount of qualified aerospace product development expenditures of a person, multiplied by the rate of 1.5 per cent".[212] The term "aerospace product development" is defined to include "research, design, and engineering activities performed in relation to the development of an aerospace product or of a product line, model, or model derivative of an aerospace product, including prototype development, testing, and certification".[213] In turn, the term "aerospace product" is defined under Washington State law as: "(i) Commercial airplanes and their components; (ii) Machinery and equipment that is designed and used primarily for the maintenance, repair, overhaul, or

[211] RCW Section 82.04.4461 (Exhibit EU-23).
[212] RCW Section 82.04.4461(2) (Exhibit EU-23).
[213] RCW Section 82.04.4461(5)(b) (Exhibit EU-23).

refurbishing of commercial airplanes or their components".[214] Such "aerospace product development" is only "qualified" − i.e. it only counts towards the tax credit − if it occurs in Washington State[215], and the relevant expenditures for such development against which the credit is calculated include a variety of "operating expenses" specified in the relevant statute that are "directly incurred in qualified aerospace product development by a person claiming the credit provided in this section".[216]

7.86. Thus, the tax treatment at issue is a credit applied against a taxpayer's B&O tax liability, calculated as 1.5% of expenditures on the development of commercial airplanes and their components, as well as machinery and equipment used in relation to commercial airplanes and their components. As a result of the enactment of ESSB 5952, the B&O tax credit for aerospace product development expires on 1 July 2040.[217] Thus, the relevant tax treatment for the covered activities, at present and until the 2040 expiry date, is as set forth above.

7.87. This tax treatment forms part of the legislation in ESSB 5952 targeted towards the aerospace industry in Washington State. Its "objective reasons" are the same as discussed in respect of the B&O aerospace tax rate − that is, to provide favourable tax treatment for the aerospace industry in order to encourage the industry to remain in Washington State and to grow its workforce.[218]

7.4.3.2.2 Second step: benchmark for comparison

7.88. Having identified the relevant tax treatment and its objective reasons, the next step of the analysis is the identification of an appropriate "benchmark for comparison" within the Washington State tax regime to determine whether this tax treatment constitutes revenue foregone by the Washington State government that would otherwise be due. This benchmark must be ascertained with regard for "the structure of the domestic tax regime and its organizing principles".[219]

7.89. With regard to the "benchmark for comparison", the European Union submits that the B&O tax credit for aerospace product development reduces the amount of B&O tax liability by the value of the credit, and that "the standard tax treatment of manufacturers, unabated by such tax credits, serves as the normative benchmark".[220] The United States, in addition to its general argument that the European Union has not met its burden to identify the benchmark for each aerospace tax measure, also submits, in respect of tax credits, that the comparable taxable "event" is not an event involving the same taxpayers absent the credit, as this would be the "type of historical comparison for a taxpayer [that] was criticized by the Appellate Body".[221]

7.90. The Panel considers that, as with the B&O aerospace tax rate, the B&O tax regime (rather than other types of taxation that exist in Washington State) constitutes the part of the Washington State tax regime that is relevant to the appropriate benchmark for the B&O tax credit for aerospace product development. Unlike the B&O aerospace tax rate, the B&O tax credit for aerospace product development does not alter the rate of taxation applicable to a given taxpayer, but rather provides for an amount to be credited or offset against that taxpayer's B&O tax liability. As discussed above, the organizing principles of the B&O tax regime involve the establishment of

[214] RCW Section 82.08.975(3)(a) (Exhibit EU-25). Under Washington State law, the term "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". RCW Section 82.32.550(1) (Exhibit EU-82). Further, the term "component" "means a part or system certified by the federal aviation administration for installation or assembly into a commercial airplane". RCW Section 82.32.550(2) (Exhibit EU-82).
[215] RCW Section 82.04.4461(5)(b) (Exhibit EU-23). United States' first written submission, para. 60.
[216] RCW Section 82.04.4461(5)(d) (Exhibit EU-23).
[217] ESSB 5952 (Exhibit EU-3), Section 9.
[218] See para. 7.65 above.
[219] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 813.
[220] See European Union's response to Panel question No. 24, para. 48; first written submission, paras. 22-24, 62-63.
[221] The United States' response to Panel question No. 57, para. 23 (citing Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 815).

generally applicable rates of taxation according to major activity classifications, across a range of different industries and sectors.[222]

7.91. Based on the evidence on record, the Panel does not consider it to be an "organizing principle" of the B&O tax regime to provide industry-specific credits for designated activities to offset a portion of the tax liability arising from the pertinent B&O tax rates. A taxpayer is normally subject to generally applicable B&O tax rates based on the type of business activity conducted (e.g. manufacturing, wholesaling, or retailing). The taxpayer's B&O tax liability would be calculated by multiplying the applicable tax rate by the taxable amount generated by the business activity.[223] The "gross" B&O tax liability thus calculated would be the benchmark against which to compare the taxpayer's B&O tax liability net of the amount of the credit. The fact that in every case of such comparison the taxpayer in question is the same does not change this conclusion, because the organizing principle is not that credits are made available, but rather that taxpayers, by virtue of the generally applicable rates of taxation according to major activity classifications, would otherwise expect to have to pay the tax that is being credited. Indeed, given that the form of the measure is a credit, or offset, against a taxpayer's gross B&O tax liability, the Panel considers this approach to identifying the benchmark for a measure of this nature as most reasonable.

7.92. The Panel therefore agrees with the European Union that the relevant normative benchmark is the B&O tax liability that would apply to a given taxpayer in the absence of the credit.

7.4.3.2.3 Third step: comparison of applicable tax treatment with benchmark

7.93. Having established the relevant tax treatment provided to alleged beneficiaries of the B&O tax credit for aerospace product development, as well as the reasons for that treatment, the Panel turns to the comparison of the B&O tax credit for aerospace product development with the identified benchmark.

7.94. As described above, taxpayers engaged in activities subject to B&O taxation in Washington State are subject to B&O tax rates corresponding to the major activity classifications. It is by virtue of the additional provision for a B&O tax credit tied to aerospace product development that this tax liability can be reduced for eligible taxpayers by the amount of the credit. As noted above, this credit is provided within the framework of legislation enacted for the express reason of incentivizing the maintenance and growth of employment in Washington State's aerospace industry.

7.95. In this regard, the Panel is mindful of the Appellate Body's reservation that "an approach that focuses too narrowly on the change effected by a tax measure could result in a finding that government revenue otherwise due is foregone anytime the tax rate applicable to a recipient is lowered."[224] The Appellate Body underscored "the risk in identifying a benchmark solely by reference to historical rates, the very departure from which may reflect evidence of shifting norms within that regime".[225] This is the issue raised by the United States referred to above.[226]

7.96. Taking into account the Appellate Body's guidance, the Panel's analysis does not concern "what *previously* applied to commercial aircraft manufacturing activities", but rather "what would *currently* apply to these activities if the conditions for" the tax credit were not met.[227] The Panel has taken into account the structure of the B&O tax system and the reasons for the specific tax treatment at issue. Moreover, the Panel does not consider, nor did the United States provide evidence or argumentation to suggest, that the provision of this tax credit reflects "evidence of shifting norms within" the B&O tax regime.[228] The Panel notes that the measure in question is a

[222] See also Tax Classifications for Common Business Activities, Washington State Department of Revenue (Exhibit EU-62).
[223] More specifically, the B&O tax liability "is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of the business, as the case may be". RCW Section 82.04.220(1) (Exhibit EU-32).
[224] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 815.
[225] Ibid.
[226] See United States' response to Panel question No. 57.
[227] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 823. (emphasis original) See also European Union's comments on the United States' response to Panel question No. 57, para. 15.
[228] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 815. See also United States' response to Panel question No. 57.

tax credit, and thus does not change the applicable tax rates, but rather offsets B&O tax liability that would otherwise be due in the absence of the credit.

7.97. Based on these considerations, the Panel finds that the B&O tax credit for aerospace product development results in the foregoing of government revenue by Washington State with respect to the B&O tax liability that would otherwise be presently incurred by the taxpayers eligible for the credit. In this regard, the Panel considers the illustrative reference in Article 1.1(a)(1)(ii) to "fiscal incentives such as tax credits" to be apposite to the circumstances of the B&O tax credit for aerospace product development as presented to the Panel.

7.98. Accordingly, the Panel finds that the B&O tax credit for aerospace product development constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

7.4.3.3 B&O tax credit for property and leasehold excise taxes

7.99. The legislation for the B&O tax credit for property and leasehold excise taxes provides in relevant part:

> (1) In computing the tax imposed under this chapter [the B&O tax], a credit is allowed for property taxes and leasehold excise taxes paid during the calendar year.
>
> (2) The credit is equal to:
>
> (a)(i)(A) Property taxes paid on buildings, and land upon which the buildings are located, constructed after December 1, 2003, and used exclusively in manufacturing commercial airplanes or components of such airplanes; and
>
> (B) Leasehold excise taxes paid with respect to buildings constructed after January 1, 2006, the land upon which the buildings are located, or both, if the buildings are used exclusively in manufacturing commercial airplanes or components of such airplanes; and
>
> (C) Property taxes or leasehold excise taxes paid on, or with respect to, buildings constructed after June 30, 2008, the land upon which the buildings are located, or both, and used exclusively for aerospace product development, manufacturing tooling specifically designed for use in manufacturing commercial airplanes or their components, or in providing aerospace services … ; or
>
> (ii) Property taxes attributable to an increase in assessed value due to the renovation or expansion, after: (A) December 1, 2003, of a building used exclusively in manufacturing commercial airplanes or components of such airplanes; and (B) June 30, 2008, of buildings used exclusively for aerospace product development, manufacturing tooling specifically designed for use in manufacturing commercial airplanes or their components, or in providing aerospace services, … [229]

7.4.3.3.1 First step: applicable tax treatment

7.100. Based on the available evidence, the Panel will first identify the applicable tax treatment under the B&O tax credit for property and leasehold excise taxes, including consideration of the objective reasons behind that treatment. As provided for in the relevant legislation, Washington State provides a credit against B&O tax liability "for property taxes and leasehold excise taxes paid during the calendar year".[230] The tax credit applies to property and leasehold excise taxes related to buildings, and/or land upon which the buildings are located, that are: "used

[229] RCW Section 82.04.4463 (Exhibit EU-24). The B&O tax credit for property and leasehold excise taxes contains further provisions on the calculation of the credit for property taxes paid on certain machinery and equipment, as well as certain computer hardware, computer peripherals, and software. See RCW Section 82.04.4463(2)(b) (Exhibit EU-24).

[230] RCW Section 82.04.4463(1) (Exhibit EU-24).

exclusively in manufacturing commercial airplanes or components of such airplanes"[231]; and "used exclusively for aerospace product development, manufacturing tooling specifically designed for use in manufacturing commercial airplanes or their components, or in providing aerospace services".[232] In addition, this B&O tax credit applies to property taxes "attributable to an increase in assessed value due to renovation or expansion" of such buildings.[233] As a result of the enactment of ESSB 5952, the B&O tax credit for property and leasehold excise taxes expires on 1 July 2040.[234] Thus, the relevant tax treatment, at present and until the 2040 expiry date, is as set forth above.

7.101. The United States explains that the B&O tax credit for property and leasehold excise taxes enables a taxpayer to claim a credit that is measured according to property taxes and leasehold excise taxes[235] "due on certain types of property with certain types of uses related to commercial airplane, airplane components, aerospace services, and aerospace product development".[236] The tax credit provided for under this aerospace tax measure "offsets the B&O tax that is due in a given year".[237]

7.102. This tax treatment forms part of the legislation in ESSB 5952 targeted towards the aerospace industry in Washington State. As such, its "objective reasons" are the same as discussed in respect of the B&O aerospace tax rate − that is, to provide favourable tax treatment for the aerospace industry in order to encourage the industry to remain in Washington State and to grow its workforce.[238]

7.4.3.3.2 Second step: benchmark for comparison

7.103. Having identified the relevant tax treatment and its objective reasons, the next step of the analysis is the identification of an appropriate "benchmark for comparison" within the Washington State tax regime to determine whether this tax treatment constitutes revenue foregone by the Washington State government that would otherwise be due. This benchmark must be ascertained with regard for "the structure of the domestic tax regime and its organizing principles".[239]

7.104. With regard to the "benchmark for comparison", the European Union submits that the B&O tax credit for property and leasehold excise taxes reduces the amount of B&O tax liability by the value of the credit, and that "the standard tax treatment of manufacturers, unabated by such tax credits, serves as the normative benchmark".[240] The United States, in addition to its general argument that the European Union has not met its burden to identify the benchmark for each aerospace tax measure, also submits, in respect of tax credits, that the comparable taxable "event" is not an event involving the same taxpayers absent the credit, as this would be the "type of historical comparison for a taxpayer [that] was criticized by the Appellate Body".[241]

7.105. The Panel considers that, as with the other B&O-related tax measures, the B&O tax regime constitutes the part of the Washington State tax regime that is relevant to the appropriate benchmark for the B&O tax credit for property and leasehold excise taxes. Like the B&O tax credit for aerospace product development, the B&O tax credit for property and leasehold excise taxes does not alter the rate of taxation but rather provides for an amount to be credited against a taxpayer's B&O tax liability. As discussed above, the organizing principles of the B&O tax regime

[231] RCW Section 82.04.4463(2)(a)(i)(A) and (B) (Exhibit EU-24). Under Washington State law, the term "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". RCW Section 82.32.550(1) (Exhibit EU-82). Further, the term "component" "means a part or system certified by the federal aviation administration for installation or assembly into a commercial airplane". RCW Section 82.32.550(2) (Exhibit EU-82).
[232] RCW Section 82.04.4463(2)(a)(i)(C) (Exhibit EU-24).
[233] RCW Section 82.04.4463(2)(a)(ii) (Exhibit EU-24).
[234] ESSB 5952 (Exhibit EU-3), Section 10.
[235] See description of these taxes in paras. 7.25-7.26 above.
[236] United States' response to Panel question No. 9, para. 18.
[237] Ibid.
[238] See para. 7.65 above.
[239] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 813.
[240] See European Union's response to Panel question No. 24, para. 48; first written submission, paras. 22-24, 62-63.
[241] The United States' response to Panel question No. 57, para. 23 (citing Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 815).

involve the establishment of generally applicable rates of taxation according to major activity classifications, across a range of different industries and sectors.[242]

7.106. As also discussed above, and based on the evidence on record, the Panel does not consider it to be an "organizing principle" of the B&O tax regime to provide industry-specific credits for designated activities to offset a portion of the tax liability arising from the pertinent B&O tax rates. The Panel follows the same approach for the B&O tax credit for property and leasehold excise taxes, for the same reasons, as that taken in respect of the B&O tax credit for aerospace product development. The Panel therefore agrees with the European Union that the relevant normative benchmark is the B&O tax liability that would apply in the absence of the credit.

7.4.3.3.3 Third step: comparison of applicable tax treatment with benchmark

7.107. The comparison for the B&O tax credit for property and leasehold excise taxes follows the same reasoning as that set out above for the B&O tax credit for aerospace product development. Thus, taxpayers engaged in activities subject to B&O taxation in Washington State are subject to B&O tax rates corresponding to the major activity classifications. It is by virtue of the additional provision for a B&O tax credit for property and leasehold excise taxes paid in respect of the designated aerospace related activities and properties that this tax liability can be reduced, for eligible taxpayers, by the amount of the credit. As noted above, this credit is provided within the framework of legislation enacted for the express reason of incentivizing the maintenance and growth of employment in Washington State's aerospace industry.

7.108. As with the B&O tax credit for aerospace product development, the Panel is mindful of the Appellate Body's reservation that "an approach that focuses too narrowly on the change effected by a tax measure could result in a finding that government revenue otherwise due is foregone anytime the tax rate applicable to a recipient is lowered."[243] The Appellate Body underscored "the risk in identifying a benchmark solely by reference to historical rates, the very departure from which may reflect evidence of shifting norms within that regime".[244]

7.109. Taking into account the Appellate Body's guidance, the Panel's analysis does not concern "what *previously* applied to commercial aircraft manufacturing activities", but rather "what would *currently* apply to these activities if the conditions for" the tax credit were not met.[245] The Panel has taken into account the structure of the B&O tax system and the reasons for the specific tax treatment at issue. Moreover, the Panel does not consider, nor did the United States provide evidence or argumentation to suggest, that the provision of this tax credit reflects "evidence of shifting norms within" the B&O tax regime.[246] The Panel notes that the measure in question is a tax credit, and thus does not change the applicable tax rates, but rather offsets B&O tax liability that would otherwise be due in the absence of the credit.

7.110. Based on these considerations, the Panel finds that the B&O tax credit for property and leasehold excise taxes results in the foregoing of government revenue by Washington State with respect to the B&O tax liability that would otherwise be presently incurred by taxpayers eligible for the credit. In this regard, and as with the B&O tax credit for aerospace product development, the Panel considers the illustrative reference to "fiscal incentives such as tax credits" in Article 1.1(a)(1)(ii) to be apposite to the circumstances of the B&O tax credit for property and leasehold excise taxes as presented to the Panel.

7.111. Accordingly, the Panel finds that the B&O tax credit for property and leasehold excise taxes constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

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[242] See also Tax Classifications for Common Business Activities, Washington State Department of Revenue (Exhibit EU-62).

[243] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 815.

[244] Ibid. See also United States' response to Panel question No. 57.

[245] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 823. (emphasis original) See also European Union's comments on the United States' response to Panel question No. 57, para. 15.

[246] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 815. See also United States' response to Panel question No. 57.

7.4.3.4 Computer sales and use tax exemptions

7.112. The legislation for the computer sales tax exemption provides in relevant part:

> (1) The tax levied by RCW 82.08.020 [the sales tax] does not apply to sales of computer hardware, computer peripherals, or software … used primarily in the development, design, and engineering of aerospace products or in providing aerospace services, or to sales of or charges made for labor and services rendered in respect to installing the computer hardware, computer peripherals, or software.[247]

7.113. The computer use tax exemption provides in relevant part:

> (1) The provisions of this chapter [the use tax] do not apply in respect to the use of computer hardware, computer peripherals … used primarily in the development, design, and engineering of aerospace products or in providing aerospace services, or to the use of labor and services rendered in respect to installing the computer hardware, computer peripherals, or software.[248]

7.4.3.4.1 First step: applicable tax treatment

7.114. Based on the available evidence, the Panel will first identify the applicable tax treatment under the computer sales and use tax exemptions, including consideration of the objective reasons behind that treatment. As provided for in the relevant legislation, Washington State provides an exemption from the retail sales tax[249] for "sales of computer hardware, computer peripherals, or software … used primarily in the development, design, and engineering of aerospace products or in providing aerospace services, or to sales of or charges made for labor and services rendered in respect to installing the computer hardware, computer peripherals, or software".[250] Additionally, the use of these items is exempt from the Washington State's "use tax"[251], which is a tax on the use of goods or certain services in the state of Washington when sales tax has not been paid.[252] As a result of ESSB 5952, the computer sales and use tax exemptions expire on 1 July 2040.[253] Thus, the relevant tax treatment for the covered activities and products, at present and until the 2040 expiry date, is as set forth above.

7.115. This tax treatment forms part of the legislation in ESSB 5952 targeted towards the aerospace industry in Washington State. As such, its "objective reasons" are the same as discussed in respect of the B&O aerospace tax rate − that is, to provide favourable tax treatment for the aerospace industry in order to encourage the industry to remain in Washington State and to grow its workforce.[254]

7.4.3.4.2 Second step: benchmark for comparison

7.116. Having identified the relevant tax treatment and its objective reasons, the next step of the analysis is the identification of an appropriate "benchmark for comparison" within the Washington State tax regime to determine whether this tax treatment constitutes revenue foregone by the Washington State government that would otherwise be due. This benchmark must be ascertained with regard for "the structure of the domestic tax regime and its organizing principles".[255]

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[247] RCW Section 82.08.975 (Exhibit EU-25).
[248] RCW Section 82.12.975 (Exhibit EU-26).
[249] RCW Section 82.08.020 (Exhibit EU-92).
[250] RCW Section 82.08.975 (Exhibit EU-25).
[251] RCW Section 82.12.975 (Exhibit EU-26).
[252] Use Tax Explanation, Washington State Department of Revenue (Exhibit USA-19). For example, the use tax is owed if goods are purchased in another state that does not have a sales tax or a state with a sales tax lower than that of the state of Washington. The use tax would also be owed if good are purchased from someone who is not authorized to collect sales tax (e.g. purchases of furniture from an individual through a newspaper classified ad or a purchase of artwork from an individual collector), or if personal property is acquired with the purchase of real property.
[253] ESSB 5952 (Exhibit EU-3), Sections 11-12.
[254] See para. 7.65 above.
[255] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 813.

7.117. With regard to the "benchmark for comparison", the European Union submits that the computer sales and use tax exemptions "exempt[] the purchase of otherwise taxable goods and services from the retail sales and use taxes", and that "the normative benchmark is the sales and use taxes that would otherwise apply absent these exemptions".[256] The United States, in addition to its general argument that the European Union has not met its burden to identify the benchmark for each aerospace tax measure, also submits, in respect of tax exemptions, that the comparable taxable "event" is not an event involving the same taxpayers absent the exemption, as this would be the "type of historical comparison for a taxpayer [that] was criticized by the Appellate Body".[257] The United States further submits that "quantitative coverage of various tax regimes could be relevant to determining a financial contribution compared to a normative benchmark"[258] and that "Washington provides a large number of exemptions … suggesting that the sales and use tax rates that are notionally (but not actually) applicable to all purchases by consumers located in Washington are not the appropriate benchmark".[259]

7.118. As a threshold matter, it is the sales and use tax regime, as distinguished from other types of taxation that exist in Washington State, in which the aerospace tax measure at issue applies and according to which the parties have advanced their arguments on the appropriate benchmark for comparison. Therefore, in order to identify the appropriate benchmark for comparison, the Panel will examine the structure of the sales and use tax regime in Washington State, particularly in respect of its organizing principles and legitimately comparable tax situations.

7.119. Washington State has a retail sales tax, which is its principal source of tax revenue.[260] Generally, a retail sale is the sale of tangible personal property, as well as the sale of certain services (including construction services) and sales of digital products to consumers.[261] The Washington State retail sales tax rate has two components: the state component, which is equal to 6.5%, and the local component, which varies by jurisdiction.[262] Local governments within Washington State have the authority to set their own retail sales tax rates within their jurisdictions, but the State administers both components.[263]

7.120. The Washington State use tax is complementary to the retail sales tax, in that it is due on the use of goods or services to the extent that the user has not paid the Washington State retail sales tax or "a legally imposed retail sales or use tax … to any other state, possession, territory, or commonwealth of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof".[264] Thus, goods in Washington State are subject to either sales or use tax, but not both, and the use tax compensates when the sales tax has not been paid.[265] Use tax is determined on the value of the goods (generally the purchase price) when first used in Washington State.[266] The use tax rate is the same as the retail sales tax rate.[267]

7.121. Both parties have noted that there are a number of exemptions from retail sales and use taxes for purchases of specific goods or services. Some of these exemptions are limited to a particular industry or sector, while other exemptions are available for any purchaser or user of the

[256] See European Union's comments on the United States' response to Panel question No. 24, para. 50; first written submission, paras. 22-24, 62-63.
[257] The United States' response to Panel question No. 57, para. 23 (citing Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 815).
[258] United States' response to Panel question No. 60, para. 31.
[259] United States' response to Panel question No. 56, para. 21.
[260] United States' first written submission, para. 42; Retail Sales Tax Explanation, Washington State Department of Revenue (Exhibit USA-12).
[261] RCW Section 82.08.020 (Exhibit EU-92); United States' first written submission, para. 42; Retail Sales Tax Explanation, Washington State Department of Revenue (Exhibit USA-12); Services Subject to Sales Tax, Washington State Department of Revenue (Exhibit USA-13); Digital Products including Digital Goods, Washington State Department of Revenue (Exhibit USA-14).
[262] See Local Sales, Use Tax Rates and Changes, Washington State Department of Revenue (Exhibit USA-16).
[263] United States' first written submission, para. 43.
[264] RCW Section 82.12.020 (Exhibit USA-17); RCW Section 82.12.035 (Exhibit USA-18).
[265] Use Tax Explanation, Washington State Department of Revenue (Exhibit USA-19).
[266] Ibid.
[267] Ibid.

specified good or service.[268] The parties also have advanced arguments based on the quantitative coverage of the exemptions.[269]

7.122. The parties' arguments on the coverage and exemption of sales and use taxes are primarily based on a 2016 Tax Exemption Study by the Washington State Department of Revenue. The portions of the study submitted to the Panel include an Introduction and Summary of Findings[270] as well as an Appendix containing a detailed list of "tax exemptions" examined in the study. The study uses the term "tax exemption" to cover "a variety of preferences that reduce tax liability for taxpayers", including exclusions, deductions, credits, preferential tax rates, and exemptions under a range of different tax regimes, not limited to the retail sales and use taxes.[271] On the basis of data in this study, both parties have submitted figures on the quantitative coverage of certain exemptions in relation to the underlying tax. The United States refers to the large number of exemptions as "suggesting that the sales and use tax rates that are notionally (but not actually) applicable to all purchases by consumers located in Washington are not the appropriate benchmark".[272]

7.123. Having examined the tax study, the Panel finds that it evidences a tax regime structure in which there are specific exemptions targeted at defined beneficiaries.[273] To the extent that the study is submitted as evidence of the factual assertion that exemptions from the tax rules in question (sales and use taxes) are of greater value than government revenue collected under those rules, the parties' arguments based on this study do not clearly establish that this is the case. For example, the parties derive fractions using different figures for the numerator[274], and the figures used by both parties fail to adjust for the exemptions in question that are available to the aerospace industry, which could be necessary to assess government revenue that would be "otherwise due" and to guard against the normative benchmark being distorted by alleged subsidies at issue.[275]

7.124. The Panel considers that the quantitative scope of what may be considered an "exception" could undermine the notion of a "general rule" for a given tax situation. An organizing principle that a government professes in respect of a tax, or that appears to be the principle that is being applied "on the surface", may not represent the "true" organizing principle. The terms and principles employed by the sovereign tax authority in question will be important but in all cases the Panel's decision must be informed by the evidence and by the Panel's interpretation of it. In this respect, the Panel finds relevant the Appellate Body's statement that the benchmark for comparison is normative in nature, and that "the task of the panel is to develop an understanding of the tax structure and principles that best explains that Member's tax regime, and to provide a reasoned basis for identifying what constitutes comparable income of comparably situated taxpayers".[276]

[268] See Table of Contents for RCW Chapter 82.08 (Exhibit USA-64); Retail Sales Tax Explanation, Washington State Department of Revenue (Exhibit USA-12) (listing "common exemptions" that include food, prescription drugs, sales to nonresidents, federal government sales, interstate and foreign sales, manufacturers' machinery and equipment, sales to Indians or Indian tribes, and newspapers); 2016 Tax Exemption Study, Washington State Department of Revenue (Exhibit EU-95), Appendix B; United States' response to Panel question No. 25, para. 55 (providing as examples motor vehicles and brokered natural gas).

[269] See parties' responses and comments on each other's responses to Panel question No. 60.

[270] 2016 Tax Exemption Study, Washington State Department of Revenue (Exhibit USA-65), Introduction and Summary of Findings.

[271] Ibid. p. 1-1.

[272] United States' response to Panel question No. 56, para. 21.

[273] 2016 Tax Exemption Study, Washington State Department of Revenue (Exhibit EU-95), Appendix B.

[274] Specifically, the United States uses a fraction based on "taxpayer savings from exemptions", whereas the European Union uses a fraction based on "state potential revenue gains" − these figures form the numerator of the fraction to represent the value of the exemption, and both parties add "forecasted tax revenues" of the particular tax to the chosen exemption value to form the denominator. The difference between taxpayer savings, on the one hand, and potential revenue gains from a full repeal, on the other hand, is that repeal of a given exemption does not automatically mean the tax can be collected due to other reasons within the Washington State tax system. See 2016 Tax Exemption Study, Washington State Department of Revenue (Exhibit USA-65), Introduction and Summary of Findings, p. 1-3.

[275] See Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 824.

[276] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 813.

7.125. In this case, the Washington State sales and use taxes are drawn as broadly applicable taxes in a non-exhaustive fashion, and are designed to complement one another through mutually exclusive coverage. This breadth of the sales and use taxes is foundational to the structure of the sales and use tax regime, which set out exemptions in a specific manner. Although the exemptions involve a diversity of goods, services, and sectors, the evidence advanced by the United States is not sufficient to rebut the *prima facie* conclusion that can be drawn from what the European Union has placed before the Panel. The structure of the tax is that of a generally applicable tax that applies by default. As a matter of fact the Panel does not find that structure to have been inverted by the relative coverage of exemptions in quantitative terms. In other words, exempting taxpayers from sales and use taxes does not amount to an "organizing principle" of the Washington State sales and use tax regime (or the Washington State tax regime more generally).

7.126. It is with regard for this basic structure, and on the basis of the rules established by Washington State, that the Panel finds that the generally applicable sales and use taxes serve as the appropriate normative benchmark in respect of the computer sales and use tax exemptions.

7.4.3.4.3 Third step: comparison of applicable tax treatment with benchmark

7.127. In view of the benchmark established above, it follows that the specific exemption from sales and use taxes, which otherwise would apply to the aerospace activities in question, amounts to the foregoing of government revenue by Washington State that would otherwise be due. Accordingly, the Panel finds that the computer sales and use tax exemption constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

7.4.3.5 Construction sales and use tax exemptions

7.128. The legislation for the construction sales tax exemption provides in relevant part:

> (1) The tax levied by RCW 82.08.020 does not apply to:
>
> (a) Charges, for labor and services rendered in respect to the constructing of new buildings, made to (i) a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes or (ii) a port district, political subdivision, or municipal corporation, to be leased to a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes;
>
> (b) Sales of tangible personal property that will be incorporated as an ingredient or component of such buildings during the course of the constructing; or
>
> (c) Charges made for labor and services rendered in respect to installing, during the course of constructing such buildings, building fixtures … [277]

7.129. The construction use tax exemption provides in relevant part:

> (1) The provisions of this chapter do not apply with respect to the use of:
>
> (a) Tangible personal property that will be incorporated as an ingredient or component in constructing new buildings for (i) a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes or (ii) a port district, political subdivision, or municipal corporation, to be leased to a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes; or
>
> (b) Labor and services rendered in respect to installing, during the course of constructing such buildings, building fixtures … [278]

[277] RCW Section 82.08.980 (Exhibit EU-27).
[278] RCW Section 82.12.980 (Exhibit EU-28).

7.4.3.5.1 First step: applicable tax treatment

7.130. Based on the available evidence, the Panel will first identify the applicable tax treatment under the construction sales and use tax exemptions, including consideration of the objective reasons behind that treatment. As provided for in the relevant legislation, Washington State provides exemptions from retail sales taxes[279] on "[c]harges, for labor and services rendered in respect to the constructing of new buildings, made to a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes", as well as taxes on "[s]ales of tangible personal property that will be incorporated as an ingredient or component of such buildings during the course of the constructing".[280] Similarly, there is an exemption from use taxes "with respect to the use of [t]angible personal property that will be incorporated as an ingredient or component in constructing new buildings for a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes".[281] As a result of ESSB 5952, the construction sales and use tax exemptions expire on 1 July 2040.[282] Thus, the relevant tax treatment for the covered activities and products, at present and until the 2040 expiry date, is as set forth above.

7.131. This tax treatment forms part of the legislation in ESSB 5952 targeted towards the aerospace industry in Washington State. As such, its "objective reasons" are the same as discussed in respect of the B&O aerospace tax rate − that is, to provide favourable tax treatment for the aerospace industry in order to encourage the industry to remain in Washington State and to grow its workforce.[283]

7.4.3.5.2 Second step: benchmark for comparison

7.132. The parties have not differentiated between the computer sales and use tax exemptions, on the one hand, and the construction sales and use tax exemptions, on the other, in their arguments regarding the benchmark for comparison.

7.133. The construction sales and use tax exemptions pertain to the same underlying tax obligations as those considered above, namely the Washington State retail sales and use taxes. In the Panel's view, the same considerations apply in determining the appropriate normative benchmark for comparison in relation to the construction sales and use tax exemptions. These exemptions form a targeted tax treatment within a structure organized according to the principle that either sales or use taxes, but not both, are generally due on the sales and use of tangible goods and services. In light of this basic organizing principle, it is the generally applicable sales and use taxes that serve as the appropriate normative benchmark in this case.

7.4.3.5.3 Third step: comparison of applicable tax treatment with benchmark

7.134. In view of the benchmark established above, it follows that the specific exemption from sales and use taxes, which would otherwise apply to the aerospace activities in question, amounts to the foregoing of government revenue by Washington State that would otherwise be due. Accordingly, the Panel finds that the construction sales and use tax exemption constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

7.4.3.6 Leasehold excise tax exemption

7.135. The legislation for the leasehold excise tax exemption provides in relevant part:

[279] RCW Section 82.08.020 (Exhibit EU-92).
[280] RCW Section 82.08.980 (Exhibit EU-27). A similar exemption is applied for charges, for labor and services for constructing new buildings, made to "a port district, political subdivision, or municipal corporation, to be leased to a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes".
[281] RCW Section 82.12.980 (Exhibit EU-28). A similar exemption is applied to tangible property used in constructing new buildings for "a port district, political subdivision, or municipal corporation, to be leased to a manufacturer engaged in the manufacturing of commercial airplanes or the fuselages or wings of commercial airplanes".
[282] ESSB 5952 (Exhibit EU-3), Sections 3-4.
[283] See para. 7.65 above.

> (1) All leasehold interests in port district facilities exempt from tax under [the construction sales and use tax exemptions] and used by a manufacturer engaged in the manufacturing of superefficient airplanes … are exempt from tax under this chapter. A person claiming the credit under [the B&O tax credit for property and leasehold excise taxes] is not eligible for the exemption under this section.[284]

7.4.3.6.1 First step: applicable tax treatment

7.136. Based on the available evidence, the Panel will first identify the applicable tax treatment under the leasehold excise tax exemption, including consideration of the objective reasons behind that treatment. As provided for in the relevant legislation, Washington State imposes a leasehold excise tax in lieu of a property tax on the use of public property by a private party.[285] The relevant regulations explain that "[t]he intent of the law is to ensure that lessees of property owned by public entities bear their fair share of the cost of governmental services when the property is rented to someone who would be subject to property taxes if the lessee were the owner of the property".[286] Washington State exempts from this tax leasehold interests in certain facilities "used by a manufacturer engaged in the manufacturing of superefficient airplanes".[287] The leasehold excise tax exemption is not available to a person claiming the B&O tax credit for property and leasehold excise taxes.[288] ESSB 5952 extended the application of this exemption to 1 July 2040.[289] Thus, the relevant tax treatment for the covered activities, at present and until the 2040 expiry date, is as set forth above.

7.137. This tax treatment forms part of the legislation in ESSB 5952 targeted towards the aerospace industry in Washington State. As such, its "objective reasons" are the same as discussed in respect of the B&O aerospace tax rate − that is, to provide favourable tax treatment for the aerospace industry in order to encourage the industry to remain in Washington State and to grow its workforce.[290]

7.4.3.6.2 Second step: benchmark for comparison

7.138. Having identified the relevant tax treatment and its objective reasons, the next step of the analysis is the identification of an appropriate "benchmark for comparison" within the Washington State tax regime to determine whether this tax treatment constitutes revenue foregone by the Washington State government that would otherwise be due. This benchmark must be ascertained with regard for "the structure of the domestic tax regime and its organizing principles".[291]

7.139. The European Union submits that the appropriate benchmark for comparison for the leasehold excise tax exemption "is the payment of the 12.84 percent leasehold excise tax that would normally apply".[292] The United States, in addition to its general argument that the European Union has not met its burden to identify the benchmark for each aerospace tax measure, also submits that, for tax exemptions, the comparable taxable "event" is not an event involving the same taxpayer absent the exemptions, as this would be the "type of historical comparison for a taxpayer [that] was criticized by the Appellate Body".[293] The United States further submits that "quantitative coverage of various tax regimes could be relevant to determining a financial

[284] RCW Section 82.29A.137 (Exhibit EU-29).
[285] Leasehold Excise Tax, Washington State Department of Revenue (Exhibit EU-49).
[286] WAC Section 458-29A-100 (Exhibit EU-50).
[287] Under Washington State law, "superefficient airplane" is defined as "a twin aisle airplane that carries between two hundred and three hundred fifty passengers, with a range of more than seven thousand two hundred nautical miles, a cruising speed of approximately mach .85, and that uses fifteen to twenty percent less fuel than other similar airplanes on the market". RCW Section 82.32.550(3) (Exhibit EU-82).
[288] RCW Section 82.29A.137 (Exhibit EU-29).
[289] ESSB 5952 (Exhibit EU-3), Section 13; RCW Section 82.29A.137 (Exhibit EU-29).
[290] See para. 7.65 above.
[291] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 813.
[292] European Union's response to Panel question No. 24, para. 51.
[293] United States' response to Panel question No. 57, para. 23 (citing Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 815).

contribution compared to a normative benchmark"[294] and that "tax exemptions far outweighed tax revenues" for state property taxes.[295]

7.140. The Panel notes that the leasehold excise tax is an excise tax that supplements the Washington State property tax regime. Specifically, the leasehold excise tax applies in lieu of real property tax where a private party uses public property under lease, rather than owning real property. This tax is complementary to real and personal property taxes, which are levied in accordance with the statutory rule of the property tax regime in Washington State that "[a]ll property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and other taxing district purposes".[296] Thus, real and personal property is generally subject to taxation, although a number of exemptions to this general rule apply.[297] For example, property valued at less than USD 500, churches and cemeteries, business inventory, and property owned by federal, state, and local governments are all exempt from property taxation.[298] Although government-owned property as such is not subject to property tax, such property becomes subject to the leasehold excise tax when it is used by a private party. Personal property such as household goods and personal effects are not subject to property tax unless these items are used in a business, and personal property is subject to the same levy rate as real property.[299]

7.141. Based on the foregoing, the Panel considers that it is the Washington State property tax regime, as distinguished from other types of taxation that exist in Washington State, that is relevant to identifying the appropriate benchmark for the leasehold excise tax exemption. As noted, under this tax regime, real and personal property is subject to taxation unless a specific exemption applies. In this respect, while the Panel takes note of the parties' arguments on the quantitative coverage of property tax exemptions[300], the relevant rules established by Washington State authorities suggest that the organizing principle of the tax regime is to create a default rule of property taxation with provision for specific exemptions and the quantitative information does not displace that principle. Exempting taxpayers from property tax liability does not appear to be an "organizing principle" of the Washington State property tax regime. Nor does the structure of the tax regime in question suggest an alternative benchmark apart from the generally defined norm of being subject to property taxation. The particular features of the leasehold excise tax, which is a tax on the use of public property by a private party in lieu of the property tax, reinforces the notion of generally applicable property taxation as the appropriate benchmark for comparison.[301] In light of this, the applicable leasehold excise tax rate of 12.84% of the rent paid by the lessee for the property represents the taxable situation that is legitimately comparable to that covered by the leasehold excise tax exemption.

7.142. Accordingly, the Panel considers that the benchmark for comparison for the leasehold excise tax exemption is the leasehold excise tax that would ordinarily be imposed on private parties using public property.

7.4.3.6.3 Third step: comparison of applicable tax treatment with benchmark

7.143. Given the benchmark of otherwise applicable leasehold excise taxation within the general regime of property taxation, the specific exemption from leasehold excise taxes, which would otherwise apply to the aerospace activities in question, amounts to the foregoing of government

[294] United States' response to Panel question No. 60, para. 31.
[295] Ibid. para. 32.
[296] RCW Section 84.36.005 (Exhibit USA-20).
[297] United States' first written submission, para. 46.
[298] RCW Section 84.36.010 (Exhibit USA-21); RCW Section 84.36.020 (Exhibit USA-22); RCW Section 84.36.477 (Exhibit USA-23).
[299] Real and personal property are chiefly distinguished by the characteristic of mobility, with the former including "land, structures, improvements to land, and certain equipment affixed to land or structures", and the latter including "machinery, equipment, furniture, and supplies of businesses and farmers". Personal Property Tax, Washington State Department of Revenue (Exhibit EU-51).
[300] See parties' responses and comments on each other's responses to Panel question No. 60. See also paras. 7.123-7.125 above. The Panel notes that the parties relied upon the same tax exemption study in respect of exemptions from property taxation as that cited in respect of exemptions from retail sales and use taxes.
[301] Leasehold Excise Tax Explanation, Washington State Department of Revenue (Exhibit USA-25); WAC Section 458-29A-100 (Exhibit EU-50).

revenue by Washington State that would otherwise be due. Accordingly, the Panel finds that the leasehold excise tax exemption constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

7.4.3.7 Leaseholder property tax exemption

7.144. The legislation for the leaseholder property tax exemption provides in relevant part:

> (1) Effective January 1, 2005, all buildings, machinery, equipment, and other personal property of a lessee of a port district eligible under [the construction sales and use tax exemptions], used exclusively in manufacturing superefficient airplanes, are exempt from property taxation. A person taking the credit under [the B&O tax credit for property and leasehold excise taxes] is not eligible for the exemption under this section. ... [302]

7.4.3.7.1 First step: applicable tax treatment

7.145. Based on the available evidence, the Panel will first identify the applicable tax treatment under the leaseholder property tax exemption, including consideration of the objective reasons behind that treatment. As provided for in the relevant legislation, Washington State exempts from property taxation "all buildings, machinery, equipment, and other personal property of a lessee of a port district eligible [for construction sales and use tax exemptions], used exclusively in manufacturing superefficient airplanes".[303] The leaseholder property tax exemption is not available to a person claiming the B&O tax credit for property and leasehold excise taxes.[304] ESSB 5952 extended the application of this exemption to 1 July 2040.[305] Thus, the relevant tax treatment, at present and until the 2040 expiry date, is as set forth above.

7.146. This tax treatment forms part of the legislation in ESSB 5952 targeted towards the aerospace industry in Washington State. As such, its "objective reasons" are the same as discussed in respect of the B&O aerospace tax rate − that is, to provide favourable tax treatment for the aerospace industry in order to encourage the industry to remain in Washington State and to grow its workforce.[306]

7.4.3.7.2 Second step: benchmark for comparison

7.147. Having identified the relevant tax treatment and its objective reasons, the next step of the analysis is the identification of an appropriate "benchmark for comparison" within the Washington State tax regime to determine whether this tax treatment constitutes revenue foregone by the Washington State government that would otherwise be due. This benchmark must be ascertained with regard for "the structure of the domestic tax regime and its organizing principles".[307]

7.148. The European Union submits that the leaseholder property tax exemption "exempts certain otherwise taxable business property from the property taxes that would normally apply", and "that otherwise applicable property tax treatment therefore provides the normative benchmark".[308] The United States, in addition to its general argument that the European Union has not met its burden to identify the benchmark for each aerospace tax measure, also submits that, for tax exemptions, the comparable taxable "event" is not an event involving the same taxpayer absent the exemptions, as this would be the "type of historical comparison for a taxpayer [that] was criticized by the Appellate Body".[309] The United States further submits that "quantitative coverage of various

[302] RCW Section 84.36.655 (Exhibit EU-30).
[303] Ibid. Under Washington State law, "superefficient airplane" is defined as "a twin aisle airplane that carries between two hundred and three hundred fifty passengers, with a range of more than seven thousand two hundred nautical miles, a cruising speed of approximately mach .85, and that uses fifteen to twenty percent less fuel than other similar airplanes on the market". RCW Section 82.32.550(3) (Exhibit EU-82).
[304] RCW Section 84.36.655 (Exhibit EU-30).
[305] ESSB 5952 (Exhibit EU-3), Section 14.
[306] See para. 7.65 above.
[307] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 813.
[308] European Union's response to Panel question No. 24, para. 51.
[309] United States' response to Panel question No. 57, para. 23 (citing Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 815).

tax regimes could be relevant to determining a financial contribution compared to a normative benchmark"[310] and that "tax exemptions far outweighed tax revenues" for state property taxes.[311]

7.149. As discussed above, under the relevant statutory rule of the Washington State property tax regime[312], real and personal property in Washington State is generally subject to taxation, although a number of exemptions from this general rule apply.[313] In this respect, the Panel has noted that the relevant rules established by Washington State authorities suggest that the organizing principle of the tax regime is to create a default rule of property taxation with provision for specific exemptions and the quantitative information does not displace that principle. Exempting taxpayers from property tax liability does not appear to be an "organizing principle" of the Washington State property tax regime. Nor does the structure of the tax regime in question suggest an alternative benchmark apart from the generally defined norm of being subject to property taxation. Thus, the generally applicable property tax within the state of Washington corresponds to the taxable situation (namely ownership of personal property by an eligible lessee) that is legitimately comparable to that covered by the leaseholder property tax exemption.

7.150. Accordingly, the Panel considers that the benchmark for comparison is the property tax that would ordinarily be imposed on personal property of lessees of port districts.

7.4.3.7.3 Third step: comparison of applicable tax treatment with benchmark

7.151. Given the benchmark of otherwise applicable property taxation, the specific exemption from property taxes, which would otherwise apply to the aerospace activities in question, amounts to the foregoing of government revenue by Washington State that would otherwise be due. Accordingly, the Panel finds that the leaseholder property tax exemption constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

7.4.3.8 Conclusion on financial contribution

7.152. In concluding, the Panel notes various additional arguments raised by the parties in relation to whether the aerospace tax measures constitute a financial contribution.

7.153. The United States has submitted that aerospace activity until 1 July 2024 would have qualified for certain tax treatment under legislation pre-dating ESSB 5952, and that the extent of any financial contribution in this dispute would be limited to revenue foregone at some point in the future.[314] In this regard, the Panel recalls its determination that the aerospace tax incentives at issue are those as currently codified and in effect until 2040 by virtue of ESSB 5952.[315] Thus, the preceding analysis of a financial contribution under each of the aerospace tax measures does not refer to a future window of time during which pre-existing tax treatment was extended. Rather, the analysis of government revenue foregone has been conducted in regard to the currently codified tax provisions, which reflect and incorporate a series of earlier legislative acts, in addition to incorporating new substantive provisions created by ESSB 5952.

7.154. The Panel further notes the European Union's clarification that its claim is directed at the aerospace tax measures "as such", and thus is "not directed against the application of these measures during any given point in time or in any specific instance".[316] The Panel considers this an important distinction from the claim made in *US – Large Civil Aircraft (2nd complaint)*, in which arguments were presented and assessed in relation to Boeing-specific subsidies and their alleged causation of adverse effects under Part III of the SCM Agreement. Thus, although evidence of actual use of certain fiscal incentives may support or confirm a finding that government revenue is foregone that is otherwise due[317], the Panel does not consider this to be required for the purposes

[310] United States' response to Panel question No. 60, para. 31.
[311] Ibid. para. 32.
[312] RCW Section 84.36.005 (Exhibit USA-20).
[313] United States' first written submission, para. 46; RCW Section 84.36.010 (Exhibit USA-21); RCW Section 84.36.020 (Exhibit USA-22); RCW Section 84.36.020 (Exhibit USA-23).
[314] United States' response to Panel question No. 2.
[315] See para. 7.42 above.
[316] European Union's response to Panel question No. 6, para. 7.
[317] See ESSB 5952 Fiscal Note (Exhibit EU-5); Snohomish County Council Lease Approval (Exhibit EU-44); Paine Field Community Council, Minutes of Meeting of 12 November 2013 (Exhibit EU-45); The Seattle Times, "State gave Boeing a free pass on $19.5M in sales tax", 30 November 2015

of Article 1.1(a)(1)(ii) of the SCM Agreement, particularly where a claim is made that the challenged measures "as such" make a financial contribution.[318]

7.155. In the same vein, the Panel notes the issue raised by the United States of whether it is possible to establish a financial contribution (and benefit) for tax incentives that legally are mutually exclusive according to their own explicit terms, as is the case for the B&O tax credit for property and leasehold excise taxes on the one hand, and the tax exemptions related to leasehold excise taxes and leaseholder property taxes on the other hand.[319] The Panel does not consider that any such mutual exclusivity should prevent simultaneous challenge, or a finding that each tax incentive, on its own and "as such", represents the foregoing of revenue otherwise due. The fact that a taxpayer can in the future choose between tax incentives does not render the one that ultimately is not chosen to be less of a foregoing of revenue. Furthermore, for measures such as those at issue where there may be multiple potential recipients of the financial contribution, certain taxpayers may be eligible for, and may use, one incentive, while others may be eligible for, and may use, the other at any given moment during the period of availability of the tax measures (in this case, until the expiration of the aerospace tax measures in 2040).[320]

7.156. Finally, the Panel notes the United States' reiteration that the European Union has failed to meet its burden of proof in respect of any financial contribution made by the aerospace tax measures, and that this burden cannot be met by substituting the findings made in the context of *US – Large Civil Aircraft (2nd complaint)* regarding different claims and measures. The Panel agrees that its terms of reference are confined to the aerospace tax measures identified in the European Union's panel request in the present case, which are formally and substantively distinct from those considered in *US – Large Civil Aircraft (2nd complaint)*. The Panel's assessment is based upon arguments and evidence on the record of this dispute, with careful regard for the principle that it is the complaining party's burden to establish a *prima facie* case which, in the absence of adequate refutation, requires the Panel to rule in favour of the complaining party. A significant amount of evidence was placed before the Panel by the European Union, and its submissions led the Panel to various relevant aspects of that evidence. Brevity in the European Union's submissions did not prejudice its satisfaction of the burden of proving facts to establish that the measures involved a foregoing of revenue otherwise due within the terms of Article 1.1(a)(1)(ii) of the SCM Agreement. The case put in rebuttal by the United States did not reverse the European Union's satisfaction of its burden.

7.157. In conclusion, none of these arguments disturbs the Panel's above analysis of the aerospace tax measures. Accordingly, the Panel finds that each aerospace tax measure constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement because "government revenue that is otherwise due is foregone or not collected".

(Exhibit EU-48); The Seattle Times, "Boeing must disclose tax-break savings, state Department of Revenue rules", 8 January 2016 (Exhibit EU-121).

[318] In the view of the United States, "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. 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." United States' second written submission, para. 85.

[319] See, e.g. United States' response to Panel question No. 2, para. 4.

[320] In this connection, the Panel's conclusions are not impacted by the fact that the alleged contingency of using domestic over imported goods does not apply to all potential beneficiaries of the subsidies at issue. The provision of subsidies to a range of beneficiaries based on a contingency applicable to only one or some of those beneficiaries may still be found inconsistent with the disciplines of the SCM Agreement, provided that: (i) a subsidy exists within the meaning of Article 1; and (ii) the availability of any such subsidy, to whichever recipient or beneficiary, is contingent in the manner set out in Article 3. These provisions do not require any strict identity of subsidy recipients and entities subject to the contingency in question. The Panel is therefore unpersuaded by the United States' contention that the applicability of ESSB 5952's contingencies to only one potential recipient of subsidies "disproves the EU's claims that the alleged subsidies are 'as such' contingent on the use of domestic over imported fuselages and wings". See United States' response to Panel question No. 59, para. 25. Accordingly, the Panel assesses in this section the criteria for determining the existence of a subsidy, and separately will consider whether, as a condition for access to any such subsidy, there is a requirement to use domestic over imported goods.

7.4.4 Whether a benefit is thereby conferred

7.158. With respect to whether a benefit is conferred under Article 1.1(b) of the SCM Agreement, the Appellate Body emphasized that "a 'financial contribution' and a 'benefit' [are] two separate legal elements in Article 1.1 of the SCM Agreement, which together determine whether a subsidy exists".[321]

7.159. The ordinary meaning of the term "benefit" has been understood as "clearly encompass[ing] some form of advantage".[322] The Appellate Body further explained that "the word 'benefit', as used in Article 1.1(b), implies some kind of comparison" to determine whether "the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution".[323] In the Appellate Body's view, "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[324]

7.160. In the case of tax-based financial contributions, while the foregoing of revenue by a government may not be conceptually equivalent to the enjoyment of an advantage by the recipient, as a practical matter the two will often coincide. That is, where the government is found to have foregone revenue, this is because it has departed from the normative benchmark in respect of some particular category or class of taxpayers or activities. By virtue of foregoing revenue, that departure from the norm means that the taxpayers that are subject to the government's normative departure owe less tax than they otherwise would under the "normal" taxation rules.

7.161. It is in this light that the Panel understands the observation of the panel in *US – Large Civil Aircraft (2nd complaint)* that, "[i]n those cases where a financial contribution has been found to exist in the form of the foregoing of revenue otherwise due, the conclusion that a benefit exists has been made with little difficulty".[325] Having reviewed cases in which the existence of a benefit readily followed from a determination of foregone revenue that was otherwise due[326], the panel concluded that "the relevant tax break is essentially a gift from the government, or a waiver of obligations due, and it is clear that the market does not give such gifts".[327] Although the parties disagree as to the extent to which revenue foregone is automatically *determinative* of a benefit, they have not directly called into question the soundness of the approach adopted by the panel in *US – Large Civil Aircraft (2nd complaint)* or its reliance on previous panels.

7.162. For tax-based financial contributions such as the aerospace tax measures, the relief from taxation otherwise due is not generally available to market participants, nor does it exist as a general condition in the marketplace. It is in this sense that the Panel understands the "marketplace" observations made by the Appellate Body in *Canada – Aircraft* as they would apply in the context of Article 1.1(a)(1)(ii).[328] Indeed, the "market conditions" that are relevant as the benchmark in this context are the competitive conditions that exist in the absence of the challenged financial contribution. Judging the conferral of a benefit by reference to such market conditions, it is clear that the financial contributions of foregone government revenue otherwise due from certain Washington State taxpayers – through a reduced tax rate, credits against business taxation, or exemptions from otherwise applicable tax liability – makes the recipients

[321] Appellate Body Report, *Brazil – Aircraft*, para. 157. (emphasis omitted)
[322] Appellate Body Report, *Canada – Aircraft*, para. 153 (citing Panel Report, *Canada – Aircraft*, para. 9.112).
[323] Appellate Body Report, *Canada – Aircraft*, para. 157.
[324] Ibid.
[325] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.169.
[326] See Panel Reports, *US – FSC*, para. 7.103; *US – FSC (Article 21.5 – EC)*, para. 8.46; *Canada – Autos*, para. 10.165.
[327] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.170. Accordingly, the panel found that "for those tax measures that it has found to constitute a financial contribution, a benefit is conferred". Ibid. para. 7.171.
[328] See fn 324 above.

"better off" than they otherwise would have been, in the marketplace, absent those contributions.[329]

7.163. While bearing in mind the guidance of the Appellate Body as to the independence of the concepts of financial contribution and benefit[330], the Panel does not consider itself precluded from using the same factual elements from its conclusions as to revenue foregone in its analysis of whether each measure also confers a benefit. By way of reference, financial contributions in the form of "grants" under Article 1.1(a)(1)(i) of the SCM Agreement have been found to confer benefits, "as they place the recipient in a better position than the recipient otherwise would have been in the marketplace", given that no entity acting pursuant to commercial considerations would make such unremunerated payments.[331] Similarly, a financial contribution in the form of foregone government revenue that is otherwise due is naturally apt to provide the taxpayers concerned with an "advantage" in comparison to market conditions where such advantages do not otherwise exist.

7.164. Accordingly, the Panel finds that each of the aerospace tax measures at issue confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

7.4.5 Conclusion under Article 1 of the SCM Agreement

7.165. Having concluded that there is a financial contribution by the Washington State government under each of the aerospace tax measures at issue, and that a benefit is thereby conferred, the Panel finds that each of the aerospace tax measures at issue constitutes a subsidy within the meaning of Article 1 of the SCM Agreement.

7.5 Whether the challenged measures are prohibited subsidies under Article 3.1(b) of the SCM Agreement

7.166. The Panel has found that the challenged measures are subsidies within the meaning of Article 1 of the SCM Agreement. It will now proceed to consider whether, as alleged by the European Union, the measures are also "contingent … upon the use of domestic over imported goods" and therefore prohibited subsidies under Article 3.1(b) of the SCM Agreement.

7.167. In this regard, the Panel recalls that, for a subsidy within the meaning of Article 1.1 to be subject to the provisions of Parts II, III, and V of the SCM Agreement (disciplines on prohibited subsidies, actionable subsidies, and countervailing measures, respectively), it must be "specific in accordance with the provisions of Article 2" of that Agreement.[332] The Panel further recalls that, pursuant to Article 2.3 of the SCM Agreement, prohibited subsidies are deemed to be specific. The

[329] See Appellate Body Report, *Canada – Aircraft*, para. 154.

[330] The Appellate Body has stated that "the second element in Article 1.1. is concerned with the 'benefit … conferred' on the *recipient* by [the] governmental action" of making a financial contribution, and that a "'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient". The Appellate Body further considered that "[l]ogically, a 'benefit' can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something". Appellate Body Report, *Canada – Aircraft*, paras. 154 and 156. (emphasis original)

The Panel notes that these statements were made in the context of rejecting a specific argument "that 'cost to government' is one way of conceiving of 'benefit'". Ibid. para. 154. The Appellate Body considered this approach to be "at odds with the ordinary meaning of Article 1.1(b), which focuses on the *recipient* and not on the *government* providing the 'financial contribution'". Ibid. (emphasis original) The Appellate Body was not addressing the particular factual circumstance of the actual use of a financial contribution (such as a tax incentive) by particular entities, nor did it address the potential relevance in this regard of alleged subsidies being challenged "as such". Rather, in response to particular arguments before it, the Appellate Body was emphasising the focus on *beneficiaries*, as distinct from the *provider*, of a given financial contribution in the conceptually distinct analysis of whether a benefit is conferred by that financial contribution.

[331] Panel Report, *US – Upland Cotton*, paras. 7.1116 and 7.1118. See also Panel Reports, *EC and certain member States – Large Civil Aircraft*, para. 7.1501 (finding that "to the extent that Airbus received a funding grant in the form of an actual 'direct transfer of funds' from the various entities involved, it was automatically placed in a better position than it would otherwise have been in without the grant", and that such funding grants therefore conferred a "benefit"); *US – Large Civil Aircraft (2nd complaint)*, paras. 7.1228-7.1229 (in relation to payments that were not disputed to "constitute a financial contribution in the form of a direct transfer of funds", finding that such payments confer a "benefit" under Article 1.1(b) of the SCM Agreement as such payments would not be made by any "private entity acting pursuant to commercial considerations") and 7.1362-7.1363.

[332] SCM Agreement, Article 1.2.

European Union's claim is that the measures at issue are prohibited subsidies in that they are contingent on the use of domestic over imported goods. Accordingly, no matter what the Panel decides in relation to the alleged contingency, the Panel is not required to conduct a specificity analysis under Article 2 of the SCM Agreement.

7.5.1 Arguments of the parties

7.5.1.1 European Union

7.168. The European Union alleges that the aerospace tax measures at issue are *de jure* and *de facto* contingent upon the use of domestic over imported goods and therefore inconsistent with the United States' obligations under Article 3.1(b) of the SCM Agreement.[333] In the European Union's view, the challenged aerospace tax measures have been contingent in this manner from the time that ESSB 5952 was enacted.[334]

7.169. According to the European Union, its first and principal claim is that the challenged aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods inasmuch as the text of ESSB 5952 clearly sets out the prohibited contingency.[335] The European Union also makes a secondary claim that the aerospace tax measures are *de facto* contingent upon the use of domestic over imported goods.[336]

7.170. In the European Union's view, Article 3.1(b) of the SCM Agreement sets out a single standard irrespective of whether the claim is that the measure is *de jure* or *de facto* contingent on the use of domestic over imported goods. The difference would be the evidence necessary to establish each claim. A *de jure* claim would be made on the basis of the express terms of the text of the measure or by necessary implication therefrom, whereas in a *de facto* claim the contingency would have to be inferred "from the total configuration of facts constituting and surrounding the subsidy grant, including the design, structure and modalities of operation set out in the measure".[337]

7.171. With respect to its *de jure* claim, the European Union submits that, as clearly set out in the text of ESSB 5952, and as a result of the First Siting Provision and the Second Siting Provision, whether considered individually or together, the challenged aerospace tax measures constitute subsidies that are contingent in law on the use of domestic over imported goods.[338] The prohibited contingency in respect of the use of fuselages as domestic goods would result solely from the First Siting Provision, while the prohibited contingency in respect of the use of wings as domestic goods would result from both the First Siting Provision and the Second Siting Provision.[339]

7.172. The European Union argues that, pursuant to the First Siting Provision in Section 2 of ESSB 5952, the challenged aerospace tax measures were contingent on the establishment of a new commercial aircraft manufacturing programme that uses goods (i.e., fuselages and wings) produced in the state of Washington. Under this provision, with respect to all aerospace companies in the state of Washington, if Boeing had decided to *use* imported wings and fuselages in the

[333] European Union's second written submission, para. 40.
[334] European Union's response to Panel question No. 6, para. 11.
[335] European Union's second written submission, paras. 1, 2, 41 and 90; closing statement at the first meeting of the Panel, para. 1; opening statement at the second meeting of the Panel, para. 2; response to Panel question Nos. 29 and 46, paras. 67 and 125. See also Request for the Establishment of a Panel by the European Union, WT/DS487/2, 13 February 2015, p. 2.
[336] European Union's second written submission, paras. 1 and 90; opening statement at the second meeting of the Panel, para. 2. See also Request for the Establishment of a Panel by the European Union, WT/DS487/2, 13 February 2015, p. 2.
[337] European Union's first written submission, para. 72; second written submission, para. 44; opening statement at the first meeting of the Panel, para. 47; response to Panel question Nos. 18 and 30, paras. 23-26 and 68-69.
[338] European Union's first written submission, paras. 70 and 73; second written submission, paras. 1, 41 and 60; opening statement at the first meeting of the Panel, para. 6; response to Panel question No. 41, para. 98.
[339] European Union's response to Panel question No. 43, para. 101.

assembly of the 777X (or any other new aircraft programme that it might have decided to site in Washington State), the challenged tax measures would not have been granted.[340]

7.173. The European Union also argues that, pursuant to the Second Siting Provision, the B&O aerospace tax rate for the 777X (or any other aircraft that Boeing might have sited to satisfy the First Siting Provision) is contingent on Boeing's use of wings produced exclusively in the state of Washington. The European Union contends in particular that, if Boeing were to source even some wings for the sited aircraft programme outside of the United States, it would lose access to the B&O aerospace tax rate in respect of the manufacturing and sale of 777X airplanes.[341]

7.174. The European Union further asserts that the United States' proposed reading of the First Siting Provision and the Second Siting Provision would render meaningless all references contained therein to "wings" and to "fuselages".[342] The European Union also argues that the text of ESSB 5952 does not require that the same manufacturer produce both the commercial airplane and the fuselages and wings; to the contrary, nothing in ESSB 5952 would preclude an airplane manufacturer from procuring wings or fuselages from another producer, as long as this other producer is located in the state of Washington.[343] The European Union further contends that the Second Siting Provision in ESSB 5952 would be triggered even by a single instance of final assembly outside the state of Washington of an airplane which was the basis of the original siting decision, or by a single instance of wing assembly for that airplane outside the state of Washington, either by Boeing or by any other entity, and that this would result in precluding the continued availability of the B&O aerospace tax rate.[344]

7.175. The European Union argues further that any evidence provided by the United States and related to the manner in which Boeing purportedly will produce 777X aircraft is irrelevant to the Panel's consideration of the European Union's *de jure* claim, although some of those facts could be relevant to the European Union's *de facto* claim.[345]

7.176. With respect to its *de facto* claim, the European Union submits that the First Siting Provision and the Second Siting Provision in ESSB 5952 are each capable of strongly influencing Boeing's choice between imported wings and fuselages, and domestic (United States-produced) wings and fuselages, for the 777X airplanes.[346] According to the European Union, ESSB 5952 creates specific penalties for the use of imported wings or fuselages and rewards for the use of domestic wings or fuselages. The First Siting Provision and the Second Siting Provision acting together would maximize trade distortions in favour of domestic goods to the detriment of imported goods, which suggests that the challenged measures are geared to induce the use of domestic over imported goods.[347] In the European Union's view, the subsidies at issue exceed the total development cost of the 777X airplanes, and would thereby overshadow any other factors that may favour a decision by Boeing to import wings and fuselages for 777X airplanes.[348]

[340] European Union's first written submission, paras. 44 and 74; second written submission, para. 61; opening statement at the first meeting of the Panel, paras. 53-54; opening statement at the second meeting of the Panel, para. 3.

[341] European Union's first written submission, paras. 47, 51-52 and 75; second written submission, para. 61; opening statement at the first meeting of the Panel, paras. 55-56; response to Panel question No. 7, para. 12.

[342] European Union's second written submission, paras. 65-75.

[343] European Union's second written submission, paras. 65 and 76-81; opening statement at the first meeting of the Panel, paras. 60-61; response to Panel question No. 45, para. 119.

[344] European Union's second written submission, paras. 65 and 82-84; opening statement at the first meeting of the Panel, para. 61; response to Panel question No. 7, para. 12.

[345] European Union's second written submission, para. 41.

[346] European Union's first written submission, para. 77; second written submission, para. 90. See also European Union's second written submission, para. 91; opening statement at the first meeting of the Panel, paras. 72-73; response to Panel question No. 29, paras. 66-67; Reuters, "Boeing seen in advanced talks to make 777X near Seattle", 4 November 2013 (Exhibit EU-65).

[347] European Union's first written submission, para. 77; opening statement at the first meeting of the Panel, paras. 6 and 70-74; response to Panel question Nos. 31 and 41, paras. 70-71 and 98.

[348] European Union's second written submission, para. 90. See also ibid, para. 91; European Union's opening statement at the first meeting of the Panel, para. 73; response to Panel question No. 29, paras. 66-67; Reuters, "Boeing seen in advanced talks to make 777X near Seattle", 4 November 2013 (Exhibit EU-65).

7.5.1.2 United States

7.177. In the United States' view, the main issue before the Panel is whether a subsidy granted for the manufacture of a finished good, including its major structural elements, and which allows the producer to import all the *parts* that are used in the production process, can nonetheless be considered to be a subsidy contingent upon the use of domestic over imported goods.[349] The United States argues in this regard that a contingency is only inconsistent with Article 3.1(b) of the SCM Agreement if it requires the use of domestic over imported goods[350], and that this determination must take into account all sources that elucidate the meaning of the words used in the measure at issue, including relevant factual information on the application of the measure.[351] According to the United States, in the analysis of both the *de jure* and the *de facto* claims, the Panel should consider evidence that pertains to the actual operation of the measure, beyond the text of the legal instrument in question.[352]

7.178. As a factual matter, the United States asserts that Boeing does not *use* wings or fuselages, either domestic or imported, to produce 777X airplanes.[353] According to the United States, fuselages and wings are not manufactured as separate products that are subsequently used in the manufacture of a finished 777X airplane.[354]

7.179. The United States asserts that the European Union has failed to establish that the aerospace tax measures at issue are *de jure* contingent upon the use of domestic over imported goods. According to the United States, if a taxpayer can meet a condition without resorting to the use of domestic over imported goods this would be sufficient to demonstrate that the underlying measure is not an import-substitution subsidy prohibited by Article 3.1(b) of the SCM Agreement.[355] The United States argues that "the First Siting Provision has been fulfilled, and the Second Siting Provision has been avoided, without any use of domestic over imported goods".[356]

7.180. The United States argues that:

> The [First] Siting Provision and the [Second] Siting Provision in ESSB 5952 make no mention of *goods*. They make no mention of the *use* of goods. They make no mention of the *domestic nature* of goods. They make no mention of *imported goods*. They contain no text that *requires* the use of domestic over imported goods, nor even *encourages* it. They therefore do not result in any *discrimination* against imported goods.[357] (emphasis added)

7.181. According to the United States, the references to the manufacturing and the assembly of fuselages and wings in the First Siting Provision and the Second Siting Provision merely define the scope of the *production activity* required to enjoy the tax treatment covered by ESSB 5952.[358] The United States argues that there are several means of satisfying the First Siting Provision and the Second Siting Provision, including one that would not involve the use of fuselages and wings as inputs into the airplane production process, namely the 777X manufacturing programme.[359]

7.182. The United States argues further that the European Union has failed to demonstrate the existence of a domestic good on which the subsidies are allegedly contingent. According to the United States, ESSB 5952 does not require the use of any domestic *parts* in the assembly of the

[349] United States' second written submission, paras. 1-3.
[350] United States' first written submission, para. 104; second written submission, paras. 10-14.
[351] United States' second written submission, paras. 11, 17 and 34.
[352] United States' second written submission, paras. 29-34 and 36; response to Panel question No. 18, paras. 37-43.
[353] United States' first written submission, paras. 37 and 105; second written submission, paras. 35 and 54-56; response to Panel question No. 44, para. 104.
[354] United States' first written submission, para. 105; response to Panel question Nos. 34, 35 and 42, paras. 79, 81-82, 102 and 110-115.
[355] United States' second written submission, paras. 10-11, 15-16, 37 and 51.
[356] United States' second written submission, para. 58. See also ibid. paras. 60-62; United States' response to Panel question No. 33, para. 74.
[357] United States' first written submission, para. 3. See also ibid. paras. 73, 101, 105-107 and 109.
[358] United States' first written submission, paras. 73 and 101; second written submission, paras. 38-47 and 57.
[359] United States' second written submission, para. 51; response to Panel question No. 18, para. 43.

fuselages and the wings; Boeing would be free to import 100% of the parts as long as the assembly takes place in the state of Washington.[360]

7.183. The United States further asserts that the European Union has failed to establish that the aerospace tax measures at issue are *de facto* contingent upon the use of domestic over imported goods, because it has not demonstrated that the use of domestic goods is required as a condition for eligibility for the subsidy.[361] According to the United States, none of the factual evidence referred to by the European Union supports its claim that the measures are *de facto* contingent.[362]

7.184. The United States also argues that Boeing has complied with the First Siting Provision and has avoided triggering the Second Siting Provision even though it does not use domestic wings and fuselages and instead completes the assembly of wings and fuselages as part of the final assembly of the finished airplane.[363] The United States adds that the measures in ESSB 5952 had no effect on Boeing's make/buy decisions nor on its decision on where to site the assembly of fuselages and wings.[364] The United States contends that the European Union has failed to establish that the challenged measures are geared to induce the use of domestic over imported goods.[365] The United States submits that, provided it conducts the requisite assembly activity in the state of Washington, Boeing would satisfy the First Siting Provision and avoid triggering the Second Siting Provision even if it imported every part of the 777X airplane; Boeing therefore would be receiving no rewards for increasing the use of domestic inputs on the 777X airplane, nor would it be penalized for increasing the use of imported inputs.[366]

7.185. The United States rejects the interpretation advanced by the European Union on the meaning of the word "use" in Article 3.1(b) of the SCM Agreement, saying that a broad characterization of the meaning of the word "use", such as that advocated by the European Union, would be subjective in that it is not based on the text of the SCM Agreement.[367] According to the United States, 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 to the enjoyment of a good for its intended purpose by an end user.[368] Accordingly, Article 3.1(b) would cover subsidies granted contingent on the employment of a good as an input or instrumentality in a productive process, but not subsidies contingent on the creation of the output of such a productive process.[369] In the United States' view, Article 3.1(b) of the SCM Agreement does not prohibit "production subsidies"; in this respect, the United States argues that Article III:8(b) of the GATT 1994 provides relevant context for the interpretation of Article 3.1(b).[370]

7.5.2 Third-party views

7.186. Australia submits that it is important that a distinction is retained between the permitted payment of a subsidy to domestic producers, including to encourage manufacturing activities, and a prohibited subsidy which is contingent on the use of domestic over imported goods.[371] Australia notes that it interprets the references to wings and fuselages in the legislation at issue merely as efforts to define the scope of the eligibility to the subsidy. According to Australia, "defining the scope of a subsidy in this manner does not imply that a subsidy is being provided contingent on the use of domestic over imported goods. Rather, it is a practical way of targeting an industry which the Washington State Government has chosen to support."[372] In Australia's view, the Panel needs to assess whether the challenged measure can be characterized as providing the scope for

[360] United States' second written submission, paras. 24, 48-50, 57, 64, 68 and 84.
[361] Ibid. para. 58.
[362] Ibid. paras. 78-83.
[363] Ibid. paras. 59-63.
[364] Ibid. paras. 64-71 and 84.
[365] United States' first written submission, paras. 105 and 132-140; second written submission, paras. 72-74; response to Panel question No. 30, paras. 65-67.
[366] United States' second written submission, paras. 75-77.
[367] Ibid. para. 20.
[368] United States' second written submission, para. 52; response to Panel question No. 44, paras. 104-108.
[369] United States' second written submission, para. 52.
[370] United States' first written submission, paras. 116-124; second written submission, para. 20.
[371] Australia's third-party submission, paras. 10 and 21; third-party statement, paras. 10-12; response to Panel question No. 5.
[372] Australia's response to Panel question No. 5.

the beneficiaries of the subsidy, or whether it can be characterized instead as a requirement to use domestic over imported goods as a condition for the subsidy.[373] Australia argues that it is unclear how the European Union reaches the conclusion that the First and the Second Siting Provisions are expressly conditioned on the use of domestic over imported goods.[374] According to Australia, it is doubtful whether the European Union has successfully made a case for a *de jure* breach of Article 3.1(b) of the SCM Agreement; the Panel's determination in the present case may ultimately depend on the finding of facts.[375] Australia encourages the Panel to consider whether the references to wings and fuselages in the First and the Second Siting Provisions can be regarded as merely defining the beneficiary of the subsidies, instead of being a requirement to use domestically produced goods.[376] In response to a question from the Panel, Australia submits that the Appellate Body's rulings in *US – Softwood Lumber IV* cannot be interpreted as stating that "goods" in Article 3.1(b) of the SCM Agreement must be tradeable or capable of being traded. In Australia's view, such an interpretation would not be practical and would undermine the object and purpose of the SCM Agreement.[377]

7.187. Brazil argues that Article 3.1(b) of the SCM Agreement does not cover production requirements, as long as these requirements do not constitute requirements to use domestic goods to the detriment of imported goods.[378] According to Brazil, the SCM Agreement does not prohibit WTO Members from providing subsidies to producers contingent on the performance of production steps of a certain good in their territories. Such a production requirement could fall upon the production of either a final or an intermediate good.[379] In Brazil's view, the expression "use" in Article 3.1(b) means that the goods in question must be "products" that can be "used" in a commercial context.[380] Brazil adds that "contingency" under Article 3.1(b) requires concrete evidence of the actual requirement to use domestic products to the detriment of imported products and cannot be based simply on a measure's incidental or indirect impact on domestic production, such as the fact that domestic products may become more attractive to the producer and lead to a larger share of domestic products as inputs.[381] According to Brazil, a subsidy can be prohibited under Article 3.1(b) because the terms of the subsidy expressly condition its granting on the use of domestic inputs or otherwise the necessary implication of the specific conditions is such that, absent the use of domestic goods, the conditions cannot be met.[382] Brazil maintains that, in the latter case, a panel would have to examine the specific requirements imposed as a condition for the granting of the subsidy, based on the text of the subsidy programme and on its necessary implications, and determine whether the conditions can be met without using domestic goods.[383] Brazil asserts that a subsidy on the production of a certain good, with requirements on the performance of production steps along the production chain, would not be considered *de jure* contingent on the use of domestic over imported goods under the purview of Article 3.1(b) of the SCM Agreement.[384] Conversely, a subsidy could be found *de facto* to be prohibited under Article 3.1(b) when a condition does not necessarily require the use of domestic goods either directly or by necessary implication, but based on the total configuration of the facts it becomes clear that, in fact, the subsidy recipient is required to use domestic over imported goods in order to receive the subsidy.[385] Brazil submits that, in the present case, the Panel will have to assess whether the conditions contained in the challenged measure simply require a domestic production activity by the producer (which would likely not amount to a prohibited conditionality) or if instead: (i) the condition requires *de jure* and by necessary implication the use of domestic over imported goods; or (ii) the condition, in combination with other factual evidence on the record, requires *de facto* the use of domestic over imported inputs.[386]

[373] Australia's third-party submission, paras. 11-13.
[374] Australia's third-party statement, para. 6.
[375] Ibid. para. 7.
[376] Ibid. para. 13.
[377] Australia's response to Panel question No. 4.
[378] Brazil's third-party submission, paras. 7-8. See also Brazil's response to Panel question No. 5.
[379] Brazil's response to Panel question No. 5.
[380] Brazil's third-party submission, para. 9; third-party statement, para. 7.
[381] Brazil's third-party submission, paras. 10-14; third-party statement, paras. 6 and 9.
[382] Brazil's third-party submission, paras. 16; third-party statement, para. 10.
[383] Brazil's third-party submission, para. 17.
[384] Brazil's response to Panel question No. 12. See also Brazil's response to Panel question No. 14.
[385] Brazil's third-party submission, paras. 18; third-party statement, para. 11.
[386] Brazil's third-party submission, para. 19.

7.188. According to Canada, the European Union appears to be arguing that a subsidy is contingent on the use of domestic over imported goods where the producer of a final good is required to produce certain components of that good in order to receive the subsidy.[387] In Canada's view, this interpretation of Article 3.1(b) would improperly extend the provision to cover situations where subsidy recipients are required to produce goods.[388] According to Canada, under the challenged measure, the beneficiary company is required to manufacture and/or assemble those fuselages and wings itself in order to receive the tax subsidy.[389] There is no requirement to purchase in the United States wings, fuselages, or other parts used in the assembly of the final aircraft.[390] Canada adds that the European Union did not provide any evidence suggesting that Boeing would *de facto* have to "use" domestic components other than those that the company manufactures itself.[391] Canada argues that WTO Members are not prohibited from providing subsidies to domestic producers, including where the subsidy to the producer of a final good is contingent on the recipient producing goods in its territory or producing certain intermediate goods by itself.[392] Similarly, in Canada's view, neither the GATT 1994 nor the SCM Agreement limits a Member's ability to define the level of production required for subsidy eligibility purposes.[393] Otherwise, production requirements would have to be limited to simple assembly operations, and the right of WTO Members to require subsidy recipients to produce goods, as defined by the granting Member, in order to receive a subsidy would be nullified.[394]

7.189. China contends that the Panel must examine whether, under the First Siting Provision and the Second Siting Provision, the subsidy is conditional or dependent on the use of domestic over imported goods.[395] China disagrees with the United States' assertion that fuselages and wings are not "goods".[396] In China's view, custom-tailored goods can also be considered as "goods" within the meaning of Article 3.1(b) of the SCM Agreement. China also disagrees with the notion that Article 3.1(b) requires that the relevant good is traded in practice, as long as the good has "the value of trading".[397] According to China, the "use" of intermediate goods in the course of production may meet the condition for being considered a "use" of domestic over imported goods.[398] The Panel should consider in this regard whether the conditions imposed by the challenged measure result in a *de facto* situation in which the 777X aircraft programme prefers domestic components or other intermediate goods over imported goods.[399] China also argues that Article III:8(b) of the GATT 1994 is not relevant to the present dispute as a legal basis to exclude the challenged measure from examination under Article 3.1(b) of the SCM Agreement.[400] In China's view, there seems to be insufficient evidence that the First Siting Provision would result *de jure* in a prohibited subsidy under Article 3.1(b) of the SCM Agreement.[401] China argues however that the Panel should examine whether *de facto* the First Siting Provision has created an incentive for the use of domestic components over imported components, taking into account that this provision may make it more favourable to purchase, in the state of Washington, the components for the fuselages and wings to be used in the assembly of 777X aircraft.[402] Likewise, China suggests that the Panel should assess whether the Second Siting Provision should be considered *de jure* as a prohibited subsidy under Article 3.1(b) of the SCM Agreement or otherwise whether

[387] Canada's third-party submission, para. 3.
[388] Ibid.
[389] Ibid. paras. 4-5.
[390] Ibid. para. 5.
[391] Ibid.
[392] Ibid. 6-7.
[393] Ibid. paras. 8-10.
[394] Ibid. paras. 8 and 11.
[395] China's third-party submission, para. 18.
[396] China's third-party statement, para. 3.
[397] China's third-party submission, para. 21; third-party statement, para. 3; response to Panel question No. 4.
[398] China's third-party statement, para. 4.
[399] China's third-party submission, para. 23.
[400] China's third-party submission, para. 25; third-party statement, para. 5. See also China's response to Panel question Nos. 5 and 15.
[401] China's third-party submission, para. 28; third-party statement, para. 7; response to Panel question No. 5.
[402] China's third-party submission, paras. 29-30; third-party statement, para. 8; response to Panel question No. 5.

de facto it may result in an incentive to use more domestic than imported components due to cost savings and efficiencies.[403]

7.190. Japan argues that the same legal standard should be followed by panels when examining prohibited subsidies under Article 3.1(a) and under Article 3.1(b) of the SCM Agreement, as well as when examining *de jure* and *de facto* contingency.[404] With respect to the evidentiary standard for the establishment of contingency, Japan states that a *de jure* analysis should be based on the words actually used in the measure at issue and their necessary implications, while a *de facto* analysis should be based on the total configuration of the facts constituting and surrounding the granting of the subsidy in light of the available evidence, rather than on subjective motivations expressed by governmental agencies, officials or legislators.[405] In Japan's view, a subsidy contingent on the use of domestic goods that is prohibited by Article 3.1(b) of the SCM Agreement cannot be justified by Article III:8(b) of the GATT 1994.[406] According to Japan, it appears that the European Union has argued that the challenged subsidy is *de jure* contingent on the use of domestic over imported goods, but has based its analysis on "factual scenarios which may or may not have materialized, factual circumstances that may or may not have existed, and choices that private actors may or may not have made", instead of focusing on the actual text of the measure.[407] With respect to the First Siting Provision, Japan asserts that a law stating that a subsidy is contingent upon the domestic *siting of* a certain programme is different from a law stating that a subsidy is contingent upon the *use of* a domestic product.[408] With respect to the Second Siting Provision, Japan asserts that the words used in the legislation are not completely clear as to whether, by virtue of the location requirement for the final assembly or wing assembly, the revenue from the 777X will not benefit from the reduced B&O tax rate if these assembling activities take place outside Washington State.[409] In Japan's view, the European Union's analysis with respect to both the First Siting Provision and the Second Siting Provision may fall short of the standard required to establish "contingency" under Article 3.1(b) of the SCM Agreement.[410]

7.5.3 Order of analysis

7.191. As noted above, the European Union has argued that its "first and principal claim in this dispute" is that the challenged aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods.[411]

7.192. The Panel will start by considering the European Union's *de jure* claim. As explained below, the Panel will assess whether the European Union has made a *prima facie* case that the contingency of the challenged aerospace tax measures upon the use of domestic over imported goods can be demonstrated on the basis of the words of the relevant legislation. This could be either because the conditionality is set out expressly in the legislation or because such conditionality can clearly be derived, by necessary implication, from the words used in the legislation.[412]

7.193. The European Union has also advanced a secondary claim, i.e. that the tax measures at issue are inconsistent with Article 3.1(b) of the SCM Agreement by being *de facto* contingent upon the use of domestic over imported goods. If the Panel were to conclude that the European Union has successfully established that the aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods, and therefore inconsistent with Article 3.1(b) of the SCM Agreement, it would not need also to establish that the same measures are *de facto* contingent. Nonetheless, in that circumstance the Panel will try to ensure that there is a complete factual record on which the Appellate Body may base its rulings in the event of an appeal.

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[403] China's third-party submission, paras. 32-33.
[404] Japan's third-party submission, paras. 2-8; third-party statement, paras. 3-5.
[405] Japan's third-party submission, paras. 2 and 11-21; third-party statement, paras. 6-11.
[406] Japan's response to Panel question No. 5.
[407] Japan's third-party submission, para. 12.
[408] Japan's third-party submission, para. 22; third-party statement, para. 13.
[409] Japan's third-party statement, para. 14.
[410] Japan's third-party submission, paras. 27-28; third-party statement, para. 12.
[411] European Union's second written submission, para. 2. See also ibid. paras. 41, 85 and 90; European Union's closing statement at the first meeting of the Panel, paras. 1 and 11; response to Panel question No. 29, para. 67.
[412] See para. 7.274 below.

7.194. Conversely, if the Panel finds that the European Union has not established its *de jure* claim, it will subsequently consider the European Union's *de facto* claim, which the European Union makes on a secondary and alternative basis. In analysing the *de facto* claim, the Panel would consider the total configuration of the facts constituting and surrounding the granting of the subsidy. As explained below[413], this would include considering (i) the design and structure of the measures granting the subsidies; (ii) the modalities of operation set out in such measures; and (iii) the relevant factual circumstances surrounding the granting of the subsidies that provide the context for understanding the measures' design, structure, and modalities of operation.

7.5.4 Article 3.1(b) of the SCM Agreement

7.5.4.1 Prohibited subsidies

7.195. Article 3.1 of the SCM Agreement reads as follows:

> Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> > (a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];
> >
> > (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.
> >
> > _____
> >
> > (footnotes original) [4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.
> >
> > [5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

7.196. Only those subsidies that meet the definition in Article 1 of the SCM Agreement and fall within the description of either Article 3.1(a) or 3.1(b), commonly referred to as "export subsidies" and "import substitution subsidies", respectively, are prohibited by the SCM Agreement. As noted by the Appellate Body:

> Only those subsidies that are conditioned on export performance or on import substitution are prohibited *per se* under Article 3 of Part II of the *SCM Agreement*. In contrast, all other subsidies are allowed under the *SCM Agreement*, albeit a Member granting such subsidies should not cause, through the use of the subsidies, adverse effects within the meaning of Article 5 of Part III, in which case it must remove the adverse effects or must withdraw the subsidies themselves.[414] (original italics)

7.197. Pursuant to Article 3.2 of the SCM Agreement, "[a] Member shall neither grant nor maintain [prohibited subsidies]".

7.198. Prohibited subsidies are a special category of subsidies, which Members have deemed to create such trade distortions that they are proscribed without the need for a complaining Member to show any adverse effects.[415] As noted by the panel in *Brazil – Aircraft*, these subsidies "are specifically designed to affect trade".[416]

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[413] See para. 7.329 below.
[414] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1054.
[415] The Appellate Body has explained that "the granting of a subsidy is not, in and of itself, prohibited under the *SCM Agreement*. Nor does granting a 'subsidy', without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the *SCM Agreement*. The

7.5.4.2 Article III:8(b) of the GATT 1994

7.199. The United States has argued that Article III:8(b) of the GATT 1994 provides context for the interpretation of Article 3.1(b) of the SCM Agreement.[417] Article III:8(b) is part of Article III of the GATT 1994, the provision dealing with the obligation of national treatment on internal taxation and regulation. As noted by the Appellate Body:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'".[418] Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.[419, 420]

7.200. Notwithstanding the above, according to Article III:8(b):

> The provisions of this Article [Article III of the GATT 1994] shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

7.201. By its terms, Article III:8(b) of the GATT 1994 applies to the national treatment disciplines under Article III of the GATT 1994, which are not at issue in this dispute, and clarifies that the provision of subsidies exclusively to domestic producers is not in itself a breach of the national treatment obligation. To the extent that Article III:8(b) provides interpretive guidance in the present case, it is consistent with the principle under the SCM Agreement that subsidization in itself is not prohibited, but only becomes so in two particular situations – one of which is a contingency on the use of domestic over imported goods.[421]

7.5.4.3 Contingency

7.202. Returning to the specific text of Article 3.1(b), the expression "contingent … upon" is common to Articles 3.1(a) and 3.1(b) of the SCM Agreement. Article 3.1(a) prohibits subsidies that are contingent upon export performance, while Article 3.1(b) prohibits those subsidies that are contingent upon the use of domestic over imported goods.

7.203. The expression "contingent … upon" is used in both Article 3.1(a) and Article 3.1(b). This expression has been found to have the same meaning in both provisions.[422] The expression "contingent … upon" has been explored in greatest detail in disputes concerning allegations of export subsidies under Article 3.1(a). In this context, the Appellate Body has noted:

> In our view, the key word in Article 3.1(a) is "contingent". As the Panel observed, the ordinary connotation of "contingent" is "conditional" or "dependent for its existence on something else". This common understanding of the word "contingent" is borne out by the text of Article 3.1(a), which makes an explicit link between "contingency" and

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only 'prohibited' subsidies are those identified in Article 3 of the *SCM Agreement*". Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47.

[416] Panel Report, *Brazil – Aircraft*, para. 7.26.

[417] See, for example, United States' first written submission, paras. 9 and 116-123; second written submission, paras. 9, 20 and 47; opening statement at the first meeting of the Panel, para. 19; opening statement at the second meeting of the Panel, para. 16.

[418] (footnote original) United States – Section 337 of the Tariff Act of 1930, BISD 36S/345, para. 5.10.

[419] (footnote original) United States – Taxes on Petroleum and Certain Imported Substances, BISD 34S/136, para. 5.1.9; Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD 34S/83, para. 5.5(b).

[420] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at p. 109.

[421] See Panel Report, *Indonesia – Autos*, para. 14.33.

[422] Appellate Body Report, *Canada – Autos*, para. 123.

> "conditionality" in stating that export contingency can be the sole or "one of several other *conditions*".[423] (emphasis original)

7.204. Regarding the interpretation of the term "contingent" in the context of an export subsidy, the Panel in *Australia – Automotive Leather II* referred to a "close connection" between the grant or maintenance of a subsidy and export performance. It added that for a subsidy to be export contingent, it must be "conditioned" upon export performance, stating:

> An inquiry into the meaning of the term "contingent…" in Article 3.1(a) must, therefore, begin with an examination of the ordinary meaning of the word "contingent". The ordinary meaning of "contingent" is "dependent for its existence on something else", "conditional; dependent on, upon".[424]

7.205. In *Canada – Autos*, the Appellate Body referred back to this earlier statement and held that "this legal standard applies not only to 'contingency' under Article 3.1(a), but also to 'contingency' under Article 3.1(b)".[425]

7.206. The Appellate Body has also clarified that Article 3.1(b) covers not only *de jure* contingency, but also *de facto* contingency. In *Canada – Autos*, the Appellate Body reversed a panel ruling that had limited "contingency" under Article 3.1(b) to *de jure* contingency:

> [W]e believe that the Panel erred in finding that Article 3.1(b) does not extend to subsidies contingent "in fact" upon the use of domestic over imported goods. We, therefore, reverse the Panel's broad conclusion that "Article 3.1(b) extends only to contingency in law."[426]

7.207. In the context of Article 3.1(a), the Appellate Body has noted that contingency "in law" (*de jure*) is demonstrated "on the basis of the words of the relevant legislation, regulation or other legal instrument".[427] The Appellate Body has added that "such conditionality can [also] be derived by necessary implication from the words actually used in the measure".[428]

7.208. Given that "contingent … upon" has the same meaning in Article 3.1(b) as it does in Article 3.1(a), a conclusion that a subsidy is *de jure* contingent upon the use of domestic over imported goods is to be based on the words of the relevant legislation, as well as their necessary implication. This would require a finding that:

> [T]he existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. The simplest, and hence, perhaps, the uncommon, case is one in which the condition … is set out expressly, in so many words, on the face of the law, regulation or other legal instrument. We believe, however, that a subsidy is also properly held to be *de jure* … contingent where the condition … is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* … contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfillment of the condition … Such conditionality can also be derived by *necessary implication* from the words actually used in the measure.[429] (emphasis added)

7.209. With respect to *de facto* contingency, in the context of Article 3.1(a) of the SCM Agreement, the Appellate Body has stated that "the evidence needed to establish *de facto* …

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[423] Appellate Body Report, *Canada – Aircraft*, para. 166.
[424] Panel Report, *Australia – Automotive Leather II*, para. 9.55.
[425] Appellate Body Report, *Canada – Autos*, para. 123.
[426] Ibid. para. 143.
[427] Appellate Body Report, *Canada – Aircraft*, para. 167. See also Appellate Body Reports, *Canada – Autos*, para. 123; *EC and certain member States – Large Civil Aircraft*, para. 1038.
[428] Appellate Body Report, *Canada – Autos*, para. 123. See also ibid. para. 100; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1038.
[429] Appellate Body Report, *Canada – Autos*, para. 100. See also Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.365 and Panel Report, *US – FSC (Article 21.5 – EC)*, paras. 8.54-8.56.

contingency goes beyond a legal instrument and includes a variety of factual elements concerning the granting of the subsidy in a specific case"[430]:

> Proving *de facto* … contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is "contingent … in fact…". Instead, the existence of this relationship of contingency, between the subsidy and … performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.[431] (emphasis original)

7.210. Still referring to contingency upon export performance under Article 3.1(a), the Appellate Body has stated that "the standard for *de facto* … contingency … would be met when the subsidy is 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."[432] The Appellate Body has further noted that:

> The existence of *de facto* export contingency, as set out above, "must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy"[433], which may include the following factors: (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.[434] (emphasis original)

7.211. Moreover, the Appellate Body has ruled as follows:

> [T]he conditional relationship between the granting of the subsidy and export performance must be objectively observable on the basis of such evidence in order for the subsidy to be geared to induce the promotion of future export performance by the recipient. The standard for *de facto* … contingency is therefore not satisfied by the subjective motivation of the granting government … In this respect, we note that the Appellate Body and panels have, on several occasions, cautioned against undue reliance on the intent of a government behind a measure to determine the WTO-consistency of that measure.[435] The Appellate Body has found that "the intent, stated or otherwise, of the legislators *is not conclusive*" as to whether a measure is consistent with the covered agreement.[436] In our view, the same understanding applies in the context of a determination on … contingency, where the requisite conditionality … must be established on the basis of objective evidence, rather than subjective intent. We note, however, that while the standard for *de facto* … contingency cannot be satisfied by the subjective motivation of the granting government, objectively reviewable expressions of a government's policy objectives for granting a subsidy may, however, constitute relevant evidence in an inquiry into whether a subsidy is *geared to induce* the promotion of future export performance by the recipient.[437] (emphasis added)

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[430] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1038.

[431] Appellate Body Report, *Canada – Aircraft*, para. 167. See also Appellate Body Reports, *Canada – Autos*, para. 123; *EC and certain member States – Large Civil Aircraft*, para. 1038.

[432] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1045.

[433] (footnote original) Appellate Body Report, *Canada – Aircraft*, para. 167. (original emphasis)

[434] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1046.

[435] (footnote original) For example, in the context of a discrimination claim under Article III of the GATT 1994, the Appellate Body found that "[i]t is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent." (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27, DSR 1996:I, 97, at 119) Moreover, "there may well be a certain degree of speculation in seeking to establish the intent of a government in the abstract." (Panel Report, *Japan – DRAMs (Korea)*, para. 7.104)

[436] (footnote original) Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 259. (emphasis added) See also Appellate Body Report, *China – Auto Parts*, para. 178, where the Appellate Body found that the intent, stated or otherwise, of the legislators is not conclusive as to the characterization of a measure.

[437] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1050.

7.212. In sum, the Panel takes note of the Appellate Body's findings in prior disputes that "contingency" has the same meaning in Article 3.1(a) and Article 3.1(b) of the SCM Agreement, and that the contingency in Article 3.1(b) can be established on a *de jure* as well as on a *de facto* basis. The Panel shall be guided by these findings in its analysis.

7.5.4.4 Other interpretive issues

7.213. The parties have advanced contrasting arguments regarding the interpretation of certain terms in Article 3.1(b) of the SCM Agreement.

7.5.4.4.1 The term "over"

7.214. Both the European Union and the United States note that the word "over" used in Article 3.1(b) of the SCM Agreement, in the expression "subsidies contingent … upon the use of domestic *over* imported goods", is defined in the dictionary as "in preference to", "in excess of", or "more than".[438]

7.215. The United States notes that the expressions equivalent to the word "over" that are used in the French and the Spanish texts of Article 3.1(b) are "*de préférence à*" and "*con preferencia a*", which would be equivalent to the English expression "in preference to" or "instead of".[439] Thus, according to the United States:

> [A] subsidy that is inconsistent with Article 3.1(b) requires the use of domestic goods "in preference to," *i.e.*, instead of, imported goods. For this reason, Article 3.1(b) is often referred to as relating to "import substitution subsidies."[440] It does not cover measures simply because they involve some sort of domestic activity, but rather it is focused specifically on subsidies that depend on the substitution of domestic over imported goods.[441]

7.216. The European Union argues that, based on its ordinary meaning, the word "over" in Article 3.1(b) should be interpreted as "in excess of".[442] The European Union recalled that the expression "in excess of" is used in other provisions of the WTO Agreements (such as Articles II:1(b) and III:2 of the GATT 1994) and has been interpreted by previous panels and the Appellate Body as excluding a *de minimis* standard.[443] Based on its proposed meaning of the word "over", the European Union argues that there is no *de minimis* standard for discrimination in Article 3.1(b) of the SCM Agreement. According to the European Union, "[a]s soon as a subsidy is contingent upon the use of domestic over imported goods, competitive opportunities between domestic and imported goods are distorted, even if no such goods are currently imported".[444]

7.217. As clarified subsequently, the parties have no real discrepancy with respect to the meaning of the word "over" in Article 3.1(b) for the purpose of this dispute. The European Union has noted that it "does not disagree with the United States' legal interpretation of 'over'."[445] The United States has noted in turn that none of the parties has argued that there is a *de minimis* exception in Article 3.1(b), so that there is no need for the Panel to address the question of whether such an exception exists.[446]

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[438] European Union's response to Panel question No. 32, para. 72; United States' second written submission, para. 25; United States' response to Panel question No. 32, para. 68. See also Japan's third-party submission, fn 5; *Shorter Oxford English Dictionary*, 5th edition, Volume 2, p. 2044 (Exhibit USA-15); and *Shorter Oxford English Dictionary*, 6th edition, pp. 2044-2045 (Exhibit USA-51).

[439] United States' second written submission, para. 25; response to Panel question No. 32, para. 68. See also European Union's second written submission, para. 52.

[440] (footnote original) See, e.g., Canada – Renewable Energy (AB), para. 5.6.

[441] United States' response to Panel question No. 32, para. 68. See also United States' second written submission, para. 25.

[442] European Union's response to Panel question No. 32, para. 77; second written submission, para. 51.

[443] European Union's response to Panel question No. 32, paras. 73-76.

[444] European Union's response to Panel question No. 32, para. 77; second written submission, paras. 50-51.

[445] European Union's second written submission, para. 52.

[446] United States' second written submission, para. 28.

7.218. In any event, the Panel notes the ordinary meaning of the word over, namely "[a]bove in degree, quality, or action; in preference to; more than".[447] In Article 3.1(b), the term "over" appears in the context of a prohibition on subsidies that are conditional upon the use of domestic *over* imported products. As noted above, the purpose of this provision is to prohibit certain subsidies that have been considered particularly trade-distorting by Members. In this context, the word "over" in Article 3.1(b) can be read in the sense of "in preference to" (or "instead of" or "rather than")[448], so that this provision prohibits any subsidy that is conditional on the use of domestic goods in preference to (or "instead of" or "rather than") imported goods.

7.5.4.4.2 The term "use"

7.219. Article 3.1(b) refers to subsidies contingent upon the *use* of domestic over imported goods. According to the United States, "[t]he term 'use' [in Article 3.1(b)] refers to either the act of using an input to produce a downstream good, or the use of a finished good by the end-user".[449] The United States refers to footnote 61 of the SCM Agreement in Annex II ("Guidelines on Consumption of Inputs in the Production Process") as "mak[ing] clear that 'use' means the consumption of goods … as inputs into a production process".[450] This is related to the United States' argument that separate wings and fuselages are elements of the finished aircraft and will not be "used" in the production of 777X airplanes.[451]

7.220. Conversely, the European Union argues that the term "use" in Article 3.1(b) is broad enough to "encompass situations where the input is 'used' in such a way that it has not been consumed and where it remains a discrete, identifiable part of the whole."[452] In the European Union's view, the term "use" is not limited to situations where an input is consumed in the production process, or merely attached to a final product.[453]

7.221. The Appellate Body has examined the ordinary meaning of the term "use" in the context of a different provision of the SCM Agreement, namely Article 2.1(c) ("use of a subsidy programme by a limited number of certain enterprises"). In this respect, the Appellate Body noted that "[t]he word 'use' refers to the action of using or employing something" and cited the following dictionary definition of the term: "the action of using something; the fact or state of being used; application or conversion to some purpose".[454] The Appellate Body also noted that, in the context of Article 2.1(c), "what is used or employed is 'a subsidy programme'".[455] The Panel observes that term "use", referring to products, appears in several other provisions in the SCM Agreement and in other covered agreements.[456]

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[447] "Over", 11, *Shorter Oxford English Dictionary*, 6th edition (2007), Vol. 2, p. 2048.

[448] This is also the meaning that best reconciles the language used in the three authentic versions of the SCM Agreement. The French text of Article 3.1(b) reads: "subventions subordonnées … à l'utilisation de produits nationaux *de préférence à* des produits importés". The Spanish text reads: "las subvenciones supeditadas al empleo de productos nacionales *con preferencia a* los importados…" (emphasis added)

[449] United States' response to Panel question No. 44, para. 104.

[450] Ibid. para. 105. Footnote 61 of the SCM Agreement provides as follows: "Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil *used* in the production process and catalysts which are consumed in the course of their *use* to obtain the exported product." (emphasis added)

[451] United States' first written submission, paras. 110-115; second written submission, paras. 52-55; opening statement at the first meeting of the Panel, paras. 8-10; United States' response to Panel question No. 44, para. 108.

[452] European Union's opening statement at the second meeting of the Panel, para. 30.

[453] European Union's response to Panel question No. 44, para. 102.

[454] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.374 and fn 1009. See also European Union's response to Panel question No. 44, paras. 103-105.

[455] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.374.

[456] See, for example, fn 29 to Article 8.2 of the SCM Agreement ("the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or *use*…"); item (d) of Annex I to the SCM Agreement ("[t]he provision by governments or their agencies … of imported or domestic products or services for *use* in the production of exported goods…"); item (h) of Annex I to the SCM Agreement ("[t]he exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services *used* in the production of exported products…"); para. II.3 of Annex II to the SCM Agreement ("[i]nvestigating authorities should treat inputs as physically incorporated if such inputs are *used* in the production process and are physically present in the product exported…"); Article III:1 of the GATT 1994 ("internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or *use* of products, and internal quantitative regulations requiring the mixture, processing or *use* of products in specified amounts or

7.222. In Article 3.1(b), the term "use" appears in the context of a prohibition on subsidies that are conditional upon the *use* of domestic over imported goods. The purpose of this provision is to prohibit certain subsidies that have been considered particularly trade-distorting by Members. The Panel finds that the ordinary meaning of the word, namely the action of using or employing something, is apt in the context of Article 3.1(b). Neither the text of Article 3.1(b) nor any relevant context indicates that the term "use" is confined to a particular manner of using or employing a given good, or that the good "used" in this context must possess certain characteristics in order to be capable of being "used" within the meaning of Article 3.1(b). Accordingly, a subsidy conditional on the consumption of domestic goods, rather than or in preference to imported goods, as inputs into a production process would be covered by Article 3.1(b), but so too would a subsidy that is conditional in any other way on the use or employment of domestic goods, rather than or in preference to imported goods.

7.5.4.4.3 The term "goods"

7.223. The United States submits that the word "goods" in Article 3.1(b) of the SCM Agreement, in the expression "subsidies contingent … upon the use of domestic over imported *goods*", refers to something that is saleable or tradeable.[457] The United States points to the dictionary definition of "goods" as "saleable commodities, merchandise, wares"[458] The United States also notes that the words used in the French and the Spanish texts of Article 3.1(b) are "*produits*" and "*productos*", respectively, both of which connote saleable commodities, merchandise, or wares.[459] The United States further notes that in Article 3.1(b) of the SCM Agreement the word "goods" is qualified by the word "imported" (as well as by the word "domestic") and an imported good would be one that by definition is traded.[460] The United States concludes that "goods", within the meaning of Article 3.1(b), must be understood as being products that are traded; if they are not, they cannot be imported, which would be inconsistent with the specific reference to "imported goods" in Article 3.1(b).[461]

7.224. The European Union agrees with the United States that the French and the Spanish texts confirm the interpretation that the word "goods" in Article 3.1(b) of the SCM Agreement is synonymous with the word "products".[462] The European Union, however, does not agree that the definition of "goods" should be limited to those products which are actually traded.[463] In the European Union's view, the approach advocated by the United States would run against a fundamental principle of the disciplines on trade in goods: that these disciplines protect competitive opportunities (and not just actual trade volumes), including the potential to compete, even absent actual trade in the goods concerned.[464] According to the European Union, the interpretation advocated by the United States would open up an easy path for circumventing the subsidy disciplines under Article 3.1(b) of the SCM Agreement[465] and would defeat the purpose of Article 3.1(b) by affording impunity to the most distortive subsidies: those that successfully

proportions…"); para. 1(a) of the Annex to the Agreement on Trade-Related Investment Measures ("the purchase or *use* by an enterprise of products of domestic origin or from any domestic source…"); para. 2 of the Annex to the Agreement on Civil Aircraft ("the products covered by the descriptions listed below … shall be accorded duty-free or duty-exempt treatment, if such products are for *use* in civil aircraft or ground flying trainers and for incorporation therein, in the course of their manufacture, repair, maintenance, rebuilding, modification or conversion…"). (emphasis added)

[457] United States' first written submission, paras. 105 and 125-128; second written submission, paras. 22-23.

[458] United States' first written submission, para. 126 (citing Appellate Body Report, *US – Softwood Lumber IV*, para. 58 & fn 43, which in turn cites *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1116).

[459] United States' first written submission, para. 126 (citing *Le Nouveau Petit Robert*, 2009, pp. 2034-2035 (Exhibit USA-28) and *Diccionario de la Lengua Española*, 2001, pp. 1839-1840 (Exhibit USA-29)).

[460] United States' first written submission, para. 126 (citing Appellate Body Report, *US – Softwood Lumber IV*, para. 62). See also United States' second written submission, para. 22.

[461] United States' first written submission, para. 128.

[462] European Union's second written submission, para. 46.

[463] Ibid.

[464] Ibid. (citing Panel Reports, *Korea — Alcoholic Beverages*, para. 10.81; *Colombia — Ports of Entry*, para. 7.356; *US — Poultry (China)*, paras. 7.424–7.427 and 7.429; and *Indonesia — Autos*, para. 14.113; and Appellate Body Report, *Canada — Periodicals*, pp. 20-21, DSR 1997:I, 449, 466-467. See also European Union's response to Panel question No. 33, para. 85.

[465] European Union's second written submission, para. 49 (citing Japan's response to Panel question No. 4, para. 4).

eliminate competing foreign products from the market.[466] The European Union submits that a challenge under Article 3.1(b) should be evaluated in view of the market situation at the point in time prior to adoption of the challenged measure.[467]

7.225. The Panel agrees with the parties that the term "goods" in Article 3.1(b) can be read as synonymous with "products". This is also the reading that best reconciles the language used in the three authentic versions of the SCM Agreement. In Article 3.1(b), the term "goods" appears in the context of a prohibition on subsidies that are conditional upon the use of domestic over imported *goods*. As noted above, the purpose of this provision is to prohibit certain subsidies that have been considered particularly trade-distorting by Members. Since a main objective of the agreement is to address trade distortions caused by subsidies − in the provision at issue, a subsidized preference for domestic over imported goods −, it follows that the goods in question must be at least potentially tradable. Indeed, the SCM Agreement is part of a set of covered agreements called "Multilateral Agreements on Trade in Goods". There is no requirement under the provision, however, that the goods in question must be actually traded. Following the Appellate Body's guidance with respect to provisions in other covered agreements, it can be said that Article 3.1(b) of the SCM Agreement protects competitive opportunities of imported products, rather than existing trade flows of such products.[468] In this regard, the fact that a given product may, or may not, be actually traded at present is not dispositive of whether competitive opportunities exist with respect to that product. The Panel therefore considers that there is no need to demonstrate present trade in a specific product as it exists at a given moment in time to establish a prohibited contingency under Article 3.1(b).

7.5.5 Relevant facts for the assessment of the alleged contingency

7.226. The European Union's primary claim is that, as a result of the First Siting Provision and the Second Siting Provision, considered individually or together, the challenged aerospace tax measures constitute subsidies that are *de jure* contingent on the use of domestic over imported goods.[469]

7.227. The European Union also argues that the First Siting Provision and the Second Siting Provision each make the tax measures at issue subsidies that are *de facto* contingent on the use of domestic over imported goods.[470]

7.228. Before assessing the European Union's claims, the Panel will review the texts of the relevant provisions of the measures at issue, as well as the additional factual evidence available.

7.5.5.1 The siting provisions of ESSB 5952

7.229. ESSB 5952 amended and extended the aerospace tax measures, which were originally established in 2003 by HB 2294.[471] The amendment and extension, however, did not take effect immediately upon enactment of ESSB 5952. Instead, the entry into force of the amendment and extension of the aerospace tax measures was contingent upon satisfaction of the First Siting Provision in Section 2 of ESSB 5952, namely "upon the siting of a significant commercial airplane manufacturing program in the state of Washington".[472] The legislation also provides that, "[i]f a significant commercial airplane manufacturing program is not sited in the state of Washington by June 30, 2017, … [this act] does not take effect".[473]

7.230. The First Siting Provision reads:

[466] European Union's second written submission, para. 46; opening statement at the first meeting of the Panel, paras. 47-48.
[467] European Union's second written submission, para. 46; closing statement at the first meeting of the Panel, para. 9.
[468] See, for example, Appellate Body Reports, *Japan − Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at pp. 109-110; *Korea − Alcoholic Beverages*, paras. 119-120.
[469] European Union's second written submission, para. 60.
[470] Ibid. 90-91.
[471] See para. 7.39 above.
[472] ESSB 5952 (Exhibit EU-3), Section 2, codified at RCW Section 82.32.850 (Exhibit EU-58). See also European Union's comments on United States' response to Panel question No. 53, para. 7.
[473] ESSB 5952 (Exhibit EU-3), Section 2, codified at RCW Section 82.32.850 (Exhibit EU-58).

NEW SECTION. **Sec. 2.** A new section is added to chapter 82.32 RCW to read as follows:

(1) Chapter ..., Laws of 2013 3rd sp. sess. (this act) takes effect contingent upon the siting of a significant commercial airplane manufacturing program in the state of Washington. If a significant commercial airplane manufacturing program is not sited in the state of Washington by June 30, 2017, chapter ..., Laws of 2013 3rd sp. sess. (this act) does not take effect.

(2) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Commercial airplane" has the same meaning provided in RCW 82.32.550.

(b) "New model, or any version or variant of an existing model, of a commercial airplane" means a commercial airplane manufactured with a carbon fiber composite fuselage or carbon fiber composite wings or both.

(c) "Significant commercial airplane manufacturing program" means an airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section:

(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.

(d) "Siting" means a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington state.

(3) The department must make a determination regarding whether the contingency in subsection (1) of this section occurs and must provide written notice of the date on which such contingency occurs and chapter ..., Laws of 2013 3rd sp. sess. (this act) takes effect. If the department determines that the contingency in subsection (1) of this section has not occurred by June 30, 2017, the department must provide written notice stating that chapter ..., Laws of 2013 3rd sp. sess. (this act) does not take effect. Written notice under this subsection (3) must be provided to affected parties, the chief clerk of the house of representatives, the secretary of the senate, the office of the code reviser, and others as deemed appropriate by the department.[474]

7.231. Under the terms of the legislation, the First Siting Provision concerns a one-time event. That is, the amendment and extension of the challenged aerospace tax measures would come into effect, for all beneficiaries, upon the siting of a significant commercial airplane manufacturing programme in Washington State. Moreover, if no such siting occurred by the specified date (30 June 2017), the possibility for the amendment and extension of the measures to take effect would lapse.

7.232. The First Siting Provision defines "siting" to mean "a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington State". In turn, "significant commercial airplane manufacturing program" is defined as:

[A]n airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section:

[474] ESSB 5952 (Exhibit EU-3).

> (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.[475]

7.233. The First Siting Provision additionally defines "new model, or any version or variant of an existing model, of a commercial airplane" to mean "a commercial airplane manufactured with a carbon fiber composite fuselage or carbon fiber composite wings or both".[476]

7.234. As to the procedures to verify the satisfaction of the conditions in the First Siting Provision, Section 2 of ESSB 5952 provides that:

> The department [of Revenue of the state of Washington] must make a determination regarding whether the contingency in subsection (1) of this section [the siting] occurs and must provide written notice of the date on which such contingency occurs and [this act] takes effect. If the department determines that the contingency in subsection (1) of this section has not occurred by June 30, 2017, the department must provide written notice stating that [this act] does not take effect. Written notice under this subsection (3) must be provided to affected parties, the chief clerk of the house of representatives, the secretary of the senate, the office of the code reviser, and others as deemed appropriate by the department.[477]

7.235. The Second Siting Provision within ESSB 5952 relates to the business and occupation (B&O) aerospace tax rate[478], and provides as follows:

> With respect to the manufacturing of commercial airplanes or making sales, at retail or wholesale, of commercial airplanes, this subsection (11) does not apply on and after July 1st of the year in which the department 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 section 2 of this act has been sited outside the state of Washington. This subsection (11)(e)(ii) only applies to the manufacturing or sale of commercial airplanes that are the basis of a siting of a significant commercial airplane manufacturing program in the state under section 2 of this act.[479]

7.236. The Second Siting Provision concerns the continued availability of the 0.2904% B&O aerospace tax rate for the version or variant of a commercial airplane that is the basis of the First Siting Provision. The Second Siting Provision specifically pertains to the siting of any "final assembly or wing assembly" of such commercial airplane.

7.237. By its own terms, the Second Siting Provision refers to the same significant commercial airplane manufacturing programme (that is, the programme that satisfied the First Siting Provision) in which certain "products, including final *assembly*, will commence *manufacture* at a … location within Washington state" (emphasis added). The Second Siting Provision "only applies to the manufacturing or sale of commercial airplanes that are the basis of a siting [under the First Siting Provision]".[480] The relevant "commercial airplanes" in this regard are Boeing 777X aircraft.

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[475] Ibid. Section 2(2)(c) and (d), codified at RCW Section 82.32.850(2)(c) and (d) (Exhibit EU-58).

[476] ESSB 5952 (Exhibit EU-3), Section 2(2)(b), codified at RCW Section 82.32.850(2)(b) (Exhibit EU-58).

[477] ESSB 5952 (Exhibit EU-3), Section 2, codified at RCW Section 82.32.850 (Exhibit EU-58).

[478] The Second Siting Provision concerns paragraph 11 of Sections 5 and 6 of ESSB 5952, which refers to the 0.2904% B&O tax rate applicable to persons "engaging within the [state of Washington] in the business of manufacturing commercial airplanes, or components of such airplanes, or making sales, at retail or wholesale, of commercial airplanes or components of such airplanes, manufactured by the seller". See ESSB 5952 (Exhibit EU-3) , Sections 5 and 6. See also United States' first written submission, paras. 79-80; response to Panel question No. 53(b), para. 16.

[479] ESSB 5952 (Exhibit EU-3), Sections 5 and 6, codified at RCW Section 82.32.850(11)(e)(ii) (Exhibit EU-22).

[480] ESSB 5952 (Exhibit EU-3), Sections 5 and 6, codified at RCW Section 82.32.850(11)(e)(ii) (Exhibit EU-22).

7.238. ESSB 5952 does not define the term "manufacture".[481] However, Section 82.04.120 of the Revised Code of Washington contains the following definition of "manufacture":

> "To manufacture" embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful substance or article of tangible personal property is produced for sale or industrial use...[482]

7.239. This definition is part of Chapter 82.04 of the Revised Code of Washington, which governs the application of the B&O tax.[483] As stated by the United States, the Department of Revenue of the state of Washington considers that the definition "would apply in the interpretation of ESSB 5952".[484]

7.240. There is no relevant statutory definition of the term "assembly". As noted by the United States, if called to interpret undefined terms, Washington State authorities would consider the common law or ordinary meaning of the word in the context of the statute in which the word appears.[485] Based on the dictionary meaning of the word, and its consideration of the statute as a whole, the United States notes that "assembly is a subset of manufacturing".[486]

7.5.5.2 Products at issue

7.241. The European Union's claim in this dispute relates to an alleged prohibited contingency based on the use of domestic over imported *wings* and *fuselages*.[487] It is not in dispute whether the measures at issue place any conditions on the use of any *other* elements or components of commercial airplanes, including sub-components of wings and fuselages.[488] Accordingly, the products at issue for the Panel's analysis under Article 3.1(b) of the SCM are wings and fuselages of commercial airplanes.

7.242. The parties have presented extensive factual evidence regarding the production of commercial airplanes, particularly with regard to the production of wings and fuselages in the context of commercial airplane assembly. In this section, the Panel will review this evidence, including undisputed aspects of the production and assembly of Boeing's 777X aircraft, as well as other evidence relating to the production and transport of wings and fuselages of other types of commercial airplanes.

7.5.5.2.1 Boeing's 777X aircraft programme

7.243. As noted above, the aerospace tax measures, as amended and extended by ESSB 5952, took effect upon fulfilment of the First Siting Provision, based on Boeing's decision to site its programme for the production of 777X aircraft in the state of Washington.[489] The United States has provided background explanations as to various aspects of the 777X programme and the production process of 777X aircraft, including information provided in a statement by corporate officers of Boeing (Boeing Expert Statement).[490]

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[481] United States' first written submission, para. 78.
[482] See RCW Section 82.04.120 (Exhibit USA-37). The provision additionally lists activities included in this definition such as *inter alia* "[t]he production or fabrication of special made or custom made articles".
[483] United States' response to Panel question No. 14, para. 28.
[484] Ibid.
[485] See Supreme Court of Washington, Citizens Alliance for Property Rights Legal Fund v. San Juan County et al. (2015) (Exhibit USA-38). United States' response to Panel question No. 14, para. 29.
[486] United States' response to Panel question No. 14, paras. 29-32.
[487] See, e.g. European Union's first written submission, paras. 74-75; opening statement at the first meeting of the Panel, para. 4; second written submission, para. 1; opening statement at the second meeting of the Panel, paras. 3, 9, 32-34.
[488] See e.g. European Union's opening statement at the second meeting of the Panel, paras. 9 and 31-32; United States' response to Panel question No. 64, para. 41.
[489] European Union's first written submission, para. 45; United States' first written submission, paras. 2 and 78. See also Letter from the Director of the Washington State Department of Revenue to the Code Reviser, 10 July 2014 (Exhibit EU-61).
[490] Boeing expert statement (Exhibit USA-1) (BCI).

7.244. The 777X is a new aircraft programme developed by Boeing, based on its earlier 777 programme. According to the explanations provided by the United States, many of the 777X production and supplier choices made by Boeing mirror those of the current 777-300ER, which is a twin-aisle aircraft, typically configured for approximately 350-375 passengers (depending on class configuration) with a range of 7,825 nautical miles. The 777-300ER's fuselages and wings, however, are composed primarily of aluminium; by contrast, the 777X's wings will be made primarily of carbon fibre-reinforced plastic.[491]

7.245. The United States submits a statement by experts affiliated with Boeing regarding Boeing's production operations and background information on the products at issue. As explained by the Boeing experts:

> An aircraft gets its essential structure, its aerodynamic and load-bearing qualities, from its *airframe*. The main airframe structures are the fuselage, wing, and tail.[492] (emphasis original)

7.246. In the following sections, the Panel will review evidence and information related to the manufacturing and assembly of the Boeing 777X. The Panel notes that this evidence, including the statement by the Boeing experts, concerns *future* manufacturing operations that have not yet commenced, and that, based on current projections, the first variant of the 777X will enter into service in the year 2020.[493]

7.5.5.2.2 Fuselage

7.247. As explained by the Boeing experts with respect to the fuselage of the aircraft:

> The *fuselage* is the long tube that forms the longitudinal axis of the aircraft, running from nose to tail. It forms the exterior structure that houses the aircraft's interior accommodations and payload – *e.g.,* passengers, crew, flight deck, cargo.[494] (emphasis original)

7.248. The fuselage's primary elements consist of:

a. Skins: the panels that form the exterior of the fuselage, with cutouts for windows and doors;

b. Frames: stronger, hoop-shaped structures positioned perpendicular to the skins at intervals along the length of the fuselage; and

c. Stringers: long, thin structures running parallel to, and reinforcing, the skins.[495]

7.249. The fuselage also includes floor frames and panels that support passengers, crew, cargo, and interior accommodations.[496]

7.250. The 777X's fuselage comprises eight separate fuselage sections, called Sections 41 to 48. Section 41 is the nose of the plane and Section 48 is the empennage (a tapered end at the tail of the plane).[497] Like all other Boeing commercial aircraft (with the exception of the 787), the 777X's primary fuselage structures are made from aluminium.[498] According to the Boeing experts, **[[BCI]]**.[499]

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[491] United States' first written submission, paras. 20-24; Boeing expert statement (Exhibit USA-1) (BCI), para. 16; Boeing 777 Backgrounder (Exhibit USA-6).
[492] See Boeing expert statement (Exhibit USA-1) (BCI), para. 11.
[493] See ibid. para. 40.
[494] See ibid. para. 12.
[495] See Boeing expert statement (Exhibit USA-1) (BCI), para. 12.
[496] See ibid.
[497] See ibid. para. 13.
[498] See ibid.
[499] See ibid. para. 42. "Make/buy" refers to the process of determining which aircraft elements Boeing will make, and which to procure from outside suppliers. Ibid. fn 1.

7.251. In its initial fuselage manufacturing operations, Boeing receives fuselage structures from its suppliers at the Everett fuselage building, which when completed will be a new facility next to the main factory building where the 777X will undergo final assembly.[500] For the various fuselage Sections, **[[BCI]]**, these primary fuselage structures **[[BCI]]**.[501] The separate fuselage Sections are then joined into three larger parts of the fuselage, namely the forward (Sections 41 and 43), center (Sections 44 and 11/45), and aft (Sections 46-48). More specifically:

a. The forward part of the fuselage incorporates Section 41, which is the foremost fuselage section that will eventually house the flight deck, which is joined to Section 43.[502]

b. The center part of the fuselage consists of Section 44, which unlike other fuselage sections does not have a keel panel; rather, Section 11/45 forms the bottom of the center part of the fuselage, and is itself constructed from various structures: **[[BCI]]**.[503]

c. The aft part of the fuselage is formed by joining three separate fuselage sections (Sections 46-48).[504]

7.5.5.2.3 Wings

7.252. As explained by the Boeing experts with respect to the wings of the aircraft:

> The *wings* join the aircraft at roughly the mid-point along the length of the fuselage. In addition to providing lift and flight control surfaces, the wings carry the engine installations and fuel.[505] (emphasis original)

7.253. The wings have elements that are fixed in flight, and flight control surfaces that move in flight. The 777X's main fixed wing elements consist of:

a. The main wing box, which forms most of the wing's visible surface area;

b. The wing tip, which is static in flight but folds at airport gates to meet certain wingspan constraints;

c. The fixed leading and trailing edges that run most of the span of the visible wing; and

d. The center wing box, which sits under the fuselage and is not visible on a finished aircraft.[506]

7.254. The visible wing box structures are composed of: (i) the skins, which form the wing exterior; (ii) the ribs, which run perpendicular to the wing span and support the skins; (iii) the spars, which run the length of the wing span and support the ribs; and (iv) the stringers, which are attached to the skins and also run the length of the wing. As for the movable elements of the wings, the primary parts are: (i) the slats on the wing's leading edge; and (ii) the droop panels, spoilers, ailerons and flaps on the trailing edge.[507]

7.255. Some of the main structures of the 777X's wings will be made mostly from carbon fibre-reinforced plastic.[508] By contrast, both the fuselage and the wing of the 777-300ER are primarily composed of aluminium.[509] According to the Boeing experts, **[[BCI]]**.[510]

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[500] Boeing expert statement (Exhibit USA-1) (BCI), para. 52(a).
[501] Ibid. para. 52(b).
[502] Ibid. para. 52(c).
[503] Ibid. para. 52(e).
[504] Ibid. para. 52(d).
[505] See Boeing expert statement (Exhibit USA-1) (BCI), para. 14.
[506] See ibid.
[507] See ibid. para. 15.
[508] United States' first written submission, para. 22; Boeing expert statement (Exhibit USA-1) (BCI), paras. 16, 39, 43.
[509] United States' first written submission, para. 21; Boeing 777 Backgrounder (Exhibit USA-6).
[510] See Boeing expert statement (Exhibit USA-1) (BCI), para. 42. See also United States' first written submission, para. 32.

7.256. The initial wing manufacturing operations for the 777X will take place in the Composite Wing Center that is being built close to the main factory building. As explained by the Boeing experts, that center is responsible for fabricating **[[BCI]]** 777X wing structures, **[[BCI]]**.[511] Further fabrication takes place in a spar sub-assembly building where **[[BCI]]**.[512]

7.257. The resulting "Section 12" wing structure consists of the main wing box (including spars, ribs, and panels) and the fixed leading and trailing edges, but does not include movable edges or the wingtip.[513]

7.5.5.2.4 Final assembly process

7.258. The United States provided detailed descriptions of the various steps in the assembly of the 777X aircraft. The United States "acknowledges that wing fabrication, wing assembly, and fuselage assembly are all production activities conducted in the manufacture of an airplane"[514], but argues that fuselages and wings are "features or elements of the finished aircraft, which are generated only through the final assembly process of the airplane itself − not inputs into the production process".[515] In other words, and as stated by the Boeing experts, "neither a complete fuselage nor complete wings enter the final assembly process".[516]

7.259. The production carried out in the fuselage building, described above, results in three separate sections of the fuselage (forward, center, and aft), which at the time they leave the fuselage building still **[[BCI]]**.[517] The three fuselage sections are then **[[BCI]]**.[518, 519]

7.260. The Section 12 wing structure, which results from initial wing manufacturing operations described above, undergoes additional operations in the main factory building, namely: **[[BCI]]**.[520] These operations result in two "outboard wing structures".[521]

7.261. Having undergone separate fabrication and installation operations[522], the center fuselage structure (including the center wing box) and outboard wing structures are at this point brought together in the "wing-body join stage" of the moving assembly line. As explained by the Boeing experts, "[t]his is the first point at which the main wing structures − the two outboard wings and the center wing box − are joined together".[523] At this stage, the outboard wing structures still lack **[[BCI]]**.[524]

7.262. The final assembly process then moves into "final body join", and the subsequent final assembly position, where, as explained by the Boeing experts, certain operations complete the airframe and install the major remaining systems:

> **[[BCI]]**[525]

7.5.5.2.5 Production and assembly of other aircraft

7.263. In addition to the Boeing 777X, the parties have presented evidence on the production of other models of aircraft, particularly in respect of the production of wings and fuselages.

[511] Boeing expert statement (Exhibit USA-1) (BCI), para. 52(h).
[512] Ibid. para. 52(i)-(k).
[513] United States' response to Panel question No. 64, para. 40.
[514] United States' response to Panel question No. 66, para. 71.
[515] United States' first written submission, para. 110.
[516] See Boeing expert statement (Exhibit USA-1) (BCI), para. 53.
[517] Ibid. para. 52(f).
[518] Ibid.
[519] Ibid. para. 52(m).
[520] Ibid. para. 52(l).
[521] Ibid.
[522] See ibid. para. 52(m).
[523] Ibid. para. 52(n).
[524] Ibid.
[525] Ibid. para. 51(p).

7.264. The parties have referred to another model of aircraft manufactured by Boeing, the 787, in respect of whether Boeing imports 787 wings from a foreign supplier.[526] The United States submits that the "787's wings, like those of all Boeing large civil aircraft, consist of numerous individual parts, including those that make up fixed wing structures (e.g., the spars, ribs, and panels that comprise the main wing box; the fixed leading and trailing edges; and the center wing box) and the movable wing elements that enable controlled flight operations (e.g., moveable leading and trailing edges)".[527] According to the United States, "Boeing imports multiple wing-related structures from Japan" that require further wing assembly activity in the United States.[528] More specifically, Boeing imports a "right-hand and left-hand partial wing structure" that include the constituent parts of the main wing box and the fixed and leading trailing edges[529], without **[[BCI]]**.[530] The United States clarifies that the imported wing structure for the 787 is referred to as Section 12, discussed above in relation to the 777X, which consists of the main wing box and the fixed leading and trailing edges.[531] These wing structures are then shipped to a Boeing 787 assembly facility in the United States in Boeing's Dreamlifter aircraft where they undergo assembly operations, including additional elements of the wing itself.[532] The European Union has also provided evidence, including descriptions from Boeing, of the production and shipping of the relevant 787 wing structures.[533]

7.265. In respect of the fuselages of the Boeing 737, it is not disputed that Boeing sources complete fuselages for the 737NG and 737MAX single-aisle aircraft from a supplier in the state of Kansas, which are then transported by rail to Boeing's 737 manufacturing facility in the state of Washington for final assembly of the aircraft.[534]

7.266. The parties have also presented evidence of the production and assembly of certain models of Airbus aircraft. The European Union describes the production and transport of Airbus A350 XWB wings, which are structurally assembled at a facility in the United Kingdom, and from there transported by the Airbus Beluga carrier aircraft to a facility in Bremen, Germany where they are "fully equipped with the relevant systems", and then transported on the Airbus Beluga to the final assembly site in Toulouse, France.[535] In this regard, the United States contends that "these structures have neither all the fixed nor all the movable parts that the fully assembled A350 XWB wings have, and they must therefore undergo further assembly"[536], such that "what leaves the United Kingdom is a **[[BCI]]**".[537] The European Union further describes the transport of Airbus A380 wings "across long distances", with wings first produced in the United Kingdom and "then moved by road for a mile, placed on a specially built barge on the river, and finally transported by road to Toulouse".[538] The United States submits that, for the A380, what is shipped

[526] See, e.g. European Union's first written submission, paras. 74-75; Reuters, "Boeing seen in advanced talks to make 777X near Seattle", 4 November 2013 (Exhibit EU-65).
[527] United States' response to Panel question No. 16, para. 34.
[528] Ibid.
[529] Ibid. para. 35.
[530] Boeing expert statement (Exhibit USA-1) (BCI), fn 6.
[531] United States' response to Panel question No. 64, para. 40; response to Panel question No. 73; Mitsubishi Heavy Industries, Boeing 787 (Exhibit USA-42); Boeing Frontiers, "Wings Around the World", March 2006 (Exhibit USA-68); Boeing 787 customs invoice and related shipment documentation (Exhibit USA-67) (BCI).
[532] United States' response to Panel question No. 16, para. 35; Boeing expert statement (Exhibit USA-1) (BCI), para. 43 (explaining that **[[BCI]]** in comparison to 777X wings).
[533] See European Union's response to Panel question No. 33, para. 79; Boeing Presentation, "Introducing the 787", September 2011 (Exhibit EU-78); Boeingblogs, "Randy's Journal: Arrivals", 22 May 2007 (Exhibit EU-79); Boeing Video, "Boeing 747 Dreamlifter", 17 January 2009 (Exhibit EU-97); Boeing Frontiers, "The 747-400 will be transformed into an even larger freighter ", June 2005 (Exhibit EU-122).
[534] United States' response to Panel question No. 35, para. 80; Spirit AeroSystems, "Spirit celebrates completion of first Boeing 737 MAX fuselage", (Exhibit USA-52); European Union's response to Panel question No. 33, paras. 80-81.
[535] See European Union's response to Panel question No. 17, paras. 18-19; Airbus, "How is an aircraft built? Production" (Exhibit EU-84); Airbus Video, "The A350 XWB Final Assembly Line: efficiency in motion", 23 October 2012 (Exhibit EU-87).
[536] United States' response to Panel question No. 64, para. 47.
[537] Ibid. (citing Email from Erik Zahn, Boeing Commercial Airplanes, 15 April 2016 (Exhibit USA-73) (BCI).
[538] See European Union's response to Panel question No. 17, para. 22; BBC Documentary, "How to Build A Super Jumbo Wing", 24 August 2013 (Exhibit EU-91).

to Toulouse are **[[BCI]]**.[539] In this connection, the United States considers that "[t]here are at least some complete finished wings for single-aisle aircraft that fit on the transport aircraft [such as an Airbus Beluga or a Boeing Dreamlifter], **[[BCI]]**."[540] However, the United States contends that the same is not true for completely assembled wings of larger aircraft, including **[[BCI]]**.[541]

7.267. In addition, the European Union submits that "[m]anufacturing fuselages as intermediate goods before the final assembly of the aircraft is also the standard practice for Airbus", referring specifically to the production of the A320, the A350 XWB, and the A380.[542]

7.5.5.3 Other relevant facts on record

7.268. In accordance with the First Siting Provision in ESSB 5952, the availability of the aerospace tax measures at issue was conditional on a determination by the Department of Revenue of the state of Washington that a manufacturer had made a final decision, after 1 November 2013 but before 30 June 2017, to site a significant commercial airplane manufacturing programme in the state of Washington.

7.269. The "significant commercial airplane manufacturing program" necessary for the Department of Revenue's determination is one in which the following products, including final assembly, will commence manufacture: (i) a new model of a commercial airplane, or any version or variant of an existing model; and (ii) fuselages and wings of a new model of a commercial airplane, or of any version or variant of an existing model. The "new model" or "any version or variant of an existing model" of a commercial airplane is defined as "a commercial airplane manufactured with a carbon fiber composite fuselage or carbon fiber composite wings or both".

7.270. Boeing's 777X programme is the "significant commercial airplane manufacturing program", and the 777X is the new model of a commercial airplane, that satisfied the First Siting Provision. On 9 July 2014, Boeing notified the Department of Revenue of the state of Washington in writing that Boeing had made a final decision to manufacture the 777X airplane in the state of Washington. In its letter Boeing stated that this decision satisfied the requirement in ESSB 5952 that a significant commercial airplane manufacturing programme be sited in the state of Washington.[543] Three attachments accompanied Boeing's letter, as examples of "actions Boeing has taken consistent with its decision to manufacture the 777X in Washington".[544] The first attachment was a copy of a Collective Bargaining Agreement between Boeing and the International Association of Machinists and Aerospace Workers, AFL-CIO, containing a Letter of Understanding in which "Boeing 'agrees to locate the 777X wing fabrication and assembly, final assembly, and major components' in Puget Sound" (Washington State).[545, 546] **[[BCI]]**.[547, 548, 549]

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[539] United States' response to Panel question No. 64, para. 48 (citing Email from Erik Zahn, Boeing Commercial Airplanes, 15 April 2016 (Exhibit USA-73) (BCI).

[540] United States' response to Panel question No. 64, para. 41(citing Email from Erik Zahn, Boeing Commercial Airplanes, 15 April 2016 (Exhibit USA-73) (BCI).

[541] United States' response to Panel question No. 64, paras. 52-53.

[542] European Union's response to Panel question No. 33, para. 83; Airbus, "How is an aircraft built? Final assembly and tests" (Exhibit EU-86); Airbus Video, "The A350 XWB Final Assembly Line: efficiency in motion", 23 October 2012 (Exhibit EU-87); Airbus Video, "A350 XWB final assembly: a step-by-step overview", 23 October 2012 (Exhibit EU-88); Airbus Video, "A380 from dream to reality: Final assembly", 18 October 2007 (Exhibit EU-104).

[543] Boeing letter to the Director of the Washington State Department of Revenue, 9 July 2014 (Exhibit USA-32) (BCI). See also United States' response to Panel question No. 10, paras. 20-21.

[544] Boeing letter to the Director of the Washington State Department of Revenue, 9 July 2014 (Exhibit USA-32) (BCI).

[545] Ibid.

[546] See Letter of Understanding No. 43, Subject: 777X Work Placement, dated 3 January 2014, in Collective Bargaining Agreement between Boeing and the International Association of Machinists and Aerospace Workers, 2 November 2008, including Contract Extension and Modification Agreements, 7 December 2011 and 3 January 2014 (Exhibit USA-33), p. 190.

[547] Boeing letter to the Director of the Washington State Department of Revenue, 9 July 2014 (Exhibit USA-32) (BCI).

[548] Addendum No. 14 to the 1991 Boeing Everett Mitigation Decision Document SEPA #14-009, 27 March 2014 (Exhibit USA-34) (BCI).

[549] Addendum No. 15 to the 1991 Boeing Everett Mitigation Decision Document SEPA #14-011 – Composite Wing Manufacturing Facility, 30 May 2014 (Exhibit USA-35) (BCI).

7.271. The Washington State Department of Revenue accepted Boeing's statement as fulfilling the contingency requirements of the First Siting Provision in ESSB 5952. Subsequent to Boeing's letter, on 10 July 2014, the Department of Revenue issued a formal notification that a manufacturer had made a final decision to site a significant commercial airplane manufacturing programme in the state of Washington; that the contingency requirements in ESSB 5952 had been satisfied; and that the relevant legislation had taken effect on 9 July 2014.[550] As a result of this determination, the expiration date for the aerospace tax measures at issue was extended until 1 July 2040 for all eligible taxpayers, and the other amendments to those measures took effect.[551] As discussed above, pursuant to ESSB 5952 the Department of Revenue's determination is a one-time decision and there is no legal mechanism under Washington State law that would allow the Department of Revenue to revoke its determination.[552]

7.5.6 Whether the subsidies are *de jure* contingent upon the use of domestic over imported goods

7.272. The Panel turns to the European Union's principal claim, which is its *de jure* claim. In this regard, the Panel must determine whether the European Union has made a *prima facie* case that the challenged aerospace tax measures are *de jure* contingent upon the use of domestic instead of imported goods, and therefore inconsistent with the United States' obligations under Article 3.1(b) of the SCM Agreement. To prevail on its *de jure* claim, the European Union has the burden of demonstrating that such contingency or conditionality is either set out *expressly* on the face of the legislation or can clearly be derived, *by necessary implication*, from the words actually used in the legislation.[553]

7.273. In this regard, the Panel understands that a contingency that is not set out expressly in the relevant legislation may nevertheless be derived by necessary implication if such contingency results inevitably from the words actually used in the legislation, or if any other interpretation would be unreasonable.[554] In other words, the terms used in the legislation must either expressly or by necessary implication demonstrate that the granting of a subsidy is contingent upon the use of domestic instead of imported goods.[555] For the purpose of the *de jure* determination, including by necessary implication, the relevant facts are therefore the text of the legislation at issue and any additional facts that can assist the Panel in understanding the meaning of the terms as used in that legislation.[556]

7.274. As noted above, the ordinary connotation of the term "contingent" is "conditional" or "dependent for its existence on something else". Therefore, the question before the Panel is whether, on the basis of the words of the relevant legislation, the challenged aerospace tax measures are conditional upon the use of domestic over imported goods. Contingency upon the use of domestic over imported goods need not be the only condition; it can be one of several other

[550] Letter from the Director of the Washington State Department of Revenue to the Code Reviser, 10 July 2014 (Exhibit EU-61). See also United States' response to Panel question Nos. 10 and 12, paras. 21 and 26.

[551] United States' first written submission, para. 78 (citing letter from the Director of the Washington State Department of Revenue to the Code Reviser, 10 July 2014 (Exhibit EU-61)); response to Panel question No. 12, para. 26.

[552] See United States' response to Panel question No. 12, para. 26.

[553] As noted above (see paragraphs 7.209 and 7.210 above), the Appellate Body has indicated that *de jure* contingency can be established explicitly by a legal instrument and "also be derived by necessary implication from the words actually used in the measure". Appellate Body Report, *Canada – Autos*, para. 100. See also ibid. para. 123.

[554] The meaning of the word "necessary", when referring to a mental concept, a truth, a judgment, etc., can be understood to refer to something "resulting inevitably from the nature of things or of the mind itself". *Shorter Oxford English Dictionary*, 6th edition (2007), Vol. 2, p. 1901. A necessary implication is an implication so strong in its probability that anything to the contrary would be unreasonable. See *Black's Law Dictionary*, 8th edition (2004), p. 770.

[555] See Appellate Body Report, *Canada – Aircraft*, para. 171. See also European Union's response to Panel question No. 18, paras. 23-26.

[556] In the context of a *de jure* analysis, such facts could include relevant context within the legislation itself, or other clarifications of legal meaning within the domestic legal system in question (such as the interpretation of pertinent terms by domestic courts, or administrative regulations directly implementing the legislation). However, any such facts would serve to illuminate the meaning of words used in the legislation, and would not extend to other factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.

conditions for benefitting from the tax measures at issue. In order to find contingency in the sense of Article 3.1(b), such contingency must be a necessary condition so that the recipient would not benefit from the subsidy unless domestic goods are used instead of, or in preference to, imported goods.

7.275. The European Union asserts that the prohibited contingency is clearly set out in the text of ESSB 5952 as a result of the First Siting Provision and of the Second Siting Provision, whether considered individually or together.[557] In the European Union's view, each of these two provisions:[558]

> [*I*]*ndependently* results in a *de jure* violation of Article 3.1(b).[559] At the same time, these conditions act *together* to maximize trade distortions in favour of domestic goods, and to the detriment of competitive opportunities for imported goods. While the [First Siting Provision] focuses on component sourcing decisions made at the beginning of a new aircraft programme, the [Second Siting Provision] focuses on later stages.[560] (emphasis original)

7.276. The European Union adds that a prohibited contingency in respect of *wings* results from both the First Siting Provision and the Second Siting Provision, while a prohibited contingency in respect of *fuselages* would result solely from the First Siting Provision.[561]

7.277. With respect to the First Siting Provision, according to the European Union:

> [U]nder the [First Siting Provision] established in Section 2 [of ESSB 5952], the aerospace tax incentive extensions and expansion provided for in [ESSB 5952] were made contingent upon Boeing's decision to locate in Washington State both (i) production of the wings and fuselage for the 777X and (ii) final assembly of the 777X.[562, 563]

7.278. The European Union concludes:

> Stated differently, for the extension and expansion of the existing aerospace tax incentives to occur, Boeing was required to commit to use wings and fuselages produced or assembled in Washington State in the final assembly of 777X LCA in Washington State.[564]

7.279. With respect to the Second Siting Provision, the European Union asserts that:

> Pursuant to the exclusive-production condition established by [ESSB 5952] … the reduced [business and occupation] tax rate would not apply to revenue from the 777X *in the event* Boeing were to perform any final assembly, *or any wing assembly*, for the 777X outside of Washington State.[565] In other words, in order for Boeing to benefit from the [business and occupation] tax rate reduction with respect to the 777X

[557] European Union's first written submission, paras. 70 and 73; second written submission, paras. 1, 2, 41, 60, and 90; opening statement at the first meeting of the Panel, para. 6; closing statement at the first meeting of the Panel, para. 3; opening statement at the second meeting of the Panel, para. 2; response to Panel question Nos. 29, 41, 46, and 68, paras. 67, 98, 125, and 46.

[558] European Union's response to Panel question No. 68, para. 46.

[559] (footnote original) See, European Union's first written submission, para. 73 ("As a result of the programme-siting condition and the exclusive-production condition, *whether considered individually or together*, the Washington State tax incentives, as amended and extended by SSB 5952, constitute subsidies that are contingent on the use of domestic over imported goods, in violation of Articles 3.1(b) and 3.2 of the SCM Agreement". (emphasis added)).

[560] European Union's opening statement at the first meeting of the Panel, para. 6. See also European Union's response to Panel question No. 41, para. 98.

[561] European Union's response to Panel question No. 43, para. 101.

[562] (footnote original) See SSB 5952 Bill Report, Exhibit EU-4, p. 3.

[563] European Union's first written submission, para. 44.

[564] Ibid. See also European Union's second written submission, para. 61; opening statement at the first meeting of the Panel, para. 4.

[565] (footnote original) See SSB 5952 §§ 5-6 (adding new subsection (e)(ii) to RCW 82.04.260(11)), Exhibit EU-3.

> (whether prior to or after 2024), Boeing must not conduct any final assembly, or any wing assembly, of that aircraft outside of Washington State …
>
> Accordingly, under this exclusive-production condition, 777X aircraft benefit from the preferential [business and occupation] tax rate only if Boeing assembles the wings and assembles the aircraft exclusively in Washington State.[566] (emphasis original)

7.280. The United States has submitted particular facts relating to the production process of the 777X programme as evidence of the meaning of the requirements in the First and Second Siting Provisions.[567] The factual evidence referred to by the United States does not specifically relate to the meaning of the terms used in the legislation, nor does it concern the necessary implication of those terms. Rather, the evidence concerns the particular manner in which Boeing will produce 777X aircraft in Washington State.[568] In this regard, the Panel is not persuaded by the United States' argument that those facts relating to the siting of the 777X programme in Washington State are relevant to the *de jure* analysis. To the extent that this evidence sheds light on "the total configuration of the facts constituting and surrounding the granting of the subsidy"[569], the Panel will consider its relevance in the context of the European Union's *de facto* claim.

7.281. The Panel must decide the European Union's *de jure* claim against the aerospace tax measures on the basis of the text of ESSB 5952. The Panel will start its consideration of this claim by looking separately at the First Siting Provision and the Second Siting Provision to assess whether the European Union has successfully demonstrated the existence of the prohibited contingency in either of the provisions. Subsequently, if necessary, the Panel will consider the two siting provisions acting jointly.

7.5.6.1 The First Siting Provision, considered separately

7.282. The Panel recalls that, according to the First Siting Provision in Section 2 of ESSB 5952, the aerospace tax measures as amended and extended by ESSB 5952 "[take] effect contingent upon the siting of a significant commercial airplane manufacturing program in the state of Washington".[570] The legislation also provides that, "[i]f a significant commercial airplane manufacturing program is not sited in the state of Washington by June 30, 2017, … [this act] does not take effect".[571]

7.283. The Panel further recalls that the First Siting Provision defines "siting" to mean "a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington State".[572] In turn, "significant commercial airplane manufacturing program" is defined as:

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[566] European Union's first written submission, paras. 47 and 52. See also European Union's second written submission, para. 61.

[567] See, for example, United States' response to Panel question Nos. 18, 39, and 46, paras. 37-43, 93-94, and 121-122.

[568] The Panel notes the United States' argument that, "even under a *de jure* analysis, a panel must make sufficient findings as to how the alleged contingency operates, which may require findings as to how the contingency applies to actual subsidy recipients." See United States' response to Panel question No. 46, para. 116. The United States seeks support for this statement in the Appellate Body's analysis in *Canada – Autos*. The measures at issue in that case created "value-added requirements" that *de jure* were company-specific and capable of variation across the manufacturer beneficiaries. Thus, according to the explicit terms of "the legal instruments at issue [in that dispute] and their implications for individual manufacturers", there was a "multiplicity of possibilities for compliance" that may have been relevant to an analysis of *de jure* contingency. Appellate Body Report, *Canada – Autos*, paras. 130 and 132. This is distinguishable from the measures at issue in the present case, for which particular production choices by a manufacturer are not part of the *de jure* requirements of the measures, but rather form part of the surrounding factual circumstances of the alleged contingency.

[569] Appellate Body Report, *Canada – Aircraft*, para. 167.

[570] ESSB 5952 (Exhibit EU-3), Section 2, codified at RCW Section 82.32.850 (Exhibit EU-58). See also European Union's comments on United States' response to Panel question No. 53, para. 7.

[571] ESSB 5952 (Exhibit EU-3), Section 2, codified at RCW Section 82.32.850 (Exhibit EU-58).

[572] ESSB 5952 (Exhibit EU-3), Section 2(2)(d), codified at RCW Section 82.32.850(2)(d) (Exhibit EU-58).

> [A]n airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section:
>
> (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.[573]

7.284. The First Siting Provision additionally defines "new model, or any version or variant of an existing model, of a commercial airplane" to mean "a commercial airplane manufactured with a carbon fiber composite fuselage or carbon fiber composite wings or both".[574]

7.285. As to the procedures involved, according to Section 2 of ESSB 5952:

> The department [of Revenue of the state of Washington] must make a determination regarding whether the contingency in subsection (1) of this section occurs and must provide written notice of the date on which such contingency occurs and [this act] takes effect. If the department determines that the contingency in subsection (1) of this section has not occurred by June 30, 2017, the department must provide written notice stating that [this act] does not take effect. Written notice under this subsection (3) must be provided to affected parties, the chief clerk of the house of representatives, the secretary of the senate, the office of the code reviser, and others as deemed appropriate by the department.[575]

7.286. Based on the terms used in the legislation, the Panel understands that, for the aerospace tax measures to take effect, the First Siting Provision requires a determination by the Department of Revenue of the state of Washington that a final decision has been made, on or after 1 November 2013 and by 30 June 2017, to site a "significant commercial airplane manufacturing program" within the state of Washington. The legislation also defines the characteristics that the "significant commercial airplane manufacturing program" would have to fulfil to qualify for the Department of Revenue's positive determination. Those characteristics are, in essence, that the following products will "commence manufacture", "including final assembly", at a new or existing location within Washington State on or after the effective date of the legislation: (i) a new model of a commercial airplane or a version or variant of an existing model; and (ii) fuselages and wings for the new model of a commercial airplane or for the version or variant of an existing model.

7.287. In other words, the amendment and extension by ESSB 5952 of the aerospace tax measures are subject, for their entry into force, to a condition precedent or suspensive condition[576] − a contingency − contained in the same legislation. That contingency is a positive determination by the Department of Revenue of the state of Washington, that a "significant commercial airplane manufacturing program" had been sited, between 1 November 2013 and 30 June 2017, in the state of Washington. Such a determination in turn requires that a producer commit to *manufacture* within the state of Washington the two following categories of products: (i) a commercial airplane with a carbon fibre composite fuselage, or carbon fibre composite wings, or both; and (ii) fuselages and wings for such commercial airplanes.[577]

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[573] ESSB 5952 (Exhibit EU-3), Section 2(2)(c), codified at RCW Section 82.32.850(2)(c) (Exhibit EU-58).

[574] ESSB 5952 (Exhibit EU-3), Section 2(2)(b), codified at RCW Section 82.32.850(2)(b) (Exhibit EU-58).

[575] ESSB 5952 (Exhibit EU-3), Section 2, codified at RCW Section 82.32.850 (Exhibit EU-58).

[576] A condition precedent is an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. See *Black's Law Dictionary*, 8th edition (2004), p. 312. A suspensive condition is one that makes a certain obligation arise only if a specified but uncertain event occurs. See *Black's Law Dictionary*, 8th edition (2004), p. 313.

[577] A possible reading of the First Siting Provision is that the "significant commercial airplane manufacturing program" could consist of the manufacture (including final assembly) of a model of commercial airplane and the manufacture (including final assembly) of fuselages and wings of a *different* model of commercial airplane. In other words, under this reading, the fuselages and wings referred to in subparagraph (ii) of the provision would not need to correspond to the commercial airplane referred to in subparagraph (i). Neither party has advanced such a reading. Moreover, such a reading would assume that the

7.288. The European Union interprets the terms of the First Siting Provision as requiring Boeing "to commit to use wings and fuselages produced or assembled in Washington State in the final assembly of 777X [large civil aircraft] in Washington State".[578] According to the European Union, "[i]f Boeing had not committed to using US-made wings and fuselages [it would have] thereby failed to satisfy the [First Siting Provision]".[579]

7.289. The Panel's reading of the text of the First Siting Provision is different. On its face, the First Siting Provision imposes a condition for certain tax benefits to take effect for a range of beneficiaries; namely, that the competent authority (the Washington State Department of Revenue) makes a one-time determination that a manufacturer has made a final decision to site a significant commercial airplane manufacturing programme in the state of Washington.

7.290. Nowhere in the words used in the First Siting Provision does the Panel find a requirement that makes the entry into force of the challenged measures contingent upon a determination that domestic goods will be used instead of imported products. Nor do the terms of the First Siting Provision impose any such requirement in respect of the "significant commercial airplane manufacturing program" that would be the basis for the Department of Revenue's determination. To the contrary, the First Siting Provision is silent as to the use of imported or domestic goods and does not make the receipt of subsidies dependent on refraining from using imported goods.

7.291. Nor can a prohibited import-substitution contingency be derived by necessary implication from the language of the First Siting Provision, in the sense that it would result inevitably from the words actually used in the legislation, or that any other interpretation would be unreasonable. The Panel sees nothing in the language of the siting contingency contained in the First Siting Provision that would *per se* and necessarily exclude the possibility for the airplane manufacturer to use wings or fuselages from outside the state of Washington[580] (if, for example, it continued manufacturing *some* fuselages and wings in the state of Washington, with the additional use of fuselages and wings that were manufactured separately elsewhere). Moreover, as a condition involving a one-time decision, the First Siting Provision in itself would not prevent the manufacturer over time, and subsequent to the Department of Revenue's determination, terminating all production of wings or fuselages and only using wings and fuselages manufactured outside the state of Washington.

7.292. The Panel is mindful of the strict limitation of a *de jure* analysis to the terms actually used in the measure at issue (and any relevant facts illuminating the meaning of those words), as well as of the specific focus of the contingency that is prohibited under Article 3.1(b), namely the requirement to use domestic goods instead of imported goods. In assessing the meaning of municipal law a panel may be assisted by "evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars"[581], as well as the "relevant practices of administering agencies".[582] In this case, no such evidence has been presented that would alter the Panel's assessment of the First Siting Provision for the purposes of the European Union's *de jure* claim.

7.293. The contingency set out in the terms of the First Siting Provision is not that products manufactured in the state of Washington (wings or fuselages) must be *used* in the manufacturing of commercial airplanes as a condition for receiving the subsidies, but rather that the

references to a "significant commercial airplane manufacturing program" and to a "new model, or any version or variant of an existing model, of a commercial airplane" can include two different commercial airplane models. Despite this theoretical possibility based on the terms of the First Siting Provision, such assumptions do not seem persuasive. The manufacturing activities referred to in the First Siting Provision are part of a single "manufacturing program" that is sited based on a decision taken by "a manufacturer", and there is no compelling evidence in the text of the measure or its context to suggest that this programme could involve more than one model of commercial airplane. Therefore, the Panel proceeds on the basis that the reference to fuselages and wings in subparagraph (ii) is to the same model of commercial airplane contemplated in subparagraph (i).

[578] European Union's first written submission, para. 44. See also European Union's second written submission, para. 61; opening statement at the first meeting of the Panel, paras. 53-54 and 68; opening statement at the second meeting of the Panel, para. 3.

[579] European Union's opening statement at the first meeting of the Panel, para. 68. See also ibid. para. 4; European Union's second written submission, para. 61.

[580] Assuming *arguendo* that the manufacturer could use wings or fuselages manufactured separately.

[581] Appellate Body Report, *US – Carbon Steel*, para. 157.

[582] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

manufacturing (including by final assembly) of all of these products be *sited* within the state of Washington. The terms actually used in the provision do not preclude a scenario in which separately produced wings and fuselages were "used" in the manner alleged by the European Union, i.e. that wings and fuselages manufactured in the state of Washington were "used" in the final assembly of 777X commercial airplanes in the state of Washington. That such a scenario may be possible on the basis of terms used in the First Siting Provision, however, is not the same as concluding that it is a requirement or condition for the subsidies that necessarily derives from those terms.

7.294. One other possible and equally reasonable reading of the terms of the First Siting Provision would allow the manufacturer to benefit from the subsidies if it used wings and fuselages manufactured outside the state of Washington in the final assembly of 777X commercial airplanes in the state of Washington, so long as it manufactured at least some wings and fuselages in the state of Washington. Another possible and also reasonable reading of the terms of the First Siting Provision, as mentioned above, would allow the manufacturer to benefit from the subsidies even if it stopped manufacturing fuselages, wings, and even commercial airplanes in the state of Washington, as the First Siting Provision involves a one-time decision on the initial establishment, but not the continuation, of certain manufacturing activities.

7.295. Furthermore, and related to the above argument by the European Union, the Panel notes that there is a discrepancy between the parties whether the First Siting Provision requires the same entity to manufacture both the commercial airplane and the fuselages and wings. In particular, the European Union has argued that "the [First Siting Provision] could have been satisfied if Boeing had planned to purchase wings and fuselages produced by another entity in Washington State.[583] Conversely, the United States has submitted that "the text of ESSB 5952 clearly contemplates a single manufacturer, and Washington officials have confirmed to the United States that this was the only scenario they contemplated".[584] The Panel notes that the terms of the First Siting Provision refer to "a significant commercial airplane manufacturing program" in which a commercial airplane, as well as fuselages and wings, are manufactured. The First Siting Provision also refers to "a manufacturer" that would have to decide to locate the significant commercial airplane manufacturing programme in the state of Washington.[585] Because the "manufacturing program" is the one and same programme, this strongly suggests that the manufacturer involved, namely the "manufacturer" referenced in the First Siting Provision, is the same manufacturer that would decide to site the programme in the state of Washington. In any event, regardless of the number of manufacturers that could satisfy the First Siting Provision, the terms of the provision in no case condition, either explicitly or by necessary implication, the availability of subsidies on the use of domestic over imported goods by the manufacturer or manufacturers involved. Thus, even if the First Siting Provision could have been satisfied by two different entities siting two different operations in the state of Washington, this situation would neither expressly require nor necessarily imply that domestic goods instead of imported goods would have to be used by either entity.

7.296. Accordingly, the Panel finds that a contingency upon the use of domestic over imported products is neither set out expressly in the First Siting Provision, nor can it be derived by necessary implication, in the sense that it results inevitably, from the terms used in this provision.[586] The contingency on siting certain production activities within the state of Washington does not entail any explicit, or any necessarily implied, requirement to use domestic goods.

7.297. For the reasons explained above, the Panel concludes that the European Union has not demonstrated that, on its own, and based on its express terms, the First Siting Provision makes the challenged aerospace tax measures *de jure* contingent upon the use of domestic over imported goods.

[583] European Union's opening statement at the first meeting of the Panel, para. 60.
[584] United States' response to Panel question No. 62, para. 35. See also United States' response to Panel question Nos. 38, 45, and 70, paras. 91, 111, and 83.
[585] See also, for example, United States' response to Panel question No. 38, paras. 91-92.
[586] Whether this contingency is demonstrated by other evidence is something that the Panel will discuss in relation to the European Union's *de facto* claim below.

7.5.6.2 The Second Siting Provision, considered separately

7.298. The Panel recalls that the Second Siting Provision in Sections 5 and 6 of ESSB 5952 relates only to the B&O aerospace tax rate and provides as follows:

> With respect to the manufacturing of commercial airplanes or making sales, at retail or wholesale, of commercial airplanes, this subsection (11) does not apply on and after July 1st of the year in which the department [of Revenue of the state of Washington] 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 section 2 of this act has been sited outside the state of Washington. This subsection (11)(e)(ii) only applies to the manufacturing or sale of commercial airplanes that are the basis of a siting of a significant commercial airplane manufacturing program in the state under section 2 of this act.[587]

7.299. In other words, the 0.2904% B&O aerospace tax rate as amended and extended by ESSB 5952 is subject to a condition subsequent or resolutory condition[588], i.e. this tax rate would cease to apply under certain defined circumstances. In particular, this condition would be activated, and the B&O aerospace tax rate terminated in respect of the manufacturing or sale of airplanes that had satisfied the First Siting Provision, if any final assembly (of an airplane) or wing assembly that was the object of a positive siting determination by the Department of Revenue of the state of Washington under the First Siting Provision, is subsequently sited outside the state of Washington.

7.300. According to the European Union, "under this [Second Siting Provision], 777X aircraft benefit from the preferential B&O tax rate only if Boeing assembles the wings and assembles the aircraft exclusively in Washington State".[589] The European Union adds that, pursuant to this provision, "if Boeing opts, for example, to purchase any 777X wings from outside Washington State, it will be penalized through loss of the B&O tax rate reduction for all revenue related to sales of the 777X".[590]

7.301. As noted in the text of the Second Siting Provision, this provision "only applies to the manufacturing or sale of commercial airplanes that are the basis of a siting of a significant commercial airplane manufacturing program in the state under section 2 of this act", that is, under the First Siting Provision. Furthermore, by its terms, the Second Siting Provision applies only to the challenged B&O aerospace tax rate, which in turn is one of the seven aerospace tax measures that would take effect upon satisfaction of the First Siting Provision. Because the First Siting Provision defines what is referred to in the Second Siting Provision, the terms used in the Second Siting Provision necessarily draw their meaning from the terms of the First Siting Provision, including the events contemplated therein.

7.302. The Panel notes some variation in the usage of the verb "site" in the First and Second Siting Provisions, as well as potential discrepancies in the "assembly" activities that are the subject of siting in each provision. The term "siting" is defined in the First Siting Provision as "a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington State". Section 2 of ESSB 5952 notes that the "definitions in this subsection apply throughout [the] section unless the context clearly requires otherwise". In this connection, the context of the First Siting Provision is different to that of the Second Siting Provision as it refers to "the siting of a significant commercial airplane manufacturing program", which in turn is "an airplane program in which" an airplane model,

[587] ESSB 5952 (exhibit EU-3), Sections 5 and 6, codified at RCW Section 82.04.260(11)(e)(ii) (Exhibit EU-22).

[588] A condition subsequent is one that, if it occurs, will bring something else to an end; an event the existence of which discharges a duty of performance that has arisen. See *Black's Law Dictionary*, 8th edition (2004), p. 312. A resolutory condition is one that upon fulfilment terminates an already enforceable obligation. See *Black's Law Dictionary*, 8th edition (2004), p. 313.

[589] European Union's first written submission, para. 52. See also European Union's second written submission, para. 61.

[590] European Union's first written submission, para. 51. See also European Union's second written submission, para. 61; opening statement at the first meeting of the Panel, paras. 61 and 68; opening statement at the second meeting of the Panel, para. 3.

fuselages, and wings are "products [that], including final assembly, will commence manufacture" in Washington State. By contrast, the Second Siting Provision does not use the term "final assembly" in conjunction with the "manufacture" of the products listed in the First Siting Provision, but rather as a discrete activity along with "wing assembly" that the Department of Revenue may determine "has been sited" outside Washington State. In the context of the Second Siting Provision, the term "final assembly" thus seems to pertain to final *aircraft* assembly, as distinguished from wing assembly, whereas "final assembly" in the First Siting Provision appears to refer to a stage or aspect of the manufacturing process of all "products" listed therein. In any event, and apart from these contextual differences of the term "final assembly", the Panel considers that the expression "has been sited" (used in the Second Siting Provision in the passive tense) is consonant with the definition of "siting" in the First Siting Provision. In particular, the reference in the Second Siting Provision to a programme having been "sited" is related to a manufacturer's decision to locate the relevant manufacturing and assembly activities in or outside Washington State.

7.303. As indicated above, the Second Siting Provision explicitly provides that the B&O aerospace tax rate will cease to apply if an assembly operation that had been sited in the state of Washington is subsequently "sited outside the state of Washington". Under the terms of the relevant legislation, to "site" is related to a manufacturer's decision to locate a manufacturing programme in a particular location.

7.304. The European Union asserts that, under the Second Siting Provision, the B&O aerospace tax rate would only continue in force "if Boeing assembles the wings and assembles the aircraft exclusively in Washington State".[591] The European Union adds that, pursuant to this provision, if Boeing purchases any 777X wings from outside the state of Washington, it would lose the B&O aerospace tax rate for all revenue related to sales of the 777X aircraft.[592]

7.305. Such conclusions, however, do not result explicitly from the terms of the Second Siting Provision. On its face, the Second Siting Provision is silent as to the use of imported or domestic goods and does not make the receipt or continued enjoyment of subsidies dependent on refraining from using imported products. The Panel finds no express indication in the terms of the provision that the subsidy provided by the B&O aerospace tax rate would be lost by importing wings, as alleged by the European Union. In particular, the contingency contemplated in the Second Siting Provision relates to 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". Based purely on the wording of this statutory contingency, the terms "any final assembly or wing assembly" are explicitly tied, and arguably limited, to the specific assembly operations that were "the basis of a siting" under the First Siting Provision. Thus, the terms of the Second Siting Provision could rather be understood to address the situation in which production activities that had been previously sited in the state of Washington, and had been the basis of the determination by the Department of Revenue pursuant to the First Siting Provision, were subsequently sited outside the state of Washington. Seen in this light, the words of the Second Siting Provision do not expressly condition the receipt of a subsidy on the use of domestic over imported goods. On its face, the Second Siting Provision, as long as production activities of the defined type continue to take place in the state of Washington, does not require that the goods for that production (whether they be wings or anything else) need to be sourced *only* from within the state of Washington.

7.306. Nor can an import-substitution contingency be derived by necessary implication from the words of the Second Siting Provision, in the sense that such a contingency would result inevitably from the words actually used in the legislation, or that any other interpretation would be unreasonable. That is, the siting contingency contained in the Second Siting Provision would not *per se* and necessarily exclude the possibility for the airplane manufacturer to use wings from outside the state of Washington (assuming *arguendo* that the manufacturer could use wings

[591] European Union's first written submission, para. 52. See also European Union's second written submission, para. 61.

[592] European Union's first written submission, para. 51. See also European Union's second written submission, para. 61; opening statement at the first meeting of the Panel, paras. 61 and 68; opening statement at the second meeting of the Panel, para. 3.

manufactured separately), as long as it did not relocate the previously sited manufacturing of wings outside the state of Washington.

7.307. The Panel recalls the strict limitation of a *de jure* analysis to the terms actually used in the measure at issue and any relevant facts that illuminate the meaning of those terms in their particular context. The Panel also recalls the specific focus of the contingency that is prohibited under Article 3.1(b), namely a requirement to "use" domestic instead of imported goods. As noted above[593], in assessing the meaning of municipal law a panel may also be assisted by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts, the writings of recognized scholars, as well as the relevant practices of administering agencies. In this case, no such evidence has been presented that would alter the Panel's assessment of the Second Siting Provision for the purposes of the European Union's *de jure* claim.

7.308. The contingency set out in the Second Siting Provision is not that products manufactured in the state of Washington (wings) must be "used" in the manufacturing of commercial airplanes as a condition for the subsidy, but rather that the manufacturing (including by final assembly) of all these products not be sited outside the state of Washington.

7.309. If the Second Siting Provision is construed as relating to the relocation of a manufacturing programme previously sited under the First Siting Provision, it would not inevitably result from the terms of the Second Siting Provision that domestic goods must be used over imports. Another reading of the terms of the Second Siting Provision would allow the manufacturer in question to continue to benefit from the subsidy if it used wings manufactured outside the state of Washington in the final assembly of the commercial airplanes in question in the state of Washington, so long as it maintained final and wing assembly previously sited in the state of Washington.

7.310. In sum, and contrary to what the European Union asserts, the Second Siting Provision does not indicate on its face that the B&O aerospace tax rate would cease to apply if the aircraft manufacturer in question "uses" imported products instead of domestic products. Moreover, it does not inevitably result from the terms of the Second Siting Provision that the importation of wings would amount to the "siting" of production activities outside the state of Washington, even if such an outcome is not excluded by the text of the Second Siting Provision. No express or obvious contingency results from the terms used in the provision, nor can one be derived inevitably from its terms.

7.311. For the reasons explained above, the Panel concludes that the European Union has not demonstrated that the Second Siting Provision, on its own, and based on its express terms, makes the challenged B&O aerospace tax rate *de jure* contingent upon the use of domestic instead of imported goods.

7.5.6.3 The First Siting Provision and the Second Siting Provision, considered jointly

7.312. The European Union asserts that, taken together, the First Siting Provision and the Second Siting Provision expressly condition all of the challenged aerospace tax measures "on the use of domestic over imported goods in the final assembly of the aircraft, in violation of Articles 3.1(b) and 3.2 of the SCM Agreement".[594] The European Union adds that these siting provisions "act *together* to maximize trade distortions in favour of domestic goods and to the detriment of competitive opportunities for imported goods. While the [First Siting Provision] focuses on component sourcing decisions made at the beginning of a new aircraft programme, the [Second Siting Provision] focuses on later stages".[595]

7.313. As noted above, the First Siting Provision and the Second Siting Provision, respectively, set out a condition for the activation of certain tax measures contained in the legislation, and a condition under which one of those tax measures (i.e. the B&O aerospace tax rate) would cease to apply. More specifically, in accordance with these provisions:

[593] See para. 7.294 above.
[594] European Union's first written submission, para. 76. See also ibid. para. 73.
[595] European Union's opening statement at the first meeting of the Panel, para. 6. (emphasis original) See also European Union's response to Panel question Nos. 31 and 41, paras. 71 and 98.

a. the entry into force of the amendments and extensions to the aerospace tax measures requires a determination by the Department of Revenue of the state of Washington that a final decision has been made to site within that state a "significant commercial airplane manufacturing program", which would include the manufacture, including the final assembly of: (i) a new model of a commercial airplane or a version or variant of an existing model; and (ii) fuselages and wings for a new model of a commercial airplane or for a version or variant of an existing model; and

b. one of the challenged aerospace tax measures (namely the 0.2904% B&O aerospace tax rate) would cease to apply if the Department of Revenue of the state of Washington makes a determination that any final assembly of airplanes or wing assembly that had been sited in the state of Washington, in accordance with the First Siting Provision, has subsequently been "sited outside the state of Washington".

7.314. On their face, the two siting provisions, and the respective conditions contained therein, provide for the "siting" of certain manufacturing activities within the state of Washington as a condition for the enjoyment of a number of tax benefits and seek to prevent certain manufacturing activities that had been sited within the state of Washington being subsequently sited outside the state of Washington. Under the terms of the First Siting Provision, the term "siting" refers to a manufacturer's decision to locate a manufacturing programme (the "significant commercial airplane manufacturing program") in a particular location (in the state of Washington).

7.315. As the Panel has found above, the First Siting Provision and the Second Siting Provision are silent as to the use of imported or domestic goods. On their face, these provisions do not make the receipt or continued enjoyment of subsidies dependent on refraining from using imported products. Such conditionality does not result explicitly from the terms of the provisions, nor can it be derived by necessary implication, in the sense that it results inevitably, from such terms. On a *de jure* basis these provisions do not speak of "component sourcing decisions"[596], but of the location of certain manufacturing activities.

7.316. Furthermore, while the Second Siting Provision pertains explicitly to the "sited" programme that would have satisfied the First Siting Provision, this textual link between the two siting provisions adds nothing to the *de jure* analysis of each of the provisions separately that the Panel has already conducted. Considering them jointly does not produce any elements that might have been obscured by considering them separately. Therefore, the Panel finds that the terms of the First Siting Provision and the Second Siting Provision, taken together, do not condition the challenged aerospace tax measures on the use of domestic over imported goods. Whether *in practice*, as also argued by the European Union, these two siting provisions act together to create a contingency on the use of domestic goods over imported goods, is something that the Panel will turn to as part of its consideration of the European Union's *de facto* claim against the measures at issue.

7.317. Accordingly, the Panel concludes that the European Union has not demonstrated that, acting together, the First Siting Provision and the Second Siting Provision make the challenged aerospace tax measures *de jure* contingent upon the use of domestic over imported goods.

7.5.7 Whether the subsidies are *de facto* contingent upon the use of domestic over imported goods

7.318. The Panel has found that the European Union has failed to establish that the challenged aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods. The Panel will now consider the European Union's secondary claim, i.e. that the aerospace tax measures at issue are inconsistent with Article 3.1(b) of the SCM Agreement by being *de facto* contingent upon the use of domestic over imported goods. In its assessment of this claim, the Panel will determine whether the contingency or conditionality of the aerospace tax measures on the use of domestic goods instead of imported goods, even if not set out *expressly* in the legislation, including by necessary implication, is demonstrated by the facts of the case.

[596] See, for example, European Union's opening statement at the first meeting of the Panel, para. 6; response to Panel question Nos. 31 and 41, paras. 71 and 98.

7.5.7.1 Legal standard

7.319. There are no specific precedents on the criteria that would guide the Panel's determination of a *de facto* import substitution contingency under Article 3.1(b). However, as discussed above, the Appellate Body has referred to elements that would be considered for a *de facto* determination of export contingency under Article 3.1(a). For the reasons explained above, these elements are also relevant for a contingency determination under Article 3.1(b).[597]

7.320. In summary, the legal standard expressed by the word "contingent" is the same for both *de jure* or *de facto* contingency.[598] However, there is a difference in the type of evidence that may be employed to establish *de jure* or *de facto* contingency. *De jure* contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument. The evidence needed to establish *de facto* contingency goes beyond the relevant legal instruments and includes a variety of factual elements concerning the granting of the subsidy in a specific case.[599] *De facto* contingency must be established from the total configuration of the facts constituting and surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure granting the subsidy, none of which on its own is likely to be decisive in any given case.[600] That configuration of the facts may include the following factors: (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.[601] Moreover, the determination of contingency must be based on an assessment of *the subsidy itself*, in the light of the relevant factual circumstances, rather than by reference to the granting authority's subjective motivation for the measure. Reviewable expressions of a government's policy objectives for granting a subsidy may, however, constitute relevant evidence in the inquiry.[602]

7.321. For the Panel to find a violation of Article 3.1(b) of the SCM Agreement, the European Union will need to make a *prima facie* case that the aerospace tax measures are granted subject to the condition that domestic products must be used instead of, or in preference to, imported products. It would not be sufficient to demonstrate, for example, that a subsidy is being granted to a firm that uses domestic instead of imported goods or even that the subsidy would negatively affect the competitive opportunities of foreign producers. Such facts would not in themselves support a determination that the challenged measures are subject to a prohibited contingency (although they might be relevant in the context of actions pursuant to Parts III and V of the SCM Agreement). Rather, the European Union will need to demonstrate that there is something about the design and structure of the challenged measures and their operation, in the circumstances in which the measures have been introduced and exist, that establishes the contingency, and does so with the requisite standard of certainty. The Panel recalls, in this regard, the Appellate Body's warning against blurring "the line drawn by the [SCM] Agreement between *prohibited* … subsidies and *actionable* … subsidies", in a manner "contrary to the overall design and structure of the Agreement".[603]

7.5.7.2 The Panel's approach to address the European Union's claim

7.322. The European Union asserts that the text of ESSB 5952, and in particular the language of the First Siting Provision and the Second Siting Provision, is the most important fact on record and the best evidence of the design, structure, and modalities of operation of the challenged subsidies and the associated contingencies.[604]

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[597] See Appellate Body Report, *Canada – Autos*, para. 123. See also paras. 7.211 and 7.212 above.
[598] Appellate Body Report, *Canada – Aircraft*, para. 167.
[599] Ibid. and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1038.
[600] Appellate Body Reports, *Canada – Aircraft*, para. 167; *EC and certain member States – Large Civil Aircraft*, para. 1051.
[601] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1046.
[602] Ibid. paras. 1051-1052.
[603] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1054. (emphasis original)
[604] European Union's response to Panel question Nos. 29 and 68, paras. 29 and 45-46. See also European Union's second written submission, paras. 90-91.

7.323. In addition to the text of ESSB 5952, the European Union cited the following four factors in support of its *de facto* claim: first, statements and testimony by the Governor of the state of Washington, referring to the "contingency language" included in the legislation[605]; second, that Boeing imports wings from Japan for its 787 aircraft[606]; third, that, prior to the enactment of ESSB 5952, Boeing would have considered the possibility of importing wings from Japan for its 777X aircraft and decided against that option once ESSB 5952 was enacted[607]; and fourth, that ESSB 5952 "creates specific multi-billion dollar *penalties* for use of imported wings or fuselages, and multi-billion dollar *rewards* for use of domestic wings or fuselages".[608]

7.324. The European Union submits that the First Siting Provision and the Second Siting Provision in ESSB 5952 are each capable of strongly influencing Boeing's choice between imported wings and fuselages, and domestic (United States-produced) wings and fuselages for the 777X airplanes.[609] The European Union asserts that the amount of the subsidies at issue exceeds the total development cost of the 777X airplanes, and would therefore overshadow any other factors that may favour a decision by Boeing to import wings and fuselages for 777X airplanes.[610] The European Union maintains that the First Siting Provision and the Second Siting Provision acting together would maximize trade distortions in favour of domestic goods and to the detriment of imported goods, which suggests that the challenged measures are geared to induce the use of domestic over imported goods.[611]

7.325. In response, the United States asserts that the European Union has failed to establish that the aerospace tax measures at issue are *de facto* contingent upon the use of domestic over imported goods, because the European Union has not demonstrated that the use of domestic goods is required as a condition for eligibility for the subsidies.[612] According to the United States, none of the factual evidence referred to by the European Union (the text of ESSB 5952; the statement of the Governor of the state of Washington; Boeing's alleged importation of wings from Japan for its 787 airplanes; Boeing's alleged consideration of importing wings from Japan for its 777X airplanes; and the alleged system of rewards and penalties in ESSB 5952) supports its claim that the measures are *de facto* contingent.[613]

7.326. The United States argues that Boeing has fulfilled the First Siting Provision and has avoided triggering the Second Siting Provision without the use of domestic over imported goods.[614] According to the United States, Boeing does not "use" domestic wings and fuselages and instead completes the assembly of wings and fuselages as part of the final assembly of the finished airplane.[615] The United States adds that the measures in ESSB 5952 have had no effect on Boeing's make/buy decisions nor on its decision on where to site the assembly of fuselages and

[605] European Union's second written submission, para. 91; response to Panel question Nos. 29 and 68, paras. 67 and 45 and 47. See also Office of Washington Governor, "Legislature approves key elements of 777X incentive package", 10 November 2013 (Exhibit EU-59); and Washington State House Finance Committee, Video, "Testimony of Governor Inslee before House Finance Committee", 7 November 2013 (Exhibit EU-110).

[606] European Union's first written submission, para. 75; second written submission, paras. 91 and 95-96; opening statement at the first meeting of the Panel, paras. 66-67; response to Panel question Nos. 29 and 68, paras. 67 and 45 and 48.

[607] European Union's second written submission, para. 91; opening statement at the first meeting of the Panel, para. 73; response to Panel question Nos. 29 and 68, paras. 67 and 45 and 48. See also Reuters, "Boeing hopeful of 777X deal, may build wings in Japan if rejected", 11 November 2013 (Exhibit EU-83).

[608] European Union's second written submission, para. 91; opening statement at the first meeting of the Panel, para. 74; response to Panel question Nos. 29, 31, and 68, paras. 67, 70, and 45. (emphasis original) See also European Union's second written submission, para. 2; response to Panel question Nos. 33 and 68, paras. 71, 85, and 46.

[609] European Union's first written submission, para. 77; second written submission, para. 90. See also European Union's second written submission, para. 91; opening statement at the first meeting of the Panel, paras. 67-69 and 72-73; response to Panel question No. 29, paras. 66-67; Reuters, "Boeing seen in advanced talks to make 777X near Seattle", 4 November 2013 (Exhibit EU-65).

[610] European Union's second written submission, para. 90. See also ibid, para. 91; opening statement at the first meeting of the Panel, para. 73; response to Panel question No. 29, paras. 66-67; Reuters, "Boeing seen in advanced talks to make 777X near Seattle", 4 November 2013 (Exhibit EU-65).

[611] European Union's first written submission, paras. 77-78; opening statement at the first meeting of the Panel, paras. 6 and 70-74; response to Panel question Nos. 30, 31 and 41, paras. 68-71 and 98.

[612] United States' second written submission, para. 58.

[613] United States' second written submission, paras. 78-83.

[614] Ibid. para. 58.

[615] United States' second written submission, paras. 59-63. See also response to Panel question No. 64, para. 56.

wings.[616] The United States contends that the European Union has failed to establish that the challenged measures are geared to induce the use of domestic over imported goods.[617] The United States submits that, provided it conducts the requisite assembly activity in the state of Washington, Boeing would satisfy the First Siting Provision and avoid triggering the Second Siting Provision even if it imported every part of the 777X airplane; Boeing therefore would be receiving no rewards for increasing the use of domestic inputs on the 777X airplane, nor would it be penalized for increasing the use of imported inputs.[618] Finally, the United States argues that, if the challenged measures are not found to be *de jure* contingent upon import substitution, to show that they are *de facto* contingent upon import substitution would typically involve at a minimum showing that the measures are having an import substitution effect.[619]

7.327. In its assessment of the European Union's *de facto* claim against the challenged aerospace tax measures, the Panel will consider whether the text of the relevant legislation, the factors cited by the European Union, and other evidence on the record, support the European Union's assertion that the aerospace tax measures are contingent upon the use of domestic over imported goods. The Panel's *de facto* analysis must go beyond the text of the legislation and will be based on a holistic examination of all the available evidence. The Panel will consider in this regard the total configuration of the facts constituting and surrounding the granting of the subsidies, such as: (i) the design and structure of the measures; (ii) the modalities of operation set out in such measures; and (iii) the relevant factual circumstances surrounding the granting of the subsidies that provide the context for understanding the measures' design, structure, and modalities of operation.

7.328. The Panel recalls that, with respect to the European Union's *de jure* claim, the Panel started by analysing the First Siting Provision and the Second Siting Provision, each considered separately, and subsequently considered the two siting provisions acting jointly.[620] Because the consideration of the European Union's *de jure* claim focused on the terms of the legislation, the Panel considered it appropriate to look at the siting provisions separately and to look subsequently at both provisions jointly. This approach was consistent with the manner in which the European Union directed its *de jure* claim at the provisions "whether considered individually or together".[621] The European Union further clarified its argument as follows:

> To be clear, the European Union understands that each condition [First Siting Provision and Second Siting Provision] *independently* results in a *de jure* violation of Article 3.1(b). At the same time, these conditions act *together* to maximize trade distortions in favour of domestic goods, and to the detriment of competitive opportunities for imported goods.[622] (emphasis original; footnote omitted)

7.329. With respect to its *de facto* claim, the European Union has asserted that the First Siting Provision and the Second Siting Provision in ESSB 5952 "are each capable of strongly influencing Boeing's choice between imported wings and fuselages, and US-produced wings and fuselages, for the 777X [airplanes]".[623] In contrast, in articulating its arguments in support of its *de facto* claim, the European Union has consistently referred to the joint operation of the two siting provisions.[624]

7.330. For purposes of determining the practical operation of the challenged measures, the Panel considers that it would be artificial to look at the siting provisions separately. Not only are both

[616] United States' second written submission, paras. 64-71 and 84.
[617] United States' first written submission, paras. 105 and 132-140; second written submission, paras. 72-74; response to Panel question No. 30, paras. 65-67.
[618] United States' second written submission, paras. 75-77.
[619] United States' response to Panel question No. 74, para. 111.
[620] See para. 7.283 above.
[621] European Union's first written submission, para. 73; second written submission, para. 60; opening statement at the first meeting of the Panel, para. 6, fn 8.
[622] European Union's opening statement at the first meeting of the Panel, para. 6.
[623] European Union's second written submission, para. 90. See also European Union's first written submission, para. 77; second written submission, para. 91; opening statement at the first meeting of the Panel, paras. 72-73; response to Panel question No. 29, paras. 66-67; Reuters, "Boeing seen in advanced talks to make 777X near Seattle", 4 November 2013 (Exhibit EU-65).
[624] European Union's second written submission, paras. 91, 98; opening statement at the first meeting of the Panel, paras.67, 70-74; response to Panel question Nos. 31, 41, 68, and 76, paras. 70-71, 98, 45, and 55.

provisions part of the same legal instrument (ESSB 5952), in practice both operate together in regulating the conditions for obtaining and then maintaining access to the subsidies at issue in this dispute. Recalling the textual linkage in the legislation of the two siting provisions (the reference in the Second Siting Provision to the significant commercial airplane programme that had satisfied the First Siting Provision), the First Siting Provision having been satisfied by Boeing's 777X siting decision, the joint operation in practice of the two siting provisions can be examined and, as a practical matter, their operation cannot at this point be dissociated.

7.331. The Panel will therefore consider the manner in which the measures at issue are structured, designed, and operate, under the terms of ESSB 5952, and as a result of the First Siting Provision and the Second Siting Provision. As noted, this approach is consistent with the manner in which the European Union has articulated its *de facto* claim, namely by reference to the joint operation of the two siting provisions.

7.5.7.3 The First and Second Siting Provisions

7.332. The Panel recalls that, based on the terms used in the legislation, for the aerospace tax measures to take effect, the First Siting Provision requires a determination by Washington State's Department of Revenue that a final decision has been made, on or after 1 November 2013 and no later than 30 June 2017, to site a "significant commercial airplane manufacturing program" within the state of Washington. The legislation also defines the characteristics that the "significant commercial airplane manufacturing program" would have to fulfil to qualify for the Department of Revenue's positive determination. Those characteristics are, in essence, that the following products will "commence manufacture", "including final assembly", at a new or existing location within Washington State on or after the effective date of the legislation: (i) a new model of a commercial airplane or a version or variant of an existing model; and (ii) fuselages and wings for a new model of a commercial airplane or for a version or variant of an existing model.

7.333. In turn, based on the terms used in the legislation, the B&O aerospace tax rate will cease to apply in respect of "the manufacturing or sale of commercial airplanes" that had satisfied the First Siting Provision if Washington State's Department of Revenue makes a determination that any final airplane assembly or wing assembly (that had been the object of a positive siting determination by the Department of Revenue under the First Siting Provision) has subsequently been sited outside the state of Washington.

7.334. The European Union interprets the terms of the First Siting Provision as requiring Boeing "to commit to use wings and fuselages produced or assembled in Washington State in the final assembly of 777X [large civil aircraft] in Washington State".[625] According to the European Union, "[i]f Boeing had not committed to using US-made wings and fuselages [it would have] thereby failed to satisfy the [First Siting Provision]".[626]

7.335. According to the European Union, under the Second Siting Provision, "777X aircraft benefit from the preferential B&O tax rate only if Boeing assembles the wings and assembles the aircraft exclusively in Washington State".[627] The European Union adds that, pursuant to this provision, "if Boeing opts, for example, to purchase any 777X wings from outside Washington State, it will be penalized through loss of the B&O tax rate reduction for all revenue related to sales of the 777X".[628]

[625] European Union's first written submission, para. 44. See also European Union's second written submission, para. 61; opening statement at the first meeting of the Panel, paras. 53-54 and 68; opening statement at the second meeting of the Panel, para. 3.

[626] European Union's opening statement at the first meeting of the Panel, para. 68. See also ibid. para. 4; European Union's second written submission, para. 61.

[627] European Union's first written submission, para. 52. See also European Union's second written submission, para. 61.

[628] European Union's first written submission, para. 51. See also European Union's second written submission, para. 61; opening statement at the first meeting of the Panel, para. 61; opening statement at the second meeting of the Panel, para. 3.

7.336. The European Union adds that the siting provisions in ESSB 5952 "are geared to induce the use of domestic over imported goods".[629] According to the European Union:

> [T]hese conditions [the First Siting Provision and the Second Siting Provision] act *together* to maximize trade distortions in favour of domestic goods, and to the detriment of competitive opportunities for imported goods.[630] While the [First Siting Provision] focuses on component sourcing decisions made at the beginning of a new aircraft programme, the [Second Siting Provision] focuses on later stages.[631] (emphasis original)

7.337. The European Union adds that the siting provisions in ESSB 5952 influence the choice by an individual producer on how to produce an aircraft and source its wings and fuselages, as follows:

> In the absence of the contingencies, Boeing would have arrived at a decision as a reasonable commercial actor, which may or may not have been to use wings and fuselages produced outside the United States. [ESSB 5952] distorts these choices. First, it takes away the *competitive opportunity* for foreign producers of wings and fuselages, pursuant to the [First Siting Provision]. If Boeing had not committed to using US-made wings and fuselages, and thereby failed to satisfy the [First Siting Provision], that would have led to severe penalties for Boeing, as the entirety of [ESSB 5952] would not have gone into effect. Second, it further takes away the *competitive opportunity* for foreign wing producers, pursuant to the [Second Siting Provision]. If Boeing uses any foreign-made wings for the 777X, and thereby fails to satisfy the [Second Siting Provision], then the 777X-related portion of the B&O tax rate reduction will be eliminated.[632]

7.338. The United States asserts that the relevant conditions in ESSB 5952 (namely, the First Siting Provision and the Second Siting Provision) have "nothing whatsoever to do with the use of goods" and instead "address aerospace-related production activities".[633] The United States also argues that "the references to manufacturing or assembly of fuselages and wings in the Siting Provisions … merely define the scope of production activity required to use the tax treatment covered by ESSB 5952".[634]

7.339. The Panel has already concluded that, on its face, the First Siting Provision imposes a condition for certain tax benefits to take effect for a range of beneficiaries, namely, that the competent authority (the Washington State Department of Revenue) make a one-time determination that a manufacturer has made a final decision to site a significant commercial airplane manufacturing programme in the state of Washington. The Panel also has concluded that the First Siting Provision does not, either by its express terms or by necessary implication thereof, make the entry into force of the subsidies at issue contingent upon a determination that domestic goods will be used instead of imported goods.[635]

7.340. The Panel has concluded further that, on its face, the Second Siting Provision is silent as to the use of imported or domestic goods and does not expressly or by necessary implication make the receipt or continued enjoyment of subsidies dependent on refraining from using imported goods. The Panel also found no indication in the terms of the provision that the subsidy provided by the B&O aerospace tax rate would be lost by importing wings, as alleged by the European Union. The Panel concluded that the Second Siting Provision does not, either by its

[629] European Union's opening statement at the first meeting of the Panel, para. 70. See also European Union's response to Panel question No. 30, paras. 68-69.
[630] (footnote original) European Union's opening oral statement, para. 6.
[631] European Union's response to Panel question No. 31, para. 71.
[632] European Union's opening statement at the first meeting of the Panel, para. 68.
[633] United States' first written submission, paras. 1-2. See also ibid. paras. 4, 7, 9, 73, 101, and 106-109; second written submission, paras. 2 and 38; opening statement at the first meeting of the Panel, paras. 4 and 23.
[634] United States' second written submission, para. 38.
[635] See paras. 7.291 and 7.292 above.

express terms or by necessary implication, condition the receipt of the B&O aerospace tax rate on the use of domestic over imported goods.[636]

7.341. The Panel recalls the European Union's argument that the siting provisions focus on "component sourcing decisions".[637] The Panel has found that the First and Second Siting Provisions *de jure* do not speak of component sourcing decisions, but of the location of certain manufacturing activities.[638] However, this does not resolve whether on a *de facto* basis these provisions operate in a manner that conditions the availability of subsidies based on whether certain components are sourced from a foreign or domestic origin. It is in respect of this question of "component sourcing decisions" that the Panel will examine the European Union's claim of *de facto* contingency on the use of domestic over imported goods.

7.342. Turning to the actual operation of the challenged measures, the evidence before the Panel confirms that the First Siting Provision in itself did not and does not make the aerospace tax measures contingent upon the use of domestic goods instead of, or in preference to, imported goods. As noted above[639], the First Siting Provision was activated by the Washington State Department of Revenue on 10 July 2014. This activation was a result of a determination by the Department of Revenue that a manufacturer (namely, Boeing) had made a final decision to site a significant commercial airplane manufacturing programme (namely, the 777X programme) in the state of Washington and that the contingency requirements in ESSB 5952 had therefore been satisfied. As a result of this determination, ESSB 5952 was deemed to have taken effect on 9 July 2014.[640] The Department of Revenue's determination in turn was based on Boeing's notification of 9 July 2014 that it had made a final decision to manufacture the 777X airplane, including its fuselages and wings, in the state of Washington.[641] Boeing's notification was accompanied by three attachments, as examples of "actions Boeing has taken consistent with its decision to manufacture the 777X in Washington".[642] As a result of the Department of Revenue's determination and the entry into effect of ESSB 5952, the expiration date for the aerospace tax measures at issue was extended until 1 July 2040 for all eligible taxpayers, including but not limited to Boeing.[643]

7.343. Under the terms of the legislation, and as confirmed by the additional evidence available, the Department of Revenue's determination was based exclusively on Boeing's decision to locate a significant commercial airplane manufacturing programme (as defined by the legislation) in the state of Washington.[644] There is no indication that the activation of the First Siting Provision was the result of any other factor, such as a commitment by the manufacturer to use domestic over imported goods.

7.344. In particular, the European Union has submitted no evidence, and there is nothing in either Boeing's letter to the Department of Revenue or the Department of Revenue's determination, that indicates that the use of domestic over imported goods − by Boeing or anyone else - was a condition for the Department of Revenue's positive determination in respect of the First Siting Provision. In fact, undisputed evidence submitted by the United States shows that Boeing will source a significant number of the components for the 777X, including wing and fuselage components and subassemblies, outside the United States.[645] In any event, there is no evidence to

[636] See paras. 7.308 and 7.313 above.
[637] See, for example, European Union's opening statement at the first meeting of the Panel, para. 6; response to Panel question Nos. 31 and 41, paras. 71 and 98.
[638] See para. 7.317 above.
[639] See para. 7.40 above.
[640] Letter from the Director of the Washington State Department of Revenue to the Code Reviser, 10 July 2014 (Exhibit EU-61). See also United States' response to Panel question Nos. 10 and 12, paras. 21 and 26.
[641] Boeing letter to the Director of the Washington State Department of Revenue, 9 July 2014 (Exhibit USA-32) (BCI). See also United States' response to Panel question No. 10, paras. 20-21.
[642] Boeing letter to the Director of the Washington State Department of Revenue, 9 July 2014 (Exhibit USA-32) (BCI).
[643] United States' first written submission, para. 78 (citing letter from the Director of the Washington State Department of Revenue to the Code Reviser, 10 July 2014 (Exhibit EU-61)); response to Panel question No. 12, para. 26.
[644] See Letter from the Director of the Washington State Department of Revenue to the Code Reviser, 10 July 2014 (Exhibit EU-61). See also para. 7.40 above.
[645] See, for example, Boeing expert statement (Exhibit USA-1) (BCI), paras. 41-42, 50-52, and 59-60; Boeing, Make/Buy Model 777-300ER, July 2007 (Exhibit USA-2) (BCI); Boeing, 777X Make/Buy, All

indicate that a particular use of goods of specific origins formed part of the Department of Revenue's determination that the First Siting Provision had been fulfilled. The Panel thus sees no factual evidence in the Department of Revenue's determination or in how Boeing will organize the sourcing for the production of the 777X indicating a *de facto* requirement to use any domestic goods, including wings or fuselages as referred to specifically in the European Union's claim of *de facto* contingency.

7.345. With respect to the First Siting Provision, the Panel additionally notes that the Department of Revenue's determination, pursuant to this provision, is a one-time decision and there is no legal mechanism under Washington State law that would allow the Department of Revenue to revoke that determination.[646] Thus, the First Siting Provision is not a measure whose operation will occur in repeated instances over some (definite or indefinite) period. Pursuant to ESSB 5952, there will be no other instance of this particular legislative provision being activated (again) in respect of another commercial airplane programme. The First Siting Provision established the possibility for a one-time creation of certain tax benefits subject to a certain condition being fulfilled. That condition was in fact fulfilled, such that the tax benefits in fact did take effect, and these events exhausted the operational life of the First Siting Provision. Thus, the evidence regarding the satisfaction, in July 2014, of the First Siting Provision by the Boeing 777X programme constitutes the entire universe of relevant evidence regarding that provision's operation.

7.346. While the operation of the First Siting Provision as such was a one-time event creating extended availability of a package of tax benefits, and while the Panel finds no factual evidence of any requirement to use domestic goods in respect of the triggering of that availability, the Panel recalls that the First Siting Provision does not exist in isolation. To the contrary, the role of the Second Siting Provision is to establish conditions for the airplane manufacturing programme that had activated the First Siting Provision (and thus effected the extended availability of the tax benefits) to maintain that programme's access to one of those tax benefits, namely the B&O aerospace tax rate. To put this more precisely, given that the conditionality in the Second Siting Provision is phrased in the negative, the Panel understands the Second Siting Provision to set forth the factual circumstances that would, if they arose, cause the airplane manufacturing programme that had satisfied the First Siting Provision (namely, the 777X programme) to lose access to the B&O aerospace tax rate. These, then, are the conditions or circumstances that Boeing must avoid in respect of the 777X programme in order not to lose access to that tax rate in respect of that programme.

7.347. The Panel thus will now consider the manner of operation of this second set of conditions attached to the subsidy. In particular, the Panel will examine in detail the facts concerning the manner in which the Second Siting Provision operates in practice in respect of the 777X programme which, having satisfied the First Siting Provision, is the sole and exclusive object of the Second Siting Provision. As its analytical framework, the Panel will consider the design, structure, and operation of the measures granting the subsidies, the modalities of operation as set forth in the measures, and the relevant factual circumstances surrounding the granting of the subsidies at issue, that provide context for understanding the measures' design, structure and operation. In that regard, the additional evidence surrounding the Department of Revenue's determination to activate the First Siting Provision can also serve to inform the factual circumstances in which the Second Siting Provision now operates. The Panel notes in particular the following facts in this regard.

7.348. First, the relevant legislation grants discretion to the Department of Revenue to determine both: (i) that a manufacturer made a final decision to site a significant commercial airplane manufacturing programme in the state of Washington; and (ii) that any final airplane assembly or wing assembly previously sited in the state of Washington, and which was the subject of the Department of Revenue's determination as described in (i) above, has subsequently been sited outside the state of Washington. To recall, the Department of Revenue's determination of the original siting decision, under the First Siting Provision, was designed to be, and in fact operated, as a one-time determination, and there is no legal mechanism under Washington State law that would allow the Department of Revenue to revoke that determination once made.[647] That said,

Commodities, Status as of 17 December 2014 (Exhibit USA-8) (BCI); Boeing, 777X Content Sources, Major Structures & Propulsion, Status as of 27 October 2015 (Exhibit USA-30) (BCI).

[646] See United States' response to Panel question No. 12, para. 26.

[647] See paras. 7.273 and 7.347 above.

under the Second Siting Provision, the Department of Revenue could exercise its discretion to make a determination as described in (ii) above at any point in the period during which the B&O aerospace tax rate is in effect under ESSB 5952. Such a determination would lead to the termination of this subsidy for the previously sited airplane programme as of 1 July of the year in which that second determination was made. A determination as described in (ii) above would only affect the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the airplane manufacturing programme in question. It would not affect any of the other subsidies to the manufacturer in question, nor would it affect any of the subsidies (including the B&O aerospace tax rate) for any of the other beneficiaries in respect of other activities.

7.349. Second, the condition contained in the First Siting Provision is to site the manufacture of certain "products" in Washington State, namely: (i) a new model, or a version or variant of an existing model, of a commercial airplane manufactured with a carbon fibre composite fuselage or carbon fibre composite wings or both; and (ii) fuselages and wings for a new model of a commercial airplane, or a version or variant of an existing model. In contrast, the condition contained in the Second Siting Provision is to refrain from siting outside of Washington State any final assembly or wing assembly of a manufacturing programme that had previously been sited under the First Siting Provision. The Panel notes that it is the Second Siting Provision's reference to wing assembly, rather than final assembly, that is relevant to the European Union's claim of *de facto* contingency to use domestic over imported wings.[648] This condition of the Second Siting Provision with respect to the siting of any wing assembly is in force for the entirety of the period during which the B&O aerospace tax rate is in effect under ESSB 5952.[649] Accordingly, the Panel understands that, under the Second Siting Provision, if the manufacturer were to relocate outside Washington State the wing assembly of the "significant commercial airplane manufacturing program" that had been previously sited in Washington State in accordance with the First Siting Provision (namely, the 777X programme), the legal consequence would be the termination of the availability of the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under that programme.

7.350. Third, the parties have discussed extensively the process of producing wings for large civil aircraft and, specifically, the incorporation of wings into the final production or final assembly of large civil aircraft. The evidence before the Panel reflects a variety of aircraft manufacturing processes, as well as continuing innovation within the aerospace industry, including for the development of the 777X itself.[650] The Panel notes in this regard the United States' observation that there is great variation in the process of producing large commercial airplanes.[651] Accordingly, the available evidence suggests that manufacturers can decide on specific processes for producing wings, including by assembly, and for incorporating wings into the final production or final assembly of large civil aircraft based on a number of factors, including economic, business, logistical, and technological considerations.

7.351. Fourth, as part of their discussion on the process of producing wings for large civil aircraft, the parties advanced different definitions of what can be considered as a "wing" for a large civil aircraft. Different large civil aircraft models have wings with different designs, sizes, and technical characteristics. As is clear from the available evidence, some large aircraft models have been produced using wing components or wing structures in different stages of completion that were

[648] See, for example, European Union's response to Panel question No. 50, paras. 132-133; comments on United States' response to Panel question Nos. 69 and 77, paras. 63 and 85-89.

[649] In this respect, the Panel notes the United States' argument that there is no prohibited contingency in this case based on the fact that Boeing's 777X programme has satisfied the First Siting Provision and has not triggered the Second Siting Provision. See, for example, United States' opening statement at the second meeting of the Panel, paras. 46-47. Although this argument rests on particular aspects of 777X production in relation to the United States' interpretation of the terms "use" and "goods" in Article 3.1(b), it also raises an important aspect of the combined operation of the First and Second Siting Provisions. Necessarily, by the terms of the legislation, a programme that satisfies the First Siting Provision would not at that moment trigger the Second Siting Provision. The latter would only be triggered at a later point in time, if the circumstances underlying the original siting determination by the Department of Revenue have changed in the manner specified in the Second Siting Provision.

[650] See, e.g. Boeing expert statement (Exhibit USA-1) (BCI), para. 39 ("The 777X is designed to be the largest and most efficient twin-engine commercial aircraft in aerospace history"). See also United States' response to Panel question No. 64, para. 57; European Union's response to Panel question No. 64, paras. 37-39; Boeing Frontiers, "The 747-700 will be transformed into an even larger freighter", June 2005 (Exhibit EU-122).

[651] United States' response to Panel question No. 64, para. 57.

produced separately from the rest of the airplane and, in some cases, transported to the site of the final airplane assembly.[652] In any event, an examination of the available evidence suggests that manufacturers of large civil aircraft can incorporate wing structures into the process of final assembly at different levels of completion based on a number of factors, including economic, business, logistical, and technological considerations.

7.352. More generally, regarding the diversity of ways in which manufacturers may assemble large civil aircraft, the United States noted that "[i]n fact, the evidence shows that what these [aircraft manufacturing] programs really have in common is that they all end up with fuselages and wings on the finished airplanes, which is not surprising because they are the main structural elements of the airframe."[653] Thus, whatever manufacturing and assembly process is chosen by a particular manufacturer, the result of that process will be a finished aircraft and the result of wing assembly, however performed, will be a finished wing. Notably, the Second Siting Provision refers to the location of "wing assembly" as the subject of a possible determination by the Department of Revenue, and the text of ESSB 5952 uses the word "products" when referring to commercial airplanes, fuselages, and wings that would have to be manufactured within Washington State as part of the "significant commercial airplane manufacturing program" under the First Siting Provision.[654]

7.353. Fifth, the Panel notes the United States' argument that Boeing does not use fuselages or wings, and has no plans to use fuselages or wings, since the wings for 777X aircraft "are only completed as part of the output of the process of producing the aircraft itself".[655] The Panel understands from this argument that Boeing is expected to assemble the wings of the 777X itself, rather than sourcing wings from another entity, domestic or foreign. In this connection, the United States clarified that "its argument is not that, as a general matter, it is impossible to assemble any aircraft wings separate from the final assembly of any aircraft".[656] **[[BCI]]**.[657]

7.354. In any event, the particular production process selected by Boeing for the 777X airplane is not in itself dispositive of whether the legislation creates *de facto* a prohibited contingency on Boeing to use domestic goods. The fact that a manufacturer has chosen a particular production process in the past or operates that process in the present, including because of economic, business, logistical, or technological factors, does not mean that alternative processes may not be available now or in the future. In this respect, it is relevant that ESSB 5952 extends the subsidies provided pursuant to the aerospace tax measures until 2040. During the entirety of this period, the conditions in the Second Siting Provision govern the availability of the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme.

7.355. Furthermore, the Panel recognizes that neither the First Siting Provision nor the Second Siting Provision, either explicitly or in their operation, binds Boeing to a specific process for manufacturing 777X aircraft, either at the time of the 2014 siting determination or in respect of its future activities through 2040. Thus Boeing is not legally constrained by the measures at issue from adopting new processes or adapting existing processes in the future in respect of the 777X. The Panel notes in this regard the United States' argument that "ESSB 5952 does not require any production process in particular".[658] The focus of the Panel's analysis, for the purpose of the current dispute, is not on the production processes for the 777X, in general or at any point in time,

[652] See paras. 7.266 and 7.268 above.
[653] United States' response to Panel question No. 64, para. 57, fn 71.
[654] "'Significant commercial airplane manufacturing program' means an airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section: (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." ESSB 5952 (Exhibit EU-3).
[655] United States' response to Panel question No. 42, para. 102. Further, in the United States' view, the fact that "complete finished wings for some smaller commercial airplanes can be transported in a large transport airplane … simply means that, for some airplanes, it is theoretically possible to fully assemble the wings in a location far from where any further assembly of the airplane will take place". United States' response to Panel question No. 64, para. 55. See also United States' second written submission, para. 60.
[656] United States' response to Panel question No. 42, para. 102.
[657] See United States' first written submission, paras. 25 and 130, and fn 45; opening statement at the first meeting of the Panel, para. 11; closing statement at the first meeting of the Panel, para. 6; response to Panel question Nos. 35 and 64, paras. 82, 52-54 and 56; Boeing expert statement (Exhibit USA-1) (BCI), para. 43.
[658] United States' response to Panel question No. 64, para. 57.

but rather on whether the measures at issue, in their design, structure, and modalities of operation, would limit access to existing subsidies if imported goods were to be used in any such processes.

7.356. Sixth, the significant commercial airplane manufacturing programme announced by the manufacturer, which is the basis of the First Siting Provision, in fact entails the production by Boeing and in Washington State of wing structures that, for other aircraft models, had been previously produced outside of Washington State and in some cases imported from outside the United States.[659] Notwithstanding the fact that "ESSB 5952 does not require any production process in particular"[660], the fact remains that following the passage of ESSB 5952 the manufacturer made a final decision, for the 777X manufacturing programme, to produce domestically certain wing structures (i.e. "Section 12" wing structures[661]) that the same manufacturer had previously imported for another commercial airplane manufacturing programme.[662]

7.357. Considering all these facts, in the light of the European Union's *de facto* contingency claim, the Panel notes first that the provision of subsidies exclusively to domestic producers, without more, is not in itself a breach of the obligations under the covered agreements. In the context of the GATT 1994, this principle is reflected in Article III:8(b) of the GATT 1994, which clarifies that the provision of subsidies exclusively to domestic producers is not in itself a breach of the national treatment obligation under that agreement. By contrast, subsidies of a particular character can be in breach of the SCM Agreement. The focus of the Panel's assessment is not whether the measures at issue have had an import substitution effect or a detrimental impact on imports, as this would require the Panel to trespass into an adverse effects analysis of the type that is not contemplated by Article 3.1. Rather, the precise question before the Panel is whether the subsidies at issue have been granted to domestic producers (i.e. Boeing) contingent, in fact, upon the use of domestic goods.

7.358. The specific nature and operating mechanism of the Second Siting Provision becomes relevant to this question. We recall, in particular, that the Second Siting Provision provides that the "siting" of "wing assembly" of the airplane model in question (the 777X) outside Washington State would result in the loss of the B&O aerospace tax rate for the manufacturing or sale of that airplane.[663] It thus is clear that so long as this "siting" does not happen, the Second Siting Provision remains dormant, operating passively as a deterrent to safeguard the *status quo* (or at least particular aspects thereof) that satisfied the First Siting Provision. This particular passive, deterrent nature of the measure in turn raises the question as to what sorts of factual evidence could inform the analysis of whether ongoing access to the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme is contingent *de facto* on the use of domestic over imported 777X wings. In particular, at the time of the Panel's assessment of this claim, the Second Siting Provision has not been triggered, and therefore no evidence exists as to the actual operation (the triggering) of the Second Siting Provision.

7.359. The Panel thus is confronted by the counterfactual question of what would trigger the Second Siting Provision, that is, what action by Boeing would result in the Department of Revenue determining that 777X wing assembly "has been sited" outside Washington State. We note in this regard the argument of the European Union that if Boeing were to use even a single imported 777X wing, the Second Siting Provision would be triggered and Boeing would lose the B&O aerospace tax rate in respect of the 777X.[664] The evidence cited by the European Union consists of

[659] See, for example, Office of Washington Governor, "Legislature approves key elements of 777X incentive package", 10 November 2013 (Exhibit EU-59); Washington State House Finance Committee, Video, "Testimony of Governor Inslee before House Finance Committee", 7 November 2013 (Exhibit EU-110); Collective Bargaining Agreement between Boeing and the International Association of Machinists and Aerospace Workers, 2 November 2008, including Contract Extension and Modification Agreements, 7 December 2011 and 3 January 2014 (Exhibit USA-33), p. 190; Addendum No. 14 to the 1991 Boeing Everett Mitigation Decision Document SEPA #14-009, 27 March 2014 (Exhibit USA-34) (BCI).

[660] United States' response to Panel question No. 64, para. 57.

[661] See paras. 7.259 and 7.266 above.

[662] See, for example, United States' first written submission, paras. 18, 24, 25, 28-29, and 31-32.

[663] The Panel recalls that the expression "has been sited" (used in the Second Siting Provision in the passive tense) is related to a manufacturer locating a manufacturing programme in a particular place, which is consonant with the definition of "siting" in the First Siting Provision. See para. 7.304 above.

[664] See European Union's opening statement at the first meeting of the Panel, paras. 5 and 48.

the word "any" in the Second Siting Provision, which it argues means that that provision would be triggered by the use of any quantity, no matter how small, of imported 777X wings.[665] The United States for its part argued that the purpose of the Second Siting Provision is to prevent Boeing from relocating, or duplicating, 777X production outside Washington State.[666]

7.360. With regard to the question of what would trigger the Second Siting Provision, the Panel finds particularly relevant the discretion granted by ESSB 5952, and specifically by the Second Siting Provision, to the Department of Revenue to terminate the availability of the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme if it determines that Boeing has "sited" assembly of wings for that model outside of Washington State. In particular, the exercise of the Department of Revenue's discretion would be inconsistent with Article 3.1(b) of the SCM Agreement if, in practice, it resulted in the termination of the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme on the basis of a determination that Boeing, by virtue of using imported 777X wings, had "sited" 777X wing assembly outside Washington State.

7.361. To elucidate the issue of what would trigger the Second Siting Provision, and more specifically, whether a use by Boeing of imported 777X wings would do so, the Panel posed a series of questions to the United States in respect of certain counterfactual scenarios, other than the existing *status quo* that satisfied the First Siting Provision (and that thus by definition does not trigger the Second Siting Provision). That existing *status quo* is that Boeing will itself assemble the wings and fuselages, and conduct the final assembly of the 777X, in Washington State. The Panel questions specifically went to whether the Second Siting Provision would be triggered if:

a. Boeing continued manufacturing, *inter alia*, wings itself in Washington State and in addition purchased wings (assuming *arguendo* that it were possible to do so) from another manufacturer in Washington State[667];

b. Boeing continued manufacturing, *inter alia*, wings itself in Washington State and also, (assuming *arguendo* that it were possible to do so), imported some wings from a different producer (i.e., other than Boeing itself).[668]

7.362. The essence of the Panel's questions thus was what would happen pursuant to the Second Siting Provision if Boeing in the future sourced some 777X wings from other entities, including foreign producers, rather than assembling all of them itself.[669] The specific focus of these questions was the geographic location of other hypothetical suppliers. In response to the first question above, the United States indicated (assuming *arguendo* that it were possible for 777X wings to be completed and transported as separate articles), that the Department of Revenue likely would not determine that any wing assembly had been sited outside Washington State, and thus the Second Siting Provision would not be triggered.[670] In response to the Panel's other question, however, the United States indicated that if completed wings were produced outside of the United States and then imported, the Department of Revenue likely would determine that some wing assembly had been sited outside Washington State, meaning that the Second Siting Provision would be triggered.[671]

[665] See European Union's response to Panel question No. 7, para. 12; comments on United States' response to Panel question No. 77, paras. 85-89.
[666] See United States' response to Panel question Nos. 43 and 80, paras. 103 and 118-120.
[667] See Panel question No. 40.
[668] See Panel question No. 80.
[669] The Panel recalls its assessment in the context of the European Union's *de jure* claim that, on its face, the Second Siting Provision did not condition the availability of the subsidy on use of domestic over imported goods. Based strictly on the terms of the Second Siting Provision, a possible reading of the conditionality set out therein would allow the manufacturer in question to continue to benefit from the subsidy if it used wings manufactured outside the state of Washington in the final assembly of the commercial airplanes in question in the state of Washington, so long as it maintained final and wing assembly previously sited in the state of Washington. See above, para. 7.311. As noted, in the context of its *de facto* analysis the Panel considers not only the text of the measure, but also additional factual evidence relevant to understanding the design, structure, and modalities of operation of the contingency in question.
[670] See United States' response to Panel question No. 40, para. 97.
[671] See United States' response to Panel question No. 39, paras. 93-95; response to Panel question No. 80, paras. 118-120. See also United States' response to Panel question No. 7, paras. 15-16.

7.363. Thus, as explained in the United States' responses in this regard, if the manufacturer were to use wings produced outside of Washington State (including in particular wings imported from other countries) in the production of 777X aircraft[672], the Department of Revenue would likely consider this to mean that some wing assembly had been sited outside of Washington State and this would activate the Second Siting Provision.[673] This would be the case even if the manufacturer imported some wings, while continuing to produce wings in Washington State, effectively duplicating wing manufacturing or assembly.[674] In such cases, as indicated by the United States, the Department of Revenue would likely determine that at least some wing assembly had been sited outside of Washington, which would activate the Second Siting Provision. As a consequence, the use of imported wings would lead to the loss of the B&O aerospace tax rate. In contrast, if the manufacturer were to use wings made in Washington State by another producer, this would not activate the Second Siting Provision.[675]

7.364. The United States' responses clarify that the Second Siting Provision is not only aimed at ensuring that a manufacturer (namely Boeing) itself assemble the 777X wings or conduct the final assembly of the 777X. This is notwithstanding the United States' arguments that the measures at issue (to the extent they are subsidies) would be production subsidies (to Boeing), rather than subsidies contingent on the use of any particular goods, and that the First Siting Provision and the Second Siting Provision contemplated a single entity performing all of the operations referred to in those provisions. In particular, the United States' responses indicate that the Second Siting Provision would not be triggered simply by a decision by Boeing to source 777X wings from another entity rather than assembling them itself. Rather, in such a scenario, whether or not the Second Siting Provision would be triggered would be determined exclusively by where the wings in question were assembled. In particular, the *only* decision by Boeing to source wings which it would then "use" in producing the 777X that *would not* trigger the Second Siting Provision would be to source such wings within Washington State, which by definition would be domestic wings.

7.365. The Panel considers that these descriptions are significant in understanding the modalities of operation of the conditions of the Second Siting Provision, which as noted are subject to administrative discretion vested in the Department of Revenue. As explained by the United States, within the Washington State domestic legal system, courts would accord "substantial weight to the agency's interpretation of the governing statutes and legislative intent" and "substantial deference to agency views when it bases its determination on factual matters".[676] The United States' clarifications as to how the Department of Revenue would likely exercise discretion shed light on the requirements imposed by the Second Siting Provision, which applies prospectively to the 777X manufacturing operations that are still being commenced and that may evolve over time. Under such circumstances, the likely actions of the relevant administrative agency in response to possible factual scenarios are indicative of whether, in practice, a subsidy would remain available so long as a manufacturer used domestic goods, while that same subsidy would be terminated if a manufacturer used those same goods from a foreign source.

7.366. In light of the foregoing, the Panel is not persuaded that the Second Siting Provision is only aimed at preventing Boeing from relocating the 777X entirely outside Washington State or from establishing a parallel 777X production program outside Washington State. The Second Siting Provision does not only concern the production of airplanes. It also concerns the "use" of certain goods, and specifically the origin of those goods that enter into the production process for the 777X as a condition for the continued availability of a subsidy. The Panel notes in particular the use of the word "or" in the Second Siting Provision. That is, that provision would be triggered if wing assembly "or" final assembly of the 777X were "sited" outside Washington State.[677] The United States' responses as to how the Department of Revenue would likely exercise its discretion, in interpreting the Second Siting Provision, demonstrate that the expression "or" in that Provision

[672] Assuming *arguendo* that the manufacturer could use wings or fuselages manufactured separately.
[673] See United States' response to Panel question Nos. 39 and 80, paras. 93-95 and 118-120. See also United States' response to Panel question No. 7, paras. 15-16.
[674] See United States' response to Panel question No. 80, paras. 118-120. See also United States' response to Panel question No. 42, para. 103; European Union's comments on United States' response to Panel question No. 80, para. 91.
[675] See United States' response to Panel question No. 40, para. 97.
[676] See Washington Court of Appeals, Nationscapital Mortgage Corporation et al. v. Department of Financial Institutions, June 2006 (Exhibit USA-84); United States' response to Panel question No. 79, para. 117, fn 146.
[677] See para. 7.304 above.

contemplates, and seeks to prevent *inter alia*, any wings (of the airplane model that satisfied the First Siting Provision) from being produced as separate products outside Washington State (including overseas), that would then be shipped to Washington State for incorporation in the final assembly process. Statements made by the Governor of Washington about the goal of keeping 777X wing production in Washington, seen in the light of the United States' responses, are consistent with this conclusion and are considered by the Panel to be relevant evidence in this *de facto* analysis.[678]

7.367. The loss of the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme if Boeing used 777X wings produced outside of Washington State, even if it maintained production of such wings in Washington State, makes the B&O aerospace tax rate for that programme contingent upon the use of wings made in Washington State. This is confirmed by the 777X programme retaining access to the B&O aerospace tax rate if Boeing used 777X wings made in Washington State by another producer. Accordingly, pursuant to ESSB 5952, and as a result of the Second Siting Provision, the B&O aerospace tax rate subsidy for the manufacturing or sale of commercial airplanes under the 777X programme is contingent *de facto* not only on the production of that aircraft and its wings in Washington State, but additionally on not using 777X wings other than those made in Washington State. Since wings made in Washington State are domestic goods and any imported wings would by definition be made outside of Washington State, it follows that the Second Siting Provision makes the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme contingent upon the use of domestic wings over imported wings.

7.368. Lastly, and for completeness, the Panel returns to the contention by the United States that wings are not used in the production of the 777X, in the sense that separate, identifiable and complete "wings" never come into existence in the production process of the 777X. In this regard we observe that Article 3.1(b) does not require the identification of a specific good in order that it can be applied to a particular situation. In the case before us, it is the output or outputs of a wing assembly process that the evidence establishes must not be sourced by Boeing from overseas, because of the implications of doing so. Regardless of precisely what these outputs are, and regardless of the reference to "wing" and to "wing assembly" in the siting provisions, there can be no doubt that goods, which together make up a wing to the factual satisfaction of the Department of Revenue, cannot be sourced by Boeing from outside the state of Washington without the consequence of activating the Second Siting Provision. The Panel's references to wings should be understood in this context.

7.369. For the reasons explained above, the Panel concludes that the siting provisions in ESSB 5952, and in particular the prospective modalities of operation of the Department of Revenue's discretion under the Second Siting Provision, make the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1 Conclusions

8.1. In light of the findings in the foregoing sections of the Report, and with respect to the aerospace tax measures at issue, as amended and extended through Washington State's Engrossed Substitute Senate Bill (ESSB 5952), the Panel concludes that:

[678] Upon the passage of ESSB 5952, the Washington State Governor issued a press release indicating that ESSB 5952 "includes strong contingency language to ensure that all of the 777X assembly and wing assembly remains in Washington. Specifically, the bill includes a provision that says the company will lose its preferential B&O tax rate for the 777X if any of that work is moved out of state." Office of Washington Governor, "Legislature approves key elements of 777X incentive package", 10 November 2013 (Exhibit EU-59). The Governor additionally provided testimony to the Washington State legislature prior to the passage of ESSB 5952 regarding House Bill 2089, a companion bill to a previous version of ESSB 5952, which had similar siting provisions referring to wing assembly and final assembly (in addition to "wing fabrication", which does not appear in ESSB 5952). In that testimony, the Governor expresses the aim of maintaining employment in the aerospace industry by retaining production of the 777X carbon fibre wing in Washington State. See Washington State House Finance Committee, Video, "Testimony of Governor Inslee before House Finance Committee", 7 November 2013 (Exhibit EU-110).

a. Each of the seven aerospace tax measures at issue in the present case constitutes a subsidy within the meaning of Article 1 of the SCM Agreement;

b. Regarding the European Union's claim that the aerospace tax measures at issue are subsidies *de jure* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement:

   i. The European Union has not demonstrated that the aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods with respect to the First Siting Provision in ESSB 5952 considered separately;

   ii. The European Union has not demonstrated that the reduced business and occupation (B&O) tax rate for the manufacture and sale of commercial airplanes (B&O aerospace tax rate) is *de jure* contingent upon the use of domestic over imported goods with respect to the Second Siting Provision in ESSB 5952 considered separately;

   iii. The European Union has not demonstrated that the aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods with respect to the First Siting Provision and the Second Siting Provision considered jointly;

c. With respect to the First Siting Provision and the Second Siting Provision in ESSB 5952, considered jointly, the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme is a subsidy *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

8.2. Having found that the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme is inconsistent with Article 3.1(b) of the SCM Agreement, the Panel also finds that the United States has acted inconsistently with Article 3.2 of the SCM Agreement.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the United States has acted inconsistently with the SCM Agreement, it has nullified or impaired benefits accruing to the European Union under that Agreement.

8.2 Recommendation

8.4. Article 4.7 of the SCM Agreement provides that, having found a measure in dispute to be a prohibited subsidy:

> [T]he panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn.

8.5. The Panel has found that the European Union has demonstrated that the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme, pursuant to ESSB 5952, is a subsidy contingent upon the use of domestic over imported goods, prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement.

8.6. Accordingly, taking into account the nature of the prohibited subsidy found in this dispute, the Panel recommends that the United States withdraw it without delay and within 90 days.

8.7. Finally, the Panel notes that the rules contained in Part II of the SCM Agreement do not require a panel to specify how the implementation of recommendations under Article 4.7 should be effected by the subsidizing Member. In this context, the second sentence of Article 19.1 of the DSU provides that a panel *may* suggest ways in which a recommendation could be implemented. Assuming that this provision also applies to recommendations under Article 4.7 of the SCM Agreement, the Panel notes that, pursuant to Article 21.3 of the DSU, the means of

implementation is in the first instance for the Member concerned.[679] Further, the Appellate Body has made clear that the second sentence of Article 19.1 "does not oblige panels to make ... a suggestion".[680] In this case, in the absence of any request from the parties, the Panel refrains from making any suggestions concerning steps that might be taken to implement its recommendation.

[679] Panel Report, *US – Hot-Rolled Steel*, para. 8.11.
[680] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 189.

WORLD TRADE ORGANIZATION

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UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS487/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 7 December 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Subject to this paragraph, the Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its substantive meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting with the parties.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the European Union requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, the European Union shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits

upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the European Union could be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

10. Parties and third parties are invited to make their respective submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1.

11. Upon indication from any party, at the latest on the date of the Panel's first substantive meeting with the parties, that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel shall, after consultation with the parties, decide whether to adopt appropriate additional procedures.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by the European Union. If the United States chooses not to avail itself of that right, the Panel shall invite the European Union to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in

writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

22. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

23. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

24. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

25. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file six paper copies of all documents it submits to the Panel. Exhibits may be filed in two copies on CD-ROM or DVD and six paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy

to ****@wto.org and to ****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

27. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION ("BCI/HSBI PROCEDURES")

Adopted on 13 January 2016

1 GENERAL

1.1. The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Panel record. These Procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of the SCM Agreement and Article 13 of the DSU.

2 DEFINITIONS

For the purposes of these Procedures,

2.1. "**Approved Person**" means a Representative or Outside Advisor of a Party, when designated in accordance with these procedures.

2.2. "**Business Confidential Information**" or "**BCI**" means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as BCI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause harm to the originators of the information. Each Party and Third Party shall act in good faith and exercise restraint in designating information as BCI, and will endeavour to designate information as BCI only if its disclosure would cause harm to the originators of the information.

2.3. "**Conclusion of the Panel Process**" means the earliest to occur of the following events:

a. pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report;

b. a Party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU;

c. pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; or

d. pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB.

2.4. "**Designated as BCI**" means:

a. for printed information, text that is set off with bold square brackets in a document clearly marked with the notation "**BUSINESS CONFIDENTIAL INFORMATION**" and with the name of the Party or Third Party that submitted the information;

b. for Electronic Information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation "**BUSINESS CONFIDENTIAL INFORMATION**", has a file name that contains the letters "**BCI**", and is stored on a storage medium with a label marked "**BUSINESS CONFIDENTIAL INFORMATION**" and indicating the name of the Party or Third Party that submitted the information; and

c. for uttered information, declared by the speaker to be "**Business Confidential Information**" prior to utterance.[1]

In case either Party objects to the designation of information as BCI under paragraphs 2.4(a)–(c), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as BCI, the submitting Party or Third Party may either designate it as non-BCI or withdraw the information. In the case of withdrawal, the Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI information previously designated by that Party or Third Party as BCI.

This paragraph 2.4 shall apply to all submissions, including exhibits, by a Party or Third Party.

2.5. "**Designated as HSBI**" means:

a. for Electronic Information, characters that are set off with double bolded square brackets (or with a heading with double bolded square brackets on each page) in an electronic file that contains the notation "**HIGHLY SENSITIVE BUSINESS INFORMATION**", has a file name that contains the letters "**HSBI**", and is stored on a storage medium with a label marked "**HIGHLY SENSITIVE BUSINESS INFORMATION**" and indicating the name of the Party or Third Party that submitted the information; and

b. for uttered information, declared by the speaker to be "**Highly Sensitive Business Information**" prior to utterance.[2]

This paragraph 2.5 shall apply to all submissions, including exhibits, by a Party or Third Party.

2.6. "**Electronic Information**" means any information stored in an electronic form (including but not limited to binary-encoded information).

2.7. "**Highly Sensitive Business Information**" or "**HSBI**" means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause exceptional harm to its originators. Each Party and Third Party shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party and Third Party may at any time designate as non-BCI/HSBI or as BCI information designated by that Party or Third Party as HSBI.

a. The following categories of information may be Designated as HSBI:

i. information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[3], and, except as provided in subparagraph 2.7 (d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

ii. information gathered or produced in the context of LCA sales campaigns;

iii. information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, or investment banks with regard to LCA products; or

[1] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the BCI in question.

[2] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the HSBI in question.

[3] This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

iv. information concerning an LCA manufacturer's costs of production, including but not limited to data regarding pricing by suppliers.

b. Each Party and Third Party may also Designate as HSBI any other category of business information that is not otherwise available in the public domain and the disclosure of which could, in the Party's view, cause exceptional harm to its originators.

c. Each Party and Third Party shall Designate as HSBI any information described in subparagraph 2.7(a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of either of the Parties.

d. Notwithstanding the foregoing, the following categories of information may not be Designated as HSBI:

i. aggregated pricing data for a particular LCA model or family of LCA within a particular market that is indexed (i.e., does not reflect actual prices but rather movements in prices off a base of 100 for a particular year). Such data shall be treated as BCI;

ii. general legal conclusions based on HSBI (e.g., that HSBI demonstrates that a producer engaged in price undercutting). Such conclusions shall be treated as neither BCI nor HSBI;

iii. intergovernmental agreements and government decisions, other than information described in subparagraph 2.7(a).

e. Information may not be Designated as HSBI simply because it is subject to bank secrecy or banker-client confidentiality.

f. In case either Party objects to the designation of information as HSBI under paragraphs 2.7(a) to 2.7(c), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as HSBI, the submitting Party or Third Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. In the case of withdrawal, the Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party or Third Party as HSBI.

2.8. "**HSBI Approved Person**" means Approved Persons specifically designated by the Parties as having the right to access HSBI (according to the procedures laid down in Section 4).

2.9. "**HSBI Location**" means a room to be kept locked when not occupied and the access to which shall be possible only for HSBI Approved Persons, located:

a. for HSBI submitted by the United States, on the premises of (i) the United States Mission to the European Union in Brussels and (ii) the Office of the United States Trade Representative in Washington, DC;

b. for HSBI submitted by the European Union, on the premises of (i) the Delegation of the European Union to the United States in Washington, DC and (ii) the Legal Service (WTO Team) of the European Commission in Brussels;

c. for HSBI submitted by a Third Party, on the premises of its Geneva Mission to the WTO.

2.10. "**Locked CD**" means a CD-ROM that is not rewritable.

2.11. "**Outside Advisor**" means a legal counsel or other advisor of a Party or Third Party, who:

a. advises a Party or Third Party in the course of the dispute;

b. is not an employee, officer or agent of an entity or an affiliate of an entity engaged in the manufacture of LCA, the provision of supplies to an entity engaged in the manufacture of LCA, or the supply of air transportation services; and

c. is subject to an enforceable code of professional conduct that includes an obligation to protect confidential information, or has been retained by another outside advisor who assumes responsibility for compliance with these procedures and is subject to such a code of professional conduct.

For purposes of this paragraph, outside legal counsel representing an LCA producer headquartered in the territory of one of the Parties or Third Parties in connection with these proceedings or outside consultants who have been retained by such counsel to provide advice with regard to these proceedings are not considered agents of an entity listed in subparagraph 2.11(b).

2.12. "**Panel**" means the DS487 panel composed on 22 April 2015.

2.13. "**Party**" means the European Union or the United States.

2.14. "**Party-BCI**" means BCI originally submitted by a Party.

2.15. **"Representative"** means an employee of a Party or Third Party.

2.16. "**Sealed Laptop Computer**" means a laptop computer having (software and hardware) characteristics considered necessary by the submitting Party for protection of HSBI, provided that it has software installed that permits such HSBI to be searched and printed in accordance with the provisions of Section 6. However, HSBI may not be edited on the Sealed Laptop Computer.

2.17. "**Secure Site**" means a facility to be kept locked when not occupied and the access to which shall be possible only for Approved Persons, located:

a. in the case of the European Union, at the offices of WTO Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Mission of the European Union to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and three additional sites specified in accordance with subparagraph (c);

b. in the case of the United States, at the offices of the General Counsel of the Office of the United States Trade Representative (600 17th Street, NW, Washington, DC, USA), the offices of the Import Administration, United States Department of Commerce (600 17th Street, NW, Washington, DC, USA), the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and three additional sites specified in accordance with subparagraph (c); and

c. at three sites other than a government office that are designated by each Party for use by its Outside Advisors; provided that the identity of those sites has been submitted to the other Party and the Panel, and the other Party has not objected to the designation of that site within ten days of such submission.

Any objections raised under subparagraph (c) may be resolved by the Panel.

2.18. "**Stand-Alone Computer**" means a computer that is not connected to a network.

2.19. "**Stand-Alone Printer**" means a printer that is not connected to a network.

2.20. "**Submission**" means any written, electronic, or uttered information transmitted to the Panel, including but not limited to, correspondence, written submissions, exhibits, oral statements, and answers to questions.

2.21. "**Third Party**" means a Member having notified its interest in the dispute to the DSB pursuant to DSU Article 10.

2.22. "**Third Party BCI Approved Person**" means a representative or Outside Advisor of a Third Party granted access to BCI pursuant to paragraphs 4.2, 5.2, 5.3 and 5.9.

2.23. "**WTO Approved Persons**" means the Panel members, PGE members or experts appointed by the Panel who in the opinion of the Panel require access to BCI, and persons employed or appointed by the WTO Secretariat who have been authorized by the WTO Secretariat to work on the dispute (and includes translators and interpreters as well as any transcribers present at Panel meetings involving BCI and/or HSBI).

2.24. "**WTO Reading Room**" means a room, located on the premises of the WTO, which a Third Party BCI Approved Person may use to access a Party's Submission that contains Party BCI.

2.25. "**WTO Rules of Conduct**" means the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1).

3 SCOPE

3.1. These procedures apply to all BCI and HSBI received by an Approved Person and by WTO Approved Persons as a result of the Panel process, and to all BCI reviewed, in accordance with these procedures, by a Third Party BCI Approved Person.

3.2. Unless specifically otherwise provided herein, these procedures do not apply to a Party's or Third Party's treatment of its own BCI and HSBI.

4 DESIGNATION OF APPROVED PERSONS

4.1. At the latest on 18 January 2016, each Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and/or Third Parties and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and/or Third Parties and whom it wishes to have designated as HSBI Approved Persons. Each Party may submit amendments to their list of Approved Persons by submitting such amendments to the other Party and Third Parties, and to the Panel.

4.2. There shall be no Third Party HSBI Approved Persons. The designation of Third Party BCI Approved Persons shall be governed by paragraphs 5.2 and 5.3.

4.3. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a total of thirty Representatives and twenty Outside Advisors as "HSBI Approved Persons".

4.4. WTO Approved Persons shall have access to BCI. The Director-General of the WTO, or his designee, shall submit to the Parties and Third Parties, and to the Panel, a list of the WTO Approved Persons and shall identify which of those WTO Approved Persons shall additionally have access to HSBI.

4.5. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 4.1 that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days.

4.6. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

4.7. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 4.3 and to objections for the addition of new Approved Persons in accordance with paragraphs 4.5 and 4.6.

5 BCI

5.1. Only Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons may have access to BCI submitted in this proceeding. Third Party BCI Approved Persons may not have access to Party-BCI other than that included in the submissions. Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons shall use BCI only for the purposes of this dispute. No Approved Person or WTO Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. No Third Party BCI Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. These obligations apply indefinitely.

5.2. Each Third Party that wants to access Party-BCI contained in the first written submission of a Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors (including clerical or support staff) who need access to such BCI and whom it wishes to have designated as Third Party BCI Approved Persons. Each Third Party shall keep the number of Third Party BCI Approved Persons as limited as possible. Each Third Party may designate no more than a total of five Representatives and Outside Advisors as Third Party BCI Approved Persons.

5.3. Unless a Party objects to the designation of an Outside Advisor of a Third Party, the Panel shall designate those persons as Third Party BCI Approved Persons, following which the access referred to in paragraph 5.2 may be given to the Third Party concerned. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 5.2 above that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

5.4. A Party shall make no more than one copy of any BCI submitted by the other Party or a Third Party for each Secure Site provided for that Party in paragraph 2.17.

5.5. Parties may incorporate BCI in internal memoranda for the exclusive use of Approved Persons. Any memorandum and the BCI it contains shall be marked in accordance with paragraph 2.4.

5.6. BCI submitted by Approved Persons or by Third Party BCI Approved Persons pursuant to these procedures shall not be copied, distributed, or removed from the Secure Site, except as necessary for submission to the Panel.

5.7. The treatment in a Party's Submissions to the Panel of any BCI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to BCI.

a. Parties may incorporate BCI in Submissions to the Panel, marked as indicated in paragraph 2.4. In exceptional cases, parties may include BCI in an appendix to a Submission.

b. A Party submitting a Submission or appendix containing BCI shall also submit, within a time period to be set by the Panel, a version redacting any BCI. This shall be referred to as the "Non-BCI Version". However, a Party is not required to submit a "Non-BCI Version" of any exhibit containing BCI, unless specifically directed to do so by the Panel. In the case of Submissions of the Parties prior to the first meeting of the Panel, each Party shall serve a "Non-BCI Version" of its Submission on Third Parties by 5.00 p.m. on the working day following the date of the Submission.

c. A Non-BCI Version shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Non-BCI Version:

    i. A Party may request the Party that originally submitted the BCI, as soon as possible, to indicate with precision portions of documents containing BCI that may be included

in the non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, to produce a Non-BCI summary in sufficient detail to achieve this aim.

ii. Upon receipt of such a request, the Party that originally submitted the BCI shall, as soon as possible, indicate with precision portions of documents containing BCI that may be included in the Non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the BCI failed to indicate with sufficient precision portions of documents containing BCI that may be included in the Non-BCI Version and to produce, if necessary, a Non-BCI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

d. The responding Party may designate the personal offices of up to four of its Approved Persons as additional Secure Sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' Submissions to the Panel. All of the protections applicable to BCI under these procedures, including the storage rules in Paragraph 5.11, shall apply to such Submissions. BCI exhibits to Submissions may not be stored or reviewed at these additional Secure Sites. The responding Party shall submit the address (including room number) of each of the additional Secure Sites to the Panel and the complaining Party.

5.8. Any document containing BCI shall not be copied in excess of the number of copies required by the Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible. Such documents may be transmitted electronically only by using secure e-mail. If a Party or Third Party submits to the Panel an original document that cannot be transmitted electronically, it shall on the day of submission deliver a copy of that document to one of the Secure Sites listed in paragraph 2.17. The Parties shall designate one of the Secure Sites listed in paragraph 2.17 for this purpose.

5.9. Notwithstanding paragraph 20 of the Working Procedures[4], the following procedures apply to the access by Third Parties to a Party's Submission that contains Party-BCI.

a. Except as provided in subparagraph 5.7(b), a Party's Submission containing Party-BCI shall not be served on Third Parties unless both Parties agree otherwise.

b. Third Party BCI Approved Persons may view Party-BCI contained in a Party's first written submission only in a Secure Site or in the WTO Reading Room. Third Party BCI Approved Persons may not bring into such room any electronic recording or transmitting devices. Third Party BCI Approved Persons may not remove a Party's Submission containing Party-BCI from such room, but may take handwritten notes of the Party-BCI contained therein. Such notes shall be used exclusively for this dispute (that is, DS487). Each person viewing a Party's Submission containing Party-BCI shall complete and sign a log identifying the Submission the person reviewed. The Party responsible for maintaining the particular Secure Site, and the WTO Secretariat in the case of the WTO Reading Room, shall maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving the room, Outside Advisors who are Third Party BCI Approved Persons may be subject to appropriate controls.

c. If a Third Party BCI Approved Person removes from the Secure Site or the WTO Reading Room a handwritten memo in accordance with subparagraph 5.9(b) above, that Third Party BCI Approved Person shall store the memo only in a locked security container. Such memo shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double

[4] Concerning service of documents.

envelopes only. The content of such memo shall not be incorporated, electronically or in handwritten form, into the Non-BCI Version, as defined in paragraph 5.7(b).

d. All Third Parties that have designated Third Party BCI Approved Persons must inform the Parties of the identity of the specific room (including the address and the room number) in which the locked security container, as referred to in subparagraph 5.9(c) above, is located.

e. If a Third Party BCI Approved Person removes from the Secure Site or the WTO Reading Room a handwritten memo in accordance with subparagraph 5.9(b) above, such memo shall not be copied in excess of the number of copies required by the Third Party BCI Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies of such memo shall be prohibited.

f. A Third Party may not incorporate into the body of its Submission any Party-BCI. If a Third Party wishes to refer to any Party-BCI, the relevant arguments including such BCI should be incorporated into a separate Appendix. Such Appendix shall not be served on other Third Parties.

g. On the date determined by the Panel as the deadline to make the Third Party written submission, a Third Party shall serve its submission only on the Parties and on the Panel. The submission shall be served on the other Third Parties only after the Parties have confirmed that the submission does not contain or disclose Party-BCI. A Party shall make this confirmation or otherwise advise of any necessary change to the relevant Third Party within two working days of receiving the submissions of Third Parties.

5.10. A Party or Third Party that wishes to submit or refer to BCI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not Approved Persons, WTO Approved Persons or, as appropriate, Third Party BCI Approved Persons from the meeting for the duration of the submission and discussion of BCI.

5.11. Approved Persons and WTO Approved Persons shall store BCI only in locked security containers. In the case of BCI submitted to the Panel, such locked security containers shall be kept on the WTO Secretariat's premises, except that Panel members may maintain a copy of all relevant documents and materials containing BCI at their places of residence. Such documents and materials shall be stored in locked security containers when not in use. BCI shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. All work papers (*e.g.*, draft submissions, worksheets, etc.) containing BCI shall, when no longer needed, be shredded or burned consistent with normal government practice for destroying sensitive documents.

5.12. The Panel shall not disclose BCI in its final report to be circulated to the Members, but may make statements or draw conclusions that are based on the information drawn from the BCI.

6 HSBI

6.1. Unless otherwise provided below, HSBI shall be subject to all the restrictions in Section 5 applicable to BCI.

6.2. HSBI shall be submitted to the Panel in electronic form, using locked CDs or two Sealed Laptop Computers connectable to 19" - 21" monitors, or in hard copy form, for access by WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI. All such HSBI shall be stored in a locked security container in a designated secure location on the premises of the WTO Secretariat.[5] Any computer in that room shall be a Stand-Alone Computer. WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI may view HSBI only in the designated secure location referred to above. A Stand-Alone Printer may be used to make hard copies of any HSBI. Such hard copies shall be

[5] At the request of any of the Parties, the WTO Secretariat will try to obtain as soon as practicable a secure safe to store all HSBI and hard copies of any HSBI, if a locked security container is deemed unsuitable for the appropriate protection of the information.

made on distinctively colored paper. Such hard copies shall either be stored in a locked security container at the designated secure location referred to above, or destroyed at the end of the relevant working session. HSBI shall not be removed from this designated secure location, except (i) in the form of handwritten notes that may be used only on the WTO Secretariat's premises and which shall be destroyed once no longer in use; and (ii) subject to appropriate precautions, for purposes of meetings of the Panel with the Parties and any internal deliberations of the Panel, as provided for in paragraph 6.11(j).

6.3. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the other Party, in the HSBI Locations listed in paragraph 2.9. A Stand-Alone Printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI Location, or destroyed at the end of the relevant working session.

6.4. If a Third Party submits HSBI, it shall notify the Parties of the fact that such submission has been made. Each Third Party submitting HSBI shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the Parties, in the HSBI Location listed in paragraph 2.9. A Stand-Alone Printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI Location, or destroyed at the end of the relevant working session.

6.5. Except as otherwise provided in these procedures, HSBI shall not be stored, transmitted or copied either in written or electronic form.

6.6. HSBI Approved Persons may view HSBI on the Sealed Laptop Computer maintained by the other Party or a Third Party or, in the case of HSBI submitted on Locked CDs on a Stand-Alone Computer, only in a designated room at one of the HSBI Locations indicated in paragraph 2.9, or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 6.2, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI Location. The designated secure location referred to in paragraph 6.2 shall be available to HSBI Approved Persons by prior arrangement with the WTO Secretariat. HSBI Approved Persons may not bring into such room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from such room, except in the form of handwritten notes or aggregated information generated on a Stand-Alone Computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI Location or designated secure location referred to in paragraph 6.2 shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI Location within its territory referenced in paragraph 2.9, maintain such log until one year after the Conclusion of the Panel Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 6.2, maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

6.7. No HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI shall disclose HSBI to any person except another HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI, and then only for the purpose of this dispute. This obligation applies indefinitely.

6.8. HSBI may be processed only on Stand-Alone Computers. Any memorandum containing HSBI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

6.9. A Party or Third Party that wishes to submit or refer to HSBI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not HSBI Approved Persons or WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI from the meeting for the duration of the submission and discussion of HSBI.

6.10. All HSBI shall be stored in a safe at the relevant HSBI Location or in accordance with paragraph 6.2.

6.11. The treatment in a Party's Submissions to the Panel of any HSBI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to HSBI.

a. HSBI may be incorporated into a separate appendix to, but not the body of, a Party's Submission, which appendix shall be comprehensible in itself. The document containing the HSBI shall be referred to as the "Full HSBI Version Appendix";

b. A Party submitting an appendix containing HSBI shall also submit, within a time period to be set by the Panel, a version redacting any HSBI. This shall be referred to as the "Redacted Version Appendix";

c. At the request of a Party, information contained in the Redacted Version Appendix may be treated as BCI, in accordance with the provisions of Section 5;

d. A Redacted Version Appendix shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Redacted Version Appendix:

   i. A Party may request that the Party that originally submitted the HSBI, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   ii. Upon receipt of such a request, the Party that originally submitted the HSBI shall, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the HSBI failed to indicate with sufficient precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and to produce, if necessary, a non-HSBI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

e. The Full HSBI Version Appendix shall be kept in an HSBI Location and in the designated secure location referred to in paragraph 6.2, as appropriate, in the form of a locked CD. If it is not practical to keep the Full HSBI Version Appendix in an HSBI Location, the Party may keep it in a locked security container in a Secure Site in the form of a locked CD.

f. The locked CD containing the Full HSBI Version Appendix shall bear the label marked "FULL VERSION OF HSBI APPENDIX TO SUBMISSION" and indicate the name of the Party that submitted the HSBI. In addition, the HSBI Appendix itself shall be marked with heading with double bolded square brackets on each page in an electronic file that contains the notation "FULL VERSION OF HSBI APPENDIX TO SUBMISSION". The electronic file containing the HSBI Appendix shall have a file name that contains the letters "HSBI VERSION".

g. The Party shall submit one copy of the Full HSBI Version Appendix to the Panel (through Mr Rodd Izadnia, Secretary to the Panel) and two copies to the other Party in the form of two locked CDs. The Full HSBI Version Appendix shall not be transmitted via e-mail. Parties shall agree between themselves beforehand on the name of the Approved Person that is to receive the locked CD.

h. The Party shall commence transfer of the locked CDs containing the Full HSBI Version Appendix no later than the deadline for the submission concerned, and, at the same time, provide the Panel and the other Party with proof that this has been done.

i. No more than one working day in advance of a Panel meeting with the parties, a Party may, exclusively at that Party's Permanent Mission in Geneva, use the locked CD to produce no more than one hard copy of the Full HSBI Version Appendix for each HSBI Approved Person planning to attend that Panel meeting. All paper versions produced pursuant to this subparagraph shall be collected by the Party concerned and destroyed immediately after the conclusion of the meeting.

j. WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, a Panel meeting with the parties and/or an internal meeting. When not in use, these paper versions shall be stored in a locked security container in the designated secure location referred to in paragraph 6.2. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Panel Process as defined in paragraph 2.3.

k. Parties are encouraged to submit versions of exhibits containing HSBI from which all HSBI has been deleted. Such exhibits shall be referred to as "HSBI-Redacted Version Exhibits". HSBI-Redacted Version Exhibits may contain BCI.

    i. A Party may submit HSBI-Redacted Version Exhibits prepared by that Party to the Panel, and serve them on the other Party in accordance with the applicable procedures, at the time it serves the submission to which the exhibit relates.

    ii. If a HSBI-Redacted Version Exhibit is not submitted by the Party submitting the exhibit, an HSBI Approved Person representing the other Party may prepare an HSBI-Redacted Version Exhibit of any such exhibit.

    iii. HSBI-Redacted Version Exhibits may be prepared by an HSBI Approved Person, at an HSBI Location, by deleting the HSBI in the exhibit (identified by double brackets) from such exhibit and either printing or photo-copying the resulting document containing no HSBI. The deletion of HSBI from the resulting document shall be verified by a person authorized for this purpose by the Party that submitted the exhibit(s) in question. The resulting document containing no HSBI (but which may contain BCI) will constitute the HSBI-Redacted Version Exhibit of such exhibit, and may be removed from the HSBI Location.

    iv. The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI Approved Person for purposes of the verification provided for in paragraph (iii) above. HSBI-Redacted Version Exhibits may be prepared by HSBI Approved Persons upon request during the times the designated room at the relevant HSBI Location is available, as provided for in paragraph 6.6 of these Procedures.

    v. The Panel shall resolve any disagreement arising from the operation of sub-paragraph 6.11(k), and may take appropriate action to ensure that the provisions of paragraph 6.11 are satisfied.

l. The Panel reserves the right, after consulting the parties, to amend the provisions of paragraph 6.11 at any time in order to accommodate situations arising during Panel meetings, and the preparation of the interim report and the final report.

6.12. The Panel shall not disclose HSBI in its report, but may make statements or draw conclusions that are based on the information drawn from the HSBI.

7 RESPONSIBILITY FOR COMPLIANCE

7.1. Each Party and Third Party is responsible for ensuring that its Approved Persons and Third Party BCI Approved Persons comply with these procedures to protect BCI and HSBI submitted by each Party and Third Party, as well as with enforceable codes of professional conduct to which its Approved Persons or other Outside Advisors are subject. WTO Approved Persons shall comply with these procedures to protect BCI and HSBI submitted by a Party or Third Party. WTO Approved Persons are covered by the WTO Rules of Conduct. As provided for in the WTO Rules of Conduct, evidence of breach of these Rules may be submitted to the Chair of the DSB or to the Director-General of the WTO, or his designee, as appropriate, for appropriate action pursuant to Section VIII of the WTO Rules of Conduct.

8 ADDITIONAL PROCEDURES

8.1. After consulting with the Parties, the Panel may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures but which the Panel considers may be of assistance in adjudicating the claims before it, including, if necessary, information that the United States internally classifies as "Top Secret", "Secret", "Confidential", or controlled pursuant to the United States' International Traffic in Arms Regulation ("ITAR").

8.2. The Panel may, with the consent of both Parties, waive any part of these procedures. Such "waiver" shall be specifically set forth in writing and signed by a representative of both Parties.

9 RETURN AND DESTRUCTION

9.1. Except as provided for in paragraph 9.2, after the Conclusion of the Panel Process as defined in paragraphs 2.3(a), 2.3(c) or 2.3(d), or as contemplated in paragraph 9.3, within a period to be fixed by the Panel, WTO Approved Persons, the Parties and Third Parties (along with all Approved Persons) shall destroy or return all documents (including electronic material) or other recordings containing BCI to the Party or Third Party that submitted such documents or other recordings. At the same time, WTO Approved Persons and the Parties shall destroy and/or return any electronic material submitted by a Party or Third Party that contains HSBI.

9.2. The WTO Secretariat shall retain one hard copy and one electronic version of any final report of the Panel containing BCI, and one electronic version of all documents containing BCI submitted to the Panel, recorded on locked CD(s), to be kept in sealed containers in a locked cabinet on the premises of the WTO Secretariat.

9.3. After the Conclusion of the Panel Process as defined in paragraph 2.3(b), the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. Following the adoption by the DSB of the Appellate Body report pursuant to Article 17.14 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body Report pursuant to Article 17.14 of the DSU, the provisions of paragraphs 9.1 and 9.2 shall apply *mutatis mutandis*.

9.4. The hard drive of each Stand-Alone Computer and all media used to back up such computers shall be destroyed at the Conclusion of the Panel Process.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE MEETING OF THE PANEL

Adopted on 22 February 2016

1.1. The Panel's meeting with the parties will start at 10h00 on 24 February 2016. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view.

1.2. The oral statements of the parties will be video recorded for later viewing, as set out in paragraph 1.8. below.

1.3. If at any point during its oral statement a party intends to address BCI or HSBI, it shall request that the video recording be discontinued for the relevant portion of the oral statement, after which video recording will be resumed. A party shall first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the video recording to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI. Either party shall inform the Panel if the other party or the Panel is referring to BCI or HSBI, whereupon the Panel shall instruct that video recording be discontinued and instruct any individuals not having BCI/HSBI approval to exit the room.

1.4. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. BCI or HSBI in the texts of the oral statements provided to the panel and the other party during the meeting and prior to the delivery of the oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. BCI should be contained within single brackets. HSBI should be contained within double brackets and deleted. In addition, a party including HSBI in its oral statement shall provide, prior to delivery of the oral statement, one paper copy to the panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

1.5. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to video record the proceedings. If at any point during the meeting a party intends to refer to BCI or HSBI, those individuals not having BCI/HSBI approval shall be asked to exit the room. If at any point during the meeting a party intends to refer to either BCI or HSBI, the team hired by the WTO Secretariat to video record the proceedings shall be asked to exit the room.

1.6. After each oral statement has been delivered, the Panel will ask the respective party whether it can confirm that no BCI or HSBI was pronounced during the video recorded portion of the oral statement. The Panel will also ask the parties for confirmation, at the end of the meeting, that no BCI or HSBI was pronounced during the video recorded portion of the meeting. If both parties so confirm, the showing of the video recording will proceed according to the schedule to be determined by the Panel, as provided in paragraph 1.8. If either party requests to review the video recording, the Panel will invite both parties to attend a review session, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. In the event, each party shall designate a maximum of two persons, who shall be BCI/HSBI-approved persons, to participate in the review session. Parties should be prepared to advise the technician which portion of the oral presentation presents a concern, and limit review to those portions of the video recording to the maximum extent possible. If either party considers that a specific portion of the video recording must be deleted − because it is BCI or HSBI − the specific portion of the video recording will be deleted.

1.7. The third party session will start at 10h00 on 25 February 2016. Third parties shall indicate to the Panel, not later than by 13h00 on 24 February 2016, whether they consent to the video recording of their oral statements for later viewing. The Panel will start the third party session with

the statements of those third parties so consenting. After such third parties have made their statements, any questions or comments from the parties, other third parties or the Panel concerning these statements shall be made. The Panel shall then proceed to a third party closed session during which the rest of the third parties shall make their statements. The Panel or any party or third party may pose questions to any third party or make comments concerning these statements. Should any third party intend to include BCI in its oral statement or otherwise to refer to BCI during the third party session, it is requested to inform the Panel by 13h00 on 24 February 2016 so that appropriate arrangements can be made to protect the confidentiality of that information.

1.8. The showing of the video recording of the oral statements of the parties and third parties shall take place at a date to be determined by the Panel. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental organizations, upon presentation of their official badges. Other interested persons will be able to attend by registering directly with the WTO. To this effect, the Secretariat will place a notice by on the WTO website informing the public of the showing and including a link through which members of the public can register.

ANNEX A-4

ADDITIONAL WORKING PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE SECOND MEETING OF THE PANEL

Adopted on 23 March 2016

1.1. The Panel's meeting with the parties will start at 10h00 on 5 April 2016.

1.2. In accordance with the Working Procedures adopted for the dispute, the Panel shall ask the United States whether it wishes to avail itself of the right to present its case first at the meeting. If the United States wishes to do so, it will be invited by the Panel to deliver its opening statement first. Subsequently, the Panel shall invite the European Union to present its point of view. If the United States chooses not to avail itself of that right, the Panel shall invite the European Union to present its opening statement first.

1.3. The oral statements of the parties will be video recorded for later viewing, as set out in paragraph 1.9. below.

1.4. If at any point during its oral statement a party intends to address BCI or HSBI, it shall request that the video recording be discontinued for the relevant portion of the oral statement, after which video recording will be resumed. A party shall first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the video recording to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI. Either party shall inform the Panel if the other party or the Panel is referring to BCI or HSBI, whereupon the Panel shall instruct that video recording be discontinued and instruct any individuals not having BCI/HSBI approval to exit the room.

1.5. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. BCI or HSBI in the texts of the oral statements provided to the panel and the other party during the meeting and prior to the delivery of the oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. BCI should be contained within single brackets. HSBI should be contained within double brackets and deleted. In addition, a party including HSBI in its oral statement shall provide, prior to delivery of the oral statement, one paper copy to the panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

1.6. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to video record the proceedings. If at any point during the meeting a party intends to refer to BCI or HSBI, those individuals not having BCI/HSBI approval shall be asked to exit the room. If at any point during the meeting a party intends to refer to either BCI or HSBI, the team hired by the WTO Secretariat to video record the proceedings shall be asked to exit the room.

1.7. After each oral statement has been delivered, the Panel will ask the respective party whether it can confirm that no BCI or HSBI was pronounced during the video recorded portion of the oral statement. The Panel will also ask the parties for confirmation, at the end of the meeting, that no BCI or HSBI was pronounced during the video recorded portion of the meeting. If both parties so confirm, the showing of the video recording will proceed according to the schedule to be determined by the Panel, as provided in paragraph 1.9.

1.8. If either party requests to review the video recording, the Panel will invite both parties to attend a review session, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. In the event, each party shall designate a maximum of two persons, who shall be BCI/HSBI-approved persons, to participate in the review session. Parties should be prepared to advise the technician

which portion of the oral presentation presents a concern, and limit review to those portions of the video recording to the maximum extent possible. If either party considers that a specific portion of the video recording must be deleted − because it is BCI or HSBI − the specific portion of the video recording will be deleted.

1.9. The showing of the video recording of the oral statements of the parties and non-confidential portions of the meeting shall take place at a date to be determined by the Panel. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental organizations, upon presentation of their official badges. Other interested persons will be able to attend by registering directly with the WTO. To this effect, the Secretariat will place a notice by on the WTO website informing the public of the showing and including a link through which members of the public can register.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. Pursuant to paragraph 20 of the Panel's Working Procedures (adopted 7 December 2015), the European Union now provides an integrated executive summary of the facts and arguments presented in the European Union's (i) first written submission, (ii) first opening oral statement, (iii) first closing oral statement, and (iv) responses to questions following the first substantive meeting.

2. In the present dispute, the European Union challenges several subsidies, in the form of tax incentives awarded by Washington State to aerospace companies, which are contingent on the use of domestic over imported goods, and hence prohibited under Article 3.1(b) of the SCM Agreement. These tax incentives, originally established by House Bill 2294 ("HB 2294"), have been amended, and extended through 2040, by Substitute Senate Bill 5952 ("SSB 5952").

3. With its first written submission, the European Union established a *prima facie* case that (i) the measures at issue are subsidies within the meaning of Article 1.1 of the SCM Agreement, and that (ii) these subsidies are contingent on the use of domestic over imported goods within the meaning of Article 3.1(b).

4. As for "subsidy", the European Union has demonstrated the existence of a financial contribution in the form of foregoing of government revenue otherwise due, within the meaning of Article 1.1(a)(1)(ii). Further, the European Union has demonstrated that the measures confer a "gift" on the recipients that would not have been available in the market, thereby conferring a "benefit" within the meaning of Article 1.1(b).

5. As for the prohibited contingency, the European Union refers to both the text of SSB 5952 (*de jure* contingency), and certain additional facts (*de facto* contingency). While the European Union advances both *de jure* and a *de facto* claims of contingency, its first and principal claim is the *de jure* claim.

6. By way of background, the European Union notes that Washington State, itself, has quantified the total value of the revenue foregone pursuant to the conditional amendments and extensions established by SSB 5952 - nearly USD 9 billion. While the quantum of subsidization is irrelevant to a prohibited subsidy dispute as a legal matter, it is pertinent to note that the measures at issue confer on their beneficiaries – with Boeing being the principal beneficiary – the single largest targeted state tax break in United States history.

II. FACTUAL ASPECTS

A. The Washington State Aerospace Tax Incentives

7. At issue in this dispute are tax incentives for civil aircraft provided by the State of Washington (the "aerospace tax incentives"), as amended and extended by SSB 5952, and as subject to the conditions in Sections 2, 5, and 6 thereof.

8. In 2003, the State of Washington enacted HB 2294 for the purpose of "retaining and attracting the aerospace industry to Washington State" and included a set of "comprehensive tax incentives" directed at achieving this aim. This legislation was part of a package of incentives for Boeing to locate the 787 final assembly facility in Washington. HB 2294 took effect upon a final decision to site a facility in Washington State "with the capacity to produce at least thirty-six super-efficient airplanes a year," defined by the precise specifications for the 787.

9. HB 2294 established seven tax incentives for producers of civil aircraft (including certain suppliers):

- A reduction in the rate of Business and Occupation ("B&O") tax, i.e., the State of Washington's principal business tax, to 0.2904%, compared to the generally applicable rates of 0.484% for manufacturing, and 0.471% for retailing activities.

- A B&O tax credit for pre-production development for commercial airplanes and components;

- A B&O tax credit for property taxes on commercial airplane manufacturing facilities;

- An exemption from sales and use taxes for certain computer hardware, software, and peripherals;

- An exemption from sales and use taxes for certain construction services and materials;

- An exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes; and

- An exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes.

10. While the tax incentives that originated in HB 2294 were originally enacted in connection with Boeing's decision to locate the first 787 final assembly line in Washington State, HB 2294 provided that those benefits were to apply to all Boeing LCA developed and produced in Washington State, through the original expiration date of 1 July 2024.

B. The Conditional Extension and Amendment of the Washington State Aerospace Tax Incentives: Substitute Senate Bill 5952

1. The 777X incentive legislation

11. Over the course of 2013, Boeing publicly considered developing a new, advanced variant of its 777 family of long-range, twin-aisle LCA, known as the 777X. On 5 November 2013, Washington State, Boeing, and the trade union representing Boeing machinists reached a tentative agreement to locate production of the 777X in Washington, whereby the union would agree to a new long-term contract, and the State would provide Boeing with billions of dollars in additional subsidies.

12. On 9 November 2013, the Washington State legislature passed SSB 5952, which, subject to certain conditions discussed below, amends and extends each of the existing aerospace tax incentives − originally due to expire in 2024 − through 2040, at a value estimated at more than USD 8.7 billion for Boeing, its suppliers, and other local aerospace firms. Governor Jay Inslee signed SSB 5952 into law on 11 November 2013.

2. The Programme-Siting condition

13. Section 2 of SSB 5952 provides that the entire act would take effect only upon the decision to locate a new commercial aircraft programme − expressly defined to include *wing and fuselage production* of an aircraft, in addition to *final assembly* of that same aircraft − in Washington State. Specifically, Section 2 provides that:

> {this act} takes effect contingent upon the siting of a significant commercial airplane manufacturing program in the state of Washington. If a significant commercial airplane manufacturing program is not sited in the state of Washington by June 30, 2017, {this act} does not take effect.

The European Union refers to this provision as the "Programme-Siting condition".

14. Section 2 defines "siting" to mean "a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington state". It further defines "significant commercial airplane manufacturing program" as:

> an airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section:
>
> (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.[1]

15. Accordingly, under the Programme-Siting condition established in Section 2, the aerospace tax incentive extensions and expansion provided for in SSB 5952 were made contingent upon Boeing's decision to locate in Washington State both (i) production of the wings and fuselage for a new aircraft model, version, or variant, and (ii) final assembly of that same aircraft model, version, or variant. In fact, the relevant aircraft turned out to be the 777X.

3. The Exclusive-Production condition

16. In addition to the Programme-Siting condition, SSB 5952 establishes a second condition related to the availability of the B&O tax rate reduction for the 777X, hereinafter referred to as the "Exclusive-Production condition".

17. Pursuant to the Exclusive-Production condition, the reduced B&O tax rate would not apply to revenue from the 777X *in the event* Boeing were to perform any final assembly, *or any wing assembly*, for the 777X outside of Washington State.

III. PROHIBITED SUBSIDIES UNDER ARTICLE 3.1(B) OF THE SCM AGREEMENT

A. The Aerospace Tax Incentives, as Amended by SSB 5952, Constitute Specific Subsidies

1. Financial contribution

18. Each of the aerospace tax incentives, as amended and extended by SSB 5952, constitutes a financial contribution by a government involving the "forego{ing}" of "government revenue that is otherwise due" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

19. The identification of revenue "otherwise due" involves a comparison between the challenged measure and a "defined, normative benchmark". According to the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, the proper comparison must be "between the rules of taxation contained in the challenged measure and other rules of taxation of the Member concerned", and "{i}n identifying the appropriate benchmark for comparison, panels must obviously ensure that they identify and examine fiscal situations which it is legitimate to compare".

20. In response to Panel Question 24, and expanding on the European Union's *prima facie* showing in its First Written Submission, the European Union has further specified the relevant normative benchmark for each of the measures at issue, demonstrating that the tax treatment enjoyed by the beneficiaries involves foregoing of revenue that would be due under the relevant benchmark. Additionally, the European Union has explained that Washington State, itself, has publicly acknowledged this foregoing of revenue, and has even quantified the revenue that is foregone under each of the measures at issue, making the Panel's task a simple one.

21. In analyzing Article 1.1(a)(1)(ii), the Appellate Body in *US – FSC* has explained that the word "foregone" "suggests that the government has *given up an entitlement to raise revenue* that it could 'otherwise' have raised".[2] When a government confers upon a taxpayer an *entitlement* to a tax reduction, it foregoes its own *entitlement* to raise a part of the revenue that would otherwise be due from the taxpayer under the normative benchmark. Through each of the tax breaks at issue, Washington State has conferred an *entitlement* on Boeing and other Washington State

[1] Emphasis added.
[2] Emphasis added.

aerospace companies to receive the continued tax reductions, contingent on satisfaction of the Programme-Siting and Exclusive-Production conditions. In that sense, the government is foregoing, and has foregone, revenue that is otherwise due.

22. In response to Panel Question 6, the European Union has clarified that its challenge is directed at the tax incentives, as amended and extended by SSB 5952, "as such"; this challenge is not focused on the application of these measures during any given point in time or in any specific instance. Having said that, the European Union has also demonstrated that the challenged tax incentives have already foregone revenue that became due in the past, revenue that is currently due, and revenue that will become due in the future. All of these are relevant to determining the existence of a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

23. The European Union has clarified that SSB 5952 not only (conditionally) extended the expiration date of the existing tax incentives from 2024 through 2040, but also amended the *sales and use tax exemption for construction services and materials* so that Boeing could take advantage of that exemption in constructing its new 777X manufacturing facilities in *2015 and 2016*. Thus, SSB 5952 has already led to foregoing of revenue in the past, and this was dependent on satisfaction of the Programme-Siting condition. In addition, Boeing's continued enjoyment of the B&O tax rate reduction associated with the 777X production and sales is *currently* subject to the Exclusive-Production condition.

24. With respect to the 2024-2040 period, an *entitlement* in favour of Boeing has been created, and, in turn, an *entitlement* has been *foregone* by Washington State, at present. An interpretation under which only foregoing of revenue due in the past would constitute a financial contribution would allow Members to craft prohibited subsidy programs that include a long time gap between the intended distortion (through the meeting of the prohibited contingency) and the reward for such conduct in the form of disbursement of a subsidy, in a manner that would limit the effectiveness of a challenge under Article 3.1(b). Moreover, Article 3.2 clarifies that "maintain{ing}" a subsidy programme tied to the prohibited contingencies violates the *SCM Agreement*, even when the financial contribution is yet to be "grant{ed}", let alone actually disbursed or used.

2. Benefit

25. The European Union has demonstrated that the financial contribution in the present dispute – in the form of forgiveness of tax obligations – is, in the words of the panel in *US – Large Civil Aircraft,* "essentially a gift from the government, or a waiver of obligations due, and it is clear that the market does not give such gifts". Thus, there is a benefit because the very nature of a market precludes the availability of multi-billion dollar gifts to a commercial actor.

3. Conclusion on "subsidy"

26. The European Union, consistent with its burden to establish a *prima facie* case, has demonstrated that each of the measures at issue provides a financial contribution and confers a benefit. Absent effective rebuttal by the United States, the very nature of a *prima facie* case requires the Panel to make findings in favour of the European Union.

27. The European Union also recalls that the findings it seeks are largely consistent with the "financial contribution" and "benefit" findings made by the panel and the Appellate Body in *United States – Large Civil Aircraft*. While the European Union's reliance on these findings certainly does not erase the burden to establish a *prima facie* case (which it has discharged), the goals of predictability and security set out in Article 3.2 of the DSU, as well as the guidance of the Appellate Body, would warrant the Panel arriving at findings consistent with those made by the panel and Appellate Body in *United States – Large Civil Aircraft*, to the extent the relevant facts have not changed.

28. The European Union acknowledges that the *United States – Large Civil Aircraft* panel held that three of the tax incentives at issue did not involve a financial contribution because Boeing was unlikely to use these incentives. These are the (i) sales and use tax exemption for construction services and materials, (ii) leasehold excise tax exemption and (iii) leaseholder property tax

exemption. The panel expressly stated that its finding was a result of the European Union's claim not being one of a financial contribution in the abstract, but one specifically of a financial contribution to Boeing. By contrast, in the present instance, the European Union alleges financial contribution in the abstract, warranting a different conclusion. Additionally, the European Union has also demonstrated that, with the construction of the new 777X wing assembly plant, which commenced in 2014 and is expected to be completed in 2016, there is evidence of Boeing having used the sales and use tax exemption for construction services and materials.

B. The Aerospace Tax Incentives, as Amended by SSB 5952, Constitute Prohibited Subsidies Contingent upon the Use of Domestic over Imported Goods

29. As a result of the Programme-Siting and Exclusive-Production conditions established in SSB 5952, the aerospace tax incentives, as amended and extended, constitute prohibited subsidies "contingent ... upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement. While the European Union advances both a claim of *de jure* contingency and of *de facto* contingency, its first and principal claim is that of *de jure* contingency.

1. The legal standard for demonstrating the existence of a subsidy contingent upon the use of domestic over imported goods

30. Article 3.1(b) of the SCM Agreement provides that "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods" "shall be prohibited".

31. The United States correctly points out that the French and Spanish texts of Article 3.1(b) employ the terms *produits* and *productos*. The European Union agrees with the United States that the use of the words *produits* and *productos* in the French and Spanish versions is instructive, and the European Union considers the word "goods" in Article 3.1(b) of the SCM Agreement to be synonymous with the term "products".

32. The European Union has also indicated its agreement with the United States and Japan that the word "over", in the text of Article 3.1(b), means "in preference to", "in excess of" or "more than". Further, the use of the word "over" (i.e., "in excess of") in Article 3.1(b) confirms that no *de minimis* discrimination is acceptable under the prohibition in Article 3.1(b) of the SCM Agreement. As soon as a subsidy is contingent upon the use of domestic over imported goods, competitive opportunities between domestic and imported goods are distorted, even if no such goods are currently imported.

33. The European Union has also set out its understanding that the word "use" in Article 3.1(b) has a broad meaning, including in response to Panel Question 44. Prior guidance of the Appellate Body, and the context afforded by other provisions of covered agreements that employ the word "use", indicate that its meaning goes beyond simple incorporation of a domestic input in the final subsidised product.

34. To the extent that the United States argues that a "good", within the meaning of Article 3.1(b), must be actually traded, the European Union disagrees. This argument ignores a hallmark tenet of WTO jurisprudence that the disciplines on goods protect not just actual trade in goods as seen or envisioned in the market today, but also *competitive opportunities*. In the context of a purely origin-based discrimination, such as mandated by the legislation at issue, this protection extends to "potentiality to compete" even in the absence of an actual product which is traded at the relevant time.

35. If the United States were correct that actual trade in a product needs to be demonstrated for it to qualify as a "good" under Article 3.1(b), the most trade restrictive of import substitution subsidies − i.e., those which have succeeded in distorting the market so much that they preclude *even the existence* of competing foreign producers in the market − would not be disciplined by Article 3.1(b), while less trade distorting import substitution subsidies would be subject to that provision.

2. Application of the legal standard to the facts of this case

36. The European Union fully agrees with the United States and the third parties that Article 3.1(b) does not discipline production subsidies. However, the measures at hand are not production subsidies, but subsidies contingent on the use of domestic over imported goods, which are properly within the scope of the prohibition in Article 3.1(b).

37. In this case, pursuant to the Programme-Siting condition in Section 2 of SSB 5952, the amended and extended aerospace tax incentives are contingent on the establishment of a new commercial aircraft manufacturing programme that uses goods (i.e., fuselages and wings) produced in the United States (specifically, in Washington State) in the subsidized aircraft. Under this condition, the tax incentives would not have been extended in duration through 2040 if Boeing had decided to "use" imported wings and fuselages in the assembly of the 777X, nor would the scope of the sales and use tax exemption for construction services and materials have been expanded to cover Boeing's work on the 777X manufacturing facilities in 2015 and 2016.

38. Likewise, pursuant to the Exclusive-Production condition, Boeing benefits from the reduced B&O tax rate for the 777X only so long as it "uses" wings assembled exclusively in Washington State for the 777X, or any variant thereof. If, for example, Boeing were to use *any* wings made in Japan for the 777X, as it does for the 787, it would lose its entitlement to the preferential B&O tax rate with respect to the manufacture and sale of the 777X.

39. In response to the European Union's arguments in this regard, the United States asserts that wings and fuselages are not "goods", and that they are not "used" in the production of the 777X. But the very wording of SSB 5952, itself, describes wings and fuselages as "products", a term synonymous with the word "goods". The European Union refers to the shared understanding of the World Customs Organization, the United States' Customs authorities, Washington State, Boeing, and Airbus − outside the context of this dispute − that wings and fuselages are goods. There are real world examples, including the Boeing 787 and 737, and the Airbus A350 and A380, where aircraft wings and fuselages have been traded and transported across long distances.

40. While it is not incumbent upon the complaining Member in a prohibited subsidy dispute to positively demonstrate nullification and impairment − in the form of prior existing identifiable competitive opportunity, and its erosion by the challenged measure − the European Union also demonstrates that prior to the enactment on SSB 5952, Boeing had considered importing the 777X wing from Japan, as it currently does for the 787. The European Union referred the Panel to a November 2013 statement by Boeing's own Chief Technology Officer, Mr. John Tracy. According to press reports, Mr. Tracy explained, immediately before the adoption of SSB 5952, that Boeing was "consider{ing} all other alternatives", and specifically clarified that such alternatives included "the possibility of *taking production of the wings out of the United States to Japan*".

41. The United States provides details of how Boeing *today* intends to produce the 777X. While a publicly-available technical report by Washington State's Department of Ecology contradicts the United States' current narrative about this production process, the European Union considers it unnecessary to enter into a protracted debate on 777X production. These details are an irrelevant distraction. It is necessary to evaluate a challenge to Article 3.1(b) in view of the market situation at the point in time prior to adoption of a challenged measure.

42. SSB 5952 was adopted, and worded the way it is, precisely in order to take away competitive opportunity from wing and fuselage producers outside of Washington State. Therefore, what Boeing or any other entity does *today* or intends to do *in the future* in a market scenario distorted by the subsidies at issue is irrelevant and extraneous to the issues at hand.

43. The United States' assertion that the conditions at hand establish the eligibility parameters for a "production subsidy" is equally erroneous. It is true that SSB 5952 begins by providing that the subsidized product − a commercial aircraft − must be produced in Washington State. This aspect, taken alone, is a hallmark of a production subsidy, which would not be disciplined by Article 3.1(b). However, the references to wings and fuselages, which the United States struggles to read out of SSB 5952, convert what would otherwise be a production subsidy into a prohibited local content contingency.

44. The Programme-Siting condition provides that the required "fuselages and wings" cannot be just any type of "fuselages and wings" – rather, they must be fuselages and wings of the same "airplane program" that must be "fina{lly} assembl{ed}" in Washington State. Similarly, the Exclusive-Production condition does not provide only that "wing assembly", generally, must take place in Washington State; rather, it must be the "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". Thus, according to the text of the legislation, fuselages and wings must be produced in Washington State, and these same components must be used in the final assembly of the subsidized airplane program.

45. The interpretation of Washington State law is a question of fact before this Panel that must be considered objectively, and the United States' interpretation cannot be the correct one. When interpreting domestic law of a Member, the role of a WTO panel is to determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. As a matter of Washington State law, "{s}tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous". The United States' proposed interpretation would, in fact, render critical parts of SSB 5952 meaningless and superfluous – namely, the references to wings and fuselages. As such, the United States' arguments must be rejected.

3. The violation of Article 3.1(b) is both *de jure* and *de facto*

46. The European Union has established a *prima facie* case in respect of its first and principal claim – one of *de jure* contingency, with reference to the text of SSB 5952, which expressly sets out a multi-billion dollar reward for the use of domestic wings and fuselages, and a corresponding multi-billion dollar penalty for the use of imported wings and fuselages. The text of SSB 5952 does not provide, as did the measure considered by the Appellate Body in *Canada – Autos*, a "multiplicity of possibilities for compliance" with the Program-Siting and Exclusive-Production conditions that may "make the use of domestic goods only one possible means". It provides one and only one possibility for compliance – the use of domestic wings and fuselages in the same aircraft that satisfied the Programme Siting condition – and makes the subsidies contingent on compliance. Thus, the very text of SSB 5952 demonstrates the *de jure* contingency that the European Union alleges.

47. Additionally, the European Union has identified the following facts, which are demonstrative of *de facto* contingency in the present case:

- The text of SSB 5952, and in particular the language of the Programme-Siting condition and Exclusive-Production condition;
- The statement of Governor Inslee indicating that "the legislation includes strong contingency language";
- The fact that Boeing currently imports wings for its 787 from Japan;
- The fact 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.
- The fact that 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 or fuselages. This penalty/reward structure was designed to distort decision-making both at the initiation of the new aircraft programme (i.e. Programme-Siting condition), and throughout the life of that programme (i.e. Exclusive-Production condition).

IV. CONCLUSION AND REQUEST FOR RELIEF

48. For the reasons set out in its submissions to date, the European Union respectfully requests the Panel to find that each of the Washington State tax incentives, as amended and extended by SSB 5952, constitutes a subsidy that is prohibited pursuant to Articles 3.1(b) and 3.2 of the SCM Agreement.

49. In accordance with Article 4.7 of the SCM Agreement, the Panel should recommend that the United States withdraw the subsidies without delay.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. In accordance with the Panel's Working Procedures (adopted 7 December 2015), the European Union now provides an integrated executive summary of the facts and arguments presented in the European Union's (i) second written submission, (ii) oral statement at the second substantive meeting, and (iii) responses (and comments on the United States' responses) to the Panel's questions following the second substantive meeting.

2. During the course of this dispute, the European Union has provided evidence and argument demonstrating that Washington State's aerospace tax incentives, as amended and extended by SSB 5952[1], confer subsidies that are *de jure* contingent on the use of domestic over imported goods, in violation of Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The Panel has before it the text of the legislation (submitted as Exhibit EU-03), which expressly conditions the provision of over $9 billion in subsidies on the use of domestic "products" on aircraft manufactured in Washington State. The European Union has also demonstrated, through additional factual evidence, a secondary claim of *de facto* contingency, also under Articles 3.1(b) and 3.2.

3. Recalling the text of SSB 5952, Section 2 provides (in the "Programme-Siting condition") that the amended and extended subsidies would not be granted unless a new commercial aircraft program which uses *domestically*-made "*products*", namely "fuselages and wings", is sited in Washington State. Additionally, Sections 5 and 6 (in the "Exclusive-Production condition") would serve to remove a large portion of one of the most valuable tax incentives in the package *if* the aircraft manufacturer satisfying the Programme-Siting condition were to *use* any *foreign-made* wings in the newly sited aircraft manufacturing facility in Washington State.

4. This statutory text is further supplemented by additional factual evidence. Most notably, in testimony to the Finance Committee of Washington State's House of Representatives just two days prior to passage of SSB 5952, Governor Jay Inslee explained in the following terms why he was sponsoring the legislation, and why the legislature should quickly pass it:

> Look, this is pretty simple what we are looking at here, and that is a simple fact, and that is the construction of the Boeing 777X and its carbon fiber wing, and assembly of that airplane, will be the lynchpin for economic growth in the State of Washington in the decades to come. We have an opportunity in the few days ahead of us to make sure that advanced manufacturing of the carbon fiber wing – the first time we have reversed the outflow of work of this nature from the State of Washington to bring it back to the State of Washington, we can achieve that in the next few days. And I can't overstate the significance of this event. Bringing this wing back to the State of Washington sets the foundation for an advanced carbon fiber industrial ecosystem in the State of Washington. When we lost the wing for the Boeing 787, some thought Washington would lose its lead in composites and advanced manufacturing. The 787 wing went to Japan; the second line went to South Carolina. . . . Today, we are going to reverse that trend with the 777X and its carbon fiber wing built here in the State of Washington . . . .[2]

5. Governor Inslee's statement could not have been any clearer – SSB 5952 amended and extended the tax incentives to the aerospace industry with conditions that will ensure that Washington State would not, once again, "los{e} the wing" to Japan, as it did for the 787. Rather,

[1] The European Union uses the term "SSB 5952" to refer to the law that is designated as Chapter 2 of the Laws of the 2013 3rd Special Session of the Washington State legislature, and published in the 2014 volume of the official digest of the Session Laws of the State of Washington, beginning at page 2. The United States refers to the same legislation as "ESSB 5952".

[2] Emphases added.

through the Programme-Siting and Exclusive-Production conditions, Washington State has "reversed the outflow" of those inputs for Boeing's latest aircraft programme so that they will be "built" "in the State of Washington". This was not the statement of a leader who would have accepted the current United States' assertions that wings of the 777X could not possibly be imported from foreign countries. Nor would the Governor have accepted the novel United States' position that wings are not components of a plane that are used in aircraft production.

6. The Washington State legislature passed the Governor's proposed legislation two days later. And, as a result of these conditions, SSB 5952 has already been a big success − and certainly not the "demonstrable failure" alleged by the United States − in ensuring that the wings and fuselages for Boeing's next new aircraft programme will be domestic goods.

7. Having summarised what this dispute is about, it is important to clarify what the present dispute is not about:

- Despite the United States' repeated contentions to the contrary, this dispute is not about a simple "production subsidy" that provides a financial contribution and benefit to domestic producers without regard to whether domestic or imported goods are used in production of the subsidised product.

- This is not a dispute related to contingency on the use of domestic over imported *components of* wings and fuselages. Rather, the European Union's claim is that the prohibited contingency in SSB 5952 is based on the use of domestic over imported *wings* and *fuselages*, which are themselves "goods".

- This is not a dispute about the use of objects that could not be considered "goods". In fact, the United States, itself, accepts (as it must) that wings and fuselages are traded on a regular basis, including for large commercial aircraft.

8. With respect to the "subsidy" element, the United States' response consists primarily of repeated and erroneous assertions that a *prima facie* case has not been established, and ambiguous observations about the types of evidence the United States might present if there were a *prima face* case to rebut. For example, the United States has made cursory "suggestions" (i) that Washington State's tax regime has a "complicated structure" that may result in an effect known as "pyramiding", (ii) that Washington State primarily relies on a Business and Occupation ("B&O") tax, which is unlike the tax regimes in other states in the United States, and (iii) that there exist "numerous product-based, entity-based, use-based, and other similar tax adjustments" in Washington State. The United States has not taken a position on how the first two of these assertions should affect the Panel's determination of the normative benchmarks. On the third, the United States has made certain belated and erroneous observations in its response to Panel Question 60, which the European Union discusses below.

9. With respect to "benefit" within the meaning of Article 1.1(b) of the SCM Agreement, in stark contrast to all WTO panels that have previously considered the issue, the United States asserts that the existence of tax breaks constituting a financial contribution within the meaning of Article 1.1(a)(1)(ii), which by their very nature are a "gift" from the government to the recipient, does not demonstrate conferral of "benefit".

10. As for contingency under Article 3.1(b) of the SCM Agreement, all of the United States' arguments are based on three fundamental flaws − (i) an erroneous definition of "goods", (ii) an erroneous understanding of "use", and (iii) a focus on components of wings and components of fuselages as the relevant "domestic" and "imported" goods at issue, rather than the "products" actually referenced in SSB 5592 − i.e. wings and fuselages.

11. In presenting its defense, the United States interprets both the text of SSB 5952 and that of the SCM Agreement in a manner that contradicts their ordinary meanings (considered in context and in light of the relevant object and purpose), while offering no substantiation for such interpretations. As for the evidence of *de facto* contingency, the United States' strategy has been to rely on assertions and statements tailor-made for the present dispute, and to casually dismiss inconvenient evidence from the real world as "imprecise" or "colloquial references".

12. While the United States has erred in accusing the European Union of "trying to fit a square peg into a round hole" in this dispute by characterizing the challenged incentives as prohibited subsidies (rather than production subsidies), the actual problem here is that the United States is attempting to drill a hole in the SCM Agreement so large that any Member could easily avoid the disciplines of Article 3.1(b). The factual inaccuracies and legal fallacies associated with each of the US assertions have been highlighted by the European Union in its submissions. In the following sections, the European Union briefly summarizes the arguments presented in the European Union's second written submission and its subsequent submissions

II. THE AEROSPACE TAX INCENTIVES, AS AMENDED BY SSB 5952, CONSTITUTE SPECIFIC SUBSIDIES

13. The European Union's second written submission once again details why the tax incentives, as amended and extended by SSB 5952, constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement. In particular, the European Union has explained that each of the seven aerospace tax incentives confers a financial contribution involving the "forego{ing}" of "government revenue that is otherwise due", within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. For each individual tax incentive, the European Union has provided details about the relevant normative benchmark. With respect to "benefit", the European Union again demonstrated that the tax breaks are a "gift" from the government that the recipients would not receive in the market. As for specificity, there is no dispute that subsidies violating Article 3.1(b) are deemed "specific" pursuant to Article 2.3 of the SCM Agreement.

A. Financial Contribution

14. The European Union now summarizes its responses to the United States' (1) arguments regarding the timing of the tax incentives, and (2) suggestions related to the normative benchmarks, as they relate to the issue of "financial contribution" under Article 1.1(a)(1)(ii) of the SCM Agreement.

1. Timing

15. The United States first hinted at a position, similar to the one it adopted in the *United States – Large Civil Aircraft* dispute, that only revenues foregone in the past would qualify as a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. The European Union demonstrated that there is no textual basis for such a temporal limitation. Further, the Appellate Body has interpreted the word "foregone" in Article 1.1(a)(1)(ii) to mean "the government has *given up an entitlement to raise revenue* that it could 'otherwise' have raised",[3] an action that does not have to occur *after* the revenue has become payable. If accepted, the United States' interpretation would incentivise Members to craft prohibited subsidy programmes in which the subsidy is received as a delayed reward for satisfying a prohibited contingency; in particular, the United States' interpretation could preclude a timely, effective challenge under Articles 3.1(b) and 3.2 in such circumstances, where the grant is complete and the firm is already in a position to account for, rely on, and benefit from a future revenue stream.

16. The United States subsequently modified its views on the temporal restriction it seeks to impose on Article 1.1(a)(1)(ii). In particular, in its response to Panel Question 21, the United States suggested that Article 1.1(a)(1)(ii) may cover the foregoing of revenue that would have become due in the future within "the coming year", but not later. The United States has offered no reasoning for its oscillating positions on temporal restrictions. Such legal arguments are not only erroneous, but they are internally inconsistent.

17. In addition, putting aside the United States' flawed legal interpretation, the European Union has explained that five of the seven tax incentives have, in fact, actually foregone revenue in the past, including since the November 2013 entry into force of SSB 5952. In fact, the United States does not deny that the following tax incentives have already lowered the taxes of the Washington State aerospace industry in the past, and continue to do so in the present: (1) B&O tax rate reduction for the manufacture and sale of commercial airplanes; (2) B&O tax credit for pre-production development of commercial airplanes and components; (3) B&O tax credit for property

[3] Emphasis added.

taxes and leasehold excise taxes on commercial airplane manufacturing facilities; (4) exemption from sales and use taxes for computer hardware, software, and peripherals; and (5) exemption from sales and use taxes for certain construction services and materials.

2. Normative benchmark

18. Until its most recent submissions, the United States refused to engage in a specific discussion of the relevant normative benchmarks in the present dispute, other than to repeatedly assert that the European Union did not identify any such benchmarks. In fact, the European Union has identified and detailed such normative benchmarks, beginning with its first written submission.

19. In its second written submission, the United States appeared to argue that the pre-existing aerospace tax incentives initiated under House Bill 2294 ("HB 2294") could provide the appropriate normative benchmark to determine whether the measures at issue involve a financial contribution under Article 1.1(a)(1)(ii). In response, the European Union recalled that a normative benchmark is the tax rate that would *normally* apply, taking into account the structure of the particular tax system. As the panel and Appellate Body correctly found in *US − Large Civil Aircraft*, the 0.2904 percent tax is the subsidized B&O tax rate for commercial aircraft; as such, it cannot be the normative benchmark.

20. The United States also suggested that the various specifically-targeted sales and use tax exemptions offered by Washington State to entities outside the aerospace industry are somehow relevant to identification of the normative benchmark. As the European Union has explained, however, special tax treatment accorded to particular companies or industries does not reflect "the tax rates that would normally apply". Rather, the tax treatment generally applicable to all actors engaging in the relevant taxable activities within Washington State − for example, manufacturing or retail sales in the case of the B&O tax rate reduction − is what is relevant for identifying "the tax treatment of comparable income of comparably situated taxpayers".

21. In its response to Question 60, the United States submitted a table of figures which, according to the United States, "suggest{s}" that the generally applicable tax rates for the taxes at issue have become the exceptions rather than the general rule, and therefore cannot serve as the normative benchmark. However, these belatedly submitted numbers do not warrant the conclusion that the United States seeks. In that table, the United States treats every instance in which Washington State has not imposed the maximum tax liability with respect to a particular activity − including even those instances where Washington State is constitutionally prohibited from imposing a tax − as an "exemption". Thus, based in large part on numerous "exemptions" completely irrelevant to an enquiry under Article 1.1(a)(1)(ii), the United States then claims that a majority of all revenue in Washington State is subject to "exceptions", rendering the general tax rates purely notional. In view of the figures relied upon by the United States, this proposition goes against the Appellate Body's express guidance that a normative benchmark, "cannot, {...} be an entitlement in the abstract, because governments, in theory, could tax all revenues." The European Union applied corrections to this table, eliminating some instances which are not foregoing of revenue otherwise due in the sense of Article 1.1(a)(1)(ii), and arrived at the conclusion that far lower portions of the total revenue in Washington State are subject to "exemptions" from the general rate.

22. Even the corrected figures presented by the European Union suffer from two major drawbacks, however. First, these figures do not account for *local* property taxes or *local* sales and use taxes, which are also subject to the property tax exemption, and the two sales and use tax exemptions at issue. Second, the United States failed to remove from its calculations the tax exemptions resulting from the very subsidies being challenged in the present dispute. In *United States − Large Civil Aircraft*, the Appellate Body found that this second error rendered similar United States' figures useless for evaluating the normative benchmark.

B. Benefit

23. The European Union has demonstrated that the financial contribution in the present dispute − in the form of forgiveness of tax obligations − is, in the words of the panel in *US − Large Civil Aircraft,* "essentially a gift from the government, or a waiver of obligations due, and it is clear that

the market does not give such gifts". A "benefit" exists because the very nature of a market precludes the availability of multi-billion dollar gifts to a commercial actor.

24. In response, the United States presented an irrelevant "example", asking the Panel to consider a case where a tax break would not provide a "benefit" when, "by not taking the challenged tax treatment, the taxpayer qualified instead for another equal or better tax treatment". Here, the United States appeared to suggest that, in some instances, it may become possible for the taxpayer to forego the tax incentive at issue, and instead avail itself of generally available tax treatment that is more or equally advantageous to that incentive. This, however, would appear to relate to the relevant benchmark for purposes of the "financial contribution" analysis, rather than the analysis of "benefit" conferred by a tax measure already found to provide a financial contribution. Moreover, the United States fails to demonstrate, or even assert, that the facts of the present case are somehow similar to this "example". They are not.

C. Conclusion on "subsidy"

25. The European Union, consistent with its burden to establish a *prima facie* case, has demonstrated that each of the tax incentives at issue provides a financial contribution and confers a benefit. Absent effective rebuttal by the United States, the Panel must make findings in favour of the European Union.

III. THE AEROSPACE TAX INCENTIVES, AS AMENDED BY SSB 5952, CONSTITUTE PROHIBITED SUBSIDIES CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS

26. As a result of the Programme-Siting and Exclusive-Production conditions established in SSB 5952, the aerospace tax incentives, as amended and extended, constitute prohibited subsidies "contingent ... upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement.

27. The European Union has explained that, as of the moment SSB 5952 became law in 2013, the amended and extended tax incentives provided subsidies contingent on the use of domestic over imported goods. Consequently, the United States' contention that the European Union "has the burden to demonstrate that {the} contingency obtains specifically with respect to the alleged subsidy conferred from July 1, 2024, to June 30, 2040" does not follow from the European Union's actual claims in this dispute.

28. The United States errs when it asserts that "the treatment prior to 2024 under any of these measures … is *a priori* not contingent on any of the conditions introduced by ESSB 5952". As the European Union has explained on several occasions, under the Exclusive-Production condition, if a determination is made − at any point after the Programme-Siting condition was satisfied in July 2014 − that Boeing has sited any wing assembly outside Washington State (for any version or variant of the airplane programme that was the basis for satisfying the Programme-Siting condition), the B&O tax rate reduction would become inapplicable to Boeing's revenues from that programme (i.e., 777X program). Additionally, had Boeing not satisfied the Programme-Siting condition, the amendments extending the sales & use tax exemptions for construction services and materials to cover all commercial aircraft (not just superefficient airplanes), would not have taken effect. Thus, the *current* availability of the B&O tax rate reduction for the 777X programme, and the *current* availability of the sales and use tax exemptions for construction services and materials, are already contingent on meeting the conditions on SSB 5952, even before 2024.

29. The Panel is faced with subsidies *de jure* contingent upon the decision by an aircraft producer to use domestic wings and domestic fuselages for a new aircraft programme, where a major portion of that subsidy would be lost if even a single wing for that aircraft programme is imported through the year 2040. While these facts should be determinative of the question of contingency under Article 3.1(b) of the SCM Agreement, the United States seeks to obscure the prohibited contingency through a series of erroneous and irrelevant statements.

A. Three Foundational Errors Made by the United States

30. The entirety of the United States' argumentation on contingency is founded on three erroneous propositions − (i) wings and fuselages are not "goods"; (ii) wings and fuselages are not "used" on aircraft; and (iii) the phrase "domestic over imported goods", as it applies to wings and fuselages, requires an enquiry into the origin of *the components* of the wings and fuselages, rather than the origin of the wings and fuselages, themselves.

1. US' Error #1: "goods"

31. The United States persists with its erroneous assertion that wings and fuselages are not "goods", although (i) the United States has acknowledged that Boeing purchases "complete fuselages" for the 737; (ii) Boeing has previously explained (outside the context of this dispute) that it imports wings for the 787; and (iii) SSB 5952, itself, refers to fuselages and wings as "products", a term that the United States has accepted is a synonym for the legal term used in Article 3.1(b) − "goods".

32. Originally, the United States claimed that the protection under Article 3.1(b) would extend only to goods that are *actually traded*. In its second written submission, however, the United States conceded that the protection extends to *competitive opportunities* for imported "goods". The United States qualified that concession with an assertion that the protection does not extend to "strictly theoretical" opportunities. Putting aside the lack of any textual or jurisprudential basis to characterize certain competitive opportunities as "strictly theoretical", there is nothing theoretical about importing or otherwise purchasing wings and fuselages for a civil aircraft, as even the United States acknowledges for certain aircraft.

2. US' Error #2: "use"

33. The United States continues to assert that wings and fuselages are not "used" on aircraft, or in the production of aircraft, because they are the output of aircraft production, rather than inputs. The United States' erroneous position is based on its false allegations about the planned production process for the 777X, which − even if true − would be irrelevant to a *de jure* analysis of SSB 5952. As the European Union has explained, and the United States has not contested, SSB 5952 does not even mention the 777X, but instead references only a new model, version, or variant of a commercial aircraft with a composite wing and/or fuselage. For some other large commercial aircraft, the United States generally agrees with the European Union that fuselages and wings are inputs which are used in aircraft production. As a result, the US' position on the 777X production process, even if correct, does nothing to refute the European Union's *de jure* claim.

34. Moreover, the United States' claims about the planned 777X production process are contradicted by statements made by Boeing and Washington State outside the confines of the present dispute. For example, according to press reports, Eric Lindblad, the vice president of 777X Wing Integration, explained that "{t}he wing subassemblies will {} be moved into a final wing assembly area in the main building, where they will be turned into full wings" and "finally put together" before being attached to the aircraft.[4]

3. US' Error #3: "imported" vs. "domestic"

35. The United States continues to argue that it is relevant, and even legally determinative, that Boeing may import *components of* wings and fuselages for the sited aircraft without restriction, while still satisfying the Programme-Siting and Exclusive-Production conditions. But the European Union is not challenging the subsidies as being conditional on use of domestic over imported *components of* wings and fuselages. The European Union's challenge is clear − i.e. to satisfy the two conditions, imported *wings* and imported *fuselages* may not be used on the *aircraft* that is the subject of the siting decision.

36. The United States complains that the European Union has not explained "what is the domestic and what is the imported good for each of the measures at issue". In fact, the European

[4] Emphases added.

Union has repeatedly and clearly stated that wings and fuselages are the relevant "goods" for purposes of determining whether the challenged tax incentives are contingent upon use of domestic over imported goods, under Article 3.1(b). The United States' attempt to refocus the Panel's attention on the *components of* wings and the *components of* fuselages − rather than the components of aircraft − provides an irrelevant distraction. The European Union is the master of its own claims, and this is simply not a case about components of wings, nor a case about components of fuselages.

37. The fact is that, however Washington State defines a "wing" or a "fuselage", those "products" must be either "manufacture{d}" or "assembl{ed}" in Washington State, and used on the sited aircraft, in order to satisfy the Programme-Siting and Exclusive-Production conditions. If, at the time of its siting decision, Boeing expressed an intention to import something that Washington State understood to be a "wing" or "fuselage" for the 777X, or if something that Washington State understands to be a "wing" is imported today (or anytime before 2040) for use on the 777X, the subsidy (or a significant portion thereof) would be lost.

38. As an interpretative matter, the European Union has maintained a dualist view, wherein any good that is not "imported" would be "domestic". The European Union submitted that any different interpretative view would require a panel to examine whether goods are "domestic" under applicable rules of origin. Given the absence of multilateral rules of origin, Members would be at liberty to circumvent the discipline in Article 3.1(b) − and those in all other provisions of the covered agreements employing the "domestic" and "imported" duality − by resorting to conveniently tailored domestic rules of origin.

39. In Question 72, the Panel requested the parties to identify "provisions in the covered agreements" that could further assist in the interpretation of the words "domestic" and "imported", for the purpose of Article 3.1(b) of the SCM Agreement. In response, the European Union demonstrated confirmation of its dualist view, which divides goods into "domestic" and "imported", with reference to Articles II:2(a), III:1, III:2, and XI:2(c) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"); Article 15.3, footnote 57, and Paragraph I of Annex III of the SCM Agreement; Paragraphs 1(a), 1(d), and 1(g) of Annex C to the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement"); and Article 3.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti Dumping Agreement").

40. In its own response, the United States instead chose to again express general disagreement with the European Union's interpretative proposal, while not identifying any provision in a covered agreement (barring a general unexplained reference to the Agreement on Rules of Origin) that would warrant an interpretation different from the one proposed by the European Union. Nor did the United States even attempt to assert an interpretation of its own, let alone defend one. The United States even attempted to shield itself behind an assertion that it is the "EU's burden" to interpret Article 3.1(b), and in particular the meaning of "domestic" and "imported". Yet, the Appellate Body has explained that "the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court".

B. Availability of the Subsidies to Entities Other than Boeing

41. The United States argues that the availability of the tax incentives at issue to entities other than Boeing precludes a finding that the subsidies are contingent on the use of domestic over imported goods, because only Boeing needs to satisfy the conditions. The United States seeks to obscure the fact that none of the tax incentives, as amended and extended by SSB 5952, would have taken effect in respect of any of the potential recipients had the Programme-Siting condition not been fulfilled by Boeing (or another commercial aircraft producer). Thus, the current availability of the amended and extended tax incentives enjoyed by all the recipients is a direct result of the satisfaction by Boeing of the prohibited contingency in the Programme-Siting condition, on 9 July 2014.

42. Further, nothing in the text of Article 3.1(b) requires that the entity receiving the subsidy, on the one hand, and the entity required to meet the prohibited contingency, on the other hand, must be one and the same, for a measure to violate that provision. If the drafters had intended to include such a limitation, they could have provided, for example, for prohibition of "subsidies to an

enterprise contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods by that enterprise". They did not.

C. Production Subsidies, and the United States' Flawed Examples

43. From the very beginning of this dispute, the United States has dedicated large parts of its submissions to defending a proposition that is non-controversial − production subsidies, in and of themselves, do not result in *de jure* violations of Article 3.1(b). The European Union signalled its agreement with this proposition, in unequivocal terms, in several of its submissions, yet the United States has persisted with this argument.

44. When faced with a claim that a subsidy is contingent on the use of domestic over imported goods, a Member may not evade the prohibition under Article 3.1(b) simply by characterizing a challenged measure as a production subsidy. Such a claim should be decided on the basis of the obligation in Article 3.1(b), and whether the measure violates that obligation. It should not be decided on the basis of what each party understands to be a "production subsidy", which is a term that does not appear in the covered agreements.

45. With respect to the United States' assertion that "wings" and "fuselages" are what makes a vehicle an "airplane" and that this needed to be clear in SSB 5952, in the context of an alleged "production subsidy" for airplanes, the European Union finds it difficult to believe that, absent such references to wings and fuselages, Washington State would have faced the risk that recipients of the subsidies at issue would manufacture vehicles without wings and fuselages and claim them to be "airplanes" eligible for the subsidy. That did not, for example, appear to be a concern with HB 2294, which defined the airplane that needed to be manufactured in Washington State as a "twin aisle airplane that carries between two hundred and three hundred fifty passengers, with a range of more than seven thousand two hundred nautical miles, a cruising speed of approximately mach .85, and that uses fifteen to twenty percent less fuel than other similar airplanes on the market". In this definition, there is no reference to wings, fuselages, or any other components of the airplane.

46. The United States uses its assertions relating to "production subsidies" to set up a series of straw-men that it then proceeds to knock down. The United States creates absurd hypothetical scenarios − most recently going so far as to invent a "production subsidy" *contingent on importation* of two halves of an airplane − which consider whether a "production subsidy" should be available to certain producers or importers. In each hypothetical, the United States first asserts its subjective view that the subsidy it describes should be characterized as a production subsidy, and should be consistent with Article 3.1(b). Then the United States goes on to apply what it erroneously characterizes as the "EU's theory" to the hypothetical, and concludes that under that alleged "theory" (which is unrecognisable to the European Union, itself), the subsidy in question would constitute a *de jure* violation of Article 3.1(b). Based on that series of exercises and conclusions, the United States claims that the "EU's theory" should be rejected.

47. To be clear, the European Union does not offer a special "theory" on Article 3.1(b). The European Union's position is simply that *any* subsidy "contingent on the use of domestic over imported goods" is inconsistent with Article 3.1(b). That understanding applies no matter what the goods at issue are − i.e. screws, screwboxes missing screws, front halves or back halves of airplanes, parts of paper planes, or, most importantly for this case, wings and fuselages of commercial aircraft.

48. The United States has argued that, if accepted, the European Union's position on the interpretation of the words "goods" and "use" in Article 3.1(b) would mean that, to be consistent with Article 3.1(b), "production subsidies" could require nothing more than that a domestic producer perform "the very last production step", such as "turning the very last screw" or "drilling the final rivet", in the territory of the Member providing the subsidy. This argument is a red herring, as there are numerous ways to condition a subsidy on significant domestic production (far beyond "turning the very last screw") without creating a *de jure* violation of Article 3.1(b), as the United States and Washington State already know. In fact, the European Union has gone beyond its burden in the present dispute to identify several ways in which the United States could have offered production subsidies in the present fact pattern, without resulting in a *de jure* violation. Unlike the absurd US hypotheticals involving paper airplanes, airplanes split into halves, and

subsidies contingent on use of imported goods, the examples that the European Union has highlighted are those that various US states, including Washington State, have actually employed in order to encourage local investment, job creation, and production activity.

D. The 777X Production Process, and the Definition of a "wing"

49. Starting with its first written submission, the United States introduced several facts relating to the process allegedly to be employed by Boeing in production of the 777X. These assertions seek to establish that the 777X wings and fuselages do not come into existence as separate goods at any time before the final assembly of the aircraft. The European Union has demonstrated that these assertions, tailor-made for the present dispute, are contradicted by assertions made by Boeing and Washington State outside the present dispute.

50. More importantly, as the European Union has repeatedly explained, these allegations about the 777X production process are irrelevant to the *de jure* claim, because SSB 5952 does not name Boeing or the 777X programme. It does not even specify the size of the aircraft that should be sited in Washington State pursuant to the Programme-Siting condition. Any aircraft manufacturer could have satisfied the Programme-Siting condition in respect of any aircraft that had a composite wing or fuselage or both, even if that aircraft was much smaller than, and markedly different from, the 777X. Thus, assertions as to how Boeing intends to produce the 777X are entirely irrelevant, at least to the European Union's first and principal claim of *de jure* contingency.

51. The United States claims that the "fact" that Boeing satisfied the Programme-Siting condition in respect of the 777X without the "use" of "domestic over imported goods" precludes a finding that SSB 5952 contains contingencies prohibited by Article 3.1(b). However, this assertion is again predicated on the same three foundational errors repeatedly made by the United States, in respect of the words "use", "goods", and the US' presumption that the relevant goods for understanding "domestic" and "imported" are *components of* fuselages and *components of* wings, not fuselages and wings.

52. Similar to its factually erroneous and legally irrelevant assertions relating to the production process of the 777X, the United States dedicates much effort to defining a "wing". The United States falsely attributes to the European Union the position that only "complete finished wings" (and not "complete wings" or "finished wings") are relevant to the present dispute. Then the United States goes on to supply a definition of "wing" that is entirely divorced from the text of SSB 5952 and reality. Under that definition, for example, a wing that does not carry the engines and fuel is not a wing; and a wing that is not fitted with winglets is not a wing. The European Union has demonstrated the absurdity of this definition, highlighting that, under that definition, several real-world aircraft − MD-80, MD-90, Boeing 717, Boeing 737 − have flown for decades without a "wing".

53. The United States relies on this flawed definition to postulate that the 787 "wing" was not imported, and that Governor Inslee was imprecise in describing the contingencies in SSB 5952 in his testimony before the House Finance Committee, specifically in asserting that "{t}he 787 wing went to Japan". Similarly, the United States dismisses, as "colloquial references", all assertions by Boeing and Washington State outside the confines of the present dispute indicating that the 787 wing was imported.

54. In any event, it is not necessary for the Panel to decide the precise definition of a "wing" or "fuselage" in the present dispute, especially in context of the European Union's first and principal claim of *de jure* contingency. What matters is that there is a "product" called a "wing", and a "product" called a "fuselage" (which is different from components of whatever Washington State understands to be a "wing" or a "fuselage") that, if imported, will result in the loss of the subsidy, or a portion thereof. That is clear from the text of SSB 5952, itself.

E. Conclusion on Contingency

55. The European Union has demonstrated in SSB 5952 the existence of a prohibited contingency, under Article 3.1(b) of the SCM Agreement, with reference to the text of that legislation, and additional evidence. The United States has failed to rebut that *prima facie* case.

The United States' defenses are based on three foundational errors, and are factually inaccurate and largely legally irrelevant.

IV. CONCLUSION AND REQUEST FOR RELIEF

56. For the reasons set out in its submissions to date, the European Union respectfully requests the Panel to find that each of the Washington State tax incentives, as amended and extended by SSB 5952, constitutes a subsidy that is prohibited pursuant to Articles 3.1(b) and 3.2 of the SCM Agreement.

57. In accordance with Article 4.7 of the SCM Agreement, the Panel should recommend that the United States withdraw the subsidies without delay.

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1. The EU's entire case is an example of trying to fit a square peg into a round hole. The hope appears to be that, if the peg and the hole are not examined closely, no one will notice that the peg cannot fit. The EU asserts that Engrossed Substitute Senate Bill ("ESSB") 5952 discriminates against imported products by requiring the use of domestic over imported goods as a condition for receiving subsidies. It is on this basis that the EU challenges seven Washington tax measures as prohibited by Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). But the relevant conditions in ESSB 5952 have nothing whatsoever to do with the use of goods, whether domestic or imported. They therefore do not discriminate against imported goods. Article 3.1(b) does not prohibit subsidies provided to domestic producers for or in light of domestic production.

I. WASHINGTON'S AEROSPACE INDUSTRY AND BOEING'S PRODUCTION OF COMMERCIAL AIRPLANES

2. Washington has emerged as an aerospace hub, and in turn, the aerospace sector is an integral part of Washington's economy and employment. As of February 2015, there were 1,361 firms in Washington State's aerospace manufacturing and supporting industries, with 186 of these in the core industry. Nearly 20 percent of U.S. aerospace jobs are in Washington.

3. A major part of Washington's emergence and continued role as an aerospace hub is owed to the presence of Boeing Commercial Airplanes ("Boeing"). Boeing has deep roots in Washington, which continues to be the center of its operations worldwide. Two of Boeing's three major production facilities are there. The Renton and Everett facilities produce the 737NG and 737 MAX; and the 747, 767, 777, and 787 Dreamliner airplanes, respectively. Development of the 777X is based in Everett, and Boeing plans to produce the 777X there as well. The third production facility is in North Charleston, South Carolina. Except for some 787s manufactured after 2012, all commercial aircraft ever manufactured by Boeing were assembled in Washington, and all of Boeing's major in-house production operations are in the United States.

4. Large commercial aircraft ("LCA") are among the most complex machines ever built. They consist of tens of thousands of individual parts, which must be integrated into a single safe, reliable, and economic system. For this reason, developing LCA is extremely costly, with development costs running into the billions of dollars. Many variables across a long time horizon dictate the success or failure of a program, making such investments very risky. In this atmosphere, Boeing requires an elaborate planning system for bringing new aircraft to market, which can be simplified as occurring in four phases: pre-launch, launch, post-launch, and entry into service and industrial ramp-up.

5. The same elaborate planning process was required for the 777X program based out of the Everett, Washington facility. Boeing sought to limit costs, risks, and logistical complexities of the sort that had burdened the 787 program, where aggressive outsourcing of manufacturing activities contributed to significant production delays and increased program costs.

II. WASHINGTON'S TAX SYSTEM AND THE CHALLENGED MEASURES

6. The measures challenged in this dispute pertain to five categories of Washington taxes: the business & occupation ("B&O") tax, the retail sales tax, the use tax, the leasehold excise tax, and the property tax. These taxes form an important component of the backdrop against which the challenged measures operate. The EU submission gives them short shrift, but the details are critical to any evaluation as to whether they constitute financial contributions and confer a benefit within the meaning of Article 1 of the SCM Agreement, or are "contingent … upon the use of domestic over imported goods." Accordingly, the United States describes each of these in greater detail below.

7. The State of Washington relies primarily on a B&O tax − rather than a corporate tax or an income tax − for purposes of business taxation. The tax is an excise tax on "gross receipts," which refers to the gross proceeds of sales, gross income of a business, or the value of products. The tax is imposed on the gross receipts of all sales, not just retail sales. No deductions are permitted for the costs of doing business, such as expenses for raw materials, wages paid to employees, or component parts manufactured by others that are incorporated into a product being sold. In addition, the B&O tax does not vary depending on the profitability of the taxpayer.

8. Washington also has a retail sales tax, which is its principal tax source (*i.e.*, of all revenue, including both business and non-business tax revenue). This tax applies to sales to consumers of tangible personal property, as well as the sale of certain services, including construction services (*e.g.*, constructing and improving new or existing buildings and structures), some personal services, and other miscellaneous services. The Washington retail sales tax rate has two components: the state component, which is equal to 6.5 percent, and the local component, which varies by jurisdiction. Local governments within Washington have the authority to set their own retail sales tax rates, but both components are administered by the State.

9. The use tax is a tax due on the use of goods or services to the extent that the user has not paid Washington sales tax or "a legally imposed retail sales or use tax…to any other state, possession, territory, or commonwealth of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof." For example, use tax is due if goods are purchased in another state that does not have a sales tax, or has a sales tax rate that is lower than that of Washington. The tax is imposed on the privilege of using as a consumer specified goods or services in Washington.

10. Washington also has a property tax. Under RCW § 84.36.005, "{a}ll property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and other taxing district purposes." Thus, all real and personal property is subject to tax. However, a number of exceptions to this general rule apply. Property tax rates vary among territorial subdivisions of Washington. However, the Washington Constitution limits the regular (*i.e.*, non-voted) combined property tax rate to 1 percent of market value.

11. Washington also has a leasehold excise tax. As noted above, property owned by federal, state, or local governments is exempt from the property tax. However, when private parties lease such property, they are subject to the leasehold excise tax. In effect, the leasehold excise tax imposes a tax burden on persons using publicly owned, tax-exempt property similar to the property tax that they would pay if they owned the property. The 12 percent rate is then multiplied by an additional tax, which is currently set at 7 percent. Thus, the total leasehold excise tax rate is 12.84 percent of the rent paid for the property.

III. THE CHALLENGED MEASURES AND CONDITIONS IN ESSB 5952

12. The EU challenges seven measures in this dispute, each of which provides for certain tax treatment under the law of the state of Washington: (i) the 0.2904 percent B&O tax rate, (ii) the B&O tax credit for aerospace product development; (iii) the B&O tax credit for property taxes; (iv) the sales and use tax exemption for computer hardware, software, and peripherals; (v) the sales and use tax exemption for construction services and materials; (vi) the leasehold excise tax exemption for port district facilities, and (vii) the property tax exemption.

13. The challenged measures have several important features. The first feature is general availability on a non-discriminatory basis. Although the EU submission focuses on Boeing, none of the challenged measures refers to Boeing explicitly. Rather, they set out tax treatment that is available to any eligible company in Washington. For example, non-U.S. airplane manufacturers, and suppliers to such companies, are eligible for the challenged tax treatment.

14. The second feature is silence with respect to the use of domestic over imported goods. None of the challenged measures distinguishes between domestic and imported goods, let alone condition availability on the use of domestic over imported goods. This is true of ESSB 5952 as well.

15. The third feature is changes in conditions for eligibility. In 2006, 2008, and 2013, Washington State enacted legislation that affected the availability of the challenged tax treatment by expanding the class of companies that could claim such treatment.

16. The EU challenges these measures "as amended and extended" by ESSB 5952. In 2013, Washington enacted ESSB 5952, which would extend aerospace-related tax measures if and when a significant commercial airplane manufacturing program was sited in the state. The Washington legislature noted that ESSB 5952 served its "specific public policy objective to maintain and grow Washington's aerospace industry workforce."

17. ESSB 5952 contains two provisions that the EU alleges are relevant to this dispute: an Initial Siting Provision and a Future Siting Provision. Both are silent on the use of domestic over imported goods, and indeed do not draw any distinction between domestic and imported goods. They contain no text that requires the use of domestic over imported goods, nor even encourages it. They therefore do not result in any discrimination against imported goods.

18. Rather, the Initial Siting Provision requires that certain manufacturing activities occur in Washington. Under the Future Siting Provision, the continued applicability of the 0.2904 percent B&O tax rate for 777X sales (because the 777X is the program that triggered the Initial Siting provision) depends on "final assembly and wing assembly" − a narrow category of manufacturing activity − taking place in Washington.

IV. THE EU IGNORES ITS BURDEN OF PROOF AS THE COMPLAINANT IN A NEW DISPUTE

19. As the complaining Member, the EU of course bears the burden of demonstrating that the challenged measures are subsidies within the meaning of Article 1 of the SCM Agreement, and that they contain a "contingency" − *i.e.*, a relationship of "contingency," or a state of "dependen{ce} for its existence on something else." It is also required to demonstrate that this "contingency" is "upon the use of domestic over imported goods." Each of these showings consists of several elements, and the EU bears the burden of proving each.

20. Yet, the EU ignores this burden, seeking to establish the alleged import substitution contingency with conclusory assertions, unsupported assumptions, and references to *US − Large Civil Aircraft*, a separate dispute in which the EU failed to demonstrate that any of the challenged measures are prohibited under Article 3.1(b). Such arguments are insufficient to establish a *prima facie* case. This is only confirmed by the fact that the *US − Large Civil Aircraft* panel addressed facts as they existed in the 2004-2006 period, rather than the time of this Panel's establishment in 2014, and the current dispute involves measures that differ from those at issue in the other, separate dispute. The EU's claims fail as a result of it not even attempting to allege and prove with evidence each of the elements of its claims.

V. THE EU FAILS TO DEMONSTRATE THAT ANY OF THE CHALLENGED MEASURES IS A SUBSIDY UNDER ARTICLE 1.1 OF THE SCM AGREEMENT

21. The EU does not even attempt to make a *prima facie* case that the challenged measures involve financial contributions that confer a benefit. In fact, the EU simply assumes, without support − and it asks the Panel to assume − that the challenged measures are subsidies within the meaning of Article 1 of the SCM Agreement.

A. Financial Contribution

22. The EU alleges that each of the challenged measures involve revenue foregone by Washington during the time period from July 1, 2024 − July 1, 2040. However, the EU fails to establish that any such financial contribution exists, and therefore fails to make a *prima facie* case.

23. To show a financial contribution, the EU relies on the findings in a separate dispute, *US − Large Civil Aircraft*. Yet the EU ignores the fact that in that dispute, three of the challenged measures were in fact found *not* to be subsidies because the panel found that the EU failed to establish the existence of a financial contribution. The EU also ignores that the *US − Large Civil*

Aircraft panel's findings pertain to a different time period (*i.e.*, prior to 2007), and cannot support a finding that revenues supposedly to be foregone after July 1, 2024, result in a present subsidy.

24. Indeed, where an allegation is specific to a particular recipient of an alleged subsidy, it is normally necessary for that recipient to have actually used or exercised that fiscal incentive. For some of the measures, the EU does not even *allege* use by Boeing.

25. The EU seems unaware, or it intentionally glosses over the fact, that references to past findings in *US − Large Civil Aircraft* cannot substitute for evidence in this dispute. The EU also fails to analyze Washington's unique B&O tax system and establish, in light of such analysis, a normative benchmark against which alleged revenue foregone can be compared.

B. Benefit

26. As discussed above, the EU has failed to establish a *prima facie* case that any of the challenged measures involves a financial contribution. It would seem to be a potential future benefit that would be enjoyed, if at all, 10 years from now. The EU, however, has not explained what it believes to be such a future financial contribution and benefit. Thus, it automatically follows that the EU fails to establish that any benefit is conferred by such financial contributions.

27. In this regard, it is noteworthy that the EU has not even attempted to establish benchmarks for any of the challenged measures, as is its burden. Rather, the EU's benefit arguments consist of citations to other panel reports and the unsupported arguments related to financial contribution. Accordingly, there is no valid "benefit" argument for the United States to rebut, and the EU has failed to establish a *prima facie* case.

VI. THE EU FAILS TO ESTABLISH THAT ANY OF THE CHALLENGED MEASURES IS CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS AS PROHIBITED BY ARTICLE 3.1(B) OF THE SCM AGREEMENT

28. The discipline of Article 3.1(b) is focused and specific. It prohibits the granting of subsidies that are contingent upon the use of domestic over imported goods. Yet the measures challenged here do not address the use of goods at all, let alone require the use of domestic over imported goods as a condition for any particular alleged subsidy. Rather, they provide specified tax treatment to persons that conduct certain activities (*e.g.*, certain types of manufacturing, retailing, R&D) in Washington. They are available to all companies that do business in Washington, whether headquartered in the United States, the EU, or elsewhere − and regardless of whether they sell goods for use in the supply chains of Boeing, Airbus, or another company.

29. To establish its claims under Article 3.1(b), the EU must demonstrate that a measure established to be a subsidy is contingent upon the use of domestic over imported goods. The EU argues that the alleged subsidies are contingent on the use of domestic over imported goods in breach of Article 3.1(b) of the SCM Agreement because of two conditions in ESSB 5952 regarding the siting of certain manufacturing operations related to a commercial airplane program. The EU's argument fails for several reasons.

30. First, the EU incorrectly states that the text of ESSB 5952 "expressly condition{s}" the challenged tax treatment on the use of domestic over imported goods. The EU states that under two provisions in ESSB 5952, the Initial Siting Provision and the Future Siting Provision, "all of the aerospace tax incentives . . . are *expressly conditioned* on the use of domestic over imported goods in the final assembly of the aircraft." In fact, these provisions − and the statutes challenged by the EU − are silent on the use of domestic over imported goods, and indeed do not draw any distinction between domestic and imported goods. They merely extend the tax treatment for companies that perform certain production and non-production activities in Washington if and when a significant commercial airplane program is sited in the state.

31. Specifically, the Initial Siting Provision states that, for the expiration dates of the challenged tax measures to be extended, Washington's Department of Revenue ("DOR") must first determine that a company has made a final decision to "commence manufacture" of a new model or variant of a commercial airplane, including the wings and fuselage of a new model or variant of a new commercial airplane, in Washington. The Future Siting Provision partly revokes this tax treatment

if DOR determines "that any final assembly or wing assembly" of that new model or variant "has been sited outside the state of Washington." These provisions do not implicitly, much less "express{ly}," require the use of domestic over imported goods, as the EU asserts. In fact, they do not mention the use of goods at all.

32. Second, the EU's argument assumes, without support, that ESSB 5952 requires the separate production of fuselages and wings for use in the production of commercial airplanes. It does not. ESSB 5952 is silent on the how the manufacture and assembly of fuselages and wings fits into the overall production process of a commercial airplane. It does not require manufacturers to produce fuselages or wings as finished intermediate goods that can be "used" in downstream production.

33. And Boeing, in fact, does not do so. 777X fuselages and wings never exist as discrete, standalone goods that are subsequently "used" in a downstream production process. In fact, during the final assembly process, parts of the fuselage and parts of the wing are joined to each other before a complete fuselage or complete wing is produced. In short, the 777X's fuselage and wing are elements of the output of the final assembly process (that is, the manufacture of a commercial airplane), not goods used as inputs to that process. In no case does Boeing purchase (or otherwise "procure") complete wings from a supplier. Therefore, the EU's whole case is dependent on a false premise − that fuselages and wings are *goods* required to be used in the production of a commercial airplane.

34. Third, the EU relies on an incorrect interpretation of Article 3.1(b) of the SCM Agreement. Article 3.1(b) is focused and captures a specific type of subsidy: it prohibits subsidies "contingent ... upon the use of domestic over imported goods." However, Article 3.1(b) does not discipline subsidies provided to domestic producers for their domestic production. This interpretation is confirmed by Article III of the GATT 1994. Article III:8(b) of GATT 1994 establishes that providing subsidy to domestic producers for production activities in the grantor's territory cannot be equated with providing a subsidy advantaging domestic over imported goods. And because disciplining subsidies contingent upon use of domestic over imported goods is an area of overlap between Article 3.1(b) of the SCM Agreement and Article III of the GATT 1994, Article 3.1(b)'s prohibition on subsidies contingent upon the use of domestic over imported goods also cannot be equated with subsidies provided for domestic production. Therefore, even ignoring the many other flaws in its arguments, the EU's claims also necessarily fail on this basis because, at best, the EU can only even attempt to show a subsidy provided for domestic production.

35. Fourth, the EU argument assumes, without support, that 777X fuselages and wings are saleable or traded "goods" capable of importation. Prior Appellate Body guidance confirms that "goods" within the meaning of Article 3.1(b) must be understood as products that are traded, and therefore capable of being imported. This necessarily excludes 777X fuselages and wings, which are not available in a commercial setting. In short, 777X fuselages and wings are not goods within the meaning of Article 3.1(b).

36. Fifth, the EU fails to establish that the "geared to induce" standard is appropriate in the context of Article 3.1(b), much less demonstrate with evidence that it is met in this case. In its brief argument, the EU states that the challenged measures are "geared to induce" the use of domestic over imported goods. The EU does not establish that this standard, which was endorsed in the context of Article 3.1(a), is appropriate in the context of Article 3.1(b). Once again, even aside from the fact that the 777X fuselage and wings do not constitute "goods" that Boeing would "use" within the meaning of Article 3.1(b), the evidence shows the challenged measures were not anticipated to, and did not, affect the proportions of domestic and imported content in the 777X.

37. By the time Washington was considering ESSB 5952, it was clear that Boeing would produce the 777X, as it has every model of commercial airplane throughout its 100-year history, in the United States. Moreover, ESSB 5952 has not prevented Boeing from planning to import significant foreign content for the 777X. Other Washington taxpayers too will receive the identical tax treatment challenged by the EU despite there being no restrictions on their use of goods, whether domestic or imported. In fact, a retailer selling exclusively imported commercial airplane components that it manufactured abroad would be entitled to the tax treatment challenged by the EU. The EU thus fails to establish a *prima facie* case, and the evidence actually contradicts its theory.

VII. CONCLUSION

38. The EU fails to make a *prima facie* case with respect to each of the elements of its claims, and with respect to each of the seven challenged measures. All of the EU's arguments, moreover, are based on an incorrect interpretation of Article 3.1(b) of the SCM Agreement that conflates subsidies that are contingent upon the use of domestic over imported goods with measures that are contingent on domestic production. Accordingly, and for the reasons as set out above, the United States requests that the Panel reject the EU's claims and find that the challenged measures are not inconsistent with the U.S. obligations under Article 3.1(b) of the SCM Agreement.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

I. INTRODUCTION

39. The EU's entire case, which alleges that the measures at issue are import-substitution subsidies prohibited by Article 3.1(b) of the SCM Agreement, is an effort to force a square peg into a round hole.

II. THE EU'S FAILURE TO ESTABLISH EACH ELEMENT OF ITS CLAIMS

40. The EU bases its claims on conditions − what the United States refers to as the Initial Siting Provision and the Future Siting Provision − that it alleges require the use of domestic over imported goods. In fact, the EU goes so far as to assert that the challenged measures "are expressly conditioned on the use of domestic over imported goods." However, in reality, the siting provisions by their plain language address only the scope of manufacturing that will take place in Washington. Neither provision addresses the use of goods at all, much less the domestic or imported character of goods that are used. This is evident from the explicit text of the Initial Siting Provision and the Future Siting Provision, and illustrated by the fact that the 777X will consist of a great deal of imported content, as well as domestic content from U.S. states other than Washington.

41. Beyond the EU's incorrect characterization of ESSB 5952, the EU's meager submission does nothing to lay out the relevant facts or link them to the WTO provision, Article 3.1(b) of the SCM Agreement, that it invokes. It does not describe the operation of the multiple measures it challenges. It does not establish that the challenged measures confer a subsidy within the meaning of Article 1 of the SCM Agreement. It does not explain how, based on the customary rules of interpretation of public international law used for interpreting the covered agreements, the analysis should proceed. This falls short of a complaining party's burden to present a *prima facie* case with respect to each element of its claims. And, as witnessed by the submissions of the United States and the third parties, the EU's many omissions have not obscured the fact that its claims rely upon multiple distortions of Article 3.1(b).

42. The EU also does not attempt to show that, if the Initial Siting Provision or the Future Siting Provision did require the "use" of fuselages or wings, one or both of those conditions would require that such fuselages or wings be domestic instead of imported. This is another example of the EU's silence on necessary elements of a *prima facie* case under Article 3.1(b).

43. The EU fails to explain why the 777X fuselages and wings are "goods" within the meaning of Article 3.1(b). In not addressing this element, the EU simply ignores inconvenient facts, such as that there are no buyers and sellers of 777X fuselages or wings, 777X fuselages and wings never exist in their completed forms separate and apart from the product that they are supposedly used to produce, *i.e.*, the finished airplane.

44. The EU also invokes a "geared to induce" standard endorsed by the Appellate Body only in the context of Article 3.1(a), but makes no effort to establish its proper application in the context of Article 3.1(b) or to prove that such a standard is met based on evidence in this dispute.

45. Another example of the EU's cursory treatment of the elements of its claims is its failure to identify the alleged financial contribution, including a normative benchmark, and benefit for each challenged measure. Instead, the EU points to a report in a different dispute − a report, the

United States notes, in which the panel rejected the EU's contention that three of the tax measures challenged in this dispute were subsidies, and which examined a period nearly 20 years earlier than the year in which alleged revenue foregone in this matter is alleged to begin. The EU then attempts to improperly shift the burden to the United States to prove that such measures are not subsidies. Nothing requires a respondent to rebut a case the complaining party has not made in the current dispute.

III. THE SWEEPING SYSTEMIC CONSEQUENCES OF THE EU'S INTERPRETATION OF ARTICLE 3.1(B)

46. The EU's interpretation of Article 3.1(b) would also have dangerous systemic consequences and would be at odds with the text of the provision, its context, and the object and purpose of the Agreement. For example, by seeking to frame the final stages of a production process as making "use" of "goods," the EU's theory would effectively turn every subsidy for production in the grantor's territory into a prohibited import-substitution subsidy. As nearly all of the third party submissions in this dispute make clear, this is not the proper interpretation of Article 3.1(b).

47. For example, as Canada points out, Article 6.1 and Annex IV:3 of the SCM Agreement demonstrate unambiguously that subsidies tied to production of a given product, without more, are not prohibited. Rather, they are properly the subject of a serious prejudice analysis under Article 5.

48. Australia observes that "it is important that the distinction is retained between the permitted payment of a subsidy to domestic producers and a subsidy which is contingent on the use of domestic over imported goods."

49. Similarly, Brazil notes that, given that Article III:8(b) of the GATT 1994 states that Article III does not prevent the payment of subsidies exclusively to domestic producers − which the United States addressed in its first written submission − "it would be incongruous to interpret Article 3.1(b) of the SCM Agreement to prohibit a measure simply based on the measure's link to domestic production."

50. Japan notes that among the "deficiencies" in the EU's analysis is the failure to recognize that "a law stating that a subsidy is contingent upon the domestic 'siting of' a certain program is different from a law stating that subsidy is contingent upon the 'use of 'the domestic product."

IV. THE RELEVANT FACTS DO NOT SUPPORT THE EU'S CASE, AND IN FACT UNDERMINE IT

51. The EU has invoked a provision that applies narrowly and in very specific factual situations. However, in this case, the measures bear none of the hallmarks of import-substitution subsidies. For example, the company whose behavior they were supposed to influence − Boeing − can use the tax measures despite planning to source much of the content for the 777X from outside the United States and from U.S. states other than Washington.

52. This is the case because the Initial Siting Provision and Future Siting Provision pertain only to the location of certain manufacturing activities. They do not distinguish between domestic and imported goods, and have nothing to do with import substitution. There is no evidence that either the Initial Siting Provision or Future Siting Provision is structured to discriminate against imported goods. They do not, and for that reason, they have not had that effect.

53. Moreover, companies other than Boeing can also use the tax measures without having to fulfill local content requirements or even meet production conditions. Indeed, the tax measures are available to aerospace companies for engaging in a range of activities, some of which are far afield of the use of goods, such as engineering work and R&D. Thus, the EU's arguments simply ignore how the challenged measures are structured and designed, and how they operate in the real world.

54. Thus, the siting provisions themselves do not support the contention that any alleged benefits are contingent on the use of domestic over imported goods. Moreover, the factual evidence lends no support to the EU's allegation that the Initial Siting Provision and Future Siting

Provision are structured to pursue, or do in fact accomplish, import substitution. Not only does the EU adopt an improper interpretation of Article 3.1(b), but the facts only further undermine the theory it advances.

EXECUTIVE SUMMARY OF U.S. CLOSING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

55. The EU's case remains deeply flawed. The EU proposes an overly broad interpretation of Article 3.1(b) of the SCM Agreement that is inconsistent with the ordinary meaning of the provision as a whole, its context, and the object and purpose of the treaty.

56. The EU also refuses to take account of the facts, which rather than support the EU's case, undermines and contradicts it. Instead, the EU relies on a range of false premises, including the notion that a wing for the 777X as a practical matter can be used or imported as a separate object prior to final assembly.

57. The EU emphasizes its *de jure* argument, which it identifies as its primary argument, and in which case the EU is required to show that the subsidy is contingent on the use of domestic over imported goods. However, the conditions it cites say nothing about "goods" at all, but instead talk about the commencement of manufacture, final assembly, wing assembly − all manufacturing and production activities which have no explicit or implicit reference to the use of goods.

58. The United States has explained that these are very predictable ways of defining the scope of the domestic manufacturing activity that a granting member would expect to take place in its territory to qualify for the tax treatment. There is no aspect of the SCM Agreement that would require any production or manufacturing subsidy to be granted only if it required that nothing more than the last screw was turned. Such an interpretation would turn virtually every manufacturing or production subsidy into an import substitution subsidy.

59. The EU, in its closing statement, refers to statements it thinks show that Boeing might have, or there would have been, some competitive opportunity in which the wing would be imported for the 777X. We understand this to be an effort to prove a *de facto* claim. But the EU's notion that the conditions of ESSB 5952 resulted in import substitution is divorced from reality and from what could have taken place.

60. The EU also asserts that the U.S. position that wings and fuselages are not used in aircraft is contrary to actual practice occurring for 100 years. The EU is relying on the definition of the terms "wings" and "fuselages," but these definitions say nothing about their use in the aircraft production process, and nothing about whether the fuselages or wings need to be "used" as "goods" in the 777X.

61. Turning to the EU's assertion that Boeing produces and assembles a wing, and then uses that wing to assemble the aircraft − that is not true. Boeing does not assemble a wing and then use that to assemble a final aircraft. A wing and a fuselage are never used prior to the final aircraft being created.

62. Lastly, the EU is suggesting that you can subsidize airplane production and asking why the text of ESSB 5952 specifies anything else. But the United States has made it clear that the text of ESSB 5952 specifies the scope of production expected in producing an airplane, *i.e.*, what it means to produce an airplane.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1 EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

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, even though Boeing plans to use a wide range of imported components for the 777X, including on its fuselage and wings. 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. 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 not designed and structured 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. 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*." 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. According to the EU, this combination alone converts what would otherwise be a production subsidy into a prohibited local content contingency.

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. 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." In this case, the 777X program demonstrates that there is at least indeed one such means for satisfying the two Siting Provisions, 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. 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.

II. Legal Standard: A Contingency is Prohibited Under Article 3.1(b) Only If it Requires the Use of Domestic over Imported Goods

8. The first major error in the EU's case is its incorrect interpretation of Article 3.1(b) of the SCM Agreement. The parties agree that this obligation does not prohibit subsidies contingent on the production of goods in the territory of a Member. 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. 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.

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

9. In the context of Article 3.1(b) of the SCM Agreement, a relation of contingency exists only where the "use of domestic over imported goods" is required to receive the alleged subsidy. In *Canada – Autos*, the Appellate Body applied this principle in the context of Article 3.1(b). According to the Appellate Body, 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).

10. 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. 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).

11. 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. The United States and the EU also cite largely the same provisions of the SCM Agreement as context. 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. Second, the EU seeks to characterize the meaning of "use" in Article 3.1(b) as either "broad" or "very broad." 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. 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 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.

12. The parties have also debated the meaning of the term "goods" as it appears in Article 3.1(b) of the SCM Agreement. 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). 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.

13. The EU has done nothing to meet its burden of establishing that the goods on the use of which the subsidy is allegedly contingent are or would be domestic. 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."

14. The dictionary definition of the word "over" is"{a}bove in degree, quality, or action; in preference to; more than." The EU argues that the relevant meaning is "more than" or "in excess of." 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. 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.*

1.1.2 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

15. 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." It explained further that "such conditionality can be derived by necessary implication from the words actually used in the measure." 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.

16. 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.

17. 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.

18. 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.

19. 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. 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. 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." Thus, DOR's interpretation of ESSB 5952 would also factor into the overall analysis of its meaning under Washington law.

20. 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. 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." 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.

21. 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*.

22. 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, 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." 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

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

24. 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," 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.

1.1.3 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

25. 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. This combination, according to the EU, "convert{s} what would otherwise be a production subsidy into a prohibited local content contingency," and represents the "express conditioning of the grant of a subsidy on use of domestic over imported inputs."

26. 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.

27. 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."

28. 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." 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." 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."

29. 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" and "wing" as "one of the airfoils that develops a major part of the lift which supports a heavier-than-air airplane." The OED, which the EU cites, 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," and "wing" as "one of the planes of an aeroplane."

30. 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.

31. The analysis is similar for the Second Siting Provision. 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.

32. 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. 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 such subsidies 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 Article III:8(b) of the GATT 1994.

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

33. 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.

34. 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.

35. This hole in the EU's argument is all the more obvious because of the factual circumstances of the 777X. And, as the United States previously noted, even if all the components of the 777X were fabricated outside the United States, 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. The EU has proposed that "domestic" means anything not imported. 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.

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

36. The United States recalled that 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. 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 alone 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.

37. 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. 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. But Article 3.1(b) does not cover subsidies contingent on the creation of the output of such a productive process.

38. 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. The EU further alleges that by requiring fuselages and wings to be manufactured in Washington, the two Siting Provisions prevent the importation of fuselages and wings that could otherwise occur in the absence of the challenged subsidies. However, these allegations cannot be reconciled with the factual evidence before the Panel. For example, the Boeing Expert Statement states that fuselages and wings are "elements of the output of the production process"– not inputs. 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. 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.

39. 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 insufficient to support its assertion that "aircraft *could* not be produced" without using fuselages and wings as inputs. 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.

40. In conclusion, 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

41. 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. 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.

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

42. The EU contends that the First and Second Siting Provisions "*require* the use of specific domestic goods." 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. The EU has largely ignored – and asked the Panel to disregard – the facts of the 777X production process, 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 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 make eligibility for the ESSB 5952 tax incentives contingent on the use of domestic over imported goods.

43. 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. The EU asserts that ESSB 5952 has distorted competitive opportunities for imported 777X fuselages and wings, 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. 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. 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.

44. For example, 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. In addition, ESSB 5952 places no conditions on the location of fuselage or wing structure fabrication, or on the origin of individual airplane parts. Moreover, 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.

45. 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.

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

46. 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), based on the Appellate Body's use of the "geared to induce" analysis to evaluate prohibited export subsidies in *EC – Large Civil Aircraft*. 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.

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

47. 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." 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. Most importantly, none supports the EU's *de facto* arguments.

48. ***"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, but 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.

49. ***Statement of Washington's Governor.*** The EU cites a statement by Governor Inslee "indicating that the 'legislation includes strong contingency language.'" A political statement is not direct evidence of what a measure actually requires, and 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.

50. ***Boeing's importation of "wings for its 787 from Japan."*** Boeing does not import complete 787 wings from Japan. Rather, Boeing imports multiple wing-related structures from Japan and must therefore conduct further wing assembly activity in the United States. 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.

51. ***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." This is incorrect in several respects, reflecting the EU's refusal to engage with the evidence. The facts directly contradict the EU's assertion that Boeing "formally decided against "importing 777X wings" once SSB 5952 was enacted."

52. ***"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." 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.

53. 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.

V. The EU Fails to Establish that the Challenged Measures Confer a Financial Contribution or a Benefit

54. 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. 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. 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.

55. 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.

56. 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. There is no reason to consider, as the EU does, that "maintain" in Article 3.2 of the SCM Agreement applies to the present and "grant" to the future. Moreover, the application of Article 1.1(a)(1)(ii) depends not on theoretical entitlements, but on an essentially counterfactual comparison. 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. 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.

57. In this dispute, the EU argues that a finding of benefit proceeds automatically from a finding that revenue is foregone. But that is not the case. Revenue is "foregone" for purposes of Article 1.1(a)(1)(ii) when the authorities provide tax 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. The EU's approach treats these measurements as identical when they

are, in fact, different. 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.

2 EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

58. During the first meeting, the United States described how the EU is trying to fit a square peg into a round hole. This is just as true today as it was then. Even if the challenged measures were found to be subsidies, they would be production subsidies, which even the EU acknowledges are not, in and of themselves, prohibited. They are simply not contingent on the use of domestic over imported goods. The EU attempts to stretch the scope of Article 3.1(b) of the SCM Agreement, and reads meaning into ESSB 5952 that simply is not there.

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

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

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

62. Furthermore, the EU has abstained from any detailed analysis of what would make a good "domestic" for purposes of Article 3.1(b). Rather, it appears that the EU assumes that a "good" is "domestic," at least for purposes of Article 3.1(b), if an article was modified in any way in the grantor's territory, irrespective of whether it was produced from foreign parts or how much value is attributable to the production or assembly step. Therefore, in any production process that involves more than one step, the first step will result in a "domestic good," and the second step necessarily will involve the use of that domestic good. Accordingly, under the EU's theory, a requirement that more than one production step be performed in the grantor's territory would make a subsidy contingent on the use of a domestic over an imported good.

63. Second, the EU is wrong in asserting that "it is a fact that aircraft 'use' wings and fuselages: without those inputs, the aircraft could not be produced." If the EU is suggesting that fuselages and wings are "used" as "goods" within the meaning of Article 3.1(b) merely because airplanes have fuselages and wings, the EU is mistaken. A manufacturer does not "use" every element of a finished good that one can point to and describe with a name. "Use" in the context of a manufacturing process refers to what goes into the process, and not the features of the product at the end of the process. Those are elements of the output, and not "goods" that are "used" themselves, but elements of a distinct finished good. To take an example, one can quite easily point to a finished building's façade, but the builder does not "use" the façade as a good within the meaning of Article 3.1(b). Likewise, just because one can point to a finished airplane's fuselage and wings does not mean that the manufacturer "used" the fuselage and wings as goods within the meaning of Article 3.1(b).

64. If the EU is suggesting that, as a factual matter, airplanes cannot be produced without first producing fuselages and wings as separate goods and then using them as inputs, this is inaccurate. The fuselage and wings of an airplane effectively make up the airframe and, as such, are functionally important elements of an airplane, but there is no definitional or physical reason why they would have to be produced as separate goods that are used as inputs. It is certainly feasible for an airplane to be assembled without first assembling a completed fuselage and wings as separate goods. Rather, fuselages and wings can be − and in the case of the 777X will be − completed only during and as part of the final assembly of the finished airplane. Therefore, the EU is wrong when it suggests that "it is a fact that aircraft use wings and fuselages "within the meaning of Article 3.1(b).

65. If the EU means that airplanes "use" fuselages and wings as "goods" by virtue of the fact that airplanes have fuselages and wings, this is a misinterpretation of the term "use." If, on the other hand, the EU means that, as a factual matter, a manufacturer must first produce fuselages and wings as separate goods and then use them as inputs to produce the finished airplanes, this is incorrect. As the 777X program demonstrates, a manufacturer need not assemble completed fuselages and wings prior to assembling the finished airplane.

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

67. The EU also asserts that its interpretation is necessary to give meaning to the words "fuselages" and "wings" as they appear in the definition of "significant commercial manufacturing program." It contends that the U.S. description of the operation of ESSB 5952, by contrast, would render those words meaningless and superfluous. This is nonsense. The words in question (*i.e.*, "fuselages" and "wings") appear within the definition of a defined term (*i.e.*, "significant commercial airplane manufacturing program"). They do what the words of any definition do − add clarity and concreteness to a term used elsewhere in the measure. In this case, the terms "siting" and "significant commercial airplane manufacturing program "form the condition that must be met for the legislation to take effect. And, it is logical that it clarified the meaning and ensured the desired level of significance for this commercial airplane manufacturing program in terms of the principal elements of the structural airframe, the fuselage and wings.

68. The EU also seeks to support its interpretation of ESSB 5952 by asserting that the "cardinal purpose" of ESSB 5952 was "making the importation of wings and fuselages of the 777X prohibitively expensive so as to ensure the use of domestic wings and fuselages over imported wings and fuselages." The EU's story is that Washington used ESSB 5952 to induce Boeing to use domestic, made-in-Washington goods in the production of the 777X. However, Washington decided not to require such use or otherwise define minimum local content (which, by the way, is the actual classic example of a local content contingency). Furthermore, under the EU's theory, Washington chose to effect the local content requirement not through the conditions themselves, but rather in the definitions section. According to the EU, Washington chose to focus on elements of an airplane, but ignore Boeing's sourcing of all of the various parts it purchases, a significant portion of which are actually to be imported and a significant portion of which are brought in from other U.S. states. And Washington also chose to ignore whether the goods used by all taxpayers other than Boeing were domestic or imported, while nonetheless providing the identical tax treatment made available to Boeing.

69. The EU's view is implausible. The text of ESSB 5952, as well as the surrounding facts, make it very clear that the point of ESSB 5952 was to ensure that a significant manufacturing program was sited in the state, in order to maintain and grow Washington's aerospace industry workforce. And it did just that; it did not have as its "cardinal purpose," nor did it actually require, the use of domestic over imported goods.

70. Fourth, the EU is incorrect that the factual circumstances of the 777X program are irrelevant. The 777X manufacturing program is the only one considered by DOR and determined to fulfill the First Siting Provision. It also has, since that determination, not been determined to trigger the Second Siting Provision. Therefore, it certainly is the most reliable evidence of the proper interpretation of ESSB 5952. And the 777X program will not include the production of completed fuselages and wings as separate goods that will then be used to produce the finished airplane. Because fuselages or wings − whether domestic or imported goods − are not produced as separate "goods" and then "used" as inputs in producing the finished 777X, and the program nevertheless was determined to satisfy the First Siting Provision and has not been found to trigger the Second Siting Provision, those Siting Provisions necessarily do not require the "use" of fuselages and wings as "goods" within the meaning of Article 3.1(b), much less require the use of *domestic* over imported fuselages and wings. Where, as here, factual evidence refutes the complaining Member's *de jure* arguments, the proper course is not to ignore the factual evidence, but to reject the *de jure* claim.

71. Fifth, the EU's entitlement theory of financial contribution highlights the insufficiency of the EU's cursory benefit argument. It is possible that an abstract entitlement exists, but no one uses it. As the EU itself states: "it is not necessary for any . . . actual foregoing to take place in order to qualify as a financial contribution." But if this were the case, there would be no benefit.

72. In addition, the EU's current financial contribution argument undermines its contingency arguments. In the context of Article 3.1(b) of the SCM Agreement, a relation of contingency exists only where the "use of domestic over imported goods" is required to receive the alleged subsidy. However, in this case, the tax treatment provided for by the alleged subsidies would still have been available until July 1, 2024, even if the supposed contingencies had never been met. This is because July 1, 2024, was the expiration date for the relevant tax treatment prior to the adoption of ESSB 5952. Accordingly, even on the EU's own theory, the alleged subsidies are not "dependent for their existence" on the use of domestic over imported goods.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

1. Australia has taken the opportunity to participate as a third party in this dispute as there are significant systemic issues about the interpretation of obligations under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

I. What is a prohibited subsidy under Article 3.1(b) of the SCM Agreement?

2. Australia recalls that Article 3.1(b) of the SCM Agreement prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods." In *Canada – Autos* the Appellate Body found that Article 3.1(b) of the SCM Agreement extends to contingency in fact, because to not do so "would make circumvention of obligations by Members too easy."[1]

3. The EU notes in paragraph 76 of its submission that the two provisions are "expressly conditioned on the use of domestic over imported goods." However, the EU does not clearly illustrate how it reaches that conclusion. It is also unclear whether the EU is suggesting that subsidies alleged to breach the SCM Agreement are contingent on the use of domestic goods in a *de jure* or *de facto* manner.

4. To make a claim that the legislation makes a subsidy contingent, *de jure,* on the use of domestic goods, the EU must point to the infringement set out in "the words actually used in the measure."[2] This standard was set by the Appellate Body in *Canada-Autos*. To make a claim that the legislation makes a subsidy contingent, *de facto*, on the use of domestic goods requires greater consideration of the facts. The *EC – Large Civil Aircraft* Appellate Body report provides guidance in the context of Article 3.1(a). It states that:

> [t]he existence of de facto export contingency, as set out above, "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy".[3]

5. Australia submits that the Panel can be guided by this approach in relation to Article 3.1(b). Accordingly, the Panel's determination in this case will depend on the finding of facts.

II. The Relationship between Article III:8(b) of GATT 1994 and Article 3.1(b) of the SCM Agreement

6. Australia notes that there is a legitimate scope within the WTO system for subsidies to domestic industries. This is recognised in Article III:8(b) of GATT 1994, which provides:

> The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

7. This was interpreted by the panel in *Indonesia – Autos* to "confirm that subsidies to producers do not violate Article III, so long as they do not have any component that introduces discrimination between imported and domestic products."[4]

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[1] *Canada – Autos*, Appellate Body report, para 142.
[2] *Canada – Autos*, Appellate Body report, para 123.
[3] *EC – Large Civil Aircraft*, Appellate Body report, para 1046.
[4] Panel Report, *Indonesia — Autos*, paras. 14.41–14.45.

8. Australia contends that the Panel should maintain and clarify the important distinction between the permitted payment of a subsidy exclusively to domestic producers and a subsidy which is contingent on the use of domestic over imported goods.

9. The Panel needs to assess whether the right to provide subsidies to domestic producers includes the right to require that the manufacturing *activity* occurs within the territory of the subsidising authority; and whether such a requirement could be characterised as one requiring the use of domestic over imported goods.

III. The scope for Members to provide subsidies to beneficiaries within their territory

10. Australia contends that the Panel should consider whether references to a "significant commercial airplane manufacturing program" and "fuselages and wings" in the legislation being examined in this dispute can be regarded as merely defining the scope of the beneficiary or beneficiaries of a subsidy rather than a requirement to use domestically produced goods.

IV. The scope for Members to provide subsidies based on geographical location

11. The legislation in question providing tax incentives to the aerospace industry (SSB5952) conditions the concessional tax arrangements on certain activities taking place in Washington State.

12. Should the tax incentives provided by Washington State be found to be a subsidy, and the references to wings and fuselages be found to merely define the beneficiaries of the subsidy, the Panel may find that the tax measures in question are permitted subsidies under Article III:8(b) of GATT. The intersection between the GATT and Article 3.1(b) of the SCM Agreement could be further explored by the Panel in this instance.

13. Australia considers that careful consideration should be given to whether the scope of a subsidy for manufacture and assembly based on geographical location amounts to the requirement to use domestic products over imported goods.

14. Careful consideration should also be given to whether the requirement to site the activity within the jurisdiction of the granting authority amounts to a local content requirement. The Panel needs to clarify whether the beneficiary of the tax incentive would receive benefits for manufacture and assembly regardless of the source of the inputs to manufacture and assembly.

15. Relevant context to consider the ability to limit or target subsidies to specific regions or within designated geographical regions within the jurisdiction of a granting authority is provided within the SCM. In particular, Article 8.2(b) and 2.2 of the SCM Agreement demonstrate that provision of subsidies on a regional basis is permitted.

16. 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

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. PROPER SCOPE OF THE CONTINGENCY UNDER ARTICLE 3.1(b) OF THE *SCM AGREEMENT*

1. Brazil would like to highlight that only two types of subsidies are prohibited under Part II of the *SCM Agreement*. As stated by the Appellate Body in *EC – Large Civil Aircraft*[1] :

> Only those subsidies that are conditioned on export performance or on import substitution are prohibited per se under Article 3 of Part II of the SCM Agreement. In contrast, all other subsidies are allowed under the SCM Agreement, albeit a Member granting such subsidies should not cause, through the use of the subsidies, adverse effects within the meaning of Article 5 of Part III, in which case it must remove the adverse effects or must withdraw the subsidies themselves.

2. In the case of Article 3.1(b) of the *SCM Agreement*, the import substitution subsidy has a particular contingency: "the use of domestic over imported goods". The contingency therefore hinges primarily on two elements: "goods" and their "use".

3. First, Brazil would like to emphasize that Article 3.1(b) of the *SCM Agreement* textually requires the use of "goods" to establish its contingency. It does not cover production requirements. A Member therefore is only prohibited from requiring the use of domestic "goods" as a condition for the granting of a subsidy. In other words, it is permissible to impose a condition upon the granting of a subsidy, as long as this condition is not tied to domestic goods. This is essentially what Brazil understands to have been the position expressed by the Appellate Body in *Canada – Autos*. A domestic "value-added" requirement is not prohibited unless it effectively or necessarily requires the use of domestic "goods".

4. The contingency under Article 3.1(b) therefore must be for domestic *products* to the detriment of imported *products. Mutatis mutandis,* the Appellate Body in *EC – Large Civil Aircraft* stated with regard to export contingent subsidies:

> Among the latter category of subsidies—that is, the actionable subsidies—are those granted to an export-oriented recipient, without being contingent upon export performance. The mere fact that such subsidies may increase the company's production sold in the export market does not bring them under the discipline of Part II of the SCM Agreement.[2]

In the same sense, Article 3.1(b) does not cover requirements other than requirements to use domestic products even if they ultimately lead to a gain in productivity of the domestic industry.

5. Second, the condition must concern the "use" of domestic goods over imported goods. The use of this term ("use") confirms that the "goods" in question must be "products" that are capable of being "used" in a commercial context.

6. Article 3.1(b) of the *SCM Agreement* does not prohibit subsidies affecting domestic and imported products generally, but only those which cause the *use* of domestic over imported goods. The contingency under Article 3.1(b) of the *SCM Agreement* must be established upon the actual *use* of the domestic product to the detriment of the imported product, not in relation to "any domestic transaction" it may entail. Given this exclusion applicable to the payment of domestic production subsidies, it would be incongruous to interpret Article 3.1(b) of the *SCM Agreement* to prohibit a measure simply based on the measure's link to domestic production. Article 3.1(b) requires more concrete evidence of a *de jure* or *de facto* contingency on the use of domestic over imported goods.

[1] Appellate Body Report, *EC – Large Civil Aircraft,* para. 1054.
[2] *Id.*

7. Subsidies programs are generally linked to a localization/domestic establishment requirement. This linkage may cause an incidental impact on local production and may benefit domestic producers of input products. Their products may become more attractive to the producer that established itself in the area as transportation costs go down and for other reasons. Thus, rather than importing products, the newly established domestic producer may start to use a larger share of domestic products as inputs. Clearly, such an indirect effect of the subsidy does not turn it into a prohibited subsidy.

8. In that respect, one must be careful not to make the same "false positive"- mistake that footnote 4 of the *SCM Agreement* warns against with respect to export contingency: it is not because a subsidy is granted to companies which export, that there is an "export contingency." The same applies to domestic producers. The fact that subsidies are granted to domestic producers does not, for that reason alone, mean that there is import substitution conditionality. In Brazil's view, the focus of the enquiry under Article 3.1 (b) should be on the conditionality of the subsidy and the extent to which it requires the "use" of domestic over imported "goods".

9. In conclusion, Brazil considers that in order to sustain a claim of violation of Article 3.1(b) of the *SCM Agreement*, a complainant must show that the subsidy in question has a specific contingency: that of the *use* of domestic *goods* over imported *goods*. Any subsidy that does not impose such a contingency is not prohibited under Article 3.1(b) and could only be challenged as an actionable subsidy under the *SCM Agreement*.

10. Blurring the line between prohibited and actionable subsidies would undermine the overall balance between Members' obligations under the WTO and their policy space, and it would unduly curtail the fomenting of industrial development. At the same time, the disciplines of the *SCM Agreement* must be respected in order to ensure a level playing field among Members and to minimize trade distortions. This requires a careful examination of the specific nature and implications of the conditions attached to a subsidy.

II. BRAZIL'S RESPONSES TO QUESTIONS FOR THIRD PARTIES

Reply by Brazil to question 1

It is not entirely clear to Brazil what the Panel means by "actual use or exercise of the fiscal incentive". If the Panel is asking whether the mere foreshadowing of a fiscal incentive is enough, the answer is clearly no.

Reply by Brazil to question 3

In sum, Article 1 defines a subsidy for purposes of the SCM Agreement. Article 2 defines "specificity" and also frequently refers to the "granting authority" and the "granting of disproportionately large amounts of subsidy", thus employing the same term "granting" as found in Article 3. Article 3 imposes a specific discipline for certain types of subsidies, prohibiting these categories. Article 3.2 imposes a specific requirement not to grant "or maintain" such prohibited subsidies and is thus part of the context in which the definition of a subsidy as set forth in Article 1 is to be read. In that respect, this provision is contextually "relevant", just like any other provision of the SCM Agreement.

Reply by Brazil to question 4

In light of the Vienna Convention's disciplines that the starting point for ascertaining "object and purpose" is the treaty itself, in its entirety, rather than a particular provision[3], Brazil understands that the object and purpose of Article 3.1(b) of the SCM Agreement is to prohibit import substitution subsidies contingent upon the use of goods, domestic over imported. Therefore, the interpretation of the term "goods" should not be made so as to blur the line between prohibited subsidies, which affect goods, and actionable subsidies, which affect production.

[3] Appellate Body Report, *EC – Chicken Cuts*, para. 238.

Reply by Brazil to question 5

Brazil understands that the SCM Agreement does not prohibit WTO Members from providing subsidies to producers contingent on the performance of production steps of a certain good in their territories. This production requirement could fall either upon the production of a final or an intermediate good. A subsidy can require the performance of production steps relating to the final good whose production is being subsidized or of the intermediate product which will be integrated into that specific subsidized production chain. A Member could just as well legitimately create, under Article 3.1(b) of the SCM Agreement, two separate subsidy programmes requiring the performance of production steps in its territory, one related to the final product and one related to the intermediate product which will be integrated into that specific subsidized production chain. In this sense, Brazil understands that the scenario submitted by Canada would not be a *de jure* contingency claim under Article 3.1(b) of the SCM Agreement.

Additionally, whether the conditionality in question amounts to a prohibited condition to "use domestic over imported goods" must be analysed based on the text of the specific subsidy program, in the light of its necessary implications and in the context of the total configuration of the facts of each situation.

Reply by Brazil to question 6

It is not entirely clear to what "guidance from previous cases" the Panel is referring because the Panel does not refer to any specific cases. In any case, Brazil considers that a *de facto* claim requires a panel to go beyond the text of the specific subsidies program and its necessary implications to examine the program in the context of the totality of the facts surrounding the granting of the subsidy.

The Panel should take into due consideration previous jurisprudence regarding *de facto* claims under Article 3.1(a) of the SCM Agreement for the analysis of a *de facto* claim under Article 3.1(b). In *EC – Large Civil Aircraft*, the Appellate Body ruled that the standard of *de facto* export contingency under Article 3.1(a) and footnote 4 of the SCM Agreement "would be met when the subsidy is 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"[4]. Mutatis mutandis, the fact that the granting of a subsidy might increase overall domestic production or decrease imports would not in and of itself be de facto contingent on the use of domestic over imported goods. It would have to provide an incentive that is not simply reflective of the conditions of supply and demand for domestic and imported goods.

In the analysis of a *de facto* contingency claim under Article 3.1(b), a Panel may also use some of the same tests or factors as in Article 3.1(a), such as a "but for" test or an expected sales ratio from a profit maximizing firm.

Reply by Brazil to question 7

The key legal matter in this connection is the proper understanding of the term "domestic" in Article 3.1(b) of the SCM Agreement, which is not defined in the Covered Agreements. To Brazil, the discipline contained in Article 3.1(b) requires a definition of "domestic" that makes economic sense. While it may be impossible to determine in the abstract the exact percentage of value added in the country concerned that is required to characterize a product as "domestic" in all cases, there certainly are cases that can be safely excluded – or included – in this definition. In any case, in Brazil's view, this is a factual question that is to be determined by looking at the specific nature of the specific product and its production process, in the light of applicable domestic legal requirements.

Reply by Brazil to question 8

Brazil refers the Panel to its answer to question 6.

[4] Appellate Body Report, *EC – Large Civil Aircraft,* para. 1.045

Reply by Brazil to question 11

What was emphasized in Brazil's submission was that the term "use" has already been interpreted by the Panel in US − Upland Cotton, which opposed the understanding that "any domestic transaction" would fall within the meaning of use. Furthermore, Brazil emphasizes the use of products so as to clearly delimit the prohibited subsidies from actionable production subsidies.

Brazil does not take a position on the specific facts of the case, but reiterates that the discussion of whether a subsidy is prohibited or not in light of Article 3.1(b) requires the analysis of whether the conditionality established within the subsidy programme is related to the performance of production steps or to the use of products. If the condition, for instance, simply requires a domestic production activity of the producer, it will likely not amount to a prohibited conditionality.

Reply by Brazil to question 12

Brazil will not delve into the specific facts as raised by the parties and will therefore not express a position on the ultimate merits of the parties' allegations that follows from applying the law to the facts of this case. The Panel's question whether "the use of a domestically assembled or manufactured wing always constitute[s] the use of domestic goods" is thus to be answered based precisely on the facts of this case rather than on the basis of categorical conclusions of what "always" or "never" will constitute use of domestic goods.

Brazil understands that a subsidy on the production of a certain good, with requirements on the performance of production steps along the production chain, would not be considered *de jure* contingent on the use of domestic over imported goods under the purview of Article 3.1(b). Therefore, an automatic contingency would not be present when a programme requires the assembly of a good in the territory of a Member. For a *de facto* contingency claim, an evaluation of the programme in practice would be needed.

Reply by Brazil to question 14

As mentioned before, Brazil understands that there is a fundamental difference between a requirement of the performance of production steps and a requirement of the use of domestic products for a *de jure* contingency under Article 3.1(b). A *de facto* contingency would require an analysis of the total configuration of the facts at hand. As a third party, Brazil only has limited access to the parties' factual and legal arguments and thus prefers not to express a definitive view on how the law applies to the facts of this particular dispute

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

1. The findings of the Panel in this dispute will have important consequences for the way in which the Agreement on Subsidies and Countervailing Measures (SCM Agreement) is interpreted and applied in future disputes. Canada therefore welcomes the opportunity to present its views to the Panel. Canada's submission addresses the issue of prohibited import-substitution subsidies under Article 3.1(b) of the SCM Agreement.

2. The European Union claims that the continuation and extension of subsidies[1] by Washington State in the form of tax benefits to Boeing under SSB 5952 are contingent upon the use of domestic over imported goods in violation of Article 3.1(b) of the SCM Agreement. The European Union thus alleges that a "programme-siting condition" and an "exclusive-production condition" require Boeing "to use wings and fuselages produced or assembled in Washington State in the final assembly of 777X LCA in Washington State".[2]

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. The European Union appears to be arguing that a subsidy is contingent on the use of domestic over imported goods where the producer of a final good is required to produce certain components of that good in order to receive the subsidy.[3]

4. Canada understands that under what the European Union describes as the "programme-siting condition" Boeing is required to locate the 777X development program and manufacture and/or assemble the 777X, including fuselage and wings, in Washington State.[4] A so-called "exclusive-production condition" confirms that Boeing must carry out the final assembly or wing assembly of (any) of its aircraft models in Washington State, and not elsewhere, in order to benefit from reduced taxes.[5]

5. Although Boeing may, in fact, "use" fuselages and wings produced in Washington State to receive the tax subsidies, the company would be *required* to manufacture and/or assemble those fuselages and wings *itself*. There is no requirement included in SSB 5952 to purchase wings, fuselages, parts used in the assembly thereof or other parts used in the assembly of the final aircraft produced in the United States. The European Union also did not provide any evidence suggesting that Boeing would *de facto* have to "use" domestic components other than those that the company manufactures itself.

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[1] The tax incentives challenged by the European Union under Article 3.1(b) are a reduced Business and Occupation ("B&O") tax rate for the manufacture and sale of commercial airplanes, a B&O tax credit for pre-production development for commercial airplanes and components, a B&O tax credit for property taxes on commercial airplane manufacturing facilities, an exemption from sales and use taxes for certain computer hardware, software, and peripherals, an exemption from sales and use taxes for certain construction services and materials, an exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes and an exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes (European Union's first written submission, para. 15).

[2] European Union's first written submission, para. 44, see also para. 52.

[3] The European Union claims that "pursuant to the programme-siting condition in Section 2 of SSB 5952, the post-2024 aerospace tax incentives were contingent on the establishment of a new commercial aircraft manufacturing programme that uses goods (i.e. fuselages and wings) produced in the United States (specifically, in Washington State). Under this condition, the tax incentives would not have been extended in duration to 2040 if Boeing had decided to 'use' imported wings and fuselages in the assembly of the 777X". European Union's first written submission, para. 74. (footnotes omitted; emphasis added). The European Union continues: "Likewise, pursuant to the exclusive-production condition, the reduced B&O tax rate subsidy for the 777X is contingent on Boeing's use of wings produced in the United States (specifically, in Washington State) exclusively. Under this condition, Boeing benefits from the reduced B&O tax rate for the 777X only so long as it 'uses' wings assembled exclusively in Washington State for the 777X, or any variant thereof". European Union's first written submission, para. 75.

[4] Substitute Senate Bill 5952, Chapter 2, Laws of 2013 3rd Special Session, 2014 Wash. Sess. Laws 2 (SSB 5952), Exhibit EU-03, section 2.

[5] Ibid. subsections 5(11)(e)(ii) and 6(11)(e)(ii).

6. Canada considers that a WTO Member is not prohibited from providing subsidies to its domestic producers, including where the subsidy to the producer of a final good is contingent either on the production or the assembly of an intermediate good by that same producer. In both instances, the subsidy is a production subsidy that is not contingent on the use of domestic over imported goods.

7. Nothing in the General Agreement on Tariffs and Trade 1994 (GATT 1994) or SCM Agreement prohibits a subsidizing Member from making the granting of a subsidy contingent on a recipient producing goods in its territory.[6] In fact, GATT Article III:8(b) explicitly allows WTO Members to provide subsidies to their domestic producers.[7] A producer of a final good that is required to produce an intermediate good is also a producer of the intermediate good. Therefore, a subsidy can be made contingent on the production of an intermediate as well as a final good.

8. Neither the GATT 1994 nor the SCM Agreement limit a subsidizing Member's ability to define the level of production required for subsidy eligibility purposes. As part of this discretion, a Member may explicitly require the production of an intermediate good. A Member's ability to condition the provision of a subsidy on a production requirement would be significantly curtailed if a Member could not require the production of an intermediate good. A production requirement would then have to be limited to simple assembly operations.

9. This position is supported by the Appellate Body's report in *Canada – Autos*. In that dispute, the Appellate Body assessed whether a measure providing Canadian automobile manufacturers with an import duty exemption contingent, *inter alia*, on satisfaction of a Canadian value-added (CVA) requirement, was inconsistent with Article 3.1(b) of the SCM Agreement.[8] Under the measure, a manufacturer could meet the CVA requirement by disclosing the aggregate of certain costs of producing vehicles in Canada listed in the definition of "Canadian value added".[9] A number of costs were included in the definition of CVA. The most relevant for the Appellate Body's analysis were (1) the cost of *domestic goods*, that is, those domestic parts and materials *purchased* by the manufacturer for use in the production of its motor vehicles[10], and (2) the cost of domestic labour[11], that is, the cost of all labour reasonably attributable to the production of vehicles. The latter would include the cost of labour used to produce intermediate goods.

10. In analyzing whether the CVA requirement was inconsistent with Article 3.1(b), the Appellate Body distinguished between the cost of labour and the cost of domestic goods. It found that the CVA requirement would violate Article 3.1(b) only if it required the manufacturer to use domestic goods.[12] However, it did not consider that a requirement to use domestic labour, regardless of whether that requirement may imply the production of intermediate goods, would violate Article 3.1(b).[13]

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[6] See Annex IV:3 of the SCM Agreement, which forms part of the rules under paragraph (a) of the now expired Article 6.1 for determining when a subsidy is deemed to have caused serious prejudice. Annex IV:3 explicitly refers to subsidies tied to the production of a given product. By contemplating that subsidies may be tied to production in the context of a serious prejudice analysis rather than in the context of a prohibition, Annex IV:3 recognizes that WTO Members are not prohibited from providing subsidies tied to production.

[7] Article III:8(b) of the GATT 1994 provides: "[t]he provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products"; See also Panel Report, *EC – Commercial Vessels*, paras. 7.69 and 7.75 where the panel found that contributions provided only to domestic producers of certain vessels were covered by GATT Article III:8(b) and therefore not inconsistent with GATT Article III.

[8] Appellate Body Report, *Canada – Autos*, para. 125.

[9] Ibid. paras. 124 and 125.

[10] Ibid. As the cost of producing intermediate goods is accounted for in the aggregate of the cost of purchased inputs and the manufacturer's own labour, the cost of domestic goods could not include the cost of intermediate goods produced by the manufacturer itself.

[11] Ibid. paras. 124 and 130.

[12] Appellate Body Report, *Canada – Autos*, para. 130: "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". (emphasis original).

[13] Ibid.:"if the level of the CVA requirements is very low, it would be much easier to satisfy those requirements *without* actually using domestic goods; for example, where the CVA requirements are set at 40

11. The European Union's interpretation would nullify the right of a WTO Member to require a subsidy recipient to produce goods, as defined by the Member, in its territory, in order to receive a subsidy. This has no basis in law, and would have considerable, negative consequences for industry given that most manufacturers produce intermediate goods as part of the production of their final goods. As such, and for the reasons set out above, the Panel should reject the interpretation advanced by the European Union.

per cent, it might be possible to satisfy that level simply with the aggregate of other elements of Canadian value added, in particular, labour costs". (emphasis original).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. This integrated executive summary summarizes the arguments and viewpoints presented by China to the Panel in its Third Party Submission, Oral Statements and responses to the questions following the substantive meeting. China mainly focuses on the two issues in this dispute in the executive summary: 1) legal framework of Article 3.1(b) of the SCM Agreement; and 2) whether the "Programme-Siting Condition" and "Exclusive-Production Condition" are consistent with Article 3.1(b) of the SCM agreement.

The Legal Framework of Article 3.1(b) of the SCM Agreement

2. At the outset, China indicates that in order to establish a *prima facie* case under Article 3.1(b), the EU is obligated to demonstrate: 1) relevant measures constitute subsidies under Article 1 of SCM Agreement; and 2) relevant measures are contingent upon the use of domestic over imported goods. China will not touch upon the first condition, but only focus on the second condition.

3. Firstly, China is of the view that "contingency" under Article 3.1(b) of the SCM agreement includes both contingency in law and contingency in fact. The Appellate Body clarified in *Canada-Autos* that "contingency" includes both contingency in law and contingency in fact and this legal standard applies not only to "contingency" under Article 3.1(a), but also to "contingency" under Article 3.1(b)[1]. Hence, China believes, under present dispute, if subsidies are found contingent upon import substitution, regardless in law or in fact, they shall be determined to constitute prohibited subsidies. In addition, China also mentions the finding of the Appellate Body made in *EC— Large Civil Aircraft* so as to establish the test for determining whether a subsidy is *de facto* contingent on export performance. Such test might be also applied in the present dispute.

4. Secondly, China believes the term "contingent" is a "key word" under Article 3.1(b). The ordinary connotation of "contingent" is "conditional" or "dependent for its existence on something else". Therefore, China is of the view that the Panel shall examine if the subsidies granted under "Programme-Siting Condition" and "Exclusive-Production Condition" are "conditional" or "dependent for its existence on something else" on the use of domestic over imported goods.

5. Thirdly, China does not agree with the United States' argument concerning the interpretation of "goods". If the logic of the United States stands, it will be contradictory to each other, since the components of fuselages and wings from upstream will be treated as goods, while the fuselages or wings assembled in downstream are not goods. With respect to the criterion of "traded" presented by the United States, China believes the connotation of "tradable" means the goods has the value of trading instead of being traded in reality. Therefore, China does not think the interpretation of "goods" provided by the United States is convincing.

6. Fourthly, China is of the view that the prohibited subsidy under Article 3.1(b) is established on the basis of contingency upon "use" of domestic over imported goods. Contrary to the United States' claim that fuselages and wings are not "inputs" that are "used" as goods in the 777X production process[2], China believes that "use" of domestic **intermediate goods** in the course of production may also meet the condition on "use" of domestic over imported goods. If the conditions concerned would result in a *de facto* situation that the 777X programme prefers the domestic components or other intermediate goods, the condition of "use" of domestic over imported goods is also met.

7. Fifthly, China is of the view that Article III of the GATT on which relied by the United States is not relevant to the present dispute. China does not deny that it is possible that Article III.8(b) of the GATT can be used for context in the interpretation of Article 3.1(b) of the SCM Agreement.

[1] Appellate Body Report, *Canada – Autos*, para.123.
[2] First Written Submission of the United States, para.110-115.

However, China believes that these two Articles impose different obligations to Members. Article III.8(b) exempts the subsidy provided to domestic producers from the obligations of Article 3.2 and 3.4 of the GATT 1994. However, when the subsidy provided to the domestic producers is contingent on use of domestic over imported goods, it will still constitute prohibited subsidies under Article 3.1(b) of the SCM Agreement. Therefore, China believes that Article III:8(b) of the GATT is not the legal basis to exempt the "Programme-Siting Condition" and "Exclusive-Production Condition" from Article 3.1(b) of the SCM Agreement.

Whether the "Programme-Siting Condition" and "Exclusive-Production Condition" are consistent with Article 3.1(b) of the SCM agreement

8. China is of the view that the analysis regarding "Programme-Siting Condition" and "Exclusive-Production Condition" shall take into account the contingency both in law and in fact perspectives.

9. With regard to the "Programme-Siting Condition", China notes that the text in SSB 5952 does not expressly or implicitly indicate LCA must purchase any products including wings or fuselage which are produced in Washington State to fulfill the "Programme-Siting Condition". There seems no sufficient evidence in law proving the "Programme-Siting Condition" would constitute a *de jure* subsidy within the scope of Article 3.1(b).

10. However, China believes that taking into account of the cost saving from logistic and tax incentives aspects, it will be more favourable to purchase the wings and fuselages components or other intermediate goods produced in Washington State in the final assembly process of 777X. Therefore, the "Programme-Siting Condition" might result in a situation domestic components are favoured than imported components. China suggests the Panel to conduct an examination on this regard.

11. With regard to the "Exclusive-Production Condition", according to its provisions and statement made by the Governor of Washington State, the B&O tax rate reduction is specifically contingent on being sited in Washington State, and it requires that both final assembly and wing assembly have to be in the Washington State. China believes that if the both procedures have to be in the same State, it will create more incentive to use more domestic components due to cost saving and efficiency perspective.

12. China suggests that the Panel shall examine whether the "Exclusive-Production Condition" provision in SSB 5952 through implicit expression shall be considered as a *de jure* subsidy within the meaning of Article 3.1(b). And if it does not constitute *de jure* prohibited subsidy, China believes that the Panel shall make an objective assessment on the fact in relation to the production process of wings, so as to determine whether the "Exclusive-Production Condition" provision in SSB 5952 shall be considered as a *de facto* subsidy within the meaning of Article 3.1(b), through evaluating (i) the design and structure; (ii) the modalities of operation; and (iii) the relevant factual circumstances of B&O tax rate reduction under "Exclusive-Production Condition".

Conclusion

13. To conclude, China is of the view that the Panel shall take into account of the contingency in law and in fact to determine whether the tax incentives upon "Programme-Siting Condition" and "Exclusive-Production Condition" within SSB 5952 constitute subsidies upon use of domestic over imported goods within the meaning of Article 3.1(b) of SCM Agreement. In addition, China believes that certain interpretations of the United States, including "use", "goods" and "relationship between GATT Article III and Article 3.1(b) of SCM Agreement" shall not be supported by the Pane

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Introduction

1. The Government of Japan presents its systemic views in this dispute brought by the European Union against the United States with respect to certain aerospace tax incentives enacted by the State of Washington in 2003, as amended and extended by Substitute Senate Bill 5952 ("SSB 5952").

II. Contingency Under Article 3.1(b) of the SCM Agreement

A. Legal Standard

2. Regarding the legal standard for "contingency" under Article 3.1(b) of the SCM Agreement, the Appellate Body in *Canada – Autos* has clarified that the same legal standard for establishing contingency under Article 3.1(a) also applies for establishing contingency under Article 3.1(b).[1]

3. In that respect, Japan recalls that the Appellate Body in *EC – Large Civil Aircraft* noted that the condition of contingency would be met under Article 3.1(a) of the SCM Agreement when the subsidy is granted so as to provide a certain "*incentive to the recipient*".[2] Under Article 3.1(b) of the SCM Agreement, Japan is of the view that this legal standard focused on the incentive requires a comparison between the use of domestic goods and imported goods, and that this interpretation especially suits the meaning of the word "*over*" used in Article 3.1(b) of the SCM Agreement.[3]

4. Therefore, in this regard, Japan agrees with the European Union's legal analysis that to establish contingency under Article 3.1(b) of the SCM Agreement the same framework as suggested by the Appellate Body in *EC – Large Civil Aircraft* for Article 3.1(a) should be used.[4]

B. Evidentiary Standard

1. *De Jure* Contingency

5. Japan asks the Panel to carefully examine what *exactly* the law itself states and what it necessarily implies since, as clarified by the Appellate Body in *Canada – Autos*, the evidentiary standard for a *de jure* contingency is that "conditionality can be derived by necessary implication from *the words actually used in the measure*."[5]

6. When there is an ambiguity in the law or if the relevant governmental official is given a degree of discretion, "evidence of consistent application of such laws, pronouncements of domestic courts on the meanings of such laws, the opinions of legal experts, and the writings of recognized scholars" should also be considered. [6]

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[1] Appellate Body Report, *Canada – Autos*, para. 123. This view was later reiterated by the Panel in *US – Upland Cotton* and left untouched by the Appellate Body in the same case.

[2] Appellate Body Report, *EC—Large Civil Aircraft*, paras. 1045, 1047. (emphasis added)

[3] Japan notes that the dictionary defines the term "over" as meaning "in preference to", "in excess of" or "more than". (*The New Shorter Oxford English Dictionary*, 4th edn., L. Brown (ed.)(Oxford University Press, 1973, 1993). The term "over", therefore, functions as a marker of comparison. Thus, establishing whether the domestic product is used in preference to the imported product necessarily implies a comparison between the use of the former and the latter.

[4] EU FWS, para. 77.

[5] Appellate Body Report, *Canada – Autos*, para. 123. (emphasis added)

[6] Appellate Body Report, *US – Carbon Steel (India),* para. 4.446 (quoting Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101; *US – Carbon Steel*, para. 157).

2. *De Facto* Contingency

7. The United States points out that the European Union has presented no evidence or arguments related to the anticipated ratio of the use of domestic to imported goods for the Boeing Company ("Boeing") with and without the challenged measure.[7]

8. In this regard, the Appellate Body admits in *EC – Large Civil Aircraft* that the assessment as to whether a subsidy is "geared to induce" export performance under Article 3.1(a) "could be based" on a comparison between the ratio of anticipated export and domestic sales of the subsidized products (namely, the "anticipated ratio"), and the same ratio in the absence of the subsidy (namely, the "baseline ratio").[8] However, it does not mention that such ratio is always relevant to establish *de facto* contingency.[9]

9. Similarly, in examining whether a subsidy provides an incentive to use domestic over imported products under Article 3.1(b) of the SCM Agreement, Japan is of the view that such comparison between the baseline and anticipated ratios may not necessarily provide a basis for determining whether a subsidy provides an incentive to its recipient.

10. One reason for this is that the increase of the use of the domestic product may be caused by *other factors*, such as certain market developments including diverging shifts in the prices of domestic products as compared to imported products. However, such other factors causing the increase of the use of the domestic product must be distinguished from the effect of *the subsidy itself,* and the effects that may be caused by these *other factors* must not be attributed to the subsidies.[10]

11. Therefore, Japan asks the Panel to cautiously examine the utility of the "anticipated ratio" test. Whether a particular subsidy provides an incentive to its recipient must be primarily inferred from "the total configuration of the facts constituting and surrounding the granting of the subsidy",[11] rather than by relying on the "anticipated ratio."

12. Japan also recalls that the Appellate Body introduced the "anticipated ratio" test as one way to determine *de facto* export contingency under Article 3.1(a) and footnote 4 of the SCM Agreement, which reads in relevant part that a subsidy is "in fact tied to … anticipated exportation."[12] In other words, the "anticipated ratio" test has a textual basis in the term "anticipated exportation" in footnote 4. In addition to Japan's comments on the overall utility of the "anticipated ratio" test, therefore, in any event, the suggested "anticipated ratio" test developed under Article 3.1(a) should not be simply imported into the evidentiary standard for the purpose of Article 3.1(b) inquiry, since Article 3.1(b) contains no reference to "anticipated" use of domestic over imported goods.

C. Application of the Legal and Evidentiary Standards

13. In light of the legal and evidentiary standards described above, Japan considers that the EU's analysis in respect of the "programme-siting condition" and "exclusive-production condition" may fall short of meeting the standard required to establish the contingency under Article 3.1(b) of the SCM Agreement.

14. We urge the Panel to, firstly, very carefully examine what *exactly* the law itself states and what is necessarily implied by the legislation in question (as a *de jure* claim) as well as its design, structure and modalities of operation (as a *de facto* claim), and then, determine whether the provision of the subsidies provides incentives for the use of domestic goods over imported goods. If anything, more careful explanations appear to be necessary to connect facts and legal analysis in paragraphs 42 to 52, and 73 to 79 of the EU FWS.

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[7] US FWS, para. 134.
[8] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1044, 1047.
[9] *Ibid*., para. 1047.
[10] *Ibid*., para. 1047 notes that when making the comparison between the "anticipated" and "baseline" ratios, "all other things" must be equal.
[11] *Ibid*., para. 1046, citing Appellate Body Report, *Canada – Aircraft*, para. 167.
[12] *Ibid*.,paras. 1042-1045.

1. The "Programme-Siting Condition"

15. First, in respect of the "programme-siting condition," it appears that 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.

16. Further, with respect to the incentive of the subsidy, there is no explanation in the EU's submission as to how the subsidy is granted so as to provide an incentive to Boeing to use domestic goods in a way that is not simply reflective of the conditions of supply and demand in a domestic market consisting of domestic goods and imported goods undistorted by the granting of the subsidy.

17. Japan submits that certain subsidies to the producer of a final good contingent on the production of an intermediate good by the same producer can be inconsistent with Article 3.1(b) of the SCM Agreement, depending on the factual circumstances of a case. Had there been an outright exclusion of subsidies contingent on domestic manufacturing of intermediate goods from the scope of Article 3.1(b), it would have allowed WTO Members to easily "circumvent the disciplines" of Part II of the SCM Agreement.[13]

18. Therefore, in order to determine whether a subsidy granted to the producer of a final good contingent on the production of an intermediate good by that same producer complies with Article 3.1(b) of the SCM Agreement, a panel should scrutinize the exact content of the requirements for the subsidy and how they operate for particular manufacturers receiving the subsidy. If, through such scrutiny, the requirement for the production of intermediate goods is found to require or incentivize the use of such domestic intermediate goods in final goods in actual situations, then the requirement would be in breach of Article 3.1(b).

2. The "Exclusive-Production Condition"

19. Second, in respect of the "exclusive-production condition," the words actually used in the legislation are not completely clear as to whether, by virtue of the requirement for the locus of the final assembly or wing assembly, the revenue from the 777X will not benefit from the reduced Business and Occupation ("B&O") tax rate if these assembling activities take place outside Washington State.

III. Goods under Article 3.1(b) of the SCM Agreement

A. Imported Goods

20. Japan submits that, for the purpose of a claim under Article 3.1(b) of the SCM Agreement, it is not necessary that the concerned goods are actually traded or are tradable.

21. The United States argues that because 777X fuselages and wings are "custom-designed for and unique to the 777X and its production process" and "[n]o potential purchasers for such articles exist", 777X fuselages and wings are not saleable or traded, and thus are not "goods" within the meaning of Article 3.1(b).[14] The United States relies primarily on the word "imported" that qualifies the word "goods" in Article 3.1(b). To follow this logic, certain products would be determined not to be "goods" within the meaning of Article 3.1(b) merely because an individual company receiving the subsidy at issue custom-designs the product and commissions a limited number of contractors to produce it.

22. Although Japan is not fully cognizant of the precise meaning which the United States attribute to the terms "tradeable" or "custom-designed" goods, which are not the treaty words in the SCM Agreement, it should be noted as a preliminary issue that Japan does not agree with the proposition that custom-designed goods developed for a particular product model are not capable of being sold, traded, or imported for that matter. Japan fails to see how the particular characteristics of "custom-design" preclude the goods from being "tradeable", *e.g.* from being

[13] Appellate Body Report, *US – Softwood Lumber IV*, para. 64.
[14] US FWS, Section VI.D, including para. 129.

supplied at arm's length from outside sources. In addition, Japan has two concerns in relation to the limited interpretation of the term "goods" for the purpose of Article 3.1(b).

23. First of all, such interpretation would open up an easy path for circumventing subsidy disciplines under Article 3.1(b) of the SCM Agreement. Indeed, WTO Members would be able to exclude a subsidy contingent on the use of domestic goods from the coverage of the SCM Agreement by simply labelling products as custom-designed. Japan recalls that the Appellate Body in *US – Softwood Lumber IV* cautioned against an interpretation of the provisions of the SCM Agreement which would permit the circumvention of the subsidy disciplines and that this consideration was highly pertinent for the Appellate Body's overall conclusion that non-tradable goods are not excluded from the scope of "goods" for the purpose of Article 1.1(a)(1)(iii) of the SCM Agreement.[15]

24. Second, such interpretation of "goods" under Article 3.1(b) has the risk of resulting in a wholly arbitrary application of this provision with unpredictable consequences for the following reasons. A product with the same basic characteristics may be custom-designed or sold in a standardised form depending on the wishes of a particular customer. Likewise, a particular company may, at times, produce and sell virtually the same product with some custom-designed characteristics, and, at different times, with standardised characteristics due to a number of factors such as a change in economic situation or the company's business strategy. However, following the United States' interpretation, although essentially the same product is produced and sold, whether it is covered or not covered by the SCM Agreement, would depend on the wishes of the customer or the company's business strategy at any given point in time leading to a wholly arbitrary application of Article 3.1(b) of the SCM Agreement.

25. Limiting the application of Article 3.1(b) to "tradeable" goods would, thus, hinder the consistent application of Article 3.1(b) to the detriment of the object and purpose of that provision.

26. Therefore, Japan submits that, for the purpose of a claim under Article 3.1(b) of the SCM Agreement, it is not necessary that the concerned goods are actually traded or tradable.

B. Domestic Goods

27. Japan considers that a product assembled entirely from imported components can be a "domestic […] good" within the meaning of Article 3.1(b) of the SCM Agreement for the following reason.

28. As discussed above, the phrase "domestic over imported goods" in Article 3.1(b) suggests that the term "domestic" can refer to anything that is not imported.

29. Hence, even if a product is assembled entirely from imported components, when *the product itself is not imported*, the product should be regarded as "domestic". Otherwise, the product could be categorized arbitrarily as either "domestic" goods or "imported" goods. This would significantly undermine the object and purpose of − the SCM Agreement by creating room for circumvention of the obligation under Article 3.1(b) of the Agreement.[16]

IV. Burden of Proof and the Relevance of Findings Made by Preceding Panels and the Appellate Body

30. The United States argues that the European Union relies on facts and legal conclusions established in a separate dispute, *US — Large Civil Aircraft*, and fails to make a *prima facie* case.[17] The United States points out, *inter alia*, that while the panel in that dispute addressed facts that existed in 2006, the present dispute involves measures that differ from those at issue in that dispute.[18] The United States submits that the existence of prior panel findings in *US — Large Civil*

[15] Appellate Body Report, *US – Softwood Lumber IV*, paras. 64 and 67.
[16] See Appellate Body Report, *Canada – Autos*, para. 142.
[17] US FWS, para. 81.
[18] *Ibid.*, paras. 82 and 87.

Aircraft does not excuse the European Union from the burden of proof that normally applies in an original dispute.[19]

31. Japan agrees with the United States that a complainant has to provide sufficient facts and arguments to allow the Panel to perform its own objective assessment of the matter, as required under Article 11 of the DSU.[20] Nonetheless, in Japan's view, this does not mean that a complainant is precluded from relying on findings contained in previously adopted panel reports if and to the extent such findings are appropriate for the consideration of the matter before the Panel.

32. Japan observes that the Panel in this dispute should make an objective assessment of the facts of the case including the issue of whether and to what extent it may rely on the findings of the previous panel, taking into consideration any differences in the factual circumstances of the two cases.

33. In this regard, it appears that the aerospace tax incentives (other than the B&O tax rate reduction) in this dispute consist of both the tax incentives that were found by the panel in *US — Large Civil Aircraft* to involve a financial contribution and those that were not. As a complainant, the European Union should clearly distinguish the two sets of tax incentives, and elaborate on the reasons why it considers that the Panel is allowed to rely on the *US — Large Civil Aircraft* panel's and the Appellate Body's findings in examining the WTO-consistency of each of the challenged measures.

[19] *Ibid*., para. 90.
[20] *Ibid*., paras. 85-86.; Panel Report, *US—Shrimp and Sawblades*, para. 7.6.

ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

LETTER FROM THE PANEL, 15 JANUARY 2016

The Panel acknowledges receipt of the United States' request to extend the deadline for the second written submissions by an additional week (i.e. that the Panel set a date no earlier than 25 March 2016).

The Panel adopted the present Timetable taking into account, among other considerations, the unavailability of the United States' lead attorney to attend a panel meeting during the week of 14 March 2016, as indicated at the organizational meeting. Accordingly, the second substantive meeting was postponed from 15-16 March, as suggested in the draft Timetable initially sent to the parties, to 5-6 April.

The Panel is cognisant of the direction under Article 12.4 of the DSU that sufficient time be given for the preparation of submissions. At the same time, it is to be recalled that these proceedings are required, under the SCM Agreement, to be expedited. What might be considered to be sufficient in expedited and in non-expedited proceedings will necessarily be different.

The Panel believes that it has fairly accommodated the parties' concerns as expressed at the organizational meeting in the adoption of the present Timetable. The concerns which have now more recently been expressed by the United States do not convince the Panel that insufficient time has been given for the preparation of submissions by the parties. In particular the Panel does not agree that the United States will only have two days to prepare its second submission.

Accordingly, the Panel declines the United States' request for an extension of the deadline for the second written submissions.

ANNEX D-2

LETTER FROM THE PANEL, 4 MAY 2016

The Panel is in receipt of the United States' communication of 28 April 2016, in which it asked for the opportunity to comment on certain factual evidence and arguments that were submitted by the European Union on 25 April with the European Union's comments on the United States' responses to Panel questions. The Panel has also received the European Union's comments of 2 May 2016 on the United States' request.

In its request, the United States refers to eight new exhibits that were provided by the European Union with its comments on the United States' responses. The United States "disagrees with the [European Union's] interpretation of this evidence and how [the European Union] employs the evidence in its argumentation". According to the United States, an opportunity to comment on this factual evidence and arguments would help to protect the United States' rights as a responding Member without delaying this proceeding any more than necessary.

In response, the European Union asks the Panel to reject the United States' request. In the European Union's view, the United States has not explained why a new opportunity to comment, which is not envisioned in the Panel's timetable, would be essential to protecting the United States' procedural rights. The European Union submits that the due process rights of the United States must be balanced with the procedural right of the European Union to a speedy resolution of the dispute, which would be affected if the United States' request were accepted. The European Union also states that the circumstances relating to the submission of the exhibits at issue, as well as the nature of the exhibits themselves, do not merit an additional set of comments. According to the European Union, the new factual evidence and related argumentation was offered as a rebuttal to arguments that the United States made in its responses to Panel questions. Nothing in this new factual evidence was previously unavailable to the United States and with respect to two exhibits the United States itself relied on and referred to the relevant documents before the European Union submitted them as exhibits. The European Union concludes that not having an additional opportunity to submit comments would not prejudice the due process right of the United States in this dispute.

Thus, in summary, the United States requests the Panel to give it the opportunity to comment on the factual evidence submitted by the European Union, and the European Union submits to the Panel that such an opportunity to comment is not envisioned by the Panel's timetable and is not otherwise merited.

The Panel's Working Procedures do not allow for any further submissions or comments from the parties at this point in the proceedings, other than in the case of the parties' comments on the interim report. Thus, the question for the Panel to decide is whether it should permit a departure from the Working Procedures. The way in which this might be justified would be if the Panel formed the view that the due process rights of a party − here, the United States − would be impacted without such an opportunity.

There are a number of different considerations for a Panel to take into account in a situation such as this. An important consideration is the degree to which the matters that a party seeks to address were themselves new, were unexpected, or were not advanced by the other party fairly.

The Panel recalls paragraph 7 of its Working Procedures:

> Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

The Panel notes that the exhibits referred to by the United States in its request were provided by the European Union as part of its comments on answers provided by the United States. In its request for an opportunity to comment on these exhibits and on the associated arguments, the United States has neither alleged nor provided any indication that the exhibits submitted by the European Union go beyond evidence that is necessary for purposes of "comments on answers provided by the other party". The Panel sees no indication that either the exhibits or the arguments of the European Union go beyond the "purposes of rebuttal, answers to questions or comments on answers provided by the other party". Thus, the European Union was acting within its rights under the Working Procedures in submitting that evidence.

The Panel has also reviewed the content of each of the eight exhibits submitted by the European Union with its comments on the United States' responses. Each of these exhibits and the related argumentation seems to relate to specific points raised by the United States in its responses to Panel questions. There is no indication that any of these exhibits introduces substantially new arguments or factual evidence of a nature that had not been previously submitted or discussed by the parties. Indeed, the United States has not argued otherwise, stating only, in support of its request, that it "disagrees with the [European Union's] interpretation of this evidence and how [the European Union] employs the evidence in its argumentation".

Accordingly, the Panel finds that the United States has not established that it should have a further opportunity to comment on the evidence and arguments submitted by the European Union at this stage of the proceedings. Such an opportunity is not contemplated in the current Working Procedures or timetable, and could potentially lead to a prolonged cycle of exchanges of additional evidence and arguments between the parties. Under the present circumstances, this would not clearly serve to protect the procedural rights of either party, and would be particularly undesirable in the current proceedings, which under the SCM Agreement should be expedited. The due process rights of the parties are framed by the Working Procedures, and in this case we do not see a proper or sufficient justification to depart from them.

For the reasons expressed above, the Panel declines the request of the United States in its communication of 28 April 2016.

WORLD TRADE ORGANIZATION

WT/DS487/R/Add.1

28 November 2016

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UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS487/R.

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WORKING PROCEDURES OF THE PANEL

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 7 December 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Subject to this paragraph, the Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its substantive meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting with the parties.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the European Union requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, the European Union shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits

upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the European Union could be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

10. Parties and third parties are invited to make their respective submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1.

11. Upon indication from any party, at the latest on the date of the Panel's first substantive meeting with the parties, that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel shall, after consultation with the parties, decide whether to adopt appropriate additional procedures.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by the European Union. If the United States chooses not to avail itself of that right, the Panel shall invite the European Union to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in

writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

22. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

23. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

24. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

25. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file six paper copies of all documents it submits to the Panel. Exhibits may be filed in two copies on CD-ROM or DVD and six paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy

to ****@wto.org and to ****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

27. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION ("BCI/HSBI PROCEDURES")

Adopted on 13 January 2016

1 GENERAL

1.1. The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Panel record. These Procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of the SCM Agreement and Article 13 of the DSU.

2 DEFINITIONS

For the purposes of these Procedures,

2.1. "**Approved Person**" means a Representative or Outside Advisor of a Party, when designated in accordance with these procedures.

2.2. "**Business Confidential Information**" or "**BCI**" means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as BCI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause harm to the originators of the information. Each Party and Third Party shall act in good faith and exercise restraint in designating information as BCI, and will endeavour to designate information as BCI only if its disclosure would cause harm to the originators of the information.

2.3. "**Conclusion of the Panel Process**" means the earliest to occur of the following events:

a. pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report;

b. a Party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU;

c. pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; or

d. pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB.

2.4. "**Designated as BCI**" means:

a. for printed information, text that is set off with bold square brackets in a document clearly marked with the notation "**BUSINESS CONFIDENTIAL INFORMATION**" and with the name of the Party or Third Party that submitted the information;

b. for Electronic Information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation "**BUSINESS CONFIDENTIAL INFORMATION**", has a file name that contains the letters "**BCI**", and is stored on a storage medium with a label marked "**BUSINESS CONFIDENTIAL INFORMATION**" and indicating the name of the Party or Third Party that submitted the information; and

c. for uttered information, declared by the speaker to be "**Business Confidential Information**" prior to utterance.[1]

In case either Party objects to the designation of information as BCI under paragraphs 2.4(a)–(c), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as BCI, the submitting Party or Third Party may either designate it as non-BCI or withdraw the information. In the case of withdrawal, the Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI information previously designated by that Party or Third Party as BCI.

This paragraph 2.4 shall apply to all submissions, including exhibits, by a Party or Third Party.

2.5. "**Designated as HSBI**" means:

a. for Electronic Information, characters that are set off with double bolded square brackets (or with a heading with double bolded square brackets on each page) in an electronic file that contains the notation "**HIGHLY SENSITIVE BUSINESS INFORMATION**", has a file name that contains the letters "**HSBI**", and is stored on a storage medium with a label marked "**HIGHLY SENSITIVE BUSINESS INFORMATION**" and indicating the name of the Party or Third Party that submitted the information; and

b. for uttered information, declared by the speaker to be "**Highly Sensitive Business Information**" prior to utterance.[2]

This paragraph 2.5 shall apply to all submissions, including exhibits, by a Party or Third Party.

2.6. "**Electronic Information**" means any information stored in an electronic form (including but not limited to binary-encoded information).

2.7. "**Highly Sensitive Business Information**" or "**HSBI**" means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause exceptional harm to its originators. Each Party and Third Party shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party and Third Party may at any time designate as non-BCI/HSBI or as BCI information designated by that Party or Third Party as HSBI.

a. The following categories of information may be Designated as HSBI:

i. information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[3], and, except as provided in subparagraph 2.7 (d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

ii. information gathered or produced in the context of LCA sales campaigns;

iii. information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, or investment banks with regard to LCA products; or

[1] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the BCI in question.

[2] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the HSBI in question.

[3] This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

iv. information concerning an LCA manufacturer's costs of production, including but not limited to data regarding pricing by suppliers.

b. Each Party and Third Party may also Designate as HSBI any other category of business information that is not otherwise available in the public domain and the disclosure of which could, in the Party's view, cause exceptional harm to its originators.

c. Each Party and Third Party shall Designate as HSBI any information described in subparagraph 2.7(a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of either of the Parties.

d. Notwithstanding the foregoing, the following categories of information may not be Designated as HSBI:

i. aggregated pricing data for a particular LCA model or family of LCA within a particular market that is indexed (i.e., does not reflect actual prices but rather movements in prices off a base of 100 for a particular year). Such data shall be treated as BCI;

ii. general legal conclusions based on HSBI (e.g., that HSBI demonstrates that a producer engaged in price undercutting). Such conclusions shall be treated as neither BCI nor HSBI;

iii. intergovernmental agreements and government decisions, other than information described in subparagraph 2.7(a).

e. Information may not be Designated as HSBI simply because it is subject to bank secrecy or banker-client confidentiality.

f. In case either Party objects to the designation of information as HSBI under paragraphs 2.7(a) to 2.7(c), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as HSBI, the submitting Party or Third Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. In the case of withdrawal, the Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party or Third Party as HSBI.

2.8. "**HSBI Approved Person**" means Approved Persons specifically designated by the Parties as having the right to access HSBI (according to the procedures laid down in Section 4).

2.9. "**HSBI Location**" means a room to be kept locked when not occupied and the access to which shall be possible only for HSBI Approved Persons, located:

a. for HSBI submitted by the United States, on the premises of (i) the United States Mission to the European Union in Brussels and (ii) the Office of the United States Trade Representative in Washington, DC;

b. for HSBI submitted by the European Union, on the premises of (i) the Delegation of the European Union to the United States in Washington, DC and (ii) the Legal Service (WTO Team) of the European Commission in Brussels;

c. for HSBI submitted by a Third Party, on the premises of its Geneva Mission to the WTO.

2.10. "**Locked CD**" means a CD-ROM that is not rewritable.

2.11. "**Outside Advisor**" means a legal counsel or other advisor of a Party or Third Party, who:

a. advises a Party or Third Party in the course of the dispute;

b. is not an employee, officer or agent of an entity or an affiliate of an entity engaged in the manufacture of LCA, the provision of supplies to an entity engaged in the manufacture of LCA, or the supply of air transportation services; and

c. is subject to an enforceable code of professional conduct that includes an obligation to protect confidential information, or has been retained by another outside advisor who assumes responsibility for compliance with these procedures and is subject to such a code of professional conduct.

For purposes of this paragraph, outside legal counsel representing an LCA producer headquartered in the territory of one of the Parties or Third Parties in connection with these proceedings or outside consultants who have been retained by such counsel to provide advice with regard to these proceedings are not considered agents of an entity listed in subparagraph 2.11(b).

2.12. "**Panel**" means the DS487 panel composed on 22 April 2015.

2.13. "**Party**" means the European Union or the United States.

2.14. "**Party-BCI**" means BCI originally submitted by a Party.

2.15. **"Representative"** means an employee of a Party or Third Party.

2.16. "**Sealed Laptop Computer**" means a laptop computer having (software and hardware) characteristics considered necessary by the submitting Party for protection of HSBI, provided that it has software installed that permits such HSBI to be searched and printed in accordance with the provisions of Section 6. However, HSBI may not be edited on the Sealed Laptop Computer.

2.17. "**Secure Site**" means a facility to be kept locked when not occupied and the access to which shall be possible only for Approved Persons, located:

a. in the case of the European Union, at the offices of WTO Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Mission of the European Union to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and three additional sites specified in accordance with subparagraph (c);

b. in the case of the United States, at the offices of the General Counsel of the Office of the United States Trade Representative (600 17th Street, NW, Washington, DC, USA), the offices of the Import Administration, United States Department of Commerce (600 17th Street, NW, Washington, DC, USA), the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and three additional sites specified in accordance with subparagraph (c); and

c. at three sites other than a government office that are designated by each Party for use by its Outside Advisors; provided that the identity of those sites has been submitted to the other Party and the Panel, and the other Party has not objected to the designation of that site within ten days of such submission.

Any objections raised under subparagraph (c) may be resolved by the Panel.

2.18. "**Stand-Alone Computer**" means a computer that is not connected to a network.

2.19. "**Stand-Alone Printer**" means a printer that is not connected to a network.

2.20. "**Submission**" means any written, electronic, or uttered information transmitted to the Panel, including but not limited to, correspondence, written submissions, exhibits, oral statements, and answers to questions.

2.21. "**Third Party**" means a Member having notified its interest in the dispute to the DSB pursuant to DSU Article 10.

2.22. "**Third Party BCI Approved Person**" means a representative or Outside Advisor of a Third Party granted access to BCI pursuant to paragraphs 4.2, 5.2, 5.3 and 5.9.

2.23. "**WTO Approved Persons**" means the Panel members, PGE members or experts appointed by the Panel who in the opinion of the Panel require access to BCI, and persons employed or appointed by the WTO Secretariat who have been authorized by the WTO Secretariat to work on the dispute (and includes translators and interpreters as well as any transcribers present at Panel meetings involving BCI and/or HSBI).

2.24. "**WTO Reading Room**" means a room, located on the premises of the WTO, which a Third Party BCI Approved Person may use to access a Party's Submission that contains Party BCI.

2.25. "**WTO Rules of Conduct**" means the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1).

3 SCOPE

3.1. These procedures apply to all BCI and HSBI received by an Approved Person and by WTO Approved Persons as a result of the Panel process, and to all BCI reviewed, in accordance with these procedures, by a Third Party BCI Approved Person.

3.2. Unless specifically otherwise provided herein, these procedures do not apply to a Party's or Third Party's treatment of its own BCI and HSBI.

4 DESIGNATION OF APPROVED PERSONS

4.1. At the latest on 18 January 2016, each Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and/or Third Parties and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and/or Third Parties and whom it wishes to have designated as HSBI Approved Persons. Each Party may submit amendments to their list of Approved Persons by submitting such amendments to the other Party and Third Parties, and to the Panel.

4.2. There shall be no Third Party HSBI Approved Persons. The designation of Third Party BCI Approved Persons shall be governed by paragraphs 5.2 and 5.3.

4.3. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a total of thirty Representatives and twenty Outside Advisors as "HSBI Approved Persons".

4.4. WTO Approved Persons shall have access to BCI. The Director-General of the WTO, or his designee, shall submit to the Parties and Third Parties, and to the Panel, a list of the WTO Approved Persons and shall identify which of those WTO Approved Persons shall additionally have access to HSBI.

4.5. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 4.1 that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days.

4.6. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

4.7. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 4.3 and to objections for the addition of new Approved Persons in accordance with paragraphs 4.5 and 4.6.

5 BCI

5.1. Only Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons may have access to BCI submitted in this proceeding. Third Party BCI Approved Persons may not have access to Party-BCI other than that included in the submissions. Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons shall use BCI only for the purposes of this dispute. No Approved Person or WTO Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. No Third Party BCI Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. These obligations apply indefinitely.

5.2. Each Third Party that wants to access Party-BCI contained in the first written submission of a Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors (including clerical or support staff) who need access to such BCI and whom it wishes to have designated as Third Party BCI Approved Persons. Each Third Party shall keep the number of Third Party BCI Approved Persons as limited as possible. Each Third Party may designate no more than a total of five Representatives and Outside Advisors as Third Party BCI Approved Persons.

5.3. Unless a Party objects to the designation of an Outside Advisor of a Third Party, the Panel shall designate those persons as Third Party BCI Approved Persons, following which the access referred to in paragraph 5.2 may be given to the Third Party concerned. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 5.2 above that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

5.4. A Party shall make no more than one copy of any BCI submitted by the other Party or a Third Party for each Secure Site provided for that Party in paragraph 2.17.

5.5. Parties may incorporate BCI in internal memoranda for the exclusive use of Approved Persons. Any memorandum and the BCI it contains shall be marked in accordance with paragraph 2.4.

5.6. BCI submitted by Approved Persons or by Third Party BCI Approved Persons pursuant to these procedures shall not be copied, distributed, or removed from the Secure Site, except as necessary for submission to the Panel.

5.7. The treatment in a Party's Submissions to the Panel of any BCI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to BCI.

a. Parties may incorporate BCI in Submissions to the Panel, marked as indicated in paragraph 2.4. In exceptional cases, parties may include BCI in an appendix to a Submission.

b. A Party submitting a Submission or appendix containing BCI shall also submit, within a time period to be set by the Panel, a version redacting any BCI. This shall be referred to as the "Non-BCI Version". However, a Party is not required to submit a "Non-BCI Version" of any exhibit containing BCI, unless specifically directed to do so by the Panel. In the case of Submissions of the Parties prior to the first meeting of the Panel, each Party shall serve a "Non-BCI Version" of its Submission on Third Parties by 5.00 p.m. on the working day following the date of the Submission.

c. A Non-BCI Version shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Non-BCI Version:

    i. A Party may request the Party that originally submitted the BCI, as soon as possible, to indicate with precision portions of documents containing BCI that may be included

in the non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, to produce a Non-BCI summary in sufficient detail to achieve this aim.

ii. Upon receipt of such a request, the Party that originally submitted the BCI shall, as soon as possible, indicate with precision portions of documents containing BCI that may be included in the Non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the BCI failed to indicate with sufficient precision portions of documents containing BCI that may be included in the Non-BCI Version and to produce, if necessary, a Non-BCI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

d. The responding Party may designate the personal offices of up to four of its Approved Persons as additional Secure Sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' Submissions to the Panel. All of the protections applicable to BCI under these procedures, including the storage rules in Paragraph 5.11, shall apply to such Submissions. BCI exhibits to Submissions may not be stored or reviewed at these additional Secure Sites. The responding Party shall submit the address (including room number) of each of the additional Secure Sites to the Panel and the complaining Party.

5.8. Any document containing BCI shall not be copied in excess of the number of copies required by the Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible. Such documents may be transmitted electronically only by using secure e-mail. If a Party or Third Party submits to the Panel an original document that cannot be transmitted electronically, it shall on the day of submission deliver a copy of that document to one of the Secure Sites listed in paragraph 2.17. The Parties shall designate one of the Secure Sites listed in paragraph 2.17 for this purpose.

5.9. Notwithstanding paragraph 20 of the Working Procedures[4], the following procedures apply to the access by Third Parties to a Party's Submission that contains Party-BCI.

a. Except as provided in subparagraph 5.7(b), a Party's Submission containing Party-BCI shall not be served on Third Parties unless both Parties agree otherwise.

b. Third Party BCI Approved Persons may view Party-BCI contained in a Party's first written submission only in a Secure Site or in the WTO Reading Room. Third Party BCI Approved Persons may not bring into such room any electronic recording or transmitting devices. Third Party BCI Approved Persons may not remove a Party's Submission containing Party-BCI from such room, but may take handwritten notes of the Party-BCI contained therein. Such notes shall be used exclusively for this dispute (that is, DS487). Each person viewing a Party's Submission containing Party-BCI shall complete and sign a log identifying the Submission the person reviewed. The Party responsible for maintaining the particular Secure Site, and the WTO Secretariat in the case of the WTO Reading Room, shall maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving the room, Outside Advisors who are Third Party BCI Approved Persons may be subject to appropriate controls.

c. If a Third Party BCI Approved Person removes from the Secure Site or the WTO Reading Room a handwritten memo in accordance with subparagraph 5.9(b) above, that Third Party BCI Approved Person shall store the memo only in a locked security container. Such memo shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double

[4] Concerning service of documents.

envelopes only. The content of such memo shall not be incorporated, electronically or in handwritten form, into the Non-BCI Version, as defined in paragraph 5.7(b).

d. All Third Parties that have designated Third Party BCI Approved Persons must inform the Parties of the identity of the specific room (including the address and the room number) in which the locked security container, as referred to in subparagraph 5.9(c) above, is located.

e. If a Third Party BCI Approved Person removes from the Secure Site or the WTO Reading Room a handwritten memo in accordance with subparagraph 5.9(b) above, such memo shall not be copied in excess of the number of copies required by the Third Party BCI Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies of such memo shall be prohibited.

f. A Third Party may not incorporate into the body of its Submission any Party-BCI. If a Third Party wishes to refer to any Party-BCI, the relevant arguments including such BCI should be incorporated into a separate Appendix. Such Appendix shall not be served on other Third Parties.

g. On the date determined by the Panel as the deadline to make the Third Party written submission, a Third Party shall serve its submission only on the Parties and on the Panel. The submission shall be served on the other Third Parties only after the Parties have confirmed that the submission does not contain or disclose Party-BCI. A Party shall make this confirmation or otherwise advise of any necessary change to the relevant Third Party within two working days of receiving the submissions of Third Parties.

5.10. A Party or Third Party that wishes to submit or refer to BCI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not Approved Persons, WTO Approved Persons or, as appropriate, Third Party BCI Approved Persons from the meeting for the duration of the submission and discussion of BCI.

5.11. Approved Persons and WTO Approved Persons shall store BCI only in locked security containers. In the case of BCI submitted to the Panel, such locked security containers shall be kept on the WTO Secretariat's premises, except that Panel members may maintain a copy of all relevant documents and materials containing BCI at their places of residence. Such documents and materials shall be stored in locked security containers when not in use. BCI shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. All work papers (*e.g.*, draft submissions, worksheets, etc.) containing BCI shall, when no longer needed, be shredded or burned consistent with normal government practice for destroying sensitive documents.

5.12. The Panel shall not disclose BCI in its final report to be circulated to the Members, but may make statements or draw conclusions that are based on the information drawn from the BCI.

6 HSBI

6.1. Unless otherwise provided below, HSBI shall be subject to all the restrictions in Section 5 applicable to BCI.

6.2. HSBI shall be submitted to the Panel in electronic form, using locked CDs or two Sealed Laptop Computers connectable to 19" - 21" monitors, or in hard copy form, for access by WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI. All such HSBI shall be stored in a locked security container in a designated secure location on the premises of the WTO Secretariat.[5] Any computer in that room shall be a Stand-Alone Computer. WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI may view HSBI only in the designated secure location referred to above. A Stand-Alone Printer may be used to make hard copies of any HSBI. Such hard copies shall be

[5] At the request of any of the Parties, the WTO Secretariat will try to obtain as soon as practicable a secure safe to store all HSBI and hard copies of any HSBI, if a locked security container is deemed unsuitable for the appropriate protection of the information.

made on distinctively colored paper. Such hard copies shall either be stored in a locked security container at the designated secure location referred to above, or destroyed at the end of the relevant working session. HSBI shall not be removed from this designated secure location, except (i) in the form of handwritten notes that may be used only on the WTO Secretariat's premises and which shall be destroyed once no longer in use; and (ii) subject to appropriate precautions, for purposes of meetings of the Panel with the Parties and any internal deliberations of the Panel, as provided for in paragraph 6.11(j).

6.3. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the other Party, in the HSBI Locations listed in paragraph 2.9. A Stand-Alone Printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI Location, or destroyed at the end of the relevant working session.

6.4. If a Third Party submits HSBI, it shall notify the Parties of the fact that such submission has been made. Each Third Party submitting HSBI shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the Parties, in the HSBI Location listed in paragraph 2.9. A Stand-Alone Printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI Location, or destroyed at the end of the relevant working session.

6.5. Except as otherwise provided in these procedures, HSBI shall not be stored, transmitted or copied either in written or electronic form.

6.6. HSBI Approved Persons may view HSBI on the Sealed Laptop Computer maintained by the other Party or a Third Party or, in the case of HSBI submitted on Locked CDs on a Stand-Alone Computer, only in a designated room at one of the HSBI Locations indicated in paragraph 2.9, or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 6.2, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI Location. The designated secure location referred to in paragraph 6.2 shall be available to HSBI Approved Persons by prior arrangement with the WTO Secretariat. HSBI Approved Persons may not bring into such room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from such room, except in the form of handwritten notes or aggregated information generated on a Stand-Alone Computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI Location or designated secure location referred to in paragraph 6.2 shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI Location within its territory referenced in paragraph 2.9, maintain such log until one year after the Conclusion of the Panel Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 6.2, maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

6.7. No HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI shall disclose HSBI to any person except another HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI, and then only for the purpose of this dispute. This obligation applies indefinitely.

6.8. HSBI may be processed only on Stand-Alone Computers. Any memorandum containing HSBI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

6.9. A Party or Third Party that wishes to submit or refer to HSBI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not HSBI Approved Persons or WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI from the meeting for the duration of the submission and discussion of HSBI.

6.10. All HSBI shall be stored in a safe at the relevant HSBI Location or in accordance with paragraph 6.2.

6.11. The treatment in a Party's Submissions to the Panel of any HSBI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to HSBI.

a. HSBI may be incorporated into a separate appendix to, but not the body of, a Party's Submission, which appendix shall be comprehensible in itself. The document containing the HSBI shall be referred to as the "Full HSBI Version Appendix";

b. A Party submitting an appendix containing HSBI shall also submit, within a time period to be set by the Panel, a version redacting any HSBI. This shall be referred to as the "Redacted Version Appendix";

c. At the request of a Party, information contained in the Redacted Version Appendix may be treated as BCI, in accordance with the provisions of Section 5;

d. A Redacted Version Appendix shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Redacted Version Appendix:

   i. A Party may request that the Party that originally submitted the HSBI, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   ii. Upon receipt of such a request, the Party that originally submitted the HSBI shall, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the HSBI failed to indicate with sufficient precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and to produce, if necessary, a non-HSBI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

e. The Full HSBI Version Appendix shall be kept in an HSBI Location and in the designated secure location referred to in paragraph 6.2, as appropriate, in the form of a locked CD. If it is not practical to keep the Full HSBI Version Appendix in an HSBI Location, the Party may keep it in a locked security container in a Secure Site in the form of a locked CD.

f. The locked CD containing the Full HSBI Version Appendix shall bear the label marked "FULL VERSION OF HSBI APPENDIX TO SUBMISSION" and indicate the name of the Party that submitted the HSBI. In addition, the HSBI Appendix itself shall be marked with heading with double bolded square brackets on each page in an electronic file that contains the notation "FULL VERSION OF HSBI APPENDIX TO SUBMISSION". The electronic file containing the HSBI Appendix shall have a file name that contains the letters "HSBI VERSION".

g. The Party shall submit one copy of the Full HSBI Version Appendix to the Panel (through Mr Rodd Izadnia, Secretary to the Panel) and two copies to the other Party in the form of two locked CDs. The Full HSBI Version Appendix shall not be transmitted via e-mail. Parties shall agree between themselves beforehand on the name of the Approved Person that is to receive the locked CD.

h. The Party shall commence transfer of the locked CDs containing the Full HSBI Version Appendix no later than the deadline for the submission concerned, and, at the same time, provide the Panel and the other Party with proof that this has been done.

i. No more than one working day in advance of a Panel meeting with the parties, a Party may, exclusively at that Party's Permanent Mission in Geneva, use the locked CD to produce no more than one hard copy of the Full HSBI Version Appendix for each HSBI Approved Person planning to attend that Panel meeting. All paper versions produced pursuant to this subparagraph shall be collected by the Party concerned and destroyed immediately after the conclusion of the meeting.

j. WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, a Panel meeting with the parties and/or an internal meeting. When not in use, these paper versions shall be stored in a locked security container in the designated secure location referred to in paragraph 6.2. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Panel Process as defined in paragraph 2.3.

k. Parties are encouraged to submit versions of exhibits containing HSBI from which all HSBI has been deleted. Such exhibits shall be referred to as "HSBI-Redacted Version Exhibits". HSBI-Redacted Version Exhibits may contain BCI.

    i. A Party may submit HSBI-Redacted Version Exhibits prepared by that Party to the Panel, and serve them on the other Party in accordance with the applicable procedures, at the time it serves the submission to which the exhibit relates.

    ii. If a HSBI-Redacted Version Exhibit is not submitted by the Party submitting the exhibit, an HSBI Approved Person representing the other Party may prepare an HSBI-Redacted Version Exhibit of any such exhibit.

    iii. HSBI-Redacted Version Exhibits may be prepared by an HSBI Approved Person, at an HSBI Location, by deleting the HSBI in the exhibit (identified by double brackets) from such exhibit and either printing or photo-copying the resulting document containing no HSBI. The deletion of HSBI from the resulting document shall be verified by a person authorized for this purpose by the Party that submitted the exhibit(s) in question. The resulting document containing no HSBI (but which may contain BCI) will constitute the HSBI-Redacted Version Exhibit of such exhibit, and may be removed from the HSBI Location.

    iv. The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI Approved Person for purposes of the verification provided for in paragraph (iii) above. HSBI-Redacted Version Exhibits may be prepared by HSBI Approved Persons upon request during the times the designated room at the relevant HSBI Location is available, as provided for in paragraph 6.6 of these Procedures.

    v. The Panel shall resolve any disagreement arising from the operation of sub-paragraph 6.11(k), and may take appropriate action to ensure that the provisions of paragraph 6.11 are satisfied.

l. The Panel reserves the right, after consulting the parties, to amend the provisions of paragraph 6.11 at any time in order to accommodate situations arising during Panel meetings, and the preparation of the interim report and the final report.

6.12. The Panel shall not disclose HSBI in its report, but may make statements or draw conclusions that are based on the information drawn from the HSBI.

7 RESPONSIBILITY FOR COMPLIANCE

7.1. Each Party and Third Party is responsible for ensuring that its Approved Persons and Third Party BCI Approved Persons comply with these procedures to protect BCI and HSBI submitted by each Party and Third Party, as well as with enforceable codes of professional conduct to which its Approved Persons or other Outside Advisors are subject. WTO Approved Persons shall comply with these procedures to protect BCI and HSBI submitted by a Party or Third Party. WTO Approved Persons are covered by the WTO Rules of Conduct. As provided for in the WTO Rules of Conduct, evidence of breach of these Rules may be submitted to the Chair of the DSB or to the Director-General of the WTO, or his designee, as appropriate, for appropriate action pursuant to Section VIII of the WTO Rules of Conduct.

8 ADDITIONAL PROCEDURES

8.1. After consulting with the Parties, the Panel may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures but which the Panel considers may be of assistance in adjudicating the claims before it, including, if necessary, information that the United States internally classifies as "Top Secret", "Secret", "Confidential", or controlled pursuant to the United States' International Traffic in Arms Regulation ("ITAR").

8.2. The Panel may, with the consent of both Parties, waive any part of these procedures. Such "waiver" shall be specifically set forth in writing and signed by a representative of both Parties.

9 RETURN AND DESTRUCTION

9.1. Except as provided for in paragraph 9.2, after the Conclusion of the Panel Process as defined in paragraphs 2.3(a), 2.3(c) or 2.3(d), or as contemplated in paragraph 9.3, within a period to be fixed by the Panel, WTO Approved Persons, the Parties and Third Parties (along with all Approved Persons) shall destroy or return all documents (including electronic material) or other recordings containing BCI to the Party or Third Party that submitted such documents or other recordings. At the same time, WTO Approved Persons and the Parties shall destroy and/or return any electronic material submitted by a Party or Third Party that contains HSBI.

9.2. The WTO Secretariat shall retain one hard copy and one electronic version of any final report of the Panel containing BCI, and one electronic version of all documents containing BCI submitted to the Panel, recorded on locked CD(s), to be kept in sealed containers in a locked cabinet on the premises of the WTO Secretariat.

9.3. After the Conclusion of the Panel Process as defined in paragraph 2.3(b), the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. Following the adoption by the DSB of the Appellate Body report pursuant to Article 17.14 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body Report pursuant to Article 17.14 of the DSU, the provisions of paragraphs 9.1 and 9.2 shall apply *mutatis mutandis*.

9.4. The hard drive of each Stand-Alone Computer and all media used to back up such computers shall be destroyed at the Conclusion of the Panel Process.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE MEETING OF THE PANEL

Adopted on 22 February 2016

1.1. The Panel's meeting with the parties will start at 10h00 on 24 February 2016. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view.

1.2. The oral statements of the parties will be video recorded for later viewing, as set out in paragraph 1.8. below.

1.3. If at any point during its oral statement a party intends to address BCI or HSBI, it shall request that the video recording be discontinued for the relevant portion of the oral statement, after which video recording will be resumed. A party shall first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the video recording to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI. Either party shall inform the Panel if the other party or the Panel is referring to BCI or HSBI, whereupon the Panel shall instruct that video recording be discontinued and instruct any individuals not having BCI/HSBI approval to exit the room.

1.4. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. BCI or HSBI in the texts of the oral statements provided to the panel and the other party during the meeting and prior to the delivery of the oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. BCI should be contained within single brackets. HSBI should be contained within double brackets and deleted. In addition, a party including HSBI in its oral statement shall provide, prior to delivery of the oral statement, one paper copy to the panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

1.5. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to video record the proceedings. If at any point during the meeting a party intends to refer to BCI or HSBI, those individuals not having BCI/HSBI approval shall be asked to exit the room. If at any point during the meeting a party intends to refer to either BCI or HSBI, the team hired by the WTO Secretariat to video record the proceedings shall be asked to exit the room.

1.6. After each oral statement has been delivered, the Panel will ask the respective party whether it can confirm that no BCI or HSBI was pronounced during the video recorded portion of the oral statement. The Panel will also ask the parties for confirmation, at the end of the meeting, that no BCI or HSBI was pronounced during the video recorded portion of the meeting. If both parties so confirm, the showing of the video recording will proceed according to the schedule to be determined by the Panel, as provided in paragraph 1.8. If either party requests to review the video recording, the Panel will invite both parties to attend a review session, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. In the event, each party shall designate a maximum of two persons, who shall be BCI/HSBI-approved persons, to participate in the review session. Parties should be prepared to advise the technician which portion of the oral presentation presents a concern, and limit review to those portions of the video recording to the maximum extent possible. If either party considers that a specific portion of the video recording must be deleted − because it is BCI or HSBI − the specific portion of the video recording will be deleted.

1.7. The third party session will start at 10h00 on 25 February 2016. Third parties shall indicate to the Panel, not later than by 13h00 on 24 February 2016, whether they consent to the video recording of their oral statements for later viewing. The Panel will start the third party session with

the statements of those third parties so consenting. After such third parties have made their statements, any questions or comments from the parties, other third parties or the Panel concerning these statements shall be made. The Panel shall then proceed to a third party closed session during which the rest of the third parties shall make their statements. The Panel or any party or third party may pose questions to any third party or make comments concerning these statements. Should any third party intend to include BCI in its oral statement or otherwise to refer to BCI during the third party session, it is requested to inform the Panel by 13h00 on 24 February 2016 so that appropriate arrangements can be made to protect the confidentiality of that information.

1.8. The showing of the video recording of the oral statements of the parties and third parties shall take place at a date to be determined by the Panel. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental organizations, upon presentation of their official badges. Other interested persons will be able to attend by registering directly with the WTO. To this effect, the Secretariat will place a notice by on the WTO website informing the public of the showing and including a link through which members of the public can register.

ANNEX A-4

ADDITIONAL WORKING PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE SECOND MEETING OF THE PANEL

Adopted on 23 March 2016

1.1. The Panel's meeting with the parties will start at 10h00 on 5 April 2016.

1.2. In accordance with the Working Procedures adopted for the dispute, the Panel shall ask the United States whether it wishes to avail itself of the right to present its case first at the meeting. If the United States wishes to do so, it will be invited by the Panel to deliver its opening statement first. Subsequently, the Panel shall invite the European Union to present its point of view. If the United States chooses not to avail itself of that right, the Panel shall invite the European Union to present its opening statement first.

1.3. The oral statements of the parties will be video recorded for later viewing, as set out in paragraph 1.9. below.

1.4. If at any point during its oral statement a party intends to address BCI or HSBI, it shall request that the video recording be discontinued for the relevant portion of the oral statement, after which video recording will be resumed. A party shall first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the video recording to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI. Either party shall inform the Panel if the other party or the Panel is referring to BCI or HSBI, whereupon the Panel shall instruct that video recording be discontinued and instruct any individuals not having BCI/HSBI approval to exit the room.

1.5. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. BCI or HSBI in the texts of the oral statements provided to the panel and the other party during the meeting and prior to the delivery of the oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. BCI should be contained within single brackets. HSBI should be contained within double brackets and deleted. In addition, a party including HSBI in its oral statement shall provide, prior to delivery of the oral statement, one paper copy to the panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

1.6. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to video record the proceedings. If at any point during the meeting a party intends to refer to BCI or HSBI, those individuals not having BCI/HSBI approval shall be asked to exit the room. If at any point during the meeting a party intends to refer to either BCI or HSBI, the team hired by the WTO Secretariat to video record the proceedings shall be asked to exit the room.

1.7. After each oral statement has been delivered, the Panel will ask the respective party whether it can confirm that no BCI or HSBI was pronounced during the video recorded portion of the oral statement. The Panel will also ask the parties for confirmation, at the end of the meeting, that no BCI or HSBI was pronounced during the video recorded portion of the meeting. If both parties so confirm, the showing of the video recording will proceed according to the schedule to be determined by the Panel, as provided in paragraph 1.9.

1.8. If either party requests to review the video recording, the Panel will invite both parties to attend a review session, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. In the event, each party shall designate a maximum of two persons, who shall be BCI/HSBI-approved persons, to participate in the review session. Parties should be prepared to advise the technician

which portion of the oral presentation presents a concern, and limit review to those portions of the video recording to the maximum extent possible. If either party considers that a specific portion of the video recording must be deleted − because it is BCI or HSBI − the specific portion of the video recording will be deleted.

1.9. The showing of the video recording of the oral statements of the parties and non-confidential portions of the meeting shall take place at a date to be determined by the Panel. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental organizations, upon presentation of their official badges. Other interested persons will be able to attend by registering directly with the WTO. To this effect, the Secretariat will place a notice by on the WTO website informing the public of the showing and including a link through which members of the public can register.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. Pursuant to paragraph 20 of the Panel's Working Procedures (adopted 7 December 2015), the European Union now provides an integrated executive summary of the facts and arguments presented in the European Union's (i) first written submission, (ii) first opening oral statement, (iii) first closing oral statement, and (iv) responses to questions following the first substantive meeting.

2. In the present dispute, the European Union challenges several subsidies, in the form of tax incentives awarded by Washington State to aerospace companies, which are contingent on the use of domestic over imported goods, and hence prohibited under Article 3.1(b) of the SCM Agreement. These tax incentives, originally established by House Bill 2294 ("HB 2294"), have been amended, and extended through 2040, by Substitute Senate Bill 5952 ("SSB 5952").

3. With its first written submission, the European Union established a *prima facie* case that (i) the measures at issue are subsidies within the meaning of Article 1.1 of the SCM Agreement, and that (ii) these subsidies are contingent on the use of domestic over imported goods within the meaning of Article 3.1(b).

4. As for "subsidy", the European Union has demonstrated the existence of a financial contribution in the form of foregoing of government revenue otherwise due, within the meaning of Article 1.1(a)(1)(ii). Further, the European Union has demonstrated that the measures confer a "gift" on the recipients that would not have been available in the market, thereby conferring a "benefit" within the meaning of Article 1.1(b).

5. As for the prohibited contingency, the European Union refers to both the text of SSB 5952 (*de jure* contingency), and certain additional facts (*de facto* contingency). While the European Union advances both *de jure* and a *de facto* claims of contingency, its first and principal claim is the *de jure* claim.

6. By way of background, the European Union notes that Washington State, itself, has quantified the total value of the revenue foregone pursuant to the conditional amendments and extensions established by SSB 5952 - nearly USD 9 billion. While the quantum of subsidization is irrelevant to a prohibited subsidy dispute as a legal matter, it is pertinent to note that the measures at issue confer on their beneficiaries – with Boeing being the principal beneficiary – the single largest targeted state tax break in United States history.

II. FACTUAL ASPECTS

A. The Washington State Aerospace Tax Incentives

7. At issue in this dispute are tax incentives for civil aircraft provided by the State of Washington (the "aerospace tax incentives"), as amended and extended by SSB 5952, and as subject to the conditions in Sections 2, 5, and 6 thereof.

8. In 2003, the State of Washington enacted HB 2294 for the purpose of "retaining and attracting the aerospace industry to Washington State" and included a set of "comprehensive tax incentives" directed at achieving this aim. This legislation was part of a package of incentives for Boeing to locate the 787 final assembly facility in Washington. HB 2294 took effect upon a final decision to site a facility in Washington State "with the capacity to produce at least thirty-six super-efficient airplanes a year," defined by the precise specifications for the 787.

9. HB 2294 established seven tax incentives for producers of civil aircraft (including certain suppliers):

- A reduction in the rate of Business and Occupation ("B&O") tax, i.e., the State of Washington's principal business tax, to 0.2904%, compared to the generally applicable rates of 0.484% for manufacturing, and 0.471% for retailing activities.

- A B&O tax credit for pre-production development for commercial airplanes and components;

- A B&O tax credit for property taxes on commercial airplane manufacturing facilities;

- An exemption from sales and use taxes for certain computer hardware, software, and peripherals;

- An exemption from sales and use taxes for certain construction services and materials;

- An exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes; and

- An exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes.

10. While the tax incentives that originated in HB 2294 were originally enacted in connection with Boeing's decision to locate the first 787 final assembly line in Washington State, HB 2294 provided that those benefits were to apply to all Boeing LCA developed and produced in Washington State, through the original expiration date of 1 July 2024.

B. The Conditional Extension and Amendment of the Washington State Aerospace Tax Incentives: Substitute Senate Bill 5952

1. The 777X incentive legislation

11. Over the course of 2013, Boeing publicly considered developing a new, advanced variant of its 777 family of long-range, twin-aisle LCA, known as the 777X. On 5 November 2013, Washington State, Boeing, and the trade union representing Boeing machinists reached a tentative agreement to locate production of the 777X in Washington, whereby the union would agree to a new long-term contract, and the State would provide Boeing with billions of dollars in additional subsidies.

12. On 9 November 2013, the Washington State legislature passed SSB 5952, which, subject to certain conditions discussed below, amends and extends each of the existing aerospace tax incentives − originally due to expire in 2024 − through 2040, at a value estimated at more than USD 8.7 billion for Boeing, its suppliers, and other local aerospace firms. Governor Jay Inslee signed SSB 5952 into law on 11 November 2013.

2. The Programme-Siting condition

13. Section 2 of SSB 5952 provides that the entire act would take effect only upon the decision to locate a new commercial aircraft programme − expressly defined to include *wing and fuselage production* of an aircraft, in addition to *final assembly* of that same aircraft − in Washington State. Specifically, Section 2 provides that:

> {this act} takes effect contingent upon the siting of a significant commercial airplane manufacturing program in the state of Washington. If a significant commercial airplane manufacturing program is not sited in the state of Washington by June 30, 2017, {this act} does not take effect.

The European Union refers to this provision as the "Programme-Siting condition".

14. Section 2 defines "siting" to mean "a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington state". It further defines "significant commercial airplane manufacturing program" as:

> an airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section:
>
> (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.[1]

15. Accordingly, under the Programme-Siting condition established in Section 2, the aerospace tax incentive extensions and expansion provided for in SSB 5952 were made contingent upon Boeing's decision to locate in Washington State both (i) production of the wings and fuselage for a new aircraft model, version, or variant, and (ii) final assembly of that same aircraft model, version, or variant. In fact, the relevant aircraft turned out to be the 777X.

3. The Exclusive-Production condition

16. In addition to the Programme-Siting condition, SSB 5952 establishes a second condition related to the availability of the B&O tax rate reduction for the 777X, hereinafter referred to as the "Exclusive-Production condition".

17. Pursuant to the Exclusive-Production condition, the reduced B&O tax rate would not apply to revenue from the 777X *in the event* Boeing were to perform any final assembly, *or any wing assembly*, for the 777X outside of Washington State.

III. PROHIBITED SUBSIDIES UNDER ARTICLE 3.1(B) OF THE SCM AGREEMENT

A. The Aerospace Tax Incentives, as Amended by SSB 5952, Constitute Specific Subsidies

1. Financial contribution

18. Each of the aerospace tax incentives, as amended and extended by SSB 5952, constitutes a financial contribution by a government involving the "forego{ing}" of "government revenue that is otherwise due" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

19. The identification of revenue "otherwise due" involves a comparison between the challenged measure and a "defined, normative benchmark". According to the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, the proper comparison must be "between the rules of taxation contained in the challenged measure and other rules of taxation of the Member concerned", and "{i}n identifying the appropriate benchmark for comparison, panels must obviously ensure that they identify and examine fiscal situations which it is legitimate to compare".

20. In response to Panel Question 24, and expanding on the European Union's *prima facie* showing in its First Written Submission, the European Union has further specified the relevant normative benchmark for each of the measures at issue, demonstrating that the tax treatment enjoyed by the beneficiaries involves foregoing of revenue that would be due under the relevant benchmark. Additionally, the European Union has explained that Washington State, itself, has publicly acknowledged this foregoing of revenue, and has even quantified the revenue that is foregone under each of the measures at issue, making the Panel's task a simple one.

21. In analyzing Article 1.1(a)(1)(ii), the Appellate Body in *US – FSC* has explained that the word "foregone" "suggests that the government has *given up an entitlement to raise revenue* that it could 'otherwise' have raised".[2] When a government confers upon a taxpayer an *entitlement* to a tax reduction, it foregoes its own *entitlement* to raise a part of the revenue that would otherwise be due from the taxpayer under the normative benchmark. Through each of the tax breaks at issue, Washington State has conferred an *entitlement* on Boeing and other Washington State

[1] Emphasis added.
[2] Emphasis added.

aerospace companies to receive the continued tax reductions, contingent on satisfaction of the Programme-Siting and Exclusive-Production conditions. In that sense, the government is foregoing, and has foregone, revenue that is otherwise due.

22. In response to Panel Question 6, the European Union has clarified that its challenge is directed at the tax incentives, as amended and extended by SSB 5952, "as such"; this challenge is not focused on the application of these measures during any given point in time or in any specific instance. Having said that, the European Union has also demonstrated that the challenged tax incentives have already foregone revenue that became due in the past, revenue that is currently due, and revenue that will become due in the future. All of these are relevant to determining the existence of a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

23. The European Union has clarified that SSB 5952 not only (conditionally) extended the expiration date of the existing tax incentives from 2024 through 2040, but also amended the *sales and use tax exemption for construction services and materials* so that Boeing could take advantage of that exemption in constructing its new 777X manufacturing facilities in *2015 and 2016*. Thus, SSB 5952 has already led to foregoing of revenue in the past, and this was dependent on satisfaction of the Programme-Siting condition. In addition, Boeing's continued enjoyment of the B&O tax rate reduction associated with the 777X production and sales is *currently* subject to the Exclusive-Production condition.

24. With respect to the 2024-2040 period, an *entitlement* in favour of Boeing has been created, and, in turn, an *entitlement* has been *foregone* by Washington State, at present. An interpretation under which only foregoing of revenue due in the past would constitute a financial contribution would allow Members to craft prohibited subsidy programs that include a long time gap between the intended distortion (through the meeting of the prohibited contingency) and the reward for such conduct in the form of disbursement of a subsidy, in a manner that would limit the effectiveness of a challenge under Article 3.1(b). Moreover, Article 3.2 clarifies that "maintain{ing}" a subsidy programme tied to the prohibited contingencies violates the *SCM Agreement*, even when the financial contribution is yet to be "grant{ed}", let alone actually disbursed or used.

2. Benefit

25. The European Union has demonstrated that the financial contribution in the present dispute – in the form of forgiveness of tax obligations – is, in the words of the panel in *US – Large Civil Aircraft,* "essentially a gift from the government, or a waiver of obligations due, and it is clear that the market does not give such gifts". Thus, there is a benefit because the very nature of a market precludes the availability of multi-billion dollar gifts to a commercial actor.

3. Conclusion on "subsidy"

26. The European Union, consistent with its burden to establish a *prima facie* case, has demonstrated that each of the measures at issue provides a financial contribution and confers a benefit. Absent effective rebuttal by the United States, the very nature of a *prima facie* case requires the Panel to make findings in favour of the European Union.

27. The European Union also recalls that the findings it seeks are largely consistent with the "financial contribution" and "benefit" findings made by the panel and the Appellate Body in *United States – Large Civil Aircraft*. While the European Union's reliance on these findings certainly does not erase the burden to establish a *prima facie* case (which it has discharged), the goals of predictability and security set out in Article 3.2 of the DSU, as well as the guidance of the Appellate Body, would warrant the Panel arriving at findings consistent with those made by the panel and Appellate Body in *United States – Large Civil Aircraft*, to the extent the relevant facts have not changed.

28. The European Union acknowledges that the *United States – Large Civil Aircraft* panel held that three of the tax incentives at issue did not involve a financial contribution because Boeing was unlikely to use these incentives. These are the (i) sales and use tax exemption for construction services and materials, (ii) leasehold excise tax exemption and (iii) leaseholder property tax

exemption. The panel expressly stated that its finding was a result of the European Union's claim not being one of a financial contribution in the abstract, but one specifically of a financial contribution to Boeing. By contrast, in the present instance, the European Union alleges financial contribution in the abstract, warranting a different conclusion. Additionally, the European Union has also demonstrated that, with the construction of the new 777X wing assembly plant, which commenced in 2014 and is expected to be completed in 2016, there is evidence of Boeing having used the sales and use tax exemption for construction services and materials.

B. The Aerospace Tax Incentives, as Amended by SSB 5952, Constitute Prohibited Subsidies Contingent upon the Use of Domestic over Imported Goods

29. As a result of the Programme-Siting and Exclusive-Production conditions established in SSB 5952, the aerospace tax incentives, as amended and extended, constitute prohibited subsidies "contingent ... upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement. While the European Union advances both a claim of *de jure* contingency and of *de facto* contingency, its first and principal claim is that of *de jure* contingency.

1. The legal standard for demonstrating the existence of a subsidy contingent upon the use of domestic over imported goods

30. Article 3.1(b) of the SCM Agreement provides that "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods" "shall be prohibited".

31. The United States correctly points out that the French and Spanish texts of Article 3.1(b) employ the terms *produits* and *productos*. The European Union agrees with the United States that the use of the words *produits* and *productos* in the French and Spanish versions is instructive, and the European Union considers the word "goods" in Article 3.1(b) of the SCM Agreement to be synonymous with the term "products".

32. The European Union has also indicated its agreement with the United States and Japan that the word "over", in the text of Article 3.1(b), means "in preference to", "in excess of" or "more than". Further, the use of the word "over" (i.e., "in excess of") in Article 3.1(b) confirms that no *de minimis* discrimination is acceptable under the prohibition in Article 3.1(b) of the SCM Agreement. As soon as a subsidy is contingent upon the use of domestic over imported goods, competitive opportunities between domestic and imported goods are distorted, even if no such goods are currently imported.

33. The European Union has also set out its understanding that the word "use" in Article 3.1(b) has a broad meaning, including in response to Panel Question 44. Prior guidance of the Appellate Body, and the context afforded by other provisions of covered agreements that employ the word "use", indicate that its meaning goes beyond simple incorporation of a domestic input in the final subsidised product.

34. To the extent that the United States argues that a "good", within the meaning of Article 3.1(b), must be actually traded, the European Union disagrees. This argument ignores a hallmark tenet of WTO jurisprudence that the disciplines on goods protect not just actual trade in goods as seen or envisioned in the market today, but also *competitive opportunities*. In the context of a purely origin-based discrimination, such as mandated by the legislation at issue, this protection extends to "potentiality to compete" even in the absence of an actual product which is traded at the relevant time.

35. If the United States were correct that actual trade in a product needs to be demonstrated for it to qualify as a "good" under Article 3.1(b), the most trade restrictive of import substitution subsidies − i.e., those which have succeeded in distorting the market so much that they preclude *even the existence* of competing foreign producers in the market − would not be disciplined by Article 3.1(b), while less trade distorting import substitution subsidies would be subject to that provision.

2. Application of the legal standard to the facts of this case

36. The European Union fully agrees with the United States and the third parties that Article 3.1(b) does not discipline production subsidies. However, the measures at hand are not production subsidies, but subsidies contingent on the use of domestic over imported goods, which are properly within the scope of the prohibition in Article 3.1(b).

37. In this case, pursuant to the Programme-Siting condition in Section 2 of SSB 5952, the amended and extended aerospace tax incentives are contingent on the establishment of a new commercial aircraft manufacturing programme that uses goods (i.e., fuselages and wings) produced in the United States (specifically, in Washington State) in the subsidized aircraft. Under this condition, the tax incentives would not have been extended in duration through 2040 if Boeing had decided to "use" imported wings and fuselages in the assembly of the 777X, nor would the scope of the sales and use tax exemption for construction services and materials have been expanded to cover Boeing's work on the 777X manufacturing facilities in 2015 and 2016.

38. Likewise, pursuant to the Exclusive-Production condition, Boeing benefits from the reduced B&O tax rate for the 777X only so long as it "uses" wings assembled exclusively in Washington State for the 777X, or any variant thereof. If, for example, Boeing were to use *any* wings made in Japan for the 777X, as it does for the 787, it would lose its entitlement to the preferential B&O tax rate with respect to the manufacture and sale of the 777X.

39. In response to the European Union's arguments in this regard, the United States asserts that wings and fuselages are not "goods", and that they are not "used" in the production of the 777X. But the very wording of SSB 5952, itself, describes wings and fuselages as "products", a term synonymous with the word "goods". The European Union refers to the shared understanding of the World Customs Organization, the United States' Customs authorities, Washington State, Boeing, and Airbus − outside the context of this dispute − that wings and fuselages are goods. There are real world examples, including the Boeing 787 and 737, and the Airbus A350 and A380, where aircraft wings and fuselages have been traded and transported across long distances.

40. While it is not incumbent upon the complaining Member in a prohibited subsidy dispute to positively demonstrate nullification and impairment − in the form of prior existing identifiable competitive opportunity, and its erosion by the challenged measure − the European Union also demonstrates that prior to the enactment on SSB 5952, Boeing had considered importing the 777X wing from Japan, as it currently does for the 787. The European Union referred the Panel to a November 2013 statement by Boeing's own Chief Technology Officer, Mr. John Tracy. According to press reports, Mr. Tracy explained, immediately before the adoption of SSB 5952, that Boeing was "consider{ing} all other alternatives", and specifically clarified that such alternatives included "the possibility of *taking production of the wings out of the United States to Japan*".

41. The United States provides details of how Boeing *today* intends to produce the 777X. While a publicly-available technical report by Washington State's Department of Ecology contradicts the United States' current narrative about this production process, the European Union considers it unnecessary to enter into a protracted debate on 777X production. These details are an irrelevant distraction. It is necessary to evaluate a challenge to Article 3.1(b) in view of the market situation at the point in time prior to adoption of a challenged measure.

42. SSB 5952 was adopted, and worded the way it is, precisely in order to take away competitive opportunity from wing and fuselage producers outside of Washington State. Therefore, what Boeing or any other entity does *today* or intends to do *in the future* in a market scenario distorted by the subsidies at issue is irrelevant and extraneous to the issues at hand.

43. The United States' assertion that the conditions at hand establish the eligibility parameters for a "production subsidy" is equally erroneous. It is true that SSB 5952 begins by providing that the subsidized product − a commercial aircraft − must be produced in Washington State. This aspect, taken alone, is a hallmark of a production subsidy, which would not be disciplined by Article 3.1(b). However, the references to wings and fuselages, which the United States struggles to read out of SSB 5952, convert what would otherwise be a production subsidy into a prohibited local content contingency.

44. The Programme-Siting condition provides that the required "fuselages and wings" cannot be just any type of "fuselages and wings" – rather, they must be fuselages and wings of the same "airplane program" that must be "fina{lly} assembl{ed}" in Washington State. Similarly, the Exclusive-Production condition does not provide only that "wing assembly", generally, must take place in Washington State; rather, it must be the "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". Thus, according to the text of the legislation, fuselages and wings must be produced in Washington State, and these same components must be used in the final assembly of the subsidized airplane program.

45. The interpretation of Washington State law is a question of fact before this Panel that must be considered objectively, and the United States' interpretation cannot be the correct one. When interpreting domestic law of a Member, the role of a WTO panel is to determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. As a matter of Washington State law, "{s}tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous". The United States' proposed interpretation would, in fact, render critical parts of SSB 5952 meaningless and superfluous – namely, the references to wings and fuselages. As such, the United States' arguments must be rejected.

3. The violation of Article 3.1(b) is both *de jure* and *de facto*

46. The European Union has established a *prima facie* case in respect of its first and principal claim – one of *de jure* contingency, with reference to the text of SSB 5952, which expressly sets out a multi-billion dollar reward for the use of domestic wings and fuselages, and a corresponding multi-billion dollar penalty for the use of imported wings and fuselages. The text of SSB 5952 does not provide, as did the measure considered by the Appellate Body in *Canada – Autos*, a "multiplicity of possibilities for compliance" with the Program-Siting and Exclusive-Production conditions that may "make the use of domestic goods only one possible means". It provides one and only one possibility for compliance – the use of domestic wings and fuselages in the same aircraft that satisfied the Programme Siting condition – and makes the subsidies contingent on compliance. Thus, the very text of SSB 5952 demonstrates the *de jure* contingency that the European Union alleges.

47. Additionally, the European Union has identified the following facts, which are demonstrative of *de facto* contingency in the present case:

- The text of SSB 5952, and in particular the language of the Programme-Siting condition and Exclusive-Production condition;
- The statement of Governor Inslee indicating that "the legislation includes strong contingency language";
- The fact that Boeing currently imports wings for its 787 from Japan;
- The fact 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.
- The fact that 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 or fuselages. This penalty/reward structure was designed to distort decision-making both at the initiation of the new aircraft programme (i.e. Programme-Siting condition), and throughout the life of that programme (i.e. Exclusive-Production condition).

IV. CONCLUSION AND REQUEST FOR RELIEF

48. For the reasons set out in its submissions to date, the European Union respectfully requests the Panel to find that each of the Washington State tax incentives, as amended and extended by SSB 5952, constitutes a subsidy that is prohibited pursuant to Articles 3.1(b) and 3.2 of the SCM Agreement.

49. In accordance with Article 4.7 of the SCM Agreement, the Panel should recommend that the United States withdraw the subsidies without delay.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. In accordance with the Panel's Working Procedures (adopted 7 December 2015), the European Union now provides an integrated executive summary of the facts and arguments presented in the European Union's (i) second written submission, (ii) oral statement at the second substantive meeting, and (iii) responses (and comments on the United States' responses) to the Panel's questions following the second substantive meeting.

2. During the course of this dispute, the European Union has provided evidence and argument demonstrating that Washington State's aerospace tax incentives, as amended and extended by SSB 5952[1], confer subsidies that are *de jure* contingent on the use of domestic over imported goods, in violation of Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The Panel has before it the text of the legislation (submitted as Exhibit EU-03), which expressly conditions the provision of over $9 billion in subsidies on the use of domestic "products" on aircraft manufactured in Washington State. The European Union has also demonstrated, through additional factual evidence, a secondary claim of *de facto* contingency, also under Articles 3.1(b) and 3.2.

3. Recalling the text of SSB 5952, Section 2 provides (in the "Programme-Siting condition") that the amended and extended subsidies would not be granted unless a new commercial aircraft program which uses *domestically*-made "*products*", namely "fuselages and wings", is sited in Washington State. Additionally, Sections 5 and 6 (in the "Exclusive-Production condition") would serve to remove a large portion of one of the most valuable tax incentives in the package *if* the aircraft manufacturer satisfying the Programme-Siting condition were to *use* any *foreign-made* wings in the newly sited aircraft manufacturing facility in Washington State.

4. This statutory text is further supplemented by additional factual evidence. Most notably, in testimony to the Finance Committee of Washington State's House of Representatives just two days prior to passage of SSB 5952, Governor Jay Inslee explained in the following terms why he was sponsoring the legislation, and why the legislature should quickly pass it:

> Look, this is pretty simple what we are looking at here, and that is a simple fact, and that is the construction of the Boeing 777X and its carbon fiber wing, and assembly of that airplane, will be the lynchpin for economic growth in the State of Washington in the decades to come. We have an opportunity in the few days ahead of us to make sure that advanced manufacturing of the carbon fiber wing – the first time we have reversed the outflow of work of this nature from the State of Washington to bring it back to the State of Washington, we can achieve that in the next few days. And I can't overstate the significance of this event. Bringing this wing back to the State of Washington sets the foundation for an advanced carbon fiber industrial ecosystem in the State of Washington. When we lost the wing for the Boeing 787, some thought Washington would lose its lead in composites and advanced manufacturing. The 787 wing went to Japan; the second line went to South Carolina. . . . Today, we are going to reverse that trend with the 777X and its carbon fiber wing built here in the State of Washington . . . .[2]

5. Governor Inslee's statement could not have been any clearer – SSB 5952 amended and extended the tax incentives to the aerospace industry with conditions that will ensure that Washington State would not, once again, "los{e} the wing" to Japan, as it did for the 787. Rather,

[1] The European Union uses the term "SSB 5952" to refer to the law that is designated as Chapter 2 of the Laws of the 2013 3rd Special Session of the Washington State legislature, and published in the 2014 volume of the official digest of the Session Laws of the State of Washington, beginning at page 2. The United States refers to the same legislation as "ESSB 5952".

[2] Emphases added.

through the Programme-Siting and Exclusive-Production conditions, Washington State has "reversed the outflow" of those inputs for Boeing's latest aircraft programme so that they will be "built" "in the State of Washington". This was not the statement of a leader who would have accepted the current United States' assertions that wings of the 777X could not possibly be imported from foreign countries. Nor would the Governor have accepted the novel United States' position that wings are not components of a plane that are used in aircraft production.

6. The Washington State legislature passed the Governor's proposed legislation two days later. And, as a result of these conditions, SSB 5952 has already been a big success − and certainly not the "demonstrable failure" alleged by the United States − in ensuring that the wings and fuselages for Boeing's next new aircraft programme will be domestic goods.

7. Having summarised what this dispute is about, it is important to clarify what the present dispute is not about:

- Despite the United States' repeated contentions to the contrary, this dispute is not about a simple "production subsidy" that provides a financial contribution and benefit to domestic producers without regard to whether domestic or imported goods are used in production of the subsidised product.

- This is not a dispute related to contingency on the use of domestic over imported *components of* wings and fuselages. Rather, the European Union's claim is that the prohibited contingency in SSB 5952 is based on the use of domestic over imported *wings* and *fuselages*, which are themselves "goods".

- This is not a dispute about the use of objects that could not be considered "goods". In fact, the United States, itself, accepts (as it must) that wings and fuselages are traded on a regular basis, including for large commercial aircraft.

8. With respect to the "subsidy" element, the United States' response consists primarily of repeated and erroneous assertions that a *prima facie* case has not been established, and ambiguous observations about the types of evidence the United States might present if there were a *prima face* case to rebut. For example, the United States has made cursory "suggestions" (i) that Washington State's tax regime has a "complicated structure" that may result in an effect known as "pyramiding", (ii) that Washington State primarily relies on a Business and Occupation ("B&O") tax, which is unlike the tax regimes in other states in the United States, and (iii) that there exist "numerous product-based, entity-based, use-based, and other similar tax adjustments" in Washington State. The United States has not taken a position on how the first two of these assertions should affect the Panel's determination of the normative benchmarks. On the third, the United States has made certain belated and erroneous observations in its response to Panel Question 60, which the European Union discusses below.

9. With respect to "benefit" within the meaning of Article 1.1(b) of the SCM Agreement, in stark contrast to all WTO panels that have previously considered the issue, the United States asserts that the existence of tax breaks constituting a financial contribution within the meaning of Article 1.1(a)(1)(ii), which by their very nature are a "gift" from the government to the recipient, does not demonstrate conferral of "benefit".

10. As for contingency under Article 3.1(b) of the SCM Agreement, all of the United States' arguments are based on three fundamental flaws − (i) an erroneous definition of "goods", (ii) an erroneous understanding of "use", and (iii) a focus on components of wings and components of fuselages as the relevant "domestic" and "imported" goods at issue, rather than the "products" actually referenced in SSB 5592 − i.e. wings and fuselages.

11. In presenting its defense, the United States interprets both the text of SSB 5952 and that of the SCM Agreement in a manner that contradicts their ordinary meanings (considered in context and in light of the relevant object and purpose), while offering no substantiation for such interpretations. As for the evidence of *de facto* contingency, the United States' strategy has been to rely on assertions and statements tailor-made for the present dispute, and to casually dismiss inconvenient evidence from the real world as "imprecise" or "colloquial references".

12. While the United States has erred in accusing the European Union of "trying to fit a square peg into a round hole" in this dispute by characterizing the challenged incentives as prohibited subsidies (rather than production subsidies), the actual problem here is that the United States is attempting to drill a hole in the SCM Agreement so large that any Member could easily avoid the disciplines of Article 3.1(b). The factual inaccuracies and legal fallacies associated with each of the US assertions have been highlighted by the European Union in its submissions. In the following sections, the European Union briefly summarizes the arguments presented in the European Union's second written submission and its subsequent submissions

II. THE AEROSPACE TAX INCENTIVES, AS AMENDED BY SSB 5952, CONSTITUTE SPECIFIC SUBSIDIES

13. The European Union's second written submission once again details why the tax incentives, as amended and extended by SSB 5952, constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement. In particular, the European Union has explained that each of the seven aerospace tax incentives confers a financial contribution involving the "forego{ing}" of "government revenue that is otherwise due", within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. For each individual tax incentive, the European Union has provided details about the relevant normative benchmark. With respect to "benefit", the European Union again demonstrated that the tax breaks are a "gift" from the government that the recipients would not receive in the market. As for specificity, there is no dispute that subsidies violating Article 3.1(b) are deemed "specific" pursuant to Article 2.3 of the SCM Agreement.

A. Financial Contribution

14. The European Union now summarizes its responses to the United States' (1) arguments regarding the timing of the tax incentives, and (2) suggestions related to the normative benchmarks, as they relate to the issue of "financial contribution" under Article 1.1(a)(1)(ii) of the SCM Agreement.

1. Timing

15. The United States first hinted at a position, similar to the one it adopted in the *United States – Large Civil Aircraft* dispute, that only revenues foregone in the past would qualify as a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. The European Union demonstrated that there is no textual basis for such a temporal limitation. Further, the Appellate Body has interpreted the word "foregone" in Article 1.1(a)(1)(ii) to mean "the government has *given up an entitlement to raise revenue* that it could 'otherwise' have raised",[3] an action that does not have to occur *after* the revenue has become payable. If accepted, the United States' interpretation would incentivise Members to craft prohibited subsidy programmes in which the subsidy is received as a delayed reward for satisfying a prohibited contingency; in particular, the United States' interpretation could preclude a timely, effective challenge under Articles 3.1(b) and 3.2 in such circumstances, where the grant is complete and the firm is already in a position to account for, rely on, and benefit from a future revenue stream.

16. The United States subsequently modified its views on the temporal restriction it seeks to impose on Article 1.1(a)(1)(ii). In particular, in its response to Panel Question 21, the United States suggested that Article 1.1(a)(1)(ii) may cover the foregoing of revenue that would have become due in the future within "the coming year", but not later. The United States has offered no reasoning for its oscillating positions on temporal restrictions. Such legal arguments are not only erroneous, but they are internally inconsistent.

17. In addition, putting aside the United States' flawed legal interpretation, the European Union has explained that five of the seven tax incentives have, in fact, actually foregone revenue in the past, including since the November 2013 entry into force of SSB 5952. In fact, the United States does not deny that the following tax incentives have already lowered the taxes of the Washington State aerospace industry in the past, and continue to do so in the present: (1) B&O tax rate reduction for the manufacture and sale of commercial airplanes; (2) B&O tax credit for pre-production development of commercial airplanes and components; (3) B&O tax credit for property

[3] Emphasis added.

taxes and leasehold excise taxes on commercial airplane manufacturing facilities; (4) exemption from sales and use taxes for computer hardware, software, and peripherals; and (5) exemption from sales and use taxes for certain construction services and materials.

2. Normative benchmark

18. Until its most recent submissions, the United States refused to engage in a specific discussion of the relevant normative benchmarks in the present dispute, other than to repeatedly assert that the European Union did not identify any such benchmarks. In fact, the European Union has identified and detailed such normative benchmarks, beginning with its first written submission.

19. In its second written submission, the United States appeared to argue that the pre-existing aerospace tax incentives initiated under House Bill 2294 ("HB 2294") could provide the appropriate normative benchmark to determine whether the measures at issue involve a financial contribution under Article 1.1(a)(1)(ii). In response, the European Union recalled that a normative benchmark is the tax rate that would *normally* apply, taking into account the structure of the particular tax system. As the panel and Appellate Body correctly found in *US − Large Civil Aircraft*, the 0.2904 percent tax is the subsidized B&O tax rate for commercial aircraft; as such, it cannot be the normative benchmark.

20. The United States also suggested that the various specifically-targeted sales and use tax exemptions offered by Washington State to entities outside the aerospace industry are somehow relevant to identification of the normative benchmark. As the European Union has explained, however, special tax treatment accorded to particular companies or industries does not reflect "the tax rates that would normally apply". Rather, the tax treatment generally applicable to all actors engaging in the relevant taxable activities within Washington State − for example, manufacturing or retail sales in the case of the B&O tax rate reduction − is what is relevant for identifying "the tax treatment of comparable income of comparably situated taxpayers".

21. In its response to Question 60, the United States submitted a table of figures which, according to the United States, "suggest{s}" that the generally applicable tax rates for the taxes at issue have become the exceptions rather than the general rule, and therefore cannot serve as the normative benchmark. However, these belatedly submitted numbers do not warrant the conclusion that the United States seeks. In that table, the United States treats every instance in which Washington State has not imposed the maximum tax liability with respect to a particular activity − including even those instances where Washington State is constitutionally prohibited from imposing a tax − as an "exemption". Thus, based in large part on numerous "exemptions" completely irrelevant to an enquiry under Article 1.1(a)(1)(ii), the United States then claims that a majority of all revenue in Washington State is subject to "exceptions", rendering the general tax rates purely notional. In view of the figures relied upon by the United States, this proposition goes against the Appellate Body's express guidance that a normative benchmark, "cannot, {...} be an entitlement in the abstract, because governments, in theory, could tax all revenues." The European Union applied corrections to this table, eliminating some instances which are not foregoing of revenue otherwise due in the sense of Article 1.1(a)(1)(ii), and arrived at the conclusion that far lower portions of the total revenue in Washington State are subject to "exemptions" from the general rate.

22. Even the corrected figures presented by the European Union suffer from two major drawbacks, however. First, these figures do not account for *local* property taxes or *local* sales and use taxes, which are also subject to the property tax exemption, and the two sales and use tax exemptions at issue. Second, the United States failed to remove from its calculations the tax exemptions resulting from the very subsidies being challenged in the present dispute. In *United States − Large Civil Aircraft*, the Appellate Body found that this second error rendered similar United States' figures useless for evaluating the normative benchmark.

B. Benefit

23. The European Union has demonstrated that the financial contribution in the present dispute − in the form of forgiveness of tax obligations − is, in the words of the panel in *US − Large Civil Aircraft,* "essentially a gift from the government, or a waiver of obligations due, and it is clear that

the market does not give such gifts". A "benefit" exists because the very nature of a market precludes the availability of multi-billion dollar gifts to a commercial actor.

24. In response, the United States presented an irrelevant "example", asking the Panel to consider a case where a tax break would not provide a "benefit" when, "by not taking the challenged tax treatment, the taxpayer qualified instead for another equal or better tax treatment". Here, the United States appeared to suggest that, in some instances, it may become possible for the taxpayer to forego the tax incentive at issue, and instead avail itself of generally available tax treatment that is more or equally advantageous to that incentive. This, however, would appear to relate to the relevant benchmark for purposes of the "financial contribution" analysis, rather than the analysis of "benefit" conferred by a tax measure already found to provide a financial contribution. Moreover, the United States fails to demonstrate, or even assert, that the facts of the present case are somehow similar to this "example". They are not.

C. Conclusion on "subsidy"

25. The European Union, consistent with its burden to establish a *prima facie* case, has demonstrated that each of the tax incentives at issue provides a financial contribution and confers a benefit. Absent effective rebuttal by the United States, the Panel must make findings in favour of the European Union.

III. THE AEROSPACE TAX INCENTIVES, AS AMENDED BY SSB 5952, CONSTITUTE PROHIBITED SUBSIDIES CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS

26. As a result of the Programme-Siting and Exclusive-Production conditions established in SSB 5952, the aerospace tax incentives, as amended and extended, constitute prohibited subsidies "contingent ... upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement.

27. The European Union has explained that, as of the moment SSB 5952 became law in 2013, the amended and extended tax incentives provided subsidies contingent on the use of domestic over imported goods. Consequently, the United States' contention that the European Union "has the burden to demonstrate that {the} contingency obtains specifically with respect to the alleged subsidy conferred from July 1, 2024, to June 30, 2040" does not follow from the European Union's actual claims in this dispute.

28. The United States errs when it asserts that "the treatment prior to 2024 under any of these measures … is *a priori* not contingent on any of the conditions introduced by ESSB 5952". As the European Union has explained on several occasions, under the Exclusive-Production condition, if a determination is made − at any point after the Programme-Siting condition was satisfied in July 2014 − that Boeing has sited any wing assembly outside Washington State (for any version or variant of the airplane programme that was the basis for satisfying the Programme-Siting condition), the B&O tax rate reduction would become inapplicable to Boeing's revenues from that programme (i.e., 777X program). Additionally, had Boeing not satisfied the Programme-Siting condition, the amendments extending the sales & use tax exemptions for construction services and materials to cover all commercial aircraft (not just superefficient airplanes), would not have taken effect. Thus, the *current* availability of the B&O tax rate reduction for the 777X programme, and the *current* availability of the sales and use tax exemptions for construction services and materials, are already contingent on meeting the conditions on SSB 5952, even before 2024.

29. The Panel is faced with subsidies *de jure* contingent upon the decision by an aircraft producer to use domestic wings and domestic fuselages for a new aircraft programme, where a major portion of that subsidy would be lost if even a single wing for that aircraft programme is imported through the year 2040. While these facts should be determinative of the question of contingency under Article 3.1(b) of the SCM Agreement, the United States seeks to obscure the prohibited contingency through a series of erroneous and irrelevant statements.

A. Three Foundational Errors Made by the United States

30. The entirety of the United States' argumentation on contingency is founded on three erroneous propositions − (i) wings and fuselages are not "goods"; (ii) wings and fuselages are not "used" on aircraft; and (iii) the phrase "domestic over imported goods", as it applies to wings and fuselages, requires an enquiry into the origin of *the components* of the wings and fuselages, rather than the origin of the wings and fuselages, themselves.

1. US' Error #1: "goods"

31. The United States persists with its erroneous assertion that wings and fuselages are not "goods", although (i) the United States has acknowledged that Boeing purchases "complete fuselages" for the 737; (ii) Boeing has previously explained (outside the context of this dispute) that it imports wings for the 787; and (iii) SSB 5952, itself, refers to fuselages and wings as "products", a term that the United States has accepted is a synonym for the legal term used in Article 3.1(b) − "goods".

32. Originally, the United States claimed that the protection under Article 3.1(b) would extend only to goods that are *actually traded*. In its second written submission, however, the United States conceded that the protection extends to *competitive opportunities* for imported "goods". The United States qualified that concession with an assertion that the protection does not extend to "strictly theoretical" opportunities. Putting aside the lack of any textual or jurisprudential basis to characterize certain competitive opportunities as "strictly theoretical", there is nothing theoretical about importing or otherwise purchasing wings and fuselages for a civil aircraft, as even the United States acknowledges for certain aircraft.

2. US' Error #2: "use"

33. The United States continues to assert that wings and fuselages are not "used" on aircraft, or in the production of aircraft, because they are the output of aircraft production, rather than inputs. The United States' erroneous position is based on its false allegations about the planned production process for the 777X, which − even if true − would be irrelevant to a *de jure* analysis of SSB 5952. As the European Union has explained, and the United States has not contested, SSB 5952 does not even mention the 777X, but instead references only a new model, version, or variant of a commercial aircraft with a composite wing and/or fuselage. For some other large commercial aircraft, the United States generally agrees with the European Union that fuselages and wings are inputs which are used in aircraft production. As a result, the US' position on the 777X production process, even if correct, does nothing to refute the European Union's *de jure* claim.

34. Moreover, the United States' claims about the planned 777X production process are contradicted by statements made by Boeing and Washington State outside the confines of the present dispute. For example, according to press reports, Eric Lindblad, the vice president of 777X Wing Integration, explained that "{t}he wing subassemblies will {} be moved into a final wing assembly area in the main building, where they will be turned into full wings" and "finally put together" before being attached to the aircraft.[4]

3. US' Error #3: "imported" vs. "domestic"

35. The United States continues to argue that it is relevant, and even legally determinative, that Boeing may import *components of* wings and fuselages for the sited aircraft without restriction, while still satisfying the Programme-Siting and Exclusive-Production conditions. But the European Union is not challenging the subsidies as being conditional on use of domestic over imported *components of* wings and fuselages. The European Union's challenge is clear − i.e. to satisfy the two conditions, imported *wings* and imported *fuselages* may not be used on the *aircraft* that is the subject of the siting decision.

36. The United States complains that the European Union has not explained "what is the domestic and what is the imported good for each of the measures at issue". In fact, the European

[4] Emphases added.

Union has repeatedly and clearly stated that wings and fuselages are the relevant "goods" for purposes of determining whether the challenged tax incentives are contingent upon use of domestic over imported goods, under Article 3.1(b). The United States' attempt to refocus the Panel's attention on the *components of* wings and the *components of* fuselages − rather than the components of aircraft − provides an irrelevant distraction. The European Union is the master of its own claims, and this is simply not a case about components of wings, nor a case about components of fuselages.

37. The fact is that, however Washington State defines a "wing" or a "fuselage", those "products" must be either "manufacture{d}" or "assembl{ed}" in Washington State, and used on the sited aircraft, in order to satisfy the Programme-Siting and Exclusive-Production conditions. If, at the time of its siting decision, Boeing expressed an intention to import something that Washington State understood to be a "wing" or "fuselage" for the 777X, or if something that Washington State understands to be a "wing" is imported today (or anytime before 2040) for use on the 777X, the subsidy (or a significant portion thereof) would be lost.

38. As an interpretative matter, the European Union has maintained a dualist view, wherein any good that is not "imported" would be "domestic". The European Union submitted that any different interpretative view would require a panel to examine whether goods are "domestic" under applicable rules of origin. Given the absence of multilateral rules of origin, Members would be at liberty to circumvent the discipline in Article 3.1(b) − and those in all other provisions of the covered agreements employing the "domestic" and "imported" duality − by resorting to conveniently tailored domestic rules of origin.

39. In Question 72, the Panel requested the parties to identify "provisions in the covered agreements" that could further assist in the interpretation of the words "domestic" and "imported", for the purpose of Article 3.1(b) of the SCM Agreement. In response, the European Union demonstrated confirmation of its dualist view, which divides goods into "domestic" and "imported", with reference to Articles II:2(a), III:1, III:2, and XI:2(c) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"); Article 15.3, footnote 57, and Paragraph I of Annex III of the SCM Agreement; Paragraphs 1(a), 1(d), and 1(g) of Annex C to the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement"); and Article 3.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti Dumping Agreement").

40. In its own response, the United States instead chose to again express general disagreement with the European Union's interpretative proposal, while not identifying any provision in a covered agreement (barring a general unexplained reference to the Agreement on Rules of Origin) that would warrant an interpretation different from the one proposed by the European Union. Nor did the United States even attempt to assert an interpretation of its own, let alone defend one. The United States even attempted to shield itself behind an assertion that it is the "EU's burden" to interpret Article 3.1(b), and in particular the meaning of "domestic" and "imported". Yet, the Appellate Body has explained that "the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court".

B. Availability of the Subsidies to Entities Other than Boeing

41. The United States argues that the availability of the tax incentives at issue to entities other than Boeing precludes a finding that the subsidies are contingent on the use of domestic over imported goods, because only Boeing needs to satisfy the conditions. The United States seeks to obscure the fact that none of the tax incentives, as amended and extended by SSB 5952, would have taken effect in respect of any of the potential recipients had the Programme-Siting condition not been fulfilled by Boeing (or another commercial aircraft producer). Thus, the current availability of the amended and extended tax incentives enjoyed by all the recipients is a direct result of the satisfaction by Boeing of the prohibited contingency in the Programme-Siting condition, on 9 July 2014.

42. Further, nothing in the text of Article 3.1(b) requires that the entity receiving the subsidy, on the one hand, and the entity required to meet the prohibited contingency, on the other hand, must be one and the same, for a measure to violate that provision. If the drafters had intended to include such a limitation, they could have provided, for example, for prohibition of "subsidies to an

enterprise contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods by that enterprise". They did not.

C. Production Subsidies, and the United States' Flawed Examples

43. From the very beginning of this dispute, the United States has dedicated large parts of its submissions to defending a proposition that is non-controversial − production subsidies, in and of themselves, do not result in *de jure* violations of Article 3.1(b). The European Union signalled its agreement with this proposition, in unequivocal terms, in several of its submissions, yet the United States has persisted with this argument.

44. When faced with a claim that a subsidy is contingent on the use of domestic over imported goods, a Member may not evade the prohibition under Article 3.1(b) simply by characterizing a challenged measure as a production subsidy. Such a claim should be decided on the basis of the obligation in Article 3.1(b), and whether the measure violates that obligation. It should not be decided on the basis of what each party understands to be a "production subsidy", which is a term that does not appear in the covered agreements.

45. With respect to the United States' assertion that "wings" and "fuselages" are what makes a vehicle an "airplane" and that this needed to be clear in SSB 5952, in the context of an alleged "production subsidy" for airplanes, the European Union finds it difficult to believe that, absent such references to wings and fuselages, Washington State would have faced the risk that recipients of the subsidies at issue would manufacture vehicles without wings and fuselages and claim them to be "airplanes" eligible for the subsidy. That did not, for example, appear to be a concern with HB 2294, which defined the airplane that needed to be manufactured in Washington State as a "twin aisle airplane that carries between two hundred and three hundred fifty passengers, with a range of more than seven thousand two hundred nautical miles, a cruising speed of approximately mach .85, and that uses fifteen to twenty percent less fuel than other similar airplanes on the market". In this definition, there is no reference to wings, fuselages, or any other components of the airplane.

46. The United States uses its assertions relating to "production subsidies" to set up a series of straw-men that it then proceeds to knock down. The United States creates absurd hypothetical scenarios − most recently going so far as to invent a "production subsidy" *contingent on importation* of two halves of an airplane − which consider whether a "production subsidy" should be available to certain producers or importers. In each hypothetical, the United States first asserts its subjective view that the subsidy it describes should be characterized as a production subsidy, and should be consistent with Article 3.1(b). Then the United States goes on to apply what it erroneously characterizes as the "EU's theory" to the hypothetical, and concludes that under that alleged "theory" (which is unrecognisable to the European Union, itself), the subsidy in question would constitute a *de jure* violation of Article 3.1(b). Based on that series of exercises and conclusions, the United States claims that the "EU's theory" should be rejected.

47. To be clear, the European Union does not offer a special "theory" on Article 3.1(b). The European Union's position is simply that *any* subsidy "contingent on the use of domestic over imported goods" is inconsistent with Article 3.1(b). That understanding applies no matter what the goods at issue are − i.e. screws, screwboxes missing screws, front halves or back halves of airplanes, parts of paper planes, or, most importantly for this case, wings and fuselages of commercial aircraft.

48. The United States has argued that, if accepted, the European Union's position on the interpretation of the words "goods" and "use" in Article 3.1(b) would mean that, to be consistent with Article 3.1(b), "production subsidies" could require nothing more than that a domestic producer perform "the very last production step", such as "turning the very last screw" or "drilling the final rivet", in the territory of the Member providing the subsidy. This argument is a red herring, as there are numerous ways to condition a subsidy on significant domestic production (far beyond "turning the very last screw") without creating a *de jure* violation of Article 3.1(b), as the United States and Washington State already know. In fact, the European Union has gone beyond its burden in the present dispute to identify several ways in which the United States could have offered production subsidies in the present fact pattern, without resulting in a *de jure* violation. Unlike the absurd US hypotheticals involving paper airplanes, airplanes split into halves, and

subsidies contingent on use of imported goods, the examples that the European Union has highlighted are those that various US states, including Washington State, have actually employed in order to encourage local investment, job creation, and production activity.

D. The 777X Production Process, and the Definition of a "wing"

49. Starting with its first written submission, the United States introduced several facts relating to the process allegedly to be employed by Boeing in production of the 777X. These assertions seek to establish that the 777X wings and fuselages do not come into existence as separate goods at any time before the final assembly of the aircraft. The European Union has demonstrated that these assertions, tailor-made for the present dispute, are contradicted by assertions made by Boeing and Washington State outside the present dispute.

50. More importantly, as the European Union has repeatedly explained, these allegations about the 777X production process are irrelevant to the *de jure* claim, because SSB 5952 does not name Boeing or the 777X programme. It does not even specify the size of the aircraft that should be sited in Washington State pursuant to the Programme-Siting condition. Any aircraft manufacturer could have satisfied the Programme-Siting condition in respect of any aircraft that had a composite wing or fuselage or both, even if that aircraft was much smaller than, and markedly different from, the 777X. Thus, assertions as to how Boeing intends to produce the 777X are entirely irrelevant, at least to the European Union's first and principal claim of *de jure* contingency.

51. The United States claims that the "fact" that Boeing satisfied the Programme-Siting condition in respect of the 777X without the "use" of "domestic over imported goods" precludes a finding that SSB 5952 contains contingencies prohibited by Article 3.1(b). However, this assertion is again predicated on the same three foundational errors repeatedly made by the United States, in respect of the words "use", "goods", and the US' presumption that the relevant goods for understanding "domestic" and "imported" are *components of* fuselages and *components of* wings, not fuselages and wings.

52. Similar to its factually erroneous and legally irrelevant assertions relating to the production process of the 777X, the United States dedicates much effort to defining a "wing". The United States falsely attributes to the European Union the position that only "complete finished wings" (and not "complete wings" or "finished wings") are relevant to the present dispute. Then the United States goes on to supply a definition of "wing" that is entirely divorced from the text of SSB 5952 and reality. Under that definition, for example, a wing that does not carry the engines and fuel is not a wing; and a wing that is not fitted with winglets is not a wing. The European Union has demonstrated the absurdity of this definition, highlighting that, under that definition, several real-world aircraft − MD-80, MD-90, Boeing 717, Boeing 737 − have flown for decades without a "wing".

53. The United States relies on this flawed definition to postulate that the 787 "wing" was not imported, and that Governor Inslee was imprecise in describing the contingencies in SSB 5952 in his testimony before the House Finance Committee, specifically in asserting that "{t}he 787 wing went to Japan". Similarly, the United States dismisses, as "colloquial references", all assertions by Boeing and Washington State outside the confines of the present dispute indicating that the 787 wing was imported.

54. In any event, it is not necessary for the Panel to decide the precise definition of a "wing" or "fuselage" in the present dispute, especially in context of the European Union's first and principal claim of *de jure* contingency. What matters is that there is a "product" called a "wing", and a "product" called a "fuselage" (which is different from components of whatever Washington State understands to be a "wing" or a "fuselage") that, if imported, will result in the loss of the subsidy, or a portion thereof. That is clear from the text of SSB 5952, itself.

E. Conclusion on Contingency

55. The European Union has demonstrated in SSB 5952 the existence of a prohibited contingency, under Article 3.1(b) of the SCM Agreement, with reference to the text of that legislation, and additional evidence. The United States has failed to rebut that *prima facie* case.

The United States' defenses are based on three foundational errors, and are factually inaccurate and largely legally irrelevant.

IV. CONCLUSION AND REQUEST FOR RELIEF

56. For the reasons set out in its submissions to date, the European Union respectfully requests the Panel to find that each of the Washington State tax incentives, as amended and extended by SSB 5952, constitutes a subsidy that is prohibited pursuant to Articles 3.1(b) and 3.2 of the SCM Agreement.

57. In accordance with Article 4.7 of the SCM Agreement, the Panel should recommend that the United States withdraw the subsidies without delay.

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1. The EU's entire case is an example of trying to fit a square peg into a round hole. The hope appears to be that, if the peg and the hole are not examined closely, no one will notice that the peg cannot fit. The EU asserts that Engrossed Substitute Senate Bill ("ESSB") 5952 discriminates against imported products by requiring the use of domestic over imported goods as a condition for receiving subsidies. It is on this basis that the EU challenges seven Washington tax measures as prohibited by Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). But the relevant conditions in ESSB 5952 have nothing whatsoever to do with the use of goods, whether domestic or imported. They therefore do not discriminate against imported goods. Article 3.1(b) does not prohibit subsidies provided to domestic producers for or in light of domestic production.

I. WASHINGTON'S AEROSPACE INDUSTRY AND BOEING'S PRODUCTION OF COMMERCIAL AIRPLANES

2. Washington has emerged as an aerospace hub, and in turn, the aerospace sector is an integral part of Washington's economy and employment. As of February 2015, there were 1,361 firms in Washington State's aerospace manufacturing and supporting industries, with 186 of these in the core industry. Nearly 20 percent of U.S. aerospace jobs are in Washington.

3. A major part of Washington's emergence and continued role as an aerospace hub is owed to the presence of Boeing Commercial Airplanes ("Boeing"). Boeing has deep roots in Washington, which continues to be the center of its operations worldwide. Two of Boeing's three major production facilities are there. The Renton and Everett facilities produce the 737NG and 737 MAX; and the 747, 767, 777, and 787 Dreamliner airplanes, respectively. Development of the 777X is based in Everett, and Boeing plans to produce the 777X there as well. The third production facility is in North Charleston, South Carolina. Except for some 787s manufactured after 2012, all commercial aircraft ever manufactured by Boeing were assembled in Washington, and all of Boeing's major in-house production operations are in the United States.

4. Large commercial aircraft ("LCA") are among the most complex machines ever built. They consist of tens of thousands of individual parts, which must be integrated into a single safe, reliable, and economic system. For this reason, developing LCA is extremely costly, with development costs running into the billions of dollars. Many variables across a long time horizon dictate the success or failure of a program, making such investments very risky. In this atmosphere, Boeing requires an elaborate planning system for bringing new aircraft to market, which can be simplified as occurring in four phases: pre-launch, launch, post-launch, and entry into service and industrial ramp-up.

5. The same elaborate planning process was required for the 777X program based out of the Everett, Washington facility. Boeing sought to limit costs, risks, and logistical complexities of the sort that had burdened the 787 program, where aggressive outsourcing of manufacturing activities contributed to significant production delays and increased program costs.

II. WASHINGTON'S TAX SYSTEM AND THE CHALLENGED MEASURES

6. The measures challenged in this dispute pertain to five categories of Washington taxes: the business & occupation ("B&O") tax, the retail sales tax, the use tax, the leasehold excise tax, and the property tax. These taxes form an important component of the backdrop against which the challenged measures operate. The EU submission gives them short shrift, but the details are critical to any evaluation as to whether they constitute financial contributions and confer a benefit within the meaning of Article 1 of the SCM Agreement, or are "contingent … upon the use of domestic over imported goods." Accordingly, the United States describes each of these in greater detail below.

7. The State of Washington relies primarily on a B&O tax − rather than a corporate tax or an income tax − for purposes of business taxation. The tax is an excise tax on "gross receipts," which refers to the gross proceeds of sales, gross income of a business, or the value of products. The tax is imposed on the gross receipts of all sales, not just retail sales. No deductions are permitted for the costs of doing business, such as expenses for raw materials, wages paid to employees, or component parts manufactured by others that are incorporated into a product being sold. In addition, the B&O tax does not vary depending on the profitability of the taxpayer.

8. Washington also has a retail sales tax, which is its principal tax source (*i.e.*, of all revenue, including both business and non-business tax revenue). This tax applies to sales to consumers of tangible personal property, as well as the sale of certain services, including construction services (*e.g.*, constructing and improving new or existing buildings and structures), some personal services, and other miscellaneous services. The Washington retail sales tax rate has two components: the state component, which is equal to 6.5 percent, and the local component, which varies by jurisdiction. Local governments within Washington have the authority to set their own retail sales tax rates, but both components are administered by the State.

9. The use tax is a tax due on the use of goods or services to the extent that the user has not paid Washington sales tax or "a legally imposed retail sales or use tax…to any other state, possession, territory, or commonwealth of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof." For example, use tax is due if goods are purchased in another state that does not have a sales tax, or has a sales tax rate that is lower than that of Washington. The tax is imposed on the privilege of using as a consumer specified goods or services in Washington.

10. Washington also has a property tax. Under RCW § 84.36.005, "{a}ll property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and other taxing district purposes." Thus, all real and personal property is subject to tax. However, a number of exceptions to this general rule apply. Property tax rates vary among territorial subdivisions of Washington. However, the Washington Constitution limits the regular (*i.e.*, non-voted) combined property tax rate to 1 percent of market value.

11. Washington also has a leasehold excise tax. As noted above, property owned by federal, state, or local governments is exempt from the property tax. However, when private parties lease such property, they are subject to the leasehold excise tax. In effect, the leasehold excise tax imposes a tax burden on persons using publicly owned, tax-exempt property similar to the property tax that they would pay if they owned the property. The 12 percent rate is then multiplied by an additional tax, which is currently set at 7 percent. Thus, the total leasehold excise tax rate is 12.84 percent of the rent paid for the property.

III. THE CHALLENGED MEASURES AND CONDITIONS IN ESSB 5952

12. The EU challenges seven measures in this dispute, each of which provides for certain tax treatment under the law of the state of Washington: (i) the 0.2904 percent B&O tax rate, (ii) the B&O tax credit for aerospace product development; (iii) the B&O tax credit for property taxes; (iv) the sales and use tax exemption for computer hardware, software, and peripherals; (v) the sales and use tax exemption for construction services and materials; (vi) the leasehold excise tax exemption for port district facilities, and (vii) the property tax exemption.

13. The challenged measures have several important features. The first feature is general availability on a non-discriminatory basis. Although the EU submission focuses on Boeing, none of the challenged measures refers to Boeing explicitly. Rather, they set out tax treatment that is available to any eligible company in Washington. For example, non-U.S. airplane manufacturers, and suppliers to such companies, are eligible for the challenged tax treatment.

14. The second feature is silence with respect to the use of domestic over imported goods. None of the challenged measures distinguishes between domestic and imported goods, let alone condition availability on the use of domestic over imported goods. This is true of ESSB 5952 as well.

15. The third feature is changes in conditions for eligibility. In 2006, 2008, and 2013, Washington State enacted legislation that affected the availability of the challenged tax treatment by expanding the class of companies that could claim such treatment.

16. The EU challenges these measures "as amended and extended" by ESSB 5952. In 2013, Washington enacted ESSB 5952, which would extend aerospace-related tax measures if and when a significant commercial airplane manufacturing program was sited in the state. The Washington legislature noted that ESSB 5952 served its "specific public policy objective to maintain and grow Washington's aerospace industry workforce."

17. ESSB 5952 contains two provisions that the EU alleges are relevant to this dispute: an Initial Siting Provision and a Future Siting Provision. Both are silent on the use of domestic over imported goods, and indeed do not draw any distinction between domestic and imported goods. They contain no text that requires the use of domestic over imported goods, nor even encourages it. They therefore do not result in any discrimination against imported goods.

18. Rather, the Initial Siting Provision requires that certain manufacturing activities occur in Washington. Under the Future Siting Provision, the continued applicability of the 0.2904 percent B&O tax rate for 777X sales (because the 777X is the program that triggered the Initial Siting provision) depends on "final assembly and wing assembly" − a narrow category of manufacturing activity − taking place in Washington.

IV. THE EU IGNORES ITS BURDEN OF PROOF AS THE COMPLAINANT IN A NEW DISPUTE

19. As the complaining Member, the EU of course bears the burden of demonstrating that the challenged measures are subsidies within the meaning of Article 1 of the SCM Agreement, and that they contain a "contingency" − *i.e.*, a relationship of "contingency," or a state of "dependen{ce} for its existence on something else." It is also required to demonstrate that this "contingency" is "upon the use of domestic over imported goods." Each of these showings consists of several elements, and the EU bears the burden of proving each.

20. Yet, the EU ignores this burden, seeking to establish the alleged import substitution contingency with conclusory assertions, unsupported assumptions, and references to *US − Large Civil Aircraft*, a separate dispute in which the EU failed to demonstrate that any of the challenged measures are prohibited under Article 3.1(b). Such arguments are insufficient to establish a *prima facie* case. This is only confirmed by the fact that the *US − Large Civil Aircraft* panel addressed facts as they existed in the 2004-2006 period, rather than the time of this Panel's establishment in 2014, and the current dispute involves measures that differ from those at issue in the other, separate dispute. The EU's claims fail as a result of it not even attempting to allege and prove with evidence each of the elements of its claims.

V. THE EU FAILS TO DEMONSTRATE THAT ANY OF THE CHALLENGED MEASURES IS A SUBSIDY UNDER ARTICLE 1.1 OF THE SCM AGREEMENT

21. The EU does not even attempt to make a *prima facie* case that the challenged measures involve financial contributions that confer a benefit. In fact, the EU simply assumes, without support − and it asks the Panel to assume − that the challenged measures are subsidies within the meaning of Article 1 of the SCM Agreement.

A. Financial Contribution

22. The EU alleges that each of the challenged measures involve revenue foregone by Washington during the time period from July 1, 2024 − July 1, 2040. However, the EU fails to establish that any such financial contribution exists, and therefore fails to make a *prima facie* case.

23. To show a financial contribution, the EU relies on the findings in a separate dispute, *US − Large Civil Aircraft*. Yet the EU ignores the fact that in that dispute, three of the challenged measures were in fact found *not* to be subsidies because the panel found that the EU failed to establish the existence of a financial contribution. The EU also ignores that the *US − Large Civil*

Aircraft panel's findings pertain to a different time period (*i.e.*, prior to 2007), and cannot support a finding that revenues supposedly to be foregone after July 1, 2024, result in a present subsidy.

24. Indeed, where an allegation is specific to a particular recipient of an alleged subsidy, it is normally necessary for that recipient to have actually used or exercised that fiscal incentive. For some of the measures, the EU does not even *allege* use by Boeing.

25. The EU seems unaware, or it intentionally glosses over the fact, that references to past findings in *US − Large Civil Aircraft* cannot substitute for evidence in this dispute. The EU also fails to analyze Washington's unique B&O tax system and establish, in light of such analysis, a normative benchmark against which alleged revenue foregone can be compared.

B. Benefit

26. As discussed above, the EU has failed to establish a *prima facie* case that any of the challenged measures involves a financial contribution. It would seem to be a potential future benefit that would be enjoyed, if at all, 10 years from now. The EU, however, has not explained what it believes to be such a future financial contribution and benefit. Thus, it automatically follows that the EU fails to establish that any benefit is conferred by such financial contributions.

27. In this regard, it is noteworthy that the EU has not even attempted to establish benchmarks for any of the challenged measures, as is its burden. Rather, the EU's benefit arguments consist of citations to other panel reports and the unsupported arguments related to financial contribution. Accordingly, there is no valid "benefit" argument for the United States to rebut, and the EU has failed to establish a *prima facie* case.

VI. THE EU FAILS TO ESTABLISH THAT ANY OF THE CHALLENGED MEASURES IS CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS AS PROHIBITED BY ARTICLE 3.1(B) OF THE SCM AGREEMENT

28. The discipline of Article 3.1(b) is focused and specific. It prohibits the granting of subsidies that are contingent upon the use of domestic over imported goods. Yet the measures challenged here do not address the use of goods at all, let alone require the use of domestic over imported goods as a condition for any particular alleged subsidy. Rather, they provide specified tax treatment to persons that conduct certain activities (*e.g.*, certain types of manufacturing, retailing, R&D) in Washington. They are available to all companies that do business in Washington, whether headquartered in the United States, the EU, or elsewhere − and regardless of whether they sell goods for use in the supply chains of Boeing, Airbus, or another company.

29. To establish its claims under Article 3.1(b), the EU must demonstrate that a measure established to be a subsidy is contingent upon the use of domestic over imported goods. The EU argues that the alleged subsidies are contingent on the use of domestic over imported goods in breach of Article 3.1(b) of the SCM Agreement because of two conditions in ESSB 5952 regarding the siting of certain manufacturing operations related to a commercial airplane program. The EU's argument fails for several reasons.

30. First, the EU incorrectly states that the text of ESSB 5952 "expressly condition{s}" the challenged tax treatment on the use of domestic over imported goods. The EU states that under two provisions in ESSB 5952, the Initial Siting Provision and the Future Siting Provision, "all of the aerospace tax incentives . . . are *expressly conditioned* on the use of domestic over imported goods in the final assembly of the aircraft." In fact, these provisions − and the statutes challenged by the EU − are silent on the use of domestic over imported goods, and indeed do not draw any distinction between domestic and imported goods. They merely extend the tax treatment for companies that perform certain production and non-production activities in Washington if and when a significant commercial airplane program is sited in the state.

31. Specifically, the Initial Siting Provision states that, for the expiration dates of the challenged tax measures to be extended, Washington's Department of Revenue ("DOR") must first determine that a company has made a final decision to "commence manufacture" of a new model or variant of a commercial airplane, including the wings and fuselage of a new model or variant of a new commercial airplane, in Washington. The Future Siting Provision partly revokes this tax treatment

if DOR determines "that any final assembly or wing assembly" of that new model or variant "has been sited outside the state of Washington." These provisions do not implicitly, much less "express{ly}," require the use of domestic over imported goods, as the EU asserts. In fact, they do not mention the use of goods at all.

32. Second, the EU's argument assumes, without support, that ESSB 5952 requires the separate production of fuselages and wings for use in the production of commercial airplanes. It does not. ESSB 5952 is silent on the how the manufacture and assembly of fuselages and wings fits into the overall production process of a commercial airplane. It does not require manufacturers to produce fuselages or wings as finished intermediate goods that can be "used" in downstream production.

33. And Boeing, in fact, does not do so. 777X fuselages and wings never exist as discrete, standalone goods that are subsequently "used" in a downstream production process. In fact, during the final assembly process, parts of the fuselage and parts of the wing are joined to each other before a complete fuselage or complete wing is produced. In short, the 777X's fuselage and wing are elements of the output of the final assembly process (that is, the manufacture of a commercial airplane), not goods used as inputs to that process. In no case does Boeing purchase (or otherwise "procure") complete wings from a supplier. Therefore, the EU's whole case is dependent on a false premise − that fuselages and wings are *goods* required to be used in the production of a commercial airplane.

34. Third, the EU relies on an incorrect interpretation of Article 3.1(b) of the SCM Agreement. Article 3.1(b) is focused and captures a specific type of subsidy: it prohibits subsidies "contingent ... upon the use of domestic over imported goods." However, Article 3.1(b) does not discipline subsidies provided to domestic producers for their domestic production. This interpretation is confirmed by Article III of the GATT 1994. Article III:8(b) of GATT 1994 establishes that providing subsidy to domestic producers for production activities in the grantor's territory cannot be equated with providing a subsidy advantaging domestic over imported goods. And because disciplining subsidies contingent upon use of domestic over imported goods is an area of overlap between Article 3.1(b) of the SCM Agreement and Article III of the GATT 1994, Article 3.1(b)'s prohibition on subsidies contingent upon the use of domestic over imported goods also cannot be equated with subsidies provided for domestic production. Therefore, even ignoring the many other flaws in its arguments, the EU's claims also necessarily fail on this basis because, at best, the EU can only even attempt to show a subsidy provided for domestic production.

35. Fourth, the EU argument assumes, without support, that 777X fuselages and wings are saleable or traded "goods" capable of importation. Prior Appellate Body guidance confirms that "goods" within the meaning of Article 3.1(b) must be understood as products that are traded, and therefore capable of being imported. This necessarily excludes 777X fuselages and wings, which are not available in a commercial setting. In short, 777X fuselages and wings are not goods within the meaning of Article 3.1(b).

36. Fifth, the EU fails to establish that the "geared to induce" standard is appropriate in the context of Article 3.1(b), much less demonstrate with evidence that it is met in this case. In its brief argument, the EU states that the challenged measures are "geared to induce" the use of domestic over imported goods. The EU does not establish that this standard, which was endorsed in the context of Article 3.1(a), is appropriate in the context of Article 3.1(b). Once again, even aside from the fact that the 777X fuselage and wings do not constitute "goods" that Boeing would "use" within the meaning of Article 3.1(b), the evidence shows the challenged measures were not anticipated to, and did not, affect the proportions of domestic and imported content in the 777X.

37. By the time Washington was considering ESSB 5952, it was clear that Boeing would produce the 777X, as it has every model of commercial airplane throughout its 100-year history, in the United States. Moreover, ESSB 5952 has not prevented Boeing from planning to import significant foreign content for the 777X. Other Washington taxpayers too will receive the identical tax treatment challenged by the EU despite there being no restrictions on their use of goods, whether domestic or imported. In fact, a retailer selling exclusively imported commercial airplane components that it manufactured abroad would be entitled to the tax treatment challenged by the EU. The EU thus fails to establish a *prima facie* case, and the evidence actually contradicts its theory.

VII. CONCLUSION

38. The EU fails to make a *prima facie* case with respect to each of the elements of its claims, and with respect to each of the seven challenged measures. All of the EU's arguments, moreover, are based on an incorrect interpretation of Article 3.1(b) of the SCM Agreement that conflates subsidies that are contingent upon the use of domestic over imported goods with measures that are contingent on domestic production. Accordingly, and for the reasons as set out above, the United States requests that the Panel reject the EU's claims and find that the challenged measures are not inconsistent with the U.S. obligations under Article 3.1(b) of the SCM Agreement.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

I. INTRODUCTION

39. The EU's entire case, which alleges that the measures at issue are import-substitution subsidies prohibited by Article 3.1(b) of the SCM Agreement, is an effort to force a square peg into a round hole.

II. THE EU'S FAILURE TO ESTABLISH EACH ELEMENT OF ITS CLAIMS

40. The EU bases its claims on conditions − what the United States refers to as the Initial Siting Provision and the Future Siting Provision − that it alleges require the use of domestic over imported goods. In fact, the EU goes so far as to assert that the challenged measures "are expressly conditioned on the use of domestic over imported goods." However, in reality, the siting provisions by their plain language address only the scope of manufacturing that will take place in Washington. Neither provision addresses the use of goods at all, much less the domestic or imported character of goods that are used. This is evident from the explicit text of the Initial Siting Provision and the Future Siting Provision, and illustrated by the fact that the 777X will consist of a great deal of imported content, as well as domestic content from U.S. states other than Washington.

41. Beyond the EU's incorrect characterization of ESSB 5952, the EU's meager submission does nothing to lay out the relevant facts or link them to the WTO provision, Article 3.1(b) of the SCM Agreement, that it invokes. It does not describe the operation of the multiple measures it challenges. It does not establish that the challenged measures confer a subsidy within the meaning of Article 1 of the SCM Agreement. It does not explain how, based on the customary rules of interpretation of public international law used for interpreting the covered agreements, the analysis should proceed. This falls short of a complaining party's burden to present a *prima facie* case with respect to each element of its claims. And, as witnessed by the submissions of the United States and the third parties, the EU's many omissions have not obscured the fact that its claims rely upon multiple distortions of Article 3.1(b).

42. The EU also does not attempt to show that, if the Initial Siting Provision or the Future Siting Provision did require the "use" of fuselages or wings, one or both of those conditions would require that such fuselages or wings be domestic instead of imported. This is another example of the EU's silence on necessary elements of a *prima facie* case under Article 3.1(b).

43. The EU fails to explain why the 777X fuselages and wings are "goods" within the meaning of Article 3.1(b). In not addressing this element, the EU simply ignores inconvenient facts, such as that there are no buyers and sellers of 777X fuselages or wings, 777X fuselages and wings never exist in their completed forms separate and apart from the product that they are supposedly used to produce, *i.e.*, the finished airplane.

44. The EU also invokes a "geared to induce" standard endorsed by the Appellate Body only in the context of Article 3.1(a), but makes no effort to establish its proper application in the context of Article 3.1(b) or to prove that such a standard is met based on evidence in this dispute.

45. Another example of the EU's cursory treatment of the elements of its claims is its failure to identify the alleged financial contribution, including a normative benchmark, and benefit for each challenged measure. Instead, the EU points to a report in a different dispute − a report, the

United States notes, in which the panel rejected the EU's contention that three of the tax measures challenged in this dispute were subsidies, and which examined a period nearly 20 years earlier than the year in which alleged revenue foregone in this matter is alleged to begin. The EU then attempts to improperly shift the burden to the United States to prove that such measures are not subsidies. Nothing requires a respondent to rebut a case the complaining party has not made in the current dispute.

III. THE SWEEPING SYSTEMIC CONSEQUENCES OF THE EU'S INTERPRETATION OF ARTICLE 3.1(B)

46. The EU's interpretation of Article 3.1(b) would also have dangerous systemic consequences and would be at odds with the text of the provision, its context, and the object and purpose of the Agreement. For example, by seeking to frame the final stages of a production process as making "use" of "goods," the EU's theory would effectively turn every subsidy for production in the grantor's territory into a prohibited import-substitution subsidy. As nearly all of the third party submissions in this dispute make clear, this is not the proper interpretation of Article 3.1(b).

47. For example, as Canada points out, Article 6.1 and Annex IV:3 of the SCM Agreement demonstrate unambiguously that subsidies tied to production of a given product, without more, are not prohibited. Rather, they are properly the subject of a serious prejudice analysis under Article 5.

48. Australia observes that "it is important that the distinction is retained between the permitted payment of a subsidy to domestic producers and a subsidy which is contingent on the use of domestic over imported goods."

49. Similarly, Brazil notes that, given that Article III:8(b) of the GATT 1994 states that Article III does not prevent the payment of subsidies exclusively to domestic producers − which the United States addressed in its first written submission − "it would be incongruous to interpret Article 3.1(b) of the SCM Agreement to prohibit a measure simply based on the measure's link to domestic production."

50. Japan notes that among the "deficiencies" in the EU's analysis is the failure to recognize that "a law stating that a subsidy is contingent upon the domestic 'siting of' a certain program is different from a law stating that subsidy is contingent upon the 'use of 'the domestic product."

IV. THE RELEVANT FACTS DO NOT SUPPORT THE EU'S CASE, AND IN FACT UNDERMINE IT

51. The EU has invoked a provision that applies narrowly and in very specific factual situations. However, in this case, the measures bear none of the hallmarks of import-substitution subsidies. For example, the company whose behavior they were supposed to influence − Boeing − can use the tax measures despite planning to source much of the content for the 777X from outside the United States and from U.S. states other than Washington.

52. This is the case because the Initial Siting Provision and Future Siting Provision pertain only to the location of certain manufacturing activities. They do not distinguish between domestic and imported goods, and have nothing to do with import substitution. There is no evidence that either the Initial Siting Provision or Future Siting Provision is structured to discriminate against imported goods. They do not, and for that reason, they have not had that effect.

53. Moreover, companies other than Boeing can also use the tax measures without having to fulfill local content requirements or even meet production conditions. Indeed, the tax measures are available to aerospace companies for engaging in a range of activities, some of which are far afield of the use of goods, such as engineering work and R&D. Thus, the EU's arguments simply ignore how the challenged measures are structured and designed, and how they operate in the real world.

54. Thus, the siting provisions themselves do not support the contention that any alleged benefits are contingent on the use of domestic over imported goods. Moreover, the factual evidence lends no support to the EU's allegation that the Initial Siting Provision and Future Siting

Provision are structured to pursue, or do in fact accomplish, import substitution. Not only does the EU adopt an improper interpretation of Article 3.1(b), but the facts only further undermine the theory it advances.

EXECUTIVE SUMMARY OF U.S. CLOSING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

55. The EU's case remains deeply flawed. The EU proposes an overly broad interpretation of Article 3.1(b) of the SCM Agreement that is inconsistent with the ordinary meaning of the provision as a whole, its context, and the object and purpose of the treaty.

56. The EU also refuses to take account of the facts, which rather than support the EU's case, undermines and contradicts it. Instead, the EU relies on a range of false premises, including the notion that a wing for the 777X as a practical matter can be used or imported as a separate object prior to final assembly.

57. The EU emphasizes its *de jure* argument, which it identifies as its primary argument, and in which case the EU is required to show that the subsidy is contingent on the use of domestic over imported goods. However, the conditions it cites say nothing about "goods" at all, but instead talk about the commencement of manufacture, final assembly, wing assembly − all manufacturing and production activities which have no explicit or implicit reference to the use of goods.

58. The United States has explained that these are very predictable ways of defining the scope of the domestic manufacturing activity that a granting member would expect to take place in its territory to qualify for the tax treatment. There is no aspect of the SCM Agreement that would require any production or manufacturing subsidy to be granted only if it required that nothing more than the last screw was turned. Such an interpretation would turn virtually every manufacturing or production subsidy into an import substitution subsidy.

59. The EU, in its closing statement, refers to statements it thinks show that Boeing might have, or there would have been, some competitive opportunity in which the wing would be imported for the 777X. We understand this to be an effort to prove a *de facto* claim. But the EU's notion that the conditions of ESSB 5952 resulted in import substitution is divorced from reality and from what could have taken place.

60. The EU also asserts that the U.S. position that wings and fuselages are not used in aircraft is contrary to actual practice occurring for 100 years. The EU is relying on the definition of the terms "wings" and "fuselages," but these definitions say nothing about their use in the aircraft production process, and nothing about whether the fuselages or wings need to be "used" as "goods" in the 777X.

61. Turning to the EU's assertion that Boeing produces and assembles a wing, and then uses that wing to assemble the aircraft − that is not true. Boeing does not assemble a wing and then use that to assemble a final aircraft. A wing and a fuselage are never used prior to the final aircraft being created.

62. Lastly, the EU is suggesting that you can subsidize airplane production and asking why the text of ESSB 5952 specifies anything else. But the United States has made it clear that the text of ESSB 5952 specifies the scope of production expected in producing an airplane, *i.e.*, what it means to produce an airplane.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1 EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

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, even though Boeing plans to use a wide range of imported components for the 777X, including on its fuselage and wings. 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. 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 not designed and structured 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. 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*." 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. According to the EU, this combination alone converts what would otherwise be a production subsidy into a prohibited local content contingency.

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. 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." In this case, the 777X program demonstrates that there is at least indeed one such means for satisfying the two Siting Provisions, 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. 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.

II. Legal Standard: A Contingency is Prohibited Under Article 3.1(b) Only If it Requires the Use of Domestic over Imported Goods

8. The first major error in the EU's case is its incorrect interpretation of Article 3.1(b) of the SCM Agreement. The parties agree that this obligation does not prohibit subsidies contingent on the production of goods in the territory of a Member. 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. 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.

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

9. In the context of Article 3.1(b) of the SCM Agreement, a relation of contingency exists only where the "use of domestic over imported goods" is required to receive the alleged subsidy. In *Canada – Autos*, the Appellate Body applied this principle in the context of Article 3.1(b). According to the Appellate Body, 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).

10. 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. 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).

11. 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. The United States and the EU also cite largely the same provisions of the SCM Agreement as context. 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. Second, the EU seeks to characterize the meaning of "use" in Article 3.1(b) as either "broad" or "very broad." 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. 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 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.

12. The parties have also debated the meaning of the term "goods" as it appears in Article 3.1(b) of the SCM Agreement. 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). 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.

13. The EU has done nothing to meet its burden of establishing that the goods on the use of which the subsidy is allegedly contingent are or would be domestic. 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."

14. The dictionary definition of the word "over" is"{a}bove in degree, quality, or action; in preference to; more than." The EU argues that the relevant meaning is "more than" or "in excess of." 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. 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.*

1.1.2 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

15. 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." It explained further that "such conditionality can be derived by necessary implication from the words actually used in the measure." 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.

16. 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.

17. 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.

18. 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.

19. 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. 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. 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." Thus, DOR's interpretation of ESSB 5952 would also factor into the overall analysis of its meaning under Washington law.

20. 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. 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." 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.

21. 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*.

22. 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, 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." 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

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

24. 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," 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.

1.1.3 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

25. 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. This combination, according to the EU, "convert{s} what would otherwise be a production subsidy into a prohibited local content contingency," and represents the "express conditioning of the grant of a subsidy on use of domestic over imported inputs."

26. 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.

27. 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."

28. 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." 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." 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."

29. 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" and "wing" as "one of the airfoils that develops a major part of the lift which supports a heavier-than-air airplane." The OED, which the EU cites, 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," and "wing" as "one of the planes of an aeroplane."

30. 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.

31. The analysis is similar for the Second Siting Provision. 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.

32. 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. 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 such subsidies 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 Article III:8(b) of the GATT 1994.

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

33. 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.

34. 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.

35. This hole in the EU's argument is all the more obvious because of the factual circumstances of the 777X. And, as the United States previously noted, even if all the components of the 777X were fabricated outside the United States, 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. The EU has proposed that "domestic" means anything not imported. 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.

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

36. The United States recalled that 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. 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 alone 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.

37. 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. 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. But Article 3.1(b) does not cover subsidies contingent on the creation of the output of such a productive process.

38. 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. The EU further alleges that by requiring fuselages and wings to be manufactured in Washington, the two Siting Provisions prevent the importation of fuselages and wings that could otherwise occur in the absence of the challenged subsidies. However, these allegations cannot be reconciled with the factual evidence before the Panel. For example, the Boeing Expert Statement states that fuselages and wings are "elements of the output of the production process"– not inputs. 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. 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.

39. 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 insufficient to support its assertion that "aircraft *could* not be produced" without using fuselages and wings as inputs. 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.

40. In conclusion, 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

41. 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. 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.

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

42. The EU contends that the First and Second Siting Provisions "*require* the use of specific domestic goods." 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. The EU has largely ignored – and asked the Panel to disregard – the facts of the 777X production process, 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 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 make eligibility for the ESSB 5952 tax incentives contingent on the use of domestic over imported goods.

43. 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. The EU asserts that ESSB 5952 has distorted competitive opportunities for imported 777X fuselages and wings, 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. 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. 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.

44. For example, 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. In addition, ESSB 5952 places no conditions on the location of fuselage or wing structure fabrication, or on the origin of individual airplane parts. Moreover, 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.

45. 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.

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

46. 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), based on the Appellate Body's use of the "geared to induce" analysis to evaluate prohibited export subsidies in *EC – Large Civil Aircraft*. 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.

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

47. 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." 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. Most importantly, none supports the EU's *de facto* arguments.

48. ***"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, but 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.

49. ***Statement of Washington's Governor.*** The EU cites a statement by Governor Inslee "indicating that the 'legislation includes strong contingency language.'" A political statement is not direct evidence of what a measure actually requires, and 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.

50. ***Boeing's importation of "wings for its 787 from Japan."*** Boeing does not import complete 787 wings from Japan. Rather, Boeing imports multiple wing-related structures from Japan and must therefore conduct further wing assembly activity in the United States. 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.

51. ***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." This is incorrect in several respects, reflecting the EU's refusal to engage with the evidence. The facts directly contradict the EU's assertion that Boeing "formally decided against "importing 777X wings" once SSB 5952 was enacted."

52. ***"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." 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.

53. 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.

V. The EU Fails to Establish that the Challenged Measures Confer a Financial Contribution or a Benefit

54. 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. 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. 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.

55. 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.

56. 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. There is no reason to consider, as the EU does, that "maintain" in Article 3.2 of the SCM Agreement applies to the present and "grant" to the future. Moreover, the application of Article 1.1(a)(1)(ii) depends not on theoretical entitlements, but on an essentially counterfactual comparison. 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. 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.

57. In this dispute, the EU argues that a finding of benefit proceeds automatically from a finding that revenue is foregone. But that is not the case. Revenue is "foregone" for purposes of Article 1.1(a)(1)(ii) when the authorities provide tax 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. The EU's approach treats these measurements as identical when they

are, in fact, different. 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.

2 EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

58. During the first meeting, the United States described how the EU is trying to fit a square peg into a round hole. This is just as true today as it was then. Even if the challenged measures were found to be subsidies, they would be production subsidies, which even the EU acknowledges are not, in and of themselves, prohibited. They are simply not contingent on the use of domestic over imported goods. The EU attempts to stretch the scope of Article 3.1(b) of the SCM Agreement, and reads meaning into ESSB 5952 that simply is not there.

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

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

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

62. Furthermore, the EU has abstained from any detailed analysis of what would make a good "domestic" for purposes of Article 3.1(b). Rather, it appears that the EU assumes that a "good" is "domestic," at least for purposes of Article 3.1(b), if an article was modified in any way in the grantor's territory, irrespective of whether it was produced from foreign parts or how much value is attributable to the production or assembly step. Therefore, in any production process that involves more than one step, the first step will result in a "domestic good," and the second step necessarily will involve the use of that domestic good. Accordingly, under the EU's theory, a requirement that more than one production step be performed in the grantor's territory would make a subsidy contingent on the use of a domestic over an imported good.

63. Second, the EU is wrong in asserting that "it is a fact that aircraft 'use' wings and fuselages: without those inputs, the aircraft could not be produced." If the EU is suggesting that fuselages and wings are "used" as "goods" within the meaning of Article 3.1(b) merely because airplanes have fuselages and wings, the EU is mistaken. A manufacturer does not "use" every element of a finished good that one can point to and describe with a name. "Use" in the context of a manufacturing process refers to what goes into the process, and not the features of the product at the end of the process. Those are elements of the output, and not "goods" that are "used" themselves, but elements of a distinct finished good. To take an example, one can quite easily point to a finished building's façade, but the builder does not "use" the façade as a good within the meaning of Article 3.1(b). Likewise, just because one can point to a finished airplane's fuselage and wings does not mean that the manufacturer "used" the fuselage and wings as goods within the meaning of Article 3.1(b).

64. If the EU is suggesting that, as a factual matter, airplanes cannot be produced without first producing fuselages and wings as separate goods and then using them as inputs, this is inaccurate. The fuselage and wings of an airplane effectively make up the airframe and, as such, are functionally important elements of an airplane, but there is no definitional or physical reason why they would have to be produced as separate goods that are used as inputs. It is certainly feasible for an airplane to be assembled without first assembling a completed fuselage and wings as separate goods. Rather, fuselages and wings can be − and in the case of the 777X will be − completed only during and as part of the final assembly of the finished airplane. Therefore, the EU is wrong when it suggests that "it is a fact that aircraft use wings and fuselages "within the meaning of Article 3.1(b).

65. If the EU means that airplanes "use" fuselages and wings as "goods" by virtue of the fact that airplanes have fuselages and wings, this is a misinterpretation of the term "use." If, on the other hand, the EU means that, as a factual matter, a manufacturer must first produce fuselages and wings as separate goods and then use them as inputs to produce the finished airplanes, this is incorrect. As the 777X program demonstrates, a manufacturer need not assemble completed fuselages and wings prior to assembling the finished airplane.

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

67. The EU also asserts that its interpretation is necessary to give meaning to the words "fuselages" and "wings" as they appear in the definition of "significant commercial manufacturing program." It contends that the U.S. description of the operation of ESSB 5952, by contrast, would render those words meaningless and superfluous. This is nonsense. The words in question (*i.e.*, "fuselages" and "wings") appear within the definition of a defined term (*i.e.*, "significant commercial airplane manufacturing program"). They do what the words of any definition do − add clarity and concreteness to a term used elsewhere in the measure. In this case, the terms "siting" and "significant commercial airplane manufacturing program "form the condition that must be met for the legislation to take effect. And, it is logical that it clarified the meaning and ensured the desired level of significance for this commercial airplane manufacturing program in terms of the principal elements of the structural airframe, the fuselage and wings.

68. The EU also seeks to support its interpretation of ESSB 5952 by asserting that the "cardinal purpose" of ESSB 5952 was "making the importation of wings and fuselages of the 777X prohibitively expensive so as to ensure the use of domestic wings and fuselages over imported wings and fuselages." The EU's story is that Washington used ESSB 5952 to induce Boeing to use domestic, made-in-Washington goods in the production of the 777X. However, Washington decided not to require such use or otherwise define minimum local content (which, by the way, is the actual classic example of a local content contingency). Furthermore, under the EU's theory, Washington chose to effect the local content requirement not through the conditions themselves, but rather in the definitions section. According to the EU, Washington chose to focus on elements of an airplane, but ignore Boeing's sourcing of all of the various parts it purchases, a significant portion of which are actually to be imported and a significant portion of which are brought in from other U.S. states. And Washington also chose to ignore whether the goods used by all taxpayers other than Boeing were domestic or imported, while nonetheless providing the identical tax treatment made available to Boeing.

69. The EU's view is implausible. The text of ESSB 5952, as well as the surrounding facts, make it very clear that the point of ESSB 5952 was to ensure that a significant manufacturing program was sited in the state, in order to maintain and grow Washington's aerospace industry workforce. And it did just that; it did not have as its "cardinal purpose," nor did it actually require, the use of domestic over imported goods.

70. Fourth, the EU is incorrect that the factual circumstances of the 777X program are irrelevant. The 777X manufacturing program is the only one considered by DOR and determined to fulfill the First Siting Provision. It also has, since that determination, not been determined to trigger the Second Siting Provision. Therefore, it certainly is the most reliable evidence of the proper interpretation of ESSB 5952. And the 777X program will not include the production of completed fuselages and wings as separate goods that will then be used to produce the finished airplane. Because fuselages or wings − whether domestic or imported goods − are not produced as separate "goods" and then "used" as inputs in producing the finished 777X, and the program nevertheless was determined to satisfy the First Siting Provision and has not been found to trigger the Second Siting Provision, those Siting Provisions necessarily do not require the "use" of fuselages and wings as "goods" within the meaning of Article 3.1(b), much less require the use of *domestic* over imported fuselages and wings. Where, as here, factual evidence refutes the complaining Member's *de jure* arguments, the proper course is not to ignore the factual evidence, but to reject the *de jure* claim.

71. Fifth, the EU's entitlement theory of financial contribution highlights the insufficiency of the EU's cursory benefit argument. It is possible that an abstract entitlement exists, but no one uses it. As the EU itself states: "it is not necessary for any . . . actual foregoing to take place in order to qualify as a financial contribution." But if this were the case, there would be no benefit.

72. In addition, the EU's current financial contribution argument undermines its contingency arguments. In the context of Article 3.1(b) of the SCM Agreement, a relation of contingency exists only where the "use of domestic over imported goods" is required to receive the alleged subsidy. However, in this case, the tax treatment provided for by the alleged subsidies would still have been available until July 1, 2024, even if the supposed contingencies had never been met. This is because July 1, 2024, was the expiration date for the relevant tax treatment prior to the adoption of ESSB 5952. Accordingly, even on the EU's own theory, the alleged subsidies are not "dependent for their existence" on the use of domestic over imported goods.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

1. Australia has taken the opportunity to participate as a third party in this dispute as there are significant systemic issues about the interpretation of obligations under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

I. What is a prohibited subsidy under Article 3.1(b) of the SCM Agreement?

2. Australia recalls that Article 3.1(b) of the SCM Agreement prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods." In *Canada – Autos* the Appellate Body found that Article 3.1(b) of the SCM Agreement extends to contingency in fact, because to not do so "would make circumvention of obligations by Members too easy."[1]

3. The EU notes in paragraph 76 of its submission that the two provisions are "expressly conditioned on the use of domestic over imported goods." However, the EU does not clearly illustrate how it reaches that conclusion. It is also unclear whether the EU is suggesting that subsidies alleged to breach the SCM Agreement are contingent on the use of domestic goods in a *de jure* or *de facto* manner.

4. To make a claim that the legislation makes a subsidy contingent, *de jure,* on the use of domestic goods, the EU must point to the infringement set out in "the words actually used in the measure."[2] This standard was set by the Appellate Body in *Canada-Autos*. To make a claim that the legislation makes a subsidy contingent, *de facto*, on the use of domestic goods requires greater consideration of the facts. The *EC – Large Civil Aircraft* Appellate Body report provides guidance in the context of Article 3.1(a). It states that:

> [t]he existence of de facto export contingency, as set out above, "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy".[3]

5. Australia submits that the Panel can be guided by this approach in relation to Article 3.1(b). Accordingly, the Panel's determination in this case will depend on the finding of facts.

II. The Relationship between Article III:8(b) of GATT 1994 and Article 3.1(b) of the SCM Agreement

6. Australia notes that there is a legitimate scope within the WTO system for subsidies to domestic industries. This is recognised in Article III:8(b) of GATT 1994, which provides:

> The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

7. This was interpreted by the panel in *Indonesia – Autos* to "confirm that subsidies to producers do not violate Article III, so long as they do not have any component that introduces discrimination between imported and domestic products."[4]

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[1] *Canada – Autos*, Appellate Body report, para 142.
[2] *Canada – Autos*, Appellate Body report, para 123.
[3] *EC – Large Civil Aircraft*, Appellate Body report, para 1046.
[4] Panel Report, *Indonesia — Autos*, paras. 14.41–14.45.

8. Australia contends that the Panel should maintain and clarify the important distinction between the permitted payment of a subsidy exclusively to domestic producers and a subsidy which is contingent on the use of domestic over imported goods.

9. The Panel needs to assess whether the right to provide subsidies to domestic producers includes the right to require that the manufacturing *activity* occurs within the territory of the subsidising authority; and whether such a requirement could be characterised as one requiring the use of domestic over imported goods.

III. The scope for Members to provide subsidies to beneficiaries within their territory

10. Australia contends that the Panel should consider whether references to a "significant commercial airplane manufacturing program" and "fuselages and wings" in the legislation being examined in this dispute can be regarded as merely defining the scope of the beneficiary or beneficiaries of a subsidy rather than a requirement to use domestically produced goods.

IV. The scope for Members to provide subsidies based on geographical location

11. The legislation in question providing tax incentives to the aerospace industry (SSB5952) conditions the concessional tax arrangements on certain activities taking place in Washington State.

12. Should the tax incentives provided by Washington State be found to be a subsidy, and the references to wings and fuselages be found to merely define the beneficiaries of the subsidy, the Panel may find that the tax measures in question are permitted subsidies under Article III:8(b) of GATT. The intersection between the GATT and Article 3.1(b) of the SCM Agreement could be further explored by the Panel in this instance.

13. Australia considers that careful consideration should be given to whether the scope of a subsidy for manufacture and assembly based on geographical location amounts to the requirement to use domestic products over imported goods.

14. Careful consideration should also be given to whether the requirement to site the activity within the jurisdiction of the granting authority amounts to a local content requirement. The Panel needs to clarify whether the beneficiary of the tax incentive would receive benefits for manufacture and assembly regardless of the source of the inputs to manufacture and assembly.

15. Relevant context to consider the ability to limit or target subsidies to specific regions or within designated geographical regions within the jurisdiction of a granting authority is provided within the SCM. In particular, Article 8.2(b) and 2.2 of the SCM Agreement demonstrate that provision of subsidies on a regional basis is permitted.

16. 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

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. PROPER SCOPE OF THE CONTINGENCY UNDER ARTICLE 3.1(b) OF THE *SCM AGREEMENT*

1. Brazil would like to highlight that only two types of subsidies are prohibited under Part II of the *SCM Agreement*. As stated by the Appellate Body in *EC – Large Civil Aircraft*[1] :

> Only those subsidies that are conditioned on export performance or on import substitution are prohibited per se under Article 3 of Part II of the SCM Agreement. In contrast, all other subsidies are allowed under the SCM Agreement, albeit a Member granting such subsidies should not cause, through the use of the subsidies, adverse effects within the meaning of Article 5 of Part III, in which case it must remove the adverse effects or must withdraw the subsidies themselves.

2. In the case of Article 3.1(b) of the *SCM Agreement*, the import substitution subsidy has a particular contingency: "the use of domestic over imported goods". The contingency therefore hinges primarily on two elements: "goods" and their "use".

3. First, Brazil would like to emphasize that Article 3.1(b) of the *SCM Agreement* textually requires the use of "goods" to establish its contingency. It does not cover production requirements. A Member therefore is only prohibited from requiring the use of domestic "goods" as a condition for the granting of a subsidy. In other words, it is permissible to impose a condition upon the granting of a subsidy, as long as this condition is not tied to domestic goods. This is essentially what Brazil understands to have been the position expressed by the Appellate Body in *Canada – Autos*. A domestic "value-added" requirement is not prohibited unless it effectively or necessarily requires the use of domestic "goods".

4. The contingency under Article 3.1(b) therefore must be for domestic *products* to the detriment of imported *products. Mutatis mutandis,* the Appellate Body in *EC – Large Civil Aircraft* stated with regard to export contingent subsidies:

> Among the latter category of subsidies—that is, the actionable subsidies—are those granted to an export-oriented recipient, without being contingent upon export performance. The mere fact that such subsidies may increase the company's production sold in the export market does not bring them under the discipline of Part II of the SCM Agreement.[2]

In the same sense, Article 3.1(b) does not cover requirements other than requirements to use domestic products even if they ultimately lead to a gain in productivity of the domestic industry.

5. Second, the condition must concern the "use" of domestic goods over imported goods. The use of this term ("use") confirms that the "goods" in question must be "products" that are capable of being "used" in a commercial context.

6. Article 3.1(b) of the *SCM Agreement* does not prohibit subsidies affecting domestic and imported products generally, but only those which cause the *use* of domestic over imported goods. The contingency under Article 3.1(b) of the *SCM Agreement* must be established upon the actual *use* of the domestic product to the detriment of the imported product, not in relation to "any domestic transaction" it may entail. Given this exclusion applicable to the payment of domestic production subsidies, it would be incongruous to interpret Article 3.1(b) of the *SCM Agreement* to prohibit a measure simply based on the measure's link to domestic production. Article 3.1(b) requires more concrete evidence of a *de jure* or *de facto* contingency on the use of domestic over imported goods.

[1] Appellate Body Report, *EC – Large Civil Aircraft,* para. 1054.
[2] *Id.*

7. Subsidies programs are generally linked to a localization/domestic establishment requirement. This linkage may cause an incidental impact on local production and may benefit domestic producers of input products. Their products may become more attractive to the producer that established itself in the area as transportation costs go down and for other reasons. Thus, rather than importing products, the newly established domestic producer may start to use a larger share of domestic products as inputs. Clearly, such an indirect effect of the subsidy does not turn it into a prohibited subsidy.

8. In that respect, one must be careful not to make the same "false positive"- mistake that footnote 4 of the *SCM Agreement* warns against with respect to export contingency: it is not because a subsidy is granted to companies which export, that there is an "export contingency." The same applies to domestic producers. The fact that subsidies are granted to domestic producers does not, for that reason alone, mean that there is import substitution conditionality. In Brazil's view, the focus of the enquiry under Article 3.1 (b) should be on the conditionality of the subsidy and the extent to which it requires the "use" of domestic over imported "goods".

9. In conclusion, Brazil considers that in order to sustain a claim of violation of Article 3.1(b) of the *SCM Agreement*, a complainant must show that the subsidy in question has a specific contingency: that of the *use* of domestic *goods* over imported *goods*. Any subsidy that does not impose such a contingency is not prohibited under Article 3.1(b) and could only be challenged as an actionable subsidy under the *SCM Agreement*.

10. Blurring the line between prohibited and actionable subsidies would undermine the overall balance between Members' obligations under the WTO and their policy space, and it would unduly curtail the fomenting of industrial development. At the same time, the disciplines of the *SCM Agreement* must be respected in order to ensure a level playing field among Members and to minimize trade distortions. This requires a careful examination of the specific nature and implications of the conditions attached to a subsidy.

II. BRAZIL'S RESPONSES TO QUESTIONS FOR THIRD PARTIES

Reply by Brazil to question 1

It is not entirely clear to Brazil what the Panel means by "actual use or exercise of the fiscal incentive". If the Panel is asking whether the mere foreshadowing of a fiscal incentive is enough, the answer is clearly no.

Reply by Brazil to question 3

In sum, Article 1 defines a subsidy for purposes of the SCM Agreement. Article 2 defines "specificity" and also frequently refers to the "granting authority" and the "granting of disproportionately large amounts of subsidy", thus employing the same term "granting" as found in Article 3. Article 3 imposes a specific discipline for certain types of subsidies, prohibiting these categories. Article 3.2 imposes a specific requirement not to grant "or maintain" such prohibited subsidies and is thus part of the context in which the definition of a subsidy as set forth in Article 1 is to be read. In that respect, this provision is contextually "relevant", just like any other provision of the SCM Agreement.

Reply by Brazil to question 4

In light of the Vienna Convention's disciplines that the starting point for ascertaining "object and purpose" is the treaty itself, in its entirety, rather than a particular provision[3], Brazil understands that the object and purpose of Article 3.1(b) of the SCM Agreement is to prohibit import substitution subsidies contingent upon the use of goods, domestic over imported. Therefore, the interpretation of the term "goods" should not be made so as to blur the line between prohibited subsidies, which affect goods, and actionable subsidies, which affect production.

[3] Appellate Body Report, *EC – Chicken Cuts*, para. 238.

Reply by Brazil to question 5

Brazil understands that the SCM Agreement does not prohibit WTO Members from providing subsidies to producers contingent on the performance of production steps of a certain good in their territories. This production requirement could fall either upon the production of a final or an intermediate good. A subsidy can require the performance of production steps relating to the final good whose production is being subsidized or of the intermediate product which will be integrated into that specific subsidized production chain. A Member could just as well legitimately create, under Article 3.1(b) of the SCM Agreement, two separate subsidy programmes requiring the performance of production steps in its territory, one related to the final product and one related to the intermediate product which will be integrated into that specific subsidized production chain. In this sense, Brazil understands that the scenario submitted by Canada would not be a *de jure* contingency claim under Article 3.1(b) of the SCM Agreement.

Additionally, whether the conditionality in question amounts to a prohibited condition to "use domestic over imported goods" must be analysed based on the text of the specific subsidy program, in the light of its necessary implications and in the context of the total configuration of the facts of each situation.

Reply by Brazil to question 6

It is not entirely clear to what "guidance from previous cases" the Panel is referring because the Panel does not refer to any specific cases. In any case, Brazil considers that a *de facto* claim requires a panel to go beyond the text of the specific subsidies program and its necessary implications to examine the program in the context of the totality of the facts surrounding the granting of the subsidy.

The Panel should take into due consideration previous jurisprudence regarding *de facto* claims under Article 3.1(a) of the SCM Agreement for the analysis of a *de facto* claim under Article 3.1(b). In *EC – Large Civil Aircraft*, the Appellate Body ruled that the standard of *de facto* export contingency under Article 3.1(a) and footnote 4 of the SCM Agreement "would be met when the subsidy is 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"[4]. Mutatis mutandis, the fact that the granting of a subsidy might increase overall domestic production or decrease imports would not in and of itself be de facto contingent on the use of domestic over imported goods. It would have to provide an incentive that is not simply reflective of the conditions of supply and demand for domestic and imported goods.

In the analysis of a *de facto* contingency claim under Article 3.1(b), a Panel may also use some of the same tests or factors as in Article 3.1(a), such as a "but for" test or an expected sales ratio from a profit maximizing firm.

Reply by Brazil to question 7

The key legal matter in this connection is the proper understanding of the term "domestic" in Article 3.1(b) of the SCM Agreement, which is not defined in the Covered Agreements. To Brazil, the discipline contained in Article 3.1(b) requires a definition of "domestic" that makes economic sense. While it may be impossible to determine in the abstract the exact percentage of value added in the country concerned that is required to characterize a product as "domestic" in all cases, there certainly are cases that can be safely excluded – or included – in this definition. In any case, in Brazil's view, this is a factual question that is to be determined by looking at the specific nature of the specific product and its production process, in the light of applicable domestic legal requirements.

Reply by Brazil to question 8

Brazil refers the Panel to its answer to question 6.

[4] Appellate Body Report, *EC – Large Civil Aircraft,* para. 1.045

Reply by Brazil to question 11

What was emphasized in Brazil's submission was that the term "use" has already been interpreted by the Panel in US − Upland Cotton, which opposed the understanding that "any domestic transaction" would fall within the meaning of use. Furthermore, Brazil emphasizes the use of products so as to clearly delimit the prohibited subsidies from actionable production subsidies.

Brazil does not take a position on the specific facts of the case, but reiterates that the discussion of whether a subsidy is prohibited or not in light of Article 3.1(b) requires the analysis of whether the conditionality established within the subsidy programme is related to the performance of production steps or to the use of products. If the condition, for instance, simply requires a domestic production activity of the producer, it will likely not amount to a prohibited conditionality.

Reply by Brazil to question 12

Brazil will not delve into the specific facts as raised by the parties and will therefore not express a position on the ultimate merits of the parties' allegations that follows from applying the law to the facts of this case. The Panel's question whether "the use of a domestically assembled or manufactured wing always constitute[s] the use of domestic goods" is thus to be answered based precisely on the facts of this case rather than on the basis of categorical conclusions of what "always" or "never" will constitute use of domestic goods.

Brazil understands that a subsidy on the production of a certain good, with requirements on the performance of production steps along the production chain, would not be considered *de jure* contingent on the use of domestic over imported goods under the purview of Article 3.1(b). Therefore, an automatic contingency would not be present when a programme requires the assembly of a good in the territory of a Member. For a *de facto* contingency claim, an evaluation of the programme in practice would be needed.

Reply by Brazil to question 14

As mentioned before, Brazil understands that there is a fundamental difference between a requirement of the performance of production steps and a requirement of the use of domestic products for a *de jure* contingency under Article 3.1(b). A *de facto* contingency would require an analysis of the total configuration of the facts at hand. As a third party, Brazil only has limited access to the parties' factual and legal arguments and thus prefers not to express a definitive view on how the law applies to the facts of this particular dispute

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

1. The findings of the Panel in this dispute will have important consequences for the way in which the Agreement on Subsidies and Countervailing Measures (SCM Agreement) is interpreted and applied in future disputes. Canada therefore welcomes the opportunity to present its views to the Panel. Canada's submission addresses the issue of prohibited import-substitution subsidies under Article 3.1(b) of the SCM Agreement.

2. The European Union claims that the continuation and extension of subsidies[1] by Washington State in the form of tax benefits to Boeing under SSB 5952 are contingent upon the use of domestic over imported goods in violation of Article 3.1(b) of the SCM Agreement. The European Union thus alleges that a "programme-siting condition" and an "exclusive-production condition" require Boeing "to use wings and fuselages produced or assembled in Washington State in the final assembly of 777X LCA in Washington State".[2]

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. The European Union appears to be arguing that a subsidy is contingent on the use of domestic over imported goods where the producer of a final good is required to produce certain components of that good in order to receive the subsidy.[3]

4. Canada understands that under what the European Union describes as the "programme-siting condition" Boeing is required to locate the 777X development program and manufacture and/or assemble the 777X, including fuselage and wings, in Washington State.[4] A so-called "exclusive-production condition" confirms that Boeing must carry out the final assembly or wing assembly of (any) of its aircraft models in Washington State, and not elsewhere, in order to benefit from reduced taxes.[5]

5. Although Boeing may, in fact, "use" fuselages and wings produced in Washington State to receive the tax subsidies, the company would be *required* to manufacture and/or assemble those fuselages and wings *itself*. There is no requirement included in SSB 5952 to purchase wings, fuselages, parts used in the assembly thereof or other parts used in the assembly of the final aircraft produced in the United States. The European Union also did not provide any evidence suggesting that Boeing would *de facto* have to "use" domestic components other than those that the company manufactures itself.

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[1] The tax incentives challenged by the European Union under Article 3.1(b) are a reduced Business and Occupation ("B&O") tax rate for the manufacture and sale of commercial airplanes, a B&O tax credit for pre-production development for commercial airplanes and components, a B&O tax credit for property taxes on commercial airplane manufacturing facilities, an exemption from sales and use taxes for certain computer hardware, software, and peripherals, an exemption from sales and use taxes for certain construction services and materials, an exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes and an exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes (European Union's first written submission, para. 15).

[2] European Union's first written submission, para. 44, see also para. 52.

[3] The European Union claims that "pursuant to the programme-siting condition in Section 2 of SSB 5952, the post-2024 aerospace tax incentives were contingent on the establishment of a new commercial aircraft manufacturing programme that uses goods (i.e. fuselages and wings) produced in the United States (specifically, in Washington State). Under this condition, the tax incentives would not have been extended in duration to 2040 if Boeing had decided to 'use' imported wings and fuselages in the assembly of the 777X". European Union's first written submission, para. 74. (footnotes omitted; emphasis added). The European Union continues: "Likewise, pursuant to the exclusive-production condition, the reduced B&O tax rate subsidy for the 777X is contingent on Boeing's use of wings produced in the United States (specifically, in Washington State) exclusively. Under this condition, Boeing benefits from the reduced B&O tax rate for the 777X only so long as it 'uses' wings assembled exclusively in Washington State for the 777X, or any variant thereof". European Union's first written submission, para. 75.

[4] Substitute Senate Bill 5952, Chapter 2, Laws of 2013 3rd Special Session, 2014 Wash. Sess. Laws 2 (SSB 5952), Exhibit EU-03, section 2.

[5] Ibid. subsections 5(11)(e)(ii) and 6(11)(e)(ii).

6. Canada considers that a WTO Member is not prohibited from providing subsidies to its domestic producers, including where the subsidy to the producer of a final good is contingent either on the production or the assembly of an intermediate good by that same producer. In both instances, the subsidy is a production subsidy that is not contingent on the use of domestic over imported goods.

7. Nothing in the General Agreement on Tariffs and Trade 1994 (GATT 1994) or SCM Agreement prohibits a subsidizing Member from making the granting of a subsidy contingent on a recipient producing goods in its territory.[6] In fact, GATT Article III:8(b) explicitly allows WTO Members to provide subsidies to their domestic producers.[7] A producer of a final good that is required to produce an intermediate good is also a producer of the intermediate good. Therefore, a subsidy can be made contingent on the production of an intermediate as well as a final good.

8. Neither the GATT 1994 nor the SCM Agreement limit a subsidizing Member's ability to define the level of production required for subsidy eligibility purposes. As part of this discretion, a Member may explicitly require the production of an intermediate good. A Member's ability to condition the provision of a subsidy on a production requirement would be significantly curtailed if a Member could not require the production of an intermediate good. A production requirement would then have to be limited to simple assembly operations.

9. This position is supported by the Appellate Body's report in *Canada – Autos*. In that dispute, the Appellate Body assessed whether a measure providing Canadian automobile manufacturers with an import duty exemption contingent, *inter alia*, on satisfaction of a Canadian value-added (CVA) requirement, was inconsistent with Article 3.1(b) of the SCM Agreement.[8] Under the measure, a manufacturer could meet the CVA requirement by disclosing the aggregate of certain costs of producing vehicles in Canada listed in the definition of "Canadian value added".[9] A number of costs were included in the definition of CVA. The most relevant for the Appellate Body's analysis were (1) the cost of *domestic goods*, that is, those domestic parts and materials *purchased* by the manufacturer for use in the production of its motor vehicles[10], and (2) the cost of domestic labour[11], that is, the cost of all labour reasonably attributable to the production of vehicles. The latter would include the cost of labour used to produce intermediate goods.

10. In analyzing whether the CVA requirement was inconsistent with Article 3.1(b), the Appellate Body distinguished between the cost of labour and the cost of domestic goods. It found that the CVA requirement would violate Article 3.1(b) only if it required the manufacturer to use domestic goods.[12] However, it did not consider that a requirement to use domestic labour, regardless of whether that requirement may imply the production of intermediate goods, would violate Article 3.1(b).[13]

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[6] See Annex IV:3 of the SCM Agreement, which forms part of the rules under paragraph (a) of the now expired Article 6.1 for determining when a subsidy is deemed to have caused serious prejudice. Annex IV:3 explicitly refers to subsidies tied to the production of a given product. By contemplating that subsidies may be tied to production in the context of a serious prejudice analysis rather than in the context of a prohibition, Annex IV:3 recognizes that WTO Members are not prohibited from providing subsidies tied to production.

[7] Article III:8(b) of the GATT 1994 provides: "[t]he provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products"; See also Panel Report, *EC – Commercial Vessels*, paras. 7.69 and 7.75 where the panel found that contributions provided only to domestic producers of certain vessels were covered by GATT Article III:8(b) and therefore not inconsistent with GATT Article III.

[8] Appellate Body Report, *Canada – Autos*, para. 125.

[9] Ibid. paras. 124 and 125.

[10] Ibid. As the cost of producing intermediate goods is accounted for in the aggregate of the cost of purchased inputs and the manufacturer's own labour, the cost of domestic goods could not include the cost of intermediate goods produced by the manufacturer itself.

[11] Ibid. paras. 124 and 130.

[12] Appellate Body Report, *Canada – Autos*, para. 130: "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". (emphasis original).

[13] Ibid.:"if the level of the CVA requirements is very low, it would be much easier to satisfy those requirements *without* actually using domestic goods; for example, where the CVA requirements are set at 40

11. The European Union's interpretation would nullify the right of a WTO Member to require a subsidy recipient to produce goods, as defined by the Member, in its territory, in order to receive a subsidy. This has no basis in law, and would have considerable, negative consequences for industry given that most manufacturers produce intermediate goods as part of the production of their final goods. As such, and for the reasons set out above, the Panel should reject the interpretation advanced by the European Union.

per cent, it might be possible to satisfy that level simply with the aggregate of other elements of Canadian value added, in particular, labour costs". (emphasis original).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. This integrated executive summary summarizes the arguments and viewpoints presented by China to the Panel in its Third Party Submission, Oral Statements and responses to the questions following the substantive meeting. China mainly focuses on the two issues in this dispute in the executive summary: 1) legal framework of Article 3.1(b) of the SCM Agreement; and 2) whether the "Programme-Siting Condition" and "Exclusive-Production Condition" are consistent with Article 3.1(b) of the SCM agreement.

The Legal Framework of Article 3.1(b) of the SCM Agreement

2. At the outset, China indicates that in order to establish a *prima facie* case under Article 3.1(b), the EU is obligated to demonstrate: 1) relevant measures constitute subsidies under Article 1 of SCM Agreement; and 2) relevant measures are contingent upon the use of domestic over imported goods. China will not touch upon the first condition, but only focus on the second condition.

3. Firstly, China is of the view that "contingency" under Article 3.1(b) of the SCM agreement includes both contingency in law and contingency in fact. The Appellate Body clarified in *Canada-Autos* that "contingency" includes both contingency in law and contingency in fact and this legal standard applies not only to "contingency" under Article 3.1(a), but also to "contingency" under Article 3.1(b)[1]. Hence, China believes, under present dispute, if subsidies are found contingent upon import substitution, regardless in law or in fact, they shall be determined to constitute prohibited subsidies. In addition, China also mentions the finding of the Appellate Body made in *EC— Large Civil Aircraft* so as to establish the test for determining whether a subsidy is *de facto* contingent on export performance. Such test might be also applied in the present dispute.

4. Secondly, China believes the term "contingent" is a "key word" under Article 3.1(b). The ordinary connotation of "contingent" is "conditional" or "dependent for its existence on something else". Therefore, China is of the view that the Panel shall examine if the subsidies granted under "Programme-Siting Condition" and "Exclusive-Production Condition" are "conditional" or "dependent for its existence on something else" on the use of domestic over imported goods.

5. Thirdly, China does not agree with the United States' argument concerning the interpretation of "goods". If the logic of the United States stands, it will be contradictory to each other, since the components of fuselages and wings from upstream will be treated as goods, while the fuselages or wings assembled in downstream are not goods. With respect to the criterion of "traded" presented by the United States, China believes the connotation of "tradable" means the goods has the value of trading instead of being traded in reality. Therefore, China does not think the interpretation of "goods" provided by the United States is convincing.

6. Fourthly, China is of the view that the prohibited subsidy under Article 3.1(b) is established on the basis of contingency upon "use" of domestic over imported goods. Contrary to the United States' claim that fuselages and wings are not "inputs" that are "used" as goods in the 777X production process[2], China believes that "use" of domestic **intermediate goods** in the course of production may also meet the condition on "use" of domestic over imported goods. If the conditions concerned would result in a *de facto* situation that the 777X programme prefers the domestic components or other intermediate goods, the condition of "use" of domestic over imported goods is also met.

7. Fifthly, China is of the view that Article III of the GATT on which relied by the United States is not relevant to the present dispute. China does not deny that it is possible that Article III.8(b) of the GATT can be used for context in the interpretation of Article 3.1(b) of the SCM Agreement.

[1] Appellate Body Report, *Canada – Autos*, para.123.
[2] First Written Submission of the United States, para.110-115.

However, China believes that these two Articles impose different obligations to Members. Article III.8(b) exempts the subsidy provided to domestic producers from the obligations of Article 3.2 and 3.4 of the GATT 1994. However, when the subsidy provided to the domestic producers is contingent on use of domestic over imported goods, it will still constitute prohibited subsidies under Article 3.1(b) of the SCM Agreement. Therefore, China believes that Article III:8(b) of the GATT is not the legal basis to exempt the "Programme-Siting Condition" and "Exclusive-Production Condition" from Article 3.1(b) of the SCM Agreement.

Whether the "Programme-Siting Condition" and "Exclusive-Production Condition" are consistent with Article 3.1(b) of the SCM agreement

8. China is of the view that the analysis regarding "Programme-Siting Condition" and "Exclusive-Production Condition" shall take into account the contingency both in law and in fact perspectives.

9. With regard to the "Programme-Siting Condition", China notes that the text in SSB 5952 does not expressly or implicitly indicate LCA must purchase any products including wings or fuselage which are produced in Washington State to fulfill the "Programme-Siting Condition". There seems no sufficient evidence in law proving the "Programme-Siting Condition" would constitute a *de jure* subsidy within the scope of Article 3.1(b).

10. However, China believes that taking into account of the cost saving from logistic and tax incentives aspects, it will be more favourable to purchase the wings and fuselages components or other intermediate goods produced in Washington State in the final assembly process of 777X. Therefore, the "Programme-Siting Condition" might result in a situation domestic components are favoured than imported components. China suggests the Panel to conduct an examination on this regard.

11. With regard to the "Exclusive-Production Condition", according to its provisions and statement made by the Governor of Washington State, the B&O tax rate reduction is specifically contingent on being sited in Washington State, and it requires that both final assembly and wing assembly have to be in the Washington State. China believes that if the both procedures have to be in the same State, it will create more incentive to use more domestic components due to cost saving and efficiency perspective.

12. China suggests that the Panel shall examine whether the "Exclusive-Production Condition" provision in SSB 5952 through implicit expression shall be considered as a *de jure* subsidy within the meaning of Article 3.1(b). And if it does not constitute *de jure* prohibited subsidy, China believes that the Panel shall make an objective assessment on the fact in relation to the production process of wings, so as to determine whether the "Exclusive-Production Condition" provision in SSB 5952 shall be considered as a *de facto* subsidy within the meaning of Article 3.1(b), through evaluating (i) the design and structure; (ii) the modalities of operation; and (iii) the relevant factual circumstances of B&O tax rate reduction under "Exclusive-Production Condition".

Conclusion

13. To conclude, China is of the view that the Panel shall take into account of the contingency in law and in fact to determine whether the tax incentives upon "Programme-Siting Condition" and "Exclusive-Production Condition" within SSB 5952 constitute subsidies upon use of domestic over imported goods within the meaning of Article 3.1(b) of SCM Agreement. In addition, China believes that certain interpretations of the United States, including "use", "goods" and "relationship between GATT Article III and Article 3.1(b) of SCM Agreement" shall not be supported by the Pane

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Introduction

1. The Government of Japan presents its systemic views in this dispute brought by the European Union against the United States with respect to certain aerospace tax incentives enacted by the State of Washington in 2003, as amended and extended by Substitute Senate Bill 5952 ("SSB 5952").

II. Contingency Under Article 3.1(b) of the SCM Agreement

A. Legal Standard

2. Regarding the legal standard for "contingency" under Article 3.1(b) of the SCM Agreement, the Appellate Body in *Canada – Autos* has clarified that the same legal standard for establishing contingency under Article 3.1(a) also applies for establishing contingency under Article 3.1(b).[1]

3. In that respect, Japan recalls that the Appellate Body in *EC – Large Civil Aircraft* noted that the condition of contingency would be met under Article 3.1(a) of the SCM Agreement when the subsidy is granted so as to provide a certain "*incentive to the recipient*".[2] Under Article 3.1(b) of the SCM Agreement, Japan is of the view that this legal standard focused on the incentive requires a comparison between the use of domestic goods and imported goods, and that this interpretation especially suits the meaning of the word "*over*" used in Article 3.1(b) of the SCM Agreement.[3]

4. Therefore, in this regard, Japan agrees with the European Union's legal analysis that to establish contingency under Article 3.1(b) of the SCM Agreement the same framework as suggested by the Appellate Body in *EC – Large Civil Aircraft* for Article 3.1(a) should be used.[4]

B. Evidentiary Standard

1. *De Jure* Contingency

5. Japan asks the Panel to carefully examine what *exactly* the law itself states and what it necessarily implies since, as clarified by the Appellate Body in *Canada – Autos*, the evidentiary standard for a *de jure* contingency is that "conditionality can be derived by necessary implication from *the words actually used in the measure*."[5]

6. When there is an ambiguity in the law or if the relevant governmental official is given a degree of discretion, "evidence of consistent application of such laws, pronouncements of domestic courts on the meanings of such laws, the opinions of legal experts, and the writings of recognized scholars" should also be considered. [6]

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[1] Appellate Body Report, *Canada – Autos*, para. 123. This view was later reiterated by the Panel in *US – Upland Cotton* and left untouched by the Appellate Body in the same case.

[2] Appellate Body Report, *EC—Large Civil Aircraft*, paras. 1045, 1047. (emphasis added)

[3] Japan notes that the dictionary defines the term "over" as meaning "in preference to", "in excess of" or "more than". (*The New Shorter Oxford English Dictionary*, 4th edn., L. Brown (ed.)(Oxford University Press, 1973, 1993). The term "over", therefore, functions as a marker of comparison. Thus, establishing whether the domestic product is used in preference to the imported product necessarily implies a comparison between the use of the former and the latter.

[4] EU FWS, para. 77.

[5] Appellate Body Report, *Canada – Autos*, para. 123. (emphasis added)

[6] Appellate Body Report, *US – Carbon Steel (India),* para. 4.446 (quoting Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101; *US – Carbon Steel*, para. 157).

2. *De Facto* Contingency

7. The United States points out that the European Union has presented no evidence or arguments related to the anticipated ratio of the use of domestic to imported goods for the Boeing Company ("Boeing") with and without the challenged measure.[7]

8. In this regard, the Appellate Body admits in *EC – Large Civil Aircraft* that the assessment as to whether a subsidy is "geared to induce" export performance under Article 3.1(a) "could be based" on a comparison between the ratio of anticipated export and domestic sales of the subsidized products (namely, the "anticipated ratio"), and the same ratio in the absence of the subsidy (namely, the "baseline ratio").[8] However, it does not mention that such ratio is always relevant to establish *de facto* contingency.[9]

9. Similarly, in examining whether a subsidy provides an incentive to use domestic over imported products under Article 3.1(b) of the SCM Agreement, Japan is of the view that such comparison between the baseline and anticipated ratios may not necessarily provide a basis for determining whether a subsidy provides an incentive to its recipient.

10. One reason for this is that the increase of the use of the domestic product may be caused by *other factors*, such as certain market developments including diverging shifts in the prices of domestic products as compared to imported products. However, such other factors causing the increase of the use of the domestic product must be distinguished from the effect of *the subsidy itself,* and the effects that may be caused by these *other factors* must not be attributed to the subsidies.[10]

11. Therefore, Japan asks the Panel to cautiously examine the utility of the "anticipated ratio" test. Whether a particular subsidy provides an incentive to its recipient must be primarily inferred from "the total configuration of the facts constituting and surrounding the granting of the subsidy",[11] rather than by relying on the "anticipated ratio."

12. Japan also recalls that the Appellate Body introduced the "anticipated ratio" test as one way to determine *de facto* export contingency under Article 3.1(a) and footnote 4 of the SCM Agreement, which reads in relevant part that a subsidy is "in fact tied to … anticipated exportation."[12] In other words, the "anticipated ratio" test has a textual basis in the term "anticipated exportation" in footnote 4. In addition to Japan's comments on the overall utility of the "anticipated ratio" test, therefore, in any event, the suggested "anticipated ratio" test developed under Article 3.1(a) should not be simply imported into the evidentiary standard for the purpose of Article 3.1(b) inquiry, since Article 3.1(b) contains no reference to "anticipated" use of domestic over imported goods.

C. Application of the Legal and Evidentiary Standards

13. In light of the legal and evidentiary standards described above, Japan considers that the EU's analysis in respect of the "programme-siting condition" and "exclusive-production condition" may fall short of meeting the standard required to establish the contingency under Article 3.1(b) of the SCM Agreement.

14. We urge the Panel to, firstly, very carefully examine what *exactly* the law itself states and what is necessarily implied by the legislation in question (as a *de jure* claim) as well as its design, structure and modalities of operation (as a *de facto* claim), and then, determine whether the provision of the subsidies provides incentives for the use of domestic goods over imported goods. If anything, more careful explanations appear to be necessary to connect facts and legal analysis in paragraphs 42 to 52, and 73 to 79 of the EU FWS.

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[7] US FWS, para. 134.
[8] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1044, 1047.
[9] *Ibid*., para. 1047.
[10] *Ibid*., para. 1047 notes that when making the comparison between the "anticipated" and "baseline" ratios, "all other things" must be equal.
[11] *Ibid*., para. 1046, citing Appellate Body Report, *Canada – Aircraft*, para. 167.
[12] *Ibid*.,paras. 1042-1045.

1. The "Programme-Siting Condition"

15. First, in respect of the "programme-siting condition," it appears that 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.

16. Further, with respect to the incentive of the subsidy, there is no explanation in the EU's submission as to how the subsidy is granted so as to provide an incentive to Boeing to use domestic goods in a way that is not simply reflective of the conditions of supply and demand in a domestic market consisting of domestic goods and imported goods undistorted by the granting of the subsidy.

17. Japan submits that certain subsidies to the producer of a final good contingent on the production of an intermediate good by the same producer can be inconsistent with Article 3.1(b) of the SCM Agreement, depending on the factual circumstances of a case. Had there been an outright exclusion of subsidies contingent on domestic manufacturing of intermediate goods from the scope of Article 3.1(b), it would have allowed WTO Members to easily "circumvent the disciplines" of Part II of the SCM Agreement.[13]

18. Therefore, in order to determine whether a subsidy granted to the producer of a final good contingent on the production of an intermediate good by that same producer complies with Article 3.1(b) of the SCM Agreement, a panel should scrutinize the exact content of the requirements for the subsidy and how they operate for particular manufacturers receiving the subsidy. If, through such scrutiny, the requirement for the production of intermediate goods is found to require or incentivize the use of such domestic intermediate goods in final goods in actual situations, then the requirement would be in breach of Article 3.1(b).

2. The "Exclusive-Production Condition"

19. Second, in respect of the "exclusive-production condition," the words actually used in the legislation are not completely clear as to whether, by virtue of the requirement for the locus of the final assembly or wing assembly, the revenue from the 777X will not benefit from the reduced Business and Occupation ("B&O") tax rate if these assembling activities take place outside Washington State.

III. Goods under Article 3.1(b) of the SCM Agreement

A. Imported Goods

20. Japan submits that, for the purpose of a claim under Article 3.1(b) of the SCM Agreement, it is not necessary that the concerned goods are actually traded or are tradable.

21. The United States argues that because 777X fuselages and wings are "custom-designed for and unique to the 777X and its production process" and "[n]o potential purchasers for such articles exist", 777X fuselages and wings are not saleable or traded, and thus are not "goods" within the meaning of Article 3.1(b).[14] The United States relies primarily on the word "imported" that qualifies the word "goods" in Article 3.1(b). To follow this logic, certain products would be determined not to be "goods" within the meaning of Article 3.1(b) merely because an individual company receiving the subsidy at issue custom-designs the product and commissions a limited number of contractors to produce it.

22. Although Japan is not fully cognizant of the precise meaning which the United States attribute to the terms "tradeable" or "custom-designed" goods, which are not the treaty words in the SCM Agreement, it should be noted as a preliminary issue that Japan does not agree with the proposition that custom-designed goods developed for a particular product model are not capable of being sold, traded, or imported for that matter. Japan fails to see how the particular characteristics of "custom-design" preclude the goods from being "tradeable", *e.g.* from being

[13] Appellate Body Report, *US – Softwood Lumber IV*, para. 64.
[14] US FWS, Section VI.D, including para. 129.

supplied at arm's length from outside sources. In addition, Japan has two concerns in relation to the limited interpretation of the term "goods" for the purpose of Article 3.1(b).

23. First of all, such interpretation would open up an easy path for circumventing subsidy disciplines under Article 3.1(b) of the SCM Agreement. Indeed, WTO Members would be able to exclude a subsidy contingent on the use of domestic goods from the coverage of the SCM Agreement by simply labelling products as custom-designed. Japan recalls that the Appellate Body in *US – Softwood Lumber IV* cautioned against an interpretation of the provisions of the SCM Agreement which would permit the circumvention of the subsidy disciplines and that this consideration was highly pertinent for the Appellate Body's overall conclusion that non-tradable goods are not excluded from the scope of "goods" for the purpose of Article 1.1(a)(1)(iii) of the SCM Agreement.[15]

24. Second, such interpretation of "goods" under Article 3.1(b) has the risk of resulting in a wholly arbitrary application of this provision with unpredictable consequences for the following reasons. A product with the same basic characteristics may be custom-designed or sold in a standardised form depending on the wishes of a particular customer. Likewise, a particular company may, at times, produce and sell virtually the same product with some custom-designed characteristics, and, at different times, with standardised characteristics due to a number of factors such as a change in economic situation or the company's business strategy. However, following the United States' interpretation, although essentially the same product is produced and sold, whether it is covered or not covered by the SCM Agreement, would depend on the wishes of the customer or the company's business strategy at any given point in time leading to a wholly arbitrary application of Article 3.1(b) of the SCM Agreement.

25. Limiting the application of Article 3.1(b) to "tradeable" goods would, thus, hinder the consistent application of Article 3.1(b) to the detriment of the object and purpose of that provision.

26. Therefore, Japan submits that, for the purpose of a claim under Article 3.1(b) of the SCM Agreement, it is not necessary that the concerned goods are actually traded or tradable.

B. Domestic Goods

27. Japan considers that a product assembled entirely from imported components can be a "domestic […] good" within the meaning of Article 3.1(b) of the SCM Agreement for the following reason.

28. As discussed above, the phrase "domestic over imported goods" in Article 3.1(b) suggests that the term "domestic" can refer to anything that is not imported.

29. Hence, even if a product is assembled entirely from imported components, when *the product itself is not imported*, the product should be regarded as "domestic". Otherwise, the product could be categorized arbitrarily as either "domestic" goods or "imported" goods. This would significantly undermine the object and purpose of − the SCM Agreement by creating room for circumvention of the obligation under Article 3.1(b) of the Agreement.[16]

IV. Burden of Proof and the Relevance of Findings Made by Preceding Panels and the Appellate Body

30. The United States argues that the European Union relies on facts and legal conclusions established in a separate dispute, *US — Large Civil Aircraft*, and fails to make a *prima facie* case.[17] The United States points out, *inter alia*, that while the panel in that dispute addressed facts that existed in 2006, the present dispute involves measures that differ from those at issue in that dispute.[18] The United States submits that the existence of prior panel findings in *US — Large Civil*

[15] Appellate Body Report, *US – Softwood Lumber IV*, paras. 64 and 67.
[16] See Appellate Body Report, *Canada – Autos*, para. 142.
[17] US FWS, para. 81.
[18] *Ibid.*, paras. 82 and 87.

Aircraft does not excuse the European Union from the burden of proof that normally applies in an original dispute.[19]

31. Japan agrees with the United States that a complainant has to provide sufficient facts and arguments to allow the Panel to perform its own objective assessment of the matter, as required under Article 11 of the DSU.[20] Nonetheless, in Japan's view, this does not mean that a complainant is precluded from relying on findings contained in previously adopted panel reports if and to the extent such findings are appropriate for the consideration of the matter before the Panel.

32. Japan observes that the Panel in this dispute should make an objective assessment of the facts of the case including the issue of whether and to what extent it may rely on the findings of the previous panel, taking into consideration any differences in the factual circumstances of the two cases.

33. In this regard, it appears that the aerospace tax incentives (other than the B&O tax rate reduction) in this dispute consist of both the tax incentives that were found by the panel in *US — Large Civil Aircraft* to involve a financial contribution and those that were not. As a complainant, the European Union should clearly distinguish the two sets of tax incentives, and elaborate on the reasons why it considers that the Panel is allowed to rely on the *US — Large Civil Aircraft* panel's and the Appellate Body's findings in examining the WTO-consistency of each of the challenged measures.

[19] *Ibid*., para. 90.
[20] *Ibid*., paras. 85-86.; Panel Report, *US—Shrimp and Sawblades*, para. 7.6.

ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

LETTER FROM THE PANEL, 15 JANUARY 2016

The Panel acknowledges receipt of the United States' request to extend the deadline for the second written submissions by an additional week (i.e. that the Panel set a date no earlier than 25 March 2016).

The Panel adopted the present Timetable taking into account, among other considerations, the unavailability of the United States' lead attorney to attend a panel meeting during the week of 14 March 2016, as indicated at the organizational meeting. Accordingly, the second substantive meeting was postponed from 15-16 March, as suggested in the draft Timetable initially sent to the parties, to 5-6 April.

The Panel is cognisant of the direction under Article 12.4 of the DSU that sufficient time be given for the preparation of submissions. At the same time, it is to be recalled that these proceedings are required, under the SCM Agreement, to be expedited. What might be considered to be sufficient in expedited and in non-expedited proceedings will necessarily be different.

The Panel believes that it has fairly accommodated the parties' concerns as expressed at the organizational meeting in the adoption of the present Timetable. The concerns which have now more recently been expressed by the United States do not convince the Panel that insufficient time has been given for the preparation of submissions by the parties. In particular the Panel does not agree that the United States will only have two days to prepare its second submission.

Accordingly, the Panel declines the United States' request for an extension of the deadline for the second written submissions.

ANNEX D-2

LETTER FROM THE PANEL, 4 MAY 2016

The Panel is in receipt of the United States' communication of 28 April 2016, in which it asked for the opportunity to comment on certain factual evidence and arguments that were submitted by the European Union on 25 April with the European Union's comments on the United States' responses to Panel questions. The Panel has also received the European Union's comments of 2 May 2016 on the United States' request.

In its request, the United States refers to eight new exhibits that were provided by the European Union with its comments on the United States' responses. The United States "disagrees with the [European Union's] interpretation of this evidence and how [the European Union] employs the evidence in its argumentation". According to the United States, an opportunity to comment on this factual evidence and arguments would help to protect the United States' rights as a responding Member without delaying this proceeding any more than necessary.

In response, the European Union asks the Panel to reject the United States' request. In the European Union's view, the United States has not explained why a new opportunity to comment, which is not envisioned in the Panel's timetable, would be essential to protecting the United States' procedural rights. The European Union submits that the due process rights of the United States must be balanced with the procedural right of the European Union to a speedy resolution of the dispute, which would be affected if the United States' request were accepted. The European Union also states that the circumstances relating to the submission of the exhibits at issue, as well as the nature of the exhibits themselves, do not merit an additional set of comments. According to the European Union, the new factual evidence and related argumentation was offered as a rebuttal to arguments that the United States made in its responses to Panel questions. Nothing in this new factual evidence was previously unavailable to the United States and with respect to two exhibits the United States itself relied on and referred to the relevant documents before the European Union submitted them as exhibits. The European Union concludes that not having an additional opportunity to submit comments would not prejudice the due process right of the United States in this dispute.

Thus, in summary, the United States requests the Panel to give it the opportunity to comment on the factual evidence submitted by the European Union, and the European Union submits to the Panel that such an opportunity to comment is not envisioned by the Panel's timetable and is not otherwise merited.

The Panel's Working Procedures do not allow for any further submissions or comments from the parties at this point in the proceedings, other than in the case of the parties' comments on the interim report. Thus, the question for the Panel to decide is whether it should permit a departure from the Working Procedures. The way in which this might be justified would be if the Panel formed the view that the due process rights of a party − here, the United States − would be impacted without such an opportunity.

There are a number of different considerations for a Panel to take into account in a situation such as this. An important consideration is the degree to which the matters that a party seeks to address were themselves new, were unexpected, or were not advanced by the other party fairly.

The Panel recalls paragraph 7 of its Working Procedures:

> Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

The Panel notes that the exhibits referred to by the United States in its request were provided by the European Union as part of its comments on answers provided by the United States. In its request for an opportunity to comment on these exhibits and on the associated arguments, the United States has neither alleged nor provided any indication that the exhibits submitted by the European Union go beyond evidence that is necessary for purposes of "comments on answers provided by the other party". The Panel sees no indication that either the exhibits or the arguments of the European Union go beyond the "purposes of rebuttal, answers to questions or comments on answers provided by the other party". Thus, the European Union was acting within its rights under the Working Procedures in submitting that evidence.

The Panel has also reviewed the content of each of the eight exhibits submitted by the European Union with its comments on the United States' responses. Each of these exhibits and the related argumentation seems to relate to specific points raised by the United States in its responses to Panel questions. There is no indication that any of these exhibits introduces substantially new arguments or factual evidence of a nature that had not been previously submitted or discussed by the parties. Indeed, the United States has not argued otherwise, stating only, in support of its request, that it "disagrees with the [European Union's] interpretation of this evidence and how [the European Union] employs the evidence in its argumentation".

Accordingly, the Panel finds that the United States has not established that it should have a further opportunity to comment on the evidence and arguments submitted by the European Union at this stage of the proceedings. Such an opportunity is not contemplated in the current Working Procedures or timetable, and could potentially lead to a prolonged cycle of exchanges of additional evidence and arguments between the parties. Under the present circumstances, this would not clearly serve to protect the procedural rights of either party, and would be particularly undesirable in the current proceedings, which under the SCM Agreement should be expedited. The due process rights of the parties are framed by the Working Procedures, and in this case we do not see a proper or sufficient justification to depart from them.

For the reasons expressed above, the Panel declines the request of the United States in its communication of 28 April 2016.