United States – Conditional Tax Incentives for Large Civil Aircraft

(DS487)

FIRST EXECUTIVE SUMMARY OF THE UNITED STATES

March 14, 2016

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

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.