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United States – Conditional Tax Incentives for Large Civil Aircraft

(DS487)

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TABLE OF ABBREVIATIONS AND ACRONYMS

ACRONYM/SHORT FORM	FULL PHRASE
BCI/HSBI Procedures	Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information
B&O	Business & Occupation
CFRP	Carbon Fiber Reinforced Plastic
DOR	Washington State Department of Revenue
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ESSB 5952	Washington State Engrossed Substitute Senate Bill 5952
EU FWS	First Written Submission of the European Union (Dec 9, 2015)
GATT 1994	General Agreement on Tariffs and Trade 1994
HB 2294	Washington State House Bill 2294
HB 2466	Washington State House Bill 2466
IAM	International Association of Machinists
LCA	Large Civil Aircraft
RCW	Revised Code of Washington
R&D	Research and development
RPF	Request for Proposal
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SSB 6828	Washington State Substitute Senate Bill 6828

INTRODUCTION

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[1] 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 SCM Agreement.[2] 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.

2. 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 extension of the tax measures did take effect thanks to the siting of Boeing's 777X program 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." Consistent with this objective, the conditions in ESSB 5952 identified by the EU – the Initial Siting Provision and the Final Siting Provision[3] – address aerospace-related production *activities*, and not the use of goods. The EU's attempts at misdirection in this regard are in vain. The EU cannot change the facts.

3. The Initial Siting Provision and the Final 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. Not surprisingly given that ESSB 5952 was not intended or designed to require the use of domestic over imported goods, the EU is unable to show that it does require the use of domestic over imported goods as a condition for any subsidy. (And, in fact, the 777X will include a substantial amount of imported content.)

4. The SCM Agreement provides for expedited proceedings in the case of prohibited subsidy claims. But quick is not the same as hasty; the SCM Agreement does not call for less or less demanding scrutiny. This submission demonstrates that, when the EU's claims are subjected to appropriate scrutiny, they fail for several reasons.

5. ***First, the EU fails to meet its burden as the complaining party in an original dispute.*** It is important to note that, 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

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[1] The EU incorrectly refers to the bill enacting the relevant extension and conditions as Substitute Senate Bill 5952, or SSB 5952. In fact, the bill ultimately enacted was Engrossed Substitute Senate Bill 5952.

[2] Agreement on Subsidies and Countervailing Measures.

[3] The EU terms these a Programme-Siting Condition and an Exclusive-Production Condition respectively.

a state of "dependen{ce} for its existence on something else."[4] 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. Yet, time and again 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). 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. Section IV addresses this point in greater detail.

6. ***Second, 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. 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.[5] 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. 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 forgone can be compared. Section V discusses these shortcomings further.

7. ***Third, the EU incorrectly states that the text of ESSB 5952 "expressly condition{s}"[6] 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."[7] 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. 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

[4] *Canada – Aircraft (AB)*, para. 166 (*citing The New Shorter Oxford English Dictionary*).

[5] *See US – Large Civil Aircraft (Panel)*, para. 7.212. The three measures previously found not to be subsidies are the sales and use tax exemptions for construction services and materials; the leasehold excise tax exemption; and the property tax exemption.

[6] EU FWS, para. 76.

[7] EU FS, para. 76 (emphasis added).

that a company has made a final to 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.[8] 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."[9] 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. Section VI.A discusses this point further.

8. ***Fourth, 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. 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. 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. Accordingly, as explained in greater detail in Section VI.B, the EU's claims fail.

9. ***Fifth, 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. Section VI.C discusses this point further.

10. ***Sixth, the EU argument assumes, without support, that 777X fuselages and wings are saleable or traded "goods" capable of importation.*** Prior Appellate Body guidance confirms

[8] ESSB 5952, § 2 (Exhibit EU-3).

[9] ESSB 5952, §§ 5-6 (Exhibit EU-3).

that "goods" within the meaning of Article 3.1(b) must be understood as products that are traded, and therefore capable of being imported.[10] This necessarily excludes 777X fuselages and wings, which are not available in a commercial setting, and **[BCI]**.[11] In short, 777X fuselages and wings are not goods within the meaning of Article 3.1(b). The United States addresses this point further in Section VI.D.

11. ***Seventh, 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),[12] 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. 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. As the United States discusses further in Section VI.E, the EU thus fails to establish a *prima facie* case, and the evidence actually contradicts its theory.

I. BACKGROUND: WASHINGTON'S AEROSPACE INDUSTRY AND BOEING'S PRODUCTION OF COMMERCIAL AIRPLANES

A. The Washington Aerospace Industry

12. 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.[13] Nearly 20 percent of U.S. aerospace jobs are in Washington.[14]

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

[11] Boeing Expert Statement (Exhibit USA-1(BCI)).

[12] *See EC – Large Civil Aircraft (AB)*, para. 1044.

[13] *Aerospace Manufacturing Skills: Supply, Demand, and Outcomes for Washington's Aerospace Training Programs: Annual Report – 2014*, Workforce Training and Education Consulting Board and State Board for Community and Technical Colleges, p. 4 (Feb. 2015) (Exhibit USA-3).

[14] *Aerospace Manufacturing Skills: Supply, Demand, and Outcomes for Washington's Aerospace Training Programs: Annual Report – 2014*, Workforce Training and Education Consulting Board and State Board for Community and Technical Colleges, p. 4 (Feb. 2015) (Exhibit USA-3).

Washington also outpaces other leading states in both specialization and overall employment in the aerospace sector. Aerospace employment is nearly nine times more concentrated in Washington than across the rest of the nation, and approximately 135,700 individuals in Washington are employed in aerospace-related industries.[15]

13. Furthermore, the workforce in Washington is highly sophisticated. Of employees in core aerospace occupations, 23.5 percent work in architecture and engineering, 15.6 percent work in business and financial operations, and 11.1 percent work in computer and mathematical occupations.[16] The state has invested heavily in several aerospace-focused training programs,[17] and the number of students in the five aerospace and community technical college programs increased 53 percent over the five-year period between 2009 and 2014.[18] The most significant increase is in plastics engineering technicians, due to the increasing importance of composite materials. Roughly 2,100 individuals are currently employed in composites in Washington; this figure is expected to grow to 2,475 by 2019.[19]

14. A major part of Washington's emergence and continued role as an aerospace hub is owed to the presence of Boeing Commercial Airplanes ("Boeing"), a subsidiary of The Boeing Company. Boeing has deep roots in Washington, which continues to be the center of its operations worldwide. Boeing was founded in Washington in 1916, and today two of Boeing's three major production facilities are there:

- Renton is Boeing's primary single-aisle commercial aircraft production facility with roots dating to World War II. Today Renton produces 42 737NGs per month – a figure that is expected to rise to 52 in 2018. Production of the 737NG is being gradually replaced by that of the 737 MAX, a re-engined version of the NG.[20]
- Everett is Boeing's primary twin-aisle commercial aircraft production facility, where major assembly operations began in 1967. The Everett site produces the 747, 767, 777,

[15] *Aerospace Manufacturing Skills: Supply, Demand, and Outcomes for Washington's Aerospace Training Programs: Annual Report – 2014*, Workforce Training and Education Consulting Board and State Board for Community and Technical Colleges, p. 4 (Feb. 2015) (Exhibit USA-3).

[16] *Aerospace Manufacturing Skills: Supply, Demand, and Outcomes for Washington's Aerospace Training Programs: Annual Report – 2014*, Workforce Training and Education Consulting Board and State Board for Community and Technical Colleges, p. 7 (Feb. 2015) (Exhibit USA-3).

[17] *Aerospace Manufacturing Skills: Supply, Demand, and Outcomes for Washington's Aerospace Training Programs: Annual Report – 2014*, Workforce Training and Education Consulting Board and State Board for Community and Technical Colleges, p. 8 (Feb. 2015) (Exhibit USA-3).

[18] *Aerospace Manufacturing Skills: Supply, Demand, and Outcomes for Washington's Aerospace Training Programs: Annual Report – 2014*, Workforce Training and Education Consulting Board and State Board for Community and Technical Colleges, p. 12 (Feb. 2015) (Exhibit USA-3).

[19] *See Aerospace Manufacturing Skills: Supply, Demand, and Outcomes for Washington's Aerospace Training Programs: Annual Report – 2014*, Workforce Training and Education Consulting Board and State Board for Community and Technical Colleges, p. 21 (Feb. 2015) (Exhibit USA-3).

[20] Boeing Expert Statement, para. 33 (Exhibit USA-1(BCI)).

> and 787 Dreamliner airplanes. In addition, development of the 777X is based in Everett, and Boeing plans to produce the 777X there as well. All of these aircraft are built in Everett's main assembly building, which is the largest manufacturing building in the world, with 472 million cubic feet of space over 98.3 acres. Other production areas at the Everett site include paint hangars, the flight line (a paved area for parking aircraft awaiting delivery to customers), and the delivery center (a building for meeting with customers).[21]

15. The third production facility is in North Charleston, South Carolina, which is home to a second final assembly and delivery facility for the 787 Dreamliner (*i.e.*, in addition to Everett).[22] The first delivery of a 787 assembled in South Carolina was in 2012.[23] Thus, 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.[24]

16. Today, Boeing employs roughly 80,000 individuals based in Washington State – roughly half of the total Boeing workforce.[25] By comparison, Boeing employs roughly 16,000 people in California, 15,000 in Missouri, and 8,000 in South Carolina.

B. Boeing's Development of LCA

17. 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.[26] Many variables across a long time horizon dictate the success or failure of a program, making such investments very risky.[27] In this atmosphere, Boeing requires an elaborate planning system for bringing new aircraft to market,

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[21] Boeing Expert Statement, para. 33 (Exhibit USA-1(BCI)).

[22] In addition, the North Charleston campus fabricates, assembles and installs systems for aft (rear) fuselage sections of the 787 Dreamliner and joins and integrates mid-body fuselage sections. (The assets for manufacturing these fuselage sections were previously owned by Vought Aircraft Industries until July 2009, when Boeing purchased them.) *See About Boeing South Carolina*, Boeing (available at http://www.boeing.com/company/about-bca/south-carolina-production-facility.page) (Exhibit USA-4).

[23] *About Boeing South Carolina*, Boeing (available at http://www.boeing.com/company/about-bca/south-carolina-production-facility.page) (Exhibit USA-4).

[24] Boeing Expert Statement, para. 33 (Exhibit USA-1(BCI)).

[25] *Boeing in Brief*, Boeing (available at http://www.boeing.com/company/general-info) (Exhibit USA-5).

[26] Boeing Expert Statement, para. 22 (Exhibit USA-1(BCI)).

[27] *See* Boeing Expert Statement, para. 22 (Exhibit USA-1(BCI)).

which can be simplified as occurring in four phases: pre-launch, launch, post-launch, and entry into service and industrial ramp-up.[28]

18. The planning process for the 777X program was constrained from the start by the fact that it was to be based on the existing 777 program, which has been produced (including the wing and fuselage) in Everett, Washington since the 1990s, and which remains in active production. In terms of the production system for the 777X, **[BCI]**.[29]

19. Below, the United States briefly discusses both the 777 and 777X programs. With respect to the 777X in particular, the United States notes that **[BCI]**. Moreover, even after ESSB 5952 was adopted, Boeing considered alternative site locations for the 777X program, **[BCI]** in the United States, **[BCI]**.[30] Thus, as the Boeing Expert Statement states: "Boeing's make/buy, production siting, and supplier selection processes (*i.e.*, for 'buy' items) were **[BCI]**."[31]

1. 777: Origins of the 777X

20. The 777X is a new aircraft program based on the 777 program. The 777 is a twin-aisle aircraft designed for approximately 300-375 passengers. Although the concept of the 777 dates to 1978, the aircraft was not launched until October 29, 1990.[32] Boeing decided to manufacture the 777 in Everett, Washington, and rolled out the first 777 in a public ceremony on April 9, 1994.[33] Since that time, Boeing has introduced several variants of the 777 with varying passenger capacities and ranges. The best-selling variant is the 777-300ER, which is typically configured for approximately 350-375 passengers and has a range of 7,825 nautical miles.[34] The 777-300ER continues to be manufactured today and sells well, with a backlog of 176 unfilled orders as of the end of 2015.[35]

21. The 777-300ER has a fuselages and wing composed primarily of aluminum.[36] The fuselage consists primarily of parts purchased from Japanese companies and exported to the

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[28] Boeing Expert Statement, para. 23 (Exhibit USA-1(BCI)).

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

[30] Boeingn Expert Statement, para. 61 (Exhibit USA-1(BCI)).

[31] Boeing Expert Statement, para. 57 (Exhibit USA-1(BCI)).

[32] Boeing Expert Statement, paras. 35-36 (Exhibit USA-1(BCI)).

[33] Boeing Expert Statement, para. 36 (Exhibit USA-1(BCI)).

[34] 777 Backgrounder, Boeing (available at http://www.boeing.com/resources/boeingdotcom/media/paris2015/pdf/Backgrounders/bkg_777_family.pdf) (Exhibit USA-6).

[35] Boeing Expert Statement, para. 37 (Exhibit USA-1(BCI)).

[36] *See* Boeing Expert Statement, para. 38 (Exhibit USA-1(BCI)).

United States by sea.[37] However, Spirit AeroSystems makes Section 41, the nose section, in Kansas.[38] With respect to the wing, Boeing currently manufactures the main outboard wing boxes in Everett, while the center wing box is manufactured in Japan and exported to Everett.[39] Peripheral components of the wing are manufactured by various Boeing suppliers, including Spirit AeroSystems, CASA, Vought, Korean Airlines Aerospace Division, and others.[40]

22. As discussed below, many of the production and supplier choices for the 777X mirrored those of the 777-300ER. The main exception was that the 777X wing will be made primarily of CFRP rather than aluminum.

2. Development and launch of the 777X

a. Initial Planning

23. **[BCI]**.[41]

24. **[BCI]**, Boeing had made high-level make/buy decisions for an aircraft based on the 777-300ER with new engines and a CFRP wing (later to be known as the 777X) and **[BCI]**:[42]

- **[BCI]**.
- **[BCI]**.
- **[BCI]**.[43]

25. As the Boeing Expert Statement explains, **[BCI]**:

- **[BCI]**. [44]
- **[BCI]**.[45]

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[37] Boeing Expert Statement, para. 38 (Exhibit USA-1(BCI)).

[38] Boeing Expert Statement, para. 38 (Exhibit USA-1(BCI)).

[39] Boeing Expert Statement, para. 38 (Exhibit USA-1(BCI)).

[40] Boeing Expert Statement, para. 38 (Exhibit USA-1(BCI)).

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

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

[43] Boeing Expert Statement, paras. 42, 52 (Exhibit USA-1(BCI)).

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

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

- **[BCI]** [46]

26. Boeing's initial plan to manufacture the 777X **[BCI]** the first IAM vote on November 13, 2013.[47] The commercial launch of the 777X occurred on November 17, 2013, at the Dubai Airshow in the United Arab Emirates.[48]

b. Boeing's Multi-State Site Search

27. On November 11, 2013, Washington Governor Jay Inslee signed ESSB 5952 into law. However, on November 13, 2013, Boeing's Puget Sound-region labor union, the International Association of Machinists (IAM) local chapter 751, voted to reject a proposed contract with Boeing. As a result of this vote – and notwithstanding the prior passage of SSB 5952 – Boeing initiated a multi-state search for a new site for the 777X.

28. During this process, **[BCI]** Boeing issued RPFs to many U.S. states, requiring proposals for site locations for 777X main wing box fabrication and wing, fuselage, and final assembly operations.[49] **[BCI]**.[50]

29. As the Boeing Expert Statement explains: "Boeing's preferred scenario was to co-locate major wing box structure fabrication and aircraft assembly operations either in the same facilities or in close proximity to each other."[51] Although Boeing considered an alternative scenario in which the largest wing box structures (*i.e.*, not the wing itself) would be fabricated at a separate location, **[BCI]**.[52]

30. Boeing asked for responses to the RFP by December 10, 2013, and began reviewing them after receipt. In addition, Boeing conducted site visits to several U.S. locations.

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

[47] Boeing Expert Statement, para. 44 (Exhibit USA-1(BCI)).

[48] *Boeing Launches 777X with Record-Breaking Orders and Commitments*, Boeing (Nov. 17, 2013) (Exhibit USA-7).

[49] *See* Boeing Expert Statement, para. 46 & note 7 (Exhibit USA-1(BCI)).

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

[51] Boeing Expert Statement, para. 46 (Exhibit USA-1(BCI)).

[52] *See* Boeing Expert Statement, paras. 43, 47 (Exhibit USA-1(BCI)). The EU asserts that "Mitsubishi Heavy Industries . . . reportedly approached Boeing about producing the wings for the 777X in Japan." EU FWS, para. 78. However, there is no evidence that Mitsubishi Heavy Industries' proposal involved full assembly of the wing outside the United States, **[BCI]**. *See* Boeing Expert Statement, paras. 42-43, note 6 (Exhibit USA-1(BCI)).

c. Boeing's Final Decision to Site the 777X Program in Everett, Washington

31. The site visit process was still ongoing as of January 3, 2014, when the IAM voted a second time on a proposed contract with Boeing, this time approving the contract.[53] Boeing immediately and publicly called off the multi-state site search and reverted to the plan that had existed prior to November 13, 2013, to **[BCI]**.[54] Ever since, Boeing has continued with planning for the 777X program to be sited in Everett.

3. Boeing's Planned 777X Manufacturing Operations in Everett

32. Boeing's planned manufacturing operations for the 777X in Everett are characterized by, *inter alia*, the following:

- The completion of the fuselage and wings only in the course of final assembly of the aircraft, after unfinished fuselage and wing elements have been joined with each other;[55]
- For the fuselage, sourcing of all primary structures from suppliers outside Washington, mostly as imports from Japan;[56]
- For the wings, fabrication in Everett of only the largest, most logistically challenging structures (*i.e.*, **[BCI]**), with all, or virtually all, other wing structures originating from outside Washington, including imports from **[BCI]**;[57]
- Fuselage and wing assembly operations that each represent **[BCI]** of the total costs of the fuselage and wing, respectively.[58]

33. These and other relevant facts are provided in the Boeing Expert Statement, which details the planned 777X manufacturing operations in Everett. These are recounted below.

34. The Boeing Expert Statement describes the initial 777X fuselage manufacturing operations at Everett as follows:

- "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. When the fuselage building opens, it will first handle

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[53] *See Machinists Say Yes, Secure 777X for Everett*, Dominic Gates, *Seattle Times* (Jan. 3, 2014) (Exhibit USA-9).

[54] Boeing Expert Statement, para. 49 (Exhibit USA-1(BCI)); *Machinists Say Yes, Secure 777X for Everett*, Dominic Gates, *Seattle Times* (Jan. 3, 2014) (Exhibit USA-9).

[55] Boeing Expert Statement, paras. 52-53 (Exhibit USA-1(BCI)).

[56] Boeing Expert Statement, para. 52 (Exhibit USA-1(BCI)).

[57] Boeing Expert Statement, para. 52 (Exhibit USA-1(BCI)).

[58] Boeing Expert Statement, paras. 54-55 (Exhibit USA-1(BCI)).

fuselage work for current 777 models and then, **[BCI]**, begin work on 777X structures even as it continues work on current 777 models."[59]

- "**[BCI]**, the fuselage structures **[BCI]**."[60]
- "The structures for Section 41, the foremost fuselage section that will eventually house the flight deck, are produced by Spirit AeroSystems in Kansas . . . . Kawasaki Heavy Industries of Japan produces **[BCI]** Section 43, which will join to Section 41. In the fuselage building, Boeing **[BCI]**."[61]
- "The aft fuselage structures (for Sections 46, 47, and 48) are produced by Mitsubishi Heavy Industries in Japan. The aft-most section, Section 48 (which is not pressurized), **[BCI]** the aft part of the fuselage."[62]
- "The center fuselage section incorporates Section 44 and Section 11/45. Kawasaki Heavy Industries of Japan produces the side and crown panels that Boeing forms into Section 44. Unlike other parts of the fuselage, however, the center section does not have a keel panel. The bottom of the center section is instead formed by Section 11/45, which Boeing constructs from structures produced by Fuji Heavy Industries of Japan: **[BCI]**."[63]
- "Boeing's work in the fuselage building results in three large, and still separate, sections of the fuselage: the forward (Sections 41 and 43), center (Sections 44 and 11/45), and aft (Sections 46-48). **[BCI]**."[64]
- "The three fuselage sections are then **[BCI]**."[65]

35. The Boeing Expert Statement then provides an overview of the initial 777X wing manufacturing operations:

- "The Composite Wing Center (CWC) . . . is being built close to the main factory building . . . . It is responsible for fabricating **[BCI]** 777X wing structures, **[BCI]**."[66]
- "**[BCI]**."[67]
- "**[BCI]**."[68]

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[59] Boeing Expert Statement, para. 52(a) (Exhibit USA-1(BCI)).

[60] Boeing Expert Statement, para. 52(b) (Exhibit USA-1(BCI)).

[61] Boeing Expert Statement, para. 52(b) (Exhibit USA-1(BCI)).

[62] Boeing Expert Statement, para. 52(d) (Exhibit USA-1(BCI)).

[63] Boeing Expert Statement, para. 52(e) (Exhibit USA-1(BCI)).

[64] Boeing Expert Statement, para. 52(f) (Exhibit USA-1(BCI)).

[65] Boeing Expert Statement, para. 52(g) (Exhibit USA-1(BCI)).

[66] Boeing Expert Statement, para. 52(h) (Exhibit USA-1(BCI)).

[67] Boeing Expert Statement, para. 52(i) (Exhibit USA-1(BCI)) (footnote omitted).

[68] Boeing Expert Statement, para. 52(j) (Exhibit USA-1(BCI)).

- "**[BCI].**"[69]

36. The Boeing Expert Statement describes the 777X final assembly operations as follows:

- "**[BCI].**"[70]
- "**[BCI].**"[71]
- "The center fuselage structure and outboard wing structures are then brought together in the wing-body join stage of the moving assembly line. This is the first point at which the main wing structures – the two outboard wings and the center wing box – are joined together. **[BCI].**"[72]
- "The final assembly process then moves into final body join, and the subsequent final assembly position, where the following operations complete the airframe and install the major remaining systems: **[BCI].**"[73] The Boeing experts provide the following picture illustrating "the final body join process for the 777 (which will likely be similar to that for the 777X):"[74]

- "The aircraft is then rolled out of the main factory building for the last series of operations: painting of the non-wing exterior surfaces; fueling and fuel systems check; installation and testing of remaining interior items and systems (*e.g.*, in-flight

[69] Boeing Expert Statement, para. 52(k) (Exhibit USA-1(BCI)).

[70] Boeing Expert Statement, para. 52(l) (Exhibit USA-1(BCI)).

[71] Boeing Expert Statement, para. 52(m) (Exhibit USA-1(BCI)).

[72] Boeing Expert Statement, para. 52(n) (Exhibit USA-1(BCI)).

[73] Boeing Expert Statement, para. 52(o) (Exhibit USA-1(BCI)).

[74] Boeing Expert Statement, para. 52(o) (Exhibit USA-1(BCI)).

entertainment, system software); remaining functional testing; and Boeing and customer test flights."[75]

37. As the Boeing experts observe, "neither a complete fuselage nor complete wings enter the final assembly process, and the fuselage and wings contain significant content originating from outside Washington State, including imported structures."[76] They also note that the final cost to Boeing of assembling the 777X fuselage is **[BCI]** percent of the total cost of the 777X fuselage, while, similarly, the cost of wing assembly is **[BCI]** percent of the total cost of the 777X wings.[77]

II. WASHINGTON'S TAX SYSTEM AND THE CHALLENGED MEASURES

38. 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.[78] 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.

A. B&O Tax

39. Alone among U.S. states, 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.

40. The B&O tax applies to categories of business activities, rather than categories of income or categories of taxpayers, and the tax rate varies depending on the type of business activity. In

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[75] Boeing Expert Statement, para. 52(p) (Exhibit USA-1(BCI)).

[76] Boeing Expert Statement, para. 53 (Exhibit USA-1(BCI)).

[77] Boeing Expert Statement, paras. 54-55 (Exhibit USA-1(BCI)).

[78] Title 82 of the RCW addresses excise taxes. Within Title 82, Chapter 82.04 provides for a business and occupation ("B&O") tax, Chapter 82.08 provides for a retail sales tax, Chapter 82.12 provides for a use tax, and Chapter 82.29A provides for a leasehold excise tax. Title 84 of the RCW addresses property taxes. Within Title 84, Chapter 84.36, entitled "Exemptions," identifies property subject to taxation as well as exemptions, including the specific exemption challenged by the EU.

other words, business taxpayers (whether for-profit, non-profit, or another type of organization)[79] are taxed on the basis of the activities in which they engage in the State of Washington. As a result, a taxpayer may face more than one B&O tax rate because of different activities in which it engages. For example, if a manufacturer produces a good and provides related consulting services within Washington, then its manufacturing activity would be taxable under the appropriate manufacturing B&O tax classification and the consulting under the services and other activities B&O tax classification.

41. In 1935, when the B&O tax was established by the Revenue Act, a uniform rate of 0.25 percent applied to all business activities except services (which were taxed at 0.50 percent). However, over time, Washington established B&O tax rates particular to individual categories of business activities. Because each stage of production is taxed under the B&O tax, producers at the later stages of production pay higher effective tax rates. In other words, the B&O tax is a "pyramiding tax," *i.e.*, goods 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.[80] 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. Currently, the four major activity classifications are manufacturing, wholesaling, retailing, and services and other.[81] There are other smaller subcategories as well. There is a generic rate that applies to an activity that does not fall into one of the specific tax rates established by Washington for the relevant activity classification.

B. Retail Sales Tax

42. Washington has a retail sales tax, which is its principal tax source (*i.e.*, of all revenue, including both business and non-business tax revenue).[82] 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.[83] Generally, the seller is liable to the state

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[79] *See* RCW § 82.04.030 (Exhibit USA-10).

[80] *See US – Large Civil Aircraft (Panel)*, para. 7.98.

[81] *Q&A: What are the major B&O tax classifications?*, Washington Department of Revenue (available at http://dor.wa.gov/content/QuestionsAndAnswers/article.aspx?id=10344) (Exhibit USA-11).

[82] Retail Sales Tax Explanation, Washington Department of Revenue (available at http://dor.wa.gov/Content/FindTaxesAndRates/RetailSalesTax/Default.aspx) (Exhibit USA-12).

[83] *Services Subject to Sales Tax*, Washington Department of Revenue (available at http://dor.wa.gov/Content/FindTaxesAndRates/RetailSalesTax/RetailServices.asp) (Exhibit USA-13). In addition, sales of digital products are subject to the sales tax. *Digital Products including Digital Goods*, Washington Department of Revenue (available at http://dor.wa.gov/content/getaformorpublication/publicationbysubject/taxtopics/digitalproducts.aspx) (Exhibit USA-14).

for collection of the retail sales tax. In cases where the seller is not liable, such as when the seller does not conduct business within Washington, the use tax discussed below may apply.[84]

43. 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.[85]

C. Use Tax

44. 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."[86] 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.[87]

45. The use tax is determined on the basis of the value of the goods or services when first used in Washington, which generally corresponds to the purchase price.[88] Use tax rates are equivalent to sales tax rates.[89] In addition, like the sales tax, the use tax is imposed by both the state government and local governments. The tax is imposed on the privilege of using as a consumer specified goods or services in Washington.[90]

D. Property Tax

46. 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

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[84] *See* RCW § 82.12.020 (Exhibit USA-17).

[85] The total effective retail sales taxes are available at Washington State Department of Revenue, "Local Sales, Use Tax Rates and Changes" (Effective January 1-March 31, 2006), http://dor.wa.gov/docs/forms/ExcsTx/LocSalUseTx/LocalSlsUseFlyer_Quarterly.pdf (Exhibit USA-7).

[86] *See* RCW §§ 82.12.020 (Exhibit USA-17); 82.12.035 (Exhibit USA-18).

[87] Use Tax Explanation, Washington Department of Revenue (available at http://dor.wa.gov/content/FindTaxesAndRates/UseTax/) (Exhibit USA-19).

[88] Use Tax Explanation, Washington Department of Revenue (available at http://dor.wa.gov/content/FindTaxesAndRates/UseTax/) (Exhibit USA-19).

[89] Local Sales, Use Tax Rates and Changes, Washington State Department of Revenue (Effective Jan. 1 – Mar. 31, 2006) (providing total effective retail sales taxes) (available at http://dor.wa.gov/docs/forms/ExcsTx/LocSalUseTx/LocalSlsUseFlyer_Quarterly.pdf) (Exhibit USA-16).

[90] Retail Sales Tax Explanation, Washington Department of Revenue (available at http://dor.wa.gov/Content/FindTaxesAndRates/RetailSalesTax/Default.aspx) (Exhibit USA-12).

taxing district purposes."[91] Thus, all real and personal property is subject to tax. However, a number of exceptions to this general rule apply. For example, property valued at less than $500, churches and cemeteries, business inventory, and property owned by federal, state, and local governments are all exempt from property taxation.[92]

47. 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.[93]

E. Leasehold Excise Tax

48. 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. RCW § 82.29A.030(1)(a) provides, in relevant part: "There is levied and collected a leasehold excise tax on the act or privilege of occupying or using publicly owned real or personal property or real or personal property of a community center through a leasehold interest on and after January 1, 1976, at a rate of twelve percent of taxable rent." 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.[94]

49. The 12 percent rate is then multiplied by an additional tax, which is currently set at 7 percent.[95] Thus, the total leasehold excise tax rate is 12.84 percent of the rent paid for the property.[96]

III. THE CHALLENGED MEASURES AND CONDITIONS IN ESSB 5952

50. 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.[97] The EU challenges

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[91] Exhibit USA-20.

[92] *See* RCW §§ 84.36.010 (Exhibit USA-21), 84.36.020 (Exhibit USA-22), 84.36.477 (Exhibit USA-23).

[93] Washington Constitution, art. 7 § 2 (Exhibit USA-24).

[94] Leasehold Excise Tax Explanation, Washington Department of Revenue (available at http://dor.wa.gov/content/FindTaxesAndRates/OtherTaxes/tax_leasehold.aspx) (Exhibit USA-25).

[95] RCW §§ 82.29A.030(2) (Exhibit USA-26), 82.02.030 (Exhibit USA-27).

[96] Leasehold Excise Tax Explanation, Washington Department of Revenue (available at http://dor.wa.gov/content/FindTaxesAndRates/OtherTaxes/tax_leasehold.aspx) (Exhibit USA-25).

[97] *See* EU FWS, para. 15.

these measures "as amended and extended" by ESSB 5952.[98] As discussed below, ESSB 5952 extended the expiration date for the challenged measures and made certain other limited changes to them, provided that the Initial Siting Provision was fulfilled. A portion of their application is rescinded if the Future Siting Provision is ever triggered.[99]

51. The challenged measures have several important features:

- *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.
- *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.
- *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.

52. Each of the challenged measures, as well as ESSB 5952, are discussed in turn below.

A. Challenged Tax Measures

1. B&O Tax Rate of 0.2904 Percent

53. The B&O tax rate, the expiration of which was extended by ESSB 5952, is set out at RCW § 82.04.260(11), which states:

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

[98] Thus, the EU claims appear to pertain exclusively to the time period from July 1, 2024 to July 1, 2040, with perhaps the exception of the Future Siting Provision to the extent it could theoretically be triggered prior to 2024.

[99] ESSB 5952 is not itself a measure challenged by the EU.

> (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.
>
> (c) For the purposes of this subsection (11), "commercial airplane" and "component" have the same meanings as provided in RCW 82.32.550.

54. Thus, under RCW § 82.04.260(11), every commercial airplane manufacturer and retailer within Washington, as well as every manufacturer and retailer of commercial airplane components within Washington,[100] and every manufacturer of tooling for the manufacture of commercial airplanes or airplane components, is entitled to a B&O tax rate of 0.2904 percent. This B&O tax rate will remain in effect until July 1, 2040. (The expiration date is the result of ESSB 5952, discussed below.)

55. In addition the Future Siting Provision contained in sections 5 and 6 of ESSB 5952,[101] which is set out in RCW § 82.04.260(11)(e)(ii), states:

> With respect to the manufacturing of commercial airplanes or making sales, at retail or wholesale, of commercial airplanes, this subsection {pertaining to the 0.2904% B&O tax rate} . . . does not apply on and after July 1st of the year in which 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 Initial Siting Provision} has been sited outside the state of Washington. This subsection . . . only applies to the manufacturing or sale of commercial airplanes that are the basis of a siting of a

[100] *I.e.*, "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." RCW 82.04.260(11)(a) (Exhibit EU-22).

[101] Sections 5 and 6 amend the same statute, RCW § 82.04.260, in an identical manner. At the time the bill was enacted, there were two versions of RCW § 82.04.260 in existence. One version of the statute was currently in effect until July 1, 2015. The other version became effective July 1, 2015. The only difference in the two versions of the statute is the tax rate in subsection (14) for newspaper printers and publishers.

> significant commercial airplane manufacturing program in the state under section 2 of this act.[102]

56. As noted previously, the Future Siting Provision only pertains to the availability of the 0.2904 percent B&O tax rate for the specific version or variant of airplane that was the subject of the Initial Siting Provision. The 777X served as the basis for determining that the Future Siting Provision had been fulfilled.[103] Accordingly, the Future Siting Provision applies only to the manufacturing or sale of 777X airplanes.

57. The B&O tax rate of 0.2904 percent was first introduced by HB 2294 (2003). At that time, the tax rate was only available to manufacturers and retail and wholesale sellers of commercial airplanes and components of such airplanes, but not to manufacturers of tooling for the manufacture of commercial airplanes or airplane components.[104] In addition, HB 2294 did not come into effect until the fulfillment of an initial siting provision requiring "the governor and a manufacturer of commercial airplanes sign a memorandum of agreement regarding an affirmative final decision to site a significant commercial airplane facility in Washington state."[105] The 0.2904 percent B&O tax rate would automatically expire on December 31, 2007 if "final assembly of a superefficient airplane ha{d} not begun in Washington state" by that date.[106]

58. In 2006, HB 2466 extended the 0.2904 percent B&O tax rate to certain certified repair stations.[107] In addition, in 2008, Washington adopted SSB 6828, which extended the 0.2904 percent B&O tax rate to the manufacture and retailing of tooling used in the manufacture of commercial airplanes and components of airplanes.[108]

2. B&O Credit for Aerospace Product Development

59. The B&O tax credit for aerospace product development is set out at RCW § 82.04.4461, which states, in relevant part:

> (1)(a)(i) In computing the tax imposed under this chapter {*i.e.*, 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

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

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

[104] HB 2294, § 3 (Exhibit EU-21).

[105] HB 2294, § 17 (Exhibit EU-21).

[106] HB 2294, § 17 (Exhibit EU-21).

[107] HB 2466, § 5 (Exhibit EU-35).

[108] SSB 6828, § 4 (Exhibit EU-42).

> 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.
>
> (3) Except as provided in subsection (1)(b) of this section the credit must be claimed against taxes due for the same calendar year in which the qualified aerospace product development expenditures are incurred. Credit earned on or after July 1, 2005, may not be carried over. The credit for each calendar year may not exceed the amount of tax otherwise due under this chapter for the calendar year. Refunds may not be granted in the place of a credit.

60. Thus, this measure provides a credit against B&O tax liability, equal to 1.5 percent of expenditures on "aerospace product development" – a term which 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." In addition, aerospace product development is only "qualified" – *i.e.*, it only counts towards the tax credit – if it occurs in Washington. The tax credit currently expires July 1, 2040.

61. The B&O tax credit for aerospace product development was first introduced in 2003 through HB 2294. At that time, the tax credit was only available to manufacturers or processors for hire and retail sellers of commercial airplanes and components of such airplanes, but not to manufacturers of tooling for the manufacture of commercial airplanes or airplane components.[109] In addition, as discussed above, HB 2294 did not come into effect until the fulfillment of an initial siting provision requiring "the governor and a manufacturer of commercial airplanes sign a memorandum of agreement regarding an affirmative final decision to site a significant commercial airplane facility in Washington state."[110]

62. SSB 6828 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.[111] It did not, as the EU suggests, expand the credit

[109] HB 2294, § 7 (Exhibit EU-21).

[110] HB 2294, § 17 (Exhibit EU-21).

[111] SSB 6828, § 7 (Exhibit EU-42).

to include non-manufacturing entities,[112] which were already eligible for the B&O tax credit beginning in 2006 under HB 2466.[113]

3. B&O Credits for Property and Leasehold Excise Taxes

63. RCW § 82.04.4463 provides for a credit for property taxes and leasehold excise taxes paid during the calendar year. 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, by persons not within the scope of (a)(i)(A) and (B) of this subsection (2) and are taxable under RCW 82.04.290(3), 82.04.260(11)(b), or 82.04.250(3); 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, by persons not within the scope of (a)(ii)(A) of this subsection (2) and are taxable under RCW 82.04.290(3), 82.04.260(11)(b), or 82.04.250(3); and
>
> (b) An amount equal to:
>
> (i)(A) Property taxes paid, by persons taxable under RCW 82.04.260(11)(a), on machinery and equipment exempt under RCW 82.08.02565or 82.12.02565 and acquired after December 1, 2003;

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[112] *See* EU FWS, note 47.

[113] HB 2466, § 3 (Exhibit EU-21).

(B) Property taxes paid, by persons taxable under RCW 82.04.260(11)(b), on machinery and equipment exempt under RCW 82.08.02565 or82.12.02565 and acquired after June 30, 2008; or

(C) Property taxes paid, by persons taxable under RCW 82.04.250(3) or 82.04.290(3), on computer hardware, computer peripherals, and software exempt under RCW 82.08.975 or 82.12.975 and acquired after June 30, 2008.

(ii) For purposes of determining the amount eligible for credit under (i)(A) and (B) of this subsection (2)(b), the amount of property taxes paid is multiplied by a fraction.

(A) The numerator of the fraction is the total taxable amount subject to the tax imposed under RCW 82.04.260(11) (a) or (b) on the applicable business activities of manufacturing commercial airplanes, components of such airplanes, or tooling specifically designed for use in the manufacturing of commercial airplanes or components of such airplanes.

(B) The denominator of the fraction is the total taxable amount subject to the tax imposed under all manufacturing classifications in chapter 82.04 RCW.

64. Of note, a person claiming credit under this provision is not eligible for leasehold excise and property tax exemptions also challenged by the EU.[114]

4. Computer Sales & Use Exemptions

65. RCW § 82.08.975 provides for an exemption from the Washington retail sales tax 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 or charges made for labor and services rendered in respect to installing the computer hardware, computer peripherals or software."[115] Under RCW 82.12.975, the use of these same items is exempt from the Washington use tax. Both exemptions were established by HB2294.[116] As a result of ESSB 5952, these exemptions expire on July 1, 2040, instead of July 1, 2024.[117]

5. Construction Sales & Use Exemptions

66. RCW § 82.08.980 provides for an exemption from the Washington retail sales tax for:

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[114] *See* RCW §§ 82.29A.137(1) (Exhibit EU-29), 84.36.655 (Exhibit EU-30).

[115] In addition, the labor and services rendered to install the computer-related products also qualify for this exemption. RCW § 82.08.975(1) (Exhibit EU-25).

[116] *See* HB 2294 §§ 9-10 (Exhibit EU-21).

[117] ESSB 5952 §§ 11-12 (Exhibit EU-3).

> (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 not otherwise eligible for the exemption under RCW 82.08.02565(2)(b).

67. RCW § 82.12.980 provides for an exemption from the Washington use tax for 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 not otherwise eligible for the exemption under RCW 82.08.02565(2)(b).[118]

68. Both exemptions expire July 1, 2040.[119] Prior to enactment of ESSB 5952, the exemptions were to expire July 1, 2024.[120]

6. Leasehold Excise Exemption

69. RCW § 82.29A.137 provides an exemption from the Washington leasehold excise tax for all leasehold interests in port district facilities eligible for the Construction-related Sales and Use Exemptions and "used by a manufacturer engaged in the manufacturing of superefficient airplanes, as defined in RCW 82.32.550." However, "{a} person claiming credit under

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[118] The use tax is not due on construction services. This 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.

[119] RCW §§ 82.08.980(6) (Exhibit EU-27); 82.12.980(3) (Exhibit EU-28).

[120] ESSB 5952 §§ 3(6), 4(3) (Exhibit EU-3).

RCW 82.04.4463 {*i.e.*, the B&O Credit for Property and Leasehold Excise Taxes} is not eligible for the exemption."[121] As a result of ESSB 5952, this exemption expires July 1, 2040.[122]

70. Of note, the EU does not even allege that Boeing has used or ever will use this exemption.[123]

7. Property Tax Exemption

71. RCW § 84.36.655 provides that "all buildings, machinery, equipment, and other personal property of a lessee of a port district eligible under RCW 82.08.980 and 82.12.980 {*i.e.*, the Construction Sales and Use Exemptions}, used exclusively in manufacturing superefficient airplanes, are exempt from property taxation." However, "{a} person taking the credit under RCW 82.04.4463 {*i.e.*, the B&O Credit for Property and Leasehold Excise Taxes} is not eligible for the exemption under this section."[124] As a result of ESSB 5952, this exemption expires July 1, 2040, instead of July 1, 2024.[125]

72. Of note, the EU does not even allege that Boeing has used or ever will use this exemption.[126]

B. ESSB 5952

73. ESSB 5952 contains two provisions that the EU alleges are relevant to this dispute: an Initial Siting Provision and a Future Siting Provision.[127] Both are silent on the use of domestic over imported goods, and indeed do not draw any distinction between domestic and imported goods. 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.

1. Initial Siting Provision

74. ESSB 5952 extends the expiration date for the seven tax measures outlined above from July 1, 2024 to July 1, 2040. However, ESSB 5952 as a whole (including the extension in

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[121] RCW § 82.29A.137(1) (Exhibit EU-29).

[122] ESSB 5952 § 13 (Exhibit EU-3).

[123] *Compare* EU FWS, paras. 34-36 *with ibid.*, paras. 21, 24, 27, 30.

[124] RCW § 84.36.655 (Exhibit EU-30).

[125] ESSB 5952 § 14 (Exhibit EU-3).

[126] *Compare* EU FWS, paras. 37-39 *with ibid.*, paras. 21, 24, 27, 30.

[127] The United States uses these terms for ease of reference. They do not appear in the statute.

expiration dates) does not come into effect unless the Initial Siting Provision is fulfilled. The Initial Siting Provision is in Section 2, which states:

> (1) {T}his 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, {then it} does not take effect.
>
> {. . .}
>
> (3) The department {*i.e.*, DOR} 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 21 ..., 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.

75. In turn, the term "significant commercial airplane manufacturing program" is defined as follows:

> 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) Fuselage and wings of a new model, or any version or variant of an existing model, of a commercial airplane.

76. In addition, the term "siting" is defined as follows: "a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington State."

77. Thus, the Initial Siting Provision is fulfilled if DOR makes a determination that a manufacturer has made a final decision after November 1, 2013, and before June 30, 2017, to commence manufacture of a new version or variant of an existing model of commercial airplane – including the fuselage and wings of such a model, version, or variant – in Washington State. The term "manufacture" is not defined in ESSB 5952, although it is apparent from context that it includes "final assembly."

78. Under the terms of ESSB 5952, the Initial Siting Provision can be fulfilled by the siting decision of any manufacturer, regardless of the country in which it is headquartered, and regardless of the national origin of the goods or services used in its operations. In fact, the Initial

Siting Provision has already been fulfilled.[128] As a result, the July 1, 2040, expiration date is now in effect for all seven tax measures outlined above.

2. Future Siting Provision

79. The Future Siting Provision is at Sections 5 and 6 of ESSB 5952, which have identical text stating:

> With respect to the manufacturing of commercial airplanes or making sales, at retail or wholesale, of commercial airplanes, this subsection {pertaining to the 0.2904% B&O tax rate} . . . does not apply on and after July 1st of the year in which 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 Initial Siting Provision} has been sited outside the state of Washington. This subsection . . . 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.[129]

80. Thus, the Future Siting Provision only pertains to the 0.2904 percent B&O tax rate, and it only affects "the manufacturing or sale of commercial airplanes" that were the basis for the fulfillment of the Initial Siting Provision. In particular, if DOR determines that any "final assembly or wing assembly" is sited outside Washington for the same version or variant of LCA as had been the subject of the determination pursuant to the Initial Siting Provision, then the B&O tax rate for aerospace will no longer apply to the manufacture/sale of that particular version or variant. Tax measures challenged by the EU other than the 0.2904 percent B&O tax rate, and manufacturing and retailing of other LCA versions and variants (regardless of manufacturer), are not affected by the Future Siting Provision.

IV. THE EU IGNORES ITS BURDEN OF PROOF AS THE COMPLAINANT IN A NEW DISPUTE.

81. Before rebutting the EU arguments on the merits, the United States pauses to highlight an obvious flaw in the EU's first written submission: the paucity of legal argument and evidence. Throughout its first written submission, and despite the complexity and unique nature of the measures challenged by the EU and the legal basis for its challenge, the EU opts to rely on facts and legal conclusions established in a separate dispute, *US – Large Civil Aircraft*, and it fails to provide the Panel with an appropriate basis to perform its own objective assessment as called for under Article 11 of the DSU. In other words, the EU fails to make a *prima facie* case.

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[128] *See* Notification Letter on SSB 5952 Contingency from Carol K. Nelson, Director, Washington State Department of Revenue, to Kyle Thiessen, Washington State Code Reviser (July 10, 2014) (Exhibit EU-61).

[129] RCW 82.04.260(11)(e)(ii).

82. Indeed, in several places, the EU's argument simply amounts to an assertion that "{t}here have not been any changes . . . which would affect the continued validity of the *US – Large Civil Aircraft* panel's findings."[130] 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,[131] 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 has the burden to make its own case rather than ask the Panel to make the EU's case for it on the basis of factual and legal findings from the reports of past panels.

83. It is well established in WTO dispute settlement that "the burden of proof rests on the party that asserts the affirmative of a claim or defense" to put forward "adequate legal arguments and evidence" to "establish{} a *prima facie* case."[132] A *prima facie* case is, in turn, 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."[133] The Appellate Body has observed that these principles "imply that a responding party's measure will be treated as WTO-consistent unless proven otherwise."[134] The relevant evidence and arguments must be supplied by the complaining party, and it is not for a panel to sift through the evidence to make out arguments and a case for that party.[135]

84. In this dispute, the EU's claims challenge seven measures under one provision of a covered agreement, Article 3.1(b) of the SCM Agreement. Thus, the EU has the burden to establish each element of its claims with respect to each of the seven measures, including for each measure (i) the existence of a financial contribution, (ii) the existence of a benefit conferred by the financial contribution, and (iii) contingency on the use of domestic over imported goods (the last of which, in and of itself, contains several separate elements, including obligations to demonstrate a "relationship of contingency," "on the use of," "domestic *over* imported," "goods").[136]

85. Article 11 of the DSU calls on panels to conduct an objective assessment of the factual and legal aspects of each of the challenged measures. Article 11 of the DSU does not provide for a panel to decline to examine a measure, as the EU appears to urge here, and to rely instead on the findings of a panel or the Appellate Body in a different dispute. Article 11 of the DSU states:

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[130] EU FWS, paras. 61, 63, 68.

[131] *See Chile – Price Bands (AB)*, para. 136.

[132] *Chile – Price Bands (AB)*, para. 134 (citing *US – Wool Shirts (AB)*, p. 14).

[133] *EC – Hormones (AB)*, para. 104.

[134] *Chile – Price Bands (AB)*, para. 136.

[135] *US – Gambling Services (AB)*, para. 140 ("A complaining party may not simply submit evidence and expect the panel to divine from it claims of WTO-inconsistency.").

[136] *See* SCM Agreement, arts. 1, 3.

> {A} panel should make an objective assessment of the matter before it, including an objective assessment of the 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….

86. This legal consideration has led panels, *even where the responding party does not contest a claim*, to consider that the complaining party must prove its case, and the panel must then conduct a complete analysis. As the panel in *US – Shrimp and Sawblades* observed with respect to a number of disputes presenting this situation:

> Each of these panels considered that notwithstanding the fact that the claims before them were unopposed, they were still bound by Article 11 of the DSU to make an "objective assessment of the 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". We agree with this approach and apply it in our consideration of China's claims.[137]

87. Thus, the EU invites the Panel to err by relying heavily on findings from *US – Large Civil Aircraft*, instead of demonstrating in this proceeding each element of its claims, as is its burden. For example, rather than providing evidentiary support for the assertion that the 0.2904 percent B&O tax rate has caused Washington to forego revenue that would otherwise have been due, the EU refers to the findings of the *US – Large Civil Aircraft* panel with respect to the measures and Washington law as they existed as of the time of that panel's establishment in 2006.[138] The EU adopts a parallel argument with respect to the remaining six measures it challenges, again arguing that there is a financial contribution by virtue of the panel report in *US – Large Civil Aircraft*.[139] The EU also attempts to base its benefit argument with respect to all seven measures on the findings of that panel.[140]

88. The EU attempts to excuse these shortcuts by asserting that "the factual elements of the various tax incentives relevant to the 'financial contribution' and 'benefit' analyses have not changed relative to the measures considered in *US – Large Civil Aircraft*."[141] However, an argument that nothing has changed since a prior panel considered the facts is insufficient to establish a *prima facie* case in a separate dispute. A panel may not simply adopt the factual

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[137] *US – Shrimp and Sawblades (Panel)*, para. 7.6.

[138] EU FWS, paras. 59-61 ("There have not been any changes to the relevant statutory provisions, or to any other aspect of Washington State's tax regime, which would affect the continued validity of the *US – Large Civil Aircraft* panel's findings that this tax incentive provides a financial contribution.").

[139] EU FWS, para. 63.

[140] *See* EU FWS, para. 68.

[141] EU FWS, para. 54.

findings of another panel without making an objective assessment of the evidence allegedly supporting those facts, pursuant to DSU Article 11.[142] Further, findings on whether a financial contribution or benefit exist are legal conclusions that elements of a claim have been established, not facts, and a panel is also charged under Article 11 with making an objective assessment of the applicability of, and conformity with, the provisions cited as a basis for the claim. This is not a compliance proceeding under Article 21.5 of the DSU where the proceedings are based on prior adopted panel and Appellate Body reports. Instead, the EU has the burden to present to this Panel evidence and argumentation to support its claims. *US – Large Civil Aircraft* is a separate dispute. Accordingly, the EU errs in attempting to treat the findings in that dispute as though they were controlling for purposes of the current, separate dispute. By doing so, the EU has failed to make its *prima facie* case.

89. Moreover, the EU's argument that nothing has changed is unusual considering that the EU was unsuccessful in *US – Large Civil Aircraft* in establishing than any of these measures was a prohibited subsidy under Article 3.1(b). And the EU failed in its attempt to establish a financial contribution for three of the measures.[143] Furthermore, the EU claims in this dispute challenge alleged financial contributions that will occur between 2024 and 2040.[144] The evidence in *US – Large Civil Aircraft* did not pertain to this time period – and indeed, the *US – Large Civil Aircraft* panel explicitly declined to address whether revenue foregone in the future by reason of the B&O tax constitutes a financial contribution.[145]

90. Accordingly, the existence of prior panel findings in US – *Large Civil Aircraft* does not excuse the EU from the burden of proof that normally applies in a new, original dispute (and the failure of similar claims or aspects of those claims would also not automatically make out an argument for the United States as responding party). Rather, the EU must prove all elements of each of its claims anew for the Panel to be able to make findings in its favor consistent with the requirements of Article 11 of the DSU.

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[142] *US – Shrimp and Sawblades (Panel)*, para. 7.6.

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

[144] The tax treatment in all of the challenged measures would have been available to Boeing and all other eligible companies in Washington State through July 1, 2024, in the absence of ESSB 5952 and the conditions therein that the EU cites as the basis for its claims.

[145] *US – Large Civil Aircraft (Panel)*, para. 7.158.

V. THE EU FAILS TO DEMONSTRATE THAT ANY OF THE CHALLENGED MEASURES IS A SUBSIDY UNDER ARTICLE 1.1 OF THE SCM AGREEMENT.

A. Financial Contribution

1. Legal framework

91. Article 1 of the SCM Agreement states:

> 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 or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion), potential direct transfers of funds or liabilities (*e.g.*, loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
>
> or
>
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
>
> and
>
> (b) a benefit is thereby conferred.

92. This definition governs Article 3 of the SCM Agreement, as confirmed by the chapeau of Article 3 of the SCM Agreement itself, referring to "subsidies, within the meaning of Article 1." Thus, demonstrating the existence of a subsidy under Article 3 requires establishing the existence of a financial contribution and benefit within the meaning of Article 1. Measures that involve no

financial contribution are not subsidies and therefore cannot be inconsistent with the provisions of the SCM Agreement.[146]

93. Under Article 1.1(a)(1)(ii), only revenue that is due and is foregone can qualify as a financial contribution.[147] In other words, the financial contribution occurs when the revenue that is due "is foregone or not collected." In the case of a tax measure, this would entail a comparison of the revenue otherwise due and the tax foregone or not collected. If applied through a tax credit, this would entail a comparison of the tax the tax payer would otherwise pay. Thus, it would be for the EU to establish what is the revenue otherwise due and what revenue is foregone or not collected.

2. The EU fails to demonstrate that any of the challenged measures involves a financial contribution.

94. 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.[148] However, the EU fails to establish that any such financial contribution exists, and therefore fails to make a *prima facie* case.

95. In lieu of submitting evidence that would support its claims, the EU cites various findings in *US – Large Civil Aircraft*, as if the Panel could simply adopt another panel's factual findings by reference. However, the EU neglects to mention that three of the challenged measures – *i.e.*, the sales and use tax exemptions for construction services and materials; the leaseholder excise tax exemption; and the property tax exemption – were found *not* to confer a financial contribution to Boeing.[149] Therefore, while the EU may not shift its burden to the United States, its reliance on a prior panel report is misguided as that report rejected this aspect of the EU's claim for several measures.

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[146] For example, in *US – Large Civil Aircraft (Panel)*, the panel found that the Washington sales and use tax exemptions for construction services and equipment, the leasehold excise tax exemption, and the property tax exemption conferred no financial contribution to Boeing, and therefore the panel rejected the EU claims that these measures were inconsistent with Articles 3.1(a), 5, and 6 of the SCM Agreement. *See US – Large Civil Aircraft (Panel)*, para. 7.212.

[147] In *US – Large Civil Aircraft*, the original panel considered similar issues but declined to resolve them. *See US – Large Civil Aircraft (Panel)*, para. 7.152.

[148] For this reason, the EU repeatedly states that it challenges the measures "as amended and extended" by ESSB 5952. *See, e.g.*, EU FWS, para. 6. With respect to the time period prior to July 1, 2024, the tax treatment at issue in this dispute would have been available even if ESSB 5952 had not been adopted. Accordingly, for this time period, the EU has no claim of inconsistency with Article 3.1(b), and indeed the EU does not assert that any relevant financial contribution exists during this time period.

[149] *See US – Large Civil Aircraft (Panel)*, para. 7.158.

96. Moreover, the EU itself notes that "the United States did not contest before the *US – Large Civil Aircraft* panel that each of these measures constitutes a financial contribution."[150] The United States is not precluded from raising new arguments in this new dispute that it opted not to make in a previous dispute. But the United States can only formulate its rebuttal arguments in response to a case that the EU has put forward. There is no aspect of the DSU that would allow the EU to shift its burden of proof to the United States on the basis of a panel report in a separate proceeding.

97. Furthermore, the EU neglects to address the fact that the findings in *US – Large Civil Aircraft* pertain exclusively to the time period prior to 2007, whereas the EU's own claims in this dispute pertain principally to the period from July 1, 2024, until July 1, 2040.[151] Thus, any evidence that the panel in that dispute considered is not necessarily relevant to, much less determinative of, the EU's claims in this dispute. The EU makes no explanation specific to this latter period.

98. The EU also ignores the complicated structure of Washington's tax system. Washington is the sole U.S. state to rely primarily on a B&O tax rather than a corporate or income tax for purposes of business taxation. The EU fails to even acknowledge this fact, much less deal with its implications.

99. Critically, absent from the EU First Written Submission is any evidence or arguments that would support a finding regarding a "defined normative benchmark" for the challenged measures – a key requirement for the EU to establish a *prima facie* case.[152] That is, the EU has not established what is the "government revenue that is otherwise due" during the period in which SSB 5952 would apply. Having failed to do so, the EU cannot, and has not, made out any argument that such revenue "is foregone or not collected" because it has presented no comparison between such a normative benchmark and the rate that would apply pursuant to SSB 5952. Nor has the EU attempted to explain how, for purposes of Article 1.1(a)(ii), revenue "is foregone or not collected" in a future time period. Citations to past panel and Appellate Body reports that do not in any event support its position do not suffice for this purpose. Accordingly, the EU arguments fail..

B. Benefit

100. As discussed above, the EU has failed to establish a *prima facie* case that any of the challenged measures involves a financial contribution. Thus, it automatically follows that the EU fails to establish that any benefit is conferred by such financial contributions. In this regard, it is noteworthy that the EU has not even attempted to establish benchmarks for any of the

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[150] EU FWS, para. 63.

[151] The EU repeatedly states that it challenges the Washington measures "as amended *and extended* by SSB 5952." *See, e.g.*, EU FWS, paras. 6, 9 (emphasis added).

[152] *See US – FSC (AB)*, para. 90.

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.

101. 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.

102. Contrary to the EU's allegations, the recipients of the alleged subsidies are free to select any inputs they use from any foreign or domestic source. Indeed, a great deal of imported content will likely go into the 777X, as is currently the case for the 777-300ER. There is nothing in the statute that prohibits or disincentivizes use of imported products. And a retailer that sold nothing in Washington but *imported* commercial airplane components that it manufactured abroad would qualify for the 0.2904 percent tax rate in RWC § 82.04.260 challenged by the EU.

103. Article 3.1 of the SCM Agreement states:

> Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> {...}
>
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

104. Thus, 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.

105. However, the EU fails for at least six reasons:

- First, contrary to the EU's erroneous assertions,[153] the challenged measures and the conditions in ESSB 5952 are silent with respect to the use of goods, whether domestic or imported.[154] Rather, ESSB 5952 states that the extension of the tax treatment in the relevant statutes would take effect, and remain fully effect, if certain production activities are sited in Washington.
- Second, the EU arguments assume that Boeing "uses" fuselages and wings as "goods" within the meaning of Article 3.1(b), *i.e.*, inputs to be used in the production of the 777X. In fact, fuselages and wings are features or elements of finished airplanes that are not produced as completed intermediate goods that can be used as inputs in downstream production. They are finished during and as part of the final assembly of the 777X. Thus, 777X fuselages and wings are not "goods" that Boeing "uses" in this sense of Article 3.1(b).
- Third, Article 3.1(b) does not discipline subsidies by virtue of the fact that they are provided to producers for conducting manufacturing or other activities in the territory of the grantor, as is clear from a comprehensive interpretation of Article 3.1(b) in accordance with the ordinary meaning of its terms in context, and in light of the object and purpose of the SCM Agreement. The EU neglects to undertake such an interpretation.
- Fourth, 777X fuselages and wings are not "goods" within the meaning of Article 3.1(b). Goods must be traded or saleable. This is evident from the object and purpose of the provision as well as the reference in the text to "imported goods," which are by definition traded and saleable. Because 777X fuselages and wings are not traded or saleable, they are not goods within the meaning of Article 3.1(b).
- Fifth, the EU fails to establish that the challenged measures are "geared to induce" import-substitution, as it asserts.[155] The EU's arguments focus on Boeing and not any other taxpayer subject to ESSB 5952, but the EU has not established that Boeing's decision to site 777X manufacturing in Washington (including assembly operations) differs from the choice it would have made absent the challenged measure. In fact, the total configuration of the facts confirms that the measures target production activities important for employment – without respect to whether the affected taxpayers select inputs or goods for sale that are manufactured in the United States or elsewhere.

Each of these points is discussed in greater detail below.

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[153] *See* EU FWS, para. 76 (describing the challenged measures as "expressly conditioned on the use of domestic over imported goods in the final assembly of the aircraft{}").

[154] The EU thus necessarily fails to establish a condition on the use of domestic *over imported* goos.

[155] EU FWS, para. 77.

A. The Tax Treatment in the Challenged Measures Is Not "Expressly Conditioned"[156] on the Use of Domestic over Imported Goods.

106. The EU argues that the alleged subsidies are "*expressly conditioned* on the use of domestic over imported goods in the final assembly of the aircraft."[157] In reality, there is no express condition in Washington law that specifies whether the wing or fuselage must be "domestic," nor an express condition that requires the use of any goods, whether domestic or imported.

107. According to the EU, the relevant conditions arise from the Initial Siting Provision and the Future Siting Provision.[158] They do not refer to the use of domestic goods, the use of imported goods, or a requirement to use one instead of the other. In fact, they do not refer to the use of goods at all. Instead, the Initial Siting Provision states that the tax extensions in ESSB 5952 will come into effect once DOR determines that a "significant commercial airplane manufacturing program" is sited in Washington. In turn, this phrase is defined as follows:

> 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) Fuselage and wings of a new model, or any version or variant of an existing model, of a commercial airplane.[159]

108. In addition, as discussed in greater detail above, the Future Siting Provision potentially reduces the availability of the 0.2904 percent B&O tax rate for 777X sales via the following language:

> With respect to the manufacturing of commercial airplanes or making sales, at retail or wholesale, of commercial airplanes, this subsection {pertaining to the 0.2904% B&O tax rate} . . . does not apply on and after July 1st of the year in which 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 Initial Siting Provision} has been sited outside the state of Washington. This subsection . . . only applies to the

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[156] EU FWS, para. 76.

[157] EU FWS, para. 76 (emphasis added).

[158] EU FWS, para. 76. *See supra* Section III.B for relevant text of these provisions.

[159] ESSB 5952, Section 2 (Exhibit EU-3) (emphasis added).

> 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.[160]

109. Thus, the Initial Siting Provision refers to the "commence{ment}" of "manufacture" of a commercial airplane, including the fuselage and wings of that airplane. In addition, the Future Siting Provision refers to "final assembly or wing assembly" of a commercial airplane. Neither provision states that domestic fuselages and wings must be "used," that their use must be substituted for the use of imported goods, or that any other import-substitution requirement applies. Thus, the EU is incorrect to assert that the alleged subsidies are "*expressly conditioned* on the use of domestic over imported goods in the final assembly of the aircraft."[161] Rather, if anything, the EU's allegation that ESSB 5952 contains an import substitution requirement is an inference that the EU draws based on a series of incorrect assumptions and interpretations, which are discussed in greater detail below.[162]

B. Fuselages and Wings Are Not Inputs That Are "Used" as Goods in the 777X Production Process.

110. The EU argues that ESSB 5952 conditions tax incentives on the use of domestic wings and fuselages in the assembly of the 777X.[163] Fuselages and wings are in fact 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, as the EU erroneously assumes. Accordingly, and contrary to the EU's arguments, neither the conditions in ESSB 5952 nor any challenged Washington statute requires that fuselages and wings, whether domestic or imported, be "used" in the production of a commercial airplane, and in fact, Boeing would not be in a position to fulfill such a requirement because fuselages and wings are not "used" in the production of the 777X. Therefore, the seven Washington measures challenged by the EU are not inconsistent with Article 3.1(b) of the SCM Agreement.

111. Article 3.1(b) disciplines subsidies that are conditioned on the "use of domestic over imported goods." Therefore, the relevant good must be one that is "used," either as a finished good by an end-user or as an input in downstream production. However, in the 777X program, fuselages and wings are not used in this manner. The following picture illustrates this fact; it

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[160] ESSB 5952, Sections 5, 6 (Exhibit EU-3) (emphasis added).

[161] EU FWS, para. 76 (emphasis added).

[162] The EU also appears to equate the location where assembly of a good takes place, and its status as domestic versus imported. *See* EU FWS, paras. 74-75. The two are conceptually distinct and not necessarily coextensive. The EU has not identified any basis for equating them in this case.

[163] *See* EU FWS, paras. 44, 74.

depicts part of the "final body join" stage of the final assembly process[164] for the 777-300ER, which will resemble the manufacturing process for the 777X:[165]

112. As the graphic illustrates, the fuselage is only completed as the entire aircraft itself is assembled.[166] The fuselage consists of several individual sections: Sections 41, 43, 44, 11/45, 46, 47, and 48. The primary structures making up these sections **[BCI]**.[167] Boeing forms these primary structures into individual fuselage sections, and then into three larger sections **[BCI]**: the forward (Sections 41 and 43), center (Sections 44 and 11/45), and aft (Sections 46-48).[168] At this point, the center fuselage section **[BCI]**.[169] As part of the final assembly process, and before the three fuselage sections are joined to each other, the following operations occur:

- **[BCI]**;[170]

[164] For the 777X, the fuselage building is where Boeing will form **[BCI]**. Boeing Expert Statement, para. 52 (Exhibit USA-1(BCI)). In addition, the Composite Wing Center (CWC) is where Boeing will fabricate certain wing structures **[BCI]**). *Ibid.* Both the fuselage building and the Composite Wing Center (CWC) are located close to the Everett main factory building. *Ibid.*

[165] Boeing Expert Statement, para. 52 (Exhibit USA-1(BCI)).

[166] Boeing Expert Statement, para. 53 (Exhibit USA-1(BCI)).

[167] Boeing Expert Statement, para. 52 (Exhibit USA-1(BCI)).

[168] Boeing Expert Statement, para. 52(f) (Exhibit USA-1(BCI)).

[169] Boeing Expert Statement, para. 52(e) (Exhibit USA-1(BCI)).

[170] Boeing Expert Statement, para. 52(m) (Exhibit USA-1(BCI)).

- **[BCI]**;[171]

- the center section, including the center wing box, is joined to the incomplete outboard wing structures in the "wing-body join" position of the process, which is the first point at which the main wing structures are joined together;[172]

- **[BCI]**.[173]

Only after these operations are completed does the final assembly process move into the "final body join" position, where **[BCI]**.[174] Similarly, and as indicated above, the 777X's wings are completed only after the main wing structures are connected to the center fuselage section.[175]

113. Thus, the fuselage as such cannot be considered as an input into the 777X final assembly process, but rather comes into existence only as part of the finished 777X. Likewise, the wing is not fully assembled prior to (and for use in the) assembly of the airplane. Therefore, Boeing does not in any sense *use* fuselages or wings – domestic or imported – to produce the 777X. Rather, it produces the fully assembled fuselages and wings simultaneously with and as part of its final assembly of the 777X as a finished product.

114. The Boeing Expert Statement further confirms this characterization of the facts. As the Boeing experts state: "it is incorrect to characterize the fuselage and wing as inputs that are used in the production of the 777X."[176] They explains further that "{m}anufacture of the fuselage and wing continues through the final assembly process, and at no point before the final assembly process does a complete wing or fuselage exist."[177]

115. ESSB 5952 does not require that Boeing alter this production production process in such a way that would result in fuselages and wings being used as inputs into the production process. Indeed, ESSB 5952 is silent on how the fuselage and wing are manufactured and assembled as part of the overall production process. ESSB also does not constrain how fuselages or wings are "used" by any company that utilizes the challenged tax measures.

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[171] Boeing Expert Statement, para. 52(m) (Exhibit USA-1(BCI)).

[172] Boeing Expert Statement, para. 52(n) (Exhibit USA-1(BCI)).

[173] Boeing Expert Statement, para. 52(m) (Exhibit USA-1(BCI)).

[174] Boeing Expert Statement, para. 52(o) (Exhibit USA-1(BCI)).

[175] Boeing Expert Statement, para. 52(n)-(o) (Exhibit USA-1(BCI)).

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

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

C. Article 3.1(b) Does Not Discipline Production Subsidies.

116. The EU's claims rely on an incorrect interpretation of Article 3.1(b) of the SCM Agreement that equates the payment of subsidies to domestic producers for engaging in production activities in the grantor's territory with subsidies contingent upon the use of domestic over imported goods. The ordinary meaning of the language in Article 3.1(b) does not discipline subsidies by virtue of the fact that they are provided for production activities in the territory of the grantor. This is consistent with the object and purpose of the SCM Agreement, which is to regulate trade in goods.[178]

117. Article III of the GATT 1994 further makes clear that subsidies provided for domestic production cannot be equated with subsidies contingent upon the use of domestic over imported goods. Both the Initial Siting Provision and the Future Siting Provision are silent regarding the use of goods, whether domestic or imported. Rather, they limit the relevant tax treatment to production activities, as well as non-production activities like retail and wholesale selling, in Washington. And the conditions in ESSB 5952 relate solely to manufacturing activities in Washington. Thus, the EU's claims fail because the challenged measures are contingent on domestic manufacturing, not on the use of domestic products.

118. As has been explained, Article 3.1(b), by its terms, is directed to subsidies contingent on "the use of domestic over imported goods." That is, the conditionality for the subsidy must relate to "use." Article 3.1(b) does not speak to subsidies conditional for their granting on domestic manufacturing. Rather, such subsidies (and "any" subsidy) would appear to be disciplined by Part III of the SCM Agreement (or potentially susceptible to a countervailing duty pursuant to Part V). Part III does not impose any prohibitions based on the type of subsidy but disciplines subsidies to the extent they cause certain adverse effects to the interests of other Members.

119. As the Appellate Body has noted, Article III of the GATT 1994 provides relevant context for the interpretation of Article 3.1(b) of the SCM Agreement.[179] The negotiating history of Article 3.1(b) confirms that the drafters intended for there to be overlap between Article 3.1(b) and Article III. In particular, the *travaux préparatoires* state:

> Some participants {in the Uruguay Round Negotiating Group on Subsidies and Countervailing Measures} expressed their reservation on the proposed category of other trade-related subsidies {*i.e.*, prohibited subsidies}. They considered that subsidies proposed for this category were already covered by Article III of the General Agreement (subsidies that were contingent upon the use of domestic over imported goods) or by Article XVI:4 (subsidies contingent upon export

[178] This is evident from the fact that the SCM Agreement is part of Annex 1A to the WTO Agreement, which is entitled the Multilateral Agreement on Trade in Goods. This is distinct from Annex 1B on the General Agreement on Trade in Services, as well as the other elements of the WTO Agreement.

[179] *Canada – Autos (AB)*, para. 140.

> performance). Some other participants explained that although these subsidies were already prohibited by other provisions of the General Agreement, their inclusion into the category of prohibited subsidies would serve the purpose of better clarity and certainty.[180]

In fact, Article 32.1 of the SCM Agreement suggests that provisions of the GATT 1994 are interpreted by the SCM Agreement, and the Appellate Body has noted that the SCM Agreement is generally understood to elaborate upon the disciplines in the GATT 1994.[181] The overlap in what is disciplined by Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement therefore calls for a degree of consistency in interpreting the provisions of those two articles.

120. As the Panel in *Indonesia – Autos* stated: "Article III has always been a provision that is concerned with (and prohibits) discrimination between imported and domestic products."[182] Article III:4 in particular states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

121. The panel in *Indonesia – Autos* noted with regard to Article III:4:

> As to whether the measure at issue accords imported products less favourable treatment…, in respect of subsidies, violations of Article III:4 have been found where discrimination between domestic and imported products results from the conditions attached to the granting of subsidies. This is the case, for example, if a subsidy is granted on the condition that the recipient of the subsidy purchases products of domestic origin, thereby discriminating against suppliers of the foreign-origin product.[183]

Thus, as the Appellate Body has stated, "both Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement apply to measures that require the use of domestic goods over imports."[184]

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[180] Note by the Secretariat, Meeting of 26-27 September 1989, GATT Doc. MTN.GNG/NG10/13 (Oct. 16, 1989), para. 6.

[181] *See Brazil – Desiccated Coconut (AB)*, p. 14.

[182] *Indonesia – Autos (Panel)*, para. 14.30.

[183] *EC – Commercial Vessels (Panel)*, para. 7.65 (internal citation omitted).

[184] *Canada – Autos (AB)*, para. 140.

122. Yet, while Article III:4 disciplines measures that require the use of domestic over imported goods, Article III:8(b) states:

> 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.[185]

Thus, in light of Article III:8(b), Article III:4 must be interpreted must be interpreted as not prohibiting the provision of subsidies exclusively to domestic producers for reason of their production activities. That is, a subsidy recipient's status as a "domestic producer" necessarily is defined through its domestic production activity. Such a payment to a producer should not be understood to be in conflict with Article III:4 (including its requirement of national treatment for measures affecting the "use" of a product). And given that disciplining subsidies contingent upon the use of domestic over imported goods is an area of overlap between Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement, subsidies provided exclusively to domestic producers by conditioning their receipt on defined domestic production activities must also not be equated with requiring the use of domestic over imported goods for purposes of the SCM Agreement.

123. In sum, Article 3.1(b) of the SCM Agreement disciplines subsidies contingent on the use of domestic over imported goods, but there is nothing in that text that supports the interpretation that subsidies provided only to producers that engage in production activities in the territory of the grantor are to be equated with subsidies contingent on the use of domestic over imported goods. In other words, it is insufficient for the purposes of Article 3.1(b) to establish that a Member has granted domestic production subsidies.

124. Yet, even ignoring several other deficiencies in the EU's argument, this is at best what the EU has even tried establish. Both the Initial Siting Provision and Future Siting Provision are completely silent on the use of domestic or imported goods. They instead establish a condition exclusively in relation to production activities performed in Washington. Thus, for this reason as well, the EU's claims fail.

D. 777X Fuselages and Wings are Not Saleable or Traded "Goods" Capable of Importation.

125. By its ordinary meaning, and as confirmed by prior WTO panel and Appellate Body findings, a "good{}" for the purposes of Article 3.1(b) of the SCM Agreement must be a saleable or traded good capable of importation. However, 777X fuselages and wings are not saleable or traded. Therefore, they are not "goods" within the meaning of Article 3.1(b).

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[185] Emphasis added.

126. In Article 3.1(b), the word "goods" is modified by the word "imported."[186] An imported good is by definition one that is traded. Moreover, the *Shorter Oxford English Dictionary* defines the term "goods" as "saleable commodities, merchandise, wares."[187] In addition, the French and Spanish provisions use the terms *produits* and *productos,* both of which connote saleable commodities, merchandise, or wares.[188]

127. The Appellate Body report in *US – Softwood Lumber CVDs* confirms this interpretation. There, the Appellate Body referred to the definition of "goods" as "saleable commodities, merchandise, wares."[189] The Appellate Body also found that the term "goods" is used in at least two senses in the SCM Agreement: a broader sense in Article 1, where "goods" includes "property and possessions" generally, and which corresponds to the French and Spanish terms *biens* and *bienes* in Article 1.1(a)(1)(iii); and a narrower sense, in which "goods" are "tradable items," and which corresponds to the French and Spanish terms *produits* and *productos,* which have a narrower meaning than *biens* and *bienes*.[190] Canada argued that the second definition governed the term "goods" as used in Article 1 of the SCM Agreement, such that standing (*i.e.*, unharvested) timber did not qualify as "goods." The Appellate Body rejected this argument, finding that Canada's proposed definition applies to Article 3.1(b), but not Article 1:

> Article 3.1(b) of the SCM Agreement addresses a certain situation in which subsidies favour domestic goods over "imported goods". In that provision, the word "goods" is qualified by the word "imported". In Article 1.1(a)(1)(iii), the word "goods" is not so qualified. The use of the word "goods" in Article 3.1(b), therefore, gives little contextual guidance to the meaning of the term "goods" in Article 1.1(a)(1)(iii). Contrary to Canada's argument, it does not preclude that there may be "goods" in the sense of Article 1.1(a)(1)(iii) that are not actually "imported" or traded.[191]

128. Thus, while "goods" within the meaning of Article 1 are not necessarily traded, "goods" within the meaning of Article 3.1(b) must be understood as being products that are traded. If

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[186] *US – Softwood Lumber CVDs (AB)*, para. 62. It is also modified by the word "domestic."

[187] *US – Softwood Lumber CVDs (AB)*, para. 58 & note. 43 (citing *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1116).

[188] *See, e.g.*, Le Nouveau Petit Robert (2009 ed.), p. 2034 (Exhibit USA-28) (defining "produit" as "Productions de l'agriculture ou de l'industrie, en tant qu'elles constituent des marchandises, des biens ayant une valeur."); Diccionario de la Lengua Española, 22nd edition, Real Academia Española (Espasa Calpe, 2001), p. 1839 (Exhibit USA-29) (defining "producto" as "una cosa producida," and in turn defining "producir" as "fabricar, elaborar cosas útiles.").

[189] *US – Softwood Lumber CVDs (AB)*, para. 58 & note 43.

[190] *US – Softwood Lumber CVDs (AB)*, paras. 59-61.

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

they are not, they cannot be imported, which would be inconsistent with Article 3.1(b)'s specific reference to "imported goods."

129. However, 777X fuselages and wings are not articles of trade.[192] Rather, they are custom-designed for and unique to the 777X and its production process.[193] No potential purchasers for such articles exist. Even Boeing would not be a purchaser of fuselages or wings because, as discussed above in Section VI.B, they are elements of the output of the 777X final assembly process, rather than inputs into that process.[194]

130. Furthermore, as a logistical matter, **[BCI]**. As the Boeing Expert Statement explains:

[BCI].[195]

131. Accordingly, 777X fuselages and wings are not traded or saleable commodities, merchandise, or wares that can be imported from the territory of one WTO Member to another, as the text of Article 3.1(b) envisions. Thus, they are not "goods" within the meaning of Article 3.1(b).

E. The Challenged Measures Are Not "Geared to Induce" the Use of Domestic Over Imported Goods.

132. The EU asserts that the challenged measures are "geared to induce Boeing's use of domestic components."[196] However, in reality, there is no evidence that the challenged measures are designed and structured to advance an unstated import-substitution agenda, as the EU argues. Rather, the challenged measures are designed to ensure that the aerospace 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."[197] The policy tool for pursuing this objective was the extension of tax treatment that required the siting of a significant commercial aircraft manufacturing program in Washington. Washington did not attempt, and it did not design or structure the relevant measures, to induce Boeing or any other company to favor the use of goods from domestic sources or from companies in Washington.

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[192] The United States also notes that 777X fuselages and wings, even as features or elements of a finished product, do not exist and have never existed to date. The first 777X is expected to be delivered in 2020. *See* Boeing Expert Statement, para. 40 (Exhibit USA-1(BCI)).

[193] *See* Boeing Expert Statement, paras. 42-43 (Exhibit USA-1(BCI)).

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

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

[196] EU FWS, para. 78.

[197] ESSB 5952, Section 1 (Exhibit EU-3).

133. The "geared to induce" standard invoked by the EU was in fact discussed by the Appellate Body in *EC – Large Civil Aircraft* in the context of Article 3.1(a).[198] The Appellate Body has not discussed it in the context of Article 3.1(b). In *EC – Large Civil Aircraft*, the Appellate Body stated that a determination of whether a subsidy is "geared to induce" export performance "could be based on a comparison between, on the one hand, the ratio of *anticipated* export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy, and, on the other hand, the situation in the absence of the subsidy."[199]

134. The EU does not address this test, or advocate any other inquiry, in its submission. Nor does the EU bring forward any evidence that would be relevant to the comparison previously used in the context of the "geared to induce" analysis applied to Article 3.1(a). That is, even with respect to Boeing (let alone other taxpayers), the EU has presented no evidence or argument related to the anticipated ratio of domestic to imported goods used by Boeing with and without the challenged measure. Therefore, if the EU is indeed invoking this "geared to induce" standard in the context of Article 3.1(b), then it follows again that the EU fails to establish a *prima facie* case.

135. Not only has the EU not done enough to make a *prima facie case* that the measure is "geared to induce" the use of domestic over imported goods, but the evidence, in fact, demonstrates the opposite. The 777X production process will involve a whole host of foreign suppliers, something Washington could easily have predicted based on the 777 program. As the Boeing Expert Statement explains:

> {T}he 777X's aluminum fuselage is composed mostly of parts purchased from *outside* Washington State: from the Japanese companies Mitsubishi Heavy Industries, Kawasaki Heavy Industries, and Fuji Heavy Industries (which parts are imported into the United States from Japan) and by Spirit AeroSystems in Kansas. This includes all main fuselage structural elements (mostly panels incorporating skins, stringers, and ribs) for all fuselage sections. In addition, while Everett is the site where Boeing will fabricate the largest parts of the main wing box, these are the only wing structures that Boeing is likely to fabricate in Washington once the program exits low-rate initial production (LRIP). The center wing box will be produced by Fuji Heavy Industries and imported from Japan, while all outboard wing parts aside from the main wing box will be sourced from Boeing facilities in St. Louis and Canada, plus Spirit AeroSystems in Kansas. Other 777X parts are sourced from other suppliers around the world.[200]

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[198] *See EC – Large Civil Aircraft (AB)*, para. 1044. In addition, the Appellate Body used this phrase in *Canada – Aircraft*. *See ibid.*

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

[200] Boeing Expert Statement, para. 60 (Exhibit USA-1(BCI)) (footnote omitted).

Thus, much of the 777X fuselage and wings manufactured in Washington will consist of imported content or content sourced from a U.S. state other than Washington. This is precisely the opposite of what the EU's theory suggests would be the case.

136. Moreover, the tax treatment in the challenged measures is available to all other aerospace companies in Washington other than Boeing without any condition whatsoever. The Initial Siting Provision has already been fulfilled, and the Future Siting Provision does not apply to them.[201] Yet they will receive the same tax treatment under the challenged measures through July 1, 2040.

137. Furthermore, the range of activities for which the alleged subsidies can be granted includes not only manufacturing activities but also research, design, engineering, and other activity that has, at most, a remote relation to the use of goods. In relation to these taxpayers and activities, the EU has not even alleged the measure is geared to induce use of domestic over imported goods.

138. In addition, a retailer could sell in Washington nothing but imported commercial airplane components that it manufactured abroad and still would qualify for the challenged tax treatment.

139. These aspects of the measures are inconsistent with the EU's theory that they are geared to induce import substitution. On the contrary, the challenged measures and the conditions on which the extensions were based appear to target exactly what the preamble to ESSB 5952 indicates was the goal – aerospace manufacturing and selling activity that sustains jobs that have long been an integral part of Washington's economy.

140. In sum, the EU has failed to make a *prima facie* case that the measures alleged to be inconsistent with Article 3.1(b) of the SCM Agreement are "geared to induce" the use of domestic over imported goods, and its unsupported assertions regarding the supposed contingency on the use of domestic over imported goods are contradicted by the facts.

VII. CONCLUSION

141. 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. In fact, as the United States has demonstrated above – even though we point out again that it is the EU that has the primary burden in this case – the evidence and the facts simply do not support the EU's summary allegations in its 26-page First Written Submission. All of the EU's arguments, moreover, are based on an incorrect interpretation of Article 3.1(b) of the SCM Agreement that conflates

[201] *See* Notification Letter from Carol K. Nelson, Director, Washington State Department of Revenue, to Kyle Thiessen, Washington State Code Reviser (July 10, 2014) (Exhibit EU-61); RCW 82.04.260(11)(e)(ii) (Exhibit EU-22) (identifying a determination only with respect to the siting of final assembly or wing assembly of the commercial airplane that is the basis of the determination that the Initial Siting provision had been met, and clarifying that its application is limited to only the manufacturing or sale of that airplane).

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.