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UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS487/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 7 December 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Subject to this paragraph, the Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its substantive meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting with the parties.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the European Union requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, the European Union shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits

upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the European Union could be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

10. Parties and third parties are invited to make their respective submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1.

11. Upon indication from any party, at the latest on the date of the Panel's first substantive meeting with the parties, that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel shall, after consultation with the parties, decide whether to adopt appropriate additional procedures.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by the European Union. If the United States chooses not to avail itself of that right, the Panel shall invite the European Union to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in

writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

22. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

23. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

24. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

25. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file six paper copies of all documents it submits to the Panel. Exhibits may be filed in two copies on CD-ROM or DVD and six paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy

to ****@wto.org and to ****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

27. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION ("BCI/HSBI PROCEDURES")

Adopted on 13 January 2016

1 GENERAL

1.1. The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Panel record. These Procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of the SCM Agreement and Article 13 of the DSU.

2 DEFINITIONS

For the purposes of these Procedures,

2.1. "**Approved Person**" means a Representative or Outside Advisor of a Party, when designated in accordance with these procedures.

2.2. "**Business Confidential Information**" or "**BCI**" means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as BCI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause harm to the originators of the information. Each Party and Third Party shall act in good faith and exercise restraint in designating information as BCI, and will endeavour to designate information as BCI only if its disclosure would cause harm to the originators of the information.

2.3. "**Conclusion of the Panel Process**" means the earliest to occur of the following events:

a. pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report;

b. a Party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU;

c. pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; or

d. pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB.

2.4. "**Designated as BCI**" means:

a. for printed information, text that is set off with bold square brackets in a document clearly marked with the notation "**BUSINESS CONFIDENTIAL INFORMATION**" and with the name of the Party or Third Party that submitted the information;

b. for Electronic Information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation "**BUSINESS CONFIDENTIAL INFORMATION**", has a file name that contains the letters "**BCI**", and is stored on a storage medium with a label marked "**BUSINESS CONFIDENTIAL INFORMATION**" and indicating the name of the Party or Third Party that submitted the information; and

c. for uttered information, declared by the speaker to be "**Business Confidential Information**" prior to utterance.[1]

In case either Party objects to the designation of information as BCI under paragraphs 2.4(a)–(c), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as BCI, the submitting Party or Third Party may either designate it as non-BCI or withdraw the information. In the case of withdrawal, the Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI information previously designated by that Party or Third Party as BCI.

This paragraph 2.4 shall apply to all submissions, including exhibits, by a Party or Third Party.

2.5. "**Designated as HSBI**" means:

a. for Electronic Information, characters that are set off with double bolded square brackets (or with a heading with double bolded square brackets on each page) in an electronic file that contains the notation "**HIGHLY SENSITIVE BUSINESS INFORMATION**", has a file name that contains the letters "**HSBI**", and is stored on a storage medium with a label marked "**HIGHLY SENSITIVE BUSINESS INFORMATION**" and indicating the name of the Party or Third Party that submitted the information; and

b. for uttered information, declared by the speaker to be "**Highly Sensitive Business Information**" prior to utterance.[2]

This paragraph 2.5 shall apply to all submissions, including exhibits, by a Party or Third Party.

2.6. "**Electronic Information**" means any information stored in an electronic form (including but not limited to binary-encoded information).

2.7. "**Highly Sensitive Business Information**" or "**HSBI**" means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause exceptional harm to its originators. Each Party and Third Party shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party and Third Party may at any time designate as non-BCI/HSBI or as BCI information designated by that Party or Third Party as HSBI.

a. The following categories of information may be Designated as HSBI:

i. information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[3], and, except as provided in subparagraph 2.7 (d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

ii. information gathered or produced in the context of LCA sales campaigns;

iii. information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, or investment banks with regard to LCA products; or

[1] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the BCI in question.

[2] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the HSBI in question.

[3] This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

iv. information concerning an LCA manufacturer's costs of production, including but not limited to data regarding pricing by suppliers.

b. Each Party and Third Party may also Designate as HSBI any other category of business information that is not otherwise available in the public domain and the disclosure of which could, in the Party's view, cause exceptional harm to its originators.

c. Each Party and Third Party shall Designate as HSBI any information described in subparagraph 2.7(a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of either of the Parties.

d. Notwithstanding the foregoing, the following categories of information may not be Designated as HSBI:

i. aggregated pricing data for a particular LCA model or family of LCA within a particular market that is indexed (i.e., does not reflect actual prices but rather movements in prices off a base of 100 for a particular year). Such data shall be treated as BCI;

ii. general legal conclusions based on HSBI (e.g., that HSBI demonstrates that a producer engaged in price undercutting). Such conclusions shall be treated as neither BCI nor HSBI;

iii. intergovernmental agreements and government decisions, other than information described in subparagraph 2.7(a).

e. Information may not be Designated as HSBI simply because it is subject to bank secrecy or banker-client confidentiality.

f. In case either Party objects to the designation of information as HSBI under paragraphs 2.7(a) to 2.7(c), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as HSBI, the submitting Party or Third Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. In the case of withdrawal, the Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party or Third Party as HSBI.

2.8. "**HSBI Approved Person**" means Approved Persons specifically designated by the Parties as having the right to access HSBI (according to the procedures laid down in Section 4).

2.9. "**HSBI Location**" means a room to be kept locked when not occupied and the access to which shall be possible only for HSBI Approved Persons, located:

a. for HSBI submitted by the United States, on the premises of (i) the United States Mission to the European Union in Brussels and (ii) the Office of the United States Trade Representative in Washington, DC;

b. for HSBI submitted by the European Union, on the premises of (i) the Delegation of the European Union to the United States in Washington, DC and (ii) the Legal Service (WTO Team) of the European Commission in Brussels;

c. for HSBI submitted by a Third Party, on the premises of its Geneva Mission to the WTO.

2.10. "**Locked CD**" means a CD-ROM that is not rewritable.

2.11. "**Outside Advisor**" means a legal counsel or other advisor of a Party or Third Party, who:

a. advises a Party or Third Party in the course of the dispute;

b. is not an employee, officer or agent of an entity or an affiliate of an entity engaged in the manufacture of LCA, the provision of supplies to an entity engaged in the manufacture of LCA, or the supply of air transportation services; and

c. is subject to an enforceable code of professional conduct that includes an obligation to protect confidential information, or has been retained by another outside advisor who assumes responsibility for compliance with these procedures and is subject to such a code of professional conduct.

For purposes of this paragraph, outside legal counsel representing an LCA producer headquartered in the territory of one of the Parties or Third Parties in connection with these proceedings or outside consultants who have been retained by such counsel to provide advice with regard to these proceedings are not considered agents of an entity listed in subparagraph 2.11(b).

2.12. "**Panel**" means the DS487 panel composed on 22 April 2015.

2.13. "**Party**" means the European Union or the United States.

2.14. "**Party-BCI**" means BCI originally submitted by a Party.

2.15. **"Representative"** means an employee of a Party or Third Party.

2.16. "**Sealed Laptop Computer**" means a laptop computer having (software and hardware) characteristics considered necessary by the submitting Party for protection of HSBI, provided that it has software installed that permits such HSBI to be searched and printed in accordance with the provisions of Section 6. However, HSBI may not be edited on the Sealed Laptop Computer.

2.17. "**Secure Site**" means a facility to be kept locked when not occupied and the access to which shall be possible only for Approved Persons, located:

a. in the case of the European Union, at the offices of WTO Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Mission of the European Union to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and three additional sites specified in accordance with subparagraph (c);

b. in the case of the United States, at the offices of the General Counsel of the Office of the United States Trade Representative (600 17th Street, NW, Washington, DC, USA), the offices of the Import Administration, United States Department of Commerce (600 17th Street, NW, Washington, DC, USA), the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and three additional sites specified in accordance with subparagraph (c); and

c. at three sites other than a government office that are designated by each Party for use by its Outside Advisors; provided that the identity of those sites has been submitted to the other Party and the Panel, and the other Party has not objected to the designation of that site within ten days of such submission.

Any objections raised under subparagraph (c) may be resolved by the Panel.

2.18. "**Stand-Alone Computer**" means a computer that is not connected to a network.

2.19. "**Stand-Alone Printer**" means a printer that is not connected to a network.

2.20. "**Submission**" means any written, electronic, or uttered information transmitted to the Panel, including but not limited to, correspondence, written submissions, exhibits, oral statements, and answers to questions.

2.21. "**Third Party**" means a Member having notified its interest in the dispute to the DSB pursuant to DSU Article 10.

2.22. "**Third Party BCI Approved Person**" means a representative or Outside Advisor of a Third Party granted access to BCI pursuant to paragraphs 4.2, 5.2, 5.3 and 5.9.

2.23. "**WTO Approved Persons**" means the Panel members, PGE members or experts appointed by the Panel who in the opinion of the Panel require access to BCI, and persons employed or appointed by the WTO Secretariat who have been authorized by the WTO Secretariat to work on the dispute (and includes translators and interpreters as well as any transcribers present at Panel meetings involving BCI and/or HSBI).

2.24. "**WTO Reading Room**" means a room, located on the premises of the WTO, which a Third Party BCI Approved Person may use to access a Party's Submission that contains Party BCI.

2.25. "**WTO Rules of Conduct**" means the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1).

3 SCOPE

3.1. These procedures apply to all BCI and HSBI received by an Approved Person and by WTO Approved Persons as a result of the Panel process, and to all BCI reviewed, in accordance with these procedures, by a Third Party BCI Approved Person.

3.2. Unless specifically otherwise provided herein, these procedures do not apply to a Party's or Third Party's treatment of its own BCI and HSBI.

4 DESIGNATION OF APPROVED PERSONS

4.1. At the latest on 18 January 2016, each Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and/or Third Parties and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and/or Third Parties and whom it wishes to have designated as HSBI Approved Persons. Each Party may submit amendments to their list of Approved Persons by submitting such amendments to the other Party and Third Parties, and to the Panel.

4.2. There shall be no Third Party HSBI Approved Persons. The designation of Third Party BCI Approved Persons shall be governed by paragraphs 5.2 and 5.3.

4.3. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a total of thirty Representatives and twenty Outside Advisors as "HSBI Approved Persons".

4.4. WTO Approved Persons shall have access to BCI. The Director-General of the WTO, or his designee, shall submit to the Parties and Third Parties, and to the Panel, a list of the WTO Approved Persons and shall identify which of those WTO Approved Persons shall additionally have access to HSBI.

4.5. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 4.1 that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days.

4.6. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

4.7. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 4.3 and to objections for the addition of new Approved Persons in accordance with paragraphs 4.5 and 4.6.

5 BCI

5.1. Only Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons may have access to BCI submitted in this proceeding. Third Party BCI Approved Persons may not have access to Party-BCI other than that included in the submissions. Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons shall use BCI only for the purposes of this dispute. No Approved Person or WTO Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. No Third Party BCI Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. These obligations apply indefinitely.

5.2. Each Third Party that wants to access Party-BCI contained in the first written submission of a Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors (including clerical or support staff) who need access to such BCI and whom it wishes to have designated as Third Party BCI Approved Persons. Each Third Party shall keep the number of Third Party BCI Approved Persons as limited as possible. Each Third Party may designate no more than a total of five Representatives and Outside Advisors as Third Party BCI Approved Persons.

5.3. Unless a Party objects to the designation of an Outside Advisor of a Third Party, the Panel shall designate those persons as Third Party BCI Approved Persons, following which the access referred to in paragraph 5.2 may be given to the Third Party concerned. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 5.2 above that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

5.4. A Party shall make no more than one copy of any BCI submitted by the other Party or a Third Party for each Secure Site provided for that Party in paragraph 2.17.

5.5. Parties may incorporate BCI in internal memoranda for the exclusive use of Approved Persons. Any memorandum and the BCI it contains shall be marked in accordance with paragraph 2.4.

5.6. BCI submitted by Approved Persons or by Third Party BCI Approved Persons pursuant to these procedures shall not be copied, distributed, or removed from the Secure Site, except as necessary for submission to the Panel.

5.7. The treatment in a Party's Submissions to the Panel of any BCI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to BCI.

a. Parties may incorporate BCI in Submissions to the Panel, marked as indicated in paragraph 2.4. In exceptional cases, parties may include BCI in an appendix to a Submission.

b. A Party submitting a Submission or appendix containing BCI shall also submit, within a time period to be set by the Panel, a version redacting any BCI. This shall be referred to as the "Non-BCI Version". However, a Party is not required to submit a "Non-BCI Version" of any exhibit containing BCI, unless specifically directed to do so by the Panel. In the case of Submissions of the Parties prior to the first meeting of the Panel, each Party shall serve a "Non-BCI Version" of its Submission on Third Parties by 5.00 p.m. on the working day following the date of the Submission.

c. A Non-BCI Version shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Non-BCI Version:

    i. A Party may request the Party that originally submitted the BCI, as soon as possible, to indicate with precision portions of documents containing BCI that may be included

in the non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, to produce a Non-BCI summary in sufficient detail to achieve this aim.

ii. Upon receipt of such a request, the Party that originally submitted the BCI shall, as soon as possible, indicate with precision portions of documents containing BCI that may be included in the Non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the BCI failed to indicate with sufficient precision portions of documents containing BCI that may be included in the Non-BCI Version and to produce, if necessary, a Non-BCI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

d. The responding Party may designate the personal offices of up to four of its Approved Persons as additional Secure Sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' Submissions to the Panel. All of the protections applicable to BCI under these procedures, including the storage rules in Paragraph 5.11, shall apply to such Submissions. BCI exhibits to Submissions may not be stored or reviewed at these additional Secure Sites. The responding Party shall submit the address (including room number) of each of the additional Secure Sites to the Panel and the complaining Party.

5.8. Any document containing BCI shall not be copied in excess of the number of copies required by the Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible. Such documents may be transmitted electronically only by using secure e-mail. If a Party or Third Party submits to the Panel an original document that cannot be transmitted electronically, it shall on the day of submission deliver a copy of that document to one of the Secure Sites listed in paragraph 2.17. The Parties shall designate one of the Secure Sites listed in paragraph 2.17 for this purpose.

5.9. Notwithstanding paragraph 20 of the Working Procedures[4], the following procedures apply to the access by Third Parties to a Party's Submission that contains Party-BCI.

a. Except as provided in subparagraph 5.7(b), a Party's Submission containing Party-BCI shall not be served on Third Parties unless both Parties agree otherwise.

b. Third Party BCI Approved Persons may view Party-BCI contained in a Party's first written submission only in a Secure Site or in the WTO Reading Room. Third Party BCI Approved Persons may not bring into such room any electronic recording or transmitting devices. Third Party BCI Approved Persons may not remove a Party's Submission containing Party-BCI from such room, but may take handwritten notes of the Party-BCI contained therein. Such notes shall be used exclusively for this dispute (that is, DS487). Each person viewing a Party's Submission containing Party-BCI shall complete and sign a log identifying the Submission the person reviewed. The Party responsible for maintaining the particular Secure Site, and the WTO Secretariat in the case of the WTO Reading Room, shall maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving the room, Outside Advisors who are Third Party BCI Approved Persons may be subject to appropriate controls.

c. If a Third Party BCI Approved Person removes from the Secure Site or the WTO Reading Room a handwritten memo in accordance with subparagraph 5.9(b) above, that Third Party BCI Approved Person shall store the memo only in a locked security container. Such memo shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double

[4] Concerning service of documents.

envelopes only. The content of such memo shall not be incorporated, electronically or in handwritten form, into the Non-BCI Version, as defined in paragraph 5.7(b).

d. All Third Parties that have designated Third Party BCI Approved Persons must inform the Parties of the identity of the specific room (including the address and the room number) in which the locked security container, as referred to in subparagraph 5.9(c) above, is located.

e. If a Third Party BCI Approved Person removes from the Secure Site or the WTO Reading Room a handwritten memo in accordance with subparagraph 5.9(b) above, such memo shall not be copied in excess of the number of copies required by the Third Party BCI Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies of such memo shall be prohibited.

f. A Third Party may not incorporate into the body of its Submission any Party-BCI. If a Third Party wishes to refer to any Party-BCI, the relevant arguments including such BCI should be incorporated into a separate Appendix. Such Appendix shall not be served on other Third Parties.

g. On the date determined by the Panel as the deadline to make the Third Party written submission, a Third Party shall serve its submission only on the Parties and on the Panel. The submission shall be served on the other Third Parties only after the Parties have confirmed that the submission does not contain or disclose Party-BCI. A Party shall make this confirmation or otherwise advise of any necessary change to the relevant Third Party within two working days of receiving the submissions of Third Parties.

5.10. A Party or Third Party that wishes to submit or refer to BCI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not Approved Persons, WTO Approved Persons or, as appropriate, Third Party BCI Approved Persons from the meeting for the duration of the submission and discussion of BCI.

5.11. Approved Persons and WTO Approved Persons shall store BCI only in locked security containers. In the case of BCI submitted to the Panel, such locked security containers shall be kept on the WTO Secretariat's premises, except that Panel members may maintain a copy of all relevant documents and materials containing BCI at their places of residence. Such documents and materials shall be stored in locked security containers when not in use. BCI shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. All work papers (*e.g.*, draft submissions, worksheets, etc.) containing BCI shall, when no longer needed, be shredded or burned consistent with normal government practice for destroying sensitive documents.

5.12. The Panel shall not disclose BCI in its final report to be circulated to the Members, but may make statements or draw conclusions that are based on the information drawn from the BCI.

6 HSBI

6.1. Unless otherwise provided below, HSBI shall be subject to all the restrictions in Section 5 applicable to BCI.

6.2. HSBI shall be submitted to the Panel in electronic form, using locked CDs or two Sealed Laptop Computers connectable to 19" - 21" monitors, or in hard copy form, for access by WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI. All such HSBI shall be stored in a locked security container in a designated secure location on the premises of the WTO Secretariat.[5] Any computer in that room shall be a Stand-Alone Computer. WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI may view HSBI only in the designated secure location referred to above. A Stand-Alone Printer may be used to make hard copies of any HSBI. Such hard copies shall be

[5] At the request of any of the Parties, the WTO Secretariat will try to obtain as soon as practicable a secure safe to store all HSBI and hard copies of any HSBI, if a locked security container is deemed unsuitable for the appropriate protection of the information.

made on distinctively colored paper. Such hard copies shall either be stored in a locked security container at the designated secure location referred to above, or destroyed at the end of the relevant working session. HSBI shall not be removed from this designated secure location, except (i) in the form of handwritten notes that may be used only on the WTO Secretariat's premises and which shall be destroyed once no longer in use; and (ii) subject to appropriate precautions, for purposes of meetings of the Panel with the Parties and any internal deliberations of the Panel, as provided for in paragraph 6.11(j).

6.3. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the other Party, in the HSBI Locations listed in paragraph 2.9. A Stand-Alone Printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI Location, or destroyed at the end of the relevant working session.

6.4. If a Third Party submits HSBI, it shall notify the Parties of the fact that such submission has been made. Each Third Party submitting HSBI shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the Parties, in the HSBI Location listed in paragraph 2.9. A Stand-Alone Printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI Location, or destroyed at the end of the relevant working session.

6.5. Except as otherwise provided in these procedures, HSBI shall not be stored, transmitted or copied either in written or electronic form.

6.6. HSBI Approved Persons may view HSBI on the Sealed Laptop Computer maintained by the other Party or a Third Party or, in the case of HSBI submitted on Locked CDs on a Stand-Alone Computer, only in a designated room at one of the HSBI Locations indicated in paragraph 2.9, or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 6.2, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI Location. The designated secure location referred to in paragraph 6.2 shall be available to HSBI Approved Persons by prior arrangement with the WTO Secretariat. HSBI Approved Persons may not bring into such room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from such room, except in the form of handwritten notes or aggregated information generated on a Stand-Alone Computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI Location or designated secure location referred to in paragraph 6.2 shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI Location within its territory referenced in paragraph 2.9, maintain such log until one year after the Conclusion of the Panel Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 6.2, maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

6.7. No HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI shall disclose HSBI to any person except another HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI, and then only for the purpose of this dispute. This obligation applies indefinitely.

6.8. HSBI may be processed only on Stand-Alone Computers. Any memorandum containing HSBI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

6.9. A Party or Third Party that wishes to submit or refer to HSBI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not HSBI Approved Persons or WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI from the meeting for the duration of the submission and discussion of HSBI.

6.10. All HSBI shall be stored in a safe at the relevant HSBI Location or in accordance with paragraph 6.2.

6.11. The treatment in a Party's Submissions to the Panel of any HSBI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to HSBI.

a. HSBI may be incorporated into a separate appendix to, but not the body of, a Party's Submission, which appendix shall be comprehensible in itself. The document containing the HSBI shall be referred to as the "Full HSBI Version Appendix";

b. A Party submitting an appendix containing HSBI shall also submit, within a time period to be set by the Panel, a version redacting any HSBI. This shall be referred to as the "Redacted Version Appendix";

c. At the request of a Party, information contained in the Redacted Version Appendix may be treated as BCI, in accordance with the provisions of Section 5;

d. A Redacted Version Appendix shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Redacted Version Appendix:

   i. A Party may request that the Party that originally submitted the HSBI, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   ii. Upon receipt of such a request, the Party that originally submitted the HSBI shall, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the HSBI failed to indicate with sufficient precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and to produce, if necessary, a non-HSBI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

e. The Full HSBI Version Appendix shall be kept in an HSBI Location and in the designated secure location referred to in paragraph 6.2, as appropriate, in the form of a locked CD. If it is not practical to keep the Full HSBI Version Appendix in an HSBI Location, the Party may keep it in a locked security container in a Secure Site in the form of a locked CD.

f. The locked CD containing the Full HSBI Version Appendix shall bear the label marked "FULL VERSION OF HSBI APPENDIX TO SUBMISSION" and indicate the name of the Party that submitted the HSBI. In addition, the HSBI Appendix itself shall be marked with heading with double bolded square brackets on each page in an electronic file that contains the notation "FULL VERSION OF HSBI APPENDIX TO SUBMISSION". The electronic file containing the HSBI Appendix shall have a file name that contains the letters "HSBI VERSION".

g. The Party shall submit one copy of the Full HSBI Version Appendix to the Panel (through Mr Rodd Izadnia, Secretary to the Panel) and two copies to the other Party in the form of two locked CDs. The Full HSBI Version Appendix shall not be transmitted via e-mail. Parties shall agree between themselves beforehand on the name of the Approved Person that is to receive the locked CD.

h. The Party shall commence transfer of the locked CDs containing the Full HSBI Version Appendix no later than the deadline for the submission concerned, and, at the same time, provide the Panel and the other Party with proof that this has been done.

i. No more than one working day in advance of a Panel meeting with the parties, a Party may, exclusively at that Party's Permanent Mission in Geneva, use the locked CD to produce no more than one hard copy of the Full HSBI Version Appendix for each HSBI Approved Person planning to attend that Panel meeting. All paper versions produced pursuant to this subparagraph shall be collected by the Party concerned and destroyed immediately after the conclusion of the meeting.

j. WTO Approved Persons designated pursuant to paragraph 4.4 as being additionally authorized to access HSBI may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, a Panel meeting with the parties and/or an internal meeting. When not in use, these paper versions shall be stored in a locked security container in the designated secure location referred to in paragraph 6.2. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Panel Process as defined in paragraph 2.3.

k. Parties are encouraged to submit versions of exhibits containing HSBI from which all HSBI has been deleted. Such exhibits shall be referred to as "HSBI-Redacted Version Exhibits". HSBI-Redacted Version Exhibits may contain BCI.

    i. A Party may submit HSBI-Redacted Version Exhibits prepared by that Party to the Panel, and serve them on the other Party in accordance with the applicable procedures, at the time it serves the submission to which the exhibit relates.

    ii. If a HSBI-Redacted Version Exhibit is not submitted by the Party submitting the exhibit, an HSBI Approved Person representing the other Party may prepare an HSBI-Redacted Version Exhibit of any such exhibit.

    iii. HSBI-Redacted Version Exhibits may be prepared by an HSBI Approved Person, at an HSBI Location, by deleting the HSBI in the exhibit (identified by double brackets) from such exhibit and either printing or photo-copying the resulting document containing no HSBI. The deletion of HSBI from the resulting document shall be verified by a person authorized for this purpose by the Party that submitted the exhibit(s) in question. The resulting document containing no HSBI (but which may contain BCI) will constitute the HSBI-Redacted Version Exhibit of such exhibit, and may be removed from the HSBI Location.

    iv. The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI Approved Person for purposes of the verification provided for in paragraph (iii) above. HSBI-Redacted Version Exhibits may be prepared by HSBI Approved Persons upon request during the times the designated room at the relevant HSBI Location is available, as provided for in paragraph 6.6 of these Procedures.

    v. The Panel shall resolve any disagreement arising from the operation of sub-paragraph 6.11(k), and may take appropriate action to ensure that the provisions of paragraph 6.11 are satisfied.

l. The Panel reserves the right, after consulting the parties, to amend the provisions of paragraph 6.11 at any time in order to accommodate situations arising during Panel meetings, and the preparation of the interim report and the final report.

6.12. The Panel shall not disclose HSBI in its report, but may make statements or draw conclusions that are based on the information drawn from the HSBI.

7 RESPONSIBILITY FOR COMPLIANCE

7.1. Each Party and Third Party is responsible for ensuring that its Approved Persons and Third Party BCI Approved Persons comply with these procedures to protect BCI and HSBI submitted by each Party and Third Party, as well as with enforceable codes of professional conduct to which its Approved Persons or other Outside Advisors are subject. WTO Approved Persons shall comply with these procedures to protect BCI and HSBI submitted by a Party or Third Party. WTO Approved Persons are covered by the WTO Rules of Conduct. As provided for in the WTO Rules of Conduct, evidence of breach of these Rules may be submitted to the Chair of the DSB or to the Director-General of the WTO, or his designee, as appropriate, for appropriate action pursuant to Section VIII of the WTO Rules of Conduct.

8 ADDITIONAL PROCEDURES

8.1. After consulting with the Parties, the Panel may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures but which the Panel considers may be of assistance in adjudicating the claims before it, including, if necessary, information that the United States internally classifies as "Top Secret", "Secret", "Confidential", or controlled pursuant to the United States' International Traffic in Arms Regulation ("ITAR").

8.2. The Panel may, with the consent of both Parties, waive any part of these procedures. Such "waiver" shall be specifically set forth in writing and signed by a representative of both Parties.

9 RETURN AND DESTRUCTION

9.1. Except as provided for in paragraph 9.2, after the Conclusion of the Panel Process as defined in paragraphs 2.3(a), 2.3(c) or 2.3(d), or as contemplated in paragraph 9.3, within a period to be fixed by the Panel, WTO Approved Persons, the Parties and Third Parties (along with all Approved Persons) shall destroy or return all documents (including electronic material) or other recordings containing BCI to the Party or Third Party that submitted such documents or other recordings. At the same time, WTO Approved Persons and the Parties shall destroy and/or return any electronic material submitted by a Party or Third Party that contains HSBI.

9.2. The WTO Secretariat shall retain one hard copy and one electronic version of any final report of the Panel containing BCI, and one electronic version of all documents containing BCI submitted to the Panel, recorded on locked CD(s), to be kept in sealed containers in a locked cabinet on the premises of the WTO Secretariat.

9.3. After the Conclusion of the Panel Process as defined in paragraph 2.3(b), the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. Following the adoption by the DSB of the Appellate Body report pursuant to Article 17.14 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body Report pursuant to Article 17.14 of the DSU, the provisions of paragraphs 9.1 and 9.2 shall apply *mutatis mutandis*.

9.4. The hard drive of each Stand-Alone Computer and all media used to back up such computers shall be destroyed at the Conclusion of the Panel Process.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE MEETING OF THE PANEL

Adopted on 22 February 2016

1.1. The Panel's meeting with the parties will start at 10h00 on 24 February 2016. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view.

1.2. The oral statements of the parties will be video recorded for later viewing, as set out in paragraph 1.8. below.

1.3. If at any point during its oral statement a party intends to address BCI or HSBI, it shall request that the video recording be discontinued for the relevant portion of the oral statement, after which video recording will be resumed. A party shall first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the video recording to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI. Either party shall inform the Panel if the other party or the Panel is referring to BCI or HSBI, whereupon the Panel shall instruct that video recording be discontinued and instruct any individuals not having BCI/HSBI approval to exit the room.

1.4. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. BCI or HSBI in the texts of the oral statements provided to the panel and the other party during the meeting and prior to the delivery of the oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. BCI should be contained within single brackets. HSBI should be contained within double brackets and deleted. In addition, a party including HSBI in its oral statement shall provide, prior to delivery of the oral statement, one paper copy to the panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

1.5. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to video record the proceedings. If at any point during the meeting a party intends to refer to BCI or HSBI, those individuals not having BCI/HSBI approval shall be asked to exit the room. If at any point during the meeting a party intends to refer to either BCI or HSBI, the team hired by the WTO Secretariat to video record the proceedings shall be asked to exit the room.

1.6. After each oral statement has been delivered, the Panel will ask the respective party whether it can confirm that no BCI or HSBI was pronounced during the video recorded portion of the oral statement. The Panel will also ask the parties for confirmation, at the end of the meeting, that no BCI or HSBI was pronounced during the video recorded portion of the meeting. If both parties so confirm, the showing of the video recording will proceed according to the schedule to be determined by the Panel, as provided in paragraph 1.8. If either party requests to review the video recording, the Panel will invite both parties to attend a review session, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. In the event, each party shall designate a maximum of two persons, who shall be BCI/HSBI-approved persons, to participate in the review session. Parties should be prepared to advise the technician which portion of the oral presentation presents a concern, and limit review to those portions of the video recording to the maximum extent possible. If either party considers that a specific portion of the video recording must be deleted – because it is BCI or HSBI – the specific portion of the video recording will be deleted.

1.7. The third party session will start at 10h00 on 25 February 2016. Third parties shall indicate to the Panel, not later than by 13h00 on 24 February 2016, whether they consent to the video recording of their oral statements for later viewing. The Panel will start the third party session with

the statements of those third parties so consenting. After such third parties have made their statements, any questions or comments from the parties, other third parties or the Panel concerning these statements shall be made. The Panel shall then proceed to a third party closed session during which the rest of the third parties shall make their statements. The Panel or any party or third party may pose questions to any third party or make comments concerning these statements. Should any third party intend to include BCI in its oral statement or otherwise to refer to BCI during the third party session, it is requested to inform the Panel by 13h00 on 24 February 2016 so that appropriate arrangements can be made to protect the confidentiality of that information.

1.8. The showing of the video recording of the oral statements of the parties and third parties shall take place at a date to be determined by the Panel. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental organizations, upon presentation of their official badges. Other interested persons will be able to attend by registering directly with the WTO. To this effect, the Secretariat will place a notice by on the WTO website informing the public of the showing and including a link through which members of the public can register.

ANNEX A-4

ADDITIONAL WORKING PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE SECOND MEETING OF THE PANEL

Adopted on 23 March 2016

1.1. The Panel's meeting with the parties will start at 10h00 on 5 April 2016.

1.2. In accordance with the Working Procedures adopted for the dispute, the Panel shall ask the United States whether it wishes to avail itself of the right to present its case first at the meeting. If the United States wishes to do so, it will be invited by the Panel to deliver its opening statement first. Subsequently, the Panel shall invite the European Union to present its point of view. If the United States chooses not to avail itself of that right, the Panel shall invite the European Union to present its opening statement first.

1.3. The oral statements of the parties will be video recorded for later viewing, as set out in paragraph 1.9. below.

1.4. If at any point during its oral statement a party intends to address BCI or HSBI, it shall request that the video recording be discontinued for the relevant portion of the oral statement, after which video recording will be resumed. A party shall first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the video recording to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI. Either party shall inform the Panel if the other party or the Panel is referring to BCI or HSBI, whereupon the Panel shall instruct that video recording be discontinued and instruct any individuals not having BCI/HSBI approval to exit the room.

1.5. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. BCI or HSBI in the texts of the oral statements provided to the panel and the other party during the meeting and prior to the delivery of the oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. BCI should be contained within single brackets. HSBI should be contained within double brackets and deleted. In addition, a party including HSBI in its oral statement shall provide, prior to delivery of the oral statement, one paper copy to the panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

1.6. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to video record the proceedings. If at any point during the meeting a party intends to refer to BCI or HSBI, those individuals not having BCI/HSBI approval shall be asked to exit the room. If at any point during the meeting a party intends to refer to either BCI or HSBI, the team hired by the WTO Secretariat to video record the proceedings shall be asked to exit the room.

1.7. After each oral statement has been delivered, the Panel will ask the respective party whether it can confirm that no BCI or HSBI was pronounced during the video recorded portion of the oral statement. The Panel will also ask the parties for confirmation, at the end of the meeting, that no BCI or HSBI was pronounced during the video recorded portion of the meeting. If both parties so confirm, the showing of the video recording will proceed according to the schedule to be determined by the Panel, as provided in paragraph 1.9.

1.8. If either party requests to review the video recording, the Panel will invite both parties to attend a review session, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. In the event, each party shall designate a maximum of two persons, who shall be BCI/HSBI-approved persons, to participate in the review session. Parties should be prepared to advise the technician

which portion of the oral presentation presents a concern, and limit review to those portions of the video recording to the maximum extent possible. If either party considers that a specific portion of the video recording must be deleted – because it is BCI or HSBI – the specific portion of the video recording will be deleted.

1.9. The showing of the video recording of the oral statements of the parties and non-confidential portions of the meeting shall take place at a date to be determined by the Panel. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental organizations, upon presentation of their official badges. Other interested persons will be able to attend by registering directly with the WTO. To this effect, the Secretariat will place a notice by on the WTO website informing the public of the showing and including a link through which members of the public can register.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. Pursuant to paragraph 20 of the Panel's Working Procedures (adopted 7 December 2015), the European Union now provides an integrated executive summary of the facts and arguments presented in the European Union's (i) first written submission, (ii) first opening oral statement, (iii) first closing oral statement, and (iv) responses to questions following the first substantive meeting.

2. In the present dispute, the European Union challenges several subsidies, in the form of tax incentives awarded by Washington State to aerospace companies, which are contingent on the use of domestic over imported goods, and hence prohibited under Article 3.1(b) of the SCM Agreement. These tax incentives, originally established by House Bill 2294 ("HB 2294"), have been amended, and extended through 2040, by Substitute Senate Bill 5952 ("SSB 5952").

3. With its first written submission, the European Union established a *prima facie* case that (i) the measures at issue are subsidies within the meaning of Article 1.1 of the SCM Agreement, and that (ii) these subsidies are contingent on the use of domestic over imported goods within the meaning of Article 3.1(b).

4. As for "subsidy", the European Union has demonstrated the existence of a financial contribution in the form of foregoing of government revenue otherwise due, within the meaning of Article 1.1(a)(1)(ii). Further, the European Union has demonstrated that the measures confer a "gift" on the recipients that would not have been available in the market, thereby conferring a "benefit" within the meaning of Article 1.1(b).

5. As for the prohibited contingency, the European Union refers to both the text of SSB 5952 (*de jure* contingency), and certain additional facts (*de facto* contingency). While the European Union advances both *de jure* and a *de facto* claims of contingency, its first and principal claim is the *de jure* claim.

6. By way of background, the European Union notes that Washington State, itself, has quantified the total value of the revenue foregone pursuant to the conditional amendments and extensions established by SSB 5952 - nearly USD 9 billion. While the quantum of subsidization is irrelevant to a prohibited subsidy dispute as a legal matter, it is pertinent to note that the measures at issue confer on their beneficiaries – with Boeing being the principal beneficiary – the single largest targeted state tax break in United States history.

II. FACTUAL ASPECTS

A. The Washington State Aerospace Tax Incentives

7. At issue in this dispute are tax incentives for civil aircraft provided by the State of Washington (the "aerospace tax incentives"), as amended and extended by SSB 5952, and as subject to the conditions in Sections 2, 5, and 6 thereof.

8. In 2003, the State of Washington enacted HB 2294 for the purpose of "retaining and attracting the aerospace industry to Washington State" and included a set of "comprehensive tax incentives" directed at achieving this aim. This legislation was part of a package of incentives for Boeing to locate the 787 final assembly facility in Washington. HB 2294 took effect upon a final decision to site a facility in Washington State "with the capacity to produce at least thirty-six super-efficient airplanes a year," defined by the precise specifications for the 787.

9. HB 2294 established seven tax incentives for producers of civil aircraft (including certain suppliers):

- A reduction in the rate of Business and Occupation ("B&O") tax, i.e., the State of Washington's principal business tax, to 0.2904%, compared to the generally applicable rates of 0.484% for manufacturing, and 0.471% for retailing activities.

- A B&O tax credit for pre-production development for commercial airplanes and components;

- A B&O tax credit for property taxes on commercial airplane manufacturing facilities;

- An exemption from sales and use taxes for certain computer hardware, software, and peripherals;

- An exemption from sales and use taxes for certain construction services and materials;

- An exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes; and

- An exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes.

10. While the tax incentives that originated in HB 2294 were originally enacted in connection with Boeing's decision to locate the first 787 final assembly line in Washington State, HB 2294 provided that those benefits were to apply to all Boeing LCA developed and produced in Washington State, through the original expiration date of 1 July 2024.

B. The Conditional Extension and Amendment of the Washington State Aerospace Tax Incentives: Substitute Senate Bill 5952

1. The 777X incentive legislation

11. Over the course of 2013, Boeing publicly considered developing a new, advanced variant of its 777 family of long-range, twin-aisle LCA, known as the 777X. On 5 November 2013, Washington State, Boeing, and the trade union representing Boeing machinists reached a tentative agreement to locate production of the 777X in Washington, whereby the union would agree to a new long-term contract, and the State would provide Boeing with billions of dollars in additional subsidies.

12. On 9 November 2013, the Washington State legislature passed SSB 5952, which, subject to certain conditions discussed below, amends and extends each of the existing aerospace tax incentives – originally due to expire in 2024 – through 2040, at a value estimated at more than USD 8.7 billion for Boeing, its suppliers, and other local aerospace firms. Governor Jay Inslee signed SSB 5952 into law on 11 November 2013.

2. The Programme-Siting condition

13. Section 2 of SSB 5952 provides that the entire act would take effect only upon the decision to locate a new commercial aircraft programme – expressly defined to include *wing and fuselage production* of an aircraft, in addition to *final assembly* of that same aircraft – in Washington State. Specifically, Section 2 provides that:

> {this act} takes effect contingent upon the siting of a significant commercial airplane manufacturing program in the state of Washington. If a significant commercial airplane manufacturing program is not sited in the state of Washington by June 30, 2017, {this act} does not take effect.

The European Union refers to this provision as the "Programme-Siting condition".

14. Section 2 defines "siting" to mean "a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington state". It further defines "significant commercial airplane manufacturing program" as:

> an airplane program in which the following products, including final assembly, will commence manufacture at a new or existing location within Washington state on or after the effective date of this section:
>
> (i) The new model, or any version or variant of an existing model, of a commercial airplane; and
>
> (ii) Fuselages and wings of a new model, or any version or variant of an existing model, of a commercial airplane.[1]

15. Accordingly, under the Programme-Siting condition established in Section 2, the aerospace tax incentive extensions and expansion provided for in SSB 5952 were made contingent upon Boeing's decision to locate in Washington State both (i) production of the wings and fuselage for a new aircraft model, version, or variant, and (ii) final assembly of that same aircraft model, version, or variant. In fact, the relevant aircraft turned out to be the 777X.

3. The Exclusive-Production condition

16. In addition to the Programme-Siting condition, SSB 5952 establishes a second condition related to the availability of the B&O tax rate reduction for the 777X, hereinafter referred to as the "Exclusive-Production condition".

17. Pursuant to the Exclusive-Production condition, the reduced B&O tax rate would not apply to revenue from the 777X *in the event* Boeing were to perform any final assembly, *or any wing assembly*, for the 777X outside of Washington State.

III. PROHIBITED SUBSIDIES UNDER ARTICLE 3.1(B) OF THE SCM AGREEMENT

A. The Aerospace Tax Incentives, as Amended by SSB 5952, Constitute Specific Subsidies

1. Financial contribution

18. Each of the aerospace tax incentives, as amended and extended by SSB 5952, constitutes a financial contribution by a government involving the "forego{ing}" of "government revenue that is otherwise due" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

19. The identification of revenue "otherwise due" involves a comparison between the challenged measure and a "defined, normative benchmark". According to the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, the proper comparison must be "between the rules of taxation contained in the challenged measure and other rules of taxation of the Member concerned", and "{i}n identifying the appropriate benchmark for comparison, panels must obviously ensure that they identify and examine fiscal situations which it is legitimate to compare".

20. In response to Panel Question 24, and expanding on the European Union's *prima facie* showing in its First Written Submission, the European Union has further specified the relevant normative benchmark for each of the measures at issue, demonstrating that the tax treatment enjoyed by the beneficiaries involves foregoing of revenue that would be due under the relevant benchmark. Additionally, the European Union has explained that Washington State, itself, has publicly acknowledged this foregoing of revenue, and has even quantified the revenue that is foregone under each of the measures at issue, making the Panel's task a simple one.

21. In analyzing Article 1.1(a)(1)(ii), the Appellate Body in *US – FSC* has explained that the word "foregone" "suggests that the government has *given up an entitlement to raise revenue* that it could 'otherwise' have raised".[2] When a government confers upon a taxpayer an *entitlement* to a tax reduction, it foregoes its own *entitlement* to raise a part of the revenue that would otherwise be due from the taxpayer under the normative benchmark. Through each of the tax breaks at issue, Washington State has conferred an *entitlement* on Boeing and other Washington State

[1] Emphasis added.
[2] Emphasis added.

aerospace companies to receive the continued tax reductions, contingent on satisfaction of the Programme-Siting and Exclusive-Production conditions. In that sense, the government is foregoing, and has foregone, revenue that is otherwise due.

22. In response to Panel Question 6, the European Union has clarified that its challenge is directed at the tax incentives, as amended and extended by SSB 5952, "as such"; this challenge is not focused on the application of these measures during any given point in time or in any specific instance. Having said that, the European Union has also demonstrated that the challenged tax incentives have already foregone revenue that became due in the past, revenue that is currently due, and revenue that will become due in the future. All of these are relevant to determining the existence of a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

23. The European Union has clarified that SSB 5952 not only (conditionally) extended the expiration date of the existing tax incentives from 2024 through 2040, but also amended the *sales and use tax exemption for construction services and materials* so that Boeing could take advantage of that exemption in constructing its new 777X manufacturing facilities in *2015 and 2016*. Thus, SSB 5952 has already led to foregoing of revenue in the past, and this was dependent on satisfaction of the Programme-Siting condition. In addition, Boeing's continued enjoyment of the B&O tax rate reduction associated with the 777X production and sales is *currently* subject to the Exclusive-Production condition.

24. With respect to the 2024-2040 period, an *entitlement* in favour of Boeing has been created, and, in turn, an *entitlement* has been *foregone* by Washington State, at present. An interpretation under which only foregoing of revenue due in the past would constitute a financial contribution would allow Members to craft prohibited subsidy programs that include a long time gap between the intended distortion (through the meeting of the prohibited contingency) and the reward for such conduct in the form of disbursement of a subsidy, in a manner that would limit the effectiveness of a challenge under Article 3.1(b). Moreover, Article 3.2 clarifies that "maintain{ing}" a subsidy programme tied to the prohibited contingencies violates the *SCM Agreement*, even when the financial contribution is yet to be "grant{ed}", let alone actually disbursed or used.

2. Benefit

25. The European Union has demonstrated that the financial contribution in the present dispute – in the form of forgiveness of tax obligations – is, in the words of the panel in *US – Large Civil Aircraft,* "essentially a gift from the government, or a waiver of obligations due, and it is clear that the market does not give such gifts". Thus, there is a benefit because the very nature of a market precludes the availability of multi-billion dollar gifts to a commercial actor.

3. Conclusion on "subsidy"

26. The European Union, consistent with its burden to establish a *prima facie* case, has demonstrated that each of the measures at issue provides a financial contribution and confers a benefit. Absent effective rebuttal by the United States, the very nature of a *prima facie* case requires the Panel to make findings in favour of the European Union.

27. The European Union also recalls that the findings it seeks are largely consistent with the "financial contribution" and "benefit" findings made by the panel and the Appellate Body in *United States – Large Civil Aircraft*. While the European Union's reliance on these findings certainly does not erase the burden to establish a *prima facie* case (which it has discharged), the goals of predictability and security set out in Article 3.2 of the DSU, as well as the guidance of the Appellate Body, would warrant the Panel arriving at findings consistent with those made by the panel and Appellate Body in *United States – Large Civil Aircraft*, to the extent the relevant facts have not changed.

28. The European Union acknowledges that the *United States – Large Civil Aircraft* panel held that three of the tax incentives at issue did not involve a financial contribution because Boeing was unlikely to use these incentives. These are the (i) sales and use tax exemption for construction services and materials, (ii) leasehold excise tax exemption and (iii) leaseholder property tax

exemption. The panel expressly stated that its finding was a result of the European Union's claim not being one of a financial contribution in the abstract, but one specifically of a financial contribution to Boeing. By contrast, in the present instance, the European Union alleges financial contribution in the abstract, warranting a different conclusion. Additionally, the European Union has also demonstrated that, with the construction of the new 777X wing assembly plant, which commenced in 2014 and is expected to be completed in 2016, there is evidence of Boeing having used the sales and use tax exemption for construction services and materials.

B. The Aerospace Tax Incentives, as Amended by SSB 5952, Constitute Prohibited Subsidies Contingent upon the Use of Domestic over Imported Goods

29. As a result of the Programme-Siting and Exclusive-Production conditions established in SSB 5952, the aerospace tax incentives, as amended and extended, constitute prohibited subsidies "contingent ... upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement. While the European Union advances both a claim of *de jure* contingency and of *de facto* contingency, its first and principal claim is that of *de jure* contingency.

1. The legal standard for demonstrating the existence of a subsidy contingent upon the use of domestic over imported goods

30. Article 3.1(b) of the SCM Agreement provides that "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods" "shall be prohibited".

31. The United States correctly points out that the French and Spanish texts of Article 3.1(b) employ the terms *produits* and *productos*. The European Union agrees with the United States that the use of the words *produits* and *productos* in the French and Spanish versions is instructive, and the European Union considers the word "goods" in Article 3.1(b) of the SCM Agreement to be synonymous with the term "products".

32. The European Union has also indicated its agreement with the United States and Japan that the word "over", in the text of Article 3.1(b), means "in preference to", "in excess of" or "more than". Further, the use of the word "over" (i.e., "in excess of") in Article 3.1(b) confirms that no *de minimis* discrimination is acceptable under the prohibition in Article 3.1(b) of the SCM Agreement. As soon as a subsidy is contingent upon the use of domestic over imported goods, competitive opportunities between domestic and imported goods are distorted, even if no such goods are currently imported.

33. The European Union has also set out its understanding that the word "use" in Article 3.1(b) has a broad meaning, including in response to Panel Question 44. Prior guidance of the Appellate Body, and the context afforded by other provisions of covered agreements that employ the word "use", indicate that its meaning goes beyond simple incorporation of a domestic input in the final subsidised product.

34. To the extent that the United States argues that a "good", within the meaning of Article 3.1(b), must be actually traded, the European Union disagrees. This argument ignores a hallmark tenet of WTO jurisprudence that the disciplines on goods protect not just actual trade in goods as seen or envisioned in the market today, but also *competitive opportunities*. In the context of a purely origin-based discrimination, such as mandated by the legislation at issue, this protection extends to "potentiality to compete" even in the absence of an actual product which is traded at the relevant time.

35. If the United States were correct that actual trade in a product needs to be demonstrated for it to qualify as a "good" under Article 3.1(b), the most trade restrictive of import substitution subsidies – i.e., those which have succeeded in distorting the market so much that they preclude *even the existence* of competing foreign producers in the market – would not be disciplined by Article 3.1(b), while less trade distorting import substitution subsidies would be subject to that provision.

2. Application of the legal standard to the facts of this case

36. The European Union fully agrees with the United States and the third parties that Article 3.1(b) does not discipline production subsidies. However, the measures at hand are not production subsidies, but subsidies contingent on the use of domestic over imported goods, which are properly within the scope of the prohibition in Article 3.1(b).

37. In this case, pursuant to the Programme-Siting condition in Section 2 of SSB 5952, the amended and extended aerospace tax incentives are contingent on the establishment of a new commercial aircraft manufacturing programme that uses goods (i.e., fuselages and wings) produced in the United States (specifically, in Washington State) in the subsidized aircraft. Under this condition, the tax incentives would not have been extended in duration through 2040 if Boeing had decided to "use" imported wings and fuselages in the assembly of the 777X, nor would the scope of the sales and use tax exemption for construction services and materials have been expanded to cover Boeing's work on the 777X manufacturing facilities in 2015 and 2016.

38. Likewise, pursuant to the Exclusive-Production condition, Boeing benefits from the reduced B&O tax rate for the 777X only so long as it "uses" wings assembled exclusively in Washington State for the 777X, or any variant thereof. If, for example, Boeing were to use *any* wings made in Japan for the 777X, as it does for the 787, it would lose its entitlement to the preferential B&O tax rate with respect to the manufacture and sale of the 777X.

39. In response to the European Union's arguments in this regard, the United States asserts that wings and fuselages are not "goods", and that they are not "used" in the production of the 777X. But the very wording of SSB 5952, itself, describes wings and fuselages as "products", a term synonymous with the word "goods". The European Union refers to the shared understanding of the World Customs Organization, the United States' Customs authorities, Washington State, Boeing, and Airbus – outside the context of this dispute – that wings and fuselages are goods. There are real world examples, including the Boeing 787 and 737, and the Airbus A350 and A380, where aircraft wings and fuselages have been traded and transported across long distances.

40. While it is not incumbent upon the complaining Member in a prohibited subsidy dispute to positively demonstrate nullification and impairment – in the form of prior existing identifiable competitive opportunity, and its erosion by the challenged measure – the European Union also demonstrates that prior to the enactment on SSB 5952, Boeing had considered importing the 777X wing from Japan, as it currently does for the 787. The European Union referred the Panel to a November 2013 statement by Boeing's own Chief Technology Officer, Mr. John Tracy. According to press reports, Mr. Tracy explained, immediately before the adoption of SSB 5952, that Boeing was "consider{ing} all other alternatives", and specifically clarified that such alternatives included "the possibility of *taking production of the wings out of the United States to Japan*".

41. The United States provides details of how Boeing *today* intends to produce the 777X. While a publicly-available technical report by Washington State's Department of Ecology contradicts the United States' current narrative about this production process, the European Union considers it unnecessary to enter into a protracted debate on 777X production. These details are an irrelevant distraction. It is necessary to evaluate a challenge to Article 3.1(b) in view of the market situation at the point in time prior to adoption of a challenged measure.

42. SSB 5952 was adopted, and worded the way it is, precisely in order to take away competitive opportunity from wing and fuselage producers outside of Washington State. Therefore, what Boeing or any other entity does *today* or intends to do *in the future* in a market scenario distorted by the subsidies at issue is irrelevant and extraneous to the issues at hand.

43. The United States' assertion that the conditions at hand establish the eligibility parameters for a "production subsidy" is equally erroneous. It is true that SSB 5952 begins by providing that the subsidized product – a commercial aircraft – must be produced in Washington State. This aspect, taken alone, is a hallmark of a production subsidy, which would not be disciplined by Article 3.1(b). However, the references to wings and fuselages, which the United States struggles to read out of SSB 5952, convert what would otherwise be a production subsidy into a prohibited local content contingency.

44. The Programme-Siting condition provides that the required "fuselages and wings" cannot be just any type of "fuselages and wings" – rather, they must be fuselages and wings of the same "airplane program" that must be "fina{lly} assembl{ed}" in Washington State. Similarly, the Exclusive-Production condition does not provide only that "wing assembly", generally, must take place in Washington State; rather, it must be the "wing assembly of any version or variant of a commercial airplane that is the basis of a siting of a significant commercial airplane manufacturing program in the state". Thus, according to the text of the legislation, fuselages and wings must be produced in Washington State, and these same components must be used in the final assembly of the subsidized airplane program.

45. The interpretation of Washington State law is a question of fact before this Panel that must be considered objectively, and the United States' interpretation cannot be the correct one. When interpreting domestic law of a Member, the role of a WTO panel is to determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. As a matter of Washington State law, "{s}tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous". The United States' proposed interpretation would, in fact, render critical parts of SSB 5952 meaningless and superfluous – namely, the references to wings and fuselages. As such, the United States' arguments must be rejected.

3. The violation of Article 3.1(b) is both *de jure* and *de facto*

46. The European Union has established a *prima facie* case in respect of its first and principal claim – one of *de jure* contingency, with reference to the text of SSB 5952, which expressly sets out a multi-billion dollar reward for the use of domestic wings and fuselages, and a corresponding multi-billion dollar penalty for the use of imported wings and fuselages. The text of SSB 5952 does not provide, as did the measure considered by the Appellate Body in *Canada – Autos*, a "multiplicity of possibilities for compliance" with the Program-Siting and Exclusive-Production conditions that may "make the use of domestic goods only one possible means". It provides one and only one possibility for compliance – the use of domestic wings and fuselages in the same aircraft that satisfied the Programme Siting condition – and makes the subsidies contingent on compliance. Thus, the very text of SSB 5952 demonstrates the *de jure* contingency that the European Union alleges.

47. Additionally, the European Union has identified the following facts, which are demonstrative of *de facto* contingency in the present case:

- The text of SSB 5952, and in particular the language of the Programme-Siting condition and Exclusive-Production condition;
- The statement of Governor Inslee indicating that "the legislation includes strong contingency language";
- The fact that Boeing currently imports wings for its 787 from Japan;
- The fact that Boeing actively considered the possibility of importing the 777X wings from Japan prior to the enactment of SSB 5952, and formally decided against that option once SSB 5952 was enacted.
- The fact that SSB 5952 creates specific multi-billion dollar *penalties* for use of imported wings or fuselages, and multi-billion dollar *rewards* for use of domestic wings or fuselages. This penalty/reward structure was designed to distort decision-making both at the initiation of the new aircraft programme (i.e. Programme-Siting condition), and throughout the life of that programme (i.e. Exclusive-Production condition).

IV. CONCLUSION AND REQUEST FOR RELIEF

48. For the reasons set out in its submissions to date, the European Union respectfully requests the Panel to find that each of the Washington State tax incentives, as amended and extended by SSB 5952, constitutes a subsidy that is prohibited pursuant to Articles 3.1(b) and 3.2 of the SCM Agreement.

49. In accordance with Article 4.7 of the SCM Agreement, the Panel should recommend that the United States withdraw the subsidies without delay.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. In accordance with the Panel's Working Procedures (adopted 7 December 2015), the European Union now provides an integrated executive summary of the facts and arguments presented in the European Union's (i) second written submission, (ii) oral statement at the second substantive meeting, and (iii) responses (and comments on the United States' responses) to the Panel's questions following the second substantive meeting.

2. During the course of this dispute, the European Union has provided evidence and argument demonstrating that Washington State's aerospace tax incentives, as amended and extended by SSB 5952[1], confer subsidies that are *de jure* contingent on the use of domestic over imported goods, in violation of Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The Panel has before it the text of the legislation (submitted as Exhibit EU-03), which expressly conditions the provision of over $9 billion in subsidies on the use of domestic "products" on aircraft manufactured in Washington State. The European Union has also demonstrated, through additional factual evidence, a secondary claim of *de facto* contingency, also under Articles 3.1(b) and 3.2.

3. Recalling the text of SSB 5952, Section 2 provides (in the "Programme-Siting condition") that the amended and extended subsidies would not be granted unless a new commercial aircraft program which uses *domestically*-made "*products*", namely "fuselages and wings", is sited in Washington State. Additionally, Sections 5 and 6 (in the "Exclusive-Production condition") would serve to remove a large portion of one of the most valuable tax incentives in the package *if* the aircraft manufacturer satisfying the Programme-Siting condition were to *use* any *foreign-made* wings in the newly sited aircraft manufacturing facility in Washington State.

4. This statutory text is further supplemented by additional factual evidence. Most notably, in testimony to the Finance Committee of Washington State's House of Representatives just two days prior to passage of SSB 5952, Governor Jay Inslee explained in the following terms why he was sponsoring the legislation, and why the legislature should quickly pass it:

> Look, this is pretty simple what we are looking at here, and that is a simple fact, and that is the construction of the Boeing 777X and its carbon fiber wing, and assembly of that airplane, will be the lynchpin for economic growth in the State of Washington in the decades to come. We have an opportunity in the few days ahead of us to make sure that advanced manufacturing of the carbon fiber wing – the first time we have reversed the outflow of work of this nature from the State of Washington to bring it back to the State of Washington, we can achieve that in the next few days. And I can't overstate the significance of this event. Bringing this wing back to the State of Washington sets the foundation for an advanced carbon fiber industrial ecosystem in the State of Washington. When we lost the wing for the Boeing 787, some thought Washington would lose its lead in composites and advanced manufacturing. The 787 wing went to Japan; the second line went to South Carolina. . . . Today, we are going to reverse that trend with the 777X and its carbon fiber wing built here in the State of Washington . . . .[2]

5. Governor Inslee's statement could not have been any clearer – SSB 5952 amended and extended the tax incentives to the aerospace industry with conditions that will ensure that Washington State would not, once again, "los{e} the wing" to Japan, as it did for the 787. Rather,

[1] The European Union uses the term "SSB 5952" to refer to the law that is designated as Chapter 2 of the Laws of the 2013 3rd Special Session of the Washington State legislature, and published in the 2014 volume of the official digest of the Session Laws of the State of Washington, beginning at page 2. The United States refers to the same legislation as "ESSB 5952".

[2] Emphases added.

through the Programme-Siting and Exclusive-Production conditions, Washington State has "reversed the outflow" of those inputs for Boeing's latest aircraft programme so that they will be "built" "in the State of Washington". This was not the statement of a leader who would have accepted the current United States' assertions that wings of the 777X could not possibly be imported from foreign countries. Nor would the Governor have accepted the novel United States' position that wings are not components of a plane that are used in aircraft production.

6. The Washington State legislature passed the Governor's proposed legislation two days later. And, as a result of these conditions, SSB 5952 has already been a big success – and certainly not the "demonstrable failure" alleged by the United States – in ensuring that the wings and fuselages for Boeing's next new aircraft programme will be domestic goods.

7. Having summarised what this dispute is about, it is important to clarify what the present dispute is not about:

- Despite the United States' repeated contentions to the contrary, this dispute is not about a simple "production subsidy" that provides a financial contribution and benefit to domestic producers without regard to whether domestic or imported goods are used in production of the subsidised product.

- This is not a dispute related to contingency on the use of domestic over imported *components of* wings and fuselages. Rather, the European Union's claim is that the prohibited contingency in SSB 5952 is based on the use of domestic over imported *wings* and *fuselages*, which are themselves "goods".

- This is not a dispute about the use of objects that could not be considered "goods". In fact, the United States, itself, accepts (as it must) that wings and fuselages are traded on a regular basis, including for large commercial aircraft.

8. With respect to the "subsidy" element, the United States' response consists primarily of repeated and erroneous assertions that a *prima facie* case has not been established, and ambiguous observations about the types of evidence the United States might present if there were a *prima face* case to rebut. For example, the United States has made cursory "suggestions" (i) that Washington State's tax regime has a "complicated structure" that may result in an effect known as "pyramiding", (ii) that Washington State primarily relies on a Business and Occupation ("B&O") tax, which is unlike the tax regimes in other states in the United States, and (iii) that there exist "numerous product-based, entity-based, use-based, and other similar tax adjustments" in Washington State. The United States has not taken a position on how the first two of these assertions should affect the Panel's determination of the normative benchmarks. On the third, the United States has made certain belated and erroneous observations in its response to Panel Question 60, which the European Union discusses below.

9. With respect to "benefit" within the meaning of Article 1.1(b) of the SCM Agreement, in stark contrast to all WTO panels that have previously considered the issue, the United States asserts that the existence of tax breaks constituting a financial contribution within the meaning of Article 1.1(a)(1)(ii), which by their very nature are a "gift" from the government to the recipient, does not demonstrate conferral of "benefit".

10. As for contingency under Article 3.1(b) of the SCM Agreement, all of the United States' arguments are based on three fundamental flaws – (i) an erroneous definition of "goods", (ii) an erroneous understanding of "use", and (iii) a focus on components of wings and components of fuselages as the relevant "domestic" and "imported" goods at issue, rather than the "products" actually referenced in SSB 5592 – i.e. wings and fuselages.

11. In presenting its defense, the United States interprets both the text of SSB 5952 and that of the SCM Agreement in a manner that contradicts their ordinary meanings (considered in context and in light of the relevant object and purpose), while offering no substantiation for such interpretations. As for the evidence of *de facto* contingency, the United States' strategy has been to rely on assertions and statements tailor-made for the present dispute, and to casually dismiss inconvenient evidence from the real world as "imprecise" or "colloquial references".

12. While the United States has erred in accusing the European Union of "trying to fit a square peg into a round hole" in this dispute by characterizing the challenged incentives as prohibited subsidies (rather than production subsidies), the actual problem here is that the United States is attempting to drill a hole in the SCM Agreement so large that any Member could easily avoid the disciplines of Article 3.1(b). The factual inaccuracies and legal fallacies associated with each of the US assertions have been highlighted by the European Union in its submissions. In the following sections, the European Union briefly summarizes the arguments presented in the European Union's second written submission and its subsequent submissions

II. THE AEROSPACE TAX INCENTIVES, AS AMENDED BY SSB 5952, CONSTITUTE SPECIFIC SUBSIDIES

13. The European Union's second written submission once again details why the tax incentives, as amended and extended by SSB 5952, constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement. In particular, the European Union has explained that each of the seven aerospace tax incentives confers a financial contribution involving the "forego{ing}" of "government revenue that is otherwise due", within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. For each individual tax incentive, the European Union has provided details about the relevant normative benchmark. With respect to "benefit", the European Union again demonstrated that the tax breaks are a "gift" from the government that the recipients would not receive in the market. As for specificity, there is no dispute that subsidies violating Article 3.1(b) are deemed "specific" pursuant to Article 2.3 of the SCM Agreement.

A. Financial Contribution

14. The European Union now summarizes its responses to the United States' (1) arguments regarding the timing of the tax incentives, and (2) suggestions related to the normative benchmarks, as they relate to the issue of "financial contribution" under Article 1.1(a)(1)(ii) of the SCM Agreement.

1. Timing

15. The United States first hinted at a position, similar to the one it adopted in the *United States – Large Civil Aircraft* dispute, that only revenues foregone in the past would qualify as a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. The European Union demonstrated that there is no textual basis for such a temporal limitation. Further, the Appellate Body has interpreted the word "foregone" in Article 1.1(a)(1)(ii) to mean "the government has *given up an entitlement to raise revenue* that it could 'otherwise' have raised",[3] an action that does not have to occur *after* the revenue has become payable. If accepted, the United States' interpretation would incentivise Members to craft prohibited subsidy programmes in which the subsidy is received as a delayed reward for satisfying a prohibited contingency; in particular, the United States' interpretation could preclude a timely, effective challenge under Articles 3.1(b) and 3.2 in such circumstances, where the grant is complete and the firm is already in a position to account for, rely on, and benefit from a future revenue stream.

16. The United States subsequently modified its views on the temporal restriction it seeks to impose on Article 1.1(a)(1)(ii). In particular, in its response to Panel Question 21, the United States suggested that Article 1.1(a)(1)(ii) may cover the foregoing of revenue that would have become due in the future within "the coming year", but not later. The United States has offered no reasoning for its oscillating positions on temporal restrictions. Such legal arguments are not only erroneous, but they are internally inconsistent.

17. In addition, putting aside the United States' flawed legal interpretation, the European Union has explained that five of the seven tax incentives have, in fact, actually foregone revenue in the past, including since the November 2013 entry into force of SSB 5952. In fact, the United States does not deny that the following tax incentives have already lowered the taxes of the Washington State aerospace industry in the past, and continue to do so in the present: (1) B&O tax rate reduction for the manufacture and sale of commercial airplanes; (2) B&O tax credit for pre-production development of commercial airplanes and components; (3) B&O tax credit for property

[3] Emphasis added.

taxes and leasehold excise taxes on commercial airplane manufacturing facilities; (4) exemption from sales and use taxes for computer hardware, software, and peripherals; and (5) exemption from sales and use taxes for certain construction services and materials.

2. Normative benchmark

18. Until its most recent submissions, the United States refused to engage in a specific discussion of the relevant normative benchmarks in the present dispute, other than to repeatedly assert that the European Union did not identify any such benchmarks. In fact, the European Union has identified and detailed such normative benchmarks, beginning with its first written submission.

19. In its second written submission, the United States appeared to argue that the pre-existing aerospace tax incentives initiated under House Bill 2294 ("HB 2294") could provide the appropriate normative benchmark to determine whether the measures at issue involve a financial contribution under Article 1.1(a)(1)(ii). In response, the European Union recalled that a normative benchmark is the tax rate that would *normally* apply, taking into account the structure of the particular tax system. As the panel and Appellate Body correctly found in *US – Large Civil Aircraft*, the 0.2904 percent tax is the subsidized B&O tax rate for commercial aircraft; as such, it cannot be the normative benchmark.

20. The United States also suggested that the various specifically-targeted sales and use tax exemptions offered by Washington State to entities outside the aerospace industry are somehow relevant to identification of the normative benchmark. As the European Union has explained, however, special tax treatment accorded to particular companies or industries does not reflect "the tax rates that would normally apply". Rather, the tax treatment generally applicable to all actors engaging in the relevant taxable activities within Washington State – for example, manufacturing or retail sales in the case of the B&O tax rate reduction – is what is relevant for identifying "the tax treatment of comparable income of comparably situated taxpayers".

21. In its response to Question 60, the United States submitted a table of figures which, according to the United States, "suggest{s}" that the generally applicable tax rates for the taxes at issue have become the exceptions rather than the general rule, and therefore cannot serve as the normative benchmark. However, these belatedly submitted numbers do not warrant the conclusion that the United States seeks. In that table, the United States treats every instance in which Washington State has not imposed the maximum tax liability with respect to a particular activity – including even those instances where Washington State is constitutionally prohibited from imposing a tax – as an "exemption". Thus, based in large part on numerous "exemptions" completely irrelevant to an enquiry under Article 1.1(a)(1)(ii), the United States then claims that a majority of all revenue in Washington State is subject to "exceptions", rendering the general tax rates purely notional. In view of the figures relied upon by the United States, this proposition goes against the Appellate Body's express guidance that a normative benchmark, "cannot, {...} be an entitlement in the abstract, because governments, in theory, could tax all revenues." The European Union applied corrections to this table, eliminating some instances which are not foregoing of revenue otherwise due in the sense of Article 1.1(a)(1)(ii), and arrived at the conclusion that far lower portions of the total revenue in Washington State are subject to "exemptions" from the general rate.

22. Even the corrected figures presented by the European Union suffer from two major drawbacks, however. First, these figures do not account for *local* property taxes or *local* sales and use taxes, which are also subject to the property tax exemption, and the two sales and use tax exemptions at issue. Second, the United States failed to remove from its calculations the tax exemptions resulting from the very subsidies being challenged in the present dispute. In *United States – Large Civil Aircraft*, the Appellate Body found that this second error rendered similar United States' figures useless for evaluating the normative benchmark.

B. Benefit

23. The European Union has demonstrated that the financial contribution in the present dispute – in the form of forgiveness of tax obligations – is, in the words of the panel in *US – Large Civil Aircraft,* "essentially a gift from the government, or a waiver of obligations due, and it is clear that

the market does not give such gifts". A "benefit" exists because the very nature of a market precludes the availability of multi-billion dollar gifts to a commercial actor.

24. In response, the United States presented an irrelevant "example", asking the Panel to consider a case where a tax break would not provide a "benefit" when, "by not taking the challenged tax treatment, the taxpayer qualified instead for another equal or better tax treatment". Here, the United States appeared to suggest that, in some instances, it may become possible for the taxpayer to forego the tax incentive at issue, and instead avail itself of generally available tax treatment that is more or equally advantageous to that incentive. This, however, would appear to relate to the relevant benchmark for purposes of the "financial contribution" analysis, rather than the analysis of "benefit" conferred by a tax measure already found to provide a financial contribution. Moreover, the United States fails to demonstrate, or even assert, that the facts of the present case are somehow similar to this "example". They are not.

C. Conclusion on "subsidy"

25. The European Union, consistent with its burden to establish a *prima facie* case, has demonstrated that each of the tax incentives at issue provides a financial contribution and confers a benefit. Absent effective rebuttal by the United States, the Panel must make findings in favour of the European Union.

III. THE AEROSPACE TAX INCENTIVES, AS AMENDED BY SSB 5952, CONSTITUTE PROHIBITED SUBSIDIES CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS

26. As a result of the Programme-Siting and Exclusive-Production conditions established in SSB 5952, the aerospace tax incentives, as amended and extended, constitute prohibited subsidies "contingent ... upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement.

27. The European Union has explained that, as of the moment SSB 5952 became law in 2013, the amended and extended tax incentives provided subsidies contingent on the use of domestic over imported goods. Consequently, the United States' contention that the European Union "has the burden to demonstrate that {the} contingency obtains specifically with respect to the alleged subsidy conferred from July 1, 2024, to June 30, 2040" does not follow from the European Union's actual claims in this dispute.

28. The United States errs when it asserts that "the treatment prior to 2024 under any of these measures … is *a priori* not contingent on any of the conditions introduced by ESSB 5952". As the European Union has explained on several occasions, under the Exclusive-Production condition, if a determination is made – at any point after the Programme-Siting condition was satisfied in July 2014 – that Boeing has sited any wing assembly outside Washington State (for any version or variant of the airplane programme that was the basis for satisfying the Programme-Siting condition), the B&O tax rate reduction would become inapplicable to Boeing's revenues from that programme (i.e., 777X program). Additionally, had Boeing not satisfied the Programme-Siting condition, the amendments extending the sales & use tax exemptions for construction services and materials to cover all commercial aircraft (not just superefficient airplanes), would not have taken effect. Thus, the *current* availability of the B&O tax rate reduction for the 777X programme, and the *current* availability of the sales and use tax exemptions for construction services and materials, are already contingent on meeting the conditions on SSB 5952, even before 2024.

29. The Panel is faced with subsidies *de jure* contingent upon the decision by an aircraft producer to use domestic wings and domestic fuselages for a new aircraft programme, where a major portion of that subsidy would be lost if even a single wing for that aircraft programme is imported through the year 2040. While these facts should be determinative of the question of contingency under Article 3.1(b) of the SCM Agreement, the United States seeks to obscure the prohibited contingency through a series of erroneous and irrelevant statements.

A. Three Foundational Errors Made by the United States

30. The entirety of the United States' argumentation on contingency is founded on three erroneous propositions – (i) wings and fuselages are not "goods"; (ii) wings and fuselages are not "used" on aircraft; and (iii) the phrase "domestic over imported goods", as it applies to wings and fuselages, requires an enquiry into the origin of *the components* of the wings and fuselages, rather than the origin of the wings and fuselages, themselves.

1. US' Error #1: "goods"

31. The United States persists with its erroneous assertion that wings and fuselages are not "goods", although (i) the United States has acknowledged that Boeing purchases "complete fuselages" for the 737; (ii) Boeing has previously explained (outside the context of this dispute) that it imports wings for the 787; and (iii) SSB 5952, itself, refers to fuselages and wings as "products", a term that the United States has accepted is a synonym for the legal term used in Article 3.1(b) – "goods".

32. Originally, the United States claimed that the protection under Article 3.1(b) would extend only to goods that are *actually traded*. In its second written submission, however, the United States conceded that the protection extends to *competitive opportunities* for imported "goods". The United States qualified that concession with an assertion that the protection does not extend to "strictly theoretical" opportunities. Putting aside the lack of any textual or jurisprudential basis to characterize certain competitive opportunities as "strictly theoretical", there is nothing theoretical about importing or otherwise purchasing wings and fuselages for a civil aircraft, as even the United States acknowledges for certain aircraft.

2. US' Error #2: "use"

33. The United States continues to assert that wings and fuselages are not "used" on aircraft, or in the production of aircraft, because they are the output of aircraft production, rather than inputs. The United States' erroneous position is based on its false allegations about the planned production process for the 777X, which – even if true – would be irrelevant to a *de jure* analysis of SSB 5952. As the European Union has explained, and the United States has not contested, SSB 5952 does not even mention the 777X, but instead references only a new model, version, or variant of a commercial aircraft with a composite wing and/or fuselage. For some other large commercial aircraft, the United States generally agrees with the European Union that fuselages and wings are inputs which are used in aircraft production. As a result, the US' position on the 777X production process, even if correct, does nothing to refute the European Union's *de jure* claim.

34. Moreover, the United States' claims about the planned 777X production process are contradicted by statements made by Boeing and Washington State outside the confines of the present dispute. For example, according to press reports, Eric Lindblad, the vice president of 777X Wing Integration, explained that "{t}he wing subassemblies will {} be moved into a final wing assembly area in the main building, where they will be turned into full wings" and "finally put together" before being attached to the aircraft.[4]

3. US' Error #3: "imported" vs. "domestic"

35. The United States continues to argue that it is relevant, and even legally determinative, that Boeing may import *components of* wings and fuselages for the sited aircraft without restriction, while still satisfying the Programme-Siting and Exclusive-Production conditions. But the European Union is not challenging the subsidies as being conditional on use of domestic over imported *components of* wings and fuselages. The European Union's challenge is clear – i.e. to satisfy the two conditions, imported *wings* and imported *fuselages* may not be used on the *aircraft* that is the subject of the siting decision.

36. The United States complains that the European Union has not explained "what is the domestic and what is the imported good for each of the measures at issue". In fact, the European

[4] Emphases added.

Union has repeatedly and clearly stated that wings and fuselages are the relevant "goods" for purposes of determining whether the challenged tax incentives are contingent upon use of domestic over imported goods, under Article 3.1(b). The United States' attempt to refocus the Panel's attention on the *components of* wings and the *components of* fuselages – rather than the components of aircraft – provides an irrelevant distraction. The European Union is the master of its own claims, and this is simply not a case about components of wings, nor a case about components of fuselages.

37. The fact is that, however Washington State defines a "wing" or a "fuselage", those "products" must be either "manufacture{d}" or "assembl{ed}" in Washington State, and used on the sited aircraft, in order to satisfy the Programme-Siting and Exclusive-Production conditions. If, at the time of its siting decision, Boeing expressed an intention to import something that Washington State understood to be a "wing" or "fuselage" for the 777X, or if something that Washington State understands to be a "wing" is imported today (or anytime before 2040) for use on the 777X, the subsidy (or a significant portion thereof) would be lost.

38. As an interpretative matter, the European Union has maintained a dualist view, wherein any good that is not "imported" would be "domestic". The European Union submitted that any different interpretative view would require a panel to examine whether goods are "domestic" under applicable rules of origin. Given the absence of multilateral rules of origin, Members would be at liberty to circumvent the discipline in Article 3.1(b) – and those in all other provisions of the covered agreements employing the "domestic" and "imported" duality – by resorting to conveniently tailored domestic rules of origin.

39. In Question 72, the Panel requested the parties to identify "provisions in the covered agreements" that could further assist in the interpretation of the words "domestic" and "imported", for the purpose of Article 3.1(b) of the SCM Agreement. In response, the European Union demonstrated confirmation of its dualist view, which divides goods into "domestic" and "imported", with reference to Articles II:2(a), III:1, III:2, and XI:2(c) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"); Article 15.3, footnote 57, and Paragraph I of Annex III of the SCM Agreement; Paragraphs 1(a), 1(d), and 1(g) of Annex C to the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement"); and Article 3.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti Dumping Agreement").

40. In its own response, the United States instead chose to again express general disagreement with the European Union's interpretative proposal, while not identifying any provision in a covered agreement (barring a general unexplained reference to the Agreement on Rules of Origin) that would warrant an interpretation different from the one proposed by the European Union. Nor did the United States even attempt to assert an interpretation of its own, let alone defend one. The United States even attempted to shield itself behind an assertion that it is the "EU's burden" to interpret Article 3.1(b), and in particular the meaning of "domestic" and "imported". Yet, the Appellate Body has explained that "the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court".

B. Availability of the Subsidies to Entities Other than Boeing

41. The United States argues that the availability of the tax incentives at issue to entities other than Boeing precludes a finding that the subsidies are contingent on the use of domestic over imported goods, because only Boeing needs to satisfy the conditions. The United States seeks to obscure the fact that none of the tax incentives, as amended and extended by SSB 5952, would have taken effect in respect of any of the potential recipients had the Programme-Siting condition not been fulfilled by Boeing (or another commercial aircraft producer). Thus, the current availability of the amended and extended tax incentives enjoyed by all the recipients is a direct result of the satisfaction by Boeing of the prohibited contingency in the Programme-Siting condition, on 9 July 2014.

42. Further, nothing in the text of Article 3.1(b) requires that the entity receiving the subsidy, on the one hand, and the entity required to meet the prohibited contingency, on the other hand, must be one and the same, for a measure to violate that provision. If the drafters had intended to include such a limitation, they could have provided, for example, for prohibition of "subsidies to an

enterprise contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods by that enterprise". They did not.

C. Production Subsidies, and the United States' Flawed Examples

43. From the very beginning of this dispute, the United States has dedicated large parts of its submissions to defending a proposition that is non-controversial – production subsidies, in and of themselves, do not result in *de jure* violations of Article 3.1(b). The European Union signalled its agreement with this proposition, in unequivocal terms, in several of its submissions, yet the United States has persisted with this argument.

44. When faced with a claim that a subsidy is contingent on the use of domestic over imported goods, a Member may not evade the prohibition under Article 3.1(b) simply by characterizing a challenged measure as a production subsidy. Such a claim should be decided on the basis of the obligation in Article 3.1(b), and whether the measure violates that obligation. It should not be decided on the basis of what each party understands to be a "production subsidy", which is a term that does not appear in the covered agreements.

45. With respect to the United States' assertion that "wings" and "fuselages" are what makes a vehicle an "airplane" and that this needed to be clear in SSB 5952, in the context of an alleged "production subsidy" for airplanes, the European Union finds it difficult to believe that, absent such references to wings and fuselages, Washington State would have faced the risk that recipients of the subsidies at issue would manufacture vehicles without wings and fuselages and claim them to be "airplanes" eligible for the subsidy. That did not, for example, appear to be a concern with HB 2294, which defined the airplane that needed to be manufactured in Washington State as a "twin aisle airplane that carries between two hundred and three hundred fifty passengers, with a range of more than seven thousand two hundred nautical miles, a cruising speed of approximately mach .85, and that uses fifteen to twenty percent less fuel than other similar airplanes on the market". In this definition, there is no reference to wings, fuselages, or any other components of the airplane.

46. The United States uses its assertions relating to "production subsidies" to set up a series of straw-men that it then proceeds to knock down. The United States creates absurd hypothetical scenarios – most recently going so far as to invent a "production subsidy" *contingent on importation* of two halves of an airplane – which consider whether a "production subsidy" should be available to certain producers or importers. In each hypothetical, the United States first asserts its subjective view that the subsidy it describes should be characterized as a production subsidy, and should be consistent with Article 3.1(b). Then the United States goes on to apply what it erroneously characterizes as the "EU's theory" to the hypothetical, and concludes that under that alleged "theory" (which is unrecognisable to the European Union, itself), the subsidy in question would constitute a *de jure* violation of Article 3.1(b). Based on that series of exercises and conclusions, the United States claims that the "EU's theory" should be rejected.

47. To be clear, the European Union does not offer a special "theory" on Article 3.1(b). The European Union's position is simply that *any* subsidy "contingent on the use of domestic over imported goods" is inconsistent with Article 3.1(b). That understanding applies no matter what the goods at issue are – i.e. screws, screwboxes missing screws, front halves or back halves of airplanes, parts of paper planes, or, most importantly for this case, wings and fuselages of commercial aircraft.

48. The United States has argued that, if accepted, the European Union's position on the interpretation of the words "goods" and "use" in Article 3.1(b) would mean that, to be consistent with Article 3.1(b), "production subsidies" could require nothing more than that a domestic producer perform "the very last production step", such as "turning the very last screw" or "drilling the final rivet", in the territory of the Member providing the subsidy. This argument is a red herring, as there are numerous ways to condition a subsidy on significant domestic production (far beyond "turning the very last screw") without creating a *de jure* violation of Article 3.1(b), as the United States and Washington State already know. In fact, the European Union has gone beyond its burden in the present dispute to identify several ways in which the United States could have offered production subsidies in the present fact pattern, without resulting in a *de jure* violation. Unlike the absurd US hypotheticals involving paper airplanes, airplanes split into halves, and

subsidies contingent on use of imported goods, the examples that the European Union has highlighted are those that various US states, including Washington State, have actually employed in order to encourage local investment, job creation, and production activity.

D. The 777X Production Process, and the Definition of a "wing"

49. Starting with its first written submission, the United States introduced several facts relating to the process allegedly to be employed by Boeing in production of the 777X. These assertions seek to establish that the 777X wings and fuselages do not come into existence as separate goods at any time before the final assembly of the aircraft. The European Union has demonstrated that these assertions, tailor-made for the present dispute, are contradicted by assertions made by Boeing and Washington State outside the present dispute.

50. More importantly, as the European Union has repeatedly explained, these allegations about the 777X production process are irrelevant to the *de jure* claim, because SSB 5952 does not name Boeing or the 777X programme. It does not even specify the size of the aircraft that should be sited in Washington State pursuant to the Programme-Siting condition. Any aircraft manufacturer could have satisfied the Programme-Siting condition in respect of any aircraft that had a composite wing or fuselage or both, even if that aircraft was much smaller than, and markedly different from, the 777X. Thus, assertions as to how Boeing intends to produce the 777X are entirely irrelevant, at least to the European Union's first and principal claim of *de jure* contingency.

51. The United States claims that the "fact" that Boeing satisfied the Programme-Siting condition in respect of the 777X without the "use" of "domestic over imported goods" precludes a finding that SSB 5952 contains contingencies prohibited by Article 3.1(b). However, this assertion is again predicated on the same three foundational errors repeatedly made by the United States, in respect of the words "use", "goods", and the US' presumption that the relevant goods for understanding "domestic" and "imported" are *components of* fuselages and *components of* wings, not fuselages and wings.

52. Similar to its factually erroneous and legally irrelevant assertions relating to the production process of the 777X, the United States dedicates much effort to defining a "wing". The United States falsely attributes to the European Union the position that only "complete finished wings" (and not "complete wings" or "finished wings") are relevant to the present dispute. Then the United States goes on to supply a definition of "wing" that is entirely divorced from the text of SSB 5952 and reality. Under that definition, for example, a wing that does not carry the engines and fuel is not a wing; and a wing that is not fitted with winglets is not a wing. The European Union has demonstrated the absurdity of this definition, highlighting that, under that definition, several real-world aircraft – MD-80, MD-90, Boeing 717, Boeing 737 – have flown for decades without a "wing".

53. The United States relies on this flawed definition to postulate that the 787 "wing" was not imported, and that Governor Inslee was imprecise in describing the contingencies in SSB 5952 in his testimony before the House Finance Committee, specifically in asserting that "{t}he 787 wing went to Japan". Similarly, the United States dismisses, as "colloquial references", all assertions by Boeing and Washington State outside the confines of the present dispute indicating that the 787 wing was imported.

54. In any event, it is not necessary for the Panel to decide the precise definition of a "wing" or "fuselage" in the present dispute, especially in context of the European Union's first and principal claim of *de jure* contingency. What matters is that there is a "product" called a "wing", and a "product" called a "fuselage" (which is different from components of whatever Washington State understands to be a "wing" or a "fuselage") that, if imported, will result in the loss of the subsidy, or a portion thereof. That is clear from the text of SSB 5952, itself.

E. Conclusion on Contingency

55. The European Union has demonstrated in SSB 5952 the existence of a prohibited contingency, under Article 3.1(b) of the SCM Agreement, with reference to the text of that legislation, and additional evidence. The United States has failed to rebut that *prima facie* case.

The United States' defenses are based on three foundational errors, and are factually inaccurate and largely legally irrelevant.

IV. CONCLUSION AND REQUEST FOR RELIEF

56. For the reasons set out in its submissions to date, the European Union respectfully requests the Panel to find that each of the Washington State tax incentives, as amended and extended by SSB 5952, constitutes a subsidy that is prohibited pursuant to Articles 3.1(b) and 3.2 of the SCM Agreement.

57. In accordance with Article 4.7 of the SCM Agreement, the Panel should recommend that the United States withdraw the subsidies without delay.

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1. The EU's entire case is an example of trying to fit a square peg into a round hole. The hope appears to be that, if the peg and the hole are not examined closely, no one will notice that the peg cannot fit. The EU asserts that Engrossed Substitute Senate Bill ("ESSB") 5952 discriminates against imported products by requiring the use of domestic over imported goods as a condition for receiving subsidies. It is on this basis that the EU challenges seven Washington tax measures as prohibited by Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). But the relevant conditions in ESSB 5952 have nothing whatsoever to do with the use of goods, whether domestic or imported. They therefore do not discriminate against imported goods. Article 3.1(b) does not prohibit subsidies provided to domestic producers for or in light of domestic production.

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

2. Washington has emerged as an aerospace hub, and in turn, the aerospace sector is an integral part of Washington's economy and employment. As of February 2015, there were 1,361 firms in Washington State's aerospace manufacturing and supporting industries, with 186 of these in the core industry. Nearly 20 percent of U.S. aerospace jobs are in Washington.

3. A major part of Washington's emergence and continued role as an aerospace hub is owed to the presence of Boeing Commercial Airplanes ("Boeing"). Boeing has deep roots in Washington, which continues to be the center of its operations worldwide. Two of Boeing's three major production facilities are there. The Renton and Everett facilities produce the 737NG and 737 MAX; and the 747, 767, 777, and 787 Dreamliner airplanes, respectively. Development of the 777X is based in Everett, and Boeing plans to produce the 777X there as well. The third production facility is in North Charleston, South Carolina. Except for some 787s manufactured after 2012, all commercial aircraft ever manufactured by Boeing were assembled in Washington, and all of Boeing's major in-house production operations are in the United States.

4. Large commercial aircraft ("LCA") are among the most complex machines ever built. They consist of tens of thousands of individual parts, which must be integrated into a single safe, reliable, and economic system. For this reason, developing LCA is extremely costly, with development costs running into the billions of dollars. Many variables across a long time horizon dictate the success or failure of a program, making such investments very risky. In this atmosphere, Boeing requires an elaborate planning system for bringing new aircraft to market, which can be simplified as occurring in four phases: pre-launch, launch, post-launch, and entry into service and industrial ramp-up.

5. The same elaborate planning process was required for the 777X program based out of the Everett, Washington facility. Boeing sought to limit costs, risks, and logistical complexities of the sort that had burdened the 787 program, where aggressive outsourcing of manufacturing activities contributed to significant production delays and increased program costs.

II. WASHINGTON'S TAX SYSTEM AND THE CHALLENGED MEASURES

6. The measures challenged in this dispute pertain to five categories of Washington taxes: the business & occupation ("B&O") tax, the retail sales tax, the use tax, the leasehold excise tax, and the property tax. These taxes form an important component of the backdrop against which the challenged measures operate. The EU submission gives them short shrift, but the details are critical to any evaluation as to whether they constitute financial contributions and confer a benefit within the meaning of Article 1 of the SCM Agreement, or are "contingent … upon the use of domestic over imported goods." Accordingly, the United States describes each of these in greater detail below.

7. The State of Washington relies primarily on a B&O tax – rather than a corporate tax or an income tax – for purposes of business taxation. The tax is an excise tax on "gross receipts," which refers to the gross proceeds of sales, gross income of a business, or the value of products. The tax is imposed on the gross receipts of all sales, not just retail sales. No deductions are permitted for the costs of doing business, such as expenses for raw materials, wages paid to employees, or component parts manufactured by others that are incorporated into a product being sold. In addition, the B&O tax does not vary depending on the profitability of the taxpayer.

8. Washington also has a retail sales tax, which is its principal tax source (*i.e.*, of all revenue, including both business and non-business tax revenue). This tax applies to sales to consumers of tangible personal property, as well as the sale of certain services, including construction services (*e.g.*, constructing and improving new or existing buildings and structures), some personal services, and other miscellaneous services. The Washington retail sales tax rate has two components: the state component, which is equal to 6.5 percent, and the local component, which varies by jurisdiction. Local governments within Washington have the authority to set their own retail sales tax rates, but both components are administered by the State.

9. The use tax is a tax due on the use of goods or services to the extent that the user has not paid Washington sales tax or "a legally imposed retail sales or use tax…to any other state, possession, territory, or commonwealth of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof." For example, use tax is due if goods are purchased in another state that does not have a sales tax, or has a sales tax rate that is lower than that of Washington. The tax is imposed on the privilege of using as a consumer specified goods or services in Washington.

10. Washington also has a property tax. Under RCW § 84.36.005, "{a}ll property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and other taxing district purposes." Thus, all real and personal property is subject to tax. However, a number of exceptions to this general rule apply. Property tax rates vary among territorial subdivisions of Washington. However, the Washington Constitution limits the regular (*i.e.*, non-voted) combined property tax rate to 1 percent of market value.

11. Washington also has a leasehold excise tax. As noted above, property owned by federal, state, or local governments is exempt from the property tax. However, when private parties lease such property, they are subject to the leasehold excise tax. In effect, the leasehold excise tax imposes a tax burden on persons using publicly owned, tax-exempt property similar to the property tax that they would pay if they owned the property. The 12 percent rate is then multiplied by an additional tax, which is currently set at 7 percent. Thus, the total leasehold excise tax rate is 12.84 percent of the rent paid for the property.

III. THE CHALLENGED MEASURES AND CONDITIONS IN ESSB 5952

12. The EU challenges seven measures in this dispute, each of which provides for certain tax treatment under the law of the state of Washington: (i) the 0.2904 percent B&O tax rate, (ii) the B&O tax credit for aerospace product development; (iii) the B&O tax credit for property taxes; (iv) the sales and use tax exemption for computer hardware, software, and peripherals; (v) the sales and use tax exemption for construction services and materials; (vi) the leasehold excise tax exemption for port district facilities, and (vii) the property tax exemption.

13. The challenged measures have several important features. The first feature is general availability on a non-discriminatory basis. Although the EU submission focuses on Boeing, none of the challenged measures refers to Boeing explicitly. Rather, they set out tax treatment that is available to any eligible company in Washington. For example, non-U.S. airplane manufacturers, and suppliers to such companies, are eligible for the challenged tax treatment.

14. The second feature is silence with respect to the use of domestic over imported goods. None of the challenged measures distinguishes between domestic and imported goods, let alone condition availability on the use of domestic over imported goods. This is true of ESSB 5952 as well.

15. The third feature is changes in conditions for eligibility. In 2006, 2008, and 2013, Washington State enacted legislation that affected the availability of the challenged tax treatment by expanding the class of companies that could claim such treatment.

16. The EU challenges these measures "as amended and extended" by ESSB 5952. In 2013, Washington enacted ESSB 5952, which would extend aerospace-related tax measures if and when a significant commercial airplane manufacturing program was sited in the state. The Washington legislature noted that ESSB 5952 served its "specific public policy objective to maintain and grow Washington's aerospace industry workforce."

17. ESSB 5952 contains two provisions that the EU alleges are relevant to this dispute: an Initial Siting Provision and a Future Siting Provision. Both are silent on the use of domestic over imported goods, and indeed do not draw any distinction between domestic and imported goods. They contain no text that requires the use of domestic over imported goods, nor even encourages it. They therefore do not result in any discrimination against imported goods.

18. Rather, the Initial Siting Provision requires that certain manufacturing activities occur in Washington. Under the Future Siting Provision, the continued applicability of the 0.2904 percent B&O tax rate for 777X sales (because the 777X is the program that triggered the Initial Siting provision) depends on "final assembly and wing assembly" – a narrow category of manufacturing activity – taking place in Washington.

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

19. As the complaining Member, the EU of course bears the burden of demonstrating that the challenged measures are subsidies within the meaning of Article 1 of the SCM Agreement, and that they contain a "contingency" – *i.e.*, a relationship of "contingency," or a state of "dependen{ce} for its existence on something else." It is also required to demonstrate that this "contingency" is "upon the use of domestic over imported goods." Each of these showings consists of several elements, and the EU bears the burden of proving each.

20. Yet, the EU ignores this burden, seeking to establish the alleged import substitution contingency with conclusory assertions, unsupported assumptions, and references to *US – Large Civil Aircraft*, a separate dispute in which the EU failed to demonstrate that any of the challenged measures are prohibited under Article 3.1(b). Such arguments are insufficient to establish a *prima facie* case. This is only confirmed by the fact that the *US – Large Civil Aircraft* panel addressed facts as they existed in the 2004-2006 period, rather than the time of this Panel's establishment in 2014, and the current dispute involves measures that differ from those at issue in the other, separate dispute. The EU's claims fail as a result of it not even attempting to allege and prove with evidence each of the elements of its claims.

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

21. The EU does not even attempt to make a *prima facie* case that the challenged measures involve financial contributions that confer a benefit. In fact, the EU simply assumes, without support – and it asks the Panel to assume – that the challenged measures are subsidies within the meaning of Article 1 of the SCM Agreement.

A. Financial Contribution

22. The EU alleges that each of the challenged measures involve revenue foregone by Washington during the time period from July 1, 2024 – July 1, 2040. However, the EU fails to establish that any such financial contribution exists, and therefore fails to make a *prima facie* case.

23. To show a financial contribution, the EU relies on the findings in a separate dispute, *US – Large Civil Aircraft*. Yet the EU ignores the fact that in that dispute, three of the challenged measures were in fact found *not* to be subsidies because the panel found that the EU failed to establish the existence of a financial contribution. The EU also ignores that the *US – Large Civil*

Aircraft panel's findings pertain to a different time period (*i.e.*, prior to 2007), and cannot support a finding that revenues supposedly to be foregone after July 1, 2024, result in a present subsidy.

24. Indeed, where an allegation is specific to a particular recipient of an alleged subsidy, it is normally necessary for that recipient to have actually used or exercised that fiscal incentive. For some of the measures, the EU does not even *allege* use by Boeing.

25. The EU seems unaware, or it intentionally glosses over the fact, that references to past findings in *US – Large Civil Aircraft* cannot substitute for evidence in this dispute. The EU also fails to analyze Washington's unique B&O tax system and establish, in light of such analysis, a normative benchmark against which alleged revenue foregone can be compared.

B. Benefit

26. As discussed above, the EU has failed to establish a *prima facie* case that any of the challenged measures involves a financial contribution. It would seem to be a potential future benefit that would be enjoyed, if at all, 10 years from now. The EU, however, has not explained what it believes to be such a future financial contribution and benefit. Thus, it automatically follows that the EU fails to establish that any benefit is conferred by such financial contributions.

27. In this regard, it is noteworthy that the EU has not even attempted to establish benchmarks for any of the challenged measures, as is its burden. Rather, the EU's benefit arguments consist of citations to other panel reports and the unsupported arguments related to financial contribution. Accordingly, there is no valid "benefit" argument for the United States to rebut, and the EU has failed to establish a *prima facie* case.

VI. THE EU FAILS TO ESTABLISH THAT ANY OF THE CHALLENGED MEASURES IS CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS AS PROHIBITED BY ARTICLE 3.1(B) OF THE SCM AGREEMENT

28. The discipline of Article 3.1(b) is focused and specific. It prohibits the granting of subsidies that are contingent upon the use of domestic over imported goods. Yet the measures challenged here do not address the use of goods at all, let alone require the use of domestic over imported goods as a condition for any particular alleged subsidy. Rather, they provide specified tax treatment to persons that conduct certain activities (*e.g.*, certain types of manufacturing, retailing, R&D) in Washington. They are available to all companies that do business in Washington, whether headquartered in the United States, the EU, or elsewhere – and regardless of whether they sell goods for use in the supply chains of Boeing, Airbus, or another company.

29. To establish its claims under Article 3.1(b), the EU must demonstrate that a measure established to be a subsidy is contingent upon the use of domestic over imported goods. The EU argues that the alleged subsidies are contingent on the use of domestic over imported goods in breach of Article 3.1(b) of the SCM Agreement because of two conditions in ESSB 5952 regarding the siting of certain manufacturing operations related to a commercial airplane program. The EU's argument fails for several reasons.

30. First, the EU incorrectly states that the text of ESSB 5952 "expressly condition{s}" the challenged tax treatment on the use of domestic over imported goods. The EU states that under two provisions in ESSB 5952, the Initial Siting Provision and the Future Siting Provision, "all of the aerospace tax incentives . . . are *expressly conditioned* on the use of domestic over imported goods in the final assembly of the aircraft." In fact, these provisions – and the statutes challenged by the EU – are silent on the use of domestic over imported goods, and indeed do not draw any distinction between domestic and imported goods. They merely extend the tax treatment for companies that perform certain production and non-production activities in Washington if and when a significant commercial airplane program is sited in the state.

31. Specifically, the Initial Siting Provision states that, for the expiration dates of the challenged tax measures to be extended, Washington's Department of Revenue ("DOR") must first determine that a company has made a final decision to "commence manufacture" of a new model or variant of a commercial airplane, including the wings and fuselage of a new model or variant of a new commercial airplane, in Washington. The Future Siting Provision partly revokes this tax treatment

if DOR determines "that any final assembly or wing assembly" of that new model or variant "has been sited outside the state of Washington." These provisions do not implicitly, much less "express{ly}," require the use of domestic over imported goods, as the EU asserts. In fact, they do not mention the use of goods at all.

32. Second, the EU's argument assumes, without support, that ESSB 5952 requires the separate production of fuselages and wings for use in the production of commercial airplanes. It does not. ESSB 5952 is silent on the how the manufacture and assembly of fuselages and wings fits into the overall production process of a commercial airplane. It does not require manufacturers to produce fuselages or wings as finished intermediate goods that can be "used" in downstream production.

33. And Boeing, in fact, does not do so. 777X fuselages and wings never exist as discrete, standalone goods that are subsequently "used" in a downstream production process. In fact, during the final assembly process, parts of the fuselage and parts of the wing are joined to each other before a complete fuselage or complete wing is produced. In short, the 777X's fuselage and wing are elements of the output of the final assembly process (that is, the manufacture of a commercial airplane), not goods used as inputs to that process. In no case does Boeing purchase (or otherwise "procure") complete wings from a supplier. Therefore, the EU's whole case is dependent on a false premise – that fuselages and wings are *goods* required to be used in the production of a commercial airplane.

34. Third, the EU relies on an incorrect interpretation of Article 3.1(b) of the SCM Agreement. Article 3.1(b) is focused and captures a specific type of subsidy: it prohibits subsidies "contingent … upon the use of domestic over imported goods." However, Article 3.1(b) does not discipline subsidies provided to domestic producers for their domestic production. This interpretation is confirmed by Article III of the GATT 1994. Article III:8(b) of GATT 1994 establishes that providing subsidy to domestic producers for production activities in the grantor's territory cannot be equated with providing a subsidy advantaging domestic over imported goods. And because disciplining subsidies contingent upon use of domestic over imported goods is an area of overlap between Article 3.1(b) of the SCM Agreement and Article III of the GATT 1994, Article 3.1(b)'s prohibition on subsidies contingent upon the use of domestic over imported goods also cannot be equated with subsidies provided for domestic production. Therefore, even ignoring the many other flaws in its arguments, the EU's claims also necessarily fail on this basis because, at best, the EU can only even attempt to show a subsidy provided for domestic production.

35. Fourth, the EU argument assumes, without support, that 777X fuselages and wings are saleable or traded "goods" capable of importation. Prior Appellate Body guidance confirms that "goods" within the meaning of Article 3.1(b) must be understood as products that are traded, and therefore capable of being imported. This necessarily excludes 777X fuselages and wings, which are not available in a commercial setting. In short, 777X fuselages and wings are not goods within the meaning of Article 3.1(b).

36. Fifth, the EU fails to establish that the "geared to induce" standard is appropriate in the context of Article 3.1(b), much less demonstrate with evidence that it is met in this case. In its brief argument, the EU states that the challenged measures are "geared to induce" the use of domestic over imported goods. The EU does not establish that this standard, which was endorsed in the context of Article 3.1(a), is appropriate in the context of Article 3.1(b). Once again, even aside from the fact that the 777X fuselage and wings do not constitute "goods" that Boeing would "use" within the meaning of Article 3.1(b), the evidence shows the challenged measures were not anticipated to, and did not, affect the proportions of domestic and imported content in the 777X.

37. By the time Washington was considering ESSB 5952, it was clear that Boeing would produce the 777X, as it has every model of commercial airplane throughout its 100-year history, in the United States. Moreover, ESSB 5952 has not prevented Boeing from planning to import significant foreign content for the 777X. Other Washington taxpayers too will receive the identical tax treatment challenged by the EU despite there being no restrictions on their use of goods, whether domestic or imported. In fact, a retailer selling exclusively imported commercial airplane components that it manufactured abroad would be entitled to the tax treatment challenged by the EU. The EU thus fails to establish a *prima facie* case, and the evidence actually contradicts its theory.

VII. CONCLUSION

38. The EU fails to make a *prima facie* case with respect to each of the elements of its claims, and with respect to each of the seven challenged measures. All of the EU's arguments, moreover, are based on an incorrect interpretation of Article 3.1(b) of the SCM Agreement that conflates subsidies that are contingent upon the use of domestic over imported goods with measures that are contingent on domestic production. Accordingly, and for the reasons as set out above, the United States requests that the Panel reject the EU's claims and find that the challenged measures are not inconsistent with the U.S. obligations under Article 3.1(b) of the SCM Agreement.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

I. INTRODUCTION

39. The EU's entire case, which alleges that the measures at issue are import-substitution subsidies prohibited by Article 3.1(b) of the SCM Agreement, is an effort to force a square peg into a round hole.

II. THE EU'S FAILURE TO ESTABLISH EACH ELEMENT OF ITS CLAIMS

40. The EU bases its claims on conditions – what the United States refers to as the Initial Siting Provision and the Future Siting Provision – that it alleges require the use of domestic over imported goods. In fact, the EU goes so far as to assert that the challenged measures "are expressly conditioned on the use of domestic over imported goods." However, in reality, the siting provisions by their plain language address only the scope of manufacturing that will take place in Washington. Neither provision addresses the use of goods at all, much less the domestic or imported character of goods that are used. This is evident from the explicit text of the Initial Siting Provision and the Future Siting Provision, and illustrated by the fact that the 777X will consist of a great deal of imported content, as well as domestic content from U.S. states other than Washington.

41. Beyond the EU's incorrect characterization of ESSB 5952, the EU's meager submission does nothing to lay out the relevant facts or link them to the WTO provision, Article 3.1(b) of the SCM Agreement, that it invokes. It does not describe the operation of the multiple measures it challenges. It does not establish that the challenged measures confer a subsidy within the meaning of Article 1 of the SCM Agreement. It does not explain how, based on the customary rules of interpretation of public international law used for interpreting the covered agreements, the analysis should proceed. This falls short of a complaining party's burden to present a *prima facie* case with respect to each element of its claims. And, as witnessed by the submissions of the United States and the third parties, the EU's many omissions have not obscured the fact that its claims rely upon multiple distortions of Article 3.1(b).

42. The EU also does not attempt to show that, if the Initial Siting Provision or the Future Siting Provision did require the "use" of fuselages or wings, one or both of those conditions would require that such fuselages or wings be domestic instead of imported. This is another example of the EU's silence on necessary elements of a *prima facie* case under Article 3.1(b).

43. The EU fails to explain why the 777X fuselages and wings are "goods" within the meaning of Article 3.1(b). In not addressing this element, the EU simply ignores inconvenient facts, such as that there are no buyers and sellers of 777X fuselages or wings, 777X fuselages and wings never exist in their completed forms separate and apart from the product that they are supposedly used to produce, *i.e.*, the finished airplane.

44. The EU also invokes a "geared to induce" standard endorsed by the Appellate Body only in the context of Article 3.1(a), but makes no effort to establish its proper application in the context of Article 3.1(b) or to prove that such a standard is met based on evidence in this dispute.

45. Another example of the EU's cursory treatment of the elements of its claims is its failure to identify the alleged financial contribution, including a normative benchmark, and benefit for each challenged measure. Instead, the EU points to a report in a different dispute – a report, the

United States notes, in which the panel rejected the EU's contention that three of the tax measures challenged in this dispute were subsidies, and which examined a period nearly 20 years earlier than the year in which alleged revenue foregone in this matter is alleged to begin. The EU then attempts to improperly shift the burden to the United States to prove that such measures are not subsidies. Nothing requires a respondent to rebut a case the complaining party has not made in the current dispute.

III. THE SWEEPING SYSTEMIC CONSEQUENCES OF THE EU'S INTERPRETATION OF ARTICLE 3.1(B)

46. The EU's interpretation of Article 3.1(b) would also have dangerous systemic consequences and would be at odds with the text of the provision, its context, and the object and purpose of the Agreement. For example, by seeking to frame the final stages of a production process as making "use" of "goods," the EU's theory would effectively turn every subsidy for production in the grantor's territory into a prohibited import-substitution subsidy. As nearly all of the third party submissions in this dispute make clear, this is not the proper interpretation of Article 3.1(b).

47. For example, as Canada points out, Article 6.1 and Annex IV:3 of the SCM Agreement demonstrate unambiguously that subsidies tied to production of a given product, without more, are not prohibited. Rather, they are properly the subject of a serious prejudice analysis under Article 5.

48. Australia observes that "it is important that the distinction is retained between the permitted payment of a subsidy to domestic producers and a subsidy which is contingent on the use of domestic over imported goods."

49. Similarly, Brazil notes that, given that Article III:8(b) of the GATT 1994 states that Article III does not prevent the payment of subsidies exclusively to domestic producers – which the United States addressed in its first written submission – "it would be incongruous to interpret Article 3.1(b) of the SCM Agreement to prohibit a measure simply based on the measure's link to domestic production."

50. Japan notes that among the "deficiencies" in the EU's analysis is the failure to recognize that "a law stating that a subsidy is contingent upon the domestic 'siting of' a certain program is different from a law stating that subsidy is contingent upon the 'use of 'the domestic product."

IV. THE RELEVANT FACTS DO NOT SUPPORT THE EU'S CASE, AND IN FACT UNDERMINE IT

51. The EU has invoked a provision that applies narrowly and in very specific factual situations. However, in this case, the measures bear none of the hallmarks of import-substitution subsidies. For example, the company whose behavior they were supposed to influence – Boeing – can use the tax measures despite planning to source much of the content for the 777X from outside the United States and from U.S. states other than Washington.

52. This is the case because the Initial Siting Provision and Future Siting Provision pertain only to the location of certain manufacturing activities. They do not distinguish between domestic and imported goods, and have nothing to do with import substitution. There is no evidence that either the Initial Siting Provision or Future Siting Provision is structured to discriminate against imported goods. They do not, and for that reason, they have not had that effect.

53. Moreover, companies other than Boeing can also use the tax measures without having to fulfill local content requirements or even meet production conditions. Indeed, the tax measures are available to aerospace companies for engaging in a range of activities, some of which are far afield of the use of goods, such as engineering work and R&D. Thus, the EU's arguments simply ignore how the challenged measures are structured and designed, and how they operate in the real world.

54. Thus, the siting provisions themselves do not support the contention that any alleged benefits are contingent on the use of domestic over imported goods. Moreover, the factual evidence lends no support to the EU's allegation that the Initial Siting Provision and Future Siting

Provision are structured to pursue, or do in fact accomplish, import substitution. Not only does the EU adopt an improper interpretation of Article 3.1(b), but the facts only further undermine the theory it advances.

EXECUTIVE SUMMARY OF U.S. CLOSING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

55. The EU's case remains deeply flawed. The EU proposes an overly broad interpretation of Article 3.1(b) of the SCM Agreement that is inconsistent with the ordinary meaning of the provision as a whole, its context, and the object and purpose of the treaty.

56. The EU also refuses to take account of the facts, which rather than support the EU's case, undermines and contradicts it. Instead, the EU relies on a range of false premises, including the notion that a wing for the 777X as a practical matter can be used or imported as a separate object prior to final assembly.

57. The EU emphasizes its *de jure* argument, which it identifies as its primary argument, and in which case the EU is required to show that the subsidy is contingent on the use of domestic over imported goods. However, the conditions it cites say nothing about "goods" at all, but instead talk about the commencement of manufacture, final assembly, wing assembly – all manufacturing and production activities which have no explicit or implicit reference to the use of goods.

58. The United States has explained that these are very predictable ways of defining the scope of the domestic manufacturing activity that a granting member would expect to take place in its territory to qualify for the tax treatment. There is no aspect of the SCM Agreement that would require any production or manufacturing subsidy to be granted only if it required that nothing more than the last screw was turned. Such an interpretation would turn virtually every manufacturing or production subsidy into an import substitution subsidy.

59. The EU, in its closing statement, refers to statements it thinks show that Boeing might have, or there would have been, some competitive opportunity in which the wing would be imported for the 777X. We understand this to be an effort to prove a *de facto* claim. But the EU's notion that the conditions of ESSB 5952 resulted in import substitution is divorced from reality and from what could have taken place.

60. The EU also asserts that the U.S. position that wings and fuselages are not used in aircraft is contrary to actual practice occurring for 100 years. The EU is relying on the definition of the terms "wings" and "fuselages," but these definitions say nothing about their use in the aircraft production process, and nothing about whether the fuselages or wings need to be "used" as "goods" in the 777X.

61. Turning to the EU's assertion that Boeing produces and assembles a wing, and then uses that wing to assemble the aircraft – that is not true. Boeing does not assemble a wing and then use that to assemble a final aircraft. A wing and a fuselage are never used prior to the final aircraft being created.

62. Lastly, the EU is suggesting that you can subsidize airplane production and asking why the text of ESSB 5952 specifies anything else. But the United States has made it clear that the text of ESSB 5952 specifies the scope of production expected in producing an airplane, *i.e.*, what it means to produce an airplane.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1 EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

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

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

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

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

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

6. It is not just legal principles that disprove the EU's arguments, but the actual facts of Boeing's 777X program. As the Boeing Expert Statement explains, fuselages and wings are "elements of the output of the production process"– not inputs used in the production of airplanes. The ordinary meaning of the word "airplane," as expressed in dictionaries and regulatory practice, confirms that a fuselage and fixed wings are fundamental to what makes an airplane an airplane. As the Appellate Body found in *Canada – Autos*, if the use of domestic over imported goods is only "one possible means" of satisfying the requirements for obtaining a subsidy, that would be

"insufficient for a reasoned determination of whether a contingency 'in law' on the use of domestic over imported goods exists." In this case, the 777X program demonstrates that there is at least indeed one such means for satisfying the two Siting Provisions, which shows definitively that the use of domestic over imported goods is not required, in law or in fact, by ESSB 5952.

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

II. Legal Standard: A Contingency is Prohibited Under Article 3.1(b) Only If it Requires the Use of Domestic over Imported Goods

8. The first major error in the EU's case is its incorrect interpretation of Article 3.1(b) of the SCM Agreement. The parties agree that this obligation does not prohibit subsidies contingent on the production of goods in the territory of a Member. Where the parties disagree, by contrast, with respect to the legal standard, is whether the fact that a taxpayer can meet a condition without resorting to the use of domestic over imported goods is sufficient to demonstrate that the underlying measure is *not* a prohibited import-substitution subsidy. The parties also disagree about the extent to which factual evidence can play a role in confirming such an interpretation of the relevant measures. A proper interpretation of Article 3.1(b) establishes that a subsidy is contingent on the use of domestic over imported goods only if the recipient is *required* to use domestic over imported goods. That analysis must take into account *all* sources that elucidate the meaning of the words used in the measure in question, including relevant factual information regarding the application of the measure.

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

9. In the context of Article 3.1(b) of the SCM Agreement, a relation of contingency exists only where the "use of domestic over imported goods" is required to receive the alleged subsidy. In *Canada – Autos*, the Appellate Body applied this principle in the context of Article 3.1(b). According to the Appellate Body, if there is a "multiplicity of possibilities for compliance" with a subsidy's "condition{s} for eligibility," only some of which involve the use of domestic over imported goods, then the subsidy is consistent (at least *de jure*) with Article 3.1(b).

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

11. The United States and the EU also disagree on the meaning of the word "use" in Article 3.1(b) of the SCM Agreement. The parties quote different editions of the Oxford English Dictionary to define the ordinary meaning of "use," but they mean essentially the same thing. The United States and the EU also cite largely the same provisions of the SCM Agreement as context. However, the EU errs in two important ways. First, it fails to recognize the relevance of the context provided by GATT 1994 Article III:8(b). An interpretation of "use" that resulted in making production subsidies "prohibited" would tend to render Article III:8(b) inutile, contrary to the principle of effectiveness. Second, the EU seeks to characterize the meaning of "use" in Article 3.1(b) as either "broad" or "very broad." This is a subjective characterization based on the EU's judgment, rather than the text of the SCM Agreement, and is accordingly not useful for

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

12. The parties have also debated the meaning of the term "goods" as it appears in Article 3.1(b) of the SCM Agreement. The United States has demonstrated that the fuselages and wings for the 777X are not tradable in the sense necessary for Article 3.1(b). Accordingly, the EU has failed to establish the existence of the domestic and imported "goods" that it claims are the subject of the measures at issue.

13. The EU has done nothing to meet its burden of establishing that the goods on the use of which the subsidy is allegedly contingent are or would be domestic. This omission is particularly glaring, as the United States has shown that ESSB 5952 does not require the use of any domestic parts in assembly of the fuselage or wings. In other words, Boeing is free to import 100 percent of the parts as long as assembly occurs in Washington. The EU has not even argued, let alone proven, that a wing or fuselage manufactured in this fashion – even if a discrete wing or fuselage existed at some point in the production process – would qualify as "domestic goods."

14. The dictionary definition of the word "over" is"{a}bove in degree, quality, or action; in preference to; more than." The EU argues that the relevant meaning is "more than" or "in excess of." This position cannot be reconciled with the context of Article 3.1(b) and is contrary to interpretations of the term in past panel and Appellate Body reports. If "over" in Article 3.1(b) meant "in excess of, "the prohibition would apply to subsidies contingent on the use of domestic goods *in excess of* imported goods – using a greater quantity of domestic goods than imported goods (*e.g.*, 51 percent domestic goods). Conversely, a Member would be free to require the use of *some* domestic goods, as long as the quantity was lower than the amount of imports. The Appellate Body evinced a different understanding in *Canada – Autos.*

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

15. The Appellate Body found in *Canada – Autos* that under Article 3.1(b),"contingency 'in law' is demonstrated 'on the basis of the *words* of the relevant legislation, regulation or other legal instrument." It explained further that "such conditionality can be derived by necessary implication from the words actually used in the measure." The panel consulted multiple legal instruments to evaluate the contingency at issue, but the Appellate Body found that a still broader inquiry was necessary to determine how the subsidy operated.

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

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

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

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

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

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

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

III. The EU Fails to Establish that the Alleged Subsidies are *De Jure* Contingent on the Use of Domestic Over Imported Goods

23. As explained above, to establish that the challenged measures are *de jure* inconsistent with Article 3.1(b) of the SCM Agreement, it is not enough for the EU to assert that the use of domestic over imported goods is one possible way to receive the alleged subsidies. Rather, the EU must demonstrate that receipt of the alleged subsidies is "*contingent*" on the use of domestic over imported goods in the sense of being "dependent for their existence." The EU fails in this regard, and in fact the evidence shows that it is possible to satisfy the two Siting Provisions while using *only* imported parts.

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

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

25. The EU argues that the alleged inconsistency with Article 3.1(b) of the SCM Agreement results exclusively from the combination of specific references to finished airplanes and fuselages and wings in the definition of a "significant commercial aircraft manufacturing program," used in

the First Siting Provision and the reference to "wing assembly" in the Second Siting Provision. This combination, according to the EU, "convert{s} what would otherwise be a production subsidy into a prohibited local content contingency," and represents the "express conditioning of the grant of a subsidy on use of domestic over imported inputs."

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

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

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

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

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

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

32. One reason that the terms "fuselage" and "wing" might appear in the text of ESSB 5952 – even though they are by definition elements of an airplane, which is also referenced in the text of ESSB 5952 – is that Washington decided not to allow a minimal manufacturing operation to satisfy the two Siting Provisions. Indeed, it is the EU's interpretation that is flawed, because it implies that the class of WTO-consistent production subsidies is limited to those that permit minimal finishing operations. According to the EU, subsidies for the domestic production of a final product are permissible, but such subsidies immediately "convert" into prohibited import-substitution subsidies when the legislator defines the production process to include anything more than turning the final screw. This view has no basis in the text of the covered agreements, and indeed is inconsistent with Article III:8(b) of the GATT 1994.

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

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

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

35. This hole in the EU's argument is all the more obvious because of the factual circumstances of the 777X. And, as the United States previously noted, even if all the components of the 777X were fabricated outside the United States, Boeing would be able to satisfy the two Siting Provisions simply by assembling all of the imported goods into the finished aircraft, which would include its fuselage and wings. The EU has proposed that "domestic" means anything not imported. As a result, even under the EU's approach, which is novel, wings and fuselages made up completely of imported parts would not appear to be domestic goods. Thus, it could not be assumed that the First and Second Siting Provisions require that 777X fuselages and wings themselves – even if they ever existed as separate goods – be domestic.

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

36. The United States recalled that if there is a "multiplicity of possibilities" for compliance with a subsidy's "condition{s} for eligibility," only some of which involve the use of domestic over imported goods, then the subsidy is consistent with Article 3.1(b) of the SCM Agreement. The United States has shown that there is at least one very obvious means of satisfying the First and Second Siting Provision that does not involve the use of fuselages and wings as inputs into the airplane production process: the 777X manufacturing program. This fact alone demonstrates that the EU's *de jure* interpretation of ESSB 5952 is at odds with the actual operation of the alleged contingencies. This is strong evidence that the EU misunderstands the legislation.

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

38. In this dispute, the EU alleges that the First and Second Siting Provisions require Boeing to use fuselages and wings as "inputs" into the aircraft production process. The EU further alleges that by requiring fuselages and wings to be manufactured in Washington, the two Siting Provisions prevent the importation of fuselages and wings that could otherwise occur in the absence of the challenged subsidies. However, these allegations cannot be reconciled with the factual evidence before the Panel. For example, the Boeing Expert Statement states that fuselages and wings are "elements of the output of the production process"– not inputs. And because they are not inputs, they are not "goods" that are "use{d}"to produce the very airplanes that are the subject of the First Siting Provision. Accordingly, the EU fails to demonstrate that ESSB 5952 conditions receipt of the alleged subsidies on the use of fuselages and wings as inputs into the aircraft production process. Rather, the facts show that no such use is required.

39. Furthermore, the EU's examples of airplanes other than the 777X that it views as being produced by using complete fuselages and wings as inputs in the final assembly process are insufficient to support its assertion that "aircraft *could* not be produced" without using fuselages and wings as inputs. Again, the actual evidence of the 777X production process shows that they can be and, in fact, that in the case of the 777X, this is precisely what happens.

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

IV. The EU's *De Facto* Article 3.1(B) Claims Are Unsupported and Contradicted by the Evidence

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

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

42. The EU contends that the First and Second Siting Provisions "*require* the use of specific domestic goods." Yet, it has no coherent explanation for why this is the case, and the evidence discussed below shows the EU's contention to be baseless. The EU has largely ignored – and asked the Panel to disregard – the facts of the 777X production process, even though this is the most probative evidence as to what airplane production activities may satisfy the First Siting Provision and avoid triggering the Second Siting Provision. The facts of the 777X production process show that, with respect to the putative "goods"(wings and fuselages) identified by the EU, Boeing did not propose to use, and has no plans to use, domestic over imported goods in the 777X program, and the DOR determination establishes that the program nonetheless satisfied the First Siting Provision. Thus, the First Siting Provision did not make eligibility for the ESSB 5952 tax incentives contingent on the use of domestic over imported goods.

43. The EU has not even attempted to meet its burden of showing that the goods allegedly subject to the contingency must be "domestic." There is no basis to assume as much. The EU asserts that ESSB 5952 has distorted competitive opportunities for imported 777X fuselages and wings, but the evidence shows this allegation to be baseless. Boeing could comply with the First

and Second Siting Provisions, and receive the challenged tax treatment, even if every individual part of the 777X were imported. Moreover, the histories of the 777X program and ESSB 5952 demonstrate that the challenged measures did nothing to distort competitive opportunities for imported goods, whether actual or potential. The United States in its first written submission recounted the development of the 777X and the program's production planning decisions, with details drawn from the Boeing Expert Statement. This evidence establishes that, regardless of ESSB 5952, there were no actual or potential imported substitutes for the 777X manufacturing activity Boeing sited in Everett, Washington.

44. For example, Boeing's key make/buy and supplier selection decisions were made well in advance of ESSB 5952 and, thus, were not influenced by ESSB 5952. In addition, ESSB 5952 places no conditions on the location of fuselage or wing structure fabrication, or on the origin of individual airplane parts. Moreover, passage of ESSB 5952 had no effect on Boeing's willingness to use imported goods or to site fuselage and wing assembly outside the United States. The circumstances surrounding the passage of ESSB 5952 and subsequent events provide the Panel with a natural experiment that disproves the EU's assertions regarding competitive opportunities for imported 777X wings and fuselages.

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

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

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

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

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

48. ***"The text of SSB 5952."*** The EU's reference to the First and Second Siting Provisions does nothing to remedy the core flaw in both its *de jure* and *de facto* claims: neither provision requires a specific production process, let alone one that necessarily involves the use of fuselages and wings in the production of a commercial airplane. It may be the case that Airbus manufactures a "completed, joined fuselage" of the A320 as an "intermediate good{}"before final assembly, but it does not follow that Boeing does the same with the 777X, or that ESSB 5952 requires it to do so to be eligible for the challenged tax treatment.

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

50. ***Boeing's importation of "wings for its 787 from Japan."*** Boeing does not import complete 787 wings from Japan. Rather, Boeing imports multiple wing-related structures from Japan and must therefore conduct further wing assembly activity in the United States. Even if Boeing could or did import complete 787 wings from Japan, it would not follow that ESSB 5952 requires Boeing to "use" domestic wings on the 777X program.

51. ***Boeing's supposed"active{} consider{ation}"of importing 777X wings from Japan.*** The EU asserts that "Boeing actively considered the possibility of importing the 777X wings from Japan prior to the enactment of SSB 5952, and formally decided against that option once SSB 5952 was enacted." This is incorrect in several respects, reflecting the EU's refusal to engage with the evidence. The facts directly contradict the EU's assertion that Boeing "formally decided against "importing 777X wings" once SSB 5952 was enacted."

52. ***"Rewards" and "penalties."*** As discussed above, the EU's sole argument in relation to its proposed" geared to induce" analysis is that ESSB 5952 penalizes" use of imported wings or fuselages" and rewards" use of domestic wings or fuselages." This" rewards"/"penalties" formulation merely imports from the EU's *de jure* arguments the baseless assumption that the First and Second Siting Conditions require the use of domestic fuselages and wings.

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

V. The EU Fails to Establish that the Challenged Measures Confer a Financial Contribution or a Benefit

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

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

56. The EU advances several legal arguments to evade the implication of the present tense drafting of Article 1.1(a)(1)(ii). None are valid. There is no reason to consider, as the EU does, that "maintain" in Article 3.2 of the SCM Agreement applies to the present and "grant" to the future. Moreover, the application of Article 1.1(a)(1)(ii) depends not on theoretical entitlements, but on an essentially counterfactual comparison. Finally, the EU contends that applying Article 1.1(a)(1)(ii) exclusively to existing tax liabilities would leave Members with impunity to impose prohibited contingencies in the present in exchange for tax breaks in the distant future. Its concern is misplaced. The farther in the future a tax advantage exists, the less certainty the taxpayer will have that it will continue to be advantageous, and the less likely it is to influence current conduct.

57. In this dispute, the EU argues that a finding of benefit proceeds automatically from a finding that revenue is foregone. But that is not the case. Revenue is "foregone" for purposes of Article 1.1(a)(1)(ii) when the authorities provide tax treatment more advantageous to the taxpayer than under the "normative benchmark" of the Member's tax system. In contrast, a benefit exists when a financial contribution provides the recipient more advantageous terms than the market would provide. The EU's approach treats these measurements as identical when they

are, in fact, different. The EU bears the burden of showing in each instance that the treatment under ESSB 5952 is better than available on the market, and has not done so.

2 EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

58. During the first meeting, the United States described how the EU is trying to fit a square peg into a round hole. This is just as true today as it was then. Even if the challenged measures were found to be subsidies, they would be production subsidies, which even the EU acknowledges are not, in and of themselves, prohibited. They are simply not contingent on the use of domestic over imported goods. The EU attempts to stretch the scope of Article 3.1(b) of the SCM Agreement, and reads meaning into ESSB 5952 that simply is not there.

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

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

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

62. Furthermore, the EU has abstained from any detailed analysis of what would make a good "domestic" for purposes of Article 3.1(b). Rather, it appears that the EU assumes that a "good" is "domestic," at least for purposes of Article 3.1(b), if an article was modified in any way in the grantor's territory, irrespective of whether it was produced from foreign parts or how much value is attributable to the production or assembly step. Therefore, in any production process that involves more than one step, the first step will result in a "domestic good," and the second step necessarily will involve the use of that domestic good. Accordingly, under the EU's theory, a requirement that more than one production step be performed in the grantor's territory would make a subsidy contingent on the use of a domestic over an imported good.

63. Second, the EU is wrong in asserting that "it is a fact that aircraft 'use' wings and fuselages: without those inputs, the aircraft could not be produced." If the EU is suggesting that fuselages and wings are "used" as "goods" within the meaning of Article 3.1(b) merely because airplanes have fuselages and wings, the EU is mistaken. A manufacturer does not "use" every element of a finished good that one can point to and describe with a name. "Use" in the context of a manufacturing process refers to what goes into the process, and not the features of the product at the end of the process. Those are elements of the output, and not "goods" that are "used" themselves, but elements of a distinct finished good. To take an example, one can quite easily point to a finished building's façade, but the builder does not "use" the façade as a good within the meaning of Article 3.1(b). Likewise, just because one can point to a finished airplane's fuselage and wings does not mean that the manufacturer "used" the fuselage and wings as goods within the meaning of Article 3.1(b).

64. If the EU is suggesting that, as a factual matter, airplanes cannot be produced without first producing fuselages and wings as separate goods and then using them as inputs, this is inaccurate. The fuselage and wings of an airplane effectively make up the airframe and, as such, are functionally important elements of an airplane, but there is no definitional or physical reason why they would have to be produced as separate goods that are used as inputs. It is certainly feasible for an airplane to be assembled without first assembling a completed fuselage and wings as separate goods. Rather, fuselages and wings can be – and in the case of the 777X will be – completed only during and as part of the final assembly of the finished airplane. Therefore, the EU is wrong when it suggests that "it is a fact that aircraft use wings and fuselages "within the meaning of Article 3.1(b).

65. If the EU means that airplanes "use" fuselages and wings as "goods" by virtue of the fact that airplanes have fuselages and wings, this is a misinterpretation of the term "use." If, on the other hand, the EU means that, as a factual matter, a manufacturer must first produce fuselages and wings as separate goods and then use them as inputs to produce the finished airplanes, this is incorrect. As the 777X program demonstrates, a manufacturer need not assemble completed fuselages and wings prior to assembling the finished airplane.

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

67. The EU also asserts that its interpretation is necessary to give meaning to the words "fuselages" and "wings" as they appear in the definition of "significant commercial manufacturing program." It contends that the U.S. description of the operation of ESSB 5952, by contrast, would render those words meaningless and superfluous. This is nonsense. The words in question (*i.e.*, "fuselages" and "wings") appear within the definition of a defined term (*i.e.*, "significant commercial airplane manufacturing program"). They do what the words of any definition do – add clarity and concreteness to a term used elsewhere in the measure. In this case, the terms "siting" and "significant commercial airplane manufacturing program "form the condition that must be met for the legislation to take effect. And, it is logical that it clarified the meaning and ensured the desired level of significance for this commercial airplane manufacturing program in terms of the principal elements of the structural airframe, the fuselage and wings.

68. The EU also seeks to support its interpretation of ESSB 5952 by asserting that the "cardinal purpose" of ESSB 5952 was "making the importation of wings and fuselages of the 777X prohibitively expensive so as to ensure the use of domestic wings and fuselages over imported wings and fuselages." The EU's story is that Washington used ESSB 5952 to induce Boeing to use domestic, made-in-Washington goods in the production of the 777X. However, Washington decided not to require such use or otherwise define minimum local content (which, by the way, is the actual classic example of a local content contingency). Furthermore, under the EU's theory, Washington chose to effect the local content requirement not through the conditions themselves, but rather in the definitions section. According to the EU, Washington chose to focus on elements of an airplane, but ignore Boeing's sourcing of all of the various parts it purchases, a significant portion of which are actually to be imported and a significant portion of which are brought in from other U.S. states. And Washington also chose to ignore whether the goods used by all taxpayers other than Boeing were domestic or imported, while nonetheless providing the identical tax treatment made available to Boeing.

69. The EU's view is implausible. The text of ESSB 5952, as well as the surrounding facts, make it very clear that the point of ESSB 5952 was to ensure that a significant manufacturing program was sited in the state, in order to maintain and grow Washington's aerospace industry workforce. And it did just that; it did not have as its "cardinal purpose," nor did it actually require, the use of domestic over imported goods.

70. Fourth, the EU is incorrect that the factual circumstances of the 777X program are irrelevant. The 777X manufacturing program is the only one considered by DOR and determined to fulfill the First Siting Provision. It also has, since that determination, not been determined to trigger the Second Siting Provision. Therefore, it certainly is the most reliable evidence of the proper interpretation of ESSB 5952. And the 777X program will not include the production of completed fuselages and wings as separate goods that will then be used to produce the finished airplane. Because fuselages or wings – whether domestic or imported goods – are not produced as separate "goods" and then "used" as inputs in producing the finished 777X, and the program nevertheless was determined to satisfy the First Siting Provision and has not been found to trigger the Second Siting Provision, those Siting Provisions necessarily do not require the "use" of fuselages and wings as "goods" within the meaning of Article 3.1(b), much less require the use of *domestic* over imported fuselages and wings. Where, as here, factual evidence refutes the complaining Member's *de jure* arguments, the proper course is not to ignore the factual evidence, but to reject the *de jure* claim.

71. Fifth, the EU's entitlement theory of financial contribution highlights the insufficiency of the EU's cursory benefit argument. It is possible that an abstract entitlement exists, but no one uses it. As the EU itself states: "it is not necessary for any . . . actual foregoing to take place in order to qualify as a financial contribution." But if this were the case, there would be no benefit.

72. In addition, the EU's current financial contribution argument undermines its contingency arguments. In the context of Article 3.1(b) of the SCM Agreement, a relation of contingency exists only where the "use of domestic over imported goods" is required to receive the alleged subsidy. However, in this case, the tax treatment provided for by the alleged subsidies would still have been available until July 1, 2024, even if the supposed contingencies had never been met. This is because July 1, 2024, was the expiration date for the relevant tax treatment prior to the adoption of ESSB 5952. Accordingly, even on the EU's own theory, the alleged subsidies are not "dependent for their existence" on the use of domestic over imported goods.

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

1. Australia has taken the opportunity to participate as a third party in this dispute as there are significant systemic issues about the interpretation of obligations under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

I. What is a prohibited subsidy under Article 3.1(b) of the SCM Agreement?

2. Australia recalls that Article 3.1(b) of the SCM Agreement prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods." In *Canada – Autos* the Appellate Body found that Article 3.1(b) of the SCM Agreement extends to contingency in fact, because to not do so "would make circumvention of obligations by Members too easy."[1]

3. The EU notes in paragraph 76 of its submission that the two provisions are "expressly conditioned on the use of domestic over imported goods." However, the EU does not clearly illustrate how it reaches that conclusion. It is also unclear whether the EU is suggesting that subsidies alleged to breach the SCM Agreement are contingent on the use of domestic goods in a *de jure* or *de facto* manner.

4. To make a claim that the legislation makes a subsidy contingent, *de jure,* on the use of domestic goods, the EU must point to the infringement set out in "the words actually used in the measure."[2] This standard was set by the Appellate Body in *Canada-Autos*. To make a claim that the legislation makes a subsidy contingent, *de facto*, on the use of domestic goods requires greater consideration of the facts. The *EC – Large Civil Aircraft* Appellate Body report provides guidance in the context of Article 3.1(a). It states that:

> [t]he existence of de facto export contingency, as set out above, "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy".[3]

5. Australia submits that the Panel can be guided by this approach in relation to Article 3.1(b). Accordingly, the Panel's determination in this case will depend on the finding of facts.

II. The Relationship between Article III:8(b) of GATT 1994 and Article 3.1(b) of the SCM Agreement

6. Australia notes that there is a legitimate scope within the WTO system for subsidies to domestic industries. This is recognised in Article III:8(b) of GATT 1994, which provides:

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

7. This was interpreted by the panel in *Indonesia – Autos* to "confirm that subsidies to producers do not violate Article III, so long as they do not have any component that introduces discrimination between imported and domestic products."[4]

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[1] *Canada – Autos*, Appellate Body report, para 142.
[2] *Canada – Autos*, Appellate Body report, para 123.
[3] *EC – Large Civil Aircraft*, Appellate Body report, para 1046.
[4] Panel Report, *Indonesia — Autos*, paras. 14.41–14.45.

8. Australia contends that the Panel should maintain and clarify the important distinction between the permitted payment of a subsidy exclusively to domestic producers and a subsidy which is contingent on the use of domestic over imported goods.

9. The Panel needs to assess whether the right to provide subsidies to domestic producers includes the right to require that the manufacturing *activity* occurs within the territory of the subsidising authority; and whether such a requirement could be characterised as one requiring the use of domestic over imported goods.

III. The scope for Members to provide subsidies to beneficiaries within their territory

10. Australia contends that the Panel should consider whether references to a "significant commercial airplane manufacturing program" and "fuselages and wings" in the legislation being examined in this dispute can be regarded as merely defining the scope of the beneficiary or beneficiaries of a subsidy rather than a requirement to use domestically produced goods.

IV. The scope for Members to provide subsidies based on geographical location

11. The legislation in question providing tax incentives to the aerospace industry (SSB5952) conditions the concessional tax arrangements on certain activities taking place in Washington State.

12. Should the tax incentives provided by Washington State be found to be a subsidy, and the references to wings and fuselages be found to merely define the beneficiaries of the subsidy, the Panel may find that the tax measures in question are permitted subsidies under Article III:8(b) of GATT. The intersection between the GATT and Article 3.1(b) of the SCM Agreement could be further explored by the Panel in this instance.

13. Australia considers that careful consideration should be given to whether the scope of a subsidy for manufacture and assembly based on geographical location amounts to the requirement to use domestic products over imported goods.

14. Careful consideration should also be given to whether the requirement to site the activity within the jurisdiction of the granting authority amounts to a local content requirement. The Panel needs to clarify whether the beneficiary of the tax incentive would receive benefits for manufacture and assembly regardless of the source of the inputs to manufacture and assembly.

15. Relevant context to consider the ability to limit or target subsidies to specific regions or within designated geographical regions within the jurisdiction of a granting authority is provided within the SCM. In particular, Article 8.2(b) and 2.2 of the SCM Agreement demonstrate that provision of subsidies on a regional basis is permitted.

16. The Panel therefore also needs to assess whether the distinction made in the Washington legislation is between domestic and international goods, as claimed by the EU, or whether it is the geographical scope of a tax incentive to a business activity conducted within the geographic region of the jurisdictional authority

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. PROPER SCOPE OF THE CONTINGENCY UNDER ARTICLE 3.1(b) OF THE *SCM AGREEMENT*

1. Brazil would like to highlight that only two types of subsidies are prohibited under Part II of the *SCM Agreement*. As stated by the Appellate Body in *EC – Large Civil Aircraft*[1] :

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

2. In the case of Article 3.1(b) of the *SCM Agreement*, the import substitution subsidy has a particular contingency: "the use of domestic over imported goods". The contingency therefore hinges primarily on two elements: "goods" and their "use".

3. First, Brazil would like to emphasize that Article 3.1(b) of the *SCM Agreement* textually requires the use of "goods" to establish its contingency. It does not cover production requirements. A Member therefore is only prohibited from requiring the use of domestic "goods" as a condition for the granting of a subsidy. In other words, it is permissible to impose a condition upon the granting of a subsidy, as long as this condition is not tied to domestic goods. This is essentially what Brazil understands to have been the position expressed by the Appellate Body in *Canada – Autos*. A domestic "value-added" requirement is not prohibited unless it effectively or necessarily requires the use of domestic "goods".

4. The contingency under Article 3.1(b) therefore must be for domestic *products* to the detriment of imported *products. Mutatis mutandis,* the Appellate Body in *EC – Large Civil Aircraft* stated with regard to export contingent subsidies:

> Among the latter category of subsidies—that is, the actionable subsidies—are those granted to an export-oriented recipient, without being contingent upon export performance. The mere fact that such subsidies may increase the company's production sold in the export market does not bring them under the discipline of Part II of the SCM Agreement.[2]

In the same sense, Article 3.1(b) does not cover requirements other than requirements to use domestic products even if they ultimately lead to a gain in productivity of the domestic industry.

5. Second, the condition must concern the "use" of domestic goods over imported goods. The use of this term ("use") confirms that the "goods" in question must be "products" that are capable of being "used" in a commercial context.

6. Article 3.1(b) of the *SCM Agreement* does not prohibit subsidies affecting domestic and imported products generally, but only those which cause the *use* of domestic over imported goods. The contingency under Article 3.1(b) of the *SCM Agreement* must be established upon the actual *use* of the domestic product to the detriment of the imported product, not in relation to "any domestic transaction" it may entail. Given this exclusion applicable to the payment of domestic production subsidies, it would be incongruous to interpret Article 3.1(b) of the *SCM Agreement* to prohibit a measure simply based on the measure's link to domestic production. Article 3.1(b) requires more concrete evidence of a *de jure* or *de facto* contingency on the use of domestic over imported goods.

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[1] Appellate Body Report, *EC – Large Civil Aircraft,* para. 1054.
[2] *Id.*

7. Subsidies programs are generally linked to a localization/domestic establishment requirement. This linkage may cause an incidental impact on local production and may benefit domestic producers of input products. Their products may become more attractive to the producer that established itself in the area as transportation costs go down and for other reasons. Thus, rather than importing products, the newly established domestic producer may start to use a larger share of domestic products as inputs. Clearly, such an indirect effect of the subsidy does not turn it into a prohibited subsidy.

8. In that respect, one must be careful not to make the same "false positive"- mistake that footnote 4 of the *SCM Agreement* warns against with respect to export contingency: it is not because a subsidy is granted to companies which export, that there is an "export contingency." The same applies to domestic producers. The fact that subsidies are granted to domestic producers does not, for that reason alone, mean that there is import substitution conditionality. In Brazil's view, the focus of the enquiry under Article 3.1 (b) should be on the conditionality of the subsidy and the extent to which it requires the "use" of domestic over imported "goods".

9. In conclusion, Brazil considers that in order to sustain a claim of violation of Article 3.1(b) of the *SCM Agreement*, a complainant must show that the subsidy in question has a specific contingency: that of the *use* of domestic *goods* over imported *goods*. Any subsidy that does not impose such a contingency is not prohibited under Article 3.1(b) and could only be challenged as an actionable subsidy under the *SCM Agreement*.

10. Blurring the line between prohibited and actionable subsidies would undermine the overall balance between Members' obligations under the WTO and their policy space, and it would unduly curtail the fomenting of industrial development. At the same time, the disciplines of the *SCM Agreement* must be respected in order to ensure a level playing field among Members and to minimize trade distortions. This requires a careful examination of the specific nature and implications of the conditions attached to a subsidy.

II. BRAZIL'S RESPONSES TO QUESTIONS FOR THIRD PARTIES

Reply by Brazil to question 1

It is not entirely clear to Brazil what the Panel means by "actual use or exercise of the fiscal incentive". If the Panel is asking whether the mere foreshadowing of a fiscal incentive is enough, the answer is clearly no.

Reply by Brazil to question 3

In sum, Article 1 defines a subsidy for purposes of the SCM Agreement. Article 2 defines "specificity" and also frequently refers to the "granting authority" and the "granting of disproportionately large amounts of subsidy", thus employing the same term "granting" as found in Article 3. Article 3 imposes a specific discipline for certain types of subsidies, prohibiting these categories. Article 3.2 imposes a specific requirement not to grant "or maintain" such prohibited subsidies and is thus part of the context in which the definition of a subsidy as set forth in Article 1 is to be read. In that respect, this provision is contextually "relevant", just like any other provision of the SCM Agreement.

Reply by Brazil to question 4

In light of the Vienna Convention's disciplines that the starting point for ascertaining "object and purpose" is the treaty itself, in its entirety, rather than a particular provision[3], Brazil understands that the object and purpose of Article 3.1(b) of the SCM Agreement is to prohibit import substitution subsidies contingent upon the use of goods, domestic over imported. Therefore, the interpretation of the term "goods" should not be made so as to blur the line between prohibited subsidies, which affect goods, and actionable subsidies, which affect production.

[3] Appellate Body Report, *EC – Chicken Cuts*, para. 238.

Reply by Brazil to question 5

Brazil understands that the SCM Agreement does not prohibit WTO Members from providing subsidies to producers contingent on the performance of production steps of a certain good in their territories. This production requirement could fall either upon the production of a final or an intermediate good. A subsidy can require the performance of production steps relating to the final good whose production is being subsidized or of the intermediate product which will be integrated into that specific subsidized production chain. A Member could just as well legitimately create, under Article 3.1(b) of the SCM Agreement, two separate subsidy programmes requiring the performance of production steps in its territory, one related to the final product and one related to the intermediate product which will be integrated into that specific subsidized production chain. In this sense, Brazil understands that the scenario submitted by Canada would not be a *de jure* contingency claim under Article 3.1(b) of the SCM Agreement.

Additionally, whether the conditionality in question amounts to a prohibited condition to "use domestic over imported goods" must be analysed based on the text of the specific subsidy program, in the light of its necessary implications and in the context of the total configuration of the facts of each situation.

Reply by Brazil to question 6

It is not entirely clear to what "guidance from previous cases" the Panel is referring because the Panel does not refer to any specific cases. In any case, Brazil considers that a *de facto* claim requires a panel to go beyond the text of the specific subsidies program and its necessary implications to examine the program in the context of the totality of the facts surrounding the granting of the subsidy.

The Panel should take into due consideration previous jurisprudence regarding *de facto* claims under Article 3.1(a) of the SCM Agreement for the analysis of a *de facto* claim under Article 3.1(b). In *EC – Large Civil Aircraft*, the Appellate Body ruled that the standard of *de facto* export contingency under Article 3.1(a) and footnote 4 of the SCM Agreement "would be met when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy"[4]. Mutatis mutandis, the fact that the granting of a subsidy might increase overall domestic production or decrease imports would not in and of itself be de facto contingent on the use of domestic over imported goods. It would have to provide an incentive that is not simply reflective of the conditions of supply and demand for domestic and imported goods.

In the analysis of a *de facto* contingency claim under Article 3.1(b), a Panel may also use some of the same tests or factors as in Article 3.1(a), such as a "but for" test or an expected sales ratio from a profit maximizing firm.

Reply by Brazil to question 7

The key legal matter in this connection is the proper understanding of the term "domestic" in Article 3.1(b) of the SCM Agreement, which is not defined in the Covered Agreements. To Brazil, the discipline contained in Article 3.1(b) requires a definition of "domestic" that makes economic sense. While it may be impossible to determine in the abstract the exact percentage of value added in the country concerned that is required to characterize a product as "domestic" in all cases, there certainly are cases that can be safely excluded – or included – in this definition. In any case, in Brazil's view, this is a factual question that is to be determined by looking at the specific nature of the specific product and its production process, in the light of applicable domestic legal requirements.

Reply by Brazil to question 8

Brazil refers the Panel to its answer to question 6.

[4] Appellate Body Report, *EC – Large Civil Aircraft,* para. 1.045

Reply by Brazil to question 11

What was emphasized in Brazil's submission was that the term "use" has already been interpreted by the Panel in US – Upland Cotton, which opposed the understanding that "any domestic transaction" would fall within the meaning of use. Furthermore, Brazil emphasizes the use of products so as to clearly delimit the prohibited subsidies from actionable production subsidies.

Brazil does not take a position on the specific facts of the case, but reiterates that the discussion of whether a subsidy is prohibited or not in light of Article 3.1(b) requires the analysis of whether the conditionality established within the subsidy programme is related to the performance of production steps or to the use of products. If the condition, for instance, simply requires a domestic production activity of the producer, it will likely not amount to a prohibited conditionality.

Reply by Brazil to question 12

Brazil will not delve into the specific facts as raised by the parties and will therefore not express a position on the ultimate merits of the parties' allegations that follows from applying the law to the facts of this case. The Panel's question whether "the use of a domestically assembled or manufactured wing always constitute[s] the use of domestic goods" is thus to be answered based precisely on the facts of this case rather than on the basis of categorical conclusions of what "always" or "never" will constitute use of domestic goods.

Brazil understands that a subsidy on the production of a certain good, with requirements on the performance of production steps along the production chain, would not be considered *de jure* contingent on the use of domestic over imported goods under the purview of Article 3.1(b). Therefore, an automatic contingency would not be present when a programme requires the assembly of a good in the territory of a Member. For a *de facto* contingency claim, an evaluation of the programme in practice would be needed.

Reply by Brazil to question 14

As mentioned before, Brazil understands that there is a fundamental difference between a requirement of the performance of production steps and a requirement of the use of domestic products for a *de jure* contingency under Article 3.1(b). A *de facto* contingency would require an analysis of the total configuration of the facts at hand. As a third party, Brazil only has limited access to the parties' factual and legal arguments and thus prefers not to express a definitive view on how the law applies to the facts of this particular dispute

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

1. The findings of the Panel in this dispute will have important consequences for the way in which the Agreement on Subsidies and Countervailing Measures (SCM Agreement) is interpreted and applied in future disputes. Canada therefore welcomes the opportunity to present its views to the Panel. Canada's submission addresses the issue of prohibited import-substitution subsidies under Article 3.1(b) of the SCM Agreement.

2. The European Union claims that the continuation and extension of subsidies[1] by Washington State in the form of tax benefits to Boeing under SSB 5952 are contingent upon the use of domestic over imported goods in violation of Article 3.1(b) of the SCM Agreement. The European Union thus alleges that a "programme-siting condition" and an "exclusive-production condition" require Boeing "to use wings and fuselages produced or assembled in Washington State in the final assembly of 777X LCA in Washington State".[2]

3. Canada considers that the European Union's suggested interpretation of Article 3.1(b) would improperly extend the provision to cover situations where subsidy recipients are required to *produce* goods. The European Union appears to be arguing that a subsidy is contingent on the use of domestic over imported goods where the producer of a final good is required to produce certain components of that good in order to receive the subsidy.[3]

4. Canada understands that under what the European Union describes as the "programme-siting condition" Boeing is required to locate the 777X development program and manufacture and/or assemble the 777X, including fuselage and wings, in Washington State.[4] A so-called "exclusive-production condition" confirms that Boeing must carry out the final assembly or wing assembly of (any) of its aircraft models in Washington State, and not elsewhere, in order to benefit from reduced taxes.[5]

5. Although Boeing may, in fact, "use" fuselages and wings produced in Washington State to receive the tax subsidies, the company would be *required* to manufacture and/or assemble those fuselages and wings *itself*. There is no requirement included in SSB 5952 to purchase wings, fuselages, parts used in the assembly thereof or other parts used in the assembly of the final aircraft produced in the United States. The European Union also did not provide any evidence suggesting that Boeing would *de facto* have to "use" domestic components other than those that the company manufactures itself.

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[1] The tax incentives challenged by the European Union under Article 3.1(b) are a reduced Business and Occupation ("B&O") tax rate for the manufacture and sale of commercial airplanes, a B&O tax credit for pre-production development for commercial airplanes and components, a B&O tax credit for property taxes on commercial airplane manufacturing facilities, an exemption from sales and use taxes for certain computer hardware, software, and peripherals, an exemption from sales and use taxes for certain construction services and materials, an exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes and an exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes (European Union's first written submission, para. 15).

[2] European Union's first written submission, para. 44, see also para. 52.

[3] The European Union claims that "pursuant to the programme-siting condition in Section 2 of SSB 5952, the post-2024 aerospace tax incentives were contingent on the establishment of a new commercial aircraft manufacturing programme that uses goods (i.e. fuselages and wings) produced in the United States (specifically, in Washington State). Under this condition, the tax incentives would not have been extended in duration to 2040 if Boeing had decided to 'use' imported wings and fuselages in the assembly of the 777X". European Union's first written submission, para. 74. (footnotes omitted; emphasis added). The European Union continues: "Likewise, pursuant to the exclusive-production condition, the reduced B&O tax rate subsidy for the 777X is contingent on Boeing's use of wings produced in the United States (specifically, in Washington State) exclusively. Under this condition, Boeing benefits from the reduced B&O tax rate for the 777X only so long as it 'uses' wings assembled exclusively in Washington State for the 777X, or any variant thereof". European Union's first written submission, para. 75.

[4] Substitute Senate Bill 5952, Chapter 2, Laws of 2013 3rd Special Session, 2014 Wash. Sess. Laws 2 (SSB 5952), Exhibit EU-03, section 2.

[5] Ibid. subsections 5(11)(e)(ii) and 6(11)(e)(ii).

6. Canada considers that a WTO Member is not prohibited from providing subsidies to its domestic producers, including where the subsidy to the producer of a final good is contingent either on the production or the assembly of an intermediate good by that same producer. In both instances, the subsidy is a production subsidy that is not contingent on the use of domestic over imported goods.

7. Nothing in the General Agreement on Tariffs and Trade 1994 (GATT 1994) or SCM Agreement prohibits a subsidizing Member from making the granting of a subsidy contingent on a recipient producing goods in its territory.[6] In fact, GATT Article III:8(b) explicitly allows WTO Members to provide subsidies to their domestic producers.[7] A producer of a final good that is required to produce an intermediate good is also a producer of the intermediate good. Therefore, a subsidy can be made contingent on the production of an intermediate as well as a final good.

8. Neither the GATT 1994 nor the SCM Agreement limit a subsidizing Member's ability to define the level of production required for subsidy eligibility purposes. As part of this discretion, a Member may explicitly require the production of an intermediate good. A Member's ability to condition the provision of a subsidy on a production requirement would be significantly curtailed if a Member could not require the production of an intermediate good. A production requirement would then have to be limited to simple assembly operations.

9. This position is supported by the Appellate Body's report in *Canada – Autos*. In that dispute, the Appellate Body assessed whether a measure providing Canadian automobile manufacturers with an import duty exemption contingent, *inter alia*, on satisfaction of a Canadian value-added (CVA) requirement, was inconsistent with Article 3.1(b) of the SCM Agreement.[8] Under the measure, a manufacturer could meet the CVA requirement by disclosing the aggregate of certain costs of producing vehicles in Canada listed in the definition of "Canadian value added".[9] A number of costs were included in the definition of CVA. The most relevant for the Appellate Body's analysis were (1) the cost of *domestic goods*, that is, those domestic parts and materials *purchased* by the manufacturer for use in the production of its motor vehicles[10], and (2) the cost of domestic labour[11], that is, the cost of all labour reasonably attributable to the production of vehicles. The latter would include the cost of labour used to produce intermediate goods.

10. In analyzing whether the CVA requirement was inconsistent with Article 3.1(b), the Appellate Body distinguished between the cost of labour and the cost of domestic goods. It found that the CVA requirement would violate Article 3.1(b) only if it required the manufacturer to use domestic goods.[12] However, it did not consider that a requirement to use domestic labour, regardless of whether that requirement may imply the production of intermediate goods, would violate Article 3.1(b).[13]

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[6] See Annex IV:3 of the SCM Agreement, which forms part of the rules under paragraph (a) of the now expired Article 6.1 for determining when a subsidy is deemed to have caused serious prejudice. Annex IV:3 explicitly refers to subsidies tied to the production of a given product. By contemplating that subsidies may be tied to production in the context of a serious prejudice analysis rather than in the context of a prohibition, Annex IV:3 recognizes that WTO Members are not prohibited from providing subsidies tied to production.

[7] Article III:8(b) of the GATT 1994 provides: "[t]he provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products"; See also Panel Report, *EC – Commercial Vessels*, paras. 7.69 and 7.75 where the panel found that contributions provided only to domestic producers of certain vessels were covered by GATT Article III:8(b) and therefore not inconsistent with GATT Article III.

[8] Appellate Body Report, *Canada – Autos*, para. 125.

[9] Ibid. paras. 124 and 125.

[10] Ibid. As the cost of producing intermediate goods is accounted for in the aggregate of the cost of purchased inputs and the manufacturer's own labour, the cost of domestic goods could not include the cost of intermediate goods produced by the manufacturer itself.

[11] Ibid. paras. 124 and 130.

[12] Appellate Body Report, *Canada – Autos*, para. 130: "if the level of the CVA requirements is very high, we can see that the use of domestic goods may well be a necessity and thus be, in practice, required as a *condition* for eligibility for the import duty exemption". (emphasis original).

[13] Ibid.:"if the level of the CVA requirements is very low, it would be much easier to satisfy those requirements *without* actually using domestic goods; for example, where the CVA requirements are set at 40

11. The European Union's interpretation would nullify the right of a WTO Member to require a subsidy recipient to produce goods, as defined by the Member, in its territory, in order to receive a subsidy. This has no basis in law, and would have considerable, negative consequences for industry given that most manufacturers produce intermediate goods as part of the production of their final goods. As such, and for the reasons set out above, the Panel should reject the interpretation advanced by the European Union.

per cent, it might be possible to satisfy that level simply with the aggregate of other elements of Canadian value added, in particular, labour costs". (emphasis original).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. This integrated executive summary summarizes the arguments and viewpoints presented by China to the Panel in its Third Party Submission, Oral Statements and responses to the questions following the substantive meeting. China mainly focuses on the two issues in this dispute in the executive summary: 1) legal framework of Article 3.1(b) of the SCM Agreement; and 2) whether the "Programme-Siting Condition" and "Exclusive-Production Condition" are consistent with Article 3.1(b) of the SCM agreement.

The Legal Framework of Article 3.1(b) of the SCM Agreement

2. At the outset, China indicates that in order to establish a *prima facie* case under Article 3.1(b), the EU is obligated to demonstrate: 1) relevant measures constitute subsidies under Article 1 of SCM Agreement; and 2) relevant measures are contingent upon the use of domestic over imported goods. China will not touch upon the first condition, but only focus on the second condition.

3. Firstly, China is of the view that "contingency" under Article 3.1(b) of the SCM agreement includes both contingency in law and contingency in fact. The Appellate Body clarified in *Canada-Autos* that "contingency" includes both contingency in law and contingency in fact and this legal standard applies not only to "contingency" under Article 3.1(a), but also to "contingency" under Article 3.1(b)[1]. Hence, China believes, under present dispute, if subsidies are found contingent upon import substitution, regardless in law or in fact, they shall be determined to constitute prohibited subsidies. In addition, China also mentions the finding of the Appellate Body made in *EC— Large Civil Aircraft* so as to establish the test for determining whether a subsidy is *de facto* contingent on export performance. Such test might be also applied in the present dispute.

4. Secondly, China believes the term "contingent" is a "key word" under Article 3.1(b). The ordinary connotation of "contingent" is "conditional" or "dependent for its existence on something else". Therefore, China is of the view that the Panel shall examine if the subsidies granted under "Programme-Siting Condition" and "Exclusive-Production Condition" are "conditional" or "dependent for its existence on something else" on the use of domestic over imported goods.

5. Thirdly, China does not agree with the United States' argument concerning the interpretation of "goods". If the logic of the United States stands, it will be contradictory to each other, since the components of fuselages and wings from upstream will be treated as goods, while the fuselages or wings assembled in downstream are not goods. With respect to the criterion of "traded" presented by the United States, China believes the connotation of "tradable" means the goods has the value of trading instead of being traded in reality. Therefore, China does not think the interpretation of "goods" provided by the United States is convincing.

6. Fourthly, China is of the view that the prohibited subsidy under Article 3.1(b) is established on the basis of contingency upon "use" of domestic over imported goods. Contrary to the United States' claim that fuselages and wings are not "inputs" that are "used" as goods in the 777X production process[2], China believes that "use" of domestic **intermediate goods** in the course of production may also meet the condition on "use" of domestic over imported goods. If the conditions concerned would result in a *de facto* situation that the 777X programme prefers the domestic components or other intermediate goods, the condition of "use" of domestic over imported goods is also met.

7. Fifthly, China is of the view that Article III of the GATT on which relied by the United States is not relevant to the present dispute. China does not deny that it is possible that Article III.8(b) of the GATT can be used for context in the interpretation of Article 3.1(b) of the SCM Agreement.

[1] Appellate Body Report, *Canada – Autos*, para.123.
[2] First Written Submission of the United States, para.110-115.

However, China believes that these two Articles impose different obligations to Members. Article III.8(b) exempts the subsidy provided to domestic producers from the obligations of Article 3.2 and 3.4 of the GATT 1994. However, when the subsidy provided to the domestic producers is contingent on use of domestic over imported goods, it will still constitute prohibited subsidies under Article 3.1(b) of the SCM Agreement. Therefore, China believes that Article III:8(b) of the GATT is not the legal basis to exempt the "Programme-Siting Condition" and "Exclusive-Production Condition" from Article 3.1(b) of the SCM Agreement.

Whether the "Programme-Siting Condition" and "Exclusive-Production Condition" are consistent with Article 3.1(b) of the SCM agreement

8. China is of the view that the analysis regarding "Programme-Siting Condition" and "Exclusive-Production Condition" shall take into account the contingency both in law and in fact perspectives.

9. With regard to the "Programme-Siting Condition", China notes that the text in SSB 5952 does not expressly or implicitly indicate LCA must purchase any products including wings or fuselage which are produced in Washington State to fulfill the "Programme-Siting Condition". There seems no sufficient evidence in law proving the "Programme-Siting Condition" would constitute a *de jure* subsidy within the scope of Article 3.1(b).

10. However, China believes that taking into account of the cost saving from logistic and tax incentives aspects, it will be more favourable to purchase the wings and fuselages components or other intermediate goods produced in Washington State in the final assembly process of 777X. Therefore, the "Programme-Siting Condition" might result in a situation domestic components are favoured than imported components. China suggests the Panel to conduct an examination on this regard.

11. With regard to the "Exclusive-Production Condition", according to its provisions and statement made by the Governor of Washington State, the B&O tax rate reduction is specifically contingent on being sited in Washington State, and it requires that both final assembly and wing assembly have to be in the Washington State. China believes that if the both procedures have to be in the same State, it will create more incentive to use more domestic components due to cost saving and efficiency perspective.

12. China suggests that the Panel shall examine whether the "Exclusive-Production Condition" provision in SSB 5952 through implicit expression shall be considered as a *de jure* subsidy within the meaning of Article 3.1(b). And if it does not constitute *de jure* prohibited subsidy, China believes that the Panel shall make an objective assessment on the fact in relation to the production process of wings, so as to determine whether the "Exclusive-Production Condition" provision in SSB 5952 shall be considered as a *de facto* subsidy within the meaning of Article 3.1(b), through evaluating (i) the design and structure; (ii) the modalities of operation; and (iii) the relevant factual circumstances of B&O tax rate reduction under "Exclusive-Production Condition".

Conclusion

13. To conclude, China is of the view that the Panel shall take into account of the contingency in law and in fact to determine whether the tax incentives upon "Programme-Siting Condition" and "Exclusive-Production Condition" within SSB 5952 constitute subsidies upon use of domestic over imported goods within the meaning of Article 3.1(b) of SCM Agreement. In addition, China believes that certain interpretations of the United States, including "use", "goods" and "relationship between GATT Article III and Article 3.1(b) of SCM Agreement" shall not be supported by the Pane

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Introduction

1. The Government of Japan presents its systemic views in this dispute brought by the European Union against the United States with respect to certain aerospace tax incentives enacted by the State of Washington in 2003, as amended and extended by Substitute Senate Bill 5952 ("SSB 5952").

II. Contingency Under Article 3.1(b) of the SCM Agreement

A. Legal Standard

2. Regarding the legal standard for "contingency" under Article 3.1(b) of the SCM Agreement, the Appellate Body in *Canada – Autos* has clarified that the same legal standard for establishing contingency under Article 3.1(a) also applies for establishing contingency under Article 3.1(b).[1]

3. In that respect, Japan recalls that the Appellate Body in *EC – Large Civil Aircraft* noted that the condition of contingency would be met under Article 3.1(a) of the SCM Agreement when the subsidy is granted so as to provide a certain "*incentive to the recipient*".[2] Under Article 3.1(b) of the SCM Agreement, Japan is of the view that this legal standard focused on the incentive requires a comparison between the use of domestic goods and imported goods, and that this interpretation especially suits the meaning of the word "*over*" used in Article 3.1(b) of the SCM Agreement.[3]

4. Therefore, in this regard, Japan agrees with the European Union's legal analysis that to establish contingency under Article 3.1(b) of the SCM Agreement the same framework as suggested by the Appellate Body in *EC – Large Civil Aircraft* for Article 3.1(a) should be used.[4]

B. Evidentiary Standard

1. *De Jure* Contingency

5. Japan asks the Panel to carefully examine what *exactly* the law itself states and what it necessarily implies since, as clarified by the Appellate Body in *Canada – Autos*, the evidentiary standard for a *de jure* contingency is that "conditionality can be derived by necessary implication from *the words actually used in the measure*."[5]

6. When there is an ambiguity in the law or if the relevant governmental official is given a degree of discretion, "evidence of consistent application of such laws, pronouncements of domestic courts on the meanings of such laws, the opinions of legal experts, and the writings of recognized scholars" should also be considered. [6]

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[1] Appellate Body Report, *Canada – Autos*, para. 123. This view was later reiterated by the Panel in *US – Upland Cotton* and left untouched by the Appellate Body in the same case.

[2] Appellate Body Report, *EC—Large Civil Aircraft*, paras. 1045, 1047. (emphasis added)

[3] Japan notes that the dictionary defines the term "over" as meaning "in preference to", "in excess of" or "more than". (*The New Shorter Oxford English Dictionary*, 4th edn., L. Brown (ed.)(Oxford University Press, 1973, 1993). The term "over", therefore, functions as a marker of comparison. Thus, establishing whether the domestic product is used in preference to the imported product necessarily implies a comparison between the use of the former and the latter.

[4] EU FWS, para. 77.

[5] Appellate Body Report, *Canada – Autos*, para. 123. (emphasis added)

[6] Appellate Body Report, *US – Carbon Steel (India),* para. 4.446 (quoting Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101; *US – Carbon Steel*, para. 157).

2. *De Facto* Contingency

7. The United States points out that the European Union has presented no evidence or arguments related to the anticipated ratio of the use of domestic to imported goods for the Boeing Company ("Boeing") with and without the challenged measure.[7]

8. In this regard, the Appellate Body admits in *EC – Large Civil Aircraft* that the assessment as to whether a subsidy is "geared to induce" export performance under Article 3.1(a) "could be based" on a comparison between the ratio of anticipated export and domestic sales of the subsidized products (namely, the "anticipated ratio"), and the same ratio in the absence of the subsidy (namely, the "baseline ratio").[8] However, it does not mention that such ratio is always relevant to establish *de facto* contingency.[9]

9. Similarly, in examining whether a subsidy provides an incentive to use domestic over imported products under Article 3.1(b) of the SCM Agreement, Japan is of the view that such comparison between the baseline and anticipated ratios may not necessarily provide a basis for determining whether a subsidy provides an incentive to its recipient.

10. One reason for this is that the increase of the use of the domestic product may be caused by *other factors*, such as certain market developments including diverging shifts in the prices of domestic products as compared to imported products. However, such other factors causing the increase of the use of the domestic product must be distinguished from the effect of *the subsidy itself,* and the effects that may be caused by these *other factors* must not be attributed to the subsidies.[10]

11. Therefore, Japan asks the Panel to cautiously examine the utility of the "anticipated ratio" test. Whether a particular subsidy provides an incentive to its recipient must be primarily inferred from "the total configuration of the facts constituting and surrounding the granting of the subsidy",[11] rather than by relying on the "anticipated ratio."

12. Japan also recalls that the Appellate Body introduced the "anticipated ratio" test as one way to determine *de facto* export contingency under Article 3.1(a) and footnote 4 of the SCM Agreement, which reads in relevant part that a subsidy is "in fact tied to … anticipated exportation."[12] In other words, the "anticipated ratio" test has a textual basis in the term "anticipated exportation" in footnote 4. In addition to Japan's comments on the overall utility of the "anticipated ratio" test, therefore, in any event, the suggested "anticipated ratio" test developed under Article 3.1(a) should not be simply imported into the evidentiary standard for the purpose of Article 3.1(b) inquiry, since Article 3.1(b) contains no reference to "anticipated" use of domestic over imported goods.

C. Application of the Legal and Evidentiary Standards

13. In light of the legal and evidentiary standards described above, Japan considers that the EU's analysis in respect of the "programme-siting condition" and "exclusive-production condition" may fall short of meeting the standard required to establish the contingency under Article 3.1(b) of the SCM Agreement.

14. We urge the Panel to, firstly, very carefully examine what *exactly* the law itself states and what is necessarily implied by the legislation in question (as a *de jure* claim) as well as its design, structure and modalities of operation (as a *de facto* claim), and then, determine whether the provision of the subsidies provides incentives for the use of domestic goods over imported goods. If anything, more careful explanations appear to be necessary to connect facts and legal analysis in paragraphs 42 to 52, and 73 to 79 of the EU FWS.

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[7] US FWS, para. 134.
[8] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1044, 1047.
[9] *Ibid*., para. 1047.
[10] *Ibid*., para. 1047 notes that when making the comparison between the "anticipated" and "baseline" ratios, "all other things" must be equal.
[11] *Ibid*., para. 1046, citing Appellate Body Report, *Canada – Aircraft*, para. 167.
[12] *Ibid*.,paras. 1042-1045.

1. The "Programme-Siting Condition"

15. First, in respect of the "programme-siting condition," it appears that the requirement *to locate* Boeing's production of the wings and fuselage, as well as final assembly in Washington State is not exactly tantamount to a requirement *to use* inputs produced or assembled in Washington State.

16. Further, with respect to the incentive of the subsidy, there is no explanation in the EU's submission as to how the subsidy is granted so as to provide an incentive to Boeing to use domestic goods in a way that is not simply reflective of the conditions of supply and demand in a domestic market consisting of domestic goods and imported goods undistorted by the granting of the subsidy.

17. Japan submits that certain subsidies to the producer of a final good contingent on the production of an intermediate good by the same producer can be inconsistent with Article 3.1(b) of the SCM Agreement, depending on the factual circumstances of a case. Had there been an outright exclusion of subsidies contingent on domestic manufacturing of intermediate goods from the scope of Article 3.1(b), it would have allowed WTO Members to easily "circumvent the disciplines" of Part II of the SCM Agreement.[13]

18. Therefore, in order to determine whether a subsidy granted to the producer of a final good contingent on the production of an intermediate good by that same producer complies with Article 3.1(b) of the SCM Agreement, a panel should scrutinize the exact content of the requirements for the subsidy and how they operate for particular manufacturers receiving the subsidy. If, through such scrutiny, the requirement for the production of intermediate goods is found to require or incentivize the use of such domestic intermediate goods in final goods in actual situations, then the requirement would be in breach of Article 3.1(b).

2. The "Exclusive-Production Condition"

19. Second, in respect of the "exclusive-production condition," the words actually used in the legislation are not completely clear as to whether, by virtue of the requirement for the locus of the final assembly or wing assembly, the revenue from the 777X will not benefit from the reduced Business and Occupation ("B&O") tax rate if these assembling activities take place outside Washington State.

III. Goods under Article 3.1(b) of the SCM Agreement

A. Imported Goods

20. Japan submits that, for the purpose of a claim under Article 3.1(b) of the SCM Agreement, it is not necessary that the concerned goods are actually traded or are tradable.

21. The United States argues that because 777X fuselages and wings are "custom-designed for and unique to the 777X and its production process" and "[n]o potential purchasers for such articles exist", 777X fuselages and wings are not saleable or traded, and thus are not "goods" within the meaning of Article 3.1(b).[14] The United States relies primarily on the word "imported" that qualifies the word "goods" in Article 3.1(b). To follow this logic, certain products would be determined not to be "goods" within the meaning of Article 3.1(b) merely because an individual company receiving the subsidy at issue custom-designs the product and commissions a limited number of contractors to produce it.

22. Although Japan is not fully cognizant of the precise meaning which the United States attribute to the terms "tradeable" or "custom-designed" goods, which are not the treaty words in the SCM Agreement, it should be noted as a preliminary issue that Japan does not agree with the proposition that custom-designed goods developed for a particular product model are not capable of being sold, traded, or imported for that matter. Japan fails to see how the particular characteristics of "custom-design" preclude the goods from being "tradeable", *e.g.* from being

[13] Appellate Body Report, *US – Softwood Lumber IV*, para. 64.
[14] US FWS, Section VI.D, including para. 129.

supplied at arm's length from outside sources. In addition, Japan has two concerns in relation to the limited interpretation of the term "goods" for the purpose of Article 3.1(b).

23. First of all, such interpretation would open up an easy path for circumventing subsidy disciplines under Article 3.1(b) of the SCM Agreement. Indeed, WTO Members would be able to exclude a subsidy contingent on the use of domestic goods from the coverage of the SCM Agreement by simply labelling products as custom-designed. Japan recalls that the Appellate Body in *US – Softwood Lumber IV* cautioned against an interpretation of the provisions of the SCM Agreement which would permit the circumvention of the subsidy disciplines and that this consideration was highly pertinent for the Appellate Body's overall conclusion that non-tradable goods are not excluded from the scope of "goods" for the purpose of Article 1.1(a)(1)(iii) of the SCM Agreement.[15]

24. Second, such interpretation of "goods" under Article 3.1(b) has the risk of resulting in a wholly arbitrary application of this provision with unpredictable consequences for the following reasons. A product with the same basic characteristics may be custom-designed or sold in a standardised form depending on the wishes of a particular customer. Likewise, a particular company may, at times, produce and sell virtually the same product with some custom-designed characteristics, and, at different times, with standardised characteristics due to a number of factors such as a change in economic situation or the company's business strategy. However, following the United States' interpretation, although essentially the same product is produced and sold, whether it is covered or not covered by the SCM Agreement, would depend on the wishes of the customer or the company's business strategy at any given point in time leading to a wholly arbitrary application of Article 3.1(b) of the SCM Agreement.

25. Limiting the application of Article 3.1(b) to "tradeable" goods would, thus, hinder the consistent application of Article 3.1(b) to the detriment of the object and purpose of that provision.

26. Therefore, Japan submits that, for the purpose of a claim under Article 3.1(b) of the SCM Agreement, it is not necessary that the concerned goods are actually traded or tradable.

B. Domestic Goods

27. Japan considers that a product assembled entirely from imported components can be a "domestic […] good" within the meaning of Article 3.1(b) of the SCM Agreement for the following reason.

28. As discussed above, the phrase "domestic over imported goods" in Article 3.1(b) suggests that the term "domestic" can refer to anything that is not imported.

29. Hence, even if a product is assembled entirely from imported components, when *the product itself is not imported*, the product should be regarded as "domestic". Otherwise, the product could be categorized arbitrarily as either "domestic" goods or "imported" goods. This would significantly undermine the object and purpose of – the SCM Agreement by creating room for circumvention of the obligation under Article 3.1(b) of the Agreement.[16]

IV. Burden of Proof and the Relevance of Findings Made by Preceding Panels and the Appellate Body

30. The United States argues that the European Union relies on facts and legal conclusions established in a separate dispute, *US — Large Civil Aircraft*, and fails to make a *prima facie* case.[17] The United States points out, *inter alia*, that while the panel in that dispute addressed facts that existed in 2006, the present dispute involves measures that differ from those at issue in that dispute.[18] The United States submits that the existence of prior panel findings in *US — Large Civil*

[15] Appellate Body Report, *US – Softwood Lumber IV*, paras. 64 and 67.
[16] See Appellate Body Report, *Canada – Autos*, para. 142.
[17] US FWS, para. 81.
[18] *Ibid.*, paras. 82 and 87.

Aircraft does not excuse the European Union from the burden of proof that normally applies in an original dispute.[19]

31. Japan agrees with the United States that a complainant has to provide sufficient facts and arguments to allow the Panel to perform its own objective assessment of the matter, as required under Article 11 of the DSU.[20] Nonetheless, in Japan's view, this does not mean that a complainant is precluded from relying on findings contained in previously adopted panel reports if and to the extent such findings are appropriate for the consideration of the matter before the Panel.

32. Japan observes that the Panel in this dispute should make an objective assessment of the facts of the case including the issue of whether and to what extent it may rely on the findings of the previous panel, taking into consideration any differences in the factual circumstances of the two cases.

33. In this regard, it appears that the aerospace tax incentives (other than the B&O tax rate reduction) in this dispute consist of both the tax incentives that were found by the panel in *U S — Large Civil Aircraft* to involve a financial contribution and those that were not. As a complainant, the European Union should clearly distinguish the two sets of tax incentives, and elaborate on the reasons why it considers that the Panel is allowed to rely on the *US — Large Civil Aircraft* panel's and the Appellate Body's findings in examining the WTO-consistency of each of the challenged measures.

[19] *Ibid*., para. 90.
[20] *Ibid*., paras. 85-86.; Panel Report, *US—Shrimp and Sawblades*, para. 7.6.

ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

LETTER FROM THE PANEL, 15 JANUARY 2016

The Panel acknowledges receipt of the United States' request to extend the deadline for the second written submissions by an additional week (i.e. that the Panel set a date no earlier than 25 March 2016).

The Panel adopted the present Timetable taking into account, among other considerations, the unavailability of the United States' lead attorney to attend a panel meeting during the week of 14 March 2016, as indicated at the organizational meeting. Accordingly, the second substantive meeting was postponed from 15-16 March, as suggested in the draft Timetable initially sent to the parties, to 5-6 April.

The Panel is cognisant of the direction under Article 12.4 of the DSU that sufficient time be given for the preparation of submissions. At the same time, it is to be recalled that these proceedings are required, under the SCM Agreement, to be expedited. What might be considered to be sufficient in expedited and in non-expedited proceedings will necessarily be different.

The Panel believes that it has fairly accommodated the parties' concerns as expressed at the organizational meeting in the adoption of the present Timetable. The concerns which have now more recently been expressed by the United States do not convince the Panel that insufficient time has been given for the preparation of submissions by the parties. In particular the Panel does not agree that the United States will only have two days to prepare its second submission.

Accordingly, the Panel declines the United States' request for an extension of the deadline for the second written submissions.

ANNEX D-2

LETTER FROM THE PANEL, 4 MAY 2016

The Panel is in receipt of the United States' communication of 28 April 2016, in which it asked for the opportunity to comment on certain factual evidence and arguments that were submitted by the European Union on 25 April with the European Union's comments on the United States' responses to Panel questions. The Panel has also received the European Union's comments of 2 May 2016 on the United States' request.

In its request, the United States refers to eight new exhibits that were provided by the European Union with its comments on the United States' responses. The United States "disagrees with the [European Union's] interpretation of this evidence and how [the European Union] employs the evidence in its argumentation". According to the United States, an opportunity to comment on this factual evidence and arguments would help to protect the United States' rights as a responding Member without delaying this proceeding any more than necessary.

In response, the European Union asks the Panel to reject the United States' request. In the European Union's view, the United States has not explained why a new opportunity to comment, which is not envisioned in the Panel's timetable, would be essential to protecting the United States' procedural rights. The European Union submits that the due process rights of the United States must be balanced with the procedural right of the European Union to a speedy resolution of the dispute, which would be affected if the United States' request were accepted. The European Union also states that the circumstances relating to the submission of the exhibits at issue, as well as the nature of the exhibits themselves, do not merit an additional set of comments. According to the European Union, the new factual evidence and related argumentation was offered as a rebuttal to arguments that the United States made in its responses to Panel questions. Nothing in this new factual evidence was previously unavailable to the United States and with respect to two exhibits the United States itself relied on and referred to the relevant documents before the European Union submitted them as exhibits. The European Union concludes that not having an additional opportunity to submit comments would not prejudice the due process right of the United States in this dispute.

Thus, in summary, the United States requests the Panel to give it the opportunity to comment on the factual evidence submitted by the European Union, and the European Union submits to the Panel that such an opportunity to comment is not envisioned by the Panel's timetable and is not otherwise merited.

The Panel's Working Procedures do not allow for any further submissions or comments from the parties at this point in the proceedings, other than in the case of the parties' comments on the interim report. Thus, the question for the Panel to decide is whether it should permit a departure from the Working Procedures. The way in which this might be justified would be if the Panel formed the view that the due process rights of a party – here, the United States – would be impacted without such an opportunity.

There are a number of different considerations for a Panel to take into account in a situation such as this. An important consideration is the degree to which the matters that a party seeks to address were themselves new, were unexpected, or were not advanced by the other party fairly.

The Panel recalls paragraph 7 of its Working Procedures:

> Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

The Panel notes that the exhibits referred to by the United States in its request were provided by the European Union as part of its comments on answers provided by the United States. In its request for an opportunity to comment on these exhibits and on the associated arguments, the United States has neither alleged nor provided any indication that the exhibits submitted by the European Union go beyond evidence that is necessary for purposes of "comments on answers provided by the other party". The Panel sees no indication that either the exhibits or the arguments of the European Union go beyond the "purposes of rebuttal, answers to questions or comments on answers provided by the other party". Thus, the European Union was acting within its rights under the Working Procedures in submitting that evidence.

The Panel has also reviewed the content of each of the eight exhibits submitted by the European Union with its comments on the United States' responses. Each of these exhibits and the related argumentation seems to relate to specific points raised by the United States in its responses to Panel questions. There is no indication that any of these exhibits introduces substantially new arguments or factual evidence of a nature that had not been previously submitted or discussed by the parties. Indeed, the United States has not argued otherwise, stating only, in support of its request, that it "disagrees with the [European Union's] interpretation of this evidence and how [the European Union] employs the evidence in its argumentation".

Accordingly, the Panel finds that the United States has not established that it should have a further opportunity to comment on the evidence and arguments submitted by the European Union at this stage of the proceedings. Such an opportunity is not contemplated in the current Working Procedures or timetable, and could potentially lead to a prolonged cycle of exchanges of additional evidence and arguments between the parties. Under the present circumstances, this would not clearly serve to protect the procedural rights of either party, and would be particularly undesirable in the current proceedings, which under the SCM Agreement should be expedited. The due process rights of the parties are framed by the Working Procedures, and in this case we do not see a proper or sufficient justification to depart from them.

For the reasons expressed above, the Panel declines the request of the United States in its communication of 28 April 2016.