SUBSIDIZING LARGE CIVIL AIRCRAFT: AIRBUS AND BOEING'S NEWEST DISPUTE BEFORE THE WORLD TRADE ORGANIZATION

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INTRODUCTION

On December 19, 2014, the European Communities filed a complaint with the World Trade Organization (WTO) Dispute Resolution Body against the United States claiming that a new Washington state law (Senate Bill 5952) provided improper tax incentives enticing Boeing to relocate one of its manufacturing facilities to Washington State.[1] This new dispute, titled *US—Conditional Tax Incentives for Large Civil Aircraft*, comes after Boeing's rival company, Airbus, received tax incentives to establish a manufacturing plant in Alabama.[2] While the European Communities are claiming that the tax incentives to Boeing are prohibited subsidies under the Subsidies and Countermeasures Agreement (SCM Agreement),[3] the United States has not filed a similar claim against Airbus. This raises questions about how subsidies are classified and regulated under international agreements and whether the domestic nature of the subsidy is the crux of the problem.

Since Airbus formed in 1970 as a European competitor to the American company Boeing, there has been an international debate surrounding the role of subsidies in assisting domestic manufacturers of large civil aircraft. While these two companies have been the source of constant competition since the 1970s, it wasn't until the turn of the century that any of their disputes reached the international legal community. In 2004 the United States filed a complaint with the WTO's Dispute Resolution Body claiming that the European Communities—in particular France, Germany, England, and Spain—were providing subsidies to its

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[1] Reid Wilson, *After Huge Tax Incentive Package, Boeing Still Ships Jobs out of Washington*, WASH. POST (Oct. 8, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/10/08/after-huge-tax-incentive-package-boeing-still-ships-jobs-out-of-washington/ [https://perma.cc/UX36-MLU9].

[2] Casey Toner, *Big Incentives at Stake as Airbus' Plant Comes On Line*, AL.COM (Sept. 13, 2015, 8:00 AM), http://www.al.com/news/index.ssf/2015/09/big_incentives_at_stake_as_air.html [https://perma.cc/D9CY-NKH3].

[3] *See infra* Part III.B.

domestic company, Airbus.[4] That same day, the European Communities filed a complaint against the United States for providing subsidies to Boeing, a United States domestic corporation.[5] The WTO's Dispute Resolution Body handed down panel reports in 2010 and 2011 respectively. Both reports were appealed and the Appellate Body reviewed the cases and handed down their reports circa 2012.[6] Both the United States and the European Communities have since claimed to be in compliance with their findings.[7] However, this is not the case and there are still issues surrounding subsidies for large civil aircraft.

With the onset of a new dispute regarding Senate Bill 5952 benefitting large civil aircraft manufacturers,[8] it remains unclear whether or not the WTO's Dispute Resolution Body will consider these tax incentives improper subsidies. There are three agreements concerning the WTO's treatment of subsidies, the most important of which is the SCM Agreement. Under the SCM Agreement, the WTO only deems a subsidy improper if it is actually a subsidy and is a specific subsidy.[9] Once a specific subsidy is established, if the subsidy is deemed prohibited under the SCM Agreement, the country issuing the subsidy must take steps to remove it.[10]

This Comment argues that Senate Bill 5952's tax incentive measures do not constitute an improper subsidy under the SCM Agreement because they are not prohibited subsidies. While the tax incentives promulgated in Senate Bill 5952 do constitute subsidies, this Comment will argue that they are not specific. Further, since the tax incentives contained in Senate Bill 5952 are neither export subsidies nor domestic content subsidies, it is unlikely that the WTO will find that they are prohibited or improper subsidies.

Part I of this Comment takes an in depth look at the background and history of Boeing and Airbus. Part II examines the history of the conflict between the two large civil aircraft

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[4] *See infra* note 88 and accompanying text.
[5] *See infra* note 109 and accompanying text.
[6] *See infra* notes 101-05, 113-15 and accompanying text.
[7] *See infra* note 116 and accompanying text.
[8] *See infra* Part III.
[9] *See infra* notes 42-52 and accompanying text.
[10] *See infra* notes 60-61 and accompanying text.

manufacturers. Part III examines the SCM Agreement as well as the General Agreement on Tariffs and Trade (GATT), taking note of what constitutes a prohibited subsidy. Finally, Part IV argues that the tax incentive measures contained in Senate Bill 5952 do not constitute prohibited subsidies under the SCM Agreement.

I. BACKGROUND

WTO disputes primarily concern the misdeeds of governments. However, many of the disputes arise from companies that benefit or are hurt by a countries actions. As such, the companies that involved in the international disputes should be examined. There are two corporations involved in the *EC-Aircraft*, *US-Aircraft,* and the *US—Conditional Tax Incentives for Large Civil Aircraft* disputes. The first company to be examined is the American company, Boeing. The second company, Airbus, is organized within the collective boundaries of four European countries—France, Germany, Great Britain, and Spain—all of which were members of the European Communities.[11] Below is a brief history of these companies and their origins in the large civil aircraft market.

A. Boeing

William Edward Boeing incorporated Pacific Aero Products Company on July 15, 1916, which is known today as the Boeing Company (Boeing).[12] Boeing began as an aircraft manufacturer for the United States military, and did not expand into the civil aviation market until the 1950s when it developed the United States' first jet airliner, the 707.[13] In the 1960s, Boeing continued growing within the civil aircraft market and developed two new large civil aircraft models: the 737 and the 747.[14] The Boeing 747 dominated the market for long-haul international flights, and has been "the world's most profitable commercial aircraft."[15]

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[11] The European Communities is now referred to as the European Union.

[12] Jeffrey D. Kienstra, *Cleared for Landing: Airbus, Boeing, and the WTO Dispute over Subsidies to Large Civil Aircraft*, 32 NW. J. INT'L L. & BUS. 569, 572 (2012).

[13] *Id.* at 573.

[14] *Id*.

[15] *Id*.

In 1997, Boeing merged with rival aircraft manufacturer, McDonnell Douglas Corporation, and became the United States' last major producer of large civil aircraft.[16] Boeing is currently the only American large civil aircraft manufacturer while also controlling nearly one hundred percent of the United States' industry in civil aviation manufacturing.[17] While its civilian success is impressive, Boeing never strayed from its military roots. Boeing is the world's second largest defense company, contracting with the United States' military as well as foreign militaries.[18]

More recently, Boeing announced that it would begin development of a new large civil aircraft reported to have unparalleled fuel efficiency and range flexibility, the 787 Dreamliner.[19] The development for the 787 Dreamliner began in 2003 and featured lightweight composite materials making up a majority of the airplane's fuselage, wings, and tail delivering twenty percent less fuel consumption compared with similar sized aircraft.[20] On September 26, 2011, Boeing celebrated its first delivery of the 787 Dreamliner.[21] There are currently 1207 orders for Boeing's 787 Dreamliner, of which 521 have been delivered.[22]

B. Airbus

After seeing Boeing's initial success in the commercial aviation market in the 1950s, the French company Aerospatiale joined with a group of German manufacturing firms to form Airbus Industrie GIE in 1970.[23] Eventually, the United Kingdom's British Aerospace and Spain's Construcciones Aeronauticas SA

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[16] *Id*.

[17] *Id*.

[18] *Id*. at 573-74.

[19] *Boeing 787 Dreamliner*, BOEING, http://www.boeing.com/commercial/787/ [https://perma.cc/UL26-3AR3] (last visited Feb. 20, 2017).

[20] Kienstra, *supra* note 12, at 574.

[21] *Boeing, ANA Celebrate First 787 Dreamliner Delivery*, BOEING (Sept. 26, 2011), http://boeing.mediaroom.com/2011-09-26-Boeing-ANA-Celebrate-First-787-Dreamliner-Delivery [https://perma.cc/KG2E-YPAH] (last visited Feb. 20, 2017).

[22] *Orders & Deliveries*, BOEING, http://active.boeing.com/commercial/orders/displaystandardreport.cfm?cboCurrentModel=787&optReportType=AllModels&cboAllModel=787&ViewReportF=View+Report [https://perma.cc/58L6-RCZY] (last visited Feb. 20, 2017).

[23] Kienstra, *supra* note 12, at 575.

would round out the international consortium.[24] This "loose association of fully independent cost-centered companies," would finally reorganize as Airbus SAS, a wholly owned subsidiary of the European Aeronautic Defense and Space Company (EADS).[25]

Airbus' member nations have continually provided "significant development financing" to Airbus in order to help offset the monumental up-front investments required in the industry.[26] The member nations have provided this up-front financing, termed "[L]aunch [A]id" by the United States,[27] to Airbus for the costs of developing each of its aircraft.[28] With the help of Launch Aid, Airbus gained large civil aircraft industry market share, finally overtaking Boeing as the world's top manufacturer of large civil aircraft in 1998.[29] Airbus continued its success, surpassing Boeing in terms of deliveries just five years later, in 2003.[30]

In line with Boeing's development of the 787 Dreamliner with lightweight composite materials, Airbus announced the development of A350 XWB, as a direct competitor to the 787 that also features lightweight composite materials, in 2004.[31] The combination of Airbus receiving Launch Aid for aircraft development, as well as Airbus overtaking Boeing in global market share, and the development of the A350 XWB, along with other factors, led to the United States filing a claim against the European Communities in the WTO for improperly subsidizing Airbus to the detriment of Boeing and the US large civil aircraft industry.

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[24] *Id*.

[25] First Written Submission by the European Communities, *European Communities Measures Affecting Trade in Large Civil Aircraft*, ¶ 69, WT/DS316 (Apr. 5, 2007) [hereinafter DS316 EC First Written Submission], http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134551.pdf [https://perma.cc/S49X-D8W3].

[26] Kienstra, *supra* note 12, at 576.

[27] DS316 EC First Written Submission, *supra* note 25, ¶¶ 289-90.

[28] Kienstra, *supra* note 12, at 576.

[29] *Id*. at 577.

[30] *Id*.

[31] *Id*. at 578.

II. AIRBUS-BOEING DISPUTE

The Airbus-Boeing Dispute covers two WTO disputes, and the panel and appellate body reports that followed, over improper subsidies granted by governments to national entities. The first dispute is *EC—Measures Affecting Trade in Large Civil Aircraft* (*EC-Aircraft*).[32] The second dispute is *US—Measures Affecting Trade in Large Civil Aircraft* (*US-Aircraft*).[33] These disputes are crucial to help understand why the *US—Conditional Tax Incentives for Large Civil Aircraft* dispute arose. However, in order to understand the disputes, the international agreements regarding the treatment of subsidies must first be examined.

A. Treatment of Subsidies in the WTO

There are two major agreements regarding the WTO's treatment of subsidies. The first agreement is the General Agreement on Tariffs and Trade (GATT), of which there were multiple rounds where the 1979 and 1994 rounds have the most relevance regarding subsidies. The second is the WTO Subsidies and Countervailing Measures Agreement (SCM Agreement). The SCM Agreement lays out the major principles of what constitutes a subsidy and how the WTO treats certain subsidies. It will be examined in detail below.

1. The GATT

The GATT generally covers the international community's treatment of tariffs and trade.[34] The 1979 GATT Tokyo round

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[32] Panel Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/R (adopted June 30, 2010) [hereinafter Panel Report, *EC-Aircraft*]; Appellate Body Report, *European Communities and Other Member States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/AB/R (adopted May 18, 2011) [hereinafter Appellate Body Report, *EC-Aircraft*].

[33] Panel Report, *United States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS353/R (adopted Mar. 31, 2011) [hereinafter Panel Report, *US-Aircraft*]; Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WTO Doc. WT/DS353/AB/R (adopted Mar. 12, 2012) [hereinafter Appellate Body Report, *US-Aircraft*].

[34] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS:

resulted in the creation of the plurilateral Agreement on Trade in Civil Aircraft (ATCA).[35] This agreement attempted to limit and reduce trade restricting and distorting effects caused by subsidies to large civil aircraft manufacturers by prohibiting export subsidies but allowing domestic subsidies.[36] The GATT 1979 did not adequately address the problems with subsidies and so the Uruguay round in 1994 resulted in the creation of the WTO SCM Agreement and the Dispute Settlement Body,[37] both of which would later have a profound effect on the regulation of subsidies for large civil aircraft manufacturers.

2. The SCM Agreement

The Agreement on Subsidies and Countervailing Measures (SCM Agreement) was created to address growing problems with the international community's treatment of subsidies. While the GATT 1979 prohibited export subsidies and allowed domestic subsidies, the SCM Agreement created the "primary rules on the use of subsidies."[38] In order for the WTO to determine whether a subsidy is improper, a specific subsidy that is either actionable or prohibited must exist. The first step is to determine if there is even a subsidy as defined by the SCM Agreement.[39] Next, the subsidy must be found to be specific.[40] Finally, the subsidy must be determined to be either prohibited or actionable.[41]

The SCM Agreement declares that a subsidy exists where there is a "financial contribution by a government or any public body within the territory of a Member" state,[42] and a "benefit is

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THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1154 (1994).

[35] Kienstra, *supra* note 12, at 578.

[36] *Id*. at 579.

[37] *Id*. at 579-83.

[38] SIMON LESTER, BRYAN MERCURIO & ARWEL DAVIES, WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY 421 (2d ed. 2012).

[39] *Id*. at 422.

[40] *Id*.

[41] *Id*.

[42] Agreement on Subsidies and Countervailing Measures art. 1.1(a)(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 231 (1999), 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

thereby conferred."[43] These financial contributions can be "direct transfer[s] of funds;"[44] however, they could also exist where "government revenue that is otherwise due is forgone or not collected."[45] When a WTO Panel or Appellate Body is reviewing whether revenue that is otherwise due is foregone, they look first to see if the "current tax or customs regime has a 'defined, normative benchmark,'" then they determine whether the "benchmark is not applied in specific circumstances, in a manner that collects less revenue."[46] Just because a government provides a financial contribution does not necessarily establish that there is a subsidy under the SCM Agreement.[47] The financial contribution must also confer a benefit.[48]

It would appear that government provision of a financial contribution would always confer a benefit on the party receiving the financial contribution. However, the WTO Dispute Resolution Body stated in *Canada-Aircraft* that there are certain criteria that must be met in order to find that a benefit was conferred.[49] In this dispute, the Appellate Body stated that it could determine whether a benefit existed or not by comparing the terms of the financial contribution to those that could be found on the marketplace.[50] The Appellate Body further stated that the test is to determine "whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[51]

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[43] *Id*. art. 1.1(b).

[44] *Id*. art. 1.1(a)(1)(i).

[45] *Id*. art. 1.1(a)(1)(ii) (listing "fiscal incentives such as tax credits" as examples of the type of foregone or uncollected revenue).

[46] LESTER, MERCURIO & DAVIES, *supra* note 38, at 425.

[47] SCM Agreement, *supra* note 42, art. 1.1(a)(1); LESTER, MERCURIO & DAVIES, *supra* note 38, at 428.

[48] SCM Agreement, *supra* note 42, art. 1.1(b); LESTER, MERCURIO & DAVIES, *supra* note 38, at 428.

[49] Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 157, WTO Doc. WT/DS70/AB/R (adopted Aug. 2, 1999) [hereinafter Appellate Body Report, *Canada-Aircraft*]; *see also* LESTER, MERCURIO & DAVIES, *supra* note 38, at 428.

[50] Appellate Body Report, *Canada-Aircraft supra* note 49; *see also* LESTER, MERCURIO & DAVIES, *supra* note 38, at 428.

[51] Appellate Body Report, *Canada-Aircraft, supra* note 49; *see also* Simon Lester, *The Problem of Subsidies as a Means of Protectionism: Lessons from the WTO* EC—Aircraft *Case*, 12 MELBOURNE J. INT'L L. 1, 7 (2011).

Therefore, according to the SCM Agreement in order for a subsidy to exist there must be: (1) A government or public body, (2) a financial contribution, and (3) a conferred benefit. However, once it has been established that a subsidy exists, there is another step of determining if that subsidy is specific under SCM Agreement Article 2.[52]

Article 2 of the SCM Agreement defines what is meant by specificity. Specificity will exist "where the granting authority, or the legislation… explicitly limits access to a subsidy to certain enterprises",[53] or "industry or group of enterprises or industries."[54] Further, specificity will not be found where the measure "establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy… provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to."[55]

Now that it has been established that the WTO looks at whether a specific subsidy exists, it is important to note that not all subsidies under the SCM Agreement will result in WTO intervention. The SCM Agreement classifies three main types of subsidies: (1) prohibited subsidies,[56] (2) actionable subsidies,[57] and (3) non-actionable subsidies.[58] The SCM provisions for non-actionable subsidies have since expired; therefore, the Airbus-Boeing disputes are focused on prohibited and actionable subsidies.

a. Prohibited Subsidies

The SCM Agreement categorizes certain subsidies as prohibited per se because they contain certain characteristics.[59] These prohibited subsidies are banned in all cases.[60] There are

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[52] SCM Agreement, *supra* note 42, art. 1.2.
[53] *Id*. art. 2.1(a).
[54] *Id*. art. 2.1.
[55] *Id*. art. 2.1(b).
[56] *Id*. arts. 3-4.
[57] *Id*. arts. 5-7.
[58] *Id*. arts. 8-9.
[59] Lester, *supra* note 51, at 9.
[60] LESTER, MERCURIO & DAVIES, *supra* note 38, at 432.

two types of subsidies that the SCM Agreement deems prohibited: export subsidies and domestic content subsidies.[61]

As their name suggests, export subsidies deal with the exportation of goods to foreign markets. According to Article 3 of the SCM Agreement, export subsidies are "subsidies contingent, in law or in fact, . . . upon export performance."[62] The SCM Agreement explicitly prohibits export subsidies because they effectuate strong trade distortions in international markets.[63] Export subsidies inherently favor exporting domestically produced goods over their foreign competitors in export markets.[64] However, "[t]he mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy . . . ."[65] Since export subsidies are prohibited, and therefore banned in all cases, there is no requirement that a complainant demonstrate actual adverse effects.[66] If the facts demonstrate that the granted subsidy "is in fact tied to actual or anticipated exportation or export earnings," then the standard for being an export subsidy has been met.[67]

Where export subsides are concerned with goods exported to foreign countries, domestic content subsidies involve situations where domestic goods are given advantage at a home market compared to a foreign competitor.[68] Similarly, however, the SCM Agreement also prohibits domestic content subsidies.[69] These subsidies consist of measures that are contingent, "whether solely or as one of several other conditions, upon the use of domestic over imported goods."[70] This definition overlaps with the GATT's requirement of general national treatment, where both agreements could be violated due to certain kinds of requirements concerning local content.[71]

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[61] SCM Agreement, *supra* note 42, art. 3.1(a)-(b); *see also* LESTER, MERCURIO & DAVIES, *supra* note 38, at 432.

[62] SCM Agreement, *supra* note 42, art. 3.1(a).

[63] LESTER, MERCURIO & DAVIES, *supra* note 38, at 432.

[64] Lester, *supra* note 51, at 7.

[65] SCM Agreement, *supra* note 42, art. 3 n.4.

[66] LESTER, MERCURIO & DAVIES, *supra* note 38, at 432.

[67] SCM Agreement, *supra* note 42, art. 3 n.4.

[68] Lester, *supra* note 51, at 9.

[69] SCM Agreement, *supra* note 42, art. 3.1(b).

[70] *Id*.

[71] Lester, *supra* note 51, at 9.

Both export subsidies and domestic content subsidies are prohibited per se because they discriminate against foreign products.[72] If the subsidy in question satisfies either provision in Article 3.1, then there is a violation.[73] No further evidence is required.[74]

b. Actionable Subsidies

Actionable subsidies are not prohibited outright; rather these subsidies may be challenged based on the merits of their negative trade effects.[75] That is to say, subsidies that are deemed specific may be challenged if they cause "adverse effects."[76] There are three types of adverse effects described by the SCM Agreement. First, where there is an "injury to the domestic industry of another [m]ember",[77] meaning a material injury, threat of a material injury, or a material retardation of the establishment of an industry.[78] Second, where benefits accrued towards other members are nullified or impaired.[79] Third and finally, where the subsidy causes "serious prejudice to the interests of another [m]ember."[80] SCM Agreement Article 6 describes what is meant by serious prejudice.[81]

According to Article 6 of the SCM Agreement, serious prejudice may exist in four situations.[82] First, where the "effect of the subsidy is to displace or impede the imports of a like product of another [m]ember into the markets of the subsidizing [m]ember."[83] Second, where the "effect of the subsidy is to displace or impede the exports of a like product of another [m]ember from a third country market."[84] Third, where the subsidy causes "significant price undercutting… or significant price suppression,

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[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] LESTER, MERCURIO & DAVIES, *supra* note 38, at 445.
[76] SCM Agreement, *supra* note 42, art. 5.
[77] *Id*. art. 5(a).
[78] LESTER, MERCURIO & DAVIES, *supra* note 38, at 445.
[79] SCM Agreement, *supra* note 42, art. 5(b).
[80] *Id*. art. 5(c).
[81] *Id*. art. 6.
[82] *Id*. art. 6.3.
[83] *Id*. art. 6.3(a).
[84] *Id*. art. 6.3(b).

price depression or lost sales in the same market."[85] Fourth, where the subsidy causes an increase in its world market share of that product or commodity compared with the average share it had during the prior three-year period.[86]

While there are only two types of prohibited subsidies, the analysis for actionable subsidies requires a case-by-case analysis of whether the specific subsidy causes adverse effects that could be characterized as an injury or seriously prejudicial to a foreign competitor. The injury must be material if the subsidy is to be deemed actionable. Further, only where the subsidy displaces or impedes a foreign competitor in a market, or where there is serious price undercutting or the subsidy causes an increased market share, is the subsidy actionable due to its causation of serious prejudice.

B. Disputes before the World Trade Organization Dispute Resolution Body

Boeing and Airbus have been fierce international competitors in the global marketplace for manufacturing large civil aircraft since Airbus formed in 1970. Since Airbus' founding, the European Communities (EC) continuously provided state assistance for the development of new aircraft in the form of launch aid. Despite these capital injections, the United States did not formally bring a claim against the EC until 2004 when Airbus had recently eclipsed Boeing as the global leader in exporting large civil aircraft. When the United States filed its complaint with the WTO Dispute Resolution Body, alleging thirty years of EC subsidization, the EC responded by filing its own complaint against the United States. Both of these disputes, *EC—Measures Affecting Trade in Large Civil Aircraft* (*EC-Aircraft*) and *US—Measures Affecting Trade in Large Civil Aircraft* (*US-Aircraft*), will be examined below, including the panel and appellate body reports.

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[85] *Id*. art. 6.3(c).
[86] *Id*. art. 6.3(d).

1. EC-Aircraft

On October 6, 2004, the United States submitted a request for consultations with the European Communities (EC)—Germany, France, Spain, and Great Britain—concerning measures affecting trade in large civil aircraft. In the complaint the United States claimed that the EC violated the articles concerning prohibited and actionable subsidies in the SCM agreement, as well as Article XXIII:1 of the GATT 1994.[87] Specifically, the United States claimed that the EC had provided "launch aid"—financing for the design and development of large civil aircraft models where the repayment would be forgiven if the aircraft were not commercially successful—to Airbus.[88] The United States further claimed that the EC provided loans on favorable terms as well as goods and services to expand Airbus' manufacturing sites among other grants it alleged were subsidies.[89] The United States asserted that launch aid, and its debt forgiveness provision, constituted a prohibited subsidy, while the expansion of manufacturing sites was an actionable subsidy.[90]

Almost six years after filing its complaint, the WTO Dispute Resolution Panel circulated its report on the *EC-Aircraft* case on June 30, 2010.[91] In all, the report catalogued over three hundred separate instances of subsidization, occurring over a span of forty years.[92] The Panel held that the launch aid measures were specific subsidies, but that only the German, Spanish, and UK launch aid measures were prohibited by the SCM Agreement because they were based on export performance.[93] Further, the Panel held that the infrastructure and manufacturing grants did constitute specific subsidies,[94] and that these subsidies were actionable because they caused displacement of American imports into

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[87] Request for Consultations by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/1 (Oct. 12, 2004) [hereinafter Consultations Request, *EC-Aircraft*].

[88] *Id*. at 1-2.

[89] *Id*. at 2.

[90] *Id*.

[91] Panel Report, *EC-Aircraft, supra* note 32.

[92] *Id*.

[93] *Id*. ¶ 8.1(a).

[94] *Id*. ¶ 8.1(b).

foreign markets.[95] These subsidies were also deemed to cause adverse effects in the form of "serious prejudice to the interests of the United States" because of the significant loss in sales that the United States experienced.[96] While the Panel held that many of the subsidies were either prohibited or actionable, the Panel found that some of the subsidies, though specific, did not constitute actionable subsidies. In all, three of the launch aid subsidies were prohibited and fourteen of the seventeen subsidies for manufacturing sites were actionable under the SCM Agreement, while the rest of the alleged subsidies were deemed non-actionable.[97]

In light of the Panel's report, both the EC and the United States appealed the decision to the Appellate Body of the WTO Dispute Resolution Body.[98] The EC appealed claiming that the Panel wrongly determined that launch aid was a specific, prohibited subsidy and that the infrastructure development grants were specific subsidies that caused serious prejudice.[99] The United States appealed because they believed the Panel wrongly determined that the EC was currently providing launch aid for the development of the new Airbus A350.[100]

The Appellate Body examined the Panel's holdings and circulated its report on May 18, 2011.[101] The Appellate Body upheld some of the Panel's findings about actionable subsidies, but also reversed some of the Panel's findings concerning prohibited subsidies. In its report, the Appellate Body agreed with the Panel that the launch aid measures constituted specific subsidies that conferred a benefit.[102] Despite upholding this, the Appellate Body found that the launch aid specifically for the Airbus A380 did not constitute an export subsidy because it was not "granted *because* of anticipated export performance."[103] Therefore it reversed the Panel's findings about the launch aid

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[95] *Id*. ¶ 8.2(a)-(c).
[96] *Id*. ¶ 8.2(d).
[97] Kienstra, *supra* note 12, at 594.
[98] *Id*. at 595.
[99] Appellate Body Report, *EC-Aircraft*, *supra* note 32, ¶ 571(e), (o).
[100] *Id*. ¶ 572(b).
[101] Appellate Body Report, *EC-Aircraft, supra* note 32.
[102] *Id*. ¶ 1414(e)(iv).
[103] *Id*. ¶ 1414(j) (emphasis in original).

being a prohibited subsidy, but consequently found that the launch aid provided for the development of the A380 was actionable because it caused displacement in Australian, Korean, and Chinese markets, and, therefore, serious prejudice.[104] In its conclusion, the Appellate Body recommended that the EC bring its measures into conformity with the provisions of the SCM Agreement.[105]

2. US-Aircraft

In response to the United States' request for consultations in 2004,[106] the EC filed its own request for consultations with the WTO Dispute Resolution Body on June 27, 2005, later amending its complaint on December 4, 2006.[107] The complaint alleged that the United States was in violation of Articles 3, 5, and 6 of the SCM Agreement and Article III:4 of the GATT 1994.[108] The EC specifically claimed that the United States provided prohibited and actionable subsidies to Boeing in the form of tax incentives, research and development grants, and NASA procurement contracts.[109]

The WTO subsequently composed a Panel to review the EC's allegations and issue a report on their findings. The Panel took approximately five years from the date the amended complaint was filed to circulate its report.[110] While the Panel agreed that the Foreign Sales Corporation and Extraterritorial measures violated Articles 3.1(a) and 3.2 of the SCM Agreement and were therefore prohibited subsides, the Panel found that the tax measures were

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[104] *Id*. ¶1414(m); *see also* Kienstra, *supra* note 12, at 596.

[105] Kienstra, *supra* note 12, at 596.

[106] Consultations Request, *EC-Aircraft*, *supra* note 87.

[107] Request for Consultations by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WTO Doc. WT/DS353/1 (Dec. 4, 2006) [hereinafter Consultations Request, *US-Aircraft*].

[108] Panel Report, *US-Aircraft*, *supra* note 33, at ¶¶ 4.12-.14.

[109] *Id*. The EC alleged that the state governments of Washington, Kansas, and the city government of Witchita were providing tax incentives for the production of the Boeing 787 and a corporate relocation. *Id.* In addition to this, the EC claimed that the Department of Defense and NASA were improperly providing research and development grants that were affecting Airbus' ability to trade large civil aircraft. *See id.*

[110] The Panel report was circulated on March 31, 2011. *See* Panel Report, *US-Aircraft, supra* note 33.

not prohibited subsidies.[111] However, the Panel found that the tax measures, as well as the research and development grants, provided to Boeing constituted actionable subsidies under Article 5 of the SCM Agreement.[112]

Just as both parties appealed in the *EC-Aircraft* dispute, both the EC and the United States appealed the Panel's report. The United States' appeal focused on the Panel's findings that the state and local tax incentives constituted subsidies and that they caused adverse effects.[113] The EC appeal argued, among other things, that the Panel should have measured the aggregate effect of the subsidies in order to determine their adverse effects.[114] The Appellate Body made minor modifications to the Panel's report, but, on the whole, upheld most of the Panel's determinations.[115]

In light of the end of the second dispute, both the United States and the EC claimed a victory in the outcome.[116] The United States was pleased because the value of the subsidies provided to Airbus was substantially greater than what the WTO found the United States to have provided to Boeing.[117] Both parties have since submitted statements of compliance to the WTO claiming that the improper subsidies have been revised to adhere to the SCM Agreement and that the adverse effects of the subsidies no longer exist.[118] Despite both the United States and the EC claiming compliance with the Dispute Resolution Body's findings, both parties requested authorization to impose countermeasures against each other.[119] While the substantive portions of these

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111 Panel Report, *US-Aircraft*, *supra* note 33, ¶ 8.2.

112 *Id.* ¶ 8.3.

113 Kienstra, *supra* note 12, at 599.

114 *Id.*; *see also* LESTER, MERCURIO & DAVIES, *supra* note 38, at 452.

115 Kienstra, *supra* note 12, at 599.

116 *Id.*

117 *Id.* While the EC alleged that the United States provided $24 billion in improper subsidies, the Panel found that the United States subsidies had a value of only $3 billion. *Id* at 598. In contrast, The United States calculated that the WTO valued the EC subsidies at closer to $18 billion. *Id* at 595.

118 *Id.* at 599-600.

119 *See id.* at 597 ("The United States . . . requested authorization from the DSB to take countermeasures totaling between $7 and $10 billion per year in the form of suspension of concessions . . . ."); *see also id.* at 600 ("The EC . . . requested authorization to impose countermeasures against the united states in the amount of $12 billion annually to address continuing subsidies and the continuing adverse effects of the covered subsidies.").

specific disputes have concluded, enforcement, along with the new dispute against the United States, has just begun.

III. UNITED STATES—CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

While enforcement and compliance measures for the *US-Aircraft* and *EC-Aircraft* disputes were still in their infancy, the state of Washington enacted a law authorizing tax incentives to members of the aerospace industry for opening manufacturing plants within its borders.[120] In response to the Washington law's passage, the EC filed a new complaint with the WTO Dispute Resolution Body alleging that Senate Bill 5952 violates Articles 1, 2, and 3 of the SCM Agreement.[121] This section will examine the Washington Law and the EC's complaint, and argue that the new law does not constitute a prohibited subsidy.

A. Engrossed Substitute Senate Bill 5952

On November 9, 2013, the Senate of the State of Washington passed Senate Bill 5952—authorizing tax exemptions as incentives for corporations in the aerospace industry to stay in or come to Washington. The purpose of Senate Bill 5952 is to incentivize a "long-term commitment to maintain and grow jobs in the aerospace industry in Washington State."[122] Senate Bill 5952 attempts to accomplish this goal by continuing tax preferences in the aerospace industry and expanding sales and use tax exemptions for the construction of new facilities used for manufacturing commercial airplanes.[123] According to Senate Bill 5952, the Washington legislature thought that its citizens would

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[120] Engrossed Substitute S. 5952, 63d Leg., 3d Spec. Sess. (Wash. 2013), *available at* http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bills/Session%20Laws/Senate/5952-S.sl.pdf [https://perma.cc/D5JM-A6RM] (codified at WASH. REV. CODE ANN. § 82.32.850 (West 2016)).

[121] Request for Consultations by the European Union, *United States—Conditional Tax Incentives for Large Civil Aircraft*, WTO Doc. WT/DS487/1 (Dec. 19, 2014), at 2 [hereinafter Consultations Request, *US-Tax Incentives*].

[122] Wash. Engrossed Substitute S. 5952. The legislature claims that "[i]t is [their] specific public policy objective to maintain and grow Washington's aerospace industry workforce." *Id*. § 1(3).

[123] *Id*. The legislature categorizes the tax preferences as "intended to create [and] retain jobs" within Washington's aerospace industry. *Id*. § 1(2).

benefit enormously from the wages and benefits offered by the continued presence of the aerospace industry within its borders.[124]

In order to live up to its purpose of growing and maintaining the presence of the aerospace industry in Washington, Senate Bill 5952 introduces a tax break on Washington's retail sales tax for manufacturers engaged in the manufacturing of commercial airplanes.[125] This tax break specifically applies to three types of charges made by commercial airplane manufacturers.[126] The first exempt charge is labor and construction services provided in connection with constructing new buildings made for the manufacturing of commercial airplanes – including manufacturing fuselages and wings.[127] The second exempt charge is the sale of tangible personal property to be incorporated as a component of buildings used to manufacture commercial airplanes, such as building materials.[128] The third and final exempt charge is labor and services rendered during the installation of building fixtures not otherwise eligible for the exemption.[129] Senate Bill 5952 limits these exemptions to buildings primarily used to manufacture commercial airplanes, or their wings or fuselages.[130] However, while the exemption is limited to certain types of buildings, Senate Bill 5952 explicitly provides that no application is necessary in order to qualify as long as the local government has entered into an agreement with the manufacturer to build the facility.[131]

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[124] *Id*. § 1. In 2003, 2006, and again in 2007, the Washington legislature determined that encouraging the continued presence of the aerospace industry through the provision of tax incentives was in the public interest. *Id*.

[125] *Id*. § 2.

[126] *Id*. § 3.

[127] *Id*. § 3(1)(a).

[128] *Id*. § 3(1)(b).

[129] *Id*. § 3(1)(c). The list of items not otherwise eligible for the exemption that Senate Bill 5952 includes: machinery and equipment such as hand-powered tools, property with a useful life of less than one year, and building fixtures, such as utility systems for heating, ventilation, air conditioning, communications, plumbing, or electrical. *See* WASH. REV. CODE ANN. § 82.08.02565(2)(b) (West 2016).

[130] Wash. Engrossed Substitute S. 5952 § 3(4).

[131] *Id*. § 3(3). These local governments include port districts, political subdivisions, and municipal corporations. *Id*.

B. Request for Consultations by the European Union

In their request for consultations before the WTO Dispute Resolution Body, the European Union objected to the conditional tax incentives established by Senate Bill 5952 of the State of Washington "in relation to the development, manufacture, and sale of large civil aircraft."[132] The European Union asserted that Washington's vast expansion of its aerospace industry tax incentives was specifically enacted to induce Boeing to manufacture its 777X large civil aircraft model within Washington, and constituted a subsidy worth billions of dollars.[133] The European Union further asserted that these tax incentives were contingent upon siting manufacturing facilities for commercial aircraft in Washington State and maintaining all wing and final assembly of specific commercial aircraft exclusively in Washington State.[134]

The European Union believes that certain tax measures passed by Senate Bill 5952 constitute subsidies under Articles 1 and 2 of the SCM Agreement.[135] Specifically, the European Union claims that because the measures providing preferential tax rates and tax exemptions with respect to the manufacture and sale of commercial aircraft and the buildings used to manufacture commercial aircraft provide financial contributions to Boeing by forgoing government revenue otherwise due and conferring a benefit, makes them specific subsidies.[136] Further, the European Union considers that these specific subsidies are prohibited because conditions in Senate Bill 5952 make the subsidies "contingent . . . upon the use of domestic over imported goods".[137] Therefore, the European Union believes that the measures are inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement, and should be removed without consideration for their adverse effects.[138]

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[132] *See* Consultations Request, *US-Tax Incentives, supra* note 121, at 1.

[133] *Id*.

[134] *Id*.

[135] *Id*. at 2.

[136] *Id*.

[137] *Id*.

[138] *Summary of the Dispute: United States—Conditional Tax Incentives for Large Civil Aircraft,* WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds487_e.htm [https://perma.cc/E9R7-72SD] (last visited Feb. 20, 2017).

IV. SENATE BILL 5952'S TAX INCENTIVES CONSTITUTE NON-SPECIFIC SUBSIDIES AND ARE NOT PROHIBITED BY THE SCM AGREEMENT

Under the SCM Agreement, Washington's tax incentives that were expanded and amended under Senate Bill 5952 constitute specific subsidies. However, the Panel established by the WTO's Dispute Resolution Body should find that the subsidies are not prohibited under the SCM Agreement. As noted earlier the Panel must first establish that a subsidy exists. Next, the Panel must determine whether the subsidy is specific. And third, the Panel must determine whether the subsidy is either prohibited or actionable. However, since the European Union's complaint only claims that the tax incentives are prohibited, this Comment will not explore whether they are actionable. Senate Bill 5952 will be examined to show that, although its tax incentive measures constitute specific subsidies, they are not prohibited under the terms of the SCM Agreement.

A. Senate Bill 5952's measures constitute subsidies under Article 1 of the SCM Agreement

In order for a subsidy to exist under Article 1 of the SCM Agreement, there are three requirements.[139] The SCM Agreement requires that (1) a government or public body (2) provides a financial contribution (3) thereby conferring a benefit.[140] First, since the Washington legislature passed Senate Bill 5952, there is no doubt that a government or public body was involved. Second, the European Union's Request for Consultations claimed that a financial contribution existed in the form of forgone or uncollected government revenue under Article 1.1(a)(1)(ii) of the SCM Agreement.[141] Senate Bill 5952 specifically carves out exceptions to taxes imposed on retail sales for labor and services for the construction of new buildings in connection with the manufacture of commercial aircraft.[142] Since the examples of forgone or uncollected revenue in the SCM Agreement include fiscal

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[139] SCM Agreement, *supra* note 42, art. 1.

[140] *Id*. art. 1.1.

[141] Consultations Request, *US-Tax Incentives*, *supra* note 121, at 2.

[142] Engrossed Substitute S. 5952 § 3(1)(a), 63d Leg., 3d Spec. Sess. (Wash. 2013).

incentives such as tax credits, and since Senate Bill 5952 deals with specific circumstances where the defined, normative benchmark for taxation is not applied, it can be concluded that the measures provided for in Senate Bill 5952 are financial contributions in the form of forgone government revenue.[143] However, the mere existence of a financial contribution is not sufficient to support the finding of a subsidy; a benefit must also be conferred.[144]

The next step in determining whether the measures provided for in Senate Bill 5952 constitute subsidies is to see if the measures confer a benefit.[145] Whether a benefit exists or not implies some sort of comparison, where the marketplace provides an appropriate basis for comparison of whether the recipient received the contribution on terms more favorable than those available on the market.[146] Senate Bill 5952 provides tax breaks for the construction of buildings primarily purposed for the manufacture of commercial aircraft.[147] Since these sorts of tax breaks are not normally available on the market, dispute resolution panels and appellate body reports will typically find that a benefit has been conferred.[148] Therefore, it is likely that the Panel will determine that the measures contained in Senate Bill 5952 confer a benefit.

The Panel established to determine whether Senate Bill 5952 is inconsistent with the SCM Agreement will likely find that the measures constitute a subsidy under the meaning of Article 1 of the SCM Agreement. The government of Washington provided a financial contribution in the form of foregone revenue, and that contribution probably did confer a benefit, therefore its tax incentive measures are subsidies under the SCM Agreement. However, the mere existence of a subsidy is not sufficient to

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143 *See* LESTER, MERCURIO & DAVIES, *supra* note 38, at 425 ("[W]here the current tax or customs regime has a 'defined, normative benchmark', and [that] benchmark is not applied in specific circumstances, in a manner that collects less revenue, government revenue that is otherwise due has been forgone.").

144 *Id*. at 428.

145 *See* SCM Agreement, *supra* note 42, art. 1.1(b).

146 *See* LESTER, MERCURIO & DAVIES, *supra* note 38, at 428; *see also* Appellate Body Report, *Canada-Aircraft*, *supra* note 49, ¶157.

147 Wash. Engrossed Substitute S. 5952 § 3(1)(a).

148 *See* LESTER, MERCURIO & DAVIES, *supra* note 38, at 428.

violate the SCM Agreement. Once it is determined that a subsidy exists, that subsidy must also be proven to be specific.

B. Senate Bill 5952's measures do not constitute specific subsidies under Article 2 the SCM Agreement

Senate Bill 5952's tax incentive measures do not constitute specific subsidies under the SCM Agreement because, although the bill explicitly limits access to the subsidy to enterprises within the aerospace industry, it also applies automatically to certain industries based on objective criteria for eligibility. The SCM Agreement only regulates specific subsidies.[149] Specificity hinges on the extent to which the legislation explicitly limits access to the subsidy to certain enterprises versus the extent the legislation establishes objective criteria governing the eligibility for, and amount of the subsidy.[150]

Under Article 1.2 of the SCM Agreement, subsidies are subject to the rules on prohibited and actionable subsidies only if they are specific.[151] Where the legislation explicitly limits access to the subsidy to certain enterprises,[152] that subsidy will be deemed specific.[153] Senate Bill 5952 has the explicit purpose of growing the aerospace industry within Washington State.[154] Further, the tax incentives in Senate Bill 5952 apply to buildings used primarily in the manufacturing of commercial airplanes, or their wings and fuselages.[155] This provision clearly limits access to the tax incentives to the aerospace industry, although access is not limited solely to the Boeing enterprise. Regardless, since the subsidy is limited to the aerospace industry, the subsidy is specific under Article 2.1(a) of the SCM Agreement.

However, Article 2.1(b) of the SCM Agreement states that specificity shall not exist where the legislation establishes objective criteria governing the eligibility for and the amount of the subsidy, so long as the eligibility is automatic and the criteria

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149 *Id*.

150 *See* SCM Agreement, *supra* note 42, art. 2.1(a)-(b).

151 *See id.* art. 1.2; *see also* LESTER, MERCURIO & DAVIES, *supra* note 38, at 429.

152 This includes an enterprise or industry, or group of enterprises or industries. SCM Agreement, *supra* note 42, art. 2.1.

153 *Id.* art. 2.1(a).

154 Engrossed Substitute S. 5952, 63d Leg., 3d Spec. Sess. (Wash. 2013).

155 *Id*. § 3(4).

are spelled out in law and strictly adhered to.[156] Senate Bill 5952 states that no application is necessary for the exemption to apply, but the manufacturer must have entered into an agreement with the local authorities to qualify for the exemption.[157] By not requiring an application to qualify for the exemption, the legislature made the eligibility automatic based on the objective criteria of entering into a contract with local authorities to build the facilities. Senate Bill 5952 further establishes objective criteria and conditions governing the amount of the subsidy by setting the tax rate for companies engaged in the business of manufacturing commercial airplanes within Washington.[158] Therefore, Senate Bill 5952 establishes objective criteria governing the eligibility for, and the amount of, the subsidy. Further the eligibility is automatic. The final question concerns whether or not the criteria are strictly adhered to, which this Comment cannot fully consider. However, if the criteria are strictly adhered to, then Senate Bill 5952 is not specific under Article 2.1(b). If the criteria are not strictly adhered to, then Senate Bill 5952 will be considered specific.

This leads to a confusing result. Under Article 2.1(a), Senate Bill 5952 is specific because it explicitly limits access to the subsidy to enterprises in the aerospace industry. Conversely, under Article 2.1(b), Senate Bill 5952 is non-specific because it establishes automatic, objective criteria for governing eligibility and subsidy amount. While the analysis under these two provisions points to incompatible results, the "specificity analysis must accord appropriate consideration to both principles."[159] This suggests that, in order to properly determine whether the subsidies in Senate Bill 5952 are specific, there must be a "concurrent application of these principles to the various legal and factual aspects of [the] subsidy" in Senate Bill 5952.[160]

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[156] SCM Agreement, *supra* note 42, art. 2.1(b).

[157] Wash. Engrossed Substitute S. 5952 § 3(3).

[158] *Id*. § 6(11)(a).

[159] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 369, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011).

[160] Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China*, ¶ 2.113, WTO Doc. WT/DS437/AB/R (adopted Dec. 18, 2014) [hereinafter Appellate Body Report, *US-AD/CVD (China)*].

Although Senate Bill could be seen as specific because it limits access to the tax incentives to members of the aerospace industry, the objective criteria for eligibility and amount apply automatically, therefore leaning in favor of Senate Bill 5952 not being specific. While the SCM Agreement requires a subsidy to be specific in order to be actionable, Article 2.3 states that any subsidy that is deemed prohibited shall concurrently be deemed to be specific.[161] Therefore, while the Panel could determine that the provisions of Senate Bill 5952 are not specific subsidies under Article 2 of the SCM Agreement, if they find that the tax incentives are prohibited under Article 3, they will be deemed specific regardless. This Comment will now examine whether Article 3 of the SCM Agreement prohibits the tax incentive subsidies contained in Senate Bill 5952.

C. Senate Bill 5952's measures do not constitute prohibited subsidies under the SCM Agreement

The tax incentive measures in Senate Bill 5952 are not prohibited subsidies because they are not domestic content subsidies under Article 3.1(b) of the SCM Agreement. Despite using the word contingent, his contingency is not reliant upon using domestic goods over imported goods. Senate Bill 5952's tax incentives are merely contingent upon the location of a significant commercial airplane manufacturing program within Washington State. Put another way, the subsidy is contingent upon the use of domestic land, not upon the use of domestic goods. Therefore, Senate Bill 5952 probably does not violate Article 3.1(b) of the SCM Agreement as the European Union alleges.

In its complaint against the United States, the European Union alleges that the measures found in sections 2, 5, and 6 of Senate Bill 5952 are contingent upon the use of domestic over imported goods.[162] Section 2 of Senate Bill 5952 makes the implementation of the bill "contingent upon the siting of significant commercial airplane manufacturing program[s] in the state of Washington."[163] Sections 5 and 6 of Senate Bill 5952

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[161] LESTER, MERCURIO & DAVIES, *supra* note 38, at 431.

[162] Consultations Request, *US-Tax Incentives*, *supra* note 121, at 2.

[163] Engrossed Substitute S. 5952 § 2(1), 63d Leg., 3d Spec. Sess. (Wash. 2013).

imitate each other's wording and base the tax incentive provisions' contingency upon "siting of a significant commercial airplane manufacturing program in the state" of Washington.[164]

As discussed earlier, domestic content subsidies are prohibited under the SCM Agreement because the subsidies are contingent upon the use of domestic goods over imported goods.[165] This contingency "requires some degree of link or relationship between [the] export and the subsidy," and connotes that the subsidy is dependent for its existence on the use of domestic over imported goods.[166] Senate Bill 5952's tax exemption is contingent upon a commercial aircraft manufacturing presence within Washington.[167] However, while the language of Senate Bill 5952 clearly states that the tax incentives are contingent on using land located within Washington State,[168] land is not a good.

While the WTO's dispute resolution process does not formally recognize stare decisis, subsequent panels have been known to rely on prior panel decisions as well as dictionary definitions when determining how to interpret international agreements, such as the SCM Agreement. The WTO's Dispute Resolution Body has not specifically addressed whether land is included in the meaning of the definition of domestic goods in Article 3.1(b) of the SCM Agreement, [169] but looking at past panel and appellate body decisions involving Article 3.1(b) disputes, as well as dictionary definitions and uses in other legal documents, may shed light on the term's meaning. In the *Canada-Autos* case, the Appellate Body determined that the language of the Canadian statute listed Canadian parts and materials, used for the manufacturing of automobiles, constituted domestic goods.[170] Therefore, parts and materials clearly constitute goods under the SCM Agreement. While this does not answer whether land, or real property, can be

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[164] *Id*. §§ 5(11)(e)(ii), 6(11)(e)(ii).

[165] SCM Agreement, *supra* note 42, art. 3.1(b).

[166] LESTER, MERCURIO & DAVIES, *supra* note 38, at 432; *see also* Appellate Body Report, *Canada-Aircraft*, *supra* note 49, ¶ 167.

[167] *See* Wash. Engrossed Substitute S. 5952 § 2(1).

[168] *See id*.; *see also id*. §§ 5(11)(e)(ii), 6(11)(e)(ii).

[169] SCM Agreement, *supra* note 42, art. 3.1(b).

[170] Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 125, WTO Doc. WT/DS139/AB/R (adopted May 31, 2000).

a domestic good, land is clearly not a part or material used in production.

The Merriam-Webster definition of domestic goods includes things "of, relating to, or originating within a country and especially one's own country."[171] This definition also gives little guidance on whether land can be included as a domestic good. However, the United States' Uniform Commercial Code (UCC) could be a useful reference that the Panel may consider in its determination. Under the UCC goods are defined as moveable things.[172] Since land is not moveable, the UCC definition excludes all land or real estate from the definition of goods. Therefore, a working definition of domestic goods that the Panel may consider does not include land or real estate. Since land is not a good, the tax incentive measures are not contingent upon the use of domestic goods over imported goods and are therefore not prohibited domestic content subsidies.

Thus, Senate Bill 5952's tax incentive measures are not prohibited under Article 3.1(b) of the SCM Agreement because they are contingent upon the use of land sited in Washington State and not upon the use of domestic over imported goods. In order for a domestic content subsidy to exist, the subsidy must be contingent upon the use of domestic goods over imported goods. Since land cannot be a domestic good, a bill making eligibility for a subsidy contingent upon the use of land does not violate the provision prohibiting use of domestic over imported goods. Therefore, the tax incentive subsidies in Senate Bill 5952 are not contingent upon the use of domestic over imported goods, and are thus not prohibited under Article 3.1(b) of the SCM Agreement.

CONCLUSION

While the dispute over subsidies for large civil aircraft continues to be a problem before the WTO Dispute Resolution Body, it is likely that the newest request for consultations will find that the tax incentive measures do not constitute prohibited subsidies under the SCM Agreement. Boeing and Airbus represent

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[171] *Domestic*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/domestic [https://perma.cc/9HPP-7BNK] (last visited Feb. 20, 2017).

[172] U.C.C. § 2-105 (2008).

the dominant shares of the market in trade in large civil aircraft, with Airbus having a slightly larger market share than Boeing—due in part to the European Communities subsidizing Airbus throughout its existence. However, the European Communities is not alone in its subsidization efforts. The United States also subsidized Boeing and these dual violations were eventually brought before the WTO's Dispute Resolution Body. The panels and appellate bodies reviewing the disputes found that both the United States and the European Communities were improperly subsidizing their respective large civil aircraft manufacturers, thus violating the terms of the SCM Agreement. However, even after the appellate bodies handed down their reports, the battle between the two market giants continues to rage through compliance proceedings and new requests for consultations.

The European Union's request for consultations with the WTO's Dispute Resolution Body constitutes the first step in the process of determining if the tax incentive measures in Senate Bill 5952 are inconsistent with the SCM Agreement. The last two disputes regarding large civil aircraft took around eight years each to complete, and compliance proceedings are ongoing. Despite the lengthy timeframe, when the Panel for the *United States—Conditional Tax Incentives for Large Civil Aircraft* dispute issues its report, it will likely determine that the tax incentive measures in Senate Bill 5952 do not violate the SCM Agreement. Although the measures in Senate Bill 5952 constitute subsidies, the measures are not specific, nor are they prohibited under the SCM Agreement. Therefore, Senate Bill 5952 does not violate the SCM Agreement.

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